ISSN 2029–1701 (print)
ISSN 2335–2035 (online)

Mokslinių straipsnių rinkinys
VISUOMENĖS SAUGUMAS IR VIEŠOJI TVARKA
PUBLIC SECURITY AND PUBLIC ORDER
2012 (8) Scientific articles

THE CONCEPT OF TRUST IN THE CONTEXT OF PRINCIPLE OF MUTUAL RECOGNITION IN EUROPEAN UNION CRIMINAL LAW

Simona Žižienė*

Mykolas Romeris University Public Security Faculty Law Department
Putvinskis str. 70, LT-44211 Kaunas
Telephone Num. 30310
El. paštas: simona_ziziene@mruni.eu

Annotation.. Before principle of mutual recognition gained its force in European Union legal cooperation in criminal matters the methods used in legal cooperation were not as effective, fast and economical as they were expected to be. Mutual recognition principle was meant to solve these problems by recognition of other member states legal decisions as if they were their own, with minimum formalities. In order to make this principle work high level of trust must exist between member states, so primarily we have to analyse the concept of trust as a precondition of successful application of the principle of the mutual recognition. In this paper the concept of trust is analysed in linguistic, sociological and legal terms in the context of the principle of mutual recognition in European Union criminal law.

Keywords: mutual recognition principle, trust, European Union criminal law.

INTRODUCTION

From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. Now the challenge is to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all.[1]

European Union being an area of free moovement of persons also faces problems that citizens of European Union can by using the right of free moovement, as a right facilitating job search and encreasing work possibilities abuse this right in order to avoid criminal responsability or seeking for milder punishment. This system allows to legalize money or property gained from criminal offences easier and also it is the space for international crime in its worst forms. That were the reasons for creating mechanism allowing member states to effectively cooperate in area of criminal justise seeking to prevent priviously mentioned misuses.

[1] Tampere Council 15 and 16 October 1999 Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm

Criminal law being an expression of state sovereignty is also an expression of moral values of the community as an ability to decide what is recognized as unacceptable behavior. For this reason the attempts of European Union to gain competence in the field of criminal law are always met controversially. That was one of the reasons why the Council decided to use principle of mutual recognition instead of the harmonization of criminal law, which was seen impossible by many of member state countries.

The European Council endorsed the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union and should apply both to judgments and to other decisions of judicial authorities. The principle of mutual recognition allows to recognize the legal decisions of other members states without formalities and creates a situation which Valsabis Mitselegas describes as" free movement of legal decisions".[2]

When starting the analysis of the principle of mutual recognition, which is based upon the high level of trust between member states, we have to try to identify what is beyond that formula of trust in order this would not only be a declarative phrase.

The goal of this work is to analyse the concept of mutual trust in linguistic, sociological and legal terms and identify the peculiarities of trust in the field of criminal law in European Union and the main obstacles for trust between member states and the possibilities to strengthen it.

The methods of linguistic, document and systemic analysis, comparative methods will be used in this work in order to analyse the concept of mutual trust and accomplish the set goal.

The main thesis of this paper is that while seeking the effective and adequate implementation and application of the principle of mutual recognition primarily the concept of mutual trust should be analyzed in order to indicate and define the obstacles for mutual trust as the bases for the mutual recognition principle.

MUTUAL RECOGNITION PRINCIPLE IN EUROPEAN UNION CRIMINAL LAW

The issue of mutual recognition in criminal matters was raised at the Cardiff European Council on 15 and 16 June 1998. In 1999 on 15 and 16 October in Tampere the European Council held a special meeting on the creation of an area of freedom, security and justice in the European Union. The European Council was willing to make full use of the possibilities

[2] Valsamis Mitsilegas, The Constitutional implications of mutual recognition in criminal matters in the EU", P. 1279.

offered by the Treaty of Amsterdam, the first Treaty which made an important impact to development of European Union criminal law.

A number of existing instruments offered the States Parties the possibility to choose either continued enforcement of the decision or its conversion and were much dependent on the willingness to cooperate of the requested country. So the tradition model in legal cooperation, the "request" model was slow and cumbersome, led to uncertain results[3] with lots of formalities and eventually the reforms should be made.

Solving these questions the Union position was to ensure that a ruling delivered in one Member State is not open to challenge in another and the traditional "request" model was changed to the "order" model based on the principle of the mutual recognition. Mutual recognition comes in various shapes and must be sought at all stages of criminal proceedings, before, during or after conviction, but it is applied differently depending on the nature of the decision or the penalty imposed and in the opinion of the Council contributes to legal certainty in the European Union.[4]

When the Treaty of Lisbon came in force criminal law lost it's exceptional position and became one of many fields were European Union has a competence to act, so the line which was seen in European Court of Justice decisions was consolidated in conventional level. It should be mentioned in this context that the principle of mutual recognition is a realistic assumption to expand European Union competence in the field of criminal law. The article 67 of The Treaty of Functioning of the European Union states that the Union will ensure high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. The part 4 of the same article acknowledges that mutual recognition will ensure the access to justice. Article 82 indicates mutual recognition being the corner stone of judicial cooperation in criminal matters,[5] so the role and importance of this principle was incorporated in contractual level.

[3] Massimo Fichera, Mutual Trust in European criminal law, University of Edinburgh School of law, Working paper series, 2009/10, P. 3.
[4] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Official Journal C 012 , 15/01/2001, P. 0010 – 0022.
[5] Consolidated versions of Treaty on European Union and Treaty on the Functioning of the European Union.// http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=QC3209190

In certain way this principle alows to go from state to Union position in the field of criminal law. The questions of territoriality, sovereighnity and relation between state and individual must be reconsidered in the context of mutual recognition principle[6]

It is well known that mutual recognition principal is "borrowed" from civil law, because of its meaningful impact for liberating the internal market. It could be undoubtedly stated that trust in other member states legal systems is different when we talk about free movement of goods then in case, for example, of surrendering your own nationals to another country for the criminal procedure. If you doubt other countries abilities to ensure human rights in criminal procedure you might look for a reason to refuse the order and this is the due time to talk about trust, which in legal terms can be located in the principle of loyal cooperation.[7]

LINGUISTIC AND SOCIOLOGICAL MEANING OF TRUST

In contemporary Lithuanian dictionary the word "trust" is described as an ability to rely on somebody or something, a belief that someone will not let you down.[8] In English language "trust" is described as the belief or willingness to believe that one can rely on the goodness, strength, ability of somebody or something. Another meaning of this word is interconnected with the first meaning and describes "trust" as responsibility and care. Take something on trust is to accept or believe what somebody says without evidence or investigation.[9] As one can see these meanings are closely connected with that what is meant by applying mutual recognition principle between member states. Depending on the linguistic meaning to have trust in somebody means to treat somebody as reliable, or in other words, worth trusting. It is the belief, having confidence that somebody will act properly, safely and according to your interests.

The sociological description of trust might give some clearance in understanding the grounds of trust. Social trust can be described as such a condition of society when all the members of society trust each other, are willing to cooperate and not to conflict. Social trust is closely connected with civil consciousness, when the civil consciousness is high people will

[6] Valsamis Mitsilegas, EU Criminal law, Modern Studies in European law, Oxford and Portland, Oregon, 2009, P. 116.
[7] Massimo Fichera, Mutual Trust in European criminal law, University of Edinburgh School of law, Working paper series, 2009/10, P. 12.
[8] Dabartinės Lietuvių kalbos žodynas, Lietuvių kalbos institutas, Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2000, P. 517.
[9] Oxford advanced learner's dictionary of current English /A. S. Hornby ; editor Jonathan Crowther, Oxford : Oxford University Press, 1995, P. 1281.

be wiling to trust, because this unites them in reaching the common goals. It is necessary to stress out that social trust allows simplifying the methods of supervision and control.[10]

In abundance literature trust gains synonyms of tolerance, mutuality, brotherhood, solidarity. One of the basic features of trust is that it is always related with risk, because trust is about the future events and you can only have hope that your opinion about the one you trust will not be false. Institutional organizing trust is one of the forms of personal trust. Seeking to ensure trust in society the law must be consistent, clear, public and not short-terms in order to help to develop the feeling of stability of social order. Trust becomes part of culture when it is confirmed not only in individual attitude but also in varies fields of social life and becomes a normative expect. Trust is a complex concept closely related with the concept of safety, as a physical, social, economical and political safety. The welfare of individual, social integration and personal values all have some impact to trust.[11]

If society does not have trust in political order or the institution it self it can not be expected that they will be willing to voluntarily obey the passed norms. According to the surveys summarized trust was characteristic for only one third of Lithuanian citizens. Trough the years of independence the level of trust decreased even more. Comparing the surveys made in 1995 and 2005 was a bit increasing although the main tendency is distrust of other citizens.[12] 1999 only 5 of 27 of European states thought that people could be trusted (these states were Denmark, Norway, Sweden, Holland and Finland). The lower level of trust is common in post-soviet counties in Eastern and Western Europe, 21 percent versus 41 in not post-communist states. The basic feature separating these countries is that in post communist countries trust is only for those who they know and distrust for others.[13]

It should be mentioned in the context of mutual recognition that trust in judiciary system more than trust in any other institution can increase the ability to feel safe in countries and further more the ability to trust institutions and others. According to the statistical data gathered in 2002 SIC- Market research almost half of respondents said that the reason for there insecurity is inability of judicial institutions to ensure the protection against crimes.[14]

[10] Arvydas Guogis, Dangis Gudelis, Pilietinė visuomenė ir socialinė politika: Naujosios viešosios vadybos galimybės, Filosofija. Sociologija. 2003, Nr. 4.
[11] Rūta Žiliūkaitė, Pasitikėjimas: nuo teorinių įžvalgų empyrinės analizės link, Kultūra Globalizacijos Sąlygomis, Culturology, issue 13/2006, P. 205-256, on www.ceol.com
[12] Rūta Žiliūkaitė, Pasitikėjimas: nuo teorinių įžvalgų empyrinės analizės link, Kultūra Globalizacijos Sąlygomis, Culturology, issue 13/2006, P. 205-256, on www.ceol.com
[13] Ibid.
[14] D. Janušauskienė, J. Novagrockienė, Lietuvos gyventojų požiūrio į saugumą analizė, Lietuvos metinė strateginė apžvalga, V.:LKA,2003, P. 282.

ISSN 2029–1701 (print)
ISSN 2335–2035 (online)

Mokslinių straipsnių rinkinys
VISUOMENĖS SAUGUMAS IR VIEŠOJI TVARKA
PUBLIC SECURITY AND PUBLIC ORDER
2012 (8) Scientific articles

TRUST IN THE CONTEXT OF MUTUAL RECOGNITION PRINCIPLE IN EUROPEAN UNION CRIMINAL LAW

Having in mind what was meant by implementation of mutual recognition principle in European Union criminal law we have to analyze trust in this area according to the linguistic and sociological meaning of trust.

The Union states its opinion that people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organizations throughout the Union. The joint mobilization of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.[15] Speaking in terms of sociological meaning of trust Union sets a common goal, which as we have said above might create a higher level of trust among people – citizens of the European Union.

Recognizing that implementation of the principle of mutual recognition of decisions in criminal matters presupposes that member states have trust in each others' criminal justice systems we have to imply were can this trust be grounded. The common Union belief is that the grounds for trust are on shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law in all member states of the European Union. [16]

Commission in it's communication to the Council and European Parliament states that mutual recognition principle has been one of the main and probably most promising areas of European Union activity regarding criminal justice. Commission points out that reinforcing mutual trust is the key to keep mutual recognition principle operate smoothly.[17] It is worth to be mentioned that the level of mutual trust could be increased not only by legal means, as setting minimal rules or standards, but also by building trust between member states by getting them to be familiar with each member state legal system. As Dr. Wolfgang Heusel, a German former judge who now works for the Trier-based European Law Academy says - the mutual trust is based on whether you know each other. Judge pointed out his concerns that huge diversity of judicial systems in the European Union means that people just don't

[15] Communication from the Commission to the Council and the European Parliament – on the mutual recognition of judicial decisions in criminal matters and strengthening of mutual trust between the Member States, COM (2005) 195 final.
[16] Communication from the Commission to the Council and the European Parliament – on the mutual recognition of judicial decisions in criminal matters and strengthening of mutual trust between the Member States, COM (2005) 195 final.
[17] Ibid.

understand how the common law system works, who is competent and all other things concerned. Since the area of European Union criminal law is one of the most rapidly changing areas in European Union law practicing lawyers might not catch these changes or understand them completely.[18] One of the reasons for distrust instruments applying mutual recognition principle is lack of possibility to challenge proportionality and validity of orders of other countries.[19]

Interesting to notice that results in the analysis of Eurobarometer shown that less then 50 percent of citizens in almost half of member states understand how the European Union works.[20] Keeping in mind what has been told about trust, how can you have trust someone who you don't understand what it is supposed to do?

Going back to criminal law and it's peculiarities in regard to other branches of law it must be said that the efficiency of the market needs some level of flexibility and is seeking for maximisation of profit, while clearity and predictability of criminal law principles are one of the basic features insuring the legal certainty and the rule of law in society. We must agree with prof. V. Mitsilegas describing this situation as „the jeorny in to unknown“ for the states and as well for there citizens without clear konwledge about the direction and content of criminal law, [21] which in the sociological terms of trust creates a situation of social insecurity.

These might be the reasons of the willingness of the Commission to state that open dialogue in civil society must be developed on the aims and principles of criminal law area in order to strengthen citizen’s acceptance and support and intentions to publish appropriate “user-guides” on judicial cooperation within the Union and legal systems of the member states.[22]

As pointed out in the Commissions communication one of the basic legal instruments strengthening mutual trust is to ensure that mutually recognised judgements meet high standards in terms of securing personal rights and also enduring that the courts giving the judgement really were the best place to do so. And further more this might ask for approximation of substantive law in order to give further considerations to certain measures

[18] Honor Mahony: Judicial forum to ease 'mistrust' between EU member states, available at:// http://www.asser.nl/default.aspx?site_id=8&level1=10790&level2=10858&level3=&textid=29648
[19] For further details regarding this concerns read article “Britons to be spied on by foreign police” in The Telegraph, available at:// http://www.telegraph.co.uk/news/uknews/law-and-order/7909314/Britons-to-be-spied-on-by-foreign-police.html
[20] Eurobarometer 2010, available at:// http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_std_part1.pdf
[21] *Valsamis Misilegas,* „The Constitutional implications of mutual recognition in criminal maters in the EU“, Common Market Law Review 43: P. 1277-1311, 2006.
[22]

of mutual recognition principle.[23] This was followed by adoption of Framework Decision on certain procedural rights in criminal procedure throughout the European Union in the end of 2005, the Commissions work on the presumption of innocence, gathering evidence in criminal cases and decisions in absentia and also conflicts of jurisdiction issues in the light of each Member States legal traditions in order to have certain common concepts and standards in these fields. European Union works as the coordinating balancing mechanism seeking to point out the important fields, the examples to follow and strengthens the area of freedom, security and justice by the means of cooperation.

The Hague Programme states that mutual confidence must be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality and this goal calls to establish a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary. Emphasizes the importance of improving mutual understanding between judicial authorities and legal systems such networks, which should include advocates, should play a key role in gradually building up a common judicial culture. Also emphasizes the importance of training as a means of promoting mutual trust.[24]

Evaluation mechanisms will accompany developments in the mutual recognition principle in criminal matters, they must be capable to evaluate the practical needs of the justice system and identify the potential barriers before new instruments are adopted and also specific practical conditions for implementing Union instruments, best practices and there relation to the practical needs. [25] So Union places a big role in coordinating the proper functioning of this new system and promotes many legal and practical instruments in order to decrease distrust among member states. But the aforementioned efforts raise many questions about the existent trust in European Union cooperation in criminal law matters and wishes to remind that mutual recognition principle cannot be seen as panacea capable to solve all the previous problems in legal cooperation.

[23] Communication from the Commission to the Council and the European Parliament – on the mutual recognition of judicial decisions in criminal matters and strengthening of mutual trust between the Member States, COM (2005) 195 final.
[24] Hague Programme, 10 priorities for next 5 years, available at: // http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm
[25] Communication from the Commission to the Council and the European Parliament – on the mutual recognition of judicial decisions in criminal matters and strengthening of mutual trust between the Member States, COM (2005) 195 final.

CONCLUSIONS

Before mutual recognition principle was applicable in legal cooperation in European Union criminal law methods used previously were slow, cumbersome with many possibilities to reject the request depending on the willingness to cooperate of the requested country. Analysis of linguistic and sociological meaning of trust showed that trust is always based on some kind of risk, but social and political stability, legal certainty increases an ability and capability to trust. Legal institutions more then any other institution contributes to the feeling of legal certainty and is closely related to general feeling of trust in society. High civil consciousness and further more common goals unite people and allow them to trust others with the same interests and goals. Analyzing trust in the context of mutual recognition principle in European Union criminal law it is seen that the main obstacle of trust in member states is the lack of knowledge about legal system of other states and powers to reconsider the proportionality and validity of legal decisions. European Union acts as a coordinating balancing mechanism seeking to ensure the awareness of general direction and common goals in Union criminal law and creates mechanisms of evaluation, which in the context of trust raises reasonable concerns about distrust in this field contrary to what is implied by appliance of mutual recognition principle.

LITERATŪRA:

1. Communication from the Commission to the Council and the European Parliament – on the mutual recognition of judicial decisions in criminal matters and strengthening of mutual trust between the Member States, COM (2005) 195 final.
2. Consolidated versions of Treaty on European Union and Treaty on the Functioning of the European Union.// http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=QC3209190
3. Dabartinės Lietuvių kalbos žodynas, Lietuvių kalbos institutas, Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2000.
4. Eurobarometras 2010, available at:// http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_std_part1.pdf
5. Fichera Massimo, Mutual Trust in European criminal law, University of Edinburgh School of law, Working paper series, 2009/10;
6. Guogis Arvydas, Gudelis Dangis, Pilietinė visuomenė ir socialinė politika: Naujosios viešosios vadybos galimybės, Filosofija. Sociologija. 2003, Nr. 4.
7. Hague Programme, 10 priorities for next 5 years, http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm
8. Honor Mahony: Judicial forum to ease 'mistrust' between EU member states, available at:// http://www.asser.nl/default.aspx?site_id=8&level1=10790&level2=10858&level3=&textid=29648

9. Janušauskienė Diana, Novagrockienė Jūratė, Lietuvos gyventojų požiūrio į saugumą analizė, Lietuvos metinė strateginė apžvalga, V.:LKA,2003.
10. Oxford advanced learner's dictionary of current English /A. S. Hornby ; editor Jonathan Crowther, Oxford : Oxford University Press, 1995.
11. Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Official Journal C 012 , 15/01/2001.
12. Tampere Council 15 and 16 October 1999 Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm
13. The Telegraph "Britons to be spied on by foreign police", available at ://http://www.telegraph.co.uk/news/uknews/law-and-order/7909314/Britons-to-be-spied-on-by-foreign-police.html
14. Valsamis Mitsilegas, The Constitutional implications of mutual recognition in criminal matters in the EU".
15. Valsamis Mitsilegas, EU Criminal law, Modern Studies in European law, Oxford and Portland, Oregon, 2009.
16. Žiliūkaitė Rūta, Pasitikėjimas: nuo teorinių įžvalgų empyrinės analizės link, Kultūra Globalizacijos Sąlygomis, Culturology, issue 13/2006, on www.ceol.com

PASITIKĖJIMO SAMPRATA ABIPUSIO PRIPAŽINIMO PRINCIPO EUROPOS SĄJUNGOS BAUDŽIAMOJOJE TEISĖJE KONTEKSTE

Simona Žižienė*
Mykolo Romerio universiteto Viešojo saugumo fakultetas

S a n t r a u k a

Prieš pradedant taikyti abipusio pripažinimo principu grindžiamus teisinio bendradarbiavimo baudžiamojoje teisėje instrumentus iki tol naudojami metodai buvo ne tokie efektyvūs, greiti ir ekonomiški kokie turėtų būti. Abipusio pripažinimo principas turėjo išspręsti šias problemas priimant kitų valstybių narių sprendimus taip, lyg jie būtų savi sprendimai, su minimaliais formalumais. Siekiant veiksmingo šio principo taikymo turi būti aukštas pasitikėjimo lygis tarp valstybių narių, taigi visų pirma turime analizuoti pasitikėjimo sampratą kaip prielaidą abipusio pripažinimo principui. Straipsnyje lingvistiškai, sociologiškai ir teisiškai nagrinėjama pasitikėjimo samprata, atsižvelgiant į baudžiamosios teisės ypatumus, abipusio pripažinimo principo Europos Sąjungos baudžiamojoje teisėje kontekste.

Raktiniai žodžiai : abipusio pripažinimo principas, pasitikėjimas, Europos Sąjungos baudžiamoji teisė

Simona Žižienė*, Mykolo Romerio universiteto Viešojo saugumo fakulteto Teisės katedros lektorė. Mokslinių tyrimų kryptys: baudžiamoji teisė, Europos Sąjungos baudžiamoji teisė.

Simona Žižienė*, Mykolo Romerio universiteto Viešojo saugumo fakulteto Teisės katedros lektorė. Mokslinių tyrimų kryptys: baudžiamoji teisė, Europos Sąjungos baudžiamoji teisė