

VIEWS AND COMMENTS

The Principle of Mutual Trust in EU law in the Face of a Crisis of Values



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 COMMENTS 0

The author of this post is Cecilia Rizcallah. She is visiting Professor at the Université Saint-Louis-Bruxelles and at the Université libre de Bruxelles, Postdoctoral Researcher at the National Fund for Scientific Research (F.R.S.-FNRS) and [re:constitution fellow](#). As announced in a [previous post](#), Cecilia is the author of a monograph [on the principle of mutual trust in EU Law](#), based on her doctoral thesis. She has kindly accepted to provide us with a presentation of this key-principle of EU law with a special focus on EU judicial cooperation in civil matters.

The Principle of Mutual Trust, an Essential and Transversal Principle of EU law

The principle of mutual trust, whose fundamental importance is recognised by the European Court of Justice (hereafter “ECJ”), became a genuine “leitmotiv” of discourses on EU integration. This principle indeed underpins a large set of EU rules of primary and secondary law, in the fields of the internal market and the area of freedom, security and justice.

The principle of mutual trust appeared at an early stage of European integration, in the area of [mutual recognition of diplomas and professional qualifications](#) and in the field of [free movement of goods](#). Being an attractive tool for integration by allowing the opening-up of the different national legal orders, it was subsequently called upon in the areas of European judicial cooperation in civil and criminal matters, as well as in the area of the common asylum policy. In spite of its success, this principle lacked conceptualization. The main objective of my research was to remedy this nebulous situation by providing a cross-cutting definition of the principle of mutual trust. It also analysed its role for EU integration as well as its relationship with [EU founding values](#), which include the rule of law and human rights. The principle of mutual trust is indeed presented as being “*based on the fundamental premiss that each Member*

State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU” (ECJ, [Opinion 2/13](#), pt. 168). Yet, the EU currently faces a “[crisis of values](#)” resulting from the existence of serious violations of these values and, in particular, the rule of law and human rights, in an increasing number of Member States.

The in-depth study of the manifestations of the principle of mutual trust shows that it imposes to the Member States to presume – to a certain extent and in their direct horizontal relationships – the compatibility of different national “legal solutions”. Indeed, the principle of mutual trust requires Member States – when it applies – to “trust” acts issued by other Member States, or legal practices or situations tolerated in their territory. This duty of trust prevents, as a matter of principle, the double control of these national legal solutions’ compliance with EU law. The principle of mutual trust has nevertheless no direct effect and has therefore to be implemented by primary or secondary law in order to be applicable. It constitutes one of the foundations of the principle of mutual recognition, which in turn imposes, more specifically, the recognition of a legal act issued by another Member State.

The Principle of Mutual Trust, a Foundation of the Principle of Mutual Recognition in the Field of Judicial Cooperation in Civil Matters

In the field of judicial cooperation in civil matters, the principle of mutual trust opposes the revision of a judgment issued by a – issuing – Member State for which the recognition is sought in another – executing – Member State. It therefore countenances the principle of mutual recognition imposed by a number of instruments in [civil and commercial matters](#), [matrimonial matters and matters of parental responsibility](#) and [insolvency](#). A judgment deciding on the custody of a Franco-German couple’s child handed down in Berlin will thus be able to take effect almost without formalities in Paris, despite the specificities distinguishing German and French family law. The judgments issued by the Member States should be presumed as being “equivalent” and as complying with the requirements of Union law, particularly in terms of fundamental rights.

The Principle of Mutual Trust, at the Crossroads of the Imperatives of Unity, Diversity and Equality

As a matter of fact, the principle of mutual trust plays an essential role for EU integration. It indeed lies at the crossroads of three essential imperatives of the

European construct: unity, diversity and equality between Member States. Despite the safeguarding of national substantive and procedural diversities, the borders between the Member States are fictitiously blurred so that – in broad terms – the legal solution of State A does not encounter any obstacles to penetrate the legal order of State B. The judgment issued by the authorities of a Member State A will indeed be able to take effect, without any formalities such as an *exequatur*, in the Member State B. In this way, the principle of mutual trust makes it possible to unify the national legal orders, which remain distinct and equal.

The Principle of Mutual Trust, a Source of Risk

Although it plays an essential role for EU integration, this principle generates important risks because of the lack of mutual control of legal solutions presumed to be compatible. It may indeed lead to the spread of unsatisfactory legal solutions – infringing EU law – within the European area without internal borders. These risks are of course amplified because of the existence of the “crisis of values”. The major challenges faced by the Union and the Member States in economic, security and migration matters have indeed revealed deep divisions as to the meaning of European integration and the values on which it is based. These divisions have gone so far as to lead to the existence of widespread and persistent failures which, in the opinion of the majority of observers, are causing a rule of law backsliding in a few Member States. This situation increases the likelihood that national legal solutions are incompatible with democratic values and the rule of law. A judgement issued by a judge who is no longer independent could indeed, by vertu of mutual trust, spread its effects in the other Member States.

The Principle of Mutual Trust Does not Impose “Blind” Trust

Exceptions have nevertheless been recognized to the principle of mutual trust in order to limit the risks of violation of EU founding values it entails. These exceptions must however be construed narrowly according to the ECJ, because of the principle mutual trust. Indeed, according to the Court, it is only in “*exceptional circumstances*” that this principle may be set aside ([ECJ, Opinion 2/13, pt. 191](#)).

The ECJ, for example precluded, with regards to the [Brussels II bis regulation](#), the review, by an executing authority, of a decision requiring the return of a child issued on the basis of Article 42 of this regulation. In the [Zarraga](#) case, it held that the authorities of the executing Member State were not entitled to verify whether the

court which issued the judgment requiring the return of the child had respected the child's right to be heard, as provided for by the Regulation, since the principle of mutual trust requires the national authorities to consider "*that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights*" (pt. 70). The Court of Justice justified this approach on the grounds that the regulation did not foresee any exceptions to this kind of decision and, also, that the child's right to be heard is not absolute and that the national authorities are granted a margin of discretion regarding its application (pt. 66).

Exceptions to the principle of mutual trust have nevertheless been established, when more serious risks of violation of fundamental rights were at stake, in the context of the application of the [Brussels I bis Regulation](#), which concerns the recognition and enforcement of judgments in civil and commercial matters and which establishes a general exception to mutual recognition based on public policy. This exception must however, still because of the principle of mutual trust, be construed narrowly. In the [Krombach](#) case, the Court of Justice nevertheless held that mutual recognition may be refused when the defendant has suffered "*a manifest breach of his right to defend himself before the court of origin*". A similar conclusion was made in the [Trade Agency](#) case, where the Court of Justice stressed that the public policy clause could only be relied upon when the defendant's right to a fair trial is "*manifestly*" breached, leading to the "*impossibility of bringing an appropriate and effective appeal*" against the judgement in the issuing state.

The study of all the exceptions surrounding the principle of mutual trust led to the conclusion that if not all violations of fundamental rights justify setting aside mutual trust, the ones threatening absolute fundamental rights (such as the prohibition of inhuman and degrading treatment) or the essential content of other fundamental rights, in the sense of [Article 52\(1\) of the Charter](#) do. Indeed, only the most serious violations of fundamental freedoms seem to exclude the application of the principle of mutual trust.

This observation is based on the case-law in private international law (above) which refers to the concept of "*manifest breach*", but also in the field of [criminal cooperation](#) and [asylum](#) where the Court found that a risk of infringement of [Article 4 of the Charter](#) prohibiting inhuman and degrading treatments excluded mutual trust.

Yet, if the integration aims pursued by the principle of mutual trust are legitimate, one can nevertheless wonder how to justify that this principle continues to apply even in presence of risks of “simple” infringements of fundamental freedoms, especially since this principle is supposed to be based on the respect of these rights by all the member states. The implementation of the principle of mutual trust can therefore in itself weaken its proper foundations.

The Principle of Mutual Trust, a Risk Analysis

Observing the unsatisfactory character of the limitation scheme surrounding the principle of mutual trust, this research ended by proposing ways of improving its operation so that the founding values of the Union are better protected. More specifically, we call on those involved in mutual trust to transform the principle of mutual trust from a *postulate* into a *method*. In other words, we propose to move away from the postulate of trust in favour of a methodical application of trust.

This method, which is based on risk management tools notably developed by the [Society for Risk Analysis](#), is divided into two phases.

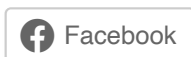
The first is aimed at EU institutions that implement, in an abstract way, mutual trust in standards with a general scope: when they adopt an EU legislation implementing this principle, it seems desirable to us that they carry out a risk analysis and that they adapt the exceptions enshrined in this instrument accordingly. To this end, several steps are proposed, which differ according to the type of value exposed by the envisaged legislation, the type and seriousness of the damage incurred, and the possible vulnerability of the resources concerned. For example, when fundamental rights are threatened by the instrument underpinned by the principle of mutual trust – such as the best interest of the child in the framework of the [Brussels II bis regulation](#) – we consider that a margin of appreciation should be reserved to national authorities implementing the instrument on a case-by-case basis.

The second phase is aimed at the actors who actually implement these general instruments in specific cases (judges, administrations, etc.). Here too, guidelines that could guide these actors in this task are developed, always with a view to increasing the protection of the fundamental rights of individuals. The method deals in particular with the question of the adjustment of the burden of proof, an issue that is

of particular importance in litigation, especially when it comes to protecting fundamental rights. In this sense, if the existence of risks of serious violations of fundamental rights is alleged and demonstrated *prima facie*, we recommend a shift of the burden of the proof so that it would be up to the authority that wants to take advantage of the principle of mutual trust to demonstrate the non-existence of this risk. This proposition is largely inspired by the adjustment of the burden of the proof in non-discriminatory law (see, for example, art. 10 of [Directive 2000/78](#))

As a complement to this method, various “risk management tools” are also explored, making it possible to reduce those that threaten human rights in the context of the implementation of mutual trust. These tools include minimum harmonization, the strengthening of procedural guarantees surrounding the principle of mutual trust, the establishment of solidarity mechanisms between the Member States, ...

Evidently, this method does not claim to solve all the difficulties arising from the principle of mutual trust. On the contrary: it aims at opening the discussion on the basis of a systematic identification of the risks induced by this principle, and to inspire the stakeholders with a few best practices.

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