
By Thomas Wischmeyer

Abstract

For a long time, EU institutions have emphasized the connection between one of the most important concepts of the integration method, mutual recognition, and the presence of mutual trust between EU Member States. Only recently, the ECJ reaffirmed in its Opinion 2/13 that mutual trust is at the heart of the EU and a “fundamental premiss” of the European legal structure. But can law really restore, advance or even govern by trust? This question is crucial for the EU of today, which finds itself in the midst of a severe crisis of trust. For the EU as a community “based on the rule of law” generating trust through law might seem the natural, maybe the only politically viable response to a crisis of trust. Nevertheless, even if one agrees that the rule of law requires people to place trust in legal rules, and that courts and administrative agencies need to trust each other in order to work efficiently and consistently, how would legal rules be able to generate or promote trust? Moreover, isn’t it deeply rooted in our ideas about constitutional government that democratic law must institutionalize mutual distrust rather than govern by trust? These conceptual and normative objections did not stop the European Union from pursuing the project of trust-building through law in one of the most sensitive areas of EU law, judicial cooperation in civil and criminal matters. This Article will ask whether the project to promote trust through law is a promising one, and, eventually, how to reinterpret statutory provisions and legal principles that purport to generate trust amongst their addressees.

* Dr. iur. Senior Research Fellow at the Institute for Staatswissenschaft and Philosophy of Law, Albert-Ludwigs-Universität Freiburg. E-mail: thomas.wischmeyer@jura.uni-freiburg.de.
A. Introduction: The Ubiquity of Trust

Successes and failures of institutions are often described as being dependent on the mutual trust of their respective stakeholders. While an economy or a polity based on trust was long associated with pre-modern types of markets or governments, trust experienced a renaissance as a theoretical category and a political objective in the early 1990s when political theorists started to question which mentalities were necessary to allow liberal democracies to thrive. These theorists—who partly stood in the tradition of the communitarian movement—tried to prove that modern societies are largely influenced by the horizontal bonds that make up their so-called social capital. Trust was identified as one of the most important factors of this social capital, and its instrumental and economic value has been widely discussed in the social sciences.

While initiatives to restore trust regularly include proposals to introduce or amend legal rules, legal academia has largely neglected the question of trust for a long time. Especially in the aftermath of the 2008–09 financial crisis, already several years previously, European Union (EU) institutions had emphasized the need to change when courts and lawmakers began to actively raise social capital by generating trust through law. Mechanisms to restore trust in the financial markets have been added to the regulatory toolbox—especially in the aftermath of the 2008–09 financial crisis. Already several years previously, European Union (EU) institutions had emphasized the value has been widely discussed in the social sciences.


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connection between one of the most important concepts of the integration method—mutual recognition—and the presence of mutual trust between EU Member States. Confidence and mutual trust—confiance mutuelle in French and gegenseitiges Vertrauen in German—have been part of the semantics of EU law at least since 1979. Only recently, the European Court of Justice (ECJ) reaffirmed in Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR) that mutual trust is at the heart of the EU and a “fundamental premiss” of the European legal structure.

But can law really restore, advance, or even govern by trust? This question is crucial for the EU of today, which finds itself in the midst of a severe crisis of trust. For the EU as a community “based on the rule of law,” generating trust through law might seem the natural—maybe the only politically viable—response to a crisis of trust. Nevertheless, there remains the obvious problem: Even if one agrees that the rule of law requires people to place trust in legal rules, and that courts and administrative agencies need to trust each other in order to work efficiently and consistently, how would legal rules be able to create or promote trust? Isn’t law “the” instrument of control, and are not trust and control true antonyms? Moreover, isn’t it a deeply rooted principle in constitutional government that democratic law must institutionalize mutual distrust rather than govern by trust? And finally, can legal rules really influence or even revive the social and emotional attitudes that are the very conditions of its own effective operation?

These conceptual and normative objections did not stop the EU from pursuing the project of trust-building through law in one of the most sensitive areas of EU law: Judicial cooperation in civil and criminal matters (judicial cooperation) which forms part of the common Area of Freedom, Security and Justice (AFSJ). Mutual recognition, and with it mutual trust, is not only considered to be “the cornerstone of judicial cooperation;”

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strengthening mutual trust has become one of the main goals of EU justice policies.\textsuperscript{9} To this end, the so-called “principle of mutual trust” developed into a “legal” principle which has been codified in EU secondary law and has been referred to in over 100 decisions of the ECJ and opinions of the Advocates General since 1998. One example is the 2004 decision in Turner, where the Court held:

It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect . . . . [A review by a court of a Member State of a jurisdictional decision by a court of another Member State] runs counter to the principle of mutual trust which . . . prohibits a court . . . from reviewing the jurisdiction of the court of another Member State.\textsuperscript{10}

Yet, upon a closer look, the ECJ’s understanding of trust in Turner seems counterintuitive from a conceptual point of view; does reasoning along the lines of “because you trust, you must not review” capture the essence of trust? Moreover, considering that a recent comprehensive empirical study on the performance of judicial cooperation over the last decade concluded that mutual trust “is still not spontaneously felt” by many judges, and that the practice of judicial cooperation could even be defined as mutual “distrust”, the ECJ’s use of the “principle of mutual trust” seems to mark political ambition rather than to be properly justified by reasons or experience.\textsuperscript{11} Similar doubts may be raised with regard to Opinion 2/13, in which the Court ruled that the draft agreement on the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms was incompatible with EU law because it disregarded the “obligation of mutual trust”—which again was defined as the duty “to presume that fundamental rights have been observed by the other Member States.”\textsuperscript{12}

Why then do the EU institutions see the necessity to develop a legal principle of mutual trust within the field of judicial cooperation at all? Is the alleged presence of trust between


\textsuperscript{10} Judgment in Turner v Grovit, C-159/02, EU:C:2004:228, paragraphs 24, 28.


\textsuperscript{12} See Opinion 2/13, supra note 5, at paras. 191, 194.
Member States mere judicial rhetoric to cover the Court’s creation of new mutual recognition obligations lacking sufficient statutory legitimation? But even if the ECJ’s approach were ultimately unpersuasive, is it still possible to create the principle of mutual trust in a way that could reasonably be expected to actually foster mutual trust amongst the courts and agencies of the EU Member States?

Using the example of judicial cooperation, this Article takes up these questions and asks whether the project to promote trust through law is a promising one and, eventually, how to reinterpret statutory provisions and legal principles that purport to generate trust amongst their addressees. To this end, the analysis proceeds in three steps.

In order to understand the legal principle of mutual trust, Part B analyzes the dialectical relationship between trust and law; it attempts to show that the two are better understood as interrelated modes of social order rather than opposing concepts. Because the internal dynamics of this relationship are always contingent on the specific regulatory context, the remainder of the Article focuses on trust in the area of judicial cooperation.

Part C analyzes the connection of mutual trust and mutual recognition, and explains the development of the principle of mutual trust in EU law. It shows that the failure to understand this principle is at least partly responsible for the current crisis of trust amongst courts and agencies of the Member States, which culminated in the United Kingdom’s opting-out from, and then partly rejoining, the EU acts adopted under the former third pillar in 2013/2014. In order to overcome the crisis and to restore or promote trust, the European legislature, the European Commission, and the Member States have already initiated a comprehensive reform agenda. The ECJ, however, still applies the principle in the majority of its decisions in a way that is more likely to promote distrust rather than trust.

Therefore, in Part D, this Article proposes to replace the ECJ’s current top-down approach—which considers only trust between the Member States’ governments to be normatively relevant—with a bottom-up construction that gives room for trust-building between the courts and agencies of the Member States—which actually implement judicial cooperation and which are the true stakeholders of mutual trust. Interpreted this way, the

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13 The “Maastricht Treaty” (Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1) implemented the pillar structure. The third pillar on Justice and Home Affairs was based on intergovernmental cooperation rather than on supranational governance. In 1997, the pillar’s scope was reduced to cooperation in the fight against crime and it was renamed Police and Judicial Co-operation in Criminal Matters, see Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. With the “Lisbon Treaty” (Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 12, 2007, 2007 O.J. (C 306) 1), the pillar was absorbed into the area of freedom, security and justice; see also infra Section C.II.
principle reminds the judicial and administrative authorities, at both the national and the supranational level, of their responsibility to generate mutual trust.¹⁴

B. Generating Trust Through Law: The Dialectics of Trust and Law

I. Dimensions of Trust

The claim that an instrumental nexus between legal rules and societal trust exists rests on a particular understanding of trust as well as on certain assumptions about the relationship between law and other modes of social order that require clarification. Historically, the concept of trust was first used in a religious context (“in God we trust”), and to describe the morally charged and deep and emotional relationships between close-knit social groups such as families.¹⁵ Over time, the understanding of trust was secularized and lost its previous religious and moral connotations. John Locke’s “government of trust” concept became part of the semantics and language of politics in the Anglophone world in the late 17th century. The German equivalent Vertrauen was applied to institutional interactions in the second half of the 18th century.¹⁶

Today, we speak of trust in a variety of ways that, at first glance, have little in common.¹⁷ The object of trust—the trustee—varies considerably. In psychology, trust stands for a particular form of emotional bond in interpersonal relationships.¹⁸ Economics, sociology,
and political science understand trust in a more systemic sense when they measure trust in the economy, government, or judiciary. The trustee can be even more abstract than an institution or organization. In this sense, one speaks of “trust in science” or “trust in numbers.”

Sociologists have introduced a couple of important and helpful distinctions to bring some order into this disarray. The most prominent categories are “thick” and “thin,” “personal” and “systemic,” and “affective” and “cognitive” trust. Whereas thick, personal, or affective trust each require real persons and emphasize the emotional component of trust, the trustees of thin, systemic, or cognitive trust can also be strangers or impersonal institutions. Neither of these distinctions should be understood to mark a dichotomy; rather, they “represent the ends of a continuum.”

Regulation that aims to create or restore trust is mostly concerned with systemic trust, both in the legal system itself—like the courts, administrative agencies, etc.—and in various societal sub-systems—such as financial markets. But the law can also attempt to protect thick trust—via a physician-patient privilege, for example. Nevertheless, the remainder of this Article focuses on the systemic dimension of trust.

also John Conlisk, Professor Zak’s Empirical Studies on Trust and Oxytocin, 78 J. Econ. Behav. & Org. 160 (2011), for a critical assessment of these and similar studies.


21 Putnam, supra note 1, at 136–37.

22 Luhmann, supra note 1, at 61–79.


24 See Martin Hartmann, Die Praxis Des Vertrauens (2011) (developing extensively this dimension of trust).

25 See Claus Offe, How Can We Trust Our Fellow Citizens?, in Democracy and Trust 42 (Mark Warren ed., 1999), for an attempt to deduce systemic trust from interpersonal trust.

26 Putnam, supra note 1, at 466.

27 Whether or not the idea of “thin” and “systemic” trust overstretches the conceptual core has been the subject of much debate. For reasons of conceptual clarity some authors recommend using the word trust exclusively to
II. Systemic Trust and Legal Rules: A Dialectical Relationship

The instrumental perspective on law and trust assumes not only that legal institutions depend on trust—this idea is already widely accepted—but also that the level of trust in a society can be influenced by the existence, the performance, and the content of legal rules. This becomes possible only when we understand that, in very general terms, trust is often the product of an active and voluntary decision, and the result of a specific way of structuring and ordering the social world. The element of decision distinguishes trust from the Husserlian concept of familiarity with one’s life-world—a feeling of belonging to this world and to one’s fellow human beings that enables interaction with the environment on a very fundamental level. It also distinguishes trust from mere cognitive expectations that our beliefs will not be disappointed. In the same vein, trusting is often framed as voluntarily becoming vulnerable to the will of another.

This brings us to the epistemological dimension of trust. Since Georg Simmel’s seminal work on trust, it is widely acknowledged that trust requires a cognitive state between


29 See McLeod, supra note 27, § 4, for a summary of the debate over this criterion.


31 In German this is marked by the distinction between Vertrauen (trust) and Zuversicht (confidence) with the latter being a more or less passive (cognitive) attitude. The distinction, however, is neither precise nor universal in German. See Luhmann, supra note 30, for the complex interplay between Vertrauen and Zuversicht. The difference between the German terms Vertrauen and Zuversicht is much stronger than between trust and confidence in English which can often be used interchangeably. But see Neil Walker, The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis, in POLICE AND JUSTICE CO-OPERATION AND THE NEW EUROPEAN BORDERS, 23 (Malcolm Anderson & Joanna Apap eds., 2002). While in English it can be either “trust in the market” or “confidence in the market,” in German only Vertrauen would make sense. See infra note 66, for the specific circumstances for the use of these terms in the multilingual EU system.

32 See Hill & O’Hara, supra note 23, at 1724. Cf. NIKLAS LUHMANN, SOZIALE SYSTEME: GRUNDRIß EINER ALLGEMEINEN THEORIE 179–82 (1987) (the decision to trust as a social “strategy”); LUHMANN, supra note 1, at 27; Luhmann, supra note 30, at 97; Denise M. Rousseau et al., Not So Different After All: A Cross-Discipline View of Trust, 23 ACAD. MGMT. REV. 393, 395 (1998); Annette C. Baier, Vertrauen und seine Grenzen, in VERTRAUEN: DIE GRUNDLAGE DES SOZIALEN ZUSAMMENHALTS 37, 43 (Martin Hartmann & Claus Offe eds., 2001); BLAIR & STOUT, supra note 2, at 1739–40 (“[A] willingness to make oneself vulnerable to another, based on the belief that the trusted person will choose not to exploit one’s vulnerability.”); RUBINSTEIN, supra note 1, at 553 (“vulnerability”); Walker, supra note 31, at 23; HARTMANN, supra note 24, at 99 (“accepted vulnerability”); HARTMANN, supra note 24, at 268; McLeod, supra note 27, § 1.
knowledge and ignorance.33 Full knowledge makes trust unnecessary. Having absolutely no knowledge and still taking the sort of risk that has just been defined as trust-specific would be credulousness, not trust.34 The truster must know not only the attitudes and qualities that make the trustee trustworthy, but also that the trustee is invested in the success of the trust relationship.35 What constitutes trustworthiness and how the relevant knowledge can be acquired differs from case to case.36 Most of the time trust will be the product of a repeated game: Trust is something acquired after one or more personal or institutional contacts have taken place.37 During this educational experience, the potential truster can obtain the knowledge necessary to decide whether he or she wants to trust the trustee in the future.38 Therefore, rules governing the knowledge of the potential truster on the attitudes and qualities of the potential trustee’s trustworthiness or on the institutional setting in which trust may be acquired can influence the level of trust.

Lastly, trust is characterized by its “conditionality.”39 Trust differs from loyalty, in that it is not unwavering, but can be withdrawn unilaterally without fear of sanctions, and must be renewed continually. We only trust “except if” and “as long as.” Moreover, for a person to be trustworthy, we expect her or him to stick to the applicable rules in order to warrant or justify our trust.40 Blind trust is an exception reserved for very close interpersonal relationships; in social or institutional contexts it is a dangerous attitude. The interrelatedness of trust and social rule systems is particularly strong in the case of systemic or institutional trust. Institutions are constituted of rules that define their

33 See GEORG SIMMEL, SOZIOLOGIE: UNTERSUCHUNGEN ÜBER DIE FORMEN DER VERGESSELLSCHAFTUNG 393–94 (1908); McLeod, supra note 27, § 2, for an overview over the questions connected to this epistemological dimension of trust. See also for how the epistemological question relates to law Rossen-Stadtfeld, supra note 2, at 225; Kaufhold, supra note 2, 419–20.
34 See Lisa Herzog, Persönliches Vertrauen, Rechtsvertrauen, Systemvertrauen, 61 Deutsche Zeitschrift für Philosophie 529 (2013), for how trust has been replaced by credulousness in the financial markets pre-2008/09.
35 See LUHMANN, supra note 1, at 40–41; FRANKEL, supra note 1, at 49 (describing trust as “believing that others tell the truth and will keep their promises”); Russell Hardin, Distrust, 81 B.U. L. Rev. 495, 496–97 (2001).
36 See Baier, supra note 27, at 244, for an analysis the complexity of this process.
37 See LUHMANN, supra note 1, at 75. See also Schmidtchen, supra note 2, for a game-theoretic analysis of trust see.
39 See Frevert, supra note 16; Ken Ruscio, Trust, in THE ENCYCLOPEDIA OF LEADERSHIP 1573, 1573 (George R. Goethals et al. eds., 2004).
40 See HARDIN, supra note 20, at 53, for an analysis of the emergence of trustworthiness through adherence to social norms and constraints. See also McLeod, supra note 27, at Introduction (describing that the question of how warranted trust is, is a question of degree).
The relationship between trust and law can encourage distrust, too. Sor the connection interpersonal and systemic trust. Empirically, the mere fact that matters are organized and institutionalized can be a positive stimulus for trust.

Because trust is conditional, it connects to other modes of social ordering or social rule systems; this is where law comes into play. Legal rules can be part of the background regime that enables people to trust other people or institutions. Trust is not only a socio-psychological precondition for the success of legal rules; rather, law depends on trust and can influence it by providing a stable environment for transactions and by safeguarding normative expectations. The connection between law and trust is not one-directional, but recursive or dialectical. If law is consistent, coherent, predictable, and efficient, it can promote trust among its addressees which, in turn, stabilizes legal institutions. Trust


43 Tyler has presented data showing that trust in legal institutions depends less on the outcome of the decision and more on the fact that the representatives of the institution follow the rules and procedures. See Tom R. Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?, 19 Behav. Sci. & L. 215 (2001).

44 This is one of the major differences between “thick” interpersonal and systemic trust. See Mark A. Hall, Law, Medicine, and Trust, 55 Stan. L. Rev. 463, 494 (2002).


46 For the trust-building effect of legal rules or the “rule of law”—on the general level of “societal trust” as well as on the micro-level for example through the legal protection of the doctor-patient-relationship—see, e.g., Claudio Franzis, Europäisches Vertrauen? Eine Skizze, 12 Humboldt Forum Recht 159, 173 (2010); Schmidt-Aßmann & Dimitropoulos, supra note 2; Kaufhold, supra note 2, at 418–19; Wolfgang Kahl, Vertrauen (Kontinuität), in Leitgedanken des Rechts, Paul Kirchhof zum 70. Geburtstag 297 (Hanno Kube et al. eds., 2013).

47 According to Luhmann, the specific function of law is the “stabilization of normative expectations.” See Niklas Luhmann, Law as a Social System 148 (2004).

48 When legal rules can encourage trust, they can encourage distrust, too. See Ribstein, supra note 1, at 576–84, for potential negative externalities of regulation on the micro-economy of trust.

49 See Luhmann, supra note 1 and 32, at 44, 181.
enables social interaction and institutions such as the law, and it is itself strengthened by these institutions as long as they and their representatives stick to the rules. Therefore, trust grows on the basis of common values and shared legal practice.\textsuperscript{50}

It is important to recognize that the narrative of law and trust operating as two complementary and mutually supportive orders rests on empirical assumptions. It is probably impossible to reconstruct the exact interrelation between the realization of the rule of law and the level of trust in a society on a macro-level because the phenomena are too complex to generate reliable statistical data.\textsuperscript{51} Even on a micro-level, very few empirical studies exist that measure how legal rules affect levels of trust. But this does not change the fact that there is an empirical, non-metaphysical claim at the center of the instrumental argument. As long as we have no sound empirical research, legal scholars must rely on “reason informed by experience” when we speak about generating trust through law.\textsuperscript{52} This is what scholars do when they write about the positive or negative effects of legal rules on the micro-economy of trust in EU asylum law,\textsuperscript{53} corporate law,\textsuperscript{54}

\textsuperscript{50} See Canor, supra note 6, at 421.


The critics argue convincingly that complexity must never serve as an excuse to bolster mere sociological hunches. Nevertheless, as long as empirical phenomena are too complex to generate reliable statistical data, the only solution is to build one’s arguments not on positive empirical knowledge, but to use “reason informed by experience,” for example to proceed cautiously and to accept that all statements are falsifiable. Cf. Ann Willcox Seidman et al., Legislative Drafting for Democratic Social Change: A Manual for Drafters 28–29 (2001).

\textsuperscript{52} ANN WILCOX SEIDMAN ET AL., LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS 28–29 (2001); see also supra, note 51.

contract law, constitutional law, privacy law, product safety law, labor law, police law—or in the EU law on judicial cooperation.

C. The Principle of Mutual Trust in Judicial Cooperation in Civil and Criminal Matters in the EU: From an “Obligation to Recognize” Towards a Legal Framework Generating Trust

In the field of judicial cooperation, the ECJ and the European legislature have actively taken ownership of the trust-generating faculty of legal rules by developing a legal principle of mutual trust. The construction of this principle has so far developed in four steps: (1) Early on, the ECJ and legal scholars recognized that mutual trust is intimately connected with the category of mutual recognition, which was already essential in creating the internal market and then was soon considered as an ideal tool for establishing what has become the AFSJ. (2) Throughout the optimistic 1990s, however, the presence of trust was simply taken for granted by the ECJ and the European legislature, or it was at least hoped that the progress of the integration method would generate the level of trust necessary to sustain the system of mutual recognition. (3) In the years since 2000, triggered by a series of events in different areas of judicial cooperation, judicial practitioners and legislators slowly recognized how precarious this assumption was. (4) While several administrative and legislative reform proposals have tried to address the subsequent crisis of trust, the intention to actively promote trust instead of administering a largely sterile principle of mutual trust still has to become part of the ECJ’s interpretative agenda.

I. Mutual Recognition Regimes and Their Need for Trust

Memorably, the ECJ developed the principle of mutual recognition in its 1979 Cassis de Dijon decision on the free movement of goods. The regulatory and political aim behind

54 Cf. Blair & Stout, supra note 2; Mitchell, Fairness and Trust in Corporate Law, supra note 2; Mitchell, Trust and Team Production in Post-Capitalist Society, supra note 2.
56 See Schmidt-Aßmann & Dimitropoulos, supra note 2, at 132–38.
57 See Brandimarte et al., supra note 45.
58 See Schmidt-Aßmann & Dimitropoulos, supra note 2, at 144–47.
61 See generally Judgment in Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, C-120/78, EU:C:1979:42 [hereinafter Cassis de Dijon]; see also Commission Interpretative Communication of 3 Oct. 1980, 1980 O.J. (C 256) 2, at 2; GIANDOMENICO MAIONE, MUTUAL RECOGNITION IN FEDERAL TYPE SYSTEMS (1993); THE PRINCIPLES OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS (Fiorella Padoa-Schioppa ed., 2005); CATHERINE
mutual recognition was to further integration by bypassing the cumbersome legal requirements of the harmonization process, which had come to a deadlock in the late 1970s. Soon, the principle of mutual recognition was applied to all four main EU “freedoms”—the free movement of goods, capital, services, and people—and spread to other policy areas. Originally judge-made, the principle slowly found its way into primary and secondary law while, over time, the ECJ recognized several important exceptions from it in the single market.

Early on, the European institutions argued that the Member States had to recognize each other’s decisions because they trusted each other. The 1979 Jenard Report already used mutual “confidence” as a justification for mutual recognition for judgments in civil and commercial matters. In the same vein, the influential 1985 Commission White Paper “Completing the Internal Market” mentioned a “principle of mutual trust” as a precondition for mutual recognition in the single market. The ECJ and the Advocates General quickly adopted the phrase. The nexus between mutual trust and mutual recognition became an established topos in EU law.


For further analysis of the historical process see Karen Alter & Sophie Meunier-Aitsahalia, Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision, 26 COMP. POL. STUD. 535 (1994). Mutual recognition as a regulatory tool was analyzed recently by Susanne K. Schmidt, Mutual Recognition as a New Mode of Governance, 14 J. EUR. PUB. POL’LY 667 (2007).


Council, supra note 4, at 46.

Commission White Paper on Completing the Internal Market, para. 93, COM(85) 310 final (June 28–29, 1985).

The ECJ mentioned the principle of mutual trust first in cases concerning intra-Community health inspections. See, e.g., Judgment in Ludwig v Free and Hanseatic City of Hamburg, C-138/77, EU:C:1978:151, paragraph 5. In the context of the EU’s “four freedoms,” the ECJ or the Advocates General used the “principle of mutual trust” or “mutual confidence.” See, e.g., Judgment in Wurmer, C-25/88, EU:C:1989:187, paragraph 18; Opinion of Advocate General van Gerven in Van den Berg, C-169/89, EU:C:1990:124, paragraphs 7, 9–10; Opinion of Advocate General Lenz in Commission v Belgium, C-11/95, EU:C:1996:178, paragraph 101; Opinion of Advocate General La Pergola in Commission v France, C-184/96, EU:C:1997:495, paragraph 30; Opinion of Advocate General Geelhoed in Commission v France, C-212/03, EU:C:2004:652, paragraph 39; Opinion of Advocate General Mangozzi in Markus Stoß et al., C-316 & 358/07 et al., EU:C:2010:109, paragraph 103; Opinion of Advocate General Cruz Villalón in dos Santos Palhota and Others, C-515/08, EU:C:2010:245, paragraph 82. In the multilingual EU law there exists no conceptual distinction between “mutual trust” and “mutual confidence.” Whether trust or confidence is used for translating the French confiance or the German Vertrauen does not follow a strict rule. See Canor, supra note 6, at 400; see also supra note 31.

Cf. GIANDOMENICO MAJONE, MUTUAL TRUST, CREDIBLE COMMITMENTS AND THE EVOLUTION OF RULES FOR A SINGLE EUROPEAN MARKET (1995); LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN (Gilles de Kerchove & Anne Weyembergh eds., 2005); BURKHARD HESS, EUROPÄISCHES ZIVILPROZESSREcht 91–100 (2010); Kaufhold, supra note 2, at 408.
Although the European institutions did not spend much time explaining or justifying their recourse to trust, it is not by chance that the principle became popular in this context.\(^68\) Creating a connection between trust and law is essential for policy networks and structures governed by law, but not fully conditioned by it.\(^69\) Probably the most important feature of a policy network is its lack of formal hierarchy and the resulting lack of a superior legal authority.\(^70\) Whereas strict hierarchies exclude trust, trust can substitute authority where non-hierarchical modes of governance are applied.\(^71\) Theorizing the EU as a policy network was particularly popular in the 1990s,\(^72\) and the recent institutional reforms of the EU have changed the constitutional structure significantly. While the EU institutions have been strengthened considerably, the network concept is still an indispensable analytical tool for EU studies.\(^73\) Even after the Lisbon Treaty, many policies of the EU are still organized as policy networks. Consequently, the ECJ and the Advocates General continue to emphasize the need for mutual trust in those areas that show the typical features of an institutional network. Those areas requiring mutual trust include: First, where the implementation of EU law depends on a functioning, trust-based relationship between different national administrations or judicial institutions;\(^74\) second, where EU institutions depend on the

\(^68\) See JANSSENS, supra note 61, at 141 (speaking of an “intrinsic link between mutual trust and mutual recognition”).

\(^69\) See NIKLAS LÜHMANN, ORGANISATION UND ENTSCHEIDUNG 408 (2000).

\(^70\) See RENATE MAYNTZ, NEW CHALLENGES TO GOVERNANCE THEORY 8 (1998); POLICY NETWORKS: EMPIRICAL EVIDENCE AND THEORETICAL CONSIDERATIONS (Bernd Marin & Renate Mayntz eds., 1991); Gunnar Folke Schuppert, Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren, in 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 16, margin numbers 134–57 (Wolfgang Hoffmann-Riem et al. eds., 2d ed. 2012).

\(^71\) See LÜHMANN, supra note 1, at 121 (arguing that in hierarchical systems trust is unnecessary, because other strategies exist to compensate uncertainty). See, e.g., Hardin, supra note 35, at 495, for an account that distrust might even be the more efficient as well as the normatively superior way of structuring social relations in a hierarchical system.


cooperation of national institutions;\textsuperscript{75} or third, where EU organs operate within a larger international context.\textsuperscript{76}

Trustering is thus an accurate description for the motivational attitude of the individual actors within a legal system based on mutual recognition.\textsuperscript{77} Nevertheless, the understanding of the relationship between trust and mutual recognition remained superficial at best,\textsuperscript{78} as long as the existence of trust between the Member States was simply taken for granted.\textsuperscript{79} Neither the Commission nor other EU institutions explained how they arrived at the empirical finding that trust actually existed—considering the political climate at the time of the Jenard-Report, it was a rather implausible claim—nor did they discuss how the reference to trust could justify mutual recognition without prior harmonization. Early on, it was Majone who pointed to the precarious and innately reciprocal nature of the relationship between trust and mutual recognition:

\textsuperscript{75} With regard to the preliminary reference procedure cf. the Opinion of Advocate General Mazák in Melki & Abbadi, C-188/10 and C-189/10, EU:C:2010:319, paragraph 64.

\textsuperscript{76} See the Opinion of Advocate General Sharpston in Ruiz Zambrano v ONEm, C-34/09, EU:C:2010:560, paragraph 147 (describing of the cooperation between the ECJ and the European Court of Human Rights in Strasbourg, as governed by the “spirit of cooperation and mutual trust”); see also the remarks of the President of the Federal Constitutional Court of Germany in Andreas Voßkuhle, Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund, 6 EUR. CONST. L. REV. 175 (2010).

\textsuperscript{77} The particular importance of trust for EU law emphasizes, for example, HANS CHRISTIAN RÖHL, AKKREDITIERUNG UND ZERTIFIZIERUNG IM PRODUKTISSECHSRECHT. ZUR ENTWICKLUNG EINER NEUEN EUROPÄISCHEN VERWALTUNGSSTRUKTUR 44 (2000) (for product safety law); Eberhard Schmidt-Aßmann, Diskussionsbemerkung, 66 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 201 (2007); Wolfgang Kahl, Begriff, Funktionen und Konzepte von Kontrolle, in 3 GRUNDLAGEN DES VERWALTUNGSRECHTS § 47, margin numbers 220, 233 (Wolfgang Hoffmann-Riem, et al. eds., 2\textsuperscript{nd} ed. 2013); Franzius, supra note 46, at 164–67; Eberhard Schmidt-Aßmann, Perspektiven der Europäisierung des Verwaltungsrechts, in Das Europäische Verwaltungsrecht in der Konsolidierungsphase, Die Verwaltung, Beilage 10 263, 270 (Peter Axer, et al. eds., 2010); Kaufhold, supra note 2, at 418; Hans-Henrich Trute, Die Demokratische Legitimation der Verwaltung, in 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 6, margin number 115 (Wolfgang Hoffmann-Riem et al. eds., 2\textsuperscript{nd} ed. 2012).


\textsuperscript{79} Majone, supra note 61, at 15; Wolfgang Kahl, Commentary to Art. 114 AEUV, in KOMMENTAR ZU EU-VERTRAG UND AEU-VERTRAG margin number 16 (Christian Callies & Matthias Ruffert eds., 2011).
Finally, a system based on mutual recognition cannot work satisfactorily without mutual trust. But mutual trust among state regulators can no more be assumed than the essential identity of the health and safety goals of the Member States. Rather, it is an important task of the central authorities to create the material and institutional conditions under which credibility and mutual respect become the most valuable public goods supplied by the supranational polity. 

Especially in the area of judicial cooperation, the EU institutions slowly had to accept the political truth of Majone’s conclusions after the initial and naïve approach towards mutual recognition had not only failed, but even threatened to damage the level of trust already achieved.

II. Trust as a Precondition and a Justification for Mutual Recognition in the Context of Judicial Cooperation

Close judicial cooperation in civil and criminal matters between judges and prosecutors of EU Member States is still a fairly recent innovation of EU law. For a long time, cooperation consisted primarily of mutual assistance requests; it was based on personal contacts and only loosely governed by EU law. From the mid-1990s, the Commission lobbied to apply the principle of mutual recognition in the field of judicial cooperation in civil matters. The 1999 Treaty of Amsterdam transferred this area into the “first pillar” of the EU. In the same year, the Tampere Programme famously affirmed the instrument of mutual recognition as “the cornerstone of judicial cooperation.” With the Treaty of Lisbon abolishing the pillar structure, cooperation in criminal matters was then absorbed into the European Union. Today, Articles 67, section 4; 70, 81, section 1; and 82, section 1 of the TFEU mention mutual recognition as the basic principle of cooperation in civil and criminal matters.
Generating Trust Through Law?

Here, mutual recognition means that one state recognizes the judicial or administrative act of another state; for example, one state treats the act of another Member State as if the state itself had acted, even if the procedural or substantive law applied by the country of origin differs from the law in the country of destination due to a lack of full or partial harmonization through EU law.

Even before the system of mutual recognition was established, various legal documents emphasized the importance of trust for the effectiveness and the success of judicial cooperation. Under the system of recognition, mutual trust became even more relevant. Considering the definition given above, trust is necessary to recognize administrative or judicial acts of another Member State in the absence of a uniform legal framework. The decision to embrace trust—and therefore voluntarily make oneself more vulnerable—is risky for the court or agency because it must deviate from its standard set of rules—especially from those substantive and procedural guarantees whose observance usually defines the existence of the institution. The decision is made without full knowledge of the legal system of the country of origin and of what has exactly happened before the court or agency first seized with the matter. And the control mechanisms of the institutions within the country of destination are limited precisely because of its obligation to recognize. For example, it takes trust to enforce an arrest warrant issued by another state against a citizen of one’s own country, when the facts of the case are unknown or when it is unclear whether the country of origin respected procedural guarantees or will respect the guarantees in the future. Only if trust is present, is it possible to tolerate decisions that deviate even considerably from a Member State’s own standards. Advocate General Ruiz-Jarabo Colomer describes the accomplishment of trust-based relations amongst courts and agencies in emphatic terms:

This shared goal cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true ‘common market of fundamental rights’. Indeed, recognition is

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85 For further reading, see the study of Vernimmen-van Tiggelen & Adamo, supra note 11.


based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one’s own State, the outcome will be such that it is accepted as equivalent to a decision by one’s own State because it reflects the same principles and values. Mutual trust is an essential element in the development of the European Union: trust in the adequacy of one’s partners’ rules and also trust that these rules are correctly applied.\(^88\)

Whereas the 1999 *Tampere Programme* did not explicitly mention mutual trust or confidence,\(^89\) EU secondary law has since underlined its significance for mutual recognition many times.\(^90\) Moreover, trust became recognized as a legal principle in the jurisprudence of the ECJ. Among the first cases in which the Court recognized a principle of mutual trust as a legal category were *Gözütok and Brügge* (2003) in criminal law and *Gasser* (2003) in civil law.\(^91\) Initially, it was not clear whether the Court used trust and recognition merely as “different names for the same principle.”\(^92\) In the meantime, the ECJ has operationalized the principle of mutual trust clearly as a legal principle in its own right.\(^93\) Representative of

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88 Opinion of Advocate General Ruiz-Jarabo Colomer in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2002:516, paragraph 124; see also Janssens, supra note 61, at 142–43.

89 The participants in Tampere presupposed mutual trust, argue Flore, supra note 86, at 18, and Kaufhold, supra note 2, at 411.


91 Judgment in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, paragraph 33 (“[T]here is a necessary implication that the Member States have mutual trust in their criminal justice systems . . . .”) (emphasis added); see also Judgment in *Gasser v MISAT Srl*, C-116/02, EU:C:2003:657, paragraph 72.


93 See Janssens, supra note 61, at 142 (“The ECJ’s explicit references to both recognition and trust would hardly make sense if both concepts meant the same thing.”); see, e.g., Judgment in *TNT Express Nederland v AXA*.
the Court’s understanding of trust is the opinion in the Van Esbroeck case on Article 54 of the Convention Implementing the Schengen Agreement (CISA):

There is a necessary implication in the *ne bis in idem* principle, enshrined in that article, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied...\(^4\)

In a similar manner, the ECJ and the Advocates General have applied the principle of mutual trust in cases on judicial cooperation in civil matters,\(^\text{95}\) in criminal matters including European Arrest Warrant cases,\(^\text{96}\) in family law,\(^\text{97}\) and in insolvency law.\(^\text{98}\)

It is not easy to grasp the theory behind the Court’s understanding of the principle of mutual trust.\(^\text{99}\) On the one hand, the ECJ treated mutual trust in the area of judicial cooperation in the same simplistic way it had been dealt with in the single market. The

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\(^{96}\) See, e.g., Opinion of Advocate General Ruiz-Jarabo in Advocaten voor de Wereld v Leden van de Ministerraad, C-303/05, EU:C:2006:552, paragraphs 17, 46, 62; and the Judgment in the same case, paragraph 57; Judgment in Melvin West, C-192/12 PPU, EU:C:2012:404, paragraphs 53, 62 [hereinafter Melvin West].


\(^{99}\) See, e.g., Janssens, supra note 61, at 141 ("The ECJ’s succinct statement on mutual trust contrasts sharply with the wide-ranging reflections and questions these statements have prompted among legal commentators.").
Court deduced from the existence of the provisions on mutual recognition in EU secondary law that mutual trust factually existed and stressed the importance of trust for justifying mutual recognition. In the words of Olivier De Schutter, the Court considered trust to be a “condition de possibilité de la reconnaissance mutuelle,” while it also thought trust “comme présupposée par la reconnaissance mutuelle” in a way that De Schutter calls “axiomatique.” Because the ECJ took the existence of mutual trust for granted, it accepted even very controversial instruments, such as the European Arrest Warrant. On the other hand, the factual premise went along with the declaration of a normative “principle of mutual trust” from which the ECJ deduced by means of purposive interpretation a general “obligation to recognize.” Advocate General La Pergola spelled out what this obligation meant in his 1998 opinion in the Coursier case:

In particular, under no circumstances may a foreign judgment be reviewed as to its substance ... even if the court of the State addressed considers that a point of fact or of law has been wrongly decided by the court of origin ... that court cannot refuse recognition or enforcement, substituting its own discretion for that of the foreign court. This prohibition, which is an expression of the respect and confidence which the legal system of the State addressed vests in the juridical sovereignty of the State of origin and which is accompanied by an almost total prohibition on reviewing the jurisdiction of the original court, constitutes, in my view, the central principle of the entire Convention.

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100 See Flore, supra note 86, at 19 (“La confiance mutuelle et établie par ses effets ... elle existe parce que la disposition concernée de la convention ... n’aurait pas été possible si la confiance n’avait pas existé.”).

101 Olivier De Schutter, La contribution du contrôle juridictionnel à la confiance mutuelle, in LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN 79, 98, 101 (Gilles de Kerchove & Anne Weyembergh eds., 2005); see also, Kaufhold, supra note 2, at 416; Cathryn Costello, Dublin-case NS/ME: Finally, an end to blind trust across the EU?, in ASIEL & MIGRANTENRECHT 83, 90 (2012) (“This comes close to asserting that because we believe it, it must be true. Just because there is trust, does not mean that trust is warranted.”).

102 Herlin-Karnell, supra note 14, at 80.


104 Opinion of Advocate General La Pergola in Coursier, Case C-267/97, see supra note 86, at para. 19. For the 1968 Brussels Convention, see supra note 82.
Later, in the 2008 *Rinau* decision, the ECJ added: “[T]he grounds for non-recognition must be kept to the minimum required.”105 The Opinion of Advocate General Kokott in *Prism Investments* demonstrates how this interpretative maxim can be derived from the principle of mutual trust. Under the heading “Teleological interpretation” Kokott argues:

Mutual trust in the administration of justice in the Community justifies judgments given in a Member State essentially being recognised automatically without the need for any procedure except in cases of dispute . . . As stated in recital 17 in the preamble to the regulation, by virtue of the same principle of mutual trust, the procedure for making a judgment enforceable must be efficient and rapid. To that end, at the first stage in the procedure, the declaration that a judgment is enforceable must be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to review of its own motion any of the grounds for non-enforcement provided for by the regulation. A review of the grounds for refusal may take place only in the appeal proceedings.106

For the ECJ, the principle consists of justifying a narrow reading of those clauses stating exceptions from the principle of mutual recognition. The normative principle of mutual trust is again interpreted as if factual trust actually existed. Or, as the Court held in *Melvin West*, mutual trust “must exist.”107

The link between the hypothetical existence of actual trust and the normative principle of mutual trust remains vague in ECJ jurisprudence. Two points are relevant for the remainder of this Article: First, in the decisions until roughly 2005, the ECJ considered only the Member States as relevant stakeholders of mutual trust—the Member States

105 *Rinau*, supra note 97, at para. 50. See Judgment in *Povse v Alpago*, C-211/10 PPU, EU:C:2010:400, paragraph 40 (hereinafter *Povse*) ([“G]rounds for non-recognition should be kept to the minimum required.”); see, e.g., *TNT Express Nederland*, supra note 93, at paras. 54–56; *Melvin West*, supra note 96, at para. 62; C., Case C- 376/14 PPU at para. 66; see also Recital 22 of Council Regulation 2201/2003 of Nov. 27, 2003 (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility), 2003 O.J. (L 338) 1 (EC).


107 *Melvin West*, supra note 96, at para. 62.
themselves are said to be truster and trustee, not the courts or authorities involved in the actual process of mutual recognition; second, the ECJ treated trust and control as two mutually exclusive concepts. Any exception from the principle of mutual recognition was considered to be per se incompatible with mutual trust. Mutual trust served as a something like a super-principle to enforce mutual recognition. Even if EU secondary legislation contained grounds for non-recognition, the courts and agencies in the country of destination had to apply the narrowest possible reading because—according to the ECJ—control had been replaced by the over-arching principle of mutual trust.

III. Reconsidering the “Principle of Mutual Trust”—In a Crisis of Mutual Trust

It is easy to criticize the ECJ and its Advocates General for their naïve assumption that comprehensive mutual trust would simply manifest as soon as EU institutions and Member States passed mutual recognition directives and regulations. A sufficient level of trust between the Member States and their respective judicial institutions probably did not exist when judicial cooperation was initiated—and it does not exist today. A comprehensive empirical study from 2009–10 comes to the skeptical conclusion: “[T]rust is still not spontaneously felt and is by no means always evident in practice, even if mutual confidence between Member States’ judicial and prosecution authorities appears to be growing.”

Mixed experiences with early cooperation projects, especially with the European Arrest Warrant, the complex and overly rapid process of EU enlargement, the slow ratification and implementation of several large reform projects, and the constitutional deficit of the EU, are only some of the factors that have contributed to the widespread

108 See cases cited supra note 94; Kaufhold, supra note 2, at 423 (providing an overview).

109 Vernimmen-van Tiggelen & Adamo, supra note 11, at 20. For a similar assessment, see Möstl, supra note 61, 419.

110 See Vernimmen-van Tiggelen & Adamo, supra note 11, at 9–10. This was recently acknowledged in European Parliament, Committee on Civil Liberties, Justice and Home Affairs, “Draft report with recommendations to the Commission on the review of the European Arrest Warrant by Sarah Ludford (Rapporteur)”, Nov. 19, 2013, 2013/2109(INL). The draft report calls for major changes to the European Arrest Warrant (EAW), including the introduction of a specific human rights’ clause.

111 Emanuele Pitto, Mutual Trust and Enlargement, in LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN 47 (Gilles de Kerchove & Anne Weyembergh eds., 2005) (analyzing the relationship between enlargement and mutual trust).

112 Massimo Fichera, Mutual Trust in European Criminal Law 1 (Univ. Edinburgh Sch. L., Working Papers 2009/10) (giving an overview over the slow reform process in the area of criminal law since 2000).

belief that EU cooperation in civil and criminal matters has not lived up to the great expectations of Tampere. The success of a supranational legal system in which substantive criteria are only partly harmonized particularly depends on the participating Member States to strictly adhere to the law. Courts and judicial authorities, however, were confronted with cases of manifest abuse of the mutual recognition regimes in various areas: The crises of European civil procedure law in the 1990s and of the mutual recognition of driving licenses in the late 2000s were particularly important. Even a Council Framework Decision now acknowledges that not every decision within the European area of judicial cooperation is always “in compliance with the principles of legality, subsidiarity and proportionality.” A recent Directive mentions explicitly, “[a]lthough all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.”

Since then, there has been growing awareness in the political realm that trust cannot be taken for granted but has to be worked hard for—an insight articulated by Majone as early as 1994—and that in the field of judicial cooperation, trust may be even more difficult to generate than in the common market. In any event, “strengthening mutual trust” has become one of the main goals of EU politics in the area of judicial cooperation. The Commission held in its 2004 evaluation of the Tampere Programme that “[f]urther progress with mutual recognition depends on greater mutual trust between Member States.” The failed 2004 Treaty establishing a Constitution for Europe mentioned the

114 Cf. also Anderson, supra note 113, at 41–42.
115 Cf. Canor, supra note 6, at 392.
116 See Gasser, Case C-116/02; see also Opinion of Advocate General Wathelet in Gazprom OAO v Lithuania, C-536/13, see supra note 93, at para. 145.
117 See infra note 142.
119 Recital 4 of Directive 2010/64/EU, supra note 118.
120 Majone, supra note 61, at 20.
need for mutual trust and confidence-building, and trust-building was highlighted in the 2004 Hague Programme, as well as in the 2009 Stockholm Programme.

While it is trite that “trust cannot be commended by decree,” those programs have acknowledged that trust can evolve, that the level of trust can change over time, and that it is influenced by the legal environment. But it is far from clear how this process can be steered effectively. Only two things seem certain considering the aforementioned EU programs and the empirical studies on the issue: (1) The dialectics of trust and law suggest that mutual trust is not only a precondition for integration, but also the result of legal regulation; and (2) the lack of mutual trust between those institutions that actually implement judicial cooperation—courts and agencies in the Member States—has been identified as one decisive reason for the crisis of judicial cooperation. The reform discussion, therefore, concentrates on those true stakeholders of mutual trust rather than on the macro-political level, or, as the Commission has put it:

Mutual trust must go beyond the perceptions of the governments of the Member States—it must also be established in the minds of practitioners, law enforcement officers and all those that will administer decisions based on mutual recognition on a daily basis. This cannot be achieved overnight …

EU secondary law now also acknowledges that the view of those practitioners is relevant for the interpretation of the principle of mutual trust:

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122 2004 O.J. (C 310) 1. Article I-42 of this Treaty declared that the EU should promote “mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions.”

123 Hague Programme, supra note 90, at 10–12; Stockholm Programme, supra note 90, at 5, 13–14 (p. 5: “Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future.”); see also European Commission, Strengthening Mutual Trust in the European Judicial Area—A Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention, COM (2011) 327 final (June 16, 2011).


125 On the evolutionary nature of trust, see Flore, supra note 86, at 28; J.W. Ouwerkerk, Wederzijdse erkenning en wederzijds vertrouwen: de Nederlandse rechtspraak inzake overlevering, in VERTROUWEN IN DE STRAFRECHTSPLEGING 87, 89 (R.S.T. Gaarthuis, et al. eds., 2010).

Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States’ rules, but also trust that those rules are correctly applied.  

Before continuing, one point needs clarification: Talking about a crisis suggests that the lack of trust is a problem. Of course, it is neither logically nor politically necessary to organize judicial cooperation by means of trust. Trust is not an end or a value in itself. Rather, the instrumental value of trust depends on the specific governance structure. For example, the category of trust would not adequately capture the relations between courts and agencies in a unitary federal state. But as long as the European judicial cooperation in civil and criminal matters is organized as a non-hierarchical policy network, its function depends on a certain level of mutual trust. Until a comprehensive European civil or criminal code is passed and a strong European judicial authority is created, trust is indispensable in order to explain and justify the risks a national court takes in every decision.

IV. Regulatory and Interpretative Answers to the Crisis of Trust

There are three basic strategies that can be pursued on a European level. Two of them are part of the Hague and Stockholm reform proposals and are already actively implemented by EU institutions, while the third strategy would require the ECI to reconsider its construction of the principle of mutual trust. Before discussing whether and how the Court can actually foster trust, we must look first at the main goals of the other two strategies.

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127 Recital 6 of Directive 2010/64/EU, supra note 118.

128 See supra note 8.

129 See infra Part D.IV.

130 See Susie Alegre, Mutual Trust – Lifting the mask, in LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN 41, 45 (Gilles de Kerchove & Anne Weyembergh eds., 2005) (emphasizing that mutual trust depends also on budgetary issues—how much individual Member States are willing to pay for the quality of their justice system, for example prisons, legal aid, etc. But this can hardly be addressed on EU level.).

131 For a concise overview of recent developments concerning judicial cooperation, see Rolf Wagner, Aktuelle Entwicklungen in der justiziellen Zusammenarbeit in Zivilsachen, in NEUE JURISTISCHE WOCHENSCRIFT 1796 (2015); Dominik Brodowski, Strafrechtsrelevante Entwicklungen in der Europäischen Union, in ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGRMATIK 79 (2015).
The first strategy aims to improve cooperation by administrative measures. The “progressive development of a European judicial culture” has been part of the reform agenda since the first comprehensive assessment of the Tampere Programme in 2004 and includes diverse measures—for example, training seminars for judges from various EU Member States, exchange programs, evaluations, and the building of judicial networks. All these measures may increase trust because they help to overcome the ignorance of potential trusters—judges, prosecutors, or other officials of the Member States—about the potential trustees, such as the courts of those Member States whose decisions should be recognized. They provide the knowledge necessary for trust regarding those attitudes and qualities associated with the trustworthiness of the trustee.

The second strategy proposes changes in the law in order to create a climate of trust. According to the Commission and the Council, one of the main impediments to the achievement of mutual trust is the absence of EU secondary law on minimum rules for the rights of the accused in criminal cases and for access to justice and due process rights in civil cases. Despite the framework of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and EU secondary law, there is still

132 Hague Programme, supra note 90, at 11.
135 See supra Part C.II.2. For practitioners who agree that information exchange, training, feedback and networks are pivotal for judicial cooperation, see Vernimmen-van Tiggelen & Adamo, supra note 11, at 20–21.
136 See European Commission, Assessment of the Tampere Programme, supra note 121, at 11; Hague Programme, supra note 90, at 11. For criminal justice, see Green Paper Report, supra note 126; Stockholm Programme, supra note 90, at 12; Recital 7 and 9 of Directive 2010/64/EU, supra note 118; Vernimmen-van Tiggelen & Adamo, supra note 11, at 9–10 (explaining the “excessive” use of European arrest warrants for minor crimes and without the safeguard of the dual criminality requirement is a big problem for legal practitioners). Another reason is mentioned by Vernimmen-van Tiggelen & Adamo, supra note 11, at 18 (“Since practitioners are only rarely involved in the process that leads to a mutual recognition instrument, results often appear too theoretical, abstract or even arbitrary to be of practical value.”).


\footnote{Limits for an overly extensive harmonization draws from article 67, § 1 in the Treaty on the Functioning of the European Union ("The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.") (emphasis added).


\footnote{Limits for an overly extensive harmonization draws from article 67, § 1 in the Treaty on the Functioning of the European Union ("The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.") (emphasis added).}} But an act of recognition remains an act of trust only as long as its voluntary nature is preserved. Full harmonization is not only unlikely to find political support, but would also replace the trust-based relationship between the courts of the Member States with a trustless relationship similar to the relationship between courts in a federal nation state.\footnote{Limits for an overly extensive harmonization draws from article 67, § 1 in the Treaty on the Functioning of the European Union ("The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.") (emphasis added).} The same would be true if a separate European court system for transnational cases were introduced in order to overcome the crisis of trust.\footnote{Limits for an overly extensive harmonization draws from article 67, § 1 in the Treaty on the Functioning of the European Union ("The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.") (emphasis added).} Harmonization may be an important step to foster trust, but it is also one step away from the policy network towards a closer federal union. As long as the policy network character of judicial cooperation within the EU is preserved, generating trust remains a project that all European institutions need to advance.

The one institution that has hardly ever been part of the discussion on how to foster a climate of trust among the courts and judicial authorities of the Member States is the ECJ. It might seem paradoxical at first, but the Court’s construction of the principle of mutual
trust as an obligation to recognize was itself—at least partly—responsible for the crisis of trust. The Court acknowledged in its 2008 Weber decision on the mutual recognition of driving licenses that an over-extensive interpretation of mutual recognition provisions may cause severe crises of trust:

To require a Member State to recognise the validity of a driving license issued by another Member State on the ground that the holder of that license has not committed any offence on the territory of the first Member State after issue of that license, despite the fact that he is subject to a valid measure withdrawing his right to drive on the basis of facts arising prior to that issue, would have the effect of encouraging offenders likely to be subject to such withdrawal to travel without delay to another Member State in order to evade the administrative or criminal consequences of those offences and would ultimately destroy the confidence on which the system of mutual recognition of driving licenses rests.

Before evaluating what the Court can do to support the system of judicial cooperation, we need to understand why and how an over-extensive interpretation of mutual recognition by the ECJ can damage trust. One central point in this regard is the discrepancies between the levels of trust of the various actors involved.

Until at least 2005, the ECJ’s approach towards the principle of mutual trust focused almost exclusively on trust between political actors. According to the ECJ, the political actors who passed the mutual recognition regulations and directives shared a high level of trust in their respective legal systems. The ECJ translated this actual or perceived trust in a

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141 This article cannot discuss the differences between interpretation and construction. As a critique, the ECJ’s approach towards the principle of mutual trust is concerned with the translation of the semantic content of a legal text into legal rules rather than with the determination of the linguistic meaning, the term “construction” will be preferred here. Yet, the distinction itself is vague. For more details, see Lawrence Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95 (2010).


143 See supra notes 94 and 108. Similar is the distinction between the requirement of trust on an “abstract level,” that means between the Member States, and mutual trust “in concreto,” i.e. the (neglected) trust between the courts and agencies, made by Janssens, supra note 61, at 143.
rather stringent way, leading to an extensive interpretation of the principle of mutual recognition and, consequently, a narrow reading of any grounds for non-recognition.\textsuperscript{144}

Considering what has been said about the importance of trust between those actors who implement mutual recognition—the courts and judicial authorities of the Member States—the ECJ’s understanding of trust seems oversimplified. Those practitioners were initially skeptical; moreover, they did not change their attitude to the extent the political actors had expected.\textsuperscript{145} When they were confronted with the fact that not every decision within the European area of judicial cooperation was always “in compliance with the principles of legality, subsidiarity and proportionality,”\textsuperscript{146} the situation worsened. Now, the ECJ’s top-down interpretation of the principle of mutual trust contributed to actually lowering the level of trust between the addressees of this principle because the Member States’ institutions lost every means of control over their recognition decisions.\textsuperscript{147} Apart from very narrow exceptions, the addressees simply had to “trust”—to recognize whatever the circumstances might be, even in cases of manifest abuse.\textsuperscript{148} But a “duty to trust” is a contradiction in terms. From the perspective of judges and prosecutors, trust was just a formal idea, not a substantive concept.\textsuperscript{149}

To sum up, the ECJ did not construe the principle of mutual trust in a holistic manner. It took the normative input into account but neglected the outcome—the actual level of trust between the Member States’ courts and agencies. This is dangerous; taking every means of control out of the hands of those institutions that are important for generating a climate of trust can be counterproductive and can seriously damage trust.\textsuperscript{150}

\textsuperscript{144} See Alegre, supra note 130, at 43 (explaining “perceived” insofar as there exists a gap between the level of trust showed by national governments and actually present in national parliaments); Vernimmen-van Tiggeelen & Adamo, supra note 11, at 9 (calling attention to the role political rhetoric plays in judicial cooperation).

\textsuperscript{145} See supra note 109; see also Anabela Miranda Rodrigues, Confiance mutuelle et contrôle juridictionnel: Une liaison nécessaire?, in LA CONFIANCE MUTUELLE DANS L’ESPACE PENAL EUROPÉEN 163, 165 (Gilles de Kerchove & Anne Weyembergh eds., 2005) (distinguishing between a “confiance confidante” on the political level and a “confiance méfiante” among legal practitioners).

\textsuperscript{146} Recital 9 of Council Framework Decision 2006/783/JHA, supra note 90. Similarly, Recital 4 of Directive 2010/64/EU, supra note 118.

\textsuperscript{147} See Möstl, supra note 61, at 429–30; Schoch, supra note 142, at margin number 379.

\textsuperscript{148} See Kaufhold, supra note 2, at 420–21 (describing the ECJ’s interpretation of the principle of mutual trust as an “obligation” to be ignorant because certain facts cannot be introduced before the courts of the country of destination).

\textsuperscript{149} On the distinction between a “formal” and a “substantive” concept of trust, see Ouwerkerk, supra note 125, at 90–91. The distinction is partly misleading because “formal trust” can hardly be called trust at all due to the absence of the essential elements of trusting. See generally supra Part C.II.

\textsuperscript{150} Möstl, supra note 61, 429–30.
D. How to Re-construct the “Principle of Mutual Trust”

The failure of the ECJ to give an adequate account of the relationship between trust and law makes it necessary to re-evaluate the construction of the principle of mutual trust. By linking theoretical insights about the ability of legal rules to promote trust with best practice experiences from different areas of supranational judicial cooperation, this Article proposes several rules for interpretation of the principle of mutual trust that avoid the shortcomings of the traditional ECJ approach. Some recent ECJ decisions and opinions of the Advocates General—though still not presenting a fully coherent and convincing framework—can serve as valuable sources of inspiration.

I. Trust as a Legal Principle: How to Optimize Trust?

Ann-Katrin Kaufhold has argued to take the ECJ at its word and to read the principle of mutual trust as a legal principle in the Alexian sense. Robert Alexy defines principles as “optimization requirements” (Optimierungsgebote) or norms that “require that something be realized to the greatest extent possible given the legal and factual possibilities.” Kaufhold’s idea is per se consistent with the ECJ’s interpretation of the principle. The ECJ does not treat the principle as political rhetoric, but has identified “le sens et l’objet” of the principle and construed it in a way that “the grounds for non-recognition must be kept to the minimum required”—a clear optimization requirement.

151 Kaufhold, supra note 2, 426–27. Recently, the category of “principles” has received a lot of attention in European private law. See, e.g., Koen Lenaerts & José A. Gutiérrez-Fons, The Constitutional Allocation of Powers and General Principles of EU Law, COMMON MKT. L. REV. 1629 (2010); Arthur S. Hartkamp, The General Principles of EU Law and Private Law, 75 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 241 (2011). However, this discussion focuses primarily on the principles in the Dworkinian sense of “law as integrity,” see Chantal Mak, Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU’s Case Law on Principles of Private Law and Some Doubts of the Fox, 20 EUR. REV. OF PRIV. L. 323 (2012), rather than on the Alexian concept of principles as optimization requirements. Consequently, one of the big differences between the general principles of private law and the principles of mutual trust and of mutual recognition is that the ECJ does not use the latter “to fill normative gaps left either by the authors of the Treaties or by the EU legislature”—one of the main functions of principles in the first sense Lenaerts & Gutiérrez-Fons, supra at 1629; see Kaufhold, supra note 2, 428–29; Möstl, supra note 61, at 410.


153 Opinion of Advocate General Kokott in Prism Investments, supra note 98, at para. 40 (“the purpose and the object”).

154 Rinau, supra note 97 at para. 50; see also Povse, supra note 105, at para. 40. Kaufhold joins the ECJ in her construction of the principle of mutual trust; she defines the ECJ’s core idea as “waiving all means of control irrespective of the state of harmonization.” Kaufhold, supra note 2, at 429,
Although the legal nature of the principle of mutual trust is hardly disputable, the question is whether the ECJ’s construction is the only reasonable one, or whether the Court is better advised to avail itself of a construction that avoids the concerns voiced in the previous Section. These concerns are based on the fact that the ECJ has lent normative weight exclusively to the mutual trust of the political actors of the Member States and has lost sight of those who actually implement mutual recognition. So far, the purpose or effect that the ECJ takes into account is maximum mutual recognition or, according to Advocate General Ruiz-Jarabo Colomer, “from the point of view of its purpose and effects, mutual trust is a tough utilitarian when it supports the principle of mutual recognition.”

Considering the importance of actual trust between legal practitioners for the success of judicial cooperation, the principle of mutual trust demands an alternative construction, which reflects its effects on those practitioners, or, in other words, a substantive—rather than formal—understanding of trust. This is generally recognized in present-day literature and acknowledged by EU secondary law. Some even speak of a triangle of trust between the courts and authorities, the political level, and the general public. In this triangle, it would not be a solution to replace the ECJ’s top-down construction with an equally one-dimensional bottom-up construction because this would make the normative commitment of the Member States meaningless. The result of optimization can neither be the obligation to recognize at all costs, nor to restore full control to the Member States’ courts and agencies. Rather, optimization has to be committed to the normative expression of trust between the Member States on a political level and has to strive to actually achieve a high level of trust between the addressees of the law.

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155 Opinion of Advocate General Colomer, supra note 103, at para. 41.

156 For the distinction between a “formal” and a “substantive” concept of trust, see supra note 149.


158 Recital 4 of Directive 2010/64/EU, supra note 118, at 1.

159 Lorenzo Salazar, Réflexions sur le rôle de la Cour de Justice des Communautés européennes dans l’instauration de la confiance mutuelle entre magistrats: le triangle nécessaire, in LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN 157 (Gilles de Kerchove & Anne Weyembergh eds., 2005).

160 For the value of trust-based judicial cooperation in the EU see the Opinion of Advocate General Colomer in Göztük and Brügge, supra note 88, at para. 124. Compare this to JANSENS, supra note 61, at 143 (“In such a framework, the principle of mutual trust works at an abstract level, i.e. as a normative principle which cannot simply be set aside whenever cracks appear in the mutual trust in concreto.”).
Any construction that takes these two dimensions into account and considers how trust can actually be achieved needs to adopt a steering perspective.\textsuperscript{161} In the present context, the steering approach asks which interpretation can actually foster mutual trust between the legal addressees without denying the normative character of the project. Such a “trust-generating construction of the law”—suggested by Eberhard Schmidt-Aßmann as early as 2007—\textsuperscript{162}—is based on the assumption that certain forms of interpretation or construction of the principle of mutual trust are more or less likely to promote trust.\textsuperscript{163}

To find a construction that satisfies these demands, some basic insights about trust and trust-building must be revisited: First, trust-building has been characterized as a learning experience.\textsuperscript{164} Political networks are particularly good at learning;\textsuperscript{165} it is therefore not by chance that most of the proposed administrative measures in the area of judicial cooperation focus on trust-building through learning.\textsuperscript{166} For the judicial construction of the principle of mutual trust to contribute to this end, there must be rules that encourage courts and agencies to exchange information and to consider the position and the competence of courts in other Member States. Second, trust does not conflict with control but rather presupposes a framework of rules and indirect mechanisms of control.\textsuperscript{167} One important reason for mutual distrust is the widespread feeling among legal practitioners that they have completely lost control, even in cases of manifest abuse.\textsuperscript{168} Therefore, the challenge for a construction of the principle of mutual trust is the development of indirect mechanisms of control without endangering the nature of the act of recognition as an act of trust. Third, questions of trust always depend on the specific regulatory context, or as


\textsuperscript{162} Schmidt-Aßmann, supra, at note 77 (“vertrauensgenerierende Dogmatik”).

\textsuperscript{163} Due to the complexity of any empirical assessment, a plausible correlation usually suffices. See supra Part B.II.

\textsuperscript{164} See supra note 38.


\textsuperscript{166} See supra Part C.IV.

\textsuperscript{167} See supra Part B.II.

\textsuperscript{168} See supra note 147.
Ester Herlin-Karnell—inf accordance with Advocate General Mengozzi—has put it, trust is a "highly differentiated concept." Answers, therefore, need to distinguish between the different fields of judicial cooperation.

II. Recent Developments in ECJ Jurisprudence

The aforementioned ideas resonate with some recent developments in the ECJ’s jurisprudence. The remarkably self-critical remarks in the Weber decision already indicated the ECJ’s growing unease with its own construction of the principle of mutual trust. While, at the end of the day, the ECJ and the Advocates General have not stepped away from their strict top-down interpretation of trust, they have, in several cases, considered a more bottom-up construction that takes the level of trust between courts and agencies of the Member States more seriously. Consider the following:

First, in Eurofood IFSC (2005), a case on insolvency proceedings—an area of judicial cooperation in civil matters—the Court affirmed using its traditional approach that “[i]t is that mutual trust which has enabled . . . the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favor of a simplified mechanism for the recognition and enforcement of decisions . . . “. Then, however, the Court added that it “is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction” according to the regulation at issue and “that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process.” Here, for the first time, the ECJ explicitly deduced a judicial obligation from the principle of mutual trust and compels the court first seized with the matter (in the country of origin) to check and justify its jurisdiction in light of a—substantive—concept of trust. The ECJ did not, however, allow the second court (in the country of destination) to review whether or not the first court had correctly fulfilled this obligation before opening insolvency proceedings. The ECJ repeated its argument from Eurofood IFSC in the 2010 decision MG Probud.


170 See supra note 142.


172 Id. at para. 41.

173 Id. at para. 42.

Second, in Gasparini (2006), Advocate General Sharpston argued against the Commission and in favor of a substance-based approach to the ne bis in idem principle of Article 54 CISA. One point Sharpston made was especially important:

It seems to me that, on the contrary, a distinction can and should be drawn between trusting other Member States’ criminal proceedings in general . . . on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all . . . on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States’ criminal law. The second is tantamount to de facto harmonisation around the lowest common denominator.

Sharpston then elaborated on the mutual recognition in the single market, where the ECJ had admitted several exceptions and “comparability requirements”—for example, substantive tests by the court of the country of destination. She demanded that “[a] fortiori,” similar exceptions be made possible in the area of judicial cooperation which, in her words, is “a delicate area of national sovereignty.” Moreover, where no minimum harmonization existed, the “principle of mutual trust” could not justify the obligation to recognize. In the end, Sharpston was neither able to convince the Court of her substance-based approach in the Gasparini case nor was the ECJ willing to adopt her position in later cases.

Third, in the Apostolides (2009) decision on Regulation (EC) No. 44/2001 concerning the jurisdiction, recognition, and enforcement of judgments in civil and commercial matters, the Court opted against an overly narrow reading of the grounds for non-enforcement of the Regulation and tried to

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175 Opinion of Advocate General Sharpston in Gasparini and Others, supra note 92, at paras. 92–104.
176 Id. at para. 109.
177 Id. at paras. 110–11.
178 Id. at para. 112.
Establish a fair balance between, on the one hand, mutual trust in the administration of justice in the Union, which justifies judgments given in a Member State being, as a rule, recognised and declared enforceable automatically in another Member State and, on the other hand, respect for the rights of the defence.  

Fourth, in Purrucker I (2010) the ECJ applied the Eurofood IFSC doctrine to the recognition and enforcement of decisions on the right of custody. In particular, the ECJ demanded that the court first seized with the matter must determine whether it has jurisdiction having regard to [European secondary law] and that it must be clearly evident from the judgment delivered by that court that the court concerned has intended to respect the directly applicable rules of jurisdiction, laid down by that regulation, or that the court has made its ruling in accordance with those rules.  

Again, however, the ECJ stopped short of allowing the second court to review the first court’s compliance with this rule.  

Fifth, in Purrucker II (2010), the ECJ affirmed that the second court must review the jurisdiction of the first. Additionally, the ECJ introduced a complex system of mutual information sharing obligations. In particular, it allowed the second court to proceed with the case if the first court did not comply with its obligation to inform the second court on request. The details of this decision are not important in the present context and the holding was largely determined by the fact that the outcome concerned the best interests of a child. Nevertheless, it is interesting that the ECJ slowly softened its strict recognition requirements and proposed alternative procedural solutions to bridge the discrepancy of trust described above.  

Next, in Povse (2010)—building on the Purrucker cases—the ECJ invokes mutual trust in order to emphasize the duty of the court first seized with the matter to “take into consideration the reasons for, and evidence underlying, the decision of non-return.”  

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181 Judgment in Apostolides, C-420/07, EU:C:2009:271, paragraph 73.  
182 Judgment in Purrucker I, C-256/09, EU:C:2010:437, paragraph 73.  
184 Povse, supra note 105, at para. 59.
This might sound self-evident, or even superfluous, but in the context of the principle of mutual trust this marks yet another step towards a more substantive interpretation of recognition duties.

Finally, in the European arrest warrant case, Jeremy F. (2013), the ECJ interpreted the relevant framework decisions “as not precluding Member States from providing for an appeal suspending execution” of decisions in the extradition process. Rather, the requested person can be granted an internal remedy even though the framework decision made “no provision on any right of appeal with suspensive effect against decisions relation to a European arrest warrant.”

None of the decisions, taken individually, break with the ECJ’s construction of mutual trust as an obligation to recognize decisions. Yet, taken together, they show that the ECJ develops over time to recognize the dialectical nature of the relationship between trust and law, and the need to pay attention to the actual level of trust among legal practitioners. The result is still impressionistic rather than systematic. At least the Court proposed some ideas upon which a reconstruction of the principle of mutual trust can build from.

**III. From “Fiat Recognitio, et Pereat Mundus” towards a “Grammar of Trust”**

A comprehensive reconstruction of the principle of mutual trust requires a thorough analysis of EU secondary law in all its diversity and with all its constellations of mutual trust and mutual recognition. This Article can only describe some necessary steps towards building a more multi-dimensional construction of the principle of mutual trust and a more comprehensive “grammar of trust” for judicial cooperation. When handled with care, the following rules are not only compatible with the mutual recognition regime, but they will also improve the “free movement of judgments” and thus the quality and quantity of judicial decisions made in accordance with judicial cooperation in the EU.

1. No Overly Restrictive Interpretation of Exceptional Provisions

The first step concerns interpretation. The Rinau Court held that, because of mutual trust, “the grounds for non-recognition must be kept to the minimum required.” This interpretative maxim expresses a one-dimensional, top-down understanding of trust, which considers exceptions to mutual recognition as being incompatible with mutual trust.

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186 For a more detailed analysis of reform proposals for the cooperation in criminal matters, see VERNIMMEN-VAN TIGGELÉN & ADAMO, supra note 11, 24–59.

187 Rinau, supra note 97, at para. 50; see also supra note 105.
This approach can damage the overall level of trust. Because control clauses are a necessary condition for trust, interpreting exceptional provisions or grounds for refusal too narrowly does not foster trust. Thus, a more adequate starting point would be the ECJ’s acknowledgement in the 2010 decision *I.B.* that, while the European Arrest Warrant system “is based on the principle of mutual recognition, that recognition does not, as is clear from Articles 3 to 5 of the framework decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued.”

As soon as we accept a more multi-dimensional concept of trust and understand that mutual trust between the courts and agencies of Member States is also relevant, a more open formula must replace *Rinau*. This new formula should allow for balancing the degree of trust that exists between the actors involved. Consequently, the interpretation of mutual recognition provisions, and of grounds for non-recognition, should strive to create a Pareto optimal level of trust. To this end, the ECJ would need to assess the effects of its interpretation of mutual recognition provisions, and the provision on grounds for non-recognition or non-execution on the actual level of trust of the different actors. Additionally, where no harmonization has taken place, the Court could use the principle of mutual trust as an interpretative maxim to tie mutual recognition to compliance with minimum standards—analogous to the proportionality exception recognized by the ECJ for the relationship between the four EU freedoms and the principle of mutual recognition.

### 2. An Obligation to Inform and to Take Account

The second step builds on the ECJ’s decisions in *Eurofood IFSC, MG Probud, Purrucker I and II*, and *Povse*. In these decisions, the ECJ emphasized the obligation of the Member States’ courts to make “clearly evident from the judgment . . . that the court has intended to respect the directly applicable rules of jurisdiction” and has introduced a complex system of mutual obligations to inform each other about the case. But the ECJ stopped short of giving the second court any way to respond if the first court did not comply with these obligations. The second court still had to recognize the first court’s decision.

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189 These very short remarks on the nature of balancing must suffice here. For balancing and the Pareto principle see generally Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 RATIO JURIS 131, 135 (2003).

190 See discussion supra note 63.

191 *Purrucker I*, supra note 182, at para. 73.

192 *Purrucker II*, supra note 183, at paras. 81–85.

193 *Cf. Health Service Executive*, supra note 97, at paras. 100–04.
If the first court neither discusses its jurisdiction according to European law nor complies with legitimate information requests, the second court lacks the knowledge necessary to trust the first court. One way to strengthen the position of the second court in this situation would be to allow it to proceed with, and even decide the case—assuming that the second court is able to answer the question of its own jurisdiction in the affirmative. The problem that two courts may come to two inconsistent decisions—a situation the European regime of judicial cooperation naturally wants to avoid—cannot be solved by the principle of mutual trust alone. The ECJ or the European legislature either needs to implement a procedure to check the validity of the first and second courts claims—for example, by using a preliminary reference procedure—or this inconsistency may have to be tolerated as a necessary consequence of decision-making in a non-hierarchical judicial network. 

An obligation to communicate could also be extended from questions of jurisdiction to the compliance with due process rights. Although a substantive review of the first court’s decision would still be barred, the second court could examine whether the first court fulfilled its procedural requirements. This form of procedural control is not toothless—the Federal Constitutional Court of Germany mandated a very similar procedure for German courts with respect to decisions of the European Court of Human Rights.

3. Grounds for Non-Recognition and Non-Enforcement as Questions of Trust: Towards a New Understanding of the Old “Ordre Public”

The most important function of a re-constructed principle of mutual trust would be to provide a coherent framework for the large variety of grounds for non-recognition in judicial cooperation and to equip them with a clear sens et objet. Because fundamental rights are seen as foundational for the EU’s identity, decisions on the grounds for non-recognition are of utmost importance. To effectively contribute to the Union’s identity, the principle of mutual trust should be expanded to include the non-recognition of judicial decisions on the basis of fundamental rights. This would allow for a more systematic approach to the problem of non-recognition and enable the courts to judge whether the other court has acted in accordance with its obligations under European law. By doing so, the principle of mutual trust would not only facilitate judicial cooperation but also protect fundamental rights within the Union. 

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194 In the same vein, recent secondary legislation tries to stimulate the horizontal dialogue between the Member States’ courts on these issues, see Directive 2014/41/EU of 3 April 2014, supra note 138, at art. 6 § 1(a) and 3, art. 11 § 4.


recognition focus on violations of human rights guarantees and EU citizenship. In the words of de Schutter, “Le respect dû aux droits fondamentaux définit la limite à l’obligation de reconnaissance mutuelle.” Advocate General Mengozzi adopted this line of thought and used the Da Silva Jorge opinion to make a sweeping statement:

Thus, as Article 1(3) of Framework Decision 2002/584 [on the European Arrest Warrant] is at pains to remind us, in the context of applying the principle of mutual recognition within the meaning of that framework decision, the protection of fundamental rights, the foremost among which is the dignity of the sentenced person, must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court . . . . It is in the light of the higher principle represented by the protection of human dignity, the cornerstone of the protection of fundamental rights within the European Union legal order, that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.

Yet, the legal situation is far from unambiguous. While in some areas of judicial cooperation, procedural and substantive rights granted by international law and EU primary law are recognized in EU secondary law as grounds for non-recognition and justify non-cooperation, other areas still lag or explicitly deprive the enforcing court of a

197 In the field of EU freedoms, fundamental rights can justify non-recognition. See, e.g., Judgment in Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeister der Bundesstadt Bonn, C-36/02, EU:C:2004:614, paragraph 35. For the European Arrest Warrant, see Judgment in Wolzenburg, C-123/08, EU:C:2009:616; Opinion of Advocate General Villalón, supra note 188, at para. 43; Opinion of Advocate General Mengozzi, supra note 169, at para. 28.

198 See De Schutter, supra note 101, at 104 (“The respect for fundamental rights defines the limit for mutual recognition obligations.”).

199 Opinion of Advocate General Mengozzi, supra note 169, at para. 28.

meaningful fundamental rights review. Moreover, Article 51 of the Charter of Fundamental Rights of the European Union precludes the ECJ from considering fundamental rights claims, at least with regard to the assessment of national law. Nevertheless, developing the principle of mutual trust as a coherent new version of the ordre public européen might solve some problems for the ECJ with regard to the EU’s obligation under Article 6(2) TEU to accede to the European Convention on Human Rights. While the Court itself seems exceedingly cautious, many commentators agree

planned (on the attempts to fully abolish the exequatur proceedings including public policy review for judgments in civil and commercial matters, see Peter Amr Nielsen, The New Brussels I Regulation, 50 COMMON MKT. L. REV. 503 (2013). See also the recent Regulation 650/2012, 2012 O.J. (L 201), 107–34 (EU) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession. Differently, however, Regulation (EU) 655/2014, supra note 138. For criminal law see VERNIMMEN-VAN TIGGELN & ADAMO, supra note 11, at 10; see, e.g., Council Framework Decision 2005/214/JHA, art. 7, 20 § 3, 2005 O.J. (L 76), 16–30 (discussing the application of the principle of mutual recognition to financial penalties); Art. 9 of Council Framework Decision 2008/909/JHA, art. 9, 2008 O.J. (L 327), 27–46 (EC) (discussing the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union).

Council Regulation 2201/2003, supra note 105, at art. 24 (“The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.”); see also infra notes 202 and 212. A slightly different development can be observed in criminal law. See Herlin-Karnell, supra note 14, at 82 (describing how general principles of EU law and Charter rights have slowly been implemented by the ECJ even with regard to former Third Pillar Measures, especially the European Arrest Warrant). See also the proposal for the introduction of a more specific human rights clause to the European Arrest Warrant in the Report by Rapporteur Sarah Ludford, supra note 110, at 5. A promising step in criminal matters is again Directive 2014/41/EU, supra note 138, whose Art. 11 sec. 1 lit. f states that the execution of an EIO may be refused in the executing State, if “there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter.”


Whether a substantive European public policy already exists or is about to emerge is hotly debated. For an overview see Haris Meidanis, Public Policy and Orde Public in the Private International Law of the EC/EU: Traditional Positions and Modern Trends, EUR. L. REV. 95 (2005); IOANNA THOMA, DIE EUROPÄISIERUNG UND DIE VERGEMEINSCHAFTUNG DES NATIONALEN ORDE PUBLIC (2007).

Generating Trust Through Law?

with the Advocates General Sharpston and Bot, among others, about the need to restrain an overly extensive mutual recognition regime and to acknowledge some human rights violations as public order exceptions precisely to stabilize mutual trust.\(^{205}\) The trust-generating effect of guaranteeing those fundamental rights exceptions is identical to the effect of the minimum harmonization described above.\(^ {206}\)

Trust-building exceptions to the duty to recognize would not endanger, but rather strengthen, the integration project—as long as fundamental rights claims are not based on national constitutions, but instead on the common European values of Article 2 TEU and the EU Charter of Fundamental rights.\(^ {207}\) Under a new ordre public européen, mandatory grounds for non-execution would be derived from EU primary law, preserving, rather than compromising, the “primacy, unity and effectiveness of EU law.”\(^ {208}\) Iris Canor argued convincingly that such a construction of a fundamental rights exception would empower all Member States’ courts. While decentralizing judicial review, setting European standards of protection of human rights would also allow the ECJ “to interweave the different European fundamental rights systems into a workable and fully integrated judicial dialogical network, and to steer and shape the exact direction in which European legislation should advance.”\(^ {209}\)

No consensus has been reached so far on which test should be applied.\(^ {210}\) It is clear that a potential human rights violation cannot automatically justify non-recognition without destroying the core of the trust-based judicial cooperation and relapsing to a sovereignty-centered ordre public line of thought. Similarly, a complete exclusion of human rights exceptions would destroy mutual trust and mutual recognition.\(^ {211}\) Slowly, an understanding seems to be growing that, at minimum, “grave” human rights violations

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\(^{205}\) Cf. Opinion of Advocate General Sharpston in Radu, supra note 179, at paras. 76–85; Opinion of Advocate General Bot in Melloni, supra note 179, at para. 127. But see also the respective judgments Radu, supra note 179, at paras. 36–43; Melloni, supra note 179, at paras. 43–44, 59–63.

\(^{206}\) See supra Part C.IV.

\(^{207}\) In this sense, the German Federal Constitutional Court in the European arrest warrant case has argued that Germany’s participation in the new framework was justified, because the other participating Member States were bound by the European values of Art. 2 TEU. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2005, 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 273 (299).

\(^{208}\) Particular emphasis on the “primacy, unity and effectiveness” place Melloni, supra note 179, at para. 60; Opinion 2/13, supra note 5, at paras. 188–89.

\(^{209}\) Canor, supra note 6, at 387, 392 and passim. Cf. id. at 414 (“By doing so, it [the ECJ] concert[s] national courts, yet again, into delegates for the application of European fundamental rights law.”).

\(^{210}\) Cf. the proposals by von Bogdandy et al., supra note 196, and Canor, supra note 6.

\(^{211}\) For more details see De Schutter, supra note 101, at 109–21; Labayle, supra note 157, at 140–47.
justify non-recognition.\textsuperscript{212} The challenge remains for the ECJ to define “grave.” In addition to an exception for grave violations, a “systemic failure” exception is necessary as well. A model for this exception is the ECJ’s Grand Chamber decision in \textit{N.S.}, where the Court accepted an exception from the “principle of mutual recognition” when a Member State’s asylum system showed “systemic deficiencies.”\textsuperscript{213} Again, minor or isolated infringements would not justify non-cooperation because Member States generally act in accordance with European primary law and fundamental rights. Yet, such a presumption of compatibility must be refutable if a systemic flaw is detected.\textsuperscript{214} Advocate General Sharpston contemplated how this line of reasoning could be applied to judicial cooperation in her 2012 opinion in \textit{Radu}; however, the Court refused to follow it.\textsuperscript{215}

Although the protection of human rights is a “crucial element for ensuring mutual confidence among the Member States in judicial cooperation,”\textsuperscript{216} it is not the only one. Consequently, non-recognition would have to be admitted in non-human rights contexts as well if recognition were to put mutual trust between the courts and/or agencies in serious danger.\textsuperscript{217} This danger could occur when the second court is confronted with a case of manifest abuse in the first trial, such as corruption, or with systemic problems of the

\textsuperscript{212} According to Britz, supra note 202, 109–10, the ECJ’s judgment in \textit{Zarraga}, C-491/10 PPU, supra note 97, while not positively affirming that grave violations of fundamental rights constitute a ground for non-recognition, see id. at para. 74 (“[T]he court with jurisdiction in the Member State of enforcement cannot oppose the recognition and enforcement of that judgment.”), does not categorically preclude such an argument, see id. at para. 60 (the “Regulation . . . may not be contrary to the Charter of Fundamental Rights”). See also Jan-jaap Kuipers, \textit{(The Non) Application of the Charter of Fundamental Rights to a Certificate for the Return of a Child}, 4 EUR. HUM. RTS. L. REV. 397 (2012). A similar position develops in \textit{Janssens}, supra note 61, 143–44, for the \textit{ne bis in idem} exception in the cooperation in criminal matters.

\textsuperscript{213} \textit{N.S.}, C-411/10 & C-493/10 at paras. 78–86. The ECJ first considered that the Common European Asylum System was “based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights”; this presumption, however, was “rebuttable” (para. 104) where Member States’ courts “cannot be unaware that systemic deficiencies in the asylum procedure . . . amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision” (id. at para. 106). On the implications of the \textit{N.S.} decision cf. Costello, supra note 101, 89–90; Brouwer, supra note 53, 143–47; Herlin-Karnell, supra note 14, 86; Canor, supra note 6, 393–94 (holding that “the crux of the judgment” is that “each regulation’s implementation is subject to an obligation not to be applied if respect of European fundamental rights by all those involved does not satisfy a certain threshold”). This even holds true for regulations “formulated in categorical terms.” In these cases, however, there exists a “strong presumption of compatibility with the protection of [...] European fundamental rights” (id. at 394).

\textsuperscript{214} \textit{But see} Canor, supra note 6, at 410, on \textit{Zarraga}, C-491/10 PPU at para. 60.

\textsuperscript{215} Opinion of Advocate General Sharpston, supra note 179, at para. 76.

\textsuperscript{216} Recital 5 of Council Framework Decision 2008/909/JHA, supra note 200.

\textsuperscript{217} See 113 BVerfGE 273, 299.
justice system where the first decision was made. The “manifest abuse” exception builds on experiences with mutual recognition in the context of driving licenses.  

While the ECJ and, particularly, some of the Advocates General have already reflected on several procedural and substantive tests, a comprehensive set of rules that balances the fundamental rights claims of the ECHR, the EU Charter, and national constitutions with the integration project and the recognition method, has not yet been developed. This Article’s purpose is not to stipulate rules for every imaginable case. A comprehensive study on how to implement these rules would inter alia need to consider which fundamental rights are involved, which policy areas are concerned, which state of integration has been reached in the area, and the regulatory mechanisms involved. With the large variety of variables it may not be “possible to lay down hard and fast rules,” rather, decisions need to be made on a “case-by-case basis.”

Yet, recognizing that mutual trust is the common denominator and the justification for exceptions from mutual recognition is essential. Once again, acknowledging that grave and systemic violations of European fundamental rights and other “manifest abuses” can justify non-cooperation would not replace the system of mutual trust with the old system of distrust and substantive control; rather, it is “a sine qua non for the establishment of a genuine and sincere mutual confidence.” Contrary to what the ECJ continues to assert, a strict duty to recognize decisions in the sense of “let recognition be done, though the world perish.”

E. Conclusion

The aim of this Article has been two-fold: First, to analyze how law and trust operate as two dialectically intertwined modes of social order. The Article argued that legal rules can promote trust, while at the same time depending on public trust, which shows that it is conceptually plausible and empirically possible to identify necessary conditions for a trust-building legal regime. Second, the Article has developed a critical stance towards the ECJ’s hegemonic, but self-defeating, interpretation of the principle of mutual trust in judicial cooperation as a “duty to recognize.” To this end, this project was inspired by the current

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218 See supra note 142.

219 See supra Part D.II. for the decisions in Eurofood IFSC, Probud and Apostolides and the opinion in Gasparini. But see cases cited supra note 179 (pointing in a very different direction).

220 Opinion of Advocate General Sharpston, supra note 179, at para. 91.

221 Canor, supra note 6, at 402.

222 “Let recognition be done, though the world perish.”
efforts of EU institutions to address the high level of mutual distrust between judiciaries and administrative agencies of EU Member States, which is the most serious problem for an otherwise successful area of EU law, as well as by a string of recent ECJ decisions and Advocate General opinions. Building on insights about the relationship between law and trust, this Article encourages a more careful and multi-dimensional approach towards, and construction of, the principle of mutual trust and has proposed prolegomena of a “grammar” of mutual trust, including providing rules for a new construction of the principle. This new construction would form a more coherent and convincing framework for the question of trust and law. By recognizing that the principle of mutual trust requires interpreters to optimize the level of trust between the courts, agencies, and governments of the Member States, this Article does not follow the ECJ in understanding the principle as a largely superfluous duplication of the mutual recognition principle. Additionally, this approach avoids the mistake that grounds for non-recognition in the EU can be justified for reasons of state sovereignty in the tradition of the old public order exceptions. Rather, the need to consider the consequences of their actions on the level of mutual trust should remind judicial and administrative authorities of their responsibility to buttress the conditions of possibility for judicial cooperation in the EU.