Received: 31 May 2022 | Accepted: 5 June 2022

DOI: 10.1111/eulj.12436

VARIETY

WILEY

Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context

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Abstract

The rule-of-law-backsliding in some Member States has subverted not only one of the EU fundamental values but also trust among national authorities when implementing European Arrest Warrants (EAW). However, when evaluating the execution of EAWs issued by countries experiencing rule-of-law crises, the Court of Justice of the EU (CJEU) sought to preserve judicial cooperation and imposed a rather "top-down" view on mutual trust among Member States. This approach seemingly disregards the (dis)trust which has emerged in the EU due to rule-of-law-backsliding and fails to acknowledge the psycho-sociological nature of trust. Drawing on the trust literature, the paper offers novel conceptual elements to rethink mutual trust in the EAW framework. Notably, it critically assesses some of the gaps in the CJEU's interpretation of mutual trust and advances suggestions to embed empirical considerations in the conceptualisation of this principle to bridge the gap between trust in practice and in principle.

1 | INTRODUCTION

Europe has witnessed an emergence of illiberalism which has put the rule of law under strain. Yet, this development has not only affected compliance with one of the EU founding values enshrined in Article 2 TEU, but, remarkably, also had a significant influence on trust among EU Member States. In a 2020 report, the Meijers Committee observed that the erosion of the rule of law and, consequently, of trust among the Member States, 'has a direct

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impact on cross-border cooperation in criminal matters.'[1] Indeed, following a series of controversial judicial reforms in Poland, several national courts showed reluctance to execute European Arrest Warrants (EAW) issued by that country. In particular, national courts, such as the district court of Amsterdam, doubted that the Polish issuing authorities could be trusted to execute an EAW because of the serious threats to the rule of law and fundamental rights protection in Poland.[2] Most recently, a Norwegian district court refused surrender to Poland based on the 'significant greater danger and probability' that a Polish court would not have a lawful judge in accordance with Article 6 of the European Convention on Human Rights (ECHR).[3]

However, when questioned about the execution of EAWs issued by countries affected by rule-of-law crises, the Court of Justice of the European Union (CJEU) has given prevalence to cooperation considerations and recalled the centrality of the principle of "mutual trust" in the EU architecture. The principle of mutual trust, which applies in many fields of EU law,[4] requires that each Member State considers other Member States as compliant with EU law and particularly with EU fundamental rights,[5] save in exceptional circumstances. By recalling that mutual trust is 'of fundamental importance [in the EU] given that [it allows] an area without internal borders to be created and maintained',[6] the CJEU concluded that intra-State mechanisms of cooperation, including the EAW, should in principle not be halted. This stance of the CJEU reveals a certain degree of disconnect with the current (dis)trust that exists between national authorities, and ultimately disregards the reality of trust as a psycho-sociological phenomenon.

In light of this gap, legal scholars have stressed that mutual trust as shaped by the CJEU is a legal fiction that often does not live up to reality.[7] However, the literature on EU law has recently started to explore the meaning of trust as a psycho-sociological phenomenon to reshape the conceptualisation of mutual trust within the EAW framework.[8] In particular, authors have offered reflections on how trust is established between different actors involved in the EAW.[9] Nevertheless, existing research has not gone as far as to provide concrete solutions to build *effective* mutual trust in the EU to underpin the legal, normative dimension of this principle, and ultimately improve EAW enforcement. On this basis, the following question remains open: *How can the gap between mutual trust as a legal principle and mutual trust as a reality be bridged in the current approach to the enforcement of the EAW framework?*

This article starts from the intuition that the trust literature developed in non-legal disciplines, in particular, those focusing on organisational and public administration, can not only provide a better understanding of the concept of trust as a psycho-sociological phenomenon; it can also offer useful lessons and tools to ensure the effectiveness of mutual trust as a legal principle. Interestingly, the EAW framework chiefly operates in an organisational context, and this makes the organisational trust literature particularly suitable to analyse the application of mutual trust in the

[1]Meijers Committee, 'Surrender to Poland suspended. Call for political intervention to protect the rule of law in EU Member States' (CM2007), 3 November 2020, https://www.statewatch.org/media/1446/eu-meijers-committee-eaw-poland-problems-3-11-20.pdf.

[2]*District Court of Amsterdam*, ECLI:NL:RBAMS:2020:3776, 31 July 2020; *District Court of Amsterdam*, ECLI:NL:RBAMS:2020:4328, 3 September 2020; *Oberlandsesgericht Karlsruhe*, 301 AR 156/19, 17 February 2020.

[3]For a discussion, see E. Holmøyvik, 'No surrender to Poland: A Norwegian court suggests surrender to Poland under the EAW should be suspended in general', *Verfassungsblog*, 2 November 2021, https://verfassungsblog.de/no-surrender-to-poland/, doi:10.17176/20211103-052947-0. Original judgment in Norwegian, translations provided by Holmøyvik.

[4]Initially developed in the area of internal market law through the famous *Cassis de Dijon* case (Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42), mutual trust has been expanded to all areas of EU law.

[5]Case C-354/20, *Openbaar Ministerie*, ECLI:EU:C:2020:1033, para. 35.

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

[7]S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', (2007) 14 *Journal of European Public Policy*, 772; T.P. Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decision' (2018) 25 *Maastricht Journal of European and Comparative Law*, 705, V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) at 125.

[8]See, in particular, A. Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart, 2021). See also E. Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust', in E. Brouwer and D. Gerard (eds.), 'Mapping Mutual Trust. Understanding and Framing the Role of Mutual Trust in EU law', *EUI Working Papers* MWP 2016/1; J. Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure', (2020) 1 *European Constitutional Law Review*, 53–55; M. Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 *European Law Journal*, 131–135; T. Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 *German Law Journal*, 344–350.

[9]Willems, above, n. 8; E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Hart, 2020).

EAW. By shaping the legal EU principle of mutual trust in light of the notion of trust as a psycho-sociological phenomenon, the CJEU would ensure that this legal construct does not impose an obligation to collaborate with other authorities based on the presumption of compliance with EU law when the conditions for trusting are absent. Such an approach has two advantages. First, the operationalisation of mutual trust would be more transparent and reflective of the actual trustworthiness of specific national authorities. Second, reliance on the empirical elements explored in this paper would enhance the legitimacy of the use of this principle and ultimately of the EU judiciary: the CJEU would demonstrate awareness of the issues stemming from the application of mutual trust "on the ground". In turn, the openness of the CJEU to the concerns of national courts can strengthen cooperation with national authorities, including the relationship between the CJEU and national courts.

This article is not intended to provide a complete overview of this extensive field of trust research and apply it to EU mutual trust—that would be a Sisyphean task. Rather, it utilises definitions, key concepts and models drawn from the trust literature validated by cross-disciplinary convergence[10] to help rethink mutual trust in the EAW field, with the ultimate objective to bridge the gap between mutual trust *on the ground* and its legal "translation". In particular, the specific elements drawn from converging the cross-disciplinary trust literature are the concept of trustworthiness, the link among vulnerability, uncertainty, interdependence and risks, the ability–benevolence–integrity (ABI) model, multi-level trust and trust-building mechanisms.[11]

Among those, the concept of trustworthiness plays a crucial role and thus constitutes the starting point of our analysis. The trustor enters into a trust relationship with the trustee only after evaluating the trustworthiness of the latter. Trustworthiness is proven to be a pivotal basis for trust in and between different government organisations,[12] including judicial organisations.[13] The organisational trust literature stresses that perceived trustworthiness should be assessed in multiple dimensions[14] and that the institutional context shapes trust decisions.[15] Literature reviews have also shown that the ABI-model (see Section 3.3 below), which is applied in many organisational and multi-level trust studies for a wide variety of contexts, is central to evaluate trustworthiness.[16]

Against this background, this article contributes not only to the growing interdisciplinary discussion on mutual trust but also suggests that the CJEU should reshape the EU principle of mutual trust, first, by drawing inspiration from the ABI model and, second, by acknowledging the implications of the multilevel nature of the trust concept. In this regard, we also refer in particular to the concept of so-called "boundary spanners" (see Section 3.2) as builders of trustworthiness, which are crucial in multi-level trust settings, such as the EAW framework. Furthermore, the article illustrates several trust-building mechanisms that can improve and strengthen trust among the parties involved in the implementation of the EAW framework.

In what follows, we start by setting out the problem and provide a brief overview of how the principle of mutual trust in the EAW regime is currently applied (Section 2). Next, the article offers suggestions on how to embed trustworthiness considerations under the principle of mutual trust in the EU, especially when used in the EAW (Section 3). In light of the building blocks provided in Section 3, Section 4 concludes by unfolding the promises of the

[10]Ibid.

[11]Ibid.

[12]R.C. Mayer, J.H. Davis and F.D. Schoorman, 'An Integrative Model of Organizational Trust' (1995) 20 *Academy of Management Review*, 709.

[13]See, for instance: P. Oomsels et al., 'Functions and Dysfunctions of Interorganizational Trust and Distrust in the Public Sector' (2016) 51(4) *Administration & Society*, 516–544 and J. Majoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' (2017) 55(3) *Journal of Common Market Studies*, 551–568.

[14]The importance of a multidimensional approach is also confirmed by the guidelines provided by the OECD regarding the measurement of trust in empirical studies; see OECD, *OECD Guidelines on Measuring Trust*, (OECD Publishing, 2017). See also Willems, above, n. 8, at 21.

[15]R. Bachmann, 'At the Crossroads: Future Directions in Trust Research' (2011) 1(2) *Journal of Trust Research*, 203–213; R. Hardin, *Trust & Trustworthiness* (Sage Foundation Series on Trust, 2002), at 211.

[16]S. Grimmelikhuijsen and E. Knies, 'Validating a Scale for Citizen Trust in Government Organisations' (2017) 83(3) *International Review of Administrative Sciences*, 583; F. Six and K. Verhoest, 'Trust in Regulatory Regimes: Scoping the Field', in F. Six and K. Verhoest (eds.), *Trust in Regulatory Regimes* (Edward Elgar, 2017), 1–36; B. McEvily and M. Tortoriello, 'Measuring Trust in Organisational Research: Review and Recommendations' (2011) 1(1) *Journal of Trust Research*, 23–63; D.H. McKnight, V. Choudhury and C. Kacmar, 'Developing and Validating Trust Measures for e-Commerce: An Integrative Typology' (2002) 13(3) *Information Systems Research*, 334; Mayer et al., above, n. 12.

trust literature in closing the gap between mutual trust as a legal principle and mutual trust as a reality in order to ensure the effective and legitimate enforcement of the EAW framework.

2 | MUTUAL TRUST IN THE EAW REGIME

The Framework Decision on the EAW regulates the procedure for the surrender of sentenced or suspected persons among EU Member States.[17] In short, the system requires judicial authorities in Member States to execute any EAW issued by another Member State seeking the arrest and surrender of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[18] The executing court is under the duty to surrender the addressee of the EAW without verification of double criminality in respect of 32 offences[19] listed in the Framework Decision. These include terrorism, trafficking in human beings, child pornography, corruption, murder, armed robbery, racism, rape and sabotage.[20] For other offences, the executing State may still require that the conduct for which the EAW has been issued constitutes an offence under the law of the executing Member State.[21] In specific cases, the execution must be refused, for example if the offence is covered by amnesty in the executing state that has jurisdiction to prosecute the offence under its own criminal law.[22] Importantly, the Framework Decision states that it 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles.'[23]

This duty for judicial authorities to surrender is based on a legal notion of mutual trust. Prechal[24] clarifies that the principle of mutual trust is based on two presumptions. These are that (a) EU Member States observe EU law and (b) that Member States offer an equivalent level of protection under EU law notwithstanding the presence of regulatory divergencies. It is worth mentioning that at the nexus of these two presumptions lies the rule of law. It commands the observance of EU law and allows for fundamental rights protection. When applied in the field of fundamental rights, the notion of mutual trust has peculiar implications. As held in *Opinion 2/13*, mutual trust 'requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.'[25] Applying these principles in that *Opinion*, the CJEU criticised the Protocol for the accession of the EU to the European Convention of Human Rights because it allowed Member States to verify reciprocal compliance with fundamental rights. Building on *Opinion 2/13*, Lenaerts identified two enforceable obligations stemming from the principle of mutual trust: (1) Member States may not demand from another Member State a higher level of national protection of fundamental rights than that provided by EU law, and (2) they are prevented from checking whether another Member State has observed the fundamental rights guaranteed under EU law, save in exceptional cases.[26] As a result, mutual trust imposes a presumption that the issuing Member State adheres to EU law, including EU fundamental rights and the fundamental value of the rule of law as enshrined in Article 2 TEU.

This overview has illustrated the synergies between the EAW framework and the principle of mutual trust. The question thus emerges how that principle works in practice in the EAW field: in which cases should the Member

[17]Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002 (hereinafter: Framework Decision).
[18]Article 1 Framework Decision.
[19]V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review*, 1284–1285; Mitsilegas, above, n. 7, 121.
[20]Article 2 Framework Decision. The validity thereof was confirmed by the Court of Justice in Case C-303/05, *Advocaten voor de Wereld v. Council of Ministers*, 3 May 2007, ECLI:EU:C:2007:261.
[21]Article 2(4) and 4(1) Framework Decision.
[22]Article 3 Framework Decision.
[23]Article 1(3) Framework Decision.
[24]S. Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2017 2 *European Papers – A Journal on Law and Integration*, 82, and following; K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust', (2017) 54(3) *Common Market Law Review*, 813.
[25]*Opinion 2/13*, above, n. 6, para. 191.
[26]Lenaerts, above, n. 24, 813.

States trust and thus execute the EAW, and on which occasions should they not? Indications to answer these questions are provided both by the Framework Decision and the CJEU case law. Starting with the Framework Decision, according to recital 10 thereof, the implementation of the EAW may be suspended only in the event of serious and persistent breach of the principles referred to in Article 2 TEU and in accordance with the procedure provided for in Article 7 TEU. However, as widely acknowledged in the literature,[27] the effectiveness of the Article 7 procedure is limited due to strict unanimity requirements. We shall see in Section 3.4 how this non-binding recital of the Framework Decision can be interpreted in context.

With reference to the case law, the CJEU has clarified that only in exceptional circumstances would mutual trust not apply.[28] However, using the words of Lenaerts, mutual trust 'must not be confused with blind trust'.[29] A series of judgments define the exceptional circumstances in which the EAW may be put on hold.[30] First, in *Aranyosi*[31] it was established that the execution of an EAW can be halted in case of risk of inhuman or degrading treatment for the EAW addressee.[32] To this end, the executing judicial authority should make two assessments. First, it should evaluate whether, on the basis of objective, reliable, specific and properly updated information on the detention conditions prevailing in the issuing Member State, there is a risk of inhuman or degrading treatment for the addressee of the EAW.[33] In a next step, the judicial authority must assess whether there are "substantial grounds" to believe that, in this specific case, the individual concerned will be exposed to that risk.[34] Even if there is evidence that the second step of the test is also fulfilled, the surrender cannot be refused, but only postponed until the court obtains supplementary information that allows it to discount the existence of such a risk.[35]

Second, *LM*[36] shows that the execution of an EAW[37] can also be suspended due to a violation of the principle of judicial independence. This principle is of particular importance in the EU as it is the essence of the right to a fair trial, which is one of the manifestations of the rule of law in the EU.[38] As a first step, judicial authorities should rely on solid evidence to establish the existence of a serious risk that the principle of judicial independence is violated. As a second step, they should evaluate *in concreto* whether a breach of Article 47 of the Charter, protecting the principle of judicial independence, would occur. In the more recent *L and P* case,[39] the CJEU has further detailed the test that the executing authority should carry out to evaluate the independence of an issuing Member State's judiciary that is located in a country where there are systemic or generalised rule-of-law deficiencies. While the first prong of the analysis delineated in *LM* remains unchanged, the CJEU listed some of the factors that must be considered in the second step. In particular, the executing authority must evaluate the personal situation of the addressee of the EAW, the nature of the offence for which he or she is being prosecuted and the factual context in which that EAW was issued. The national executing authority should perform this assessment in the light of any information provided by that Member State pursuant to Article 15(2) of the Framework Decision. The CJEU further clarified that this two-prong test is necessary because the EAW may only be suspended when the Council issues a decision identifying a

[27] C. Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU' (2021) 42 *International Political Science Review*, 501; D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law*, 153; J.F.L. Aguilar, 'Again (and Still) Poland: Rule of Law and Art. 7 TEU in the European Parliament and the Court of Justice' (2019) *Teoria y Realidad Constitucional*, 137.

[28] *Opinion 2/13*, above, n. 6, para. 168.

[29] Lenaerts, above, n. 24.

[30] See also, Case C220/18 PPU, *Generalstaatsanwaltschaft* (*Conditions of detention in Hungary*), ECLI:EU:C:2018:589, para. 50.

[31] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, ECLI: EU: C:2016:198, para. 88.

[32] Ibid.

[33] Ibid., para 89.

[34] Ibid., paras. 91–93. See, on this two-step test, S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Caldararu: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 *European Journal of Crime, Criminal Law and Criminal Justice*, 207–208.

[35] Para. 98. This way, the Court avoids writing an additional ground for refusal in the Framework Decision, although postponement may easily amount to de facto refusal; Gáspár-Szilágyi, above, n. 34, 210–211, 216.

[36] C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, ECLI:EU:C:2018:586.

[37] Para. 59.

[38] Para. 48.

[39] *Openbaar Ministerie*, above, n. 5.

serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, including the principle of the rule of law.

This summary of the CJEU case law shows that, despite some recent developments, the threshold for rebutting the presumption of the legal principle of mutual trust remains high. While this approach favours cooperation amongst Member States, it is nevertheless problematic for several reasons. First, the current application of the principle of mutual trust safeguards the interests of the issuing state, but does not equally protect those of the individuals concerned by the EAW[40] and of the executing authority. Indeed, if the issuing state does not meet the rule of law and fundamental rights' protection standards, the perceived integrity of the executing court may be put at risk if it surrenders individuals to Member States that, affected by a rule-of-law crisis, violate—or are expected to violate—fundamental rights. Although the Framework Decision provides that serious violations of Article 2 TEU can prevent the issuance of an EAW, the procedures included in Article 7 TEU are virtually impossible to operationalise due to unanimity requirements.[41] Therefore, when the issuing authority is located in a country affected by a rule-of-law crisis, national judges may decide to surrender. Yet, this decision will not be based on *real* trust, but on the court's loyalty to EU law.[42] What is more, in the absence of the conditions constitutive of effective trust among national authorities, the top-down imposition of a presumption of compliance with EU law based on a trust narrative erodes the raison d'être of mutual trust in the EU, namely the co-existence of national legal orders equally committed to the same rules and values.

In what follows, we attempt to rethink mutual trust through the lens and the drivers of trustworthiness, adopting a multilevel perspective of trust. In so doing, we hope to add novel perspectives on mutual trust in the EU and to develop helpful recommendations for judges (co-)operating under the EAW Framework.

3 | TRUST AS A PSYCHO-SOCIOLOGICAL PHENOMENON VERSUS MUTUAL TRUST IN THE EU: BRIDGING THE GAP

Trust as a social phenomenon has been examined in a panoply of sciences and social sciences, including psychology, economics, management, history, philosophy but also biochemistry, neuroscience and genetics.[43] Each of these strands brings useful insights. Considering our research question, we decided to focus on available cross-disciplinary insights combined with a more sociological account of the organisational and public administration research. Drawing on the stream of organisational trust literature, our proposal pivots around three reflections.

First, trust is strongly related to the assessment of the trustworthiness of the trustee, even though the two concepts should not be confused.[44] If there are clear signals that the trustee is *not* trustworthy, then reasonable arguments exist for not trusting the trustee—and to act upon that. Because trust is a psychological disposition that cannot simply be imposed, Willems rightly contends that creating the conditions of trustworthiness should be central to the EU's criminal law policy, rather than the enforcement of an absolute presumption of trust.[45] As Willems

[40]Mitsilegas, above, n. 7, 31; E. van Sliedregt, 'The European Arrest Warrant: Between Trust, Democracy and the Rule of Law' (2007) 7 *European Constitutional Law Review*, 247.

[41]K.L. Scheppele, D.V. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law*, 3; L. Pech, *Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?* (Oxford University Press, 2020).

[42]Öberg, above, n. 8, 58.

[43]O. Schilke, M. Reimann and K.S. Cook, 'Trust in Social Relations' (2021) 47 *Annual Review of Sociology*, 240. See, also, D.M. Rousseau, S.B. Sitkin, R.S. Burt and C. Camerer, 'Not So Different After All: A Cross-discipline View of Trust', (1998) 23(3) *Academy of Management Review*, 393–404, who emphasise the different definitions and approaches used by trust researchers from different disciplines and aim at developing a cross-disciplinary view. Or the many handbooks on trust that aim at collecting views from trust researchers from various disciplines, see K. Cook and R.M. Kramer, *Trust and Distrust in Organizations: Dilemmas and Approaches* (Russell Sage Foundation, 2004).

[44]Ibid., 19–20.

[45]Ibid., 22.

emphasises, the executing court should assess the trustworthiness of the issuing state and court before engaging in a "leap of faith"[46] and deciding to cooperate or not.[47] Second, and consequently, it is essential to identify the relevant parameters that signal trustworthiness and thus help evaluating the presence of the conditions for mutual trust. As will be illustrated, the ABI model,[48] developed to identify specific factors that signal trustworthiness and validated by trust scholars in different disciplines, is helpful in this context. Notably, the ABI model can help determine the threshold for rebutting the presumption of trust. Third and finally, trustworthiness can be nurtured and fostered by a series of trust-building tools, including third party information, dialogue and control. In the following sections, we explore these concepts with a view to (re)conceptualising mutual trust in the EAW regime.

3.1 | Actors, objects and the trust relationship

At its core, trust is conceptualised as a relational concept that involves (at least) two parties to do something: A (trustor) relies on B (trustee) to do X (object of trust).[49] Trust is, hence, *very contextual* and always relates to a certain object; specifying X is essential as trust does not exist in a vacuum. A widely used cross-disciplinary definition of trust developed by Rousseau et al. states that '[t]rust is a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behaviour of another'.[50] Therefore, trust is not merely a behaviour or a choice,[51] but an underlying psychological condition that can cause or result from certain actions.[52]

As mentioned, the principle of mutual trust in EU criminal law as interpreted by the CJEU is the presumption adopted by Member States and executing authorities that the other EU Member States will comply with EU rules and key principles, such as the rule of law and fundamental rights.[53] This presumption relies on the expectation that Member States have mutual trust in each other's criminal justice systems.[54] More specifically, in the EAW framework, mutual trust is defined as a relationship under which the issuing state expects that the executing state will act in its interest by expediently surrendering an individual, and the executing state expects that the issuing state will treat this person in accordance with the rule of law.[55]

This is where the criticism, mentioned above, comes in—that the legal principle of mutual trust emphasises the interest of the issuing state, i.e. crime control, rather than the interests of the individual concerned, particularly the protection of their fundamental rights.[56] In this respect, Schwarz holds that 'the proto-idea that trust forms a three-part relation' (trustor A, trustee B and object X) needs to be modified when considering trust within the EAW framework.[57] In particular, the trust relationship between the issuing and the executing state coexists with an underlying relationship between the individual and the issuing state (see Figure 1), where the individual expects that his or her fundamental rights will be respected, and between the individual and the executing state, where the individual expects that (s)he will only be surrendered to a state that respects his or her

[46]A. Giddens, *Modernity and Self-Identity* (Polity, 1991), 244 and G. Möllering, *Trust: Reason, Routine, Reflexivity* (Elsevier, 2006), 110.
[47]Willems, above, n. 8, 19.
[48]Mayer et al., above, n. 12, 709.
[49]R. Hardin, 'Conceptions and Explanations of Trust, in K. Cook (ed.), *Trust in Society* (Russell Sage Foundation, 2001), at 8. See also Willems, above, n. 8, at 22–23.
[50]Rousseau et al., above, n. 43, at 395.
[51]It was considered a choice from a rational choice perspective, but see the overview of critiques of that conception in R.M. Kramer, 'Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions' (1999) 50 *Annual Review of Psychology*, 573.
[52]Rousseau et al., above, n. 43, at 395.
[53]M. Poiares Maduro, 'So Close and Yet So Far: The Paradoxes of Mutual Recognition' (2007) 14 *Journal of European Public Policy*, 823.
[54]C-187/01 and C-385/01, *Gözütok and Brügge*, ECLI:EU:C:2003:87, para. 33.
[55]In legal scholarship, the arrest warrant was incorrectly identified as the "subject" of trust instead of the legal fact that brings about the trust relationship; see E. Brouwer 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust', in E. Brouwer and D. Gerard (eds.), 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU law', *EUI Working Papers* MWP 2016/1, 61.
[56]Mitsilegas, above, n. 7, 31; van Sliedregt, above, n. 40, 247.
[57]Schwarz, above, n. 8, 131.

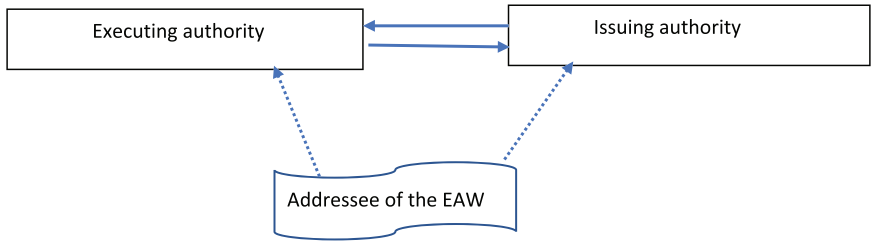

FIGURE 1 Trust relationships under the EAW [Colour figure can be viewed at wileyonlinelibrary.com]

fundamental rights. It is worth recalling that the rule of law demands not only non-arbitrary enforcement of the law, but also effective protection of rights.[58]

These trust relationships are separate but interconnected. After all, the executing state counts on the fact that the issuing state acts with respect for the individual's fundamental rights. This is an aspect that Lenaerts was keen to point out,[59] and is explicitly highlighted by the CJEU in its two-step procedure for refuting the presumption of trust.[60] Yet, as will be discussed, the current conceptualisation of the mutual trust principle under EU law does not acknowledge the importance of uncertainty, vulnerability and interdependence in the Member States' relationship, and incorrectly depicts trust as a static phenomenon. In turn, by not conceptualising mutual trust as linked to these elements, the CJEU is overlooking the position of the key actors involved in the execution of the EAW.

In laying down the foundations for reshaping the principle of mutual trust, we would like to preliminarily emphasise that there is *uncertainty* regarding the behaviour of the actors in any given trust relationship. This is especially the case for authorities located in different jurisdictions where reciprocal control is absent, as in the execution of the EAW. Moreover, the *risk* that the trustee's (i.e., issuing authority's) behaviour will harm the trustor's (i.e., executing authority's) interests signals the latter's vulnerability. The trustor's vulnerability can be higher or lower depending on the context and the guarantees provided by the trustee. Mayer et al. clarify that the trustor may decide to show vulnerability even if (s)he is not able to monitor or control the other actor.[61] Interestingly, existing legal scholarship has not explored the actual implications of vulnerability in the EAW, thus far. Under the EAW, the most vulnerable actor is undoubtedly the addressee of the EAW. However, the addressee's vulnerability influences the executing state: if the issuing state does not meet the rule of law and fundamental rights' protection standards, the perceived integrity of the executing authority may be put at risk if it surrenders individuals to Member States that, affected by a rule-of-law crisis, violate fundamental rights. This analysis illustrates in what ways the executing authority becomes vulnerable in assessing the trustworthiness of the issuing authority. As explained, mutual trust as established by the CJEU fails to consider this dynamic relationship.

Another feature of trust is *interdependence*: the interests of one actor cannot be achieved without reliance upon another.[62] This aspect is particularly relevant for the conceptualisation of the *mutual* nature of the EU legal concept of trust. For the executing authority, there is an incentive to do what the issuing authority expects it to do (i.e., surrender). By acting in accordance with those expectations in a situation of uncertainty—i.e., by surrendering—the executing authority signals its trustworthiness. In turn, the issuing authority will be more inclined to show reciprocity and to cooperate when the executing authority issues the EAW. Reciprocity is therefore 'key to keeping the

[58]B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004); T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart, 2017).
[59]Lenaerts, above, n. 24, 810, 814. See, also, C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013), at 268–269.
[60]See *Minister for Justice and Equality (Deficiencies in the system of justice)*, above, n. 36.
[61]Mayer et al., above, n. 12, at 712.
[62]Rousseau et al., above, n. 43.

system afloat'.[63] Ultimately, when reciprocal expectations are met, there is reciprocal trustworthiness. Interdependence thus plays at various levels.

Finally, trust is essentially a *dynamic* concept. The reason is that the trust dynamics can change over time. It is a truism that trust is difficult to build and easy to lose. This brings an important caveat to the principle of equality that, according to Lenaerts, serves as the constitutional basis for the principle of mutual trust.[64] Lenaerts argues that this principle means 'that all Member States are equally committed to upholding the rule of law within the EU' and share the set of common values inserted in Article 2 TEU.[65] However, even if Member States must show compliance with the Copenhagen criteria before joining the EU, this does not mean that their commitment to the values of the rule of law and fundamental rights remains unchanged. Indeed, confirming the obligation to surrender if there is no evidence of an immediate risk that fundamental rights will be violated in a specific case is highly problematic, if a *systemic* problem affecting the rule of law is noticed and the EU proves unable to resolve the violation. The imposition of an obligation to surrender would disregard the legal context in which the EAW is executed, with a high likelihood that fundamental rights may be breached. Therefore, systemic or generalised rule-of-law issues also pose an existential threat to the trust relationship among Member States. In turn, how the CJEU interprets the principle of mutual trust and the obligation to surrender to national authorities located in jurisdictions affected by a rule-of-law backsliding can have an impact on the trust relationship between national courts and the CJEU. Mutual respect for the rule of law is at the very heart of mutual trust among Member States. Hence, it seems undesirable for the CJEU to maintain that there is an obligation to surrender an individual to such a country, even if an immediate risk that fundamental rights and more broadly the rule of law will be violated in the specific case at hand is not established.

3.2 | Multilevel trust and the role of boundary spanners

In the recent literature on trust, it is recognised that trust is a multilevel concept[66] which operates at the interpersonal (micro), interorganisational (meso) and system (macro) levels. Interpersonal trust is the trust relationship that exists between two individuals connected to different or the same organisation(s). Interorganisational trust concerns trust between organisations while system trust deals with trust between systems. In particular, at the macro level, trust refers to the broader (sub-)system, its aims and values, and the adequacy with which these values are institutionalised and implemented.[67] The different levels of trust are nested into each other.[68] In this context, the role of boundary spanners is crucial. Boundary spanners[69] are representatives of an organisation or entity. Highly competent boundary spanners are needed to represent the organisation's aims and values and the associated roles and routines.[70] Perceived competence and abilities are essential signs of a boundary spanner's trustworthiness.[71] By contrast, an inadequate boundary spanner is likely to erode organisational trust. The degree of trust in the representative of a certain trust level can then feed back into other trust levels and may have spill-over effects in terms of the trustworthiness of the representative.[72] For instance, trust in an organisation (i.e., meso-level trust) shapes the trustworthiness in the organisation's boundary spanner (i.e., micro-level trust). In turn, the interaction between the trustor and the boundary spanner may change the degree of trust in the organisation. Hence, it is important to adopt

[63]Willems, above, n. 8, 24.
[64]Lenaerts, above, n. 24, 808–809.
[65]Ibid., 808.
[66]A. Fulmer and K. Dirks, 'Multilevel Trust: A Theoretical and Practical Imperative' (2018) 8(2) *Journal of Trust Research*, 137–141.
[67]F. Kroeger, 'Trusting Organizations: The Institutionalization of Trust in Interorganizational Relationships' (2012) 19 *Organization*, 743, 746.
[68]S.P. Shapiro, 'The Social Control of Impersonal Trust' (1987) 93(3) *American Journal of Sociology*, 623–658.
[69]S. Adams, 'The Structure and Dynamics of Behavior in Organizational Boundary Roles', in M.D. Dunnette (ed.), *Handbook of Industrial and Organizational Psychology* (Rand McNally, 1976), 1175; S. Adams, 'Interorganizational Processes and Organization Boundary Activities' (1980) 2 *Research in Organizational Behavior*, 321.
[70]Kroeger, above, n. 67.
[71]J.M. Hawes, K.E. Mast and J.E. Swan, 'Trust Earning Perceptions of Sellers and Buyers' (1989) 9 *Journal of Personal Selling and Sales Management*, 1. See also below regarding the ABI model.
[72]Kroeger, above, n. 67, 746.

a multilevel perspective to examine trust dynamics, such as the relationship between interpersonal trust and interorganisational trust. This aspect is currently absent in the legal literature on mutual trust in the enforcement of the EAW framework. Research on trust in organisations has further shown that, across a range of different contexts, procedural fairness can influence trust in authorities, notably also in a judicial context.[73] A crucial aspect of procedural fairness relates to the protection of fundamental rights, which is crucial in the EAW context. Procedural fairness is also a key element of the rule of law.

In the EAW regime, interpersonal trust refers to the relationship between the specific judges that issue and assess the arrest warrant. In contrast, interorganisational trust refers to trust in the judicial organisations themselves and requires that judges can act independently, with respect for the right of defence and procedural standards. However, judges also operate as boundary spanners for the judicial organisations they are affiliated with since they act as representatives for those organisations. For the EAW case, this means that the assessment of the trustworthiness of the issuing judicial authority is influenced by the institutional context—the selection of judges, the judicial training, the organisation of the judiciary and its guarantees for the independent functioning of courts, and the principal features of the entire legal and political system. Finally, system trust would correspond to the level of the Member State, which, based on democratic values and the rule of law, obliges the judicial authority to ensure procedural fairness. However, system trust may also relate to the EU and the ECHR system, both constituting the 'European legal space'[74] to which both the issuing and the executing Member States belong.

Therefore, in accordance with the concept of multilevel trust, interpersonal trust, organisational trust and system trust in the EAW are distinguished but interlinked and rely upon each other.[75] The connection between organisational and interpersonal trust means, in the first place, that it is important to facilitate a personal relationship between the judges in the EAW regime. This is because, as representatives of their organisation, they act as boundary spanners at the organisational trust level: if judge A trusts judge B, (s)he will be more inclined to trust the organisation that B represents. Van Sliegdregt highlighted that judges carry the burden of surrendering individuals, a responsibility that is no longer shared with the executive. According to this author, this shift in responsibility explains why some courts have become 'more vigorous in scrutinizing the surrender proceedings'.[76] The suggestion is that actors at the government level within the EU form a closer community, with regular interactions and more opportunities to meet, to assess the trustworthiness and to build interpersonal trust in comparison to criminal judges in the different Member States. Trust-building becomes especially difficult when the issuing judicial actors have prosecuting powers that differ from those attributed to the executing judicial authority—for example, the Swedish prosecutor who is a party to the case. In such circumstances, it may be difficult for the executing judicial authority to assess the trustworthiness of the issuing authority, and to determine whether the latter is sufficiently independent from its government.[77] Therefore, enhancement of the communication between the judges becomes crucial. We will return to this matter when we discuss trust-building mechanisms in Section 3.4. Another implication of the multilevel dynamics is that a breach in trust at the system level has an impact on the degree of trust at the other levels, and vice versa.

The next section reflects on ways to embed these findings in the legal concept of mutual trust and its application in the EAW context. We demonstrate that the notion of multilevel trust is not only relevant at the policy level as

[73] J.A. Hamm, J. Lee, R. Trinkner, T. Wingrove, S. Leben and C. Breuer, 'On the Cross-Domain Scholarship of Trust in the Institutional Context', in E. Shockley, T. Neal, L. PytlikZillig and B. Bornstein (eds.), *Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration* (Springer, 2016), 131 (literature review including trust in courts); K. Murphy, L. Mazerolle and S. Bennett, 'Promoting Trust in Police: Findings from a Randomised Experimental Field Trial of Procedural Justice Policing' (2014) 24(4) *Policing and Society*, 407. This is grounded in the theory of procedural justice; see, e.g., T.R. Tyler and Y.J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002).

[74] M. Claes and B. De Witte, 'The Role of National Constitutional Courts in the European Legal Space', in P. Popelier, A. Mazmanyan and W. Vandenbruwaene (eds.), *The Role of Courts in the Context of Multilevel Governance* (Intersentia, 2012) 79.

[75] Kroeger, above, n. 67, 747.

[76] van Sliedregt, above, n. 40. For example, the Amsterdam Court unsuccessfully challenged the second step of the rebuttal test, but in a subsequent case found the conditions to be met: *IRK Amsterdam*, 10 February 2021, ECLI:NL:RBAMS:2021:420.

[77] S. Carrera, E. Guild and N. Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Warrant System', *CEPS Paper in Liberty and Security*, No. 55 (March 2013), 19.

argued by Willems,[78] but also in the test applied by the CJEU. Moreover, we illustrate that the analysis of multilevel trust should be complemented and reinforced by the ABI model.

3.3 | Trustworthiness and the ability–benevolence–integrity (ABI) model in the EAW system

Several factors explain why an actor is perceived as trustworthy or not and whether ultimately the trustor would be inclined to trust. Those factors include individual attributes of the trustor (e.g., trusting disposition, education or personal well-being), attributes of the trustee (e.g., education, expertise, experience, reputation, norms and values) and contextual circumstances (e.g., the trustor's country's corruption grade or economic performance). Mayer et al. developed a model to analyse the individual attributes of the trustor and trustee, focusing on the concepts of ability, benevolence and integrity,[79] the so-called "ABI model". In particular, they define "ability" as that group of skills, competences, expertise and characteristics that enable a party to have influence within a specific domain. "Benevolence" is the extent to which a trustee is believed to seek the good for the trustor, aside from an egocentric profit motive. This concept focuses on the intentions of the trustee who is perceived to be positively oriented towards the trustor. "Integrity" involves the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable, for example, principles such as consistency, credibility and fairness. Each of the three factors varies on a spectrum. They may fluctuate independently from each other but can also be interrelated. This framework was originally created to address interpersonal relationships within organisations, but it is currently also commonly used to analyse and measure trust at the interorganisational, meso level, and at the system, macro level.[80] In this section, we translate this model to the legal setting of mutual trust in the EAW framework.

In the context of the execution of an EAW, at the interpersonal (micro) level, the executing judge assesses the issuing judge in terms of skills, competences, expertise and experience in the field (*ability*), the extent to which (s)he is willing to cooperate, communicate and act in a transparent manner towards the executing judge (*benevolence*) and the perception that (s)he follows the same key legal values and principles (e.g., fundamental human rights, rule of law, consistency, procedural fairness, proportionality) (*integrity*). At the same time, the executing judge's role shifts from trustor to trustee in the relation with the individual. There, *ability* relates to the skills, competences, expertise and experiences of the executing judge, *benevolence* refers to the perception that the judge will act in the best interest of the individual while *integrity* concerns the compliance with EU values such as the rule of law and fundamental rights. This implies that the executing judge will be more hesitant to take "the leap of faith"[81] if there are indications that challenge the integrity of the issuing judge, as this will indirectly also affect the trustworthiness of the executing judge as assessed by the individual, and the public at large.

At the organisational (meso) level, *ability* can be translated as the capacity of the issuing court to comply with the EU standards of effective judicial protection, by acting as an independent court and ensuring a fair trial. *Benevolence* refers to the perception of a positive, collaborative transparent orientation of the courts in the issuing state towards the executing state. *Integrity* refers to the set of principles that guide the judicial organisation of the issuing court. This is also connected with the principles and values that underpin the system of the issuing court (macro level), which clearly shows the dynamic, multilevel nature of mutual trust in the EAW. In the EU, they are included in Article 2 TEU.

Ability, benevolence and integrity are inevitably interconnected and sometimes difficult to dissect. For example, if the individual addressee of the EAW belongs to a minority group that is often the target of discrimination in the

[78] As held by Willems, above, n. 8, 171.

[79] Mayer et al., above, n. 12, 709.

[80] For a recent example of applying the ABI model at the meso and macro level, see H. Svare, A. Haugen Gausdal and G. Möllering, 'The Function of Ability, Benevolence, and Integrity-Based Trust in Innovation Networks' (2020) 27(6) *Industry and Innovation*, 585.

[81] The 'leap of faith' is a very important concept in the trust literature; see Giddens, above, n. 46 and Möllering, above, n. 46.

issuing state, it will be difficult for the executing court to remain convinced that the issuing court and the prison authorities will keep the addressee's interest in mind and secure fair treatment. Indeed, judicial authorities are also more willing to surrender to legal systems (macro-level trust) that have a better-quality criminal justice system and a stronger human rights record.[82] A high-quality criminal justice system can be seen as a signal of *ability*. In turn, a strong human rights record signals adherence to the principles of the rule of law and shows evidence of *integrity*. This means that ability and integrity are signals of trustworthiness and encourage the executing court to trust the issuing authorities. However, we should clarify that the above analysis refers only to some of the possible factors related to ability, benevolence and integrity, and ultimately the trustworthiness of the issuing judge/court.

The multi-level nature of trust in the EAW also becomes evident. The CJEU requires the executing authority to first assess not only the available evidence of systemic or generalised deficiencies, but—as a second step—also the risk that the individual, in this specific case, will be a victim of those deficiencies. The first step refers to *integrity* at the system level and it requires an assessment of whether the issuing legal system, in general, adheres to shared values and principles. The second step relates to the *ability*, *benevolence* and *integrity* at the interpersonal and organisational level, i.e., the expectation that the issuing judge will have the required skills and expertise to prepare the request in an appropriate and transparent manner and that the judge will comply with fundamental values and principles acting as an independent judge in the context of a fair trial.

The CJEU seems to ignore that these levels are interconnected: it is difficult to rely on the fact that the issuing state will treat an EAW addressee in accordance with the fundamental rights guaranteed by the EU Charter if it is established that the legal system in the issuing state is deficient at a more general level. This is what, for example, the referring court in *LM* alluded to when it questioned whether the issuing authority would be able to provide a fair trial in case of surrender of the EAW addressee. In the light of overwhelming evidence that the rule of law had been breached by the issuing state (Poland) and that such a systemic breach constituted a fundamental defect in the system of justice,[83] it was difficult to trust the issuing authority and the court system in which it operated. Nevertheless, in *LM*, Advocate General Tanchev held that 'even assuming that there is, in Poland, a real risk of flagrant denial of justice on account of the recent reforms of the system of justice, this cannot be taken to mean that *no* Polish court is capable of hearing *any case* in compliance with the second paragraph of Article 47 of the Charter.'[84]

Hence, within a multilevel conceptualisation of trust, one can consider the levels to operate either in an independent or an interdependent manner. Yet, based on an organisational research account of the trust literature, we expect interdependence between the different trust levels. Interestingly, the European Court of Human Rights (ECtHR) explicitly takes into consideration the interdependent nature of trust levels in asylum cases. In these cases, the Strasbourg Court finds evidence of systemic deficiencies sufficient.[85] Some legal scholars have pleaded in favour of applying the Strasbourg standard also to the EAW regime.[86] Most recently, a Norwegian district court refused surrender to Poland with the argument that 'the greater the general risk for a breach, the less specific grounds for a breach of Article 6 of the ECHR should be required in the specific case'.[87] The CJEU only takes account of this interdependence where it allows ignoring the second step of its test if the European Council adopts a decision determining a serious and persistent breach in the issuing state of the principles set out in Article 2 TEU.[88] It is, however, disappointing that the CJEU continues to insist on the second step at the stage of a reasoned proposal adopted by the Commission, even if that reasoned proposal is based on overwhelming evidence of such a breach.[89] The decision

[82] A. Efrat, 'Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant' (2019) 26 *Journal of European Public Policy*, 656.
[83] *Minister for Justice and Equality*, above, n. 36, para. 24.
[84] Opinion of Advocate General Tanchev of 28 June 2018, Case C216/18 PPU, ECLI:EU:C:2018:517, 108.
[85] *M.S.S. v. Greece and Belgium*, Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011; ECtHR judgment in *Tarakhel v. Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014.
[86] J. Ouwerkerk, 'Mutual Trust in the Area of Criminal Law', in H. Battjes, E.R. Brouwer, P. de Morree and J. Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law* (Forum, 2011) 47–48.
[87] Discussed in Holmøyvik, above, n. 3.
[88] Article 2 TEU, para. 72.
[89] Ibid., para. 69.

of the CJEU has been criticised in legal scholarship,[90] but not with reference to the notion of (multilevel) trust. We come back to this discussion in the following section, where we discuss third party providers of information that may signal (a lack of) trustworthiness.

3.4 | Trust-building mechanisms to increase trustworthiness of EAW actors

According to Lenaerts, the fact that Member States are committed to creating "a Union of values" underpins the principle of mutual trust.[91] However, the strict conditions under which the presumption of compliance may be overturned do not take into account the psychological nature of trust, the impact on the individual and the connected executing state's vulnerability, and the close interdependence between interpersonal, organisational and system trust. In what follows, we outline several trust-building mechanisms that can enhance the construction of real trust among the parties involved in the implementation of the EAW framework.

A trust-building mechanism is a process that generates, maintains and repairs trust.[92] An example is "relational signalling": the trustee can give the trustor (positive or negative) signals concerning his or her trustworthiness.[93] Trust-based systems benefit from (and often survive thanks to) trust-building mechanisms. The same holds true for legal systems, especially those in which the legal principle of mutual trust is a core principle, like the EU. Arguably, if an organisation uses a trust narrative to introduce a presumption of compliance with EU law, it should make such a legal construction plausible by clarifying which tools can be used for assessing and strengthening trustworthiness.[94] In other words, a system based on mutual trust requires some mechanisms that can translate trust from wishful thinking into a more concrete reality.[95] Several legal and non-legal tools that may contribute to strengthening trustworthiness have already been examined in the literature.[96] Here, we explore the importance of dialogue, third-party information providers and control mechanisms, and we focus explicitly on the use of these tools by the CJEU. Our argument is that the CJEU should rely on these mechanisms when applying the principle of mutual trust in the field of the EAW, and that the threshold for the rebuttal of the presumption of trust should be influenced by the effectiveness of trust-building mechanisms.

Mutual trust as shaped by the EU case law currently operates especially at the interorganisational and system levels. Since judges act as boundary spanners for their judicial organisations, we think it is important to focus on building trust at the interpersonal level, which, as explained, feeds into the other trust levels. Therefore, it is essential to stimulate individual judges to build personal relationships within the EAW regime. By interacting and exchanging information, they can signal ability, benevolence and integrity at the interpersonal level. In turn, this increases the trustworthiness of the organisation in which they function. The *L and P*[97] judgment is a positive development in this respect, as it delineated the factors on which national authorities should exchange information under the Framework Decision.[98]

Legal scholars have stressed that the successful operation of the principle of mutual trust requires national and European judges to engage in a constructive dialogue.[99] The CJEU also alludes to a dialogue between judges. It does

[90]See, for example, P. Bard and W. Van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v LM*' (2018) 9 *New Journal of European Criminal Law*, 354, at 360–361.
[91]Lenaerts, above, n. 24, 809.
[92]F. Six, 'Building Interpersonal Trust within Organizations: a Relational Signaling Perspective' (2007) 11 *Journal of Management & Governance*, 286.
[93]Ibid., 287. In more detail, C. Caldwell and S.E. Clapham, 'Organizational Trustworthiness: An International Perspective' (2003) 47 *Journal of Business Ethics*, 349.
[94]Janssens, above, n. 59, 29; Willems, above, n. 8, 22.
[95]Lavenex, above, n. 7, 767.
[96]See, in particular, Willems, above, n. 8, 129–155.
[97]*Openbaar Ministerie*, above, n. 5.
[98]Para. 55.
[99]Lenaerts, above, n. 24, 838. On dialogue as a strategy of trust, see J. Braithwaite and T. Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society*, 1.

so where it requires the executing judge to ask the issuing judge for information on the conditions in which the individual concerned will be detained in that state. This evidence is used to assess whether the individual runs a risk of having his or her fundamental rights breached *in concreto*.[100] However, if evidence of a systemic deficiency exists, the executing judge might find this information untrustworthy.[101] In other words: how can the CJEU require the executing judge to rely on information concerning how a particular individual will be treated, if that information is provided by the very jurisdiction that lacks the characteristics that would normally signal trustworthiness? Even though the CJEU allows the executing judge to add information from other sources, it will need to assess the information provided by the issuing authority.

In practice, judges do contact each other, for example in case of problems that may lead to a refusal or delay.[102] As yet, there is no comprehensive empirical research to develop a picture of these conversations. Nevertheless, research carried by Marguery reveals that judicial authorities in Member States that have systemic deficiencies concerning detention facilities do not take the detention conditions of issuing states into consideration when deciding on an EAW. Interviews with Polish and Romanian judges further show that the latter perceive questions for assurances and detailed information as a sign of distrust.[103] Moreover, language problems seem to complicate communication between judicial authorities.[104] In addition to these informal contacts in selected cases, various networks have been created to enable a more structural dialogue between judicial and law enforcement authorities of different Member States.[105] This brings us to third-party information providers.

As observed by Willems, reliable and up-to-date information is an essential pillar to build trustworthiness.[106] Especially if the trust relationship between the parties is weak—in the example above, if the executing judge finds the information provided by the issuing state not trustworthy, and the issuing state finds questions for assurances a sign of distrust—the information provided by third parties (e.g., media, NGOs, agencies) can be of essence. Third parties can contribute to building trust by providing information to support the assessment of trustworthiness factors, such as the elements covered by the ABI model. For instance, if A is not in a suitable position to assess the trustworthiness of B but C is, A can rely on C's judgment about B's ability, benevolence and integrity (trustworthiness).[107] Eurojust is an excellent example of a third party that could facilitate communication and share reliable information to help judges evaluate ability, benevolence and integrity.[108]

The CJEU also refers to other third parties able to offer information on the ability, benevolence and integrity of the issuing authorities. To assess whether there are generalised or systemic deficiencies in the protection of individuals detained in the issuing state, it requires the executing judge to turn to evidence that is 'objective, reliable, specific and properly updated' and is obtained from public authorities,[109] such as judgments of international courts, the ECtHR, courts of the issuing Member State, and decisions, reports or other documents produced by bodies of the Council of Europe or under the aegis of the UN.[110] Yet, if the EU imposes a presumption of trust, it should also provide more specific guidance on how information that is crucial to refute the presumption should be collected and assessed.

As the case law currently stands, the CJEU also relies on the European Council as a third-party information provider. As explained above, the Court allows for a rebuttal of the presumption if the European Council adopts a decision determining a serious and persistent breach in the issuing state of the principles set out in Article 2 TEU.

[100]Para. 95.
[101]In economic choice literature, this is called a 'mimic-beset trust game'; see M. Bacharach and D. Gambetta, 'Trust in Signs', in K.S. Cook (ed.), *Trust in Society* (Russell Sage Foundation, 2001).
[102]Marguery, above, n. 7, 712–713.
[103]Ibid., 713.
[104]Janssens, above, n. 59, 238, 246.
[105]Ibid., 246–247.
[106]Willems, above, n. 8, at 21.
[107]F. Six and K. Verhoest, 'Trust in Regulatory Regimes: Scoping the Field', in F. Six and K. Verhoest (eds.), *Trust in Regulatory Regimes* (Edward Elgar, 2017), at 10.
[108]See, e.g., Willems, above, n. 8, at 150–151.
[109]Gáspár-Szilágyi, above, n. 34, 214.
[110]*Pál Aranyosi and Robert Căldăraru*, above, n. 31, para. 89.

However, Article 7 TEU established a political mechanism that is very hard to implement.[111] The CJEU argues that the decision pursuant to Article 7 TEU is necessary because of the separation of powers: if the Court authorised the automatic suspension of the EAW before the decision of the Council pursuant to Article 7(2) TEU, this would likely lead to criticism regarding the legitimacy of the suspension.

However, scholars have criticised this reasoning. Krajewski submits that, in case of systemic deficiencies regarding the independence of the judiciary, the CJEU would not breach the division of competences with the Council if it authorises the suspension of the EAW towards a state in a rule-of-law crisis.[112] Moreover, even in the absence of a decision pursuant to Article 7(2) TEU, it is difficult to see why the separation of powers would prevent the Court from challenging the trustworthiness of the issuing state if the Council has found a clear risk of a breach pursuant to Article 7(1) TEU. From a trust perspective, the Council's decision under Article 7(1) TEU already gives a negative signal regarding the trustworthiness of the system and is likely to have an impact on the assessment of the integrity of the legal system which, in turn, reinforces the risk that the issuing state will not respect the rule of law and fundamental rights in a particular case. After all, the CJEU, as the Guardian of the Treaties, is endowed, pursuant to Article 19 TEU, with the mission to ensure that in the interpretation and application of the Treaties the law is observed, no matter which institutions, national or European, are involved.

The fact that the CJEU relies on the European Council as a third-party information provider does not imply that it has to wait for its determination, whether on the basis of Article 7(1) or 7(2) TEU. Even if recital 10 of the 2002 Framework Decision refers to a decision of the Commission 'pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof', we should recall that recitals do not contain normative provisions[113] and have neither binding legal effect[114] nor independent operative effect.[115] Instead, recital 10 should be interpreted in such a way that it permits a system of mutual trust to be maintained when faced with a rule-of-law crisis. Therefore, a decision pursuant to Article 7(2) TEU informs us that the issuing authority is not trustworthy, but it is not the only possible signal of untrustworthiness. By stating first that the EAW mechanism 'is based on a high level of confidence between Member States' and then, as a consequence, that a rule-of-law crisis would suspend the execution of EAWs, the Framework Decision actually made the necessary correlation between facts and norms, between the legal principle of mutual trust and its psycho-sociological substrate. This interpretation lives up to the complex task of giving absolute protection to the rule of law as one of the most fundamental values of the EU legal order.

Another trust-building mechanism that can help enhance trust is control. Although the trust literature from various disciplines has traditionally been divided on the relationship between trust and control, recent trust scholarship suggests that control complements trust if it enhances "self-determination", i.e. the internalisation of rules and values to the point that the actor is motivated to comply with those same rules and values.[116] One condition is that the controller is perceived as trustworthy and as giving trust. Another condition is that control enhances the trustee's autonomy, competence and relatedness,[117] meaning that (s)he can freely process the transmitted values and regulations, has the ability to understand its rationale, and recognises these as values that are shared within its social group.[118]

The current literature on trust and control tends to focus on interpersonal trust, but it is not excluded that the findings can be translated to the meso and macro levels.[119] As an example of control building trust at the macro level, we can refer to several post-communist countries that have been positively inclined towards the ECtHR and

[111]Scheppele et al., above, n. 41; Pech, above, n. 41.
[112]M. Krajewski, 'Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges: ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM' (2018) 14 *European Constitutional Law Review*, 792.
[113]Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, 1, point 10.
[114]Case C-162/97, *Nilsson*, ECLI:EU:C:1998:554, para. 54.
[115]Case C-308/97, *Manfredi*, ECLI:EU:C:1998:566, paras. 29–30.
[116]F. Six, 'Trust in Regulatory Relations' (2013) 15 *Public Management Review*, 176.
[117]Ibid., 178–179.
[118]Ibid., 174.
[119]Ibid., 180.

its control function, because they perceived it as a body that helps them understand and internalise human rights standards.[120] By reflection, the synergies between trust and control among those states and the ECtHR have favoured the internalisation of the Convention and thus human rights in those jurisdictions.

The question, then, is whether control can complement trust in a more effective manner within the EAW regime. The Framework Decision, in its preamble, explicitly recognises that the principle of mutual trust does not exclude the importance of control.[121] The executing judicial authority can be considered as an actor that is both trustor and controller. The expectation is that the issuing state will treat the addressee in accordance with the rule of law, which implies that both states have internalised commonly shared values, principles and rights. It is presumed that judicial authorities are inclined to trust EU Member States, because all EU Member States have committed themselves to commonly shared constitutional values by joining the EU and the ECHR. Therefore, the control performed by the executing judge is only a "quick scan".

More intense scrutiny of grounds for refusal is perceived in the literature as a sign of distrust.[122] However, it might also be seen in another way: if control appeals to the learning capacities of the actors involved (the issuing and executing authorities and the individual) then it can help to concretise and internalise common shared values, principles and rights. The internalisation process requires clear and elaborate reasoning to explain the values, principles or rights at stake and why, in a particular case, they are respected or infringed. If pursued in this manner, control may evolve in a kind of dialogue which can strengthen trustworthiness rather than decrease trust or signal distrust. From that angle as well, we support the calls in the literature to weaken the presumption about the integrity of the Member States' criminal justice systems and to widen the possibilities of rebuttal.[123] Relying on empirical research, Efrat confirms that weakening the presumption may ultimately strengthen trust in the EAW regime.[124]

This also applies to the national constitutional courts that scrutinise the EAW mechanism for conformity with constitutional rights and principles. A legal system built on the idea of shared fundamental values will generally be perceived as trustworthy. At the same time, doubts on whether the EAW system sufficiently takes these values into account may also prevent the trustor from taking the "leap of faith". For this reason, it is important that the executing authority can fall back on a constitutional court to control whether these fundamental values are still upheld, or to assess under which conditions they can be relaxed. If the constitutional court rules that these values are respected, this may reassure the executing judge. The judge may even be motivated to comply in difficult cases—for example if the executing Member State is asked to employ its criminal enforcement mechanisms to prosecute behaviour which is not a criminal offence in its national legal order. Such evaluation should be done in cooperation with the CJEU through the preliminary ruling procedure in order to ensure a uniform application of the EAW framework. In this context, the EU Charter of Fundamental Rights can constitute the foundation to assess compliance with fundamental rights. If the constitutional court found a violation of national fundamental values, then this can be an incentive to improve the system and strengthen its trustworthiness. In fact, the CJEU actually has some experience with this trust-building mechanism: a ruling of the German Constitutional Court[125] on the EAW was seen as the impetus that caused the CJEU to pay more attention to fundamental rights under the EAW mechanism.[126] This way, the constitutional courts' scrutiny contributed to increasing trustworthiness of the EU system, by urging the CJEU to take up its role as a trust-enhancing controller.

Section 2 described how the CJEU generally takes up this role. The Court interprets this role in a minimalist way: it distinguishes system and organisational trust in its two-step approach and accepts the Council as a third-party information provider regarding its decision that there is an actual breach of the values under Article 2 TEU. In

[120]P. Popelier, S. Lambrecht and K. Lemmens, 'Introduction: Purpose and Structure, Categorisation of States and Hypotheses', in P. Popelier, S. Lambrecht and K. Lemmens (eds.), *Criticism of the European Court of Human Rights* (Intersentia, 2016), 14.
[121]Recital 8.
[122]van Sliedregt, above, n. 40, 247.
[123]Carrera et al., above, n. 77, 22; Efrat, above, n. 82, 671.
[124]Efrat, above, n. 82, 671.
[125]*BVerfG*, 15 December 2015, 2 BvR 2735/14.
[126]Willems, above, n. 8, 66.

this way, the CJEU fails to use the opportunity to act as a stronghold of the application of the principle of mutual trust. By taking due account of the interdependent multilevel nature of trust similar to the ECtHR, the Court could contribute to the effectiveness of the EAW regime by building on important understandings of the cross-disciplinary trust literature.

4 | CONCLUSION

The principle of mutual trust does not imply a legal obligation to trust, but creates a presumption of compliance with EU law and particularly with the fundamental rights recognised by EU law. However, the use of the notion of "mutual trust" relies on a trust narrative to underpin this presumption. In brief, the presumption of compliance relies on the Member States' commitment to the values inserted in Article 2 TEU, which signals integrity, and therefore trustworthiness of the issuing authority. In this article, we discussed selected tools and mechanisms that can ensure a better "fit" between mutual trust as a legal principle and mutual trust as a reality in order to make this construction plausible. In particular, the research question was: *How can the gap between mutual trust as a legal principle and mutual trust as a reality be bridged in the current approach to the enforcement of the EAW framework?* Building on the cross-disciplinary trust literature, the article has offered reflections to address this question. We can summarise the contribution of this article in three points.

First, the cross-disciplinary trust literature offers key conceptualisations, empirical insights and terminology that help better understand how the principle of mutual trust should be understood and applied. It distinguishes trust from the notion of trustworthiness and offers several mechanisms and factors to take into account with a view to building and strengthening trustworthiness, the foundation of trust. Furthermore, this stream of literature helps disentangle the trust dynamics underlying the enforcement of EAW, and especially how the potential surrender of EAW addressees shapes the executing authority's vulnerability towards the issuing authority. It sheds light on the connection between interpersonal, organisational and system trust, and clarifies the role of dialogue, third-party information providers and controllers as mechanisms to build trust.

Second, the trust literature underpins the critique of the CJEU's case law on the conditions under which the presumption of compliance with EU law can be rebutted. It shows that the CJEU seems to underestimate the interdependence of organisational and system trust and to overlook how the impact on the addressee influences the trust relationship between the executing and issuing judges. The CJEU also appears to minimise its role as a controller that can enhance trust, and to underutilise the Council's potential to act as a third-party information provider. In particular, the Council's decision that determines a clear risk of a serious breach under Article 7(1) TEU gives an early, negative signal regarding the integrity of the concerned Member State's legal system and, thus, its trustworthiness.

Finally, the trust literature clarifies the centrality of trust-building mechanisms, such as stimulating formal and informal dialogue between judges, the role of third-party information providers and the implementation of control as a way to enhance trust. Some mechanisms have in fact provided, in the form of intensive monitoring, fora for discussion and exchange of information, training sessions, and practical mechanisms, tools and guidelines. They are key to the success of the EAW system, which, despite the criticism and suspicions in legal scholarship, seems to work quite efficiently in daily practice, with legal practitioners cooperating in a constructive way.[127]

The critique of the functioning of mutual trust in the EAW especially targets some countries that display illiberal features at the expense of the rule of law. This is where the EU system should act more decisively and should clarify the operation of the principle of mutual trust to enable a loosening of the presumption of trust where this seems necessary. The upsurge of authoritarianism, even among EU Member States, has only strengthened the argument that the presumption of trust lacks an empirical foundation.[128] It is an argument that needs to be taken seriously. By

[127] Janssens, above, n. 59, 235–236.
[128] Willems, above, n. 8, 159.

clinging on to its traditional position,[129] i.e. by considering the EAW mechanism primarily as a means to achieve a common area of freedom, security and justice and considering only in secondary order the high level of mutual trust which must exist between the Member States, as if it would be the consequence and not the necessary condition for the creation of an effective European surrender system, the CJEU transforms mutual trust into wishful thinking and contributes to its weakening and loss of legitimacy.

Therefore, we believe it is worthwhile to continue the exploration of the trust literature from various disciplines to assess how the application of the principle of mutual trust can be improved. We have illustrated several trust-building mechanisms that are relevant for the EAW regime, but we are convinced that a further development of trust-building tools is possible in light of the trust literature, which could also provide relevant insights in other fields of EU law, such as internal market law. We therefore invite other authors to join in venturing into the interdisciplinary trust literature to support the transformation of the principle of mutual trust into a mature and effective principle of EU law.

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How to cite this article: Popelier P, Gentile G, van Zimmeren E. Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context. *Eur Law J*. 2021;27(1-3):167-184. doi:10.1111/eulj.12436

[129] Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie*, 22 February 2022, ECLI:EU:C:2022:100, para. 42.