The Principle of Mutual Trust in EU Law

What is in a Name?

Birgit Aasa

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 26 February 2021.

European University Institute
Department of Law

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THESIS SUMMARY

This thesis examines the principle of mutual trust in European Union (EU) law – a nascent legal principle gradually trying to find its place in the EU legal and structural architecture and perhaps even in its constitutional hierarchy. In addition to exploring the principle from a doctrinal standpoint, the work investigates whether the way in which mutual trust has come to function in the Union legal order has the potential to foster actual trust in the EU, and between actors and subjects in the EU legal order. In order to do so, it draws on trust theories proposed by a wide range of social scientists.

The doctrinal level of the thesis tracks the historical development and transformation of mutual trust and compartmentalises case law into four distinct jurisprudential generations, each with its specific set of characteristics, terminology, and functions. It does so in a broad manner, touching upon specific policy issues but not constrained by them. In this way, the thesis demonstrates how a principle first deployed in the internal market domain, aiming to encourage Member States to recognise each other's product inspections not to second guess or duplicate them, became a broad Article 2 value adherence presumption that Member States would live up to ideals such as democracy, rule of law, freedom, and equality, respect for human dignity and human rights.

The thesis finds that the prevailing conception of mutual trust as a broad EU law and fundamental rights compliance presumption fails to satisfy even the objective parameters of trust as a concept, meaning that the contexts in which mutual trust is raised are usually not situations which would require an attitude of trust but rather compliance, legality, accountability, and judicial control. The way in which mutual trust has come to operate in the EU is more akin to an undemocratic institutionalisation of trust than the institutionalisation of mistrust the latter being more typical of free and democratic societies. In addition to its critique of the current functioning and understanding of the principle of mutual trust, the thesis offers novel insights toward rethinking and reconstructing the principle in order to better achieve its aspirations.

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This thesis would not have been possible without so many kind, generous and loving people around me. A PhD is never solo work. Nothing in this life truly is. And one might get quite obsessed with the object of one's research. As did I with trust, it seemed the object, method, and quick fix for everything. But it is not, so many other things in life matter too.

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What's in a name? That which we call a rose
By any other name would smell as sweet.
William Shakespeare, "Romeo and Juliet", 2.I.86-87

Usalda, aga kontrolli
[Trust, but control]
Estonian proverb[1]

(I) INTRODUCTION AND METHODOLOGY

1.1.THE PROLOGUE: NOT A EUROPE OF LOVE BUT A EUROPE OF TRUST?

The European Union (EU) features a principle of mutual trust. But what does this principle entail, exactly, and has it brought about enhanced trust in Europe? This dissertation seeks to answer these questions. It aims to investigate the principle of mutual trust in the Court of Justice of the European Union's (CJEU, hereafter also, the Court) practice and determine whether it functions as or for actual trust as conceptually understood by various trust theorists. In other words, the thesis examines the concept of trust, the principle of mutual trust, and the interrelation of the two.

The principle of mutual trust is complex and multifaceted. To give an initial idea of what the principle is thought to entail, let us begin with the description of mutual trust that the Court often provides in its judgements:

> "[T]he principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of

[1] This has also been described as a contradiction in terms, properly translated as "Don't trust". – see R. Raud "Usaldus ja kontroll", *Sirp*, 15.05.1998, available online: https://www.sirp.ee/archive/1998/15.05.98/Sots/sots1-5.html (last accessed: 12.02.2020). The saying has been traced back to the Russian rhyming proverb *Доверяй, но проверяй*, as well as attributed to others, including Vladimir Lenin's maxim „Trust is good, control is better" – see Adam B Seligman, 'Trust and Sociability: On the Limits of Confidence and Role Expectations' (1998) 57 American Journal of Economics and Sociology 391, 391. But the exact origins of the quote and its users are under dispute among prominent Russian experts as well, being attributed to either Reagan, Brezhnev or even Stalin in its English variant of "Trust, but verify!" – see P. Tulviste "Nõukogude ajast uuristatud usaldus", *Eesti Päevaleht*, 30.10.2008, available online: https://epl.delfi.ee/kultuur/noukogude-ajast-uuristatud-usaldus?id=51147162 (last accessed: 12.02.2020).

> those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law."[2]

As the thesis aims to provide a thorough analysis of the many different definitions, understandings, and connotations that the Court has given to the principle[3], the above-cited description, taken from the notorious *Opinion 2/13*, should serve as mere helpful shorthand regarding what mutual trust has come to mean in contemporary EU law. This is neither a working definition nor should it be taken at face value because, as will be seen, other conceptions and understandings also exist. Nonetheless, it is an influential account of mutual trust that the Court often uses in its judgements.[4] Thus, it is a good starting point for providing context.

The research question of this dissertation asks how the principle of mutual trust relates to the concept of trust and does it entail any theoretically plausible potential to foster actual trust in the EU (see on the research question further in section 1.5). For that the thesis engages with both how the CJEU has developed the concept and principle of mutual trust to contrast it with a broad range of interdisciplinary theories of trust. It draws out the main features of both mutual trust and trust conceptually and finds that although there are some conceptual convergences, the discrepancies make the aspiration that mutual trust might enhance actual trust between designated actors implausible from a theoretical perspective. Moreover, the thesis suggests that trust might be an unsuitable principle to be employed in a courtroom as judges are as per their professional duties and ethics obliged to control and ascertain not to make a leap of faith that trust inherently entails. Ordering Member States' national judiciaries to mutually trust each other and defer judicial controls might additionally suggest deeply problematic encroachments into national constitutional guarantees and the ideals of democracy and the rule of law as institutionalising trust instead of distrust is more akin to autocratic rather than democratic regimes.

Yet, one might ask: what is it about mutual trust that merits scholarly attention? Moreover, does the concept of trust, which seems to relate to personal bonds and relationships, rightly belong in a legal discussion?

In a recent interview with the German newspaper Handelsblatt, the former European Commission president Jean-Claude Juncker explained why he believes that the EU's argument

[2] *Opinion 2/13*, ECLI:EU:C:2014:2454, para 191.
[3] See further below Chapter 3.
[4] See for example most recently in Case C-314/18 *SF*, ECLI:EU C:2020:191, para 35.

against populism has become less convincing to the public in recent years: "We don't love each other. We've lost our collective libido."[5] This statement aligns well with contemporary contemplations on the role of emotions and feelings in the political realm. Love in its postmodern, intimate sense is driven by emotion.[6] Philosopher Karen Jones, for her part, has argued for an affective-emotional component of trust.[7] But why, the question might be asked, does the EU have a legal principle of mutual trust and not one of mutual love? Although the substance, value, and perhaps emotional "degree" of these two concepts differ, both are connected to affective attitudes, salient in domains relating to interpersonal relationships. Concepts of affect and emotion are used in the intersections of moral and political philosophy to make claims for how individuals should relate to the polity or to each other in contemporary societies. Such concepts can thus have political and theoretical significance and meaning. What about a legal one?

I first came to think about this particular hypothetical analogue of an imaginary EU principle of mutual love while discussing a paper presented by Max Harris in the workshop 'Trust Matters', held in late April 2018 at the European University Institute. Harris strongly advocated for love instead of trust as a desirable relational ethic in the political realm. This is in fact not a new topic for moral and political philosophers. One of the most notable contemporary philosophers, Martha Nussbaum, has written extensively on moral and political emotions, including the role of love in justice, and has condemned the politics of fear and disgust.[8] Earlier political and moral philosophers have proposed different emotional ethics and attitudes in the political realm, including sympathy, friendship, and care.[9] In an EU-specific context, one might

[5] S. Afhüppe, R. Berschens, "Jean-Claude Juncker im Interview: Die Europäer lieben sich nicht mehr" *Handelsblatt*, 03.05.2019, available online: https://www.handelsblatt.com/politik/international/europawahl/jean-claude-juncker-im-interview-die-europaeer-lieben-sich-nicht-mehr/24279034.html (last accessed 21.05.2019); see also: E. Anderson "Juncker: Europe has lost its libido" *Politico*, 03.05.2019, available online: https://www.politico.eu/article/jean-claude-juncker-europe-has-lost-its-libido/ (last accessed 21.05.2019).

[6] Niklas Luhmann, *Love as Passion: The Codification of Intimacy* (Polity Press 1986).

[7] Karen Jones, 'Trust as an Affective Attitude' (1996) 107 Ethics 4.

[8] Martha Craven Nussbaum, *Political Emotions : Why Love Matters for Justice* (The Belknap Press of Harvard University Press 2013); Martha Craven Nussbaum, *The Monarchy of Fear : A Philosopher Looks at Our Political Crisis* (Simon & Schuster 2018); Martha Craven Nussbaum, *Hiding from Humanity : Disgust, Shame, and the Law* (Princeton University Press 2004).

[9] See for example: Adam Smith, DD (David Daiches) Raphael and AL (Alec Lawrence) Macfie, *The Theory of Moral Sentiments* (Liberty Classics 1976); David O Brink, 'Eudaimonism, Love and Friendship, and Political Community' (1999) 16 Social Philosophy and Policy 252; Daniel Engster and Maurice Hamington, *Care Ethics and Political Theory* (First edition, Oxford University Press 2015).

also think of solidarity and Émile Durkheim's famous account of organic solidarity[10] that has been theorised in discussions on the sociology of European integration.[11]

So, if there are philosophical calls for acknowledging emotional concepts in the realm of the political and, moreover, we have alongside mutual trust also the principle of solidarity, should we even be concerned about having these emotionally loaded names for legal principles? One might simply say 'trust' is only a word, a metaphorical artefact for a juridical abstraction to which one (the Court) is free to give its desired substance and meaning. But if it is only a word, then it should make no difference if the word 'love' instead of the word 'trust' is used in naming a principle. It seems likely that most people would find it difficult to accept that the EU court is obliging a principle of mutual love between Member States (which is in fact exactly what it is doing with mutual trust). Whatever such a principle should come to mean or entail, the sound of it is immediately alarming and utopian, not to say off-putting.

Yet, I claim that we do not have nearly as much resistance to the principle of mutual trust. Perhaps this is because the term has a more neutral ring? Here, the point is simply that words cannot be conventionally used in a rule-abiding public discourse and communication in an extra-terrestrial manner. The fact that sociologists and philosophers ask for more love, care, and trust in society does not mean that renaming legal concepts with these words will bring about such benefits. Philosophers think deeply about concepts before making a normative claim. Should the CJEU do the same when devising principles of Union law? Judges are not philosophers, but at the same time they cannot position themselves completely outside linguistic, semantic, and logical understandings of our common world and language. As Jeremy Waldron has aptly pointed out in his analysis of rule of law as a scholarly concept, rule of law can and should be connected with real-world usage: "[p]hilosophical analysis of an important term cannot afford to distance itself too much from the use of the term on the streets".[12] The same should hold true of judicially crafted concepts and principles – particularly if they might be far-fetched both in terms of ordinary and conceptual usage, building a semantically separate word-world of their own. It has been noted that the common usages of loaded terms might not necessarily reflect careful philosophical analysis, yet scholarly analysis can inform ordinary

[10] Émile Durkheim, *The Division of Labour in Society* (Free Press 1984).
[11] Hans-Jörg Trenz, 'Elements of a Sociology of European Integration' (Centre for European Studies, University of Oslo 2008) Working Paper No 11/2008.
[12] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 Law and Philosophy 137, 138.

usage and should take ordinary usage into account.[13] The current thesis thus inquiries into whether the Court has given adequate thought to the concept of 'trust' in the principle of mutual trust by judicial fiat. That is, it questions whether the principle reflects understandings of either the ordinary or the scholarly concept of trust or helps to systematically promote such understandings.

The idea of building trust just by using the term relates to the philosophy of language and the notion of 'doing things with words', as the speech act theorist J. L. Austin has put it.[14] Can the Court, by saying that the EU has (or has to have) mutual trust, actually create more trust? The building of trust through such orders is not as straightforward as the example provided by Austin for the power of utterances to effect change in the real world: that saying "I do" in a marriage ceremony makes one married.[15] But how can one assess whether the CJEU's insistence on mutual trust has brought about more trust in the EU? The question is not only a potential empirical inquiry measuring levels of trust between EU Member States and Member State authorities, which is beyond the scope of this research, but can also be addressed at an analytical level by having a theoretically informed understanding of the prerequisites and components of trust, that is: how trust can, in principle, be built or enhanced. What makes trust trust, and not, say, faith, and are these constitutive features mirrored in the principle of mutual trust? This dissertation aims to answer the question of whether the trust-talk of the CJEU is only rhetorical – that is, whether the principle could be renamed or functionally replaced by another existing legal concept – or does it have the potential for real trust-building. In short, the thesis asks: does trust-rhetoric have a concrete effect on EU legal, social, and political reality?

1.2.BACKGROUND AND HISTORICAL DEVELOPMENT OF MUTUAL TRUST

Let us begin with a basic question: What is the real nature of the principle of mutual trust? It is nowhere to be found in the Treaties[16], yet it has come to be one of the most important (some argue even constitutional) principles in the Union legal order. The legislative and jurisprudential development of this concept calls for examination. This chapter helps to locate

[13] David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 Journal of Political Ideologies 211, 233.
[14] JL Austin, *How to Do Things with Words* (Second edition, Clarendon Press 1975).
[15] ibid 5.
[16] Yet it was interestingly included in the failed Constitutional Treaty in chapter II Article I-42 of the specific provisions relating to the AFSJ clause 1(b): "The Union shall constitute an area of freedom, security and justice: by promoting *mutual confidence* between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions;" – see Treaty establishing a Constitution for Europe [2004] OJ C 310/1. But this was not later mirrored in the following Treaty of Lisbon.

mutual trust in the history of European integration and shows how it initially emerged as functioning in the background as a sentiment of commonality for integration, after which it became tied up with mutual recognition in the internal market and transplanted with it to the AFSJ domain in the 2000s. Recently, however, the principle has been increasingly disengaging from this domain, gaining a functional and structural meaning in its own right.

1.2.1. Starting with the internal market – trust as a background premise

While the principle of mutual trust has gained particular salience in recent years in the AFSJ context, the notion of mutual trust between Member States is not a novel one – it existed implicitly from the creation of the European Economic Community and explicitly in the CJEU's case law from 1975. Its aim was European cooperation and integration based on common economic-cultural ties; it was tied together by the signed foundational treaties and served as a practical incentive for Member States to seek such close-knit cooperation.

Although neither the term "trust" nor the more elaborate term "mutual trust" has ever figured in any of the founding treaties from the Treaty of Rome to the current Treaty of Lisbon, the concept has been said to exist as a foundational value or sentiment, making European integration possible. J. Snell has argued that in the initial periods of the original common market model of economic integration of the 1950s, mutual trust did not play any kind of major operational role – it remained in the background.[17] He points to the Spaak Report as proof that something akin to mutual trust was in the wings, explaining why integration was pursued among the six rather than a broader number of states:

> "Though the common market may have only a regional basis, i.e. is established between states with a sufficiently common outlook to make the necessary adjustments in their domestic legislation and show the necessary solidarity in their policies [---]"[18]

This "sufficiently common outlook" among the founding states can be the foundational element of trust between parties predisposed to such economic and, indeed, in effect, also characteristically solidary integration. Trust was therefore the basis of initial cooperation, but it was the absence of trust, or even outright distrust, which led to the initial project of the far-reaching harmonisation of laws and regulations. As J. Snell notes, despite the fact that mutual

[17] Jukka Snell, 'The Single Market: Does Mutual Trust Suffice?' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016) 11.
[18] Report of the Heads of Delegation to the Foreign Ministers at the Messina Conference, Brussels 21.04.1956, SG/A (56)4, p 9.

trust was an underlying element in starting the integration relationship off, when it came to the actual achievement of the common market, it was all about detailed harmonisation by the political institutions.[19] This paradoxical relationship between trust and law as a basis for cooperation will be further elaborated.

Although legislative instruments did not invoke trust or mutual trust, these concepts were still understood as the basis for integrationist cooperation and adherence to the Community rules and regulations. The notion of a horizontal trust between Member States in their contractual duties from the founding treaties was argued by a Member State in a CJEU dispute already in 1963, when the Italian government relied on the necessary trust between Member States in its submissions in the context of a dispute wherein the Commission allowed a special tax on the import of Italian electric goods to France.[20] In seeking an annulment of that decision, the Italian government stressed that:

> "an atmosphere of trust is necessary for cooperation and the campaign launched by the French press in 1962 against Italian products, which led to the disputed Decision, was not conducive to such an atmosphere"[21]

This kind of reliance on an "atmosphere" or condition of trust between Member States that is necessary for intra-EU cooperation continues to hold true today. Nonetheless, the Court did not take up this trust-argument in the merits of the case and dismissed the application as unfounded.

The first time the CJEU explicitly referred to mutual trust was in a similar context of an "atmosphere" in the 1975 *Opinion 1/75* on the compatibility with the EEC Treaty of the draft OECD "Understanding on a Local Cost Standard", thus of a Common Commercial Policy (CCP) agreement.[22] There, the Court drew on a broader notion of "mutual trust within the Community" which functions to allow the Community to fulfil its task in the defence of the common interest.[23] Based on that notion, the Court argued against the possibility of Member States exercising concurring power to the Community, and for the Community's exclusive power to participate in the draft agreement.[24] The same line of argument and wording (and a

[19] Snell (n 17) 11.
[20] Case 13/63 *Italy v Commission* ECLI:EU:C:1963:20. See discussion in Eugene Regan, 'The Role of the Principles of Mutual Trust and Mutual Recognition in EU Law' (2018) 2 Il Diritto Dell´Unione Europea 7.
[21] Case 13/63 *Italy v Commission* ECLI:EU:C:1963:20, p 168.
[22] *Opinion 1/75* of 11.11.1975 given pursuant to Article 228 of the EEC Treaty, ECLI:EU:C:1975:175.
[23] *Opinion 1/75* ECLI:EU:C:1975:175, p 1364.
[24] *Opinion 1/75* ECLI:EU:C:1975:175, p 1365.

direct reference back to *Opinion 1/75*) was repeated later in 1986 in a case concerning quantitative export restrictions to a non-member country in the CCP policy area.[25]

Thus, in its period of initial development, mutual trust was very much a connoted value and function, based on a unitary and collective vision of the Community, on which the EEC integration was implicitly or explicitly built. In the case law of the Court, it functioned as a factual premise, not a normative principle or obligation, with an interpretative function. Its ultimate purpose was to defend the common community interest, to foreclose the unilateral action of states for the purposes of the unity and effectiveness of Community actions. Mutual trust was not about the Member States' relations with each other, or trust placed in their actions or attitudes (with the exception of the Italian government's arguments in Case 13/63, which the Court did not uphold), but rather about vertical EEC-Member States' relationship in defining and delimiting boundaries of power and competences. As this mutual trust was not essentially about horizontal Member States' relationships, it can be argued that it was more general in nature and not the embodiment of the principle of mutual trust as understood, conceptualised, and defined today (see on that further in Chapter 3). Nonetheless, it provides a historical layer to the development of the principle and context to the role of trust in European integration more broadly.

1.2.2. Getting picked up by mutual recognition

Slightly later but in parallel with the previous conception of mutual trust, the principle found its way to the free movement of goods domain in its functional role of the creation of the internal market. This is the role more in line with the contemporary understanding of mutual trust as something horizontal between Member States regarding the forbidding of controls and reviews of each other's decisions and authorities. This started out in the early case law in relation to product checks, analyses, and inspections.

It is in this context that mutual trust begins its apparent convergence with today's more well-known principle of mutual recognition. The latter, but also the ways in which the two become more and more entangled – albeit distinct as well – requires precise specification.

As said, although none of the treaties to date have mentioned mutual trust, a concept often tied to this term, namely, mutual recognition, was included in the Community legal order by the Treaty of Rome in 1957. Thus, Article 57(1) requires the issuing of directives for the mutual

[25] Case C-174/84 *Bulk Oil (Zug) AG* ECLI:EU:C:1986:60, p 586.

recognition of diplomas, certificates, and other qualifications, and Article 220 lays a broader basis for the mutual recognition of companies and firms and the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards.[26] The notion of recognising qualifications was in fact already present in the 1951 Treaty of Paris as Article 69(1), which required Member States to undertake to remove any restrictions based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognised qualifications in a coalmining or steelmaking occupation, subject to the limitations imposed by the basic requirements of health and public policy.[27] The fact that mutual recognition was present in the earliest of treaties (although in the narrower free movement of people and services domain but also laying the basis for freedom of establishment and free movement of judgements) is often underemphasised in the literature praising *Cassis de Dijon*[28] for establishing mutual recognition.[29]

Because mutual trust has been clearly (especially today) linked to mutual recognition, the former has also been associated with the *Cassis de Dijon*, the case often said to have introduced the principle of mutual recognition to the EU free movement of goods setting.[30] I would like to draw some important distinctions from the Cassis doctrine and show how mutual trust, also in the free movement of goods domain and between Member States horizontally, has a different normative content than the basis justifying recognition deriving from *Cassis*. If, in *Cassis*, mutual trust is not mentioned (as one can argue neither was mutual recognition per se), the implied consequences and normativity are also different. Plausibly, only in hindsight was it characterised as a judgement where "the Court imposed a qualified duty of mutual recognition, based on qualified mutual trust".[31] If the mutual recognition imposed on Member States in *Cassis* is based on two normative principles – the functional equivalence of diverging Member State laws and the home state control principle – then mutual trust in early internal market case law includes the latter but not the former. Mutual trust as understood in the *Cassis* context was about the underlying trust that different legal rules are in essence equivalent, as the problem in

[26] Article 57(1) and Article 220 of the Treaty Establishing the European Economic Community, 25 March 1957.
[27] Article 69(1) of the Treaty Establishing the European Coal and Steel Community, 18 April 1951.
[28] Case C-120/78, *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein,* ECLI:EU:C:1979:42.
[29] For some notable exceptions see: Giandomenico Majone, 'Mutual Recognition in Federal Type Systems.' (European University Institute 1993) EUI Working Paper SPS No. 93/01 7; Snell (n 17) 11.
[30] See on that: Cecilia Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) 25 European Law Journal 37, 2; Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93, 98; Snell (n 17) 11.
[31] Rizcallah (n 30) 2; Snell (n 17) 11.

Cassis came mainly from the disparities between Member States laws.[32] In the bulk of early internal market case law dealing with mutual trust, the rules in question were not just equivalent but indeed identical – directed at inspections harmonised by Community legislation – although home state control of the inspections carried out was present and the host state "double-control" was forbidden.

As an example, the very first horizontal internal market case did not involve trust in the adequacy or equivalence of different laws, but in the correctness of applying and controlling EU regulations. This was the case in the *Bauhuis* decision already two years before *Cassis*, in 1977.[33] It was then that the Court referred to trust and its variance – "mutual confidence" – in the free movement domain:

> "This system is based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported."[34]

The Court went on to reiterate that:

> "The mutual confidence, which Member States must have in the inspections carried out, under the prescribed conditions, by the competent authorities of the other Member States, constitutes a basic element of the system introduced by the directive, without which it would have no purpose."[35]

The system introduced by the Court was prescribed to Member States by a directive that not only harmonised and standardised veterinary and public health inspections, but provided unusually strict methods by which to supervise the directive's universal application.[36] Thus, the mutual trust as conceptualised in *Bauhuis* was in fact very different from the functional equivalence principle of Cassis in that it was based on harmonised and standardised Community laws, not diverging national product legislations. Mutual trust was predicated on harmonisation, not diverse national standards. Additionally, the trust required was total and imperative – Member States must or should place trust in each other as per *Bauhuis*, because there was a

[32] Nicolas Bernard, 'On the Art of Not Mixing One's Drinks: Dassonville and Cassis de Dijon Revisited' in Miguel Maduro (ed), *Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 459.
[33] Case 46/76 *Bauhuis* ECLI:EU:C:1977:6.
[34] *Bauhuis*, para 22.
[35] *Bauhuis*, para 38.
[36] *Bauhuis*, paras 20-21, 23.

harmonising directive. This has little to do with "qualified" or "managed" mutual trust based on functionally equivalent but diverging national rules, as in Cassis.

This strand of mutual trust in checks, controls, and inspections was taken up by the Court and used later in similar contexts[37]. Its use in 1989 resulted in mutual trust being for the first time used in the category of "a more general principle" in *Bouchara*.[38] The full account of this understanding of mutual trust will be elaborated further in Chapter 3.

Nonetheless, this early idea of basing mutual trust on elaborate, harmonised rules was made possible by a different era's approach to achieving an internal market, which was based on the detailed harmonisation of rules and standards to allow for the free movement architecture. That was the initial approach of the Commission in the 1960s and 1970s: expansive growth of Community legislation and detailed standardisation.[39] In the late 1970s and 1980s this approach changed both institutionally and substantially[40], first with the help of the CJEU with the Cassis decision to respond to legislative deadlocks, and then by the acknowledgment of the Commission that the work necessary to harmonise the details for the completion of the internal market by 1993 was not achievable via the harmonisation approach.[41] A new approach was designed by the Commission's 1985 White Paper, one that relied heavily on mutual recognition and, for the first time, linked it explicitly to mutual trust.[42] This important governance paradigm shift relied heavily on the Cassis philosophy, and extended it from goods to people and services.[43] The philosophy requires, first, a restriction of harmonisation to the very essential requirements of health and safety and, second, the essential principle that products lawfully manufactured and marketed in one Member State could be sold freely throughout the Community.[44]

But this philosophy required an important empirical basis – namely, that "the objectives of national legislation, such as the protection of human health and life and the protection of the environment, are more often than not identical". It follows from this assumption of functional

[37] See e.g. Case C-5/94, *Hedley Lomas* ECLI:EU:C:1996:205, para 19; Case C-11/95, *Commission v Belgium* ECLI:EU:C:1996:316, para 88; Case C-1/96 *R v MAFF* ECLI:EU:C:1998:113; para 47; Case C-102/96 *Commission v Germany* ECLI:EU:C:1998:529.
[38] Case 25/88 *Bouchara* ECLI:EU:C:1989:187, para 18.
[39] Majone (n 29) 1.
[40] Agustin Jose Menendez, 'The Existential Crisis of the European Union Special Issue: Regeneration Europe' (2013) 14 German Law Journal 453; Snell (n 17) 11.
[41] Majone (n 29) 1–2.
[42] Commission White Paper 'Completing the Internal Market' COM(85) 310 final.
[43] Commission White Paper 'Completing the Internal Market' COM(85) 310 final, para 58.
[44] Majone (n 29) 3.

equivalence that although these rules may take different forms, they essentially boil down to the same thing and so should normally be accorded recognition in all Member States.[45] This empirical assumption was described by the Commission itself as "a radical change of attitude", implying a change in habits and in traditional ways of thinking.[46] This radical attitude change and the empirical assumption of equivalence was supported in the White Paper with a new canon – the principle of mutual trust between Member States.[47] It was the first time in Community legislation or jurisprudence that mutual recognition was backed up by mutual trust in a situation of a lack of exhaustive harmonisation.

1.2.3. Transplanting mutual recognition from the internal market to the AFSJ

As the Union's powers expanded, because the main benefits of mutual-recognition-type integration of the internal market were appealing, they could be taken as a blueprint strategy for other areas as well. The appeals of mutual recognition governance were described by G. Majone: first, unlike harmonisation, mutual recognition does not involve the transfer of powers to the Community but, at most, restricts the freedom of action of Member States. Second, the emphasis on mutual recognition avoids all the difficulties linked to the necessity of drafting directives so as to suit the substantive concerns of actors or the particular requirements of their legal systems. Finally, the approach created competition among national regulators, which was argued to provide an efficient way of assessing different methods of regulation and increase the range of choice available to consumers.[48] The regulatory competition account has been vigorously disputed as not leading to an ex post harmonisation and optimal efficiency of regulation, but instead to a possible race to the bottom.[49]

Nevertheless, these apparent political-institutional benefits were appealing to legislators in the complex Justice and Home Affairs policy field. This policy area, today known under the title "Area of Freedom, Security, and Justice", includes visas, borders, asylum, immigration, and criminal and civil justice cooperation. It arguably represents the most recent stage of

[45] Commission White Paper 'Completing the Internal Market' COM(85) 310 final, para 58. See discussion in: ibid 3–4.
[46] Commission White Paper 'Completing the Internal Market' COM(85) 310 final, para 59.
[47] See Commission White Paper 'Completing the Internal Market' COM(85) 310 final, paras 41, 93, 212. See also a discussion on that in Majone (n 29) 15–20.
[48] ibid 3.
[49] See discussion in Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 Journal of European Public Policy 762, 765; Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999); Majone (n 29) 11–15.

development in European constitutionalism[50], but was stuck in a deadlock of Member States not wanting to surrender their sovereignty and competences in such delicate areas so close to the core-sovereignty of state power. Mutual recognition reduces harmonisation and gives way to divergent policy choices and exact rules that pay respect to the different historical-cultural developments of such elaborate fields as criminal or family law.

Justice and Home Affairs found its way to the founding treaties in 1993 with the Maastricht Treaty under the so-called third pillar. Although the area existed already before, it remained distinct from the Community method then and even after Maastricht, until the 2000s, functioning in a mostly intergovernmental manner[51]; both extradition in criminal matters and the enforcement system of national civil decisions remained international in nature.[52] The tide started to change in 1998, when the UK government proposed the idea of applying mutual recognition in the field of criminal law. This idea was reflected in the Cardiff European Council Presidency Conclusions, which stressed the need to enhance the ability of national legal systems to work together closely and asked the Council to identify the scope for greater mutual recognition of decisions of each other's courts.[53] The emphasis on mutual recognition was justified by the UK on the grounds that the differences between Member States' legal systems limit the progress which is possible by other means and render harmonisation time-consuming, difficult to negotiate, and unrealistic. The then-UK Home Secretary Jack Straw described drawing inspiration from the way in which the internal market was "unblocked" in the 1980s.[54] This suggestion was taken up in the 1999 Tampere European Council Conclusions, where it was presented as a "cornerstone" of judicial cooperation both in the civil and criminal fields.[55] Thus, besides being arisen from criminal law, the European legislator also decided to abolish

[50] Massimo Fichera, 'Sketches of a Theory of Europe as an Area of Freedom, Security and Justice' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an area of freedom, security and justice* (Routledge 2017) 34.

[51] Steve Peers, 'The Rise and Fall of EU Justice and Home Affairs Law' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an area of freedom, security and justice* (Routledge 2017) 11–12.

[52] This relates primarily to the intermediate control system in the Member State of enforcement known as the *exequatur* procedure in civil law - see Marie Linton, 'Abolition of Exequatur, All in the Name of Mutual Trust!' in Burkhard Hess, Maria Bergström and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2015) 257. The recognition of judgements existed in the form of an international agreement of course already from the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. In the criminal sphere, it was exemplified by the limited nature and slow progress of legislative action – see Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, 1278.

[53] Cardiff European Council 15 and 16 June 1998 Presidency Conclusions, SN 150/1/98 REV 1, para 39. See discussion in Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (n 52) 1278.

[54] ibid 1278–1279.

[55] Tampere European Council 15 and 16 October Presidency Conclusions, para 33.

the exequatur, which was characteristic of the retained host-state control principle, in 1999 and 2000.[56] This transplant has been widely criticized, raising doubts concerning its suitability in the more human rights-sensitive AFSJ policy fields and questions about differing underlying mechanisms and aims.[57] It has been noted that a major political driver for introducing these principles as a regulatory strategy for the AFSJ at Tampere was the willingness of Member States to retain sovereignty in the policy fields of civil and criminal justice.[58]

Numerous legislative instruments were subsequently adopted which made the decisions of different national judicial authorities enforceable in the Union with minimal substantive checks and restrictive limitations. The most well-known of these is the European Arrest Warrant (EAW)[59], but there followed other criminal law framework decisions such as the freezing of assets and evidence[60], recognition of confiscation orders[61], transfer of custodial sentences[62], probation and parole[63], the European Evidence Warrant[64], and the European Investigation Order[65], to name just a few. Civil justice was not left behind, with legislative instruments such as the Brussel II bis Regulation[66], European Enforcement Order Regulation[67], European Order for Payment Regulation[68], and European Small Claims Regulation[69], which, among others,

[56] Linton (n 52) 258.
[57] See e.g: Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (n 52); Lavenex (n 49).
[58] Eva Storskrubb, 'Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016) 20.
[59] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1.
[60] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/45.
[61] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59.
[62] Council Framework Decision 2008/909/JHA of 27 November 2008 on 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 [2008] OJ L 327/27.
[63] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102.
[64] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purposes of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L 350/72.
[65] Directive 2014/41 of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.
[66] Regulation (EC) No 44/2001 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 12/1.
[67] Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims [2005] OJ L 143/15.
[68] Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399/1.
[69] Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

were enacted based on the rediscovered principle of mutual recognition. With the particular subject-matter at hand and the ever-evolving CJEU case law, one should note that the grounds of refusal, automaticity, and limits to mutual recognition are still very diverse throughout these different instruments, resulting in a complex patchwork of legal requirements.[70] But the underlying principle remains: judicial decisions coming from different Member States should in principle move and be enforceable freely across the Union.

1.2.4. Refurbishing mutual trust for the purposes of mutual recognition

The underlying principle of recognition and enforcement in the AFSJ also requires a "thick" attitudinal basis. This was accomplished by mutual trust. And although mutual trust was not mentioned in the Cardiff or Tampere Conclusions, the first of which introduced mutual recognition to criminal and second to civil matters, it did follow briefly in the Council draft programme of measures for civil and commercial matters[71], but curiously not in the analogous programme for criminal matters.[72] The draft programme for civil matters made the reference on two occasions, both of which related to the establishment of some minimum standards for certain aspects of civil procedure intended to strengthen mutual trust between the Member States' legal systems.[73]

The first time the Court used mutual trust in the AFSJ field was shortly after: in the 2003 *Brügge* judgement, in the context of Article 54 of the Convention implementing the Schengen Agreement (CISA), which codified the *ne bis in idem* principle in the Schengen area, i.e. the prohibition of double prosecution for the same acts.[74] In upholding the *ne bis in idem* and barring double prosecution of persons, the CJEU held:

> "[---] there is a necessary implication that the Member States have mutual trust [emphasis added] in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[75]

[70] Peers, 'The Rise and Fall of EU Justice and Home Affairs Law' (n 51) 30.
[71] Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters 2001/C 12/01 [2001] OJ C 12/1.
[72] Council Programme of measures to implement the principle of mutual recognition of decisions in criminal matters 2001/C 12/02 [2001] OJ C 12/10.
[73] Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters 2001/C 12/01 [2001] OJ C 12/1, at B.1.
[74] Joined cases C-187/01 and C-385/01 *Brügge* ECLI:EU:C:2003:87.
[75] ibid, para 33.

This was the first time that the Court also explicitly untied mutual trust and recognition from the minimum level of harmonisation and standardisation required in previous case law[76] and implemented the Cardiff and Tampere philosophy. That case was followed by abundant mutual trust case law in AFSJ, the internal market and beyond, which is systematised and explained further in Chapter 3.

On the agenda-setting front, the following Hague[77] and Stockholm Programme[78] developed mutual trust further and confirmed its importance in building the AFSJ. Besides general proclamations, the Hague Programme had a separate paragraph on confidence-building and mutual trust which was instrumentalised for the furthering of judicial cooperation in both civil and criminal matters, alongside the progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law.[79] The 2010 Stockholm Programme was much more elaborate and contained several references to mutual trust, including a programme to achieve mutual trust which included training (of judges, prosecutors, and other judicial staff); developing networks; ex ante and ex post evaluations; improving tools for judges, prosecutors, and other actors; implementation of decisions and Union law; exchanging best practices in detention and prison management.[80] The Programme also identified the ensuring of mutual trust between authorities and services and between different legal systems as one of the main challenges for the future.[81]

Similarly, the 2014 Commission's Justice Agenda for 2020 explicitly emphasised that the European area of justice is based on mutual recognition and mutual trust, the latter of which is the "bedrock upon which EU justice policy should be built", and it should ensure that citizens, legal practitioners, and judges fully trust judicial decisions irrespective of the Member State where they have been taken.[82] The Commission also acknowledged that the key requirements for mutual trust include not only the independence, quality, and efficiency of the judicial systems and the respect for the rule of law, but also the effective transposition and application

[76] ibid, para 32.
[77] The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1.
[78] The Stockholm Programme – an open and secure Europe serving and protecting citizens 2010/C 115/01 [2010] OJ C 115/1.
[79] The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1, at 3.2.
[80] The Stockholm Programme – an open and secure Europe serving and protecting citizens 2010/C 115/01 [2010] OJ C 115/1, at 3.2.
[81] ibid, at 1.2.1.
[82] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM/2014/0144 final.

of EU laws.[83] As an illustrative point and as later seen, reflecting the mutual trust case law, the Council in 2018 also stressed the link between Article 2 TEU values and mutual trust in that the latter is developed through the shared values of the Member States concerning respect for human dignity, freedom, democracy, equality, the rule of law, and human rights, so that each authority has confidence that the other authorities apply equivalent standards of protection of rights.[84]

So, mutual trust has come a long way from the early days of the internal market, when it involved trust in Member States authorities' adequacy and EU law abidance in conducting checks and inspections, to the AFSJ and value abidance. It has also come a long way from not being strictly associated with mutual recognition and functioning in the background, to being a strong element of AFSJ. As shown later in Chapter 3, case law has recently even travelled further from AFSJ and internal market cases, being implemented in novel areas with fundamental constitutional questions of the Union and with little or no connection to mutual recognition instruments. As will become evident, there is a somewhat disconnect between these policy documents presented above and the CJEU case law on mutual trust. While the former often uses terms such as "enhancing", "furthering", and "supporting" trust with different policy instruments, the latter has taken mostly either a normative ("Member States must trust"[85] or "should have trust"[86] in each other) or factual-empirical stand ("there is mutual trust"[87]), thus seeking the idealistic trust-creating utopia the Court has perhaps ventured in its mutual trust jurisprudence. This thesis will investigate whether this ideal has any practical-theoretical merit.

1.3.TOPICALITY – MUTUAL TRUST MATTERS

Like trust[88], the principle of mutual trust matters. In fact, it has become one of the most controversial principles in contemporary EU law. It matters not only because so many EU lawyers seem to be talking about it lately, regardless of their field of interest,[89] but also because its influence is felt on many different levels and among many different actors.

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[83] ibid, at 3.
[84] Council conclusions on mutual recognition in criminal matters „Promoting mutual recognition by enhancing mutual trust" 2018/C 449/02 [2018] OJ C 449/6.
[85] See e.g. Case C-220/18 PPU *ML,* para 112; Case C-128/18 *Dorobantu,* para 66.
[86] See e.g. Case C-18/18 *Facebook,* para 28.
[87] See e.g. Case C-34/17 *Donnellan,* para 41.
[88] See Raquel Barradas de Freitas and Sergio Lo Iacono (eds), *Trust Matters: Cross-Disciplinary Essays* (Hart Publishing forthcoming).
[89] This is so from narrowly defined subject fields of EU law – see e.g: Laura Carballo Pifeiro, '"Brexit" and International Insolvency Beyond the Realm of Mutual Trust' (2017) 26 International Insolvency Review 270;

Besides the importance of the principle internally and doctrinally, i.e. vis-à-vis EU law itself – how it structures the EU legal order and its doctrine and practice – it influences a broad range of other actors. Firstly, it of course impacts Member States and their horizontal cooperative relations, which must take into account the trust obligations imposed by the CJEU. This also has bearing on individuals, who are affected by the doctrine of mutual trust. It is both citizens and third country nationals (asylum seekers). But mutual trust also has an external impact – on the EU's and Member States' relations in other international cooperative systems, most notably the European Convention of Human Rights (ECHR) system (*Opinion 2/13*). It has also come to bear on the Brexit process (cases *RO* and *MA and Others*), the abolition of the intra-EU bilateral arbitration system (case *Achmea*), and the Canada-EU free trade agreement dispute settlement mechanism (*Opinion 1/17*). Altogether the principle plays a role on four axes: the dimension of internal EU law; the international dimension, relating to the positioning of the EU and Member States in international agreements and organisations; the horizontal Member State-Member State dimension, and the dimension in individual matters of cross-border interactions. I will explain them with examples in turn.

1.3.1. The level of doctrine – a Union of mutual trust

The principle of mutual trust has come a long way since the early days of internal market integration, taking root in numerous other areas of EU law and policy. Today, it is one of the cornerstones of the EU's aspiration to become an Area of Freedom, Security, and Justice (AFSJ) in criminal, civil cooperation, and immigration matters.

The principle of mutual trust matters doctrinally. It is one of the most recent novel judicial crafting principles employed and developed by the Court. The Court itself has implied that mutual trust is the *raison d´être* of EU law.[90] In *Opinion 2/13* it was described not as a raison d´être as such, but as a principle of fundamental importance to EU law.[91] Later, in the notorious Hungarian prison conditions case *Aranyosi*, Advocate General Bot equalled it to a comparable

Kaisa Huhta, 'Too Important to Be Entrusted to Neighbours? The Dynamics of Security of Electricity Supply and Mutual Trust in EU Law' (2018) 43 European Law Review 920 to broad and fundamental questions about EU and even federalism – see Armin von Bogdandy, 'Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace' (2018) 14 European Constitutional Law Review 675; Alexander Somek, 'The Cosmopolitan and the Federal Margins of Appreciation' (University of Iowa 2020) Legal Studies Research Paper No. 2020-16.

[90] Joined Cases C- 411/10 and C- 493/10 *NS and Others* ECLI:EU:C:2011:865 para 83; see also discussion in Xavier Groussot, Jörgen Hettne and Gunnar Thor Petursson, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union', *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 96.

[91] *Opinion 2/13* ECLI:EU:C:2014:2454, para 191.

status to the principles of primacy and direct effect.[92] In scholarly literature, it has been described as a constitutional principle of EU law.[93] This adds it to the long line of consequential fundamental principles such as autonomy, effectiveness, sincere cooperation, solidarity, and, indeed, the canons of primacy and direct effect. It is also interrelated with many of them, either explicitly in case law or in its reflections in doctrine, and therefore plays a part in the structured network of principles that constitutes the constitutional architecture of the Union, which the CJEU has expressly emphasised in relation to mutual trust.[94] It thus matters doctrinally whether or not the EU is a polity of mutual trust.

Today, mutual trust not only has an influence on one or two policy fields; it has begun to infiltrate the EU legal space, going beyond the original internal market and later domains added by the AFSJ. It is the new CJEU-claimed cornerstone of not only the AFSJ, but the EU legal order and constitutional architecture more generally.[95] It cuts across different policy areas and has "tiptoed" into areas and judgements where one would not expect to find the principle.

This creep into novel policy areas has perhaps been slightly instrumental, mirroring the practical difficulties faced by EU law and policies in recent years. These EU "crises" include the rule of law crisis, the migration crisis, and Brexit. The expanded use of mutual trust has prompted response from the national judiciary, CJEU, and academics. Mutual trust has at once been labelled a potential cause and a quick fix for many current underlying practical problems faced by the EU: whether recent rule-of-law backsliding[96], the state of fundamental rights in Europe[97],

[92] Opinion of Advocate General Bot in Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* ECLI:EU:C:2016:140, para 106.

[93] Koen Lenaerts, 'La Vie Après l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 Common Market Law Review 805, 807; Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 European Papers 75, 76; Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468, 480; Dominik Düsterhaus, 'The ECtHR the CJEU and the AFSJ a Matter of Mutual Trust' (2017) 42 European Law Review 388, 400; Christina Eckes, 'Protecting Fundamental Rights in the EU's Compound Legal Order: Mutual Trust Against Better Judgment?' (Amsterdam Centre for European Law and Governance Working Paper Series 2016) 2016–06 3, 18; Cambien (n 30) 114. Laurent Pech and Kim Lane Scheppele have even called it a "bedrock constitutional principle of the EU" – see: Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 41.

[94] *Opinion 2/13*, para 167-168.

[95] See on that: *Opinion 2/13* ECLI:EU:C:2014:2454, paras 166-168; also Case C-284/16 *Achmea* ECLI:EU:C:2018:158, paras 33-35.

[96] Ernst Hirsch Ballin, 'Mutual Trust. The Virtue of Reciprocity - Strengthening the Acceptance of the Rule of Law through Peer Review' in Carlos Closa, Dimitry Kochenov and Joseph HH Weiler (eds), *Reinforcing rule of law oversight in the European Union* (Cambridge University Press 2014).

[97] Luc Danwitz, "In Rights We Trust: The ECtHR's judgment in Romeo Castaño v. Belgium and the relationship between the ECHR and the principle of mutual trust in EU law", VerfBlog, 21.08.2019, https://verfassungsblog.de/in-rights-we-trust/ (last accessed: 24.11.2020).

Brexit[98], judicial independence[99], or financial cooperation in the Banking Union[100], to name a few of many. It is perhaps symptomatic that in two of the most significant Brexit cases arriving to the CJEU so far, both employed a language of mutual trust – in *RO* explicitly, when the CJEU denied that a notification of withdrawal from the EU could limit mutual trust[101], and in *Wightman* implicitly, when it referred to the value premise underlying mutual trust, without, interestingly, a direct mention of it.[102]

The fact that mutual trust is used by the Court in such fundamental and diverse cases and reflected in scholarly literature in ever-expanding and novel contexts makes clear that the principle is gaining momentum and salience in the EU legal order and imagination. The EU is becoming a Union of mutual trust; this is significant to the EU law doctrine and also, on a deeper level, to the character of the EU itself as a polity. An EU with a principle of mutual trust between the Member States is probably a different entity than an EU without such a principle.

1.3.2. Member States' level – a principle of horizontal trust

The principle of mutual trust ultimately functions in the EU on the horizontal level of Member States and their administrative and judicial authorities. It is like a normative glue that paves the way for cooperation, mutual respect, solidarity, and recognition, as it allows Member States to "open up to each other despite their legal diversities"[103] and creates a fundamental "legalised" attitude for such integration to happen. Therefore, it is consequential to EU Member States, altering both the relations between EU Member States and the balance of the relationship between the EU and its Member States.

On an operative level, the principle of mutual trust requires Member States, in principle, to consider each other as acting in compliance with EU law and fundamental rights as protected under EU law. This compliance presumption is broad, in the sense that it does not merely stipulate that the other EU Member States are adequately implementing EU law in concrete

[98] Joseph H. H. Weiler, Daniel Sarmiento; Jonathan Faull, "An Offer the EU and UK Cannot Refuse: A Proposal on How to Avoid a No-Deal Brexit", VerfBlog, 22.08.2019, https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/ (last accessed: 24.11.2020).
[99] Petra Bárd, Wouter van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust", VerfBlog, 10.04.2018, https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/ (last accessed: 24.11.2020).
[100] Elke König, „Closer International Cooperation as the Basis for Mutual Trust", Single Resolution Board news release on Eurofi article, 24.04.2020, https://srb.europa.eu/en/node/971 (last accessed: 24.11.2020).
[101] Case C-327/18 PPU *RO* ECLI:EU:C:2018:733, para 45.
[102] Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63, which curiously in making a direct reference also the the *LM* case paragraph, which establishes mutual trust and defines mutual trust and its link with Article 2 TEU values.
[103] Rizcallah (n 30) 1.

cases, but also includes the principle of equivalence presumption: that disparate and differing national legislations, legal systems, and institutional practices are in line with some base level of adequacy and shared values on which the EU is founded.[104] This compliance and equivalence presumption is the operating mechanism on which various mutual recognition regimes, which give extraterritorial effect to foreign state acts, are based.[105] Maiani and Migliorini have aptly characterised the functioning of these trust-presumed mechanisms as built around the logic that "in dealing with a person or situation falling a priori under its jurisdiction, Member State A must or may recognize the decisions previously adopted by Member State B, subject to exceptions designed to protect competing interests".[106]

Thus, the functioning of mutual trust as operationalised by mutual recognition regimes cuts to the core of national sovereignty issues and limits national territorial jurisdiction and state powers within its borders.[107] In the internal market, mutual trust-based recognition of different (and perhaps lower) standards has been described as constituting a loss of regulatory autonomy for the Member State to define the degree of protection of safety or other concerns of public interests within its territory.[108] Moreover, this is the case in the AFSJ concerning areas much more central to sovereignty, such as criminal, family, and migration law. It brings to the forefront issues of democratic legitimacy and of the diffusion of state liability through composite, multi-party decision-making and implementation processes which do not translate to traditional control and responsibility mechanisms.[109] As it substantially relates to areas which are under Member States' competences (because mutual recognition has been preferred to substantive harmonisation), it disturbs and creates frictions of de facto implementation of extraterritorial acts not subject to scrutiny or democratic and judicial controls of the executing state. These tensions are reflected in CJEU case law and become even more pressing in light of the current issues of rule of law, which have seriously undermined the CJEU's claim of mutual trust, even in its most basic baseline – the claim that Article 2 TEU values, such as rule of law, fundamental rights, and democracy, are shared and observed by Member States. This is taking place amidst the social reality of an exceptional rule of law crisis, wherein certain Member

[104] See: Francesco Maiani and Sara Migliorini, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review 7, 8.
[105] Rizcallah (n 30) 4.
[106] Maiani and Migliorini (n 104) 26.
[107] See on that further for a discussion how mutual trust based mutual recognition limits Member States legislative, executive and judicial prescriptive and enforcement jurisdictions: Rizcallah (n 30) 4–12.
[108] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 407.
[109] See on that also: Rizcallah (n 30) 12–14.

States are no longer even considered democracies.[110] As the EU has politically failed to trigger the appropriate legal mechanism applicable to such situations – the Article 7 TEU mechanism – the onus on oversight has once again been left to the judicial branch: national courts and the CJEU. The entities second-guessing this presumed trust and testing its contents and limits are in a growing number national courts through the preliminary rulings dialogue.

Some recent examples are well-known. In the *LM* case, the Irish High Court was reluctant to return a person under a Polish-issued EAW because of concerns about the Polish legislative reforms of its justice system and consequent rule of law issues.[111] In the *RO* case, the Irish High Court was again worried about executing an EAW from the UK due to Brexit and the challenge posed by withdrawal to mutual trust.[112] As mentioned, the *Aranyosi* case was brought by a German court's concern with the fundamental rights situation in Hungarian prisons.[113] But the new Central and Eastern European rule of law-problematic states are not the only objects of such distrust. There are also politically salient and sensible issues rising from "Old Europe", such as the reluctance of Belgian courts to extradite the Catalan leader Carles Puigdemont.[114] In all of these cases, the undermining of actual mutual trust played a central role. Thus, the deployment of mutual trust has created confusion for national authorities, especially domestic courts, as the guardians of the actual legality of all state measures.[115] The associated case law has been reactionary and responsive to social and political changes and crises in the EU and in the Member States, with mutual trust being constantly doubted and tested. This is entirely understandable, considering the far-reaching effect on sovereignty brought about by mutual trust.

1.3.3. The macro-level – EU and Member States' relations with international organisations

The principle of mutual trust has additionally been an influential factor in the EU and its Member States' positioning within international constellations, most notably the ECHR system – as the notorious *Opinion 2/13* put the spotlight on the principle as one of the main substantial

[110] See Freedom House Raport „Nations in Transit 2020 – Dropping the Democratic Facade", p 3, avaliable at: https://freedomhouse.org/sites/default/files/2020-05/NIT_2020_FINAL_05062020.pdf (last accessed: 17.08.2020).
[111] Case C-216/18 PPU *LM* ECLI:EU:C:2018:586.
[112] Case C-327/18 PPU *RO* ECLI:EU:C:2018:733.
[113] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi* ECLI:EU:C:2016:198.
[114] Stefan Braum, 'The Carles Puigdemont Case: Europe's Criminal Law in the Crisis of Confidence' (2018) 19 German Law Journal 1349.
[115] See on that also: Madalina Moraru, '"Mutual Trust" from the Perspective of National Courts: A Test in Creative Legal Thinking' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016).

reasons for denying the draft accession agreement. But not only. The intra-EU bilateral investment arbitration system has also taken a hit in the *Achmea* case, where the principle was used in declaring the arbitration clauses of intra-EU bilateral investment treaties to be in violation of EU law.[116] A following *Opinion 1/17* on the contrary allowed for a similar arbitral system in the context of the CETA agreement and distinguished the dispute settlement mechanism from those set up under BITs, namely, because Member States must have mutual trust in each other (and each other's justice systems), whereas the EU and Canada did not necessarily share such trust.[117]

Both in *Opinion 2/13* and *Achmea*, the principle brought about direct negative consequences for the participation of the Union or Member States in international organisations or concluding international agreements. The primary law obligation from Article 6(2) TEU of the EU to accede to the ECHR has not materialised until today, and negotiations were only restarted after the chilling effect of *Opinion 2/13*.[118] On 5 May 2020, following the *Achmea* decision, 23 Member States signed a plurilateral agreement on the termination of all intra-EU bilateral investment treaties.[119] But not all Member States entered into this agreement. Austria, Finland, Sweden, Ireland, and the UK did not, which has caused the Commission to start infringement proceedings against Finland, the UK, Austria, and Sweden (as Ireland has already terminated all its intra-EU bilateral investment treaties).[120] This impacts both the international law system of investment protection and arbitration in the EU's territory and the Member States' positions on this system and their obligations deriving from international law.

The difficulties posed by mutual trust for the standing of the EU and Member States in international organisations also have to do with varying standards of fundamental rights protection. The *MSS* and *NS* tension of systemic deficiencies versus individual risk is well known; it went as far as Member States having to choose which international standard to apply

[116] Case C-284/16 *Achmea*, ECLI:EU:C:2018:158.
[117] *Opinion 1/17*, ECLI:EU:C:2019:341, paras 128-129.
[118] The negotiation have restarted in 2020 after a letter of 31 October 2019, co-signed by the President and the First Vice-President of the European Commission, the Secretary General of the Council of Europe was informed that the European Union stood ready to resume the negotiations on its accession to the ECHR. On 15 January 2020, the Ministers' Deputies approved the continuation of the ad hoc terms of reference of the Steering Committee for Human Rights (CDDH) to finalise in an ad hoc group 47+1 and on the basis of the work already conducted, the legal instruments setting out the modalities of accession. See information and developments on that on the Council of Europe webpage: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights (last accessed: 26.06.2020).
[119] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/INIT [2020] OJ L 169/1.
[120] See discussion in: Michael de Boeck, „Disagreement on intra-EU BITs continues: Infringement actions over intra-EU BITs", European Law Blog, 15.06.2020, https://europeanlawblog.eu/2020/06/15/disagreement-on-intra-eu-bits-continues-infringement-actions-over-intra-eu-bits/ (last accessed: 30.06.2020).

and which obligations to violate.[121] The difference of standards has arguably been resolved in recent years by the concessions given by the CJEU to ease its initial rigid systemic deficiencies doctrine and allow for fundamental rights considerations where no such deficiencies exist, but the risk of human rights violations rather stems from individual circumstances.[122] However, a tension still persists in the background, as the CJEU continuously insists that the obligation to observe and monitor fundamental rights and proportionality falls on the issuing Member State; this leaves open issues of liability and state responsibility for composite and accomplice actions, and possibly degrades the Soering doctrine, long developed by the ECtHR, in which Contracting Parties are also held responsible for human rights violations committed by another state.[123]

In all these cases of the cooperation of the EU or Member States in international organisations, the ultimate question concerning mutual trust was one of the EU legal order's autonomy and the central position of the CJEU as a final authority to adjudge matters pertaining to EU law. If in the context of the ECHR, the other authority claiming judicial body was the ECtHR, then with regard to the bilateral investment treaties, it was the arbitral tribunals set up under the dispute settlement clauses that encroached upon the CJEU's exclusive jurisdiction. In both cases, the alternative mechanisms or courses of judicial review were negated, among other things, because of the importance of mutual trust as a part of the special legal and structural architecture setting up the characteristic nature of the EU.

1.3.4. The micro-level – impact on individuals

Mutual trust as a principle probably has the most obvious impact on individuals in the realm of the EU legal sphere, both with regard to citizens and third country nationals (mainly in asylum acquis and Dublin returns). The individuals most prominently susceptible to this effect are the subjects of EAWs and investigation orders, citizens caught in the middle of parallel civil court proceedings, or asylum seekers subject to Dublin transfers. The impact can best be described using the main definition of mutual trust as a broad EU law and fundamental rights compliance presumption. In principle, a compliance presumption forbids actual control in the majority of cases; thus the effect of mutual trust, at least in most of the AFSJ, makes actual judicial control over the trust-objects more difficult for individuals in such proceedings. This calls into question the principles of effective judicial protection and defence rights. But the impact varies in the

[121] See on that: Moraru (n 115).
[122] See case C-578/16 PPU *CK and Others,* ECLI:EU:C:2017:127.
[123] ECtHR *Soering v United Kingdom,* Appl. No 14038/88, ECLI:CE:ECHR:1989:0707JUD001403888.

different areas in which mutual trust is employed, so some qualification is necessary as the modalities of the impact diverge substantially.

Thus, it is difficult to uniformly characterise the effects of mutual trust on the individual. On the one hand, individual rights and avenues of judicial protection are effectively foreclosed by the claim of mutual trust and the attribution and division of judicial labour it brings in the unified European area of justice – the main avenue of appeal and redress over alleged infringements rests in the issuing Member State, and the ability to bring claims in the executing Member States is limited, not to say impossible.[124] This is true both with regard to instruments in the AFSJ (EAWs, investigation, freezing and other orders, civil decisions, etc.) and in the internal market, although individuals usually lack direct dispute avenues there (for instance, with regard to public health or safety standards, which are usually the prerogative of the state). Foreign applicable standards, whether they are human rights or product standards, can be lower than the domestic ones otherwise enjoyed. This can bring about the so-called race to the bottom.[125] But foreign standards can also be associated with positive influences and new possibilities with potential benefit to the individual, as is clearly the case for economic operators and individuals in the internal market – their inspections, tests, certificates, and diplomas should in principle be considered adequate and lawful, and therefore valid in other Member States. The AFSJ also makes this the case in civil justice cooperation – individuals can have judicial decisions enforced and recognised without further formalities everywhere in the Union. This eases cross-border mobility and the legal recognition of inter-state acts abroad.

The most negative consequences for individuals are, of course, possible infringements of fundamental rights with no or strictly limited address mechanisms. The so-called transfers – the Dublin asylum seekers transfers and the European Arrest Warrant transfers – are typical examples. E. Xanthopoulou has done a systematisation of following the rights-based limits to mutual trust in the criminal and asylum domain and has also explored the need for more protection and an increased role for proportionality considerations in enforcing the measures.[126]

In sum, the principle of mutual trust matters on many fronts. It has become one of the fundamental principles in the Union legal order. It is important practically and doctrinally, as it

[124] See from recent examples e.g.: Case C-34/17 *Donnellan,* para 45, Case C-376/16 *Piotrowski,* para 50.
[125] Rizcallah (n 30) 17.
[126] Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (2018) 55 Common Market Law Review 480; Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (First edition, Hart Publishing 2020).

binds together the various national legal orders in the EU, creating an important normative assumption with regards to the lawfulness and compatibility of these legal orders with the EU order and with each other reciprocally. This normative presumption of adequacy and lawfulness solves many of the problems entailed by integration of different legal cultures and systems and provides shortcuts to aid the functioning of EU regulatory instruments. Mutual trust moderates and negotiates the two antagonistic Union realities of unity and diversity. However, it also causes practical problems, as such presumptions often do, mainly in terms of effective judicial protection, fundamental rights considerations, national sovereignty, the principle of legality, and the EU rule of law. It functionally augments the EU's claim of autonomy and authority over other international law instruments and affects individuals in their rights and positions vis-à-vis Member States and each other. It matters for the national judiciary and administrative authorities in implementing other Member States' acts and decisions, as they in principle must presume their lawfulness. But it also matters purely as a matter of doctrine, as a mutual trust-based Union is arguably quite different than a Union without such a horizontal principle between its constituent states and their authorities.

1.4.FROM STATE OF THE ART TO CONTRIBUTION TO THE FIELD

Over the course of writing this thesis, the principle of mutual trust has become a buzzword in the EU legal scholarship.[127] Lately, almost no EU law journal issue goes by without a reflection on mutual trust[128] and monographs[129], not to mention book chapters, are starting to be published on the subject.[130] But despite this recent prominence in scholarly writings, there is still little conceptual theorising and overarching sectorial work on mutual trust. Below, this thesis will

[127] See a similar characterisation of mutual trust as a "buzzword" Matthias Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11 Journal of Private International Law 64, 64.

[128] See lately e.g: Maiani and Migliorini (n 104); Valsamis Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (2020) 57 Common Market Law Review 45; Valsamis Mitsilegas, 'Trust' (2020) 21 German Law Journal 69; Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) 16 European Constitutional Law Review 33; Rizcallah (n 30); Michael Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 European Law Journal 124; Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (n 126).

[129] Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (n 126); Antonina Bakardjieva Engelbrekt and others, *Trust in the European Union in Challenging Times: Interdisciplinary European Studies* (Springer International Publishing: Imprint: Palgrave Macmillan 2019).

[130] Christiaan Timmermans, 'How Trustworthy Is Mutual Trust? *Opinion 2/13* Revisited' in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019); Clemens Ladenburger, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice: Some Reflections on Its Corollaries' in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019); Ballin (n 96).

summarise the evolution of mutual trust as a topic in EU legal scholarship, its tendencies and emphasis, and the gaps still unaddressed. It will trace the trajectory of mutual trust in the literature, from a dormant side topic receiving only sector-specific attention to an object of inquiry and conceptualisation in and of itself. The next sections will also see how the emphasis has changed in different policy areas and what role trust as a concept has played in handling mutual trust as a topic.

1.4.1. Sector-specific accounts of mutual trust

Initially, writing about the principle of mutual trust was scarce and sector-specific. First, it is interesting to note that although mutual trust had already emerged as a principle in CJEU case law in the 1970s (see below in Chapter 3), it did not become a considerable and persistent topic in EU legal scholarship before the 2000s. This may be because it was understood as a legal principle with normative force, rather than an inadvertent stipulation or a general policy goal, and because of its relative triviality and scarcity both in case law and in legislative instruments. As seen later, it was not emphasised by the Court, and thus essentially slipped through the doctrine. But there are a few exceptions.

Giandomenico Majone has written about mutual trust, commitments, and rules in the internal market integration context from 1993 onward.[131] In an analysis that is still relevant today, he examined the functional importance of trust in the Community system, which depends on the loyal cooperation of Member States and of their administrations for the formulation and implementation of common rules.[132] He emphasised that mutual recognition cannot work satisfactorily without mutual trust and that distrust is liable to defeat it.[133] Importantly, he was critical of the assumption that trust can be elicited and preached by judicial fiat, and discussed the positive effects of distrust.[134]

Majone emphasised as early as 1993 in the context of the internal market that "mutual trust among state regulators can no more be assumed than the essential identity of the health and safety goals of the member states".[135] Rather, he contended that central authorities need to create the material and institutional conditions under which credibility and mutual respect

[131] Majone (n 29); Giandomenico Majone, 'Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market' (European University Institute 1995) Working Paper 95/1.
[132] Majone (n 131) 1.
[133] Majone (n 29) 16, 20.
[134] Majone (n 131) 2.
[135] Majone (n 29) 20.

become the most valuable public goods supplied by the supranational polity.[136] Remarkably, Majone's works remain among the very few accounts that specifically highlight mutual trust in the internal market domain. Even today, mutual trust is usually mentioned in passing alongside the more popular principle of mutual recognition in contemporary internal market contributions and is not an object of analysis itself.[137]

The tide shifted to civil, criminal, and asylum lawyers, but also fundamental rights experts, when mutual trust was transplanted to the AFSJ domain. After the policy developments post-Cardiff and Tampere, as well as *Brügge* (2003), the first CJEU decision to position mutual trust in the AFSJ arena, legal scholars from various fields turned their attention slowly to the new governance mechanism of mutual recognition and the mutual trust underlying it.[138] The literature grew exponentially after *Opinion 2/13*, where various AFSJ sector-specific lawyers

[136] ibid.

[137] See a notable exception, which nevertheless also includes criminal justice cooperation: Per Cramér, 'Reflections on the Roles of Mutual Trust in EU Law', *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009). For the examples of attaching mutual trust to mutual recognition in the internal market domain, see contributions in: Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge University Press 2012).

[138] See from the early 2000s e.g: Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (n 52); Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 Common Market Law Review; Felix Blobel and Patrick Spath, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 European Law Review 528; Gilles de Kerchove, Anne Weyembergh and Franco Frattini, *La Confiance Mutuelle Dans l'espace Pénal Européen* (Editions de l'université de Bruxelles 2005); Nadine Thwaites, 'Mutual Trust in Criminal Matters: The European Court of Justice Gives a First Interpretation of a Provision of the Convention Implementing the Schengen Agreement European & International Law' (2003) 4 German Law Journal 253.

in criminal[139], civil[140], and migration law[141] turned their attention to mutual trust specifically; mostly, they examined and critiqued the problems underlying the early days of CJEU's AFSJ jurisprudence as blind trust obligation, or concentrated on the case law regarding the various limits of mutual trust. The internal market lawyers kept their attention on the interconnectedness of mutual recognition and mutual trust[142], with some particularly sector-specific accounts.[143]

These conceptualisations of mutual trust according to the doctrinal understandings of the particular fields are important, but this dissertation aims to overcome sector-specific

[139] Ester Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU Law 10 Years of the European Arrest Warrant' (2013) 38 European Law Review 79; Aleksandra Sulima, 'The Normativity of The Principle of Mutual Trust Between EU Member States within the Emerging European Criminal Area' (2013) 3 Wroclaw Review of Law, Administration & Economics 72; Valsamis Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 New Journal of European Criminal Law 457; Henning Bang Fuglsang Madsen Sorensen, 'Mutual Trust – Blind Trust or General Trust with Exceptions? The CJEU Hears Key Cases on the European Arrest Warrant' [2016] Pécs Journal of International and European Law 56; Georgios Anagnostaras, 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu' (2016) 53 Common Market Law Review 1675; Szilárd Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal of Crime, Criminal Law and Criminal Justice 197; Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32 Utrecht Journal of International and European Law 112; Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is "Exceptional" Enough?' (2016) 1 European Papers; Vol. 1 943; Auke Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character' (2016) 9 European Journal of Legal Studies 211; Willems (n 93); Braum (n 114); Tp Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions' (2018) 25 Maastricht Journal of European and Comparative Law 704; Aida Torres Pérez, 'A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights' in Bruno de Witte and others (eds), *National Courts and EU Law: new issues, theories and methods* (Edward Elgar Publishing 2016); Jannemieke Ouwerkerk, 'Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant' (2018) 26 European Journal of Crime, Criminal Law and Criminal Justice 103; Massimo Fichera, 'Mutual Trust in European Criminal Law' (University of Edinburgh 2009) University of Edinburgh Working Paper Series 2009/10.

[140] Eva Storskrubb, 'Mutual Recognition as a Governance Strategy for Civil Justice' in Burkhard Hess, Maria Bergström and Eva Storskrubb (eds), *EU Civil Justice : Current Issues and Future Outlook* (Hart Publishing 2015); Eva Storskrubb, 'Mutual Trust and the Dark Horse of Civil Justice' (2018) 20 Cambridge Yearbook of European Legal Studies 179; Linton (n 52); Weller (n 127); Monique Hazelhorst, 'Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law' (2018) 65 Netherlands International Law Review 103; JM Emaus, 'The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU's Aspirations Relating to Contractual Relations' (2017) 2 European Papers 117; Julie Doughty, 'The Best Interests of Children and the Mutual Trust Principle That Goes Both Ways' (2016) 38 Journal of Social Welfare and Family Law 333; Silvia Bartolini, 'In the Name of the Best Interests of the Child: The Principle of Mutual Trust in Child Abduction Cases' (2019) 56 Common Market Law Review 91.

[141] Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 Utrecht Law Review 135; Hemme Battjes and Evelien Brouwer, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?' (2015) 8 Review of European Administrative Law 183; Giulia Vicini, 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust' (2015) 8 European Journal of Legal Studies 50.

[142] Miguel Poiares Maduro, 'So Close and yet so Far: The Paradoxes of Mutual Recognition' (2007) 14 Journal of European Public Policy 814; Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy 682; Cambien (n 30).

[143] See e.g: Huhta (n 89); Pifeiro (n 89).

understandings of mutual trust and create a more holistic understanding of the principle in the wider (both historical and sectorial) EU setting.

1.4.2. Mutual trust, fundamental rights, autonomy, and federalism

Opinion 2/13 triggered a (mostly quite critical) scholarship on its own, which also focused specifically on mutual trust as one of the fundamental reasons why the CJEU overruled the ECHR draft accession agreement, concentrating either on fundamental rights issues[144], autonomy[145], or even additional considerations of federalism.[146] Most of the discussion focused on the particular place accorded to mutual trust by the Court to support the autonomy and particularities of EU law, and that the CJEU's argument in essence boiled down to a claim that in certain circumstances EU law should be allowed to give less protection than the ECHR standard of rights protection.[147]

D. Halberstam went further from a mere descriptive account of how mutual trust functioned in *Opinion 2/13* to place it in a broader context of federalism, stressing the mismatch between obligations of mutual trust and social reality.[148] Moreover, he suggested that the survival of any Union that demands that states trust and assign validity to the legal process of every other state depends on three interrelated conditions: first, a reasonably common set of values and similar level of fundamental rights protection; second, the Union's ability to remedy rights violations in states effectively whenever they occur; and, third, a safety valve (either primary or secondary law) for a state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union apart.[149] He claimed that there is a hydraulic connection between these conditions: where one or more elements are weak, the remaining must be equally strong, as for a federal union to survive, any legal obligation of mutual trust must be grounded in social reality, not judicial fiat.[150]

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[144] Bruno de Witte, '*Opinion 2/13* on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 European Law Review 683; Eleanor Spaventa, 'A Very Fearful Court: The Protection of Fundamental Rights in the European Union after *Opinion 2/13*' (2015) 22 Maastricht Journal of European and Comparative Law 35.
[145] Piet Eeckhout, '*Opinion 2/13* on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky European Union Law Issue' (2015) 38 Fordham International Law Journal 955.
[146] Daniel Halberstam, 'It's the Autonomy, Stupid: A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105.
[147] de Witte (n 144) 702.
[148] Halberstam (n 146) 130.
[149] ibid 130–131.
[150] ibid 131.

There is another similar, but slightly less critical strand of scholarship linking mutual trust to the Union's federal structure through Article 2 TEU value enforcement, as well as essence of rights and systemic deficiencies doctrines. M. Wendel has recently emphasised the federal dimension of mutual trust in that it applies to the horizontal relationships between states and relates to a balance of power between the search for unity and the protection of diversity in a multi-levelled polity.[151] He endorses and welcomes the CJEU criterion of "systemic deficiencies" as a precondition to limit mutual trust to fulfil the role of a federal safeguard, which, within certain limits, allows national courts to monitor their peers' compliance with fundamental rights.[152]

This resonates with the recent theme of a possible EU value enforcement and the two mechanisms proposed for such an enforcement: the so-called "reverse" and "horizontal" Solange, which have come to the forefront in the ongoing rule of law crisis in the EU. Kochenov has listed the reverse and horizontal *Solange* amongst the seven innovative value enforcement mechanisms suggested by the scholarship alongside already-existing institutional possibilities, such as the Article 7 TEU procedure or the recourse to financial penalties via Article 260 TFEU.[153]

The reverse *Solange* was inspired by AG Maduro's opinion in the *Centro Europa 7* case[154] and later promoted prominently by Armin von Bogdandy.[155] In essence, it argues that outside the Charter's scope it should be presumed that Member States comply with their fundamental rights obligations rising out of Article 2 TEU, but that this presumption is rebutted by systemic violations in national courts and the CJEU.[156] Von Bogdandy cites mutual trust as one of the three bases for such value enforcement in exceptional circumstances.[157] This has been described and criticised as allowing the CJEU to move into the domain of national law in purely internal

[151] Mattias Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' (2019) 15 European Constitutional Law Review 17, 35, authors referred to in fn 103.
[152] ibid 39, 47.
[153] Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, vol 1 (Oxford University Press 2017) 18.
[154] Opinion of AG Maduro, Case C-380/05 *Centro Europa 7* ECLI:EU:C:2007:505, paras 14-23.
[155] Armin von Bogdandy and others, 'Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 Common Market Law Review 489; Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391. See discussion and description in Kochenov (n 153) 21.
[156] von Bogdandy and others (n 155) 518.
[157] Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 713; von Bogdandy and Spieker (n 155) 423.

situations with the aim of enforcing EU values and even reviewing the legality of national actions in light of Article 2 TEU, which the Court is currently not entitled to do.[158]

The horizontal *Solange* was proposed in 2013 by Iris Canor. In essence, it argues for a similar presumption as the reverse Solange; however, the enforcing actor would not be the CJEU, but Member States themselves in not implementing mutual trust-based instruments in their national legal systems.[159] This has been described as de facto disapplying EU law in bilateral relations with the "guilty" Member State, and has been criticized in that it fundamentally undermines the very nature of EU law as not based on reciprocity.[160] Arguably, and as will be shown later, the route the CJEU has chosen when facing these difficult questions on where to draw the limit of mutual trust has reflected the horizontal more than the reverse *Solange* in allowing Member States' peer-review of fundamental rights compliance.[161] This has prompted some scholars to call on the CJEU to "take back control" in defining the limits of mutual trust.[162]

Although I am quite sympathetic both to Halberstam's pleas to limit mutual trust when the actual underlying social reality is not present and to Wendel's suggestion that the CJEU should be the ultimate arbiter of the limits of mutual trust and assume a more assertive and explicit role in guiding the application (and non-application) of mutual trust, these accounts of mutual trust, although transcending conventional sector-specificity, still do not engage with mutual trust on a more fundamental level – namely, what the principle is about beyond these more exceptional cases on the fundamental rights' bound limits to it, and whether it is necessary and helpful on a functional-conceptual level in the Union legal system. These questions should precede the discussions on limits and competences.

This goes also for the literature on the two *Solange* presumptions. These presumptions and their reflection in mutual trust case law will be further discussed in the analytical section of the thesis, but my main concern with the value-enforcement literature is that it does not take mutual trust at the centre of its analysis, but rather uses it instrumentally to affirm normative proposals or

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[158] Kochenov (n 153) 21. For more criticism see: Dimitry Kochenov, 'On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Yearbook of International Law 145; Michal Dorociak and Wojciech Lewandowski, 'A Check Move for the Principle of Mutual Trust from Dublin: The Celmer Case' (2018) 3 European Papers 857.

[159] Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"' (2013) 50 Common Market Law Review 39.

[160] Kochenov (n 153) 25.

[161] See e.g. the Court allowing Member States' courts to review the prison conditions or right to fair trial in the context of the judicial reforms in Poland: Joined Cases C-404/15 and C-659/15 PPU *Aranyosi* ECLI:EU:C:2016:198; Case C-219/18 PPU *LM* ECLI:EU:C:2018586; Case C-128/18 *Dorobantu* ECLI:EU:C:2019:857.

[162] Wendel (n 151) 41–44.

theories. Before mutual trust can be instrumental in enforcing Article 2 TEU values, one must ask what the principle is, essentially and historically, and whether the way it is used and defined today is normatively or conceptually plausible or desirable. This dissertation tries to go further in that sense, inquiring whether the problems with mutual trust might be more fundamentally rooted in its role and function in the current EU context, and whether there might be a deeper tension in the very existence of a legal principle of trust as such.

1.4.3. Surpassing sector-specificity, but still confined to the AFSJ?

The lack of cross-policy area conceptualisations has long been characteristic of mutual trust scholarship. More recently, long-awaited attempts have emerged to rationalise and systematise the functioning of the principle in a more comprehensive manner not bound by the typical mono-policy perspectives. Many of them are still confined to the AFSJ, but some notable exceptions surpass it and attempt to conceptualise mutual trust in the EU on a higher level of abstraction.

One of the first noteworthy exceptions to the sector-specificity with a concentrated focus on mutual trust was the MWP EUI Working Paper published in 2016, edited by Evelien Brouwer and Damien Gerard, following a workshop organized at the EUI in 2015.[163] It was one of the first pieces to turn its attention to more fundamental questions about the possible constitutional nature of mutual trust[164] and its foundations in intellectual history.[165] However, most of the contributions therein still remained largely sector-[166] or AFSJ-specific.[167]

D. Gerard's contribution in the Working Paper cautiously did not name mutual trust as a general or constitutional principle of EU law, but rather tried to place it in the context of EU constitutionalism.[168] He notably drew parallels between the functionality of effectiveness and

[163] Evelien Brouwer and Damien Gerard, 'Mapping Mutual Trust. Understanding and Framing the Role of Mutual Trust in EU Law' (European University Institute 2016) EUI Working Paper MWP 2016/13.
[164] Damien Gerard, 'Mutual Trust as Constitutionalism?' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016).
[165] Franz Leander Fillafer, 'Mutula Trust in the History of Ideas' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016).
[166] Valsamis Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016); Storskrubb, 'Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice' (n 58); Snell (n 17).
[167] Evelien Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper MWP 2016/13 2016); Moraru (n 115).
[168] Gerard (n 164) 70.

mutual trust, and tried to place it under the "umbrella" of the principle of loyal cooperation epitomised in Article 4(3) TEU, applicable horizontally between Member States and extending the recognition of their domestic solutions.[169] He also suggests that the emphasis on "mutuality" could "embed a particular constitutionalism for the Union," ingrained in a mutually recognised diversity, dependence, and interconnectedness.[170]

Historically, from the intensified usage of mutual trust in the AFSJ after the Treaty of Lisbon took hold, there have been different and opposing views on the nature and status of mutual trust in Union law, from a characterization as "not a principle of law but a fragile reflexive social situation"[171] to the very strong statement made in AG Bot's opinion in *Aranyosi* that "the principle of mutual confidence is today among the fundamental principles of Union law, of comparable status to the principles of primacy and direct effect".[172] This shift arguably also traces the changes in jurisprudence and language of the CJEU when relying on mutual trust.

It was Koen Lenaerts, the president of the CJEU himself, who provided his own strong conceptual defence and empowerment of mutual trust. Echoing the jurisprudential developments in *N.S.* and *Aranyosi*, he stressed that mutual trust is not blind, but rather qualified trust; most notably, he depicted it as a constitutional principle of Union law, based on the equality of Member States before the law, enshrined in Article 4(2) TEU.[173] After that proclamation, there has been little to no opposition to the acceptance of mutual trust as a constitutional principle of Union law.[174]

More recently, the scholarship has turned to some more general conceptualisations of mutual trust beyond the issues of EU constitutionalism and the status and role of mutual trust in that domain. Cecilia Rizcallah presents mutual trust as a governance regime.[175] She conceptualises mutual trust in a functional manner as a tool for achieving a borderless European area in that it enables the Member States to exercise their prescriptive and enforcement powers extraterritorially; while she agrees that the principle enables such horizontal integration, she raises many concerns pertaining to Member States' sovereignty, democratic legitimacy, protection of individual rights, state liability, and the duty of national authorities to protect the

[169] ibid 76–79.
[170] ibid 78.
[171] Cramér (n 137) 58.
[172] Opinion of Advocate General Bot, Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru*, ECLI:EU:C:2016:140, para 106
[173] Lenaerts (n 93) 807.
[174] See as recent examples: Maiani and Migliorini (n 104) 8; Timmermans (n 130) 21,26.
[175] Rizcallah (n 30).

public interest.[176] The governance tool account is well-known for the principle of mutual recognition[177]. In my opinion, it is slightly imprecise to use this account analogously for mutual trust, as it reduces mutual trust to mutual recognition. I do not agree with such a unifying account of mutual trust and mutual recognition, as I will defend later on in the thesis the position that mutual trust has surpassed its functional connection with mutual recognition mechanisms and has become a legal-normative principle in its own right. Even if one takes the example of mutual trust and recognition functioning alongside one another, they are still not the same, in that mutual recognition is an action – the recognition of a certain act by a foreign state, i.e. an embodiment of a governance regime. Mutual trust, on the other hand, is the underlying philosophy, the cognitive-emotional attitude necessary for such acts of recognition and governance. Also, their operational part is different: mutual recognition operates – as implied by its name – to recognise foreign state acts; mutual trust becomes operational not by the recognition part itself but one prior to and separate from it: the suspension of control (usually meaning judicial control) over a foreign state act. One does not necessarily imply the other as there might be recognition with prior substantial controls and there can also be non-recognition without any controls. Rizcallah's paper does a good job in explaining mutual trust in action when bound by mutual recognition regimes and the practical problems they create. However, I still find such a light-handed equalisation and an instrumental approach to mutual trust reductionist, and argue for a more nuanced approach to the principle.

Ermioni Xanthopoulou has made a distinction between mutual trust and recognition in a thorough study on the changing limits of mutual trust in two domains of the AFSJ – criminal and asylum law.[178] She distinguishes three phases of mutual trust: the phase of blind trust; the phase of controlled derogations from mutual trust; and an evolving phase of individual assessment.[179] She goes on to argue for clarity in terminology and conceptual distinctions, and importantly differentiates mutual trust from mutual recognition in that "trust cannot be enclosed into a static obligation, but should be understood as a dynamic social construct that is not enforceable in itself, unlike mutual recognition".[180] She also advocates for the respect of

[176] ibid 1, 19.
[177] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 Law and contemporary problems 263; Susanne K Schmidt, 'Mutual Recognition as a New Mode of Governance' (2007) 14 Journal of European Public Policy 667; Julia Sievers and Susanne K Schmidt, 'Squaring the Circle with Mutual Recognition? Demoi-Cratic Governance in Practice' (2015) 22 Journal of European Public Policy 112.
[178] Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (n 126).
[179] ibid 493–498.
[180] ibid 499.

fundamental rights, strengthening shared values via harmonisation and communication, learning, and mutual understanding between authorities to strengthen trust.[181] Xanthopoulou's account gives a concise overview of the limits of mutual trust in case law (although only in criminal and asylum law), which I will draw on later, and provides an important contribution in distinguishing mutual trust from mutual recognition, but falls short in giving a theoretically grounded basis for it, which might also qualify her normative points on harmonisation and the overall plausibility of the principle conceptually.

In a different vein, but similarly confined to the AFSJ, Francesco Maiani and Sara Migliorini have conducted a comprehensive systematisation of mutual trust-based secondary law instruments in order to trace and complement the development of the principle in case law.[182] They identify the different trends and differentiations of mutual trust in civil, criminal, and migration law instruments, and provide an abstract logic around which all the analysed instruments are built: in dealing with a person or situation falling a priori under its jurisdiction, Member State A must or may recognize the decision previously adopted by Member State B, or acknowledge the competence of Member State B, subject to exceptions designed to protect competing interests.[183] They conceptualise mutual trust in the observance of relevant EU rules, standards, and values by the issuing/competent State as the operating presumption on which the mechanism rests.[184] Maiani and Migliorini offer a useful overview of the myriad of existing secondary law and provide an apt doctrinal link between mutual trust and effet utile as an interpretative principle of EU legislative instruments. But in analysing mutual trust from the perspective of mutual recognition acts only, they repeat the same fallacy as Rizcallah in that by analysing legislation, they tie mutual trust inherently with mutual recognition, even going so far as to claim that mutual trust requires a legislative provision giving expression to it in order to operate at all.[185] As will be shown in the case law analysis in Chapter 3, this is not the case anymore, and mutual trust has been emancipated from its secondary role as a mere presumption to enable the implementation of mutual recognition instruments. In confining themselves to AFSJ, they also fail to provide a truly holistic conceptualisation of mutual trust, as they claim to do.[186] This disregards mutual trust in the internal market and the newly developed strategy

[181] ibid 500.
[182] Maiani and Migliorini (n 104).
[183] ibid 26.
[184] ibid.
[185] ibid 41–42.
[186] ibid 7.

of what I call sui generis jurisprudence with a quasi-constitutional nature, which would make the disassociation from mutual recognition apparent.

These have been the most recent laudable accounts to conceptualise and position mutual trust in the EU legal structure and architecture. This dissertation builds on many of these works, but has an inherently different aim that is conceptually prior to any such status rankings or agreeing with the aims and functions of the principle. That is, this dissertation aims to inquire conceptually about the nature of the principle and how it relates to the concept it uses in its wording – trust. It builds on the hypothesis that mutual trust is fundamentally problematic, both doctrinally in terms of its object (see further Chapter 3) and conceptually in terms of what kind of a concept trust is, what it entails, and how it can be fostered in the EU (see Chapter 4).

1.4.4. Trust theories in mutual trust literature

Only a few years ago, there were almost no substantial analyses of mutual trust through the theoretical lens of the concept of trust. This tide has started to change, and although initially cross-disciplinary references to trust as richly theorised in other disciplines, such as sociology or philosophy, entered the legal discussions on mutual trust as a contextualising side note, the legal understanding of trust has recently become a subject in its own right.

Christina Eckes deploys some references to Luhmann's theoretical framework of trust in her account of the meaning of mutual trust and her attempt to contextualise its significance in the Union legal order. She singles out and briefly introduces Luhmann's relational and subjective elements of trust, its requirement of familiarity, and its function to reduce complexity, and argues that trust with its subjective element cannot be a normative principle (to obligate someone to trust), but must be limited to a negative obligation not to distrust.[187] She applies the theoretical framework in passing only, and does not elaborate on further conclusions of her interdisciplinary observations. In its brevity, her account leaves many questions to be answered, and merely introduces the possibility of employing existing broad interdisciplinary possibilities in order to fully understand mutual trust in EU law.

In a similar vein, other scholars such as Misoski and Rumenov[188], Willems[189], and most recently von Bogdandy[190] have contextualised their object of research with references to the concept of

[187] Eckes (n 93) 18.
[188] Ilija Rumenov and Boban Misoski, 'The Effectiveness of Mutual Trust in Civil and Criminal Law in the EU' (2017) 1 EU and Comparative Law Issues and Challenges Series 364.
[189] Willems (n 139).
[190] von Bogdandy (n 89).

trust. Misoki and Rumenov do so in order to contextualise mutual trust in civil and criminal cooperation, but only in passing.[191] Auke Willems takes up a slightly more comprehensive analysis in the criminal cooperation field and translates some important characteristics of trust, such as willingness to take risks, interests, differentiation between trust and trustworthiness, and the three-part relation substance of trust.[192] Armin von Bogdandy takes the discussion to his characteristic setting in the broader European rule of law, with an emphasis on trust in institutions and systems, and explores the possibility of construing the European rule of law according to theories of trust.[193]

Thomas Wischmeyer has taken a more thorough approach in his seminal article, asking whether trust can be conceptually created through law in the context of mutual trust and EU judicial cooperation.[194] Importantly, he discusses the dialectical interrelationship between trust and law, as well as the epistemological basis of trust and its conditionality. These are all truly novel insights in legal discussions of mutual trust. He also makes some important normative conclusions based on these insights: namely, that legal rules can indeed promote trust, but that the CJEU's interpretation of mutual trust as a "duty to recognize" is "hegemonic, but self-defeating".[195] Wischmeyer's essay is an important conceptual starting point for the trust-theoretical examination of mutual trust, but (due to the brevity of the format) it is limited to a discussion of the relations between law and trust, and does not reflect on the deeper fundamental questions of how the CJEU's conception of trust lives up to the elaborate theoretical concepts and whether it should. From an EU law perspective, the piece is also confined to civil and criminal justice cooperation cases.

In the most recent contribution, Michael Schwarz has taken mutual trust head-on through trust-theoretical inquiries. He provides a conceptualisation of recognition trust using the conceptual underpinnings of trust theories; sheds light on the interplay of trust, distrust, and the law; and claims that trust figures in the EU as a form of recognition.[196] Although he does an excellent job of both de-idealising trust conceptually and using it as a theoretical framework to scrutinise the functioning of mutual trust in the AFSJ, his discussion falls short of a general theory of mutual trust, as it is still limited to the AFSJ. The principle of mutual trust is not restricted to

[191] Rumenov and Misoski (n 188) 367–368.
[192] Willems (n 139) 235–240.
[193] von Bogdandy (n 89) 692–695.
[194] Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 German Law Journal 339.
[195] ibid 381.
[196] Schwarz (n 128) 1, 18.

that area alone; it has been particularly developed in the internal market domain, and is now reaching its conceptual importance in cases concerning neither the internal market nor the AFSJ.[197] That has caused another fallacy in Schwarz's account of recognition trust: as noted, mutual trust is no longer intrinsically tied with mutual recognition, as will be demonstrated later in Chapter 3. This makes Schwarz's account of recognition trust if not inaccurate, then at least incomplete.

All these conceptualisations, both doctrinal and trust-theoretical, have built a solid foundation on which this dissertation will continue to build. All of them conceptualise and scrutinise mutual trust holistically through a trust-theoretical lens, which is the ultimate aim of this thesis. But all in all, although the themes of both mutual trust and trust are trending in EU law research, there remain notable gaps in the existing literature – mainly a historical and cross-area overview and conceptualisation of mutual trust as a principle beyond the constrained perspectives of individual policy areas or the AFSJ (putting aside the internal market and what I call "sui generis" cases – see Chapter 3), and a comprehensive, analytical, interdisciplinary insight into the concept of trust and the added value of this theoretical lens. These are the absences this dissertation aims to cover. It will build on extant knowledge and accounts of mutual trust, but aims to elaborate the (EU) legal understandings of trust in order to further these accounts.

1.5.RESEARCH QUESTION

The above-stated gap in the literature has led me to the following research question:

> How does the EU principle of mutual trust as conceptualised by the CJEU relate to the concept of trust as reflected in interdisciplinary trust theories and, based on these theories, does it have the potential to enhance actual trust in the EU?

This research question contains three sub-questions and thus requires three distinct steps to answer it.

First, what is the concept of trust in interdisciplinary theories? This will provide a theoretical frame and reference point for the thesis; it will not only inform the final, analytical section, but will also ground the case law analysis and periodisation presented in the thesis, which is focused on the constitutive elements of (mutual) trust. The concept of trust will be presented as understood in main strains of interdisciplinary theoretical literature as the theoretical framework for answering the research question. Lawyers have not theorised trust, thus the need for

[197] See for example: Case C-284/14 *Achmea* ECLI:EU:C:2018:158; Case C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117.

multidisciplinarity. But trust is theoretically conceptualised in many social sciences literatures, including sociology, political sciences, philosophy, cognitive sciences, economics, management, and psychology, although many scholars have contended that trust is such an elusive concept that it is nearly impossible to define coherently.[198] I do not agree with this pessimism; after becoming acquainted with many different concepts of trust from various disciplines, a clear conceptual core emerges. Words and concepts do have meanings and content; conceptual clarity is possible, and it differentiates trust from other border-lining concepts, such as faith, reliance, and confidence. This conceptual core will be elucidated, and it will provide a baseline for my later analysis of the principle of mutual trust.

Second, how is the principle of mutual trust conceptualised by the CJEU? For this purpose, I will present the historic development of the principle of mutual trust as understood and gestated by the CJEU. I will give a four-generational periodisation and characterisation of mutual trust jurisprudence based on the basic theoretical depiction of trust as "A trusts B in doing X". This will illustrate between who and in what the CJEU sees and has seen mutual trust as the main parameters of the principle. The transformations as a principle over time along this analytical axis gives a solid grounding for tracking the essential paradigm shifts the principle has undergone in CJEU jurisprudence. After the periodisation, some doctrinal conclusions will be derived from the case law.

Thirdly, does the concept of mutual trust live up to the concept of trust? This third and final part is analytical. It scrutinises mutual trust as defined and used by the Court in light of the elaborate trust theories presented in the first part. It examines whether there is 'trust' in the principle of mutual trust, i.e. whether a concept of trust is detectable in the principle and what features and parameters of the theoretical concept of trust are fulfilled or frustrated in the functioning of mutual trust. It also asks questions about the principle of mutual trust informed by the theories of trust, i.e. whether trust as a principle is adequate and appropriate as a legal principle with normative effects, or whether it is suitable in delivering the desired goals (among them increased trust between Member States and Member States' authorities). To anticipate possible confusions, this is not done in an empirical manner (I do not possess the methods or even aim to evaluate whether the principle of mutual trust has created "more trust" as a matter of socio-empirical fact[199] on the ground), but in a theoretical manner (whether the way the

[198] See for example: Willems (n 139) 235.
[199] As Luhmann has differentiated that jurisprudence is concerned with norms, sociology is concerned with facts.- Niklas Luhmann, 'Law as a Social System' (1988) 83 Northwestern University Law Review 136, 136.

principle is functioning possesses the theoretical prerequisites necessary for a potential trust-building, conceptually understood).

1.6.METHODOLOGY AND MITIGATION OF OBSTACLES

There are several possible ways to inquire into the principle of mutual trust in a legal thesis. Arguably, I might have chosen the most non-legal of them all: although legal doctrinal and empirical analysis (mostly in the form of case law analysis) constitutes a considerable part, it is all performed through the analytical framework of interdisciplinary trust theories. But I am a firm believer that the most cutting-edge research happens when the boundaries of mono-disciplinarity are crossed. That should be especially so in the social sciences, where the objects of inquiry are inherently social and interconnected, particularly when the target of the research is as truly cross-disciplinary as trust.

But the thesis is also heavily grounded in legal analysis. The most legal analysis is done in the chapter where I analyse mutual trust case law throughout the historical development of CJEU case law and place the principle of mutual trust into the structural and constitutional order of the EU. There I will rely heavily on legal doctrinal case law analysis.

1.6.1. From case law analysis to a doctrinal understanding

The legal methodology of the project will include, first and foremost, legal doctrinal, empirical, and historical methods to understand the principle of mutual trust in EU law. As mutual trust is a judge-made principle, the project focuses on CJEU case law. It aims to do so holistically, i.e. gathering all empirical material from the Court's jurisprudence that has reflected on "mutual trust" or its synonym[200] "mutual confidence" in its reasoning, without confining itself to any subject, policy area, or period. Regardless of whether the Court refers to mutual trust as a principle, the Court's use of mutual trust in its legal argumentation provides an important insight into its conception of trust, whether it is a factual or legal category, and how it can be operationalised.

Secondary sources, e.g. relevant legal literature and legal theories, will be used in the doctrinal analysis following the periodisation and case law systematisation, using theories of EU law and constitutionalism to identify the position of mutual trust in the EU legal architecture and reflect on its function and development in doctrine. Particular emphasis will be put on its

[200] Conceptually trust and confidence are not synonyms, but in the multilingual EU law, they are – see further elaborations on that below in Chapter 3.

interrelationship with the principle of mutual recognition, in order to distinguish it from a mere collateral of it. Theories of mutual recognition as a form of EU governance, which also sometimes reflect briefly on mutual trust as a necessary precondition to recognition regimes, will be used for these purposes.

1.6.2. Why only jurisprudence?

The thesis focuses on CJEU case law, bringing legislative instruments and policy documents only to contextualise and briefly explain the institutional setting or to describe the overall historic development of mutual trust. A legitimate question could be raised: why such a focus on CJEU jurisprudence and a disregard of legislation? The answer is twofold: first, the principle of mutual trust has emerged and been refined by the CJEU, and has only afterwards been reflected in legislation; second, although legislative and policy documents refer to mutual trust, they do not make any legal obligations upon Member States (authorities) to trust each other. This normative trust-obligation is under the sole authority and discretion of the Court.

The theories of CJEU as a motor and vehicle of EU integration or the "judicial construction of Europe"[201] are so well-known that they need no repeating here. But they also hold true with regard to the principle of mutual trust. As I have noted, this is an entirely judge-made and developed principle, functional to certain integrationist aims (see further in Chapter 3); it is not reflected as a legal obligation in primary law, secondary legislation, nor even the evolutionary policy documents that led to the mutual recognition transplant from the internal market to the AFSJ. Mutual trust first appeared in policy documents as a general policy goal, which is understandable and necessary in a cooperative venture such as the EU. But it was the Court that started to treat and deploy mutual trust as a concept, initially as an empirical-factual presumption to support its argumentation in upholding the effectiveness of mutual recognition instruments, then gradually as a self-standing legal principle with normative effects. This was neither predictable nor predicated on any policy or legislative instruments. It was a judicial fiat comparable with those undertaken by the Court in the early days of the Community when establishing the doctrines of primacy and direct effect.

But despite being absent from the treaties, mutual trust as a concept does exist in secondary law instruments as well as policy documents, as illustrated in the historical development section

[201] See e.g: Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

above. The occurrence of mutual trust in secondary legislation merits some further explanation and brief comments.

During this research, I have also systematically investigated all EU secondary law instruments that explicitly refer to mutual trust. For these purposes, I compiled a database with all EU legislative instruments currently in force that contain the phrase "mutual trust" or "mutual confidence".[202] The search gave 121 results, out of which I identified 51 as false positives not pertaining to the principle of mutual trust as something inherently horizontal between Member States (authorities).[203]

What is notable is that out of the 70 relevant acts containing mutual trust, temporally ranging from 1979 until 2020[204], a staggering 51 – thus nearly 73% – of them only referred to mutual trust in the recitals and not in the contents of the legislative act. An example can be given from the 2013 Regulation on mutual recognition of protection measures in civil matters, where recital 4 stipulates:

> "Mutual trust in the administration of justice in the Union and the aim of ensuring ˇ quicker and less costly circulation of protection measures within the Union justify the principle according to which protection measures ordered in one Member State are recognised in all other Member States without any special procedure being required. As a result, a protection measure ordered in one Member State ('Member State of origin') should be treated as if it had been ordered in the Member State where its recognition is sought ('Member State addressed')."[205]

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[202] Search criteria in EUR-lex: *Domain: EU law and related documents, Subdomain: Legislation, Limit to legislation in force: True, Results containing: "mutual trust" In title and text, OR: "mutual confidence" In title and text, Search language: English.*

[203] The false positives could be categorised as: ´International mutual trust` – where mutual trust is referred to in the context of trust between the EU and third or EU and other international organisations; or in the context of concluding international agreements, between the secretariats of the Union and the relevant third country or between UN countries in general; ´Inter-institutional mutual trust` – where mutual trust is referred to when depicting trust between EU institutions or a EU institution and a Member State - these examples include inter-institutional agreements, Ombudsman reports (trust between the Ombudsman and other institutions), rules of procedure (trust between the European Parliament and the Commission); and where the trust was referred to in the context of structural funds allocation being between the beneficiary Member State and the Commission; and ´Individual or private mutual trust` – where mutual trust is referred to either in the context of the individual or broader private-national contexts (usually with regard to the internal market, but not only). The examples include mutual trust within undertakings, between industry and social partners, manufacturers, farmers, railway staff, in the context of competition decisions or legislation (trust between undertakings in price coordination), trust in the context of individual staff, officials or volunteers recruitment or working relations. For exact acts and references see database filed with author.

[204] Note that this historical insight is surely limited due to the search criteria looking at acts only currently in force and thus a further inquiry should be made into the acts not in force anymore. That might also explain why there are no acts from the 1980s and only seven instruments from the 1990s.

[205] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4.

The meaning and significance of preambles has been the object of studies both in constitutional[206] and EU law, where a recent qualitative and quantitative study showed a rise in preambles and recitals containing normative exhortations.[207] Still, preambles and recitals in EU legislation do not traditionally have any autonomous legal effect, but are secondary interpretative tools to help to explain legislative intent and resolve ambiguities; in principle, the CJEU refers to them in a limited manner and does not ascribe power to recitals.[208] Thus, preamble recitals usually have circumscribed operative function. This seems to be different with mutual trust, where a concept mainly contained in legislative recitals has in fact been operationalised by the Court. But the fact remains that the legislator has put the concept in recitals, thus constraining any direct normative effect. As such, it is the Court that has truly operationalised the principle of mutual trust and not the legislator. That is why the object of inquiry is also restricted to CJEU case law and does not focus on legislative instruments.

Even in the acts where mutual trust is situated in the operative section, it is on no occasion a legal obligation to trust or presume EU law compliance or foreclose controls. In all the 16 acts where mutual trust was present in the normative part itself, it is presented as a broad policy goal in order to "develop mutual confidence"[209], "increase mutual trust"[210], "enhance mutual trust"[211], "reinforce mutual confidence"[212], "enhance, improve and develop mutual trust"[213],

[206] See e.g: Justin O Frosini, 'Constitutional Preambles: More than Just a Narration of History Symposium: Constitutional History: Comparative Perspectives' (2017) 2017 University of Illinois Law Review 603; Milton Handler, Brian Leiter and Carole E Handler, 'A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation' (1990) 12 Cardozo Law Review 117.
[207] Maarten den Heijer, Teun van Os van den Abeelen and Antanina Maslyka, 'On the Use and Misuse of Recitals in European Union Law' (University of Amsterdam 2019) Amsterdam Law School Legal Studies Research Paper 2019/31.
[208] Roberto Baratta, 'Complexity of EU Law in the Domestic Implementing Process' (2014) 2 The Theory and Practice of Legislation 293, 302.
[209] Article 32 of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L 169/1.
[210] Article 8(2) of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2014] OJ L 159/11.
[211] Article 4(2)(c) of Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 [2013] OJ L 354/62 and Article 4(2)(d) of Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 [2013] OJ L 354/73.
[212] Article 3(f) of Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice [2007] OJ L 257/16.
[213] Article 3(f) and Article 2(1)(c) and (d) of Council Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme Criminal Justice [2007] OJ L 58/13.

"build up mutual trust"[214], or "build mutual confidence"[215]. Even the first legislative instrument from 1979 discusses "improving trading conditions on the basis of increased mutual trust".[216] So in all the acts where mutual trust appears in the operative section, the concept of trust is employed not in its normative, obligatory manner, but by reference to general policy goals, as an aspirational aim. This further negates the claim that mutual trust could be somehow legislation driven.

Only five acts altogether refer to mutual trust as a principle.[217] A recent example of a reference to mutual trust as a principle was in the recent reviewed regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and international child abduction, in which recital 55 states that:

> "The recognition and enforcement of decisions, authentic instruments and agreements given in a Member State should be based on the principle of mutual trust. Therefore the grounds for non-recognition should be kept to the minimum in the light of the underlying aim of this Regulation which is to facilitate recognition and enforcement and to effectively protect the best interests of the child."[218]

Even more curiously, besides being dominated by preamble referrals and worded as broad policy goals, mutual trust as defined by the Court in *Opinion 2/13* as an EU law compliance presumption is only reflected in two legislative instruments: the European Investigation Order

[214] Recommendation of the European Parliament and of the Council of 15 February 2006 on further European cooperation in quality assurance in higher education [2006] OJ L 64/60, p 6 and Council Resolution of 29 November 1996 on the drawing up of police/customs agreements in the fight against drugs [1996] OJ L 375/1, p 2.

[215] Article 3(b) of Council Decision 93/588/EEC of 29 October 1993 on the adoption of a programme of Community action on the subject of the vocational training of indirect taxation officials [1993] OJ L 280/27.

[216] Information from the Commission - Multiannual programme for the attainment of the customs union [1979] OJ L 84/2, p 4.

[217] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1, recital 55; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1, recital 21; Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2014] OJ L 159/11, recital 43; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19, recital 65; Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [2016] OJ L 200/1, recital 3.

[218] Recital 55 of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1.

Directive, issued shortly after the rendering of *Opinion 2/13* in 2014,[219] and most recently in the 2018 regulation on the mutual recognition of freezing orders and confiscation orders.[220] It might thus be said that legislators have been rather reluctant to "legalise" the definition given to mutual trust by the CJEU in 2014, and scarcely even refer to mutual trust as a principle. As a general rule, they have continued to refer to it as a general policy goal worth enhancing and pursuing and situate it in the vast majority of the cases in the preambles of legislative acts.

One can derive from this that legislation has played a marginal part in the development and conceptualisation of mutual trust as a legal principle. This supports and justifies the focus of this dissertation strictly on CJEU case law, and the choice not to include legislative and policy instruments beyond mere contextualisation or the presentation of history and context as illustrated in this introductory chapter.

1.6.3. Conceptual analysis – the legal and the extra-legal

Law involves language organised into concepts.[221] Thus, besides being more broadly the building blocks of thought, concepts are thus building blocks of legal doctrine.[222] Conceptualisation involves the process of formulating a mental construct at a particular level of abstraction, which is usually done by definitions, necessary or necessary and sufficient attributes, or family resemblance.[223] In turn, conceptual analysis is an exercise in making explicit or laying bare what is already implicit in one's understanding of a given concept.[224] And while conceptual analysis makes explicit the already implicit, constructive conceptual analysis also attempts to correct, revise, or improve on what might be mistaken, distorted, or

[219] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1, preamble recital 19 states: "The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable."

[220] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1, preamble recital 34 states: "The creation of an area of freedom, security and justice within the Union is based on mutual trust and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, in exceptional situations, where there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of a freezing order or confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, the executing authority should be able to decide not to recognise and execute the order concerned."

[221] Tom Ginsburg and Nicholas Stephanopoulos, 'The Concepts of Law' (2017) 84 University of Chicago Law Review 147, 148.

[222] ibid 147.

[223] ibid 150–151.

[224] Michael Giudice, 'Conceptual Analysis, Legal Pluralism, and EU Law' (2015) 6 Transnational Legal Theory 586, 605, see also definitions by F. Jackson and C. McGinn and footnotes 49 and 50.

parochial in the understanding of a concept.[225] This can be done both by testing against observable social reality[226] or by means of a compatibility analysis between concepts.[227]

The method ultimately used in both the doctrinal and the interdisciplinary theoretical sections of this thesis is conceptual analysis, as well as its constructive facet. This method is well-known and highly developed not only in philosophy[228] and social sciences[229], but in legal studies.[230] Philosophers Gilles Deleuze and Felix Guattari famously saw philosophy itself as concept creation.[231] But it is not only philosophy that creates concepts; other disciplines do the same in their respective fields of study. The question is: do and should they pertain to or at least be translatable to each other in their multiplicity of disciplines and approaches? The constructive conceptual analysts and idealists will answer in the affirmative, as the conceptual system of a person or even society should ideally function at least in a minimally coherent manner in order to fulfil its communicative role.

The conceptual analysis will be provided firstly for the concept of trust in social sciences and secondly regarding the concept of mutual trust in EU law. The first is descriptive in its character, as it is an attempt to introduce and translate the conceptual richness of trust as a phenomenon to lawyers. There are plentiful trust theories in the social sciences, which I present, systematise, and epitomise for the purposes of a theoretical framework of this dissertation and for a better understanding of mutual trust. The second exercise of conceptual analysis is more ingrained in what legal scholars do on a day-to-day basis. It is the legal-doctrinal, empirical quest to construct the Court's understanding of mutual trust throughout its jurisprudential history and various subject areas. This has not been done systematically in EU legal scholarship, as case law analysis is usually limited to the most precedential well-known cases or predetermined subject-fields, and focuses not on the modalities of mutual trust but on its limits (and those of mutual recognition). I should note also that the object of study is, to be precise, the concept of

[225] ibid 607.
[226] ibid.
[227] ibid 606; Colin McGinn, *Truth by Analysis: Games, Names, and Philosophy* (Oxford University Press 2011) 99–100.
[228] Christopher Peacocke, *A Study of Concepts* (MIT Press 1992); James Higginbotham, 'Conceptual Competence' (1998) 9 Philosophical Issues 149; Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford University Press 2000); Jeffrey C King, 'Philosophical and Conceptual Analysis' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology*, vol 1 (Oxford University Press 2016).
[229] Gary Goertz, *Social Science Concepts: A User's Guide* (Princeton University Press 2006); David Collier and John Gerring (eds), *Concepts and Methods in Social Science: Giovanni Sartori and His Legacy* (Routledge 2008).
[230] Jaap C Hage and Dietmar von der Pfordten (eds), *Concepts in Law* (Springer 2009); Ginsburg and Stephanopoulos (n 221); Giudice (n 224).
[231] Gilles Deleuze and others, *What Is Philosophy?* (Verso 1994) 5.

mutual trust, not the principle per se. As mutual trust has transformed from "a fragile reflexive social situation"[232] to an actual principle of law, then including this social situation, not labelled as a principle but rather as a concept of mutual trust, helps to track this transformation and characterise it. It also provides an insight into how the Court has understood trust specifically throughout its case law history. Then the two will be matched – i.e. illustratively put on top of another to see which parts of the latter fit to the mould of the former. To put it bluntly, analysing the principle of mutual trust as developed by the Court will give an idea of the Court's conception of trust in its jurisprudence. This conception is then evaluated in light of the concept of trust itself.

The concept-conception differentiation is an established theme in analytic philosophy, mostly in the philosophy of language. J. Higginbotham distinguishes between one's concept, one's conception of a concept, and one's conscious view of it.[233] The differentiation also underwrites the distinction between concept possession and concept mastery.[234] Conceptions are usually implicit, and concept possession does not imply an adequate conception of a concept – an individual's conception of a meaning of a word can be partial or mistaken.[235] As only conceptions which are adequate or properly grounded amount to knowledge and concept mastery, analogously, the inadequacy of a person's conception of a concept will manifest in failures of knowledge or misapplication of the concept.[236]

This can translate directly to the trust-mutual trust comparison. Both are separate concepts developed by different societal subsystems (see also the next subsection). But the word deployed by the CJEU – trust – coincides not only with the concept as elaborated in philosophy, sociology, and other disciplines, but also as used in ordinary language. In constructing a principle or, prior to that, making references to the concept of mutual trust, the judges of the CJEU must have had some conception of what trust is and what it means, entails, and implies. The legal and the extra-legal are associated by the communicative language they use, and that language should not diverge to an extent that makes it impossible for the law to fulfil its societal function.[237] Additionally, as with concept-possession and concept-mastery, the mere possession

[232] Cramér (n 137) 58.
[233] Higginbotham (n 228) 150.
[234] Maite Ezcurdia, 'The Concept-Conception Distinction' (1998) 9 Philosophical Issues 187, 188.
[235] Higginbotham (n 228) 150–151, 154.
[236] ibid 149, 157.
[237] As Luhmann puts it: Law has to fit the social limitations of possible communication, and therefore, use language correctly, or at least comprehensibly. - Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' (European University Institute 1986) EUI Working Paper 86/264 10.

or use of a concept, without an informed understanding of its content, can cause failures, errors, and misapplications. Most of all, it can lead to frictions at the communicative level, which are already present in the realm of mutual trust, as so many scholars, experts, and even national courts ask the CJEU: how can there be an obligation to trust if in reality there is no trust? Herein lies also the real-life factual need to somehow unify, bridge, or at least have an informed understanding of concepts – implementation problems are emerging more frequently on the level of practice in situations where concepts are misconceived. This resonates with the prevalent understanding that strong (comprehensible, operational, coherent) principles make better, more consistent practice.

1.6.4. Should judges care about trust?

The main criticism of using interdisciplinary trust theories to explain and investigate mutual trust comes from a purely legal-formalist perspective: why should a philosophical-sociological concept of trust be of any relevance or importance to a legal principle that happens to use the word? Should extra-legal concepts have any bearing on legal concepts? Do sociology and philosophy matter for law? Do judges know philosophy? Should they? Putting aside the intrinsic value of philosophical self-awareness[238], I claim that they should at least be attentive to the insights supplied by other disciplines and not demean the ordinary and conceptual meanings of words and terms. Judges, although they are free to develop their own concepts, tests, and standards (within the bounds set by the legislator), are still constrained and conditioned by language and the common meanings of words. And while legal actors remain ultimately in charge and responsible for the contours and contents of legal concepts, they have the means to listen and are influenced by extra-legal sources in further developing or reconsidering already-developed concepts.

This has something to do with what concept of law (note the difference from concepts of law[239]), i.e. legal theory, one employs.

The concept of law elaborated in this thesis is primarily inspired by Luhmann's system-theoretic view of law as a social system, a differentiated functional system within society, and how it interrelates with other parts of social reality.[240] Luhmann's account of law's operative closure and cognitive openness is well-known. His system-theoretical thesis argues that law is

[238] Giudice (n 224) 602.
[239] See also for a discussion on this difference: Ginsburg and Stephanopoulos (n 221) 149.
[240] Luhmann (n 170) 138; see generally: Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert and others eds, Oxford University Press 2004).

a self-referential, autopoietic system, meaning that law is produced by law on law's own internal terms.[241] This operational closure is about autonomy: the selection of communications that belong to the system is internal to the system itself.[242] Although politics and sciences (including sociology and philosophy, as well as the concept of trust as conceptualised therein) operate alongside law, law may respond to them (they are from law's internal perspective its environment), but only by altering its selections of what it translates and transports into law as established by the legal system itself.[243]

But Luhmann also stresses that despite operational closure, the legal system is still a part of the overall social system, and is linked to it by means of communication that can never be so abstract as to be completely removed from normal, comprehensible meaning:

> "This means not only that the legal system fulfils a function for society – that it "serves" society – but also that the legal system participates in society's construction of reality, so that in the law, as everywhere in society, the ordinary meanings of words (of names, numbers, designations for objects and actions, etc) can, and must, be presupposed."[244]

This presupposition implies that law has to fit into the social limitations on possible communication, and use language correctly, or at least comprehensibly.[245] As the law participates in society's already-achieved construction of reality, without having to work it out itself, it makes use of language and more or less consistent use of words inside and outside the legal system.[246] In the illustrative example given by Luhmann: Mr Miller must be Mr Miller both in the legal system and in society for the law to properly fulfil its role. But should trust similarly be trust (conceptually understood)? Despite its much more abstract and elusive character, I claim that it should. And perhaps judges could and should be more like philosophers in the sense of employing words that have developed sophisticated conceptual meanings and connotations.

But what if judges do use words in a way that diverges significantly from their conceptual meanings? According to systems theory, it is for the law itself to make corrections and to develop or rethink already elaborated doctrines and legal concepts on its own terms. This can be done using what Luhmann calls cognitive openness to the environment and structural

[241] Luhmann, 'Law as a Social System' (n 199) 146–147; Luhmann, *Law as a Social System* (n 240) 7–8.
[242] Luhmann, *Law as a Social System* (n 240) 8.
[243] ibid.
[244] Luhmann, 'Law as a Social System' (n 199) 138.
[245] Luhmann, 'Closure and Openness: On Reality in the World of Law' (n 237) 10.
[246] ibid 11.

coupling. Luhmann has described the legal system as working under normative closure and cognitive openness, the latter of which is important for the evolution of law in that it is prepared to learn from the environment.[247] Everything extra-legal is the environment for the legal system, which has bearing on the system only if the system itself translates and operationalises it internally. If normative closure is characterised by internal self-reference and developed legal concepts, then cognitive openness relates to external reference through information and interests.[248] Through the structural coupling of system and environment, information from the environment (and other systems) can enter the legal system – but still on the legal system's terms, i.e. the legal validity of claims and decisions can only derive from the legal system itself and not from external sources, such as religion, politics, economy, sociology, and the like.[249] And if the legal system already contains references to such external sources, then these references are already legal norms.[250]

Here lies the difficulty in critiquing the principle of mutual trust from an extra-legal trust-theoretical perspective. Mutual trust is already legalised by the CJEU. According to the system-theoretical understanding of the law, the Court's use of the word and concept of trust can be evaluated, criticised, and communicated externally in hopes that the Court "will listen", i.e. change its doctrine as reflected in its practice. However, such input will arrive to the Court on a case-by-case basis, where it has to balance and decide between the normative stability and future predictability of the law as contained in already-developed legal concepts on the one hand, and the particularities and interests of the issue and parties at hand that might have a problematic relationship with the existing concept on the other. This has repeatedly happened in the context of mutual trust in particular. An example can be found in the recent *LM* case, in which the Irish court issuing the preliminary ruling specifically asked how it could still have trust, as per the principle of mutual trust, in the Polish judiciary, in light of recent reforms flagged as problematic by the EU itself.[251] This problem has its roots in the friction between the self-referentiality of the law and legal concepts and the external-referentiality of social reality and interests described by Luhmann. And as (mutual) trust has already been legalised as a concept, problems raised by theory, social reality, and various actors with regard to the term's

[247] Niklas Luhmann, 'Legal Argumentation: An Analysis of Its Form' (1995) 58 The Modern Law Review 285, 296.
[248] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo Law Review 1419, 1424, 1430.
[249] Luhmann, 'Closure and Openness: On Reality in the World of Law' (n 237) 20.
[250] ibid 21.
[251] Case C-216/18 PPU *LM*, ECLI:EU:C:2018:586.

conceptualisation and legalisation threaten the stability and persistence of the existing concept and principle. Change is nevertheless possible; modification of legal concepts and evolution of case law do happen.

There must be, of course, paramount and clear reasons for changing a legal concept, which manifest either in tensions with social reality and interests or in the law's internal inconsistency and/or incoherence. This thesis aims to unveil some of these tensions, including conceptual inconsistencies deriving from extra-legal subsystems, which still share the same language as means of communication. But the ultimate power to change doctrine and jurisprudence of course lies with the Court itself, as it is for the legal system to decide autonomously what it will translate into law from external sources. In that process, it faces years of developed case law, of which mutual trust as a legal concept has been a part, although it has only crystallized as a principle with clear normative content in recent years. However, this is always the case when criticising extant judicial or even legislative concepts. Therefore, it remains the task of academia.

Thus, the thesis' review of the concept of mutual trust as conceptualised by the CJEU in light of the concept of trust as conceptualised by interdisciplinary theories follows Luhmann's concept of law as a social system. The methodological claim that different social sciences should rely on and relate more to each other is additionally supported by the observation that it is difficult to differentiate meaningfully between disciplines in the social sciences (different sub-systems in a Luhmannian understanding). This is especially so with regard to a concept such as trust, as it truly permeates the social condition, being a concept closely tied with any voluntary cooperative venture – from interpersonal, intimate relationships, to organisations, governments, and institutions, to abstractions such as money or reputation, trust genuinely predicates the social condition. This is reflected in the numerous disciplines that address it as a concept – not only the most overt, such as sociology and philosophy, but also political sciences, history, economics, cognitive and behavioural sciences, psychology, and organisational and management studies.

1.7.SCOPE AND STRUCTURE OF THE THESIS

As the aim of this thesis is ambitious – to reconsider the appropriateness of the principle of mutual trust essentially and conceptually from a trust-theoretical perspective – its scope is also ample. First, a robust theoretical framework of the concept of trust will be provided. Then mutual trust as conceptualised by the CJEU across policy eras will be examined, together with

systematisation and periodisation. The historical scope will not be limited to any given timeframe, but rather will present a historical overview of the genealogy of the principle. The analytical section will bring the two together and scrutinise mutual trust through a trust-theoretical lens.

In order to do that, the thesis is structured as follows.

The following Chapter 2 presents the underlying theoretical framework: cross-policy area conceptual ideas about trust. It does so by presenting the conceptual core of the phenomena and its main facets, definitions, implications, and delineations. It uses sociology and philosophy as the main disciplinary reference points, but where relevant, it will also bring insights from political sciences, history, and economics.

Chapter 3 goes on to track the concept of mutual trust and its development throughout the CJEU case law history. It distinguishes four main periods – what I call generations – of trust based on the trust-theoretical representation of the concept as "A trusts B in doing X" by tracing the definition of "X" in all cases and presenting both the mundane patterns and the evolutionary paradigm shifts in the activities at which mutual trust has been directed. It also unveils the main conceptions and understandings of mutual trust up to date, their doctrinal, practical and philosophical significances.

Chapter 4 presents the main analytical chapter of the thesis by deconstructing mutual trust as conceived and built by the Court in light of the concept of trust as theorised across various disciplines. It will present both the convergences and tensions of the two concepts (the concept of mutual trust and the concept of trust) when compared and highlights the most problematic issues regarding the Court's conception and use of trust. It will answer the question of whether the principle of mutual trust actually has anything to do with trust as a concept and whether it entails any theoretical potential to foster trust as a matter of social and empirical reality in the EU.

The final chapter, Chapter 5, will summarise the main findings and conclusions of the thesis, present further avenues of research, and propose normative suggestions for further conceptually coherent and meaningful jurisprudential development of the principle of mutual trust in EU law.

(II) STARTING WITH TRUST – THE THEORETICAL FRAMING

2.1.TRUST AS PERMEATING THE SOCIAL CONDITION

Before inquiring into the function and nature of mutual trust in EU law, trust as a concept needs some explanation. The question is what is trust? and whether it is something easily definable and identifiable merits attention. This is the aim of this chapter; although trust is a complex, multidimensional, and in many ways elusive[252] concept, it is possible to pin down its main parameters and features without doing injustice to different disciplinary accounts. There is a conceptual core of the phenomenology of trust which differentiates it from other, border-lining phenomena.

Trust is a concept that is somehow basic to human interactions and the social condition. It predominates our relationships, be they personal, professional, or societal. Some social and political scientists have characterized it as a key ingredient for the flourishing of societies – a kind of social capital.[253] The early sociologist George Simmel emphasised that "without the general trust that people have in each other, society itself would disintegrate"[254] and that trust is "one of the most important synthetic forces within society"[255]. Another notable social (and trust) theorist, Niklas Luhmann, described trust as "a basic fact of social life", a complete absence of which would prevent a person from even getting up in the morning.[256] Trust has been characterised as a protective mechanism that prevents chaos and disorder by providing feelings of safety, certainty, and familiarity.[257]

As trust is inherently social – penetrating diverse social realities and various relationships – its conceptualisation has also permeated the social sciences, meriting intense attention from philosophers, psychologists, sociologists, political scientists, economists, and historians, among others. This has led to numerous context- and method-contingent approaches. Economists study trust mostly to model and rationalise cooperative behaviour, which reduces transaction costs (the costs of monitoring and controls). Psychological and cognitive scientists inquire into the

[252] Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (B Blackwell 1988) i.
[253] See, e.g: James S Coleman, *Foundations of Social Theory* (Belknap Press of Harvard University Press 1994); Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Penguin Books 1995); Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).
[254] Georg Simmel and others, *The Philosophy of Money* (2nd ed., Routledge 1990) 178.
[255] Georg Simmel, *The Sociology of Georg Simmel* (Kurt H Wolff ed, Free Press; Collier-Macmillan 1950) 318.
[256] Niklas Luhmann, *Trust and Power* (Christian Morgner and Michael King eds, English revised ed, Polity Press 2017) 5.
[257] Barbara A Misztal, 'Normality and Trust in Goffman's Theory of Interaction Order' (2001) 19 Sociological Theory 312, 312.

cognitive and emotional processes at play in the psychological experience of trust. Sociologists turn their attention to the almost taken-for-granted character of trust[258], which predicates social order and cohesion in the modern world of increasing risks and complexities. Normative philosophers emphasise the moral and evaluative questions of trust – who and when to trust, what is its value, and how it alters conditions and structures of power, justice, and knowledge relationships. Political scientists address an extensive range of topics, but mostly investigate broader notions of trust in and between states and institutions, citizens' trust, and issues of legitimacy, to name a few.

Against this backdrop, it is curious that lawyers have not yet turned their sharpened conceptual focus and apparatus on trust, with the exception of a limited number of more theoretical questions with their roots mostly in common law (more specifically private law theory). These questions tend to grapple with the paradoxical relationship between trust and law and whether one supports or precludes the other – i.e. whether a contract is a manifestation of presence or an absence of trust between contracting parties, and whether it in turn makes trust flourish or forestalls it[259]; the behavioural foundations of corporate law[260]; or the specific context of trust law[261]. Legal theory has had little to say about the concept of trust, as trust has not been a concept generalised through law in a manner comparable with ideas such as intention, causation, responsibility, or fault.[262] This may have changed, at least on the EU level, with the "legalisation" of mutual trust. But other questions about the relation between trust and control could be equally important to law as they are, for example, to management and organisational studies.[263] Not having turned their cutting-edge focus on trust or the relationship between trust and law, lawyers still have yet to discover the broader interdisciplinary opportunities that trust research entails and the topics and potentials it might bring.

Despite the relative absence of lawyers in these trust conversations or even the lack of conversations themselves for the understanding of law, it remains the case that very many different disciplines have been concerned with trust research. Such a multiplicity can and does lead to slight divergences in conceptualisation, as seen in the next subsection. But does

[258] Guido Möllering, *Trust: Reason, Routine, Reflexivity* (First edition, Elsevier 2006) 51.
[259] See two diametrically opposing opinions on that: Frank B Cross, 'Law and Trust' (2005) 93 Georgetown Law Journal; Larry E Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553.
[260] Margaret M Blair and Lynn A Stout, 'Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law' (2001) 149 University of Pennsylvania Law Review 1735.
[261] Roger Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46 Current Legal Problems 75.
[262] ibid 76.
[263] Ana Cristina Costa and Katinka Bijlsma-Frankema, 'Trust and Control Interrelations: New Perspectives on the Trust—Control Nexus' (2007) 32 Group & Organization Management 392.

interdisciplinary talk about trust then make sense at all? I contend that it does, as the conceptual core does not vary to such a great degree, and as G. Möllering has stressed that trust as a phenomenon has an inherent "connectability", including a huge potential for interdisciplinarity, especially for social scientists,[264] but not necessarily being limited to them. Thus, although different disciplinary emphasis might lead to slightly different accentuations and approaches, a common conceptual language allows social scientists to speak with each other about overlapping and interconnected phenomena. This too is embedded in the maxim that words and terms do have meanings.

2.1.1. Different levels of analysis resulting in varying accentuations

The different disciplinary approaches are characterised by different levels of analysis in trust research. Accordingly, micro-, meso-, and macro-levels of trust analysis can be distinguished, observable both in empirical and theoretical work.[265] The micro-level of trust research refers to individuals and interpersonal trust relationships; the meso-level to associations ranging from small groups such as families, work groups, teams, clubs, clans, and organizations to entire subsystems of societies such as local communities, industrial sectors, or professions; and at the macro end of the scale, there are studies addressing trust at the level of broad institutional frameworks or entire economies and societies, even international or global systems.[266] This difference in the level of analysis also corresponds fairly well with different disciplines immersed in trust studies: moral philosophers, psychologists, and cognitive scientists inquire into interpersonal and dispositional aspects of trust (i.e. trust between individuals and the individual presuppositions and characteristics of trust); economists and management studies also pay attention to trust relationships in and between groups and organizations; while sociologists and political scientists are mostly interested in trust more broadly in and between collective units: society, institutions, states, and international systems.

This distinction in levels of analysis has gotten more dynamic and blurred in contemporary trust research as increasing number of scholars admit that trust is such a multi-layered and dynamic concept that one of its remarkable characteristics is in fact its potential to permeate different levels of interaction and cooperation, have spill over effects and connect the micro and macro

[264] Möllering (n 258) 5.
[265] ibid 130–131; Stephen Alexander Rompf, *Trust and Rationality: An Integrative Framework for Trust Research* (Springer 2015) 15–16.
[266] Möllering (n 258) 130–131. A similar distinction between micro-, meso- and macrolevel is found in the recent monograph of S. A. Rompf with the only distinction that he allocates the interpersonal, what he calls dyadic relationships also to the mesoanalytical level and leaves only the microanalysis of the individual level of trust generation, maintenance and disruption. See: Rompf (n 265) 15–16.

levels of individual relationships and social cooperation. To that end, many scholars have stressed the interconnectedness of the micro- and macro-levels, as per James Coleman: "the purposive actions of individual actors, deciding to place or withdraw trust or to break or keep trust; the micro-to-macro transition through which these actions combine to bring about behaviour of the system; and the macro-to-micro transition through which some state of the system modifies the decisions of individual actors to place trust and to be trustworthy".[267] In other words, interpersonal trust may affect and lend to institutional and societal trust and vice versa. Lewis and Weigert have also stressed on a methodological note that thus trust cannot be fully understood and studied exclusively either on a purely psychological or on a collective level, because it so thoroughly permeates both.[268] Thus, interdisciplinary and holistic accounts add to the conceptual understanding of trust as a phenomenon, as they help to draw a more complete picture of it.

But the differentiation of levels of analysis and their corresponding disciplinary manifestations give a good overview into the development of trust research and its sophistication as a concept. Thus, they merit attention. These different approaches are cognitive rational choice approaches, moral-affective approaches, and general-systemic (sociological) approaches to trust research. They differ mainly in their understanding of the necessary components or underlying rationale or basis of trust; they do not necessarily deny each other's contributions, but have a different fundamental emphasis.

2.1.1.1. The rational-cognitive approaches

These approaches mostly pertain to interpersonal trust as studied in economics and behavioural and cognitive sciences, but also extend to sociology and political studies. In simplistic terms, the definition of trust according to these accounts is cognitive risk assessment, an act based on cost-benefit analysis when asking the question: am I justified in relying on this person or organisation?[269] The purely rational self-interest account of trust is knowledge-based in that: you trust someone if you have adequate reason to believe it will be in that person's interest to be trustworthy in the relevant way at the relevant time.[270] Economic and rational choice approaches should be, strictly speaking, differentiated, as the conceptualisation of trust in economic theories has mostly focused on avoiding negative outcomes – opportunistic behaviour

[267] Coleman (n 253) 175.
[268] J David Lewis and Andrew Weigert, 'Trust as a Social Reality' (1985) 63 Social Forces 20, 974.
[269] Cross (n 259) 1465–1466.
[270] Jean Ensminger, 'Reputations, Trust, and the Principal Agent Problem' in Karen S Cook (ed), *Trust in society* (Russell Sage Foundation 2001) 188–189.

by the trustee – and emphasised incentives, utility maximising, and optimisation,[271] while rational choice theorists theorise trust according to its cognitive basis – the perceived trustworthiness of the trustee in the eyes of the trustor.[272] But economists and rational choice theorists fundamentally agree on calculativeness as the main mechanism in explaining trusting behaviour.[273] Trust thus implies calculativeness, as it is subject to rational calculation and reasoning.[274] Whenever they see that trust has a non-calculative meaning, they tend to disregard it as pertaining only to close personal relationships (and therefore leave it out of their conceptualisations – one weakness of their accounts).[275] This approach also conditions both the trustor and trustee to be directed towards the aim of satisfying and maximising their interests.[276] Rational choice theory of trust portrays trust as justifiable, meaning that one's placing of trust should be rationally un-criticisable. One is justified in trusting if one has good grounds for believing that the other person is trustworthy.

This rational choice approach is not only prevalent among (behavioural) economists on the individual level, who have conducted multiple trust-games and experiments, but has also been extended to the sociology and social sciences literature, in the works of most notably James Coleman and Russel Hardin.[277] As referenced earlier, James Coleman saw trust as a typical example of transitions between micro-level individual action and macro-level states of the system.[278] He construed trust on the basis of potential gains and losses from another person's behaviour, assuming rationality on behalf of both the trustor and trustee, and saw trust as purposive behaviour aiming at the maximisation of utility under risk.[279]

Russel Hardin elaborates on these rational choice accounts in what he has termed the "encapsulated interests theory," wherein he endorses the rational choice theory; his concept of trust is rationally accounted for when the trustor perceives that the trustee realises that his own interest encapsulates the interests of the trustor, who learns to trust by drawing on his relevant past experience with the trustee or with relevant other people, and by making and continuously

[271] Möllering (n 258) 24–25.
[272] ibid 22.
[273] ibid 26.
[274] Oliver E Williamson, 'Calculativeness, Trust, and Economic Organization' (1993) 36 The Journal of Law & Economics 453.
[275] Möllering (n 258) 26.
[276] Coleman (n 253) 96.
[277] Coleman (n 253); Russell Hardin, *Trust* (Polity 2006); Russell Hardin, 'The Street-Level Epistemology of Trust' (1993) 21 Politics & Society 505; Russell Hardin, *Trust and Trustworthiness* (Russell Sage Foundation 2002). See discussion in: Barbara A Misztal, *Trust in Modern Societies: The Search for the Bases of Social Order* (Polity Press ; Blackwell 1996) 78 et seq.
[278] Coleman (n 253) 175. See discussions in: Misztal (n 277) 79; Möllering (n 258) 15 et seq.
[279] Misztal (n 277) 79.

updating an estimate of the trustee's trustworthiness.[280] This encapsulation of interests theory ultimately means that one trusts the other because your interest encapsulates mine, which means that you have an interest in fulfilling my trust.[281] It again evolves around rational, optimising people and their egoistic self-interests, not taking into account broader interests, reciprocation not driven by self-interest, moral norms, altruism, etc.

Although conceptually incomplete, as shown in the next subsection, the rational choice accounts of trust epitomise the basics of trust as an expectation of other's behaviour and build an important epistemological basis for the concept to come about – the importance of knowledge, reputation, and evidence for creating trust and beliefs about the trustworthiness of the trustee. But such purely rational choice approaches ultimately run into a paradox: although there may be an element of reason in all trust, trust as such would not be required if it could be solely and wholly explained by reason.[282] So new approaches were needed.

2.1.1.2. The moral-affective approaches

These new approaches found their rooting in the emotional and moral grounding of trust relationships. They are epitomised by the acknowledgment that one not only "thinks" trust, but also "feels" trust.[283] These approaches are concerned mostly with interpersonal trust as studied mainly in psychology and philosophy. If rational-cognitive approaches disregarded close personal relationships, moral-affective approaches, by contrast, often over-emphasise them. It has to do with the moralisation of trust and associating it with emotionally loaded non-rational states and feelings. Like the economic and rational choice approaches, the moralistic and emotional approaches should be kept distinct, as the first emphasises the moral and ethical considerations that affect both the trustor and the trustee while the second introduces the impact of emotions and affective bonds and feelings in the process of placing trust. But they are similar in that both of them surpass calculations of pure rationality and self-interest.

These conceptualisations start from the apparent shortcomings of the rational choice approaches, in that trust cannot be fully explained by rational calculation in and between self-interested individuals. This observation was born out of the controversy and limit of rationality- and prediction-based approaches to trust in that sometimes trust seems utterly irrational, the reality of bounded rationality or the empirical reflections that sometimes people act

[280] Hardin, *Trust* (n 277) 18–20; Hardin, 'The Street-Level Epistemology of Trust' (n 277).
[281] Möllering (n 258) 21.
[282] ibid 10.
[283] Rompf (n 265) 56.

altruistically and not according to what could be modelled or predicted as their strict self-interest. The observation is also built on the critique that rational-economic approaches equate trust with cooperation and that, by requiring a positive expected value from trust, they explain trust away – as we have noted, if one trusts only because there are incentives for the other to be trustworthy and potential gains for both, then the inherent vulnerability that gives trust its very meaning is removed.[284] Trust goes beyond reason and may be explained in terms outside our normal understandings of individual-based, self-interested, utility-maximising rationality. While the cognitive dimension and epistemological foundations of trust are important, they cannot represent the entirety of trust: otherwise, trust would be a mere rational reliance or calculation, and would not explain why we sometimes act in ways that cognitive risk assessment cannot explain.[285] For example, in various game-theoretical experiments, behavioural economists have shown that people are often inclined to trust one another even when doing so is not the rational strategy.[286]

This has given way to emphasising the emotional and moral, both characterised as non-cognitive additional dimensions of trust.

These approaches can be traced back to one of the first philosophers to think deeply about trust specifically: Annette Baier. Her seminal essay "Trust and Antitrust" offers a first moral-philosophical insight into the premises and implications of trust in the interpersonal realm. Her concept of trust defines trust as the reliance on another person's goodwill towards oneself.[287] In that concept, Baier, as many later authors, associates trust with reliance, risks, and vulnerability. She recognizes both the benefits and risks of trusting and explains the risks associated with the possibility that the trustee is in the position to harm the trustor, as she depends on the trustee's goodwill towards her.[288] As trust is accepted vulnerability to another's possible but not expected ill will or lack of goodwill, the special vulnerability involved in trust is vulnerability to not-yet-noticed harm or disguised ill will.[289] One has to note that the emphasis on "goodwill" is a moralised notion – it requires some kind of benevolence and an emotional and moral stance of the trustee towards the trustor.

[284] Möllering (n 258) 43.
[285] See discussion in: Kevin Werbach, *The Blockchain and the New Architecture of Trust* (The MIT Press 2018) 21.
[286] Harvey S James Jr., 'The Trust Paradox: A Survey of Economic Inquiries into the Nature of Trust and Trustworthiness' (2002) 47 Journal of Economic Behavior & Organization 291.
[287] Annette Baier, 'Trust and Antitrust' (1986) 96 Ethics 231, 234.
[288] ibid 235.
[289] ibid 239.

As trust involves risks and vulnerability, Baier argues that reasonable trust requires good grounds for confidence in another's goodwill, or at least the absence of good grounds for expecting their ill will or indifference.[290] This is the recurring rational basis of trust, which she still shares with rational choice approaches; however, she sees this basis as more moral and not necessarily driven by self-interest. She recognises a variety of grounds for such an ability to trust, such as the common good, the things the trustee values or cares about, awareness of what is customary, promises, and past experience.[291] This goes against the rational self-interest-driven basis for trust, as the normative evaluation of the moral qualities of the trustee sometimes requires the trustee to put the interests of the trustor before her own; as such, the trustee's fundamental motivation is not the pursuit of self-interest.[292] Thus, these moral-normative accounts of trust assume the motivation for trustworthiness to be rooted in the trustee's compliance to moral principles, values, or other social norms.[293]

The emotional-affective approach to trust agrees that trust has a cognitive basis, but that the cognitive in itself is not sufficient. Karen Jones' work epitomises this affective approach, which is not non-rational but accounts for a missing element. She has conceptualised affective trust as an optimistic view of others that is bounded in emotion, as for her to trust "is to have an attitude of optimism that the goodwill and competence of another will extend to cover the domain of our interaction with her".[294] Through this optimistic lens, trust shapes perceptions and interpretations both of others' behaviour and of the reasons we have and justify to ourselves.[295] K. Jones stresses that she prefers the term 'affective' and not 'non-cognitive' trust, as she does not deny the cognitive dimension of trust.[296] An optimistic disposition or interpretative lens towards others that operates outside purely strategic and rational motivations is a more complex psychological state that incorporates social and emotional factors.[297] While cognitive trust is primarily based on cold reasoning and has a low level of affectivity, emotional trust is motivated primarily by positive affect for the trustee, and relies less on its cognitive foundation.[298]

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[290] ibid 235.
[291] ibid 235, 245, 246.
[292] Rompf (n 265) 52.
[293] ibid 55.
[294] Jones, 'Trust as an Affective Attitude' (n 7) 4.
[295] Karen Jones, 'Trusting Interpretations' in Pekka Mäkelä and Cynthia Townley (eds), *Trust: analytic and applied perspectives* (Brill 2013).
[296] Jones, 'Trust as an Affective Attitude' (n 7) 5.
[297] JL Morrow, Mark H Hansen and Allison W Pearson, 'The Cognitive and Affective Antecedents of General Trust Within Cooperative Organizations' (2004) 16 Journal of Managerial Issues 48, 50. Discussed in: Werbach (n 285) 22.
[298] Rompf (n 265) 61.

Because of these moral-affective (but not non-rational) critical accounts against purely rational choice theories, some theorists, as is commonplace in the contemporary behavioural sciences in general, have started to reconceptualise rationality itself, rethinking the relation between reason and sociality in order to arrive at a new and more inclusive conception of rationality. M. Hollis has done this by rethinking reason in replacing me-rationality embedded in narrow self-interest with an us-rationality that takes aim at reciprocity and the pursuit of the common good.[299] This allows for a reconceptualization of trust, taking into account both its cognitive-rational and added moral-affective components, which are often socially embedded, and recognising that individual actors want and need to be a member of a community.

2.1.1.3. The general-systemic approaches

Social embeddedness exemplifies the rooting of both the trustor and the trustee in social systems and structures consisting of social relationships, rules, and resources that affect and sometimes even constitute trust.[300] This brings us to the macro-level of analysis, which goes beyond individual reasons for trusting and basis of trust (although it includes them as well) and views trust as a subject on a broader societal level. The starting point of these approaches is that trust is essential both to society and to social institutions.[301] They mostly appear in the sociological and political sciences literature which conceptualises the so-called general or system trust in its many manifestations and occurrences, including but not limited to discussions of the importance of trust for the social order[302], economic prosperity and social capital[303], cooperation[304], risk-taking behaviour[305], and reduction of social complexity[306]. But it is also manifested in the sociological literature which, in addition to the cognitive and moral-affective basis, grounds trust in a broader social-institutional context which can also help to explain individual interpersonal trust relationships. Thus, these general-systemic approaches function in two ways: first, by conceptualising broader systems as recipients of trust, thus elevating trust to a more general, abstract level, and second, by emphasising the general institutional and societal factors that influence and ground trust relationships (which may also be interpersonal).

[299] Martin Hollis, *Trust within Reason* (Cambridge University Press 1998). See also discussion in: Möllering (n 258) 40.
[300] Möllering (n 258) 50.
[301] Trudy Govier, *Social Trust and Human Communities* (McGill-Queen's University Press 1997) 19.
[302] Misztal (n 277) 26 et seq.
[303] Fukuyama (n 253); Putnam (n 253).
[304] Gambetta (n 252).
[305] Coleman (n 253).
[306] Luhmann, *Trust and Power* (n 256).

It is particularly emblematic of political scientists and sociologists to see trust as structural in nature[307], playing a functional role in society. This view has been made possible by the insight, expressed by numerous sociologists that as the conditions of modernity have caused individuals to become more fragmentised and atomised individuals, the types and modes of social bonds they need have changed accordingly.[308] Ann-Mari Sellerberg has described this as a de-personalisation of trust and a shift to modern impersonal trust as people's trust in institutions, expressing confidence in the operations of law, controls, and bureaucracy.[309] It is prevalent in contemporary literature to explain our trust in certain professionals and institutions based on their institutional structures, motives, and the risks that surround them, as well as systems of credentials, qualifications and monitoring.[310]

This is similar to Luhmann's work on system trust, which he argues is more paramount in the modern world than personal trust. System trust, in contrast to interpersonal trust, refers to abstract institutions or systems as objects of trust.[311] It is about normative expectations towards the system's performance.[312] It is a basis on which one can trust doctors, judges, or even parties, states, or organizations. Although not denying or denigrating personal trust, he defined trust in more generalised terms as providing a basis for dealing with uncertain, complex, and often threatening future possibilities.[313] He argues that the ultimate function of trust is the reduction of complexity, alongside other mechanisms such as law and formal organization.[314] He defines trust as going beyond available information and generalizing expectations of behaviour in that it replaces missing information with an internally guaranteed security.[315] This definition is not "moralised"[316] or confined to the narrow realm of interpersonal relations, but includes trust in more general system mechanisms, such as quality, education, control, and sanctioning systems.

It is important to note also that besides general and systemic trust, sociologists have not disregarded interpersonal trust. What is different in their accounts is that in conceptualising

[307] Harrison D Mcknight and Norman L Chervany, 'The Meanings of Trust' (University of Minnesota 1996) Carlson School of Management Working Paper No. 96-04 11.
[308] Putnam (n 253) 277 et seq; Anthony Giddens, *The Consequences of Modernity* (Polity Press in association with Basil Blackwell, Oxford, UK, 1990) 7 et seq.
[309] Ann-Mari Sellerberg, 'On Modern Confidence' (1982) 25 Acta Sociologica 39.
[310] Katherine Hawley, *Trust: A Very Short Introduction* (Oxford University Press 2012) 97.
[311] Rompf (n 265) 67.
[312] Patrick Sumpf, *System Trust: Researching the Architecture of Trust in Systems* (Springer 2019) 19.
[313] Niklas Luhmann, *Trust and Power: Two Works* (Wiley 1979) 13.
[314] ibid 8, 93.
[315] Luhmann, *Trust and Power* (n 256) 103.
[316] In the sense of placing high moral or ethical expectations on the trustee, such as goodwill, benevolence, or integrity – see as a contrast A. Baier's definition of trust as „the willingness to be vulnerable to the trusted, to rely on their competence and *goodwill*, when we entrust something we care about to their case." – see in: Annette Baier, 'What Is Trust?' in David Archard and others (eds), *Reading Onora O'Neill* (Routledge 2013) 175.

interpersonal trust, they try to take a broader approach, applicable also to the personal cognitive and psychological parameters by which the trustor trusts in broader systems, firms, institutions, etc. Their conceptualisations usually include the rational-cognitive and sometimes also the moral-affective basis of trust, while often replacing the latter with their own sociological or even quasi-rational-cognitive understandings of that missing element that truly characterises trust. As emotional-affective approaches, they reflect the non-rational component, the unknown circumstances, that call for trust, without which trust could not be explained in full. G. Möllering calls it suspension or a metaphorical "leap of faith"[317]; Luhmann and Simmel have called it "a blend of knowledge and ignorance"[318]. They do not necessarily characterise this additional element – the suspension – from the perspective of either morals or emotions, but rather ground it on trust's functionality or embeddedness in society, or describe it in mere pragmatic terms as an epistemological gap which requires this metaphorical leap.

These institutional and systemic accounts of trust need one clarification: whether impersonal and collective objects can be at the sending or receiving end of trust (either trustors or trustees). First, there is a significant consensus that individual and purposeful actors are the primary trustors, i.e. actors on the sending side of trust.[319] This is because trust is conceived of predominantly as a mental phenomenon.[320] This raises the question of whether collectives and systems can be such purposeful trustors. Arguably, inanimate objects and systems cannot be trustors, but collective entities as purposeful actors can. What is important here is the notion of human agency, as in the end all trust can be traced back to some forms of human cognitive conditions. G. Möllering has interestingly argued against a strictly psychological definition of trust, as not only individual persons but also collective or even non-human entities could be classified as both trusting and trusted actors as long as it is possible to ascribe expectations and actions to them meaningfully.[321] Whereas there is little disagreement that collective entities and actors can be both trustors and trustees, Möllering's bold claim that non-human entities could also manifest trust (i.e. trustors) is still controversial, as it is widely agreed in literature that trust is a cognitive state of mind or attitude. There presumably still needs to be at least one person or similarly purposeful actor, at least on the sending end of the trust.[322] But this perhaps ultimately

[317] Möllering (n 258) 105 et seq.
[318] Simmel (n 255) 318; Luhmann, *Trust and Power* (n 313) 26.
[319] Rompf (n 265) 31.
[320] ibid 32. See further below in Chapter 4.
[321] Möllering (n 258) 7.
[322] As A. Baier has put it: "[T]he trusted need not to be a private individual, but may be a firm or agency. It is always a person, an agent with a mind, who does the trusting, but it may be something more impersonal which is

depends how liberally one defines and deploys the terms "attitude", "state of mind", or "willingness" – and which "non-human" entities are still defined as possessing human agency and responsibility.

The claim that collective and, strictly speaking, non-human entities can be on the receiving end of trust (the trustees or the objects of trust) is much less controversial, as literature uniformly agrees on the existence of what is labelled under the various names of abstract[323], system[324], public[325] or institutional trust[326], depending on the theorist, but which to a largely converging degree is explained as trust that goes beyond individual persons, being directed at the adequacy, honesty, and competence of systems and institutions to live up to their commitments and carry out their duties.[327] There is also a notion of human agency and purposefulness here in the act of taking and living up to such commitments. Katherine Hawley has stressed that both institutions and states can be the recipients of trust, as they can make commitments by entering into legal contracts, signing treaties, and having charters, statements of purpose, constitutions, goals, and guidelines.[328]

Also Luhmann, the pioneer of system trust, acknowledged that trust is extended first and foremost to another human being, but that one could also place his trust in the functioning of systems (such as money) and not in people directly; such trust in systems stands primarily on individuals' trust in expert knowledge accumulated and stored in highly differentiated social systems and sufficient controls over reliability built into these systems.[329] Thus being adequate trust recipients and mediators. Stzompka has made a strong case that all these various types of collective trust still operate according to the same logic: most importantly, behind all of them there looms the "primordial" form of trust – in people and their actions.[330] Thus, appearances notwithstanding, all of the systemic or collective objects of trust are reducible to human actions as the ultimate objects of trust and derivatively their effects, manifestations, or products.[331] All in all, purposeful collective agencies can be both on the sending and receiving ends of trust if

trusted." See: Annette Baier, ´What is Trust? in David Archard and others (eds), *Reading Onora O'Neill* (Routledge 2013) 178.

[323] Misztal (n 277) 72.

[324] Luhmann, *Trust and Power* (n 313) 50.

[325] Cynthia Townley and Jay L Garfield, 'Public Trust' in Pekka Mäkelä and Cynthia Townley (eds), *Trust: analytic and applied perspectives* (Brill 2013).

[326] Möllering (n 258) 71.

[327] Hawley, *Trust* (n 310) 99.

[328] ibid 98–99, 106–107.

[329] Luhmann, *Trust and Power* (n 313) 39, 50, 53.

[330] Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press 1999) 46.

[331] ibid.

actions and expectations can be meaningfully ascribed to them. Highly specialised (knowledge) systems can be the objects of trust, as is the case with system trust.

The general-systemic approaches therefore stress the social embeddedness of trust, its functions for the whole social system, and the importance of societies, culture, and institutions in creating, upholding, and structuring trust. It is worth noting that these approaches again do not deny the previous two, but rather build on them, partially adopting their understanding of the basis of trust (its cognitive and affective grounds) while adding insights from trust's functionality on a broader societal and institutional level. They refrain from having a one-sided (either purely rational-calculative or overly psychological-emotional) conceptualisation of trust, trying to merge the valuable and appropriate insights while adding their own disciplinarily extended point of view.

2.1.2. Trust – an essentially contested concept?

The multitude of approaches and definitions can lead to a kind of dubiety over the possibility of reaching consensus. While it is true that as trust is a thick, multifaceted, not to say amorphous concept, it is often taken for granted from the outset; the closer you get, the harder it is to spell it out, especially in vastly differing contextual backgrounds. Because of trust's characteristic traits as an elusive and often-challenged concept among scholars from different disciplines, it is not surprising that varied, sometimes convergent conceptualisations of it are found in the literature.[332] As Karen S. Cook and Jessica J. Santana have noted: "[t]here are at least as many conceptualizations of trust as there are disciplines in the social sciences."[333] This has led some scholars to have a sceptical view of a possible coherent conceptual core of trust.

It has been described as difficult to pin down trust in its multitude of usages, importance, and meanings. Larue Tone Hosmer has observed that: "[t]here appears to be widespread agreement on the importance of trust in human conduct, but [---] an equally widespread lack of agreement on a suitable definition of the construct."[334] Olli Lagerspetz has even gone so far as to contend that we even cannot hope to find an all-purpose definition of "trust" and that such a definition

[332] Cristina Costa and Bijlsma-Frankema (n 263) 394.
[333] Karen S Cook, Jessica J Santana, ´Trust and Rational Choice, 'in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust* (Oxford University Press 2018) 253.
[334] Larue Tone Hosmer, 'Trust: The Connecting Link between Organizational Theory and Philosophical Ethics' (1995) 20 The Academy of Management Review 379, 380.

would not help us anyway, because all-purpose definitions are unhelpful in addressing sensitive questions that may arise.[335]

Although I agree with the need for disciplinary purpose-specificity and the accompanying sharpening (and the accompanying divergence) of the concept, I do not share the pessimistic outlook that this mandates the total absence of a conceptual core, leading to infinite relativity and the capsulation of disciplines – leaving the disciplines unable to speak with each other in a comprehensible manner, although arguably speaking of the same thing. I rather see the different conceptualisations on the basis and content of trust as a manifestation of conceptual development and sophistication, wherein scientists from different disciplinary backgrounds have advanced each other's understandings of such a complex and multifaceted phenomenon as trust.

It is true that trust is a complex concept, but it is not an essentially contested one. The concept of essentially contested concepts was introduced by W. B. Gallie[336] and elaborated by Collier et al.[337] by identifying sevenfold criteria for assessing whether or not a concept can be considered essentially contested. These criteria are: the appraisive character; internal complexity; diverse describability; openness; reciprocal recognition of their contested character among contending parties; an original exemplar that anchors conceptual meaning; and progressive competition through which greater coherence of conceptual usage can be achieved.[338] Gallie himself proposed such essentially contested concepts to be art, democracy, and the Christian tradition.[339] Collier et al. evaluated the contestedness of the concepts of democracy and the rule of law.[340]

Without going into an in-depth analysis and application of Gallie's framework to the concept of trust, it should be noted that trust is not widely considered an essentially contested concept.[341] There might be some conceptual confusion, but this is different from conceptual contestation.[342] As J. Waldron has stressed in discussing the contestedness of the rule of law concept, that conceptual disarray might actually be the evidence of a process that can lead to more

[335] Olli Lagerspetz, *Trust, Ethics and Human Reason* (Bloomsbury Academic 2015) 7.
[336] WB Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167.
[337] Collier, Hidalgo and Maciuceanu (n 13).
[338] ibid 212.
[339] Gallie (n 336) 168.
[340] Collier, Hidalgo and Maciuceanu (n 13) 222 et seq.
[341] On the view that trust is not an essentially contested concept see: Tuomas Forsberg, 'Taking Stock of the Trust Study in International Relations' in Hiski Haukkala, Carina van de Wetering and Johanna Vuorelma (eds), *Trust in International Relations : Rationalist, Constructivist, and Psychological Approaches* (Routledge 2018) 159.
[342] Collier, Hidalgo and Maciuceanu (n 13) 212.

analytically rigorous concepts capable of specifying the meaning more adequately.[343] So there is a fine line between conceptual contestation and conceptual development. In the case of trust, I argue, this line has not been passed, and the different accounts and conceptualisations have served the purpose of conceptual clarification well. It might lead to some conceptual ambiguity and variance along the way, but it must not be mistaken for conceptual relativism, if you take the ultimate aim of conceptual analysis not to be the establishment of unitary unambiguous meanings but rather the giving of realistic accounts of complex concepts and their dynamic patterns of change.[344]

Although trust is not an easy concept, as it is not directly observable[345] with regard to abstract psychological-attitudinal states of mind, it is traceable in trust-based actions. The latter is what sociologists and economists often aim to measure and quantify in their empirical work. But its subjective cognitive and affective experiences can also be observed and described. Philosophers and psychologists are concerned with deeper conceptual, psychological, and theoretical questions about trust and its antecedents and conditions. However, all advance the overall understanding of the concept and sharpen its conceptual contours. Moreover, overarching and cross-disciplinary conceptualisation is possible, as in fact it has been done in recent years, and it demonstrates great connectivity and significant coherence between different disciplinary concepts.[346]

So the conviction that there are as many definitions of trust as there are social sciences disciplines might be true, semantically taken, and these definitions' emphases also vary to some extent depending on the concrete approach, context, and aim of trust adopted in a particular discipline. But there are also major overlaps and common ground; these can be said to point to the core of the concept, which I will try to pin down in the next sections.

[343] Waldron (n 12) 161–163; Collier, Hidalgo and Maciuceanu (n 13) 231.
[344] Collier, Hidalgo and Maciuceanu (n 13) 214.
[345] Forsberg (n 341) 159.
[346] See for some recent and less recent examples: Lewis and Weigert (n 268); Denise M Rousseau and others, 'Not So Different After All: A Cross-Discipline View Of Trust' (1998) 23 Academy of Management Review 393; Roger C Mayer, James H Davis and F David Schoorman, 'An Integrative Model of Organizational Trust' (1995) 20 The Academy of Management Review 709; F David Schoorman, Roger C Mayer and James H Davis, 'An Integrative Model of Organizational Trust: Past, Present, and Future' (2007) 32 Academy of Management Review 344; Rompf (n 265).

2.2. TRUST – THE CONCEPTUAL PHENOMENON, COMPONENTS, AND DEFINITIONS

2.2.1. A unifying account is possible: contemporary cross-disciplinary approaches

As seen above, the different approaches have led to different conceptualisations, accentuations, and definitions, but in order to understand the concept, it is in place to rationalise and explain these disparities.

In understanding the level of divergence, it is important to note that the level of controversy and dispute in trust literature revolves around the necessary content of the subjective psychological contents that bring about the mental attitude of trusting. There is little to no controversy and disagreement on the structural elements of trust, i.e. what kind of situations and relations prompt the need for trust in the first place. This is what S. A. Rompf terms the objective structure of trust, noting that there is a reasonable level of consensus on the set of conditions necessary for trust to arise.[347] The examples of these elements are the situation of risk, social interdependence, transfer of control, vulnerability, and future-orientation.[348] I would add to that uncertainty and conditionality, autonomy and discretion of the trustee, but these elements will be discussed more in-depth below in Chapter 4.

The disagreements come from subjective experiences – affect, cognition, faith – and their content, proportions, and relevance, i.e. whether trust is ultimately rational or non-rational, a matter of will or something inherently latent. This is what Rompf calls the subjective experience of trust, which is the internal mental states associated with trust, and it is namely this element that according to him causes definitions of trust to be convoluted in the literature.[349] The confusions in the subjective part are understandable, as these elements are also not directly observable and are heavily context- and subject-dependent. But it still must be said that solely rationalist models have been largely denied in literature, with philosophers and sociologists mainly arguing about the nature of the needed non-rational component of trust: whether it is emotion, a kind of faith, moralistic notions, ignorance, indifference, or a mere knowledge gap. But they do not deny trust's cognitive-epistemic foundations as a vital element of trust creation and experience.

[347] Rompf (n 265) 30.
[348] ibid.
[349] ibid.

Moreover, contemporary interdisciplinary scholarship no longer tries to over-emphasise one asset or aspect of trust or the basis of trust, and provides accounts which aspire to be more holistic and comprehensive in their approach and content.

Today's integrationist accounts aim to merge the disciplinary understandings in order to arrive at a more complete and inclusive understanding of trust, one that does not do injustice to discipline-specific views. Along those lines, A. Weigert and J. D. Lewis have argued in their seminal work "Trust as Social Reality" that there are three components of trust: cognitive, emotional, and behavioural, which are all merged into a unitary social experience, but the relative importance of each provide grounds for differentiating subtypes of trust.[350] The cognitive dimension reflects "good reasons" for trusting, and that trust is based on a chosen "leap" from considered evidence to beliefs beyond what that evidence would warrant.[351] The emotional component is a kind of affective bond between those who trust each other; it is important that this emotional component is present in all types of trust, although it is more intense in close interpersonal trust.[352] The behavioural dimension is the manifestation of trust: behaviourally, to trust is to act as if the uncertain future actions of others were certain in circumstances wherein the violation of these expectations results in negative consequences for trustors.[353] Lewis and Weigert argue that all three components are required for trust to be a social reality, as without cognitive content, we would not have trust but blind faith or fixed hope; without emotion, we would not have trust but calculated risk-taking; and without the behavioural component, trust would be inoperative.[354] From the perspective of the objective structure of trust, without somehow acting on trust, the risks and vulnerabilities required for a trust situation to exist in the first place would also not be materialised, and the risky choice of trust would remain hypothetical.

It is important to stress that these distinct components of trust all provide an important added value and build a more complete definition of trust in that, if we take away one of them or, conversely, use or overstress only one part, the definition stays imprecise or inadequate (not properly describing all possible manifestations of the notion), even descriptive of something else. This can happen when trust is reduced to purely calculative and evidence-based predictions – then it might fall under the term 'confidence'. This would rip the moral obligations of the

[350] Lewis and Weigert (n 268) 969–970.
[351] ibid 970.
[352] ibid 971.
[353] ibid.
[354] Ibid.

trustee and her agency and upon a closer look trust might turn out to be mere reliance. Take for example the huge body of trust literature based on rational choice theory which explains rational calculation as the basis of trust, but sometimes fails to address the issues of bounded rationality and the occasionally latent or unconscious character of trust; reduces trust to cooperative behaviour only; or falls short in explaining and theorising one of the most important results of these trust-inducive game theories: that people often act altruistically when, all things considered, it is not in their homo economicus self-interest as explainable by economic models and observable in game-theoretical trust games. The purely rational theory approach explains trust away and reduces it to mere self-interest-driven calculation, which does not, as experiments and empirical observations have proven, describe trust adequately in its entirety.

Modern scholarly investigations also more frequently characterise trust as a process, involving reflexivity on the side of the actors to develop and function[355] and emphasise its non-binary nature, meaning that it is rare that trust is wholly absent or rationally absolutely present and verifiable, but instead manifests in degrees and can be viewed on a spectrum along multiple dimensions.[356] This non-absolute process view of trust relies heavily on the process-philosophical maxim "all things flow"[357] and denies oversimplifying complex concepts, contexts, and relationships.[358]

2.2.2. Trust: the phenomenon and the components

However, when starting to think about how to define trust as a phenomenon and under which known taxonomies of realities it can be categorised, it gets continuously more difficult to pin down an obvious term word. Is trust an emotion, a cognitive state of mind, an attitude, a relationship, or an action, to name just a few plausible options? As a categorising phenomenon, trust is most often described as a mental "attitude"[359], a "psychological state"[360], or an expectation of the trustor, bounded in social, interdependent relationships between actors and manifested in risky, reliant behaviour. But it has also been called a "willingness to accept

[355] Möllering (n 258) 111.
[356] Werbach (n 285) 20–21; Cross (n 259) 1462.
[357] A slogan coined already by the ancient Greek philosopher Heraclitus, see: Johanna Seibt, "Process Philosophy", The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.), available online: https://plato.stanford.edu/archives/sum2020/entries/process-philosophy/ (last accessed: 25.11.2020).
[358] Möllering (n 258) 103.
[359] Jones, 'Trust as an Affective Attitude' (n 7); Luhmann, *Trust and Power* (n 313) 27.
[360] Möllering (n 258) 7; Rousseau and others (n 346) 395.

vulnerability or to take risks"[361], a "bet about the future contingent actions of others"[362] or even a "leap of faith"[363]. While it is unclear whether a "bet" or a "leap of faith" should be understood as an action or mental phenomenon, there is an overwhelming consensus among trust theorists that trust as a phenomenon most appropriately describes something belonging to the domain of mental (or psychological) attitudes or states, however it may be named in a particular case.[364] Russel Hardin has added that as a mental-cognitive notion, trust belongs to the family of terms that includes knowledge and belief. Since trust is cognitive, we do not choose to trust; rather, once we have relevant knowledge, that knowledge constitutes our degree of trust or distrust.[365]

Philosopher Annette Baier has stipulated that trust is one of those phenomena that challenges the usual division of mental phenomena into cognitive, affective, and volitional, and that it is all of these: "it is based on what we believe about another person or agency, it requires that we feel safe in their hands, and it usually involves a voluntary act of entrusting, or placing trust."[366] So we arrive back to this three-part main composition of trust as a concept comprising of cognition (reason), affect (emotion), and the act of (en)trusting (behavioural component) based on a reflective volitional choice. Trust can neither be fully understood without all these components nor reduced to only one of them (e.g. in the most common case, reducing trust to the manifestation of trusting behaviour alone). Moreover, categorising trust without even one of them may make such categorisation conceptually deficient, as it might not amount to a concept of trust, but rather of neighbouring ideas (such as confidence, reliance, faith, or gullibility – see section 2.4). Most of the conceptualisations of trust elaborated today also reflect all these facets or components of trust, although the distinction between them could be more pronounced.

Although it is comprised of all these components, trust as a category of reality falls under the domain of the mental and is most often called a mental or psychological state or attitude.

2.2.3. Trust: the relational model

Trust can be depicted as a relational model. This entails the representation of the trust relationship in an analytical, not to say a computational, model of actors and their connections,

[361] Roger C Mayer and James H Davis, 'An Integrative Model of Organizational Trust' (1995) 20 The Academy of Management Review 709, 712; Baier, 'Trust and Antitrust' (n 287) 236.
[362] Piotr Sztompka, *Trust: A Sociological Theory*. (Cambridge University Press 1999) 25.
[363] Möllering (n 258) 111.
[364] Rompf (n 265) 30.
[365] Hardin, *Trust* (n 277) 17.
[366] Annette Baier, ´What is Trust?` in Archard and others (n 322) 177; Annette Baier, *Moral Prejudices: Essays on Ethics* (Harvard University Press 1994) 132.

and it is encapsulated in the understanding that trust is a fundamental element of social interaction.[367] In this model of depicting the actors and their interactions, trust is largely described in the literature as a three-place relationship, where "A trusts B in doing/with respect to X"[368], where A is the subject of trust (trustor), B is the object of trust (trustee), and X is the content of the trust relation – the entity at which trust is directed, the conditional domain of trust.[369] Although this is by far the most widespread connotation of the trust relation, just as there are different approaches and emphases, there are also different models of trust – both reduced and extended – which focus on or add to a variety of elements.

First, there are some reductionist accounts. Some scholars have turned their attention to the more abstract question of what it means if "A trusts B" full stop, i.e. in entirety, without conditioning trust on a particular aim, task, context, or competence.[370] This has also been called "rich" or "thick" trust or trustworthiness, because it involves thick moral connotations and belongs to the domain of intimate interpersonal relationships.[371] But this two-place relation has been deemed a rarity, as trust is mostly characterised by being relative, as Russel Hardin has said: "[o]nly a small child, a lover, Abraham speaking to God, or a rabid follower of a charismatic leader might be able to say "I trust you" without implicit modifier."[372] Some scholars have pieced apart the trust relation equations even further, discussing trust merely as "A trusts", i.e. concentrating their focus on the propensity to trust or on trust disposition as a personality trait.[373] This can be called "generalized" (or "moralistic") trust, which is a belief that most people can be trusted, and also explains trust in strangers and people different from ourselves.[374]

In the same vein, there are also accounts of trust as a four-, five- or even six-place relation. L. C. Becker has added a contextual component in addition to the mere conditionality of domain-

[367] Govier (n 301) 22.
[368] Rompf (n 265) 32; Hardin, *Trust* (n 277) 19; Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 6; Hardin, *Trust and Trustworthiness* (n 277) 9; Katherine Hawley, *How To Be Trustworthy* (1st edn, Oxford University Press 2019) 25.
[369] Rompf (n 265) 32.
[370] Jacopo Domenicucci and Richard Holton, 'Trust as a Two-Place Relation' in Paul Faulkner and Thomas Simpson (eds), *The Philosophy of Trust* (Oxford University Press 2017).
[371] See: Karen Jones, 'Trustworthiness' (2012) 123 Ethics 61, 73; Govier (n 36) 6; Karen Jones, ´Distrusting the Trustworthy´ in Archard and others (n 35) 189.
[372] Russell Hardin, 'The Street-Level Epistemology of Trust' (1993) 21 Politics & Society 505, 507; Sztompka (n 330) 55.
[373] See discussions on that: Ribstein (n 259) 559 et seq; Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 7.
[374] Eric M Uslaner, *The Moral Foundations of Trust* (Cambridge University Press 2002) 21; Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 7.

specificity in his model: "A believes or expects B will do X in situation S".[375] This adds an emphasis on the importance of situational background conditions, which surely can play a part in the trust relation, but not necessarily a constitutive part. In their analysis of trust, Cristiano Castelfranchi and Rino Falcone take trust to be a five-place relation, where "x, believing y, in circumstances C, to be competent and willing, delegates some task, t, to y, in order that x's goal G be attained".[376] This model not only adds additional circumstances but also attributes a goal to the trustor. A. Baier, a pioneering trust philosopher, builds on this view in one of her recent analyses of trust, adding that it would be even more precise to construe a comprehensive understanding of trust as a six-place predicate; she describes the sixth place as "the reason, r, that x trusts y to carry out the task t, or to do vaguer things like not intentionally harm x".[377] These expanded accounts provide additional motivations, context, and goals for trust. While they have explanatory force in such elaborate situations, they may fail to capture others and need not always be present in every trust relation.

Despite these finesse theorisations of a possible understanding of trust from a one- to six-place relationship, the most prevalent account remains that of trust as a three-place relation wherein A trusts B in doing X. The relevant common denominator of all the accounts that differ from this most common one is that they either describe only one facet or occurrence of trust, unfairly reducing trust to only that aspect, or overload the concept with many additional (but perhaps in conceptual terms unnecessary) features and parameters, which may not be present in all trust manifestations, and thus are unnecessary for apt and adequate conceptualisation.

2.2.4. Trust: the definitions

We will now examine the definitions themselves. One of the shortest and in many ways most appealing definitions of trust comes from the intellectual historian Peter Schröder, who, in the context of answering the question of whether can there ever be trust between states and how to overcome conflicts which are aggravated by a lack of mutual trust, conceptualises trust as the assumption of others' future behaviour.[378] It in fact gives a relatively adequate general understanding of trust in its broad sense, including trust as an expectation of others' behaviour and the future-oriented nature of trust. Despite the appeal of its clarity and focus, it also has a

[375] Lawrence C Becker, 'Trust as Noncognitive Security about Motives' (1996) 107 Ethics 43, 44.
[376] Christiano Castelfranchi and Rino Falcone, *Trust Theory: A Socio-Cognitive and Computational Model* (John Wiley and Sons 2010).
[377] Annette Baier, ´What is Trust?` in Archard and others (n 322) 181.
[378] Peter Schröder, *Trust in Early Modern International Political Thought, 1598-1713* (Cambridge University Press 2017) 9.

slightly reductionist character, and fails to recognize some of the important and essential features of trust described above. One immediate oversight is the question of the behaviour's quality: what kind of future behaviour by others is assumed? According to this account, it could also be harmful behaviour, but this intuitively could not be the case with trust (although it might be with distrust).

Diego Gambetta, a salient sociologist with a focus on trust research, has defined trust as a particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both before he can monitor such action (or independently of his capacity ever to be able to monitor it) and in the context in which it affects his own action.[379] According to Gambetta, when we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is beneficial or at least not detrimental to us is high enough for us to consider engaging in some form of cooperation with him.[380] Gambetta's observations are valuable, as he builds on the time and risk parameters developed by Luhmann, but adds to them the notion of control (or rather its impossibility) and the quality of the expected behaviour only implicit in Luhmann's definitions: the beneficial or at least not detrimental character of the behaviour of others. Both Luhmann and Gambetta tie trust to a situation of risk and vulnerability in the context of the irreducible contingency of possible futures – especially the unpredictability of the future actions of other actors.

But can we have a cross-disciplinary definition of trust as a social phenomenon? A much-cited study on interdisciplinary understandings of trust has proposed such an integrative definition:

> "Trust is the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control the other part."[381]

This willingness to be vulnerable has sometimes also been referred to as a willingness to depend on another actor with regard to something.[382] The cross-disciplinary definition falls along the lines of D. Gambetta's sociological definition; I consider these two to be the most comprehensive accounts of trust I have come across so far, as they are precise and at the same time abstract enough to deploy across disciplines and contexts.

[379] Gambetta (n 252) 217.
[380] ibid.
[381] Mayer and Davis (n 361) 712.
[382] Mcknight and Chervany (n 307) 23.

2.3. THE ANTECEDENTS AND CONSEQUENTS OF TRUST

There are numerous conditions which allow trust to manifest itself (and which can be taken into account in the institutional design of trust) and consequences which make trust observable in reality. These are what I call the antecedents and consequents of trust. The first allow or are the basis for trust to happen and the last are its result, but they should not be confused with trust itself.[383] The consequents of trust are also what was previously referred to as the behavioural components of trust.

2.3.1. The antecedents: different bases for trust

Trust needs some good reasons to believe in the trustworthiness of the trustee. But what are the sources of trust-related knowledge? Possible candidates include information (evidence), experience, emotion (e.g. friendship, kinship, love), culture (familiarity and similarity), environment, and institutions. These bases – antecedents of trust – can be interpreted rationally or through a more biased emotional lens (the affective component of trust).

There are many informational bases for trust. These bases have been described and categorised by numerous scholars according to their level of applicability and source, i.e. whether the trust-related knowledge pertains directly to the characteristics of the trustee or the trustor, or rather reflects indirect sources such as institutions, regulations, tradition, and the like.[384] In general, there are "macro" sources, which apply generally and impersonally, and "micro" sources, which arise in specific exchange relations and are personalised.[385] This is similar to what Sztompka calls "primary" and "derived" informational sources of trustworthiness. The first has to do with the immanent traits and features of the trustee; the second has to do with the context in which the trustee operates and the external influences that may bear on trustworthiness.[386]

More specifically, these sources can be also categorised according to the modes of trust production. This has been the basis for differentiating between "process-based" trust, which is founded in repeated experience with a trustor or his reputation; "characteristics-based" trust, which relies on an assessment of stable characteristics (the trustworthiness) of the trustee; and

[383] As per G. Möllering: "It [the state of expectation that trust is] must not be confounded with the bases from which it is reached (antecedents), nor with the actions (enactment) resulting from trustful expectations." – See: Möllering (n 258) 7.
[384] Rompf (n 265) 42.
[385] ibid; Bart Nooteboom, 'Forms, Sources and Processes of Trust' in Reinhard Bachmann and Akbar Zaheer (eds), *Handbook of Trust Research* (Edward Elgar Publishing 2006).
[386] Sztompka (n 330) 71.

"institution-based" trust, which refers to a set of shared expectations derived from formal social structures.[387] An additional element is also the trustee's disposition to trust as a character trait.

2.3.1.1. The characteristics of the trustee

This is the main basis on which expectations are created about the future behaviour and trustworthiness of the trustee – her perceived trustworthiness, which can manifest itself not only in contextual factors but in many different personality traits, which have been extensively addressed by scholars.

Hawley has in a nutshell stated that trusting involves expectations about skills (competence, knowledge) and intentions (goodwill, honesty).[388] These are the two main proxies for trustworthiness, the expectations most often highlighted in trust research. But they are not the only ones. Mayer et al., Hosmer, and Rompf have done a comprehensive synthesis of the factors of trustworthiness as conceptualised in literature and distilled four major ones: benevolence, competence, integrity, and predictability.[389]

Benevolence indicates an assumption concerning the trustee's motivation: the trustee is benevolent to the extent that he cares about the welfare of the trustor beyond an egocentric profit motive and will not choose opportunistic behaviour even if there are incentives and possibilities to do so.[390] It also points to the normative dimension of trust as a moral value in itself [391] and implies fiduciary responsibilities[392] to put the other's interests above one's own.[393] It has been also referred to as loyalty[394] or goodwill[395] towards the trustor.

Competence refers to the capability and qualification of the trustee to fulfil the content of the trust relation – the technical knowledge, skills, and characteristics necessary to perform.[396] This has also been called ability, expertise[397], or prudence.[398] The requirement of competence is what

[387] Lyanne G Zucker, 'Production of Trust: Institutional Sources of Economic Structure: 1840-1920' in Barry M Staw and Larry L Cummings (eds), *Research in Organizational Behaviour*, vol 8 (JAI Press) 42. See discussion also in: Rompf (n 265) 42.
[388] Hawley, *Trust* (n 310) 7.
[389] Mayer, Davis and Schoorman (n 346) 717–720; Rompf (n 265) 43; Hosmer (n 334) 384 et seq.
[390] Rompf (n 265) 43; Mayer, Davis and Schoorman (n 346) 718; Becker (n 375) 54.
[391] Hosmer (n 334) 385.
[392] Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983) 14 et seq.
[393] Rompf (n 265) 43.
[394] Philip Pettit, 'The Cunning of Trust' (1995) 24 Philosophy and Public Affairs 202, 208–209; Hosmer (n 334) 384. Hosmer here defines loyalty through benevolence by loyalty being benevolence, or the willingness to protect, support, and encourage others.
[395] Baier, 'Trust and Antitrust' (n 287) 234.
[396] Rompf (n 265) 43; Hosmer (n 334) 384.
[397] Mayer, Davis and Schoorman (n 346) 717.
[398] Pettit (n 394) 208–209.

makes trust conditional and domain-specific, as it is the primary reason why A trusts B with regard to X but not with regard to Y – in a highly specialised society, expectations of competence and ability do not extend over all domains.[399]

Integrity means that the trustee adheres to a set of principles or values which the trustor deems acceptable and necessary.[400] It also has to do with the reputation or perceived honesty and truthfulness of the trustee, the extent to which a trustor believes the trustee's statements of future intentions, and how congruent the trustee's actions are with his words.[401] This is again a normative value-laden dimension of trust, and there arguably needs to be some value congruence between the trustor and the trustee – integrity will be high if the trustor can identify a shared value or moral principle and assume that the trustee acts accordingly.[402] P. Pettit has referred to this characteristic as being generally virtuous.[403]

Predictability is a value-free perception of the trustee's consistency in action, meaning that the trustee's actions are sufficiently consistent over time that the trustor can forecast to a satisfying degree what the trustee will do.[404] High predictability also makes other characteristics (benevolence, competence) more stable.[405] Predictability relates to routines which can manifest either in personal or organizational contexts.[406] Predictability has also been referred to as consistency or reliability in literature.[407]

2.3.1.2. Reputation and prior experience

This basis of trust creation refers to the mode of "process-based" trust that is grounded either in personal experience or in the trustee's reputation for trust responsiveness. This is the dyadic embeddedness of the trust relation which stores knowledge from repeated and reciprocal interaction.[408] This is what has been described by Misztal as trust as habitus, in that trust is a protective mechanism that relies on everyday routines, stable reputations, and tacit memories.[409]

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[399] Rompf (n 265) 44.
[400] Mayer, Davis and Schoorman (n 346) 719; Rompf (n 265) 44.
[401] Hosmer (n 334) 384; Rompf (n 265) 44.
[402] Rompf (n 265) 44.
[403] Pettit (n 394) 208–209.
[404] Rompf (n 265) 44.
[405] ibid.
[406] Möllering (n 258) 65–70.
[407] Hosmer (n 334) 384.
[408] Rompf (n 265) 46.
[409] Misztal (n 277) 102.

Trust has its basis in the normality and familiarity of everyday life. Misztal has discussed trust as an outcome of situational normality based on familiarity, common faith, and values.[410] This rests on the commonality of reality and the socio-institutional context, in that actors normally do not doubt the reality of their everyday world and assume that the other actor's view of reality is not too different from their own. Trust hinges on the actors' natural ability to have a world in common with others and rely on it.[411]

A reputation is "a characteristic or attribute ascribed to a person" or other entity based on direct interactions or third-party information.[412] It thus functions as a proxy of one's standing in terms of trustworthiness, which allows us to trust another actor before having contact with that person or entity.[413] It is a kind of accumulated knowledge (through experience, hearsay, or other mechanisms of communication) about an actor's trustworthiness which serves as a warrant for trust and helps to start the trust relationship off. Reputational systems motivate trustworthiness through threat of sanction or promise of reward.[414]

2.3.1.3. The socio-institutional context

This can be categorised under "institutional-based" trust, which is based on shared expectations derived from social and institutional structures represented, for example, by signals of membership in professions or associations, or by intermediary mechanisms such as bureaucracy or legal regulations.[415] But it is also about the socio-institutional setting where trust relations take place and the understanding that everyone knows and accepts the basic rules for interaction.[416] The institutional embeddedness of trust means the internalisation of trust-related norms, social roles, and cultural practices, as well as knowledge concerning institutional safeguards such as legal contracts, regulations, and guarantees.[417] All these have an influence on the initiating, maintaining, and changing of trust. This has also been called more narrowly "rule-based" trust, not referring only to legal rules, but to the broader social-cultural normativity connoting trust, which rests upon familiarity with the cultural and normative content of the social systems and the institutions surrounding a trust relation.[418]

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[410] Misztal (n 257) 322.
[411] Möllering (n 258) 55–56.
[412] Karen S Cook and Jessica J Santana, 'Trust and Rational Choice' in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust*, vol 1 (Oxford University Press 2017) 267.
[413] Misztal (n 277) 120–121.
[414] Cook and Santana (n 412) 267.
[415] Möllering (n 258) 60.
[416] ibid 58.
[417] Rompf (n 265) 46.
[418] ibid 64.

This type of basis for trust is needed in today's modern and increasingly impersonal setting, as it allows for the creation of trust in settings where there might be no information or indicators about the trustworthiness of the trustee or any previous interaction (established "process-based" trust). But it is also important to distinguish this institution-based trust as the contextual setting of particular trust relationships from trust in institutions (system trust) – although the former must necessarily imply some form of the latter (otherwise the institutional context would have no bearing on the trustor and relationship), they are still analytically distinct.[419]

Sztompka has defined these contextual cues for secondary trust as contextual conditions that make the actions of persons or institutions more trustworthy, independent of any other characteristic they might have. He considers these to be accountability (control and enforcement), pre-commitment (such as promises or contracts), and trust-inducing situations (traditions and social roles, social cohesion, technical or institutional design).[420]

Institutions are seen as not only third-party guarantors and enforcers but as systems of rules and meanings that provide common expectations – i.e. they simultaneously empower and control.[421] In creating expectations, they simultaneously decrease the number of potential contingencies the future can bring; thus, they also might act as a functional equivalent instead of[422] and not a contextual basis for trust, depending on concrete circumstances and the object of trust.

2.3.1.4. The disposition to trust

To increase trust, it is not enough to try to make actors trustworthy; it is also necessary to make them willing to trust.[423] Thus, not only the character traits of the trustee, but also those of the trustor play a role in initiating trust. However, the attributes of the trustor are confined to only one main feature: what is called the disposition or propensity to trust. This comes from the observation that different people have different predispositions to enter into trust relations, regardless of the evidential or contextual basis at play. The disposition to trust is a character trait of the trustor rooted in the reduced model "A trusts", and it also evaluates the trustor's propensity to show and act on trust towards the unknown. Mayer et al. have characterised the propensity to trust as a stable within-party factor that affects the likelihood the party will trust and might be explained as a general willingness to trust others.[424] Uslaner called this

[419] Möllering (n 258) 71.
[420] Sztompka (n 330) 86–87.
[421] Möllering (n 258) 60–61.
[422] Luhmann, *Trust and Power* (n 313) 8.
[423] Baier, 'What Is Trust?' (n 316) 178.
[424] Mayer, Davis and Schoorman (n 346) 715.

"generalized" trust with a moral connotation, marking a belief that most people can be trusted, which also explains trust in strangers and people different from ourselves.[425]

People differ in their dispositional character towards trust; it is affected by experiences, personality types, and cultural backgrounds. Propensity will influence how much trust one has for a trustee prior to the availability of data on that particular party.[426] Mayer et al. single out so-called 'blind trust' as an extreme example of such propensity in that some individuals can repeatedly trust in situations that most people would agree not to warrant trust.[427]

2.3.2. The consequents: trusting actions

The consequences of trust as a phenomenon – being a mental state or an attitude – is the behavioural component of trust: trusting action, the manifestations of trust. Manifestations of trust are any empirical incidents in which the state of trusting expectation is reached, irrespective of whether the trustor is conscious of it or whether it is directly observable by others in any way.[428] But often it is observable and is empirically measured by scholars; this has led it to be taken as trust itself. This manifestation of trust in action also been sometimes called in the literature "entrusting".[429] In her conceptualisation of entrusting, A. Baier emphasises the notion of handing over the care of something to someone, but this need not be the only behavioural manifestation of trust. There are also more pragmatic ways to manifest trust behaviourally, such as reliance or cooperation.

It is important to distinguish these behavioural manifestations or components of trust from trust itself – that is, it is not correct to equate them with trust, i.e. taking reliance or cooperation to be trust.[430] This is conceptually imprecise and problematic and might lead to further conceptual and practical fallacies.

The most frequent behavioural component often confused with trust is cooperation. Mayer et al. have stressed that although trust can frequently lead to cooperative behaviour, it is not a necessary condition for cooperation to occur, as cooperation does not necessarily put a party at risk – cooperation can also be mutually beneficial with no risk taken, no potential loss, or no

[425] Uslaner, *The Moral Foundations of Trust* (n 374) 21; Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 7.
[426] Mayer, Davis and Schoorman (n 346) 715.
[427] ibid.
[428] Möllering (n 258) 7.
[429] Baier, 'Trust and Antitrust' (n 287) 240.
[430] Russell Hardin, 'Conceptions and Explanations of Trust' in Karen S Cook (ed), *Trust in society* (Russell Sage Foundation 2001) 11–12; Rompf (n 265) 35–36; Mayer, Davis and Schoorman (n 346) 712.

choice available.[431] One can cooperate with someone without necessarily trusting the other party.[432]

This also explains another confusion in trust literature: whether trust can be a matter of free choice, i.e. whether one can "choose" to trust. The literature, especially the rational choice literature, uses the language of choosing to trust.[433] But today's contemporary and integrative theories mostly deny the possibility of choosing to trust. According to R. Hardin, trust is in the category of knowledge and acting on trust is in the category of action; therefore, one does not choose to trust, but only chooses to act on trust.[434] This is why Mayer et al. draw an important differentiation between "willingness" to assume risks and actually "assuming" risk. The corresponding definitions cast trust as the willingness to assume risk and behavioural trust as the actual assumption of risk.[435]

Thus, the concept of trust cannot be equated with its behavioural manifestations, such as cooperation or reliance, although the latter constitutes the behavioural component of trust, as otherwise the risks inherent in the objective structure that prompts the situation of trust would not materialise, and trust would remain purely hypothetical, a non-risky business. The conceptual differentiation between trust and acting on trust also explains why trust as a mental phenomenon similar to belief[436] cannot be actively chosen and is contingent upon available information: the characteristics of the trustee and the trustor and the contextual background. Only the action based on trust – its behavioural manifestation – can be chosen.

2.4. CONCEPTUAL CLARITY – DEMARCATING TRUST FROM NEIGHBORING CONCEPTS

Concept mastery often does not come only by defining, explaining, and qualifying the concept at hand, but also from the exercise of differentiating the concept from and contrasting it to its adjacents. There are many related concepts to trust which are often confused for trust or used

[431] Mayer, Davis and Schoorman (n 346) 712. See discussion also in: Rompf (n 265) 36.
[432] Mayer, Davis and Schoorman (n 346) 713.
[433] See for example: Diego Gambetta, 'Can We Trust Trust?' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (B Blackwell 1988) 217. See discussion also in: Rompf (n 265) 35. But not only, also the early trust philosopher A. Baier discussed besides what she termed unconsious trust also about „conscious trust the trustor has chosen to endorse and cultivate" – see Baier, 'Trust and Antitrust' (n 287) 244.
[434] Hardin, 'Conceptions and Explanations of Trust' (n 430) 11–12.
[435] Mayer, Davis and Schoorman (n 346) 724.
[436] Just as we find ourselves trusting or distrusting, we find ourselves believing or not believing, with little sense of control and it is difficult to simply abandon these beliefs at will – if you want me to change my mind, you have to produce and present some evidence. See: Hawley, *Trust* (n 310) 78.

to explain or qualify it. These concepts are confidence, reliance, hope, and faith on the one hand, and gullibility, distrust, mistrust, and the absence of trust on the other.

2.4.1. Confidence

The delineation between trust and confidence has to do with the notion of personal control and choice in a situation of uncertainty and the level of assurances available leading to mental certainty.

Both confidence and trust are directed to the future and refer to expectations that may lapse into disappointment.[437] The objective structural component of trust is its directedness to the future. As per Luhmann, to show trust is to anticipate the future; it is to behave as though the future were certain.[438] Confidence is also involved in predicting the future, in that it brings the future into the present by providing a sense of certainty.[439] But although the internal consequences might be the same in one aspect (the creation of mental certainty), they are not the same with regard to another – the acceptance and perception of vulnerability. It has been argued that in cases of trust, one accepts and embraces vulnerability, while in cases of confidence, one ignores vulnerability – vulnerability is suppressed from actual perception.[440]

The reason why vulnerability is removed from experience might also come from external context. For confidence, the external evidence might support certainty more, and there might be fewer options, whereas for trust, there are bigger gaps of information and knowledge but more available choices of action. Confidence has been described as an emotion of assured expectation.[441] When I know that another party will behave as expected in a predetermined and well-anticipated situation, this knowledge could better be described as confidence, as trust is involved only when there is the possibility of an unanticipated or only imperfectly anticipated situation in which there is a real risk of default.[442] Accordingly, Philip J. Nickel has described the distinction between a disposition based on the predictive expectations of reliability, which is labelled "confidence", and a trusting disposition, which is not a prediction, but rather an

[437] Niklas Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988) 97.
[438] Luhmann, *Trust and Power* (n 313) 10.
[439] JM Barbalet, 'Social Emotions: Confidence, Trust and Loyalty' (1996) 16 International Journal of Sociology and Social Policy 75, 81.
[440] Rompf (n 265) 65.
[441] Barbalet (n 439) 74.
[442] Henry Farrell, 'Institutions and Midlevel Explanations of Trust' in Russell Hardin, Margaret Levi and Karen S Cook (eds), *Whom Can We Trust? How Groups, Networks, and Institutions Make Trust Possible* (2009) 129–130.

evaluation of the social situation and the person on whom one is in a position to rely.[443] Trust is thus less predictive (although it is also predictive) and more subject-dependent. In a similar manner, Seligman has distinguished trust from confidence in that the latter rests on knowledge or predictability of the other's actions, while trust is necessary to maintain interaction in the absence of such knowledge.[444] He stresses that confidence is predicated on knowledge of what will be, knowledge that may be based either on contextual circumstances (e.g. ability to impose sanctions) or the familiarity or "sameness" of others.[445] The psychological distinction between confidence and trust lies in that the first is a disposition towards reliance based on reliable information or predictive knowledge, while the second is a similar disposition towards reliance where such solid knowledge is lacking.[446]

Luhmann and Sztompka have differentiated trust and confidence on the level of subjective experience and attribution: although both of them refer to expectations of future contingencies that may disappoint, the term "confidence" is applicable whenever an actor subjectively does not take into account alternatives or the potential for damage and harm.[447] In this vein, Luhmann has qualified that the distinction between the two depends on perception and attribution: if you do not consider the alternatives, you are in a situation of confidence and react to disappointment by external attribution, but if you choose one action in preference to others, you are in a situation of trust, and will react to disappointment with an internal attribution – regretting your trusting choice.[448] Sztompka has similarly stressed that in the case of confidence, one is not actively involved, but rather passively, contemplatively observes the situation: detached, distanced, and noncommittal.[449] This has to do with the situation of confidence, which besides being more contextually certain, also involves fewer (in fact, no) available alternative options for the subject.

All in all, trust and confidence differ on four accounts. First, the perception and admittance of vulnerability – in cases of trust one embraces vulnerability, while in cases of confidence one ignores potential vulnerability. This ignorance or suppression might come from two factors: either the situational context is more certain (there is predictive knowledge, no matter whether

[443] Philip J Nickel, 'Being Pragmatic about Trust' in Paul Faulkner and Thomas Simpson (eds), *The Philosophy of Trust* (Oxford University Press 2017) 204.
[444] Seligman (n 1) 391.
[445] ibid 392–393.
[446] Nickel (n 443) 206.
[447] Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' (n 437) 97. See also discussion in: Rompf (n 265) 64–66.
[448] Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' (n 437) 97–98.
[449] Sztompka (n 330) 24–25.

this turns out to be accurate or not) in the case of confidence, so vulnerability is less perceived or there are no alternatives to consider. Thus, the subjective involvement in cases of confidence is reduced to a minimum. For this reason, the attribution of disappointment in cases of failed expectations is also different: if confidence fails, one reacts with external blame, while if trust fails, at least some of the blame materialises as regret in the decision to act on trust, as one had a choice between alternative courses of action.

2.4.2. Reliance

Reliance is often used to describe and even define trust.[450] K. Hawley has explained that trust involves reliance in that a common core of trust is practical reliance on the trustee.[451] But mere reliance is nevertheless distinguished from trust, usually demarcating only its behavioural component. This was already noticed by A. Baier in her philosophical account of trust as distinguishing it from mere reliance; although she uses the word in the definition, she still makes a differentiation between mere reliance and trust in that we can still rely when we no longer trust.[452]

From a structural perspective, trust is prior to the decision to rely[453] and the act of reliance itself – trust is not an action, but an attitude that comes before and explains an action. But besides being a part of the structural composition of trust, not all relying requires the prior attitude of trusting. Thus, there is a more fundamental differentiation between them besides the temporal antecedence of trust.

Another facet that distinguishes trust from reliance is the moral dimension: trust has a moral aspect that is absent from reliance.[454] Trust is moral, reliance is pragmatic.[455] Both trusting and relying on someone involve presupposing that she will act as expected, but trust involves such reliance plus some additional factor.[456] We also rely on things (i.e. a clock) and other inanimate objects, but trust requires some minimal form of morality, attribution of disappointment, and agency.

Richard Holton has described this difference between trust and reliance in that trust involves taking a participant stance towards the person you are trusting: when you trust someone to do

[450] See for example: Baier, 'Trust and Antitrust' (n 287) 234; Barbalet (n 439) 77.
[451] Hawley, *How To Be Trustworthy* (n 368) 2.
[452] Baier, 'Trust and Antitrust' (n 287) 234.
[453] Ribstein (n 259) 560.
[454] Lagerspetz (n 335) 15.
[455] Townley and Garfield (n 325) 97.
[456] Hawley, *How To Be Trustworthy* (n 368) 8.

something, you rely on them to do it, and you regard that reliance in a certain way – you have a readiness to feel betrayal should it be disappointed, and gratitude should it be upheld.[457] This is a part of treating them as a person[458] – giving them agency and discretion and attributing responsibilities, but accordingly also possible blame or merit. Note that blame, betrayal, gratitude, and merit are again the manifestations of the affective and moral components of trusting: they are strong emotions after one feels they are let down, often in contexts involving moral and value-laden normative expectations.

Hawley has described this additional factor in differentiating trusting from mechanical reliance as something to do with heightened expectations in trusting and your reaction if the trustee lets you down.[459] She proposes that this heightened expectation comes from a commitment of the trustee in what she conceptualises as the commitment account of trust: to trust someone to do something is to believe that she has a commitment to doing it, and to rely upon her to meet that commitment.[460] These commitments are best captured in the form of promises, but not only; according to Hawley, commitments can be explicit or implicit, weighty or trivial, conferred by roles and external circumstances, default or acquired, welcome or unwelcome.[461] Commitments trigger moral responsibility when they are not met and reactive attitudes on the part of the trustor – notably resentment, feelings of betrayal, and blame. This also explains why we can rely on inanimate objects, but not trust them – they do not possess human agency that is capable of assuming responsibility or responsive to such normative expectations.

Thus, reliance, besides being the manifestation of the behavioural component of trust, also does not have a moral, commitment-triggered connotation and thus could also be placed in inanimate objects. This added commitment differentiates trust from reliance, and it triggers responsibility, liability and accountability if not met.

2.4.3. Hope, faith, and gullibility

The distinction of trust from hope, faith, and gullibility has to do with epistemology and the rational-cognitive basis and with the emotional-dispositional degree, with trust being more rooted in available information and evidence and less dispositional.

[457] Richard Holton, 'Deciding to Trust, Coming to Believe' (1994) 72 Australasian Journal of Philosophy 63, 67.
[458] ibid.
[459] Hawley, *Trust* (n 310) 5.
[460] Hawley, *How To Be Trustworthy* (n 368) 9.
[461] ibid 10.

Hope is also associated with optimistic beliefs, but according to Sztompka, it is a passive, vague, not rationally justified feeling that things will turn out for the good.[462] In Sztompka's account, there are three types of orientations with which we face the human predicament of uncertainty and risk: hope, confidence, and trust. Hope does not usually have a person or human agent at its receiving end and is more related to situations and their expected outcomes. Luhmann has also characterised this participant stance differentiating trust from hope in that according to him trust reflects contingency, but hope ignores contingency.[463] As such, trusting is more reflective of available evidence and the countless possibilities of the future, whereas hoping is passive. On the availability of evidence, Rompf has added that in the total absence of information it is more appropriate to talk of hope and not trust, although trusting acts could be observed.[464] Lewis and Weigert have also stressed that in cases where all cognitive content of emotional trust is removed, what is left is mere hope.[465]

Govier has spelled out the difference between trust and faith in that both require undoubting belief, but where there is trust as opposed to faith, the undoubting belief is not the result of ignoring potential evidence.[466] Trust is more grounded in evidence and more sensitive to it and thus closer to reality than is faith, whereas faith often ignores the evidence.[467] This makes a distinction between a question of faith and a question of trust: believing in something despite the existing contrary evidence (and interpreting it suitably) vs. believing in something on the basis of evidence and interpreting the lack of evidence and certainty suitably.

Gullibility, on the other hand, is a readiness to believe that which is wished for, a positive readiness to be deceived (or a lack of consideration of deception), and an absence of reflectiveness and critical thinking.[468] Thus, its cognitive, evidential basis might be similar to trust, but is a difference in the disposition to trust and rely to an extreme extent disregarding the cognitive informational basis for trust.

In summary, the availability and consideration of information as the basis of forming a certain belief about expected outcomes and the trustor's modality differentiates trust from hope, faith, and gullibility. Trust must be grounded on some, although imperfect evidence, and there cannot be contradictory evidence; hope is grounded in the total absence of evidence and faith is

[462] Sztompka (n 330) 24.
[463] Luhmann, *Trust and Power* (n 313) 24.
[464] Rompf (n 265) 37.
[465] Lewis and Weigert (n 268) 972.
[466] Govier (n 301) 14.
[467] ibid.
[468] ibid 16.

grounded in the ignoring of contrary evidence. Gullibility is the personal disposition of the trustor to be indifferent or ignorant towards the potential evidentiary basis of the trusting belief with a disposition towards forming such trusting attitudes.

2.4.4. Distrust, mistrust, absence of trust?

There have been discussions in literature whether distrust represents merely the absence of trust, the opposite of trust on a continuum, or even a distinct concept in a separate dimension[469]. The continuum view is probably most prevalent in literature, placing trust, distrust, and absence of trust in such a continuum.

First, although there have been some tentative attempts to draw a conceptual distinction between distrust and mistrust, they are predominantly not very well delineated in trust literature. The distinction is sometimes made in that mistrust reflects a general absence of trust and hesitation, prompting caution and doubt, while distrust is more the opposite of trust, more emotionally loaded and based on negative experience that prompts suspicion and cynicism.[470] Along these lines, Sztompka has conceptualised mistrust as a neutral situation, where both trust and distrust are suspended, and there is a lack of clear expectations and hesitation about commitment, while distrust involves negative expectations and defensive commitments (avoidance, escape, distancing, inaction).[471] Although there are examples where the difference between the two is disregarded[472] or they are even used interchangeably[473], the most commonly used term for the symmetric opposite of trust is distrust.[474] As mistrust and distrust are often conceptually conflated and used interchangeably, I will, for the purposes of clarity, mostly use the term absence of trust to refer to the in-between neutral state of trust and distrust.

D. Gambetta has put trust, distrust, and the absence of trust (what he calls uncertainty) in a figurative distribution of expectations which can take number values suspended between complete distrust (0) and complete trust (1), and which is centred around a mid-point (0.50) of

[469] See for example discussion in: Möllering (n 258) 49; Rompf (n 265) 69–74.
[470] Forsberg (n 341) 160; Patti Tamara Lenard, 'Trust Your Compatriots, but Count Your Change: The Roles of Trust, Mistrust and Distrust in Democracy' (2008) 56 Political Studies 312, 318.
[471] Sztompka (n 330) 26.
[472] See for that: Florian Mühlfried (ed), *Mistrust: Ethnographic Approximations* (transcript-Verlag 2018); Florian Mühlfried, *Mistrust: A Global Perspective* (Springer International Publishing 2019); Matthew Carey, *Mistrust: An Ethnographic Theory* (Hau Books 2017).
[473] Sim B Sitkin and Katinka M Bijlsma-Frankema, 'Distrust' in Rosalind H Searle and others (eds), *The Routledge Companion to Trust* (Routledge 2018) 51; Hawley, *How To Be Trustworthy* (n 368) 6.
[474] See for example: Sitkin and Bijlsma-Frankema (n 473); Russell Hardin, *Distrust* (Russell Sage Foundation 2004); Hawley, *How To Be Trustworthy* (n 368).

uncertainty.[475] Besides this scale and the midpoint of uncertainty in making up one's mind on someone's trustworthiness, there are also situations where neither trust nor distrust is appropriate: not every aspect of other people's behaviour is a proper target of our trust or distrust.[476] There are cases in which both trust and distrust are simultaneously inappropriate, unwanted or unwarranted.[477]

Distrust is not a mere absence of trust (as often referred to as mistrust).[478] Whereas the absence of trust leads to fear or indifference, which are passive attitudes, distrust is an actively negative attitude based on scepticism and suspicion.[479] Luhmann has stressed that distrust is not just the mere opposite of trust, but also its functional equivalent – it is a simplification of a complex reality through a negative expectation.[480]

There are two key determinants of distrust: perceived value incongruence and negative attribution of motives.[481] These are the flipsides of the antecedents of trust in the perceptions of the trustee's integrity (as reflected in value congruence) and benevolence.

When trust is based on value congruence, then distrust is rooted in value incongruence.[482] Value incongruence has been defined as "the belief that others adhere to values that are perceived as incompatible with the actor's core values".[483] Distrust arises as others come to be characterised as unpredictable and threatening and under such circumstances, distrust – the unwillingness to be vulnerable – arises.[484]

Distrust and the mere lack of trust are also differentiable by the affective component of trust on their emotional reactions: low or absent trust is portrayed as simply dampening positive feelings (such as feeling calm, secure, accepting, ambivalent, or confident), distrust is portrayed as engendering strong negative feelings of fear, betrayal, anxiety, wariness, even hostility, anger,

[475] Gambetta (n 433) 218.
[476] Katherine Hawley, 'Trust, Distrust, and Epistemic Injustice' in Ian James Kidd, José Medina and Gaile Pohlhaus (eds), *The Routledge Handbook of Epistemic Injustice* (Routledge 2017) 75.
[477] Hawley, *How To Be Trustworthy* (n 368) 7.
[478] ibid 4.
[479] Mühlfried, *Mistrust* (n 472) 5.
[480] Luhmann, *Trust and Power* (n 313) 71.
[481] Sitkin and Bijlsma-Frankema (n 473) 53.
[482] ibid.
[483] Katinka Bijlsma-Frankema, Sim B Sitkin and Antoinette Weibel, 'Distrust in the Balance: The Emergence and Development of Intergroup Distrust in a Court of Law' (2015) 26 Organization Science 1018, 1020.
[484] Sitkin and Bijlsma-Frankema (n 473) 53.

or hate.[485] As per Katherine Hawley, distrust embodies a moral criticism, involving attitudes such as resentment and a distinctive emotional colour.[486]

Another stark contrast between absence of trust and distrust is the pervasive character of the latter, i.e. when distrust has been created, it permeates the relationship and does not allow trust to happen.[487] It has been described as a self-reinforcing cyclical process that pervades across domains.[488] This is different from the domain and context specific nature of trust – trust and low (or absent) trust can exist together towards the same subject in different domains: i.e. A trusts B with regard to X but not with regards to Y (this "not" signifies the absence of trust, not that A distrusts B with regard to X). If A already distrusts B (as a dispositional attitude), it might spill over from domain X to domain Y, Q, Z, etc. Distrust in that sense is more invasive and all-encompassing, crisscrossing contexts. Trust does not have the same degree of spillover as distrust does.[489] It has been argued that if distrust is present, factors that typically help to build trust will have no effect and the distrust issue has to be addressed first; this is not the case with the mere absence of trust.[490] This is so because the presence of distrust leads the foundations of trustworthiness (shared values, integrity, benevolence, etc.) to be undermined.[491]

2.5. DE-IDEALIZING TRUST

Trust has a warm and fuzzy[492] connotation to it, but that does not mean that trust is inherently positive or virtuous in philosophical terms. Although D. Gambetta has said that it may be rational to trust trust and to distrust distrust[493], this is not necessarily always the case. It would require a qualification: it is functional (or rational) to trust the trustworthy and dysfunctional (irrational) to distrust the untrustworthy.[494] As Sztompka has noted, the idealisation of trust breaks down where trust can be stupid or even culpable, and the obvious dysfunctionality occurs in situations of blind or naïve trust and when someone ignores any indications of trustworthiness, is misled by purposefully contrived fake trustworthiness, or discounts the negative evidence.[495]

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[485] ibid 54.
[486] Hawley, 'Trust, Distrust, and Epistemic Injustice' (n 476) 70–71.
[487] Sitkin and Bijlsma-Frankema (n 473) 56.
[488] ibid 52.
[489] Hardin, *Trust* (n 277) 18.
[490] Sitkin and Bijlsma-Frankema (n 473) 55–56.
[491] ibid 52.
[492] Hawley, *How To Be Trustworthy* (n 368) 1.
[493] Gambetta (n 433) 234.
[494] Sztompka (n 330) 108; Möllering (n 258) 83.
[495] Sztompka (n 330) 108.

Not even trustworthiness has been described among the common classical list of virtues in philosophy. Although proposed as such[496], the trust theorist K. Jones has strongly negated it. Taking virtue as a stable state of character that is an excellence, she denies trustworthiness as a virtue because of the three-place relational and conditional character of trust and trustworthiness, which does not make trustworthiness a stable state of character; trust may further bad ends as well as good ones.[497] Her most important rebuttal of the virtue account is that if trustworthiness were a virtue, then untrustworthiness was a vice, but that cannot be so as one can be required to be untrustworthy.[498] This is because trust and trustworthiness are context-dependent: not all situations equally require trust; sometimes distrust and the functional equivalent – control – are required, appropriate, and necessary. This resonates with A. Baier's account that trusting in a trust relationship that is corrupt, perpetuating brutality, tyranny, or injustice, is silly self-exposure, and disappointing and betraying trust, including encouraged trust (and even more so, imposed trust), may not be merely morally permissible but morally praiseworthy.[499]

Thus, trust is not always, and by definition, functional in terms of desirable or ethical outcomes – not only are there potential errors due to bounded rationality of the trustor, potential deceit, and the principal freedom of the trustee; functionality also depends on what trust is used for and whose functionality is assessed (trustor, trustee, third parties, society).[500] Contrastingly, Luhmann has emphasised that trust is not at all a means that can be chosen for particular ends, nor an end/means structure capable of being optimised.[501] Trust is neither intrinsically good nor bad, but it depends.[502] In a wider societal context, there are immoral as well as moral trust relationships.[503]

G. Möllering has moreover stressed the possibly unmoral aspect of the rhetoric of trust in that it might be hypocritical, disguising ulterior motives on the part of those who invoke trust in order to manipulate others: to force trust on other in order to compel them into a form of loyalty and responsibility that stretches beyond the ordinary.[504] He stressed the importance of distinguishing between genuine trust and trust-like facades in discourse and behaviour and that

[496] Nancy N Potter, *How Can I Be Trusted? A Virtue Theory of Trustworthiness* (Rowman & Littlefield 2002).
[497] Jones, 'Trustworthiness' (n 371) 78 et seq.
[498] ibid 84.
[499] Baier, 'Trust and Antitrust' (n 287) 253.
[500] Möllering (n 258) 83.
[501] Luhmann, *Trust and Power* (n 313) 87.
[502] Sztompka (n 330) 114.
[503] Baier, 'Trust and Antitrust' (n 287) 232.
[504] Möllering (n 258) 4.

the latter, these rhetorical aspects of trust, remind us that trust has consequences and affects interests.[505] In sum, Sztompka has called for a double relativisation of trust: first, an epistemological relativisation meaning an assessment whether trust is grounded or not in sound estimates (with an aim to trust the trustworthy and distrust the untrustworthy); and second, ethical relativisation, meaning an assessment of whether the trust has beneficial effects for the whole society or only for some limited segments against others.[506]

Thus, it is undesirable and conceptually mistaken to burden trust and trustworthiness with unnecessary moral and normative content and connotations without providing context and conditions. Only relationships characterised by mutual trust and trustworthiness, which are genuine, prudent, and in pursuit of valuable goals, can be considered intrinsically valuable.[507] The valuable nature of trust is grounded in the form of trust which does not fail on any fronts: I trust you when I have some evidence of you being trustworthy, and if you are trustworthy I can cooperate with or rely on you to our mutual (and societal) benefit.[508] But trust is not categorically laudable as an object in itself, but needs precise consideration and calibration in light of the desired aims and contextual circumstances. Thus, the value of trust is subject to at least two qualifiers: whether it is well-grounded and whether it pursues worthwhile aims. If the first fails, trust is misguided; if the second fails, trust is bad or unethical. Distrust might be necessary, rational in itself, and even beneficial for creating trust systemically.[509] This leads into discussions about mutual trust as a concept in EU law, which will be dismantled later in Chapter 4.

[505] ibid 5.
[506] Sztompka (n 330) 102–103.
[507] M Harding, 'Manifesting Trust' (2009) 29 Oxford Journal of Legal Studies 245, 262.
[508] Hardin, *Trust* (n 277) 3.
[509] See on that further below Chapter 4.

(III) TRANSFORMATION OF MUTUAL TRUST – THE MAKING OF A PRINCIPLE

But what is the EU principle of mutual trust about? To get an answer to that, an EU lawyer would run to consult the treaties. The problem with that is, as explained earlier, that mutual trust, like many other EU law principles, is and never has been mentioned in any of the founding treaties that have been in force throughout history. The draft treaty establishing the Constitution for Europe is a unique exception, which, as is well known, never entered into force due to its failures in the French and Dutch national referendums. But the draft treaty included under its chapter II Article I-42 of the specific provisions relating to the AFSJ clause 1(b):

> "The Union shall constitute an area of freedom, security and justice: by promoting mutual confidence [emphasis added] between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions;"[510]

As will be shown and argued later, Union institutions, especially the Court, have used mutual trust and mutual confidence interchangeably; thus, this reference to mutual confidence is akin to a reference to mutual trust, as they are the same in EU law and policy (compare before the difference of trust and confidence in Chapter 2). But this clause nevertheless never entered into force, and the following Lisbon Treaty contained no references to either mutual confidence or trust. EU primary law has thus never been the explicit normative source of the principle of mutual trust.

It has been instead a principle developed by the CJEU in its case law, like many other fundamental principles today constitutive of the EU legal order. It appeared already in the late 1970s in the Court's argumentation and would become decades later a fundamental principle of Union law[511], or as Advocate General Bot has contended: that of comparable status to the principles of primacy and direct effect.[512] Emerging and repeated in case law, later mirrored in legislation – that is often how the Union legal process sequences. One thing is sure – mutual trust as we know it today is not what it used to be. It is not the same as in the onset decades ago, nor even what it was only a few years ago. As will be shown, mutual trust is amorphous and dynamic, and has become even more so in very recent years.

[510] Treaty establishing a Constitution for Europe [2004] OJ C 310/1.
[511] *Opinion 2/13*, para 191.
[512] Opinion of AG Bot in Cases C-404/15 and C-659/15 PPU *Aranyosi* ECLI:EU:C:2016:140, para 106.

This chapter aims to map this transformation and takes a close, comprehensive look at CJEU's mutual trust case law throughout history. This to provide an exhaustive overview and with it (and as to facilitate grasp of the vast case law) a tentative catalogue of distinct mutual trust jurisprudential eras. With an overall aim to clarify and sharpen the understanding of the principle and provide a solid basis for further discussions. It is a genesis of a principle, which is the beginning of any conceptualisation.

I say the beginning, as mapping out case law and its categorisation are first and foremost descriptive exercises. But not only. As Julie Dickson has said: "[j]urisprudential theories must not merely tell the truths, but must tell us truths which illuminate that which is most important about and characteristic of the phenomena under investigation".[513] And although one legal theoretical consideration is to give due and truthful regard to the self-understandings of those living under and administrating the law, the ultimate aim is not only to record and reproduce these understandings, but also to evaluate and make judgements[514] where necessary; to appropriately "tidy up" legal concepts where they are vague, confused, mistaken, or incomplete; or to introduce new conceptual distinctions.[515] The last bit will come in the next two chapters, where I aim to theoretically evaluate and reconstruct mutual trust, but some important evaluations and conceptualisations are already made in this chapter. And, needless to say, the presentation and categorisation done here lays an important foundation for the analytical reconstructive enterprise taken on in the next chapters and provides apprehensible mind units for the reader (for what mutual trust is, what it relates to and is based on, what it has been, and how/why this change has come about).

Categorisation for better comprehension is needed, as the analysed case law is vast and broad. The analysis in this chapter is based on a total of 115 cases. This is the first time to my knowledge that such all-encompassing research and categorisation of mutual trust case law has been done. To do it in an intelligible manner, one must first find all relevant case law (as intact as possible) and separate the wheat from the chaff. This exercise is first depicted for methodological clarity in the following section.

[513]Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 25. See discussion in Giudice (n 224) 592.
[514]Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Julie Dickson and Paulos Z Eleutheriades (eds), *Philosophical foundations of European Union law* (Oxford University Press 2012) 52.
[515]Julie Dickson, 'On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become' (2011) 30 Law and Philosophy 477, 495.

3.1. WHAT IS ANALYSED AND WHAT IS NOT?

3.1.1. The data and the method

First comes the data. Any claim about the nature of a principle presupposes an inquiry into its usage by relevant actors. As guided by the research question, the relevant actor in the current case is the Court. Accordingly, the quest for conceptual clarity began by compiling a dataset of all judgements where the Court mentions "mutual trust" or "mutual confidence".

The first confusion surfaces – why trust and confidence? The reason for including the latter is that despite the relatively obvious intuition that "trust" and "confidence" are neither linguistically[516] nor theoretically[517] equivalent concepts, the Court nevertheless throughout its case law history uses the two notions to connote the same substance[518] interchangeably and conceptually inattentively. This is especially surprising after the important (if not to say constitutional) moment that the principle had with *Opinion 2/13*, where the Court clearly pinned down and defined the principle as we know it today.[519] If it might have been expected that the CJEU would then continue to use the singular and univocal concept and its definition delimited in the opinion, then that has not proven to be the case. The Court has continued to use mutual confidence alongside mutual trust[520], or even separately and independently of the latter.[521] After a systematic analysis of the case law, there is no plausible basis to say that they are different principles or concepts. Their substance in meaning, normative and argumentative force, and

[516] The Cambridge English Online Dictionary defines trust as a verb: "to believe that someone is good and honest and will not harm you, or that something is safe and reliable" and as a noun: "the belief that you can trust someone or something"; whereas it defines confidence as "the quality of being certain of your abilities or of having trust in people, plans, or the future". See: https://dictionary.cambridge.org/dictionary/english/trust and https://dictionary.cambridge.org/dictionary/english/confidence (last accessed: 08.05.2019). Linguistically it is evident, that besides the fact that trust works both as a verb and a noun and confidence does not, the latter is also conceptually wider as it also includes the conception of self-confidence and its modality is "stronger" – one is a belief, the other amounts to *being certain.*

[517] See discussion in Chapter 2 where many theorists, including N. Luhmann distinguish clearly between trust and confidence, having also practical implications.

[518] That can be said after conducting the research in this dissertation, but an additional argument comes from the mere comparison of language versions. Thus, the French language versions also have two equivalents to the English terms mutual trust/confidence, being "confiance mutuelle" and "confiance reciproque", with the difference of the term relating to "mutual" and not trust. Still, a combined search in EUR-lex with the two terms in French gives a largely coinciding search result with the English language.

[519] *Opinion 2/13* defined the principle of mutual trust between the Member States as requiring, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. See *Opinion 2/13*, para 191.

[520] See for some recent examples: *Aranyosi and Caldararu*, paras 76-78; Case C-453/16 PPU *Özçelik* ECLI:EU:C:2016:860, paras 23-24, 35-36; Case C-452/16 PPU *Poltorak* ECLI:EU:C:2016:858, paras 26, 45; Case C-477/16 PPU *Kovalkovas* ECLI:EU:C:2016:861, paras 26-27, 44; Case C-578/16 PPU *CK and Others* ECLI:EU:C:2017:127, paras 70, 95.

[521] See e.g. Case C-241/15 *Bob-Dogi* ECLI:EU:C:2016:385, paras 32-33, 52, 65; Case C-554/14, ECLI:EU:C:2016:835, paras 47-48; Case C-289/15 *Grundza* ECLI:EU:C:2017:4, para 41.

practical consequences are the same. There is no evidence that the difference in wording is anything more than stylistic or coincidental. This has been affirmed in mutual trust literature.[522]

Therefore, to analyse the object of this research, I needed to find and compile all decisions where the Court has used the phrases "mutual trust" or "mutual confidence", i.e. encompassing all mutual trust case law. For that I conducted an advanced search in the EUR-lex database with the search criteria: Domain: EU law and related documents, Subdomain: EU case law, Document type: Judgement, Results containing: "mutual trust" In title and text, OR: "mutual confidence" In title and text, Search language: English. This gave a total of 188 results. All of these were judgements of the Court. As my preliminary knowledge hinted, I needed to include also opinions of the Court (as *Opinion 2/13* had a significant impact in terms of both on mutual trust as a principle and vice versa the principle to the final verdict and our understanding of the Union legal structure). Finding all relevant opinions was not as straightforward, as one search did not capture all opinions for some (probably technical) reason, and two separate searches were necessary.[523] I identified the total of four opinions of the Court given pursuant to Art 218(11) TFEU (or the earlier equivalents of Art 300(5) EC and Art 228(1) EEC) on the compatibility of envisaged international agreements with the treaties. The four opinions and international agreements were: the 11 November 1975 *Opinion 1/27* on the OECD draft Understanding on a Local Cost Standard; the 7 February 2006 *Opinion 1/03* on the new Lugano Convention on jurisdiction and recognition and enforcement of judgements in civil and commercial matters; as mentioned, the 18 December 2014 *Opinion 2/13* on the draft accession agreement to the ECHR; and most recently, the 30 April 2019 *Opinion 1/17* on the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States (the CETA agreement).

That makes up the complete bulk of 192 decisions which mention somewhere in them either "mutual trust" or "mutual confidence". Obviously, not all the results address mutual trust/confidence as the principle of mutual trust as developed through the case law to what it is today. Although I specifically chose to take a broad and open-minded approach to mutual trust

[522] See recently in: Dominik Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European Administrative Law 151, 153–154, fn 8; Timmermans (n 130) 25; Lenaerts (n 93) 813 fn 28.

[523] With the first search criteria (which did not give the oldest and in fact first ever decision were mutual trust was mentioned in 1975): *Domain: All, Subdomain: All documents, Form: Opinion of the Court, Results containing: "mutual trust" In title and text, OR: "mutual confidence" In title and text, Search language: English* combined with the second search criteria: *Domain: EU law and case law, Subdomain: Case law, Document type: Opinion, Results containing: "mutual trust" In title and text, OR: "mutual confidence" In title and text, Search language: English.*

to avoid doing injustice and excluding necessary conceptual evolutions and developments of the notion (especially in the early days of its appearance in the case law), there were still many clear and obvious (and some not so clear and obvious) strains of cases that, in my view and judgement, do not merit analysis under the principle of mutual trust jurisprudence in light of the chosen research question. So false positives had to be eliminated and since it was a careful and analytic effort, it merits a section in its own right to serve both methodological and conceptual clarity and valuable potential for future research.

3.1.2. The false positives and a false negative

In the course of the analysis of this overwhelming data, some immediate types of false positives appeared. But not all of them were straightforward, so a few methodological explanations and the basis of choices for eliminating false positives is in place. I will continue to list the clusters of cases that were disregarded as false positives and provide the underlying reasons for doing so.

First, I included in the analysis only those decisions where the Court has used mutual trust or confidence in its legal reasoning. That means that the mentioning of the phrase had to appear in the merits of the case, i.e. usually under the heading "Consideration of the question referred", "Opinion of the Court", "Substance", "Discussion", or the like, and not i.e. under the parts "Legal context/background" or "The dispute in the main proceedings and the questions referred for a preliminary ruling" or "Submissions of the parties" in all different wordings possible throughout the Court's judgement-drafting history. It must be noted that especially in the earlier case law, judgements were not as clearly structured as today or not structured at all, but still the merits of the case or "the voice of the Court" was always distinguishable. Since mutual trust has emigrated from CJEU case law to legislation, the initial results also included numerous cases where mutual trust popped up in the reference to applicable law (usually preambles) or parties' submissions. The number of cases omitted on this ground was 23.[524]

[524] Case C-87/94 *Commission v Belgium,* ECLI:EU:C:1996:16; Case C-476/01 *Amtsgericht,* ECLI:EU:C:2004:261; Case C-115/08 *Land Oberösterreich*, ECLI:EU:C:2009:660; Case C-185/07 *Allianz SpA,* ECLI:EU:C:2008:466; Case C-385/05 *Confédération générale du travail*, ECLI:EU:C:2007:37; Case C-320/01 *Wiebke Busch,* ECLI:EU:C:2003:114; Case C-250/07, *Commission v Hellenic Republic,* ECLI:EU:C:2009:338; Case C-276/12 *Jiří Sabou,* ECLI:EU:C:2013:678; Case C-200/13 P, *Council v Bank Saderat Iran,* ECLI:EU:C:2016:284; Case C-176/13 P *Council v Bank Mellat,* ECLI:EU:C:2016:96; Case C-300/14 *Imtech,* ECLI:EU:C:2015:557; Case C-593/13 *Rina Services SpA*, ECLI:EU:C:2015:159; Case C-438/12 *Weber,* ECLI:EU:C:2014:212; Case C-280/12 P *Council v Fulmen,* ECLI:EU:C:2013:775; Case C-543/12 *Zeman,* ECLI:EU:C:2014:2143; Case T-566/08 *Total Raffinage,* ECLI:EU:T:2013:423; Case C-406/09 *Realchemie Nederland BV,* ECLI:EU:C:2011:668; Case C-347/09 *Dickinger,* ECLI:EU:C:2011:582; Joined Cases C-317/08,

Second, there emerged a cluster of cases relating to access to documents proceedings. This is the group of cases concerning a dispute over someone's request for access to documents, whereby the EU institution at hand justifies the disclosure by the need to ensure "a climate or atmosphere of mutual trust" in negotiations or other procedures.[525] The Court usually accepts this argument or otherwise reflects it in its considerations. Mutual trust and confidence are also used interchangeably in this context.[526] This type of mutual trust is needed in treaty negotiations, infringement proceedings, or other procedures, and could be either between EU institutions and Member States[527] or between the Union and third countries or institutions[528] in foreign instrument negotiations. Thus, this notion of mutual trust embodies a much broader spectrum of addressees[529] and usages than what is in its essence prescribed by the principle of mutual trust (as broadly speaking between EU Member States and its authorities). I consider this usage, although interesting, not to reflect the principle of mutual trust as the object of this dissertation and as defined and understood by the Court in its other, vast case law. I identified 23 access to documents cases that I discarded as false positives.[530]

The third type of false positives comprises all cases where mutual trust connotes interpersonal relations, i.e. individual or private mutual trust. These usually include staff or employer-employee relations in contexts of the civil employment relationships in the EU, settled in EU courts. The majority of cases here are Civil Service Tribunal cases for solving EU staff

C-318/08, C-319/08 and C-320/08 *Alassini and Others,* ECLI:EU:C:2010:146; Case C-271/17 PPU *Openbaar,* ECLI:EU:C:2017:629; Case C-729/17, *Commission v Greece,* ECLI:EU:C:2019:534; Joined cases C-188/10 and C-189/10; Case C-659/18 *Melki*, ECLI:EU:C:2010:363.

[525] See e.g. Case T-20/99, *Denkavit*, ECLI:EU:T:2000:209, para 49.

[526] See as a counterexample the „climate of mutual confidence" in Case T-105/95 *WWF UK*, ECLI:EU:T:1997:26, para 48.

[527] See e.g. Case T-191/99, *Petrie and Others*, ECLI:EU:T:2001, para 67.

[528] See e.g. Case T-301/10 *Veld*, ECLI:EU:T:2013:135, para 119.

[529] As regards to addresses, see also below the discussion on the principle of mutual trust not being applicable to extra-EU relations. This could be an alternative rationale of dismiss. Similarly, in many of the access to documents cases, mutual trust or confidence was referred to only in the parties submissions part of the judgement and not in the merits of the case – see e.g. Case T-851/16 *Access Info Europe*, ECLI:EU:T:2018:69, para 31. I still found it useful to exclude this line of case law as homogenous.

[530] These are: *Denkavit*; *Petrie and Others*; Case *WWF UK*; Case T-309/97, *Bavarian Lager*, ECLI:EU:T:1999:257; Case T-123/99 *JT's Corporation Ltd*, ECLI:EU:T:2000:230; *Veld*; Case T-306/12, *Spirlea*, ECLI:EU:T:2014:816; Case C-612/13 P, *ClientEarth*, ECLI:EU:C:2015:218; Case T-402/12, *Schlyter*, ECLI:EU:T:2015:209; Case T-111/11, *ClientEarth*, ECLI:EU:T:2013:482; Case T-623/13, *Unión de Almacenistas*, ECLI:EU:T:2015:268; Case T-669/11 *Spirlea*, ECLI:EU:T:2014:814; Case T-447/11 *Catinis*, *EC*LI:EU:T:2014:267; Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, ECLU:EU:C:2013:738; Case C-477/10 P *Commission v Agrofert*, ECLI:EU:C:2012; *LPN v Commission*; Case T-250/08, *Batchelor v Commission*, ECLI:EU:T:2011:236; Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission*, ECLI:EU:T:2010:511; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, ECLI:EU:C:2010:376; Case C-331/15 P *France v Schlyter*, ECLI:EU:C:2017:639; Case T-540/15 *Capitani v Commission*, ECLI:EU:T:2018:167; Case T-851/16 *Access Info Europe*, ECLI:EU:T:2018; Case T-852/16 *Access Info Europe II*, ECLI:EU:T:2018:71.

disputes[531], but this also incurred in some distinct cases that arrived at the Court in the realm of labour relations[532] and competition cases[533]. The overall number of these private types of individual mutual trust false positives was 21.

Fourth, there emerged a precarious type of mutual trust: including an EU institution (as a rule so far, the Commission) and either a Member State authority[534], a private party[535], or all of them[536]. Through these cases, the Court confirmed their overall obligations to cooperate in good faith and with mutual trust. As in the whole case law history there are only three such cases where mutual trust includes an EU institution, I consider these to be isolated instances diverging from the broader conception of mutual trust as something horizontal between Member States (authorities) and not vertical between EU institutions and Member States. That belongs more to the realm of the principle of sincere cooperation. As mentioned, there were altogether three such false positives.

Finally, I disregarded all cases that concerned extra-EU mutual trust, i.e. mutual trust being between EU or Member State authorities and a third state or third state authorities. This was not so intuitive, as they could not be excluded prima facie because of the very similar wording, but it was necessary for delimiting the scope of analysed cases. The difficulty of identification came, moreover, from the fact that sometimes the then-non-EU Member State (at the time when

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[531] In these cases, mutual trust or confidence is typically referred to in contexts that mutual trust is an essential element of employment contracts or relations, a requirement alongside good faith. There are altogether 15 Civil Service Tribunal staff cases: Case 125/80 *Arning*, ECLI:EU:C:1981:248; Case F-128/07, *Menidiatis*, ECLI:EU:F:2009:30; Case F-15/05 *Andres*, ECLI:EU:F:2008:81; Case C-166/95 P *Commission v Daffix*, ECLI:EU:C:1997:73; Case T-45/90 *Speybrouck v Parliament*, ECLI:EU:T:1992:7; Case T-237/00 *Reynolds v Parliament*, ECLI:EU:T:2005:437; Case C-111/02 P *Parliament v Reynolds*, ECLI:EU:C:2004:265; Case T-404/06 P *Fondation européenne pour la formation v Pia Landgren*, ECLI:EU:T:2009:313; Case C-150/03 P *Hectors v Parliament*, ECLI:EU:C:2004:555; Case F-132/14, *CH v Parliament*, ECLI:EU:F:2015:115; Case F-129/12 *CH v Parliament*, ECLI:EU:F:2013:203; Case F-41/14 *CW v Parliament*, ECLI:EU:F:2015:24; Case F-124/13 *CW v Parliament*, ECLI:EU:F:2015:23; Case F-43/10 *Cerafogli v ECB*, ECLI:EU:F:2012:184; Case T-160/17 *RY v Commission*, ECLI:EU:T:2019:1.

[532] Where mutual trust is referred to as merely to describe the special relationship of mutual trust between the employer and the worker. There was one such case besides all the Civil Service Tribunal staff case law: Case C-260/17 *Anodiki Services EPE*, ECLI:EU:C:2018:864, para 30.

[533] Usually in the arguments and considerations related to allegedly distortive behaviours and agreements – either to establish understandings created on the basis of mutual trust; or that such behaviours were i.e. necessary to create the climate of mutual trust and cooperation / group discipline between private parties. See the total of five competition cases: Case T-396/10 *Zucchetti Rubinetteria SpA*, ECLI:EU:T:2013:446, para 76; Case T-112/07, *Hitachi Ltd*, ECLI:EU:T:2011:342, para 158; Case T-113/07 *Toshiba Corp*, ECLI:EU:T:2011:343, para 126; Case T-186/06 *Solvay SA v Commission*, ECLI:EU:T:2011:276, para 152; Case T-299/08 *Elf Aquitaine SA* ECLI:EU:T:2011:217, para 356.

[534] See Case T-2/11 *Portugal v Commission* ECLI:EU:T:2013:307, para 32.

[535] In that case a grant beneficiary: Case T-196/01 *Aristoteleio Panepistimio Thessalonikis v Commission* ECLI:EU:T:2003:249, para 49.

[536] The Court stressed the obligation of the Commission, the Member State and the undertakings concerned to cooperate in good faith and mutual confidence in the case of state aid investigations: Case T-237/02 *Technische Glaswerke Ilmenau GmbH* ECLI:EU:T:2006:395, para 92.

the facts of the case happened) had become a Member State by the time the judgement was delivered[537] and often the wording, manner, and purpose by which mutual trust was deployed was identical to the "regular" cases of intra-EU mutual trust.[538] This might similarly happen in an opposite direction soon with regard to the UK in the context of Brexit.

The crucial factor, why I still decided to exclude extra-EU mutual trust in any form, came after the delivery of *Opinion 1/17* on the CETA agreement in April 2019, where the Court for the first time explicitly said that the principle of mutual trust is not applicable in relations between the Union and a non-Member State.[539] More importantly, I think the Court wanted to imply that the principle of mutual trust does not accordingly apply in relations between Member States and non-Member States. This is not self-evident, as the Union has an independent legal personality under Art 47 TEU, but an opposing interpretation would seem unlikely, as the principle of mutual trust has been defined explicitly as applicable between EU Member States and not between Member States and the Union. As the meaning and purpose of the rule in *Opinion 1/17* seems to reasonably imply that there can be no principle of mutual trust between either EU and third countries or Member States and third countries as far as EU law is concerned, I decided to eliminate from further analysis all the borderline cases concerning extra-EU mutual trust. This conclusion becomes still more controversial now, as merely a year after rendering *Opinion 1/17*, the Court in fact again extended mutual confidence over the relationships of EU Member States with Iceland as an EFTA state, but it must be stressed that this might be an exception, as a reference to mutual confidence between the contracting parties in the structure and functioning of their legal systems was in the preamble of that particular international agreement under dispute.[540] So this exception should be deemed isolated, although it does raise particularly interesting questions about the possibility to extend mutual trust to third countries, former Member States (in the case of Brexit[541]), or different states participating

[537] As was the case with regard to Hungary in Case C-442/08 *Commission v Hungary*, ECLI:EU:C:2010:390 and Joined Cases C-23/04 to C-25/04 *Sfakianakis AEVE v Elliniko Dimosio*, ECLI:EU:C:2006:92 and Latvia in cases C-574/17 P *Commission v Combaro* ECLI:EU:C:2018:598 and Case T-752/14 *Combaro v Commission* ECLI:EU:T:2017:529.

[538] See for example Case T-752/14 *Combaro* ECLI:EU:T:2017:529, para 86.

[539] See *Opinion 1/17* after reiterating the normative content of the principle in para 128 goes on to stress in para 129: "However, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State."

[540] See Case C-897/19 PPU *Ruska Federacija v I.N.* ECLI:EU:C:2020:262, paras 11, 73.

[541] Mutual trust has already been proposed by some notable scholars as one practical avenue to overcome the deadlock in negotiations and disputes over regulatory controls and alignements post Brexit, see: Joseph H. H. Weiler, Daniel Sarmiento; Jonathan Faull, "An Offer the EU and UK Cannot Refuse: A Proposal on How to Avoid a No-Deal Brexit", VerfBlog, 22.08.2019, https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/ (last accessed: 25.11.2020).

in different forms of cooperative arrangements such as EFTA or the Schengen acquis.[542] This might create different forms of mutual trust and hierarchies dependent on the closeness of integration and participation in different extra-EU but closely associated cooperative frameworks. Although they merit further research in their own right, I still decided to exclude from this analysis these instances of extra-EU mutual trust. Analytically speaking, there was no major loss in disregarding these, cases as there were altogether only seven cases of such extra-EU mutual trust.[543]

There were therefore an overall 78 false positives among the 192 search results.

Besides the false positives, I additionally identified one important false negative from the early case law that did not appear as a search result due to not having the word "mutual" in front of "trust", but which still forms a logical and important part of the mutual trust case law and inherently expresses it: the *Hedley Lomas* case.[544] Despite not mentioning "mutual trust", it does mention "trust" in a manner that would fall under a description of mutual trust today and was frequently referenced when addressing the concept of mutual trust in its argumentative parts of different judgements by the Court, especially in the initial jurisprudential period distinguished below.[545] After deep thought, I decided not to omit *Hedley Lomas* from the analysis merely because it mentions 'trust' and not 'mutual trust'. Methodologically, however, this does not mean that the focus of my analysis shifted from analysing mutual trust to analysing trust. Although the analysis of trust forms an important part of the theoretical-conceptual analysis of this research, the research question still asks whether the principle of mutual trust (as a concept) is informed by trust theories, not whether the CJEU's overall conception of trust is informed by any theories of trust. That is also an interesting question but can be left for future inquiries. I do not rule out more such false negatives that appeared neither in the searches nor in the later qualitative analysis of those cases, but they appeared neither in the identified

[542] As a reference point, see the argumentation of the CJEU in the recently rendered Icelandic extradition case, where expansion of mutual confidence and the *Petruhhin* precedent by analogy to Iceland was justified explicitly with Iceland's participation in the EEA and in the Schengen aquis and being an EFTA state which according to the Court is „based on proximity, long-standing common values and European identity" – see *Ruska Federacija v I.N.*, para 50.

[543] Joined cases C-23/04 to C-25/04, *Sfakianakis*, ECLI:EU:C:2006:92; Case C-175/12 *Sandler AG*, ECLI:EU:C:2013:681; Case C-409/10 *Hauptzollamt*, ECLI:EU:C:2011:843; Case C-442/08 *Commission v Germany*, ECLI:EU:C:2010:390; Case T-752/14 *Combaro*, ECLI:EU:T:529; Case C-574/17 P *Combaro*, ECLI:EU:C:2018:598 and previously referred *Ruska Federacija v I.N.*.

[544] Case C-5/94 *Hedley Lomas*, ECLI:EU:C:1996:205.

[545] *Hedley Lomas*, para 19. *Hedley Lomas* is added to the analysed cases in the first-generation case law. It was the only influential hidden case I identified that merits proper attention and I thereby included it in the analysed case law as it was highly significant to the genesis and development of the initial mutual trust case law.

judgements themselves nor from literature review; therefore, if existent, they might have an insignificant doctrinal impact on mutual trust as a concept and principle of EU law.

As mentioned in the beginning of this section, my aim in providing all the false positives in detail is motivated by the abundant research possibilities I see in them: one could ask and question not only the Court's overall conception of trust and its theoretical adherence to the concept of trust, but also its conceptual coherence with the functioning of mutual trust. Also, there could be very interesting inquiries done by comparing the CJEU's understandings of intra-EU and extra-EU (mutual) trust and why not even the interpersonal and inter-institutional trust embodiments. One possible research question could also be whether the concept of mutual trust as used in the access to documents cases corresponds with the quest for transparency and control as depicted in sociological and philosophical approaches to trust. So, there are numerous intriguing research agendas derived merely from the above-described false positives, raising both theoretically and practically consequential questions about the role of trust in the European project.

But staying confined with this research agenda, the subtraction of the 78 false positives and addition of one false negative to the 192 search results settles the final number of CJEU decisions included in the scope of analysis (including the temporal scope – as mentioned before, I could not have included decisions delivered by the Court later than 01.08.2020) of this thesis on 115 cases. That is the foundational data of the dissertation.

3.2. GENERAL OVERVIEW OF MUTUAL TRUST CASE LAW

These more than a hundred cases are quite a volume to properly digest and comprehend. In the next subsections, I will attempt to confine it to more apprehensible generations and present the case law in a more intelligible manner by exemplifying main categories and tendencies. But there is also some inherent merit in looking at the jurisprudence in its entirety, as some important statistics, characteristics, and trends can be illustrated. So, in this subchapter I first bring some general observances and characteristics from the entire dataset. Additional important traits, institutional contexts, and dynamics are then brought under each identified jurisprudential generation.

As said, the total number of mutual trust cases throughout history is 115 and counting, but due to the temporal constraints, the case law included in this thesis is confined to cases delivered up to 01.08.2020. This time period extends over 45 years with the first ever occasion the CJEU mentioned mutual trust on 11 November 1975, and the last case included in this analysis from

the first half-year of 2020 (until 01.08.2020) delivered on 14 May 2020. There are many fascinating features and trends that can enlighten our understanding of mutual trust as a concept and as a principle. Beside the overall number of references to it by the Court (that can explain the existence or importance of mutual trust in CJEU jurisprudence) and its change in time, these also include the types of proceedings in which it occurs, the dynamics of the subject areas in which it is mentioned, and the dominance and structural proportions of different policy areas throughout the historic development of mutual trust case law. All these factors tell the story of mutual trust and inform us on its relevance, spread, and significance in the Union legal order. They are, of course, also contingent on the changing legal and institutional context throughout those years; this will be highlighted further under different generations defined in the following subchapters. But these legal-institutional changes should not in my opinion be taken as the primary catalysts of the transformation of mutual trust into a "fundamental principle of Union law", as they never explicitly prescribed it, and as a tool and a principle, the normativity of mutual trust has always been in the hands of the Court, its creator.[546] In other settings it remains a rhetorical, not to say aspirational, abstraction, and not a legal obligation, that finds practical value and operationalisation only in the toolbox of the CJEU.[547]

The first ever occasion when the Court used mutual trust was on 11 November 1975 in *Opinion 1/75* on the compatibility of a draft "Understanding on a Local Cost Standard" of OECD with the EEC Treaty and more particularly on the question of whether the Community has the power to conclude that agreement and, if so, whether that power is exclusive.[548] The latest occasion (given that the temporal limit of this thesis was 01.08.2020) was *Bouygues*, delivered on 14 May 2020, which concerns the mutual trust and effects of A1 certificates of posted workers that prove the social security cover of workers in other Member States.[549] In both decisions, mutual trust was mentioned explicitly and played an important part. They will be discussed further under their respective generations in the next subsections.

But as a matter of overall statistics, out of the analysed 115 cases, only four are opinions of the Court. Six are infringement proceedings, two are actions for annulment (one of them the highly politicised asylum relocation scheme contestation by Hungary and Slovakia, the other an action

[546] As although it migrated to legislation, it is never expressed there as a normative "rule" part of a provision, but figures exclusively in preambles or at maximum as an aim on a concrete policy measure – see on that further above in Chapter 1.
[547] See on this further below in subsection 3.4.
[548] *Opinion 1/75* ECLI:EU:C:1975:145.
[549] Case C-17/19 *Bouygues* ECLI:EU:C:2020:379.

brought by the Czech Republic against the Weapons Directive), and the vast majority – 103 cases, which account for 90% of all cases – are preliminary rulings as illustrated in Chart 1.

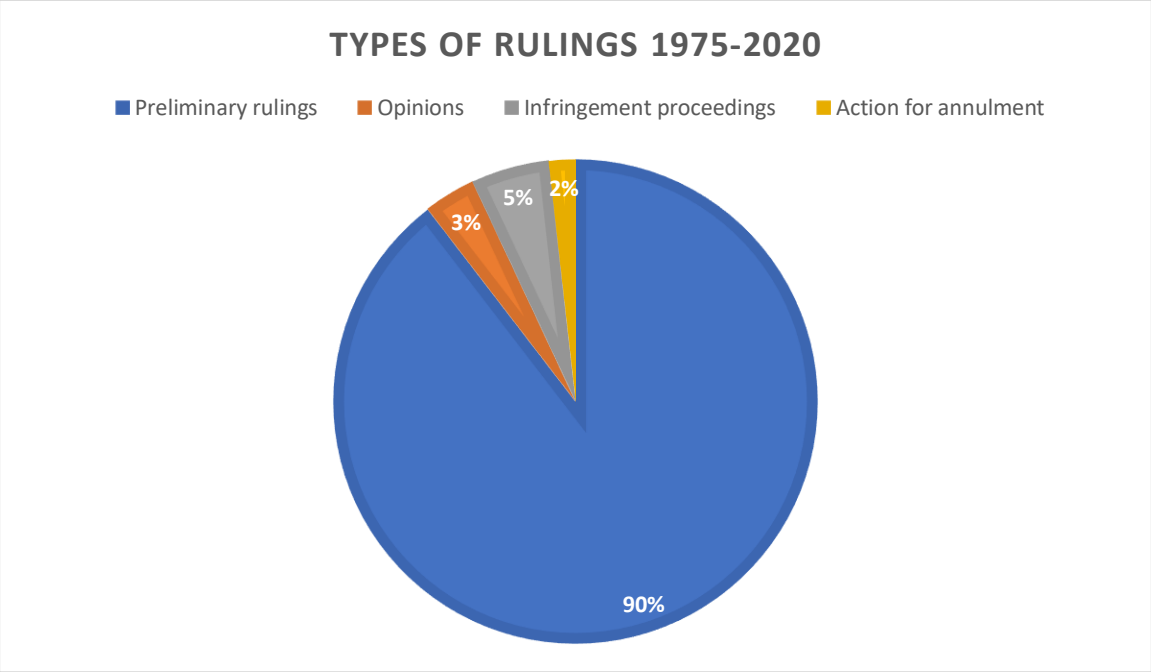

Chart 1 – Proportions of decision types of all mutual trust case law

Subject matter-wise, as explained in the introduction, mutual trust emerged as one could guess in the internal market case law and was transplanted to the ambit today called the Area of Freedom, Security and Justice (AFSJ). AFSJ (previously called also Justice and Home Affairs – JHA) in turn encompasses judicial cooperation in civil and commercial matters (mostly jurisdictional rules and laws on the enforcement and recognition of judgements – what is traditionally known also as private international law), police and judicial cooperation in criminal matters, and common immigration and asylum policy. Out of the 115 analysed cases, 20 cases concern the internal market, 42 civil cooperation matters, 35 criminal cooperation matters, nine are asylum policy cases, and nine cases are what I call sui generis, which include e.g. constitutionally significant cases which do not fall under any of the previous categories, concerning inter alia specific fundamental rights issues, foreign and common commercial policy cases, and similar. There are many interesting statistical dynamics that can be illustrated with the data on policy field. Many of it is also contingent on the developing legal and institutional backdrop, i.e. the Court acquiring gradual novel jurisdictions over particular AFSJ fields. This will be brought in under specific identified case law generations in the next chapters. The overall case law is dominated by 37% of cases on judicial cooperation in civil and commercial matters and taken together, AFSJ cases make up the majority of all mutual trust jurisprudence throughout its history. Among the AFSJ case law, interestingly, and perhaps

counterintuitively compared to their broad resonance, asylum cases take up the smallest fraction of all mutual trust case law. These proportions are depicted in Chart 2.

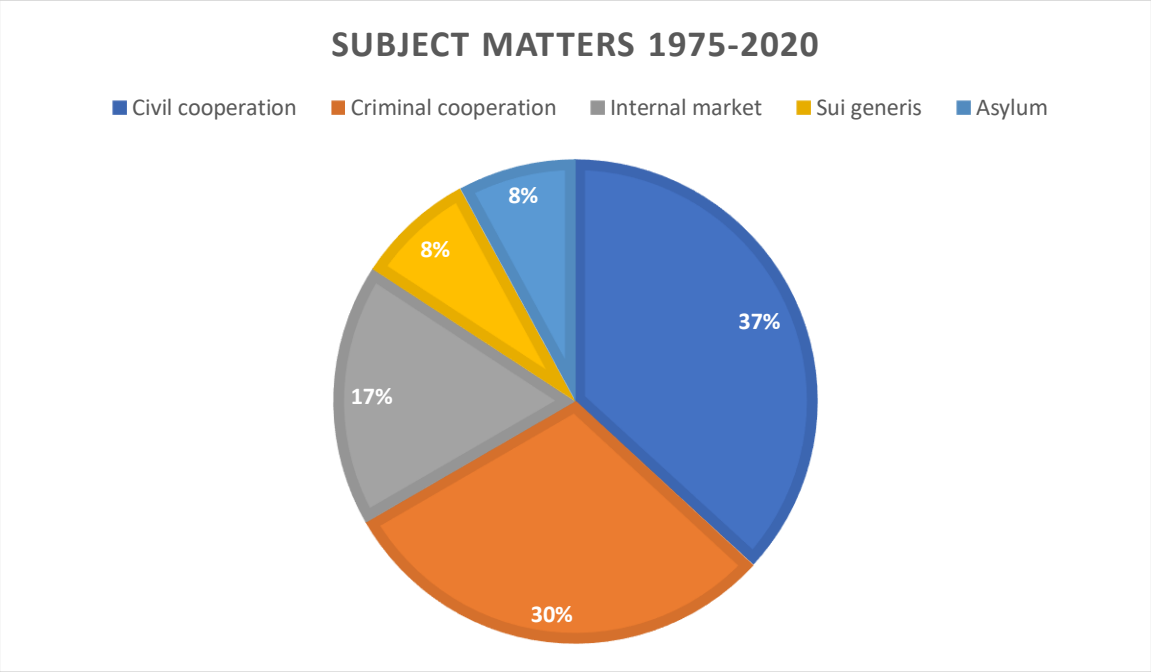

Chart 2 – Proportions of policy fields in all mutual trust case law

But what this static graph does not show is the gradual dynamic change over time, both the increase in the general usage of mutual trust by the Court and the addition of new contexts in which it is mentioned (from the internal market to AFSJ to sui generis constitutional issues). To that end, Chart 3 first illustrates the number of cases the Court has delivered per each year mentioning mutual trust or mutual confidence.

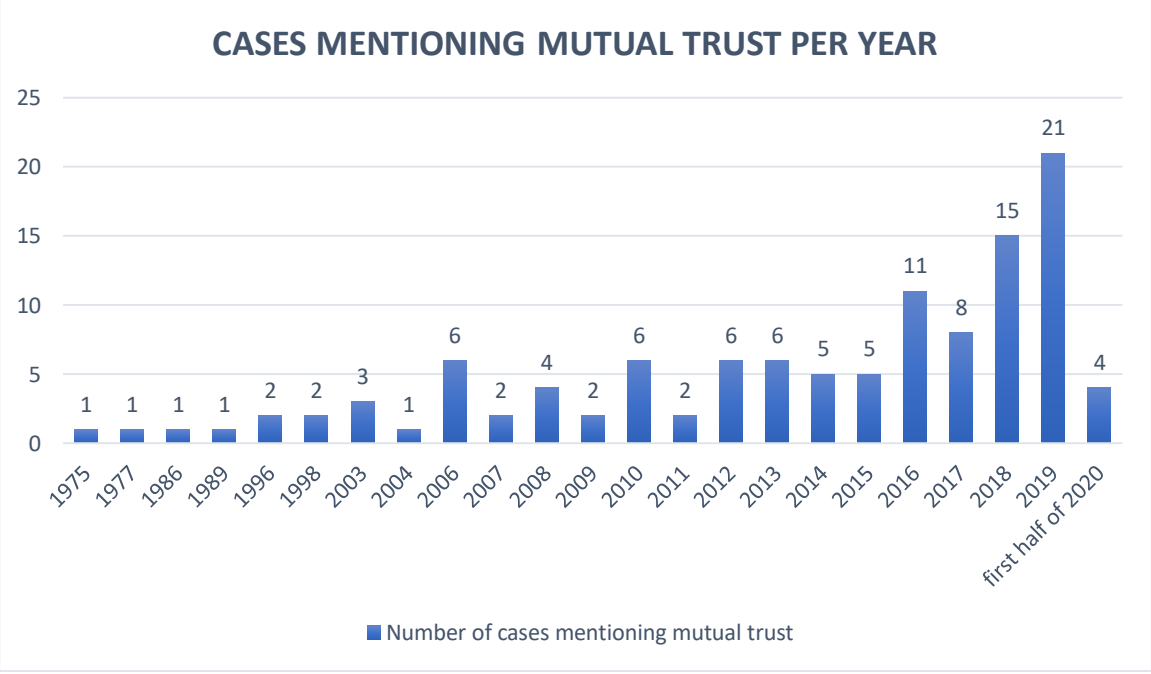

Chart 3 – Distribution of all mutual trust cases per year of delivery

Chart 3 shows that there has been a significant growth in the frequency of referring to mutual trust by the Court in recent years. 2019 was a record year in referrals to mutual trust, with 21 judgements altogether mentioning the principle at least once. Before that, there was a strong and steady growth from 2006 on, with the year 2005 being the only one of the last 15 years when CJEU did not make any references to mutual trust. Before 2005, years passed by when making no reference to mutual trust was the rule (there were no references to it in 1999-2002, 1997, 1990-1995, 1987-1988, 1978-1985, or 1976). There can be many legal and institutional reforms that help to contextualise and explain these numbers and the growth in references. One relates to the aspect of granting CJEU gradual jurisdiction over AFSJ areas and instruments. Another might be the internal aspect: after cementing mutual trust in the EU constitutional order in December 2014 with *Opinion 2/13*, there was also a subsequent increase in references to it (at least from 2016 on).

To illustrate the general structural change in the policy fields' ratios of mutual trust jurisprudence, Chart 4 pinpoints the main trends of transformation regarding from which subject matter the cases referring mutual trust came from.

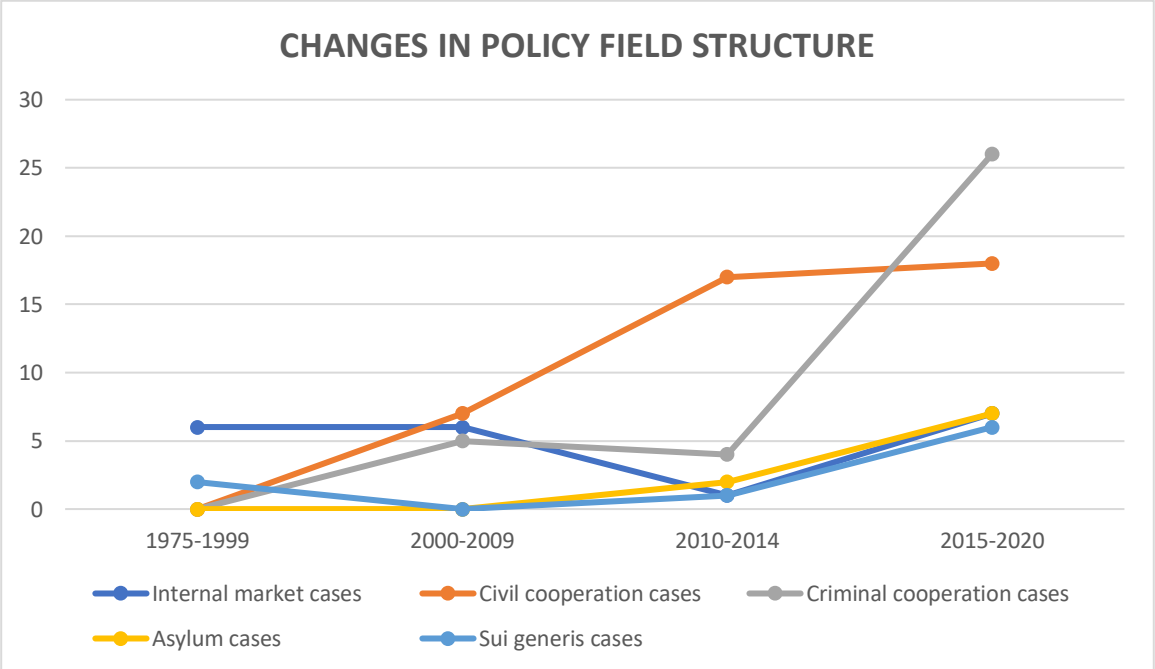

Chart 4 – Number of cases from each policy field in a chosen period

Chart 4 illustrates how from the early clear internal market case law dominance, the first decade of the new millennium, and added Union competences allowed civil cooperation cases to take over. That trend, which was unprecedented also in the first years after the entry into force of

the Treaty of Lisbon, has changed in recent years to criminal cooperation dominance. Other characteristics include the raise of the sui generis cases in recent years and the revival of mutual trust cases coming from the broad internal market policy field.

Against the backdrop of these general characteristics, a more specific categorisation and periodisation will be made, the parameters of which are set next.

If one looks at the entirety of mutual trust case law, it is apparent that it has undergone a transition. At times, this change is striking and self-evident, at others more hidden and subtle. The next sections aim to trace, describe, characterise, and group these transformations. It detects four distinguishable case law generations and tries to pin down their main features, characteristics, and typologies. But before jumping into the concrete case law presentation in identified generations, some methodological remarks are required to explain the basis of such categorisation.

There could be many different grounds on which to classify mutual trust jurisprudence. The most intuitive would be a policy field-specific approach. But as explained in the introduction, my aim is to surpass that level and aspire to a cross-policy approach, that is, to conceptualise and theorise mutual trust as abstractly as possible, then to be able to analyse cross-thematically mutual trust as a phenomenon and as a potential structural (possibly even constitutional) principle of EU law. I think zooming in to policy area-specific issues does not do justice to mutual trust as a concept, as it dismisses the more fundamental questions: what the principle is phenomenologically and how it has developed over time and across policy borders. It fails to have a more abstract vantage point.

But that does not mean that policy fields play no role in the analysis. As illustrated in the previous section, the appearing, disappearing, and reappearing of different policy fields in the ambit where mutual trust is used and operationalised can be an important trait and provide a basis for discussions on its constitutional character, or at least its universal role and function in the Union legal order.

Another factor that is omnipresent in any attempt to provide a genesis or otherwise historically bound presentation and categorisation of a phenomenon is time. The temporal aspect should not be overemphasised, but neither should it be neglected in analysing the change of a concept, as change inherently presupposes an element of time – most evidently, the need to fix a specific moment in time when a previous generation ends and the next begins. Often the features of all eras are present in different phases to a greater or lesser extent, but what serve as deciding

factors are their (first) occurrence and preponderance. That is to say that the generations are not clear-cut: there is often no definite end to one type of case law that is characteristic to one generation as they spread over time and generations. That is the difficulty of categorising change.

In this I have drawn inspiration from Joseph Weiler's methods and explanations used in his presentation of the changes of international law under the term "geology".[550] Although his method of geology has been later described as "explaining the transformations of international law of paradigmatic importance"[551], he himself still stressed the need to have caution over a possible overemphasis and oversimplification of such "transformations", as a close look at the data (cases) reveals parallel and stratified paradigms and practices.[552] Change, according to Weiler, can thus not be adequately described as a total shift from one paradigm to another, but geology "allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside."[553] That does not mean that identifying such paradigmatic transformations is not possible, as geology recognizes eruptions, but it also allows a focus on the regular and the quotidian.[554] This geological layering enables to bring out different layers (what Weiler calls strata) but also enables us to compare their dominance and relative change over time. But it is not only the numbers that count, but also the substantial gravity of the subject matter. Time is still a currency, but not the main one and the transformations are not necessarily fundamental and clear-cut.

This is very much the case with the entirety of mutual trust case law: changes have taken place, some of them eruptive and paradigmatic, but different strands of conceptualisations and approaches have persisted more or less alongside each other. This makes clear distinctions and categories more difficult, as is generally the case when typifying and compartmentalising complex and diversified phenomena.

[550] JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 46 Heidelberg Journal of International Law 547.
[551] Christian Joerges, 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, multilevel trade governance and international economic law* (Second edition, Hart 2011) 420.
[552] Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (n 550) 551.
[553] ibid.
[554] ibid.

But besides this balanced approach, geology still recognises eruptions that bring about these paradigm changes.[555] A baseline to track and trace such eruptions is thus needed. This helps to identify patterns and, importantly also, where – in which moment of time – these patterns started. This moment of time in the language of jurisprudence is usually a landmark judgement. To track and trace these patterns and landmark judgements, I have relied on four criteria with regard to which the case law has changed over time. These parameters relate also either to the previously described trust theories or EU law specific conceptual issues. The four criteria are: (1) normative-conceptual structure of mutual trust (i.e. mutual trust in what – the object of mutual trust – but also trust between who – the subjects, definitions and concrete normative obligations); (2) link with prior harmonisation and mutual recognition instruments (and the type of recognition at play); and (3) policy field appearance and structure.

The first criterion of analysis is conceptual. It asks the question: mutual trust in what? It takes its basis from the computational model of trust as "A trusts B in doing / with regard to X", the distinctive criterion – object of trust – here being the X. But also, A and B (the subjects – in the case of mutual trust, the trust is reciprocal) are reflected upon. Secondly, it examines whether there is a definition of mutual trust and what the normative content of the principle is: what it entails, what is the rule deriving from the principle, or whether there perhaps is no rule at all, but a factual premise. It might not even be concerned so much with what is explicitly written down in the judgement as to what mutual trust is or ought to be, but more with the (often) hidden or at least not-so-apparent aspects, such as what the acclaimed trust is directed at and how it functions. Mostly it is a question about: mutual trust in what, for what? In what lies the main normative force of mutual trust, what does it bring about as an obligation and a legal principle to its subjects, and how does it function in the EU legal order?

The second criterion is tracing the interrelationship of mutual trust with a general level of prior harmonisation and specific mutual recognition instruments. The link between mutual trust and prior harmonisation translates into the theoretical discussions about the interrelationship (and functional equivalence) of trust and law. It is asking in what such mutual trust should be grounded (compare theoretically with the antecedents of trust) – the epistemological basis for trust. The connection between mutual trust and mutual recognition relates to the latter as the behavioural consequent of mutual trust again in theoretical terms. Bringing out this criterion specifically is derived from the commonplace claim that mutual trust is only something related

[555] ibid.

with mutual recognition.[556] But as I have traced down, this is not always the case. It has not historically been the case, and it is even more so not the case today. So, this needs specific attention in the task of conceptualising mutual trust, and, also, in categorising it.

The third criterion is contextual and relatively straightforward – it traces four big changes in the structure and presence of cases from different policy fields where mutual trust is used. That might be a contingent factor, but in all four phases important changes are clearly identifiable. Even though it is not the crucial or even most significant criterion in organising the case law, it still is an important feature and plays into the context and understanding of both the normative and conceptual aspects of mutual trust. This is contingent on the temporal legal-institutional changes that took place, and they will also be explained in each category.

Based on these criteria, I have identified three paradigmatic cases where the essence of mutual trust has changed substantially (not to say paradigmatically) as compared to previous tendencies and contents of the case law. These cases are, first, *Brügge*[557], which is the first case from the AFSJ domain to change the object of trust from concrete checks and inspections harmonised in detail to general legal systems under the competences of Member States; second, *Zarraga*[558] which for the first time introduced fundamental rights as the object of trust; and third, *Pula Parking*[559], which started the shift away from mutual trust as a fundamental rights compliance presumption to a more balanced approach. These paradigmatic cases allow us to divide the 115 cases into four generations. Each of them will be characterised according to the identified criteria under corresponding sections, and the case law contained therein will be described. The less case law, the more thorough its description – on the other hand, the more cases, the more distinctive patterns and repetitions emerge, and clusters of cases can be illustrated with their most representative examples.

In the context of these general and methodological observations, I turn now to provide a substantial overview of mutual trust case law over its 45-year-old history and present it with a proposed four-period categorisation (a geology) to reflect the genesis of a principle.

[556] See for example how it is conceptualised recently in: Rizcallah (n 30); Schwarz (n 128).
[557] Joined Cases C-187/01 and C-385/01 *Brügge* ECLI:EU:C:2003:87.
[558] Case C-491/10 PPU *Zarraga* ECLI:EU:C:2010:828.
[559] Case C-551/15 *Pula Parking* ECLI:EU:C:2017:193.

3.3. THE GEOLOGY OF MUTUAL TRUST: THE FOUR GENERATIONS

3.3.1. First generation: trust in inspections in the internal market

The initial phase sprawls from the very first mention of mutual trust by the Court in the 11 November 1975 *Opinion 1/75* until the first next-generation case, *Brügge* on 2 February 2003 (which effectively brought mutual trust to the AFSJ). Interestingly, however, the last case of subcategory is the case *Commission v Germany* from 12 November 1998, leaving a gap of almost five years in between. The first generation, although spanning over 28 years, has only eight cases. Out of those eight cases, five were preliminary rulings (under Article 177 of the EEC Treaty or, subsequently the EC Treaty), two were infringement proceedings (under Article 169 of the EC Treaty) and one the aforementioned opinion of the Court (under Article 228 of the EEC Treaty) in proportions as shown in Chart 5.

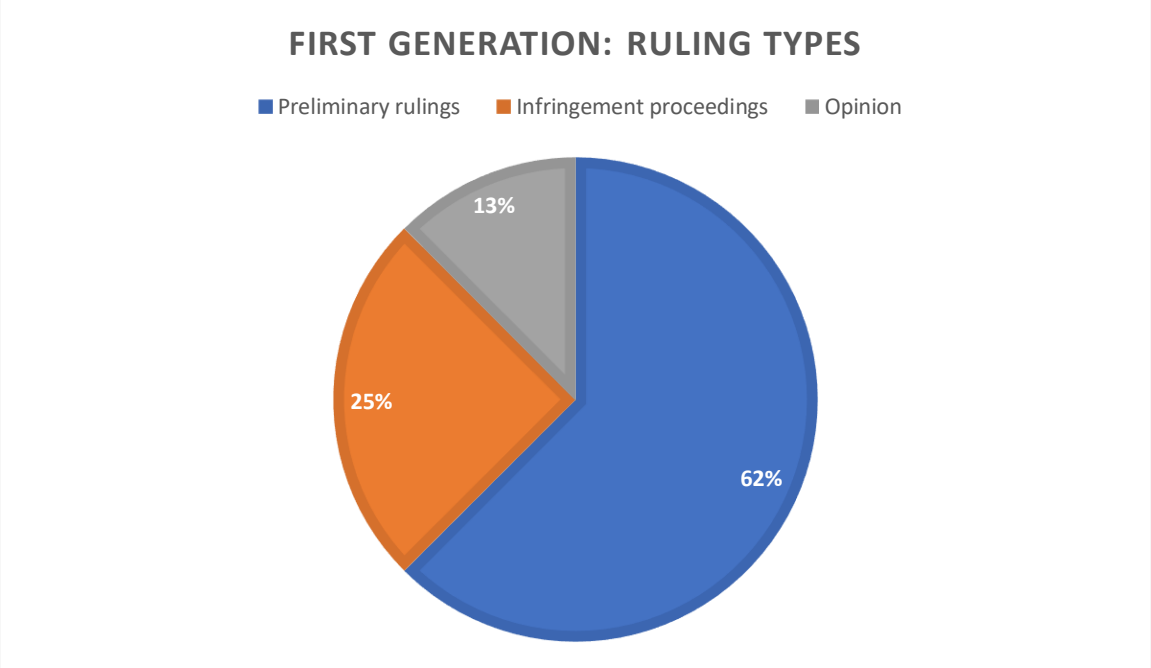

Chart 5 – Types of rulings in first-generation case law

The policy areas of these eight cases are mostly internal market-related, relating mainly to free movement of goods and import barriers. That is symptomatic of the jurisprudential era. But there are also two common commercial policy cases (among them the *Opinion 1/75*). The proportion is illustrated in Chart 6.

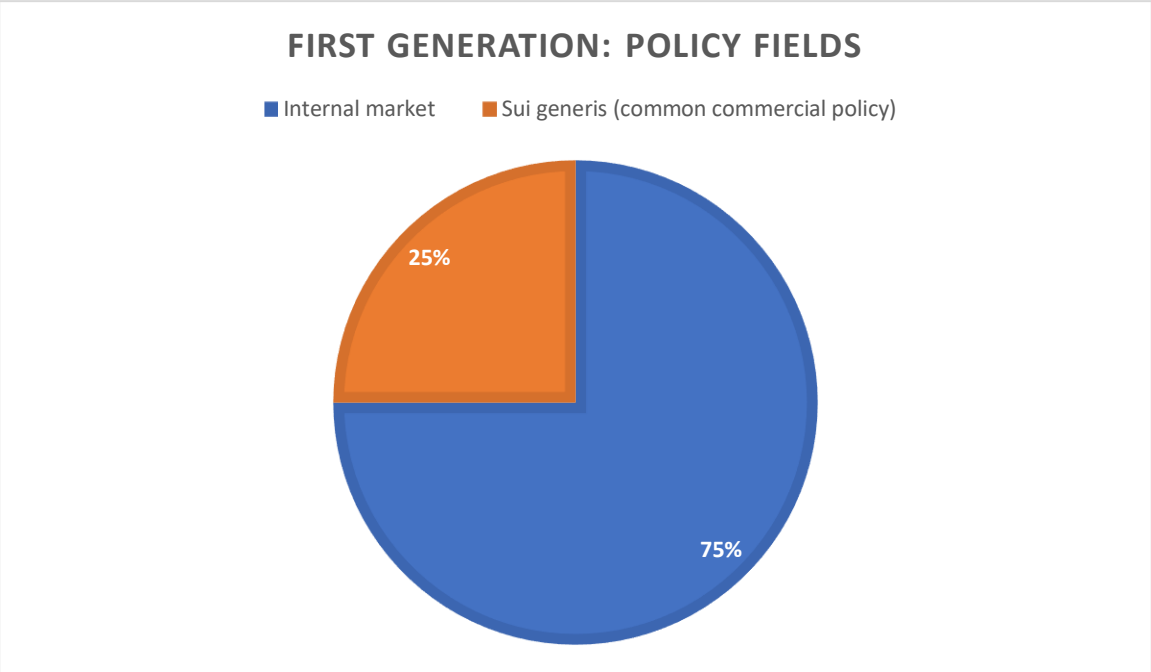

Chart 6 – Proportions of first-generation case law per policy field

The legal-institutional context explaining it was the obvious fact that the Communities had limited competences and thus also the Court had jurisdiction in only few policy fields. The main policy focus was on combatting market barriers on free movement of goods in the internal market. The legal background also includes all early treaties over more than two decades: the Treaty of Rome, Single European Act, and Maastricht Treaty. The period of the first generation case law coincides with the later entry into force of the Treaty of Amsterdam Treaty on 1 May 1999, which incorporated some of today's AFSJ areas in the Union pillars as Member States transferred new diverse competences to the Union, including legislating on immigration and civil and criminal cooperation, which was not possible before. CJEU's jurisdiction in these matters remained restricted until major institutional shifts explained under the next generation.

As for the first criterion of distinction – the conceptual clarity and delineation of mutual trust – it is slightly vague and dissonant, as is often the case with emerging concepts. But the dissonance is dual: the concept of mutual trust in the common commercial policy cases (CCP) is minimalist – it is only a reminder that a measure cannot "call into question the mutual trust within the Community".[560] Importantly, already the first mutual trust case *Opinion 1/75* defined mutual trust as something within the Community and not vis-à-vis third countries. As explained above, this has not always been the case, and only now in O*pinion 1/17* has the Court again explicitly confirmed it (although there is still later divergent case law). Still, in the CCP field

[560] *Opinion 1/75* ECLI:EU:C:1975:145, p 1364; Case 174/84 *Bulk Oil* ECLI:EU:C:1986:60, para 30.

no direct normative obligations arose, and there were no definitions, clear recipients, or normative rules derived from the concept. The foreclosure of concurring Member State competences might be indirectly taken as one, but mutual trust was used as an interpretational principle and not as a rule per se. Also, the two cases are categorised above under the sui generis case law, as they concern common commercial policy, which is not a commonplace field for mutual trust today. But this context and wording is something that can only be traced back to those early days of mutual trust case law: besides these two cases, no other case has used mutual trust in this wording or in the CCP context. So, despite being the first and, importantly, referring to intra-EU mutual trust, the CCP cases remained isolated instances of mutual trust wording and usage.

In the more predominant internal market free movement case law on the other hand, the Court created a concept of mutual trust that is much more like the one we know today. It made clear that mutual trust is something Member States (authorities) should have regarding the checks and inspections carried out by them. Despite some semantic variances, the wordings were similar, being in essence that "Member States must have mutual trust with regard to checks carried out on their respective territories".[561] Member States were the subjects and the (sufficiency, adequacy of) checks or inspections the objects of mutual trust obligations. As a standout in that lineage of case law, *Bouchara* offers a slightly different wording and is the first ever case to explicitly refer to the general principle of mutual trust.[562] Other judgements remain silent on mutual trust being a principle.

As for the normative content – as mentioned, it was rather non-existent in the CCP cases. In the internal market cases, on the other hand, the normative content was traceable in the obligation put on Member States' authorities to trust and not repeat the checks and inspections carried out in their respective territories, as such double-checking (and putting the bearing of the costs on the importer) would constitute an impediment for the internal market of goods. That is an importantly similar normativity that the principle of mutual trust also holds today, although mostly in other contexts.

[561] See only slight variances to that in: Case C-1/96 *Queen v Minister of Agriculture* ECLI:EU:C:1998:113, para 47; Case C-102/96, *Commission v Germany* ECLI:EU:C:1998:529 para 22; Case C-11/95 *Commission v Belgium*, ECLI:EU:C:1996:316, para 88; *Hedley Lomas*, para 19 and *Bauhuis*, para 38.

[562] Case 25/88 *Bouchara* para 18 after asserting that the authorities of the State of importation are not entitled to require technical or chemical analyses when the same analyses or tests have already been carried out in another Member State and their results are available to those authorities: „That rule is a particular application of a more general principle of mutual trust between the authorities of the Member States [---]".

For the sake of completeness and as it is the only of the four generations which allows for it, an exhaustive overview of the early mutual trust case law will be presented next under two distinguished categories: the early two mutual trust cases in the CCP field for the defence of the common interest and the internal market free movement of goods case law where mutual trust was directed at the checks and inspections carried out by other Member States' authorities. As the second category is persistent over time and also more numerous, it is the defining type of case law of this initial period, but the first lends it importance to that – being the first time ever the Court used the concept "mutual trust" explicitly in its decisions.

3.3.1.1. Mutual trust for the defence of the common interest

Opinion 1/75

The Court mentioned mutual trust explicitly for the first time already in 1975 in its *Opinion 1/75* on the conclusion of the OECD Understanding on a Local Cost Standard. *Opinion 1/75* essentially concerned whether the EEC's powers in the field of common commercial policy are exclusive in nature. The Commission wanted to know if the Community is competent to conclude an OECD agreement on the subject of credit cover for exporting firms for costs incurred in the importing countries, and, more importantly, whether the power to conclude it is exclusive – that is, whether the Member States can be excluded from participation.[563] The Court ultimately granted the Commission exclusive competences and used mutual trust in its argumentation to specifically allow for the exclusiveness of these competences, stating:

> "To accept that the contrary were true [allowing the Member States concurrent powers] would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the *mutual trust* [emphasis added] within the Community and prevent the latter from fulfilling its task in the defence of the common interest."[564]

It can be argued that mutual trust as used by the Court here is incidental and very different from the concept or principle of mutual trust known today, but it still is an important starting point for the creation of the phenomenon of mutual trust and bears many meanings and ramifications.

First, it allocates mutual trust alongside the institutional framework of the Community, both of which, according to the Court, would be damaged by a shared competence to conclude international agreements. This foundational case manifests the entrenchment of mutual trust in

[563] Sara Dillon, *International Trade and Economic Law and the European Union* (Hart 2002) 327.
[564] *Opinion 1/75* ECLI:EU:C:1975:145, p 1364

the very structural order of the Community by juxtaposing the decisional capacities of Member States against those of the Community. It is an early manifestation of the potentials of mutual trust as a rhetoric and as a tool of European governance.

Second, it defines mutual trust as something existing within the Community. Although it is not clear from that wording whether such trust is meant to exist only horizontally (between Member States) or also vertically (between Member States and Community institutions), an argument could be made that the institutional framework was intended to refer to Community institutions, and mutual trust, accordingly, only to Member States. That would also correspond considerably with the understanding of mutual trust we have today, especially after *Opinion 1/17*, and is thus an important historical foundation to that understanding.

Third, mutual trust (and mutual trust only, i.e. not the institutional framework that is mentioned alongside) is expressly operationalised to serve a task to defend the "common interest". It is left unclear what that common interest specifically is or what it consists of, an oversight that has been also criticised in the literature.[565] But this operationalises mutual trust for the purposes of the Community integrationist common good vis-à-vis Member States' sovereign rights to conclude international agreements. Such functional understanding of mutual trust can also serve a purpose in complementing our present-day understanding of mutual trust as mainly a driver of the autonomy and effectiveness of EU law – both goods that the EU as a community aims to deliver.

Opinion 1/75 laid an important groundwork for the future development of mutual trust as a rhetoric and as a principle, positioning it strongly in the still-developing structural architecture of the Community.

Bulk Oil

The second occasion where the Court used the same common interest-directed blueprint for mutual trust was in 1986, when the Court adjudged a preliminary ruling again on a common commercial policy matter concerning an assessment on the validity under Community law of a UK policy regarding quantitative restrictions on the export of crude oil to non-member countries.[566] In it the Court upheld the CCP mutual trust doctrine as developed in *Opinion 1/75*,

[565] Dillon (n 563) 327.
[566] Case 174/84 *Bulk Oil* ECLI:EU:C:1986:60.

making a clear reference and directly quoting the aforementioned paragraph from the opinion.[567] But it did not introduce any new elements or considerations to the concept.

These two early CCP cases remain the only ones using mutual trust in such a manner and wording until today and remain limited in their effect and importance to mutual trust case law. But they still embody the historically interesting illustrations of the first (perhaps incidental) steps in the appearance of the concept of mutual trust in CJEU jurisprudence.

3.3.1.2. Mutual trust in checks and inspections

Bauhuis

The first ever judgement (and not an opinion on an international agreement, as was *Opinion 1/75*), where the Court mentioned mutual trust (in the name of mutual confidence, but also mentioning trust – see below) was in the 1977 *Bauhuis* decision from the free movement of goods domain. It concerned the question of whether the fees charged by the Netherlands on veterinary inspections of exported livestock had an equivalent effect to customs duties on imports and exports prohibited under Article 16 of the EEC Treaty.[568] The Court found justified only those fees prescribed by the Community provisions, which are uniform and required to be carried out before dispatch within the exporting country.[569] All other inspections (i.e. those prescribed unilaterally by a Member State) and fees charged for them were deemed as incompatible with Community law.[570]

In its argumentation, the Court first made a reference to simply trust (without the "mutual" part) after explaining how the harmonised system of veterinary and public health inspections introduced by the directive is based on the principle that the veterinary and public health guarantees required by each of the Member States have equivalent effects, and the aim of this system is to transfer supervision to the exporting Member State:

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[567] *Bulk Oil*, para 30: "Furthermore, as the Court stated in its Opinion of 11 November 2975 (*Opinion 1/75*, [1975] ECR 1355), 'it cannot be accepted that in a field covered by export policy and more generally by the common commercial policy the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere [---]. To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the *mutual trust* within the Community and prevent the latter from fulfilling its task in the defence of the common interest.'

[568] Case 46-76 *Bauhuis* ECLI:EU:C:1977:6.

[569] *Bauhuis*, p 21.

[570] ibid.

> "This system is based on the *trust* [emphasis added] which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported."[571]

The term "mutual confidence" was coined later in the ruling after emphasising again the instrumental importance of Directive No 64/432 in promoting the free movement of bovine animals and swine by making veterinary and public health inspections generally applicable and uniform in the whole of Community territory.[572] The Court reiterated:

> "The *mutual confidence* [emphasis added], which Member States must have in the inspections carried out, under the prescribed conditions, by the competent authorities of the other Member States, constitutes a basic element of the system introduced by the directive, without which it would have no purpose."[573]

A new and clear object of mutual trust emerges: the inspections carried out by another Member State. The subjects of mutual trust are Member States and its authorities. It is noteworthy that for the first time ever in a judgement, the Court used mutual trust in the practically same sense that we give to the principle today; moreover, it used this meaning twice, and this meaning even served as a quite decisive argument for the Court's conclusion. *Bauhuis* is also the first ever case where mutual trust has a very strong normative content: not to carry out parallel inspections and charge importers for them if they have already been undertaken in the Member State of origin. As from the wording: Member States must have trust. The basis for such trust was the precise harmonisation of such inspections by a Community directive.

Bouchara

The next occasion for the Court to employ mutual trust was in 1989 in the *Bouchara* case, where the referring national court asked whether the application of a provision to products imported from another Member State requiring the person who first places products on the national market to verify their conformity with the rules in force on that market and imposing criminal liability if they fail to do so is compatible with Articles 30 and 36 of the EEC Treaty.[574] The Court, after restating its prior case law that although Member States are not prohibited from requiring prior approval of certain products, even if those products have already been approved

[571] *Bauhuis*, para 22.
[572] *Bauhuis*, para 37.
[573] *Bauhuis*, para 38.
[574] Case 25/88 *Bouchara* ECLI:EU:C:1989:187, para 7.

in another Member State, the authorities of the State of importation are however not entitled unnecessarily to require technical or chemical analyses when the same analyses or tests have already been carried out in another Member State and their results are available to those authorities, articulated further that:

> "That rule is a particular application of a more *general principle of mutual trust* [emphasis added] between the authorities of the Member States and must therefore also apply when the verification is the responsibility of the importer himself. It follows that the latter must be able to discharge his responsibility by producing a certificate concerning the composition of the product issued by the authorities of the Member State of production or by a laboratory authorized to issue such certificates by those authorities."[575]

This time, the object of mutual trust was certificates issued about technical or chemical analyses carried out, and the subjects of trust were explicitly Member States authorities, not Member States in the abstract. The Court in this continued its distribution of labour between the exporting and importing countries' authorities – it assured the reliability of official domestic certificates and inspections extraterritorially within the internal market. It is also noteworthy that mutual trust was for the first time explicitly referred to as a general principle, while the rule to trust another Member State's certificates was a particular application of that general principle. Besides characterising the general principle via that particular example, the principle was not generally defined or explained with regard to what the principle can entail in other possible contexts or circumstances.

Hedley Lomas

After *Bauhuis* and *Bouchara* comes another doctrinally significant judgement – *Hedley Lomas.* Although it does not mention mutual trust or confidence explicitly (it is one of the identified false negatives), it does mention trust, and later becomes an authoritative judgement in the early internal market mutual trust case law which gets cited regularly after its rendering as it construes some important doctrinal guidelines.

Hedley Lomas once again concerned a free movement of goods case, wherein the UK did not grant export licences of sheep to Spain on the alleged grounds that Spain was not complying with the requirements of a Community harmonising directive, as a certain number of Spanish slaughterhouses were not complying with the agreed requirements.[576] Just before reiterating the

[575] ibid.
[576] Case C-5/94 *Hedley Lomas* ECLI:EU:C:1996:205, para 3.

by then-settled case law principle, that Member States cannot unilaterally adopt, on their own authority, corrective or protective measures designed to obviate any breach by another Member State of Community law[577], it also briefly reflected on trust:

> "The exclusion of recourse to Article 36 [allowing the maintenance of restrictions on the free movement of goods justified on grounds of the protection of the health and life of animals] cannot be affected by the fact that, in the present case, the Directive does not lay down any Community procedure for monitoring compliance nor any penalties in the event of breach of its provisions. The fact that the Directive lays down no monitoring procedure or penalties simply means that the Member States are obliged, in accordance with the first paragraph of Article 5 and the third paragraph of Article 189 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law [---]. In this regard, the Member States must rely on *trust* [emphasis added] in each other to carry out inspections on their respective territories [---]."[578]

Hedley Lomas was thus the first case, which although it reflected the importance of harmonisation, was faced with a concrete (and not abstract) alleged breach of Community law. It was not just about a Member State's (authority's) abstract need or want to control, it was a concrete allegation of non-compliance with Community law. The Court did not allow for a mitigation of such an accusation in concrete instances, at least not in the form of denying licences. Thus, the Court specified that mutual trust applies both in abstract and concrete instances of actual mistrust (suspicion) and put an emphasis on the principle of effectiveness.

Commission v Belgium

Shortly after, the case *Commission v Belgium* took up that doctrine in the first ever mention of mutual trust in infringement proceedings in 1996 regarding the failures of Belgium to fulfil its obligations regarding television broadcasting licensing harmonised under Directive 89/552/EEC due to the fact that it maintained a system of prior authorisation of television broadcasts from other Member States.[579] The Court reminded the basic system of originating State control under which it is solely for the Member States from which programmes emanate to monitor compliance with the provisions of the directive by the broadcasters under their jurisdiction.[580] It then answered the Belgian Government's question whether it might not be

[577] Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* ECLI:EU:C:1965:80; Case 232/78 *Commission v France* ECLI:EU:C:1979:215, para 9; Case C-5/94.
[578] *Hedley Lomas*, para 19.
[579] Case C-11/95 *Commission v Belgium* ECLI:EU:C:1996:316.
[580] *Commission v Belgium*, para 86.

necessary, in order to create between Member States the reciprocal trust enabling television programmes to freely cross borders, to allow for the receiving Member State to verify, within certain limits, whether the originating State is actually supervising compliance with the directive, resolutely:

> "In this regard the Court reiterates that the Member States must have *mutual trust* [emphasis added] in each other as far as controls carried out on their respective territories are concerned [---]."[581]

It was a clash of two opposites: while Belgium hinted that actual supervision and control might strengthen trust between Member States, the Court maintained that mutual trust in respective controls is an obligation under an acclaimed mutual trust. The Court again, by relying heavily on *Hedley Lomas*, disregarded any theoretical or abstract possibility of real-life shortcomings in the originating State control principle as it was argued by the defendant. But it did provide an elegant solution and a theoretical remedy for such errors: the possibility for the receiving Member State to bring infringement proceedings under Article 170 of the EC Treaty or request that the Commission itself take action against the non-compliant Member State under Article 169 of the EC Treaty.[582] This was the first time the Court emphasised such a shift from ex ante to ex post control mechanisms.

R v MAFF

The next case delivered in 1998 again concerned animal protection and the UK's refusal to restrict, based on Article 36 of the EC Treaty, the export of veal calves to other Member States. This time it was a preliminary reference made in a dispute where animal rights societies had challenged the UK's decision not to restrict exports.[583] CJEU used mutual trust in its argumentation only to refer back to the *Hedley Lomas* decision and remind that Member States must rely on mutual trust to carry out checks on their respective territories:

> "In such a case, the appropriate checks must be carried out and protective measures adopted within the framework outlined by the harmonising directives. [---] In that regard, the Member States must rely on *mutual trust* [emphasis added] to carry out checks on their respective territories [---].[584]

[581] ibid, para 88.
[582] ibid, para 89.
[583] Case C-1/96 *R v MAFF* ECLI:EU:C:1998:113, para 2.
[584] ibid, para 47.

This is an almost identical wording to that of *Hedley Lomas*. Again, mutual trust must be between Member States, directed at checks carried out, and has a strong normative content – double-checking is not allowed.

Commission v Germany

Likewise, the last judgement of the Court in this period concerned infringement proceedings against Germany in failing to fulfil its obligations under directives concerning intra-Community trade in fresh meat and veterinary checks.[585] Here Germany had adopted additional regulations and veterinary inspections of male pigs in order to protect consumers that went beyond Community-level harmonisation.[586] The Court deemed this not in compliance with Community law and substantiated its argument again by referring back to *Hedley Lomas* analogously to the previous *R v MAFF* case with minor semantic variances:

> "Therefore, the appropriate checks must be carried out and protective measures adopted within the framework outlined by the harmonising directives. [---] In that regard, the Member States must display *mutual trust* [emphasis added] with regard to checks carried out on their respective territories [---][587]

Instead of the obligation to rely on mutual trust, one had to now display mutual trust, but the normativity remained the same. Mutual trust was still based on the high level of harmonisation and duplicate controls were prohibited.

3.3.1.3. First generation case law patterns

The overview of the eight cases from 1975 until 1998 mentioning mutual trust or confidence or, also, as per *Hedley Lomas*, mentioning only trust builds an important initial understanding of the concept and sets out its normative contours. The first-generation mutual trust case law carved out a distinct normativity at least in the internal market domain relating specifically to the free movement of product (or service) inspections and checks and Member States' corresponding obligation to recognise these foreign checks. Under the specific wordings, the object of trust was either checks, inspections, or control. Member States of import could not replicate those checks and carry on the costs onto the importer.

[585] Case C-102/96 *Commission v Germany* ECLI:EU:C:1998:529.
[586] ibid, para 20.
[587] ibid, para 22.

Policy area-wise it was naturally predominated by the internal market domain, specifically free movement of goods, with the two exceptions of CCP. The CCP cases brought in a more fundamental dimension of mutual trust – that it is related to intra-Community relations, has an aim to defend the common interest, and has an effect on the competences and institutional functioning of the polity. The normativity of CCP cases was much weaker, not to say non-existent – mutual trust was used as a purely argumentative rhetoric supporting the conclusions, but without any direct normative effects itself.

As internal to the Community, Member States and their authorities were the distinct subjects of this trust obligation. The object of mutual trust was predominantly the adequacy of the inspections conducted. In the internal market case law, mutual trust was importantly based on the prior extensive harmonisation of the checks and standards subject to such trust, and thus the trust needed to extend only to the proper implementation of that harmonisation by other Member States. *Hedley Lomas* and *Commission v Belgium* set important precedents by foreseeing the possibility that in fact the Community-level harmonised standards might also in reality not be complied with, but they established that mutual trust still prevails and the adequate redress mechanism is that of infringement proceedings in the Community legal framework, rather than unilateral retaliation, additional controls, or barriers to the free movement of goods. So, in essence, the object of mutual trust was not the diverging or different Member States' laws or regulations themselves, but the proper and adequate implementation of Community law in practice, on the ground.[588]

The association with mutual recognition instruments is latent but not made pronounced – i.e. the instruments in need of recognition were there in the free movement of goods cases (checks and inspections certificates, authorisation documents – the authorisation of goods in the internal market), but mutual recognition was never explicitly mentioned. Considering the importance that the principle of mutual recognition later gained in the development of mutual trust, it is curious that in the foundational decisions of both principles, neither of the other was explicitly present as mutual trust was also not present, i.e. in *Cassis de Dijon*.[589] The indirect way that mutual trust functioned to catalyse the mutual recognition of goods in those early days was also different from the main contemporary understandings. Miguel Poiares Maduro has differentiated three distinct forms of mutual recognition which require different degrees of

[588] This is similar with today's meaning and definition of mutual trust as set out i.e. in *Opinion 2/13* as being also about the compliance with *EU* law (and fundamental rights as recognised by EU law). – See *Opinion 2/13,* para 191.
[589] Case 120/78 *Rewe-Zentral AG* ECLI:EU:C:1979:42.

mutual trust and pre-existent identity: norms recognition (functional equivalence); policy recognition (mutual recognition of different goals); and systems recognition (mutual enforcement and systems recognition).[590] The modality of recognition implicit in the first-generation case law yet does not correspond to any of these and is to my understanding another form of recognition – enforcement recognition. This type of recognition regime is characterised not by diverging norms, policy goals, or systems, but is directed at possible variances in the enforcement and compliance of commonly agreed and precisely regulated norms and standards. It is a recognition of and mutual trust in the adequate and appropriate enforcement of harmonised rules by the competent administrative authorities. This is a specific characteristic of the type of mutual recognition at play and what mutual trust is directed at.

3.3.2. Second generation: trust in legal systems and judicial institutions

It is easy to provide an all-inclusive case law analysis on all relevant aspects of the first era, as there were only eight cases. The second era is already slightly more difficult in that regard as, although it covered a much shorter time-period, from 2003 until 2010, the number of cases almost tripled – from eight to twenty-three cases. This is noteworthy as the previous initial period, although over almost thirty years, from the first mentioning of mutual trust in 1975 until 2003, it only used mutual trust in eight instances. This second phase, lasting more than four times less – seven years – refers to mutual trust almost three times more frequently. Mutual trust in this period gained salience and both theoretical and practical importance in the Union. The identified start date of this era is 11 February 2003, when the Court delivered its judgement in the case *Brügge* which was the first ever case in AFSJ, more specifically in criminal cooperation subject matter prompting also a new object of mutual trust – trust in other Member States criminal justice systems, thus no longer specific checks or inspections as in the first generation. The phase ends with the last case *Purrucker* on 9 November 2010, which is a civil cooperation case due to the next recognised transitory case *Zarraga* causing the shift to the next paradigmatic generation.

Out of those 23 cases amidst the specified time period, 20 were preliminary rulings, two were infringement proceedings against Spain and Greece for their failure to recognise diplomas and qualifications and one was an opinion of the Court on the Lugano Convention. The proportions are illustrated in Chart 7.

[590] Poiares Maduro (n 142) 822.

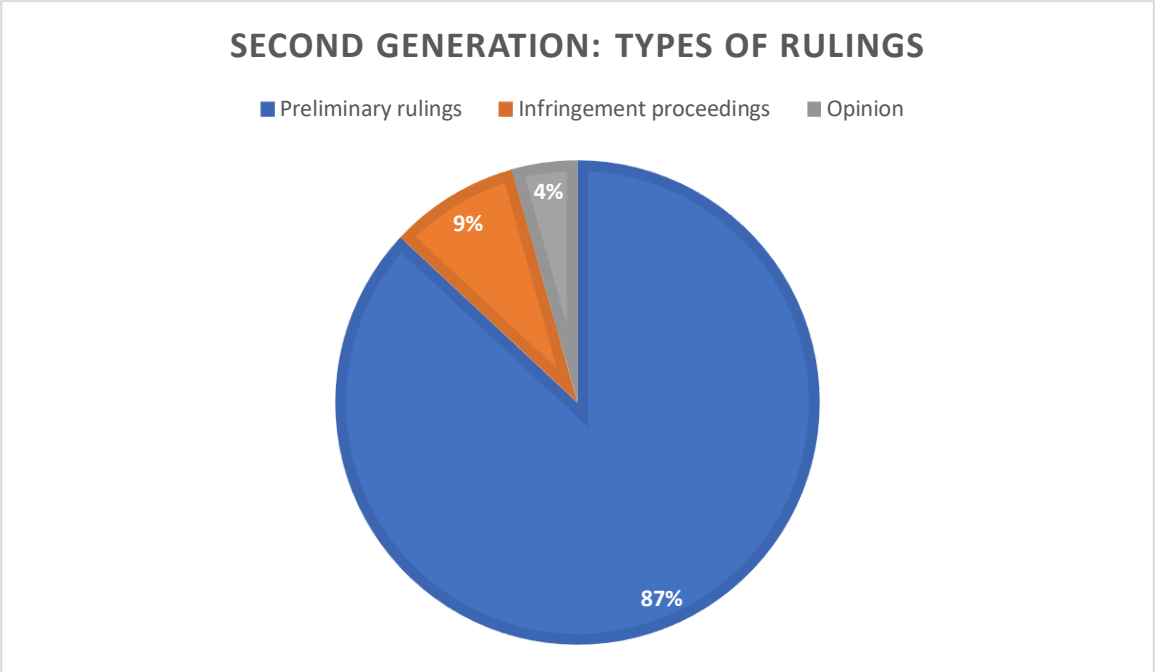

Chart 7 – Second-generation case law types proportionally

Out of the total of 23 cases, 13 cases were from the civil justice subject field, five cases involved the internal market, and five were from criminal justice cooperation matters. Thus, it could be said that after entering the mutual trust domain, AFSJ immediately gained a dominant position and proportion in the mutual trust jurisprudence, especially civil justice jurisprudence. Internal market cases are still strongly present, but civil justice cooperation demands more and criminal justice cases equal attention. There are no cases that could be categorised as sui generis cases, i.e. not falling into the categories of internal market or AFSJ (civil and criminal justice cooperation or asylum matters). There is also no more trace of any common commercial policy cases. The subject matter ratios are shown in Chart 8.

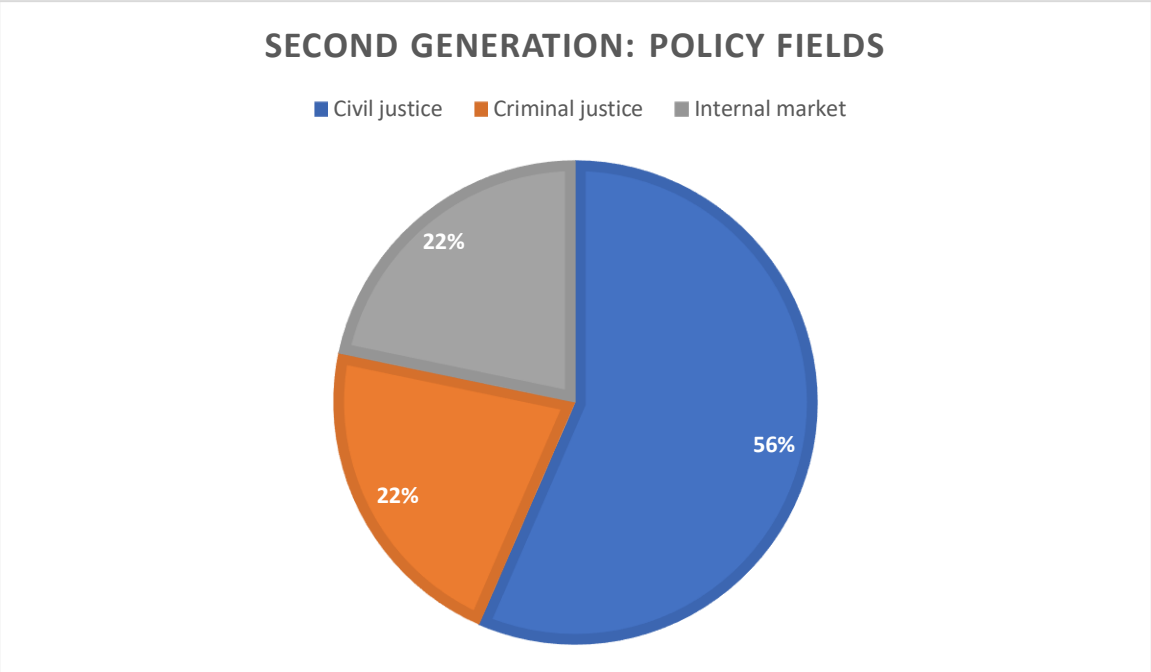

Chart 8 – Proportions of second-generation case law per policy field

The legal-institutional background bears influence on this. Although coinciding temporally with the time period when the Treaty of Nice was in force, it is more affected by the Treaty of Amsterdam, which made some important legal and institutional changes. AFSJ, previously known under the title of Justice and Home Affairs (JHA), was from the beginning of European integration under the intergovernmental method and not under the traditional "Community" method. This meant instruments were taken outside the Community legal framework, with unanimity and the usual international law enforcement mechanisms. Governments had no interest in giving, for example, the CJEU jurisdiction over those intergovernmental measures taken in areas so close-knit with sovereign powers as the JHA (i.e. family, immigration, and criminal law), except for some dealing with civil cooperation.[591] This remained true also after the Maastricht Treaty created two new pillars besides the original Community economic matter – namely Common Foreign and Security Policy and JHA, the latter of which replaced the former informal intergovernmental cooperation bodies. But this did not make much substantial difference, as the third pillar still was still the subject of "formal intergovernmentalism"[592] under the third pillar and the Court had no mandatory jurisdiction over the third pillar but had to be given specifically with each intergovernmental convention.

[591] Steve Peers, *EU Justice and Home Affairs Law: EU Criminal Law, Policing and Civil Law* (Fourth edition, Oxford University Press 2016) 8.
[592] ibid 9.

The Treaty of Amsterdam, entered into force on 1 May 1999, transferred part of the third pillar (immigration, asylum, and civil law) to the EC method, significantly amended the rules and structures of criminal law cooperation remaining in the third pillar, and incorporated the Schengen acquis to primary law. Although the Amsterdam Treaty significantly expanded the role of the Court over the third pillar, it still remained the case that Member States had to do opt-ins to give CJEU jurisdiction over preliminary rulings, and these could also be reserved to final courts only. In fact still most (nineteen, excluding the UK, Denmark and Ireland of the old Member States and Estonia, Poland, Slovakia, Bulgaria, and Malta from the newly acceded ones) Member States opted in to the Court's post-Amsterdam third pillar jurisdiction over preliminary rulings, and almost all (except Spain) permitted all national courts to send questions.[593] Thus there were many rulings from the Court also before abolishing such jurisdictional restrictions of the Court.[594] But the playing field was territorially fragmented CJEU jurisdiction-wise.

As most of the AFSJ was put under the Community method, EU legislative documents started to emerge, and thus also disputes under them in CJEU. Thus, in this second generation, the cases arriving to the CJEU, at first the remnants of the intergovernmental era (the 1985 Convention Implementing the Schengen Agreement[595] and the 1968 Brussels convention on jurisdiction and enforcement of judgements in civil and commercial matters[596]), started also to include the newly adopted EU's own AFSJ instruments – such as the 2000 Regulation on insolvency proceedings[597], the 2000 Regulation on jurisdiction and the enforcement of judgements in civil and commercial matters[598] and the 2003 Regulation on the jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility.[599]

[593] ibid 20–21.
[594] See a discussion about the number and fields of issues that the CJEU had in fact ruled on even before the entry into force of the Treaty of Lisbon: ibid 21–22.
[595] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.
[596] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32.
[597] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1.
[598] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[599] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1.

All of these new instruments already included references to mutual trust in their preambles which might have been influenced heavily by the main policy driver in these fields – the Council – as was shown in the first chapter regarding the Cardiff and Tampere conclusions which carved out mutual trust and recognition as the cornerstones of this new approach to civil and criminal cooperation.

The adding of policy fields – civil and criminal cooperation matters – is one important characteristic of second-generation case law. Notably, asylum cases were still absent. But the added civil and criminal justice policy fields were not the only developments. There were also important normative and conceptual changes in the concept of mutual trust that might have been catalysed by the added policy fields.

In conceptual terms, mutual trust gets many new forms of expression with the new policy fields. At the same time, the inherent mutual trust concept in the internal market shifts and changes as new legislative instruments are enacted. The most important new conceptual characteristic in this generational phase is that mutual trust can be directed at national legal systems as a whole and not just concrete checks or controls as in the previous period. This had never happened before, as the object of mutual trust in the first period was narrowly either the checks, controls, analyses, tests, or inspections carried out in the exporting Member State, or not mentioned at all as in CCP cases, but it was never directed at Member States legal systems. These checks and inspections were fully harmonised at the Community level. National legal systems are under the competences of Member States and not harmonised at the EU level.

As a common denominator, mutual trust is still something between Member States, sometimes specifically between Member States' authorities[600] or courts[601], but it is crystallised that mutual trust, besides being intra-EU, is also something horizontal: concerning cooperative relations between Member States (authorities) and not subordinate relations between EU institutions and Member States (authorities). Besides that, there is no clear conceptual clarity in describing or explaining mutual trust in this generational phase. It is most commonly defined as trust that Member States should have in each other's legal systems and judicial institutions[602]. But the

[600] E.g. between Member States' tax authorities: Case C-73/06 *Planzer Luxembourg*, ECLI:EU:C:2007:397, para 38.
[601] See Case C-195/08 PPU *Rinau*, ECLI:EU:C:2008:406, para 47; Case C-341/04 *Eurofood*, ECLI:EU:C:2006, paras 40-41; *Opinion 1/03*, ECLI:EU:C:2006:81, para 163.
[602] See as a blueprint Case C-116/02 *Erich Gasser*, ECLI:EU:C:2003:657 para 72; also Case C-139/02 *Gluiber v Commission*, para 24; Case C-292/05, *Lechouritou*, ECLI:EU:C:2007:102, para 44.

wording and explanation vary to great extents from specifically criminal justice systems[603] or Member States' courts[604] to the general administration of justice in the Union[605].

Normatively and from the perspective of the object of mutual trust, civil and criminal cooperation widen the scope of trust objects, encompassing in this phase also civil and criminal judgements or other decisions (i.e. jurisdictional decisions) coming from other Member States or proceedings that are either ongoing or have finished there. Interestingly, there is also a shift in the internal market, from trust in checks and inspections to trust in professional qualifications certificates and diplomas.[606] That embodies the shifting attention in the internal market jurisprudence from the free movement of goods or services to the free movement of people (professionals).

Regarding mutual recognition, mutual trust in this generation of cases is clearly and unequivocally functionally directed at the recognition of an instrument, be it recognising qualifications and diplomas, or judgements and proceedings done in other Member States. Still, interestingly, as in the previous phase, it is usually implicit, and there is only one mention of the principle of mutual recognition alongside mutual trust.[607] It is the first connection made between the two principles by the CJEU emphasising that the principle of mutual recognition is based on the principle of mutual trust. [608] This later gets picked up and repeated by the Court on numerous occasions.

Conceptually, second-generation mutual trust case law can be divided into four main categories according to the object of trust: (1) mutual trust in legal (criminal) systems and judicial institutions; (2) mutual trust in the administration of justice in the EU; (3) mutual trust as a judicial presumption of correctness; and (4) mutual trust in qualifications and diplomas.

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[603] See e.g. Joined Cases C-187/01 and C-385/01 *Brügge*, ECLI:EU:C:2003:87 para 33; Case C-436/04, para 30; Case C-150/05 *Straaten*, ECLI:EU:C:2006:614 para 43; Case C-467/04 *Gasparini*, ECLI:EU:C:2006:610, para 30.

[604] Case C-195/08 PPU *Brügge*, ECLI:EU:C:2003:87, para 47; Case C-341/04 *Eurofood*, ECLI:EU:C:2006:281, para 41; *Opinion 1/03*, para 163.

[605] See Case C-420/07, *Apostolides,* ECLI:EU:C:2009:271, para 73.

[606] See Case C-330/03 *Caminos*, ECLI:EU:C:2006:45, para 21; Case C-286/06 *Commission v Spain*, ECLI:EU:C:2008:586, para 65; Case C-274/05 *Commission v Greece*, ECLI:EU:C:2008:585, para 30; Case C-110-01 *Tennah-Durez*, ECLI:EU:C:2003:357, para 30.

[607] Which is surprising as mutual trust is today mainly considered as a corollary or even a part of the principle of mutual recognition – see on a more comprehensive discussion on that in Chapter 1. This first and among the two generations only case, where the principle of mutual trust is mentioned alongside the principle of mutual recognition is in the civil justice judgement on child abduction: Case C-403/09 PPU *Deticek*, para 45.

[608] *Deticek*, para 45.

3.3.2.1. Mutual trust in legal systems and judicial institutions

This generation of case law starts off with a paradigmatic shift – not only does a new policy area, the AFSJ, enter the stage, but from a substantial perspective the object of trust starts to be the entirety of legal systems and judicial institutions from the landmark case *Brügge* on. This is fundamentally different than the general wording of CCP mutual trust and the defence of the common interest, intertwined with institutional balance and the internal market-specific mutual trust in checks and inspections carried out abroad. At first this type of trust in legal systems was confined to the first criminal law specificity arriving to the Court, but as civil justice cases were added, it broadened from mutual trust in criminal justice systems and criminal laws of different Member States to legal systems and judicial institutions in the abstract. This then later evolved to what was coined as mutual trust in the administration of justice within the Union (discussed in the next subsection).

Mutual trust in criminal justice systems and criminal law – from Brügge *to* Bourquain

This generation of case law starts with the first ever case mentioning mutual trust in CJEU's criminal justice case law – *Brügge* – which concerns the ne bis in idem principle under Article 54 of the Convention Implementing the Schengen Agreement (CISA).[609] That provision establishes that a person may not be prosecuted in a Member State for the same acts for which his case has been finally disposed of in another Member State. The main issue in the proceedings was whether Member States are allowed to prosecute a person who has exercised his free movement rights on the same facts as those that have led to a final discontinuation of proceedings in another Member State but not by a court but by a public prosecutor's office. The Court in interpreting the ne bis in idem principle stated that:

> "In those circumstances, whether the ne bis in idem principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have *mutual trust* [emphasis added] in their criminal justice systems and that each of them recognises the criminal law in force in the other Member State even when the outcome would be different if its own national law were applied."[610]

The Court ultimately ruled that due to mutual trust, ne bis in idem applies also if the "final disposition" has not been made in a court, but by the prosecutor. The case brought to the

[609] *Brügge*, paras 18, 23.
[610] ibid, para 33.

spotlight the difficulties of different, not harmonised legal systems and the possibilities in prosecuting crimes that constitute as same acts and are thus barred from double prosecution in domestic legal systems in cases where another Member State's court has already prosecuted those same acts, but the accused has not been found guilty in that first prosecution. The issues arise when people use their free movement rights and relocate between Member States and either the consequences, victims, or evidence are situated in different Member States. Depending on the legal systems at hand, several Member States might have jurisdictions. This is a vivid example of the level of intertwinement and legal complexity that the EU dimension adds to the conventional understandings and theories of criminal law. Obviously, and especially regarding evidence, some Member States are better positioned than others in prosecuting these crimes. Thus, the question arises, whether the ne bis in idem would and should apply in instances where the first Member States discontinues proceedings due to lack of evidence. The Court in *Brügge* decided in favour of the accused that the ne bis in idem applies in full and therefore any further prosecution is barred.[611]

This is an important doctrinal development as *Brügge*, besides being the first ever AFSJ judgement to mention mutual trust, was also the first judgement that explicitly connoted the object of trust not being checks or inspections as in the previous internal market case law, or something abstract as first-generation CCP cases, but the entirety of criminal justice systems and criminal laws of other Member States. But one can note a conceptual similarity with first-generation case law – adjudging in favour of the mobile Union citizen, prevention of double proceedings and the obligation to recognize the conclusions made in the first Member State. This is a similar functioning of the principle as it was in the free movement cases, where authorities had to have trust in product checks and inspections. This type of regulatory administrative trust in inspections has shifted to a trust in criminal inspections and proceedings, although similar, still essentially different in nature.

The above quoted definition of mutual trust in *Brügge* also introduced the principle of functional equivalence to the criminal justice sphere, by expressly stressing that Member States should have mutual trust in each other's criminal laws despite the fact that the outcome might be different. Functional norm equivalence assumes that although norms may take different forms, they essentially come down to the same thing and should normally be recognised in all

[611] ibid, para 48.

Member States.[612] *Brügge* transformed the more specific first-generation mere norm enforcement recognition, which left only the appropriate enforcement of commonly agreed and standardised norms to the ambit of trust, into a proper norms recognition which made the adequacy and equivalence of norms themselves the object of mutual trust.

The level of harmonisation needed was thus much laxer than in the free movement of goods cases. Before bringing in mutual trust, the Court explicitly stressed that the treaties do not make the application of Article 54 CISA conditional upon harmonisation or approximation of Member States' criminal laws.[613] This is drastically different from how mutual trust functioned in the internal market: the basis and rationale of mutual trust were common harmonised rules which set out elaborate standards for health and veterinary inspections. Besides changing the object of trust, it also was a paradigmatic shift: from a rule and enforcement[614]-based trust to a leap of faith-type of trust, where Member States did not even know exactly what constituted those criminal justice systems in general and the rules contained therein in particular in all other Member States and whether they actually are acceptable and equivalent to their own when having extraterritorial effect. So, the epistemic basis for trust was significantly narrowed with *Brügge* introducing mutual trust in the criminal justice systems of other Member States.

After *Brügge* there were four other criminal justice ne bis in idem cases mentioning mutual trust in identical terms. All of them also concerned Article 54 CISA and they were: case *Van Esbroeck*, which asked whether the same material acts are also the exporting and importing of the same narcotic drugs even if they fall under different legal classifications in Member States[615]; case *Van Straaten*, which again concerned the exporting and importing of narcotics and their different qualifications but also touched on a question similar to *Brügge* regarding an acquittal for the lack of evidence[616]; case *Gasparini*, on different limitation periods in Member States and whether one country can still prosecute a person when another Member State's courts has acquitted the person as the offence is time-barred[617]; and case *Bourquain*, which concerns

[612] Commission White Paper 'Completing the Internal Market' COM(85) 310 final, para 58. See also, in general: Joseph Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in Fiorella Padoa-Schioppa (ed), *The principle of mutual recognition in the European integration process* (Palgrave Macmillan 2005).
[613] *Brügge*, para 32.
[614] The enforcement stemming mainly from the possibility to initiate infringement proceedings in cases when a Member State was in fact not abiding by agreed obligatory common rules. This was the mechanism coming from *Hedley Lomas.* That is not possible with regard to domestic criminal law as it was not (and still is not, with some narrow procedural exceptions) harmonised at EU level.
[615] Case C-436/04 *Van Esbroeck* ECLI:EU:C:2006:165, para 30.
[616] Case C 150/05 *Van Straaten* ECLI:EU:C:2006:614, para 43.
[617] Case C-467/04 *Gasparini* ECLI:EU:C:2006:610, para 30.

a question whether the ne bis in idem is still applicable and excludes prosecution if a sentence was finally imposed but could never be enforced in the sentencing Member State.[618]

In all these cases, the wording and functioning of mutual trust was the same – it is directed at other criminal justice systems and it entails the recognition of the criminal law in force in other Member States even when the outcomes are different from those of national law. It must be stressed, though, that the commonplace account that mutual trust and recognition in the AFSJ and especially in criminal law matters functions against the individual concerned as it empowers the punitive or other powers of the State vis-à-vis the individual[619] does not hold true, as in all these cases the result was clearly positive for the individuals concerned – they could not be prosecuted again in other Member States.

Mutual trust in legal systems and judicial institutions – civil justice cases

In 2003 came also the first civil justice cooperation cases, which, although using a similar logic in determining the object of mutual trust, widened the scope. The first one was obviously the need to move from the criminal justice system as an object of mutual trust to a broader notion – legal systems as a whole and judicial institutions that implement them.

The first ever civil justice mutual trust case was *Gasser* in 2003, which concerned a jurisdictional dispute under the 1968 Brussels Convention where a court second seized questioned whether it can review the jurisdiction of the court first seized if it considers itself having exclusive jurisdiction under the Convention and whether the court second seized can derogate from the rule to stay proceedings while prior proceedings are ongoing in another Member State if the duration of proceedings has been excessively long. In its answer to the second question the Court reiterated:

> "Second, it must be born in mind, that the Brussels Convention is necessarily based on the *trust* [emphasis added] which the Contracting States accord to each other's legal systems and judicial institutions. It is that *mutual trust* [emphasis added] which has enabled a compulsory system of jurisdiction to be established, which all countries within the purview of the Convention are required to respect, and as a corollary the waiver of those States of the right to apply their internal rules on recognition and enforcement of foreign judgements in favour of a simplified mechanism for the recognition and enforcement of judgements."[620]

[618] Case C-297/07 *Bourquain* ECLI:EU:C:2008:708, para 37.
[619] See in e.g: Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (n 52) 1280.
[620] Case C-116/02 *Gasser* ECLI:EU:C:2003:657, para 72.

Thus, the court second seized was not allowed to review the jurisdiction of the court first seized, nor to set aside the jurisdictional rules contained in the Brussels Convention if it regarded the proceedings excessively long.[621] It is important here that as opposed to the criminal cooperation case law, mutual trust here encompasses a broader notion of legal systems (as opposed to only criminal justice systems) and adds that of judicial institutions, which is not present in the criminal justice case law.

It is different from prior criminal law cases in that the mutual trust in this instance is directed particularly at other Member States' courts, or in the words of the Court: judicial institutions. This was seen in the *Gasser* case also from the Commission's submissions, where it explicitly stated that "the Brussels Convention is based on mutual trust and the equivalence of the courts of the Contracting States".[622] This equivalence and trust in courts comes from the established binding system of jurisdiction which all courts within the purview of the Convention are required to observe.[623] Thus, the epistemic basis of mutual trust is different from the criminal law cases – it is the unified and harmonised system and rules of jurisdiction and the courts' obligation to trust that other courts have followed the rules. Mutual trust is based on a set of harmonised law and rules, not divergent criminal law as in the prior case. The equivalence of national legal systems and the equivalence of national courts are rather different notions, although the wording of mutual trust is similar. But the normativity of the functioning of mutual trust is similar to that in criminal law – to accept and not review, modify, or adopt national parallel actions with regard to other states' judicial or legislative acts.

A similar emphasis on judicial institutions – courts – as the particular object of trust is common to other following civil justice cases, with some case-by-case additions or modifications. Cases *Lechouritou* and *Turner* concern also jurisdictional disputes and replicate *Grasser* wording. *Lechouritou* emphasised that besides the fact that the Brussels Convention is founded on mutual trust, it also seeks to ensure legal certainty by laying down uniform rules on conflict of jurisdiction and to simplify formalities with a view to the rapid recognition and enforcement of judicial decisions.[624] This is the first time the Court emphasised speed and simplification as policy aims in the context of mutual trust.

[621] ibid, para 73.
[622] ibid, para 67.
[623] ibid.
[624] Case C-292/05 *Lechouritou* ECLI:EU:C:2007:102, para 44.

Turner went further, stating that it is inherent in the principle of mutual trust that the rules of recognition that the Convention lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them.[625] It also added an understanding that an assessment of the appropriateness of bringing proceedings before a court of another Member State runs counter to the principle of mutual trust, which prohibits a court, except in special circumstances, from reviewing the jurisdiction of a court of another Member State.[626] This formulation is noteworthy, as it is the first time that the Court refers to the possibility to limit mutual trust and recognition in the occurrence of "special circumstances" (compare with today's equivalent of exceptional circumstances). With that *Turner* prohibited any anti-suit injunction against the continuation or commencement of proceedings before a court of another Contracting State, even when that party is acting in bad faith with a view to frustrate the existing proceedings.[627]

With those first civil justice cases, the object of trust was abstractly broadened to legal systems but in particular directed at the judicial decisions of other Member States courts. Thus, the trust in judicial institutions dominated the new conceptualisation. Member states courts are equal and equivalent. The stressing of the same authority of different courts refers to the equality of courts in their competence of applying jurisdictional rules. It has the effect of protecting such authority in that no external review or limitations by peers can be made as per mutual trust. But the rules are still the same for all, thus in mutual recognition terms the stress was back on enforcement recognition instead of rules recognition as was the case in the early criminal justice cases. This means also an institutional shift of focus from legislators to the judicial branch.

3.3.2.1.1. Mutual trust in the administration of justice in the EU

Apostolides

Another different conception regarding the object of mutual trust which is very similar to that of the previous subcategory is that of trust in the administration of justice in the Union. This was first mentioned in a civil justice cooperation dispute *Apostolides* concerning the reluctance of a court to recognize and enforce a judgement in the context where the defendant was not served the document instituting proceedings.[628] Therein the Court coined yet another understanding of mutual trust:

[625] Case C-159/02 *Turner* ECLI:EU:C:2004:228, para 25.
[626] ibid, para 28.
[627] ibid, para 31.
[628] Case C-420/07 *Apostolides.*

> "[---] the system of appeals for which it [Regulation No 44/2001] provides against the recognition or enforcement of a judgement aims to establish a fair balance between, on the one hand, *mutual trust* [emphasis added] in the administration of justice in the Union, which justifies judgements 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, which means that the defendant should, where necessary, be able to appeal in an adversarial procedure against the declaration of enforceability if he considers one of the grounds for non-enforcement to be present."[629]

The Court thus ruled that the recognition or enforcement of a default judgement cannot be refused where the defendant was able to commence proceedings to challenge the default judgement.[630] This case illustrated the tension between mutual trust and fundamental rights (the right to defence) explicitly and limited the usage of the public policy clause for the non-recognition of judgements. Although setting the administration of justice in the Union as an object of mutual trust, the Court does not define it, leaving it up for initial debate whether such administration includes only the EU's own justice mechanisms and institutions and/or those of the Member States. The CJEU only later specified in the 2016 *Meroni* judgement that such administration of justice should be directed at both Member States' domestic legal systems, legal remedies, and institutions plus the additional safeguard of the EU's preliminary reference procedure in cases of misapplication of national or EU law.[631] Thus it was only later clarified that the administration of justice in the Union includes both national and EU legal systems, remedies, and institutions.

Even if it only mentions mutual trust in passing, the judgement also lays an important foundation of another aspect of mutual trust: although not deriving from mutual trust explicitly, *Apostolides* is the first time that the CJEU imports an important normativity from its prior case law in interpreting the Brussels Convention by stressing that the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of origin.[632] Although not tied directly with mutual trust here, this normativity (a ban to

[629] ibid, para 73.
[630] ibid, para 80.
[631] As per the Court: "It should also be pointed out that the rules of recognition and enforcement laid down by Regulation No 44/2001 are based on mutual trust in the administration of justice in the European Union. It is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals." – See Case C-559/14 *Meroni*, ECLI:EU:C:2016:349, para 47.
[632] *Apostolides*, para 58.

review other Member States' decisions in fact or law) becomes later on deeply intertwined with the principle of mutual trust.[633]

TNT Express

A similar wording of mutual trust in the administration of justice in the EU was also used in the *TNT Express* case, which again concerned a jurisdictional dispute over the relationship of applicability of Regulation No 44/2001 and the Convention on the Contract for the International Carriage of Goods by Road (CMR).[634] In addressing the question of whether or not the specialised convention applies (as instead of or alongside the Regulation), the Court held that its application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the EU, such as the principles of free movement of judgements in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.[635] The Court furthermore found with regard to mutual trust that:

> "Having regard to the *principle of mutual trust* [emphasis added] referred to above, the Court has stated that the court of the State addressed is never in a better position than the court of the State of origin to determine whether the latter has jurisdiction. Accordingly, Regulation No 44/2001, apart from a few limited exceptions, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court of another Member State."[636]

This rule, which ultimately prohibits any review of the court second seized, is not novel, but it explicitly pins down the rationale of functionally dividing judicial labour within the EU by determining the appropriate court to assess jurisdictional disputes.

Conceptually, *TNT Express* elevated the importance of mutual trust, as it recognised it as a principle that underlies judicial cooperation in civil and commercial matters in the EU. Although not explicit in the Court's language in this era, the administration of justice in the EU as an object of trust should be understood in light of the previous subcategory in that the EU means not the Union itself and its institutions, but EU as composed of Member States, and thus still relates to the administration of justice in different EU Member States and their respective

[633] See for example: Case C-139/10 *Prism Investments* ECLI:EU:C:2011:653, paras 27-31; Case C-681/13 *Diaego Brands* ECLI:EU:C:2015:471, paras 40-43.
[634] Case C-533/08 *TNT Express* ECLI:EU:C:2010:243.
[635] ibid, para 49.
[636] ibid, para 55.

reciprocal trust in each other in that regard. That is complimented by the EU's own additional judicial remedies and mechanisms, especially the preliminary rulings procedure. So, although the semantics between the two subcategories is different, the substantial content is not so much. Also, the normativity of the rule deriving from mutual trust is in principle to recognise and declare automatically enforceable judgements given in another Member State.[637] So mutual trust is inherently tied to mutual recognition also in this subcategory. The recognition is again directed at enforcement recognition (as double review is barred) and the main institutional subjects are Member State domestic courts.

3.3.2.1.2. Mutual trust as a judicial presumption of correctness and its limits

The third strand of cases in this second-generation jurisprudence is again not so different from the previous two, prevailing also in civil justice cases. But besides the wording, it is also more focused on the concrete recognition instrument (usually a judicial decision) at hand and stresses the more cooperative practices and division of judicial labour at play. It does not expressly define mutual trust as directed at either legal systems, judicial institutions, or the administration of justice in the EU, but on a case-by-case basis explains the particularities and consequences of the functioning of the principle. It is still essentially mutual trust between Member States' courts directed at their judicial decisions and the deriving negative obligation to refrain from reviewing each other's decisions, but it is more concrete, as the rebuttals made against the general functioning of mutual trust are strong and tensions become more apparent.

Opinion 1/03

To start off, *Opinion 1/03* marks another opinion of the Court, this time on the Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; it touches only briefly upon some general questions of mutual trust. In discussing the competence of the Community to conclude the convention, the Court relies on the similarities with Regulation 44/2001 and the role of mutual trust, as the lack of review of the jurisdiction of courts of the Member State of origin rests on mutual trust between Member States and, in particular, that placed in the court of the Member State of origin by the court of the State in which enforcement is required.[638] The Court stresses that the basis of such trust is the rules of direct jurisdiction which the Member States must follow.

[637] *Apostolides*, para 73.
[638] *Opinion 1/03* ECLI:EU:C:2006:81, para 163.

Mutual trust in insolvency proceedings – Eurofood *and* Probud Gdynia

Eurofood starts by asking questions about jurisdiction in insolvency proceedings, particularly whether the referring court can review the jurisdiction to open insolvency proceedings assumed by another Member State's court in which recognition has been applied for. In answering, the Court reiterated that the rule of priority (that insolvency proceedings opened in the first Member State are to be recognised in all the Member States) is based on the principle of mutual trust.[639] The Court specified that:

> "It is that *mutual trust* [emphasis added] which has enabled a compulsory system of jurisdiction to be established, which all the courts [---] are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules of recognition and enforcement of foreign judgements in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings."[640]

But the Court went on to stress an additional obligation of that first Member State in 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 and in return, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.[641]

The fact remains that the first court seized may have made a mistake in assuming jurisdiction either in fact or in law. That was also the motivation of the preliminary reference, as it was evident that the referring court had its doubts as to whether the first court actually had jurisdiction, and it even asked with the fifth question whether it was required to recognise insolvency proceedings opened in another Member State where the decision opening those proceedings was handed down in disregard of procedural rules guaranteed in the first Member State contrary to its public policy (i.e. the public policy exception).[642] The CJEU did not allow for such an exception. The solution of the Court to remedy that error was the option of the interested party to challenge it before the courts of the Member State in which they were opened.[643] And for the public policy exception possibility, the Court again emphasized mutual trust according to which the grounds for non-recognition should be reduced to the minimum

[639] Case C-341/04 *Eurofood* ECLI:EU:C:2006:281, para 39.
[640] ibid, para 40.
[641] ibid, paras 41-42.
[642] ibid, para 60.
[643] ibid, para 43.

necessary and be allowed only when the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[644] This referred to its prior case law allowing recourse to that clause only where recognition or enforcement of a judgement would be at variance to an unacceptable degree with the legal order of that State inasmuch as it infringes a fundamental principle, the infringement of which would have to constitute a manifest breach of a rule of law regarded as essential in the legal order.[645] That, of course, is a very high threshold. Thus, despite a substantial error, neither the review of the jurisdiction of the first court nor the recourse to the public policy clause was allowed.

The case is an important first judgement to explicitly lay out in the AFSJ context the division of labour between courts and the only safeguard regarding possible errors – appeal in the first court. This is also an important first case linking mutual trust with the requirement to interpret the grounds of non-recognition extremely strictly, limiting them with rule of law breaches essential in the legal order and manifest contradictions with fundamental principles and constitutional rights and individual liberties (i.e. fundamental rights). This will be later contrasted and developed in the next generations.

There are many further civil cooperation cases which later repeat the wording of *Eurofood*. *Probud Gdynia* also concerned a Polish court's worry with regard to the lawfulness of an attachment of an undertaking's assets effected by German authorities in insolvency proceedings initiated in Poland, as Polish law would not allow for such an attachment.[646] The Court, relying on mutual trust in identical wording to *Eurofood*, denied the German enforcement actions based on its own national law in favour of the Polish proceedings and applicable law.[647]

Parental and child abduction cases – Purrucker, Rinau, Povse, *and* Deticek

The two *Purrucker* cases concerned parallel proceedings in two Member States in a parental responsibility and child abduction case.[648] The whole saga concerned the significance of the fact that the court first seized only handled provisional measures and not the substance of the case about parental responsibility, and failed to represent the criteria under EU law to make it possible to ascertain that it had jurisdiction.[649] Because of this failure of the court first seized,

[644] ibid, para 63.
[645] ibid.
[646] Case C-444/07 *Probud Gdynia* ECLI:EU:C:2010:24.
[647] ibid, paras 27-29.
[648] Case C-256/09 *Purrucker I* ECLI:EU:C:2010:437; Case C-296/10 *Purrucker II* ECLI:EU:C:2010:578.
[649] *Purrucker I,* para 66.

and after relying on the mutual trust conception in a manner identical to *Eurofood*, the Court went further and maintained that besides the obligation of the court first seized, it also must be clearly evident from the judgement delivered that the court has intended to respect the directly applicable rules of jurisdiction and that the court has made its ruling in accordance with those rules.[650] And, accordingly, the general prohibition of reviewing other Member States' courts' assessments does not preclude the possibility of the second court to ascertain the basis on which the first court considered itself competent; if the substantive jurisdiction is not plainly evident, it may be inferred that the judgement was not adopted in accordance with the rules of jurisdiction.[651] The Court thus allowed for some grounds of review and assessment of other courts' jurisdictional decisions.

Cases *Rinau* and *Povse* both also concerned the wrongful removal of children from one Member State to another, and the CJEU mentioned mutual trust in passing (in the case of *Rinau* in the preliminary observations part of the judgement) in reiterating that the recognition and enforcement of judgements given in a Member State should be based on the principle of mutual trust and grounds for non-recognition should be kept to the minimum required.[652] *Povse* also used mutual trust to justify enforceability and made a clear reference to another underlying associated principle – Member States' procedural autonomy.[653]

In *Rinau*, the CJEU also added that the rules concerning jurisdiction and enforcement of judgements are based under the principle of trust of the courts of one Contracting State in the decisions taken by the courts of another Contracting State and vice versa.[654] The institutional actors at play are clearly domestic courts.

Another child abduction case, *Deticek*, as mentioned before, was the first case ever to tie mutual recognition and mutual trust explicitly by stressing that the former is based on the latter.[655] This has become commonplace today, but as mutual recognition was not directly and expressly tied with mutual trust in the early case law, this stands out as a new development. It also added that beside the jurisdictional decisions and considerations, the evaluation of the best interests of the

[650] ibid, para 73.
[651] ibid, paras 75-76.
[652] Case C-195/08 PPU *Rinau* ECLI:EU:C:2008:406, para 50; Case C-211/10 PPU *Povse* ECLI:EU:C:2010:400, para 40.
[653] *Povse*, paras 56, 59.
[654] *Rinau*, para 47.
[655] Case C-403/09 PPU *Deticek* ECLI:EU:C:2009:810, para 45.

child should also be considered in proceedings before the court with jurisdiction as to the substance of the case.[656]

The Court concentrated its efforts on judicial cooperation (i.e. between courts) in the second *Purrucker* judgement, where for the first time it tied mutual trust to judicial cooperation and provided a first ever cooperative (and not deferential) mechanism for such cooperation between Member States courts. In the context of a disarray of different parental proceedings in two Member States, it stressed that the court second seized has to ascertain whether a judgement of the court first seized on provisional measures was merely preliminary and whether it and a claim brought subsequently relating to matters of substance constitute a procedural unit. CJEU proposed a procedure for that:

> "Moreover, taking into consideration the fact that Regulation No 2201/2003 is based on mutual judicial cooperation and *mutual trust* [emphasis added], that court may advise the court first seized that an action has been brought before it, alert the court first seized to the possibility of lis pendens, and invite the court first seized to send information on the action pending before it and to state its position on its jurisdiction within the meaning of Regulation No 2201/2003 or to notify it of any judgement already delivered in that regard."[657]

This is the first ever time that the Court proposes an actual cooperative and communicative mechanism between courts and places mutual trust explicitly alongside judicial cooperation. This will also be mirrored by subsequent judgements in the next generation.[658]

This sums up the ample case law under this subcategory, which ultimately regulates the cooperative obligations of courts to sometimes use cooperative communication mechanisms between them, but as a rule still mainly confer the negative obligation not to review the decisions of other courts, all for the purposes of smooth and simple recognition of those instruments. It is mostly a form of enforcement recognition, based on harmonised (private international law – i.e. jurisdiction and enforcement) rules.

3.3.2.1.3. Mutual trust in qualifications and diplomas

The final category is already known from the first-generation type of internal market case law that aim at building it and fighting market barriers. But in this generation, mutual trust is not directed at checks, inspections, and analyses of goods, but mainly concern the recognition of

[656] *Deticek*, para 60.
[657] Case C-296/10 *Purrucker* ECLI:EU:C:2010:665, para 81.
[658] See further below and especially the discussions on the *Aranyosi* judgement.

qualifications and diplomas. Thus, it reflects a shift from the free movement of goods to the free movement of persons and professionals.

There are four cases under this subcategory, and its representative examples are the infringement proceedings cases against Spain and Greece brought because of their failure to recognise foreign diplomas required under EU law, where the Court ruled in identical wording that:

> "The general system for the recognition of higher education diplomas laid down in Directive 89/48 is based on the *mutual trust* [emphasis added] that Member States have in the professional qualifications that they award. That system establishes the presumption that the qualifications of an applicant entitled to pursue a regulated profession in one Member State are sufficient for the pursuit of that profession in the other Member State."[659]

In a similar context regarding a dispute over France's reluctance to recognise Belgian medical diplomas, the Court stated that the automatic and unconditional recognition of diplomas is underpinned by the Member States' mutual trust in the adequacy of the medical diplomas awarded by other Member States, such trust being based on a training system the standards of which were determined by mutual agreement.[660] The Court specifically stressed that Community law makes the awarding of a diploma subject to certain specific requirements that entail a degree of harmonisation and coordination at Community level as a basis of trust, as was the case with regard to the first-generation trust in standardised inspections. Also, in a diploma recognition dispute, mutual trust was mentioned for the first time alongside the principle of non-discrimination pinpointed as fundamental principles inherent in the Community system for recognising diplomas.[661]

The unifying thread between internal market case law not only in both first- and second-generation internal market cases but also in second-generation civil justice cases is the existence of detailed harmonisation measures that should in principle ground mutual trust. The particular epistemic basis of trust is the agreed training systems for awarding diplomas. Mutual trust is directed at mutual recognition of diplomas, and it is institutionally subjected to the administrative or educational authorities awarding such qualifications. The type of recognition at play is enforcement recognition, as there are no particular diverging legal norms under

[659] Case C-286/06 *Commission v Kingdom of Spain* ECLI:EU:C:2008:586, para 65 and Case C-274/05 *Commission v Hellenic Republic* ECLI:EU:C:2008:585, para 30.
[660] Case C-111/01 *Tennah-Durez* ECLI:EU:C:2003:257, para 30.
[661] Case C-330/03 *Colegio* ECLI:EU:C:2006:45, para 21.

consideration – rather, the concrete compliance with harmonised EU norms, standardised training, and coordination requirements.

One final odd-one-out case is an internal market case, *Planzer Luxembourg*, concerning alleged wrongful information on a VAT tax certificate where the referring court wanted to know whether it can review the actual place of establishment when it has a doubt that the place marked on the certificate is accurate. In answering, the Court mentions mutual trust only in passing, stating that the harmonising tax directive rests on a mechanism of cooperation and mutual trust between tax authorities of the Member States.[662] This prompts the next finding that the certificate permits the assumption that it is correct and in principle the tax authorities are bound by the information contained therein.[663] But the Court went on to state that this still cannot prevent the tax authorities from seeking assurances as to the economic reality of the establishment; thus they can seek further verification and assess the economic reality referred to in the certificate by having recourse to all the Community instruments for cooperation and administrative assistance.[664]

The case is an interesting, one-of-a-kind early blueprint for situations in which Community law-based instruments might not reflect reality (in that particular case economic reality) and the Court has been lax in allowing review to prevent fraud. The presumption of mutual trust on the accuracy of information here poses only the rule that the certificate cannot be simply disregarded based on a mere doubt, but a further verification and assessment with the help of cooperative practices must be undertaken.

3.3.2.2. Second-generation case law patterns

There are some distinctive patterns distinguishing second-generation case law from its predecessor. Subject matter-wise, it is straightforward: the added two AFSJ policy fields – criminal and civil justice cooperation – started to dominate case law and accelerated conceptualisation. Internal market cases remained, but there was a clear shift from the free movement of goods to the free movement of people.

The deviation in policy fields also led to a diversification of actors at whom mutual trust is directed. If in the first-generation case law, it was clearly domestic administrative authorities (customs authorities) to whom the trust obligation of foreign checks and inspections was

[662] Case C-73/06 *Planzer Luxembourg* ECLI:EU:C:2007:397, para 38.
[663] ibid, paras 40-41.
[664] ibid, paras 47, 48, 50.

addressed, then with the shift to trust in laws, legal systems, and judicial institutions, the trust recipients were widened to legislators and domestic courts respectively. This is a much more substantial type of trust, not based on commonly agreed rules and norms, but rather on the adequacy and equivalence of diverging norms and practices in different Member States, as criminal laws are not harmonised at the EU level. It translates into norms recognition and systems recognition as opposed to the prevalence of enforcement recognition of common rules in the first generation. These put higher requirements on the trustor and demand, in Maduro's terms, a higher degree of pre-existing common identity[665], the existence of which at the time and even now is empirically disputable. The enforcement recognition of commonly agreed rules still remains, but as noted, its occurrence has been transformed from trust in administrative authorities' adequacy in conducting product checks (and applying common rules and standards in doing so) to the adequacy of national courts' applying common civil-procedural (mostly jurisdictional) rules. They are both being disputed at a micro-level – i.e. that in a concrete case under dispute the court or authority failed to apply the common rules appropriately – and not on a macro-level, i.e. questioning the overall capability of such actors and authorities to correctly apply harmonised rules. This is also a slight development from the first-generation enforcement recognition, where no direct mistakes or errors were raised, but the distrust seemed to manifest a more fundamental suspicion of foreign systems and a wish to apply and conduct controls on the basis of national rules and practices.

The micro-level disputing against mutual trust leads to a special type of case law emergence, what I call error jurisprudence. This is the plea to stop mutual recognition (of national judgements) and limit mutual trust in cases which elicit actual distrust, as common rules have either not been appropriately observed or there has been other errors of fact or (substantive or procedural) law. This type of case law comes mostly from the field of civil justice and is illustrated acutely in cases such as *Apostolides*, *Rinau*, *Purrucker*, *Eurofood*, and *Planzer Luxembourg*. The solutions by the Court also divide into two: in some cases the national court is allowed to review or remedy the error from entering the second Member State's legal order (as they amount to the exceptional cases needed to trigger the public policy exception – see e.g. *Purrucker*, *Eurofood*, and internal market cases not having recourse to the public policy exception but an allowed check of "economic reality" in *Planzer Luxembourg*), yet in others no such review or remedy is allowed as per mutual trust (e.g. *Apostolides, Rinau*).

[665] Poiares Maduro (n 142) 822.

This also translates into the necessary prior harmonisation to form a basis for mutual trust. Also, in this regard, internal market and civil justice cases are similar in that they require prior harmonisation of rules and procedures, be that jurisdictional rules or rules on approximation of training and education to recognise each other's diplomas. But criminal law cases created a completely new understanding in that no prior harmonisation was necessary nor available and thus also the conceptual shift: mutual trust in the entirety of other Member States legal systems and specifically in their criminal laws. Although civil law cases replicated that wording, their object still did not have much to do with national legal systems (except for the judiciary applying the rules), but rather the application of EU norms.

The conceptual and semantic turn in mutual trust case law to start being about trust in other Member States' legal systems and judicial institutions (or the administration of justice in the EU which arguably includes both) is a consequential jurisprudential shift. Although civil justice cases kept their practical focus on the trust in and between courts as judicial institutions, the criminal law cases clearly turned their approach to the more general systems trust in non-harmonised national legal systems and determined that even though laws and practices might arrive at different outcomes, they still must be afforded a similar and equal level of recognition in the national system.

This leads to the final parameter – interrelationship with the principle of mutual recognition and, in practical terms, with mutual recognition instruments. There is a continuity from the first-generation case law in that mutual recognition of different instruments or proceedings is a constant aim of mutual trust – mutual recognition instruments are present in all the cases in one form or another also in this second period jurisprudence. But as in the previous phase, the principle of mutual recognition is not explicitly present, except for the first ever case in 2009 which directly tied together the two principles and stressed that the principle of mutual recognition is based on the principle of mutual trust. As will be seen in the next period, these two become more and more inseparable in case law.

All in all, the second generation conceptualises the understanding of mutual trust and draws out the main normative rules and canons of interpretation still relevant today – such as its main effect to foreclose judicial controls of equal and sovereign (although interconnected) Member States' courts and authorities and the strict interpretation of deviation from mutual trust and recognition only in exceptional cases. But it did provide for two different understandings of the principle – one for civil justice and one for criminal justice cases. If the former resembles the

internal market understanding of trust in EU norms enforcement, then the latter is broader and focused on national law and legal orders. This is reflected and further diverged and developed in the next generation, where mutual trust becomes increasingly present in the Court's jurisprudence.

3.3.3. Third generation: trust in fundamental rights compliance

3.3.3.1. Characteristics and legal-institutional context

The third generational extends temporally from December 2010 until February 2017 – more than seven years – and is numerous in its case count. There are 39 cases all together in this period. The vastness of cases might be explained by the fact that this era could be characterized as the "classical era" of mutual trust jurisprudence: the principle gains a proper place and prominence in the Union legal order and is in effect arguably constitutionalised with the notorious *Opinion 2/13*. But the decisive factor for this exact periodisation does not lie in this particular ruling, as the tendencies started already earlier (*Opinion 2/13* was ruled in the end of 2014). The reason for the start of this generation already in 2010, more precisely with the civil cooperation case *Zarraga* on 22 December 2010, lies in the fact that in that case the Court first tied mutual trust with the presumption of fundamental rights compliance.[666] This together with the following case law starts to pave the way for *Opinion 2/13* and the novel normative content of mutual trust as a broad EU law and, in particular, a fundamental rights compliance presumption. Note that in some of the last cases of the prior generation, i.e. *Apostolides*, the Court on the contrary juxtaposed mutual trust vis-à-vis fundamental rights (rights of the defence)[667] or named them as a theoretical possibility to limit its application[668], thereby identifying the two as separate categories. So the shift in *Zarraga* was a change of paradigm in the mutual trust jurisprudence, as fundamental rights compliance became a part, an object of mutual trust, not a consideration from the outside limiting and balancing its functioning. The last case that marks the end of the third generation is an asylum case, *C.K. and Others* on 16 February 2017[669], due to the identification of the case *Pula Parking* as the start of the next generation in March 2017.

As for the large number of cases in this period, the third-generation case law is difficult to characterise in an unequivocal way, but some important patterns and traits do stand out. First,

[666] Case C-491/10 PPU *Zarraga*, ECLI:EU:C:2010:828, para 70.
[667] *Apostolides*, para 73.
[668] I.e. *Eurofood*, para 63.
[669] *C.K. and Others*.

we will examine the statistics of the third generation. The structure of types of rulings in this vast period is surprisingly homogenous. There are 38 preliminary rulings and only one opinion of the Court: *Opinion 2/13* on the draft accession agreement to the ECHR. That dominance is illustrated in Chart 9.

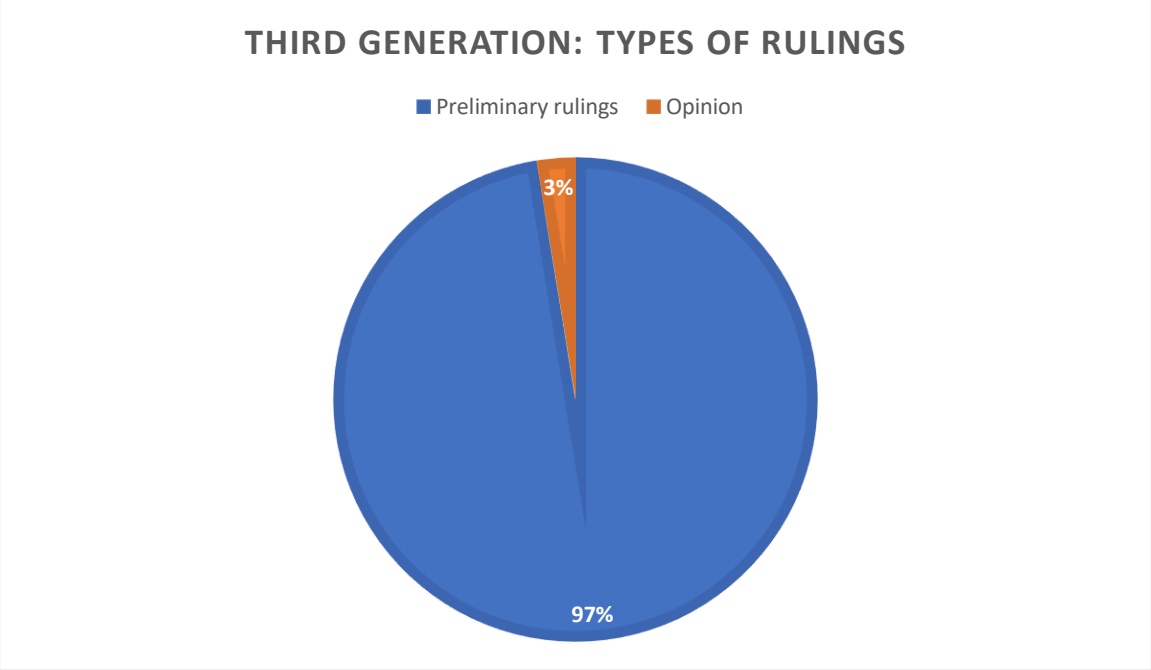

Chart 9 – Types of rulings in third-generation case law

Subject matter-wise, there is a bit more diversity. Out of the 39 cases 20 are civil justice cooperation cases, 13 are criminal justice cooperation judgements, four judgements concern a new policy field – asylum acquis – and only one case comes from the internal market domain and one case is sui generis and could be described as constitutional (concerning fundamental rights and the autonomy and effectiveness of the EU legal system – *Opinion 2/13*) in character. These proportions are shown in Chart 10.

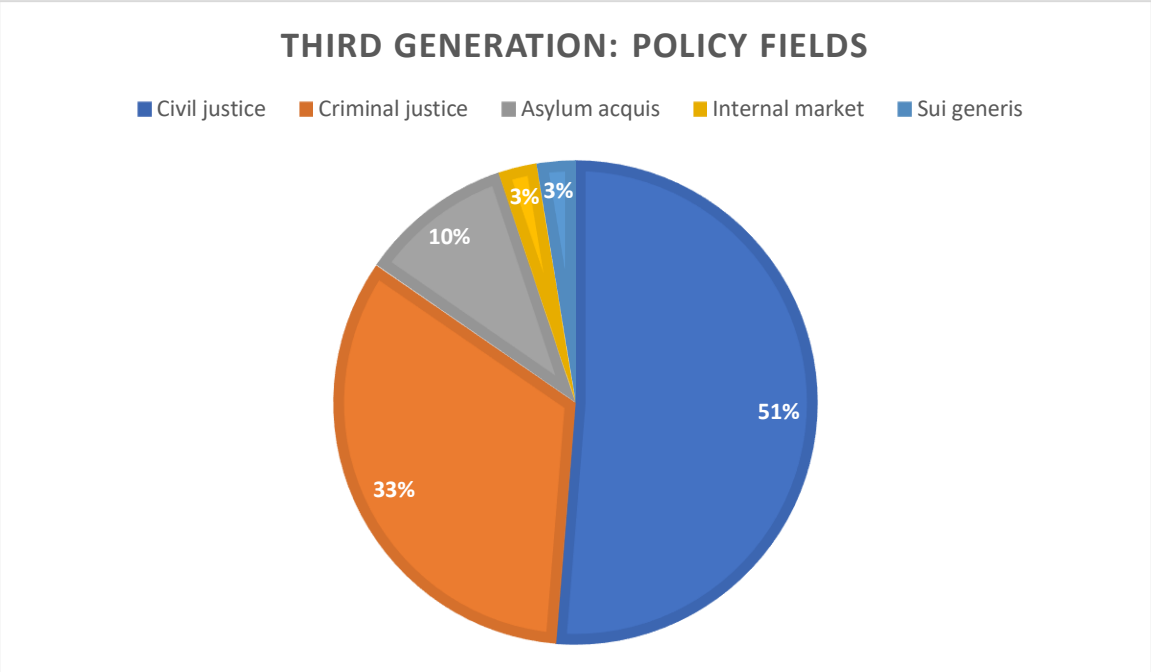

Chart 10 – Proportions of third-generation case law per policy field

The changes in the subject matter structure are drawn out. There is a continued dominance of civil justice cooperation cases and a near-to-complete disappearance of the original internal market domain (only one case). There is an important new policy field emerging – asylum case law – which is also one of the constitutive characteristics of this generation's case law subject matter-wise.

The legal-institutional background of this era is relatively straightforward. The timespan of this generation falls entirely within the period of the Treaty of Lisbon, with the sole caveat that the Treaty of Lisbon also prescribed a five-year transitional period with its Protocol No 36 on transitional provisions, which limited the jurisdiction of the CJEU with regard to the field of police cooperation and judicial cooperation in criminal matters by keeping the pre-existing jurisdictional rules and limitations (i.e. CJEU having jurisdiction if a Member State has accepted such jurisdiction).[670] However, that limitation lapsed on 1 December 2014. The entry into force of the Treaty of Lisbon is influential in many regards. First, it "reunites" all the rules governing the AFSJ, as well as the provisions on policing and criminal law matters, under Title V of TFEU and thus the whole of the AFSJ under the Community method. The second significance is the enactment of the Charter as primary law, which starts to play an important part as the harmonising basis for mutual trust in this generation's case law. This is probably also the main reason why fundamental rights entered the domain of mutual trust objects – they

[670] See Article 10(1) and (3) of the Protocol (No 36) on transitional provisions [2008] OJ C 115/322.

received a clear and strong legal basis as an explicit (and not merely case law-driven) part of EU law.

There are also new instruments prompting preliminary references to the Court, such as the notorious European Arrest Warrant Framework Decision[671] (EAW FD) and the asylum application regulation creating the so-called Dublin system of asylum procedural responsibilities between Member States.[672] Both of them quickly became the main instruments developing mutual trust case law in the disputes over EAW surrenders or Dublin transfers of asylum seekers. With some time-lag, the first asylum dispute mentioning mutual confidence was decided by the Court in the *NS* case[673] in the end of 2011, and the first EAW dispute where mutual trust was referred to in June 2012 was *West*.[674]

There is another important national institutional and legal development that starts to materialise during this period and starts to resonate with mutual trust case law in this and the next period as it begins to arrive to the Court via preliminary references. It is the process of rule-of-law backsliding in Member States, starting in Hungary with the election of Fidesz in 2010 and in Poland with the Law and Justice Party (PiS) securing power in 2015. Their immediate attack on the independent judiciaries and other rule-of-law guarantees becomes blatant, which prompts the Commission to establish an EU rule-of-law framework[675] and embark on subsequent inquiries. The framework itself mentions mutual trust twice: first, in the introduction, to restate that mutual trust among EU Member States and their respective legal systems is the foundation of the Union and the way the rule of law is implemented at national level plays a key role in this respect[676]; second, in explaining why the framework itself is needed by reflecting the objectives of the EU to protect its founding values and to reach a further degree of mutual trust and integration in the AFSJ.[677] Mutual trust was thus instrumentalised to fight systemic and adverse threats to rule-of-law mechanisms in Member States, and one should note that the aim and target of the framework – systemic deficiencies – also took its basis from one of this era's influential case laws for mutual trust– the N.S. case. The limit to mutual trust in

[671] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.
[672] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national [2003] OJ L 50/1.
[673] Joined Cases C-411/10 and C-493/10 *NS*, ECLI:EU:C:2011:865.
[674] Case C-192/12 PPU *West*, ECLI:EU:C:2012:404.
[675] Communication from the Commission to the European Parliament and Council on a new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final.
[676] ibid, p 2.
[677] ibid, p 6.

"exceptional circumstances" was already developed in the second-generation case law civil justice cases and did not concern systemic deficiencies, but rather concrete grave errors and the strict interpretation of permitting recourse to public policy clause to deny enforcement only in "exceptional cases"[678] or allowing the review of one court's assessment of another's jurisdiction only in "special circumstances".[679]

Conceptually, as mentioned, this phase is characterised by the convergence of mutual trust and fundamental rights compliance presumption, which achieves its peak and crystallises (not to say constitutionalises) with *Opinion 2/13*. This generation's case law is, in fact, clearly characterised by the type of case law in *Opinion 2/13*: both in paving the way for *Opinion 2/13*'s conceptualisation and in the dominance of its usage post-*Opinion 2/13*. The main feature of types of conceptual understanding of mutual trust is relating it to broad EU law and fundamental rights compliance presumptions which preclude actual controls over compliance. As shown under the fourth generation, in the next period this type of mutual trust conceptualisation is in turn modified again to a more tempered and instrumentalised usage and loses its normative dominance.

Functionally, mutual trust still keeps its inherent tie with instruments of mutual recognition, as all cases are in the context of a dispute over an act by a foreign state that needed either to be enforced or in any other way recognised (e.g. jurisdiction restrained). After the first judgement, which explicitly determined mutual trust as a basis of mutual recognition in the previous generational phase (*Deticek*), this becomes prevalent in this generation, and the two principles are clearly used and conceptualised alongside each other both contextually and explicitly. Mutual trust clearly and prevalently becomes an instrument for mutual recognition, brushing aside and suppressing regulatory divergences (i.e. of criminal laws), suspicions and hesitations over giving domestic legal force to foreign acts issued either in error of fact or EU law, and doubts over fundamental rights compliance practices.

With regard to mutual trust's interrelationship with prior harmonisation, this also changes, probably due to legal-contextual developments (entry into force of the Charter). Mutual trust in fundamental rights compliance is in this jurisprudential era often tied with the Charter as the relevant and binding standard prompting such confidence – but not only, as the ECHR and even the Geneva Convention are also invoked. Different EU legislative measures are also brought as

[678] *Eurofood*, para 62; *Apostolides*, para 55; *Probud Gdynia*, para 34.
[679] *Turner*, para 28.

the basis of mutual trust. So, a link with legislative instruments is there, but the level of standardisation (i.e. for fundamental rights) is not nearly as specific as it was, for example for the first-generation product standards or the second-generation emerging civil justice procedural rules. And the criminal law context stays the same: mutual trust in non-harmonised national legal systems needs no link with prior approximation. On the contrary, the missing link is sometimes explicitly brought out as the need to accept (and have trust in) such diverging laws and procedures.

Semantically, mutual trust evolves into even more different wordings and embodiments in this era. It might be mentioned only in passing without being given much normative content or explanation or used in many different paragraphs and even parts of the judgement according to various graspable conceptions, which might even be logically inconsistent. Thus, multiple generalisations and patterns of mutual trust can be distinguished. As a distinctive feature of this period, mutual trust in fundamental rights compliance stands out and will be described most extensively. Three mutual trust modalities as emerged in the previous phase retain their position in case law: they are mutual trust as a judicial presumption of correctness; mutual trust in the administration of justice in the Union; and mutual trust in Member States' legal systems and judicial institutions. The latter two are expressly introduced by the Court in this generation. And one can see that the subgroup of internal market trust in qualifications is entirely gone. That is because internal market case law is essentially non-existent in this generation, with only one case throughout the whole period. As the continuing subcategories mirror prior conceptualisations, for the purposes of conciseness I will not repeat them in full, but rather highlight some of the most noteworthy and influential judgements and developments.

3.3.3.2. Third-generation case law overview

3.3.3.2.1. Mutual trust in fundamental rights compliance

The third generation is distinguished from the previous generation on the basis that fundamental rights became the object of mutual trust, rapidly taking over mutual trust case law by dominating the cases in this jurisprudential era: one-third (thirteen decisions altogether) of the total of 39 conceptualise mutual trust as EU law and, more specifically, fundamental rights compliance presumption. This had never happened before, and it was cemented in the EU law doctrine with *Opinion 2/13*. However, the *Zarraga* judgement had already paved the way for it two years earlier.

As mentioned before, the third-generation case law could be considered as the classical era of mutual trust case law, in that it grew very voluminous, influential, and, arguably, also constitutional with *Opinion 2/13*. But if one would read *Opinion 2/13* only in light of all the case law of the first two jurisprudential generations, she would be extremely surprised, as none of the first- or second-generation cases (i.e. from 1975 until 2010) mention or even hint anywhere that fundamental rights compliance could be the object of mutual trust. EU law compliance could be somehow deducted from the fact that often actual reviews and checks by courts second seized or otherwise handling an issue already in some manner dealt with by another Member State's court, was forbidden, but that EU law abidance presumption was often explained by the existence of harmonising instruments which foresaw the procedures or rules in detail (i.e. jurisdictional or product requirement and inspection rules) and the possibility to seek redress through the Union legal framework (i.e. infringement proceedings). If in the criminal law cases, the fundamental rights compliance could be imagined to the foreground, the focus was still on the criminal laws in force in different Member States. With the entry into force of the Charter, mutual trust in fundamental rights abidance became a rule.

Zarraga

The first case in this revolutionary new line of case law was *Zarraga*, which was a civil justice cooperation case over a jurisdictional dispute in parental matters. The facts of the case were quite unfortunate, as they concerned a child's abduction by her mother, parallel proceedings in two jurisdictions – Spain and Germany, and an acclaimed manifest error of fact in the contents of the enforceable judgement, as it claimed that the child was heard when in fact she was not.[680] In light of this, the referring German court asked the CJEU whether it could enjoy an exceptional power of review when the judgement to be enforced contains a serious infringement of fundamental rights and whether it is obliged to enforce a judgement which contains a declaration that is manifestly inaccurate.[681]

In answering these questions, the Court first recalled the already established principle that the recognition and enforcement of judgements given in a Member State should be based on the principle of mutual trust and grounds for non-recognition should be kept to the minimum

[680] Case C-491/10 PPU *Zarraga*, ECLI:EU:C:2010:828, para 36.
[681] ibid, para 37.

required.[682] But then, in supporting the conclusion that it is solely for the national court of origin to examine the lawfulness of that judgement, went on to state that:

> "As was emphasised in paragraph 46 of this judgement, the systems for recognition and enforcement of judgements handed down in a Member State which are established by that regulation are based on the *principle of mutual trust* [emphasis added] between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights."[683]

Based on this, and as appeal proceedings were still pending before the Spanish court, where an appeal could be brought on the basis of any infringements of the fundamental rights of the child, the Court did not allow neither review nor non-enforcement of the erroneous Spanish judgement.[684] The case is exceptional in many regards. Besides mentioning fundamental rights as the object of mutual trust, it is depicted as a matter of fact that all Member States national legal systems are capable of providing an equivalent and effective fundamental rights protection. But one should note that being capable of providing it is different from whether in a particular case the protection was provided. In that, the implementing courts are not allowed to control the observation of that fact, which has traditionally been their task, even if a violation is manifest. The solution offered by the Court was that the lawfulness of the enforceable judgement must be challenged within the legal system of the Member State of origin and not in the Member State of execution.[685] The mentioning of the Charter is also noteworthy, as the enacting of it as primary law with the Treaty of Lisbon might have been the catalyst in creating this understanding of mutual trust in the first place.

N.S.

But maybe not, as the next case tying mutual trust and fundamental rights exemplifies. The second judgement linking mutual trust with fundamental rights protection is incidentally also the first ever asylum mutual trust case and a notorious one: the *N.S.* case concerning Dublin transfers of asylum seekers to the country of first entry – Greece – where serious and systemic human rights violations had been identified by the ECtHR earlier the same year in the *M.S.S. v. Belgium and Greece* case.[686] So the tension and fundamental rights infringements were real,

[682] ibid, para 46.
[683] ibid, para 70.
[684] ibid, paras 72, 74-75.
[685] ibid, para 71.
[686] ECtHR 21.01.2011 judgement *M.S.S. v. Belgium and Greece,* Appl. No 30696/09, § 358, 360, 367.

and had already caused tensions between the two European courts. The Court brings in mutual trust in its observation that the consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.[687] It then goes on to state that it is because of that principle that the EU legislature adopted Regulation No 343/2003 in order to rationalise the treatment of asylum claims, to avoid blockages in the system, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus avoid forum-shopping, it being the principal objective of all these measures to speed up the handling of claims.[688] After admitting that it is not, however, inconceivable that that system might experience major operational problems in practice, it still insisted that any infringement of a fundamental right would affect the obligations under Union law, going so far to stress that:

> "At issue here is the raison of the European Union and the creation of an area of freedom, security and justice, and, in particular, the Common European Asylum System, based on *mutual confidence* [emphasis added] and a presumption of compliance, by other Member States, with European Union law, and, in particular, fundamental rights."[689]

As a leeway to national courts, CJEU held that a Dublin transfer would be incompatible with Article 4 of the Charter only in there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhumane or degrading treatment, and that there are substantial grounds for believing that the asylum seeker would face a real risk of being subject to that treatment.[690] Thus, the first ever asylum mutual trust case in history shifted many boundaries. First, it established the controversial and heavily criticised "systemic deficiencies" test. Second, it tied mutual trust for the first time not merely with EU but with international human rights standards. Thus, the basis of mutual trust needs not be grounded in EU, but also international law. This is surprising, as the prior *Zarraga* decision hinted that the new object of mutual trust could be epistemically justified by the Charter as a written human rights instrument and by its being elevated to the status of primary law.

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[687] *NS*, para 78.
[688] ibid, para 79.
[689] ibid, para 83.
[690] ibid, paras 86, 94.

Disregarding the Charter and emphasising international law also brings a tension with the original redress mechanism in cases of non-compliance proposed already with *Hedley Lomas* – that of initiating infringement proceedings within the Union legal framework – as this mechanism is simply not possible with regard to international instruments. N.S. also interestingly tied mutual trust to the Union's ultimate raison d´être of becoming an AFSJ. This added leverage to mutual trust as both an instrumental and existential (not to say philosophical) principle. Finally, it also acclaimed mutual trust as the basis of the raison d´être of the EU itself. This resolute wording might have paved the way for the strong emphasis and constitutional language that mutual trust obtains also in *Opinion 2/13*.

Jeremy F

Before *Opinion 2/13*, there were still two more cases replicating *Zarraga*'s newly developed conceptualisation. The criminal law case Jeremy F concerned an EAW and the question of whether Member States are precluded from providing for an appeal with a suspending effect on the EAW.[691] The Court relied on mutual trust in its argumentation in order to justify that the EAW FD itself provides sufficient fundamental rights guarantees, it still did not prevent Member States from providing for such a right of appeal, as the FD does not regulate it.[692] The decision is interesting in two regards. First, although the Court referred to the Charter as the relevant fundamental rights standard in the definition of mutual trust, it still identified ECHR and national fundamental rights standards as the basis of mutual trust in addressing the prevalent concern that national substantive criminal proceedings lie outside the scope of the EAW FD and EU law.[693] Second, it was the first ruling in criminal law and EAW in particular to transpose the currently only civil law normativity of mutual trust in that it precludes appeals or rebuttals of mutual trust instruments in the Member States of execution but puts the onus on the affected individuals to use legal remedies in the Member State of origin. In doing that, the Court referred by analogy to the civil justice case *Zarraga*:

> "The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the *mutual confidence* [emphasis added] between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at the European Union level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the

[691] Case C-168/13 PPU *Jeremy F*, ECLI:EU:C:2013:358, para 37.
[692] ibid, para 51.
[693] ibid, para 48.

> subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which let to that sentence or order, to be contested."[694]

Thus, there is a kind of double paradox in the case. First, why did the CJEU feel the need to transfer the civil justice obligation to appeal in the issuing (originating) Member State, if it in fact actually allowed for an appeal mechanism? Second is the question of the epistemic foundation of mutual trust: is it the Charter, international, or national fundamental rights standards? Despite the fact that just three months before Jeremy F the Court had rendered its controversial decision in *Melloni*[695], which did not allow the Spanish court to take into account its higher procedural standards in halting an EAW extradition to Italy, the Court in *Jeremy F* still assures that provided that the application of the EAW FD is not frustrated, it does not prevent a Member State from applying its constitutional rules relating inter alia to respect of the right to fair trial.[696]

After *Jeremy F* emerged from the criminal justice field, it, together with *Zarraga* and *N.S.*, squared the circle of the new type of understanding of mutual trust as a fundamental rights compliance presumption in the AFSJ. This took place in a mere 1,5 years.

Abdullahi

Before *Opinion 2/13* there was still yet another asylum case under this subcategory – *Abdullahi* – which deliberated a similar question, whether Member States are obliged to provide an asylum applicant the right to appeal against a transfer decision to request the review of the determination of the Member State responsible on the grounds that the criteria laid down in the regulation have been misapplied.[697] In answering the question, the Court repeated the *N.S.* logic and wording – that the only way in which the applicant can call into question the choice of the transfer criterion is by pleading systemic deficiencies in the asylum procedure and in the reception conditions, providing substantial grounds for believing that he would face a real risk of being subject to inhuman or degrading treatment.[698] *Abdullahi* added again that the basis for

[694] ibid, para 50.
[695] Case C-399/11 *Melloni* ECLI:EU:C:2013:107 – in *Melloni* the Court mentioned mutual trust once in arguing in the contrary that opening for review the Italian *in absentia* decision „would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision." – See *Melloni*, para 63.
[696] *Jeremy F*, para 53.
[697] Case C-394/12 *Abdullahi*, ECLI:EU:C:2013:813, para 42.
[698] ibid, para 62.

mutual confidence is the assumption that all participating States, whether Member States or even third States, observe fundamental rights, including the rights based on the Geneva Convention, the 1967 Protocol, and the ECHR.[699] It furthermore added an additional epistemological basis: namely, that the rules applicable to asylum applications have also been to a large extent harmonised at EU level.[700] This effectively provided a double epistemic basis for mutual trust – that of international law and the harmonised EU procedural norms.

Melloni

There is one more important predecessor to *Opinion 2/13*. Although it does not belong to this subcategory in its wording itself, using mutual trust in only a passing manner, it creates a clear precedent that the opinion later picks up. This is the notorious *Melloni* judgement, in which the Court prohibited the Spanish Constitutional Court from applying its own higher constitutional standard on a ban of in absentia criminal prosecutions to the extradition of Mr Melloni to Italy to serve his sentence where such a conviction had taken place. The question under dispute was not even the possible Spanish refusal to execute the EAW, but rather making it conditional upon the in absentia conviction being open to review in the issuing state.

After referencing mutual trust to explain the aim and purpose of the EAW FD[701], the CJEU ultimately relied on it in the interpretation of Article 53 of the Charter and did not allow for such a conditionality, as it "would undermine the principles of mutual trust and recognition which that decision [EAW FD] purports to uphold and would, therefore, compromise the efficacy of that framework decision."[702]

Melloni created the so-called primacy, unity, and effectiveness doctrine, whereby national authorities can apply higher national standards of fundamental rights protection than those provided for by the Charter as long as the primacy, unity, and effectiveness of EU law is not compromised.[703] This was later cemented by *Opinion 2/13*.[704]

[699] ibid, para 52.
[700] ibid, para 54.
[701] As by the CJEU „Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of *confidence* [emphasis added] which should exist between the Member States." – *Melloni*, para 37.
[702] *Melloni*, para 63.
[703] ibid, para 60.
[704] *Opinion 2/13*, paras 188-189.

This choice to interpret Article 53 of the Charter in such a limiting manner and use mutual trust for the purpose was neither commonplace nor predictable from prior case law. In light of the preceding case law, it could have also been decided in the opposite direction. It could have followed the lineage of cases where the Court has clearly juxtaposed mutual trust and the rights of the defence and allowed a public policy exception not to enforce a decision in cases where there is no possibility for appeal in civil judgements where persons had not been heard.[705] There is no reasonable explanation why allowing that in a criminal case would compromise the efficacy, unity, and primacy of EU law more than allowing it in a civil case. But *Opinion 2/13* clearly took up the *Melloni* interpretation of Article 53 of the Charter and developed it and the principle of mutual trust as prompting such interpretation even further.

Opinion 2/13

Opinion 2/13 itself probably does not need much introduction. In a nutshell, the Court was asked about the compatibility of the draft accession agreement to the ECHR with primary law, and it notoriously denied accession and deemed the draft agreement to be in infringement with the treaties. One considerable reason for that, among others, was mutual trust. The Court referred to it in four separate occasions. First, when considering the constitutional structure of the EU, it indicated that:

> "This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of *mutual trust* [emphasis added] between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."[706]

Opinion 2/13 was a first in many things, but this paragraph particularly was the first instance ever that the Court tied mutual trust with Article 2 TEU values as implying and justifying mutual trust (and not specific harmonisation at EU-level or national or international standards or agreements). Thus, it effectively developed the epistemic basis of mutual from its prior grounding in either harmonised EU law (and precise rules and standards) or national or international (fundamental rights) standards to the much vaguer and broader (and some arguable unenforceable) Article 2 values. This is a change of paradigm for the concept of mutual trust.

[705] See *Eurofood*, para 67; Case C-619/10 *Trade Agency* ECLI:EU:C:2012:531, paras 43, 62.
[706] *Opinion 2/13*, para 168.

In considering the draft agreement and ECHR Article 53 that allows the Contracting Parties to lay down higher standards than those guaranteed by the ECHR, it emphasised:

> "In the second place, it should be noted that the *principle of mutual trust* [emphasis added] between the Member States is of fundamental importance in EU law, given that it allows for an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with fundamental rights recognised by EU law."[707]

This is another first – nowhere before had the Court said that the principle of mutual trust was of fundamental importance in EU law. The court had only once before referred to mutual trust in an internal market second-generation case alongside the principle of non-discrimination as a fundamental principle inherent in the Community system for recognising diplomas.[708] The Court also specifically defined mutual trust as an EU law and fundamental rights compliance presumption, although it had developed such a connotation with regard to fundamental rights only in the previous four years and, on the contrary, rather been in tension with fundamental rights for the 35 years prior to that. Mutual trust as a compliance presumption with EU law was also not obvious as, for example in all of the criminal law cases, it was made explicit that there was no such prior harmonisation or any EU law to comply with at all, and mutual trust was about national legal systems' ability to provide equivalent and effective protection.

But it did not stop there and went on to stress further the possibility that after acceding to the ECHR, Member States might theoretically be required to actually check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States; accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.[709] It was not previously known that the negative obligation not to check on each other *in concreto* was such a part of the underlying balance of the EU and autonomy of EU law. It was also the first such association of mutual trust with the basic structural principles of the Union legal order, as unlike *Melloni* where mutual trust was tied with the efficacy of EU law, the Court now saw it to undermine the "underlying balance of the EU" and the autonomy of EU law. As the agreement envisaged contains no provision to

[707] ibid, para 191.
[708] Case C-330/03 *Colegio de Ingebieros de Caminos* ECLI:EU:C:2006:45, para 21.
[709] *Opinion 2/13*, para 194.

prevent such a development, it led the Court to list mutual trust as one of the four reasons why the draft accession agreement was incompatible with primary law.[710]

Diageo Brands

The difficulties created with such a broad-brush compliance presumption did not hide themselves very long; in fact, in the next judgement concerning mutual trust and EU law and fundamental rights compliance, the CJEU itself was faced with a difficulty of how to handle actual non-compliance. The case *Diageo Brands* concerned an actual manifest misapplication of EU law.[711] Thus, the national court received a justified question whether it is then allowed not to recognise such a judgement on public policy grounds, perhaps because of the misapplication of EU law related to trademark regulations or perhaps because the applicant in that proceeding did not appeal to that decision. The Court ultimately did not allow for such a non-recognition, not even on the public policy exception.[712]

In justifying the decision, besides relying on mutual trust as phrased in *Opinion 2/13*[713], CJEU also added the older conceptualisation of mutual trust in that the rules of recognition and enforcement are based on mutual trust in the administration of justice in the EU and it is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure, affords a sufficient guarantee to individuals, who are in principle required to use all legal remedies made available by the law of the Member State of origin.[714] In elaborating on that point, the Court also reiterated that if courts or the highest court in that effect should fail to fulfil their obligation to actually make a preliminary reference that would render the Member State liable under the *Köbler* doctrine.[715]

Diageo Brands was thus the first case post-*Opinion 2/13* where the Court conceptualised mutual trust as an EU law compliance presumption and turned a blind eye to actual non-compliance, developing the case law to the direction of monetary state liability instead of the legal remedy of stopping the further harmful effects of an illegal act. It was also a precedential case in explicitly merging together three understandings of mutual trust – this being directed at EU law

[710] ibid, para 258.
[711] See Case C-681/13 *Diageo Brands*, ECLI:EU:C:2015:471, paras 46-49.
[712] ibid, para 68.
[713] ibid, para 40.
[714] ibid, paras 63-64.
[715] ibid, para 66; Case C-224/01, *Köbler*, ECLI:EU:C:2003:513, paras 50, 59.

and fundamental rights compliance, the administration of justice in the EU, and the legal systems and judicial institutions of Member States. This holistic and integrative understanding of mutual trust still remains a rarity, and most of the following case law still continues to use different conceptions of mutual trust alongside one another.

Bohez, Aranyosi, Bob-Dogi, Kovalkovas, Poltorak, Özcelik, and *C.K*

But *Opinion 2/13*-type wording and definition of mutual trust became predominant. Another seven cases followed: besides the already described *Diageo Brands* another civil justice case[716], five criminal justice cases all on the enforcement of EAWs[717], including inter alia the famous *Aranyosi* case, where the Court transferred the systemic deficiencies doctrine from the asylum to criminal justice area with regard to inhumane prison conditions in Hungary[718], and one asylum case – *C.K.* – where the Court specified that mutual trust also encompasses the strong presumption that the medical treatments offered to asylum seekers will be adequate and clarified the attributability of a transfer resulting in inhumane and degrading treatment.[719]

Aranyosi also developed mutual trust case law with regard to its limits by specifying the co-operational and informational obligations of the actors involved in both issuing and enforcing the EAW and for the first time allowing for a postponement of the execution of an instrument (but not its abandonment – leaving it unclear for how long an EAW can be postponed for), if sufficient guarantees are not given.[720]

Bob-Dogi further developed a mutual confidence-derived co-operational obligation by obliging the executing judicial court to request the issuing judicial authority to supply all supplementary information as a matter of urgency to enable it to examine the existence of a prior national arrest warrant required under Article 8(1)(c) of the EAW FD.[721] The other three EAW cases started what has come to become the long road to conceptualise the autonomous concept of "judicial authority" under Union law, with *Kovalkovas* and *Poltorak* ruling that the Lithuanian Ministry

[716] On the enforcement of a penalty payment in parental matters: Case C-4/14 *Bohez* ECLI:EU:C:2015:563, para 58.
[717] Case C-241/15 *Bob-Dogi* ECLI:EU:C:2016:385, paras 32-33, 65; Case C-453/16 PPU *Özcelik* ECLI:EU:C:2016:860, paras 23-24, 35-36; Case C-452/16 PPU *Poltorak* ECLI:EU:C:2016:858, paras 26, 45; Case C-477/16 PPU *Kovalkovas*, ECLI:EU:C:2016:861, paras 26-27, 44.
[718] Joined cases C-404/15 and C-659/15 PPU *Aranyosi* ECLI:EU:C:2016:198, paras 76-78, 82.
[719] The Court specified that in a situation where a Member State would proceed with the transfer of an asylum seeker in the occurrence of exceptional situations, the resulting inhuman and degrading treatment would not be attributable, directly or indirectly, to the authorities of the Member State responsible, but to the first Member State alone. – *C.K. and Others*, paras 70, 95.
[720] *Aranyosi*, paras 89, 92-99.
[721] *Bob-Dogi*, para 66.

of Justice and the Swedish police cannot be regarded as judicial authorities, but according to *Özcelik* the Hungarian Public Prosecutor's Office can. Although not directly emphasising the independence of the judiciary but rather the separation of powers (and that ministries and the police usually belong to the domain of the executives), the cases still paved the way to later develop the EU's judicial independence doctrine.[722] Mutual trust played an ancillary role in that it was used in the argumentation to showcase that an EAW issued that has not undergone a judicial approval undermines the trust between Member States and, vice versa, one that has such approval justifies the high level of trust.[723]

C.K. also gave some long-awaited concretisation about the need for systemic deficiencies in cases where the transfer of an asylum seeker itself might pose a risk to the person in the absence of widespread deficiencies. It relaxed the applicability of the doctrine on occasions which they do not matter and the mere possibility of a transfer has the effect of violating fundamental rights.[724] *C.K.* also provided for an unusual conceptualisation of mutual trust and its link with harmonisation; namely, the epistemic basis was put on the fact that the reception directive stipulates an obligation to provide asylum seekers with the necessary health care and medical assistance and that conditioned the object of mutual trust:

> "In those circumstances, and in accordance with the *mutual confidence* [emphasis added] between Member States, there is a strong presumption that the medical treatments offered to asylum seekers in the Member States will be adequate [---]."[725]

This is the first such, and a particularly dissonant, focus of mutual trust. One can understand that there is a difference between an obligation to provide necessary health care and the more subjective and arguable question about the adequacy of such health care. The focus here is again on enforcement recognition (recognising and accepting other countries' practices as adequate and equivalent) and not norm recognition (recognising legal norms' equivalence and adequacy). Like *Aranyosi*, *C.K.* provided the possibility to postpone the transfer in cases of risk, but whereas *Aranyosi* did not allow for an ultimate abandonment of an EAW[726], the Dublin system allows for the usage of the discretionary clause of non-execution, which the Court highlighted.[727] It additionally set up a series of cooperation and information-sharing

[722] See in particular the later cases: *Juízes Portuguese* and *LM*.
[723] *Kovalkovas*, para 44; *Poltorak*, para 45; and for the opposite, an EAW that has undergone judicial approval justifies the high level of confidence: *Özcelik*, para 36.
[724] *C.K. and Others*, paras 65, 85, 96.
[725] *C.K. and Others*, para 70.
[726] *Aranyosi*, para 98.
[727] *C.K. and Others*, para 88.

mechanisms, but also specified the substantial requirements for the transfer itself and the medical care provided.[728]

In effect, while both *Aranyosi* and *C.K.* have been lauded as an end to blind mutual trust and manifestations of a more tempered version[729], it still should be stressed that the principle itself has not been substantially changed by the two cases; the limits and procedural mechanisms were only further clarified. As it is declared in *C.K.* itself: the interpretation adopted therein "fully respects the principle of mutual trust since, far from affecting the existence of a presumption of fundamental rights are respected in each Member State, it ensures that the exceptional circumstances are [---] duly taken into account".[730] Expanding the limits of mutual trust and allowing for exceptions (including co-operational and informational duties and postponement) clearly brushes aside the normative strength of the principle, but its dogmatic essence has not changed. This is why the two cases are categorised as belonging to this jurisprudential phase and not the following one – mutual trust's main way of functioning is still to foreclose judicial review over alleged violations (of EU law or fundamental rights) as also in the prior two generations and not, on the opposite, to incite such review as starts to be the tendency in the next phase.

3.3.3.2.2. Mutual trust in the administration of justice in the EU

Apart from the new conceptualisation of mutual trust as an explicit fundamental right and EU law compliance presumption, this generation of case law also includes the subtypes of the previous jurisprudential era. The most persistent of them both time- and frequency-wise is the understanding of mutual trust as directed at the administration of justice in the EU, with eight cases in this generation, while in the previous era that number was only two, so a growth is noticeable. All the cases referring to mutual trust in this wording still come from the domain of civil justice cooperation.

It is important to note that although two rulings – the previously mentioned *Diageo Brands* and *Meroni* – have tied mutual trust to the administration of justice and the next subtype mutual trust in legal systems and institutions in that after noting that mutual trust in the administration of justice in the European Union is:

[728] See *C.K. and Others*, paras 76-84.
[729] See e.g. Lenaerts (n 93).
[730] *C.K. and Others*, para 95.

> "[---] trust which Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals."[731]

Despite this association, that mutual trust in the administration of justice in the EU is equated with trust in Member States legal systems and institutions (and not, for example, in the Union's own institutions and legal systems), the two trust objects still remain differentiated in case law not only before *Meroni* and *Diageo Brands* but also after the rulings. The main pattern in this distinction is that mutual trust in the more general administration of justice in the EU is relied on exclusively in civil justice cases, whereas mutual trust in legal systems and institutions is relied on predominantly (with one civil justice case exception) in criminal law cases.

Prism Investments

As said, the semantics stay pretty much stable. The first case using administration of justice as the object of trust in this period is *Prism Investments*, on a dispute over the reluctance of the referring court to enforce a decision of liquidation proceedings in a context of an error in fact (as the order of payment of money had been allegedly already complied with).[732] The Court mentions mutual trust in the administration of justice in the EU not once, but twice in the judgement. It was first deployed by the Court in preliminary observations, where the Court notes that the rules on recognition and enforcement are based on mutual trust, and such trust requires not only that judicial decisions delivered in one Member State be recognised automatically in another Member State, but also that the procedure for making those decisions enforceable in that Member State be efficient and rapid.[733]

The Court then stressed that the enforcement procedure may involve only a purely formal check of the documents required for enforceability and authorities may not carry out any assessment of the elements of fact and law of the case decided.[734] Even though this dual prohibition was already referred to in the second-generation case *Apostolides*[735], this was not as expressly tied with the functioning of mutual trust as in *Prism Investments*, as it went on to justify this conclusion with mutual trust:

[731] *Diageo Brands*, para 47; Case C-681/13 *Meroni* ECLI:EU:C:1958:7, para 63.
[732] Case C-139/10 *Prism Investments* ECLI:EU:C:2011:653, paras 21, 23.
[733] ibid, para 27.
[734] ibid, paras 28, 30.
[735] *Apostolides*, para 58.

> "The limited nature of that review is justified by the purpose of that procedure, which is not to initiate new proceedings, but rather to agree, on the basis of *mutual trust* [emphasis added] in the administration of justice in the Member States, to the judgement delivered by a court or tribunal of a Member State other than a Member State in which enforcement is sought being enforced by means of incorporation into the latter Member State's legal order."[736]

Thus, the Court precluded any possibility of not enforcing the decision.[737] This was the first time the Court explicitly derived the prohibition of control over a mutual recognition instrument in issues of both fact and law from mutual trust. As mentioned in the previous phase, in *Apostolides* such a ban was for the first time spelled out in a judgement mentioning also mutual trust; however, the rule did not get its normative force from the latter but was taken from older Brussels Convention case law. *Prism Investments* makes explicit that this limited nature of review is in fact rooted in mutual trust in the administration of justice in the Member States. One can also note a change here. The Court for some reason changed its wording from mutual trust in the administration of justice in the EU to that in the Member States. This might be inconsequential, but it could also be taken as a clarification of mutual trust in that it is not about the vertical relations between Member States and the EU and its institutions but about something horizontal between Member States themselves, in which the EU only plays a contextual part (mutual trust because of the EU membership and the deriving legal-institutional guarantees, mechanisms, and other implications). Following the strong statements on mutual trust, the CJEU did not allow the referring court to refuse or revoke a declaration of enforceability.[738]

Importantly also, the Court for the first time brought out the intertwinement of legal orders that mutual trust brings about in that enforcement based on mutual trust is done by incorporating the judgement of the court of origin into the Member State of execution's legal order. That procedure enables in essence the foreign judgement (from another Member State) to have the effect in the enforcing Member State equal to a national enforceable judicial decision.[739]

Trade Agency

A tension with that interpretation did not wait long to reappear before the Court. The case *Trade Agency* only less than a year later pressured the Court to review its own conclusions; it

[736] *Prism Investments*, para 31.
[737] ibid, para 43.
[738] ibid, para 43.
[739] ibid, para 31.

concerned the reluctance of a Latvian court to enforce a default UK judgement that did not give any reasons at all.[740] The referring court considered this manifestly contrary to Latvian public policy, both as to the absent reasoning and as to the fact that the rights of the defence had been breached, as the defendant had not been informed about the legal proceedings initiated in the UK. Here the Court after reminding the general conception of trust and its requirement of automatic, efficient, and rapid recognition[741], went on to address the juxtaposition of mutual trust and rights of the defence:

> "[---] that system of appeals for which it provides against the recognition or enforcement of a judgement, aims to establish a fair balance between, on the one hand, *mutual trust* [emphasis added] in the administration of justice in the Union, and on the other, respect for the rights of the defence, which means that the defendant should, where necessary be able to appeal in an adversarial procedure against the declaration of enforceability if he considers one of the grounds for non-recognition to be present."[742]

The Court also admitted that the assessment of whether the defendant was served with the document which instituted proceedings is of factual nature[743] and information about it is not actually included in the certificate issued for enforcement.[744] Thus, the court decided to allow the jurisdiction of the executing court to verify that the information in the certificate was consistent with the evidence.[745] As for the public policy claim, the court also in principle permitted its use, but only if the defendant does not have any possibilities of bringing an appropriate and effective appeal against the decision.[746]

Although the Court did not make a clear indication that it had departed from its previous restrictive approach towards the impossibility of assessing the facts or law of the enforceable judgement, it in fact did, as the information on being served was not in the certificate over which the executing court could make only a "formal" assessment and the Court explicitly agreed that such an assessment is of factual nature.

[740] Case C-619/10 *Trade Agency* ECLI:EU:C:2012:531, para 20.
[741] ibid, para 40.
[742] ibid, para 43.
[743] ibid, para 33.
[744] ibid, para 37.
[745] ibid, para 46.
[746] ibid, para 62.

FlyLAL-Lithuanian Airlines

This case concerned an enforcement of a Lithuanian court's judgement on provisional and protective measures in Latvia and the latter's doubt that the recognition of that judgement might be against the public policy of Latvia as, first, there is uncertainty whether the Lithuanian courts had jurisdiction, and, second, the judgement on provisional and protective measures provides no explanations of the method by which the amounts were calculated.[747] The court relied on mutual trust in answering the question of whether the failure to give reasons can constitute grounds of the infringement of public policy by referring back to *Prism Investments* that only purely formal checks of the documents of enforceability can be involved, and, again, that no review of the accuracy of the findings of law or fact can be made.[748]

In addressing the question of the alleged infringement of public policy, the Court reiterated its previous case law that recourse to the public-policy clause can be made only where recognition and enforcement of a judgement would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle and constitute a manifest breach of a rule of law regarded as essential in the legal order of the State or a right considered to be fundamental within the legal order.[749] So although Member States remain in principle free to determine according to their own national conceptions what the requirements of public policy are, the limits of that concept remain under the review of the Court to determine whether Member States may have recourse to that concept.[750] Despite the finding in the previous *Trade Agency* case, the CJEU here found itself that there was no lack of reasoning, since the principles of fair trial were additionally respected; thus, there was no breach of public policy, and Latvia was not granted such a recourse this time.[751]

Meroni, Lebek, Handel, Nipponkoa, Nickel

As said, the aforementioned *Meroni* case effectively tied the conception of mutual trust in the administration of justice in the EU with the trust that the Member States accord to one another's legal systems and judicial institutions. But in construing that link, *Meroni* also went on to explain the controversial course of the Court's case law in which many of the errors and

[747] Case C-302/13 *flyLAL-Lithuanian Airlines* ECLI:EU:C:2014:2319, paras 20-21.
[748] ibid, paras 45, 48.
[749] ibid, para 49.
[750] ibid, para 47.
[751] ibid, paras 53-54, 59.

mistakes that national courts made in their practise by referring to the conclusion drawn in *Diageo Brands* that it is that trust which permits the interference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure, afford a sufficient guarantee to individuals.[752] The Court thus emphasised again that it is for the individuals are required, in principle, to use all the legal remedies made available by the law of the Member State of origin.[753] Thus the Court, again, did not allow for a public policy exception due to the fact that an affected person (though not a party to the proceedings) was not heard.[754] This might have been influenced by the preceding *Melloni* and *Opinion 2/13* doctrines, as it effectively followed them instead of a different lineage of *Trade Agency* and *Eurofood*.

In a later case, *Lebek*, the Court again used the construction of mutual trust in the administration of justice in the EU, juxtaposing it with the rights of defence.[755] It further clarified the threshold to which the defence rights have to adhere – namely, that a mere default decision does not allow non-recognition, but only when the defendant has failed to appear without any fault on his part and has submitted an application for relief which has been dismissed.[756] This highlights the highly subjective standard of protection for defence rights and might again be influenced by *Melloni*, as the facts of the case (Mr Melloni escaped the prosecution of bankruptcy and, although aware of the place and time of trial, preferred not to attend) might have borne heavily on the final doctrinal outcome.

The case *Handel* concerned two irreconcilable judgements in the Member State of origin; the Court noted that the possibility to allow for non-recognition when there is a conflict between two judgements given in one Member State is inconsistent with the principle of mutual trust, as such an interpretation would allow the court in the Member State in which recognition is sought to substitute its own assessment for that of the court in the Member State of origin.[757] The CJEU reiterated that such a review of substance is not allowed, even though the irreconcilability of two judgements in two different Member States is a basis to deny recognition.

Under this subcategory there were furthermore two cases involving the interrelationship between the specialised international treaty CMR (Convention on the Contract for the

[752] *Meroni*, para 47.
[753] ibid, para 48.
[754] ibid, para 54.
[755] Case C-70/15 *Lebek* ECLI:EU:C:2016:524, para 36.
[756] ibid, paras 46-47.
[757] Case C-157/12 *Salzgitter Mannesmann Handel* ECLI:EU:C:2013:597, para 36.

International Carriage of Goods by Roads) and Regulation 44/2001, both of which regulate jurisdictional matters. The Court stressed that the application of such a specialised convention cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the EU, such as mutual trust in the administration of justice in the EU, and that the application of CMR can be allowed only if it enables mutual trust to be achieved under conditions at least as favourable as those resulting from Regulation 44/2001.[758] Coming before *Opinion 2/13,* they were the preceding cases stressing the need to protect the principle of mutual trust from other international agreements, regimes, and arrangements, thus hinting at a certain EU law protectionism and scepticism over international law.

3.3.3.2.3. Mutual trust in legal systems and judicial institutions

If trust in legal (criminal) justice systems and judicial institutions was one of the distinct and dominating subcategories of the previous generation, then it has lost its traction in the third one. Cases referring to mutual trust in this sense have halved from eight to four cases: one civil and three criminal justice rulings. This might be because mutual trust in the administration of justice in the EU post-*Diageo Brands* and *Meroni* in 2015 and 2016 respectively includes trust in legal systems and judicial institutions, and thus the two converge. But some cases still resisted.

The civil justice case *Gazprom* uses mutual trust in the context of the recognition and enforcement of a foreign arbitral award which had issued an anti-suit injection, thereby prohibiting jurisdiction under Union rules.[759] The Court held that such an injection, if exercised by a Member State, can result in obstructing the exercise of a Member State of the powers conferred on it by Regulation No 44/2001, which runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and is liable to bar an applicant who considers an arbitration agreement void, inoperative, and incapable of being performed from access to the court before which he nevertheless brought proceedings.[760] But since arbitral tribunals are not courts of a State, such an injunction by an arbitral tribunal does not raise questions of an infringement of the principle of mutual trust by interference of a court of one Member State in the jurisdiction of the court of another Member State.[761] Thus the Court held that neither the arbitral award nor the decision by which the court of a Member State recognises it are capable of affecting the mutual trust between the courts of the various Member

[758] Case C-452/12 *Nipponkoa* ECLI:EU:C:2013:858, paras 36,36; Case C-157/13 *Nickel* ECLI:EU:C:2014:2145, para 38.
[759] Case C-536/13 *Gazprom* ECLI:EU:C:2015:316, para 26.
[760] ibid, para 34.
[761] ibid, para 37.

States.[762] This judgement is an interesting contrast to the recent *Achmea* case where the court effectively arrived at a diametrically different conclusion by using the same principle – mutual trust. But this case will be analysed in the next generation of case law.

The three criminal cases under this subcategory are very similar to the cases under the corresponding subcategory in the previous generation. The cases *Ognyanov* and *Grundza* both concerned the enforcement of foreign criminal judgements; both of them restated in general that judicial cooperation in criminal matters under the Framework Decision 2008/909 is founded on a special mutual confidence of the Member States in their respective legal systems.[763] The former went on to find that in essence, the re-examining of the period of detention served in the issuing Member State would jeopardise the special mutual confidence.[764] Thus it was again about a ban of review in substance of a prior decision of another state's judicial authority and illustrated the differences in national legal systems, which caused tensions, but were still to be deemed essentially equivalent.

The final case, *Kossowski*, once again concerned a question of the ne bis in idem principle under Article 54 CISA and the question of whether further prosecution is prohibited when a prosecution for the same act was terminated and finally closed by the public prosecutor in another Member State, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed.[765] The Court found that such a decision cannot be regarded as a final decision when it is clear from the statement of reasons that the procedure was closed without a detailed investigation having been carried out; the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.[766]

In arriving at that conclusion, the Court also used mutual trust, stating that Article 54 CISA necessarily implies 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.[767] The Court went on to state for the first time that:

[762] ibid, para 39.
[763] Case C-554/14 *Ognyanov* ECLI:EU:C:2016:835, para 47; Case C- 289/15 *Grundza* ECLI:EU:C:2017:4, para 41.
[764] *Ognyanov*, paras 48-49.
[765] Case C-486/14 *Kossowski* ECLI:EU:C:2016:483, para 23.
[766] ibid, para 54.
[767] ibid, para 50.

> "That *mutual trust* [emphasis added] requires that the relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State.[768]

It was linguistically the first case where the Court explicitly says that mutual trust means that the other state's final decision must be accepted at face value. But the Court did not stop there and qualified the situation further that this mutual trust, however, can prosper only if the second Member State can be reassured that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case.[769] As that particular decision did not have a determination of the merits, as there was no detailed investigation, that decision cannot be characterised as a final decision; otherwise, mutual trust between Member States would be undermined.[770] So ne bis in idem did not apply and further prosecution was allowed.

3.3.3.2.4. Mutual trust as a judicial presumption of correctness

As a reminder, this type includes all cases directed at concrete mutual recognition instruments (usually judgements) and are either explicitly or implicitly directed at courts as a negative obligation to refrain from reviewing other courts' decisions, sometimes mentioning also judicial cooperation in the abstract.

This strand of case law gets more fragmentised and diversified and uses mutual trust in a much briefer manner usually in passing, stressing a particular rule coming from the principle – such as that the grounds for non-recognition should be kept to the minimum required[771], the prohibition to review other courts' decisions in their substance[772], or the prohibition to apply one's own internal rules on recognition and enforcement.[773]

And in case *W and V*[774], mutual trust was mentioned alongside judicial cooperation as a cornerstone for the creation of a genuine judicial area. The case *Balaž*, being the only criminal justice case regarding a recovery of a traffic fine, turns that conception slightly around and

[768] ibid, para 51.
[769] ibid, para 52.
[770] ibid, para 53.
[771] Case C-376/14 PPU *C v M* ECLI:EU:C:2014:2268, para 66; Case C-455/15 PPU *P v Q*, ECLI:EU:C:2015:763, para 35.
[772] Case C-428/15 *Child and Family Agency v JD* ECLI:EU:C:2016:819, para 57; Case C-456/11 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* ECLI:EU:C:2012:719, paras 36-37; See Case C-92/12 PPU *Health Service Executive* ECLI:EU:C:2012:255, para 103.
[773] Case C-527/10 ERSTE *Bank Hungary Nyrt* ECLI:EU:C:2012:417, para 34.
[774] Case C-499/15 *W and V v X* ECLI:EU:C:2017:118, para 50.

asserts that since mutual confidence between Member States is the cornerstone of judicial cooperation within the Union (and not as previously alongside a cornerstone of the creation of a genuine judicial area), it is coupled with appropriate safeguards, and brings as an example the obligation of Member States to inform the Council and the Commission yearly of the cases in which the grounds for non-recognition or non-execution of a decision have been applied.[775] The Court in that case adjudged that the court having jurisdiction in criminal matters under the applicable Union law is an autonomous concept and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure.[776] The CJEU considered the Austrian independent administrative authority Unabhängiger Verwaltungssenat to satisfy these criteria. This provides yet another foundation for the soon-to-be-elaborated rule of law and the independence of the judiciary doctrine.

3.3.3.3. Third-generation case law patterns

Third-generation case law brought about many paradigmatic changes. Although previous conceptualisations of mutual trust as trust in the administration of justice in the EU, Member States' national legal systems, and institutions persisted, a new paradigm – mutual trust in EU law and fundamental rights compliance – emerged and took dominance.

This might have had an impact from the changing policy fields – asylum acquis entered the stage and become immediately influential with its strong fundamental rights dimension (especially in the context of Dublin transfers). As criminal law cases shifted from CISA ne bis in idem cases to EAW disputes, a form of transfers of people became as fundamental rights-sensitive as asylum transfers and took centre-stage. But despite the two fundamental rights-laden areas, civil justice cases still continued their reign, making up the majority of all cases: 20 out of the totality of 39. Internal market cases effectively disappear in this phase.

Conceptually, mutual trust started as a presumption about EU law and, in particular, fundamental rights compliance by Member States and their authorities. If previously mutual trust and the blanket ban of reviewing other Member States' state acts were effectively challenged by fundamental rights-based arguments, now it got incorporated into the trust presumption. This was not confined to criminal and asylum cases but was unexpectedly prompted by a civil justice case – *Zarraga* – and gained particular salience and arguably got effectively constitutionalised by *Opinion 2/13*. Many well-known and influential cases lead to

[775] Case C-60/12 *Marián Baláž* ECLI:EU:C:2013:733, para 30.
[776] ibid, para 42.

or later take up this conceptualisation of mutual trust – *N.S., Melloni, Diageo Brands, Aranyosi, C.K., Abdullahi*, and others. After *Opinion 2/13* it becomes clear that mutual trust functions for the purposes of the primacy, effectiveness, unity, and autonomy of EU law, in effect prioritises the speedy and simplified application and effectiveness of EU law over meaningful judicial controls over actual practices and possible non-compliance and prevents Member States from applying their higher constitutional standards of fundamental rights protection if it impedes the efficacy of EU instruments. This might obfuscate the object and meaning of Article 53 of the Charter and was not a necessary dogmatic change.

But conversely, Charter seems to be the main epistemic basis that allowed for such a shift in mutual trust doctrine and practice. The link with harmonisation gets embodied by the newly adopted instrument elevated to a primary law status. Fundamental rights as the object of mutual trust enter CJEU's reasoning as the trust object only after its entry into force. Before, they were a recurring objection to the application and existence of mutual trust. But the standard of fundamental rights compliance is not clear. Beside the *Opinion 2/13* stress of fundamental rights "as recognised by EU law" – thus the Charter and CJEU case law – other international and even national standards and instruments are also suggested, such as the Geneva Convention and the ECHR. From an epistemic point of view, *Opinion 2/13* interestingly also for the first time grounds mutual trust as a broad-brush EU compliance presumption rooted in Article 2 TEU values. This might be because of the acknowledgment that many of the subject fields and policies falling under the mutual trust presumption were not in EU competences; thus, the EU level of fundamental rights protection was not directly applicable or, at the very least, its applicability was disputable. This had been precisely why mutual trust and recognition developed in the criminal law field as an instrument instead of harmonisation, thus the object of trust being national laws, institutions, and legal systems conceptualised in the previous generational phase. Still, case law references to specific EU secondary law instruments as an epistemic basis for mutual trust remain also in parallel in civil justice cases; thus, the alleged sources of mutual trust are diversified.

EU law and fundamental rights compliance presumption as a new conceptualisation of mutual trust should be analytically separated when analysing the recognition type. Fundamental rights compliance presumption is arguably more akin to system recognition, as it does not rest on a premise of adequate enforcement of specific norms or the aim and content of diverging rules, but rather a much broader sentiment that national realities (not only laws, but also the execution and enforcement of laws and other practices not necessarily legally regulated at all) are capable

of providing an adequate level of fundamental rights protection. It not only demands a strong trust-sentiment about the laws, rules, and standards themselves, but cuts deeper into questions of political, cultural, economic, and redistributive choices and tendencies. The type of systems recognition requires also a stronger shared identity and value-congruence. The Court thus grounds for the first time in *Opinion 2/13* mutual trust and common identity in the notion of Article 2 TEU shared values that all Member States have signed up to, which takes on a life of its own in the next generation.

EU law compliance presumption, on the other hand, is more related to enforcement recognition already present in previous phases. EU law compliance presumes the existence of written and in force norms and that the EU has competence to have had enacted them. All other cases that do not embrace mutual trust as broad EU law and fundamental rights compliance presumption in their wording also keep their focus on trust between courts (in the administration of justice in the EU) and thus enforcement recognition. Norm's recognition as prevailing in the previous era effectively loses its salience in this jurisprudential phase and is referred to scarcely, thanks to criminal justice cases placing their trust in national criminal laws and legal systems. Mutual recognition and mutual trust as principles are also tied together more often in this period, and there is always a mutual recognition instrument present at which mutual trust is ultimately directed. This gets more pronounced in the language of the judgements as well.

One separate cluster of cases emerges that paves the way for some of the tendencies that become explicit in the next era – the four cases that develop the autonomous concepts of the "court having jurisdiction in particular in criminal matters" in *Balaž* already in 2013 and the concept of "judicial authority" in *Poltorak, Kovalkovas,* and *Özcelik* in 2016. Although not yet focusing on independence, rule of law, or systemic deficiencies doctrine specifically, it lays the foundation for the CJEU to decide the up-to-that-point national issue of who are the appropriate enforcers of commonly agreed EU instruments despite the broad procedural autonomy that Member States should in principle enjoy in this regard.

Another interesting tendency in this era is the elaboration and embrace of the Court's handling of errors and other shortcomings, which become even more evident in this generation (although starting to appear already in the previous). These failures might amount to fundamental rights infringements (especially concerning the rights of the defence), but not necessarily. There are also instances of errors in fact or procedure or even manifest infringements of EU law which might not amount to fundamental rights violations per se but which still directly contest mutual

trust as an EU law compliance presumption and make it, to say the least, paradoxical. With only a few exceptions, the Court remains reluctant in allowing Member States' national judiciaries to review and remedy those errors, favouring efficiency, and effectiveness consideration, thus making mutual trust in its essence the enabler and legal basis for the outspread and extraterritorial effect of erroneous or otherwise flawed national-state acts (mostly judicial decisions). This brings questions of liability and responsibility of such composite law or fundamental rights infringements that are not addressed, but rather exacerbated by the Court with mutual trust in a post-*Opinion 2/13* era.

3.3.4. Fourth generation: something entirely different

3.3.4.1. Characteristics and legal-institutional context

The fourth-generational time period starts in March 2017 and is ongoing. Being restrained by the temporal scope of the thesis (i.e. comprising cases until 01.08.2020), there are as many as 45 cases over the mere three-year-long period of this last generation. This is the highest number of cases over the shortest timespan out of the generations identified herein. It also includes the year with the most numerous mutual trust references ever: 2018, with 15 cases mentioning mutual trust in their merits. It is clear that the principle has affixed its position in the Union legal system and constitutional architecture.

If the previous third generation can be called the "classical" era of mutual trust jurisprudence, with strong tendencies and mostly clear-cut and homogenous categories and understandings of how mutual trust functions, then in recent years this has changed. Mutual trust has become eclectic and unpredictable, changing its normative and semantic accentuations and functions. But what is the critical juncture? There are many subtle and discordant hints that the last few years' mutual trust case law is different than it used to be, but the one feature I see as decisive is the departure of the so-called "classical" *Opinion 2/13* case law, and accordingly the paradigm of fundamental rights as mutual trust objects that must not be checked. Instead, mutual trust is used as a rationale to check either fundamental rights or the functioning of other rule of law mechanisms. This shift in paradigm starts with two civil cooperation cases delivered by the Court on 9 March 2017 – *Zulfikarpašić*[777] and *Pula Parking*[778] – which depart notably from the previous copying of *Opinion 2/13*'s wording in a context where it usually would have been used. The more detailed description of this will be provided below.

[777] Case C-484/15 *Ibrica Zulfikarpašić v Slaven Gajer* ECLI:EU:C:2017:199.
[778] Case C-551/15 *Pula Parking,* ECLI:EU:C:2017:193.

The types of ruling in this last generation are still clearly dominated by preliminary rulings. Out of the 45 cases, 40 are preliminary rulings, two are actions for annulment, two are infringement proceedings, and one is an opinion of the court (*Opinion 1/17* on the CETA agreement). These proportions are portrayed in Chart 11.

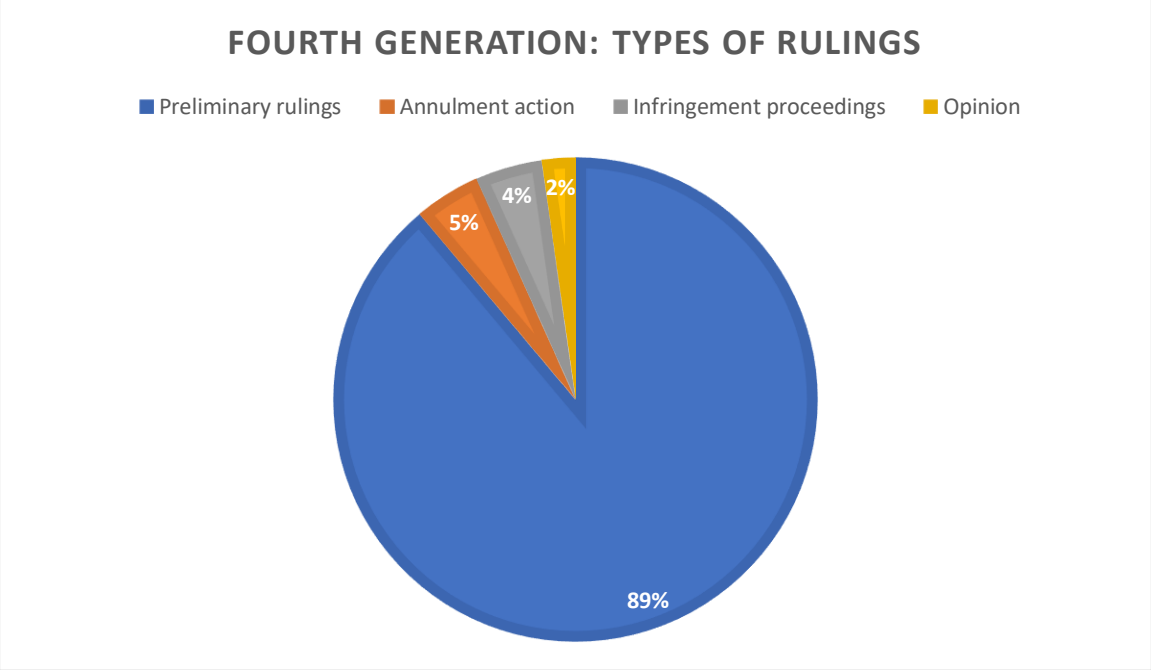

Chart 11 – Types of rulings in fourth-generation case law

There are many different interesting dynamics, subject matter-wise. Out of the total of 45 cases, seventeen are criminal justice cooperation cases, ten are civil justice cooperation judgements, nine are internal market cases, four are sui generis cases, and there are also 5 asylum cases. This diversity is illustrated in Chart 12.

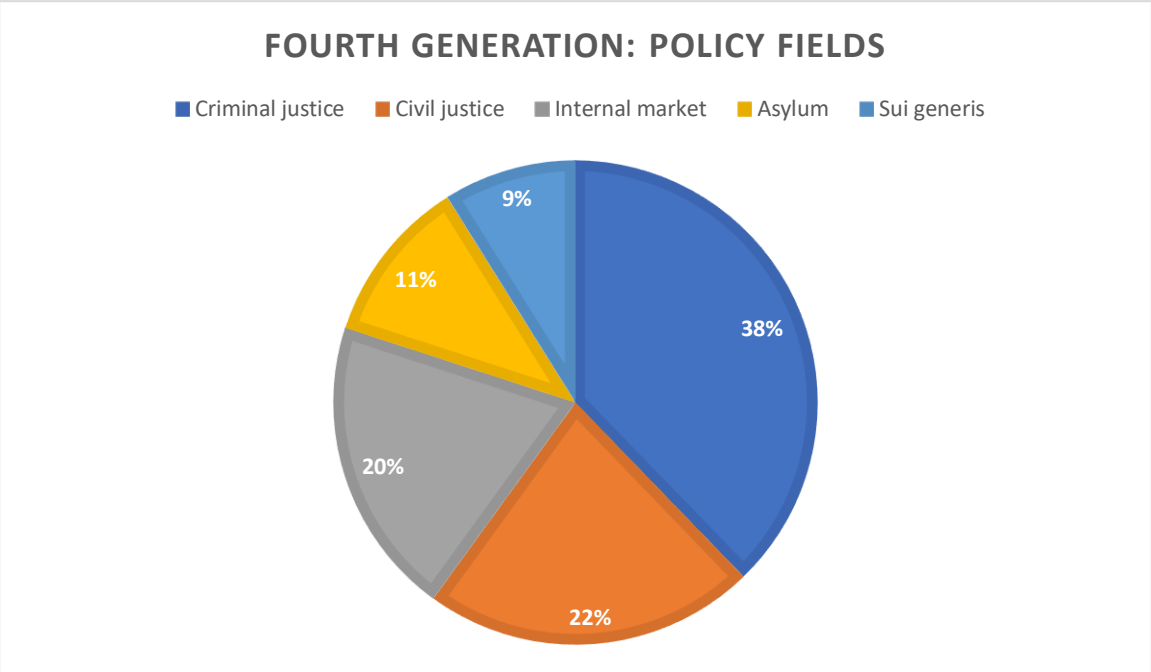

Chart 12 – Proportions of fourth-generation case law per policy field

In this generation, the picture is much more diverse. Criminal justice jurisprudence has taken the dominance from civil justice cooperation cases. There is a notable proportion of sui generis (here also in essence constitutional-type) cases that are neither associated with AFSJ or the internal market and are thus of particular interest in this generation. Internal market case law itself has made a strong come-back and diversified in its content. Asylum case law, after emerging in the previous generation, keeps a relatively low occurrence rate.

The legal-institutional background of this era is the most straightforward. The time span of this generation falls exclusively within the period of the Treaty of Lisbon and the Charter. But there are some notable social and contextual conditions that start to affect the Court and arrive on its docket. They can be broadly described as crises – be it the preceding euro crisis, Brexit, the refugee crisis, or the rule of law crisis. All of them arrive to the Court's desk, and mutual trust is used in the judgements coming from all these social abruptions and realities.[779]

Conceptually, this generation is even more diverse than the previous one. An important role is played by the fact that as new, rethought conceptions of mutual trust emerge, the old ones

[779] Accordingly: *Juizes Portugueses* was a delayed decision from the aftermath of the euro crisis; cases *RO* and *MA & Others* were triggered by Brexit (and also, notably, although *Wightman* does not directly mention mutual trust, it does depict its definition in its argumentation – see Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63); *Slovakia and Hungary v Council* and *Commission v Poland* (asylum relocation mechanism) were the highly politicised refugee crisis and asylum reallocation scheme cases and judgements in *LM* and *Commission v Poland* (Supreme Court independence) are one of the most notable examples of the rule of law crisis in Poland arriving to the court. All of these judgement rely to a larger or smaller extent on the priniple of mutual trust and mention it at least once in the merits of the case.

remain more or less present in references and wordings in the argumentation. So as in the previous era, mutual trust is represented in many different forms and notions, not to say even more so in this fourth jurisprudential generation, despite it being the shortest so far (only slightly more than three years). Importantly, and as one significant characteristic of this era: besides the fact that mutual trust starts popping up in policy fields that it traditionally has not (what I call the sui generis cases), it is also used as a concept in ways in which it has never been used before, such as a tool for Article 2 TEU value enforcement or associating it with the principle of sincere cooperation.

Semantically, mutual trust has many different wordings and embodiments in this era. Sometimes it is mentioned only in passing without much normative content or explanation; sometimes it is used in many different paragraphs and parts of the judgement, according to many graspable conceptions which might even be logically inconsistent. Thus, it is again difficult to pin down one uniform conception for this generation. I identified again four main subgroups within this period, which are: (1) mutual trust as a vehicle for fundamental rights' and rule of law protection (as opposed to being a compliance presumption); (2) mutual trust in value recognition (and alongside a persisting *Opinion 2/13* wording); (3) mutual trust and (sincere) cooperation; (4) all other types from previous generations.

3.3.4.2. Fourth-generation case law overview

3.3.4.2.1. Mutual trust as a vehicle for rights and rule of law protection

If, as explained in the previous generation, the appearance and dominance of a broad EU law and fundamental rights compliance-directed (or *Opinion 2/13*-type) mutual trust was of that generation's main features, then in this generation this is turned on its head. This era of case law starts the reconceptualization of mutual trust by instrumentalising it not as something that effectively undermines fundamental rights protection (by prohibiting review as a compliance presumption) but, on the contrary, by actively supporting it because of the existence of mutual trust. This is on deeper reflection somewhat circular, as in effect the CJEU first creates and defines mutual trust as a broad EU law and compliance presumption and precludes actual controls on it, then brings out that same principle either in a completely opposite meaning and normativity or as a newfound reason to tackle emerging rule-of-law problems. This is somewhat illogical and paradoxical, but a change of direction is apparent.

Only direct and explicit changes in the concept and wording of mutual trust are considered in this regard, i.e. not previous-generation cases like *Aranyosi*, which, although subject to huge

tensions of actual fundamental rights compliance, did not find the solution in changing the nature or definition of mutual trust, but rather merely shifted its limits (by using the doctrine of "exceptional circumstances") and practices (i.e. the solution of freezing the EAW execution to obtain more information and assurances). The concept and functioning of the principle stayed the same, and the presumption was juxtaposed and weighed against fundamental rights concerns. The case law introduced in this era will trace the change of the actual principle and concept of mutual trust in that regard, which might have come from the apprehension by the Court that maybe a default general EU law and fundamental rights compliance presumption is not doctrinally plausible after all. States are both the guarantors and infringers of EU law and fundamental rights, as nobody is perfect, not even EU Member States, in their day-to-day practices. This simple recognition (and the rapidly changing social reality) might have shifted the tide.

Autonomous concept of a court – Zulfikarpašić *and* Pula Parking

This distinct subcategory is introduced by two civil justice judgements that have a similar wording and usage of mutual trust: *Zulfikarpašić*[780] and *Pula Parking*[781], both of which continued the line of cases, starting in the previous era, developing the autonomous concept of a "court" or "judicial authority" in EU law. But if in the third generation mutual trust was still worded and used as an EU law and fundamental rights compliance presumption[782] and independence guarantees were not raised explicitly, then this changed now where the Court instrumentalised mutual trust to demand such guarantees, stating in the assessment whether Croatian notaries fall under the concept of a court in EU law:

> "Compliance with the *principle of mutual trust* [emphasis added] in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgements the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of audi alteram partem."[783]

[780] Case C-484/15 *Zulfikarpašić*, ECLI:EU:C:2017:199.
[781] Case C-551/15 *Pula Parking*, ECLI:EU:C:2017:193.
[782] See *Kovalkovas*, para 27; *Poltorak*, para 26; *Özcelik*, para 23.
[783] *Pula Parking*, para 54; *Zulfikarpašić*, para 43.

As the notaries in Croatia did not conduct proceedings on an *inter partes* basis and were otherwise separate from the judicial system, the CJEU found that they could not be regarded as "courts" able to issue European Enforcement Orders.[784]

This is a significant change of direction for mutual trust as a principle, as for the first time in fundamental rights context it is not a passive dogma of compliance presumption, but rather an active vehicle for setting rule of law and fundamental rights standards (right for the defence standards). It no longer functions as a mechanism for banning judicial control over fundamental rights compliance but one endorsing it. The antecedents for this case law were in many ways the previous generation's judgements, where the court juxtaposed mutual trust with the rights to defence, balanced them against each other, and sometimes also let the latter prevail.[785] But it never before justified these defence rights through mutual trust. That is a completely new operationalisation of mutual trust.

Several subsequent cases developed the concepts of a court and judicial authority further; although they did not much change the normative content or semantics of mutual trust explicitly, they still concentrated on issues of independence and fair trial guarantees as forces to further mutual trust. Accordingly, the Polish notary was not deemed a court that can issue succession certificates in the *WB* case[786], and in cases concerning EAWs German Public Prosecutors were classified as not independent enough to be considered judicial authorities[787], whereas Austrian[788] and French Public Prosecutors[789] were, and the judgement on the Lithuanian Public Prosecutors was left to the referring court as the CJEU had insufficient evidence to make a conclusive decision.[790] In these cases there was no novel definition or wording of mutual trust, but it was mostly referred to in *Opinion 2/13* terms[791], often under preliminary matters or considerations.

Autonomous concept of a trial – Tupikas *and* Ardic

Another autonomous concept creation that upgraded the understanding of mutual trust was that of the concept of a trial. The case *Tupikas* was a dispute over the execution of an EAW and the

[784] *Pula Parking,* paras 56-59; *Zulfikarpašić,* paras 49-50.
[785] See e.g. *Trade Agency,* para 43.
[786] Case C-658/17 *WB,* ECLI:EU:C:2019:444.
[787] Joined Cases C-508/18 and C-82/19 PPU *OG and PI,* ECLI:EU:C:2019:456.
[788] Case C-489/19 PPU *NJ,* ECLI:EU:C:2019:849.
[789] Joined Cases C-566/19 PPU and C-626/19 PPU *JR and YC,* ECLI:EU:C:2019:1077.
[790] Case C-509/18 *PF,* ECLI:EU:C:2019:457.
[791] See *PF,* para 22; *OG and PI,* para 43; *JR and YC,* para 42; *NJ,* para 27; in the civil justice case *WB* it was refrred to similarily with *Pula Parking and Zulfikarpašić* in the conception of mutual trust in the administration of justice: see *WB,* para 52.

interpretation of the concept in the EAW FD "trial resulting in a decision" in a context where there were a number of judicial decisions handed down in a Member State that issued the EAW, at least one without the subject appearing in person at the trial.[792] The Court, after a general reminder of its settled case law that the EAW FD is based on the principle of mutual recognition, which itself as a "cornerstone" of judicial cooperation is based on the principle of mutual trust between Member States with a view to achieving the objective set for the Union to become an area of freedom, security, and justice[793] and emphasising also the need to fully respect rights of defence[794], made a novel declaration:

> "In other words, the *principles of mutual trust* [emphasis added] and recognition on which that Framework Decision is based must not in any way undermine the fundamental rights guaranteed to the person concerned."[795]

The Court has never explicitly made such an assertive claim about mutual trust. It has, of course, asserted separately that fundamental rights cannot be undermined, but not that the principle of mutual trust in particular must not undermine them. In fact, it had been the case that fundamental rights had been effectively undermined, or their defence or remedy restricted by the functioning of mutual trust.

The case *Ardic* was also from a criminal justice domain concerning again an EAW and the concept of a "trial resulting in decision", but this time over the underlying question of whether it also concerns the sentence suspension revocation decisions after infringement of conditions during probationary period, as the person was not present in these trials.[796] Despite the fact that the Court did not consider it included under the concept, the Court emphasised that the obligation to respect fundamental rights and fundamental legal principles was enshrined in Article 6 TEU, including the right of defence of persons subject to criminal proceedings and the obligation to ensure that those rights and principles are respected by judicial authorities reinforces mutual trust.[797]

3.3.4.2.2. Mutual trust in values recognition

This is only a slight modification of the *Opinion 2/13*-type jurisprudence, but potentially one taken purposefully and having enormous ramifications. Although *Opinion 2/13* itself provided

[792] Case C-270/17 PPU *Tupikas* ECLI:EU:C:2017:628, para 48.
[793] ibid, para 49.
[794] ibid, para 58.
[795] ibid, para 59.
[796] Case C-571/17 PPU *Ardic* ECLI:EU:C:2017:1026, para 53.
[797] ibid, paras 89-90.

for the first time for the link between mutual trust and Article 2 TEU values[798], unlike its definition of mutual trust as an EU law and fundamental rights compliance presumption, this linkage with values was not immediately picked up by subsequent case law. It is only in this period that it gains traction to end up comprising most *Opinion 2/13*-type cases. Mutual trust starts being epistemologically and legally based and justified with the common treaty obligation to respect Article 2 TEU values: human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minority groups. Here mutual trust, reviving the earlier *Opinion 2/13* wording which for the first time tied mutual trust to Article 2 TEU values, is effectively instrumentalised to create an EU value enforcement jurisprudence.

Setting the stage: Juizes Portugueses *and* Achmea

It was the well-known *Juizes Portugueses* case in late February 2018 which was the first case post-*Opinion 2/13* to remind and revive the understanding that Article 2 TEU values are the foundation of mutual trust. Taking into account the context of that decision (the question referred was whether austerity-driven budgetary salary cuts undermine the judicial independence of the Portuguese tribunal), the CJEU emphasised that mutual trust in particular functions between the courts and tribunals of Member States (and not Member States as such as was worded in *Opinion 2/13*):

> "According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that *mutual trust* [emphasis added] between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU."[799]

The preceding wording that justice prevails in a society is new to mutual trust case law. Here again, mutual trust is used to introduce the obligation to respect fundamental rights (including the independence of the judiciary, which forms part of the right to effective remedy and the rule of law) and not for the proposition of a fundamental rights compliance presumption. In this regard, it also follows the tendencies of the previous subcategory – mutual trust as an instrument to enforce and not hinder fundamental rights (and rule of law) enforcement.

[798] *Opinion 2/13*, para 168.
[799] Case C-64/16 *Juizes Portugueses,* ECLI:EU:C:2018:117, para 30.

The Court goes on to analyse in detail the requirements that the EU based on the rule of law entails, including from national courts and tribunals, even if they do not concretely implement, but potentially adjudge fields covered by Union law.[800] Even more interestingly, the Court also brings in the general principle of sincere cooperation, emphasising in an innovative manner that the Member States are obliged by reason of the principle to ensure application and respect for EU law in their respective territories.[801] This is a remarkable departure and in essence a re-consideration of *Opinion 2/13*-type case law: mutual trust is no longer used to oblige Member States to have a default EU law and fundamental rights compliance presumption regarding all other Member States. Quite the contrary: mutual trust is used to reason for the need to respect fundamental rights and the rule of law with the respective obligation stemming from the principle of sincere cooperation.

In that particular case, the adopted austerity measures were not deemed to adversely affect the independence of the Portuguese tribunal, but it nevertheless laid a strong foundation to tackle the ongoing rule of law and judicial independence problems the EU was facing. It also provided a hint that the persistent mutual trust case law exacerbating the problem might be under reconsideration and recalibration in the EU judiciary.

It should be stressed that a case such as *Juizes Portugueses* should not have anything to do with mutual trust, as there is no mutual recognition measure (i.e. a judgement, transfer, or other AFSJ instrument, a qualification, diploma or a check or inspection or any other internal market instrument) under consideration, so it falls under the sui generis-constitutional type of cases, which start to feature in this generation. By migrating mutual trust to an ultimately constitutional (and arguably also both historically and legally national) policy field, which need not have any direct link with an EU legal instrument, the CJEU paved the way for a value enforcement jurisprudence and a huge competence creep of reviewing national constitutional law and administration of justice because of its own created judicial principle that obliges a Union-wide presumption of legality, correctness, and adequacy in such administration of justice.

The next high-profile surprise case did not wait long to be released, as a mere week later the CJEU ruled in *Achmea* that all intra-EU bilateral investment treaties' (BITs') arbitral clauses are not in compliance with EU primary law as they have an adverse effect on the autonomy of

[800] ibid, paras 29, 31-33.
[801] ibid, para 34.

EU law and are incompatible with the principles of sincere cooperation and mutual trust.[802] The Court brought in mutual trust in two separate occasions. First in laying out the applicable principles and settled case law in a similar, but in important regards further synthesised conception of mutual trust:

> "EU law is thus based on a fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of *mutual trust* [emphasis added] between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason, inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU."[803]

As *Achmea* followed *Juizes Portuguezes* shortly, one can notice the same construction of the mutual trust paragraph and the linkage with sincere cooperation[804], only that for the purposes here it is not raised to argue for the need for rule of law or fundamental rights protection, but that of the autonomy of the EU legal order.[805] In answering the question, the Court ascertained that despite the settled doctrine that arbitral tribunals consider national laws as factual questions, it still considered the tribunals as interpreting or applying EU law.[806] It went on to consider whether the tribunal can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. It found that it is not and that, moreover, the arbitral awards made by it are not subject to review by Member States courts.[807] Thus the Court considered that such arbitration clauses thus call into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of the law established by the Treaties. Therefore, it is not compatible with the principle of sincere cooperation and has an adverse effect on the autonomy of EU law.[808]

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[802] Case C-284/16 *Achmea*, ECLI:EU:C:2018:158, paras 59-60.
[803] ibid, para 34.
[804] See to that effect *Juizes Portugueses,* paras 30, 34.
[805] *Achmea*, para 35.
[806] ibid, para 41; see *Achmea*'s counterargument that the tribunal can rule only on possible infringements of the BIT – para 40. This is later starkly contrasted with the CJEU's findings in *Opinion 1/17* on the CETA agreement, where the CJEU was satisfied with the line of argumentation that the agreement does not interpret or apply national law (i.e. including EU law). - See *Opinion 1/17*, para 131.
[807] *Achmea*, paras 49, 53.
[808] ibid, paras 58-59.

There is a lot to unpack in this decision, but the most important being: mutual trust is instrumentalised for the purposes of fundamental, raison d´être objectives of the EU and not merely for the purposes of securing the enforcement of a mutual recognition instrument. These purposes have moved from fundamental rights and rule of law considerations to questions of autonomy and external relations as consequentially, Member States had to terminate hundreds of intra-EU BITs and a shadow was cast on both the viability of the investment arbitration systems and the pending cases before different tribunals. Importantly, again, similarly to *Juizes Portugueses, Achmea* had nothing to do with mutual recognition. Thus, it roots both the alleged constitutionalisation of mutual trust and its emancipation from being a mere necessary precondition or a side-bone of mutual recognition.

The independence of Polish judiciaries – LM *and* Commission v Poland

The next two cases concern the issues surrounding Polish judicial reforms deemed to be violating the rule of law. These are the recent salient judgements of *LM,* on the Irish court's preliminary reference on the execution of an EAW coming from Poland and doubting the independence of its judiciary[809], and *Commission v Poland,* where the Commission brought an action under Article 258 TEU finding that the lowering of the retirement age in the Polish Supreme Court is in violation of EU law.[810]

The *LM* case keenly summarises all mutual trust rules and practices in four paragraphs mirroring the *Opinion 2/13* canons and the *Achmea* value recognition [811], but then, after noting that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial[812] and that the independence of national courts and tribunals is essential both to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism[813] and to the free movement of judicial decisions in the AFSJ[814], stressed in particular that:

> "The *high level of trust* [emphasis added] between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence

[809] Case C-216/18 PPU *LM,* ECLI:EU:C:2018:586.
[810] Case C-619/18 *Commission v Poland,* ECLI:EU:C:2019:531.
[811] *LM*, paras 35-36, 40, 43.
[812] ibid, para 48.
[813] ibid, para 54.
[814] ibid, para 55.

> or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts."[815]

So here again, effectively, despite at first reproducing the fundamental rights compliance presumption of *Opinion 2/13*, the CJEU then turns it on its head and uses mutual trust to argue for actual respect for fundamental rights and judicial independence, which is seemingly at odds with the compliance presumption concept. As is well known, the Court in the end allowed for some leeway for the referring court, mainly ordering it to "ask" the Polish courts whether they are independent or not, creating the parameters for cooperation and information-sharing obligations.[816] It in effect allowed the Irish court to gather information and assess whether the EAW transfer could put the person into real risk of breach of his fundamental right to an independent tribunal; if so, the Irish executing court was allowed to refrain from giving effect to the EAW.[817]

Still, the final vivid example of mutual trust case law in the fight over Polish independent judiciary is the Polish Supreme Court retirement age case, where the Court deemed the retirement age reform illegal under Article 19(1) TEU as it attacks violates judicial independence, in particular the principle of the irremovability of judges.[818] In arriving to that conclusion, the Court invoked, among other arguments, mutual trust. It had again recourse to the voluntary commitment to Article 2 TEU values and the premise that those values are shared and recognised with all Member State and because of mutual trust, the values, including the rule of law, will be recognised.[819]

With it the Court again instrumentalised mutual trust to fight the rule of law battle and enforce Article 2 TEU values in a situation that might have been regarded as a purely internal situation. That was in fact the counterargument of Poland, supported by Hungary: that the national rules under question cannot be reviewed, as the national justice system is a competence not conferred to the EU but remains exclusively to the Member States.[820] The Commission and the Court did not agree and effectively used mutual trust as a competence-acquiring mechanism in a context

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[815] ibid, para 58.
[816] ibid, para 79; see for a discussion also: Cecilia Rizcallah "Dear Collegue, Are You Independent Enough? The Fate of the Principle of Mutual Trust in Case of Systemic Deficiencies in a Member State's Justice System", EU Law Analysis blog, 04.07.2018, http://eulawanalysis.blogspot.com/2018/07/dear-colleague-are-you-independent.html (last accessed: 14.09.2020).
[817] ibid, paras 75, 78.
[818] *Commission v Poland*, para 96.
[819] ibid, para 43.
[820] ibid, paras 37-39.

where no EU law instruments were directly present (i.e. any mutual recognition instruments), but challenged a general systemic policy that itself could also be argued as a rule-of-law error by the EU as going against EU primary law – the principle of conferral. It is also noteworthy that in its argumentation why the Court should have competence to review such national legislation, it relied heavily on its very recently developed rule of law, autonomy, and mutual trust jurisprudence – referencing cases such as *Juizes Portugueses, Achmea, N.S.*, and the most recent *LM.* A new doctrine of value enforcement has been created, which starts being reflected and reinforced by the newly acquired value-recognition object of mutual trust case law.

Brexit and mutual trust

The next two cases concerned EAW executions and the possibilities of non-execution: the first *RO,* again an Irish High Court question on whether it is allowed to decline a surrender to the UK because of Brexit[821]; and the second *IK,* on the question of whether a failure to indicate on an EAW an additional sentence of conditional release precludes the enforcement of that EAW.[822] In answering the questions, the Court presented again the value recognition rhetoric[823] and in both cases it refused the requested non-execution of surrenders.[824] In the Brexit *RO* case the Court further specified (in an answer to the referring court's claim that the Article 50 TEU withdrawal notification has irreparably eroded mutual trust[825]) that the withdrawal notification does not have the effect of suspending the application of EU law, and therefore the principles of mutual trust and mutual recognition continue in full force and effect in that State until the time of its actual withdrawal from the EU.[826]

A similar suspicion on Brexit's effect was raised again in one of the following cases on asylum law and transfers made under the Dublin system. The case *M.A and Others* concerned again a reluctance of the Irish High Court as to the impact of Brexit on Dublin transfers of asylum seekers to the UK.[827] CJEU again stressed that the Article 50 TEU notification does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law and the mutual confidence and presumption of respect by the Member States for fundamental rights continues in full force and effect in that Member State until the time of its

[821] Case C-327/18 PPU *RO,* ECLI:EU:C:2018:733 para 33.
[822] Case C-551/18 PPU *IK,* ECLI:EU:C:2018:991, para 33.
[823] *RO,* paras 34-35; *IK,* paras 34-35.
[824] *RO,* para 62; *IK,* para 70.
[825] *RO,* para 43.
[826] ibid, para 45.
[827] Case C-661/17 *MA and Others,* ECLI:EU:C:2019:53, paras 41, 43.

actual withdrawal.[828] But interestingly, the Court did not stop there, and found it necessary to stress that since all the Member States are also parties to the Geneva Convention and the ECHR, the continuing participation of a Member State in those instruments is not linked to it being a member of the EU and, accordingly, a Member State's decision to withdraw from the EU has no bearing on its obligations to respect those instruments, including the principle of non-refoulment, and Article 3 ECHR.[829] This was used to explain why the withdrawal notification cannot lead to a real risk of a person suffering inhuman or degrading treatment. Such expansion of mutual rights sources and standards also to Brexit raises questions about the possible applicability of mutual trust also for third countries and might hint at the possibility of a future asylum coordination relationship with the UK, as the standard of fundamental rights compliance could be considered adequate. But it also further obscures the epistemic basis of mutual trust – whether it is EU law or something external to EU law, i.e. international or national law and standards.

Opinion 1/17

The question about the possible application of mutual trust presumption to third countries due to their national and international law obligations was addressed only three months later in *Opinion 1/17* on the EU-Canada free trade agreement (CETA), where the Court needed to consider the compatibility of the envisaged dispute settlement mechanism with primary law. As said, contrary to the conclusions drawn in *Achmea*, it did find this time that the CETA Tribunal has no jurisdiction to interpret and apply rules of EU law other that the provisions of the CETA, and it distinguished the issues of creating or preserving an investment tribunal by an international agreement between EU Member States from the question of creating such a tribunal by means of an agreement between the Union and a non-Member State by having recourse to the EU and fundamental rights presumption entailed by mutual trust.[830] It went on to distinguish this situation by emphasising that:

> "However, that *principle of mutual trust* [emphasis added], with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State."[831]

[828] ibid, para 80.
[829] ibid, para 85.
[830] *Opinion 1/17*, para 126-128.
[831] ibid, para, 129.

This is the first time to expressly rule out the possibility of mutual trust being applicable extra-EU. And yet it does not fully explain why an arbitral tribunal called together under an intra-EU BIT and possibly interpreting EU law as a matter of fact is fundamentally different from the CETA Tribunal applying EU law as a matter of fact. It is not entirely clear how the principle of mutual trust can change that logic or justify the palpable claim that the CETA Tribunal may effectively be indirectly interpreting EU law just as much as an intra-EU arbitration could. Both could thus undermine EU law autonomy. But due to the non-existing presumption of an effective remedy before an extra-EU independent tribunal, the Court did not put its emphasis on the aspect of the possible interpretation of EU law by an arbitral tribunal and autonomy problems, but diluted the objection posed by differentiating between arbitral tribunals provided for by international agreements entered into by the Member States from those entered into by the Union because of mutual trust and the law abidance presumptions it entails.

Dublin transfers – asylum reception conditions in Italy and Bulgaria

Jawo concerned the transfer of an asylum applicant in Dublin from Germany to Italy and the question of halting the transfer due to the concerns of living conditions in Italy. After restating the typical mutual trust in value recognition and EU law and fundamental rights compliance presumptions, the Court acknowledged that it is not still "inconceivable that that system may, in practice, experience major operational problems in a given Member State" and stressed that the presumption is not irrebuttable.[832] The Court specified that it is not only about the systemic flaw doctrine, but that a transfer is ruled out in any situation in which there are substantial grounds for believing that the applicants runs a real risk of inhuman or degrading treatment during his transfer.[833] The Court further qualified that also the systemic deficiencies must attain a particularly high level of severity as a new qualifier stemming from old ECtHR case law.[834]

Another asylum case from the same day, *Ibrahim and Others*, also adopted the same standard, and the question prompting the reference was whether a Member State can reject an asylum application as inadmissible as the applicant has already been granted subsidiary status by another Member State (Bulgaria), but wherein that Member State living conditions for people granted subsidiary status are in breach of Article 4 of the Charter and the Qualification Directive.[835] The argumentation of the Court started again with the *Opinion 2/13*-type of

[832] Case C-163/17 *Jawo*, ECLI:EU:C:2019:218, paras 80-84.
[833] ibid, para 87.
[834] ibid, para 91.
[835] Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others*, ECLI:EU:C:2019:219, para 81.

wording, first by reiterating the values that justify mutual trust and the following presumption that national legal systems are capable of providing equivalent and effective protection as that of the Charter[836], and second in giving the fundamental rights compliance presumption substance to the principle of mutual trust.[837] But in considering the actual alleged fundamental rights shortcomings in Bulgaria and Poland as the states that had provided the prior subsidiary protection, the Court noted that:

> "Given the concerns of the referring court on this point, it must be made clear that, having regard to the importance of the *principle of mutual trust* [emphasis added] for the common European asylum system, infringements of the provisions of Chapter VII of the Qualification Directive which do not result in a breach of Article 4 of the Charter do not prevent the Member States from exercising the option granted by Article 33(2)(a) of the Procedures Directive."[838]

So, the Court effectively said that because of mutual trust (which should be in that context both a fundamental rights and EU law compliance presumption) it does not matter that a Member State has actually breached EU law (the Qualification Directive), as long as it does not amount to a fundamental rights breach as defined by the Court (the definition of which being quite extreme[839]). This conceptualisation makes mutual trust problematic. Mutual trust is defined as an EU law and fundamental rights compliance presumption, but with Ibrahim the Court acknowledges that EU law non-compliance is tolerable as long as it does not amount to a fundamental rights non-compliance. CJEU effectively endorses and upholds EU law infringements and qualifies them as insignificant if they do not arrive to the degree of Charter violations. The principle of legality and the obligation to abide by and uphold the law is a basic tenet of the rule of law, which the Union itself, including the CJEU, ascribes to.[840] The Court itself has on several occasions emphasised that the existence of effective judicial review to ensure compliance with EU law is of the essence of the rule of law.[841] A conceptualisation of mutual trust which turns a blind eye (and allows for little legal remedy) to EU law infringements

[836] ibid, para 83.
[837] ibid, para 84.
[838] ibid, para 92.
[839] E.g. the Court did not seem to consider sufficient the referring court's referrals to the inexistence of subsistence allowances or such allowances being inferior to that in other Member States as it stressed that these factors can lead to the finding that that applicant is exposed in that Member State to a real risk of suffering treatment that is in breach of Article 4 of the Charter only if the consequence is that the applicant ism because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty – see ibid, paras 89-91 and 93.
[840] See e.g. Case 294/83 *Les Verts*, ECLI:EU:C:1986:166, para 23.
[841] *Juizes Portugueses*, para 36; Case C-72/15 *Rosneft*, ECLI:EU:C:2017:236, para 73; Case C-362/14 *Schrems*, ECLI:EU:C:2015:650, para 95.

if they do not reach a certain level of "severity" raises serious questions about the state of rule of law in the EU itself.

EAW transfers – prison conditions in Hungary and Romania

The two last value recognition cases in this subcategory are post-*Aranyosi* cases trying to further clarify the conditions and requirements of assessing other Member States' prison conditions after having made use of the cooperative and informational obligations put forth in *Aranyosi* before an EAW can be executed.

The *ML* case concerned again Hungarian prison conditions and the assessment of gathered evidence gained from the Hungarian authorities.[842] Therein the CJEU effectively categorised the informational and evidentiary value of the information acquired by differentiating between assurances given by the executive from those given by the courts. Mutual trust was given a new normative meaning by emphasising the obligatory nature of trust between judicial authorities as opposed the possibility to show distrust and invoke further controls over the information provided by the Hungarian Ministry of Justice. It did so by stressing that because of mutual trust the EAW executing judicial authorities must rely on assurances given by the issuing judicial authorities, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter.[843] But since in that particular case the assurances were given by the Hungarian Ministry of Justice and neither provided nor endorsed by the issuing judicial authority, thus the executing judicial authority must still evaluate them by carrying out an overall assessment of all information available to it.[844] The case thus further differentiated the treatment of trust subjects and emphasised the primary and privileged status and obligation of mutual trust between courts.

The case *Dorobantu* concerned prison conditions in Romania and the questions of a German court about the review over systemic or generalised deficiencies – whether the review must be comprehensive or only limited to cases of manifest inadequacies of detention conditions, whether EU law prescribes minimum prison cell space requirements, and whether any failures to comply with such minimum requirements should be weighed against the efficacy of judicial cooperation in criminal matters and the principles of mutual trust and recognition.[845]

[842] Case C-220/18 PPU *ML,* ECLI:EU:C:2018:589.
[843] ibid, para 112.
[844] ibid, paras 113-114.
[845] Case C-128/18 *Dorobantu,* ECLI:EU:C:2019:857, paras 41-44.

In answering these elaborate questions, the Court first, as preliminary observations, reiterated the parameters of mutual trust and its newly conceptualised definition of value recognition additional to the EU law and fundamental rights compliance presumption, the normative content of not being allowed to demand a higher level of fundamental rights protections of another state, and that even a check can be conducted in exceptional circumstances.[846] After recalling the *Aranyosi* parameters of how to check the conditions in practice in those exceptional circumstances, it specified that the assessment was not limited to obvious inadequacies only, and in principle the executing judicial authority must rely on the assurances given, except for exceptional circumstances; on the basis of precise information it may deviate from the assurances and find on its own that there is a real risk of Article 4 Charter violations.[847] The Court found similarly with *Melloni* that although Member States can adopt higher national standards for prison conditions than those resulting from Article 4 of the Charter and Article 3 ECHR, they cannot make a surrender subject to those higher standards, as it would undermine the principles of mutual trust and recognition and compromise the efficacy of the EAW FD.[848] As a novelty, though, the Court clarified that as the prohibition of any inhuman and degrading treatment is absolute, in cases of such risks it justifies a limitation of the principles of mutual trust and recognition and there can be no weighing of the opposing considerations against each other.[849]

3.3.4.2.3. Mutual trust and (sincere) cooperation

This subgroup draws its interpretation from the previous generations' case law that mentions mutual trust and judicial cooperation alongside each other to enhance better cooperation and coordination practices between courts. An example of such a case is *Liberato*, concerning the usual reoccurring civil justice cooperation of enforcing other Member States' decisions and the limited possibility of review even in cases of grave errors of fact or law.

But it also starts to exemplify a totally new conceptual and normative link with cooperation, known as sincere cooperation, by both its mere rhetoric and its legal embodiment in Article 4(3) TEU as the principle of sincere cooperation. This coupling with sincere cooperation was already beginning to appear in some of the value recognition subcategory cases (see e.g. *Juizes*

[846] ibid, paras 45-47.
[847] ibid, paras 62, 68-69.
[848] ibid, para 79.
[849] ibid, paras 82-84.

Portugueses[850] and *Achmea*[851]) and it might have something to do with the quest of the Court to anchor the principle of mutual trust in the treaties, thereby consolidating its place and significance in the EU's constitutional architecture also as a matter of written EU constitutional law, which the treaties embody.[852]

Juizes Portugueses and *Achmea* are pioneering in that regard, as they were the first cases to suggest a normative association between the principles of mutual trust and sincere cooperation. *Juizes Portugueses* did not tie mutual trust explicitly with sincere cooperation, but after invoking mutual trust as value recognition, it grounded the Member States' obligation to ensure application and respect for EU law in their territories via the principle of sincere cooperation, which itself is founded on earlier case law.[853] It is remarkable that in doing so, the Court did not even refer to the commonplace definition of mutual trust as an EU law compliance presumption (which in effect precludes much of the meaningful review and enforcement of EU law in practice), but revoked only the newfound conception of mutual trust as presumption of value recognition. Instead of the opposite-direction normativity of EU law compliance presumption, it revoked Article 4(3) and the obligation of sincere cooperation to ensure the enforcement and application of EU law in Member States' respective territories. This might be because of the realisation that a compliance presumption (and an accompanying ban of control) and an obligation of actual compliance are not exactly consistent with each other and might hinder the obligation put on the CJEU and national courts to be the guardians of EU law enforcement.

This link was between the two principles was made explicit in *Achmea*, where the Court tied the two explicitly as, after depicting mutual trust as a value and EU law implementation recognition presumption, it stressed that it is "in that context that Member States are obliged, by reason inter alia of the principle of sincere cooperation [---] to ensure in their respective territories the application and respect for EU law".[854] Thus the circle had been squared: mutual trust created the law and value abidance presumption (and a ban of review externally) and sincere cooperation the internal subjective obligation to abide by and enforce EU law. This

[850] *Juizes Portugueses,* para 34
[851] *Achmea*, paras 34, 58.
[852] *Les Verts,* para 23.
[853] The Court itself cited *Opinion 1/09* on the Unified Patent Litigation System Agreement, which besides reminding the obligation to ensure the application and respect for EU law stemming from Article 4(3) TEU principle of sincere cooperation also emphasised that „[I]t is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure the judicial protection of an individual's rights under that law" – *Opinion 1/09* ECLI:EU:C:2011:123, para 68.
[854] Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 34.

conception started surfacing in subsequent case law from different proceedings and policy fields but with further varying normative and explanatory degrees.

Spirit of cooperation and mutual trust - the asylum relocation mechanism disputes

Not tied with the principle of sincere cooperation per se, but two influential cases with a more abstract wording of a "spirit of cooperation and mutual trust" emerged from the highly politicised disputes in the refugee crisis aftermath over the severely challenged asylum relocation quota scheme.

The first is the *Slovakia and Hungary v Council* action for annulment, where Hungary and Slovakia used their legal means to challenge the adopted relocation scheme.[855] In an again-unusual context, the Court surprisingly referred to mutual trust twice in considering one of Poland's positions on the effectiveness of the scheme:

> "If, as the Republic of Poland maintains, the mechanism provided for in Article 5(7) of the contested decision were ineffective because it requires Member States to check large numbers of persons in a short time, such practical difficulties are not inherent in the mechanism and must, should they arise, be resolved in the spirit of cooperation and *mutual trust* [emphasis added] between the authorities of the Member States that are the beneficiaries of relocation and those of the Member States of relocation. That spirit of cooperation and *mutual trust* [emphasis added] must prevail when the relocation procedure provided for in Article 5 of the contested decision is implemented."[856]

This wording was recently repeated in the *Commission v Poland and Others* case, where the Commission took legal action over Poland's, Hungary's, and Slovakia's failures to fulfil their obligations under EU law with the decision not to take part in the relocation scheme. The Court used an identical wording of *Slovakia and Hungary v Council* twice in the judgement again to stress the obligation to resolve any difficulties in the spirit of cooperation and mutual trust between the authorities of the Member States.[857] It is interesting that this obligation was again triggered by Polish and Czech allegations that the mechanism was malfunctioning and ineffective because of an alleged systemic lack of cooperation on the part of Greek and Italian

[855] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.
[856] ibid, para 309.
[857] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland and Others*, ECLU:EU:C:2020:257, paras 164, 182.

authorities[858] – this is a clear expression of actual distrust by Poland and Czechia towards their counterparts, or at least a plea claiming distrust for legal argumentation purposes.

As is well-known, the CJEU in these cases ruled against the Member State and in favour of the Council and the Commission, upholding the legal mechanism and condemning the Member States' failures to fulfil their obligations. The exact part played by mutual trust in these findings, however, is obscure. First, it is ambiguous whether or not the Court wants to refer to the principle of mutual trust in this context, and if so, to which conception of it. Mutual trust is in effect triggered more as a moral and cooperation-building notion than anything to do with its previously developed usages of EU law and fundamental rights or value compliance presumptions. But it seems highly unlikely that the usage of the phrase is purely coincidental, considering the high profile and salience of the matter. Therefore, it is interesting that the Court uses it, puts it alongside cooperation, and essentially reflects it to be a spirit of mutual trust, i.e. a cooperative-constructive attitude which should prevail in tackling problems and crises.

Sincere cooperation and mutual trust in the internal market – E 101 certificate cases

Another cluster of cases linking mutual trust with sincere cooperation is much more like the *Achmea* and *Juizes Portugueses* line of thought. It interestingly comes from a gradually reappearing internal market policy field that has specifically come to tackle alleged posted workers' E 101 social security registration certificate frauds and errors.

The first such judgement placing mutual trust alongside sincere cooperation is the *Altun and Others* case from the internal market domain, concerning Bulgarian posted workers' E 101 certificate given under Union law; the case asked a Belgian court whether this certificate can be annulled or disregarded by a court other than that of the sending Member State if the facts support the conclusion that the certificate was fraudulently obtained or relied on.[859] The fraudulence had been established by a Belgian judicial investigation, and the question arriving to the Court concerned the criminal proceedings and whether such fraudulent certificates can be disregarded as such although they have not been withdrawn by the Member State of origin (Bulgaria).

Although context-wise this was a classical mutual recognition instrument case, the Court used mutual trust in a surprising and unusual manner. After stressing that the principle of sincere cooperation requires the issuing institution to carry out a proper assessment of relevant facts

[858] ibid, paras 164, 173.
[859] Case C-359/16 *Altun and Others*, ECLI:EU:C:2018:63, para 27.

and rules and ensure that the information on the certificate is accurate, and thus the certificate establishes a presumption that the worker concerned is properly registered and it is binding on the competent authority where the person actually works[860], the Court continued that:

> "Indeed, the principle of sincere cooperation implies that of mutual trust."[861]

Here, the mutual trust is meant to imply the presumption of accuracy of the certificate, as the CJEU goes on to stress that as long as the E 101 certificate is not withdrawn or declared invalid, it must be taken as accurate by other Member States, and that it follows from the principle of sincere cooperation that Member State authorities must carry out diligent examinations of its own social security systems and other Member States are entitled to expect that those obligations are diligently fulfilled.[862] But in the end the Court revoked the prohibition of being able to rely on EU law for abusive or fraudulent ends and still allowed on certain conditions (if the issuing authority itself would not review and revoke the certificate within reasonable time) the national court to disregard the certificates on the basis of relevant evidence.[863]

It is curious that the Court used the principle of sincere cooperation instead of mutual trust throughout the judgement, only mentioning in the passing that the former implies the latter. This might be part of a more fundamental shift of replacing mutual trust with sincere cooperation and stressing the obligations of the Member State of origin to abide by the law, particularly EU law, and issue (and if needed review and withdraw) lawful EU law-based instruments and certificates.

Two similar cases in spring 2020 – *Vueling* and *Bouygues* – confirmed and further developed *Altun* reasoning and were also taken in the context of confirmed fraudulent behaviours. In *Vueling*, the airline company had been rendered guilty in fraudulent manipulation of E 101 certificates[864], and in *Bouygues*, the construction company was found guilty of concealed employment offences also in the context of fraudulent E 101 certificates.[865] In answering the questions of whether the certificates can be disregarded and whether they are binding not only in the area of social security but also in the area of employment law, the Court again had recourse to the interconnectedness of sincere cooperation and mutual trust:

[860] ibid, paras 37, 39.
[861] ibid, para 40.
[862] ibid, paras 41-42.
[863] ibid, paras 48, 61.
[864] Joined Cases C-370/17 and C-37/18 *Vueling*, ECLI:EU:C:2020:260, para 49.
[865] Case C-17/19 *Bouygues*, ECLI:EU:C:2020:379, para 27.

> "Under the principle of sincere cooperation, laid down in Article 4(3) TEU, which also entails the *principle of mutual trust* [emphasis added], in so far as the E 101 and A1 Certificates create a presumption that the worker concerned is properly affiliated to the social security scheme of the Member State whose competent institution has issued those certificates, those certificates are binding, in principle, on the competent institutions and the courts of the Member State in which the worker is working."[866]

Thus, as long as the certificate is not withdrawn or declared invalid, it is also binding. But the Court went on to say that it follows from the principle of sincere cooperation that where the host Member State expresses doubts as to the accuracy of facts on which the certificate is based, it is incumbent on the competent institution of the issuing state to reconsider the grounds for that issue and, if appropriate, to withdraw the certificate; it is also for the host and issuing Member State to engage in a dialogue and cooperate closely in such investigations, using all investigatory powers available to them under national law to check all matters of fact and law.[867] But *Vueling* also established that if the issuing Member State fails to undertake a review and a decision within a reasonable time after the host Member State has initiated it, the court of the host Member State can disregard the certificate in judicial proceedings if two cumulative conditions are met: (i) the institution that issued those certificates has failed to undertake a review in light of the evidence transmitted by the host state and has failed to make a decision within reasonable time on the request to cancel or withdraw the certificates; and (ii) that evidence permits that court or tribunal to find, with due regard to fair trial safeguards, that the certificates were fraudulently obtained or relied on.[868]

Thus, *Vueling* and *Bouygues* again confirm that the principle of mutual trust, at least in the internal market domain, is entailed and implied by the Article 4(3) TEU principle of sincere cooperation and establish sophisticated parameters to rebut the correctness presumption and binding effect of the issued certificates. The cumulative conditions set out in *Vueling* to rebut and remedy that presumption might offer a blueprint also for other mutual trust presumption affairs and contexts as they pin down the important normative dimensions of mutual trust: the priority of issuing state control and the evidentiary problems the executing state might face when reviewing foreign state acts.

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[866] *Bouygues*, para 40; see in a similar wording: *Vueling*, para 62.
[867] *Vueling*, paras 63-64, 66;
[868] *Vueling*, para 78.

These cases in effect develop a reconsidered and further elaborated subcategory of error jurisprudence – what can be called here fraud jurisprudence. The difference still being that the fraud is done by private actors and not by, i.e. the national courts, as is often the case with error jurisprudence (errors in applying EU law manifestly wrong). But they mark a fundamental paradigm shift for how the CJEU deals with errors, mistakes, and indeed, frauds by allowing more controls in some, highly regulated occasions and shifting the rhetoric from trust to cooperation, from blind priority of speedy implementation to more state of origin authorities' responsibility over the instruments issued.

3.3.4.2.4. All other subcategories of previous generations

Opinion 2/13-type jurisprudence – Donnellan *and* Lada

Despite the values recognition subcategory, which constituted only a slight linguistic (but significant conceptual) change of emphasis, *Opinion 2/13* legacy was not very easy to break, and it remained in its pure prior wording alongside the new emphasis on values. Hence, besides that new subgroup, there is also a persisting number of cases still staying in the *Opinion 2/13* wording as mutual trust in EU law and fundamental rights compliance presumption.

The first of this rudimental case law is another paradigm-shifting case from the re-emerging internal market: *Donnellan*, which involved mutual assistance for the acclaimed recovery of a claim (Greek administrative penalty) in Ireland against an Irish national for smuggling cigarettes in Greece although he was acquitted on all criminal charges on appeal.[869] As the documents of the subsequent administrative penalty case file were not notified or delivered to him, he was deprived of his right to an effective remedy, and the Irish court considered that the enforcement of such a decision would be contrary to public policy in Ireland.[870] The Irish court asked whether it could refuse to enforce the decision.[871]

In answering, the Court immediately started by referencing to the *Opinion 2/13* wording of mutual trust as a fundamental rights compliance presumption, particularly in the AFSJ.[872] It interestingly went on from that:

> "While coming within the area of the internal market, and not that of freedom, security and justice, Directive 2010/24 is also based on the *principle of mutual trust* [emphasis added] referred to

[869] Case C-34/17 *Donnellan*, ECLI:EU:C:2018:282, paras 19-21.
[870] ibid, para 36.
[871] ibid, para 38.
[872] ibid, para 40.

> above. The implementation of the system of mutual assistance established by that directive depends on the existence of such *trust* [emphasis added] between the national authorities concerned."[873]

This is the first time that the Court used the *Opinion 2/13* wording in an internal market case and explicitly confirmed that the principle as defined therein is also applicable in the internal market (despite the explicit emphasis on the AFSJ in the definition). But like the previous E 101 certificate cases, this too is essentially very similar to other AFSJ (especially civil justice) cases, as it is directed to a concrete mutual recognition instrument.

In the end, the Court allowed Ireland to refuse to enforce the decision.[874] The road to that conclusion is rather tumultuous, as the Court gave mixed and inconsistent signals and novel concepts. On the one hand, it operationalised mutual trust towards the aim of division of judicial control labour and sustained the default rule that any contestation of a claim should be brought before the authorities of the applicant Member State and not before the requested Member State to avoid forum shopping.[875] But on the other hand, in interpreting the use of public policy clause vis-à-vis and without disregarding mutual trust[876], it arrived through fuzzy argumentative paths to a diametrically opposing conclusion. And it did so by introducing the significance of mutuality:

> "The assistance provided for in Directive 2010/24 is, as is indicated by the title and various recitals of that directive, described as 'mutual', which implies, in particular, that it is for the applicant authority to create, before it makes a request for recovery, the conditions under which the requested authority will be able to grant its assistance in a meaningful manner and in conformity with the fundamental principles of EU law."[877]

This is fascinating, as it uses the mere word 'mutual' to invoke the principle of mutual trust, which indicated a different conclusion. And it is unclear from where this 'mutual' emanates: mutual trust, mutual recognition, mutual assistance, all, or some of them? But it does put greater responsibility for the lawfulness and appropriateness of its acts on the issuing Member State authority.

The case *Lada* relates to a recognition of a criminal conviction and the question of whether a Member State is precluded from taking into account in new criminal proceedings a final

[873] ibid, para 41.
[874] ibid, para 61-62.
[875] ibid, para 43-45.
[876] ibid, para 53.
[877] ibid, para 61.

judgement previously handed out in another Member State conditional on a special procedure of prior recognition.[878] In particular, Hungary (the executing court) had established a special procedure in its domestic law which involved an examination of the foreign conviction in order to ascertain whether fundamental rights have been observed in the foreign proceedings and, if necessary, reclassify the offence according to the Hungarian Criminal Code.[879] It provides a legally prescribed system to defeat mutual trust and enforce innate controls.

Following the AG's advice, the Court stressed that the Framework Decision 2008/675 under question contributes to strengthening mutual trust within the European area of justice, in that it encourages a judicial culture in which previous convictions handed down in another Member State are in principle taken into account.[880] That in itself is interesting, as it does not talk any longer about AFSJ but a broader European area of justice which might also involve other policy areas (as explicitly expanded to the internal market with *Donnellan*). The reference to the encouragement of a judicial culture alongside mutual trust is also a first; previous references were constrained by judicial cooperation.[881] As the procedure for recognition imposed an obligation to actually ascertain whether fundamental rights are observed, the Court found it calls into question the principle of mutual trust and ruled out the possibility of any such prior procedures.[882]

Mutual trust in the administration of justice

Besides the *Opinion 2/13*-type cases, which were also present and in fact characteristic of the third generation, there are also examples of other previous generations' subcategories that keep re-emerging in their typical contexts and cases. The most represented strand among these is the conception of mutual trust with regard to the administration of justice in the Union or in the Member States. It is still restrained in its entirety to civil justice cooperation policy field with six cases.

As a novelty, the principle of mutual trust in this subgroup got more and more expressly associated with legal certainty. For example, in the *BUAK* case concerning the enforcement of a judgement and whether a social security dispute falls under civil and commercial matters, the Court for the first time addressed mutual trust under the question of admissibility, as the

[878] Case C-390/16 *Lada*, ECLI:EU:C:2018:532, para 26.
[879] ibid, paras 34-35.
[880] ibid, para 36.
[881] See e.g. *Purrucker*, para 81.
[882] *Lada*, paras 37, 48.

Commission asked to clarify whether a procedure to issue a certificate under Article 53 of Regulation No 1215/2012 (certificate on the enforceability of a judgement) a court is even acting in the exercise of a judicial function for the purposes of Article 267 TEU.[883] It is noteworthy that there was again an acclaimed error in the main judgement, as it was not apparent from the rendered judgement (the enforceability of which was sought) that the national court had examined whether it had jurisdiction under Regulation No 1215/2012.[884] In declaring the reference admissible, the CJEU allowed for the court issuing an enforceability certificate to review the question of jurisdiction, as it deemed it to be continuing the previous judicial proceedings and found that such a conclusion "responds to the need to guarantee rapid enforcement of court judgements while ensuring the legal certainty which is the basis of mutual trust in the administration of justice in the Union".[885] The Court thus allows for some more review, namely by the court issuing the enforceability certificate, but it must be stressed that this court is still in the country of origin and not the executing court, which is in another Member State. Thus, the CJEU remains consistent in its position that any review should in principle take place in the issuing Member State.

Two analogous cases followed – *Weil* and *Salvoni* – both of which concerned again the issuing of a certificate on the enforcement of a judgement ordering a payment, which was either given in breach of the EU rules on jurisdiction[886] or where the certificate issuing court was not sure whether the action giving rise to the judgement falls within the scope of Regulation No. 1215/2012.[887] In Weil the Court answered to the referring Hungarian court asking whether it must issue the certificate automatically or can ascertain the applicability of the regulation, that it is mutual trust which requires both that the decisions be recognised automatically and the procedure of enforceability be efficient and rapid[888] and that the court issuing the certificate ascertains whether the regulation applies.[889] So mutual trust seems to point in two opposing directions, but the latter and greater leeway for controls prevailed. In *Salvoni*, again under admissibility considerations, the Court confirmed that such an issuance is an exercise of judicial functions and repeated to that end the wording of *BUAK*.[890] Thus both judgements again

[883] Case C-579/17 *BUAK*, ECLI:EU:C:2019:162, para 33.
[884] ibid, para 25.
[885] ibid, para 39.
[886] Case C-347/18 *Salvoni*, ECLI:EU:C:2019:661, para 17.
[887] Case C-361/18 *Weil*, ECLI:EU:C:2019:473, para 17.
[888] ibid, para 29.
[889] ibid, para 33.
[890] *Salvoni*, para 30.

allowed for some review over the certificates (although still by the issuing Member State's court).

There are also some other additional cases in the so-called error jurisprudence. In the civil child abduction case *CE and NE*, an anti-suit injection was allowed despite mutual trust, as the two different countries (UK and Ireland) had distinct subject matters and effects.[891] This somehow remedied the procedural errors of not serving the parents before the removal of their child back to the UK by local authorities.

The case *Aktiva Finants* also concerned the enforcement of an in absentia Estonian civil judgement enforced in Finland, where the defendant questioned the jurisdiction of the court; he was not present or served and was not aware of the procedure against him before he was notified of the declaration of enforceability in Finland.[892] Here the Court used mutual trust in an interesting wording, noting that:

> "[T]he system of recognition and enforcement provided therein [Regulation No 44/2001] is based on *mutual trust* [emphasis added] in justice in the European Union. Such trust requires that judicial decisions given in one Member State must not only be recognised ipso jure in another Member State, but also that the procedure for making a decision given in another Member State enforceable in one Member State must be efficient and expeditious."[893]

The wording is interesting, as instead of "mutual trust in the administration of justice in the Union", as is commonplace, it was shortened to "mutual trust in justice in the EU". We will see whether or not this reflects a substantive and viable change of jurisprudence, but in this particular case it meant that despite the directions given by mutual trust, the Court still stressed that the rights of the defence cannot be undermined. As the regulation did not lay down the details of appeals, a procedure granting leave for further considerations in appeal was permitted.[894]

But the mutual trust rebuttal was still not allowed that easily in the case *Liberato*, where a manifest error in applying the mandatory jurisdictional rules of EU law by a Romanian court was not allowed to be reviewed or remedied.[895] Mutual trust was used in its conventional way to reiterate the importance of judicial cooperation[896] and to emphasize that the grounds for non-

[891] Joined cases C-325/18 PPU and C-375/18 PPU *CE and NE*, ECLI:EU:C:2018:739, paras 90, 94.
[892] Case C-433/18 *Aktiva Finants*, ECLI:EU:C:2019:1074, para 15.
[893] ibid, para 23.
[894] ibid, paras 26-28, 39.
[895] Case C-386/17 *Liberato*, ECLI:EU:C:2019:24, paras 30, 38.
[896] ibid, para 41.

recognition of a judgement should be kept to the minimum possible.[897] *Liberato* is thus another example of error jurisprudence, where a manifest infringement of EU law was maintained and a public policy refusal to enforce an illegal decision was not allowed according to mutual trust and a widening interpretation of Article 24 of Regulation No 2201/2003. The Court even restated its rule that recognition of a foreign judgement may not be refused "solely on the ground that it considers that national or EU law was misapplied in that judgement".[898] That, again, questions the status of the rule of law (even by its bare minimum conception: rule by law) in the EU itself.

And finally, there is an increasing field of decisions and disputes that can be subcategorised under the common denominator of the intertwinement and incompatibility of different Member States' legal orders and rules. The civil judgement enforcement case *Società Immobiliare* asked essentially whether a time limit on enforcement in one state is applicable in another and thus capable of barring enforcement.[899] In answering the question, the Court had recourse to the commonplace definition of mutual trust in the administration of justice in the Member States by means of incorporating the judgement into the Member State of enforcement's legal order.[900] For this reason, the CJEU specified that the applicable law is thus also the law of the executing Member State, and that state is not required to apply any provisions of the issuing Member State's legal order, as it would be a disproportionate burden if national authorities would have to enforce foreign law.[901]

Mutual trust in national criminal law and justice systems

This type of jurisprudence based on inter-legality and differing rules and legal cultures is also creating tensions in the criminal justice field. It is noteworthy that many criminal cases still keep their focus and directedness on the national criminal laws and legal systems as conceptualised in the early second-generation case law.

Such a case of divergent rules and intertwined legal orders was *Piotrowski*, on the execution of an EAW of a minor, where in fact there were different rules on criminal liability in the issuing and executing Member State. The person committed the crime when he was 17 and could be tried and convicted in Poland in that age, but this ran counter to the additional requirement in

[897] ibid, para 46.
[898] ibid, para 54.
[899] Case C-379/17 *Società Immobiliare*, ECLI:EU:C:2018:806, para 21.
[900] ibid, para 25.
[901] ibid, paras 35-36, 43.

place when prosecuting minors under 18 in Belgium (a Juvenile Court has to decline to hear the matter).[902] As the impossibility of liability of minors is a mandatory basis for the non-execution of an EAW, the Belgian court asked whether in assessing this it should take into account only the minimum age required for criminal liability for such an offence, or consider additional conditions and personal circumstances as well.[903]

The Court answered that no such additional objective and subjective conditions should be assessed, and only in exceptional cases may the executing court even seek additional information on the specific circumstances, as this would deprive the objective of simplifying and ensuring a swift surrender procedure.[904] In arriving to that conclusion, it instrumentalised mutual trust twice: first to restate the exceptional circumstances doctrine, and second to stress that any reassessment of liability and subjective conditions infringes mutual recognition, which implies mutual trust that each Member State accepts the application of criminal law of other Member States even if outcomes are different and assessments of criminal responsibility cannot be substituted.[905] The Court explicitly stressed, among other things, that, as per mutual trust, the safeguarding of fundamental rights and the rights of children also fall primarily on the issuing state.[906] This might be somewhat dubious taking into account ECtHR case law on state responsibility over such accomplice actions, especially in such transfer systems in the EU.[907]

Similarly, a first ever European Confiscation Order case mentioning mutual trust, *ET*, concerned the possible differences between national legal systems and criminal procedures on confiscations, where the executing country sought confiscation measure of imprisonment and the referring court wanted to know whether the fact that the issuing state's law also allows for similar imprisonment has any bearing on the application of such a measure in the executing state.[908] After the general reminders of the importance and functionality of mutual trust and recognition, the Court allowed the use of imprisonment to enforce a confiscation order.[909] Due to the normativity of mutual trust as accepting the application of different criminal laws of other Member States, even with different outcomes, the Court expressly ruled that the fact whether

[902] Case C-367/16 *Piotrowski*, ECLI:EU:C:2018:27, para 16-21.
[903] ibid, para 39.
[904] ibid, paras 61-62.
[905] ibid, paras 49, 52.
[906] ibid, para 50.
[907] *Soering v United Kingdom*, Appl. No 14038/88, ECLI:CE:ECHR:1989:0707JUD001403888. See a discussion in Richard B Lillich, 'The Soering Case' (1991) 85 The American Journal of International Law 128.
[908] Case C-97/18 *ET*, ECLI:EU:C:2019:7, para 31.
[909] *ET*, paras 17, 27, 30.

the issuing state provides for such a measure or not has no bearing on the application of imprisonment in the executing state.[910]

Thus, the Court confirmed its previous standing that national authorities cannot apply foreign law or be conditioned by them, and the execution of trans-EU judicial instruments is governed by each Member States' national laws and procedures unless expressly otherwise mandated by Union legislation. At the same time, the issuing authority maintains control over the legality, proportionality, and fundamental rights observance of the issued trans-European instruments. Mutual trust is thus an instrument of the division of judicial labour and responsibility between Member States in their roles as pan-European actors.

Mutual trust in the internal market – trust in the protection of safety and adequacy of evidence

As internal market case law made a comeback in this generation, there is also a resurgence of a similar type of internal market cases of the first and second generation. It is, broadly, mutual trust aimed at the adequacy of evidence and the more general protection of safety of persons.

First, the judgement *Preindl* concerned a dispute over a professional qualification recognition and the referring court's question whether the host state may verify compliance with the conditions that the overall duration, level and quality of part-time training are not lower than those of full-time training.[911] The Court did not allow such verification because of the Member States' mutual trust in the adequacy of the evidence of formal qualifications issued by other Member States, and added that such trust is based on a training system the standards of which were determined by mutual agreement.[912] The CJEU emphasised that the recognition of evidence has to be automatic and unconditional, and if there is justified doubt, there is a mechanism provided in the directive which allows the national authority to require confirmation from the competent authorities on the authenticity of attestations and evidence of formal qualifications as well as confirmation of the fulfilment of minimum required training conditions.[913]

One cannot help but notice the similarities with the *LM* and independent judiciaries cases – asking the issuing authorities whether they are adequate (or independent) enough and abiding by EU laws and values.

[910] ibid, paras 33, 35.
[911] Case C-675/17 *Preindl*, ECLI:EU:C:2018:990, para 33.
[912] ibid, paras 31, 35.
[913] ibid, paras 37-38.

Another two of the few internal market cases pertain to the EU rules on firearms and Directive 91/477 on control of the acquisition and possession of weapons. In the preliminary ruling, *Buhagiar* used mutual trust to interpret the aim of the directive to approximate legislation by creating effective rules on the acquisition, possession, and transfer of firearms, and that such partially harmonised rules generate greater mutual confidence between Member States in the field of the protection of the safety of persons.[914]

This wording was repeated in the annulment action of the Czech Republic against a new amending directive on the grounds, in part, that the amended directive has an erroneous legal basis, as it no longer aims to eliminate obstacles in the internal market but rather to fight terrorism and other crime.[915] The Court did not agree and replicated the *Buhagiar* wording of the aims and purposes of the directive and mutual trust.[916]

The cases, besides bringing out a completely new object of mutual trust – the protection of safety of persons – also stress the importance of harmonisation and approximation in generating mutual trust. But it is also interesting that in the latter two cases, as opposed to the more conventional qualification recognition dispute in *Preindl*, there are no mutual recognition instruments at hand or under dispute. No actual firearms controls or inspections are challenged, and the mutual confidence is brought in in an abstract manner, perhaps because it is present in the preamble of the directive.

3.3.4.3. Fourth-generation case law patterns

It is much harder to identify patterns in such diverse and multifaceted case law, but some important tendencies do stand out.

If the last generation, the so-called "classical era" of mutual trust, was about the principle as a broad EU law and fundamental rights compliance presumption, then in this contemporary phase this starts to change. Perhaps because of the persistent backlash and pressure both from national courts and academia, the CJEU seems to reconsider whether it can oblige such a presumption in the face of both proven systemic deficiencies and individual instances of grave violations. The social reality has become too evident to ignore. This gets reflected in the gradual drift away

[914] Case C-267/16 *Buhagiar*, ECLI:EU:2018:26, para 43.
[915] Case C-482/17 *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:1035, paras 21-22.
[916] ibid, para 46.

from such presumptive jurisprudence to a more substantive check and enforcement of actual EU law and fundamental rights observance and control.

This was either done expressly (in the first subtype of instrumentalising mutual trust for fundamental rights enforcement or control) or by a newly rediscovered emphasis on mutual trust in value congruence and observance, epistemically rooted in Member States signing up to Article 2 TEU in ratifying the founding treaties. This was a novel way to instrumentalise mutual trust for the purposes of EU value enforcement. But it was not the only ambition, as support for other Union aims and aspirations also emerged, such as the autonomy of EU law, solidarity and sincere cooperation, and the already strongly present effectiveness and efficiency considerations.

But it is important to note that besides and alongside the new emphasis on mutual trust as value recognition, the *Opinion 2/13*-type conception of mutual trust persisted, either mentioned in parallel with the new accentuations or used separately in an isolated manner continuing the previous era's jurisprudential dogmas. The Court did not explicitly overrule this understanding, but merely gradually adjusted the focus and emphasis. Such graduality is emblematic of CJEU's case law, but it also creates a significant legal uncertainty as to the current content and meaning of the principle.

It is contextually important that mutual trust in this generation transcends its usual policy field constraints and starts to appear in cases and disputes where it has never done so before. Mutual trust-based rhetoric and argumentation starts emerging in cases which have nothing to do with mutual recognition instruments. Such cases include, for example, *Achmea*, *Juizes Portugueses, Commission v Poland, Slovakia and Hungary v Council,* and *Opinion 1/17*. But of course, all "conventional" subject matter also continues – civil and criminal justice, with the latter gaining dominance, and the strong return of internal market case law, both in its ordinary issues of diploma recognition but also with regard to social security certificates.

There are thematic clusters of cases, some continuing from the previous periods, some new. The jurisprudence of the concept of a "court" or "judicial authority" mostly develops to address independence issues, then is later taken on to tackle the rule of law problematique in some Member States. The criminal law autonomous concept of a trial develops more casuistically. The criminal law field is in general characterised by the numerous autonomous concepts under

development that bring about the creation of an emerging "Europeanised criminal law".[917] Its main function is to mediate and synchronise the different interconnected legal orders that have become connected by the EU procedural instruments and mechanisms.

Civil law continues to tackle the so-called error jurisprudence questions, with internal market adding the notions of fraud and its mitigation. The two internal market cases *Vueling* and Bouygues created a two-strand test on the possibility to disregard mutual trust objects (mutual recognition instruments) if two cumulative prerequisites are fulfilled: (i) the issuing institution fails to or takes too long to cancel or withdraw the fraudulent instrument (i.e. certificates) and (ii) the evidence permits the court or tribunal to find, with due regard to the safeguards inherent in the right to a fair trial, that the instruments at issue were fraudulently obtained or relied on.[918] This two-tier test on limiting mutual trust in the internal market could be a blueprint also for other fields and instances. As the case *Vueling* was the first to articulate this test, I will call it the *Vueling* test.

As for the limits of mutual trust, the Court also continues to develop its exceptional circumstances jurisprudence, and mutual trust case law starts to concentrate ever more on the difficulties posed by the intertwinement, overlap, and contradiction of different national legal orders, rules, instruments, and procedures – whether the different rules on criminal liability, as e.g. in *Piotrowski*[919], or different time-limits for appeals in civil cases in different Member States, as in *Società Immobiliare*[920]. Also, subject matter does not matter – there are cases both from civil and criminal law, as well as from the internal market. The Court's role is increasingly to reconcile between legal orders and decide which legal order's law is applicable in circumstances that inherently have a cross-border element. Not only criminal and civil proceedings, but also economic and civil undertakings and life projects, start to be simultaneously conducted in different Member States, and it is increasingly difficult to assess which rules and norms (both procedural and substantive) should be applicable – i.e. what happens with the fundamental rights-sensitive principles and doctrines of criminal and procedural law.

As for harmonisation, the newly found epistemological basis for mutual trust is Article 2 TEU values. But of course, these values are not harmonised and standardised in detail, and thus

[917] Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n 128).
[918] *Vueling*, para 78; *Bouygues*, para 43.
[919] *Piotrowski*, para 30.
[920] *Società Immobiliare*, para 13.

distrust and disputes over their breaches and different understandings continue. Harmonised rules as the epistemic basis for mutual trust have also not disappeared – especially in the internal market and civil justice policy fields. Mutual trust in different national criminal laws still needs no substantial EU-wise harmonisation.

As said, mutual trust has been emancipated from its inherent tie with mutual recognition instruments and has started to be used and referred to in cases where there is no mutual recognition instrument and no need to recognise any foreign state act or decision. The association of the two principles where such an instrument is present has been maintained, and the two are often quoted alongside each other with one implying the other. It is more difficult to suggest a dominant recognition type in this generation's jurisprudence as for its plurality. The new focus on mutual trust as values recognition might suggest just that – recognition of values. But in fact, it is about everything other than the recognition of value plurality, as they are, in principle, agreed and reflected in Article 2 TEU, and thus there can be no such divergence in the founding values themselves that would require trust and the recognition of differences. Thus, the recognition is at most directed at the different embodiments of those values in practice (both legislative, institutional, and executional practice). This type of value-oriented trust is again more akin to system trust, as it is a belief that the system (the legal, but also political order) adheres to and acts according to those values. So, it is not the values that are different (and thus would need to be recognised), but the implementation of those values in the laws and practices of a state that might diverge. But there is an inherent tension in this understanding of trust in values and recognition of value enforcement pluralism that goes against what the Court is actually doing: enforcing its conception and unified understanding of Article 2 TEU values. This is an important and consequential historical turning point in the development of EU constitutionalism and the understanding of what the EU and its Member States are and can be as polities and, more importantly, who decides what the agreed Article 2 TEU values mean in practice. This important aspect will be discussed further below.

3.3.5. The transformation of mutual trust

This chapter has looked at all the Court's case law on mutual trust and tracked its development and predominant patterns over almost half a century. It has demarcated four distinguishable generations of case law, all of which have their specific features and characteristics, although they (and especially the later ones) still retrospectively mirror the previous jurisprudential clusters and usages. The findings have been exposed through a method of geology, according

to which transformations and paradigm changes are not total and revolutionary, superseding everything that came before, but rather incremental and persistent, slowly taking a prevalent position over historic understandings and conceptions. But how to understand these transformations in context and in comparison, with each other throughout the historical transformation of the concept?

The four generations unveiled in the study are: (1) the foundational first generation of mutual trust in inspections in the internal market of goods; (2) the developmental second generation of mutual trust for implementing mutual recognition instruments, adding civil and criminal justice domains; (3) the classical third generation of mutual trust as a presumption of fundamental rights and EU law compliance (also the *Opinion 2/13*-type of mutual trust); and (4) the current dynamic contemporary fourth generation of reconsidering mutual trust as value recognition, no longer necessarily a fundamental rights compliance presumption nor tied with mutual recognition instruments, but something entirely different. The main characteristics of the four generations are summarised in Table 1.

	First generation: "THE FOUNDATIONAL ERA"	**Second generation: "THE DEVELOPMENTAL ERA"**	**Third generation: "THE CLASSICAL ERA"**	**Fourth generation: "THE CONTEMPORARY ERA"**
Time period	Nov 1975 – March 1998	Feb 2003 – Nov 2010	Dec 2010 – Feb 2017	March 2017 - … (ongoing)
No. of cases	8	23	39	45
Policy areas	Internal market (goods), CCP	Criminal (new), civil (new, dominant), internal market (people)	Asylum (new), civil (dominant), criminal	Sui generis (new), criminal (dominant), civil, asylum, internal market
Characteristic object of mutual trust (MT)	MT in checks and inspections	MT in national legal systems, criminal laws, and judicial institutions	MT in EU law and fundamental rights compliance	MT in values recognition (for fundamental rights and rule of law compliance)

Association with mutual recognition (MR), recognition instruments and recognition type	No explicit tie between MT and MR; but implicit recognition of checks, certificates, inspections; enforcement recognition	No explicit tie, but indirectly enforcing MR instruments; rules recognition and enforcement recognition	A growing explicit tie, always directed at MR instruments; system and enforcement recognition	Disassociation from MR instruments; system and value recognition
Institutional trust focus	Administrative authorities	Legislators (criminal justice), courts	Courts, all authorities (legislative, executive, judicial) concerned with fundamental rights guarantees	Courts, all national actors capable of shaping and enforcing values
Legal-epistemic basis of mutual trust, link with harmonisation	Detailed existing EU-level harmonisation and standardisation	Procedural harmonisation: i.e no prior harmonisation in criminal law; harmonised rules in civil procedural and internal market law	Charter, international and national human rights instruments; alongside procedural harmonisation	An increasing focus on Article 2 TEU values; other foundations alongside

Table 1 – Characteristics of the four generations of mutual trust case law

The first generation is characterised by very few cases over a long period of time, meaning that mutual trust had no major importance or impact in the Union legal order. The usage of it in the CCP field seems in hindsight incidental, and its function or meaning in this regard is not passed down in future case law. The usage of mutual trust in the free movement of goods domain to

fight market barriers and oblige national authorities to trust their foreign colleagues' inspections, qualifications, and checks is the meaning of mutual trust that has endured to a more or less similar extent up until now and thus forms an important foundational basis for its development to the principle we know today. Although mutual recognition is not mentioned alongside mutual trust, it is implicitly always there in the internal market cases (but not in the CCP cases) as recognition is de facto done: the recognition of goods and their certificates, inspections done on them, etc. The institutional focus is on administrative authorities, i.e. it is mostly them who must do the trusting and recognising, but indirectly also on courts if they hear disputes concerning the issues. It is crucial that mutual trust started off in this foundational era in the internal market in the context of extensive existing harmonisation, both of product requirements and inspection coordination itself.

The semantic and conceptual changes endured by mutual trust in the second generation can be explained by the added important policy fields of civil and criminal cooperation to the pool of cases that the Court had to deliver. There is a conceptual multiplicity in the definitions and functions of mutual trust in this generation, but they have one thing in common: mutual trust is always used to enforce (or in other ways empower, i.e. to disallow another court's jurisdiction) the concrete mutual recognition instruments under dispute (mostly judgements or other decisions, diplomas, qualifications, certificates, etc.). In this era, a specific category of main mutual trust-related obligations' addressees was carved out: national judges in recognising and enforcing foreign state instruments. Important clusters and themes of cases emerge related to the move from the internal market to the AFSJ: the so-called error jurisprudence and the normative focus on upholding mutual trust-based recognition instruments and cooperative mechanisms even in cases of errors or fundamental rights-based objections. Most of the normative effects of the principle have their origins in this second-generation case law: the strict interpretation rule, antecedents of the exceptional circumstances' doctrine and the functionality of the division of labour, responsibilities, and jurisdiction between national courts. In this generation, mutual trust further deepened its functional tie with mutual recognition, as it was never used in a non-related context, i.e. where no mutual recognition instrument was at stake even at a theoretical level (with the sole exception of *Opinion 1/03* on the Lugano convention, which itself still was on mutual recognition instruments). The second generation also importantly introduced the possibility of no needed prior harmonisation for the mutual trust obligation to exist, most pronouncedly in criminal law cases.

The third generation could be called the classic period of mutual trust, where it surpassed the shadows of mutual recognition and first gained the broader attention of both the Court itself and also scholars, especially after *Opinion 2/13*. This generation was also characterised by the *Opinion 2/13*-type jurisprudence operationalising and explicitly defining mutual trust as a broad default EU law and fundamental rights compliance presumption between Member States and their (judicial) authorities. Although transcending mutual recognition in its topicality, it still stayed functionally tied with its traditional usage in the domain of implementing mutual recognition instruments. There was a stark decline of the importance of internal market cases in this era, as well as the appearance of one new policy field: asylum and immigration. The exceptional circumstances doctrine developed in the second generation gained further sophistication in a series of fundamental rights objection cases in this era and achieved its conceptualisation in the systemic deficiencies and real risk standards. But social realities of distrust were strengthened in the background, and the Court was bound to take them into account by adjusting jurisprudence from *Aranyosi* onwards to cultivate the cooperation and information-sharing obligations of national courts to establish a tentative system of mutual peer review of each other's human rights track records. Additionally, mutual trust started to appear in cases that started developing the autonomous concept of a court and judicial authorities in EU law. Besides the fundamental rights compliance presumption taking the stage, all the other embodiments of mutual trust still remained represented.

The contemporary fourth period is fascinating and lively with regard to what mutual trust is, what it aims towards, and how it is used. This generation is first and foremost characterised by its step back from the strong *Opinion 2/13*-type fundamental rights compliance presumption, to the opposite direction of monitoring and demanding actual respect for EU law and the rights and values on which it is founded. The object of mutual trust as EU law and fundamental rights compliance starts to be replaced or complimented by another object revived from *Opinion 2/13*: mutual trust in article 2 TEU values. The paradigmatic shift might be explained by political turmoil, rule-of-law failures, and a constant parade of crises in the Union, or perhaps by understanding the intellectual flaws and the illogicality of demanding a general EU law and fundamental rights presumption from Member States vis-à-vis each other and the deferential approach by the CJEU itself that did not remedy any issues or actual non-compliances in the past. This had structurally impeded the level and institutional ability of fundamental rights protection and effective judicial procedure and remedies in different Member States, not to mention its remoteness from the underlying social and political reality, especially in new

Central and Eastern European Member States. Whatever the reason, the shift in the normative content and wording is clear. But also, and interestingly, the *Opinion 2/13* case law continues to exist in parallel.

Another important distinctive feature of this ongoing generation is the complete move away from the traditional contexts in which mutual trust was used: in arguing (even if unsuccessfully) for the implementation or recognition of a foreign state act (the mutual recognition instrument). Cases like *Achmea, Juizes Portugueses, Slovakia and Hungary v Council* and *Opinion 1/17* are very prominent examples of this, where no mutual recognition instrument is under question. Categorised under the sui generis policy field, it should be also noted that in the past two years, this sui generis case law has faced a shift on its own: if in the early generations it could have been categorised also as falling under CFSP domain (concluding foreign agreements, be it in the CCP or other areas – i.e. *Opinion 1/03, Opinion 2/13*), then with the exception of recent *Opinion 1/17,* it is not the case anymore: mutual trust is also used independently in preliminary rulings in areas not related with mutual recognition even remotely, and, arguably, in cases with vast constitutional importance for the functioning and *raison d´être* of the EU itself, EU law autonomy, effectiveness, solidarity, and sincere cooperation. Mutual trust has also more and more to do with issues of judicial independence, the rule of law, and a more general notion of enhancing judicial cooperation for creating a common European judicial culture.

3.4 THE COMPETING CONCEPTIONS OF MUTUAL TRUST

3.4.1. The different functionalities of mutual trust

Mutual trust is not homogeneous or unidirectional in its manifestations. One has to look to a bulk of cases from different subject fields to be able to compile all the different rules of implementation and interpretation deriving from the multifaceted principle. These rules are: (i) strict interpretation of exceptions and limits to mutual trust and the enforcement of mutual recognition instruments; (ii) in principle, no review over the first (country of origin) court's/authority's assessment of fact or law (except for some narrow allowed circumstances and under the coordination and control of the CJEU); (iii) no application of higher national standards (if it undermines the primacy, unity, and effectiveness of EU law); (iv) no implementation of differing national standards, but accepting other, possibly differing Member State or EU standards; (v) allocation of judicial and administrative labour – in principle the authority responsible to settle disputes and assess evidence is the first (issuing, responsible) Member State; (vi) but still, in some instances and contexts of intertwined legal orders, it is the

procedure of the executing Member State that applies to procedures requested by another Member State (i.e. European Confiscation Orders); (vii) together with the responsibility to solely assess the accompanying liability over possible errors and failures to safeguard legality, proper fundamental rights, and proportionality assessments.

It must be stressed that the rules listed are not entirely persistent, as they see variances and exceptions throughout case law in various times and case types. For example, the rule that it is in principle the substantial and procedural law and standards of the first Member State which are applicable was not reflected in the case *ET*, which in effect said that in the context of enforcing European Confiscation Orders it is the procedural law of the Member State of execution which applies, and no regard should be given to the procedural law and standards of the issuing Member State.[921] This might differ based on the applicable secondary law instrument and the cooperative mechanisms foreseen therein.

This difficulty of pinning down the rule and its manifestations also holds true for most cases concerning the so-called error jurisprudence and the exceptional circumstances doctrine in fundamental rights-derived limits to mutual trust. The latter could in principle be seen as a constantly progressing continuum of giving more appreciation to human rights concerns (from *N.S.* to *Aranyosi* to *LM* to *CK and Others* and *Dorobantu*). It developed both in the realm of specifying the assessment of systemic deficiencies and in that of real risk themselves, acknowledging that systemic deficiencies are not necessarily always needed for there to be a real risk of human rights violations to the affirmation that mutual trust cannot be weighed against absolute fundamental rights in *Dorobantu*. But there were simultaneous recalibrations of progression, such as the principles set out in Ibrahim and *Jawo* that systemic deficiencies must attain a particularly high level of severity and that infringements of fundamental rights, but not infringements of EU law, can limit mutual trust. An even more austere non-uniformity arose in the context of error jurisprudence in civil justice cases, where it remains until today seemingly arbitrary when an actual EU law infringement or error in fact or law implementation can trigger a cessation of mutual trust. Many cases maintained an error[922] whereas many also allowed for some review and remedy for errors.[923] There was no clear tendency towards one way or another, neither a substantial factual nor legal differentiation between the cases that

[921] *ET*, paras 17, 27, 30.
[922] I.e. *Prism Investments, fly-LAL Lithuania, Meroni, Lebek, Rinau, Zarraga, Diageo Brands, IK, Liberato, Salvoni.*
[923] I.e. *Trade Agency, Purrucker, Eurofood, Luxembourg, Kossowski, Donnellan, Vueling, Bouygues, BUAK, ML v Aktiva Finants.*

would allow for some generalisations. As has been claimed with regard to mutual recognition[924], mutual trust in these cases can be deemed not to work, perhaps because it does not exist. It certainly does not work uniformly across the board, as it is not being upheld in a principled manner but can be instead described as highly context-dependent and casuistic. As mutual recognition has been described as not absolute but managed mutual recognition[925], it is also managed mutual trust, where the Court is constantly recalibrating varyingly and case-specifically the ever-changing limits of mutual trust and its relative importance over other counterweighing interests and principles.

But courts of course settle only the dispute on their table, and that should not in itself be a source of critique.

Despite these pluralities of meaning and function, three prevailing modalities of mutual trust still crystallise from the case law and can be said to dominate the contemporary normativity of mutual trust. These are: the structural-constitutionalising function; the coordinating function of allocating jurisdictional spheres, rights, and obligations; and the utopian community-building and value-enforcing function.

3.4.1.1. The structuring constitutionalising function: a constitutional principle of mutual trust?

A Union with a principle of mutual trust between Member States and their authorities is without a doubt different than a Union without such a principle. Whether and how such a trust principle can flourish and benefit all actors affected by it, and what prerequisites it needs, is a different question. But first, some reflections on the constitutionalising function and significance of the principle.

If one takes EU constitutionalism as a process that has often been characterised as a juridical and judicial construction of Europe[926] and what Kaarlo Tuori in a similar vein has labelled not a stand-still phenomenon, but an ever-uncompleted series of legal speech acts[927], then can the principle of mutual trust be considered one of the most recent examples of such legal speech acts aimed at creating and shaping the content and discourses around EU constitutionalisation?

[924] Stephen Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist' (2018) 43 European Law Review 224.
[925] K Nicolaidis-G Shaffer and Kalypson Nicolaidis, 'Managed Mutual Recognition Regimes: Governance without Global Government' (2005) 6 IILJ NYU Law School Working Paper 8.
[926] Stein (n 201); Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.
[927] Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010) 14.

This question has a descriptive and a normative side: first, has the principle as a matter of descriptive facts and empirics entered the practices and discourses surrounding EU constitutionalism, and what are its effects? Second, is such a labelling and usage plausible and desirable from a normative standpoint? The second requires further qualifications (plausible and desirable in relation to and on the basis of what?) and it will be further elaborated and theoretically rooted in the next chapter. This section deals with the first question and makes some initial doctrinal remarks.

First, there are growing academic references to[928] and little to no fundamental scholarly opposition to the positioning of mutual trust in the prominent line of general or constitutional principles of Union law. Interestingly, after the noteworthy article by president of the Court Professor Koen Lenaerts, which was one of the first high-profile pieces calling for the constitutional status of mutual trust rooting its primary law origins in Article 4(2) TEU and the equality of Member States[929], there have been no fundamental challenges of this classification or its treaty basis. The legislative institutions and the CJEU themselves have stopped short of such fundamental promulgations to constitutional or general principles, but have nevertheless used significant importance-conferring phraseology: the Court has called it a principle of fundamental importance in EU law[930], and AG Bot has called it a fundamental principle of EU law, of comparable status to the principles of primacy and direct effect.[931] A principle of fundamental importance in EU law needs not be a general or constitutional principle. A comparable status with primacy and direct effect supposedly is. But of course, one advocate general and not even one sitting judge (be it the president) of the Court has no conclusively authoritative claims over the constitutional status of a principle. Without any explicit anchoring of mutual trust by the legislature in primary law or by the CJEU as an institution in the explicit list of general or constitutional principles in a ruling, I consider the constitutional status of the principle still very much up for debate and not yet determinately decided. Thus, there is still time and room for discussion and considerations over its appropriateness and plausibility as a possible manifestation of EU constitutionalism.

On the descriptive side, the broader functionality of mutual trust is associated with the structural-integrationist aim of the principle. Mutual trust offers the Court an argument that the

[928] Lenaerts (n 93) 807; Prechal (n 93) 76; Willems (n 93) 480; Düsterhaus (n 93) 400; Eckes (n 93) 3, 18; Cambien (n 30) 114. Laurent Pech and Kim Lane Scheppele have even called mutual trust a "bedrock constitutional principle of the EU" – see: Pech and Scheppele (n 93) 41.
[929] Lenaerts (n 93) 807.
[930] *Opinion 2/13*, para 191.
[931] Opinion of Advocate General Bot in cases C-404/15 and C-659/15 PPU *Aranyosi*, para 106.

EU is sui generis and that the EU legal order is an autonomous order, and thus EU has claims both over the EU as an entity in international relations and over the horizontal relations between Member States and their authorities. If the latter can be seen throughout mutual trust case law in all of its four generations, then the former was in fact present in the very first decisions where the Court had recourse to the concept of mutual trust (*Opinion 1/75* and *Bulk Oil*), then disappeared to emerge again in the third generation on with *Melloni* and *Opinion 2/13* and the following case law, which tied mutual trust to considerations of primacy, unity, and autonomy of EU law but also solidarity between Member States (e.g. the cases *Commission vs Poland*, *Juizes Portugueses*, *Achmea*, *Opinion 1/17*, *Slovakia and Hungary vs Council*, *Commission vs Poland, Hungary and Czech Republic*). Arguably, the considerations of autonomy and primacy are themselves different from the effectiveness considerations, which emerged relatively early and enthroned EU secondary mechanisms' rapid and effective application over opposing (mostly fundamental rights-driven, but also public policy exceptions-driven) worries that had already started in the early internal market case law, but gained momentum in the fundamental rights-sensitive implantation of mutual trust to the AFSJ (most visibly i.e. in *NS*). But as a common denominator, all these aims and functions (effectiveness, primacy, autonomy, unity, solidarity) position mutual trust in the line of integrationist rationales and principles and not, i.e. Member States' sovereignty, procedural autonomy, national identity, or subsidiarity-supporting principles, thus favouring Union and integration-specific aims over sovereignty and subsidiarity considerations. But this focus on one and disregard of the other is inherently bound to bring about tensions. These have materialised, for example, in the recent Dutch-Polish face-off over the total reciprocal halt of EAW executions coming from respective states.[932]

This structural functionality of mutual trust falls under the category of what Marise Cremona has called "structural principles of EU law" in that they are not concerned with the substantive content of policy, but rather with processes and the relationships between actors in those processes.[933] As such, mutual trust also mostly structures and mediates the horizontal

[932] The Amsterdam Regional Court which is the only court in the Netherlands considering EAW cases decided to suspend all EAW extraditions to Poland and submitted a preliminary reference to the CJEU on 3 August 2020 – see Anna Wójcik "The Netherlands will extradite no-one to Poland under European Arrest Warrant", *Rule of Law*, 04.09.2020, available online: https://ruleoflaw.pl/the-netherlands-will-extradite-no-one-to-poland-under-european-arrest-warrant/ (last accessed: 26.10.2020). As retaliation, Poland's National Public Prosecutor sent an order to all prosecutors to block EAW's issued by the Netherlands – see Mariusz Jałoszewski "Poland's National Public Prosecutor is going to war with the Netherlands", *Rule of Law*, 25.10.2020, available online: https://ruleoflaw.pl/polands-national-public-prosecutor-is-going-to-war-with-the-netherlands/#:~:text=Poland's%20National%20Public%20Prosecutor%20is%20going%20to%20war%20with%20the%20Netherlands,-Share (last accessed: 26.10.2020).

[933] Marise Cremona, 'Structural Principles and Their Role in EU External Relations Law' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 12.

relationships between EU Member States and their authorities – how they should relate to, consider, and give due regard to one another. It is not so much concerned with particular policies or the content of substantive policy decisions. But Cremona has further qualified structural principles as divided into two main types: relational and systemic structural principles, in which relational principles govern the relationships between actors or legal subjects (and not norms), while systemic principles are concerned with the operation of the system as a whole, with building the EU's identity as a coherent, effective, and autonomous actor.[934] She has further qualified relational principles in the Member State-Member State, Member State-institutions, inter-institutional and EU institutions – individuals/Third Countries/International Organisations axis.[935]

Drawing from this sophisticated typology, there can be not much doubt that mutual trust can be characterised as a structural principle of Union law, as it is concerned with processes and relationships rather than specific policy contents. But it is interesting to note that if the predominant manifestation of mutual trust structures relations between Member States, thus belonging to the Member State-Member State relational-structural principle type, then this line has also been blurred recently, with mutual trust also taking on many characteristics of systemic principles in post-*Opinion 2/13* case law, as it has started to play a role in the advancement of EU's objectives and build its identity as a coherent, effective, and autonomous actor[936] vis-à-vis both national constitutional and international law and legal orders. This reflects the contemporary double functionality and the recent development of the principle of mutual trust in emancipating from mere mutual recognition contexts and instruments to a normative principle in its own right. This duality is reflected by the acknowledgment that although in most cases mutual trust can be categorised as a Member State-Member State relational structural principle, it also increasingly manifests itself as a systemic structural principle in realms that enhance the very "actorness" and autonomy of the EU.

But this does not necessarily imply that the principle is or should be regarded as a full-fledged general or constitutional principle of EU law. Also, Cremona stresses that not all structural principles rank as general principles and that such value might altogether be limited.[937] Other threats of such elevation should also be considered – for example, if mutual trust were to be affirmed to have a constitutional ranking or affirmed as a general principle of EU law, i.e.

[934] ibid 17–18.
[935] ibid 18–26.
[936] ibid 27–28.
[937] ibid 15.

equated to primary law, than it should constitute a possible ground to review the legality of all secondary law and acts of institutions. This itself might be dubious, as it might be hard to imagine that a directive or regulation is struck down on the basis of violating the principle of mutual trust (which in the current predominant definition means that all Member States must consider all other Member States EU law- and fundamental rights-compliant).[938] This could be at almost constant and direct odds with fundamental rights protection as another general principle of EU law, constitutionalised in the Charter and Article 2 TEU.

And yet, if not taking the proposed Article 4(2) TEU at face value as a primary law foundation of the principle of mutual trust (which I am highly critical of), then it is difficult to find any treaty source for an acclaimed basis of constitutional status. More than the principle of equality of Member States, mutual trust as an EU law compliance presumption could be rooted in the more general pacta sunt servanda principle enshrined in Article 4(3) TEU, but that is both constitutionalised in the wording of the provision and in case law as the principle of sincere cooperation and not that of mutual trust.[939] As mentioned, the failed draft Constitutional Treaty included under an AFSJ section a provision to promote mutual confidence between Member State's authorities[940], but this was not later included in the Lisbon Treaty. Also, a general objective to promote mutual confidence is different than a legal obligation to consider all Member States EU law-compliant and fundamental rights-observant. This marks the stark discrepancy between the manifestations of mutual trust in legislative instruments as ideals to promote and support from the normative default imperative coming from the Court to trust, presume, and not control (except for exceptional circumstances), at times even in the face of proven contrary evidence of non-compliance.

Besides not being enshrined in the treaties, mutual trust cannot be deduced bottom-up from Member States' common constitutional traditions, as to the author's knowledge no EU Member State has a similar constitutional principle or doctrine of mutual trust, not even federal states. It is rather a principle deriving specifically from the objectives of the EU, having its functional analogues in primacy and direct effect. Hesselink has referred to such principles as top-down (deductive) as opposed to bottom-up (inductive) principles.[941]

[938] Although, see how it in fact was used and instrumentalised to strike down the international agreements (intra-EU BITs) concluded between Member States in *Achmea,* paras 34, 58, although with reference to Articles 267 and 344 TFEU and also the principle of sincere cooperation in Article 4(3) TEU.
[939] See e.g *Achmea*, para 34.
[940] See Article I-42 of chapter II of the Treaty establishing a Constitution for Europe [2004] OJ C 310/1.
[941] Martijn W Hesselink, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy' (University of Amsterdam 2011) Amsterdam Law School Legal Studies Research Paper No. 2011-35 40.

All in all, although mutual trust can be functionally described as a top-down structural principle of EU law, in its dual manifestations it is either mostly a relational Member State-Member State relationship regulating structural principle, or (recently, increasingly) also a systemic principle aimed at claims of autonomy and the sui generis nature of the EU and its legal order. But this does not necessarily mean that it is a part of EU constitutional law, and I would have strong reservations before appointing it such a status. The reasons for this will be discussed further in the next sections and in Chapter 4, but in purely doctrinal terms I would also refer to the issues and concerns vividly highlighted by Anneli Albi in her thorough work on tracing the fulfilment of the traditional constitutional standards in EU law, where she pinpoints mutual trust as among the concepts and doctrines that erodes traditional constitutional safeguards as provided in thick and well-developed national constitutional traditions and practices in a broader tendency that she coins as a thin, weak, and procedural version of European constitutionalism.[942] Albi argues that the simplistic "Eurosceptic"-"Euro-friendly" discourse has given scholarly legitimacy to the erosion of a range of classic constitutional rights and rule of law safeguards in EU law, in particular a reduced access to courts, the changing role of courts, and the emergence of a gap in constitutional review.[943] She documents a wide comparative case law which draws attention to the contexts where EU constitutional law has brought about a shift towards a thin, weak, procedural version of constitutionalism, with priority given to effectiveness, uniformity, trust, and supremacy over national constitutional rights.[944]

The role of mutual trust as having the effect of denying individuals' access to justice and changing the role of national courts (prohibiting them from reviewing other Member States' laws and decisions) and with it skewing individual rights should not be underestimated or overlooked in discussions about mutual trust as constitutionalism. The aim of mutual trust and recognition to create, among other things, a free movement of judgements in the EU is in its nature procedural, and in effect in many cases hinders substantial and meaningful judicial review even in cases where violations are evident and proven. This is a form of imposed (mutual) trust against better (national court) judgement, which is deeply problematic.

[942] See: Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism." Part 1' (2015) 9 ICL Journal 151; Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism." Part 2' (2015) 9 ICL Journal 291.
[943] Albi, 'Erosion of Constitutional Rights in EU Law, Part 1' (n 942) 151.
[944] ibid.

3.4.1.2. The pragmatic jurisdiction and judicial labour conferring function: an EU principle of comity to mitigate growing interlegality?

But can the aim and function of mutual trust also be rethought and recalibrated doctrinally (in the internal sense, as it will be later done externally with regard to trust theories in Chapter 4)? The way in which mutual trust predominantly manifests itself as a structural and organising principle between different legal orders and jurisdictions relates to another well-known principle of private international law – comity – and a newly developed understanding of the contemporary legal predicament as one of interlegality. These perspectives might provide some important insights and inspirations in discussing the role and function of mutual trust.

This quest starts from the acknowledgement that the principle of mutual trust was deployed and developed for something necessary or missing from such a supranational legal system as the EU. This underlying problem or "vice" can be seen in the over-politicization and arduousness of transnational judicial cooperation, i.e. the onerous and slow process of enforcing and recognising foreign judgements, extraditions, the impossibility of gathering evidence or confiscating items in another country, etc., despite the fact that the free movement of persons in the EU had become a reality. The EU secondary law mechanisms that brought about such new avenues of inter-state action and cooperation without the extensive harmonisation otherwise necessary required new forms of cooperation (mutual recognition) and a normative glue to make such cooperation (without the necessary substantial and often even procedural law harmonisation) possible. But this also, in effect, creates a system of gradually deepening cooperation not only between national administrative or law enforcement authorities (police, prosecutors, etc.), but also of courts having to decide which rules of substantial law and procedure to apply to which set of facts and, importantly, which constitutional standards apply for the legality of such composite and collaborative cross-border actions. EU secondary law does not necessarily (as we have seen from the skyrocketing volume of preliminary references from AFSJ) provide all the answers necessary to deal with such situations and legal and practical controversies. Thus, some kind of meta-norms and principles were needed, and mutual trust became one such meta-norm (alongside, for example, mutual recognition, effectiveness, and sincere cooperation).

This context of intertwined legal spheres, norms, systems, actors, and institutions can be described as a situation of interlegality.

The concept of interlegality was famously coined by the Portuguese legal sociologist Boaventura de Sousa Santos and recently further developed by Jan Klabbers and Gianluigi Palombella. De Sousa Santos considered interlegality to be a phenomenological counterpart of legal pluralism and the second key concept of a postmodern conception of law.[945] He explained it as porous legality or legal porosity of multiple networks of legal orders forcing us into constant transitions and trespassings because our legal life is constituted by an intersection of different legal orders, that is, by interlegality.[946] It was a claim to start seeing the law as different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions.[947]

Jan Klabbers and Gianluigi Palombella explained the concept further as referring to situations where actors are confronted with a variety of norms stemming from a variety of legal orders and all are valid and applicable in principle.[948] And while sometimes those rules may point in the same direction, often they do not. Klabbers and Palombella pin down defining elements for interlegality to operate as threefold: it must concern a variety of norms from different systems; these must all be valid within their own legal spheres; and they must in principle all be applicable to a particular set of facts.[949]

The question of what mutual trust is and what its object should be can be analysed through the theoretical lens of interlegality, as this threefold conditionality for interlegality can be traced down in many mutual trust cases and contexts. There is no doubt that Europeans, especially mobile EU citizens using their free movement rights, are probably the most entrenched in such situations of overlapping, intertwining, and mixing of legal spheres and orders. This is similarly the case with people falling under the influence or realm of the various EU instruments designed to either create new interoperabilities and means of cooperation and functionalities: take for example the EU civil procedural rules or the many novel criminal or administrative instruments to conduct proceedings in another or between different Member States. This prompts the situation where to one set of persons, facts, and situations three legal orders and jurisdictions are potentially applicable: that of the Member State of origin/issuing/responsibility; that of the Member State of destination/execution; and the EU legal order, which mostly provides

[945] Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279, 298.
[946] ibid.
[947] ibid 297–298.
[948] Jan Klabbers and Gianluigi Palombella, 'Introduction: Situating Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (1st edn, Cambridge University Press 2019) 9–10.
[949] ibid 10.

procedural meditation and the facilitation of rules, but to a certain extent also supplies substantive rules (take for example fundamental rights, product, and inspection standards, etc.). All of these norms, legal orders, and jurisdictions are valid and potentially applicable.

The challenge of interlegality is to mediate those competing claims of validity and authority and find the best solution. Both national and CJEU judges might find the description of interlegality familiar, as they are often faced with such complex situations and intertwined legal orders and actors. Mutual trust has emerged as one meta-principle to guide the resolving of these situations and complexities. But despite the descriptive recognition of interlegality, it can still be argued whether what mutual trust has become to mean in its normativity is still an adequate and appropriate solution to the problems of interlegality. This is an evaluative question that puts the onus on the actors resolving such disputes and complexities: in the current focus of the study – the CJEU. Klabbers has noted that a unique set of knowledge, understanding, and skills is necessary for tackling the challenges posed by interlegality, especially for the judges deciding on such claims and complexities.[950]

As mentioned before, various normative rules and guidance derive from mutual trust. The most commonplace of these is the ban on checks of either fact or law of another Member State's state act (usually a judicial act, but not always). This ban of double-checking has been defined by the CJEU as an EU law and fundamental rights (as protected under EU law) compliance presumption. Only in the field of criminal law has this presumption been specifically directed at national criminal laws. But if one takes the most frequent interlegality situation in the EU to be the intertwinement of two national and one EU legal order which has arrived at an EU court – the CJEU – on the basis of a legal question of EU law, then should the object of mutual trust as a mediating and mitigating principle really be compliance with EU law and fundamental rights as protected by EU law and not with national law and fundamental rights as protected under national constitutional law? This would also correspond better with the conceptualisation and understanding of mutual recognition as a principle of functional equivalence[951], as the equivalence and adequacy under assessment is not (or should not be) about the EU legal order, but rather about national laws, decisions, and practices. Thus, mutual trust should have

[950] See on that: Jan Klabbers, 'Judging Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (1st edn, Cambridge University Press 2019).
[951] See in general: Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' (n 612).

something to do with the trust (as a subjective expectation) towards the equivalence and adequacy of national and not EU law.

Here, further inspiration might be drawn from another well-known principle of transnational judicial cooperation: the principle of comity.

Comity is a legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgements out of deference, mutuality, and respect.[952] Comity allows a court to make an exception to the principles of State sovereignty and territoriality.[953] Comity as a doctrine has two components: first, placing and demonstrating mutual trust and confidence in foreign judicial institutions, not interfering with them, and determining the precise conditions by which this is to be done; and second, giving full faith and credit to, or respecting the conclusiveness of, the acts of foreign institutions, and working out exactly what this means.[954] This could be done in several ways: by adjusting the rules of jurisdiction, by the recognition of judgements, and by defining and placing limits on the application of local laws.[955]

The doctrine of comity thus principally: (i) requires a court to respect, and not to question, the laws of a foreign State in so far as these apply to persons, property, and events located within the territorial jurisdiction of a foreign State; (ii) requires a court to respect, and not to interfere with, the integrity of judicial orders made by a foreign court in so far as these apply to persons and property within the territorial jurisdiction of the foreign State; and (iii) requires a court to respect, and not to interfere with, the integrity of judicial proceedings taking place before the courts of a foreign State.[956]

This is very similar to the main functioning and claims that mutual trust has on Member States' courts and authorities. And it indeed has already been suggested that the EU's principle of mutual trust is a kind of version of comity which courts have to observe in relation to each

[952] See definition in: Cornell Law School Legal Information Institute entry on comity, available online: https://www.law.cornell.edu/wex/comity#:~:text=In%20Constitutional%20law%2C%20the%20Comity,Citizens%20in%20the%20several%20States.%E2%80%9D (last accessed: 09.06.2020).
[953] Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 Collected Courses of the Hague Academy of International Law 82.
[954] ibid 91.
[955] ibid.
[956] ibid 181.

other, and that mutual recognition, full faith and credit, and the like are at least reflections of the principle of comity.[957]

But if mutual trust is to remedy and address the difficulties posed by interlegality with a method similar to that of comity and giving respect and deference to other Member States' official and in force state acts, then the object should be diametrically different than what it is today: mutual trust should not be a compliance presumption of EU law, but that of national law. Whether another Member State's authority has respected and abided by already-agreed and in-force EU law should not be a matter of trust, but of compliance. Whenever non-compliance with EU law is argued, it should be referred to the CJEU (which has been the case so far, as indicated by numerous such preliminary references) but the CJEU in turn should also take responsibility and be receptive to those concerns and adjudicate to remedy those wrongs. That has not always been the case so far in mutual trust case law, as shown above, especially with regard to the so-called error jurisprudence where the CJEU has allowed for the magnification of EU law violations, giving them additional extra-territorial effect (e.g. cases such as *Liberato*, *Diageo Brands*, *Salvoni*, and *Apostolides*). Although some leeway has been given in alleged fundamental rights and judicial independence issues by the Court's parameters for judicial peer review, the blind trust approach still continues in the civil justice sphere, an area often overlooked in mutual trust jurisprudence, but which in fact (and as seen from this chapter) has historically been the main driver of mutual trust case law and doctrine.

All in all, if EU is to manage the ever-growing complexities and hurdles caused by the increasing context of interlegality, it is also increasingly hard to conclusively pin down grand meta-principles to be generally applicable to such situations. Still, considering the most common tripartite nature of interlegal situations, the trust and deference left for national courts and authorities could and should include strictly only the final application and interpretation of their national laws and procedures, and all questions pertaining to EU law should be open for review and control by the Court (via the preliminary references of national courts who have to adjudge over any alleged misapplications, failures, and errors). That would be mutual trust manifesting as a proper EU principle of comity as the deference and respect granted to national courts and authorities over questions regarding only the application of their national laws and procedures. This would be the judicial variance of subsidiarity, sovereignty, and procedural autonomy. But as interlegality is complex and demanding as a social situation, overview of

[957] ibid 88.

purely internal matters and decisions might become pertinent, increasingly demanded, and necessary. This is already the case with the expanding case law on arguably purely internal matters whenever any kind of cross-border element (not to mention an EU instrument) is present. It has also become a reality in the EU under the recent flagship of Article 2 TEU value enforcement jurisprudence.

3.4.1.3. The utopian community building function: mutual trust for value enforcement?

It is hard to ignore the aspirational-utopian functionality of mutual trust: already, intuitively, cooperation in the EU between Member States and their authorities based on mutual trust is more desirable than cooperation without such trust. In this sense, mutual trust has a certain community and bond-building element that cannot be denied. It is an aspirational enterprise to build and achieve a Union not only based on rational self-interest-driven goals and practical endeavours, but also on mutual trust, respect, values, and solidarity. This aspect of mutual trust can be seen as a necessary factual requirement or an inevitable result of cooperation (compare with i.e. Durkheim's account of organic solidarity) or as a separate ambition in its own right that can be enhanced with other tools besides mere cooperation and prior experience.

The current strongest advocate for mutual trust and its constitutionality, Professor Lenaerts, in fact searched for such trust-enhancing principles in the Union legal order as early as 2004. Interestingly, he did not identify mutual trust as a candidate at the time, but instead had recourse to transparency, equality of arms, precautionary principle, and the principle of sound administration[958], although, as demonstrated in Chapter 1 of this thesis, the principle of mutual trust also already existed at that time. The omission is curious and could perhaps indicate a different functionality than that of trust-enhancing (i.e. one of the two discussed in the previous two sections). The importance of trust in and between the CJEU and national courts has also been deemed crucial by scholars thinking and writing about EU law and constitutionalism.[959]

There are three distinguishable facets of this utopian conception of mutual trust: mutual trust as a practical presumption that might amount to a legal double fiction; mutual trust for the

[958] Koen Lenaerts, '"In the Union We Trust": Trust-Enhancing Principles of Community Law' (2004) 41 Common Market Law Review 317.
[959] Jan Komárek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 European Law Review 467; Juan A Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' (2017) 55 Journal of Common Market Studies 551; Juan A Mayoral, 'Impact through Trust: The CJEU as a Trust-Enhancing Institution' in Marlene Wind (ed), *International Courts and Domestic Politics* (1st edn, Cambridge University Press 2018).

purposes of Article 2 TEU value enforcement; and the more general aspiration of mutual trust as an end in itself: to build more trust between cooperating actors (national authorities, especially judiciaries) in the EU. I will address them in turn.

3.4.1.4. Mutual trust as a judicial presumption – and a legal fiction?

The first facet of this utopianism is the predominant and still prevailing definition of mutual trust as a legal presumption and its fictitiousness. Mutual trust functions ultimately as another judicial presumption, especially in its most predominant conception and definition as an "EU law and fundamental rights compliance presumption". It is a judge-made legal presumption about compliance. Legal presumptions are of course not something new or uncommon in law and legal doctrine. The character of mutual trust being a legal presumption puts it among some of the most well-known juridical fundamental rights presumption doctrines in contemporary Europe: the notorious *Solange* and *Bosphorus* presumptions. In all of them the unifying element is the premise that another polity (be it another Member State or the European Union) has a sufficient and satisfactory fundamental rights compliance record in the eyes of the beholder for it to be considered adequate when compared to the assessor's requirements. As such, the basic *Solange* doctrine establishes the presumption in legal order A that acts emanating from legal order B comply with A's standards.[960] In the case of Solange, the B is the EU legal order and the A is the German legal order. This blueprint is used also in the *Bosphorus* presumption, where A, again, connotes the EU and B the ECHR system. The presumptions entail that less controls are required for a functional cooperative relationship.

But such presumptions might be prompted by an inherent contention with control; they often arise when power of review over other legal orders is limited, as the assessing legal order has no or disputed competence to review it in the first place. This is the case with ECtHR reviewing EU legal acts before EU's accession to the ECHR and with the Member States' arguable power to ultimately review EU acts' compliance with their national constitutional standards, which from a EU law autonomy standpoint is impermissible, but national constitutional courts have still reserved themselves a right to such assessment in differently stipulated severe cases (i.e. the German identity review doctrine). This element is also present with mutual trust, as judicial or administrative peer review of each other's state acts (decisions, laws, practices) is in principle not possible due to jurisdictional, evidentiary, and sovereignty considerations. But the main object and emphasis of this impossibility should again lie in the impossibility of review with

[960] von Bogdandy and Spieker (n 155) 424.

national law and not with EU law – the latter is and should be referred to the CJEU and left under its competence. Currently, this depends vastly on the subject matter. In judicial independence and prison conditions cases, the CJEU is showing increasing willingness to allow for some review of manifest and systemic national errors, leaving the ultimate assessment up to national courts to review each other's independence (i.e. case *LM*) or fundamental rights track record (i.e. cases *Aranyosi*, *ML*). But in the more subtle civil law cases, the CJEU is continuing to deny review and remedies even in cases where manifest errors of EU law (i.e. *Diageo Brands, Apostolides, Liberato*) or serious failures in fundamental or defence rights guarantees (i.e. *Zarraga, Rinau, flyLAL-Lithuania, Meroni*) are proven and substantiated.

Another difference of mutual trust from *Solange* and *Bosphorus* lies also in the fact that if the latter two are subjected only to fundamental rights standards and review, then mutual trust as defined in *Opinion 2/13* also concerns a more general compliance presumption with all of EU law – i.e. not only with fundamental rights as protected under EU law (the Charter) but with the overall body of EU law, including all secondary instruments in their vastness and diversity. Needless to say, this is a radically broader scope of a compliance presumption, with frictions necessarily emerging more readily (as has been the case with all of the so-called error jurisprudence cases, where EU law was proven to have been violated, but the CJEU still did not allow for its review or remedy or even the halting of the effect of the cross-border instrument – e.g. *Apostolides, Diageo Brands, Liberato, Salvoni*). Therefore, with mutual trust, the CJEU has arguably effectively developed an analogous doctrine of compliance and adequacy presumption for EU-wide inter-state relations with a much broader object and effect than the currently known presumption doctrines. Moreover, if in the beginning this standard was epistemically broader and less focused than the analogous *Solange* and *Bosphorus* doctrines, then in recent years the focus has narrowed down and shifted its object to Article 2 TEU values' adherence presumption (see the next subsection).

But besides the doctrinal considerations, are there also more fundamental legal-theoretical problems with such broad compliance presumptions? As a general remark, legal presumptions by definition need not necessarily reflect reality. They have been used by legislators and judges at least since Roman law and have proven useful mechanisms for legal regulation and adjudication.[961] L. Fuller was one of the first contemporary legal theorists to discuss the

[961] See examples of such presumptions that existed already in Roman law: Clifford Ando, 'Fact, Fiction, and Social Reality in Roman Law' in Maksymilian Del Mar and William Twining (eds), *Legal fictions in theory and practice* (Springer 2015).

definition of legal fictions at length.[962] For him a fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility.[963] He also discusses legal presumptions and comes to the conclusion that irrebuttable presumptions are legal fictions.[964]

But what might be those utilities of legal presumptions in general and mutual trust in particular? Fictions are thus a specific legal technique designed, principally by the courts, to achieve certain ends, but part of it is asserting generalisations about unconscious motivation and about inherent constraints on intellectual capacity.[965] They are a kind of mental shortcut. Hans Vaihinger's philosophy of "as if" proposed in a more general sense that man willingly accepts falsehoods and fictions in order to live peacefully in an irrational world.[966] The mind simplifies reality in order to process it. The most obvious way in which our minds simplify reality is what Vaihinger calls "neglective fictions" – a series of methods in which the deviation from reality manifests itself specifically as a disregard of certain elements of the situation, as progress cannot be made without the conscious disregard of minor factors.[967] The device of legal technique which bears the closest resemblance to Vaihinger's neglective fiction is the prima facie presumption. Through the use of presumptions the law confers upon facts a clarity of outline which is lacking in natural facts and introduces into an entangled mass of interrelated events a certain tractable simplicity without which the effective administration of justice would be encumbered.[968] This aligns with the aims and goals stipulated by the CJEU itself for mutual trust: the aim of creating a free movement of judgement[969] and a simplified and more efficient mechanism for the rapid recognition and enforcement of decisions[970]. All this is for the benefit of the administration of justice in the EU among and between Member States.

But it also comes with dangers: when one sets out to consciously disregard certain factors in a complex situation, one must keep constantly in mind the end toward which one is working, as the question of what factors may safely be disregarded depends necessarily upon the purpose for which the neglective assumption is being developed.[971] Thus, although legal fictions are not

[962] Lon L Fuller, *Legal Fictions* (Stanford University Press 1967).
[963] ibid 9.
[964] ibid 41.
[965] Kenneth Campbell, 'Fuller on Legal Fictions' (1983) 2 Law and Philosophy 339, 347.
[966] Hans Vaihinger, *The Philosophy of 'As If': A System of the Theoretical, Practical and Religious Fictions of Mankind* (Routledge 1924).
[967] Lon L Fuller, 'Legal Fictions' (1930) 25 Illinois Law Review 877, 887.
[968] ibid 888.
[969] See e.g. *TNT Express,* para 49.
[970] See e.g. *Purrucker,* para 72; *ML,* para 53 and *Weil,* para 29.
[971] Fuller (n 967) 888.

necessarily bad in themselves, they might become so, if the adverse effects of the fiction outweigh its benefits. This can be the case also when the fiction becomes "too fictitious", i.e. diverges from reality to an unacceptable degree, which causes harm and can no longer be justified by its ends. Particularly pertinent in the context of mutual trust might also be the observation that one must guard against an unjustified transference of assumptions, which may be useful and productive in one field, to another field in which these factors neglected by the assumption assume a primary importance.[972] If mutual trust as a fictitious presumption might have been justified in the first-generation free movement of goods cases, where the object of trust was goods inspections (standardised in detail) and the effect empowered both individuals (in direct terms) and Union goals vis-à-vis protectionist state practices, then the current transplant of mutual trust to the AFSJ, where it predominantly favours state powers (and again, Union goals) vis-à-vis the directly adversely affected individuals, might not be justified. Of course, the harms and interests are not homogeneous and unidirectional also in the AFSJ cases (i.e. the rights of different parents, of victims and the accused, etc.), but the gravity of potential adverse effects (fundamental rights violations) should be taken into account when calibrating opinions and approaches to mutual trust as a juridical compliance presumption.

In assessing utilities, the winners and losers of these juridical constructs, the biggest losers in this triad of presumptions are arguably the individual and the domestic court. In light of the *Solange* presumption, national courts defer the possibility to review Union acts. The *Bosphorus* presumption makes the review of national acts implementing EU acts almost non-reviewable in ECtHR or in light of the ECHR. The mutual trust presumption forecloses the national courts' option to review the compliance of other Member States' courts and authorities of EU law and fundamental rights adherence. Presumptions complicate judicial control. Additionally, the rebuttability threshold of these presumptions is extremely high, requiring "manifest deficiencies", violations of "essential content", or "exceptional circumstances". This is the most detrimental from the viewpoint of the individual concerned, as it accords an exceptionally high burden of proof on her. But it also undermines national courts, as the ECtHR has put in the context of the *Bosphorus* and mutual trust presumptions:

> „Moreover, the Court observes that where the domestic authorities give effect to European Union law and have no discretion in that regard, the *Bosphorus* presumption is applicable. This is the case where the mutual-recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. The domestic

[972] ibid.

> court is thus deprived of its discretion in the matter, leading to automatic application of the *Bosphorus* presumption. The Court emphasises that this results, paradoxically, in a *twofold limitation of the domestic court's review* [emphasis added] of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the *Bosphorus* presumption."[973]

Thus, the *Bosphorus* and mutual trust presumptions in their interplay limit the possibility of domestic courts' review over actual compliance in a double manner. The CJEU plays a big part in this constellation, as when it insists on mutual trust, it effectively leaves the domestic court with no possibility of discretion, thus also triggering the *Bosphorus* doctrine. The actual level of protection and compliance is left for abstractly construed presumptions which have little to do with real-life situations and circumstances. Fundamental rights are controlled and possibly also complied with only at the margins of exceptional circumstances proven with evidence of systemic deficiencies, which, as implied by their name, do not happen often, and in most cases the presumed compliance trumps judicial protection and review. This has serious adverse effects not only on the individual, but also on national courts and constitutional systems. Instead of a possible regulatory competition for the best outcome, there is a race to the bottom, as the common denominator is laid low. EU-wide cooperation might be speedier and more efficient, but at what costs? Presumptions are always in favour of unity, not diversity, of meaning[974], and the above-described effects make the possible utilities of using them as mutual trust functions open to critique at the very least.

But besides the functioning of mutual trust as an EU law and fundamental rights compliance presumption as amounting to a legal fiction depending on its degree of rebuttability, in the final-generation case law (and even before) mutual trust itself has been recently turned into a fictitious factual premise for the even more weighty goal: Article 2 TEU value enforcement. In this, it resembles a mechanism that Peter Smith has identified when a judge deploys a new legal fiction when he relies on a factual premise that is false or inaccurate in crafting a legal rule.[975] Here, although the utility and goal can be agreed to be extremely important, it is the friction with reality that causes the most difficulties. And it relates to the borderline of how to distinguish legal fictions from truth, errors, and lies.

[973] ECtHR *Avotiņš v Latvia*, Appl. No. 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207, para 115.
[974] Campbell (n 965) 345.
[975] Peter J Smith, 'New Legal Fictions' (2007) 95 Georgetown Law Journal 1435, 1437.

The relationship of fictions with truth is necessarily an uneasy one. Fuller claimed that a statement must be false before it can be fiction.[976] But at the same time he contends that it is generally more difficult to say that a given statement is false when it relates purely to legal concepts than when it relates to extra-legal fact.[977] According to K. Campbell, Fuller's account still cannot differentiate fiction from lies and errors. Fictions involve a falsity that distinguishes them from the truth, but they also involve consciousness of that falsity, which distinguishes them from error.[978] On this basis, K. Campbell has reconstructed Fuller's view by defining fictions as falsities contained in rules permitted by courts, known or suspected by the courts to be falsities, but not intended to deceive.[979] If they are deployed by courts while they are known as consciously false and also intended to deceive, they might even amount to not just necessary and useful legal fictions, but even lies.

Here lies the fallacy and circularity of mutual trust in its contemporary double nature as on the one hand an EU law and fundamental rights and, most recently, value presumption, and on the other hand an argued factual basis that creates a need for value enforcement: this argument contains a double contradiction with reality. The first contradiction is the often-irrebuttable presumption (in many cases actually proven wrong with evidence) that all Member States are EU law and fundamental rights-compliant. The second is that because of this mutual trust between Member States (in reality not true), Article 2 TEU values need to be protected and enforced. This goes beyond the mere categorisation of mutual trust as a necessary legal fiction, as besides creating a purely legal concept (mutual trust) which is at odds with empirical extra-legal facts (whether or not there is actual mutual trust between those upon whom it is conveyed), it also creates a presumption of legality and compliance, which in very many cases is in fact undermined by facts, as there is a proven non-compliance but not overruled by the Court (e.g. the cases *Zarraga*, *Diageo Brands*, *Apostolides*, and *Liberato*) and uses it consciously to make additional claims on enforcing values. If the Court is aware of this fallacy, it might not just amount to an error or a necessary legal fiction, but to a lie (a conscious misrepresentation of fact, rules, and reality). For the sake of maintaining the rule and creating new rules, not only is the fiction upheld against reality claims in particular cases, but it is furthermore used to make new claims and rules based on this fiction that (although perhaps necessary and well-intentioned) are known to be false in many instances.

[976] Fuller (n 962) 11.
[977] ibid 28.
[978] Campbell (n 965) 346.
[979] ibid.

Therein lies the most significant controversy and tension between reality and mutual trust. And it inevitably is bound to bring about tensions, non-compliance, and uncooperative behaviour in practice. This can be already seen in the breakdown of (imposed) mutual trust-based cooperation, i.e. in Dutch and Polish courts and contexts.[980] A legal presumption that loses any contact with the underlying real-world facts by not being responsive to them (usually in the form of a possible rebuttal of a presumption) becomes a legal fiction or even a lie. Without any concrete and overwhelmingly necessary utility or benefit, such legal fictions as lies have the potential to cast doubts as to the adequacy of the law or legal rule in place both in the internal and external sense of the law (in the terms of Luhmannian systems theory).

3.4.1.5. Mutual trust for community-building value enforcement?

As said, the juridical focus of mutual trust has in the fourth-generation case law recently turned to a vehicle to enforce Article 2 TEU values, especially judicial independence in Member States, in the context of a rule of law-backsliding political and social reality. This has many functional merits and prominent proponents, but is it an appropriate and justified operationalisation of mutual trust? This is to ask the consequential question of whether constructing a community of values can still be considered such a critically important aim that it overrides any theoretical critique and discussions of mutual trust being circular, illogical, or a juridical legal fiction without basis in reality. If one accepts that mutual trust as a utopian legal fiction is employed for a good (perhaps even more utopian) cause, might not the ends in this case justify the means? I would like to raise some inherent concerns about and repercussions of such an instrumentalist endeavour in a broader EU context.

As explained above, the new value-enforcing functionality of mutual trust has been somewhat circular in nature: it first created the problem and then took up the fight to solve the problem in the name of what created the problem in the first place (the extra-territoriality of adverse effects created by mutual trust). In other words, mutual trust functions to fight the problems it itself caused, using itself as a rationale for fighting those problems.

But the enterprise to enforce Article 2 TEU values by any means possible, including via mutual trust, has nevertheless gained traction in the EU. This is a sympathetic aim, as the problem is serious and the concerns legitimate. But should it be up to the Court to take on that problem? This question is especially pointed considering that there is also a political mechanism

[980] See the row escalating between Poland and the Netherlands regarding the execution of EAW-s explained before (fn 932).

available: the Article 7 TEU procedure, the triggering of which has been supported by the so-called all-affected-principle.[981] A value failure in one Member State affects the persons and actors in other Member States due to the close-knit EU integration, the internal market, and AFSJ. Every EU citizen has the right to presume that the Article 2 TEU values of the EU are upheld in every country where he or she should go when using his or her free movement rights, and that EU taxpayers' money is not being used to endorse and uphold systems with undemocratic, illiberal, or even autocratic tendencies.

Article 2 TEU constitutionalises the Copenhagen criteria, laid down in the decision by the European Council in June 1993[982], to open up a perspective of accession for the transformation countries which still had to overcome authoritarian traditions.[983] Article 7 TEU in turn provides a legal and political "nuclear solution" for cases of non-compliance. In that sense, it might be said that the masters of the treaties predicted that some countries might not stay adherent to the Copenhagen criteria. But the predominant imagination still assumed the road to liberal democracy to be only progressive. M. Kumm argued in 1999 that there is a strong liberal constitutionalist consensus in Europe that makes fundamental clashes in values unlikely.[984] He claimed that values as normative ideals – liberty, equality, democracy, and the rule of law – are common to the EU Member States and the EU itself.[985] But this premise no longer holds true today. Liberal constitutional democracy is being heavily disputed in some EU Member States, as exemplified by the rule of law crisis. Hungary openly endorses itself as an example of illiberal democracy. That is a direct clash of values, but the EU still holds a principle of presumption of value and law adherence under the name of mutual trust.

This begs the question: who should be the institution responsible for upholding these values, and is it for the CJEU to take the lead (again) in the current political impasse?

Many have argued that it is. In this vein, Von Bogdandy et al have suggested that the mutual trust presumption is justified and should be taken up by the Court and turned towards the Member States outside the Charter's scope of application to ensure that the essence of

[981] Jan-Werner Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?' (2014) 165 Revista de Estudios Políticos 141, 142.
[982] Conclusions of the Presidency, Copenhagen 21-22 June 1993, SN 180/1/93, p 13.
[983] von Bogdandy and others (n 155) 509.
[984] Mattias Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351, 361.
[985] See discussion in Jan Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 Common Market Law Review 9, 34.

fundamental rights (as set out in Article 2 TEU) is safeguarded.[986] According to them the presumption can be rebutted when there are systemic violations of this essence.[987] Thus, this reverse *Solange* doctrine is essentially about the presumption of compliance with Article 2 TEU in fields autonomous from EU law.[988] As seen in mutual trust case law, the Court has indeed taken up elements of such a reverse *Solange* doctrine (i.e. tackling judicial independence cases i.e. in *Juizes Portugueses* and *LM*; or Hungarian and Romanian prison conditions in *Aranyosi* and *ML*, etc.) in matters traditionally seen as purely internal; this might be conditioned by the altered political reality.

There are also challengers to such a reverse *Solange* doctrine. Jan-Werner Müller predicted already in 2014 the obstacles that might arise from reverse Solange, in that Member States governments would be very hesitant towards such "constitutional paternalism" were the CJEU to empower itself systematically to review the rule of law within Member States. This would probably overburden the Court, and a government determined to undermine democracy and the rule of law might not be so impressed by the rulings from Luxembourg anyway.[989] He suggests that a legal response is unsuited to an essentially political challenge, and advocates for more Europolitics instead of yet more Eurolegalism.[990] The threats illustrated by Müller have in fact materialised today, as certain Member States' governments aggressively oppose and disregard not only the Court, but also the Commission's rule of law battles and methodologies[991], and the CJEU is flooded with judicial independence references, with even German courts second-guessing whether they are independent enough in the eyes of the CJEU.[992]

But isn't there a grain of truth in the critical rogue government's arguments about double standards and the fact that EU institutions are going against Visegrád states, but not i.e. against

[986] von Bogdandy and others (n 155) 508.
[987] ibid 509.
[988] ibid 512.
[989] Müller (n 981) 156.
[990] ibid 156–157.
[991] Most recently even establishing a rule of law institute that aims to tackle Brussel's double standards and employ comparative law methods to unveil them, see: Laurenz Gehrke, „Poland, Hungary to set up rule of law institute to counter Brussels", *Politico,* 29.09.2020, available: https://www.politico.eu/article/poland-and-hungary-charge-brussels-with-double-standards-on-rule-of-law/ (last accessed: 31.10.2020).
[992] See the request for a preliminary ruling in Case C-276/20 *B* where German civil court claims it is not independent from the executive. It is also quite difficult for the Court to answer such own independence questions as deriving from the case law the CJEU has considered it under jurisdiction questions and when the referring court is not independent it has refused to hear the case because of missing jurisdiction: see e.g. Case C-53/03 *Syfait and Others*, ECLI:EU:C:2005:333, paras 31, 38; Case C-516/99 *Schmid*, ECLI:EU:C:2002:313, paras 43-44.

Germany[993] or Spain[994], which have in many respects similarly political judicial appointment or executive overview systems? That observation can be coupled with the recent controversies around the CJEU's own politicised judicial appointments, with some scholars calling the Court's composition unlawful and not satisfying its own developed standards of personal and functional independence.[995] This raises the question: is it morally appropriate that a court that is allegedly not itself independent demand and control the judicial independence of others? As the saying goes: those who live in glass houses should not throw stones.

Moreover, while academics and commentators have been increasingly (and justifiably) concerned with the rule of law backsliding in the EU[996], are they not too readily brushing aside the rule of law backsliding of the EU, especially with the help of mutual trust as used by the CJEU? This can be traced to its effects in undermining defence rights and fundamental rights in general (even the prohibition of torture and inhumane treatment in cases such as *N.S.*, *Aranyosi*, but also children's procedural rights in *Zarraga*, and broader defence rights in *Melloni*, *Meroni*, and *Lebek*) but also eroding the rule of law of the EU even in its thinnest conception as rule by law, as the effects of mutual trust have led to outcomes where the CJEU upholds and gives extraterritorial effect to decisions that are proven to infringe EU law (the so-called error jurisprudence – see e.g. *Diageo Brands, Apostolides, Liberato, IK, Salvoni*).

This creates a controversy, where on the one hand, the CJEU has stressed that the EU is based on the rule of law[997] and that "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.[998] But on the other hand, mutual trust makes such effective judicial review even in cases of manifest misapplications of EU law impossible[999] or extremely arduous, to say the least. The jurisprudential principle that recognition of a judgement coming from another Member State cannot be refused solely on the ground that national or EU law was misapplied in that judgement[1000] can be conceived as strikingly at odds with the rule of law benchmarks of the EU itself. If the glass house metaphor

[993] See, again, the German civil court's preliminary request on it: Case C-276/20 *B*, and also the CJEU Joined Cases C-508/18 and C-82/19 PPU *OG and PI*, ECLI:EU:C:2019:456, which deemed the German Public Prosecutor's Offices not independent enough from the executive to issue EAW-s.
[994] See: Guy Hedgecoe „Spain's judiciary in the dock" *Politico,* 26.10.2020, available: https://www.politico.eu/article/spains-judiciary-in-the-dock/ (last accessed: 31.10.2020).
[995] Dimitry Kochenov and Graham Butler, 'The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution' (2020) Jean Monnet Working Paper No 2/20.
[996] Pech and Scheppele (n 93).
[997] *Les Verts*, para 23.
[998] *Juízes Portugueses*, para 36.
[999] See e.g. *Diaego Brands,* paras 47-49.
[1000] See recently *Diageo Brands,* para 49, *P v Q*, para 46; *Meroni*, para 47.

has been used already in the rule of law oversight discussions in the context of the claimed democratic deficit of the EU[1001], then these cases also demonstrate the shortcomings of the other two components of the tripartite Western liberal democratic order as the foundational values of Europe: rule of law and fundamental rights protection.[1002] This in effect impairs and de-legitimises the moral authority of the CJEU to embark on a rule of law battle against Member States themselves.

All in all, the aim to aspire towards a Union where all Member States would abide by the noble Article 2 TEU values is laudable and virtuous in itself, but besides the obvious question of legitimacy, separation of powers, and standards of such review by the CJEU (i.e. the question: is there or should there be a common and compulsory ideal type of liberal democratic order, or are there instead different and equally legitimate national-culturally and historically contingent realities?), there are specific concerns and criticism as to whether the principle of mutual trust as used and defined in CJEU case law is the most suitable means by which to do it. Just to be clear: I am not arguing that Article 2 TEU value enforcement is impossible or implausible in Europe overall, or that any criticism of the EU's own performance would necessarily preclude all such aims and controls. I agree with many thinkers that despite historical, cultural, and political differences, core tenets of a European post-war liberal democratic order can be distilled[1003] and accordingly also controlled and adjudicated. I would simply like to cast doubt as to whether the use of the principle of mutual trust by the CJEU is suitable for these purposes, either as a fictitious factual premise or a dubious normative obligation in the face of opposing social realities. It might not be wise to use the same tool in advocating for the solution of a problem that augmented the problem in the first place.

3.4.1.6. Mutual trust as an aspirational end in itself

And finally, there is an aspirational side of mutual trust as an aim in itself. This is not mutual trust as a means, but as an end, an inspiring goal to strive for. This is in fact the original and legislative connotation of mutual trust in policy documents and also its manifestation in secondary law instruments, mostly contained in preambles of Union legislative acts as described in Chapter 1.

[1001] JHH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).
[1002] ibid 318.
[1003] Müller (n 981) 148.

But this conception of mutual trust also finds quite significant support and reflection in case law, in the plurality of cases which depict mutual trust not as a normative rule, an imposition on Member States and national authorities, nor a factual premise to enforce Union instruments or values, but as a separate goal to pursue. This notion of mutual trust is often used in contexts linked with judicial cooperation[1004], the ambition to build a genuine European judicial culture[1005], but also in the context of stressing the need to resolve all difficulties in a spirit of cooperation and mutual trust.[1006] It is sometimes referring to secondary law recitals, which explicitly set a goal to "enhance mutual trust among Member States".[1007] It might also be used rhetorically, as an interpretative tool to support one particular conclusion in a judgement, not in a normative manner – imposing trust obligations on actors – but more subtly, only hinting that there should be such a thing as mutual trust.

This is one of the least controversial conceptions of mutual trust, as it does not cause frictions with factual reality, directly infringe anyone's rights, nor directly prefer or disregard one actor's aims or interests over another's. Besides being the least contentious conception, it is also the most authentic one, the closest to the initial legislature's aims and wordings, and perhaps also the most balanced aspirational understanding of mutual trust, not instrumentalising it as a means for some other grand, ambitious autonomy- or power-seeking ambition, but admitting the inherent value and benefit of trust and sincere, virtuous cooperation as goals in themselves. But despite being the most original and least contentious, it is by far the least prevalent conceptualisation of mutual trust in CJEU case law. However, its importance could be rethought and prioritised if CJEU really aims to enhance actual trust between Member States and their authorities.

But if enhancing trust is to be considered at least one of the functions or ultimate end-goals of the principle of mutual trust, then the ways in which it works and can be advanced become crucial. This is the ambition of the next chapter: to look at the ways in which trust operates conceptually and how mutual trust relates to and lives up to the possible task of supporting or creating genuine trust between actors, thus facilitating cooperation in the EU legal and collaborative system.

[1004] *Balaž,* para 30; *Gavanozov*, para 35.
[1005] See e.g. *Lada,* , para 36.
[1006] See recently in *Commission v Poland, Hungary and Czech Republic,* paras 164, 182; *Slovakia and Hungary v Council*, para 309.
[1007] See e.g. *Covaci*, para 36.

(IV) BUT WHAT ABOUT TRUST? – TRUST IN MUTUAL TRUST

4.1 COMPARING THE CONCEPTS – DEFINITIONS, PHENOMENON, COMPONENTS, MODEL

To tease out the potentials and pitfalls of the principle of mutual trust and whether it can theoretically enhance, foster, or in any way help in building actual trust within the EU and between Member States and their authorities, the common ground between the two concepts should be found. This chapter will do just that: contrast the definitions, the phenomenon and its components, and the relational models of trust and mutual trust. It will begin with a preliminary phenomenological comparison of the two concepts, which will be followed by a more in-depth conceptual analysis of whether mutual trust lives up to the properties of trust as a concept drawn from interdisciplinary theories as presented in Chapter 2.

To start with the definitions, the interdisciplinary definition of trust was the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control the other part.[1008] Mutual trust as a principle is most frequently and predominantly defined as the obligation of EU Member States to presume, save in exceptional circumstances, that all other EU Member States are complying with EU law and fundamental rights protected under EU law.[1009] Having also been defined as something relating to national laws and practices (i.e. mutual trust in the adequacy of Member States criminal laws or the administration of justice), a broader, more all-encompassing conception can be defined as a presumption about the adequacy, lawfulness, correctness, and sufficiency of national legal systems (with the relevant threshold being EU law and values) and acts and decisions taken by national authorities. Even in the face of national variances, the essence of rights and values should not be violated.[1010]

Of course, both concepts and definitions have their variances and further qualifications depending on the context or discipline, but the broad contours emerge quite distinctly. How do they relate to each other – are they worlds apart, or do they have some commonalities and convergences?

[1008] See above Chapter 2
[1009] See in Chapter 3.
[1010] Wendel (n 151).

First, as for the metaphysical substance of trust as a phenomenon, then the content of the principle of mutual trust seems to fall within the broad type of phenomenon defined as trust: an attitude or mental state of mind with emotional connotations manifested in trusting behaviour. All three components of trust as a concept also present themselves in mutual trust to a greater or lesser extent. To mutually trust is to presume, and that in itself is a mental-cognitive state of mind. A presumption, as described above, is a mental shortcut, and a legal presumption is a mental shortcut given legal significance. Mutual trust, like trust itself, functions as a mental mechanism to overcome complexity and uncertainty, with the sole difference that mutual trust as a principle (and a mechanism) is legalised (not in the meaning of making it legal, but in the meaning of making it law) and to a certain extent universalised by the Court as an abstractly and generally applicable rule with a community-based and community-building effect: to abide by the principle of mutual trust is to presume that all members of the community follow the previously agreed rules and values in their laws and behaviour, and thus no actual control over the concrete following of these rules and values is necessary or permissible. This makes cooperation faster and smoother. This manifestation of mutual trust has a phenomenologically cognitive character, but also embodies the affective and behavioural components of trust.

The emotional-affective component can be found in the fact that although mutual trust can be grounded in some evidence or epistemic basis, it also on many occasions and aspects is not: it can have a greater affective degree with its emotionally laden biases and preconceptions grounded not necessarily on available evidence but also broader tendencies, CJEU instructions, hearsay, prior experience, and the like. This manifests itself most clearly in the command to mutually trust despite available contrary evidence or broader adverse and systemic tendencies. Here mutual trust transforms to an illusion or utopia which has little to do with evidence, confidence, or rationality. The CJEU's perceived aim of community-building with mutual trust has an in-built non-rational and emotional degree: it is focused on achieving a kind of aspirational aim deemed important and worthy of pursuit. It has come to the point where the ends justify the means. Practical obstacles on the way are brushed off as insignificant in the face of the broader noble (and perhaps also politically and emotionally biased) goal (i.e. an ever-closer union or internal market building, effectiveness, and autonomy considerations) or surmounted by questionable means and methods (i.e. the doctrine that misapplication of EU or national law cannot affect mutual trust and recognition[1011]).

[1011] See *Diageo Brands,* para 49; *P v Q,* para 46; *Meroni,* para 47.

The emotional content of mutual trust may be also found in preliminary questions sent by national courts which hint to the existence of distrust and the pertinent evidence and in the reluctance to enforce such CJEU-imposed mutual trust obligations.[1012] It may also manifest in the novel and innovative techniques that national courts and authorities invent in order to surpass the trust obligation[1013] and even settle without ever reaching the CJEU, with national courts experiencing such a high level of distrust that they prefer not to even ask for centralised guidance which they probably predict to nudge them towards mutual trust, which in reality does not exist and cannot be upheld in light of existing countervailing evidence and contexts. This might be seen in the examples of the German FCC of not referring an EAW case to the CJEU by declaring the acte claire doctrine and upholding their national safeguards and control mechanisms.[1014] Similar tendencies are appearing in Poland, where the central institutions have given guidance to public prosecutors not to enforce EAWs coming from the Netherlands in the aftermath of the Dutch de facto halt of enforcing Polish EAWs.[1015]

But it can also be the diametrical opposite: that many more national cases are resolved without ever arriving at the CJEU, as domestic judiciaries have no problem mutually trusting each other with all the accompanying recognition or other cooperative manifestations. These non-problematic cases might again be based either on sufficient or inconclusive evidence of actual trustworthiness, which can itself be coloured with prejudicial and innate biases (say, for example, geographical and/or cultural proximity, familiarity with the counterpart's legal system, etc. – this would require further in-depth research which reaches beyond the scope of this thesis, but see further discussion of the colouring of evidence and interpretation with these biases below in section 4.3.2.3).

The behavioural manifestation of mutual trust is predominantly mutual recognition. Since that is the concrete observable consequence of mutual trust, the two are often confused or referred to as identical or interchangeable concepts. But the mutual trust case law analysis has shown that this is no longer exclusively the case. As mutual trust has surpassed its intrinsic link with mutual recognition instruments, its behavioural manifestation may also materialise in other forms of activity and cooperation than the incorporation and recognition of foreign state acts

[1012] For example the judicially active Irish courts sending their doubts whether they still should mutually trust Polish authorities in the context of rule of law backsliding in *LM* and even their UK counterparts in the context of Brexit and their inevitable departure from the EU in *RO*.
[1013] On the innovative solutions of national courts' to bypass mutual trust obligations see: Moraru (n 115).
[1014] See German Federal Constitutional Court Decision No 4/2016 of 26 January 2016, BvR 4/2016, paras 67 and 73.
[1015] See the developments in two countries described above (fn 932).

into the executing state's legal order. This is for example the case in the asylum relocation mechanism disputes, where the Court effectively requires Member States to resolve any difficulties that may arise in a spirit of cooperation and mutual trust.[1016] Here, there is no mutual recognition as a result of mutual trust, just normal constructive cooperation to overcome obstacles in joint endeavours.

Besides satisfying the phenomenological criteria of being mainly a mental mechanism and involving also the collateral affective and behavioural components, mutual trust also satisfies the computational model of depicting trust as "A trusts B in doing/with regard to X". This is reflected in mutual trust case law. This relationality and conditionality of trust and the different and diverging objects (the "X") and subjects (the "A" and "B") of trust will be analysed further below.

But the mere general metaphysical and phenomenological convergence does not mean that the principle of mutual trust is unproblematic from the perspective of trust conceptually. To say anything more conclusive about the convergences and divergences of trust and mutual trust conceptually, further conceptual analysis is needed. As the words, wordings, definitions, and manifestations still cogently deviate, the analysis should cut to the substantial core of the concepts through priorly identified parameters of trust. This will be done next.

4.2 ASSESSING MUTUAL TRUST THROUGH THE PARAMETERS OF TRUST

Before I contrast how the CJEU has conceptualised mutual trust with theoretical accounts of trust, the main features of trust as a concept, which provide the baseline for analysis, should be restated. I derived them from the rich theoretical conceptualisations of trust presented in Chapter 2; I call these the parameters of the concept of trust, and they include its essential indispensable parts (the necessary and sufficient properties of the concept). This exercise provides a baseline for answering the question whether mutual trust has anything to do with the concept of trust and where the convergences and tensions lie.

The integral elements in depicting the social reality of trust as explained above are the cognitive, affective, and behavioural parts of trust, i.e. reason, emotion, and the act of trusting. Another important characteristic is the widespread agreement that trust is a three-place relation: A trusts B in doing X. The parameters which follow from conceptual accounts of trust are relationality and conditionality; functionality to reduce complexity and open up further possibilities of

[1016] See: *Commission v Poland, Hungary and Czech Republic*, paras 164, 182; *Slovakia and Hungary v Council*, para 309.

cooperation; optimism; risk, vulnerability, and interdependence; context of uncertainty and uncontrollability; being entrenched in freedom, necessarily implying discretion of the trustee and unresponsiveness to coercion on the side of the trustor. These will be analysed with regard to mutual trust in turn.

4.2.1. The relationality and conditionality of trust

It has been stressed that trust is best understood in relational terms, both as a set of micro-level personal relations between specific individuals and as a structure of macro-level impersonal relations between positions in organisations, institutions, or other collectives.[1017] Trust is inherently relational and socially embedded (and mostly between people), i.e. concerned with the relations between people or other actors who are capable of action and who are the conferrers and recipients of expectations. Trust is based in relationships and is varied across relationships and individuals.[1018] Although self-trust is another claimed manifestation of trust, it does not fall within the lines of usual accounts for trust as requiring at least two counterparts and their interdependence.[1019]

This relationality is reflected in the relational model of trust as "A trusts B in doing X". The relational aspect is the dependence relationship of A and B, and the conditional aspect lies in object of trust X. Mutual trust is also socially embedded and relational, concerning different actors in the EU legal sphere and conditional upon its object (or various objects as shown in Chapter 3).

4.2.1.1. The subjects of trust in mutual trust – the relationality of trust

To be able to speak of trust, trustors and trustees need to be identified.[1020] This is the "A trusts B" part of the model: who is the trustor A and who is the trustor B in the trust relationship. It should be noted that trust as a concept is not necessarily mutual and reciprocal, i.e. A can trust B, but B must not necessarily trust A.[1021]

In mutual trust, the trust is reciprocal by definition. Since the trust in mutual trust is expressly mutual, it could also be depicted as "A trusts B with regard to X and B trusts A with regard to X". The CJEU has identified throughout its case law numerous such trust subjects. Most

[1017] PA Lewis, 'Review of Trust: Forms, Foundations, Functions, Failures and Figures' (2004) 114 The Economic Journal F156, F156.
[1018] Schoorman, Mayer and Davis (n 346) 345.
[1019] Govier (n 301) 3.
[1020] Möllering (n 258) 7.
[1021] Schoorman, Mayer and Davis (n 346) 347.

frequently, mutual trust is defined and deemed to exist between Member States, but also between Member States' authorities, be they judicial or administrative. Courts as judicial authorities have often been specifically singled out as recent particularly predominant recipients of mutual trust obligations, as they are the ones settling disputes and implementing numerous EU mutual recognition instruments, which also entail mutual trust obligations. But as the CJEU has embarked on the journey to define and delimit the autonomous concept of judicial authority according to its own standards, Member States' public prosecutors' offices have also been deemed independent enough to be considered to be included under the concept of judicial authority and thus included in the trust circle, i.e. having the normative obligations to mutually trust.

If trust in and between judges as persons is easily conceivable, then can there also exist trust between states or institutions as abstractions? Actors able to manifest and receive trust need not always be people, although it is often the case. What is important is the notion of human agency, as trust is a mental phenomenon – in the end, all trust can be traced back to some form of human cognitive conditions, and thus it needs to relate back to actors, to whom it is possible to describe expectations and actions meaningfully.[1022] But there needs to be a person or a form of human agency at least on the sending end of the trust, as trust is widely agreed to be a cognitive state of mind or attitude.[1023] Collective and, strictly speaking, non-human entities can still be on the receiving end of trust (the trustees or the objects of trust), as the literature uniformly agrees on the existence of what is labelled with the varying names of abstract[1024], system(ic)[1025] or institutional trust[1026] and which in essence is trust being directed at the adequacy, honesty, and competence of systems and institutions to live up to their commitments and carry out their duties.[1027]

Luhmann acknowledged that trust could also be placed in the functioning of systems, and that such trust in systems stands primarily on the individual's trust of expert knowledge accumulated and stored in highly differentiated social systems and the sufficient controls over reliability built into these systems.[1028] Katherine Hawley has stressed that both institutions and states can be

[1022] Möllering (n 258) 7.
[1023] As A. Baier has put it: ´[T]he trusted need not to be a private individual but may be a firm or agency. It is always a person, an agent with a mind, who does the trusting, but it may be something more impersonal which is trusted.´. See: Annette Baier, ´What is Trust? in Archard and others (n 322) 178.
[1024] Misztal (n 277) 72.
[1025] Luhmann, *Trust and Power* (n 313) 50; Misztal (n 277) 133.
[1026] Möllering (n 258) 71.
[1027] Hawley, *Trust* (n 310) 99.
[1028] Luhmann, *Trust and Power* (n 313) 39, 50, 53.

the recipients of trust, as they can make commitments by entering into legal contracts, signing treaties, and having charters, statements of purpose, constitutions, goals, and guidelines.[1029] Thus, they are adequate trust recipients and mediators. Trusting (and distrusting) relationships are thus possible between states, as states are able to cooperate, have normative expectations, and try to predict one another's behaviour, with the possibility of a moralised expectation to "do the right thing" or act benevolently.[1030] Trust in international relations can concern honesty, competence, and adherence to agreements, values, or ideology, which are all bases for trusting expectations.[1031]

Accordingly, trust is possible both in and between states, but states act through different forms of human agency. The antecedents of trust – reputation, integrity, agreements, prior experience and familiarity, and value congruence – play a big part in the formation of such interstatal and interinstitutional forms of mutual trust. This is not far-fetched when thinking and talking about the principle of mutual trust in the EU as having recently been directed at values in the breakdown of trust prompted by widespread reputational questionability and suspicions on the integrity of states and their institutions (governments being described as rogue[1032]) and their commitment to agreed treaty obligations. This exemplifies how we can meaningfully ascribe trusting expectations and trustworthiness projections to states.

4.2.1.2. The objects of trust in mutual trust – the conditionality of trust

Mutual trust case law also revealed many different objects of trust. In the computational model, this relates to the "X" and the domain specificity of trust: it is almost never all-encompassing or abstract (it can be so only with regard to very close interpersonal relationships), but relates to specified contexts, competences, tasks, domains, or activities. Trust in its societal and institutional form is always context-dependent, and this is also observable with regard to mutual trust too.

The principle of mutual trust can be first and foremost conceptualised as system trust – trust in the legal systems and institutional practices of EU Member States. This is reflected in the determining trust objects as the administration of justice in the EU and in Member States, EU law, fundamental rights and value compliance, and trust in the adequacy of Member States' laws, inspections, qualifications, and diplomas. This all falls under the theoretical framework

[1029] Hawley, *Trust* (n 310) 98–99, 106–107.
[1030] ibid 106–107.
[1031] ibid 108–109.
[1032] Pech and Scheppele (n 93) 7.

of system trust. It has been stressed that trust in institutions means trust in the institution's reliable functioning; this has to be based mainly on trust in the visible controls and representative performances (access points) rather than on the entirety of the internal workings of the institution as a whole.[1033]

Falling under the theoretical type of system trust does not mean that the previously described emotional, moral, and behavioural components become irrelevant, as they still remain the characteristics and constituent elements of trust on the side of the trustor A, the one who places the trust in the system. As human agency is required in the sending end of trust, it makes it still coloured by perception, biases, emotions, and morally loaded expectations. Although it often takes place in a more formal and institutionalised setting, the systemic manifestation of trust is not fundamentally different from the more commonplace social and interpersonal trust manifestations; it is only the object of trust which is occurs in the form of a system (and often also as a person representing that system, thus cultivating interplay and mutual dependence between interpersonal and system trust).

All in all, the bulk of CJEU case law adheres to the conditionality requirement for the functioning of trust mostly represented by systemic trust in legal systems and institutions across the EU. National judiciaries and authorities and the decisions rendered by them remain the main representations of such systems trust, as they are the concretisations and manifestations of the broader legal and institutional systems that are supposedly trusted. There are also many references to a more generalised, non-conditioned mutual trust in the vast case law, but these instances remain isolated and use the rhetoric of trust only in passing.[1034]

4.2.2. Trust's function: complexity reduction

Trust is a method to surpass the endless complexity and contingencies of possible futures. Govier has emphasised the need for trust for our boundless interdependency and mutual vulnerability in societies that require trust to a large extent as a coping mechanism for such complexity, ambiguity, and risk.[1035] Trust is the mental mechanism that helps to deal with such complexities and uncertainties. Trust's function is thus similar to that of law or even morals – it is to stabilise the expected behaviour of others in a society of contingent actions of free actors.

[1033] Möllering (n 258) 74.
[1034] See i.e. the few cases described above in section 3.4.5.3 where mutual trust manifests itself as an aspirational end in itself.
[1035] Govier (n 301) 3.

It is normative in the sense that similarly to law, tradition, or morals, it has to do with normative expectations of others' behaviour.

Niklas Luhmann was a pioneer of functionalism and functional analysis; inspired by that work, he explained trust as functional to reduce societal complexities. According to him, trust simplifies life by the taking of a risk, and constitutes a more effective form of complexity reduction than the alternatives, chaos and fear.[1036] As such, trust increases psychological tolerance of uncertainty, but it must not be confused with mastery over events, as the latter (in forms such as law, control and enforcement, and formal organisation) are mutually exchangeable mechanisms of complexity reduction.[1037]

Mutual trust also operates in a context of social and legal complexities: as described before, it is typical of contexts of interlegality and situations of intertwined legal orders, cross-border interactions, and the difficult balancing of different interests, rights, and prerogatives possibly falling under different, and equally valid and potentially applicable, legal orders. Take, for example, the vast number of cross-boundary child abduction cases, where both parents usually start legal proceedings in two different Member States which have made contradictory but often already res judicata decisions. The settlement of such disputes and issues often requires, besides knowledge of different fields of law, also expertise on different and differing jurisdictions and on substantive and procedural national rules and institutional practices, in addition to familiarity with the EU law instruments and issues under question. There are very many rights, principles, goals, and values affected, and no necessary a priori subordination between such values and interests (i.e. the best interests of the child, right to access to justice and defence rights of the parents, the principle of legal certainty and upholding res judicata, the aimed coherence and harmony of the unified EU justice area, the effectiveness and autonomy of EU law, etc). This is just one example of the immense complexities surrounding situations where mutual trust is present. Similar complex and intertwined legal and factual difficulties are present also in criminal justice and internal market cases.

In fact, the CJEU itself has also explicitly linked the simplified and efficient system created by mutual trust with the specific aim to reduce complexities in the extradition procedures in the EAW cases Jeremy F and Piotrowski.[1038]

[1036] Luhmann, *Trust and Power* (n 313) 8.
[1037] ibid 8, 15.
[1038] See *Jeremy F*, para 57, *Piotrowski*, para 54.

The principle of mutual trust as trust also conveys normative expectations upon trustees – it is to presume (that is to mentally expect) the non-harmful behaviour of others (either the trustee's EU law and fundamental rights compliance in practice or the adequacy of the Member State's laws, procedures, and general institutional frameworks). If such expectations are not met, the trustor feels disappointed and let down, as with any failure to meet normative expectations (compare i.e. with law infringements or moral condemnations).

4.2.3. Trust as an optimistic cooperation-enhancing belief

The qualitative value of the abovementioned expectation also plays a role: it is not any kind of behaviour that is expected, it is somehow beneficial or at least not detrimental behaviour of others that is channelled by trusting expectations. K. Jones has stressed: trust is always an optimistic belief.[1039] As risk and vulnerability can be perceived as negative threats, trust is the mechanism which allows people to cope with them. As trust is the "willingness to be vulnerable", this vulnerability is in most cases recognised, but mentally supressed with a more positive expectation. The "willingness to be vulnerable" should not be understood as "willingness to be hurt", but as highly optimistic expectations that vulnerability is not a problem and no harm will materialise.[1040] In that sense, trust as a mechanism of dealing with risks and vulnerability differs crucially from other social and psychological processes that are aimed at eliminating vulnerability or resigning to it rather than positively accepting it.[1041]

But besides the general optimism about possible harm and vulnerability, it also has to do with optimism about the trustee's behaviour and trust-responsiveness. Optimism about the trustee's expected behaviour is the most frequent case. The borderline is that it must be at least neutral or not pessimistic.[1042] This facet of optimism has to do with the quality of the expectation: it presumes beneficial or at least not harmful behaviour by others. It is also about perceived trustworthiness; trustworthiness is a matter of meeting commitments, and this requires both good intentions and competence.[1043] T. Govier has described it as an important feature of trust, which involves "a general attitude to interpret the trusted person's actions favourably".[1044] This

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[1039] Jones, 'Trust as an Affective Attitude' (n 7) 4. See also: Marek Kohn, *Trust: Self-Interest and the Common Good* (Oxford University Press 2008) 9.
[1040] Möllering (n 258) 8–9.
[1041] ibid 9.
[1042] See to that end again Gambetta's comment on the essence of trust: "when we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is *beneficial or at least not detrimental* to us is high for us to consider engaging in some form of cooperation with him." See Gambetta (n 252) 217.
[1043] Hawley, *Trust* (n 310) 65.
[1044] Govier (n 301) 6.

is always risky, as people can always choose (as autonomous actors with discretionary powers) to deflect and not to meet trust.

This element of optimism and utmost positivity is clearly evident in the usage and conceptualisations of mutual trust by the CJEU. The Court effectively imposes upon Member States and their authorities that all other Member States' laws, practices, and institutions are adequate, equivalent, and EU law- and Article 2 TEU value-compliant. This is without a doubt a positive expectation of others, not to say in many respects and in today's context a utopian expectation.

4.2.4. The value of trust: enhancing cooperation

Trust as an optimistic attitude or belief enables action. Cooperation and cooperative behaviour are the consequents of trust (but need not be – there can also be cooperation without trust, such as pragmatic and self-interest-driven cooperation). Most cooperative ventures still require some kind and degree of trust. Gambetta has stressed that cooperation frequently makes some demand on the level of trust, particularly of mutual trust, as if distrust is complete, cooperation will fail among free agents. Furthermore, if trust exists only unilaterally, cooperation may also fail, and if it is blind it may constitute rather an incentive to deception.[1045]

But there is also an important circularity about trust and cooperation: trust is as much the result of a condition for cooperation (as an antecedent – the prior experience of cooperation – and a consequent of trust manifesting in collaborative behaviour).[1046] This is grounded in the process view of trust; it stresses the importance of the disposition to trust, and in some cases starts off with blind or irrational trust (see also the section of therapeutic trust below in section 4.2.6.2.3).

E. Uslaner has made an interesting observation between trust, cooperation, and difference in that trusting is not about cooperation because of similarities but rather an important mechanism to cooperate in the inevitable presence of differences and the uncertainties they create.[1047] As such, it is not a tool of assimilation but a way to overcome growing diversification. This can be directly translated to the use of mutual trust for mutual recognition: to overcome the abundant diversity and complexity of different national legislative and institutional choices, mutual trust

[1045] Gambetta (n 433) 219.
[1046] Möllering (n 258) 79. See also in Chapter 2.
[1047] Eric M Uslaner, 'The Study of Trust' in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust*, vol 1 (Oxford University Press 2017).

is introduced to overcome differences and create further avenues of cooperation that would not have been possible otherwise.

Mutual trust was historically developed and has been employed up until today to make way for cooperative ventures – be it the introduction of a non-politicised system of surrenders, the cross-border enforcement of judgements and orders, the acquiring of evidence in another state, etc. The list of such mutual trust-based collaborative arrangements is long and increasing its length by the year.

As mutual trust and trust as a concept are necessary and beneficial for cooperative endeavours, the institutional design of trust becomes essential. Such institutional design to create more necessary trust between actors is possible, but due to the possible pitfalls mentioned above, it must be very carefully calculated, as errors (i.e. creating distrust, unidirectional trust or blind trust instead of genuine mutual trust) can be fatal for trust and instead seed distrust, which is harder to turn into trust than trust is into distrust (see on that further in section 4.3.5).

4.2.5. Trust as risky business: interdependence, risk, and vulnerability

As mentioned, trust relations involve a certain kind of interdependence between the trustor and trustee. This goes beyond the mere relational aspect; such interdependence between the actions of the trustor and trustee is manifested in the fact that the trustee can harm the trustor, but his own action partly also determines whether or not and, if so, to what extent the trustee can actually harm him.[1048] T. Govier has stressed the general boundless interdependency and mutual vulnerability of societies and that trust copes with this complexity, ambiguity, and risk.[1049] This is applicable when the trustor is put to a vulnerable position by definition, but trusting itself can also empower the trustee, meaning that the trustor also holds a certain notion of power over the trustee.

Trust is thus a "risky investment" for the trustor, as she must transfer control over certain resources or events to the trustee, and at the same time is incapable of determining the final outcome (see further about the necessary discretion of the trustee).[1050] This risky giving away of control and discretion makes the trustor dependent on the trustee.[1051]

[1048] Möllering (n 258) 8.
[1049] Govier (n 301) 3.
[1050] Rompf (n 265) 35.
[1051] Townley and Garfield (n 325) 96.

But interdependence means the dependence of two or more people on each other; thus, it is not a one-way dependence relationship. How is the dependence of the trustee on the trustor constituted? A. Baier has stressed early on in trust research that trust alters power relations in that it gives new powers to the trustee (discretionary powers to decide over that which is entrusted) and deprives the trustor of those powers.[1052] That is the essence of vulnerability. Injustices arise when people are unfairly and inaccurately represented by others as being untrustworthy; these kinds of injustices can become a self-fulfilling prophecy.[1053] Unfair distrust is un-empowering and may arise from prejudicial mistakes in attributing success or knowledge.[1054]

So, dependence and vulnerability can be taken as a two-way street: although evidently manifest in the case of the trustor, it can also be traced back from the conditions of the trustee, especially in cases of prejudicial or unfair distrust or the withholding of trust, as the position of the trustee is also in the hands of the trustor's choice to act on trust. This has the potential to empower the trustee.

The mutuality already emphasised in the name of mutual trust reinforces even more this idea of interdependence. It creates the relationship of mutual reliance and expectations with regard to the object of trust in a systemic and closed setting of the EU. According to Baier, trust and trustworthiness are best attained when there is some approximation to equality between the parties and when trust is reciprocal.[1055] This mutuality and reciprocity gains particular importance in long-term, open-ended relationships, given the costs of construing fully effective constraints and controls and the reinforcing and self-fulfilling nature of both trust and distrust.[1056] As trust saves transaction costs – if the transaction is attempted without trust, costly methods of constant monitoring or legal safeguards must be put into place – the test of perceived trustworthiness (and hence trust) is not how one performs when monitored, but how one performs when trusted, i.e. left minimally monitored.[1057]

But the equality part cannot be taken without reservations, as it has been stressed that trust needs to become discriminating if it is to become wise.[1058] The discrimination concerns keeping

[1052] Baier, 'Trust and Antitrust' (n 287) 240; Baier, 'What Is Trust?' (n 316) 182.
[1053] Hawley, 'Trust, Distrust, and Epistemic Injustice' (n 476) 74.
[1054] ibid 75.
[1055] Baier, 'What Is Trust?' (n 316) 183.
[1056] Ribstein (n 259) 561; Baier, 'What Is Trust?' (n 316) 182.
[1057] Baier, 'What Is Trust?' (n 316) 183.
[1058] Karen Jones, 'Distrusting the Trustworthy' in David Archard and others (eds), *Reading Onora O'Neill* (Routledge 2013) 189.

oneself responsive to contrary evidence and having due regard for the conditionality of trust – i.e. we do not need to know for the specificities of a trust relation whether people are trustworthy in general, but rather whom we can trust to do what under what circumstances.[1059] The equality relates to equality of the parties as leading to more stable trust relations, but not colouring or dismissing trust as an universal attitude on the basis of this relying e.g. on group membership.

Group membership is certainly a reality with regard to the EU and is manifested in many accounts of mutual trust, especially the most recent ones, which argue that as for the membership in the EU and the signing of the treaties, including Article 2 TEU values, Member States must mutually presume each other to recognise, adhere to, and comply with these values. Compliance is derived directly from membership without many additional controls or safeguards, as there is no effective value enforcement mechanism and political action has struck a stalemate. From a more traditional constitutional theory perspective, it should be first and foremost the Commission or the Council that enforces the rules, including respect for the rule of law, and that places the idea of trust between the Member States in the EU context. Member States should and could be able to trust each other precisely because the EU (presumably in the institutional form of the Commission) can distrust Member States and enforce the agreed rules. As Jan-Werner Müller has put it: "precisely because Brussels can mistrust Member States, Member States can then trust each other".[1060] This construes a tripartite trust relationship, where the trust in the EU and EU's distrust in Member States would allow and facilitate the mutual trust between equal fellow Member States. This can be drawn also from the trust-theoretical three-party relationship enhancing interpersonal trust and the role of courts in it: as explained further in section 4.3.2.2 it similarly claims that because of the role of courts to control and treat their object of inquiry with distrust, it makes more trust, reliance, and cooperation possible in society as people can cooperate and trust in such cooperation, perhaps even sign contracts, precisely because they have trust in and rely on the judicial system that will enforce and remedy those contracts and broken trust relationships in occurrences of a breach.

Equality as a normative foundation for mutual trust was claimed as a Treaty basis for the principle by the president of the Court.[1061] But equality cannot and should not function in a way which systemically undermines the EU values themselves (rule of law, democracy, fundamental rights). This might be the case with regards to a blanket obligation of mutual trust which inhibits

[1059] ibid.
[1060] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 European Law Journal 141, 145.
[1061] Lenaerts (n 93) 807.

actual judicial controls while adding an element of EU and CJEU deference. This claim of equality as a normative justification of mutual trust directly contradicts the conceptual claim that trust needs to discriminate and be open to contrary evidence in order to be wise and rational. Although there is also a tendency towards such new avenues and mechanisms to obtain and consider evidence in mutual trust case law (e.g. *Aranyosi*, *LM*, *ML*), there is also a continuing case law which denies such possibilities and keeps insisting on complete and unqualified mutual trust even in the face of concrete contrary evidence (see e.g. *Liberato, IK, Salvoni, Meroni, Lebek, Diageo Brands* among others). Almost with no exceptions, these cases come from the civil justice policy field, which although it is identified as a trend-setter in mutual trust jurisprudence, is also left behind in the latest conceptual developments and remains until today the odd one out in the broader context of mutual trust's jurisprudential progressions.

The broader element of interdependence in the way which mutual trust operates also cannot be denied. It probably needs no further explanation that the presumption of law- and rights protection-abidance and acting upon such trust makes the executing Member State reliant and dependent on the actions of the issuing Member State. This is most evident in the transfer cases – the EAW or the Dublin transfers provide good examples of where, as per the ECtHR *Soering* doctrine, both the executing and the issuing Member State might be held responsible for human rights violations (resulting not only from the transfer, but also from what happens thereafter). Thus, the transferring Member State's possible liability (not to mention the treatment of the persons concerned) is directly dependent on the actions of the Member State of transfer destination. Besides external legal liabilities (i.e. ECHR and ECtHR), the national courts also have to consider domestic (possibly higher) standards and constitutional requirements. Thus, it is also about the internal identity and culturally, ethically, and historically contingent grounds and practices of rights protection (*Melloni* being a vivid example of mutual trust overriding the argued constitutional identity and higher standards of the Spanish constitution).

Related and intertwined with this interdependence are two other important contextual parameters: vulnerability and risk. Risk, or having something vested, is a requisite of trust – the need for trust only arises in risky situations.[1062] Otherwise, it would be confidence (no risks or risks are fully mitigated and suppressed) or lack of action (risks are too high and one withdraws

[1062] Mayer, Davis and Schoorman (n 346) 711.

further action – thus trust does not manifest itself, as both the dispositional and behavioural components are missing). Trust is a response to risk and trusting is always risky.[1063]

The risk involved is also a special kind of risk – arising from interdependence and vulnerability and the social contexts that require trust. J. Coleman has stressed that situations involving trust constitute a subclass of those involving risk – they are situations in which the risk one takes depends on the performance of another actor.[1064] But what is risk and how is it different from danger? This was already carved out by Luhmann in his differentiation of trust and confidence in that the former relates to risks and the latter to danger because for the latter there are no choices or agency available.[1065] This has been confirmed by contemporary understandings of risk as the probability of adversity related to our own actions, choices, and commitments (as opposed to a passive stance and the fate that dangers may materialise without us having anything to do with them happening).[1066] So risk is intertwined with the other characteristics of trust – those of agency (freedom to choose between alternatives) and placing oneself in a vulnerable position.

A. Baier also associates trust with reliance, risks, and vulnerability, emphasising that trusting entails a dependence on another's behaviour, thus a risk, and placing yourself in a vulnerable position of being harmed by that risk. In other words, trust is an accepted vulnerability to another's possible but not expected ill will (or a lack of good will).[1067] We need trust to provide an internally secured guarantee that mentally blocks the possibility of risk and vulnerability that results from the freedom of action of others. That opens up further possibilities of (cooperative) action otherwise not possible. But there is a curious case with regards to vulnerability, as although it is a precondition for trust because the trustor can be harmed in principle, when a trustor reaches a state of trust it means that the trustor no longer expects to be harmed.[1068] Thus it is vulnerability in the objective, but not in the subjective sense.

The described interdependence situations of mutual trust also involve risks and vulnerability, especially in cases of possible fundamental rights violations, as what might be at stake is the core value that the EU should aspire to: human dignity and the protection of human rights. Although the rights protection under question is mostly that of an individual, i.e. a party outside

[1063] Baier, 'What Is Trust?' (n 316) 183.
[1064] Coleman (n 253) 91.
[1065] Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' (n 437) 97.
[1066] Sztompka (n 330) 30; Max Boholm, 'The Semantic Distinction Between "Risk" and "Danger": A Linguistic Analysis' (2012) 32 Risk Analysis 281.
[1067] Baier, 'Trust and Antitrust' (n 287) 235.
[1068] Möllering (n 258) 8.

the CJEU created trust relationship, the state is still involved in risky choices and is made vulnerable as it might face liability and responsibility (both legal and political).[1069] The subjective dimension of trusting will be discussed later, but contexts where the CJEU insists on mutual trust involve risky situations and the acceptance of vulnerability and possible harm if trust is not met.

4.2.6. The uncertainty, uncontrollability, and yet the rationality of trust

The next category of parameters is associated with trust's function of overcoming uncertainty about another's behaviour. Trust is inherently embedded in uncertainty.[1070] It is important that the uncertainty and vulnerability present in the trust situation are irreducible, meaning that the trustor's expectations about the other's actions are imperfect.[1071] Trust is really trust in the face of contingency and having to make a behavioural decision from an incomplete epistemic basis. The uncertainty is expressed either according to missing information and evidence (information asymmetry) or as time asymmetry associated with uncontrollability of the (mostly future, but also uncontrollable past) actions of others as the object of trust.

4.2.6.1. Informational context: evidentiary deficit, but no contrary evidence

One main strand of critique regarding the principle of mutual trust in academia is that it is not vested in social reality and contradicts available and already proven evidence on the ground.[1072] This critique resonates with the informational context where trust as a phenomenon can exist. Already, Luhmann shed light on the feature that by trusting, an actor willingly surmounts a deficit of information.[1073] Anthony Giddens has similarly defined trust as the vesting of confidence in persons or in abstract systems, made on the basis of a "leap of faith" which brackets ignorance or lack or information.[1074] Thus, on the one hand, trust functions in a context of informational lacunas.

On the other hand, and to make things more complicated, it is important to note that relevant evidence and information regarding the trustworthiness of the trustee is at the same time one important rational basis of trust. Karen J. Cook has argued that trust is based on reasoned

[1069] This is also explained by the theoretical notion of fiduciary obligations of judges vis-a-vis the citizens and people it is supposed to protect – see: Leib, Ethan J.; David, David L.; Serota, 'A Fiduciary Theory of Judging' (2013) 101 California Law Review 699.
[1070] Hardin, 'Conceptions and Explanations of Trust' (n 430) 5.
[1071] Möllering (n 258) 8.
[1072] See for example: Halberstam (n 146) 130.
[1073] Luhmann, *Trust and Power* (n 313) 32.
[1074] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991) 244.

assessment of evidence at hand that leads one to evaluate others as trustworthy.[1075] What makes it difficult is that the evaluation of trustworthiness also involves psychological elements (the motives and intentions of the other actor as the antecedents of trust) as we cannot see inside others. The best we can do, then, is to make a fair assessment based on the available evidence at that concrete moment in time.[1076] When the stakes are low, the needed evidence may be less, but when the stakes are high, so is the pressure on evidence. Arguably, when holding responsibility for making trust decisions that affect third parties, the threshold might have to be set even higher (triggering morally and ethically laden fiduciary trust).[1077]

So, all theorists agree that the rational component of trust is anchored in available information and evidence (including mediators of such information like reputation and past performance[1078]). But the important part is that this available evidence cannot be complete or entirely cover the object of trust. As Lewis and Weigert have put it: "[t]rust is based on a blend of knowledge and ignorance".[1079] D. Gambetta has diagnosed well this paradox and the role of evidence and information in the development of trust. He explains aptly that trust begins with keeping oneself open to evidence and stresses the specific nature of trust as a "peculiar belief predicated not on evidence but on the lack of contrary evidence"[1080]. This fragile balance between existing and missing information and the importance of non-existing contrary evidence is what really defines the essence of trust and what makes it such a fascinating mental and social phenomenon.

The question of available evidence is a tricky one for the functioning of mutual trust in CJEU case law. If trust is predicated on evidentiary lacunas but the categorical lack of contrary evidence, then the way in which mutual trust is deemed to function in the EU as per the Court is deeply problematic, as there are numerous cases where the national courts have referred cases and questions to the CJEU on the basis of direct contrary evidence, i.e. either proven or alleged infringements of either primary or secondary EU law[1081]. This direct evidence should overturn obligations arising from mutual trust as an EU law compliance presumption or more systemic

[1075] Karen J. Cook, Jessica J. Santana, ´Trust and Rational Choice´ in Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 273.
[1076] Hawley, *Trust* (n 310) 15.
[1077] ibid 55.
[1078] Uslaner, *The Oxford Handbook of Social and Political Trust* (n 333) 273.
[1079] Lewis and Weigert (n 268) 970.
[1080] Gambetta (n 252) 234–235.
[1081] See for example cases on proven or suspected EU secondary law infringements or procedural or factual errors: *Prism Investments* para 21, *Apostolides* para 47, *Rinau* para 56, *Diageo Brands* para 47, *Zarraga* paras 34, 36, *Purrucker* para 58, *Planzer Luxembourg* para 45, *IK* para 16, *Bouygues* para 34, *IM* para 49, *Salvoni* para 17, *Liberato* para 23.

rule of law and fundamental rights violation[1082] as Article 2 TEU values non-observance in practice should also overturn the mutual trust presumption of value and fundamental rights' compliance. For trust to be rational and functional (and also valuable in a more ethical sense), it needs not contradict available evidence of possible untrustworthiness. As in numerous cases the CJEU has imposed mutual trust obligations even in the face of manifest EU law and Article 2 TEU values violations, it contradicts this basic property of trust as a concept.

It conceptually strengthens the long-standing critique of the Court's mutual trust case law that it does not take into account the social reality and presented evidence and concerns that national courts refer to the CJEU. But besides this vast case law, which either clearly or allegedly contradicts available evidence about the compliance and adequacy presumptions put forward by the principle of mutual trust, there is also of course a lot of case law where there really are informational lacunas and epistemic gaps – where national courts and authorities may have their suspicions or reluctances that have prompted the preliminary references, but there is no concrete contrary evidence to dispute mutual trust. The early first-generation internal market cases are a good example of this, where there was a general reluctance to accept foreign checks and controls (or later on diplomas and qualifications) but no necessary rational or evidentiary basis for this reluctance, which usually remained purely speculative. In such cases, insisting on mutual trust is possible and justified from a trust-theoretical perspective.

4.2.6.2. Temporal context: trust as directed to the future

Uncertainty as a parameter of trust has also a temporal feature: trust is usually directed to the future actions of others that we cannot control, as we cannot predict the future.[1083] In this most prevalent form, trust is a state of expectation of those future actions of others. This temporal aspect was already addressed by Luhmann when he emphasised the problematic relationship between trust and time in order to show that trust is to anticipate the future; it is to behave as though the future were certain, although it is not.[1084] Time and risk are bound: as per Coleman,

[1082] See for example cases on such alleged systemic or concrete (defence) rights or rule of law violations: *N.S., Aranyosi, LM, Trade Agency* para 20, *fly-LAL Lithuania* para 50, *Meroni* para 46, *Lebek,* para 39, *Eurofood* para 67, *Ibrahim* para 82, *Donnellan* paras 33,35, *C.E. and N.E.* para 63.

[1083] This temporal and control aspect of trust becomes visible very well in the above cited D. Gambetta's trust definition: trust as a particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both *before he can monitor such action* (or independently of his capacity ever to be able to monitor it) and in the context in which it affects his own action. - Gambetta (n 252) 217.

[1084] Luhmann, *Trust and Power* (n 313) 10.

time asymmetries in delivery introduce risk into a unilateral action or transaction for the party or parties who must invest resources before receiving a return.[1085]

To qualify this further, trust can also be directed to past or current actions or intentions, but then it means they have to be uncontrollable in essence, or the trust-decision is developed in the context of missing information about them (see the previous contextual parameter of information asymmetry). Dasgupta has noted that the importance of trust is a result not only of our inability to monitor others' behaviour due to a time lag but also because of the unobservability of some of these actions.[1086] Unobservability can be equated with uncontrollability in the moment the trust-decision has to be made. In most accounts of trust, it is directed to the unpredictable and contingent future. In very rare and limited occasions, the object of trust can be the uncontrollable present or past.

This temporal aspect is reflected differently in different clusters of mutual trust cases. In one important topic, where mutual trust is used – the Dublin or EAW transfer disputes – the temporal directedness to the future is present. In those cases, the involved risks and vulnerabilities have not materialised yet, but may, if the persons are transferred to the issuing or responsible state and not treated adequately. Thus, the executing court usually does not know for certain whether the acclaimed fundamental rights violations will take place or not: there is a situation of risks, vulnerability, and interdependence due to the unpredictable and uncontrollable future action of others (of the country and authorities of the transfer destination).

At the same time, most cases where mutual trust is invoked concern the facts, actions and claims of something that has already happened in the past. This is characteristic of ex post judicial review: it predominantly concerns control and identification of facts and events that have already passed to make judgements on their legality or illegality. Judges usually do not engage in deciding the legality of future events, except for very limited, usually procedural instances (i.e. deciding on the legality of continuous detentions, transfers, giving out licenses for surveillance or other intrusive evidence collection, granting provisional legal protection, etc). Effects that can or may materialise in the future might be part of judicial deliberations and considerations, but they rarely belong to the concrete subject of proceedings or proof that the court needs to ascertain.

[1085] Coleman (n 253) 91.
[1086] Partha Dasgupta, ´Trust as a Commodity´ in Gambetta (n 252) 51; Misztal (n 277) 83.

Here lies the second important conceptual point of critique: judicial review as predominantly concerned with controlling past events cannot have the necessary element of future directedness or uncontrollability necessary for trust to exist. Judicial control by definition has to control the legality of things that have happened in the past; thus, in principle there can be no claims of trust towards the legality, adequacy, or appropriateness of such events. This explains well the tensions apparent in mutual trust case law, where the Court has upheld mutual trust and recognition claims (including the mutual trust claim of EU law compliance) despite judicially proven misapplications of EU primary or secondary law.[1087] Besides the logical contradiction (to assume compliance in the face of proven non-compliance) there is also a conceptual problem here, as the context of trust is not fulfilled: there are no temporal or otherwise uncontrollable uncertainties for trust to arise as a concept in the first place.

4.2.6.3. The common denominator: the aspect of uncontrollability

A unifying facet of uncertainty is the impossibility of full control over the object of trust. This should be explained with reservations, as some (background) monitoring and control mechanisms can in fact facilitate or start off trust-creation. K. Hawley has emphasised that vigilance underpins trust.[1088] But this vigilance cannot be absolute and all-encompassing, as otherwise it would be mere rational calculation and confidence in the functioning of controls, and trust would become redundant. Trust begins where prediction ends.[1089] In Luhmannian terms: trust and control (also through law) are functional equivalents for the same goal – complexity and uncertainty reduction.[1090] There has to remain at least a grain of uncontrolled uncertainty for trust to exist, as uncertainty is the constitutive attribute of trust. As Cotterrell has put it: trusting is a way of coping with the impossibility of gaining sufficient knowledge of all aspects of complex circumstances.[1091] If there were total mastery and control over events and the actions of others (the object of trust), then trust would be superfluous and unnecessary.

Control systems are thus alternate mechanisms for dealing with risk in relationships.[1092] As per Mayer et al., the concept of trust arises when control mechanisms are reduced or removed.[1093] The two can also come in degrees, as trust and control are not necessarily forever and always mutually exclusive. It is more complex and, as always with trust, depends on what the control

[1087] See most pronouncedly in cases *Diego Brands, Zarraga, P v Q, Liberato.*
[1088] Hawley, *Trust* (n 310) 56.
[1089] Lewis and Weigert (n 268) 976.
[1090] Luhmann, *Trust and Power* (n 313) 15, 34.
[1091] Cotterrell (n 261) 78.
[1092] Schoorman, Mayer and Davis (n 346) 346.
[1093] Mayer, Davis and Schoorman (n 346) 710.

system (and trust) are directed at and the level and context in which it operates. Thus Mayer et al. have also stressed that in the particular instances when the risk in a situation is greater than the trust (and thus the willingness to take that risk), a control system can bridge the difference by lowering the risk to a tolerable level managed by trust.[1094] But some level of uncertainty and uncontrollability must remain for trust to be able to exist.

The uncontrollability can manifest itself either through the previously presented informational or temporal asymmetry, i.e. either there are no ways of controlling the future contingent actions of others or there are informational deficiencies surrounding the present or past actions and facts. They can also be simultaneous and cumulative: the uncontrollability can be caused both by the future directedness of trust and by additional informational gaps about past or present events that would provide epistemic basis for trustworthiness convictions (i.e. no previous experience or familiarity, no value congruence, no reputational sources, etc.).

Here lies the controversial paradox of trust and mutual trust: the puzzling and tense relationship between trust and control. Control includes judicial control. The way in which the CJEU alternates between obligatory mutual trust (and thus no control) and the occasional permission of controls is symptomatic of mutual trust jurisprudence. It might be explained by conceptual frictions.

The default rule stemming from the principle is that there is no possible control and no second-guessing another Member State's EU law or fundamental rights compliance record, even if manifest errors or evidence point to a different conclusion.[1095] And control is what the judiciary does. So the way in which mutual trust functions effectively inhibits judicial control and power in Member States. It proposes instead a CJEU obliged mutual trust. This in fact at first sight satisfies the conceptual characteristic of trust as arising in situations of uncontrollability, but the context is still categorically different: there are usually neither any informational lacunas, but instead concrete contrary evidence (which spreads and should prompt distrust and controls); nor are there temporal aspects that impede controls, but instead the situation of uncontrollability is caused by the Court's mutual trust doctrine itself. This is related, inter alia, to autonomy and the inherent freedom and discretion to choose trust. If this autonomy is taken away, there is a possibility of "learning by doing" or in theoretical terms therapeutic trust, but there are also

[1094] Schoorman, Mayer and Davis (n 346) 346.
[1095] See e.g. the recently pronounce doctrine that no EU or national law misapplication can affect the obligation of recognition of other Member States judgements in *P v Q*, para 46, *Apostolides*, para 60.

conceptual boundaries that prevent this from succeeding as a generalised or institutionalised policy.

All in all, even though mutual trust factually functions in a situation of hindered control, the situation is brought about by the principle itself and not necessarily by any context-dependent informational or temporal asymmetries that call for the need to use trust as a mechanism to surpass these impediments.

4.2.6.4. Trust and mutual trust "as if" – the inherent blindness of (mutual) trust

But as a result of the above, cannot it then be said that trust (and therefore mutual trust) are necessarily always blind, as there are informational or temporal lacunas? Yes, but the source of this blindness should be qualified, and the necessary rationality of trust still plays an important role.

As explained in Chapter 2, trust presents a particular combination of rationality and non-rationality. This element of non-rationality has been described and theorised in different terms and aspects. Möllering has conceptualised this important characteristic element in all manifestations of trust figuratively as "a leap of faith" required for all forms of trust: it is the "as if" element, which he also calls suspension, and which can be achieved by ways of trust as fiction, trust as bracketing out, and trust as the will to believe.[1096] The idea of suspension means that actors interact with each other as if ignorance, doubts, and dangers that exist alongside knowledge, convictions, and assurances are unproblematic and can be set aside – the result is a fiction of reality which is a result of bracketing out irreducible and unsolvable social vulnerability and uncertainty as if they were favourably resolved.[1097] Trust presumes the suspension of doubt. In Luhmannian terms, it is the functionality of reducing complexity but not eliminating it. Luhmann also describes trust as a movement towards indifference: by introducing trust, certain possibilities can be excluded from consideration; certain dangers which cannot be removed but which should not disrupt action are neutralised.[1098]

In that sense, trust is necessarily always to some extent blind – in that it cannot be fully rational and predicated on evidence. But this blindness should be rooted in uncertainty and the absence of information, not the presence of contrary information. As Giddens has provocatively stressed: "All trust is in a certain sense blind trust".[1099] Were we to have total mastery over

[1096] Möllering (n 258) 11.
[1097] ibid 115.
[1098] Luhmann, *Trust and Power* (n 313) 25. See discussion in: Möllering (n 258) 116.
[1099] Giddens (n 308) 33.

events, either the possibility to secure and predict the future or to have total information and control over the events that have happened in the past, there would be no need for trust, as there would be no element of uncertainty or uncontrollability.

This "as if" leap of faith is also prominent in the functioning of mutual trust. First, one can compare mutual trust, as a compliance presumption, a sort of intra-EU *Solange* (so lange – "as long as"), to the "as if" construction. To treat something "as if" in a legal setting is basically a legal presumption. In that sense, the principles of mutual trust and trust coincide. As explained before, legal presumptions are a special form of legal fiction, and they can amount to lies or deceptions if they are irrebuttable or are not rebutted if the presuppositions upon which the presumption is construed have been proven false. Thus, in a sense, both trust "as if" and mutual trust "as if" presumptions are fragile, in that when faced with concrete and reliable contrary evidence, both presumptions should be rebutted and the opposing (protective) mechanisms – either distrust and absence of further (cooperative) action or controls and sanctions – should be triggered.

And here also lies the main difference between the two "as if" presumptions as fictions: if the limit of the functioning of trust "as if" is the presence of contrary evidence (i.e. any evidence of untrustworthiness usually sharply ends trust as a mental attitude), then mutual trust has been imposed by the CJEU even despite the existence and proof of manifest errors and contrary evidence which clearly should have, and in reality has, triggered suspicion and distrust (often manifest in the preliminary references sent to the Court). This is another important conceptual friction that mutual trust would have to learn from trust as a concept and why it might have caused so much controversy and tension in practice and in academia. Mutual trust has received a lot of critique for its "blindness"[1100], but, illuminated by trust theories, this blindness aspect should be qualified: trust is conceptually always to a certain extent blind, as there might be informational or temporal uncertainties and uncontrollability, but such a blindness argument takes its main normative force when mutual trust is imposed despite existing and proven contrary evidence. That is the facet of blindness which is unacceptable also from a conceptual perspective.

4.2.7. Freedom – discretion and unresponsiveness to coercion

As another necessary conceptual feature, trust is characteristically entrenched in freedom, and this freedom manifests itself both with regard to the trustor and the trustee. The freedom is tied

[1100] See recently e.g: Bartolini (n 140).

on the one hand to the necessary discretionary freedom given to the trustee in the trust relationship in carrying out or with regard to the object of trust (the X in the model of "A trusts B in doing/with regard to X"). On the other hand, trust as a mental attitude of the trustor is necessarily unresponsive to coercion. The risks, uncontrollability, and freedom in trust necessitates the agency of both the trustor and the trustee, who are autonomous in their states of mind and their actions are not fully determined, i.e. neither manifestations of trust nor the honouring of trust can ultimately be forced or granted, as then it would not be a situation of trust but something entirely different.[1101]

4.2.7.1. Trust as giving discretion to the trustee

First, trust is in the first place made necessary by the freedom of action of the other party.[1102] It is about giving away control from the trustor to the trustee over a certain domain; in this domain, the trustee must obtain some degree of discretion. That is, to trust is to give away control and discretion, as is inherent in all trusting relationships.[1103] A. Baier has further explained that accepting vulnerability means letting the trustee take care of something one cares about and is vested in, giving her discretionary powers, without insisting on frequent audits or any supervision – as even if audits did show good performance, that would be performance when subject to audit, and not trusting.[1104] In systemic terms, trust is a policy for handling the freedom of other human agents or agencies.[1105] It is also recognising others' agency and capabilities; thus, if done wisely and responsibly, it might trigger trust-responsiveness and have empowering effects on the trustee.[1106]

This giving away of control and providing free discretion is the reason why trust-relations are risky for the trustor: the trust and discretion can always be violated, harming the trustor. But as risks are inherent in trust relations, such transfer of discretionary power is necessary, as per Gambetta, for trust to be relevant. There must be the possibility of exit, betrayal, or defection, and if other's people's actions were heavily constrained, the role of trust would be proportionally smaller.[1107] This was what Luhmann meant when categorising trust and control

[1101] Möllering (n 258) 8.
[1102] Lagerspetz (n 335) 29.
[1103] Cotterrell (n 261) 79.
[1104] Baier, 'What Is Trust?' (n 316) 175.
[1105] John Dunn, 'Trust and Political Agency' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (B Blackwell 1988) 73.
[1106] Victoria McGeer and Philip Pettit, 'The Empowering Theory of Trust' in Paul Faulkner and Thomas Simpson (eds), *The Philosophy of Trust* (Oxford University Press 2017).
[1107] Gambetta (n 433) 218–219.

mechanisms (or other forms of mastery over events) as functional equivalents[1108] – having one, you do not need the other for the same object. The freedom of the other and his very otherness are the object of trust – the trustor expects not to be harmed but lacks means to verify his expectations.[1109]

On the effect of law to the extent of the discretion of the trustee, Cotterrell has stressed that law cannot remove, but only shape and limit, discretions which continue to give trustees power over trustors' affairs.[1110] Also, action prior to the trusting relation must be done freely, as Luhmann explained that since trust is founded on the motivation attributed to behaviour, thus actions which are predetermined cannot be significant expressions of actors' trustworthiness. Rather, the actor must be seen as free to act – acting according to a norm is usually a weak expression from which trust can generate.[1111]

This understanding has significant ramifications for mutual trust. It cuts to the core of the interrelationship of trust and law (harmonisation, regulation) in that it refers again to the more limited role of law in creating trust and trust-responsiveness than conventionally thought. If law comprehensively bound the content and details of the discretion of the trustee, then it would leave no more room for trust and trustworthiness, but only law and law-abidance. But this already calls into question the initial understanding of mutual trust in the first-generation case law as the proper implementation of commonly agreed, sophisticated standards. Such limited discretion leaves little room for trust, and the notion should be compliance instead.

This theoretical observation also meets opposition in more recent mutual trust case law, as the CJEU has reiterated on several occasions that law and harmonised rules would "generate"[1112] or "promote"[1113] mutual trust or even constitute "an expression of the principle of mutual trust".[1114] This has been done irrespective of the subject matter, as the cases range from the internal market to AFSJ and asylum. The stress on values as the newly discovered focus of mutual trust as a "legalised" and agreed-upon category reflects the same type of misunderstanding that law creates trust (for the same object).

[1108] Luhmann, *Trust and Power* (n 313) 15.
[1109] Möllering (n 258) 98.
[1110] Cotterrell (n 261) 79.
[1111] Luhmann, *Trust and Power* (n 313) 41–42.
[1112] See *Buhagiar*, para 43; *Czhech Republic v Parliament and Council*, para 46.
[1113] *Tahir*, para 40.
[1114] *Ibrahim*, para 85.

The only explicit voice from the Court who has shown opposition to such perceptions about links between harmonisation and trust is AG Bobek, who in his opinion in case *Procureur-generaal v X* contemplated in a footnote:

> "On a side note, I must nonetheless admit that the argument made by the Procureur-Generaal (Prosecutor General) and the Belgian Government vividly illustrates the inherent tension between the terminology used, on the one hand, and the legal set-up and operation of the EAW system (or many other systems of mutual recognition in the EU, for that matter), on the other. The guiding principle is said to be one of (mutual) trust, which is supposed to be brought into being and fostered by the law. But if one trusts, there is little need for law. It is only when there is no (more) trust that enforceable legal rules become necessary. At a certain point, enforceable legal rules could indeed be superseded by mutual trust. But that can happen only gradually and organically in a bottom-up social interaction. Trust cannot be created normatively by decree from above."[1115]

This displays one of the most sophisticated conceptual analyses of trust and mutual trust and trust and law that any of the CJEU judgements or opinions have as yet demonstrated. Besides discussing the relationship between mutual trust and the existing level of harmonisation, it also pinpoints the inherent problem of imposing trust imperatively top-down, and advocates for a more organic, gradual, and bottom-up enhancement of trust. Interestingly, the final CJEU judgement made absolutely no references to mutual trust at all; it opted for a more cryptic and formal argumentation, but one that still followed the interpretation of the EAWFD in a way in which the enforcement of an EAW was not possible.[1116]

Thus, although the predominant understanding in the CJEU seems to be that law and harmonisation promotes and creates or even is an expression of trust, there are some qualified opinions on this, with AG Bobek being one of the only members of the Court to have both thought out and written down more elaborate considerations on the interrelationship between the two. In conceptual terms, law and trust are still functional equivalents, meaning that where there is law, there is no room or need for trust for the same object, and the very existence of law should in principle restrict the choice of action available for the trustee to zero with regard to the object of that law. The compliance with such agreed rules is then not a manifestation of trust and trustworthiness, but of law abidance.

[1115] Opinion of AG Bobek in Case C-717/18 *Procureur-generaal v X*, ECLI:EU:C:2019:1011, fn 21.
[1116] Case C-717/18 *Procureur-generaal v X*, ECLI:EU:C:2020:142.

4.2.7.2 Trust as unresponsive to coercion

4.2.7.2.1. External coercion – one cannot be commanded to trust

There is another connotation of this freedom inherent in trust relations: besides the free discretion over a certain domain of the trustee, it is also unresponsive to coercion, both as a feature of the trustor and the trustee. Notions of freedom, autonomy, and discretion are symptomatic of any occurrence of trust, and it does not manifest in circumstances of compulsion. When it is relatively intuitive for interpersonal trust, it also holds true for system trust, as also for the latter in cases where no choices are involved, there can be no trust.[1117] Trust cannot tolerate coercion on either end of the trust relationship: the trustor cannot be forced to trust, either by external or internal pressures, and the trustee cannot be forced to meet trust, as this again is the occurrence of control or coercion. Both have the autonomous free will to trust or not to trust and to meet this trust or not. Vulnerability and freedom from coercion are thus essential to trust – trust does not emerge from legal or any other coercion.[1118] If trust were not externally voluntary, it would be compliance, not trust.[1119]

4.2.7.2.2. Internal coercion – can one choose to trust?

If the former was related to external pressures, there is again an interesting paradox of non-voluntariness in the internal sense: a trustor cannot cognitively "choose" or will himself to trust. Although trust rests on a kind of "willingness" to trust and be vulnerable, trust still cannot be willed against the trustor's own very personal and private sentiments – trust cannot be requested.[1120] Trust is not a matter of free will cognitively. In that case it is similar to belief: you either have it or not. Actively choosing to trust or to believe is simply mimicking trust and belief (in behaviour) and does not amount to actual trust or belief. In this dual paradox, trust is at the same time free in the external meaning and determined in the internal one. A common denominator here is the unresponsiveness to coercion, both internally (by one's will) and externally and on both the trustor and the trustee.

But the issue of internal coercion or whether one can choose to trust and the cognitive dimension of free will in the trust process has been debated; it is a source of complex discussions and most of the disagreements in the literature. Although trust in its true sense has on numerous accounts been described as impossible to choose, this contradicts various rational choice accounts of trust

[1117] Sumpf (n 312) 20.
[1118] Ribstein (n 259) 566, 571.
[1119] Möllering (n 258) 119.
[1120] ibid 121.

as inherent already in their title: they believe in the possibility of a rational choice based on available evidence and information when it comes to a trusting decision. But as shown before, these accounts alone cannot provide a full explanatory account of trust as a phenomenon, as trust situations inherently take place in a context of missing information and cannot be explained on a purely rational basis. If there is only missing information and no contrary cognitive basis, the act of suspension or "leap of faith" might in fact be a conscious act of the will. But in cases where there is rational contrary information that makes trusting gullible or foolish and the actor realises the situation as such, then one cannot will herself to trust despite the contrary evidence (with the sole theoretical possibility of therapeutic trust, as discussed below in the next section). This leads to the importance of distinguishing between available, missing, and contrary evidence in analysing issues of trust.

So, the question – can we simply decide to trust? – is a difficult one. If we firmly believe (and have according evidence), we may decide to pretend to trust or to give an opportunity, but neither of these amount to genuine trust.[1121] It is acting "as if" trusting (not to be confused with the "as if" component integral to trust). But trust itself is beyond our control (and free will) like a belief – it can be overturned only with internalised contrary evidence.[1122]

This deeply theoretical discussion seems at first far removed from the principle of mutual trust, but it might not be. It provides an answer to the question: can national judges come to mutually trust each other just because the CJEU says so? And the theoretical answer is no, they cannot, as trust can be neither externally nor internally forced on the trustor. This is also what AG Bobek reflected in the footnote in his opinion in *Procureur-generaal v X* that trust cannot be normatively required by decree. But this is directly in conflict with decades of mutual trust case law that indeed impose such normative trust obligations on actors (mainly national courts) up to a point, where they must disregard for these purposes their own higher constitutional or ECHR standards (*N.S.*, *Melloni*, questions underlying foreign prison conditions in *Aranyosi* and *ML*).

Thus, this facet of trust, that it necessitates the autonomy and free agency of both the trustor and the trustee, is in stark contradiction with the bulk of mutual trust case law. The integrity of trust as a concept can only be claimed if various alternative courses of action are open in principle both to the trustor (to trust or not) and the trustee (to meet the trust or not). This makes

[1121] Hawley, *Trust* (n 310) 11.
[1122] ibid 78.

mutual trust as a legal principle inherently problematic, as legal principles should in principle be implementable and enforceable. If the enforceable facet of mutual trust is the action of mutual recognition or some other form of cooperation, what makes mutual trust necessary as a legal principle in the first place? Could not it simply be replaced by the principle of mutual recognition, sincere cooperation, procedural autonomy, or effectiveness?

4.2.7.2.3. Therapeutic trust – the semantic tactics of creating trust?

But perhaps CJEU's words are capable of changing the social reality by creating, changing, or enhancing trust relations? They do not necessarily have to be, as legal realities are realities too, as long as in Luhmannian terms they sustain the fiction well enough for the system to operate. But this operational limit might well be on the brink of a breakdown in the current European climate – as seen from the collapse of trust between collaborating national courts and institutions, which has paused the implementation of mutual trust-based instruments precisely because the friction with reality has become too grave to tolerate. And the breakdown is two-way, as the one not trusted feels accused and reciprocates.[1123] But at least in theory, there still is an avenue that might still hold the potential for real-life change (i.e. by creating trust by the act of trusting or learning by doing) by triggering trust and trustworthiness rhetoric. Although some theories support this possibility, when considered in the concrete context of mutual trust, they still lack some necessary prerequisites to create or alter reality through mere trust semantics.

The empowering theory of trust lies in the suggestion that by me manifestly relying on you – by exercising trust – I may not only cause you to exercise your existing capacity for trust-responsiveness (which may also be internal and moral – your pre-existing disposition not to let people down), I may also cause you to develop that capacity, achieving a higher degree of dependability and durability (trust-responsiveness).[1124] This can be paralleled with another theoretical account of the so-called therapeutic trust, where the trustor strategically aims at increasing the trust-responsiveness of the trustee by the explicit acknowledgement of placing trust.[1125]

These accounts may also be relevant for the EU to analyse whether the rhetoric of mutual trust might have such an empowering or therapeutic effect. But there is an important caveat: such

[1123] See the Dutch-Polish EAW row explained above in fn 932.
[1124] McGeer and Pettit (n 1106) 18.
[1125] See: HJN Horsburgh, 'The Ethics of Trust' (1960) 10 The Philosophical Quarterly 343; Pettit (n 394).

therapeutic trust requires that the trustee is aware of the trust placed in him, its terms and object.[1126] There are cases where the functioning of mutual trust in the EU does not particularly fulfil this condition: in many instances, the recipient of mutual trust is not aware of the trust placed in it (i.e. civil justice cases, which are already decided, or EAW and Dublin transfer cases, where the actors responsible for guaranteeing fundamental rights protection might not even be aware of the proceedings in Luxembourg or in the executing state and are thus blissfully ignorant about any such mutual trust triggering and obligations). In these cases, trust cannot have any therapeutic, empowering, or trust-responsiveness-triggering effect, as the trustees are not aware of the trust placed in them and thus cannot be responsive to the therapeutic trust strategy.

There are also other types of mismatches: for example, the discrepancy between the subjects of mutual trust and their ability to influence the objects of trust (Member States' EU law compliance, criminal laws, legal systems, administration of justice, etc.). If the actual trust-subjects are unable to influence the object of trust, then the empowering theory cannot work. That is, acting on and letting the other party know that the trustor (the Member State's court) is actively showing mutual trust has no actual trust-building effect, as the trustee (another Member State's court or authority) has no sole power or authority over the trust object (legal system, fundamental rights protection level and practice, independence of the judiciary, etc).

Thus, it is rather difficult to draw parallels and derive theoretically beneficial or even ethical or moral responsiveness-triggering effects of mutual trust as a rhetoric. If the conceptual-structural elements of trust are not present or are somehow skewed, any empowering or therapeutic trust theory becomes ineffective, possibly causing more harm than benefits.

4.2.7.2.4. Trust as law – the impossibility of universalising trust

Related to coercion, freedom, and the discretion of trust participants is also the question about the legalisation of trust – imposing trust as a universal attitude or principle of law (as is the principle of mutual trust). This is conceptually problematic. Already, Luhmann emphasised that neither trust nor distrust is feasible as a universal attitude: that would either be too risky or too great of a burden.[1127] He untied trust from universal ethical claims and stressed the conditional nature of making demands, as there are obviously some cases which call for trust and other cases which call for distrust. As such, trust is rationally indisputable; accordingly, it cannot be

[1126] Horsburgh (n 1125) 346.
[1127] Luhmann, *Trust and Power* (n 313) 72.

a maxim for conduct which is valid without exception.[1128] He formulated an important procedural point:

> "Therefore, even if there is formulated a general rule about trust as a principle, the decision as to whether it should be followed or not must be delegated and left to the situation."[1129]

This again relates to freedom of choice and the discretion of affected actors. Russel Hardin has also stressed in answering the question of whether there can be trust as a norm that "[t]here clearly cannot be a sensible norm merely to trust, because far too many people would be utterly untrustworthy in various contexts in which entrusting certain things to them would cause harm to the trustee or others."[1130] He adds that there might be a norm to be trustworthy which would make cooperative endeavours prosper more readily.[1131] It is thus primarily trustworthiness which should be promoted and universalised, but not that of trust, as depending on the situation, it might be necessary, rational, and functional to distrust.

This presents a strong claim against the principle of mutual trust as a universalised principle, obligation, or norm to trust. Besides disputing it as an abstract general principle, it also lays doubt on the adequacy of the relevant actor to decide when mutual trust is required and when not – it is currently the CJEU who decides, but conceptually, as trust is entrenched in freedom and discretion, Luhmann's procedural point to leave it to the affected participants is an important one. So, although there are also the top-down exceptions of "exceptional circumstances", "systemic deficiencies", and other juridically construed limits to mutual trust, it still remains the case that the principle to mutually trust is a universal rule in the EU legal order decided and imposed by the Court upon national courts and authorities. It is up for discussion whether even those CJEU-set and ever-changing limits to its functioning really do delegate enough to the domestic (judicial) authorities to consider the particularities of the situation at hand. The ability to consider particularities is strongly required for trust conceptually, in that trust cannot and should not be universal, but is always a conscious relative attitude contingent on antecedents and institutional-informational context. Mutual trust should be rethought accordingly.

All in all, this chapter has so far shown that while the principle of mutual trust possesses many of the conceptual parameters of trust – such as relationality and conditionality, optimism, and

[1128] ibid 86.
[1129] ibid.
[1130] Hardin, *Trust* (n 277) 90–91.
[1131] ibid 91.

enhancement of cooperation, involving a situation of risk, interdependence and vulnerability, and seeming uncontrollability – it still contradicts many of trust's important features and characteristics. The clusters of cases most visibly contradicting trust conceptually are the so-called error jurisprudence cases starting from the second generation and continuing until the ongoing fourth one, where the CJEU insists on mutual trust despite existing contrary (and often manifest or proven) evidence. This directly contradicts with the rationality of trust functioning in a context of no existing contrary evidence. The other main points of friction in general are the fact that mutual trust, unlike trust, is more often directed at events taking place in the past rather than those happening in the future (with the exception of Dublin and EAW transfers); the fact that judicial control should in principle ascertain all required evidence and leave no informational lacunas, which trust necessarily necessitates; and the way in which mutual trust as imposed top-down by the CJEU violates the characteristic of trust as free from internal and external coercion and entrenched in freedom of action and discretion both on the part of the trustor and the trustee. Most importantly, neither the giving of or responding to trust cannot be coerced on anyone, nor should it be universalised as a general principle or attitude applicable without considering the particularities at hand.

The conception of mutual trust as a top-down obligatory imperative is an inherent part of its emergence in CJEU case law. It reached its conceptual peak (in terms of its "blindness" and automaticity) in the second-generation so-called classical era when the Court construed its main facets of denying any substantial or procedural judicial peer-review and brushing off even manifest errors of EU law application with the strict interpretation of public policy exceptions and mutual trust and recognition doctrines. The third generation continued with that case law, but also added the shifted focus on fundamental rights protection compliance as the main object of mutual trust. In the last generation, the focus has arguably again turned to a more flexible regime that allows for some judicial review and discretion, but conceptually, the way in which mutual trust is defined, framed, and used has not changed so much. Although it is saddled in the forefront of rule of law battles, it is done so just by making the problems the principle has brought about as a cause to embark on these new battles, areas of law, and competences. This does not fundamentally change the conceptual deficiencies constitutive of the principle on a more fundamental level.

But besides these conceptual divergences and convergences, there are some other lessons and implications that the theories of trust possess to potentially inform and elevate our discussions about the principle of mutual trust. These will be discussed next.

4.3 THE TRUSTWORTHINESS OF MUTUAL TRUST AND ITS ALTERNATES

This section considers some additional theoretical associations and implications that the theories of trust hold for the reassessing of the principle of mutual trust. It further delves into questions relating to trust and its epistemic basis and functional equivalents to illuminate the theory and practice surrounding mutual trust as understood in EU law and doctrine. It goes beyond the prior conceptual analysis and comparisons of the two by asking further questions about the relationships between trust and law and trust and values and puts forward the normative suggestion that in fact systemic and institutionalised distrust, and not systemic and imposed trust, might pave the way for more trust in societies and between actors, that being the case also in the EU context. It also elaborates further on the question whether trust is an appropriate principle in a courtroom, as the judiciary should be inherently distrustful about any claims of trustworthiness presented to it. It concludes by asking whether the way in which the principle of mutual trust functions in the Union legal order might not be more akin to its conceptual cognates such as faith, hope, or gullibility, and whether a more desirable and appropriate concept to employ in such judicial contexts might not be confidence instead of trust (that is also the current parallel wording of the principle, but conceptually different).

4.3.1. Trust and law – impact of regulation on trust creation

Just as important as the prior question of "legalising trust" (imposing it as a universalised command) is the question of how the existence of legal regulation can affect trust from a broader perspective. These are two different questions: whether there can be a legal rule to trust vs. whether legal rules can contribute to trust. This section takes aim at the latter. It has to do with the extent to which mutual trust is either supported by or reliant on common harmonised rules, which was one of the objects of focus in Chapter 3. It asks the question of whether the commonplace suggestion that "we need more law and harmonisation in the EU to support mutual trust"[1132] holds ground conceptually.

Fukuyama has observed that there is usually an inverse relationship between rules and trust: the more people depend on rules to regulate their interactions, the less they trust each other, and

[1132] See for such suggestions in the context of the principle of mutual trust e.g: Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 372; Mitsilegas, 'Trust' (n 128) 73. The Court has also made a strong assertive claim that harmonised rules create mutual trust, see recently in *Buhagiar*, para 43.

vice versa.[1133] Luhmann's note that law and trust are functional equivalents[1134] makes them mutually exclusive for the same object. In a similar vein, L. E. Ribstein has stressed in very strong words that law cannot produce trust because law substitutes for rather than complements trust.[1135] He moreover has iterated that regulation cannot produce personal trust as in the presence of regulation, parties rely on each other because of the underlying legal constraint, not because of any trust-like vulnerability. However, he does believe in the role of regulation in the so-called "seeding" of relationships, i.e. starting relationships in which trust can ultimately develop by reducing the risk of relying on others.[1136] Law instead of trust is not trust at all because it wholly replaces vulnerability with legal coercion – trust requires voluntary subjection to risk and vulnerability.[1137]

But there are also more optimistic accounts which do not necessarily deny the possible positive effects of rules and sanctions for trust. It has been observed that law and other social institutions are mechanisms to coordinate expectations which make the risk of trust more bearable and not the enforcement of sanctions, but the assurance and orientation gained from their existence is what promotes trust.[1138] According to a Luhmannian mechanism: rules can reduce complexity to a level where the further reduction of complexity (and risk) by trust becomes possible. Institutional reduction thus precedes and prepares trust (this is the so-called "institutions-based" trust).[1139] But the rules cannot eliminate risk, complexity, and vulnerability entirely, as this would make trust redundant, turning it into both externally and internally guaranteed confidence. Coleman argues that trust is based not simply on an estimate of the probability of the trustee's keeping trust, but also in part on the use of negative sanctions – when trust relations are supported by negative sanctions.[1140] Misztal also lists coercion alongside three other motives of cooperation, the others being interests, values, and personal bonds.[1141]

So there are both strong advocates for and against the potential of law to create trust. The truth lies, as always, probably somewhere in the middle. The most calibrated view seems to be that trust and law, sanction or contract can be both complements and substitutes[1142], depending on

[1133] Fukuyama (n 253) 224. Citing therein also: Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber 1974) 30–31.
[1134] Luhmann, *Trust and Power* (n 313) 15.
[1135] Ribstein (n 259) 556.
[1136] ibid 563.
[1137] ibid 571, 580.
[1138] Möllering (n 258) 66.
[1139] ibid 67.
[1140] Coleman (n 253) 115; Misztal (n 277) 79.
[1141] Misztal (n 277) 83.
[1142] See discussion and authors referred to in: Möllering (n 258) 66.

the object of both in their interaction. And the precise identification of that object is crucial in order to institutionally design trust. Trust and law both express normative expectations; thus, their normative contours can overlap[1143], but for them not to make each other redundant, their role and object needs to be specified and diversified.

In the context of mutual trust, this means that if the EU is to keep and reinforce the principle of mutual trust in the EU legal order, then the particular object of that trust should not be pursued simultaneously and overlappingly by law and enforcement. Trust is trust because there are no finite guarantees or assurances. Accordingly, if EU chooses, as it has, e.g. to strengthen defence and victims' rights in the criminal proceedings with harmonised EU legislative instruments, then the questions about compliance with those rules and the level of rights protection to the extent commonly agreed in such legislation should not be an object or question of trust, but rather of enforcement and control over the implementation of those agreed and in-force rules. The enactment of such rules cannot enhance trust in the particular object of the rules, but only trust at a wider scale (i.e. a general level of rights protection in Member States, adherence to Article 2 TEU values). This is also the reason why the current conceptualisation of mutual trust as an "EU law and fundamental rights (as protected by EU law) compliance presumption" is problematic, as compliance with EU law and fundamental rights as protected by EU law should not be a question of trust but should always be controlled and enforced (by the CJEU and also by national courts as enforcers of EU law alongside the CJEU).

But it does leave room for the understanding of mutual trust as inherently a presumption about the adequacy of national laws and institutional practices that are not harmonised and standardised under EU law. This is the second-generation added conception of mutual trust in the criminal law field as trust about the adequacy of different national criminal law systems and the acceptance of outcomes even if they are different from those commonplace in the national law of the executing state. As EU law cannot (at least yet) have substantive claims over national criminal law in purely internal matters (i.e. not relating to Union financial interests and the like), there is room for trust in those domestic laws and practices, as EU law in principle has no claims over their content, with the exception of the general adequacy of their broader (and also usually non-standardised) objectives and values (Article 2 TEU). Here is where the contemporary fourth generation understanding of mutual trust as a value recognition presumption comes in. In conceptual terms, it is an adequate object of trust, as there are no precise agreed standards of

[1143] Harding (n 507) 265.

value review and precise laws on their implementation in all Member States (with the exception of fundamental rights as categorised in the Charter and the emerging case law standardisation of judicial independence requirements). The extent to which they are not "legalised" leaves room for mutual trust. But the moment that they do become legally agreed and coerced standards, then the adequate conception should again be that of compliance and not trust.

4.3.2. The voluntary commitment account of trust: trust and values

Another associated issue tied to the interrelationship between values, law, and trust is the commitment or obligation account of trust, which correspondingly triggers moral responsibility and accountability. But moral responsibility is different from legal responsibility, which comprises another argument against mutual trust in EU law compliance, the violation of which should be the object of legal and not mere moral responsibility.

As illustrated in Chapter 2, integrity is an important element (a so-called antecedent) of trust that enhances an actor's perceived trustworthiness. One facet of integrity can be found in the notion of living up to moral and ethical standards and commitments and fulfilling not only given promises but also undertaken legal commitments (such as contracts, agreements, laws, and rules – the pacta sunt servanda doctrine). Here lies the importance of law, agreement, and rules to the possible furthering of trust and perceived trustworthiness – if a person has a characteristic and reputation of integrity, other actors might decide to trust them more readily, and thus the entry barriers and transaction costs for starting cooperative engagements are lower. If there exist potential legal coercions and sanctions in cases of default, incentives of cooperative and trust relations are even higher. That is the way in which law, rules, contracts, and sanctions can enhance trust and cooperative relations; however, an assessment of reputation and characteristics of integrity still retain their importance, as sanctions and other legal mechanisms rarely preclude deception and betrayal fully. There is always a possible margin of risk and harm, and that is also the constitutive factor of trust to be able to exist in the first place, as explained above.

This corresponds theoretically to the commitment account of trust refined by philosopher K. Hawley, in essence that trust is best understood as taking a commitment or obligation on behalf of the trustee, and trustworthiness accordingly reflects a determination to fulfil voluntarily acquired obligations and commitments.[1144]

[1144] Katherine Hawley, 'Trustworthy Groups and Organizations' in Paul Faulkner and Thomas Simpson (eds), *The Philosophy of Trust* (Oxford University Press 2017) 246.

This commitment account of trust and its emphasis on the ethical and not legal significance of commitments for trust is deeply associated with the question of trust in Article 2 TEU values in the EU. As demonstrated in Chapter 3, the object of mutual trust has shifted from enforcement and norm congruence to value congruence, and Article 2 TEU values instead of profoundly harmonised standards have become the main epistemic basis for mutual trust expectations (the presumption of compliance).

The notion of values as a basis of trust has to do with the previously discussed antecedents of trust – the characteristics of the trustee, based on which predictions about trustworthiness can be made. One of the four most cited bases of trustworthiness was the integrity of the trustee, which in essence was the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable.[1145] This compatibility of principles and values as the basis of trust has been called value congruence.[1146] This notion of shared values influences the trustor's perception of the trustee's integrity and potentially also benevolence. Values, however, cannot be directly legally coerced, but only institutionally incentivised and designed and morally condemned when defied.

The principle of mutual trust has come to rely on the shared values of Article 2 TEU in recent years as well. Taking inspiration from the commitment account of trust as primarily an ethical and not legal commitment[1147] and the paradox that the enforcement of the trust object should not be fully covered by options of legal coercion and implementation, then a value-adherence conception of mutual trust seems to fit better with the conceptual accounts of trust than the more pronounced EU law-compliance conception of mutual trust. The particularities of the impediments and competence issues in legally enforcing values leaves significant gaps for uncertainty and uncontrollability, making room for questions of trust to arise. This is similar to mutual trust objects as national (criminal) laws, where the EU as a polity has limited to no regulation and control mechanisms to enforce any of its own standards or conceptions of what those national laws should be (where EU has no competence). In the end, this also boils down to adherence and adequacy with regard to some more general standards – such as, again, Article 2 TEU values, and that the concepts and aspirations therein are protected equivalently throughout the Union, as Member States have voluntarily signed up for those values when acceding to the EU. This again leaves room for trust (in the form of mutual trust) to operate.

[1145] Mayer, Davis and Schoorman (n 346) 719.
[1146] Rompf (n 265) 54; Mayer, Davis and Schoorman (n 346) 720.
[1147] Hawley, *How To Be Trustworthy* (n 368) 9.

But one should note that there might necessarily still not be any direct legal coercion or sanction mechanisms to deploy in cases of non-compliance with those values (although there is the Article 7 TEU procedure in EU foreseen by the masters of the treaties for such instances).

4.3.3. The role of distrust in creating systemic trust

Moving on, however, to a more general level of discussion on the appropriateness and function of trust and distrust in societies, another point should be raised about the theoretical issue of how to promote trust in and between societies, and whether not distrust could in fact play a decisive role in this. Sometimes distrust is not only rational but necessary and functional. This is especially the case in institutional design and devising trust at the macro level.

A. Baier has reiterated that climates of trust come as webs where one form of trust depends on others, including trust in those, such as the police, who pose a threat to the wrongdoers; it is possible to institutionally design those webs, although it takes a social genius.[1148] The crucial point is that the institutional design of trust is possible. There are some roles and social functions in today's highly differentiated and specialised societies which are in place to show distrust in the name of trust. Besides police, examples could include the whole of the legal and judicial systems. In designing such monitoring and control mechanisms, societies inherently deploy an attitude of distrust. According to Baier, distrust is especially necessary with regard to those in power, as power corrupts and therefore distrust and mistrust are the appropriate default attitudes towards any powerful group.[1149]

As per P. Sztompka:

> "When the culture of trust is one-sided, focused exclusively on prescribing trust, but ignoring or condoning breaches of trust, it is in fact a culture of naiveness, and has highly dysfunctional consequences. [---] The culture of trust is even more dysfunctional when it requires blind trust prohibiting criticism and scepticism, forbidding any monitoring or checking of the trustee."[1150]

Sztompka sees the optimal balance in rules that are two-sided, prescribing and releasing trust, but also strongly condemning and therefore preventing breaches of trust. This is not rocket science. But it is not the case for the current functioning of mutual trust in the EU legal order, and trust theories provide a powerful footing for critique.

[1148] Baier, 'What Is Trust?' (n 316) 181–182.
[1149] ibid 182.
[1150] Sztompka (n 330) 112.

4.3.3.1. Democracies institutionalise distrust, autocracies institutionalise trust

As trust has been tied to accountability, commitments, and institutions, there has also been a strong connection drawn between different forms of trust and democracy. This has been most pronouncedly elaborated by Sztompka in his sociological theory of trust, where he derives that a proper and functioning culture of trust has several policy implications for shaping rules and institutions, such as: a democratic, coherent, non-contradictory, and transparent legal and constitutional system; strong, accountable, and transparent institutions; rule of law; democracy; judicial review of independent courts; equality before the law; fundamental rights.[1151] For that, he contends, the institutionalisation of distrust is a must. He particularly sees it as a precondition for democracy, as it has an emphasis on accountability and pre-commitment through international agreements and constitutions, and this means that trust in a democratic regime is due to the institutionalisation of distrust in the architecture of democracy.[1152] This can be seen in the principles constitutive of democratic orders, which by institutionalising distrust provide a backup or insurance for those who would be ready to risk trust, a disincentive for those who would contemplate breaches of trust, and a corrective of actual violations of trust if they occur. He describes this as a paradox of democracy, in that the more there is institutionalised distrust, the more there will be spontaneous trust.[1153]

These principles of institutionalised distrust are: the principle of legitimacy; periodical elections and terms of office; division of powers, checks and balances, and limited competences of institutions; rule of law and independent courts; constitutionalism and judicial review; due process; civic rights; law enforcement; open communication and transparency; civic and local activism and organisations.[1154] Through them, distrust is institutionalised, because it is rightly assumed that trust can potentially be breached, and because they provide correctives and safeguard against such a contingency.[1155] As long as these corrective and control mechanisms are activated sporadically, the culture of trust is not undermined but rather enhanced by the confirmation of effective accountability.[1156]

Opposing that, autocratic regimes attempt to institutionalise trust either formally or informally and try to turn it into a strongly sanctioned institutionalised demand (obligation to trust) in that

[1151] ibid 134–136.
[1152] ibid 140.
[1153] ibid.
[1154] ibid 140–145.
[1155] ibid 145.
[1156] ibid 145–146.

trust takes a paternalistic form and is unquestionable. It is also often blind, ignoring any relevant or contrary evidence.[1157] This is what Sztompka calls the paradox of autocracy: institutionalised trust produces pervasive distrust.[1158]

This theoretical framing also casts doubt on the way in which mutual trust has been legalised and institutionalised in the EU. Is it not an expression of an autocratic rather than a democratic regime? The effect and function of the principle of mutual trust to impede and subvert traditional long- and well-developed national judicial controls; to uphold EU law, rule of law, and rights violations; and to brush off any concerns and manifestations of social reality and actual distrust is concerning. It resonates with Anneli Albi's caution about the erosion of traditional constitutional rights and safeguards in Europe.[1159] It cuts to the core of basic democratic institutions and principles, such as rights to defence, rights to effective remedies, and the basic principles of legality, proportionality, and judicial independence and discretion. The way in which the principle of mutual trust plays out in the EU legal order and simultaneously affects national constitutional orders has more in common with institutionalised trust as an autocratic principle than it does with institutionalised distrust as a democratic principle.

4.3.3.2. Role of the judiciary in the creation of systemic trust

Furthermore, the fact the principle of mutual trust is first and foremost directed as an obligation on the national courts and judges poses another pertinent conceptual question: whether trust is at all an appropriate principle to impose on the judiciary and employ in the courtroom. To mutually trust, in the majority of cases, means that the national courts and judges do not exercise the judicial control they would in normal circumstances and that extraterritorial legal effect is given to acts of a foreign state in their domestic jurisdictions – in extreme cases, even in the face of manifest errors. But is it appropriate to require judges not to control? Perhaps in the cases of lack of contrary evidence, yes, as then the juridical presumption as a legal fiction would not pose a direct threat, but as with mutual trust even in instances of proven and manifest errors and violations? The latter is problematic even according to common sense; both are in tension with trust theories which have singled out specific distrust mechanisms beneficial for the creation of wider trust in societies and the particular role of the judicial system in it.

[1157] ibid 148.
[1158] ibid 150.
[1159] See: Albi, 'Erosion of Constitutional Rights in EU Law, Part 1' (n 942); Albi, 'Erosion of Constitutional Rights in EU Law, Part 2' (n 942).

The role of the judicial branch as using distrust methodically in order to create trust in societies has been specifically singled out in trust literature. Already Luhmann has stressed that an important way of institutionalising distrust for the creation of trust is supervision.[1160] He explains that he identifies particular roles which within the specific purport of their task are allowed and even required to treat the trusted as not trusted and to regard any reports about trustworthiness with distrust – such as judges and researchers.[1161] Also, Sztompka has emphasised that some social roles include an expectation of, or even demand, distrust; he especially identified police, border guards, ticket controllers, public attorneys, and prosecutors in court. They are expected to exercise suspicion as a professional duty.[1162]

Sztompka has argued for the two-dimensional character of trust in that besides the direct primary targets (persons, firms, institutions, etc.), trust is also placed in the background institutions; as per Dasgupta, enforcement agencies themselves must be trustworthy, as if your trust in the enforcement agency falters, you will also not place trust in the primary target of trust.[1163] One of the important type of contextual conditions to create trust and trustworthiness is accountability, meaning the presence of agencies monitoring and sanctioning the conduct of the trustee (such as courts, police, consumer protection, ombudsmen, standardisation boards, etc).[1164] Necessarily, however, the sheer presence of these agencies of accountability is not enough to bring about accountability and trust – they must also be able to act effectively, as if they cannot, all benefits of accountability will be lost, and the distrust seeded against the defaulting actor may also have a spill-over effect into the institution responsible for review and remedy.[1165]

This supports the strong normative claim that a principle of trust is prima facie inappropriate in a courtroom, as judges should not in principle be under an obligation (even a rebuttable presumption) to trust; their professional role includes and requires suspicion and distrust over any claim, including claims of trustworthiness. Judges have to control and ascertain, not trust and presume. As trust and control preclude each other for the same object, an obligation to trust forbids control for the same object, which happens to be the primary task of the judiciary – to exercise judicial control. It does not necessarily matter that the identified subject of the mutual

[1160] Luhmann, *Trust and Power* (n 313) 89.
[1161] ibid 92.
[1162] Sztompka (n 330) 67.
[1163] ibid 41–48; Partha Dasgupta, 'Trust as a Commodity' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (B Blackwell 1988) 50.
[1164] Sztompka (n 330) 87.
[1165] ibid 88.

trust obligation is another judge: claims about the legality and trustworthiness of foreign decisions also require and are subject to certain judicial controls. And even though, because of European integration and EU legal instruments, there might be institutional and cooperative mechanisms designed to facilitate controls and information-sharing, to impose trust over claims of illegality, creating with it an extraterritorial effect of potential illegality, should not be the primary policy object of either the Court or any institution of the EU. The doctrine of the CJEU that misapplication of EU or national law in a judgement should not be grounds for refusal to recognise that judgement from another Member State[1166] is a stark and unfortunate tendency that has a negative impact both on the extent of judicial control possible in Member States over EU law violations and the creation of systemic trust in and between Member States and their judicial authorities.

The threat of doctrine that indirectly upholds EU law violations and impedes also the national courts' role as additional guardians and implementers of both EU primary and secondary law should not be underestimated. In the context of a centralised steering of the EU, Müller has argued that in order to trust other Member States, it is important that the EU can and will mistrust Member States, meaning controlling and scrutinising them.[1167] This would propose that, i.e. in cases of EU law violations or manifest misapplications or errors, it should be solely for the CJEU to remedy and adjudge those errors. It is also a manifestation of the original understanding of mutual trust and recognition in the early internal market checks and inspection cases – that if Member States (authorities) suspect that other Member States are not complying with their obligations under EU law, not to manifest such suspicion by unilaterally forbidding the import of goods and impeding free movement, but by initiating infringement proceedings under the EU legal framework.[1168]

But although that initial logic had its merits in that particular context and time, it is not conceivable today, as the way in which mutual trust functions (i.e. with regard to purely internal matters and national laws and practices, over which EU has express competence, or even international standards) makes it much more difficult to actually use such remedies in the EU legal architecture. This relates to one of the arguments to support mutual trust as a judicial principle, found in this early first-generation *Hedley Lomas* and *Commission v Belgium* type of case law, which developed the doctrine that supported the understanding of mutual trust as

[1166] See to that effect: Case C-455/15 PPU *P v Q*, ECLI:EU:C:2015:763, para 46.
[1167] Müller (n 1060) 145.
[1168] See in cases *Commission v Belgium*, para 89; *Hedley Lomas*, para 20.

foreclosing actual controls over compliance for the reason that in actual, proven, and systematic cases of non-compliance, Member States should seek remedies and redress mechanisms through the Union legal framework and primarily through the possibility of initiating infringement proceedings against each other.[1169] This theoretical possibility has been proven insignificant in reality, as Member States have not used their Article 259 TFEU avenue even in less controversial cases of, say, internal market disputes. To date, the number of cases brought to the CJEU by one Member State against another have been so scarce that they can be counted on two hands – there have been only six judgements delivered by the CJEU, with the most recent being the Slovenia-Croatia border dispute.[1170] One Member State will probably be extremely reluctant to initiate legal proceedings against another Member State, moreover, on the basis that its constitutional court is not independent, its criminal laws are inadequate, or its standard of fundamental rights protection is poor. This seems practically and politically improbable, at least in the current socio-political reality, but of course it might still be subject to fundamental paradigm shifts if the tensions grow higher.

As a counterargument (and a supportive argument to mutual trust), claims of sovereignty, procedural autonomy, non-interference, and the aim not to fall back to reciprocity in international relations can be raised. The sovereignty and non-interference arguments can be tackled by the kind of polity that the EU and its component Member States have become – one of shared sovereignty. In areas where the EU has exercised its powers, cooperation is enhanced and free movement rights are exercised, and the claims over unlimited sovereignty and procedural autonomy are bound. The principle of non-interference, not to meddle with the purely internal matters of another state, is limited when there is an extraterritorial aspect, as there almost always is with regard to mutual trust and recognition instruments. If the Portuguese are most likely not interested in what happens to Bulgarians in Bulgaria, then they are or should in principle be interested in what happens to Portuguese in Bulgaria who have used their free movement rights, or in what happens to the Bulgarian in Bulgaria who is subject to an EAW and a possible extradition from Portugal to Bulgaria, as it might trigger responsibility both under national constitutional law and the ECHR, according to the ECtHR *Soering* doctrine.

[1169] See *Commission v Belgium*, para 89; *Hedley Lomas*, para 20.
[1170] Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65. The others to the author's knowledge are: Case 141/78 *France v United Kingdom*, ECLI:EU:C:1979:225; Case C-388/95 *Belgium v Spain*, ECLI:EU:C:2000:244; Case C-145/04 *Spain v United Kingdom*, ECLI:EU:C:2006:543; Case C-364/10 *Hungary v Slovakia*, ECLI:EU:C:2012:630; Case C-591/17 *Austria v Germany*, ECLI:EU:C:2019:504.

Another counterargument lies in the question of whether allowing national courts' peer review over each other brings back the principle of reciprocity. In principle, this should be denied, as judicial review is a review of legality in concrete cases. It is not a manifestation of the international law mechanism of reciprocity, but a manifestation of liberal constitutionalism, rule of law, and democratic judicial controls over all acts applicable in a state. It is not a political mechanism of triggered strict reciprocity, as in principle when e.g. a Hungarian civil judgement is not recognised and enforced on grounds of EU law infringement by a civil court in France, this does not mean necessarily and automatically that a French civil judgement would reciprocally be denied enforcement in Hungary. This is what Müller also describes as a differentiation between systemic and one-off violations of violating shared principles and values: one-off violations can and should be dealt with by courts, while more fundamental and systemic violations might become too big of a burden on them and legislators or more systemic remedies should also step in.[1171] This argues against the bulk of mutual trust case law, which has used mutual trust to brush aside one-off violations and EU law infringements and preferred to fight more systemic and persistent deficiencies and attacks against core Article 2 TEU values.

Although such politization and systematisation of judicial review might again happen in reality (as has been the tendency recently in the Polish-Dutch EAW enforcement controversy[1172]), judicial control over all acts of state (be they domestic or foreign) is a principle enshrined in national constitutional orders and should not be deemed as a manifestation of political reciprocity. From recent developments, it rather seems that the opposite might be true: if CJEU takes a strictly restrictive and deferential view of the possible real-life triggered limits to mutual trust, that itself might trigger politization and reciprocity on a more systematic and fundamental scale. This is where mutual trust jurisprudence has led with regard to the enforcement EAWs in the Netherlands and Poland, where it has become first and foremost a political and not strictly a judicial question. I claim that this could be followed back to the problematic mutual trust case law by the CJEU – if a case-by-case judicial review would have been always possible and supported by EU institutions, then it might have mitigated against and prevented the current, more systemic positionings and collapses of trust and cooperative mechanisms.

[1171] Müller (n 981) 150–151.
[1172] See explained above in fn 932.

4.3.3.3. Trust and interpretation

There is another problem with having a universalised principle of trust in the courtroom, and that is related to the effects of trust on interpretation and judging. Trusting can be conceived of as a framing surrounding the interpretation of evidence. This is because we use, process, and take as a basis the available information to develop and inform our trust, estimates of trustworthiness, and the trusting action based on that trust. And this interpretation is itself also influenced by already-held trust or distrust beliefs. There is a circularity: the use of evidence in our assessments of the trustworthiness of others always implies interpretation, and the interpretation we give to the evidence will be dependent upon our previous relations with people and dispositions.[1173]

Lagerspetz has conceptualised trust as an interpretative activity[1174] and K. Jones has focused on the cognitive aspect of trust as interpretation.[1175] Jones stresses the fact that trust guides our perception of the facts: it reveals itself in patterns in the agent's interpretations of reasons.[1176] Trust is what makes us interpret facts in one way rather than another (favourably to the trusted and unfavourably to the distrusted person).[1177] In that sense, trust can also distort the perception of reality, reproduce innate prejudices, and be subject to the usual cognitive biases of a human mind, as can distrust in a diametrically opposite way. But the consequences are somewhat different: in cases of distrust you withhold cooperation or set up controls, in cases of trust you venture in cooperative action but make yourself vulnerable to risks and negative impacts.

If mutual trust is to be taken as an interpretative principle, it seems to align at first sight with the interpretative functionality of trust. But on a closer look, it becomes more problematic. How should we regard a legal principle of trust if it might have an inherent prejudicial and evidence-ignoring or -colouring effect? This obfuscates the role of the courts as (at least in principle and seemingly) objective, neutral, and professional (thorough) institutions for settling societal disputes.[1178] Obviously, everyone might have some biases in decision-making, and courts and judges are no different in that regard. We might interpret the actions that seem to us more

[1173] Lagerspetz (n 335) 81.
[1174] ibid 81 et seq.
[1175] Jones, 'Trusting Interpretations' (n 295).
[1176] ibid 16.
[1177] ibid 27; Lagerspetz (n 335) 86.
[1178] See also on the necessary virtues of judges and the added requiresments in contexts of inter-legality: Klabbers (n 950).

trustworthy more beneficially than those that seem less trustworthy. But should this bias be turned into law via a judicial principle imposed on national judges?

This is a bit more problematic, as the function of judges is to control and ascertain to a certain standard (i.e. beyond reasonable doubt, preponderance of evidence) the facts of the case at hand. If this is to be replaced by a principle of trust in the evidence gathered or shared, it disturbs the underlying balance and doctrine of judicial decision-making. In the context of the principle of mutual trust, such an obligation to trust is put primarily on and between national judges – i.e. the EU instrument executing judge must have mutual trust and rely on the evidence put forth by another Member State's national judiciary (usually the issuing judge).[1179] Such a standard to interpret the evidence given by one more beneficially than evidence given by another is concerning in a judicial setting. Even if it is premised on the presumed independence and trustworthiness of all Member States' courts, as recent political reality has shown, such a presumption cannot be taken at face value anymore.

Accordingly, mutual trust is not an appropriate interpretative principle to give guidance to national judges in their assessment of evidence. The process of assessing and interpreting the law and linking it with available evidence should be left to the more traditional and well-established interpretative rules and principles and to the integrity and good judgement of national judges, and not to a CJEU-imposed principle of trust.

4.3.4. Mutual trust as confidence, reliance, faith, hope, or gullibility?

Chapter 4 illustrated how the CJEU's concept of mutual trust does not correspond in all aspects and parameters with the theoretical concept of trust. This is an important inference in its own right, but what about its true conceptual character? Might it be that the concept of mutual trust has more in common with the conceptual cognates of trust as described above in Chapter 2?

As we have seen, trust is a kind of blend of knowledge and belief, information and ignorance, evidence and lack of evidence. The different constitution and ratio of these components determine the concept. The availability and consideration of information as the basis for forming a certain belief about expected outcomes and the trustor's modality differentiates trust from hope, faith, and gullibility. As a reminder, trust must be grounded on some, although imperfect, evidence, and there cannot be contradictory evidence; hope is grounded in the total absence of evidence, and faith is arguably grounded in the ignoring of contrary evidence.

[1179] See on the special obligation of reliance on evidence and information transmitted from the national judiciary as opposed to the national executive branch – *ML*, paras 112-113.

Gullibility is the personal disposition of the trustor to be indifferent or ignorant towards the potential evidentiary basis of the trusting belief because of a disposition towards the formation of trusting attitudes.

As mutual trust often requires trust and reliance despite the existence of contrary evidence that would normally direct towards distrust, perhaps that particular manifestation of mutual trust is more akin to a degree of faith, as faith can be conceptualised as a trusting belief despite contrary evidence.

Another occurrence of mutual trust is the situation in which there might not necessarily be existing and apparent contrary evidence, but mutual trust prohibits the obtaining of evidence (i.e. the normative rule deriving from mutual trust not to review other court's decisions in fact or in law). This manifestation has similarities with hope and gullibility – hope needs not be grounded in any evidence and is also a more passive stance (the actor must not necessarily act on hope), while gullibility is mental indifference to possible conflicting evidence, but includes activity and results in recklessness.

Thus, these different manifestations of the mutual trust position are closer to those of hope, faith and gullibility as conceptual cognates. But what could be the conceptual aspiration of mutual trust? I claim it can be either confidence or mere reliance, depending on the context and situation. As a reminder: reliance is the manifestation of the behavioural component of trust that does not need to have a moral, commitment-triggered connotation (as we can rely not only on impersonal and inanimate objects, but also on people, without them knowing we rely on them: e.g. I rely on my neighbour walking her dog every morning precisely at 7 to adjust my morning schedule, but that does not mean I have any moral expectations or can feel betrayed when this prediction is not met – I may feel surprised, but not let down by my neighbour, as she was not aware of my reliant expectation). In the context of mutual trust, reliance could conceptually be mutual recognition, as the behavioural manifestation of mutual trust and thus the necessity of another concept or principle with the same functionality is dubious.

Confidence, on the other hand, was a concept characterised by a stronger level of assurances available and leading to mental certainty. It requires a stronger evidentiary basis and is distinguished from trust in that it rests on knowledge or almost complete predictability of the other's actions. This is a concept that is potentially compatible with judicial review, as it assures via knowledge and information (thus judicial control and review) and not via mere hope or faith that law will be complied with and rights will not be violated.

Whether trust or confidence is appropriate also depends on the object of mutual trust and its controllability either by national courts or by the CJEU. The conception of mutual trust as a broad EU law and fundamental rights (as protected under EU law) compliance presumption does not make sense conceptually, as EU law and rights as protected under it should be a matter of control and compliance both by the CJEU and by national courts (or, as in recent cases, refer a question to the CJEU or control themselves on the basis of CJEU-drawn parameters). Here a more appropriate term could be confidence: both executing national courts and the CJEU should be confident and have reassurances that relevant EU law was adequately implemented. But in the conception of mutual trust as a more practical EU principle of judicial deference and comity left to national courts in their respective fields of autonomy, trust might play a conceptual role. The same holds true for a value abidance protection with no means of control. But then the definition of mutual trust as an EU law and fundamental rights (as protected under EU law) compliance presumption should be explicitly changed to a national law (and fundamental rights as protected under national constitutional law) compliance presumption, as continuing with the current definition would cause unnecessary misconceptions.

Thus, a more appropriate judicial concept would be that of confidence and not trust with regard to EU law compliance; if the main purpose of mutual trust is rethought as a national law compliance presumption, the definition should be change accordingly. It is remarkable that mutual confidence is a parallel name used by the CJEU for essentially the same principle (see on that Chapter 3). But perhaps it has been a more appropriate concept (at least in theoretical and semantic terms) all along.

4.3.5. Attribution of disappointment

Delimiting mutual trust as a phenomenon might have practical ramifications, too, besides being a mere object of intellectual and conceptual curiosity. As explained earlier in Chapter 2, there is a theoretical and conceptual differentiation between trust and confidence; its main variation comes also from the attribution of disappointment when the trustee lets you down.

Luhmann draws a clear conceptual differentiation between trust and confidence in his theory. He argues that although both concepts refer to expectations which may lapse into disappointments, the differentiation between them depends on perception and attribution – if you do not consider alternatives, you are in a situation of confidence, whereas if you choose one action in preference to others in spite of the possibility of being disappointed by the action

of others, you are in a situation of trust.[1180] Although both can be a matter of routine and normal behaviour, Luhmann still associates trust with risks (as it presupposes a situation of risk – you can avoid taking the risk, but only if you are willing to waive the associated advantages) and confidence with danger (you are confident that your expectations will not be disappointed, although there is a contingent danger of disappointment, but there are no alternatives – you depend on confidence).[1181] That differentiation leads to a corresponding different reaction in cases where those risks or dangers materialize – in cases of confidence, you will react to disappointment by external attribution, but in the case of trust, you will have to consider an internal attribution and eventually regret your trusting choice.[1182]

It is interesting in this regard that the CJEU uses the terms "trust" and "confidence" interchangeably in its jurisprudence. That might lead to another interesting question – when the Court requires Member States (courts) to have and show trust as a normative rule (i.e. they have no alternatives, legally speaking), then does it not therefore inherently imply also that they do not have another reasonable choice, and the terminologically correct term to use should be confidence rather than trust?

But more important is the conceptual difference between trust and confidence and the consequences of attribution over disappointment. It might also be strategically desirable for the EU to use and employ the concept of confidence instead of the concept of trust in the blame attribution component as well. The EU in all likelihood would not want to be blamed for Member States' failures to meet expectations. Such attribution of blame on the EU or on the CJEU might have long-term negative effects.

4.3.6. The fragility of trust

Although the benefits of trust when rational and functional (i.e. directed towards the trustworthy) cannot be disregarded, trust is usually not a problem when cooperation flourishes and there are no failed expectations or mismatches. Trust usually becomes topical when it is problematic.[1183] In other times, it is taken for granted if not specifically pronounced, as the early economist Alfred Marshall contended: it "permeates all life, like the air we breathe: and its services are apt to be taken for granted and ignored, like those of fresh air, until attention is

[1180] Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' (n 437) 97.
[1181] ibid.
[1182] ibid 97–98.
[1183] Möllering (n 258) 2.

forcibly attracted by their failure".[1184] As trust tends to become visible only through breakdown, it is the most effective and fully actual when it remains unnoticed; trust thus ideally occurs as the invisibility of trust.[1185] Perhaps, then, emphasizing it as explicitly as has been the exceptional practice in the EU legal judicial setting lately might instead have a negative effect, as it turns trust very much visible and perhaps even lays bare the existent manifest distrust.

Depending on the existing antecedents, trust is generally taken as slow and difficult to initiate, arduous to maintain, and notoriously easy to destroy.[1186] As A. Baier has contemplated: once trust has broken down, it is very difficult to rebuild, as it is a kind of miracle that it was ever there in the first place.[1187] This derives from the characteristic of distrust not being domain-specific like trust, as when doubts arise in relation to one aspect of an actor's conduct, they are liable to arise in relation to every other aspect of that actor's conduct.[1188] The destructiveness of distrust and betrayal also come to the fore in the continuum of distrust-mistrust-trust in that the mistrust resulting from the breach of trust leads rapidly to full-fledged distrust, whereas mistrust resulting from the withdrawal of unjustified distrust will build towards full-fledged trust more slowly.[1189] Luhmann has contended that it is easier to transform trust into distrust than distrust into trust.[1190] It is for these reasons that D. Gambetta said that it may be rational to trust trust and to distrust distrust, that is, to choose deliberately to start off with tentative trust-resembling action.[1191] It might be better to start with trust than defection.[1192] Although, as explained before, one cannot be able to properly "choose" trust in the true meaning of the word, as trust is rather difficult to produce at will[1193], this is what resembles the previously described concept of therapeutic trust – choosing trusting actions although available evidence is too scarce (and corresponding risks too high) or is against the triggering of a mental state of trust.

Transferring this to the historical EU setting: might have the EU as a polity had a better situation on the trust front in times when it was not in fact so frequently emphasised and judicially

[1184] Alfred Marshall, *Industry and Trade: A Study of Industrial Technique and Business Organization and of Their Influences on the Conditions of Various Classes and Nations* (Macmillan 1920) 165.
[1185] JM Bernstein, 'Trust: On the Real but Almost Always Unnoticed, Ever-Changing Foundation of Ethical Life' (2011) 42 Metaphilosophy 395, 403, 395.
[1186] Govier (n 301) 17.
[1187] Baier, 'What Is Trust?' (n 316) 178.
[1188] Govier (n 301) 18.
[1189] Sztompka (n 330) 27.
[1190] Luhmann, *Trust and Power* (n 313) 89.
[1191] Gambetta (n 433) 234.
[1192] Misztal (n 277) 84.
[1193] ibid.

dictated? It was just a powerful, silently functioning systemic mechanism in the background making cooperation and integration possible without creating problems and disputes.

It has been described that trust can fail in three ways: by direct violations, opportunistic behaviour, or systemic collapse.[1194] The latter happens not because the parties in the trust relation are necessarily untrustworthy, but because the environment is inimical to trust: there are systemic failures that make it unwise for anyone to trust, such as rule of law or legal system failures.[1195] The latter two are imminent realities of the contemporary European condition. Systemic failures seem so high that a breakdown of trust might be inevitable, as is in fact seen in the EU legal and political setting. But can something be done about it?

A. Baier has interestingly drawn a distinction between the mechanisms of repairing trust in interpersonal versus system trust. She stresses the notion of accountability and how it takes a different form when a collective entity is trusted or distrusted; it is procedures as well as individuals that may take the fault, and when a failure becomes evident, one does not trust the inadequate procedure again but rather expects it to be revised.[1196] This is in contrast with individual trust, where after forgiveness one might be trusted again to do better: we forgive some opportunistic individuals, but we replace faulty procedures.[1197] This manifests once again the agency and reflexivity of trust. In cases of breaches, there must be the possibility of change and learning; otherwise, regaining trust is impossible.

This is to argue that perhaps it is not useful to use such moralised and emotionally connoted concepts in the legal realm of the EU, especially if they do not correspond to social reality. If they break down visibly and explicitly, they may also draw strong emotional reactions such as resentment, anger, and betrayal, and make the prospect of rebuilding trust in those remnants continuously harder. That is why it might be more functional to speak in terms of compliance, control, legality, and effectiveness than trust, and create procedures and institutions that reflect and live up to such increasing trust demands. This should be especially so in a courtroom in whichever EU Member State and in Luxembourg.

[1194] Werbach (n 285) 24.
[1195] ibid.
[1196] Baier, ‘What Is Trust?’ (n 316) 176.
[1197] ibid.

(V) CONCLUSIONS

The conceptual currency possessed by courts is not unlimited – it is bound both by the common understandings and meanings of words and concepts and by the consequences they bring about in social reality (as evaluated against the aims they argue to pursue). This certainly holds true for the EU's newly revived, reshuffled, and reasserted principle of mutual trust. While it is not a completely new concept in the EU's legal history and the CJEU's jurisprudential development, it is certainly one that has, to the surprise of many, recently gained particular attention and salience in the Union legal order, even prompting calls for a place in the prominent line of general, fundamental, or constitutional principles of EU law and being referred to and relied on by the Court in more frequent and diversifying cases and contexts.

In addressing the research question, this thesis has taken up a twofold inquiry: first, what the principle of mutual trust as developed in CJEU case law is about, what are the different conceptions and functions of mutual trust as seen by the Court, and second, how these conceptions correspond to the general concept of trust as theorised in detail by philosophers, sociologists, and other political, social, and cognitive scientists. It principally asks whether the way in which the principle of mutual trust functions in the EU legal order has any potential to promote or enhance actual trust in the EU and between Member States. It takes such a metaphysical route in order to explore and analyse the depth of the rift between trust in action and mutual trust in case law. In doing so, the case law analysis does not concern itself with the details of sector-specific legal and regulatory considerations, abundant in existing literature, but rather takes a broader vantage point to explore a more general conception of trust that the CJEU has envisioned, construed, and imposed on mutual trust addressees, usually national courts and authorities. All of this is predicated on the current state of crisis and a large-scale breakdown of rule of law, fundamental rights protection, and even democracy – the bedrocks of the Union's legal and political order, which have also started to dominate in discussions and adjudications over the principle of mutual trust.

The doctrinal section of case law analysis of this thesis carves out four distinguishable generations of case law and three broader conceptions and functions that mutual trust has come to represent in the EU legal order and constitutional architecture.

The transformation of mutual trust

First, the historical-conceptual journey through the aggregate mutual trust jurisprudence has demonstrated great transformations, flexibility, and at times great divergences – but an overall gradual crystallisation of the principle and its normative contents and contours. This genesis can be represented in a four-fold categorisation to case law generations, based on the definition, object, and subjects (institutional focus) of trust, subject fields where it is used and link with harmonisation and mutual recognition mechanism. The findings are summarised in Table 1 in Chapter 3.

The first generation, or the foundational era, started in late 1975 and continued until 1998, with the main focus of mutual trust in the checks and inspections conducted in the internal market of goods in the context of extensive harmonised rules and standards. The second-generation developmental era, from 2003 until 2010, brought mutual trust to the civil and criminal justice domain with the newly found object of trust in national legal systems (particularly criminal laws) and judicial institutions. This decoupled mutual trust from necessary prior harmonisation and enforced the acceptance of different but essentially adequate and trustworthy rules and practices.

The third generation, or the so-called classical era of mutual trust jurisprudence, from 2010 to 2017, epitomised the *Opinion 2/13*-type understanding of mutual trust as a broad-brush EU law and fundamental rights compliance presumption for the benefit of EU law enforcement and autonomy vis-à-vis differing (and often higher) national constitutional standards and practices. In this classical era, mutual trust was mostly used against any opposing fundamental rights claims in concrete mutual recognition instruments – i.e. it still kept its inherent tie with concrete instruments that needed enforcement and recognition. The level of needed harmonisation became more blurred as the reference to fundamental rights standards varied from the explicit definitional referral to the EU standards (i.e. the Charter), but other sources of mutual trust were also named, including the ECHR, other international agreements (the Geneva Convention), and national laws and standards. In this era, courts emerged as the main subjects of trust-obligations.

If the implicit referral to Article 2 TEU values as the epistemic basis for such trust was hinted at already in *Opinion 2/13*, it did not gain its salience until the beginning of 2017, with the fourth generation or the contemporary era, where the CJEU started its shift away from mutual trust as a disabling law and rights compliance presumption, and started to conceptualise it more as a value recognition presumption, increasingly instrumentalised to enforce the agreed values,

rights, and institutional practices in the face of growing contestation and discontent. With it, mutual trust outgrew its inherent association as the flipside of the principle of mutual recognition, as from here on it did not require the existence of a recognition instrument and started to appear in novel sui generis cases and contexts with not merely semantic but also functional and normative value in its own right.

These changes have not been all-encompassing or fundamental in the sense that one conception replaces the other entirely, but have rather been gradual and continuous, maintaining examples of previous conceptualisations, thus also leaving room for flexibility and avenues of regression back to previous understandings, corrections, or re-emphasis. This might hold important for the possibility of rethinking mutual trust in light of either purely practical-logical considerations (i.e. the prevalent blind trust critique) or the theoretical-conceptual critique put forth in this thesis. This is to say that a fundamental negation of the conceptual adequacy of the principle's function as a EU law and rights compliance presumption in the face of clearly proven contrary evidence and contexts in no way means that the principle should be abandoned in its entirety. In the abundant case law, there are examples of different, more tempered and qualified conceptions of mutual trust which allow the coherent coexistence or even mutual enhancement of the principle of mutual trust in the legal and trust in the real-life or conceptual-theoretical realm.

The competing conceptions of mutual trust

Mutual trust, like many other EU law-specific structural principles and doctrines, has always been instrumental to a certain goal. In case law, this can be identified as the golden nugget: be it achieving the internal market, the unhindered free movement of goods (and the accompanying faith in the fulfilment of product requirements checks and certificates), the speediness and efficiency of free movement of decisions in the AFSJ, or even EU's own autonomy considerations. I identified three main broader functions and conceptions of mutual trust that emerge from the vast case law: the structuring-constitutionalising function; the pragmatic jurisdiction and judicial labour-coordinating function; and the broader utopian-aspirational community-building function. All conceptions have their descriptive facets reflecting the case law as it currently stands but zooming in on the aims also allows for a clearer reconstruction of what the principle is for and how it can be further strengthened, taking into account this aim while simultaneously not losing sight of the need for a clear and coherent jurisprudence that

would be useful and instructive for its recipients (national courts and authorities, but also other actors – Member States and individuals).

The thesis does not deny that mutual trust has an important structural-relational (and perhaps also systemic) function which can be and has been used for constitutional ends – i.e. to offer and support the argument that the EU (and its component Member States) is a sui generis and autonomous polity with a special and reciprocally deeply intertwined legal system, which must be at times protected both from external international and internal national overview claims. But it does raise concern as to the one-directedness of the principle in its characteristic functioning, what A. Albi has called the erosion of classical constitutional rights and safeguards in the EU.

The second practical jurisdiction and judicial labour-coordinating function can be understood as an EU principle of comity in the context of growing complexity and interlegality. This is reflected in the main aim of mutual trust to protect national sovereignty and res judicata judgements coming from different Member States and the rules foreseen to mitigate errors, failures, misinterpretations, and misapplications of national or EU law. But a true principle of judicial deference and comity in the EU legal system should be directed namely first and foremost as a national law compliance presumption – which confers respect and regard of other Member States' courts and not one of EU law compliance presumption, as it is for the CJEU to control and remedy EU law infringements. National courts should be able to halt trans-national instruments' effects if such worries are raised.

The third function can be seen as the utopian-aspirational object and effect of mutual trust to build a values-based community. This is reflected in the attempts of the CJEU to insist on the presumptions to trust in the real-life context which would direct otherwise and its recent instrumentalisation for Article 2 TEU value enforcement. But there are some serious reasons why this might be problematic both practically and doctrinally. First, there is the double standard problem: how can the CJEU enforce judicial independence if it arguably itself is also not lawfully composed, but subject to arbitrary political appointments? Second, the effect of mutual trust has historically been and continues to be the insistence on mutual recognition instruments despite alleged or manifest EU law and fundamental rights infringements or simply judicial errors (the so-called error jurisprudence). This has for years undermined EU rule of law compliance and given extraterritorial effect to Member States' rule of law failures or simply

judicial mistakes. In this light, using the same principle as a rationale to enforce rule of law and other Article 2 TEU values might be implausible.

But there is also a modest but original strand of case law that positions mutual trust (as prevalent in secondary law instruments) as an end in itself, worthy of promotion and support by different cooperative and information-sharing means. If the principle of mutual trust is in any way deployed to enhance (alongside other mechanisms) actual trust in the EU and between Member States (authorities) as it emerges as a goal, at least in legislation and policy documents, then a more thorough focus should be put on what trust as a concept is and how it can be furthered.

Trust in mutual trust

Although trust and mutual trust are on first sight indeed similar phenomena (mental mechanisms of shortcuts or presumptions), mutual trust as predominantly conceptualised by the Court to date (as an EU law and fundamental rights compliance presumption) has significant friction with the concept of trust and the way in which (and in which necessary contexts) it operates. Here also law and case law differ. The contrast in the use of tone and emphasis of mutual trust in legislative and policy documents as contrasted with the compelling imperative tenor of the case law is stark. This thesis argues that the constructive approach taken in legislation is more in line with how trust can be built conceptually.

The way in which mutual trust has come to be used by the CJEU in its case law as a normative principle has two main frictions with trust as a concept and the sophisticated theories of how it can be enhanced or furthered by institutional design. The first frictions lie in the conclusion that mutual trust does not possess the objective contextual parameters necessary for trust to arise: uncontrollability either by way of temporal or informational aspects, that is, being either directed to the unpredictable future or the uncontrollable past actions of others. Judicial controls are usually directed precisely at controlling past actions, facts, and events and their legality. The bulk of mutual trust case law does not satisfy this objective parameter of trust. The second major contradiction is rooted in the necessary characteristic of trust as unresponsive to coercion and it being impossible to oblige as a universalised rule. This makes an obligation to mutually trust futile, conceptually speaking.

What is more, when contrasting the way in which mutual trust operates with the theoretical implications deriving from trust theories, further controversies emerge. First, trust theories question the commonplace understanding that more harmonisation can lead to increased mutual trust between Member States and their authorities. This is not necessarily the case, and as

always – it depends. The factor on which this depends is the object of trust: enacting detailed laws and regulations for the same object makes trust redundant, and thus the first does not necessarily enhance or support the second but eliminates it entirely. This is why the institutional design of trust via law should be specific, analytic, and precisely calibrated to make possible the synergies and mutual enhancements they can possess conceptually.

There is also the manifest paradox of having trust as a universalised rule: democracies institutionalise distrust, whereas autocracies institutionalise trust. Mutual trust institutionalised as a universalised principle is therefore more similar to the non-democratic principle of trust than to its democratic opposites of judicial controls, legality, accountability, and rule of law. This directly contradicts the Article 2 TEU values that the EU has set for itself and for its Member States. It is indirectly tied with another problem with having trust as a default principle in a courtroom: judges have been specifically singled out as a profession that must necessarily display distrust towards their object of control in order to create a wider trust in society. Trust as an interpretative principle, with its in-built biases and colouring of evidence, makes it an unsuitable principle for judicial practice.

So, although mutual trust case law has been adaptable, diversified, and somewhat responsive to societal changes and peer pressures (i.e. either by the ECtHR in the *N.S* and *M.S.S* saga or to national courts in the rule of law and judicial independence lineage of cases), it still has not changed course on its insistence on mutual trust despite existing contrary evidence. Although it has become laxer and some cooperative and control mechanisms in the EAW and Dublin cases have been introduced, this has not materialised in the vast and important area of civil justice case law, where insistence on "blind" mutual trust continues. And, interestingly, this is despite the observation that in tracking the genesis of the principle, it has mostly been the civil justice cases that have steered the mutual trust conceptualisation and case law of the Court, not criminal and asylum cases as one might presume from the accompanying scholarly attention and polemics.

The normative proposals

All in all, the current predominant conceptualisation of mutual trust as an EU law and fundamental rights compliance presumption even in the context of proven non-compliance is not conceptually plausible. If it must be a compliance presumption to smooth out cooperation and enforcement in the common judicial area with still distinct and sovereign fields of jurisdiction and competence, it could at most be a national law compliance presumption. Then

it would be a kind of EU principle of comity allocating jurisdictional boundaries and negotiating controls over mistakes and errors (and defence rights) against national procedural autonomy, giving due respect and deference to national laws and institutional practices. But then it should be just that – a national and not an EU law compliance presumption – and accordingly those different spheres of control and jurisdiction, as well as possible differing standards, should not be confused or intertwined. CJEU should retain control over the boundaries and limits of actual controls that are possibly triggered in cases of concrete errors; here, the recent cases from the internal market establishing a two-fold so-called *Vueling* criteria to review foreign state acts that are manifestly fraudulent and wrong might be taken as a blueprint also for other disputes and policy fields. The *Vueling* criteria of review are: first, that the authority of the country of origin does not itself review and if necessary, withdraw erroneous or fraudulent instruments; and second, that the judicial authority of the state of execution possesses necessary information and evidence, with due regard to fair trial safeguards, to establish itself that the foreign state act is fraudulent or inadequate.[1198]

If there were a conceptual shift in national laws as the real object of mutual trust obligations, then it would also make sense to have an ultimate circuit breaker in cases of exceptional and systematic value infringements that normally would not fall under other Member States' or EU and CJEU competences to regulate or declare invalid, similar to the systemic deficiencies and exceptional circumstances doctrines currently in place. It is in these occasions that the CJEU could intervene also in what would usually be purely internal situations (i.e. the composition or disciplinary supervision over national courts and judges) that violate the essence of Article 2 TEU rights and values. But still, it would be necessary to reformulate the definition of mutual trust: it is not about EU law compliance presumption, but primarily national law compliance with a broader set of values and governance principles which is not detailed by any specific secondary law provisions (or even primary law besides Article 2 TEU) but derived only from Article 2 TEU values and principles – rule of law, democracy, equality, and fundamental rights protection. These principles can inherently be violated in any policy field, including those primarily falling historically under sole national sovereignty and competence. Thus, it brings about a competence creep and should be used in a precise, controllable, and calibrated manner. When used in a way that is conceptually confused and logically dubious, it is liable to bring about more backlash and adverse impacts than benefits.

[1198] See to that effect: *Vueling,* para 78.

And there is always the glass house question in enforcing values: if the CJEU were to continue to insist on mutual trust as an EU law compliance presumption despite actual, proven, and manifest non-compliances, this would amount to an EU rule of law problem. If rule of law is defined in its most thin sense as non-conditional abidance by laws applicable and in force – the CJEU has overridden this in many of its mutual trust rulings. The flipside of instrumentalising mutual trust to then enforce the CJEU's conception of thick rule of law conception (what independent judiciaries should look like) in Member States without an obvious and previously agreed mandate creates a double standard and may be a source of immense criticism of the Court and of the EU more broadly.

All in all, the normative proposal of this thesis is that mutual trust should be reconceptualised as at most a national law compliance and adequacy presumption, with the exceptional limit of Article 2 TEU values presumption and recognition, with the possibility to review and overturn the actual non-compliance with national law and EU values in exceptional and systemic circumstantial occasions, such as the *Vueling* criteria to reassess national state acts in cases of manifest frauds and errors or the systemic deficiencies doctrine in cases of exceptional value infringements. Allowing, empowering, and enforcing judicial review in the common European justice areas by any given courts and under the guidance and supervision of the CJEU has the real potential to create actual trust in the EU, as well as between Member States and between their judicial and other authorities.

Nearly all questions and challenges facing contemporary Europe could probably be translated or reformulated as issues of trust, be they the furthering of the banking and monetary union, fundamental rights, foreign and defence policy, Brexit, trade policy, or even the ever-persisting questions of the unfinished internal market. All cooperative and collaborative enterprises require trust and must transcend distrust, suspicion, and untrustworthiness, whether prejudicially perceived or realistically justified. Thus, the engineering of trust and trusting relationships into any large-scale cooperative endeavours is of imperative importance. Trust can be institutionally designed, but this requires a prior sound understanding of the concept and its requisites.

As a concept, trust has enormous potential for connectivity – not only between different disciplines and approaches, but also between different levels of analysis, with spill-over effects and even a powerful factor of synthesis between individual rational reasons and communitarian goals, embedded in the predicament of individuals in society but limited by the sensible

cognitive evidentiary confines of what makes trust rationally possible. Law and lawyers have not yet meticulously cultivated this potential, perhaps because there has not yet been sufficient reason to cultivate it beyond the confines of narrow trust law or contract theory. However, in recent years, the CJEU has opened this theoretical door in its effort to "legalise" trust (not in the sense of making trust legal, but in a sense of making trust the law, a rule to trust) under the name of the principle of mutual trust. This thesis has, in addition to empirically categorising and periodising the Court's such jurisgenerative efforts, examined conceptually and theoretically the question of whether such trust institutionalisation makes sense.

The conclusion and answer to the research question is simple and critical in nature: although it has some semantic force and displays a few structural components of the concept of trust, it is theoretically dubious whether the way in which the principle of mutual trust has come to predominantly function in the EU legal order has any plausible potential to help build actual trust in the EU and between Member States and their authorities. Institutionalised trust in a courtroom might be counterproductive to broader trust creation, as democracies should institutionalise distrust and not trust, especially in the judicial system. This does not mean that the principle has no potential or role in the EU legal system and constitutional order, but the current conceptualisation, definition, and usage should be rethought and redesigned to match the contemporary problems and increasing demands of justice, flexibility, legal certainty, and legality in the interlegal system of intertwined legal spheres, rules, and orders.

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