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The Principle of Mutual Trust between Member States in the Area of Freedom, Security and Justice

Clemens Ladenburger

This study discusses, from various angles, the principle of mutual trust between Member States in the Area of Freedom, Security and Justice (AFSJ). As a starting point it refers to three emblematic cases decided by the European Court of Justice: “Aguirre Zarraga”, a child abduction case, “Jawo”, a case involving a transfer of an asylum applicant under the Dublin III regulation, and “LM”, a case concerning a European Arrest Warrant from Poland, called into question by courts in Ireland in the light of problems of judicial independence in Poland. The first section deals with the foundations and legal effects of the principle of mutual trust. Based on a fundamental distinction to be made between the AFSJ and more traditional EU law settings, it argues that the principle of mutual trust is not a freestanding legal requirement but rather a functional construction principle for the AFSJ. The second section explores several possible corollaries of mutual trust – independent authorities, common EU standards on criminal procedure and on penitentiary systems, and EU membership as such – and finds that all these are not quite as straightforward corollaries as they may appear at first sight. The decisive meta-corollary seems is respect for the rule of law. The third section looks at how EU law defines the limits to mutual trust and at the respective roles of the case law and the EU legislator in this context. It finds growing convergence between the two European Court in defining limits and proposes a heuristic distinction between retrospective and prospective settings as a guide for further interpretation. High emphasis is placed on the responsibility of the EU legislator in defining appropriate, tailor-made limits to mutual trust. Looking at the legislative reality so far, marked by various inconsistencies, there is ample room for improvement, but this will remain an arduous task as long as the notorious rule of law problems persist in some Member States. The last section is devoted to the perspective of the EU’s accession to the ECHR, in the aftermath of Opinion 2/13 in which the Court had relied inter alia on the principle of mutual trust to find the draft accession agreement as incompatible with EU primary law. The article dismisses ideas of a “disconnection clause” or of codifying the “Bosphorus presumption” to overcome the mutual trust objection of Opinion 2/13, and instead recommends a combination of a substantive clause on mutual trust and of procedural means to deal appropriately with cases on mutual trust arising in the Strasbourg Court. The final proposition is that the EU’s accession to the ECHR may be seen as a catalyst for mutual trust between EU Member States, promoting the smooth operation of legislative schemes based upon that principle, rather than as an obstacle to it.

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Zur Zwangshaft gegen (deutsche) Amtsträger, insbesondere zu der Entscheidung des EuGH C-752/18, Deutsche Umwelthilfe e. V. gegen Freistaat Bayern

Franziska Lind, Anne Sophie Priebel

This paper focuses on the possibility of imposing coercive detention on German public officials if they fail to comply with legally binding judgments. This analysis is particularly relevant in light of the recent preliminary ruling by the CJEU, Case C-752/18 involving a dispute between Deutsche Umwelthilfe e.V. and the Land of Bavaria (Germany) concerning the latter’s persistent refusal to adopt the measures necessary to comply with the limit value set for nitrogen dioxide in the city of Munich (EU-Directive 2008/50). The paper begins with an analysis of why coercive detention of German public officials is not compatible with German law, especially with regard to Article 2, paragraph (2) of the German Constitution. It then examines how the obligation to ensure the effective implementation of EU law might dispel these concerns. The paper demonstrates that this
Resolving Business and Human Rights Disputes – Is Arbitration the Way to Go?

Corina Vodă

The insufficient level of protection afforded to human rights violations caused by business-related activities of multinational enterprises has recently begun to garner increased attention. On an intergovernmental level, the elaboration of an internationally binding treaty regulating the activities of transnational corporations is underway. States have also taken initiatives on a national level to reflect their commitment in implementing the UN Guiding Principles on Business and Human Rights. In both respects, much work remains ahead. Against this background, a group of prominent lawyers have suggested the use of arbitration as an alternative venue for resolving business and human rights disputes. After a span over five years of concept elaboration, public consultation and drafting, the idea has materialised in the creation of the Hague Rules on Business and Human Rights Arbitration (the Hague Rules or Rules), which were officially launched on 12 December 2019. This paper aims to take stock of the proposed Rules and the context of their appearance and examine if arbitration is a suitable medium for resolving business-related human rights infringements. In doing so, it discusses the legal framework governing the confluence of business and human rights as well as the features which speak both in favor and against arbitration as a means of settling business-related human rights disputes. The provisions of the Hague Rules are addressed in detail, particularly where default rules where tailored to better respond to the needs of human rights disputes. The paper concludes with an assessment of arbitration’s potential to ensure protection and enforcement of human rights in international business and reflects whether the Rules are robust enough to empower victims in this endeavor.

The Commission’s initiative on the passerelle clauses – Exploring the unused potential of the Lisbon Treaty

Robert Böttner

The Treaty of Lisbon introduced general and special passerelle or bridging clauses into primary law. They can be used to alter voting arrangements from unanimity to qualified majority in the Council or from a special to the ordinary legislative procedure. This is to enable a shift to more supranational decision-making without the need for a full-fledged treaty revision. The European Parliament called on the European Council and the Council to make use of the passerelle clauses, also to involve Parliament as a co-legislator under the ordinary legislative procedure. The former Commission had started a discussion on the use of the passerelle clauses in four policy areas and it appears that the incumbent Commission President has endorsed this ambitious project. This article aims to explore the potential and the shortcomings of the bridging clauses as part of the unused potential of the Lisbon Treaty and discusses the enhanced cooperation procedure as a possible alternative.

Der Fall Azarov und seine Folgen: Zur Reichweite des Grundrechtsschutzes am Beispiel europäischer Veruntreuungssanktionen in der Ukraine-Krise

Philipp Reinhold

The misappropriation of state funds is the subject of the global fight against corruption. At the same time, it has now also become an area of application for European sanctions policy. In a number of cases, the European Union has used autonomous sanctions to achieve its foreign objectives. In line with developments in the UN sanctions policy, it has moved away from comprehensive to targeted sanctions. Although these can limit the number of addressees, they raise questions about their relationship with the protection of the fundamental rights of the persons concerned. The possibility for the persons concerned to obtain legal protection before the European courts pursuant to Art. 263 (4) TFEU or Art. 275 (2) alternative 2 TFEU has led to the European courts constantly developing the protection of fundamental rights on the basis of sanctions. The present article deals with such a recent development using the example of misappropriation sanctions in the Ukraine crisis. At
its heart is a ruling of the European Court of Justice of 19 December 2018 on EU sanctions against former
Ukrainian Prime Minister Mykola Yanovych Azarov. On the one hand, the case represents a recent
development in the not yet so prominent area of misappropriation sanctions and, on the other hand, it leads to
a stricter legal binding of the EU's external action. In the following, the case will be discussed against the
background of previous case law on misappropriation sanctions and examined with regard to its significance
for the future sanctions policy of the EU, but also for the European system of fundamental rights.