

The European Union and the United States of America's Perspectives on the Principle of Mutual Trust in Criminal Matters

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Abstract

Judicial cooperation in criminal matters among the Member States of the European Union currently operates based on the trust they mutually extend to one another regarding the judgments they deliver and the criminal procedures they conduct. Building on this interstate trust, numerous legal instruments have been developed to combat organized crime and to transform the administration of justice into an efficient process in which the cross-border formalities undertaken by states are simplified. Whether we refer to the European Arrest Warrant, the European Investigation Order, or the most recent mechanism of enhanced cooperation, the European Public Prosecutor's Office, the principle of mutual trust proves both its usefulness and its necessity in the effort to eradicate cross border crime. The study aims at examining the evolutionary stage of the principle of mutual trust on the European continent in comparison with the situation in the American context, as well as the legal instruments derived from this principle within each cooperation system. Furthermore, the analysis of the case law and doctrine of the United States of America on this topic leads to the conclusion that the way the principle of mutual trust is applied may serve as a reference model for European states, offering potential avenues for improvement.

Keywords: mutual trust, judicial cooperation in criminal matters, EU area of freedom, security and justice, United States of America.

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1. Introduction

The principle of mutual trust currently constitutes the foundation of international judicial cooperation in criminal matters. To confirm its indispensable feature in combating crime at the international level, as well as to identify the aspects that may be optimized in the context of its application, the present study has been constructed along two phases of research.

In the first phase, the study examines the principle of mutual trust diachronically, with the aim of highlighting its evolution on the European continent. In the next stage of the analysis, the examination of legal texts - both the primary and secondary legislation of the European Union - reveals the vision of the European legislator, the critical points that have been strengthened thus far, and the direction set by the European Union (EU) regarding the cooperation mechanisms driven by the principle of mutual trust. Furthermore, the analysis of academic doctrine and the judicial practice of European courts clarify the framework within which the principle may be applied and establishes the limits within which it can operate, so that it does not interfere either with other principles of international judicial cooperation in criminal matters or with other fundamental rights.

The second part of the study is dedicated to presenting the principle of mutual trust in comparative terms, by highlighting the way it is used by the United States of America (USA) in interstate relations. The research aims to highlight the cooperation mechanisms existing among the American states, the way in which the applicable legal provisions in this field are simplified, and the way the operational component is maximized to achieve the intended results. At the same time, the assessment of American case law concerning issues arising from interstate judicial cooperation in criminal matters reveals an efficient, flexible, and streamlined system of cooperation, oriented toward finality - the eradication of criminal conduct - and less toward the applicable procedure. Given the architecture of the European Union and that of the United States of America, one might argue that, at least on the surface, the two entities could not be meaningfully compared (the former being an international entity, and the latter a federal state), and that the terms of such a comparison could not exist. However, their structures allow for comparative research regarding the principle of mutual trust, particularly through the lens of the connections created among EU Member States and, respectively, among the federal states.

The purpose of the research is to demonstrate that the American example may be regarded as a model for EU Member States - a model validated not only by its longevity, but also by the efficiency and speed with which judicial cooperation takes place and offenders are punished. On the other hand, one cannot overlook the more sustained concern of EU structures and Member States regarding the protection of fundamental rights, matters that are sometimes treated more superficially in the USA.

2. The Principle of Mutual Trust on the European Continent

The issue of mutual trust has been addressed on the European continent since ancient times, and in the modern era the philosopher Voltaire, in his commentary on Cesare Beccaria's *Dei delitti e delle pene*, wondered whether a convention between states for the reciprocal surrender of offenders², based on trust, would be useful. In light of Beccaria's observations, the conclusion was that such an action would indeed be useful; however, the obstacles to its implementation stemmed from the differences between the judicial systems of each state, the systems of penalties they regulated (including the existence of the death penalty in some states), and the risk of impunity (the same offence might be punishable in one state but not regulated at all in another). Thus, until a certain degree of harmonisation of legal systems - and implicitly of penalties - could be achieved, the surrender of offenders based on reciprocity would not have constituted a fair measure for them.

Years later, European states intensified their cooperative relations, concluding not only bilateral treaties but also European-level conventions³ founded on the principle of mutual trust and aimed at combating criminal activity. The 20th century is therefore marked by the activity of the Council of Europe, which made significant efforts to develop cooperation between states through the adoption of a broad normative framework applicable to them. The end of the 20th century and the beginning of the 21st century brought to the forefront another organisation on the European continent within whose activity the principle of mutual trust would acquire constitutional value: the European Union.

In 1999, at the Tampere European Council, the principle of mutual recognition was designated as the "cornerstone" of judicial cooperation in criminal matters⁴. Mutual recognition is grounded in the mutual trust that states place in the legal systems of other Member States — systems which, however different they may be, provide a minimum level of guarantees regarding fairness and an equivalent standard of procedural quality⁵.

² Cesare Beccaria, *An Essay on Crimes and Punishments*, by the Marquis Beccaria of Milan; with a Commentary by M. de Voltaire, new ed., corrected (Edinburgh: Alexander Donaldson, 1778), 141–42, <https://doi.org/10.5479/sil.36417.39088001520584>.

³ See Council of Europe, *European Convention on Extradition*, ETS No. 024 (Paris, December 13, 1957); Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, ETS No. 030 (Strasbourg, April 20, 1959); Council of Europe, *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*, ETS No. 051 (Strasbourg, November 30, 1964); and Council of Europe, *European Convention on the Transfer of Proceedings in Criminal Matters*, ETS No. 073 (Strasbourg, May 15, 1972).

⁴ European Council, *Presidency Conclusions, Tampere European Council, 15–16 October 1999*, para. 33, https://www.europarl.europa.eu/summits/tam_en.htm.

⁵ Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Oxford: Hart Publishing, 2021), 2, <https://doi.org/10.5040/9781509924578>.

Starting with Tampere, judicial cooperation acquired new dimensions through the adoption of several instruments facilitating the accountability of offenders, including the European Arrest Warrant⁶, the European Investigation Order⁷, and more recently, European Production Orders and European Preservation Orders for electronic evidence⁸. Nevertheless, amid the dynamism of these cooperation mechanisms, it became apparent that the principles of mutual trust and mutual recognition of judicial decisions issued by other Member States were increasingly confronted with the problem of non-compliance with the fundamental rights of the individuals targeted by these procedures. Thus, in the application of one of these cooperation instruments, there was a risk of violating, for example, the right to a fair trial or of exposing individuals to inhuman or degrading treatment⁹. In practice, the principle reached a stage in which trust became “blind”¹⁰, prevailing over other fundamental rights¹¹. Although Article 6 of the European Convention on Human Rights sets out a series of rights that must be respected in judicial proceedings, these guarantees often proved insufficient, with cooperation instruments and their intended objectives taking precedence. Consequently, the Council adopted a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings¹², precisely to provide additional safeguards ensuring that their rights are respected.

The Lisbon Treaty of 2009 marked another reference point for judicial cooperation in criminal matters by embedding mutual recognition in the Treaty

⁶ Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, *Official Journal of the European Communities* L 190 (July 18, 2002): 1–20, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584>.

⁷ Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 regarding the European Investigation Order in Criminal Matters, *Official Journal of the European Union* L 130 (May 1, 2014): 1–36, <https://eur-lex.europa.eu/eli/dir/2014/41/oj/eng>.

⁸ Regulation (EU) 2023/1543 of the European Parliament and of the Council of July 12, 2023, *Official Journal of the European Union* L 191 (July 28, 2023): 118–180, <https://eur-lex.europa.eu/eli/reg/2023/1543/oj/eng>; Directive (EU) 2023/1544 of the European Parliament and of the Council of July 12, 2023, *Official Journal of the European Union* L 191 (July 28, 2023): 181–190, <https://eur-lex.europa.eu/eli/dir/2023/1544/oj/eng>.

⁹ *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198 (Court of Justice of the European Union, April 5, 2016).

¹⁰ *Radu*, Case C-396/11, EU:C:2013:39 (Court of Justice of the European Union, January 29, 2013); *Melloni*, Case C-399/11, EU:C:2013:107 (Court of Justice of the European Union, February 26, 2013).

¹¹ Rosaria Sicurella, “Fostering a European Criminal Law Culture: In Trust We Trust,” *New Journal of European Criminal Law* 9, no. 3 (2018): 308, <https://doi.org/10.1177/2032284418801561>; Ermioni Xanthopoulou, “The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?,” *European Law Journal* 28, nos. 4–6 (2022): 219, <https://doi.org/10.1111/eulj.12467>.

¹² Council of the European Union, Resolution of November 30, 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, *Official Journal of the European Union* C 295 (December 4, 2009): 1–3, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204(01)).

framework¹³ within “an area of freedom, security and justice”¹⁴. Mutual trust itself is not expressly named in the Treaties; it subsequently emerged in the case law of the Court of Justice as a structural principle of EU law. The two principles are closely connected and are frequently treated as complementary components of judicial cooperation¹⁵ in legal matters concerning judicial , although they remain conceptually distinct.

However, no clear definition of the principle of mutual trust, nor any standards for measuring the degree of trust between states, has ever been officially established. Each entity retains the freedom to assess the importance of the principle, the limits within which it may be applied, and the consequences of its absence. What can nevertheless be stated with certainty is that legal scholarship and case law in recent years have demonstrated that the principle of mutual trust is autonomous - not merely “the principle behind the principle”¹⁶ - and that it follows its own trajectory within the architecture of European law. Moreover, the Court of Justice of the European Union (CJEU)¹⁷ has also acknowledged the structural value of the principle of mutual trust.

As a result of the effects of previous CJEU judgments, as well as national case law, it became clear that the regulation of certain limits¹⁸ on the application of the principle of mutual trust was necessary. Likewise, the range of European normative instruments designed¹⁹ either to contextualize the way the principle is applied or to establish specific rights for individuals targeted by cooperation procedures has expanded.

Evidently, a new vision of the principle of mutual trust has taken shape on the European continent. National courts in countries such as Poland, Romania,

¹³ Treaty on the Functioning of the European Union, consolidated version, *Official Journal of the European Union* C 202 (June 7, 2016): 47–200, arts. 67, 70, 80, and 82.

¹⁴ Treaty on the Functioning of the European Union, Title V, “Area of Freedom, Security and Justice.”

¹⁵ Romania, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, republished in *Monitorul Oficial al României*, Part I, No. 411 (May 27, 2019), art. 84(2), <https://legislatie.just.ro/Public/DetaliiDocument/153661>.

¹⁶ Willems, *Principle of Mutual Trust*, 51, 173–78.

¹⁷ *Opinion 2/13*, EU:C:2014:2454, para. 191 (Court of Justice of the European Union, December 18, 2014).

¹⁸ Sacha Prechal, “Mutual Trust before the Court of Justice of the European Union,” *European Papers* 2, no. 1 (2017): 75–92, <https://doi.org/10.15166/2499-8249/139>; Valsamis Mitsilegas, “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual,” *Yearbook of European Law* 31, no. 1 (2012): 319–372, <https://doi.org/10.1093/yel/yes023>.

¹⁹ See Directive 2010/64/EU of October 20, 2010, *Official Journal of the European Union* L 280 (October 26, 2010): 1–7, <https://eur-lex.europa.eu/eli/dir/2010/64/oj/eng>; Directive 2013/48/EU of October 22, 2013, *Official Journal of the European Union* L 294 (November 6, 2013): 1–12, <https://eur-lex.europa.eu/eli/dir/2013/48/oj/eng>; and Directive (EU) 2016/1919 of October 26, 2016, *Official Journal of the European Union* L 297 (November 4, 2016): 1–8, <https://eur-lex.europa.eu/eli/dir/2016/1919/oj/eng>.

Hungary, Slovenia, and even Greece or Spain²⁰ have become increasingly concerned with safeguarding the fundamental rights of individuals involved in judicial cooperation procedures in criminal matters. Consequently, the CJEU has been called upon with growing frequency to clarify the interpretation of European legal norms arising in the practice of these courts.

Thus, the principle has evolved from the stage of unconditional trust, to limited trust, and at present, both doctrine and case law suggest that the prevailing trend is toward contextualized trust - one that is assessed individually, rather than by reference to systemic deficiencies of a judicial system.

3. The Principle of Mutual Trust in the Relations between the United States of America

At first glance, one might state that the manner in which EU Member States cooperate in combating crime is similar to the model existing in the United States of America. All U.S. states have different criminal law systems and distinct procedures applicable to the investigation of offences or to judicial cooperation processes. Likewise, at the regional level or at the level of the federal state as a whole, there are normative acts that have been implemented into the domestic legislation of U.S. States, just as European states have incorporated the primary and secondary legislation adopted at EU level. Nevertheless, despite the legislative diversity among U.S. States, the homogeneity of provisions concerning judicial cooperation is evident, and divergences in their application are far fewer than those encountered on the European continent, as the U.S. manages to solve them through less rigid and more spontaneous mechanisms.

As for the instruments of judicial cooperation, the United States adopts a more relaxed approach than the European model, in the sense that, in many cases, such cooperation does not require a rigid normative framework to be followed. Cooperation may also arise in an “informal” way, which is considered just as essential by U.S. authorities as formal cooperation. Informal cooperation means that, in addition to the official measures used by states for cooperation, they may also resort to other legal actions that are flexible and adaptable to the circumstances, without becoming blocked by legislative barriers.

As for the principles of mutual trust and mutual recognition, the U.S. Constitution contains a provision in Article IV, Section I, requiring states to respect the “public acts, records, and judicial proceedings of every other state,” the so-called *Full Faith and Credit Clause*. Article IV, Section II, Clause II regulates the *Extradition Clause*.

Although the *Full Faith and Credit Clause* could be seen as an analogue of mutual recognition in Europe, it does not require sister States to enforce one

²⁰ Urszula Jaremba and Jasper Krommendijk, “How Much Trust in Times of Distrust: National Courts, the ECJ and Criminal Cooperation in an Era of Rule-of-Law Backsliding,” *Erasmus Law Review* 17, no. 1 (2024): 51, <https://doi.org/10.5553/ELR.000274>.

another's penal judgments; the U.S. Supreme Court has expressly recognized this penal-law limitation²¹. Consequently, the clause is primarily relevant to civil judgments and other non-penal matters.

The *Extradition Clause*, on the other hand, incorporates the same features of reciprocity and trust, but applies exclusively to criminal law²², without interfering with the jurisdiction of each U.S. state. Regarding extradition, the United States adopted the *Extradition Act* in 1793 and later, in 1926, the *Uniform Criminal Extradition Act*, with the aim of standardizing extradition procedures among the states²³. The framework established by the *Uniform Criminal Extradition Act* has been adopted by the majority of U.S. states²⁴. What makes extradition a particularly notable form of cooperation is its constitutional regulation, and in practice its application generally does not raise difficulties.

Other forms of cooperation are established concretely through agreements or arrangements concluded between states, without being formalized at the constitutional level. In practice, U.S. states are free to conclude bilateral or multilateral agreements and may create the normative framework applicable to a particular form of cooperation. Moreover, U.S. states have the possibility - but not the obligation - to give effect to the agreements they have signed, depending on the specific circumstances they face.

One of the forms of cooperation used among U.S. states is the detainer order. This represents "a request made by a law enforcement agency to the institution where an inmate is incarcerated, asking either that the inmate be kept in custody for that agency or that the agency be notified when the inmate's release is imminent"²⁵. Over time, this order was applied between states on the basis of the principle of interstate comity, without having a binding feature, which created difficulties in its implementation.

The Interstate Agreement on Detainers was drafted by the Council of State Governments in 1956 and subsequently adopted by the participating jurisdictions; Congress enacted it in 1970 on behalf of the United States and the District of Columbia. Article III provides that a prisoner against whom a detainer has

²¹ *Nelson v. George*, 399 U.S. 224, 229 (1970); see also Mark W. Janis, "The Recognition and Enforcement of Foreign Law: The Antelope's Penal Law Exception," *The International Lawyer* 20, no. 1 (1986): 303–308, <https://scholar.smu.edu/til/vol20/iss1/16/>.

²² U.S. Const. art. IV, § 2, cl. 2: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

²³ Willems, *Principle of Mutual Trust*, 193–94; see also 18 U.S.C. § 3182.

²⁴ The Uniform Criminal Extradition Act has been adopted in 48 states. See *Cuyler v. Adams*, 449 U.S. 433, 435 n.1 (1981).

²⁵ *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (defining a detainer as a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release is imminent).

been lodged may request final disposition of pending charges in another jurisdiction and must be brought to trial within 180 days after the request is delivered to the prosecuting officer and the appropriate court²⁶. The mechanism is therefore designed to secure the expeditious disposition of outstanding charges.

Another instrument used in the United States to prevent offenders from evading investigation or trial, and to prevent witnesses from avoiding testimony in criminal cases, is the Fugitive Felon Act. Enacted in 1934, it formed part of a package of federal crime legislation responding to organized interstate crime and to the difficulties state authorities faced in pursuing fugitives across state lines²⁷. The statute allows federal authorities to assist in locating and apprehending persons who cross state lines to avoid prosecution, confinement, or testimony in qualifying criminal proceedings. It is principally an assistance mechanism rather than a substitute federal prosecution for the underlying state offence.

Regarding the way in which judicial authorities obtain evidence located in other states, this usually occurs through spontaneous agreements that, in principle, respect the rules on the admissibility of evidence²⁸. Federal agencies may likewise provide support or even take over investigations in the most complex cases. The difficulty, however, arises from determining which law applies to the admissibility of evidence: the law of the state where the evidence is collected, the law of the state where the investigation takes place, or the law of the state with the greatest interest in solving the case²⁹. Nevertheless, the doctrine³⁰ notes that situations giving rise to divergences regarding the applicable law for the collection and admissibility of evidence have been very rare in the United States over time, and legislative differences between states are minimal, meaning that uniformization of cooperation mechanisms in this field has not been necessary.

4. Conclusions

It may be concluded that the cooperation system among U.S. states functions without significant difficulties, since their legal systems, although different, are homogeneous with respect to the means of cooperation or are open to finding

²⁶ Interstate Agreement on Detainers, 18 U.S.C. app. 2, § 2, art. III(a); William A. Meadows, "Interstate Agreement on Detainers and the Rights It Created," *Akron Law Review* 18, no. 4 (1985): 691, 695, <https://ideaexchange.uakron.edu/akronlawreview/vol18/iss4/7/>.

²⁷ "Fugitive Felon Act: Its Function and Purpose," *Washington University Law Quarterly* 1964, no. 3 (1964): 355–367, https://openscholarship.wustl.edu/law_lawreview/vol1964/iss3/5/; 18 U.S.C. § 1073 historical and revision notes (tracing the statute to the Act of May 18, 1934, ch. 302, 48 Stat. 782).

²⁸ Willems, *Principle of Mutual Trust*, 202.

²⁹ John Bernard Corr, "Criminal Procedure and the Conflict of Laws," *Georgetown Law Journal* 73 (1985): 1217–19, <https://scholarship.law.wm.edu/facpubs/839/>.

³⁰ Jenia Iontcheva Turner, "Interstate Conflict and Cooperation in Criminal Cases: An American Perspective," *European Criminal Law Review* 4, no. 2 (2014): 114–146, <https://doi.org/10.5235/219174414813522060>.

ad hoc solutions that allow such collaboration to be effective. Additionally, the minimum standards set in the Constitution provide states with an additional guarantee regarding the reliability of the cooperation procedures they engage in. At the same time, the constant support offered by the federal government constitutes yet another mechanism ensuring that the cooperation process will be efficient and will achieve the outcome sought by the states involved.

Drawing an analogy with the situation in the European Union, we may note that both the EU's leadership structures and its various bodies and agencies support Member States in facilitating international judicial cooperation in criminal matters. However, the aspect in which Member States should follow the American model is the uniformization of the legislative framework in this field, and the implementation of EU norms should be carried out in a way as closely aligned as possible, without fundamental divergences. Moreover, there remains a certain rigidity of procedures that could be nuanced, precisely in light of the trust that EU Member States ought to place in the legal systems of their fellow Union members.

Likewise, U.S. legislation in the field of cooperation does not provide such numerous grounds for refusal of cooperation procedures as those found in European legislation. Furthermore, the rule of specialty is not applied in relations between U.S. states, but only at the international level, which reflects the high degree of trust states have in the proper conduct of criminal proceedings in other states. Nevertheless, the extent to which fundamental rights are respected remains debatable - an element on which the EU places significant emphasis in the conduct of cooperation relations.

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