



# Freedom, Security and Justice within the European Union

- with special emphasis on criminal justice issues

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## MODULE 3

### Legal Innovation within AFSJ: Ideas and Solutions

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#### Reading Lecture 2

#### Mutual Recognition – An Introduction

##### 1. In this lecture you will learn about...

- the mutual trust between the MS (related to their criminal justice systems),
- the principle of mutual recognition (as a leading legal principle in legislation since 1999) and
- the rule of law mechanism and its connection to the mutual trust.

**Learning time – approximately 2 hours**



## 2. Mutual trust

Read the text!

Mutual trust is not mentioned **in either TFEU or in TEU**, but it has become an essential (political) principle of EU integration. The core element of its concept is that

that MS trust each other criminal justice systems in the terms of operating legally both materially and formally and complying human rights standards

MS trust one another's criminal justice systems in the terms of operating legally both materially and formally and also in complying with human rights standards. However, the principle of mutual trust is not 'blind trust', but rather a presumption and as such it can be overturned or rebutted.

As **Willems** stated the mutual trust has a **hybrid character**. "Broadly speaking, these could be grouped into 'social' and 'legal-political' elements. When these two groups of elements are brought together, a complete, and arguably hybrid image of trust appears. On the one hand elements which in social science literature have been attributed to a concept of (social) trust, on the other elements which are more particular to the surroundings of EU cooperation, or even more specifically to EU criminal justice cooperation. It is important to value both sides or aspects of mutual trust equally **since treating trust as if purely legal-political would raise false expectations**. The power to control and steer trust by means of legislation is only a limited one, and a wide variety of factors impact on its existence. The role of trust building legislation is to create the conditions for Member States to be trustworthy. (...) On the legal and political side, mutual trust has emerged as a core principle in the development of the field labelled as EU criminal law and **is widely regarded to be a prerequisite for mutual recognition-based cooperation**. It had already gained relevance for EU law long before and trust might be the very reason why Member States cooperate to begin with.

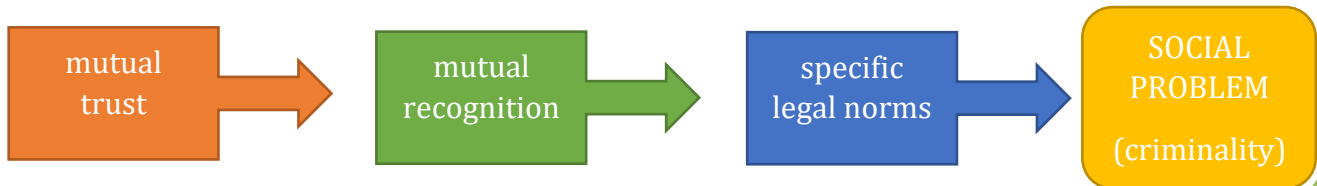
What do you think, generally, why „can” the MS trust each other?

In the context of the AFSJ, the principle has a slightly different meaning from its application in other EU policy fields, mainly because of the nature of the issues involved, namely dealing with criminal law necessarily involves (the violation of) fundamental rights. The principle of mutual trust brings together several of the foundational principles of the EU's legal order and as such is a collective notion. Mutual trust links with reciprocity and loyalty, functions on a level of equivalence and,



particularly important in the criminal law context, heavily relies on respect for fundamental rights and procedural fairness.”<sup>1</sup>

Maintaining and enhancing mutual trust is crucial for European criminal policy, because this is the philosophical basis of the functional principle of mutual recognition concurrently, the latter requires the former. Meanwhile, mutual recognition is the engine of cooperation in criminal matters between MS, and mutual trust is the fuel.



Hence mutual trust means that the MS have mutual trust vested in one another’s criminal justice systems and that each state recognizes the criminal law in force in the other MS, even if the procedure would be national law were to declare that if criminal and its legal results shall be enforced MS, this ‘foreign’ link solely as refusal of **trust is more of a political principle anchored in the TFEU without a norm-content**, it serves for and embeds the legitimation of new legal tools and instruments on an EU-level and furthermore for judgements of the Court of Justice of the EU (CJEU). However, the recent development in connection with Article 7 of TEU challenges mutual trust (see later in Module 3 reading lecture 3).

The acknowledgement of mutual trust leaves no doubts on the proper functioning of another MS (criminal) justice system.

outcome of a criminal different if its own have been applied. It law applies in a MS consequences or or used in another cannot be referenced cooperation. **Mutual**



Mutual trust was simply assumed to be existent by the European Council of Cardiff, and equally presupposed by the Council of Tampere. This trust is still not spontaneously felt and is by no means always evident in practice, even if mutual confidence between MS judicial and prosecution authorities appears to be growing. It is important to note that in concrete cases, MS are willing to articulate that there is no trust and there is nothing mutual; **but on a European level – on criminal policy level – the general withdrawal from mutual trust is indefensible**. Maintaining mutual trust also means the acknowledgement of a certain common responsibility for the

<sup>1</sup> Auke Willems: Mutual trust as a term of art in EU criminal law: revealing its hybrid character. European journal of legal studies, 2016, Vol. 9, No. 1, pp. 211-249. <https://cadmus.eui.eu/handle/1814/43289>



proper functioning criminal justice systems within the EU – “by entering into a system of closer cooperation in criminal matters (...), they not only share the benefit of more efficient criminal law enforcement, but they also more closely share the burden of maintaining the rule of law and protecting the human rights of citizens throughout the Union. If anywhere within the Union human rights are endangered, no Judicial Authority of a requested state can wash his hands in innocence.”<sup>2</sup>



### 3. Mutual recognition

Read the text!

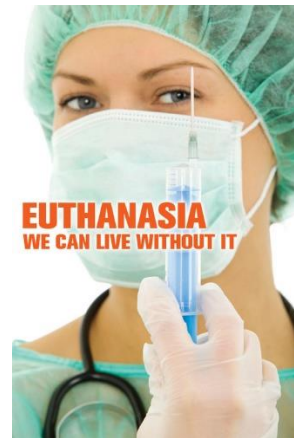
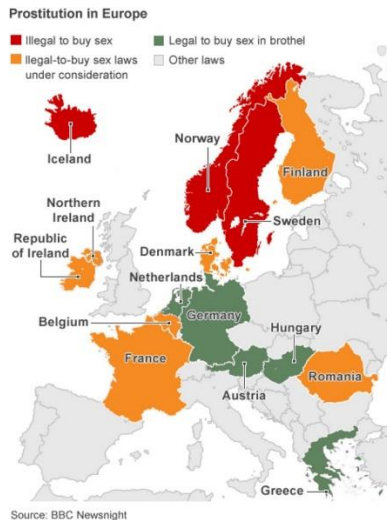
The principle of mutual recognition **does not take a clear stand on the question of punishability or impunity**; it calls only for the execution of the concrete (foreign) decision in the legal framework of mutual cooperation in criminal matters between the MS. It means that, if a state on account of physical circumstances cannot enforce its decision for example because the accused has escaped to abroad or the evidences are abroad or the witness lives in a foreign country (etc.) – the other state renders help, without supervising the decision in all details. Only the formal obstacles of the cooperation can be supervised, the main issues (the existence of criminal responsibility) of the foreign criminal proceedings should remain untouched.

Mutual recognition of punishability or impunity?

substantive criminal law = definitions and elements of crimes, definitions of sanctions; requirements of criminal responsibility

However, the principle of mutual recognition in connection with criminal decisions may **have such ‘side effects’ that could have truly influence the substantive law-regulation**. Therefore these ‘side effects’ demand separate examination in cases where the substantive-law regulations are different in the cooperating states.

<sup>2</sup> N. KEIJZER, The European Arrest Warrant and Human Rights. Current Issues in European Law and the Protection of Financial Interests, Dubrovnik, 13-14 May 2005. Asser Institute. [www.asser.nl](http://www.asser.nl)



In Germany, it is possible and legal to run a brothel (bordello) in Germany, but in Hungary it is prohibited. If a Hungarian citizen is running a brothel in Germany, s/he is harshly punishable by Hungarian criminal law, but not under German criminal law.

Euthanasia is punishable in some countries (murder or participation in suicide) but in others not.

What do you think, how can mutual recognition operate in such cases?

The principle of mutual recognition in connection with cooperation in criminal matters is more and more gaining ground, parallel with the weakening of double incrimination in EU law. The European Council proclaimed in Tampere (15-16 October 1999) that the principle of mutual recognition should become the **cornerstone of judicial cooperation** also in criminal matters in the EU – the proclamation of the Presidency Conclusions lead to this ‘dramatic’ change<sup>3</sup>.

The framework decision on the European Arrest Warrant (2002) has recognized this new attitude for the first time as a positive legal provision.

The following EU legislations granted mutual recognition to other decisions of domestic authorities, such as in the framework decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, framework decision on the execution in the European Union of orders freezing property or evidence, on the application of the principle of mutual recognition to financial penalties or the FD on the application of the principle of mutual recognition to confiscation orders – the principle of

<sup>3</sup> LIGETI (2006) 140



**mutual recognition became the central element in the development of EU criminal law.**

The development process of the principle and of its acceptance was '**reversed**'. That means that in the first period there was no place for a general acceptance of the principle (including every national decision in criminal matters), there were only **some type** of decisions over which the mutual recognition was accepted. It can be labelled as a fragmental or singular acceptance of the principle. Mutual recognition was "not a 'one size fits all' instrument but rather a flexible tool that needs to adapt itself, case by case, to the concrete needs of each new instrument."<sup>4</sup>

the free  
movement' of  
judicial decisions

Despite this non-totality the progressive legislation in the EU promised the true expansion and the general acknowledgement of the mutual recognition regarding criminal decisions of all type and might achieve the ultimate target, 'the free movement' of judicial decisions (in criminal matters). And today, according to the TFEU, the principle of mutual recognition is now generally accepted, **but it does not yet mean its validity in connection of every decisions**. Anchoring the principle in the TFEU and putting that into the origo of the AFSJ, it provides entitlements for the EU to release further – in case of necessity also more comprehensive – legal acts based on mutual recognition.

As a partial result it can be laid down as a fact that the principle of mutual recognition has the following objective: the decisions passed under different law systems of the MS during the execution in another Member State have to **share the legal attributes** of decisions passed under its domestic law, i.e. they should not be divergent from 'interior legal assistance'<sup>5</sup>.

**The principle of mutual recognition is a judgementless method which could be efficient in criminal matters.** There are two ways to settle its basic conditions.

Mutual  
recognition is  
a legal tool of  
integration.

First, when **the confidence placed in other Member State' criminal jurisdiction is complete and real**. Until this confidence is apparent, only the other way is open for the MS; namely, an **external, common system of norms and control** – binding every Member State the same way (or at least partially) – is necessary to operate the principle of mutual recognition in an acceptable way. This system of norms could refer to requirements **based on human rights** or expressly to the rules laying down completely the procedure of evidence-recording.

<sup>4</sup> FICHERA and JANSSENS (2007) 183

<sup>5</sup> This legal instrument is used for example if the municipal court requests some procedural acts (in the criminal procedure) from the court of another town in the same country.



The MS (and the EU) did not choose any of the above-mentioned ways. They opted for a third way which represents only an illusive confidence and the lack of common framework of control norms at the same time. This way cannot be followed any more. Since the Member States in today's world are not matured enough for the first way, as the 27 Member States are not yet accustomed to each other, the jurisprudence has given a helping hand to support the second way. This means, that – being so much paradoxical<sup>6</sup> – to reach an untroubled and unburdened enforcement of the principle of mutual recognition, we have to provide a more stricter criminal law integration, **approximation of laws or even the unification of law.**

Copied from Karsai Krisztina: The principle of mutual recognition. ZBORNİK RADOVA PRAVNI FAKULTET (NOVI SAD) 42 : 1-2 pp. 941-954. , 14 p. (2008)

**The long version of the paper can be found under**

<https://m2.mtmt.hu/gui2/?mode=browse&params=publication;1168316>



#### 4. Mutual trust or recognition?

Which is which? Write the number preceding each element in the appropriate column below.

Mutual Trust	Mutual Recognition

1. It means that the MS trust in one another's justice systems.
2. A method free from judgment.
3. Political declaration.

4. Its subject may be a judicial decision issued in another MS.
5. Legal tool of integration.
6. The first legal instrument footed on it was the European Arrest Warrant.

<sup>6</sup> SIEBER (1997) 369-380





## 5. Questions for review

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1. Which is mentioned in the TFEU? Mutual trust or mutual recognition?
2. Explain the differences between mutual trust and mutual recognition!
3. What is the link between the European Arrest Warrant and the mutual recognition?

### References:

FICHERA, MASSIMO – JANSSENS, CHRISTINE: Mutual recognition of judicial decisions in criminal matters and the role of the national judge. ERA Forum 2007/8 177-202

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SCHÜNEMANN, BERND: Fortschritte und Fehlritte in der Strafrechtspflege der EU. Goldammer's Archiv 2004/4 193-209

SIEBER, ULRICH: Memorandum für ein Europäisches Modellstrafgesetzbuch. Juristen Zeitung 1997/8 369-380

VOGEL, JOACHIM: Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung. ZStW 2004/2 400-423

### Further Readings:

Bárd – Ballegooij: Judicial Independence as a Precondition for Mutual Trust, 2018.

<https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>

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