Ius Commune Conference 2024

Workshop: Judicial Protection and Law Enforcement I

Thursday, 28 November (14.00 – 18.00)

Room

Participants

Session 1
From multi-level interactions and to multiple black holes of accountability in EU administrative law: the case of EU asylum and migration law

Chair: **Mariolina Eliantonio** (Maastricht University)

14.00 – 14.05 The aim of this panel is to discuss how the national and EU levels of administrative governance interact through either influencing each other at the policy-making stage, or interacting with each other in the application and enforcement stages. The panel will discuss these mutual influences and interactions through the case of the EU asylum and migration policy and present a number of challenges which the intertwinement of national and EU policies may pose for accountability and judicial protection.

14.05 – 14.30 **Lynn Hillary** (University of Amsterdam)
An exploration of the interaction between the Common European Asylum System and national law, policy and legal practice

The literature on EU law often distinguishes between EU law and national law, either by opting for an EU-based approach to public law, or by focussing on the effect of EU law on national law. An understudied element of the interaction between EU law and its national implications is the influence of national law, policy, and legal practice on the EU legal system. However, this paper argues that the application and implementation of EU law in the Member States should not only be considered interesting due to the influence of EU law on national law, but also because of the possible influence of national law, policy, and legal practice on the development of EU law. I expect national law, policy, and legal practice (including the implementation and application of EU law in the national context) to exert a bottom up influence on the development of EU law. This, in turn, influences the Europeanization of national law – not solely in that specific Member state but also in the other Member States.
This paper explores the idea that the EU legal system is shaped as much by the national laws, policies, and legal practices of its Member States, as the domestic systems of the Member States are by EU law. It does so in the specific context of the Common European Asylum System as exemplary for an area of EU law and policy that is particularly prone to interaction between the EU and national level. Indeed, the Common European Asylum system is, on the one hand, a highly controversial policy area and, on the other hand, currently consists of Directives for the most part. This paper thus studies the potential interaction between the Common European Asylum System and national law, policy and legal practice in the Member States. More specifically, it raises the question of how the national refugee law, policy, and legal practice of the Member States may or may not influence the Common European Asylum System. In turn, and wherever possible, the paper studies how this ultimately influences the legal systems of Central and Eastern European Member States. Central and Eastern Europe (CEE) was chosen as a

geographical limitation for the study since it is a particularly interesting region within Europe to study such interaction processes between the national and EU level, both because of the serious democratic difficulties in the region and because of the inclination of some of the CEE Member States to push back on EU asylum policies.
Gaining insight into such interaction between the Common European Asylum System and national law, policy, and legal practice is crucial for policy development on asylum law. Indeed, this paper concludes by suggesting that national and EU policy makers should take into account such interactions when implementing and operationalizing EU law in the national context, as well as when developing national and EU law.

14.30 – 14.55 **Imke Smets** (Utrecht University)
The EU as a catalyst of national administrative law development: an analysis of the impact of the Europeanization of Dutch migration law on Dutch administrative law

The *Europeanization* of national administrative law is increasingly taking place through sectoral secondary Union legislation, concerning the Europeanization in the subfields of administrative law. In recent years, an increasing number of developments have occurred in the specialized fields of administrative law – instigated by EU law – that have influenced general principles and rules of administrative law. In Dutch administrative law practice, developments in migration law, as a subfield of administrative law, are increasingly influenced by EU law and impact general administrative development. However, it remains unclear whether this practice consists of merely incidental cases of transmission or if there is a continuous interplay between the different areas of law. This research aims to investigate to what extent migration law serves as a source for the development of administrative law and to what extent this is driven by EU law. In other words, to what extent migration law serves as a conduit through which (international and) European standards are introduced into national administrative law. Based on some examples, insight will be provided into this practice in Dutch administrative law.

14.55 – 15.20 **Agostina Pirrello** (Utrecht University) and **Sarah Tas** (Maastricht University)
Towards the development of a regime of shared liability for EU agencies?

In spite of the numerous press reports denouncing illegal violence against migrants happening in the presence of Frontex at the borders of the EU, none of the claims lodged before the Court by civil society against the Agency succeeded so far. In particular, the recent case *WS v Frontex* (Case T-600/21) for the Agency's non-contractual liability attracted a lot of criticism in the academic debate as the Court missed an opportunity for a potential development of the concept of shared liability in migration management. Shortly after WS, the Court adopted a decision on Europol (*Marián Kočner v Europol*, Case T-528/20), which displays a glimmer of hope for shared liability to be affirmed in the EU. The CJEU has in fact recognized that Europol's Regulation of 2016 established a regime of shared and several liability. However, is that truly the case, and what lessons can be drawn from this case for Frontex? The presentation will draw on the most recent case-law about Frontex and Europol to critically explore whether a regime of shared and several liability may be developed for migration management in light of the current legal framework and case-law.

15.20 – 15.45 **Andreina de Leo** (Maastricht University)
The quest for accountability in EU border externalization practices in Libya: Any room for the EU Court of Justice?

Cooperation with third countries for migration control purposes – when carried out without proper safeguards to ensure compliance with fundamental rights – belongs to a strategy referred to as cooperative-based externalization, whereby destination states implement policies aimed at avoiding or shifting international protection responsibilities to third countries with the ultimate goal of preventing asylum seekers to reach their territories and seek protection (Garlick, 2021). In this context, legal scholarship has recently focused on providing innovative interpretation of the notions of extraterritorial

jurisdiction within the meaning of Article 1 of the European Convention on Human Rights (Moreno-Lax, 2020), as well as ancillary responsibility under both international public law (Skordas, 2018) and international criminal law (Kalpouzos, 2020) to hold destination states accountable for these contemporary forms of migration control practices. While the role of the EU in this context is well recognized, mainly taking the form of provision of financial and technical assistance to third countries (Santos Vara & Matellán, 2021), the possibility to make recourse to the system of legal remedies in the EU to obtain redress has so far been neglected in the literature, despite the identification of potential violations of the EU Charter on Fundamental Rights (Ferstman, 2020). To fill such a gap, and using the EU-Libyan cooperation, implemented though Italy, as an exemplary case, this presentation will assess the potentiality of bringing a case to the EU Court of Justice (action for annulment, action for damages, preliminary ruling), for the fundamental rights violations arising from the provision of financial assistance to the Libyan Coast Guard, and reflect on the potentialities and limits of this accountability avenue compared to the ones which have been so far extensively discussed in the literature.

15.45 – 16.15 **Coffee break**

Session 2
Legislative and Judicial Perspectives on Mutual Recognition: Exploring implementation from the Single Market to the Area of Freedom, Security, and Justice

Chair: **Mariolina Eliantonio** (Maastricht University)

This panel explores the implementation of mutual recognition across different EU policy fields, in particular focusing on the Single Market and the Area of Freedom, Security, and Justice (AFSJ). It examines the varied applications of mutual recognition in these policy fields, highlighting the strategies that support its implementation and the implications for mutual trust among Member States.
Mutual Recognition was embedded as the 'New' mode of European Governance in 1985 by the Delors Commission's in its infamous White Paper on 'Completing the Internal Market'. Since then mutual recognition has become a cornerstone of European governance, facilitating the coexistence of diverse national regulations while preventing fragmentation at the EU level. However, its application varies significantly across policy areas.
The panel highlights that in the Internal Market – by contrast to judicially driven mutual recognition à la Cassis de Dijon – the principle's implementation is underpinned by common rules, standards, and administrative cooperation rather than mutual trust. Conversely, in the AFSJ, mutual trust is central to the operation of legislative frameworks and international agreements, supporting judicial and administrative cooperation between states. Yet – by contrast to legislatively driven mutual recogntion in the internal market – this deep embedding of mutual trust in the AFSJ provides both opportunities and challenges for cooperation as different values interact, overlap, and often conflict.
Ultimately, this panel aims to contribute to our understanding of how mutual recognition functions across different areas of law and policy, and the critical role played by mutual trust and mutual cooperation mechanisms in EU governance modes.

Theme One:
'Managed' Mutual Recognition: legislative implementation in the internal market

16.15 – 16.40 **Ton van den Brink** (University of Utrecht)
Mutual Recognition as a legislative strategy

The presentation explores mutual recognition as a legislative strategy within the European Union and it is contrasted with other legislative approaches in European Union law in light of the greater variety of legislative strategies being adopted by the EU legislature (in particular procedural harmonization in EU asylum law and diploma recognition). The presentation will also reflect on idea of the constitutional embedding of mutual recognition as a legislative strategy, in particular asking to what extent the choice of mutual recognition and the design of related legislation is informed by the EU's constitutional framework (such as the principles of conferral, subsidiarity, and proportionality) and how is this manifested in the legislative process (for example in relation to IAs, explanatory memoranda, etc.).

16.40 – 17.05 **Rónán Riordan** (Maastricht University)
Governing Services: Exploring the Differentiated Implementation of 'Managed' Mutual Recognition in EU Service Law

This paper explores the differentiated application of mutual recognition in the field of EU services law via an examination of secondary legislation implementing it as a governance mode. It utilises a set of distinctive and dynamic case studies to explore the interaction between law and politics within the Union, and the impact of those interactions on policy formation and implementation vis-à-vis the form of mutual recognition implemented.
The research highlights a number of findings. The harmonisation of the 'types' of rules recognised between jurisdictions – but not the content of those rules – was a key regulatory issue to be resolved so as to support recognition across all dossiers. This question of the types of rules to be recognised had a significant impact upon the form of mutual recognition embedded in legislation owing to the political, social, cultural, economic, and social salience of the policy areas to be regulated. The mode of recognition implemented varied, based on these factors, from 'managed' mutual recognition, to mutual recognition à la Cassis de Dijon, and a country of origin rule which represents a more maximal form of integration.
Finally, the research highlights that, by contrast to judicially driven mutual recognition in the internal market context, in the legislative context the notion of mutual 'trust' is less central to supporting recognition between Member States within the Union. In place of mutual trust, mutual cooperation and enforcement mechanisms (administrative, judicial, regulatory, information sharing, mutual monitoring requirements, etc) are embedded in the legislative instruments, establishing trust as a by-product of cooperation rather than as the source of cooperation.

Theme Two:
Mutual Recognition and Mutual Trust in the Field of EU Criminal Law

17.05 – 17.30 **Gaetano Ancona** (Maastricht University)
Fundamental Rights Protection to Foster Mutual Recognition in Criminal Proceedings: reflections from the EIO Framework

Protection of fundamental rights in the context of mutual recognition in criminal matters is paramount. Upholding these rights enhances mutual trust between EU Member States, which, in turn, is crucial for the recognition, and execution of judicial decisions and legal orders in the EU's area of freedom, security and justice. The European Investigation Order, a key instrument for facilitating cross-border criminal investigations within the EU, relies heavily on mutual trust. However, the failure to respect the fundamental rights of individuals involved in criminal proceedings can significantly impede the exchange of judicial decisions. The importance of individuals' rights is highlighted by two landmark cases of the Court of Justice of the European Union (CJEU): Gavanozov II (2021) and Encrochat (2024). In these cases, the CJEU determined that violations of the right to an effective remedy constituted insurmountable obstacles to the mutual recognition of evidence. The implications of a failure to respect these rights are profound. It might lead to the non-functioning of instruments intended to guarantee effective exchange between judicial authorities and undermine the trust each state places in the others. From a

broader perspective, this erosion of trust can have a cascading effect, weakening the overall framework of judicial cooperation and potentially leading to increased reluctance among Member States to engage in mutual recognition of judicial decisions. In conclusion, the protection of fundamental rights is not merely a legal obligation but a cornerstone of the mutual recognition principle in the EU's judicial cooperation. Hence, this discussion will explore the dual role of fundamental rights in judicial cooperation in criminal matters: (i) an impediment to mutual recognition; and (ii) a means to achieve mutual trust to enhance mutual recognition. One crucial question remains open for discussion. How to create a common framework for the protection of fundamental rights across the EU?

17.30 – 17.55 **Marleen Kappé** (KU Leuven)
Disentangling the role and drivers of factual (dis-)trust in judicial cooperation in the framework of mutual recognition in criminal matters: a social-legal research design

Mutual trust is of fundamental importance in EU law and in horizontal transnational judicial interaction in specific. One of the most important forms of that interaction is judicial cooperation in criminal matters in the form of mutual recognition based on mutual trust. Illiberalism in the EU has put trust between judges in that judicial cooperation under pressure. Despite CJEU's position that mutual trust must be presumed, and may only be rebutted in exceptional cases, recent research indicates (dis)trust to be significant to judges' engagement in judicial cooperation, and hence the very functioning of the area of freedom, security and justice. Little empirical research has been conducted on the role of factual trust in judges' decision to engage in judicial cooperation in criminal matters, nor on what factors drive (dis)trust in that judicial cooperation. This presentation will outline the research design of a project aimed at addressing this gap by exploring the roles and influencing factors of micro-, meso-, and macro-level (dis)trust in judicial cooperation through mutual recognition in criminal matters. Through a combination of legal doctrinal and qualitative research methods, the project seeks to illuminate the role of fatual (dis)trust in judicial engagement and cooperation within the EU's area of freedom, security, and justice as well as what the drivers of (dis)trust in that cooperation are.

17.55 **Closure by the chair**