



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 3

Mutual Recognition – In Actio

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 legislative since 1999) and
- the rule of law mechanism and its connection to the mutual trust.

Learning time – approximately 2 hours



2. Mutual recognition – challenges

Read the text!

The mutual confidence placed in other MS' judicial systems as a principle is in an ideal case a declaration which defines an existing phenomenon and custom. Nowadays this is only an illusion. This illusion is followed by the EU and its MS, as they declared something, which is not real. It is understandable since on the present stage of integration – especially in connection with the regulation of the surrender procedure (and the system of the European Arrest Warrant) – also the theoretical foundation seemed to be necessary. But the illusion breaks at the point when the chance for unconditional recognition of other MS' legal systems totally or partially becomes reality.

forum shopping (in criminal cases) = a) choosing the place of the offence based on the most favourable legal framework or b) choosing the place of practicing jurisdiction based on the most effective legal environment

The principle of mutual recognition might easily let law enforcement authorities use **forum shopping** – without (at least partial) common regulatory system and judicial control mechanism. Choosing the place for practicing jurisdiction might become a strategic decision based on the place for the lowest intervention limits, i.e. it is the Member State with the lowest human rights' protection system. The fear for this could be felt, if we think of the aspirations for eliminating the parallel criminal procedure in connection with crimes crossing several MS; actually with a decision settles finally the competent Member State.¹ The efficiency factor in connection with decision-making might lead to forum shopping.

The principle of mutual trust (political) prevails well for the most part in a significant part of the cases, this way it provides the functionality of legal instruments based on mutual recognition. However, in some concrete cases, **it demonstrates significant deficit and can even jeopardize cooperation between member states.**

Concrete cases of doubting mutual trust may well be colourful, and a MS can be both a 'victim' and 'perpetrator' of this mistrustful state's behaviour [See Module 3 reading lecture 3]. For example, Hungarian criminal justice was the 'victim' of mistrust exercised by Irish authorities in **the Ciaran Tobin extradition case**², but is a true 'perpetrator' in the case of the chief manager of the Hungarian national oil company, who is charged with severe corruption allegations by Croatian authorities and sought by the European arrest warrant. The person was not surrendered to Croatia despite a lawfully issued and

¹ For a while by recommendations, criminal law enforcement authorities coming from Eurojust and Europol, and the already published green book of the Commission [Green Paper of the Commission on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings, COM(2005) 696 final, 23.12.2005]

² <https://www.independent.ie/irish-news/ciaran-tobin-begins-hungarian-prison-sentence-after-killing-two-children-in-crash-29915243.html>



enforceable arrest warrant; and moreover, the surrender obligation was creatively circumvented by a parallel Hungarian criminal procedure. For now, the case is still open, because the CJEU decided in a preliminary ruling procedure on this 'second' Hungarian criminal procedure³ with a consequence that it has no effect on the surrender request, according to EU law, Hungary should surrender the concerned person to Croatia. Such individual cases cannot truly violate or inflate the mutual trust generally, but indeed they make dark shadows on the expectation of citizens towards authorities to carry out fair cooperation in criminal matters.

In this regard, a more disturbing phenomenon with serious potential to harm mutual trust is if the legal system (within criminal justice) as such would be questioned or if in some ways institutional doubts would be formulated against a MS. The recent case of Poland and Hungary is an example of such a situation (based on the Article 7 TEU) thus the risk that national courts distinct individual MS that had to decide on the requests of judicial authorities from these two countries regarding any form of cooperation in criminal matters will grow to mistrust the countries and as a result, deny the cooperation. That is an eminent danger. This was the opinion of the Irish High Court as well through requesting a preliminary ruling⁴ in a European arrest warrant case against a Polish citizen.⁵

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Read the press releases in the annex
and compare their content.

The CJEU stated in its milestone decision⁶ that the judiciary has an important role on serving rule of law: "the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued has material (...) indicating that there is a real risk of breach of the fundamental right to a fair trial (...) on account of systemic or generalised deficiencies so far as concerns the independence of the issuing **Member State's judiciary, that authority must determine, specifically and precisely**, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing

³ Court of Justice of the European Union, judgement of 25 July 2018, case C-268/17, *European arrest warrant against AZ*

⁴ <http://www.courts.ie/> Minister for Justice and Equality -v- Celmer (No.1) [2018] IEHC 119; 12. March 2018.

⁵ P. BARD, W. VAN BALLEGOOIJ, *Judicial Independence as a Precondition for Mutual Trust*, in VerfBlog, 2018/4/10, <https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>

⁶ Court of Justice of the European Union, judgement of 25 July 2018, case C-216/18 PPU, *European arrest warrants issued against LM*



Member State (...) there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.”

The usage of Article 7 poses the consequence that mutual trust as a political declaration has become the subject of political concerns. CJEU added a certain legal content to the political declaration of mutual trust and made “judges monitoring the judges”⁷ – this decision obliges judges to be aware of rule of law and fundamental rights implications through adjudication, and requires that they read ‘between the lines’ based on the information provided by the requesting judicial authorities.

To sum up: who has the right and the obligation to evaluate whether there is a breach of fundamental right?

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3. Expert's interview on the mutual trust & mutual recognition

Watch the video lectures No 7-8!



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4. Questions for Review

1. What is forum shopping in the context of mutual recognition?
2. How is mutual trust linked to the rule of law?
3. What are the two hot topics in the EU in connection with mutual trust?

⁷ T. T. KONCEWICZ, *The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 1)*, VerBlog, 2018/4/05, <https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1>



4. How are prison conditions related to mutual trust?
5. In what context applied the expert the rotten apple metaphor?

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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ANNEX

European Commission – Press release. Brussels, 20 December 2017.

Rule of Law: European Commission acts to defend judicial independence in Poland. Despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland. The Commission is therefore proposing to the Council to adopt a decision under Article 7(1) of the Treaty on European Union. The European Commission is taking action to protect the rule of law in Europe. Judicial reforms in Poland mean that the country's judiciary is now under the political control of the ruling majority. In the absence of judicial independence, serious questions are raised about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants.

European Parliament - Press Release, 12 September 2018.

Rule of law in Hungary: Parliament calls on the EU to act. EP sees a clear risk of a serious breach of the EU founding values in Hungary. Judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees are key concerns. Council may address recommendations to Hungary to counter the threat. Parliament has asked EU member states to determine, in accordance with Treaty Article 7, whether Hungary is at risk of breaching the EU's founding values. The request was approved by 448 votes to 197, with 48 abstentions. To be adopted, the proposal required an absolute majority of members (376) and two thirds of the votes cast - excluding the abstentions. This is the first time that Parliament has called on the Council of the EU to act against a member state to prevent a systemic threat to the Union's founding values. These values, which are enshrined in EU Treaty Article 2 and reflected in the EU Charter of Fundamental Rights, include respect for democracy, equality, the rule of law and human rights. MEPs called on EU countries to initiate the procedure laid down in Article 7(1) the EU Treaty, noting that despite the Hungarian authorities' readiness to discuss the legality of any specific measure, they have not addressed the situation, "and many concerns remain". They stress that this is the preventive phase of the procedure, providing for a dialogue with the country concerned, and that it is "intended to avoid possible sanctions".