



## ARTICLES

### SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (FIRST PART)

#### INTRODUCTION

Mutual recognition has developed into a key principle of the European Union, to achieve a wide range of policy objectives. The principle has become an essential tool in the EU integration process. It means that in the field of law where the principle operates Member States' actors are bound to accept and enforce standards and/or judicial decisions made in other Member States. The recognition is sometimes quasi-automatic even if these standards and decisions were adopted according to a complete different legal system. Mutual recognition may be seen as a "third way" between full legislative freedom for Member States and harmonisation.<sup>1</sup> As such, it has been branded as a non-centralistic, non-hierarchical method of governance and integration. It is, all in all, subject to high expectations and considered suitable to achieve EU objectives, and effective in dealing with cross-border issues of a wide variety. At the same time it is viewed to be respectful of national sovereignty and national and local diversity.<sup>2</sup> It is now implemented in many subject matters from the Internal Market to the Area of Freedom, Security and Justice (AFSJ) that covers migration law and cooperation in civil and criminal matters.

Mutual recognition (MR) – and the underlying principle of mutual trust (MT) – is neither a new, nor a unique feature of the EU legal order. Nevertheless, there is currently every reason to revisit MR and MT and their role in the European integration process. The political, legal and practical relevance of MR and MT increased significantly in recent years. The increased *political* relevance has for the greater part been the result of the way in which the foundations of EU migration law in general and the Dublin rules on

<sup>1</sup> For the purpose of this description, "approximation" and "harmonisation" are synonyms, see however F.M. TADIĆ, *How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law*, in A. KLIP, H. VAN DER WILT (eds), *Harmonisation and harmonising measures in criminal law*, Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002, p. 1 *et seq.*

<sup>2</sup> Pelkmans argues that mutual recognition as a regulatory instrument has enjoyed a great deal more success than as a judicial principle (in the absence of any connection to harmonization); see J. PELKMANS, *Mutual recognition in goods. On promises and disillusion*, in *Journal of European Public Policy*, 2007, p. 699 *et seq.*

asylum responsibility have been challenged in the current migration crisis. A more intricate relation with fundamental rights and principles has contributed to the *legal* relevance of MR and MT arrangements. In its seminal opinion 2/13 on the draft agreement on the accession of the European Union to the European Convention on Human Rights (ECHR),<sup>3</sup> the CJEU identified MT as a constitutional principle and as a possible obstacle to the accession of the EU to the ECHR.<sup>4</sup> It is still unclear how respect for MT will be implemented as no new draft accession agreement has been concluded as yet. MR and MT are, furthermore, not just theoretical concepts, but they carry very real and direct consequences for citizens and business. The consequences for requested persons in the framework of the European Arrest Warrant; for asylum seekers under the Dublin system and for workers or self-employed persons seeking recognition in another Member State – not to mention for all national authorities which are called upon to apply MR and MT obligations – demonstrate that these principles are also in practical terms systemic elements of the EU legal order.

Scholars have evaluated in particular the *effectiveness* of MR. Indeed, MR has been developed by the CJEU and the EU legislature as a mode of governance<sup>5</sup> to achieve internal market objectives (and later on, justice and home affairs objectives as well). As an alternative to the more hierarchical method of harmonization, the question arose whether MR would be equally effective to achieve EU policy objectives. MR requires Member States authorities to apply foreign laws and/or decisions which may be more difficult than having to apply a single EU set of rules. MR may thus be less effective, but this may be accepted in light of MR being viewed as less intrusive on national legal orders. This latter viewpoint is important in the current legitimacy crisis of the EU. Now that concerns over the political sensitivity and public acceptance of EU policies are growing, alternatives to hierarchical forms of steering may offer more viable solutions.

Limitations are an inherent element of MR and MT. A sufficient degree of functional equivalence has been the key criterion for Member States authorities to define whether they must apply MR obligations or not.<sup>6</sup> This may imply a certain degree of approximation.<sup>7</sup> With regard to the AFSJ, research has demonstrated that trust is closely related to the existence of common standards of fundamental rights and is, therefore, essential

<sup>3</sup> Court of Justice, opinion 2/13 of 18 December 2014.

<sup>4</sup> See on this H. LABAYLE, F. SUDRE, *L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union à la Convention européenne des droits de l'Homme: pavane pour une adhésion défunte?*, in *Revue française de droit administratif*, 2015, p. 3 *et seq.*

<sup>5</sup> S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007, p. 667 *et seq.*

<sup>6</sup> M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 405 *et seq.*

<sup>7</sup> *Ibid.*

for the good functioning of mutual recognition.<sup>8</sup> One may contend that the principle of mutual trust and the respect for the individual's rights are the bedrock upon which mutual recognition should be built. MR seems based on the premise that EU Member States share common values and equivalent standards of in particular fundamental rights and therefore trust each other's legal systems. Respect for fundamental rights and common values is thus a significant precondition or limit to MR.

Yet, much of the nature of the principle of mutual recognition, its effects, its constitutional positioning and its interaction with mutual trust and harmonisation remain unclear and contested. This special issue will therefore discuss the meaning and scope of the principles of mutual recognition and mutual trust in various policy areas of EU law. The focus will be on how mutual recognition and mutual trust propose to achieve EU integration while ensuring the protection of citizens and preserving the diversity of the Member States legal systems.

The special issue will be divided into two parts, the first part being published in the present issue of *European Papers* whereas the second part will be published in the first issue of 2017. The various contributions to this special issue will discuss mutual recognition and mutual trust from different perspectives. Several articles will analyze the principles of MR and MT from a more constitutional perspective, whereas other papers will discuss the meaning of these principles in specific policy areas. In the first range of contributions, Prechal (part II) discusses the meaning and scope of the principle of mutual trust considered by the CJEU in its opinion 2/13 as a principle of EU constitutional law. Marin (part II) will focus on how the principle of mutual trust must evolve and take into account the protection of fundamental rights in order to fit the constitutional dimension of EU law. Groussot, Petursson and Wenander (part I) on the one hand and Van den Brink (part I) on the other discuss the regulatory function of MR and MT in the EU. Groussot, Petursson and Wenander explain how the principles operate in EU free movement law as a balancing tool at the intersection between national interests and EU objectives. The principles must be understood as interchangeable and seen in a broader context, taking into account other important variables such as the principles of proportionality and the level of substantive and procedural protection in the host state. Van den Brink discusses the role of MR in shaping the relations between the EU Member States (horizontal federalism) in light of similar mechanisms that exist in the US. The author argues that the US constitutional and legislative system includes not only a greater variety in horizontal federalism instruments but also in balancing central control, home state control and host state autonomy.

<sup>8</sup> S. ALEGRE, M. LEAF, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant*, in *European Law Journal*, 2004, p. 200 *et seq.*, see also M. FICHERA, *Criminal Law beyond the State: The European Model*, in *European Law Journal*, 2013, p. 174 *et seq.*

The second range of contributions focus on various fields of law from EU asylum law, criminal law, competition law, internal market law and civil law. Marguery (part I) explains how the respect of fundamental rights imposes limits on mutual trust and consequently mutual recognition in cooperation in criminal matters. The article analyses how the case law of the European Court of Human Rights (the European Court) interacts with the CJEU recent rulings on fundamental rights in European Arrest Warrant proceedings. In the same vein, Montaldo (part I) discusses in depth these recent rulings and their meaning for the future of judicial cooperation. Brouwer (part I) reviews the case law of the CJEU and the European Court in order to discover how mutual trust in the AFSJ can be rebutted by national courts. The analysis extends to all the fields of law covered by the AFSJ, thus not only migration, but also criminal, civil and matrimonial law. Cambien (part II) sheds light on the precise meaning of the principle of mutual trust and clarifies its relationship with mutual recognition. In particular, the article focuses on the internal market law. Finally, Emaus (part II) elaborates how the principles of mutual recognition and mutual trust operate in the field of cooperation in civil matters. The contribution is particularly interesting considering the recent case *Avotins v. Latvia* decided by the European Court in the context of the Brussels II Regulation.<sup>9</sup>

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<sup>9</sup> European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotins v. Latvia* [GC].

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