Editorial

As we learn to live with the Covid-19 virus in our daily tasks as parents, law practitioners, judges, civil servants and academics, we are reminded of our connection to people all over the world. When it comes to obtaining personal protective equipment, for instance, countries depend on global supply chains. With the Covid-19 pandemic, borders have regained the meaning of separation and otherness that they had lost for many EU citizens over the last decades. When we cross borders, we need more than ever to know the different local requirements for travel and social distancing. By adopting guidelines, a network set up under the aegis of the European Union seeks to encourage EU Member States to adopt interoperable Covid-19 tracing apps.[1] Vaccines will rapidly need accreditation across the EU, first to reach vulnerable groups and people working in the care sector, and then the whole population. Well-oiled EU-wide legal mechanisms are cornerstones of guaranteeing both the safety of the vaccination programme and its wide accessibility in the European administrative space. Among the available mechanisms, mutual recognition works like the legal equivalent of interoperability for operational requirements. The idea is simple; its implementation far more challenging.

Mutual recognition was born in 1979 when a superstore decided to import French *Cassis de Dijon* liquor to put on the German market. The story behind this landmark case[2], its myths and the metamorphoses it has undergone have been recounted over the subsequent decades.[3] Starting in the internal market to balance policy considerations with freedom of movement, the concept has spread to various EU fields and developed into many variations. Taking stock of these developments over the following forty years leads to three comments.

Firstly, mutual recognition has far-reaching legal consequences at a technical level: national administrative decisions adopted in one Member State will be given legal consequences extra-territorially, hence leading to a major exception to the principle of the sovereignty of a State, as the public authorities of one Member State have to take into account the existence of an administrative decision (for instance, a marketing authorization, a degree or a licence) or situation created lawfully in another Member State. This leads to questions regarding the transnational effects of administrative decisions and procedures: whether, how and to what extent their effects have to be accepted, enforced and controlled in another EU Member State, despite different understandings of policy considerations (in their content and/or in their inclusion in administrative decision-

1 eHealth Network, 'Interoperability guidelines for approved contact tracing mobile applications in the EU' (13 May 2020) < https://ec.europa.eu/health/sites/health/files/ehealth/docs/contacttracing_mobileapps_guidelines_en.pdf> accessed 28 September 2020.

2 Case C-120/78 *Rewe-Zentraal AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42 para 14.

3 K Nicolaidis, 'The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 278-300.

making). In the guise of a technical device, mutual recognition quickly touches upon sensitive policy preferences.

Secondly, the basic idea of mutual recognition was connected to that of equivalence between national administrative requirements to lawfully bring services or goods to the market and to benefit from freedom of movement. Practice, case law and EU directives have greatly departed from such a simplified idea, to branch out into many different modalities in terms of pre-requisites, scope and level of automaticity in the recognition and monitoring of its consequences. This has led to a sophisticated and differentiated administrative machinery for supporting the operations of what is known as a whole as 'mutual recognition'. This whole machinery is connected to mutual trust in two ways. Firstly, it signals that mutual trust between the EU and Member States, and among Member States, does not exist automatically. Secondly, it signals willingness within the EU and Member States to purposefully build this mutual trust.

Thirdly, this administrative machinery supporting mutual recognition is costly – in terms of time, staff, processes, and finances. It may bring about key differences among the players regarding policy considerations – not only in the field of economic freedom but also in other policy fields such as the justice, freedom and security areas (when we think of the European Arrest Warrant, for instance). Some Member States may stop playing the game: not cooperating sincerely and loyally with requests for information made by another Member State. The CJEU has had to remind Member States that they are expected to cooperate sincerely and loyally with each other. In exceptional cases, when they will not do so, their administrative acts may be dismissed by the competent bodies in the requesting Member State.[4] Key to this is the very real risk of economic actors abusing the loopholes in the administrative machinery: giving effects to acts obtained in fraud goes against the heart of any legal system, as the adage *fraus omnia corrumpit* tells us.[5] As such, this is one of the consequences inherent in 'mutual recognition' – it was only ever meant that equivalence between national measures would be deemed for products or services lawfully put on the market of one of the EU Member States. However, the costs and burdens for Member States to demonstrate fraud may be so high as to make reversing the presumption of good faith and legality worthwhile only in extreme cases. The other option is to adopt a narrow approach to mutual recognition in general. This, compounded by issues relating to national sovereignty, may have somehow contributed to making the star of mutual recognition fade away.

4 Case C-359/16 *Ömer Altun* [2018] EU:C:2018:63.

5 A Lenaerts, 'The role of the principle *Fraus Omnia Corrumpit* in the European Union: A possible evolution towards a general principle of law?' (2013) 32 Yearbook of European Law 460-498.

However, this present special issue shows the dynamic nature of discussions on mutual recognition. It brings together expert analyses of mutual recognition at European and domestic levels. **Dorigo**, **Eliantonio** and **Lanceiro** provide an excellent overview of the state of art in this field, carefully explaining the contribution they seek to make in the present collection of papers – in terms of updating knowledge on the principle, exploring under-researched areas where the principle plays a role and drawing the attention to the fact that some national legal systems also use the principle of mutual recognition internally. After a general discussion of mutual recognition pertaining to the free movement of goods (**De Lucia**), mutual recognition is analysed systematically in five specific sectors: driving licences (**Schröder**), pharmaceuticals (**Röttger-Wirtz**), social security (**Wenander**), tax matters (**Dorigo)** and agriculture (**Volpato**). The last contribution discusses the case of a national use of the principle of mutual recognition in Spain (**Arroyo-Jiménez**). From these skilful expert analyses the constant adaptations and increasing complexity of mutual recognition come forth in a striking manner.

The conclusions ask: 'Where does [this] leave the development of a "transnational administrative European space" fostered by horizontal cooperation and especially mutual recognition?'. If the future is indeed unpredictable due to tensions between centripetal and centrifugal forces in the EU and the emergence of 'new paradigms', what this special issue makes clear is that the system of mutual recognition can only give rise to litigation. National and European courts will thus be called on to contribute to the next chapter in mutual recognition and its heirs.

This issue closes with two book reviews. In her review of the book by Valaguzza and Parisi, *Public Private Partnerships, Governing Common Interests* (Edward Elgar 2020), **Voorwinden** highlights how the authors situate public-private partnerships within major shifts from government towards governance. It is highly difficult to move beyond the well-trodden pathways of our cognitive mindsets and to learn to count up to three: our brains are hard-wired by the public/private divide. Yet, what hides behind these labels? Behind 'public' should we not look at the citizens and taxpayers paying for PPPs? Behind 'private' should we not analytically distinguish between 'private economic actors' and 'civil society'? These two groups have their own distinctive needs and interests. Before dwelling on what is 'common', knowing what is 'specific' to each partner may be required for trust to be built and cooperation to ensue.

In his review of the edited collection emerging from the proceedings of the Academy of Comparative Law on deference,[6] **Moliterni** flags very judiciously the need for a better analysis of the 'constitutional relevance of public administration in contemporary legal systems'. If it is difficult to develop a general

6 G Zhu (ed), *Deference to the Administration in Judicial Review* (Springer 2019).

theory of deference, it is also important to identify the more-or-less strong constitutional recognition of judicial review and its consequences for the operationalisation of judicial review. Current reforms of judicial review in the UK vividly demonstrate how the executive may be tempted to retaliate against unpleasant judicial decisions.[7] As the UK is now taking one more step away from the EU family, re-imagining the rule of law in Europe may only be beginning. Hopefully for the best. Mutual trust – within and outside the EU – depends on it.

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7 T Konstadinides, L Marsons & M Sunkin, 'Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020' (2020) UK Constitutional Law Blog https://ukconstitutionallaw.org/ accessed 28 September 2020.

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