

## Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”

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### 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.

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### 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.<sup>1</sup> 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.<sup>2</sup> This changed 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.<sup>3</sup> Already several years previously, European Union (EU) institutions had emphasized the

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<sup>1</sup> See generally FRANCIS FUKUYAMA, *TRUST: SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); TAMAR FRANKEL, *TRUST AND HONESTY* (2006). For emphasis on the integrative power of trust for a society, see GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 326 (Kurt Wolff ed. & trans., 1950) (“Trust is one of the most important synthetic forces within society.”); NIKLAS LUHMANN, *VERTRAUEN: EIN MECHANISMUS DER REDUKTION SOZIALER KOMPLEXITÄT [TRUST AND POWER]* (4th ed. 2000). See also Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553 (2001); ONORA O’NEILL, *A QUESTION OF TRUST* (2002) (emphasizing the costs or negative externalities of trust); UTE FREVERT, *VERTRAUENSFRAGEN: EINE OBSESSION DER MODERNE* 147–220 (2013) (identifying and criticizing the moral and political underpinnings of the proponents of the idea that trust is a societal “resource”). See ERNST RUDOLF HUBER, *VERFASSUNGSRECHT DES GROßDEUTSCHEN REICHES* 279 (1939), for the affinity of the public law literature in the Third Reich to the concept of trust.

<sup>2</sup> But see Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425 (1993); Simon Deakin & Frank Wilkinson, *Contract Law and the Economics of Interorganizational Trust*, in *TRUST WITHIN AND BETWEEN ORGANIZATIONS: CONCEPTUAL ISSUES AND EMPIRICAL APPLICATIONS* 146 (Christel Lane & Reinhard Bachmann eds., 1998); Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869 (1999); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 UNIV. PA. L. REV. 1735 (2001); Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457 (2005); Bruce Ian Carlin et al., *Public Trust, the Law, and Financial Investment*, 92 J. FIN. ECON. 321 (2009); Helge Rossen-Stadtfeld, *Das Wissen der “Wissensgesellschaft”*, 82 KRITISCHE VIERTELJAHRSSCHRIFT 223, 227–28 (1999); Dieter Schmidtchen, *Vertrauen und Recht: Eine Ökonomische Analyse*, in *BAUSTEINE ZU EINER VERHALTENSTHEORIE DES RECHTS* 75 (Fritjof Haft et al. eds., 2001); Eberhard Schmidt-Aßmann & Georgios Dimitropoulos, *Vertrauen in und durch Recht: Überlegungen zum Verhältnis von Vertrauen und Recht als Beitrag zu einer Phänomenologie des Vertrauens*, in *VERTRAUEN IN DER KRISE. ZUGÄNGE VERSCHIEDENER WISSENSCHAFTEN* 129 (Markus Weingart ed., 2011); Ann-Katrin Kaufhold, *Gegenseitiges Vertrauen. Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts*, EUROPARECHT 408 (2012).

<sup>3</sup> See Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361 (2009); Ronald J. Colombo, *The Role of Trust in Financial Regulation*, 55 VILL. L. REV. 577, 577–80 (2010).

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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> For the EU as a community “based on the rule of law,”<sup>7</sup> 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?<sup>8</sup> 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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<sup>4</sup> See Council, Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by Mr. P. Jenard, 1979 O.J. (C 59) 1–65, 46. See *infra* notes 31 and 66, for the different connotations of trust, confidence, *Vertrauen*.

<sup>5</sup> See Opinion 2/13, EU:C:2014:2454, paragraph 168.

<sup>6</sup> See *Commission Report Standard Barometer 81 on Public Opinion in the European Union* 88–96 (Spring 2014), [http://ec.europa.eu/public\\_opinion/archives/eb/eb81/eb81\\_publ\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_publ_en.pdf); see also Jan-Herman Reestman & W. T. Eijsbouts, *Mutual Trust: Editorial*, 2 EUR. CONST. L. REV. 1 (2006); Iris Canor, *My Brother’s Keeper? Horizontal Solange: “An Ever Closer Distrust Among the Peoples of Europe,”* 50 COMMON MKT. L. REV. 383 (2013). See *infra* Section D.II, discussing the crisis of trust in the EU judicial cooperation in civil and criminal matters.

<sup>7</sup> Judgment in *Les Verts v Eur. Parliament*, C-294/83, EU:C:1986:166, paragraph 23.

<sup>8</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). See Joseph H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights in the European Community*, 61 WASH. L. REV. 1103 (1986), for an adaptation of this motive to the EU; see also PIERRE ROSANVALLON, *COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST* (2008).

strengthening mutual trust has become one of the main goals of EU justice policies.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.”<sup>12</sup>

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

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<sup>9</sup> See Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999). The story behind the success of the mutual recognition principle on the Tampere summit reconstructs meticulously Hans G. Nilsson, *Mutual Trust or Mutual Mistrust?*, in LA CONFIANCE MUTUELLE DANS L’ESPACE PÉNAL EUROPÉEN 29 (Gilles de Kerchove & Anne Weyembergh eds., 2005).

<sup>10</sup> Judgment in *Turner v Grovit*, C-159/02, EU:C:2004:228, paragraphs 24, 28.

<sup>11</sup> See GISÈLE VERNIMMEN-VAN TIGGELEN & LAURA SURANO, ANALYSIS OF THE FUTURE OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EUROPEAN UNION: FINAL REPORT 20 (2008).

<sup>12</sup> 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.<sup>13</sup> 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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<sup>13</sup> 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.<sup>14</sup>

## 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.<sup>15</sup> 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 17<sup>th</sup> century. The German equivalent *Vertrauen* was applied to institutional interactions in the second half of the 18<sup>th</sup> century.<sup>16</sup>

Today, we speak of trust in a variety of ways that, at first glance, have little in common.<sup>17</sup> The object of trust—the trustee—varies considerably. In psychology, trust stands for a particular form of emotional bond in interpersonal relationships.<sup>18</sup> Economics, sociology,

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<sup>14</sup> The focus on the ECJ and the proposal of a re-conceptualization of the legal principle of mutual trust distinguishes this article from approaches that are primarily concerned with empirical evaluations, with recommendations for an administrative or legislative reform agenda, or that simply give an account of the case law. For recent studies see PIM ALBERS ET AL., TOWARDS A COMMON EVALUATION FRAMEWORK TO ASSESS MUTUAL TRUST IN THE FIELD OF EU JUDICIAL COOPERATION IN CRIMINAL MATTERS (2013); Ester Herlin-Karnell, *From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant*, 38 EUR. L. REV. 79 (2013); *infra* Part C.

<sup>15</sup> See Ute Frevert, *Vertrauen—eine historische Spurensuche*, in VERTRAUEN: HISTORISCHE ANNÄHERUNGEN 7 (Ute Frevert ed., 2003), for the conceptual history of trust.

<sup>16</sup> See Ute Frevert, *Wer um Vertrauen wirbt, weckt Misstrauen: Politische Semantik zwischen Herausforderung und Besänftigung*, EUROZINE (Jan. 13, 2009), <http://www.eurozine.com/articles/2009-01-13-frevert-de.html>.

<sup>17</sup> See Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J. L. & ECON. 453, 453 (1993), for definitions of “trust”; Kirsimarja Blomqvist et al., *Towards Measuring Interorganizational Trust* (2002), <http://www.impgroup.org/uploads/papers/4586.pdf>, for a concise, though slightly dated overview over the theories and concepts of trust until 2002; see also Susan P. Shapiro, *The Social Control of Impersonal Trust*, 93 AM. J. SOC. 623, 623 (1987) (speaking of a “confusing potpourri of definitions applied to a host of units and levels of analysis”).

<sup>18</sup> See ERIC H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950), for the seminal work on “basic trust” that understands the capacity to trust as an essential step in the psycho-social development of human beings. The influential neuro-scientific research uses a “thick” concept of trust as well. For important neuro-scientific studies on trust see Michael Kosfeld et al., *Oxytocin Increases Trust in Humans*, 435 NATURE 673 (2005); Ernst Fehr et al., *Neuroeconomic Foundations of Trust and Social Preferences: Initial Evidence*, 95 AM. ECON. REV. 346 (2005). See

and political science understand trust in a more systemic sense when they measure trust in the economy, government, or judiciary.<sup>19</sup> 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.”<sup>20</sup>

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,”<sup>21</sup> “personal” and “systemic,”<sup>22</sup> and “affective” and “cognitive”<sup>23</sup> trust. Whereas thick, personal, or affective trust each require real persons and emphasize the emotional component of trust,<sup>24</sup> the trustees of thin, systemic, or cognitive trust can also be strangers or impersonal institutions.<sup>25</sup> Neither of these distinctions should be understood to mark a dichotomy; rather, they “represent the ends of a continuum.”<sup>26</sup>

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.<sup>27</sup>

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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.

<sup>19</sup> See sources cited *supra* note 1, for the role of trust in public politics. See also, e.g., MARK WARREN, *DEMOCRACY AND TRUST* (1999). See, e.g., FRANKEL, *supra* note 1, for economics. For attempts to measure institutional trust see Blomqvist et al., *supra* note 17; John Ermisch et al., *Measuring People's Trust*, 172 J. ROYAL STAT. SOC'Y: SERIES A 749 (2009); Onora O'Neill, *Perverting Trust: Presentation at the 2010 New Zealand Aronui Lecture Series* (Mar. 10, 2009) (critiquing those attempts), <http://www.royalsociety.org.nz/media/Lecture-Notes-Perverting-Trust.pdf>.

<sup>20</sup> For the role trust plays in science see, e.g., Piotr Sztompka, *Trust in Science*, 7 J. CLASSICAL SOC'Y 211 (2007); RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* (2002). For a historical perspective on science as an “order” of trust see STEVEN SHAPIN, *A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND* (1994); THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1995).

<sup>21</sup> PUTNAM, *supra* note 1, at 136–37.

<sup>22</sup> LUHMANN, *supra* note 1, at 61–79.

<sup>23</sup> See Williamson, *supra* note 17, at 479; Ronald J. Colombo, *The Role of Trust in Financial Regulation*, 55 VILL. L. REV. 577, 580 (2010). See Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. UNIV. L. REV. 1717, 1724–27 (2006), for a similar distinction between “trust in” and “trust that” is made.

<sup>24</sup> See MARTIN HARTMANN, *DIE PRAXIS DES VERTRAUENS* (2011) (developing extensively this dimension of trust).

<sup>25</sup> 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.

<sup>26</sup> PUTNAM, *supra* note 1, at 466.

<sup>27</sup> 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<sup>28</sup>—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.<sup>29</sup> 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.<sup>30</sup> It also distinguishes trust from mere cognitive expectations that our beliefs will not be disappointed.<sup>31</sup> In the same vein, trusting is often framed as voluntarily becoming vulnerable to the will of another.<sup>32</sup>

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

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describe interpersonal relationships. See, e.g., TALCOTT PARSONS, ACTION THEORY AND THE HUMAN CONDITION 45–47 (1978); WILLIAMSON, *supra* note 17, at 463; FREVERT, *supra* note 1, at 209–20. For attempts by others to revive the moral dimension of trust cf. Annette C. Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986); Carolyn McLeod, *Trust*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 7, 2011), <http://plato.stanford.edu/archives/spr2011/entries/trust>.

<sup>28</sup> Cf. KYRILL-A. SCHWARZ, VERTRAUENSCHUTZ ALS VERFASSUNGSPRINZIP 43 (2002).

<sup>29</sup> See McLeod, *supra* note 27, § 4, for a summary of the debate over this criterion.

<sup>30</sup> See Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 94 (Diego Gambetta ed., 1988).

<sup>31</sup> 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.

<sup>32</sup> See Hill & O'Hara, *supra* note 23, at 1724. Cf. NIKLAS LUHMANN, SOZIALE SYSTEME: GRUNDRISß 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.”); RIBSTEIN, *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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> What constitutes trustworthiness and how the relevant knowledge can be acquired differs from case to case.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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."<sup>39</sup> 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.<sup>40</sup> 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

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<sup>33</sup> See GEORG SIMMEL, *SOZIOLOGIE: UNTERSUCHUNGEN ÜBER DIE FORMEN DER VERGESELLSCHAFTUNG* 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-Stadtfield, *supra* note 2, at 225; Kaufhold, *supra* note 2, 419–20.

<sup>34</sup> 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.

<sup>35</sup> 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).

<sup>36</sup> See Baier, *supra* note 27, at 244, for an analysis the complexity of this process.

<sup>37</sup> See LUHMANN, *supra* note 1, at 75. See also Schmidtchen, *supra* note 2, for a game-theoretic analysis of trust see.

<sup>38</sup> See MARTIN ENDREß, *VERTRAUEN* 53 (2002), for empirical studies on trust-building. On trust as an educational experience see LUHMANN, *supra* note 1, at 33–34, 48–50; Walker, *supra* note 31, at 23.

<sup>39</sup> See Frevert, *supra* note 16; Ken Ruscio, *Trust*, in *THE ENCYCLOPEDIA OF LEADERSHIP* 1573, 1573 (George R. Goethals et al. eds., 2004).

<sup>40</sup> 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).

purpose, membership, and exit options.<sup>41</sup> Institutions live by and through their rules and sanction violations.<sup>42</sup> Part of the trust in these institutions is therefore based on how well or consistently institutions fulfill these rules.<sup>43</sup> If systemic trust is broken, the truster can usually rely on sanctions provided by those institutional rules that govern the system.<sup>44</sup> Empirically, the mere fact that matters are organized and institutionalized can be a positive stimulus for trust.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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<sup>48</sup> among its addressees which, in turn, stabilizes legal institutions.<sup>49</sup> Trust

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<sup>41</sup> See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 83 (1991), for the connection between rules and institutions. See also Seumas Miller, *Social Institutions*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 7, 2011), <http://plato.stanford.edu/archives/spr2011/entries/social-institutions/>, for an overview.

<sup>42</sup> These rules are not only legal rules. For a discussion on the relationship between trust and other modes of social order see, e.g., CHRISTOPH ENGEL, *VERTRAUEN: EIN VERSUCH* 31–33 (Nov. 1999), [https://www.coll.mpg.de/pdf\\_dat/1999\\_12online.pdf](https://www.coll.mpg.de/pdf_dat/1999_12online.pdf); ANTJE MÖLLER, *ÖKONOMISCHE ANALYSE VON VERTRAUEN IN UMWELTORIENTIERTEN INNOVATIONSKOOPERATIONEN*, FAKULTÄT FÜR WIRTSCHAFTSWISSENSCHAFT RUHR-UNIVERSITÄT BOCHUM, DISCUSSION PAPER NO. 03-04 14–15 (July 2003), <http://www.ruhr-uni-bochum.de/vwb/paper/vwbrub03-04.pdf>.

<sup>43</sup> 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).

<sup>44</sup> 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).

<sup>45</sup> Laura Brandimarte et al., *Misplaced Confidences: Privacy and the Control Paradox*, 4 SOC. PSYCHOL. & PERSONALITY SCI. 340 (2013).

<sup>46</sup> 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 Franzius, *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 KIRCHHOFF ZUM 70. GEBURTSTAG 297 (Hanno Kube et al. eds., 2013).

<sup>47</sup> According to Luhmann, the specific function of law is the “stabilization of normative expectations.” See NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 148 (2004).

<sup>48</sup> 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.

<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> 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.<sup>52</sup> 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,<sup>53</sup> corporate law,<sup>54</sup>

<sup>50</sup> See Canor, *supra* note 6, at 421.

<sup>51</sup> See Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 *ECON. J.* 295 (2001), for empirical data supporting the assumptions of Putnam and Fukuyama. See also Niclas Berggren et al., *Trust and Growth: A Shaky Relationship*, 35 *EMPIRICAL ECON.* 251 (2008), for a skeptical perspective on the empirical claim of a trust-growth nexus.

The complexity problem concerns not only studies on trust, but nearly every empirical study on the nexus between law, its social resources and the consequences of legal regulation. The problem has been addressed extensively in the literature on law and development. See THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006); Michael Riegner & Thomas Wischmeyer, “*Rechtliche Zusammenarbeit mit Transformations- und Entwicklungsländern als Gegenstand öffentlich-rechtlicher Forschung*,” 50 *DER STAAT* 436 (2011) (giving particular emphasis to pages 461–62 for the current state of empirical research); David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 95, 147 (David M. Trubek & Alvaro Santos eds., 2006) (providing a critical perspective on these empirical approaches); Veronica Taylor, *The Law Reform Olympics: Measuring the Effects of Law Reform in Transitional Countries*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 83 (Tim Lindsey ed., 2007).

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).

<sup>52</sup> ANN WILLCOX SEIDMAN ET AL., *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS* 28–29 (2001); see also *supra*, note 51.

<sup>53</sup> See Judgment in *N.S. v Sec’y of St. for Home Dep’t & M.E. v Refugee Applications Comm’r*, C-411 & 493/10, EU:C:2011:865, paragraphs 78–80 [hereinafter *N.S.*]; Kay Hailbronner & Daniel Thym, *Vertrauen im europäischen Asylsystem*, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 406 (2012); HEMME BATTJES ET AL., *THE PRINCIPLE OF MUTUAL TRUST IN EUROPEAN ASYLUM, MIGRATION, AND CRIMINAL LAW: RECONCILING TRUST AND FUNDAMENTAL RIGHTS* (2011); Evelien Brouwer, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, 9 *UTRECHT L. REV.* 135 (2013).

contract law,<sup>55</sup> constitutional law,<sup>56</sup> privacy law,<sup>57</sup> product safety law,<sup>58</sup> labor law,<sup>59</sup> police law,<sup>60</sup> —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.<sup>61</sup> The regulatory and political aim behind

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<sup>54</sup> 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.

<sup>55</sup> See Deakin & Wilkinson, *supra* note 2; Mathew Boyle, *The Relational Principle of Trust and Confidence*, 27 OXFORD J. LEGAL STUD. 633 (2007).

<sup>56</sup> See Schmidt-Aßmann & Dimitropoulos, *supra* note 2, at 132–38.

<sup>57</sup> See Brandimarte et al., *supra* note 45.

<sup>58</sup> See Schmidt-Aßmann & Dimitropoulos, *supra* note 2, at 144–47.

<sup>59</sup> David Cabrelli, *Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?*, 34 INDUS. L.J. 284 (2005).

<sup>60</sup> TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

<sup>61</sup> 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 MAJONE, 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.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> The ECJ and the Advocates General quickly adopted the phrase.<sup>66</sup> The nexus between mutual trust and mutual recognition became an established *topos* in EU law.<sup>67</sup>

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BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 589 (2d ed. 2007); Markus Möstl, *Preconditions and Limits of Mutual Recognition*, 47 *COMMON MKT. L. REV.* 405 (2010); CHRISTINE JANSSENS, *THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW* (2013).

<sup>62</sup> 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’Y* 667 (2007).

<sup>63</sup> See, e.g., Judgment in *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411, paragraph 37.

<sup>64</sup> Council, *supra* note 4, at 46.

<sup>65</sup> *Commission White Paper on Completing the Internal Market*, para. 93, COM(85) 310 final (June 28–29, 1985).

<sup>66</sup> 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 *Wurmser*, 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.

<sup>67</sup> 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.<sup>68</sup> Creating a connection between trust and law is essential for policy networks and structures governed by law, but not fully conditioned by it.<sup>69</sup> Probably the most important feature of a policy network is its lack of formal hierarchy and the resulting lack of a superior legal authority.<sup>70</sup> Whereas strict hierarchies exclude trust, trust can substitute authority where non-hierarchical modes of governance are applied.<sup>71</sup> Theorizing the EU as a policy network was particularly popular in the 1990s,<sup>72</sup> 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.<sup>73</sup> 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;<sup>74</sup> second, where EU institutions depend on the

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<sup>68</sup> See JANSSENS, *supra* note 61, at 141 (speaking of an “intrinsic link between mutual trust and mutual recognition”).

<sup>69</sup> See NIKLAS LUHMANN, ORGANISATION UND ENTSCHEIDUNG 408 (2000).

<sup>70</sup> 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).

<sup>71</sup> See LUHMANN, *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.

<sup>72</sup> See John Peterson, *Decision-Making in the European Union: Towards a Framework Analysis*, 2 JOURNAL FOR EUR. PUB. POL’Y 69 (1995); Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 EUR. L.J. 33 (1997); Mark Thatcher, *The Development of Policy Network Analyses: From Modest Origins to Overarching Frameworks*, 10 J. THEORETICAL POL. 389 (1998).

<sup>73</sup> See Adrienne Héritier & Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance*, 28 J. PUB. POL’Y 1 (2008); David Coen & Mark Thatcher, *Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies*, 28 J. PUB. POL’Y 49 (2008).

<sup>74</sup> For a reference to the principle of mutual trust, see Opinion of Advocate General Geelhoed in *Keller v INSS*, C-145/03, EU:C:2005:17, paragraph 18, in the context of the European social security system; Opinion of Advocate General Maduro in *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte*, C-347/04, EU:C:2006:350, paragraph 46, in the context of the common tax policy; Opinion of Advocate General Trstenjak in *Commission v Germany*, C-442/08, EU:C:2010:167, paragraph 63, in the context of the Customs Union; *N.S.*, *supra* note 53, at paras. 78–80, 83, in the context of the Common European Asylum System.

cooperation of national institutions;<sup>75</sup> or third, where EU organs operate within a larger international context.<sup>76</sup>

Trusting is thus an accurate description for the motivational attitude of the individual actors within a legal system based on mutual recognition.<sup>77</sup> Nevertheless, the understanding of the relationship between trust and mutual recognition remained superficial at best,<sup>78</sup> as long as the existence of trust between the Member States was simply taken for granted.<sup>79</sup> 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:

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<sup>75</sup> With regard to the preliminary reference procedure cf. the Opinion of Advocate General Mazák in *Melki & Abdeli*, C- 188/10 and C- 189/10, EU:C:2010:319, paragraph 64.

<sup>76</sup> 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).

<sup>77</sup> The particular importance of trust for EU law emphasizes, for example, HANS CHRISTIAN RÖHL, AKKREDITIERUNG UND ZERTIFIZIERUNG IM PRODUKTSICHERHEITSRECHT. ZUR ENTWICKLUNG EINER NEUEN EUROPÄISCHEN VERWALTUNGSSTRUKTUR 44 (2000) (for product safety law); Eberhard Schmidt-Aßmann, *Diskussionsbemerkung*, 66 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRICHTSLEHRER 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<sup>nd</sup> 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, BEIHEFT 10 263, 270 (Peter Axer, et al. eds., 2010); Kaufhold, *supra* note 2, at 418; Hans-Heinrich Trute, *Die Demokratische Legitimation der Verwaltung*, in 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 6, margin number 115 (Wolfgang Hoffmann-Riem et al. eds., 2d ed. 2012).

<sup>78</sup> See, for example, the summary of aim and content of the first mutual recognition Directive 89/48, concerning the recognition of professional qualifications in Commission, Bull. E.C. 6-1988, 11, at <http://aei.pitt.edu/id/eprint/65119> (“[R]ecognition is to be based on the principle of mutual trust, without prior coordination.”). The same, rather simplistic, line of reasoning appears in many opinions of the Advocates General, see, for example, Opinion of Advocate General Stix-Hackl in *Commission v Italy*, C-145/99, EU:C:2001:240, paragraph 62; Opinion of Advocate General Ruiz-Jarabo Colomer in *Beuttenmüller v Land Baden-Württemberg*, C-102/02, EU:C:2003:464, paragraph 28; Opinion of Advocate General Léger in *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado*, C-330/03, EU:C:2005:414, paragraph 50; Opinion of Advocate General Maduro in *Consiglio Nazionale degli Ingegneri v Cavallera*, C-311/06, EU:C:2008:130, paragraph 33; Opinion of Advocate General Trstenjak in *Koller*, C-118/09, EU:C:2010:306, paragraphs 79, 91.

<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> For a long time, cooperation consisted primarily of mutual assistance requests; it was based on personal contacts and only loosely governed by EU law.<sup>82</sup> 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."<sup>83</sup> With the Treaty of Lisbon abolishing the pillar structure, cooperation in criminal matters was then absorbed into the European Union.<sup>84</sup> 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

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<sup>80</sup> Majone, *supra* note 61, at 20.

<sup>81</sup> On the historical development of judicial cooperation in civil and criminal matters in the EU, see Kaufhold, *supra* note 2, at 410–12; Hess, *supra* note 67, at 80–122.

<sup>82</sup> The most relevant legal rules governing the process of mutual assistance were Article 220 of the Treaty establishing the European Economic Community of 1958 and the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1998 O.J. (C 27) 1–27 (consolidated version).

<sup>83</sup> See Tampere European Council, *Presidency Conclusions*, *supra* note 9, at paras. 33–37.

<sup>84</sup> *But cf.* Article 10 of Protocol No. 36 of the Lisbon Treaty on transitional provisions, 2008 O.J. (C 115) 1–388. See also Herlin-Karnell, *supra* note 14, at 79–91, describing the "Lisbonisation" of the former Third Pillar instruments, especially of the European Arrest Warrant.

criminal matters.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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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<sup>85</sup> For further reading, see the study of Vernimmen-van Tiggelen & Adamo, *supra* note 11.

<sup>86</sup> See Council, *supra* note 4. The Council of Europe mentioned "confiance mutuelle" in the context of judicial cooperation even earlier. See Daniel Flore, *Le rôle de la notion de confiance mutuelle*, in LA CONFIANCE MUTUELLE DANS L'ESPACE PENAL EUROPEEN 17, 18 (Gilles de Kerchove & Anne Weyembergh eds., 2005). On trust and the 1968 Brussels Convention, *supra* note 82, compare Opinion of Advocate General La Pergola in *Coursier v Fortis Bank and Martine Coursier, née Bellami*, C-267/97, EU:C:1998:269, paragraph 19; with Opinion of Advocate General Alber in *Régie Nationale des Usines Renault SA v Maxicar SpA*, C-38/98, EU:C:1999:325, paragraph 49.

<sup>87</sup> On this aspect see Kaufhold, *supra* note 2, at 420–21; Ann-Katrin Kaufhold, *Vertrauen als Voraussetzung, Inhalt und Gegenstand von Recht*, in WAS IST VERTRAUEN: EIN INTERDISZIPLINÄRES GESPRÄCH 101, 116 (Jörg Baberowski ed., 2014).

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.<sup>88</sup>

Whereas the 1999 *Tampere Programme* did not explicitly mention mutual trust or confidence,<sup>89</sup> EU secondary law has since underlined its significance for mutual recognition many times.<sup>90</sup> 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.<sup>91</sup> Initially, it was not clear whether the Court used trust and recognition merely as "different names for the same principle."<sup>92</sup> In the meantime, the ECJ has operationalized the principle of mutual trust clearly as a legal principle in its own right.<sup>93</sup> Representative of

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<sup>88</sup> 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.

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

<sup>90</sup> The last two "five-year plans" for the AFSJ both emphasized the importance of trust. See Council, The Hague Programme: Strengthening freedom, security and justice in the European Union, 2005 O.J. (C 53) 10–11 [hereinafter *Hague Programme*]; Council, The Stockholm Programme: An open and secure Europe serving the citizen, 2010 O.J. (C 115) 5, 13 [hereinafter *Stockholm Programme*]. Moreover, trust is mentioned in most of the regulations, directives and initiatives on judicial cooperation. See, e.g., Recital 22 of Council Regulation No 1346/2000 on insolvency proceedings, 2000 O.J. (L 160) 1–18 (EC); Recital 16 and 17 of Council Regulation 44/2001 of Dec. 22, 2000, Jurisdiction, recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1–23 (EC); Council, Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, 2001 O.J. (C 12) 5, 6; Council, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 2001 O.J. (C 12) 10, 11; Recital 10 of Council Framework Decision 2002/584/JHA of June 13, 2010, European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 1–20; Recital 9 of Council Framework Decision 2006/783/JHA of Oct. 6, 2006, Application of the principle of mutual recognition to confiscation orders, 2006 O.J. (L 328) 59–78.

<sup>91</sup> 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.

<sup>92</sup> Cf. Opinion of Advocate General Sharpston in *Gasparini*, C-467/04, EU:C:2006:406, paragraph 107; see also sources cited *supra* note 87.

<sup>93</sup> 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 . . . .<sup>94</sup>

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,<sup>95</sup> in criminal matters including European Arrest Warrant cases,<sup>96</sup> in family law,<sup>97</sup> and in insolvency law.<sup>98</sup>

It is not easy to grasp the theory behind the Court's understanding of the principle of mutual trust.<sup>99</sup> 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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*Versicherung AG*, C-533/08, EU:C:2010:243, paragraphs 54–56 [hereinafter *TNT Express Nederland*] (“In the case of the recognition and enforcement of judgments, the relevant principles are those . . . of free movement of judgments and mutual trust in the administration of justice (favor executions).”). The principle of mutual trust does not bind arbitral tribunals. See Judgment in *Gazprom OAO v Lithuania*, C- 536/13, EU:C:2015:316, paragraphs 34–37.

<sup>94</sup> Judgment in *Van Esbroeck*, C-436/04, EU:C:2006:165, paragraph 30. The identical argument is made in Opinion of Advocate General Sharpston in *Kraaijenbrink*, C-367/05, EU:C:2006:760, paragraph 43. Cf. also Opinion of Advocate General Jääskinen in *Zoran Spasic*, C- 129/14 PPU, EU:C:2014:586, paragraph 94.

<sup>95</sup> See, e.g., Judgment in *Turner*, C-159/02, EU:C:2004:228, paragraphs 24–28; Opinion of Advocate General Kokott in *Allianz v West Tankers, Inc.*, C-185/07, EU:C:2008:466, paragraphs 22–26, 34–35.

<sup>96</sup> 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*].

<sup>97</sup> See, e.g., Judgment in *Rinau*, C-195/08 PPU, EU:C:2008:406, paragraph 50 [hereinafter *Rinau*]; Judgment in *Detiček v Sgueglia*, C-403/09 PPU, EU:C:2009:810, paragraph 45; Judgment in *Aguirre Zarraga v Pelz*, C-491/10 PPU, EU:C:2010:828, paragraphs 46, 70; Judgment in *Health Service Executive v S.C.*, C-92/12 PPU, EU:C:2012:255, paragraphs 100–104 [hereinafter *Health Service Executive*]; Judgment in *C. v M.*, C- 376/14 PPU, EU:C:2014:2268, paragraph 66.

<sup>98</sup> See *TNT Express Nederland*, *supra* note 93, at paras. 54–56; Opinion of Advocate General Kokott in *Prism Investments v. Meer*, C-139/10, EU:C:2011:653, paragraphs 40–42; Opinion of Advocate General Kokott in *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:308, paragraph 66; Judgment in *ERSTE Bank Hungary Nyrt v. Állam*, C-527/10, EU:C:2012:417, paragraph 34.

<sup>99</sup> 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.<sup>100</sup> 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 présumée par la reconnaissance mutuelle*” in a way that De Schutter calls “*axiomatique*.”<sup>101</sup> Because the ECJ took the existence of mutual trust for granted, it accepted even very controversial instruments, such as the European Arrest Warrant.<sup>102</sup> On the other hand, the factual premise went along with the declaration of a normative “principle of mutual trust”<sup>103</sup> 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.<sup>104</sup>

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<sup>100</sup> 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.”).

<sup>101</sup> 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.”).

<sup>102</sup> Herlin-Karnell, *supra* note 14, at 80.

<sup>103</sup> Opinion of Advocate General Ruiz-Jarabo Colomer in *Regensburg v Bourquain*, C-297/07, EU:C:2008:206, paragraph 45.

<sup>104</sup> 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.”<sup>105</sup> 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.<sup>106</sup>

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.”<sup>107</sup>

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

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<sup>105</sup> *Rinau*, *supra* note 97, at para. 50. See Judgment in *Povse v Alpage*, 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).

<sup>106</sup> Opinion of Advocate General Kokott in *Prism Investments*, *supra* note 98, at paras. 40–42 (emphasis added); see also Judgment in *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*, C-157/12, EU:C:2013:597, paragraphs 31–36; Judgment in *Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS*, C- 302/13, EU:C:2014:2319, paragraph 45.

<sup>107</sup> *Melvin West*, *supra* note 96, at para. 62.

themselves are said to be trustor and trustee, not the courts or authorities involved in the actual process of mutual recognition;<sup>108</sup> 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.”<sup>109</sup>

Mixed experiences with early cooperation projects, especially with the European Arrest Warrant,<sup>110</sup> the complex and overly rapid process of EU enlargement,<sup>111</sup> the slow ratification and implementation of several large reform projects,<sup>112</sup> and the constitutional deficit of the EU,<sup>113</sup> are only some of the factors that have contributed to the widespread

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<sup>108</sup> See cases cited *supra* note 94; Kaufhold, *supra* note 2, at 423 (providing an overview).

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

<sup>110</sup> 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.

<sup>111</sup> 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).

<sup>112</sup> 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).

<sup>113</sup> See Walker, *supra* note 31, at 32; Malcolm Anderson, *Trust and Police Co-operation*, in POLICE AND JUSTICE CO-OPERATION AND THE NEW EUROPEAN BORDERS 46 (Malcolm Anderson & Joanna Apap eds., 2002).

belief that EU cooperation in civil and criminal matters has not lived up to the great expectations of *Tampere*.<sup>114</sup> 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.<sup>115</sup> 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<sup>116</sup> and of the mutual recognition of driving licenses in the late 2000s were particularly important.<sup>117</sup> Even a Council Framework Decision now acknowledges that not every decision within the European area of judicial cooperation is always taken “in compliance with the principles of legality, subsidiarity and proportionality.”<sup>118</sup> 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.”<sup>119</sup>

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<sup>120</sup>—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.”<sup>121</sup> The failed 2004 Treaty establishing a Constitution for Europe mentioned the

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<sup>114</sup> Cf. also Anderson, *supra* note 113, at 41–42.

<sup>115</sup> Cf. Canor, *supra* note 6, at 392.

<sup>116</sup> 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.

<sup>117</sup> See *infra* note 142.

<sup>118</sup> This is now explicitly recognized in Recital 9 of Council Framework Decision 2006/783/JHA, *supra* note 90. See also Recital 4 of European Parliament and Council Directive (EU) 2010/64 of Oct. 20, 2010, The right to interpretation and translation in criminal proceedings, 2010 O.J. (L 280) 1.

<sup>119</sup> Recital 4 of Directive 2010/64/EU, *supra* note 118.

<sup>120</sup> Majone, *supra* note 61, at 20.

<sup>121</sup> European Commission, *Communication from the Commission to the Council and the European Parliament - Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, COM (2004) 401 final (Feb. 26, 2004). In its 2009 evaluation of The Hague Programme, the Commission complains about the lack of any significant progress: European Commission, *Justice, Freedom and Security in Europe since 2005: An Evaluation of the Hague Programme and Action Plan*, COM (2009) 263 final (Oct. 6, 2009).

need for mutual trust and confidence-building,<sup>122</sup> and trust-building was highlighted in the 2004 *Hague Programme*, as well as in the 2009 *Stockholm Programme*.<sup>123</sup>

While it is trite that “trust cannot be commended by decree,”<sup>124</sup> 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.<sup>125</sup> 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 . . . .<sup>126</sup>

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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<sup>122</sup> 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.”

<sup>123</sup> *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).

<sup>124</sup> European Networks of Councils for the Judiciary, Mutual Confidence. “Report and Recommendations, 2009–2010”, <http://www.encj.eu/images/stories/pdf/mutualconfidence/mc2009-2010en.pdf>. *See discussion supra* note 71.

<sup>125</sup> 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. Gaarhuis, et al. eds., 2010).

<sup>126</sup> European Commission, “Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union”, COM (2003) 75 final (Dec. 15, 2003) [hereinafter *Green Paper Report*]; *see also Kaufhold, supra* note 87, at 116–19.

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.<sup>127</sup>

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.<sup>128</sup> For example, the category of trust would not adequately capture the relations between courts and agencies in a unitary federal state.<sup>129</sup> 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.<sup>130</sup> 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 ECJ 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.<sup>131</sup>

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<sup>127</sup> Recital 6 of Directive 2010/64/EU, *supra* note 118.

<sup>128</sup> *See supra* note 8.

<sup>129</sup> *See infra* Part D.IV.

<sup>130</sup> *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.).

<sup>131</sup> For a concise overview of recent developments concerning judicial cooperation, see Rolf Wagner, *Aktuelle Entwicklungen in der justiziellen Zusammenarbeit in Zivilsachen*, in NEUE JURISTISCHE WOCHENSCHRIFT 1796 (2015); Dominik Brodowski, *Strafrechtsrelevante Entwicklungen in der Europäischen Union*, in ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 79 (2015).

The first strategy aims to improve cooperation by administrative measures. The “progressive development of a European judicial culture”<sup>132</sup> has been part of the reform agenda since the first comprehensive assessment of the *Tampere Programme* in 2004<sup>133</sup> and includes diverse measures—for example, training seminars for judges from various EU Member States, exchange programs, evaluations, and the building of judicial networks.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> 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

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<sup>132</sup> *Hague Programme*, *supra* note 90, at 11.

<sup>133</sup> European Commission, *Assessment of the Tampere Programme*, *supra* note 121, at 10. Apart from the *Hague* and *Stockholm Programmes*, see also Serge de Biolley, *Panorama des mesures accompagnatrices de la confiance mutuelle dans l'espace européen de justice pénale*, in *LA CONFIANCE MUTUELLE DANS L'ESPACE PÉNAL EUROPÉEN* 175 (Gilles de Kerchove & Anne Weyembergh eds., 2005); European Network of Councils for the Judiciary, *Mutual Confidence 2009-2010. Report and Recommendations* (2010), [http://www.csm1909.ro/csm/liinkuri/07\\_01\\_2011\\_\\_38124\\_ro.pdf](http://www.csm1909.ro/csm/liinkuri/07_01_2011__38124_ro.pdf). See also Anderson, *supra* note 113, at 35.

<sup>134</sup> *Hague Programme*, *supra* note 90, at 11; *Stockholm Programme*, *supra* note 90, at 13. See European Commission, *Building Trust in EU-Wide Justice: A New Dimension to European Judicial Training*, COM (2011) 551 final (Sept. 13, 2011), [http://ec.europa.eu/justice/criminal/european-judicial-training/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-judicial-training/index_en.htm). For an overview over the existing European judicial networks and professional organizations, see European Commission, *European Judicial Training* (last updated March 23, 2016), [http://ec.europa.eu/justice/criminal/european-judicial-training/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-judicial-training/index_en.htm).

<sup>135</sup> 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.

<sup>136</sup> 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.”).

a considerable margin for the Member States.<sup>137</sup> Mutual recognition is facilitated notably by partial harmonization, because it is easier for courts or agencies to trust when they know that the trustee follows those minimum rules.<sup>138</sup> 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.<sup>139</sup> The same would be true if a separate European court system for transnational cases were introduced in order to overcome the crisis of trust.<sup>140</sup> 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

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<sup>137</sup> See Vernimmen-van Tiggelen & Adamo, *supra* note 11, at 22. For a very recent harmonization proposal see European Commission, Proposal for a Directive on Certain Aspects of the Presumption of Innocence and of the Right to be Present at Trial in Criminal Proceedings, COM (2013) 821/2, as well as the other proposals in the legislative package to strengthen procedural safeguards for citizens in criminal proceedings; *cf.* Press Release, European Commission, The Right to . . . — a Fair Trial! Commission wants more safeguards for citizens in criminal proceedings (Nov. 27, 2013), [http://europa.eu/rapid/press-release\\_IP-13-1157\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1157_en.htm). Legislative developments are tracked by <http://db.eurocrim.org/db/de/sachgebiete/stpo/verfahrensrechte/>, and [http://db.eurocrim.org/db/de/sachgebiete/stpo/opferschutz\\_zeugenschutz/](http://db.eurocrim.org/db/de/sachgebiete/stpo/opferschutz_zeugenschutz/).

<sup>138</sup> See Majone, *supra* note 61, at 4, 11–15; Vernimmen-van Tiggelen & Adamo, *supra* note 11, at 10; *see also* Opinion of Advocate General Ruiz-Jarabo Colomer, *supra* note 103, at para. 43. Consequently, recent legislative efforts in criminal law have concentrated on establishing minimum standards for specific procedural situations, for example trial *in absentia*, rather than attempting to fully harmonize the law, *cf.* Council Framework Decision 2009/299/JHA, art. 4(a), 2009 O.J. (L 81) 24–36 (EC) (amending Framework Decisions 2002/584/JHA et al.); Council Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime, art. 8, 2014 O.J. (L 127) 39–50 (EC); Council Directive 2014/41/EU Regarding the European Investigation Order in Criminal Matters (EIO), art. 14, 2014 O.J. (L 130) 1–36 (EC). In civil justice, the second generation instruments operate in a similar way. Here, the abolition of the exequatur regime for the enforcement of specific orders and judgments is accompanied by a series of procedural safeguards, for example minimum procedural standards for the court of origin, *cf.* Regulation 805/2004, Creating a European Enforcement Order for uncontested claims, 2004 O.J. (L 134) 15–39 (EC); Regulation 1896/2006, Creating a European order for payment procedure, 2006 O.J. (L 399) 1–32 (EC); Regulation 861/2007, Establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1–22 (EC). More detailed procedural standards are prescribed by Regulation 655/2014, Establishing a European account Preservation Order procedure, 2014 O.J. (L 189) 59–92 (EU).

<sup>139</sup> 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).

<sup>140</sup> This idea is discussed by Kaufhold, *supra* note 2, at 422–23.

trust<sup>141</sup> 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*.<sup>142</sup>

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.<sup>143</sup> 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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<sup>141</sup> 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).

<sup>142</sup> Judgment in *Weber*, C-1/07, EU:C:2008:640, paragraph 39 (emphasis added). A sense of crisis is shared by Friedrich Schoch, *Gerichtliche Verwaltungskontrollen*, in 3 GRUNDLAGEN DES VERWALTUNGSRECHTS § 50, margin numbers 378–79 (Wolfgang Hoffmann-Riem et al. eds., 2d ed. 2013). Potential consequences of a crisis are discussed by Kaufhold, *supra* note 2, at 421–23.

<sup>143</sup> 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.<sup>144</sup>

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.<sup>145</sup> When they were confronted with the fact that not every decision within the European area of judicial cooperation was always taken “in compliance with the principles of legality, subsidiarity and proportionality,”<sup>146</sup> 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.<sup>147</sup> Apart from very narrow exceptions, the addressees simply had to “trust”—to recognize whatever the circumstances might be, even in cases of manifest abuse.<sup>148</sup> 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.<sup>149</sup>

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.<sup>150</sup>

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<sup>144</sup> 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 Tiggelen & Adamo, *supra* note 11, at 9 (calling attention to the role political rhetoric plays in judicial cooperation).

<sup>145</sup> 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 EUROPEEN 163, 165 (Gilles de Kerchove & Anne Weyembergh eds., 2005) (distinguishing between a “confiance confidente” on the political level and a “confiance méfiante” among legal practitioners).

<sup>146</sup> Recital 9 of Council Framework Decision 2006/783/JHA, *supra* note 90. Similarly, Recital 4 of Directive 2010/64/EU, *supra* note 118.

<sup>147</sup> See Möstl, *supra* note 61, at 429–30; Schoch, *supra* note 142, at margin number 379.

<sup>148</sup> 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).

<sup>149</sup> 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.

<sup>150</sup> 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.<sup>151</sup> 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.”<sup>152</sup> 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”<sup>153</sup> 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.<sup>154</sup>

<sup>151</sup> 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.

<sup>152</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47 (2002); see also Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS 294 (2000).

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

<sup>154</sup> 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 touch utilitarian when it supports the principle of mutual recognition."<sup>155</sup>

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.<sup>156</sup> This is generally recognized in present-day literature<sup>157</sup> and acknowledged by EU secondary law.<sup>158</sup> Some even speak of a triangle of trust between the courts and authorities, the political level, and the general public.<sup>159</sup> 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.<sup>160</sup> 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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<sup>155</sup> Opinion of Advocate General Colomer, *supra* note 103, at para. 41.

<sup>156</sup> For the distinction between a "formal" and a "substantive" concept of trust, see *supra* note 149.

<sup>157</sup> See also Guy Stessens, *The Principle of Mutual Confidence Between Judicial Authorities in the Area of Freedom, Justice and Security*, in *L'ESPACE PÉNAL EUROPÉEN: ENJEUX ET PERSPECTIVES* 91, 93 (Gilles de Kerchove & Anne Weyembergh eds., 2002); Henri Labayle, *Les perspectives du contrôle juridictionnel de la confiance mutuelle dans l'Union européenne*, in *LA CONFIANCE MUTUELLE DANS L'ESPACE PÉNAL EUROPÉEN* 123, 137 (Gilles de Kerchove & Anne Weyembergh eds., 2005); VERNIMMEN-VAN TIGGELEN & ADAMO, *supra* note 11, at 20 ("[M]utual confidence between Member States' judicial and prosecuting authorities . . ."); Fichera, *supra* note 112, at 13; Kaufhold, *supra* note 2, 423–24.

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

<sup>159</sup> 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 PENAL EUROPEEN* 157 (Gilles de Kerchove & Anne Weyembergh eds., 2005).

<sup>160</sup> For the value of trust-based judicial cooperation in the EU see the Opinion of Advocate General Colomer in *Gözütok and Brügger*, *supra* note 88, at para. 124. Compare this to JANSSENS, *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.<sup>161</sup> 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<sup>162</sup>—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.<sup>163</sup>

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.<sup>164</sup> Political networks are particularly good at learning;<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> 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

<sup>161</sup> On this methodological project, see Matthias Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in *THE TRANSFORMATION OF ADMIN. L. EUR.* 3 (Matthias Ruffert ed., 2007); Gunnar Folke Schuppert, *Verwaltungsrecht und Verwaltungsrechtswissenschaft im Wandel. Von Planung über Steuerung zu Governance?*, 133 *ARCHIV DES ÖFFENTLICHEN RECHTS* 79 (2008); Wolfgang Kahl, *What Is “New” About the “New Administrative Law Science” in Germany*, 16 *EUR. PUB. L.* 105 (2010). For the broader context of this project see Karl-Heinz Ladeur, *The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law*, 6 *OSGOODE HALL L. SCH. (CLPE Res. Paper Series 2011)*; Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10 *INT’L J. CONST. L.* 603 (2012).

<sup>162</sup> Schmidt-Aßmann, *supra*, at note 77 (“*vertrauensgenerierende Dogmatik*”).

<sup>163</sup> Due to the complexity of any empirical assessment, a plausible correlation usually suffices. See *supra* Part B.II.

<sup>164</sup> See *supra* note 38.

<sup>165</sup> For the EU see OLIVIER DE SCHUTTER, *THE ROLE OF COLLECTIVE LEARNING IN THE ESTABLISHMENT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE IN THE EU* (2007), <http://eucenter.wisc.edu/Conferences/GovNYDec06/Docs/DeSchutterApril.pdf>. More generally, see Martin Eifert, *Innovationen in und durch Netzwerkorganisationen: Relevanz, Regulierung und staatliche Einbindung*, in *INNOVATION UND RECHTLICHE REGULIERUNG* 88 (Martin Eifert & Wolfgang Hoffmann-Riem eds., 2002).

<sup>166</sup> See *supra* Part C.IV.

<sup>167</sup> See *supra* Part B.II.

<sup>168</sup> See *supra* note 147.

Ester Herlin-Karnell—in accordance with Advocate General Mengozzi—has put it, trust is a “highly differentiated concept.”<sup>169</sup> 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.<sup>170</sup> 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 . . . .”<sup>171</sup> 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.”<sup>172</sup> 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.<sup>173</sup> The ECJ repeated its argument from *Eurofood IFSC* in the 2010 decision *MG Probud*.<sup>174</sup>

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<sup>169</sup> Herlin-Karnell, *supra* note 14, at 81 (referring to Opinion of Advocate General Mengozzi in *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:151).

<sup>170</sup> See *supra* note 142.

<sup>171</sup> Judgment in *Eurofood IFSC*, C-341/04, EU:C:2006:281, paragraph 40.

<sup>172</sup> *Id.* at para. 41.

<sup>173</sup> *Id.* at para. 42.

<sup>174</sup> Judgment in *MG Probud Gdynia*, C-444/07, EU:C:2010:24, paragraphs 27–29.

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.<sup>175</sup> 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.<sup>176</sup>

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."<sup>177</sup> Moreover, where no minimum harmonization existed, the "principle of mutual trust" could not justify the obligation to recognize.<sup>178</sup> 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.<sup>179</sup>

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<sup>180</sup>, the Court opted against an overly narrow reading of the grounds for non-enforcement of the Regulation and tried to

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<sup>175</sup> Opinion of Advocate General Sharpston in *Gasparini and Others*, *supra* note 92, at paras. 92–104.

<sup>176</sup> *Id.* at para. 109.

<sup>177</sup> *Id.* at paras. 110–11.

<sup>178</sup> *Id.* at para. 112.

<sup>179</sup> See Judgment in *Kretzinger*, C-288/05, EU:C:2007:441; Opinion of Advocate General Colomer in *van Straaten v. Nederlanden*, C-150/05, EU:C:2006:381, paragraphs 61–62, 73; Opinion of Advocate General Bot in *Mantello*, C-261/09, EU:C:2010:501, paragraphs 14, 34, 82, 131; Judgment in *Radu*, C-396/11, EU:C:2013:39, paragraphs 36–43; Judgment in *Melloni v Fiscal*, C-399/11, EU:C:2013:107, paragraphs 43–44, 59–63.

<sup>180</sup> Council Regulation 44/2001, 2001 O.J. (L 012), 1–23 (EC).

[E]stablish 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.<sup>181</sup>

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

[M]ust 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.<sup>182</sup>

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.<sup>183</sup> 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.”<sup>184</sup>

<sup>181</sup> Judgment in *Apostolides*, C-420/07, EU:C:2009:271, paragraph 73.

<sup>182</sup> Judgment in *Purrucker I*, C-256/09, EU:C:2010:437, paragraph 73.

<sup>183</sup> Judgment in *Purrucker II*, C-296/10, EU:C:2010:665, paragraphs 81–85.

<sup>184</sup> *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.”<sup>185</sup>

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.<sup>186</sup> 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.”<sup>187</sup> 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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<sup>185</sup> Judgment in *Jeremy F. v Premier Ministre*, C-168/13 PPU, EU:C:2013:358, paragraph 56.

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

<sup>187</sup> *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."<sup>188</sup>

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.<sup>189</sup> 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—analogue to the proportionality exception recognized by the ECJ for the relationship between the four EU freedoms and the principle of mutual recognition.<sup>190</sup>

## 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"<sup>191</sup> and has introduced a complex system of mutual obligations to inform each other about the case.<sup>192</sup> 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.<sup>193</sup>

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<sup>188</sup> Judgment in *B.*, C-306/09, EU:C:2010:626, paragraph 50.

<sup>189</sup> 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).

<sup>190</sup> See discussion *supra* note 63.

<sup>191</sup> *Purrucker I*, *supra* note 182, at para. 73.

<sup>192</sup> *Purrucker II*, *supra* note 183, at paras. 81–85.

<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup>

### *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,<sup>196</sup> decisions on the grounds for non-

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<sup>194</sup> 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.

<sup>195</sup> In Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 14, 2004, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 307–22, the German Federal Constitutional Court decided that all German courts had to "take into account" the ECtHR's jurisprudence. On what "take into account" means: Gertrude Lübke-Wolff, *ECHR and National Jurisdiction – The Görgülü Case*, 11 HUMBOLDT F. RECHT 138, 145 (2006).

<sup>196</sup> For the nexus between fundamental rights protection and the Union's identity see Armin von Bogdandy et al., *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L. REV. 489 (2012); Canor, *supra* note 6, at 383. For a recent critique of the ECJ's human rights legacy, see Gráinne de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649 (2011). For a more positive assessment, see Jeff Kenner, *The Court of Justice of the European Union and Human Rights in 2010 – Entering a Post-Lisbon Age of Maturity?*, EUR. Y.B. ON HUM. RTS. 173 (2011).

recognition focus on violations of human rights guarantees and EU citizenship.<sup>197</sup> In the words of de Schutter, “*Le respect dû aux droits fondamentaux définit la limite à l’obligation de reconnaissance mutuelle.*”<sup>198</sup> 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.<sup>199</sup>

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,<sup>200</sup> other areas still lag or explicitly deprive the enforcing court of a

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<sup>197</sup> In the field of EU freedoms, fundamental rights can justify non-recognition. See, e.g., Judgment in *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin 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.

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

<sup>199</sup> Opinion of Advocate General Mengozzi, *supra* note 169, at para. 28.

<sup>200</sup> For a comprehensive survey of the grounds for non-recognition in European private law see BURKHARD HESS & THOMAS PFEIFFER, INTERPRETATION OF THE PUBLIC POLICY EXCEPTION AS REFERRED TO IN EU INSTRUMENTS OF PRIVATE INTERNATIONAL AND PROCEDURAL LAW (2011), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI\\_ET\(2011\)453189\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf). While Hess and Pfeiffer show that public policy exceptions are only rarely applied in practice, the existence of a “safety net” is still essential for trust-building, cf. Canor, *supra* note 6, at 411, 115. Characteristically, Regulation 1215/2012, 2012 O.J. (L 351), 1-32 (EU) (Brussels Ia-Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters did not remove the “public order” exception as initially

meaningful fundamental rights review.<sup>201</sup> 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.<sup>202</sup> Nevertheless, developing the principle of mutual trust as a coherent new version of the *ordre public européen*<sup>203</sup> 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.<sup>204</sup> While the Court itself seems exceedingly cautious, many commentators agree

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planned (on the attempts to fully abolish the exequatur proceedings including public policy review for judgments in civil and commercial matters, see Peter Arnt 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 TIGGELEN & 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).

<sup>201</sup> 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.”

<sup>202</sup> Cf. Judgment in *McB. v E.*, C-400/10 PPU, EU:C:2010:582, paragraphs 51–52. Gabriele Britz, Justice of the Federal Constitutional Court of Germany, describes and criticizes the consequences of the lack of common fundamental rights standards in family law, especially with regard to the right to respect for the family. Gabriele Britz, *Grundrechtsschutz in der justiziellen Zusammenarbeit – zur Titelfreizügigkeit in Familiensachen*, 68 JURISTENZEITUNG 105 (2013). On the highly controversial structure and content of Art. 51 of the Charter, see Thomas von Danwitz & Katherina Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, 35 FORDHAM INT’L L.J. 1396 (2012); Judgment in *Åklagaren v Fransson*, C-617/10, EU:C:2013:105; Daniel Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter?*, 9 EUR. CONST. L. REV. 391 (2013); Johannes Masing, *Einheit und Vielfalt des Europäischen Grundrechtsschutzes*, 70 JURISTENZEITUNG 477 (2015).

<sup>203</sup> 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 Ordre 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 ORDRE PUBLIC* (2007).

<sup>204</sup> Opinion 2/13, *supra* note 5, at paras. 191–95. Cf. the decision of *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (Jan. 21, 2011), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050&filename=001-103050.pdf&TID=nubefaxep, on the implications of the European Charter of Human Rights for EU asylum 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.<sup>205</sup> The trust-generating effect of guaranteeing those fundamental rights exceptions is identical to the effect of the minimum harmonization described above.<sup>206</sup>

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.<sup>207</sup> 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.”<sup>208</sup> 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.”<sup>209</sup>

No consensus has been reached so far on which test should be applied.<sup>210</sup> 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.<sup>211</sup> Slowly, an understanding seems to be growing that, at minimum, “grave” human rights violations

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<sup>205</sup> 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.

<sup>206</sup> See *supra* Part C.IV.

<sup>207</sup> 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).

<sup>208</sup> 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.

<sup>209</sup> 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.”).

<sup>210</sup> Cf. the proposals by von Bogdandy et al., *supra* note 196, and Canor, *supra* note 6.

<sup>211</sup> For more details see De Schutter, *supra* note 101, at 109–21; Labayle, *supra* note 157, at 140–47.

justify non-recognition.<sup>212</sup> 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 *N.S.*, where the Court accepted an exception from the “principle of mutual recognition” when a Member State’s asylum system showed “systemic deficiencies.”<sup>213</sup> 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.<sup>214</sup> Advocate General Sharpston contemplated how this line of reasoning could be applied to judicial cooperation in her 2012 opinion in *Radu*; however, the Court refused to follow it.<sup>215</sup>

Although the protection of human rights is a “crucial element for ensuring mutual confidence among the Member States in judicial cooperation,”<sup>216</sup> 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.<sup>217</sup> 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

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<sup>212</sup> According to Britz, *supra* note 202, 109–10, the ECJ’s judgment in *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, *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 JANSSENS, *supra* note 61, 143–44, for the *ne bis in idem* exception in the cooperation in criminal matters.

<sup>213</sup> *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 *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).

<sup>214</sup> *But see* Canor, *supra* note 6, at 410, on *Zarraga*, C-491/10 PPU at para. 60.

<sup>215</sup> Opinion of Advocate General Sharpston, *supra* note 179, at para. 76.

<sup>216</sup> Recital 5 of Council Framework Decision 2008/909/JHA, *supra* note 200.

<sup>217</sup> *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.<sup>218</sup>

While the ECJ and, particularly, some of the Advocates General have already reflected on several procedural and substantive tests,<sup>219</sup> 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 “a case-by-case basis.”<sup>220</sup>

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.”<sup>221</sup> Contrary to what the ECJ continues to assert, a strict duty to recognize decisions in the sense of “*fiat recognitio, et pereat mundus*”<sup>222</sup> will break the system of judicial cooperation—not a more flexible interpretation that is concerned with actually promoting mutual trust.

## 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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<sup>218</sup> See *supra* note 142.

<sup>219</sup> 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).

<sup>220</sup> Opinion of Advocate General Sharpston, *supra* note 179, at para. 91.

<sup>221</sup> Canor, *supra* note 6, at 402.

<sup>222</sup> “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.