



## ARTICLES

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

# MUTUAL RECOGNITION AND MUTUAL TRUST IN THE INTERNAL MARKET

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ABSTRACT: The principles of mutual trust and mutual recognition are often mentioned together, and sometimes even equated. This paper argues that they are distinct but interconnected principles and that mutual trust is the more fundamental of the two. On the one hand, the paper tries to shed more light on the origins, the meaning and scope of the principle of mutual trust, but also on its relationship with the principle of mutual recognition. On the other hand, it examines the importance of the mutual trust principle in the context of the internal market. It is argued that the elevation of the principle of mutual trust to a constitutional principle in recent Court of Justice case law regarding the Area of Freedom, Security and Justice can and should have a positive impact on the functioning of EU law in this field.

KEYWORDS: mutual trust – mutual recognition – internal market – Area of Freedom, Security and Justice – Court of Justice – constitutional principles of EU law.

## I. INTRODUCTION

The well-known principle of mutual recognition has long been established as a cornerstone of the European internal market. The principle equally plays a central role in the

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creation of the Area of Freedom, Security and Justice as an area “without internal frontiers”. Very often it is mentioned together with another principle, namely the principle of mutual trust. The latter principle is more of a “dark horse”; it does not figure in the Treaties, and was for a long time mostly absent in Court of Justice case law or EU legislation. This has changed dramatically in recent years. Court of Justice case law and EU legislation now contain frequent references to mutual trust. This increased attention by the Court and the EU legislator, in turn, has sparked an increased interest into the concept from the legal community, effectively turning “mutual trust” into one of the buzzwords of EU legal scholarship.<sup>1</sup>

Be that as it may, despite the increased attention, there is still a lot of uncertainty surrounding the meaning of the principle of mutual trust. Indeed, many commentators point out that mutual trust is an “elusive” concept that suffers from a lack of conceptualisation.<sup>2</sup> Adding to this uncertainty is the somewhat opaque relationship between the principle of mutual trust, on the one hand, and the principle of mutual recognition, on the other hand. To illustrate the point: these two principles are not only often mentioned together, sometimes they are even used interchangeably.<sup>3</sup>

The aim of this paper is, on the one hand, to shed light on the precise meaning of the principle of mutual trust, in particular by clarifying the relationship between the principles of mutual trust and mutual recognition. In order to determine the precise scope of the principle of mutual trust, the paper also focuses on the limitations and conditions that surround it. On the other hand, the paper analyses what role the principle of mutual trust can play in the internal market. While traditionally, internal market literature is focused on mutual recognition, it is less clear what the importance is of the principle of mutual trust in this field. In this connection, the paper examines whether the pivotal role given to the principle of mutual trust in the context of the Area of Freedom, Security and Justice, in particular after Opinion 2/13,<sup>4</sup> should be extended to the field of the internal market.

## II. THE ORIGINS OF “MUTUAL TRUST” AS A CONCEPT OF EU LAW

As a preliminary point, it is important to devote a few lines to the origins of “mutual trust” as a legal principle in EU law. Perhaps surprisingly, there is no mention of “mutual trust” in the EU Treaties, not even in their preamble. Admittedly, the Treaties do refer to

<sup>1</sup> Obviously, this is not to say that the analysis of “mutual trust” in EU law is a recent development (see e.g. already the discussion in G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI Working Papers*, no. 1, 1993).

<sup>2</sup> See e.g. E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Working Papers*, MWP, no. 13, 2016, p. 1.

<sup>3</sup> See e.g. opinion of AG Sharpston delivered on 15 June 2006, case C-467/04, *Gasparini et al.*, para. 107, footnote 87.

<sup>4</sup> Court of Justice, opinion 2/13 of 18 December 2014.

“mutual recognition”,<sup>5</sup> but, as I will submit in this paper, mutual recognition is not the same as “mutual trust”.<sup>6</sup> The principle of mutual trust was, in fact, developed by the Court of Justice and later taken over by the EU legislator.

## II.1. IN COURT OF JUSTICE CASE LAW

It was the Court of Justice which explicitly introduced “mutual trust” as a notion of EU law. The notion first surfaced in the Court’s case law in the late 1970s,<sup>7</sup> but it is only in recent years that it has been regularly mentioned by the Court. In fact, a simple search of the Court’s case law shows that the concept was mentioned in less than 10 Court judgments issued before 2003. By contrast, from 2003 onwards, the Court pronounces virtually every year at least one judgment containing a reference to this notion. Interestingly, the principle was also referred to in three Opinions of the Court<sup>8</sup> and has been amply discussed by a number of AGs.<sup>9</sup>

The English notion of mutual trust corresponds to the notions “wederzijds vertrouwen” in Dutch, “confiance mutuelle” or “confiance réciproque” in French and “gegenseitiges Vertrauen” in German. However, it must be stressed that the terminology used by the Court is not fully consistent. In fact, in some judgments, the Court uses the expression “mutual confidence” rather than “mutual trust”.<sup>10</sup> To my mind, both notions should be understood to mean exactly the same thing, contrary to what certain scholars have suggested.<sup>11</sup> In fact, the French version of the judgments concerned consistently uses the expression “confiance mutuelle”.<sup>12</sup> One has to bear in mind that all Court judgments are drafted in French, and subsequently translated into other languages. Hence, the fact that two different notions are used in the English version of these judgments does not carry a difference in meaning.

<sup>5</sup> See e.g. in the context of judicial cooperation in criminal matters: Art. 82 TFEU.

<sup>6</sup> “Mutual trust” is not the same either as “mutual respect”; the latter principle is referred to in Arts 3, para. 5, TEU and 4, para. 3, TEU.

<sup>7</sup> See already Court of Justice, judgment of 25 January 1977, case 46-76, *Bauhuis*, para. 38 and the discussion in D. GERARD, *Mutual Trust as Constitutionalism?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 71.

<sup>8</sup> Court of Justice, opinion 1/75 of 11 November 1975; Court of Justice, opinion 1/03 of 7 February 2006 and opinion 2/13, cit.

<sup>9</sup> Notably by AG Ruiz-Jarabo Colomer (see e.g. opinion of AG Ruiz-Jarabo Colomer delivered on 8 April 2008, case C-297/07, *Bourquain*).

<sup>10</sup> E.g. Court of Justice, judgment of 21 December 2011, case C-411/10, *M.S.* [GC], paras 79 and 83; Court of Justice, judgment of 10 December 2013, case C-394/12, *Abdullahi* [GC], para. 53; Court of Justice, judgment of 1 June 2015, case C-241/15, *Bob-Dogi*, paras 33, 52 and 65.

<sup>11</sup> See e.g. I. CANOR, *My Brother’s Keeper? Horizontal Solange: “An Ever Closer Distrust Among the Peoples of Europe”*, in *Common Market Law Review*, 2013, pp. 399-401.

<sup>12</sup> Or, more rarely, the expression “confiance réciproque”.

The Area of Freedom, Security and Justice is by far the most common area of law in which Court judgments make a reference to the notion of mutual trust. For instance, the Court has frequently repeated, in the context of the Schengen Agreement, that “the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied”.<sup>13</sup> The Court has also, for instance, referred to mutual trust in the context of the application of Regulation 604/2013 (hereinafter, the Dublin Regulation).<sup>14</sup> In this context, the Court famously ruled that mutual trust is also subject to certain limitations, for instance in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in a given Member State.<sup>15</sup> Similarly, the notion of mutual trust often figures in judgments concerning the European Arrest Warrant<sup>16</sup> or concerning private international law.<sup>17</sup>

The notion of mutual trust has, however, also been referred to by the Court of Justice in other areas of law, including e.g. the field of external relations,<sup>18</sup> or in cases concerning the internal market.<sup>19</sup>

## II.2. IN LEGISLATIVE DOCUMENTS

The Union legislator, for its part, has also referred to “mutual trust” in a number of regulations and directives. Again, it is clear that references to mutual trust have multi-

<sup>13</sup> See, most recently Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski* [GC], para. 50, referring to the Court of Justice, judgment of 11 December 2008, case C-297/07, *Bourquain*, para. 37 and the case-law cited.

<sup>14</sup> Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, which has replaced Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

<sup>15</sup> See *N.S.*, cit.

<sup>16</sup> See e.g. Court of Justice, judgment of 5 April, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], paras 78 and 82.

<sup>17</sup> See e.g. Court of Justice, judgment of 19 November 2015, case C-455/15 PPU, *P*, para. 35.

<sup>18</sup> E.g. Court of Justice, judgment of 9 February 2006, joined cases C-23/04, C-24/04, C-25/04, *Sfakianakis*, para. 21.

<sup>19</sup> See the discussion in section IV, *infra*.

plied in recent years. In fact, only after the Tampere Conclusions of 1999,<sup>20</sup> did the principle fully find its way into EU legislation.<sup>21</sup>

As one would expect, “mutual trust” is most frequently referred to in legislation concerning the Area of Freedom, Security and Justice.<sup>22</sup> Mutual trust has become one of the corner stone concepts of EU legislative activity in this field, and its importance will likely still increase. Indeed, the Commission has announced that its objective for the future is “to make further progress towards a fully functioning common European area of justice based on trust, mobility and growth by 2020”.<sup>23</sup> In this connection, the Commission clarified that “[m]utual trust is the bedrock upon which EU justice policy should be built” and that “[w]hile the EU has laid important foundations for the promotion of mutual trust, it needs to be further strengthened to ensure that citizens, legal practitioners and judges fully trust judicial decisions irrespective of in which Member State they have been taken”.<sup>24</sup> It comes as no surprise then that the Commission has identified helping Member States “to further develop mutual trust” as one of its priorities in the context of the European Agenda on Security.<sup>25</sup>

However, also outside this field, EU legislation increasingly refers to “mutual trust”, for instance, in legislative acts related to EU citizenship<sup>26</sup> or the internal market.<sup>27</sup> One could say that “mutual trust” has become something of a “buzz-word”, permeating the

<sup>20</sup> Tampere European Council Conclusions of 15-16 October 1999. Interestingly, “mutual trust” is not mentioned as such in the Tampere Conclusions. This may be because, at that time, the European Council found it obvious that the Member States trusted each other’s criminal justice systems (see L. LIMÉK, *The European Arrest Warrant*, Heidelberg: Springer, 2015, p. 76).

<sup>21</sup> For an early example, see Regulation (EC) 1346/2000 of the Council of 29 May 2000 on insolvency proceedings.

<sup>22</sup> For a recent example, see Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

<sup>23</sup> European Commission Press Release IP/14/233 of 11 March 2014, *Towards a True European Area of Justice: Strengthening Trust, Mobility and Growth*.

<sup>24</sup> *Ibid.*

<sup>25</sup> Communication COM(2015) 185 final of 28 April 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*.

<sup>26</sup> See e.g. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

<sup>27</sup> See e.g. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System.

whole EU legal system.<sup>28</sup> Telling in this regard is the EU Commission's statement referring to "the whole EU legal system, which is based on mutual trust".<sup>29</sup>

### III. MUTUAL TRUST V. MUTUAL RECOGNITION

#### III.1. MUTUAL RECOGNITION AND MUTUAL TRUST: MEANING AND RELATIONSHIP

The next question then is: what is the meaning of the principle of mutual trust? To answer this question, it is tempting to start referring to the principle of mutual recognition, which has long been established as a corner stone of the European internal market. Ever since the landmark judgment in *Cassis de Dijon*,<sup>30</sup> it is clear that the Member States must recognize each other's national rules regarding product requirements as binding, subject to certain public interest exceptions. Similarly, the Member States must, as a rule, recognize diplomas granted by another Member State.<sup>31</sup> Accordingly, the principle of mutual recognition makes an essential contribution to the establishment and functioning of the internal market, as it frees economic operators from the burden of having to comply with various national standards.<sup>32</sup>

The principle of mutual recognition equally plays a pivotal role in the creation of the Area of Freedom, Security and Justice as an area "without internal frontiers".<sup>33</sup> This is already clear from the fact that the principle is explicitly mentioned in, *inter alia*, Art. 67, paras 3 and 4, TFEU. It is a central principle of numerous legislative acts adopted in the

<sup>28</sup> See, specifically with regard to EU private international law, M. WELLER, *Mutual Trust: in Search of the Future of European Union Private International Law*, in *Journal of Private International Law*, 2015, p. 64.

<sup>29</sup> European Commission Press Release of 21 November 2013, *Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shape the Future of EU Justice Policy*.

<sup>30</sup> Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*. For a discussion of its importance, see K. NICOLAIDIS, *Kir Forever, The Journey of a Political Scientist in the Landscape of Mutual Recognition*, in L. AZOULAI, M. POIARES MADURO (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, pp. 447-455.

<sup>31</sup> See Art. 53 TFEU and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. For a discussion, see M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, pp. 423-427.

<sup>32</sup> For a concrete example, see Court of Justice, judgment of 30 April 2014, case C-365/13, *Ordre des architectes v. État belge* (Belgium may not oblige an architect from another Member States to undertake a traineeship, or to prove that he possesses equivalent professional experience, in order to be authorised to practise the profession of architect).

<sup>33</sup> Art. 3, para. 2, TEU reads as follows: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

field, such as, for instance, Council Framework Decision 2002/584/JHA<sup>34</sup> (hereinafter, the Framework Decision on the European Arrest Warrant). According to recital 3 of the Framework Decision: “The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation”.

Mutual recognition is not, however, the same as mutual trust.<sup>35</sup> Both concepts have a different meaning and play a different role, as will be shown hereinafter. The fact that both concepts are to be distinguished is, in fact, already indicated by the fact that they are mentioned separately in a number of Court of Justice judgments.<sup>36</sup>

It is often said that the principle of mutual trust is ambiguous and suffers from a lack of conceptualisation. Matters have slightly improved in recent years, because the Court of Justice has provided a definition of what the principle means in the Area of Freedom, Security and Justice. As the Court explained in its Opinion 2/13, that principle requires each of the Member 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.<sup>37</sup> In the context of the Schengen regulation, the Court has explained that mutual trust requires that the relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State.<sup>38</sup> AG Ruiz-Jarabo Colomer, for his part has explained, that mutual trust relates to “trust in the adequacy of one’s partners’ rules and also trust that these rules are correctly applied”,<sup>39</sup> as has often been repeated afterwards.<sup>40</sup>

It should be clear from this case law that mutual trust plays a role at a more fundamental level than mutual recognition. Indeed, the duty imposed on a Member State to place “trust” in the legal system of another Member State is clearly more far-reaching than a duty to recognize certain rules or acts produced by that legal system. This dis-

<sup>34</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>35</sup> I do not agree with AG’s Sharpston’s assumption that these are different names for the same principle (Opinion of AG Sharpston, *Gasparini et al.*, cit., para. 107, footnote 87).

<sup>36</sup> See C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 142.

<sup>37</sup> Opinion 2/13, cit., para. 191.

<sup>38</sup> *Kossowski* [GC], cit., para. 51.

<sup>39</sup> Opinion of AG Ruiz-Jarabo Colomer delivered on 19 September 2002, cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 124.

<sup>40</sup> See e.g. recital 6 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

inction is in line with the ordinary meaning to the concepts of trust and recognition: I may well recognize your decisions, but that does not necessarily mean that I have trust in you. Trust requires something more fundamental, which will, in many circumstances, require a more stable and advanced relationship. In this sense, it is probably no coincidence that the development of mutual trust as a legal principle happened more recently than that of the principle of mutual recognition. Furthermore, trust is in particular required in times of crisis, when one or more parties go through a difficult period of time. This observation too, against the background of the existential crises facing the EU, may explain the recent interest of the legal community in the principle of mutual trust.

Despite their obvious differences, it should be emphasised that mutual trust and mutual recognition are interrelated concepts,<sup>41</sup> which are often mentioned together.<sup>42</sup> It is clear from the case law that both principles are necessary for the creation of the Area of Freedom, Security and Justice.<sup>43</sup> Yet, the precise relationship between the two is not entirely clear. It is often said that mutual recognition – in the context of the Area of Freedom, Security and Justice – presupposes mutual trust.<sup>44</sup> Accordingly, the Court has stated that the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter of Fundamental Rights of the European Union (Charter).<sup>45</sup> We find the same idea expressed in the preamble of a number of EU legislative acts.<sup>46</sup> However, according to some, the relationship between the two is the other way around. As AG Bot has explained, “mutual trust” is not a prerequisite for the operation of mutual recognition, but

<sup>41</sup> See already the discussion in G. MAJONE, *Mutual Recognition*, cit., p. 15.

<sup>42</sup> E.g. *Bob-Dogi*, cit., paras 52 and 65.

<sup>43</sup> See *Aranyosi and Căldăraru* [GC], cit., para. 78 (“Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained”).

<sup>44</sup> See e.g. L. BAY LARSEN, *Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart Publishing, 2012, p. 148; O. DE SCHUTTER, *La contribution du contrôle juridictionnel à la confiance mutuelle*, in G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle dans l'espace pénal européen – Mutual trust in the European Criminal Area*, Brussels: Institut d'études européennes de l'ULB, 2005, p. 98.

<sup>45</sup> *Bob-Dogi*, cit., para. 33. See also, dealing with a case concerning the organisation of bets on sporting competitions, opinion of AG Mengozzi delivered on 3 March 2010, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß*, para. 104 (“the cases at present before the Court reveal national practices which are themselves capable of destroying the mutual trust [...] upon which an eventual harmonisation of the sector or, at least, the system of mutual recognition of gaming licences would have to be based”).

<sup>46</sup> See e.g. recital 4 of Directive 2013/48, cit.,: “The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other’s criminal justice systems”.



a consequence that is imposed on Member States by the application of that principle. According to him, the application of the principle of mutual recognition requires the Member States to place trust in each other regardless of the differences in their respective national laws.<sup>47</sup>

To my mind, both points of view rightly emphasise the close connection between mutual recognition and mutual trust. In my view, it makes sense to consider mutual trust as being part of the broader context which is necessary to have a properly functioning system of mutual recognition. Indeed, it would not make sense to require a Member State to *systematically* recognise the decisions and rules of another Member State if it did not have trust in the adequacy of the legal system of that other Member State. This point can be illustrated by reference to recent Court of Justice judgments with regard to the Common European Asylum System. As the Court has explained, the Common European Asylum System was conceived in a context making it possible to assume that the Member States can have trust in each other.<sup>48</sup>

In this connection it is important to point out that this context of mutual trust should not be considered as something exogenous to the EU principle of mutual recognition. The latter principle should not only operate in a context of mutual trust, its application should also have the effect of fostering mutual trust. This idea was clearly expressed in Art. I-42 of the Treaty Establishing a Constitution for Europe, which declared that the EU should promote “mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions”. We find the same idea in a number of legislative acts, which are sometimes referred to as “trust-enhancing measures”.<sup>49</sup>

This point illustrates very well a certain ambivalence surrounding the concept of mutual trust in EU law. On the one hand, it is treated as something which is already present, and even as a necessary precondition for the application of the principle of mutual recognition. On the other hand, it is treated as a goal to aspire, but which has not yet been achieved. Accordingly, one could make a distinction between *de facto* mutual trust and *de iure* mutual trust, or between “mutual trust as a precondition for mutual recognition” and “mutual trust as presupposed by mutual recognition”.<sup>50</sup> The link between this (hypothetical) existence of actual trust and the normative principle of mu-

<sup>47</sup> Opinion of AG Bot delivered on 15 December 2015, case C-486/14, *Kossowski*, para. 43.

<sup>48</sup> *Abdullahi* [GC], cit., para. 52.

<sup>49</sup> See e.g. K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The Fourth Annual Sir Jeremy Lever Lecture, University of Oxford, 30 January 2015, [www.law.ox.ac.uk](http://www.law.ox.ac.uk), p. 9.

<sup>50</sup> O. DE SCHUTTER, *Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice*, in O. DE SCHUTTER, V. MORENO LAX (eds), *Human Rights in the Web of Governance. A Learning-Based Fundamental Rights Policy for the EU*, Brussels: Bruylant, 2010., p. 295 *et seq.*

tual trust remains vague in Court of Justice jurisprudence.<sup>51</sup> Nonetheless, it seems to me that there is not necessarily contradiction between these two aspects of mutual trust. In reality, both aspects are to some extent true. As stated before, mutual trust must, to some extent, be present (or presupposed) as part of the wider context in order for mutual recognition to operate smoothly. At the same time, positive experiences based on the successful application of the principle of mutual recognition may evidently increase the mutual trust Member States can have in the adequacy and output of the legal system of another Member State.

I would add that, evidently, the level of mutual trust that has been achieved varies. Mutual trust is already present to a very large extent in some areas, but, unfortunately, still only to a limited extent in others. Moreover, the level of actual mutual trust is, by its nature, fluctuating: it may be largely present in some times, but decrease or even disappear in times of crisis. In these times, the EU has an important role to play in creating and strengthening mutual trust. Indeed, if the principle of mutual recognition is a central principle of many areas of EU law, and for these areas to function properly mutual trust “must exist”,<sup>52</sup> the absence or decrease of mutual trust among Member States, undermines the functioning of EU law in these areas. One way in which to increase mutual trust is by adopting the appropriate legislative measures entailing the adequate degree of harmonisation. I will come back to these issues below.<sup>53</sup>

### III.2. NO OBLIGATION OF BLIND MUTUAL TRUST: CONDITIONS AND LIMITATIONS

Like the principle of mutual recognition, the principle of mutual trust is subject to certain limitations.<sup>54</sup> As far as the principle of mutual recognition is concerned, it is well known that, in the context of the internal market, Member States can refuse to recognize products from another Member States by invoking certain legitimate interests.<sup>55</sup> Crucially, such refusal must not go further than necessary in order to achieve the legitimate aim pursued.<sup>56</sup> Consequently, at the end of the day, applying the principle of mutual recognition requires balancing the interest of free movement, on the one hand and

<sup>51</sup> T. WISCHMEYER, *Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”*, in *German Law Journal*, 2016, p. 359.

<sup>52</sup> Court of Justice, judgment of 26 April 2012, case C-92/12 PPU, *Melvin West*, para. 62.

<sup>53</sup> See the discussion in section IV, *infra*.

<sup>54</sup> For a discussion with regard to the Area of Freedom, Security and Justice, see V. MITSILEGAS, *The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 2012, pp. 319-372.

<sup>55</sup> For a discussion of certain unsuccessful legal challenges to mutual recognition, see A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline Through Free Movement*, in *EUI Department of Law Research Paper*, no. 42, 2015.

<sup>56</sup> For a discussion, see C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2013, p. 534 *et seq.*

certain legitimate national interests, on the other hand.<sup>57</sup> Similarly, the principle of mutual recognition is subject to limitations in the context of the Area of Freedom, Security and Justice,<sup>58</sup> such as considerations related to public policy, which are expressly recognized as a limitation to the principle of mutual trust in a number of EU legislative acts.<sup>59</sup>

Similarly, the principle of mutual trust does not impose unlimited trust: in fact, in exceptional circumstances, a Member State is not obliged under EU law to place trust in the outcome of the legal system of another Member State. This is not surprising: conditionality is of the essence of trust,<sup>60</sup> distinguishing it from pure loyalty. As Wischmeyer rightly points out, we only trust “except if” and “as long as”.<sup>61</sup> Put differently, mutual trust must not be confused with “blind trust”.<sup>62</sup> This aspect is clearly visible in the Court of Justice’s jurisprudence with regard to Art. 54 of the Convention Implementing the Schengen Agreement (CISA), which concerns the application of the *ne bis in idem* principle.<sup>63</sup> In the recent *Kossowski* judgment, the Grand Chamber stated that, while mutual trust requires that the competent authorities of a Contracting State accept at face value a final decision communicated to them which has been given another Contracting State, that mutual trust can prosper only if the first Contracting State is in a position to satisfy itself that the decision of the competent authorities of the other State does indeed constitute a final decision including a determination as to the merits of the case.<sup>64</sup> This proviso is significant, because it shows that the principle of mutual trust does not allow a Member State to “passively” accept decisions from another Member State, but obliges the competent authorities to screen whether certain conditions are in fact satisfied. The

<sup>57</sup> A. FRACKOWIAK-ADAMSKA, *Time for a European “Full Faith and Credit Cause”*, in *Common Market Law Review*, 2015, p. 203.

<sup>58</sup> See the discussion in K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 11 *et seq.*

<sup>59</sup> For instance, several articles of the Brussels II Regulation allow a Member State to refuse the recognition of certain judgments of other Member States if they are manifestly contrary to the former’s public policy. See Arts 22, let. a) and 23, let. a), of Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>60</sup> A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, p. 239.

<sup>61</sup> T. WISCHMEYER, *Generating Trust Through Law?*, cit., p. 347.

<sup>62</sup> K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 29.

<sup>63</sup> Art. 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen (Luxembourg) on 19 June 1990 and entered into force on 26 March 1995 states: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”.

<sup>64</sup> *Kossowski* [GC], cit., paras 51 and 52.

same idea was also powerfully expressed in another Grand Chamber judgment in the context of a case dealing with the European Arrest Warrant.<sup>65</sup>

On a closer look, it is possible to distinguish a number of principles or conditions limiting the scope of the principle of mutual trust. First of all, the principle of mutual trust is subject to a number of limitations, such as the principle of proportionality and national and European public-policy considerations.<sup>66</sup> For instance, the famous “systemic deficiencies” exception, first developed by the Court of Justice in case *M.S.* could be considered as an exception based on public policy considerations. This exception now expressly figures in Art. 3, para. 2, of the Dublin Regulation: “Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment [...] the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible”. Naturally, this exception only applies in exceptional circumstances. However, some commentators have suggested that the Court of Justice has in recent case law broadened this exception by no longer requiring “systemic” deficiencies.<sup>67</sup>

Moreover, it is clear from recent case law that individuals may challenge a transfer decision taken by a Member State under the Dublin Regulation, on the ground that it has systemic flaws in its asylum procedure, but also on the ground that it has incorrectly applied the criteria for determining responsibility laid down in Chapter III of the Dublin regulation.<sup>68</sup> If successful, such a challenge may have the result that another Member State should be considered the responsible Member State. This is possible even if all Member States involved are satisfied that these criteria have been correctly applied.<sup>69</sup> As such, the wide appeals possibilities given to individuals may also limit the trust Member States have in each other and, consequently, undermine the efficient working of the Dublin system based on mutual trust. Indeed, a successful appeal may force a Member State to consider another Member State’s application of the Dublin

<sup>65</sup> See *Aranyosi and Căldăraru* [GC], cit., para. 82 (“limitations of the principles of mutual recognition and mutual trust between Member States can be made ‘in exceptional circumstances’”).

<sup>66</sup> K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 29.

<sup>67</sup> See D. HALBERSTAM, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade*, in *VerfassungsBlog*, 9 June 2016, [verfassungsblog.de](http://verfassungsblog.de).

<sup>68</sup> Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash* [GC].

<sup>69</sup> See e.g. the main proceedings in the *Karim* case (Court of Justice, judgment of 7 June 2016, case C-155/15, *Karim* [GC]): the Swedish authorities requested the Slovenian authorities to take Mr. Karim back on the basis of Art. 18, para. 1, let. b), of Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, and the latter agreed.

regulation as not “trustworthy”. One could wonder whether this result is in line with the main objective of the Dublin Regulation,<sup>70</sup> which is to provide the Member States with a mechanism “to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection”.<sup>71</sup> Interestingly, it may be that the new Dublin regulation will “overrule” this case law and limit the possibilities for appealing a transfer decision.<sup>72</sup>

Yet another way in which EU law can limit the scope for mutual trust is by way of harmonisation. The EU institutions have frequently taken the view that partial harmonisation is essential for the application of the mutual trust principle and that “common rules strengthen mutual trust”.<sup>73</sup> While partial harmonisation may make it easier or more “digestible” to trust the decisions of another legal Member State, because it has to respect certain minimum rules, harmonisation at the same time reduces or even takes away the need for mutual trust, particularly when it amounts to full harmonisation. Indeed, mutual trust in the quality of the national rules of the home Member State is no longer required if that Member State is obliged to apply exactly the same rules as the host Member State (if the “other” becomes much like “myself”, then trust is no longer a real issue).<sup>74</sup> Be that as it may, it is obvious that the right level of harmonisation can foster mutual trust between the Member States. Indeed, it is much easier to trust the decision from another Member State if that decision can be presumed to respect certain

<sup>70</sup> See, however, the opposite view expressed in opinion of AG Sharpston delivered on 17 March 2016, case C-63/15, *Ghezelbash*, paras 68 *et seq.*

<sup>71</sup> See recital 5 in the preamble to the Dublin Regulation.

<sup>72</sup> See Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2016) 270 final, and the discussion in S. PEERS, *The Organisation of EU Asylum Law: the Latest EU Asylum Proposals*, in *EU Law Analysis*, 6 May 2016, eulawanalysis.blogspot.com.

<sup>73</sup> See e.g. Communication COM(2011) 573 final of 20 September 2011 from the Commission to the European Parliament, the Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*. For another example, see recital 8 of Directive 2013/48, *cit.*, which states: “Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union”.

<sup>74</sup> However, in such a context, the focus of mutual trust will shift from trust in the quality of national rules to trust in the efficient and fair application of harmonized rules, under effective supervision by the Court of Justice (P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford: Hart Publishing, 2009, p. 60).

(harmonised) minimum standards. Accordingly, in many fields, a certain level of harmonisation can be viewed as a prerequisite for mutual trust.<sup>75</sup>

In this context, it is important to emphasize that harmonisation can happen by the legislator, but it is also a result of certain Court of Justice judgments that confer on certain terms figuring in EU legislation an autonomous EU interpretation. Accordingly, in the recent *Dworzecki* judgment, the Court ruled that the expressions “summoned in person” and “by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial”, as referred to in Art. 4a, para. 1, let. a), sublet. i), of the Framework Decision on the European Arrest Warrant,<sup>76</sup> constitute autonomous concepts of EU law and must be interpreted uniformly throughout the European Union.<sup>77</sup> This judgment effectively has for a consequence that the Dutch referring court no longer has to put trust in the Polish practice for summoning a person,<sup>78</sup> in which it may have had little trust in the first place, as the questions it referred to the Court of Justice seem to suggest. Similarly, in three recent cases the Court of Justice was asked by the Dutch referring Court to clarify whether a European Arrest Warrant which is not issued by a Court, in the strict sense of the term, can constitute a “judicial decision” within the meaning of the Framework Decision on the European Arrest Warrant. In these cases, the arrest warrants had been issued by, respectively, the Swedish Police authority,<sup>79</sup> the Hungarian Public Prosecutor<sup>80</sup> and the Lithuanian Ministry of Justice.<sup>81</sup> In answering those questions, the Court of Justice had to decide whether the notions “judicial authority” and “judicial decision” are autonomous notions of EU law, and whether they are sufficiently broad so as to encompass the Swedish, Hungarian and Lithuanian practices with regard to the issuing of European Arrest Warrants. From the outset it was clear that the interpretation to be adopted by the Court could strongly influence the mutual trust between the Member States acting within the framework of European Arrest Warrant procedures. On the one hand, a Court ruling according to which the said notions are autonomous notions of EU law which cover only European

<sup>75</sup> See E. BROUWER, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, in *Utrecht Law Review*, 2013, p. 136 *et seq.*; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 422.

<sup>76</sup> Council Framework Decision 2002/584, *cit.*, Statements made by certain Member States on the adoption of the Framework Decision.

<sup>77</sup> Court of Justice, judgment of 24 May 2016, case C-108/16 PPU, *Dworzecki*.

<sup>78</sup> According to Polish practice, in the event of the addressee's absence from home, the summons is to be served on an adult resident of the addressee's household – if also absent, the summons can be served on the landlord or the caretaker or the village chief – on condition they undertake to pass the process on to the addressee.

<sup>79</sup> Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*.

<sup>80</sup> Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*.

<sup>81</sup> Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*.

Arrest Warrants issued by a court (in the strict sense of the word) could make it easier for courts in certain Member States to have trust in the warrants issued by other Member States. Indeed, for some courts it may be difficult to accept that, in other Member States such warrants may be issued by other authorities. On the other hand, such a narrow interpretation could, paradoxically, undermine mutual trust between Member States, since it could be viewed by those Member States that have diverging legal arrangements in place as a lack of trust in their legal systems. In its judgments, the Court of Justice put forward a balanced interpretation that seems apt to avoid the problems just outlined. The Court decided that “judicial authority” is an autonomous notion of EU law which covers not only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned, such as a public prosecutor. By contrast, the Court found that the term “judicial authority” does not cover non-judicial organs such as the Lithuanian Ministry of justice or the Swedish Police authority. Accordingly, the Court’s judgments impose on authorities in Member States with a more traditional system (such as e.g. the Netherlands) an obligation to have trust in the well-functioning of other systems, which confer the power to issue European Arrest warrants on judicial bodies that are not courts, without however obliging them to have trust in legal systems that confer this power on executive organs.

At the end of the day, it is clear that both the existence of too many differences between the legal systems of the Member States and a situation of too far-reaching harmonisation of these systems can undermine the principle of mutual trust. As always in the European Union, it is important to achieve the right balance between the two, or in other words “unity in diversity”.

#### IV. IMPORTANCE OF THE MUTUAL TRUST PRINCIPLE FOR THE INTERNAL MARKET

##### IV.1. MUTUAL TRUST IN THE INTERNAL MARKET

In the context of the internal market too, the Court of Justice has referred to mutual trust in a number of cases. In fact, some of the very first cases that mention mutual trust had to do with the free movement of goods, more precisely with trade in animals.<sup>82</sup> In this context, the Court held that the Member States must rely on trust in each other to carry out inspections relating to animal welfare on their respective territories.<sup>83</sup>

<sup>82</sup> See already *Bauhuis*, cit., para. 38 and the discussion in D. GERARD, *Mutual Trust as Constitutionalism?*, cit., pp. 71-72.

<sup>83</sup> Court of justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19, referring to *Bauhuis*, cit., para. 22.

However, overall, the number of Court of Justice cases referring to mutual trust in the context of the internal market is rather small.<sup>84</sup>

EU internal market legislation, by contrast, contains ample references to mutual trust. Already in the eighties, the Commission occasionally referred to mutual trust, for instance in informal acts relating to transport<sup>85</sup> or higher education.<sup>86</sup> Importantly, in its influential 1985 White Paper “Completing the Internal Market”, the Commission pointed out that the principle of mutual trust between the Member States was one of the main elements in a system of mutual recognition.<sup>87</sup> The Commission recently confirmed this link between mutual trust and mutual recognition in a working document on “A Single Market Strategy for Europe”,<sup>88</sup> which stated:

“Outside the area of harmonized goods, Member States still have national (and often very different) rules on products. While these national rules may conflict on paper, in practice mutual trust among Member States should apply: if a product is compliant in one Member State, it should be allowed to be marketed in all Member States by applying the principle of mutual recognition”.

Not surprisingly, the principle of mutual trust played a central role in the discussions leading up to the adoption of the controversial Directive 2006/123 (hereinafter Services Directive).<sup>89</sup> In its 2002 report on the state of the internal market for services, the Commission identified a number of legal barriers to the internal market for services.<sup>90</sup> One of the origins of these difficulties, according to the Commission, was the lack of mutual trust: “Many of the difficulties reported can be attributed primarily to a lack of trust of certain authorities in the quality of the legal systems of the other Member States [...] This lack of mutual trust may derive from ignorance of the implications of the principles of freedom of establishment and the free provision of services, but also from a lack of transparency and administrative co-operation between the Member

<sup>84</sup> For a more recent example, dealing with the customs union, Court of Justice, judgment of 24 October 2013, case C-175/12, *Sandler*, paras 49-50.

<sup>85</sup> Report COM(1984) 541 final of 8 October 1984 from the Commission to the Council on the establishment of a system for observing the transport markets.

<sup>86</sup> E.g. Communication COM(1981) 186 final of 29 April 1981 from the Commission to the Council, *Academic Recognition of Diplomas and of Periods of Study*.

<sup>87</sup> Commission, *White Paper on Completing the Internal Market*, COM(85) 310 final, para. 93.

<sup>88</sup> Commission Staff Working Document SWD(2015) 202 final of 28 October 2015, *A Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Upgrading the Single Market: more opportunities for people and business*.

<sup>89</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. For a discussion of the directive, see C. BARNARD, *Unravelling the Services Directive*, in *Common Market Law Review*, 2008, pp. 323-394.

<sup>90</sup> Report COM(2002) 441 final of 30 July 2002 from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services.



States or, in certain fields, from a lack of harmonisation of the national rules, reflected in an excessive disparity between the levels of protection of the general good guaranteed by the national systems”.

This observation regarding the lack of trust was one of the reasons behind the adoption of the Services Directive.<sup>91</sup> Indeed, the provisions of the Services Directive aim to simplify administrative procedures, remove obstacles for services activities as well as enhance both mutual trust between Member States and the confidence of providers and consumers in the Internal Market.<sup>92</sup> To that aim, the Services Directive contains a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues.<sup>93</sup> Accordingly, the directive promotes, *inter alia*, a “deep level” of administrative cooperation between the Member States, based on the obligation of mutual assistance between the competent authorities of Member States.<sup>94</sup>

In the same vein, recent EU legislation concerning the internal market does include frequent references to “mutual trust”. The preambles to such legislative acts sometimes indicate that common criteria are necessary in order to allow the building of mutual trust.<sup>95</sup> Besides, some internal market legislation provides for the adoption of effective enforcement mechanisms or mechanisms to increase transparency in order to build mutual trust among Member States that the provisions of the legislation concerned will effectively be complied with.<sup>96</sup> Likewise, other EU legislative acts provide for the putting

<sup>91</sup> Recital 3 of the Services Directive. See also the discussion in G. DAVIES, *Trust and mutual recognition in the Services Directive*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge: Cambridge University Press, 2012, pp. 230-271.

<sup>92</sup> European Commission, *Handbook on the Implementation of the Services Directive*, 2007, p. 7. See also P. TIMMERMAN, *Legislating amidst Public Controversy: The Services Directive*, Egmont Paper no. 32, 2009, [www.egmontinstitute.be](http://www.egmontinstitute.be).

<sup>93</sup> Recital 7 of the Services Directive.

<sup>94</sup> See the analysis in D. GERARD, I. LIANOS, *Shifting narratives in European economic integration: trade in services, pluralism and trust*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO*, cit., pp. 173-262.

<sup>95</sup> See e.g. recital 33 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; preamble of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons.

<sup>96</sup> See e.g. recital 38 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; recital 13 of Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) 339/93; recital 46 of Directive 93/38/EEC of the Council of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

in place of administrative cooperation in order to build mutual trust.<sup>97</sup> The importance of administrative cooperation was also emphasised by the Commission in its Recommendation on measures to improve the functioning of the single market.<sup>98</sup>

It should be clear from the foregoing that mutual trust plays an important role in the internal market, just like it does in the context of the Area of Freedom, Justice and Security. In both contexts, mutual trust has been qualified as a prerequisite for mutual recognition. However, as several authors have pointed out, there are significant differences in the way mutual recognition operates in both contexts.<sup>99</sup> This, in turn, can have an impact on the functioning of the principle of mutual trust, as will be discussed below. First, there is a significant difference in terms of the object of mutual recognition. In the context of the internal market, EU law requires the mutual recognition of product requirements, technical regulations and diplomas and professional qualifications, while in the Area of Freedom, Security and Justice, EU law requires the mutual recognition of judicial decisions taken by judicial authorities from another Member State. Second, and closely related to the first difference, the principle of mutual recognition has a different function. In the context of the internal market, the principle furthers the freedom of market operators, who may rely on it, for instance, to import goods into or have their professional qualifications recognised by another Member State. By contrast, in the context of the Area of Freedom, Security and Justice, the principle contributes to the effective exercise of public power by the Member States rather than the freedom of economic operators. In fact, the freedom of individuals is limited by the extraterritorial enforcement of judicial decisions, and this limitation may result in a violation of one or more of their fundamental rights.<sup>100</sup> Third, and again closely related to the previous

<sup>97</sup> See e.g. Art. 8 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System; Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

<sup>98</sup> Recital 9 of Commission Recommendation of 29 June 2009 on measures to improve the functioning of the single market ("Close cross-border cooperation between Member State authorities competent for single market issues allows the building of mutual trust and is of vital importance for the correct application of single market rules").

<sup>99</sup> See e.g. A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, pp. 231-232; K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., pp. 3-4; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 408 *et seq.*

<sup>100</sup> Compare, in the context of extradition agreements, the recent *Petruhhin* judgment (Court of Justice, judgment of 6 September 2016, case C-182/15, *Petruhhin* [GC], para. 32). For a discussion, see S. PEERS, *Extradition to non-EU countries: the limits imposed by EU citizenship*, in *EU Law Analysis*, 7 September 2016, eulawanalysis.blogspot.be.

points, there is the different degree of harmonisation required in both contexts. Indeed, it is said that, because mutual recognition restricts individual freedom in the context of the Area of Freedom, Security and Justice, it needs to be surrounded by stricter conditions, by means of secondary legislation entailing a sufficient degree of harmonisation. By contrast, it is claimed, in the context of the internal market, mutual recognition should not necessarily be surrounded by strict conditions, and may be enforced on the basis of primarily law.

It is tempting to argue, based on these differences, that mutual trust is less of an issue in the context of the internal market, that it comes more naturally in this context, given that it promotes the freedom of market operators (e.g. free trade in goods), rather than the exercise of public authority which may potentially entail fundamental rights violations.<sup>101</sup> One could add, on this view, that, because mutual trust is less problematic in the context of the internal market, harmonisation is less needed in this context. I would argue, however, that this point of view is mistaken. On the one hand, mutual trust in the context of the internal market is not just about harmless or uncontroversial product requirements, it is also about more fundamental aspects. First of all, some product requirements may have a significant impact on the safety, health and well-being of a Member State's inhabitants, and, therefore, placing trust in the equivalence of another Member State's regulations is not a natural or uncontroversial act, as is obvious from a high number of court proceedings.<sup>102</sup> Second, this becomes even more apparent when focusing on the free movement of persons rather than the free movement of goods. For instance, it goes without saying that it is not obvious for a Member State to allow doctors or lawyers qualified in another Member State to practice on its territory. Given the fundamental consequences this may have, it requires a deep level of mutual trust. This is perfectly illustrated by the rhetoric and arguments employed in the context of the Brexit, which often centre on the free movement of persons within the EU, and which showcase that mutual trust in the internal market can be as problematic as in the context of the Area of Freedom, Security and Justice.<sup>103</sup> Third, fundamental rights violations are an issue not just in the context of the Area of Freedom, Security and Justice, but also in the context of the internal market, as is apparent from a number of cases dealing with the free movement of goods<sup>104</sup> or with the free move-

<sup>101</sup> As Willems explains, by way of an example, a different level of trust is required when someone asks you to borrow your pen or your brand new car. Whereas the former might not be much of a problem, the latter would only occur in more developed relations (A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, p. 232).

<sup>102</sup> To cite one famous example: Court of justice, judgment of 28 January 1986, case 188/84, *Commission v. France* ("woodworking machines").

<sup>103</sup> See also the interesting discussion by G. DAVIES, *Could it all have been avoided? Brexit and Treaty-permitted restrictions on movement of workers*, in *European Law Blog*, 18 August 2016, europeanlawblog.eu.

<sup>104</sup> E.g. Court of Justice, judgment of 14 October 2004, case 36/02, *Omega Spielhallen*.

ment of persons and EU citizenship.<sup>105</sup> On the other hand, precisely because mutual trust does not come naturally in the context of the internal market either, harmonisation by way of sometimes detailed acts of secondary EU law is required. This is perfectly illustrated by the cumbersome process that took place with the enactment of the Services Directive, as discussed above.

#### IV.2. MUTUAL TRUST AS A CONSTITUTIONAL PRINCIPLE

It is tempting to infer from the foregoing that, given the problematic nature of mutual trust in the context of the internal market, the way forward is to return to a system that relies on the adoption of more and more ambitious harmonisation measures and less on mutual trust.<sup>106</sup> However, it is well known that harmonisation is slow, cumbersome and not always politically feasible. Based on past experience,<sup>107</sup> it is uncontroversial to state that EU harmonisation measures will never be able to “cover the whole field”. Consequently, even if the EU were to adopt a strategy of maximum harmonisation, a properly functioning internal market would still require a significant degree of mutual trust. Moreover, as stated above,<sup>108</sup> too much harmonisation may have the effect of killing that trust.

I would contend that an alternative avenue to deal with the problematic nature of mutual trust in the context of the internal market is to focus on the status of the principle of mutual trust. So far, this paper has made frequent references to the “principle of mutual trust”. However, it is not self-evident that “mutual trust” should, in fact, be considered to have the status of a legal principle of EU law. Indeed, it is striking that not all Court of Justice judgments or EU legislative acts that refer to “mutual trust” qualify it as a “principle”.<sup>109</sup> “Mutual trust” neither figures in many of the traditional overviews of legal principles of EU law. One could actually wonder whether “trust” can be a legal prin-

<sup>105</sup> See e.g., concerning the free movement to provide services, Court of justice, judgment of 11 July 2002, case C-60/00, *Carpenter*: refusal of a residence right for the primary carer may result in a violation of the fundamental right to respect for family life. For a more detailed discussion of residence rights for the primary carer, see N. CAMBIEN, *EU Citizenship and the Right to Care*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2016 (forthcoming).

<sup>106</sup> See, in this connection, J. SNELL, *The Single Market: does Mutual Trust Suffice?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 14.

<sup>107</sup> See White Paper on Completing the Internal Market, para. 93 (see para. 64: “relying on a strategy based totally on harmonization would be over- regulatory, would take a long time to implement, would be inflexible and could stifle innovation”).

<sup>108</sup> See *supra*, section III.2.

<sup>109</sup> See e.g. the *Gözütok and Brügge* case law, according to which “there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33).

ciple at all, or whether it should rather be viewed as a concept that operates outside the law and cannot really be encapsulated by a legal principle.<sup>110</sup> As one author has pointed out: mutual trust is not a principle of law, but a fragile reflexive social institution that has to be built organically through contacts between actors.<sup>111</sup>

Be that as it may, it is important to point out that early on already the Court of Justice actually did refer to the “principle of mutual trust”.<sup>112</sup> Moreover, in particular in the light of recent case law<sup>113</sup> and EU legislation, which frequently refers to the principle of mutual trust, one can no longer seriously question the existence of a principle of mutual trust in EU law.

More contentious is the exact status of the principle of mutual trust. There has been a long academic debate regarding the legal status and nature of this principle.<sup>114</sup> As I have already pointed out, “mutual trust” is not defined as a legal principle in the Treaties. In the light of this observation, combined with the widespread views regarding its lack of conceptualisation and its axiomatic nature,<sup>115</sup> one could be forgiven for thinking that the principle of mutual trust is not subject to judicial review. However, recent case law seems to support a different conclusion.<sup>116</sup>

Indeed, in recent case law the Court of Justice has elevated the principle of mutual trust to the status of a constitutional principle of EU law.<sup>117</sup> In the *N.S.* case the Court

<sup>110</sup> For an interesting discussion, see T. WISCHMEYER, *Generating Trust Through Law?*, cit., p. 344 *et seq.*

<sup>111</sup> P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, cit., p. 58.

<sup>112</sup> See e.g. Court of Justice, judgment of 5 July 1978, case 138/77, *Ludwig*; Court of Justice, judgment of 11 May 1989, case 25/88, *Wurmser and Others*, para. 18: “That rule is a particular application of a more general principle of mutual trust between the authorities of the Member States”.

<sup>113</sup> See e.g. an important number of PPU cases dealing with the European Arrest Warrant (e.g. *Aranyosi and Căldăraru* [GC], cit., para. 78).

<sup>114</sup> See the references cited in C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 141.

<sup>115</sup> See e.g. E. HERLIN-KARNELL, *Constitutional Principles in the EU Area of Freedom, Security and Justice*, in D. ACOSTA, C. MURPHY (eds), *EU Security and Justice Law*, Oxford: Hart Publishing, 2014, pp. 42-43; O. DE SCHUTTER, *Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice*, cit., p. 300 *et seq.*; D. GERARD, *Mutual Trust as Constitutionalism?*, cit., p. 69.

<sup>116</sup> Opinion 2/13, cit. For a critical discussion, see S. REITEMEYER and B. PIRKER, *Opinion 2/13 of the Court of Justice of the EU to the ECHR – One step ahead and two steps back*, in *European Law Blog*, 31 March 2015, [www.europeanlawblog.eu](http://www.europeanlawblog.eu). For a more positive analysis, see D. HALBERSTAM, *It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *German Law Journal*, 2015, p. 105.

<sup>117</sup> K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 6; V. MITSILEGAS, *Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship Between legal Pluralism and Rights-Based Justice in the European Union*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 36 (who speaks of the “deification of mutual trust”). See also the Meijers Committee standing committee of experts on international immigration, refugee and criminal law, *Note on Mutual trust and Opinion 2/13 on accession of the European Union to the European Convention on Human Rights*, [www.statewatch.org](http://www.statewatch.org).

referred to the “raison d’être of the European Union and the creation of an area of freedom, security and justice, in particular the Common European Asylum System, based on mutual trust”<sup>118</sup>. In Opinion 2/13, the Court stated that the legal structure of the EU is based on the fundamental premiss that each Member State shares with all the other Member States a set of common values on which the EU is founded. According to the Court, that premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.<sup>119</sup> The Court also stressed that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.<sup>120</sup> It has repeated this statement in later judgments.<sup>121</sup>

Now that the principle of mutual trust has been elevated to the status of a constitutional principle of EU law, it remains to be seen whether this can and should have an impact on other areas of EU law. In my view, this question should be answered in the affirmative as far as the internal market is concerned. Indeed, as I have already observed, mutual trust is a prerequisite for a properly functioning system based on mutual recognition. Without mutual trust, it would simply not be workable to require a Member State to systematically recognise the outcome of the regulatory system of another Member State (e.g. product requirements, technical regulations or diploma’s). Mutual trust is also a prerequisite for successful internal market harmonisation. First, the emphasis on mutual trust can result in the appropriate degree of harmonisation. Indeed, if Member States have trust in the quality of each other’s rules, there is no need for extensive harmonisation.<sup>122</sup> Harmonisation can be restricted to certain fields in which, for instance, the significant differences between the Member States rules make it desirable. Second, mutual trust is a tool that should guide harmonisation measures and can, as such, lead to the appropriate type of harmonisation measures. As Gerard explains, mutual trust can provide a frame of reference for policymakers inasmuch as it highlights the need to factor “trust safeguards” into the structuring of cooperative regulatory schemes and thereby perfect the management of diversity in the European Union.<sup>123</sup> Third, mutual trust is crucial for the application of harmonisation measures in the context of the internal market. Indeed, those rules will only be effectively applied if

<sup>118</sup> *N.S.* [GC], cit., para. 83.

<sup>119</sup> Opinion 2/13, cit., para. 168.

<sup>120</sup> *Ibid.*, para. 191.

<sup>121</sup> See e.g. *Aranyosi and Căldăraru* [GC], cit., para. 78.

<sup>122</sup> For a critical analysis with regard to the freedom to provide services, see O. DE SCHUTTER, *Trans-border Provision of Services and 'Social Dumping': Rights-Based Mutual Trust in the Establishment of the Internal Market*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO*, cit., pp. 349-380.

<sup>123</sup> D. GERARD, *Mutual Trust as Constitutionalism?*, cit., p. 79.

the Member States trust in the efficient and fair application of those rules by another Member State.<sup>124</sup>

In view of the foregoing, I would argue that it is of utmost importance that the status of mutual trust as a constitutional principle of EU law is equally confirmed in the context of the internal market. The constitutionalisation of mutual trust could shift the focus in the context from mutual recognition to mutual trust, which is the more fundamental principle of the two. This would rightly emphasise the importance of this principle for the functioning of the internal market, in particular in the current times of crisis, where trust between the Member States seems to be lacking in a number of fields and on a number of levels. At the same time, the constitutional duty of the Member States to place trust in each other could be a guiding tool for putting in place effective harmonisation measures, while at the same time it will help to avoid the pitfalls of over extensive harmonisation.

<sup>124</sup> P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, cit., p. 60.

