

MUTUAL TRUST AS A TERM OF ART IN EU CRIMINAL LAW: REVEALING ITS HYBRID CHARACTER

Auke Willems*

The term mutual trust has become a household term in the EU criminal justice vocabulary and is regarded to be a prerequisite for a successful application of the principle of mutual recognition. Regardless of its widespread use, it is often used in the vernacular, as if clear in itself. But as mutual trust has become one of the core objectives of the EU's criminal justice policy, and legislation is adopted to build trust, more specificity is required. This article attempts to unpick the notion of trust into its various elements. The argument is put forward that next to the principle's legal and political components, it also consists of more 'social' elements, as trust is a social construct after all. An assessment of the concept of trust developed in the social sciences reveals these additional elements and puts forward the idea of trust as a hybrid notion.

Keywords: EU criminal law, EU law, mutual recognition, mutual trust, fundamental rights, social trust

TABLE OF CONTENTS

I. INTRODUCTION	212
II. THE EU'S TRUST DISCOURSE	215
1. <i>Establishing the Trust Presumption</i>	215
2. <i>First Questions on the Validity of the Trust Presumption</i>	217
3. <i>First Tangible Step in Trust Building: The Roadmap</i>	219
4. <i>The CJEU: A Mutual Trust Stronghold?</i>	221
5. <i>A Rather Ambiguous Discourse</i>	227
III. THE RECEPTION OF MUTUAL TRUST IN ACADEMIC LITERATURE	228
1. <i>Challenging the Trust Presumption</i>	228
2. <i>Mistaken Analogy: The AFSJ Is Not the Internal Market</i>	231

* Ph.D. Candidate at the Vrije Universiteit Brussel (Belgium). A previous version of this article was presented at the 10th Annual International Graduate Legal Research Conference, at King's College London, 4-5 April 2016.

3. <i>General EU Principle of Mutual Trust</i>	232
4. <i>Calls for Further Development of Mutual Trust</i>	233
IV. TRUST AS A SOCIAL CONSTRUCT	234
1. <i>Willingness to Take Risks</i>	235
2. <i>Interest</i>	237
3. <i>Differentiating Between Trust and Trustworthiness</i>	238
4. <i>Trust Is a Three-Part Relation</i>	239
5. <i>Why Are We Even Speaking of Trust?</i>	240
V. MUTUAL TRUST, A TERM OF ART	241
1. <i>Fundamental Rights</i>	241
2. <i>Reciprocity</i>	242
3. <i>The Loyalty Principle</i>	244
4. <i>The Equivalence Presumption</i>	245
VI. THE HYBRID CHARACTER OF MUTUAL TRUST	247

I. INTRODUCTION

The topic of this article is the principle of mutual trust in EU criminal law. Development of that field of EU policy often labelled 'EU criminal law'¹ took a flight in the late 90's when mutual recognition was introduced as the core governance principle in an Area of Freedom, Security and Justice (AFSJ), the EU's version of a judicial space launched with the entry into force of the Treaty of Amsterdam. In essence, mutual recognition requires Member States to give full recognition to judicial decisions taken in other jurisdictions across the EU.² Mutual recognition in turn functions on a presumption of mutual trust; the logic is that the extraterritoriality of judicial decisions, created by mutual recognition, will only be accepted if there is a sufficiently

¹ A note at the outset; the term 'EU criminal law' is imperfect and potentially misleading. We are not dealing with criminal law in the conventional sense in the EU; no norms that pose an immediate threat to individuals are created at EU level. Nevertheless, the term is widely accepted and used frequently to describe the body of law and policy under examination here.

² For more on mutual recognition see for example C. Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013); W. van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015).

high level of mutual trust between Member States. Mutual trust can therefore be regarded as the principle behind the principle. The relevance of mutual trust has only increased since the introduction of mutual recognition as the core governance principle in judicial cooperation in criminal justice matters, and particularly since the Treaty of Lisbon gave constitutional status to mutual recognition and expanded the law making powers of the EU in the field of criminal procedural law and coupled them directly with 'facilitating mutual recognition'.³ Mutual recognition was initially selected as a governance rule to further EU cooperation in criminal justice matters without having to harmonise national legal systems, which was both unfeasible and undesirable. Building mutual trust is regarded as the key to enhancing or facilitating mutual recognition (and the functioning of the AFSJ more widely), and has as such become a core aspect of the EU's criminal justice agenda.

Since mutual recognition was put forward, a number of instruments have been adopted in its wake, the most important of which is the European Arrest Warrant (EAW), applying mutual recognition to extradition.⁴ However, the first decade or so of mutual recognition has not been flawless, and the aim to circumvent harmonisation in the field of criminal law by pledging to recognise each other's judicial decisions has proven more difficult than initially thought. An important reason for the difficulties that mutual recognition is facing is attributed to a lack of mutual trust. In response, so called 'trust building measures' have been taken, both legal (most notably within the framework of the Roadmap on Criminal Procedural Rights),⁵ and non-legal. While engaging in trust building necessarily implies a lack of (or at least insufficient) trust, mutual recognition operates on a trust presumption, as repeatedly confirmed by the Court of Justice of the European Union (CJEU).⁶ Regardless of this inconsistency (or contradiction), over time the

³ See art 82(2) Treaty on the Functioning of the European Union (TFEU).

⁴ Council Framework Decision 2002/584/JHA of 13 June 2002, OJ L 190, 18.7.2002, p. 1–20 [hereafter EAW]; on the EAW see for example L. Klimek, *The European Arrest Warrant* (Springer 2014); J. Spencer, 'The European Arrest Warrant' (2003) 7 Cambridge Yearbook of European Legal Studies 201.

⁵ For more on the Roadmap see section II.3.

⁶ For more on the CJEU see section II.4.

term mutual trust has become strongly embedded in the EU criminal law vocabulary and the idea that mutual trust is a prerequisite to a successful application of mutual recognition is widely accepted. But despite its widespread use and acceptance as a central policy aim, the concept of trust remains broad and ambiguous, and the EU has not made much effort to give insight into its exact meaning or functioning. Moreover, academic literature on the topic initially mainly challenged the trust presumption on grounds of insufficient regard to fundamental rights throughout the EU, while broader development of the notion of trust itself took off more slowly.

Currently, mutual trust is deployed to serve a broad spectrum of purposes, the most important of which is linked to eliminating differences between national criminal justice systems in the name of trust building (the logic being that if all national systems were perfectly equal trust would not be an issue). This creates an interesting paradox. Mutual recognition as a mode of governance was chosen exactly to enable cooperation while preserving national differences, and mutual trust serves as a prerequisite to that end. But if the principle of mutual trust ultimately leads to convergence (i.e. by eliminating those differences), it in effect reintroduces harmonisation (through the back door) and might actually run counter to the very core idea of mutual recognition. A legitimate question then would be whether mutual trust supports or contravenes mutual recognition. In order to answer this pressing question, a first important step is to clarify the role and function of mutual trust.

This article will address that lack of clarity and put forward the argument that mutual trust is a term of art in the EU criminal law context, with a meaning specific to the particularities of EU criminal justice cooperation. Yet, it is not completely separate from what can be regarded trust as a social construct. It is for this reason that, in addition to (the more conventional) legal/political analysis, a social science perspective is employed. When the two perspectives are combined, a hybrid principle emerges. The purpose of conceptualisation of the principle of mutual trust is twofold. First, it should enable a more informed debate on the functioning of the AFSJ (the criminal law component more in particular). Second, it should allow for scrutinising the legislative programme that is carried out to enhance or build trust.

The article is structured as follows. Section 2 will give insight into the EU's ambiguous trust discourse, followed by an overview of the (critical) reception of mutual trust in EU criminal law literature in section 3. Subsequently, section 4 will present a number of core aspects of trust as developed in the social sciences in order to enlighten the debate on the issue of trust. Section 5 will then identify the characteristics that are particular to trust in the EU criminal justice environment. The last section 6 will combine these two groups of elements and draw general conclusions.

II. THE EU'S TRUST DISCOURSE

I. Establishing the Trust Presumption

The term 'mutual trust' is widely used by the various EU institutions in the criminal justice discourse, *e.g.* in policy documents, legislation and case law. Nevertheless, there is no document setting out a shared understanding of its scope and fundamentals. The term was given prominence from the very beginning of mutual recognition in the AFSJ and serves as its foundation. The mutual recognition-mutual trust nexus is not sufficiently substantiated though; that mutual recognition is not flourishing is sufficiently documented,⁷ but that this is because of a lack of trust has not been convincingly shown.

Since its introduction, mutual trust has been both presumed to exist and to lack, hence; 'mutual recognition ... has many faces – as many as mutual trust in the EU's and the Member States' discourse(s)'.⁸ This section will give an

⁷ Particularly in light of the EAW, *see for example* S. Carrera, E. Guild and N. Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System' (2013) 55 CEPS Paper in Liberty and Security in Europe <<https://www.ceps.eu/publications/europe%E2%80%99s-most-wanted-recalibrating-trust-european-arrest-warrant-system>>; L. Marin, 'Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' (2013) 5(3) *New Journal of European Criminal Law* 327; A. Weyembergh, 'European Added Value Assessment: the EU Arrest Warrant' (2014) Research Paper- European Added Value United [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET\(2013\)510979\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf).

⁸ G. Vermeulen, 'Flaws and Contradictions in the Mutual Trust and Recognition Discourse: Casting a Shadow on the Legitimacy of EU Criminal Policy Making and

insight into the EU's inconsistent and at times contradictory mutual recognition/mutual trust narrative.

Upon inception of mutual recognition at the Tampere European Council (1999),⁹ it was not explicitly linked with a requirement of mutual trust.¹⁰ It was not long though until mutual trust came into the picture. Less than a year later the Commission held, when presenting its view on mutual recognition, that '[m]utual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied'.¹¹ Again less than a year later in 2001, the Programme to implement mutual recognition was released and made an important contribution to the trust discourse by introducing the presumption of trust;

Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.¹²

The articulation of a direct link between mutual recognition and mutual trust has been of paramount importance for the policy to facilitate mutual recognition, or even broader the EU's criminal justice policy as a whole, and still resonates today. By grounding this presumption on the shared

Judicial Cooperation in Criminal Matters?' in N. Persak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice* (Ashgate Publishing 2014) 153, 154.

⁹ For a closer look at the process that led to the adoption of mutual recognition see H. Nilsson, 'Mutual Trust or Mutual Mistrust?' in G. de Kerchove and A. Weyembergh (eds), *La Confiance Mutuelle Dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles 2005) 29.

¹⁰ At Tampere, mutual recognition was introduced as the 'cornerstone principle' in EU criminal justice cooperation. See Tampere European Council (15-16 October 1999), Presidency Conclusions, <http://www.europarl.europa.eu/summits/tam_en.htm>.

¹¹ Communication from the Commission to the Council and the European Parliament, 'Mutual recognition of Final Decisions in criminal matters' COM (2000) 495 final, 4.

¹² 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', OJ C12/10, 15 January 2001, 10 [hereafter the Programme].

commitment 'to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law' a justification was given, be it in a rather formalistic manner.

It appears that the trust presumption was regarded to be solid, as at the time no measures to strengthen mutual trust were prioritised. The Programme did set out to 'enhance the protection of individual rights', but as a self-standing goal of the mutual recognition project, not with an instrumental, mutual recognition enhancing, purpose.

The EAW, the first mutual recognition measure, closely followed the Programme's rationale and 'is based on a high level of confidence between Member States'.¹³ The instrument attempts to establish from the outset that confidence (or trust) is at its core.¹⁴ But as the instrument contains various indications to the contrary (grounds for refusal, partial abolition of double criminality etc.),¹⁵ this preambular statement can be regarded more as (political) rhetoric than (legal) reality.¹⁶

2. *First Questions on the Validity of the Trust Presumption*

Shortly after the introduction of the 'presumption of trust' it was already questioned and the need to enhance trust was articulated by the Commission. In its 2003 Green Paper on procedural rights, the need to strengthen trust was made explicit and directly linked to the absence of a uniform standard of

¹³ EAW, recital 10.

¹⁴ Note the use of the term 'confidence' in the EAW, used interchangeably with 'trust' in the subsequent discourse. It is not clear whether a different concept is denoted, but according to Walker the two differ; 'confidence is an accomplished state upon which we can more or less passively rely; trust is an active way of building confidence or otherwise dealing with the absence of confident expectations', see N. Walker, 'The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis', in J. Apap and M. Anderson (eds), *Police and Justice Cooperation and the New European Borders* (Kluwer 2002) 19, 22.

¹⁵ See section III. 1 below.

¹⁶ According to Eijsbouts and Reestman, 'In actual fact it [the EAW] seems to breathe *mistrust* of states having a liberal criminal law tradition', see W. Eijsbouts and J. Reestman, 'Editorial - Mutual Trust' (2006) 2(1) *European Constitutional Law Review* 1, 1.

defence rights.¹⁷ Underlying such calls was the contention that an EU wide measure offering suspects and defendants a minimum standard of procedural fairness would accommodate the lack of trust. Note that the issue was raised prior to the entry into force of the EAW, which is often regarded as the main source of dissatisfaction with the safeguarding of individual rights. But Member States could at the time (the negotiations lasted from 2004 until 2007) not agree on such an instrument,¹⁸ it however seemed obvious that sooner or later the issue of procedural safeguards would return. The second multi-annual programme in the area of justice and home affairs, the Hague Programme, further underlined the mutual recognition-mutual trust nexus,¹⁹ and the subsequent Stockholm Programme elevated the importance of mutual trust and declared 'ensuring trust' to be 'one of the main challenges for the future'.²⁰ It also repeated the logic that rights of the individual in criminal proceedings are regarded as 'essential in order to maintain mutual trust between the Member States and public confidence in the European Union'.²¹

In the meantime, the adoption of cooperation measures based on mutual recognition continued, but were signified by a change of tone. The 2008 Framework Decision on custodial sentences, declared rather modestly that mutual recognition 'should become the cornerstone' and that relations

¹⁷ Green Paper from the Commission 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', COM (2003) 75 final.

¹⁸ On these negotiations see M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union' in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008) 171.

¹⁹ 'The Hague Programme: strengthening freedom, security and justice in the European Union' (2005) OJ C53/01; see also the action plan implementing The Hague Programme, (2005) OJ C198/01. Section 3.2 of the Programme is devoted to 'confidence-building and mutual trust'.

²⁰ 'The Stockholm Programme — An open and secure Europe serving and protecting citizens' (2010) OJ C115/1; see also the 'Action Plan Implementing the Stockholm Programme', COM (2010) 171 final.

²¹ *ibid*, 2.4.

between Member States 'are characterised by special mutual confidence'.²² Not even ten years after the inception of mutual recognition and its euphoric introduction, a different, almost timid tone was chosen. This shift was rather sudden, considering that the Commission had noted in 2005 that mutual recognition still 'is' the cornerstone of judicial cooperation.²³ Even more illustrative in this light is the 2014 European Investigation Order (EIO), which explicitly acknowledges that the trust presumption is rebuttable and introduces a human rights refusal ground.²⁴ The increase in scepticism toward the presumption of trust (call it realism) expressed by the EU legislator in recent mutual recognition measures, is possibly the result of the first decade of experience with the EAW and the insights this gave into the difficulties mutual recognition presented in practice.

3. First Tangible Step in Trust Building: The Roadmap

After years of fruitless debate on an EU procedural rights measure, in 2009 progress was finally made by adopting the Roadmap on Criminal Procedural Rights.²⁵ The first 'visible' legislative step was taken to build trust by approximating procedural law,²⁶ and as such presents the most prominent expression of the legal relevance of the principle of mutual trust. The central aim of the Roadmap is to strengthen the procedural rights of suspected or accused persons in criminal proceedings by employing a 'step-

²² Council Framework Decision 2008/909/JHA of 27 November 2008, OJ L 327/27, recitals 1 and 5.

²³ Communication from the Commission to the Council and the European Parliament of 10 May 2005- The Hague Programme: ten priorities for the next five years, COM (2005), 184 final, OJ C 236.

²⁴ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, recital 19 and art 11.

²⁵ 'Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings', (2009) OJ C295/1 [hereafter Roadmap]; for more on the Roadmap see e.g. J. Blackstock, 'Procedural Safeguards in the European Union: A Road Well Travelled?' (2012) 2(1) European Criminal Law Review 20.

²⁶ In addition to procedural approximation, trust building capacities have also been attributed to substantive approximation, see e.g. A. Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42(6) Common Market Law Review 1567, 1575.

by-step' approach. The starting point was to adopt five measures on basic procedural rights and the Commission was invited to propose EU legislation to this end.²⁷ However, improving the position of the individual in criminal proceedings throughout the EU is not an end in itself, but rather a means to an (other) end; namely to facilitate mutual recognition, in line with the legal basis employed (Article 82(2) TFEU). Trust serves as the conceptual link between means and ends; hence the full chain, and thus the Roadmap's rationale, is as follows:

Legal measure	Conceptual aim	End goal
EU wide procedural rights →	enhance trust(worthiness) →	facilitate mutual recognition

Figure 1: Trust as conceptual link between means and ends

Recital 8 gives insight into the Roadmap's rationale regarding trust:

Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention [ECHR], there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.²⁸

The Roadmap thus builds on the trust presumption's formal foundation, namely the existence of the European Convention on Human Rights (ECHR), by introducing EU standards *in addition to* already existing standards. Furthermore, the exact trust relation aimed at by the Roadmap is that *competent authorities* should have trust in *foreign criminal justice systems*. Confirming the instrumental function, not in the first place to improve the position of the individual in order to increase citizens' trust in the EU, as

²⁷ The first five measures have been adopted on interpretation and translation (OJ L280/I, 2010), the right to information (L 142/I, 2012), the right to access to a lawyer (OJ L294/I, 2013), the presumption of innocence and the right to be present at trial (OJ L65/I, 2016), and on special safeguards for children (OJ L132/I, 2016). One more has been proposed on the right to legal aid.

²⁸ Roadmap, recital 8.

alleged by the multi-annual programmes, but to enhance cooperation and therefore geared towards judicial authorities. Nevertheless, sound evidence of the ratio of how exactly procedural rights will enhance judicial cooperation (and thus trust) is lacking, as well as why these exact rights are selected by the Roadmap. Is this simply the result of political realities (these are the rights that Member States could agree on), or is there empirical evidence that exactly this approach will facilitate mutual recognition, *e.g.* because national differences in the distribution of these specific rights hamper a successful application of mutual recognition? Unfortunately, the Roadmap itself does not provide clear answers to these questions. This raises issues of subsidiarity (Article 5(3) TEU) and whether the activation of the legal basis of Article 82(2) TFEU is justified (*i.e.* are there 'objective factors which are amenable to judicial review').²⁹ As the first two measures have just entered into force, it is too soon to tell how these will play out in practice,³⁰ especially since these are supposed to function as a whole and can as such be fully tested when all measures have been adopted and are in function.³¹ But in order to scrutinise whether the programme to introduce EU-wide procedural rights meets the legislative purpose of 'facilitating mutual recognition', through 'enhancing mutual trust', it is important to understand what trust is.

4. *The CJEU: A Mutual Trust Stronghold?*

Regardless of its limited jurisdiction pre-Lisbon and the five-year transitional period under Lisbon, the CJEU has found ample opportunity to weigh in on

²⁹ See also J. Oberg, 'Subsidiarity and EU Procedural Criminal Law' (2015) 5(1) *European Criminal Law Review* 19; P. Asp et al. 'European Criminal Policy Initiative - A Manifesto on European Criminal Procedure Law' (2013) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 430, 432-433; W. de Bondt and G. Vermeulen, 'The Procedural Rights Debate: A Bridge Too Far or Still Not Far Enough?' (2010) 4 *EUcrim* 163, 164.

³⁰ For an evaluation see D. Sayers, 'Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap take Us?' (2014) 14(4) *Human Rights Law Review* 733; E. Cape, 'Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?' (2015) 1 *Criminal Law Review* 48.

³¹ See T. Spronken, 'EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach' (2011) 1(3) *European Criminal Law Review* 213.

the development of mutual trust.³² More than any other EU institution, the Court has upheld the presumption of trust and became one of its strongest defenders.³³ But despite mutual trust being a central theme in the Court's AFSJ jurisprudence, it has not qualified or clarified the notion of trust, but merely adhered to the presumption found on shared respect for human rights.

The notion of mutual trust is inextricably linked with the principle of mutual recognition, but the Court's first view of mutual trust came in a different context. In *Gözütok and Brügge*,³⁴ the Court was asked whether *ne bis in idem* prohibited criminal proceedings in a Member State where prosecution was sought on the same facts that in another jurisdiction had been definitively discontinued.³⁵ In a landmark decision the Court ruled in the affirmative.³⁶ The Court held that the main justification for such an EU-wide application of *ne bis in idem* is mutual trust;

there is a necessary implication that the Member States have mutual trust 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.³⁷

³² For a more in-depth analysis of the Court's case law on the subject see e.g. V. 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(1) *Yearbook of European Law* 319, 336-349.

³³ See also T. Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6(2) *New Journal of European Criminal Law* 166.

³⁴ Joined Cases C-187/01 and C-385/01, ECLI:EU:C:2003:87, *Gözütok and Brügge*.

³⁵ *Ne bis in idem*, or the principle of double jeopardy, confers to individuals the right not to be prosecuted or tried twice for the same criminal conduct. Traditionally, the principle functioned only within a single jurisdiction. See e.g. A. Weyembergh and I. Armada, 'The Principle of *ne bis in idem* in Europe's Area of Freedom, Security and Justice' in V. Mitsilegas et al. (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) 189.

³⁶ See also M. Fletcher, 'Some Developments to the *ne bis in idem* Principle in the European Union: *Criminal Proceedings Against Huseyn Gozutok and Klaus Brugge*' (2003) 66(5) *Modern Law Review* 769.

³⁷ *Gözütok and Brügge*, para 33.

Shortly after *Gözütok and Brügger* the trust presumption was transferred to different situations. The first preliminary questions on the EAW were raised in *Advocaten voor de Wereld*,³⁸ where the Court was, *inter alia*, asked to rule on the validity of the instrument.³⁹ The Court upheld the measure and held that the instrument was justified 'on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States'.⁴⁰

However, it turned out that the reach of the trust presumption is not infinite and the Court ruled in *N.S.*,⁴¹ an asylum case (a separate AFSJ policy field, also governed by mutual recognition), that the presumption can be rebutted.⁴² By opening up the presumption of fundamental rights compliance to rebuttal, the Court radically altered interstate cooperation in the AFSJ. According to Mitsilegas, this seminal ruling 'constitutes a turning point in the evolution of inter-state cooperation in the [AFSJ]', and 'signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law'.⁴³ Peers opined that 'logically, the judgment should apply by analogy to other areas of Justice and Home Affairs law'.⁴⁴

³⁸ Case C-303/05, ECLI:EU:C:2007:261, *Advocaten voor de Wereld*.

³⁹ See also F. Geyer, 'Case Note: *Advocaten voor de Wereld*' (2008) 4 *European Constitutional Law Review* 149.

⁴⁰ *Advocaten voor de Wereld*, para 57.

⁴¹ Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865, *N.S. and others*, 21 December 2011, at 86; see also M. den Heijer, 'Case Note' (2012) 49(5) *Common Market Law Review* 1735.

⁴² The Court held that Article 4 of the EU Charter (prohibition of torture and inhuman or degrading treatment) precludes the transfer of an asylum seeker from one Member State to another in accordance with the Dublin Regulation if there are systemic deficiencies in the asylum procedure and reception conditions in the receiving Member State that give rise to a real risk of violation.

⁴³ Mitsilegas (fn 32), 358.

⁴⁴ S. Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?' *Statewatch Analysis* <<http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf>>.

National courts indeed asked the Court of Justice whether an EAW must be executed when human rights may have been breached,⁴⁵ first in *Radu*.⁴⁶ But because Radu centred his complaint on the refusal of the German authorities to hear him prior to issuing the warrant, a right not given by the EAW nor the EU Charter, the Court rejected the argument and avoided a ruling on the (wider) contentious issue of refusal to execute a warrant when human rights violations occur in the issuing state.⁴⁷ The issue (re-)appeared in various subsequent cases, but the Court held on to a close reading of the trust presumption and the exhaustive system of refusal grounds as set out by the EAW.⁴⁸ For a while, the Court managed to carefully manoeuvre around the issue, a stance which has been heavily criticised as it values efficient judicial cooperation on the basis of mutual trust over fundamental rights.⁴⁹

It always seemed likely that sooner or later the question would reappear and needed to be faced head on. And indeed, it did. In *Aranyosi* the question was raised whether refusal of a EAW was allowed in case of surrender to a Member State whose prison conditions are below standard.⁵⁰ Under such

⁴⁵ The EAW itself contains very little on procedural guarantees. There has been debate about the legal value of the preamble's phrase that the 'Framework Decision respects fundamental rights' (Recital 12), and Article 1(3) reiterates Member States' obligation to respect fundamental rights. But a general fundamental rights clause that allows states to refuse surrender in cases in which such rights would be endangered is absent.

⁴⁶ Case C-396/11, ECLI:EU:C:2013:39, *Radu*.

⁴⁷ Advocate General Sharpston in her opinion however came to a different conclusion and defended a general human rights refusal ground. See Opinion of Advocate General Sharpston in Case C-396/11, ECLI:EU:C:2012:648, *Radu*. On the topic see also M. Bose, 'Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant' in S. Ruggeri (ed), *Human Rights in European Criminal Law* (Springer 2015) 135.

⁴⁸ See Case C-399/11, ECLI:EU:C:2013:107, *Stefano Melloni*; and Case C-237/15 PPU, ECLI:EU:C:2015:474, *Minister for Justice and Equality v Francis Lanigan*.

⁴⁹ See for example M. Ventrella, 'European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?' (2013) 4(3) *New Journal of European Criminal Law* 290.

⁵⁰ Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, *Aranyosi and Căldăraru*; see S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a

conditions, *i.e.* if there is a real and substantial risk of inhuman or degrading treatment because of detention conditions in the issuing state, the Court allows postponement of a EAW. But before such a call can be made, the executing authority will have to request all information necessary on the detention, while deferring execution of the warrant; a final attempt to prevent a conflict by way of direct consultations between cooperating authorities.

Despite the high threshold set by the Court ('real and substantial risk') and the obligation to exhaust all means of communication before a request can be postponed, *Aranyosi* presents a significant departure from earlier cases in which it heavily relied on the closed system of refusal grounds and the strong presumption of mutual trust. For now, it remains to be seen what other human rights defects will justify postponement, and what exactly 'postponement' entails, but most important is that the Court has opened up the opportunity to rebut the trust presumption in the context of the EAW. The Court has in *Aranyosi* for the first time ruled that, like in mutual recognition's other incarnations, such as in the internal market and civil law cooperation,⁵¹ there are limits to its application.

Nevertheless, the importance the Court attributes to the principle of mutual trust in the EU legal order should not be underestimated, as can be illustrated by Opinion 2/13,⁵² on the EU's accession to the ECHR.⁵³ In Opinion 2/13, the Court declared the draft Agreement for Accession to be incompatible with

European Arrest Warrant' (2016) 24(2/3) European Journal of Crime, Criminal Law and Criminal Justice 197.

⁵¹ See G. Tosato, 'Some Remarks on the Limits to the Mutual Recognition of Judicial Decisions in Civil and Criminal Matters within the European Union', (2002) 38(3-4) *Rivista di Diritto Internazionale Privato e Processuale* 869.

⁵² Opinion 2/13, 18 December 2014.

⁵³ On the EU's accession to the ECHR see P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

primary EU law.⁵⁴ The Court, *inter alia*,⁵⁵ expresses concerns that accession could undermine mutual trust, and reiterates that it considers mutual trust to be an essential component in order to create 'an ever closer Union'.⁵⁶ The Court furthermore underlines that 'the principle of mutual trust ... is of fundamental importance in EU law',⁵⁷ and allows no space for evaluation of other Member State's human rights records, as EU law requires this presumption to be firm.⁵⁸ The threat that the ECHR would require Member States to assess each other's human rights compliance would undermine that presumption. A reasoning which does not display great believe in the genuine existence of trust. This view is taken even further when the Court turns the trust 'presumption' into an 'obligation'.⁵⁹ An interpretation that seems far removed from what even an everyday notion of trust entails; few would contest that if one would be 'obliged' to trust (under penalty of law) this can no longer be considered genuine trust. Furthermore, it alters the perception of the AFSJ as a legal space found on the protection of fundamental rights.⁶⁰

⁵⁴ The Court found a number of obstacles in the Opinion, which is binding, and has made accession very difficult. See e.g. B. de Witte and S. Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) 40(5) *European Law Review* 683. The Opinion has been heavily criticised for seeking to protect basic elements of the EU legal order 'by disregarding the fundamental values upon which the Union was founded', see S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16(1) *German Law Journal* 213, 213.

⁵⁵ The concern that mutual trust would be undermined is part of a wider argument that accession would be a threat for the autonomy of EU law and its *sui generis* nature. See also S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice' (2015) *UK Constitutional Law Blog* <<http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>>.

⁵⁶ Opinion 2/13, para 167.

⁵⁷ *ibid*, para 191.

⁵⁸ *ibid*, para 192.

⁵⁹ *ibid*, 'EU law imposes an obligation of mutual trust between those Member States'.

⁶⁰ See also V. Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance' (2015) 3 *EUcrim* 90, 92, 'It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights.'

Instead, the Court presents a view of a system in which fundamental rights protection comes only second after adherence to the notion of mutual trust, rather than the other way around.

5. *A Rather Ambiguous Discourse*

On first reading, the trust ratio is as simple as the mutual recognition principle itself. Mutual trust is a prerequisite to mutual recognition and is grounded on the presumption that states adhere to the same standards of justice and fairness (mainly in the form of the ECHR). So far so good. However, an assessment of the dynamics of the trust narrative as developed by the various EU actors since the introduction of mutual recognition shows a more troublesome image. The principle of mutual trust has been used in a rather ambiguous and incoherent fashion, and has fluctuated over time and with different actors within the EU, going from a presumption to a rebuttal. This incoherency erodes on the credibility of the discourse.⁶¹ A distinction can be noticed between the legislative and the executive branches on the one hand, and the judiciary on the other. Whereas the former (mainly the Council and the Commission, but also the European Parliament by pushing for comprehensive procedural rights measures) relatively soon after Tampere reversed the trust presumption into a lack of trust presumption and called for additional trust building measures, the CJEU has long remained a stronghold of the trust presumption and regards mutual trust a principle of fundamental importance in EU law. Observing the EU's trust narrative an evolution can be noticed though; from a high level of confidence and a strict trust presumption to a rebuttal and more leeway for Member States to derogate from mutual recognition. On the legislative side this evolution can be illustrated by the development from the EAW to the EIO, and on the side of the CJEU from *Gözütok and Brügge* and *Radu* to *Aranyosi*. But besides discussions on whether trust exists, the actual meaning of the concept remains elusive. Illustrative for the ambiguous and loose nature of the discourse is the interchangeable use of terms as trust and

⁶¹ See also Vermeulen (fn 8), 'the credibility of the EU's discourse on the matter (and therefore its moral authority, which is grounded on it) will undeniably be significantly compromised when it is marked by manifest contradictions or illogicality, flagrant ambiguousness or plain conceptual incoherence', 153.

confidence,⁶² the many different relations in which trust is supposed to play a role (horizontal, vertical) and generic phrases as 'a climate' and 'a spirit' of trust. The lack of conceptual clarity has not been raised by EU actors as being problematic and the contradictory terms trust presumption and trust building have over the years become strongly embedded in the EU criminal justice vocabulary, leading to a mutual trust dichotomy.

III. THE RECEPTION OF MUTUAL TRUST IN ACADEMIC LITERATURE

1. *Challenging the Trust Presumption*

Mutual trust as a principle of EU criminal law has been embraced not only at EU level, but also in the ensuing literature. The idea that mutual trust is a prerequisite for a successful functioning of mutual recognition in criminal justice matters has largely been accepted.⁶³ At the same time, the presumption of mutual trust has been criticised for lacking foundation.⁶⁴ For example, Konstadinides 'argues that "mutual recognition" does not necessarily imply mutual trust'.⁶⁵ While it was initially 'hoped' that the

⁶² Walker (fn 14).

⁶³ See for example O. de Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14(3) *Columbia Journal of European Law* 509, 542; H. Nilsson, 'Mutual Trust and Mutual Recognition of our Differences. A Personal View' in G. de Kerchove and A. Weyembergh (eds), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Européenne* (Editions de l'Université de Bruxelles 2001) 155, 158.

⁶⁴ See e.g. Carrera et al. (fn 7), 'It is argued that the next generation of the EU's criminal justice cooperation and the EAW need to recognise and acknowledge that the mutual trust premise upon which the European system has been built so far is no longer viable without devising new EU policy stakeholders' structures and evaluation mechanisms. These should allow for the recalibration of mutual trust and mistrust in EU justice systems in light of the experiences of the criminal justice actors and practitioners having a stake in putting the EAW into daily effect'.

⁶⁵ T. Konstadinides, 'The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence?' in C. Eckes and T. Konstadinides (eds), *Crime Within the Area of Freedom, Security and Justice: A European Public Order* (CUP 2011) 192, 194; see also M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47(2) *Common Market Law Review* 405, 419; and P. Asp, 'Basic Models of a European

'Member States of the European Union now have reached the level of faith and trust to enable them to accept all of its consequences',⁶⁶ it was not long until it turned out that reality was more nuanced. Or, in the words of Vernimmen and Surano; 'mutual trust was simply assumed to exist ... in reality, this trust is still not spontaneously felt and is by no means always evident in practice'.⁶⁷

The trust presumption rests on an equivalence presumption, and in the criminal law sphere this equivalence relates to the quality of judicial decisions and procedural safeguards. Because of large differences between national criminal law systems, in particular in procedural systems of protection,⁶⁸ and little regard to individual rights in mutual recognition instruments (mainly the EAW), this ground turned out to be rather shaky. Alegre and Leaf were early to recognise these impending problems, and prior to EU wide application of the EAW warned that serious human rights concerns would arise in applying mutual recognition to the field of criminal justice cooperation.⁶⁹ The issue of fundamental rights is regarded as fundamental to the viability of mutual recognition; the idea is that if the safeguarding of defence rights throughout the EU is insufficient, the trust basis is absent and so is the fundament of the mutual recognition project.

Penal Law: Mutual Recognition, Cooperation, Harmonisation' (2008) 4 *Europäischer Juristentag* 259, 264.

⁶⁶ Nilsson (fn 63), 158.

⁶⁷ G. Vernimmen-Van Tiggelen and L. Surano, 'Analysis of the future of mutual recognition in criminal matters in the European Union' (2008) Institute for European Studies, Université Libre de Bruxelles 20, <http://ec.europa.eu/justice/criminal/files/mutual_recognition_en.pdf>.

⁶⁸ See for example, S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007), 3; E. Cape, Z. Namoradze, R. Smith and T. Spronken (eds), *Effective Criminal Defence in Europe* (Intersentia 2010); and J. Hodgson, 'EU Criminal Justice: The Challenge of Due Process Rights Within a Framework of Mutual Recognition' (2011) 37(2) *North Carolina Journal of International Law and Commercial Regulation* 307.

⁶⁹ S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant' (2004) 10(2) *European Law Journal* 200.

There are various fundamental rights related issues that have led to the conclusion that the trust basis is indeed lacking. An example is the proportionality problem,⁷⁰ *i.e.* the systematic issuing of high numbers of EAW's for petty crimes by some Member States.⁷¹ Another 'trust' related issue has been in relation to *in absentia* judgments, which has led to amendment of the EAW in 2009.⁷² Other examples that can be mentioned are (poor) prison conditions and the (excessive) length of pre-trial detention. Furthermore, a number of non (or non-directly) fundamental rights related 'signals' of distrust have appeared in literature. Prominent 'expressions of distrust' include;⁷³ the (poor) implementation of the EAW,⁷⁴ the constitutional challenges in various Member States to the validity of the EAW,⁷⁵ and the EAW's (partial) abolition of double criminality.⁷⁶

⁷⁰ In its 2011 report the Commission observed that confidence in the application of the EAW had been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of very minor offences, see COM (2011) 175 final; Carrera et al (fn 7), argue that the proportionality issue presents one of the major challenges to mutual trust, 19-21.

⁷¹ For more on proportionality see E. Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6(1) *New Journal of European Criminal Law* 32.

⁷² See Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L81/24; see also M. Bose, 'Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia' (2011) 37(2) *North Carolina Journal of International Law and Commercial Regulation* 489.

⁷³ E. van Sliedrecht, 'The European Arrest Warrant: Between Trust, Democracy and the Rule of Law' (2007) 3(2) *European Constitutional Law Review* 244, 245.

⁷⁴ See M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Intersentia 2011).

⁷⁵ See E. Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); E. Guild and L. Marin (eds), *Still Not Resolved: Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009).

⁷⁶ According to Tomuschat, the abandonment amounts to a mutual vote of mistrust, see C. Tomuschat, 'Inconsistencies - the German Federal Constitutional Court on the European Arrest Warrant' (2006) 2(2) *European Constitutional Law Review* 209, 225.

2. *Mistaken Analogy: The AFSJ Is Not the Internal Market*

A common theme in literature has been to seek comparison with the application of the principle of mutual recognition in other policy fields, most notably the internal market sphere,⁷⁷ the origin of the principle.⁷⁸ The simple transfer of mutual recognition and the analogy between policy fields as alleged by the EU was met with heavy criticism. The two main arguments that have appeared are; the 'harmonisation argument' and the 'qualitative difference argument'.⁷⁹

Regarding the first, according to Peers, simply transferring the principle from the internal market to criminal matters 'might appear unexceptional', 'however, on closer examination, those analogies are deeply flawed', 'because the Council has made the error of assuming that the underlying law need not be comparable'.⁸⁰ Those 'underlying laws' do indeed need to be 'comparable' as 'mutual recognition in the internal market was only successful due to the high level of harmonisation that already existed'.⁸¹

The second main argument against the simple analogy, the 'qualitative difference argument', centres on the fundamental difference between criminal law and market integration. When zooming in on requirements or presumptions of trust in the operation of mutual recognition, significant differences appear. While in the internal market product requirements have to be recognised, which indeed can have serious repercussions for consumer health and safety, criminal law cooperation has even more serious consequences as it involves individuals subjected to disadvantageous or even coercive measures of a foreign state, and as such interferes with fundamental

⁷⁷ For a comparison of mutual recognition in the two policy areas see Janssens (fn 2).

⁷⁸ Mutual recognition was 'invented' by the CJEU in the EU internal market context, in relation to freedom of goods (product requirements) in Case-120/78, ECLI:EU:C:1979:42, *Cassis de Dijon* and gradually expanded to cover other Community policy areas such as the free movement of services, and mutual recognition of diplomas.

⁷⁹ See also C. Murphy, 'The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust?' in Eckes and Konstadinides (fn 65) 224, 226.

⁸⁰ S. Peers, 'Mutual Recognition and Criminal Law in the EU: Has the Council Got it Wrong?' (2004) 41(1) *Common Market Law Review* 5, 5.

⁸¹ Murphy (fn 79), 226.

rights. Therefore, mutually recognizing each other's judicial decisions is more demanding than recognizing goods regulations.⁸²

The *subject* of trust (product requirements vs. human rights) thus differs significantly, the *logic* underlying the notion of trust however (the equivalence presumption) is similar. As an illustration to underline the difference, think of the different 'trust' required when someone asks you to borrow your pen or your brand new car. Whereas the former might not be much of a problem, the latter would only occur in more developed relations. By analogy, the same can be said for cooperation in criminal justice matters; a specific type of relation is at stake.

3. *General EU Principle of Mutual Trust*

The principle of mutual trust is not exclusive to the EU's involvement in criminal justice matters and has long been regarded relevant for EU law.⁸³ In fact, the principle has relevance for interstate relations more widely, and in international relations theory mutual trust between states is regarded a precondition for stable relations based on expectations about other states' behaviour.⁸⁴ The same can be said for the recognition of foreign criminal judgments more broadly.⁸⁵

In the wider EU context, the principle of mutual trust has a similar meaning and is linked to expectations and predictions of how other Member States will act. Its weight has steadily increased over the years and 'has been brought up with increased frequency ... in the European political/legal debate'.⁸⁶

⁸² See also S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14(5) *Journal of European Public Policy* 762.

⁸³ The principle of mutual trust has been described as being 'at the heart of the European Union', Eijsbouts and Reestman (fn 16), 1.

⁸⁴ See for example A. Hoffman, 'A Conceptualization of Trust in International Relations' (2002) 8(3) *European Journal of International Relations* 375.

⁸⁵ See M. Plachta, 'The Role of Double Criminality in International Cooperation in Penal Matters' in N. Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 84, 118.

⁸⁶ P. Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' in M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 43, 43.

Mutual trust is in its core a mechanism to ensure compliance with EU law, or maybe better; to explain compliance. Underlying this notion is either a (sufficient) level of comparability of national laws or EU legislation to ensure that national laws are comparable. As abstract as the notion of trust itself is the question what constitutes a 'sufficient level' of comparability. This differs from one policy area to another, and even within a single policy area differences appear between various types of measures (recognition of an extradition request requires different safeguards than recognising out of state evidence). This leads to various notions of trust, in other words, trust functions differently in the various EU policy fields.

4. Calls for Further Development of Mutual Trust

Ever since the EU's involvement in criminal justice matters, it has been hard to find academic literature on the topic that does not somehow mention the term trust. Literature on the issue of trust has often focused on the absence of grounds on which it is supposed to be founded, mainly in the form of procedural rights. Normative development of the concept of mutual trust in the particular EU criminal justice context has come about more slowly.⁸⁷ The hiatus has not gone unnoticed though and recently concerns have been raised and the need for development of the principle has been underlined. Herlin-Karnell for example, holds that the lack of 'articulation of what mutual trust actually means in the field of criminal law' poses 'a significant lacuna in EU criminal law cooperation'.⁸⁸ And Ostropolski, while speaking of the importance of a principle of mutual trust, recognises that it 'lacks an explicit normative basis'.⁸⁹ The recognition of this 'lacuna' is certainly a first step

⁸⁷ For accounts of mutual trust see for example D. Flore, 'La notion de confiance mutuelle: l' <alpha> ou l' <omega> d'une justice pénale européenne?' in de Kerchove and Weyembergh (fn 9) 17; G. Stessens, 'The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security' in G. de Kerchove and A. Weyembergh (eds), *L'espace pénal européen: enjeux et perspectives* (Editions de l'Université de Bruxelles 2002) 93; V. Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance' (2015) 3 *EUcrim* 90; and Vermeulen (fn 8).

⁸⁸ E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice' in D. Acosta Arca and C. Murphy (eds), *EU Security and Justice Law After Lisbon and Stockholm* (Hart Publishing 2014) 38, 42.

⁸⁹ Ostropolski (fn 33), 166.

towards filling it, and calls for such development have become more urgent with the increasing use and importance of the term. Fichera has made an attempt to define trust in non-legal terms, but at the same time he stressed that 'future policies and strategies' should take into account that 'mutual trust in European criminal law is not uniformly developed'.⁹⁰ A warning that has not been given due consideration by EU policy makers. In a wider EU context, Cramér 'believe[s] that analysing the functions of mutual trust in the European integration process has the potential to be a fruitful endeavour that might further our understanding of the development and functioning of EU law'.⁹¹ This statement seems particularly relevant for the EU criminal law context considering the central function of mutual trust and the pace of development in the field, and strengthens the proposition that the EU's discourse leaves much to be desired and underlines the importance of the concept of trust for the further development of the AFSJ.

IV. TRUST AS A SOCIAL CONSTRUCT

In order to improve our understanding of mutual trust in the specific environment of EU criminal justice cooperation, it might be useful to take a step back and look at what elements of social trust it actually entails. Mutual trust is not a principle of law that can be closely defined, but is in essence a social construct.⁹² The term trust in the EU context is often used in the vernacular, as if clear in itself, but as has been demonstrated in the above, it is far from.

In its broadest form, trust is typically described as the reliance on another person or entity. Trust can be attributed to relationships between people, but

⁹⁰ M. Fichera, 'Mutual Trust in European Criminal Law' (2009) 10 University of Edinburgh Working Paper Series, 19.

⁹¹ Cramér (fn 86), 44, furthermore, he believes 'that further investigation of mutual trust between actors within the EU in relation to the functioning of EU law has the potential to provide us with insights that may enhance our ability to understand the dynamics of EU law and European integration at large', 60.

⁹² See also Fichera (fn 90), mutual trust is 'a non-legal term' and 'a sociological approach may be helpful to elaborate a concept that can be applied in a legal-political context', 19.

also to relationships within and between social groups and entities. The broad relevance of trust is accurately described by Gambetta:

the importance of trust pervades the most diverse situations where cooperation is at one and the same time a vital and fragile commodity: from marriage to economic development, from buying a second-hand car to international affairs, from the minutiae of social life to the continuation of life on earth.⁹³

Hence trust is studied in most of the social science disciplines, including history, philosophy and political science. It is important to note that there is not one overarching definition of trust, but that trust takes upon different meanings and forms in the various disciplines. This section will identify four core elements (or indicators) of trust literature that can be used to clarify what trust entails in the specific EU criminal justice sphere.⁹⁴ It will be demonstrated that trust as it functions in EU criminal justice cooperation does not fit tightly with the concept of trust as developed in social science literature. Some core elements can be attributed to trust in the area of cooperation under examination, while others are harder to locate.

1. Willingness to Take Risks

The first indicator of trust highlighted here is risk. There is agreement amongst scholars that the willingness to take risks, or the idea that trust '*refers to an attitude involving a willingness to place the fate of one's interests under the control of others*', constitutes an important element of trust relationships.⁹⁵ Elster defines this important aspect of trust relationships in the following way; '*to trust someone is to lower one's guard, to refrain from taking precautions against an interaction partner, even when the other, because of opportunism or incompetence, could act in a way that might seem to justify precautions*'.⁹⁶ This behavioural definition of trust requires a double

⁹³ D. Gambetta, 'Foreword' in D. Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988).

⁹⁴ This is by no means an effort to comprehensively cover trust, but rather an exercise to highlight the value of an inter-disciplinary perspective.

⁹⁵ Hoffman (fn 84), 376-377.

⁹⁶ J. Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (CUP 2003), 344.

abstention; 'one party's refraining from precautions in the hope that the other will refrain from opportunistic behaviour'.⁹⁷ According to Heimer, trust comes into play in situations involving both the vulnerability of one party to the other and the uncertainty of the trustee,⁹⁸ and she regards vulnerability and uncertainty as the core elements of a trust relationship. In a trust relationship the truster always runs a risk of betrayal,⁹⁹ if this risk is removed from cooperation trust is no longer a problem.

When translated to EU interstate relations, more in particular in the framework of the EAW, several precautions have been taken to minimise the risk involved. Both in accordance with the EAW's mandate (the grounds for refusal listed in the EAW), and contrary to it, such as a general human rights refusal ground.¹⁰⁰ Therefore, the risk involved when cooperating on the basis of the EAW is limited. Member States have prior to embarking on cooperation negotiated a document containing specific rules on when a request has to be executed, leaving minimal leeway and a relatively high degree of certainty. 'Mechanisms that create certainty about a potential trustee's future behavior replace the need for trust in relationships,' and 'make betrayal impossible'.¹⁰¹ Therefore, this important element of a trust relationship does not fully appear in EU criminal justice cooperation. Member States have not shown full 'willingness to place the fate of one's interests under the control of others',¹⁰² and actors are, to a large extent, barred from opportunistic or incompetent behaviour, minimising the risk involved. That is not to say that trust is not involved at all, but that the issue of trust is not clear-cut; trust is required for certain acts on which the

⁹⁷ *ibid.*

⁹⁸ C. Heimer, 'Solving the Problem of Trust', in K. Cook (ed), *Trust in Society* (Russell Sage Foundation 2003) 40.

⁹⁹ See for example A. Baier, 'Trust and Antitrust' (1986) 96(2) *Ethics* 231.

¹⁰⁰ For example the UK, section 21(1) of the Extradition Act 2003, requires the judge who is otherwise required to proceed to order the surrender of a wanted person to 'decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998'; another example is the Netherlands, see art 14 *Overleveringswet*.

¹⁰¹ Hoffman (fn 84), 378.

¹⁰² *ibid.*, 376-377.

cooperating Member State could err, but if the margin for error is completely removed, trust is no longer required and has been replaced by certainty.

2. *Interest*

A second important indicator of trust relationships highlighted here is that of interest. In a trusting relationship, which at minimum consists of two parties, a trustor and a trustee, both parties can be assumed to be 'purposive', meaning that they both aim to satisfy their interests.¹⁰³ An important reason to enter into a trusting relationship is to satisfy an interest, or even stronger, interests are likely to be 'the whole point' of many relationships.¹⁰⁴ There is 'strong agreement' in trust literature that 'the decision to entrust one's interests to others is usually based on the belief that the fulfilment of that trust will make the trustor better off'.¹⁰⁵ This can be easily felt when we think of our own experience with trust relationships; actors will likely choose strategies that serve their self-interest.¹⁰⁶

This element of a trust relationship is evident in EU (criminal justice) cooperation. Member States initially decided to enhance interstate cooperation in criminal matters to be better equipped to combat cross-border crime, a common interest. More specific interests are served by the various cooperation instruments such as the EAW (returning fugitives from justice), but can be grouped under the general goal of strengthening criminal law enforcement and creating a borderless AFSJ. This example does not allow for a definitive conclusion as to whether a relation can be labelled 'trust relation', but merely serves the purpose of showing an aspect of a trust relation.

¹⁰³ J. Coleman, *Foundations of Social Theory* (The Belknap Press of Harvard University Press 1990), 96.

¹⁰⁴ See R. Hardin, 'Conceptions and Explanations of Trust', in Cook (fn 98) 3, 8.

¹⁰⁵ Hoffman (fn 84), 382.

¹⁰⁶ Alternatively, there are accounts that hold trust is grounded in a strong moral commitment to fulfil certain kinds of trust (the belief that trusting is a good thing in its own right). These cases of trust do indeed exist in social life (even though they do not characterise the majority of trust relationships), but will be difficult to find in inter-state cooperation. For an account that considers morally motivated actions to be part of trust, see for example D. Messick and R. Kramer, 'Trust as a Form of Shallow Morality', in Cook (fn 98) 89.

3. Differentiating Between Trust and Trustworthiness

A third element, or maybe more accurate distinction that has to be made when speaking of trust, is to differentiate between trust and trustworthiness. It is a common conceptual slippage not to do so, not only in ordinary language use, but also in trust literature.¹⁰⁷ Simply put; 'if everyone we interact with were trustworthy, there would be no problem of trust'.¹⁰⁸ The assessment of trustworthiness and the act of 'trusting' someone are two separate steps. The use of trust often refers to the entire trusting relationship, both the trusting and the trustworthiness.¹⁰⁹ Statements as 'trust has to be strengthened', 'fostered' or 'enhanced' are examples of such slippage. After all, moving actors towards trusting if the trustee is not trustworthy can be seen as perverse. The most compelling reason for this slippage 'is that *trustworthiness commonly begets trust*'.¹¹⁰ The use of trust and trustworthiness as one 'combined' concept can be easily explained considering that something that causes trustworthiness will possibly lead to trust. The two are not distinguished from each other since they are connected. It is however necessary to make this distinction considering these are two different aspects of a trust relationship. One might be trustworthy, but you might never act upon it, but there could equally be cooperation with a non-trustworthy actor, especially if the room for choice is narrow or lacking at all.

Much of the concern with trust in the EU criminal law context is actually concern over the lack of trustworthiness. The EU is currently asserting to 'build trust' with for example the Roadmap. But these seem more like attempts to increase trustworthiness. It is not necessary that these will lead to trust.

There can be many different reasons why someone (this includes groups and entities) is perceived as trustworthy. Important in this light is information.¹¹¹

¹⁰⁷ Hardin (fn 104), 16.

¹⁰⁸ K. Cook, 'Trust in Society', in Cook (fn 98), xiv.

¹⁰⁹ Hardin (fn 104), 16.

¹¹⁰ *ibid*, 17.

¹¹¹ See also Alegre, 'mutual trust must be based on mutual knowledge that such trust is reasonable', as it can take away 'the blindfold'. S. Alegre, 'Mutual Trust- Lifting the Mask' in de Kerchove and Weyembergh (n9), 41, 43.

Expectation is essential in most accounts of trust, meaning that trust follows on the expectation that a truster has; 'trust is ... inherently a matter of knowledge or belief'.¹¹² Of course we often trust or distrust for bad reasons. It is important to stress that when speaking of reputation, we essentially speak of reputation for trustworthiness, not trust. As said, trusting necessarily involves taking risks, and 'actors that fail to accurately assess their counterparts' reliability are more likely to have their interests betrayed'.¹¹³ The danger of betrayal can be reduced by improving both the amount and quality of information available about cooperation partners. Information is key in enhancing trustworthiness.¹¹⁴ In the EU context there currently seems insufficient information on the various national legal systems at play in the AFSJ in order to make a fair assessment of trustworthiness.

4. Trust Is a Three-Part Relation

A last aspect highlighted here is that trust is a three-part relation; A trusts B to do X.¹¹⁵ Trust relationships are never unconditional; therefore, all three parts are necessary. It does not make much sense to simply state that A trusts B. In order to clarify the underlying logic of the trust relation and to be precise about what we mean we have to always be able to add the 'to do x' part to the equation. A might trust B to do X and Y, but not to Q and R. In other words, trust is very much contextual.

In contrast, there are theories of trust that suggest trust between parties can be general, thus a two-part relation that takes the form 'A trusts B'.¹¹⁶ However, there are not many relationships in which a truster has unconditional trust in the trustee, hence the three-part relation is the stronger argument.¹¹⁷

¹¹² Hardin (fn 104), 7.

¹¹³ Hoffman (fn 84), 379.

¹¹⁴ Of course, the opposite can also be true when this information shows that the other party is not worthy of trust; see also Alegre (n111), 45.

¹¹⁵ Hardin (fn 104), 12-16.

¹¹⁶ See e.g. R. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster 2000).

¹¹⁷ One possible argument to the contrary could be that the three-part relation of trust 'makes it seem that the list of issues over which A trusts B is known in advance, but in practice this is rarely the case.' However, the 'list' does not have to be known in

The addition of the 'X' is particularly important for the type of trust we are analysing, since mutual recognition operates in an *ad hoc* manner, meaning that cooperation takes place only in those areas designated by specific legislation. Trust is thus only required for these specific acts. Mutual recognition does not function in a broad manner, *i.e.* Member States are not required to trust every single aspect of the other legal systems. In order to make valid, and more importantly, meaningful statements about trust between EU Member States it always has to be specified to what 'action' exactly this trust refers. Increased specificity might make it easier to comprehend the 'trust problem' and to form policies in accordance, as it filters out a lot of unnecessary noise. Therefore, the abstract idea that some form of generalised trust is required in order to enhance judicial cooperation in criminal matters is not only inaccurate, it also clouds the reality that in order to make specific aspects of judicial cooperation work, specific supporting measures are required. Such a perspective makes the trust building policy more comprehensible and might lead to more concrete goals.

5. *Why Are We Even Speaking of Trust?*

The above has shown that what is labelled mutual trust in the EU criminal law context is not a clear-cut example of what a trust relationship is according to social science literature on the topic. For example, the important element of risk (a core part of trust) is minimised by pre-existing legal arrangements. At the same time, it is clear that the relations at stake serve a particular interest and fulfil this element of trust relations. As such we might consider the trust at issue to be a *species* of the *genus* social trust, not a stereotypical application of the concept of trust, but one with specific characteristics in the EU criminal justice context. Hence, trust in this particular context has a meaning that differs from everyday notions of trust, and therefore a policy to build or enhance trust should answer to its specific needs. Social science literature on trust can help in achieving this by showing where trust is at stake, and where it is not. In case it is the latter, it should be questioned whether legislative instruments to build trust should be employed, as these have far reaching consequences for national criminal law, something which should be kept to a minimum in line with mutual recognition's rationale. In the current discourse

advance, it can develop over time and the 'X' will present itself when examining an ongoing relationship, see Hoffman (fn 84), 378.

trust relates to pretty much everything that stands in the way of a successful functioning of mutual recognition, in this sense it is a collective term. While this is convenient for policy makers and legislators, *i.e.* the answer to every problem is trust (or better a lack thereof), it is not very helpful in furthering the establishment of an AFSJ.

V. MUTUAL TRUST, A TERM OF ART

Mutual trust in the EU criminal justice sphere thus has a meaning and function specific to its environment, and does not in every possible sense link with the social construct that trust is. Therefore, a social science perspective only tells part of the story and mutual trust consists of additional elements. This section will highlight a number of its core elements, supporting the idea that mutual trust is a term of art in the EU criminal justice environment.

I. Fundamental Rights

The core of mutual trust in the EU criminal law sphere is its link with fundamental rights. The meaning attributed to mutual trust in literature largely comes down to 'the relationship between the level of harmonisation (in sense of "harmony") of procedural law and procedural safeguards on the one hand, and the level of mutual trust as a condition for successful mutual recognition on the other'.¹¹⁸ Criticism has mostly focused on the (false) presumption of trust, by pointing to the widespread and often poor provision of defence rights throughout the EU,¹¹⁹ and the absence of a (explicit) fundamental rights refusal ground in the EAW. The CJEU has recently for the first time allowed to derogate from mutual recognition when fundamental rights will be violated.¹²⁰ If the Court continues this line of reasoning there might be more instances in which refusal would be permitted. A positive development in light of safeguarding fundamental rights in an AFSJ and recognition of the different realities within this area, as, argued by Mitsilegas, mutual trust does not only follow on the existence of

¹¹⁸ Vernimmen-Van Tiggelen and Surano (fn 67), 10.

¹¹⁹ See n 68.

¹²⁰ In *Aranyosi*, see section II.4.

fundamental rights, but also *vice versa*.¹²¹ Mutual trust and the safeguarding of defence rights throughout the EU could actually be enhanced by recognising limits to its presumed existence, contrary to the Court's earlier line of cases in which it contended that any limit to the presumption of trust would hinder the implementation of mutual recognition. In light of these recent developments, the process to mitigate the fundamental rights critique seems to have really taken off. But, while fundamental rights might indeed form the core of a concept of mutual trust in criminal justice cooperation, the concept entails more than just the link with fundamental rights and the quest to harmonise these standards.

2. *Reciprocity*

Reciprocity is an example of another core aspect of the principle of mutual trust. As aptly described by Fichera 'mutual trust can be intended as the reciprocal belief that others' behaviour will not violate the basic common principles that lay at the heart of the EU legal systems.'¹²² The idea of reciprocity is that while the EU lacks a general mechanism to enforce its legislation, Member States more frequently than not comply with EU law.¹²³ One explanation for this high degree of loyalty with EU law is the expectation that all other Member States implement and apply EU law in the same efficient manner. Without this expectation, the Union would not function as it does today, 'accordingly, all Member States have a self-interest to comply in order to safeguard the stability of the system'.¹²⁴ Yet, the CJEU has held that the principle of reciprocity does not have legal status in the Union. In *Hedley Lomas*, the Court ruled that a Member State cannot unilaterally decide to relieve itself of its obligations under Union law because another Member State has breached its obligation.¹²⁵ In its decision the Court emphasised the

¹²¹ Mitsilegas speaks of a 'symbiotic relationship' and identifies several dimensions to the relation mutual trust-fundamental rights, see V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Freedom, Security and Justice' (2015) 6(4) *New Journal of European Criminal Law* 457.

¹²² Fichera (fn 74), 207.

¹²³ Eijsbouts and Reestman (fn 16), 1.

¹²⁴ Cramér (fn 86), 53.

¹²⁵ Case C-5/94, ECLI:EU:C:1996:205, *Hedley Lomas*, para 20.

need for mutual trust between Member States,¹²⁶ and by doing so distinguished reciprocity from mutual trust. This decision is understandable when thinking of the consequences of giving formal status to reciprocity; if one Member State for whatever reason errs in its obligations under EU law, this would threaten the whole system. That is not to say there is no role for reciprocity, it functions more at the level of a state's psyche, namely it has an interest in cooperation for the sole reason that other Member States do the same, and since they have that same interest this will not easily lead to problems. Only the most fundamental concerns might lead Member States to disobey and risk jeopardising this harmony or *status quo*.

Reciprocity underlying compliance is a common mechanism in theories of international relations and public international law.¹²⁷ Whereas the EU might have limited enforcement powers, on the international level this is even more so as a global government is lacking. Reciprocity is widely accepted as a standard of behaviour which can produce cooperation among sovereign states.¹²⁸ Reciprocity is thus an important factor in explaining cooperation between sovereign actors based on self-interest.

In the criminal law sphere, more in particular the EAW, reciprocity has no formal status, yet it forms an important aspect of mutual trust in this context. A concrete example of reciprocity in the EAW context was Spain's reaction to Germany's temporary suspension of the EAW pending constitutional amendment. Spain, invoking reciprocity, declared that it would no longer execute EAW's, and that it would process requests from Germany under the 'old' pre-EAW legal framework.¹²⁹

¹²⁶ *ibid*, para 19.

¹²⁷ See e.g. R. Keohane, 'Reciprocity in International Relations' (1986) 40(1) *International Organization* 1.

¹²⁸ Or as Zoller puts it, reciprocity 'is a condition theoretically attached to every legal norm of international law', E. Zoller, *Peacetime Unilateral Remedies* (Transnational Publishers 1984).

¹²⁹ See Z. Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 271, 300.

The idea that states have a common interest in suppressing international (cross-border) crimes is the foundation of *why* states would engage in international cooperation in criminal matters.¹³⁰ If states want to successfully fight crime, especially in a globalising world without borders, cooperation is a necessity, and reciprocating other states' assistance and efforts in doing so becomes a must. Trust as a mechanism explaining cooperation refers to this self-interest and reciprocity. In the end, Member States would not engage in a measure such as the EAW if their actions would never be reciprocated, when they extradite a suspect under the EAW, they 'trust' that next time when they themselves request a person under the scheme, that effort is returned.

3. *The Loyalty Principle*

The loyalty principle,¹³¹ or the principle of sincere cooperation, is a fundamental principle of EU law and has been central in shaping the EU's legal order. Particularly relevant in the early stages, when obligations were not as inclusive as they are nowadays, but the principle has never left the institutional stage. Member States show a high degree of loyalty with EU law, despite the lack of a general enforcement mechanism. This can partly be ascribed to (a degree of) trust and the expectation that other Member States will act in a similar manner. As such loyalty is an outcome of trust and reciprocity. The principle carries weight particularly in the criminal law sphere, as its development has been piecemeal, and enforcement opportunities have slowly improved, but are still incomplete.¹³² Fichera regards the principle of loyal cooperation as 'the basis of mutual trust and mutual recognition'.¹³³ The link between loyalty and reciprocity is more precisely the 'belief that others' behaviour will not violate the basic common

¹³⁰ This idea dates back to Grotius, see H. Grotius, *De Jure Belli ac Pacis*, Volume 2, Chapter XXI, Sections III and IV' in J. Brown Scott, *The Classics of International Law* (The Carnegie Institution 1925, translated by F. Kelsey) 526.

¹³¹ The loyalty principle has been codified in Article 4(3) TEU. See also M. Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

¹³² From 1 December 2014, the Commission can use its infringement powers in the field of police and judicial cooperation in criminal matters.

¹³³ Fichera (fn 90), 12.

principles that lay at the heart of the EU legal systems'.¹³⁴ So (receiving) loyalty has a price, namely acting loyal. This circularity can also be found in the concept of trust, in order to be trusted one has to act trustworthy. Somewhere in that chain a leap has to be taken in order to overcome the initial deficit. In this sense it helps that loyalty (or 'sincere cooperation') has the status of a legal principle and Member States are bound to 'assist each other in carrying out tasks which flow from the Treaties'. Therefore, when Member States are acting 'insincere', *i.e.* not in accordance with their obligations under the Treaties or secondary law, they breach a legal obligation. And even though the drafters have chosen to keep the term trust out of the formal sphere of the Treaties, the loyalty principle has been described as consolidating the concepts of 'trust, solidarity and respect'.¹³⁵ The (three) concepts are regarded as inextricably linked, and in order for Member States to operate loyally, trust is required.

According to Herlin-Karnell, the 'elasticity of the loyalty principle' is at the core of the interpretation of mutual trust.¹³⁶ It is indeed a question of how much loyalty national courts are willing to show, and as evidenced by the case law on the EAW there are limits as to this, even without a formal ground to review the compatibility of the EAW with human rights. Examples as these reveal the parameters within which cooperation on the basis of mutual trust operates, and that as much as mutual trust is limited, the principle of loyal cooperation is too.

4. The Equivalence Presumption

An important aspect of trust is (its relation with) the equivalence presumption.¹³⁷ The presumption originates in the internal market application of mutual recognition, namely that national regulation may be different, but equivalent. In the criminal law sphere, the subject of equivalence is different, market regulation can be substituted for procedural safeguards in criminal proceedings, but the logic is the same. The equivalence

¹³⁴ *ibid*, 13.

¹³⁵ Janssens (fn 2), 151.

¹³⁶ E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant' (2013) 38(1) *European Law Review* 79, 80.

¹³⁷ See also Fichera (fn 90), 14.

or comparability presumptions are underlying or even equal to the trust presumption, and as such lead to a double presumption. In this regard it has to be noted that the equivalence presumption in the criminal sphere is more absolute than in the internal market and allows for few exceptions.¹³⁸

The specific degree of equivalence required for smooth cooperation is not known from the outset, and even if it would, this will be hard to express or measure (possibly in terms of minimum requirements). But given that Member States enter into cooperation, at least the general perception is that there is sufficient equivalence. More specifically this has to be established in practice, *i.e.* by trial and error. The degree of equivalence required for a specific measure will thus be exposed by the process started with the negotiation of an instrument to its application in practice. This process is a manifestation of the flexible nature of trust; the institutional architecture therefore has to allow that its limits are dynamic and subject to negotiation and limitation where necessary. This can in turn serve as a mechanism that will point out in what specific areas harmonisation, *i.e.* greater equivalence, is required.

One important distinction that has to be made here is that equivalence is different from compliance. There will largely be equivalence as to fundamental rights standards within the EU (all states are bound by the ECHR), however when it comes to compliance with these standards, large differences appear. This is linked to the distinction, frequently made in literature, between trust *in abstracto* and trust *in concreto*.¹³⁹ The equivalence presumption does nothing more than presuming that standards, even though different, are equivalent - a formalistic or *in abstracto* approach. The question whether these are correctly applied in practice is a different one and can be described as *in concreto*. So it can be said that while trust may (be presumed to) exist *in abstracto*, there are signals that trust *in concreto* is more problematic.¹⁴⁰

¹³⁸ See Tosato (fn 51).

¹³⁹ See for example Janssens (fn 2), 141-144.

¹⁴⁰ See J. Ouwerkerk, 'Mutual Trust in the Area of Criminal Law', in Meijers Committee, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law* (2011) 38, 47.

VI. THE HYBRID CHARACTER OF MUTUAL TRUST

In the above, several elements of the principle of mutual trust in the EU criminal justice context have been identified. Broadly speaking, these could be grouped into 'social' and 'legal-political' elements. When these two groups of elements are brought together, a complete, and arguably hybrid image of trust appears. On the one hand elements which in social science literature have been attributed to a concept of (social) trust, on the other elements which are more particular to the surroundings of EU cooperation, or even more specifically to EU criminal justice cooperation. It is important to value both sides or aspects of mutual trust equally since treating trust as if purely legal-political would raise false expectations. The power to control and steer trust by means of legislation is only a limited one, and a wide variety of factors impact on its existence. The role of trust building legislation is to create the conditions for Member States to be trustworthy. But if one thing, trust cannot be forced. Therefore, a conclusive presumption as for example in Opinion 2/13 is not constructive. The path chosen by the Court in *Aranyosi*, namely to open up the presumption to rebuttal, is more likely to enhance trust by stimulating dialogue and in the process improving trustworthiness.

On the legal and political side, mutual trust has emerged as a core principle in the development of the field labelled as EU criminal law and is widely regarded to be a prerequisite for mutual recognition-based cooperation. It had already gained relevance for EU law long before and trust might be the very reason why Member States cooperate to begin with. In the context of the AFSJ, the principle has a slightly different meaning from its application in other EU policy fields, mainly because of the nature of the issues involved, namely dealing with criminal law necessarily involves (the violation of) fundamental rights. The principle of mutual trust brings together several of the foundational principles of the EU's legal order and as such is a collective notion. Mutual trust links with reciprocity and loyalty, functions on a level of equivalence and, particularly important in the criminal law context, heavily relies on respect for fundamental rights and procedural fairness.

But while mutual trust in the AFSJ operates in a legal and political environment, it cannot be seen as completely detached from its nature as a

social construct. If this were the case, we could just let go of the term trust altogether. If we call it trust, it should at least have some links with what trust is; a social construct which is to an extent an abstract notion, but that should not be an excuse to suspend further efforts to understand its meaning and functioning. While the version of trust under consideration here shows anomalies vis-a-vis the concept of social trust, as for example the tendency to minimise risks in criminal justice cooperation, there are also similarities, such as the interest-based nature of the relationship at stake. Hence, keeping a close eye on trust as in social science literature can help explain the phenomenon under examination and guide future attitudes towards trust. Accordingly, a number of adjustments to the EU discourse might be helpful and can improve clarity. For example, distinguishing between trust and trustworthiness, recognising the importance of information, and adding the X when making statements about trust have been suggested in this light.

Important to stress is that this has by no means been an effort to closely define trust; this is not only impossible, it would also run counter to the dynamic and flexible nature of the principle.¹⁴¹ Nevertheless, increased normative clarity is needed to hold to account those who have turned trust and trust building into the core of the EU criminal justice policy and are legislating in accordance. A conceptual idea of what mutual trust is and what it is not, can contribute to a fair and just enhancement of cooperation in penal matters among EU Member States, possibly with less emphasis on trust building, or at least recognise that this might (often) be political rhetoric more than legal reality.

A trust building policy should keep in mind the essence of mutual recognition; cooperation despite differences, and mutual trust's function is to enable cooperation on the basis of regulatory differences. The scope of its functioning lies within the boundaries of what is acceptable for Member States. If the divergence is too great the system of mutual recognition will fall apart, but if the divergence is too little, there is no longer a need for trust. Focussing on harmonisation in the name of trust building is not only contrary

¹⁴¹ See also Suominen, 'Mutual trust is difficult to quantify. It is a very abstract construction, which seems to be normative or even ideological', A. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia 2012), 47.

to the original objective of mutual recognition and the much valued sovereignty of national criminal systems, but it is questionable whether harmonisation should be regarded as trust building altogether. The more harmony the less need there is for trust and *vice versa*. Hence, if the aim is to remove differences, trust evasion might be a more accurate term than trust building. In other words, if there were no more differences between national systems, trust would no longer be an issue and cooperation would be fully automatic.

Instead, an effort should be made to create the conditions that enhance trustworthiness while preserving, as much as possible, the identities of national criminal justice systems. Since the (ground breaking) EAW a large number of mutual recognition instruments have been adopted, with varied success. In the process, the critique on the functioning of the AFSJ has only increased. In this sense mutual trust is a threat and an opportunity at the same time. A continuation of the emphasis on the presumed existence of trust will further diminish the desire to cooperate as Member States might not want to be pressed to trust and cooperate in sensitive areas of criminal justice.¹⁴² When it is acknowledged that trust cannot be forced upon judicial authorities and be steered and controlled by legislation, but that its (slow) growth might involve taking some risks and reciprocating trustworthy behaviour, the principle of mutual trust might prove valuable in the quest to enhance EU criminal justice cooperation.

¹⁴² See also Nilsson, who points in light of the 'clawing back of powers from Brussels' to 'the recent yellow card from national parliaments in 11 Member States in respect of the setting up of the European Public Prosecutor's Office is another sign that Member States want to be very cautious in this very sensitive area.' H. Nilsson, 'Where Should the European Union Go in Developing Its Criminal Policy in the Future?' (2014) 1 EUcrim 19, 21.