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Mutual Trust before the Court of Justice – a view from CJEU Judge Sacha Prechal

On 6 November 2015 Judge and Professor Sacha Prechal from the Court of Justice of the European Union (CJEU) delivered a presentation on the concept of ‘mutual trust’ before the CJEU at Vrije Universiteit Amsterdam. According to her the biggest challenge for the principle of mutual trust lies in providing limitations to it without upsetting the integrity of the Area of Freedom Security and Justice (AFSJ).

Mutual trust is closely related to mutual recognition in the AFSJ. Under mutual recognition one Member State will accept and enforce decisions from another Member State as if they were its own. Such examples can be found not only in the areas of civil cooperation and cooperation in matters of criminal justice (for e.g. the Brussels 1 and 2 Regulations or the Framework Decision on the European Arrest Warrant) but, as case N.S. and M.E. (Joined Cases C 411/10 and C-493/10) illustrates, it is also applicable in the common asylum policy area. Even so, mutual recognition presumes the trust that the Member State (MS), whose decisions have to be acknowledged by another MS, has applied the rules adequately and correctly, and has provided equivalent protection.

Examples of mutual trust in the CJEU's case-law

According to Judge Prechal, mutual trust is not restricted to the AFSJ and has been used by the CJEU in Opinion 2/13 on the Draft Accession Agreement of the EU to the ECHR. This principle requires, particularly with regard to the AFSJ, that MSs consider all other MSs to be complying with EU law and “particularly” with EU fundamental rights, save for “exceptional circumstances” (Opinion 2/13, para. 191). Mutual trust, as laid down in Gözütok and Brügge (C-187/01), does not require equal protection, but equivalent protection, even if the outcome of the same case might be different in two MSs.

Even so, mutual trust often involves sensitive issues and it does not only exist in the letters of specific EU
legal instruments, but encompasses a wider notion of trust which often finds a difficult application in practice. In the pending Child and Family Agency (C-428/15) an Irish court questioned the quality of the evidence provided by UK authorities, in a case under the Brussels II Regulation in which a UK mother suffering from drug addiction gave birth to her second child in Ireland in order to avoid having her child taken away by the UK child services. In the recently decided Lanigan (C-237/15 PP) the Irish authorities failed to surrender a former member of the Irish Republican Army (IRA) to the UK authorities within the time limits prescribed by the FD on the EAW (No. 2002/584/JHA), arguing that it had to be investigated whether a fear existed that the requested person’s life would be endangered in the UK.

How is the principle applied?

According to the Judge, the principle of mutual trust is not applied as a self-standing principle but it is applied in tandem with a piece of EU legislation. It is used to guide the interpretation of the legal text and is also important when Member States have a certain degree of discretion under a legal act.

Limits to the application of the principle of mutual trust

The most delicate issue concerns the limits to the principle of mutual trust. Even though a presumption exists that MSs act in compliance with EU law and EU fundamental rights, this presumption can be rebutted on grounds of public policy or in certain cases a breach of fundamental rights.

Such limitations might occur in EU legislation or the CJEU’s case-law. For example, several articles of the Brussels II Regulation (Articles 22(a) and 23(a)) allow a MS to refuse the recognition of certain judgments of other MS if they are “manifestly contrary” to the former’s public policy. The FD on the EAW does not provide for public policy limitations and fundamental rights are not mentioned as mandatory or non-mandatory grounds for refusal to execute an EAW. However, under its preamble and Article 1(3) nothing in the FD is meant to affect the protection of fundamental rights.

CJEU case-law is also relevant for using the breach of fundamental rights as a limitation to the principle of mutual trust. For example, in N.S. and M.E. the CJEU found that mutual trust is breached where “systemic deficiencies” (para. 89) exist and there is a real risk for the asylum seeker of being subjected to degrading and inhuman treatment. The notion of “systemic flaws” is now included in the Dublin III Regulation (No. 604/2013) as a guarantee before sending somebody back to the first country of entry (Article 3(2)). Another pending case before the CJEU is Aranyosi (C-404/15) in which the CJEU is faced with the application of Article 1(3) of the FD on the EAW as a grounds to refuse the surrender of a Hungarian national by the Austrian authorities to their Hungarian counterparts, due to the poor prison conditions in the latter country.

The key issue for the CJEU is to ascertain to what extent can these ‘limitations’ be applied. An interpretation which is too broad might jeopardize the functioning of the AFSJ as a whole, since MSs could find many excuses not to recognize the decisions of another MS. According to Judge Prechal, in case of alleged breaches of fundamental rights, first there must be a ‘justified reason’ to doubt the functioning of fundamental rights protection in a given MS and then the actual situation has to be looked at. However, the challenge lies in knowing when a ‘justified doubt’ exists.

Finishing the presentation on a fundamental rights note

Judge Prechal finished the presentation by emphasizing the role of the CJEU also as a fundamental rights court. However, the usage of breaches of fundamental rights as limitations to the principle of mutual trust is not without its hurdles and future CJEU cases will need to tackle them. First, the safeguard of fundamental rights has to be ensured both de jure and de facto. Second, it is not yet sure the breach of which fundamental rights would amount to a limitation to the principle of mutual trust. Most certainly, the CJEU
would have to look at this on a case-by-case basis. Third, the seriousness of the breach is also a major issue, as well as the burden of proof and the evidence required to prove it.

According to the Judge, mutual trust has a larger field of application than the AFSJ and is closely linked to the duty of loyal cooperation. As the CJEU noted in Opinion 2/13, mutual trust is of “fundamental importance” (para. 191) to the workings of the EU. However, she cautioned about the consequences of its elevation to a constitutional principle of the EU legal order.

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