NEW DEVELOPMENTS IN THE EU INTERNAL MARKET - HARMONISATION vs. MUTUAL RECOGNITION

Ljubica Dzabirova*

Abstract.*This paper studies the recent developments of harmonisation measures in the area of free movement of goods, establishments, services and the recognition of professional qualifications at the European Union (EU) level, regarding the principle of mutual recognition.[1] The new harmonisation measures[2] signify a new practice and a different approach, by presenting mutual recognition in a different way, in the context of harmonisation measures. There is also an interrelation between different EU institutions concerning their action, i.e., an interesting link between the legislative processes on the EU level and the actions of the European Court of Justice (ECJ). This situation can be illustrated by the Commission seizing upon mutual recognition as a strategy for market integration in the wake of the Cassis de Dijon[3] judgment. An open market may impact the weaker economies that could suffer in the increased competitiveness of more open markets. As Dehousse[4] argues, "market integration has to be accompanied by improvements in social and economic cohesion, if it was to be politically acceptable." Similarly, Armstrong[5] notes that the removal of barriers to trade through mutual recognition can create positive trade possibilities for states with efficient production, while less efficiently producing states face the prospect of domestic production being displaced by competition, which may need to be cushioned through negotiations of Structural Funds.*

Keywords: *harmonisation measures, legislative process, ECJ, mutual recognition, Structural Funds, Internal Market, services*

1. New ideas for making the principle of mutual recognition work more effectively

"…The Single Market does not seek to eliminate differences in language, culture, identity or traditions. On the contrary, it is based on recognition by Member States of each other's national regulations, as well as on the subsidiarity principle, whereby decisions are to be taken as

* **Ljubica Dzabirova** is a PhD researcher at the University of Amsterdam, Department of International Law, currently doing a field research at the World Trade Organisation. Employed by the Macedonian Government, she is also working as a lecturer and researcher within the NGO Education and Research Forum.
E-mail: L.Dzabirova@uva.nl

[1] Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another member state and repealing Decision 3052/95/EC, Brussels, 14.2.2007, COM (2007) 36 final, 2007/0028 (cod).; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ L 376, 27.12.2006, p. 36–68*; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255 of 30 September

[2] See Ibid.

[3] See Ibid, Case 120/78.

[4] R, Dehousse, *Completing the Internal Market: Institutional Constrains and Challenges. In 1992: One European Market?* Baden Baden, Nomos 1998

[5] K. A. Armstrong, "Mutual recognition" in Barnard, C & Scott, J, *The Law of the Single European Market: Unpacking* the premises, Hart Publishing, Oxford and Portland, Oregon 2002

close as possible to the citizens…"[6]

This was the initial idea when creating the Single Market, repeated subsequently on many occasions by having mutual recognition as a way of eliminating differences between different categories of 'free movements' among the Member States. Mutual recognition is one of the main principles used for the abolition of all barriers of all kinds, strengthening the cooperation between countries and encouraging European firms to work together.[7]

It is a rule to remove unjustified barriers to the free movement of goods between EU Member States, whereby the time consuming legislative procedures for harmonisation of each and every national requirement or procedure at European level can be avoided. At the same time, the principle of mutual recognition enables Member States to restrict the free movement of goods if, and, as far as it is justified, on the basis of over-riding requirements.

The principle of mutual recognition is the cornerstone of the market to developing an area without frontiers and achieving the initial goal for the Single Market, rather than making all the rules uniform. It is an instrument, which applies in the absence of harmonisation rules where the countries accept each others' rules. Mutual recognition signifies the acceptance by a party of a person, of goods, services or investments that, according to an equivalent standard or standards-related measure of another party without modification, testing, certification, re-naming or undergoing any other duplicative conformity assessment procedure. The Commission adopted a Communication[8] on mutual recognition as a follow up to its Action Plan for the Single Market, where mutual recognition seemed to lie in the fact that: "It allows free movement of goods and services without the need for harmonisation of national legislation at Community level".[9] The Commission's paper begins by making clear the importance of mutual recognition for the single market.[10]

However, there have been profound changes taking place in the EU' s economic structure, due to increasing market size, which are leading to, or will lead to changes in the Union's legal system.[11] This increases potential for future changes in the legal structure. Everything done at the EU level has an effect on the Member States' internal regulations. Opening the markets for all creates different effects, and different procedures might be introduced to test the quality of a product or a service. For this reason, new instruments have been introduced at EU level. These are explained further in this paper.

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[6] J. M. Cuevas *An imperfect reality*: *The view from Spain*, in L. Cockfield, J.M Cuevas, H.D Genscher, T. Kannisto, M. Monti, L. Soudek, S. I. Valliance, K. von Wogau, *Is the Single Market Working*, The Philip Morris Institute for Public Policy Research, November, 1996

[7] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310, June 1985.

[8] Action Plan for the Single Market, SEC (97) 1 final; Commission communication, Mutual recognition in the context of the follow-up to the Action Plan for the Single Market, June 1999.

[9] See Ibid, p.3

[10] See Ibid, p.4

[11] See more in: J.M de Vet, "The analysis of the EU Enlargement and Pre-accession: Reflections concerning Central and Eastern Europe" http://www.geo.ut.ee/nbc/paper/devet.htm

Nowadays, the idea of improving the efficiency of the Single Market is beyond question the same. Nevertheless, the current developments of introducing harmonisation measures[12] in the Internal Market for goods and services reveals a beginning of a new practise and different approach, by presenting mutual recognition in a different way, based on harmonised measures. There is a Regulation on mutual recognition for the goods' market and the Directive adopted in the field of services in the internal market.[13]

It is clear that some of the most important aims of the EC Treaty, such as the free movement of persons, services or goods, may be achieved by means of harmonisation or codification. Yet, it is not very clear if by introducing harmonisation measures in the internal market for goods and services we offer a response to the growing incoherence of the European law and the economies of the Member States, and if it means harmonisation in a substantive sense. It is by this harmonisation of the procedures that the mutual recognition is presented in a different way.

It is clear that these questions shift the emphasis from difference in national legislations to a new issue: harmonisation of procedures aimed at making the mutual recognition principle work more efficiently. Armstrong[14] emphasises that "mutual recognition encourages Europeanization of regulation not through the adoption and enforcement of harmonised European norms (a vertical Europeanization) but instead through requiring openness to the other regulatory systems of Member States (a horizontal Europeanization)". Questions arise here of what is the current development track: Is it "Europeanization" done through mutual recognition and mutual trust or through harmonisation and codification? Or maybe it is just a combination and compromise between these concepts?

It is interesting to analyse how these new developments of harmonisation and codification at the EU level touch upon the issue of mutual recognition. The reason is that they have distinctive characteristics, most of them totally opposed.

Even though harmonisation measures may lead to substantive changes, the case might be that their content is essentially technical, aimed at increasing the mutual trust which is obviously lacking among the countries in the internal market and making the mutual recognition work more effectively. The effect could also be that the role of the Commission would increase, in a case of unjustified action by the Member States. Furthermore, once they are adopted, as a tool of revising the acquis, the national legislators will have to accept it as a part of their legal system.

We will see further in the text what are the effects of the harmonisation measures dealing with mutual recognition.

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[12] Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another member state and repealing decision 3052/95/EC, Brussels, 14.2.2007, COM (2007) 36 final, 2007/0028 (cod).; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68

[13] See Ibid.

[14] See more: K. Armstrong & S. Bulmer, *The Governance of the Single European Market*, Manchester University Press, 1998

2. Applying mutual recognition in the European Internal Market - current stay of play: strong points and shortcomings

Applying mutual recognition seems to be an efficient tool. It avoids the need for products to fully comply with every technical rule in every Member State where a product is or will be marketed. Under mutual recognition different national technical rules continue to co-exist within the Internal Market.[15] Member States of destination cannot forbid the sale on their territories of products which are not subject to Community harmonisation and that are lawfully marketed in another Member State.

Whenever national technical rules are being applied to products lawfully marketed in another Member State in the non-harmonised area it is done in accordance with Articles 28-30 of the EC Treaty. Technical obstacles to the free movement of goods within EU can be related to designation, form, size, composition, weight, presentation, labelling etc. If those technical rules do not implement secondary EC legislation, they constitute technical obstacles to which Articles 28 and 30 of the ECT apply. Subsequently, Articles 28 and 30 only apply in the absence of the EC harmonisation of technical rules and there is no need to intervene by regulatory measures.

Mutual recognition remains the "lex generalis" unless a "lex specialis" (a harmonisation measure) organises intercommunity trade for a product differently.[16] Some Member States have technical rules for specific types of products while others do not. The idea behind mutual recognition is to eliminate technical obstacles. Member States, who have technical rules on specific types of products, may apply the mutual recognition principle. This would be the perfect scenario for the internal market, if the Member States are ready to apply mutual recognition without any hesitation or lack of mutual trust about other Member States' procedures.

However, in the Commissions impact assessment paper[17] it is stated that with regard to national technical rules the difficulties in the Internal Market for goods still arise. It means that the Member States are not always prepared to accept each others' rules. Technical barriers refer to the many divergent national requirements affecting the cross frontier sale of goods. Some of these barriers take a legal form, originating in national legislation. Others arise from industry standards. The common effect of those barriers, whatever their character might be, fragmentation of the market, i.e., goods to be sold in one Member State, could not be sold in another country or there are time and money consuming procedures to effectuate the

[15] See more in the: Commission Staff Working Document Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, Impact Assessment {COM(2007) 36 FINAL SEC(2007) 113}

[16] Communication from the Commission to the European Parliament, the council and the European economic and Social Committee the Internal Market for Goods: A cornerstone of Europe's competitiveness, Brussels, 14.2.2007 Com (2007) 35 Final

[17] See Ibid {COM(2007) 36 FINAL SEC(2007) 113}Press, 1998

free market.[18] Looking on the other side when applying the mutual recognition principle, there is often lack of awareness of the mutual recognition principle on the part of enterprises and national authorities; legal uncertainty about the scope of the principle and the burden of proof; the risk for enterprises that their products will not get access to, or will have to be withdrawn from, the market of the Member State of destination; and absence of a dialogue between competent authorities in different Member States.[19]

Applying the principle of mutual recognition does not require paperwork and new bureaucracy. That is one of its main strong points. However, the outcome is that there is no reliable reporting and no statistics about how mutual recognition is applied. Consequently, there is little chance to have a record of possible national technical barriers to the free movement of products within the EU. However, general research by the OECD shows that regulatory impediments to product market competition have declined in recent years, and that the extent of government involvement in product markets has fallen considerably.[20] Member States' product conformity requirements are the main regulatory concern of the European companies, forcing them to adapt product design, reorganise production processes and repackaging and re-test their products before they can be put onto the market.[21]

Having effective mutual recognition in the internal market presupposes mutual trust in other Member States. Mutual recognition does not require a comparison in its real meaning but it presumes that the Member States have similar levels of protection and control. If that is not the case, perhaps that should be the main focus of action to reduce the disparities of these procedures which may help in building mutual trust. Member States of destination analyse the necessity and proportionality of its own technical rule in a specific case. A case-by-case assessment is therefore unavoidable in the field of mutual recognition.[22]

Considering the previously mentioned arguments, it is obvious that further action is necessary to make the mutual recognition in the internal market work as efficiently as possible. When there is a sufficient legal basis, the Community is allowed to take legislative action, insofar

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[18] See more: K. Armstrong & S. Bulmer, *The Governance of the Single European Market*, Manchester University Press, 1998[16] Communication from the Commission to the European Parliament, the council and the European economic and Social Committee the Internal Market for Goods: A cornerstone of Europe's competitiveness, Brussels, 14.2.2007 Com (2007) 35 Final

[18] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM (85) 310 final, 14 June 1985

[19] See more in the: Commission Staff Working Document Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, Impact Assessment {COM(2007) 36 FINAL SEC(2007) 113}

[20] Paul Conway, Véronique Janod, Guiseppe Nicoletti, "*Product Market Regulation in OECD Countries: 1998 to 2003*", OECD Economics Department Working Paper No 419, 17 February 2005.

[21] Single Market Monitor Survey, September 2001, *Flash Eurobarometer 106*
(http://ec.europa.eu/internal_market/score/docs/score09/monitor-survey_en.pdf)

[22] N. Bernard, "*Flexibility in the European Single Market*", in Catherine Barnard and Joanne Scott (ed.), *The Law of the Single European Market – Unpacking the Premises*, Hart Publishing, Oxford, 2002.

as the objectives of the proposed action cannot be sufficiently achieved by the Member States[23] whereas any action taken cannot go beyond what is necessary in order to achieve the objectives of the Treaty for creating a functioning Internal Market.[24]

It remains an interesting issue to analyse whether the mutual recognition is convenient for the legislators to achieve the Treaty goal of having an open market for goods, persons, services and capital. However, it is even more interesting to analyse the link with the harmonisation measures and their convenience and effect towards achieving this goal.

3. Adopting a Regulation on mutual recognition in the internal market for goods – Is that the right solution? Benefits vs. limitations

As explained before in the text, the principle of mutual recognition, which derives from the case-law of the Court of Justice of the European Communities, is one of the means of ensuring the free movement of goods within the internal market. It means that the mutual recognition applies to products which are not subject to Community harmonisation legislation, or to aspects of products falling outside the scope of such legislation. However, its implementation was hampered by problems, mentioned before, such as the legal uncertainty, the burden of proof, etc.

Due to these numerous problems that still exist as regards the correct application of the principle of mutual recognition by the Member States, one could expect that there will be discussions about introducing uniform procedures for minimising the possibility of technical rules' creating unlawful obstacles to the free movement of goods between Member States.

The absence of procedures in the Member States created obstacles to the free movement of goods, because enterprises are discouraged from selling their products, lawfully marketed in another Member State, on the territory of the Member State applying technical rules.

Many enterprises either adapt their products in order to comply with the technical rules of Member States, or refrain from marketing them in those Member States. The competent authorities also lack the appropriate procedures for the application of their technical rules to specific products lawfully marketed in another Member State. The lack of such procedures compromises their ability to assess the conformity of products in accordance with the Treaty.

Since the objective of the elimination of technical obstacles to the free movement of goods between Member States cannot be sufficiently achieved by the Member States, the Community had a justification in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, and, in accordance with the principle of proportionality, as set out in that Article, to adopt the Regulation on mutual recognition.[25] The Regulation only applies to the "non-harmonised" field of goods, and does not apply to goods that are already subject to EU harmonising legislation. It will be in force from 13 May 2009.

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[23] According to the principle of subsidiarity (Article 5 ECT)

[24] According to the principle of proportionality; Art. 5 ECT

[25] Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, No 764/2008

It is feasible that the Regulation can lead to positive developments, considering the abovementioned facts concerning the application of the principle of mutual recognition. Indeed, the proposed Regulation can have an immediate effect on enterprises. Besides the fact that enterprises would become aware of their rights and obligations through regulation, there can be a reduction in risk for enterprises that their products will not get access to, or will have to be withdrawn from the market of the Member State of destination. It can also eliminate the lack of awareness within national administrations and solve the problem of the burden of proof.

The biggest problem about the uncertainty is the lack of awareness about the products to which mutual recognition applies. The creation of a website with a list of products to which mutual recognition applies could clarify this. It should reduce the risk for enterprises that their products will not get access to, or will have to be withdrawn from the market of the Member State of destination.

Mutual recognition clauses will no longer be necessary, but the Member States will have to accept the Regulation[26] as a part of their national systems. The Regulation standardises the rights and obligations of the national authorities, and the rights and obligations of the enterprises.[27] It is limited to cases where technical obstacles arise, and could arise and it does not involve areas where the internal market functions well.[28]

Specifically, in relation to the regulations as a legislative instrument, the idea is it that they are accepted into the legal systems of the Member States just as they are. They do not leave the national authorities the choice of form or methods for their implementation.[29] The regulations, indeed, do not allow the objectives of the Community's legal order to be harnessed to the established patterns of national law. So, the fact that the Member States have differing legal systems is not always taken into account.

A regulation must have as object the improvement of the conditions for the establishment and functioning of the internal market.[30] However, in our opinion it is insufficient to justify Article 95 EC as a legal basis for adopting a regulation, just because of the simple result of disparities between the national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result from this assumption. Nonetheless, the situation in case of introducing the Regulation on mutual recognition for the goods market seems to be a result of the lack of mutual trust in the procedures, which might bring consequences of fragmentation and protectionism. The mutual trust was an open issue and it was obvious that further rules were needed to build the confidence of the Member States in each others actions.

There is no doubt that the Regulation[31] can have a positive impact, as outlined above. However, the interesting point

[26] See Ibid. COM (2007) 36 final, 2007/0028 (cod).
[27] See Ibid. COM (2007) 36 final, 2007/0028 (cod).
[28] See Ibid. COM (2007) 36 final, 2007/0028 (cod).
[29] Article 249 ECT.
[30] According to Articles 94, 95 ECT
[31] See Ibid. COM (2007) 36 final, 2007/0028 (cod).

to analyse here is not only the scope of the Regulation, but also the necessity of introducing harmonisation instruments and the current shift towards the harmonisation of procedures.

According to its content, the Regulation[32] does not change the substance of the technical rules. It just sets up procedures, when products have been restricted, to move freely in the Internal Market. However, it is more than clear that the solution to adopt a Regulation on mutual recognition implies that there will be further harmonisation under article 95 ECT. Even the Commission itself states[33] that "Harmonisation or further harmonisation of national technical rules remains without doubt one of the most effective instruments, both for businesses and for the national administrations. Mutual recognition cannot be a miracle solution for ensuring the free movement of goods in the single market. Therefore, greater harmonisation will continue to be indispensable in sectors where the divergence of technical rules poses too many problems in order to permit the proper application of the principle of mutual recognition."[34]

The European and the national legislators share legislative responsibilities. None of them is the superior authority, which has the final say on who is responsible for what. The same applies to the Court system. National courts apply the national law as it stands after accepting harmonisation measures in their legal system. Nevertheless, adopting a Regulation on mutual recognition[35] may disturb the domestic systems of the Member States. In other words, in this model, the legislator stretches the possibilities provided by article 249 (3) of the Treaty to the very limits. This is illustrated well in the Tobacco advertising case[36] where the EU passed legislation restricting the advertising of tobacco products. This legislation was challenged successfully by Germany, on the grounds that Art. 95 does not create an unlimited power to harmonize the national laws of Member States. The ECJ pointed out that not every instance of disparity between national laws would be sufficient to disturb the internal market, and there was no reason to think that differences in the law related to tobacco advertising would have such an effect.[37]

Most of the citizens and enterprises are generally satisfied with the way the Internal Market for Goods operates.[38] The Eurobarometer[39] shows that 3 in 4 citizens (75%) believe that the Internal Market for Goods has a positive impact.

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[32] See Ibid COM (2007) 36 final, 2007/0028 (cod).

[33] See more in the: Commission Staff Working Document Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, Impact Assessment {COM(2007) 36 FINAL SEC(2007) 113}

[34] See Ibid

[35] See ibid.

[36] Case C-376/98, Federal Republic of Germany v European Parliament and Council of the European Union., E.C.R., 2000, I-08419

[37] See ibid.

[38] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee the Internal Market for Goods: A cornerstone of Europe's competitiveness, Brussels, 14.2.2007 COM (2007) 35 Final

[39] http://ec.europa.eu/internal_market/strategy/index_en.htm

Today it would be difficult to imagine life in the EU without products from outside one's home country. The same should be applied to all the categories of the "free movements".

The establishment of "Product Contact Points" can create the basis for a dialogue between competent authorities, which without any doubt would be a positive step. However, this was an obligation for the Member States even before, when the Regulation was not considered yet. In the Commission's document named "Main administrative structures required for implementing the *acquis*",[40] there were criteria that each country should be able to fulfil in order to be a part of the Internal Market. Indeed, one of the criteria was to make sure that there is an administrative entity responsible for the follow-up and implementation of Articles 28-30 of the EC Treaty, and the application and implementation of the principle of mutual recognition. One of the most important novelties in the Regulation was the introduction of contact points in the administrations of the Member States for overcoming the current weaknesses of the application of the mutual recognition principle. Taking the above-mentioned into account we can see that this is not really a novelty. However, after adopting the Regulation, the countries will have a binding obligation to establish contact points dealing with mutual recognition and they will have to respect the set procedures.

It is a fact that the predominant form of policy in the EC pillar is regulatory. As Majone[41] puts it, regulatory policy requires little by way of a central budget, since the direct costs of such a policy are largely administrative. "The real costs of most regulatory programmes are borne directly by the firms and the individuals who have to comply with them. Compared with these costs, the recourses needed to produce the regulations are trivial."[42] Moreover a regulatory type of policy is less controversial for a fragile polity. Guy Peters[43] examines that the regulatory instruments tend to mask the effects of policies and make winners and losers less visible than the expenditure programs do. The Regulatory Policy may thus minimize conflicts over the Community Policy.

The Community's supremacy was given added force[44] and it is clear that the Community law would take precedence even over national legislation, which was adopted after the passage of the relevant EC norms. The Regulation on Mutual recognition in the goods market[45] hinders the Member States when introducing new requirements, unless they pass non-discrimination, proportionality and necessity tests. They will have to notify

[40] Commissions Informal Guide to the Main Administrative Structures Required for Implementing the acquis (updated: may 2005)

[41] Majone, G, *Regulating Europe*, Rutledge, London, 1996.

[42] Majone, G, "Cross-National Sources of Regulatory Policymaking in European Union and the United States", *Journal of Public Policy*, 1991, p.79-106

[43] Peters B. G, *Bureaucratic Politics and the Institutions of the European Community*, in Sbragia, A (ed.), *Euro-Politics: Institutions and Policymaking in the 'New' European Community*, The Brooking Institution, Washington, D.C., 1992

[44] See Case 106/77, Amministrazione delle finanze dello Stato v. Simmenthal SpA (1978) ECR 629

[45] Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, Brussels, 14.2.2007, COM(2007) 36 final, 2007/0028 (cod).

the Commission of their action, and the Commission will be able to request removal.

As Peters[46] puts it: "Regulatory policy may…minimize national, regional and even class conflicts over Community Policy. The choice of policy instrument enhances the relative power of the Commission and the bureaucracy." Nevertheless, the current situation within the internal market, regarding the application of the mutual recognition principle implies that an action was necessary in order to make it more efficient.

3.1 New practice for applying the mutual recognition principle

As emphasized several times before according to the present practise, technical obstacles can either be eliminated by harmonising national rules, or by applying the mutual recognition principle. Under this principle, the Member States of destination cannot forbid the sale on their territories of products which are not subject to Community harmonisation and that are lawfully marketed in another Member State, unless the restrictions laid down by the Member State of destination are justified on the grounds specified in Article 30 of the EC Treaty, or on the basis of overriding requirements of general public importance, recognised by the case law of the ECJ, and are proportionate.

Mutual recognition is moreover regarded as an example of subsidiarity, in the sense that it avoids the need for the "systematic creation of rules at Community level", thereby allowing for greater observance of "local, regional and national traditions".[47] Indeed, the general thrust of the Commission's approach was to move away from the concept of harmonisation towards mutual recognition and equivalence,[48] by building on the *Cassis de Dijon*[49] jurisprudence. The ECJ has signalled in *Cassis*[50] that national rules which, although they diverge in detail, nonetheless converged in terms of their regulatory goals and do not need to be harmonised if the principle of mutual recognition was applied. Therefore, this limits the task of the EC legislation to the harmonisation of "essential requirements"[51] which identify only what is important for the products to comply with, and that the residual part on how to achieve the compliance is mutually recognised. They deal with the protection of health and safety of users (usually consumers and workers) and they define the results to be achieved or the hazards to be dealt with, but do not specify or predict the technical solution for doing so. Hence, Member States are free to choose the most suitable means to achieve the essential requirements.

The whole point of mutual recognition

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[46] Peters, B.G, *Bureaucratic Politics and the Institutions of the European Community*, in Sbragia, A(ed.), *Euro-politics: Institutions and Policymaking in the 'New' European Community*, The Brookings Institution, Washington D.C., 1992

[48] COM (85) 310, 14 June 1985

[49] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649

[50] See Ibid.

[51] See more: K. Armstrong & S. Bulmer, The Governance of the Single European Market, Manchester University Press, 1998

is to allow for flexible integration leaving market regulation in the hands of the Member States, while, at the same time, preventing the use of that competence in a way that would partition the market.[52] Arguably, the only institution which was apparently advancing market integration was the ECJ through its accumulated jurisprudence. Indeed, it was the *Cassis de Dijon*[53] ruling, which paved the way for a new strategy for completing the Internal Market. However, with the Regulation[54] the legislator is introducing a harmonisation instrument, dealing with mutual recognition, which is based on uniform procedural aspects in applying the mutual recognition principle. In this way, the countries and the private entities can become aware when they have the right to apply the mutual recognition principle.

The mutual recognition will now be included in the harmonisation measures and presented in a different way. However, it is important that according to the Regulation[55] countries will be obliged to have uniform procedures in applying mutual recognition.

4. Mutual recognition of the regulatory control – new developments

Following the same line of developments, as regards the mutual recognition of the regulatory control in the goods market, there is a new package of measures harmonising procedural aspects.[56]

For the industrial products it is proposed for the existing market surveillance systems to be strengthened and aligned with import controls. Furthermore, accreditation has been introduced as a formal system, which may now be used to ensure that conformity assessment bodies, or testing and certification laboratories, provide the high quality services that manufacturers need.

It was also apparent that further action was needed to reinforce the role and credibility of CE marking. Besides the clarifications on the meaning of CE marking, it will also be protected as a community collective trade mark, which will give the authorities additional means to take legal action against manufacturers who abuse it.

As in the case of the Regulation on mutual recognition, this moves towards harmonisation of procedures, which

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[52] See N. Bernard, *Flexibility in the European Single Market in Barnard*, C & Scott, J, *The Law of the Single European Market: Unpacking the premises*, Hart Publishing, Oxford and Portland, Oregon 2002

[53] See Ibid, Case 120/78

[54] See Ibid COM (2007) 36 final, 2007/0028 (cod).

[55] Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another member state and repealing decision 3052/95/EC, No 764/2008

[56] A proposal for a Regulation of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products; A proposal for a Decision of the European Parliament and of the Council on a common framework for the marketing of products; An interpretative communication on procedures for the registration of motor vehicles originating in another Member State; See more details in the: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, "The internal market for goods: a cornerstone of Europe's competitiveness", Brussels, 14.2.2007, COM (2007)35 Final

might help in enhancing confidence between the countries, regarding the quality of conformity assessments for products, through reinforced rules on requirements for the notification of conformity assessment bodies including the increased use of accreditation. Thus, there will be a common legal framework for industrial products with common definitions of expressions, which are sometimes used differently.

Among the new proposals there is a Decision on a Common Framework for the Marketing of Products.[57] Article 2 of the Decision[58] states that "where recourse to essential requirements is not possible or not appropriate, detailed specifications may be set out in the Community legislation concerned".

Although it is more than clear why procedural aspects need to be harmonised, still this provision opens a new question. The transfer from the Council to the external agencies[59] of one important area of regulation - that concerning technical standards - represented a further shift in the character of governance. Indeed, the "New Approach", introduced, among other things, a clear separation of responsibilities from the EC legislator to the European standards bodies[60] in the legal framework allowing for the free movement of goods.[61] Regulatory compatibility is sought to be achieved through harmonisation to technical standards and regulations.

The New Approach leads to the simplification of the administrative burdens of regulation. It represented an innovative way towards technical harmonisation and mutual recognition and it was limited in order to only what is essential. Thus, efforts should be made in all cases of product regulation to apply the New Approach before going back to the Old Approach. It is an inherent part of the New Approach, that if it does not work in a specific sector, one should go back to harmonisation in that particular sector.

With the old approach there is unnecessary uniformity. Everything is regulated in detail and there is no space to apply the mutual recognition principle. Individual Member States must conform to harmonisation directives and transpose them into their national legislation. The Community legislator does not leave enough space for alternative solutions. Total, vertical harmonisation[62] proved to be problematic, and in practical terms, such an approach places enormous strain on the legislative capacities of the EC and

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[57] Proposal for a Decision of the European Parliament and of the Council on a common framework for the marketing of products, Brussels, 14.2.2007, COM(2007) 53 final, 2007/0030 (COD)

[58] See Ibid, Article 2 of the Decision, COM(2007) 53 final, 2007/0030 (COD)

[59] The European Committee for Standardization (CEN) in Brussels, Belgium; the European Committee for Electrotechnical Standardization (CENELEC) in Brussels, Belgium; and the European Telecommunications Standards Institute (ETSI), in Sophia Antipolis, France

[60] The European Committee for Standardization (CEN) in Brussels, Belgium; the European Committee for Electro technical Standardization (CENELEC) in Brussels, Belgium; and the European Telecommunications Standards Institute (ETSI), in Sophia Antipolis, France.

[61] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 04/06/1985 P. 0001 - 0009.

[62] As described by Dashwood in: Dashwod, A, *Hastening Slowly: The Community's Path towards Harmonization*, in Wallace at al. 1983.

the Member States, as soon as became evident.[63] As Pelkmans[64] puts it: "In the 'old' approach approximation of national economic regulation usually boiled down to extremely detailed lawmaking at the Community level. Partly, this was caused by unanimity – a recalcitrant Member State could insist on any detail. Partly, it reflected a lack of trust among Member States." Moreover, the 'old' approach can be inflexible in the face of new technological developments.

The realisation of the single market through the Old Approach would entail excessive amounts of legislation.[65] Technical harmonisation is a difficult task - especially against a background of different national regulatory traditions. Technical developments meant, moreover, that the Commission was fighting a losing battle. As fast as it succeeded in securing the passage of a directive to cover one technical problem, ten more would emerge on the horizon.[66]

Under the New Approach and the mutual recognition, the advantages in the markets for goods can be established far more easily and more quickly than with the Old Approach of approximation. However, we could expect at this stage that the harmonisation of the procedures and the changes introduced with the new package will increase the confidence among the countries and will make the mutual recognition principle work more effectively, so that the detailed specifications will not be needed very often. The New Approach is embedded in a kind of "procedural harmonisation" which should make the "new approach" more effective and more palatable.

5. Mutual recognition: Jurisprudence of the European Court of Justice vs. legislative processes on the EU level

In the internal market domain, the interpretations of the ECJ have played a significant role in shaping policy. The principle of mutual recognition, which started to be applied in the Internal Market after *Cassis*[67] is much more a sovereignty-friendly approach than the expectation that a single market could only be achieved by legislative harmonisation. Therefore, it starts with the *Cassis*[68] since when we can test the link between the actions of the different institutions at EU level, regarding the application of the mutual recognition principle.

The Commission seemed to recognise the new possibilities towards achieving the internal market after *Cassis*[69], when it started the various proposals following the New Approach. The principle of mutual recognition was encouraged in most of the Commission's reports and it was considered as the main principle for making the Single Market a success story. The New Approach gave a basis

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[63] See more: K. Armstrong & S. Bulmer, *The Governance of the Single European Market*, Manchester University Press, 1998.
[64] Pelkmans, J, *European Integration, Methods and Economic Analysis*, Essex, London, 1997, p. 38
[65] D.Chalmers, C.Hadjiemmanuil, G. Monti, A.Tompkins, *European Union Law: Texts and materials*, Cambridge University press, 2006, P. 478.
[66] Barnard, C & Scott, J, *The Law of the Single European Market: Unpacking the premises*, Hart Publishing, Oxford and Portland, Oregon 2002.
[67] See Ibid , Case 120/78.
[68] See Ibid , Case 120/78.
[69] See Ibid , Case 120/78.

for application of the principle of mutual recognition in the area of technical harmonisation and use of standards. It was limited only to what is essential and there was no need to harmonise each and every aspect of the technical regulations.

Disputes between private parties or disputes involving supranational institutions or the member governments can lead to the establishment of important principles. Since the Commission's role is to act as "conscience of Europe"[70] and closely monitor the work of the European Courts[71], the Commission systematically intervenes in all the cases[72] occurred in litigations brought before the Court, and is thus well placed to draw lessons from consequent jurisprudence. Accordingly, the judicial and the legislative process seem to be complementary to one another.

Besides the situation as illustrated by the Commission seizing upon mutual recognition as a regulatory strategy for market integration in the wake of the *Cassis de Dijon*[73] judgment, the same can be noticed in the current developments, as explained further in the text.

Compared to the *Dassonvile*[74] and the *Cassis de Dijon*[75] cases, which indirectly provided a potential new route map for the goal of a common market, based on the mutual recognition of products, the current track leads to a different approach. A recent Court ruling is actually shows the modification track on the case law on the free movement of goods.[76]

Indeed, the fact that the image storage media was examined and classified by a competent United Kingdom (UK) Authority, did not give sufficient guarantees for the German Authorities. The Dynamic Medien, a competitor of Avides, the company which imported and sold in Germany image storage media, asked the Regional Court to prohibit Avides from selling the image storage media in question, by mail order and over the internet, on the ground that they have not been examined and classified in Germany under the relevant domestic rules and bear no minimum age indication corresponding to a classification decision adopted by a competent German authority.

By its question to the Court, the Landgericht Koblenz asked whether the prohibition of mail order sales of such image storage media constitutes a measure having equivalent effect within the meaning of Article 28 EC and if so, if it can be justified under Article 30 EC, having regard to Directive 2000/31/EC.[77]

As explained before, under Article 28 ECT quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. It is well established in the case-law that a product which is lawfully marketed in one Member State must,

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[70] Rose, R, Lessons Drawing in Public Policy: *A Guide to Learning across Time and Space*, Chatham House, Chatham (NJ), (1993) and Sabatier, P, *An Advocacy Coalition Framework of Policy Change and the Role of policy- Oriented Learning Therein*, Policy Sciences, 1998

[71] European Court of Justice and the Court of First Instance

[72] In accordance with Article 234 of the Treaty

[73] See Ibid, Case 120/78

[74] See Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837,

[75] See Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837,

[76] See Case C 244/06 Dynamic Medien Vertriebs GmbH v Avides Media AG

[77] OJ 2000 L 178, p. 1

in principle, be able to be marketed in any other Member State, without being subject to additional controls, save in the case of exceptions provided for or allowed by the Community law.[78]

In this particular case[79] it is clear that further examination and classification for the same purpose would lead to additional costs and delays in the marketing of such products in Germany. Moreover, in accordance with the *Dassonvile*[80] formula, all trading rules adopted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restriction.[81]

The German rules in question oblige the traders concerned to label image storage media. That is a national measure that establishes a labelling requirement with which the goods must comply. Even more, the required labelling presupposes the carrying out of a national examination procedure, even if there is a comparable procedure and labelling. That is definitely sufficient to be characterized as measure having an equivalent effect to quantitative restrictions. The Court established in its previous practice that "…a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State".[82]

There is also another side in this case, where the argument is that the prohibition of mail order sales in question relates to a selling arrangement as laid down in the Keck and Mithouard judgment,[83] with the result that it falls outside the scope of Article 28 EC. However, even if it were considered that the case in point related only to the regulation of a selling arrangement, the second of the conditions laid down in the *Keck and Mithouard*[84] judgment will not be met, since according to the UK Government, the image storage media produced in Germany can meet the requirements of German law as concerns the suitability of the content for young persons more easily than those produced elsewhere.

The Court concluded that the German rules do not constitute a selling arrangement within the meaning of *Keck and Mithouard*[85] and subsequent cases. It recalled that rules restricting the marketing of products to certain points of sale and having the effect of limiting the commercial freedom of economic operators without affecting the actual characteristics of the products referred

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[78] Case 120/78 Rewe-Zentral [1979] ECR 649, paragraph 14, and Case C-123/00 Bellamy and English Shop Wholesale [2001] ECR I-2795, paragraph 18.

[79] See Ibid, C-244/06

[80] See Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837,

[81] See Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, paragraph 5; Case C-143/06 Ludwig Apothekerverband, paragraph 67; and Case C-420/01 Commission v. Italy, paragraph 25

[82] See Case C- 390/99, Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS), ECR 2002 Page I-00607, at para. 36 and 37

[83] See joined Cases 267/91 & 268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097

[84] See Ibid C-8/74

[85] See joined Cases 267/91 & 268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097

to, constitute a selling arrangement. Therefore, the need to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the German requirements from being treated as selling arrangements.[86]

However, regarding the justification under Article 30, of whether the German measures could be justified as being necessary to protect young people, being an objective linked to public morality and public policy, the Court concluded that, while it seemed *prima facie* that the German system was proportionate, the national court must examine whether it is in fact proportionate. Consequently, the German system of examination must be proportionate, in the sense that it must be readily accessible, can be completed within a reasonable period, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts.

As Genscher puts it[87]:

"*Europe must make its contribution to co-operative regionalism which, unlike confrontational regionalism, does not merely repeat at a higher level the old policy of rivalry between nation-states. A world economy based on multilateral principles is a decisive precondition for the creation of a co-operative and peaceful order. That's why the Single Market's further consolidation should not be allowed to lead to new forms of protectionism.*"[88]

6. Introducing harmonisation measures and codification of the case law at EU level for services and establishments

The ECJ's case-by-case approach is often used as main justification for introducing a regulatory instrument and codification of the current case law in this area. On the other hand, the Directive[89] means that Member States are not allowed to introduce new requirements and will have to notify the Commission.[90] Then, the Commission will be able to request removal.

The historical position of the European Court of Justice is clear; it is the final arbiter of the validity of European Law. The ECJ plays an active role and the most important principles of the EC law, such as the principle of mutual recognition itself,[91] have been established by the ECJ. All national cases whose outcome depends on the interpretation of EC law are referred to the ECJ, at the latest in the last instance, if the correct interpretation of the EC is not clear. Indeed, according to the established ECJ case law, it is not the responsibility of the ECJ to decide national cases, but only to interpret EC law.[92] It is then for the national court to apply the EC law as interpreted by the ECJ to the instant case.[93]

[86] Case C-390/99 Canal Satélite Digital SL v. Administracíon General del Estado at para. 30

[87] SH. D. Genscher, *Responding to challenges of globalization*, in L. Cockfield, J.M Cuevas, H.D Genscher, T. Kannisto, M. Monti, L. Soudek, S. I. Valliance, K. von Wogau, *Is the Single Market Working*, The Philip Morris Institute for Public Policy Research, November, 1996

[88] See Ibid.

[89] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ L 376, 27.12.2006*, p. 36–68

[90] Unless pass non-discrimination, proportionality and necessity test

[91] Case 120/78, Rewe - Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649

[92] See W. Nassal, WM 1994, 1645, 1646

[93] See ECJ judgment of 29/04 1982, Case 17/81 Pobst & Richarz KG v. Hauptzollamt Oldenburg, (1982) ECR 1331, at para. 12

While national courts may refer questions on European law to the ECJ, it is the ECJ that will then finally decide. There is always a danger that the national courts may not get things right, or will adopt a narrower perspective than the ECJ may have taken.

This is something of which the national courts are also aware:[94]

"Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It is a panoramic view of the Community and its institutions, a detailed knowledge of the Treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practise arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the community and the Member States are in issue. Where the interests of the Member States are affected they can intervene to make their views known…" [95]

In the introductory text of the Services Directive[96] it is stated that a competitive market in the services sector is essential in order to promote economic growth and create jobs in the European Union. Even more, the lack of mutual trust is mentioned as one of the main reasons to create barriers that affect the free movements.[97]

Nevertheless, the Services Directive does not deal with the mutual recognition and the proposed solution is not a substantial change from the previous practise. Hence, the doubt is whether these goals can be achieved with the case law, without applying the mutual recognition.

It seems that the operation of mutual recognition is therefore dependent in practise on the exercise of their discretion by regulatory authorities of the Member States. For example the Directive on the mutual recognition of diplomas[98] allows the host state to impose compensatory measures, such as an aptitude test of a period of traineeship, where there is a "substantial" difference between the training acquired in another Member State and that required in the host state.[99] Subsequently, the application of the mutual recognition principle is often hindered by the formal content of the legislation itself, but also by the practical decisions made by the authorities that are in direct contact with the citizens or the economic operators.[100] The legislation provides a basis for an action but the countries often show no suppleness. The mutual trust is again the crucial precondition.

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[94] See Justice Bingham's remarks in Commissioners of Customs and Excise v. Samex (1983) 3 CMLR 194
[95] See ibid.
[96] See Ibid *OJ L 376, 27.12.2006, p. 36–68*
[97] See Ibid *OJ L 376, 27.12.2006, p. 36–68*
[98] Directive 2005/36/EC of The European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22, 30.09.2005
[99] See more in Case 340/89 Vlassopolu (1991) ECR 2357
[100] See SEC (1999) 1106, para. 5

7. Conclusion: Encouraging mutual recognition and further development of the Single Market

The Treaty ideals, especially the ones linked to the "free movements" are clearly stated.[101] The creation of the Single Market is a major development in the history of the European integration. One interpretation is that the project provided a platform for a major revival of European integration itself. The motivation behind the project is various, but common to all of them was to give the EU a new relevance to meeting the economic challenges of the era.[102]

The corollary of the Single Market upon economic and political actors takes time to become clear, so that much of the manoeuvring for power and control in the market will often change tactics during the years. The Internal Market is not new; it is merely a re-formulation of the existing treaty goals. In that respect it should have much to do with "policy learning": learning from the failures of the Old Approach[103] and the lessons from the *Cassis*[104] judgement.

National authorities need to make sense of the regulatory history of a good or a service or a worker within their own domestic processes and that should stimulate a bureaucratic learning process as how other systems regulate rather than acceptance or rejection. Mutual recognition shall be the tool of establishing mutual trust, information sharing and cooperation between Member States.[105]

The White Paper[106] set forward a strategy for completing the internal market that was driven by an attack on barriers and obstacles. In consequence, it did not follow the division of labour within the Treaty of Rome of separating out the so-called four freedoms (of goods, services, labour and capital). The initial idea seemed to be that there was not a different approach of opening the markets for the different categories of the free movements or having a different approach to mutual recognition. Rather, it used the attack on frontiers and barriers as a specific strategy. Lord Cockfield justified this approach in the following terms:[107]

"If the Community was to become a United Europe…the frontiers and the controls associated with them would have to go. It is useless simplifying the controls and leaving the frontiers in place. As long as the frontiers are there they will attract controls: each control will be the excuse for some other control."

The democratic strength of the new and enlarged Europe will have to rest not only on its Institutions but perhaps more on the values that it holds. If citizens are to feel that they have a stake, they must trust

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[101] Under: Title I. Free movement of goods & Title III. Free movement of persons, services and capital

[102] See more: K. Armstrong & S. Bulmer, *The Governance of the Single European Market,* Manchester University Press, 1998

[103] The old approach directives define the essential requirements that products must meet, when they are put on the market, but also the technical specifications of how to do so, are included.

[104] Ibid, See Case 120/78

[105] See more: G. Majone, *Mutual recognition in Federal Type Systems*, EUI Working Paper SPS No. 93/1

[106] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM (85) 310 final, 14 June 1985

[107] See more: Lord Cockfield, *The European Union: creating the single market,* Wiley Chancery Law, London, 1994

the values and objectives of European Integration, trust the procedures, trust the people responsible for carrying them out and above all, the judicial protection provided within the Union.

The shift should be in the direction of removing the gaps and differences between the Member States, rather that focusing on instruments for power control. An open market may have an impact on the weaker economies that could suffer in the increased competitiveness of more open markets. As Dehousse[108] argues, "market integration has to be accompanied by improvements in social and economic cohesion, if it was to be politically acceptable." Similarly, Armstrong[109] notes that the removal of barriers to trade through mutual recognition can create positive trade possibilities for states with efficient production, while less efficiently producing states face the prospect of domestic production being displaced by competition, which may need to be cushioned through negotiations of Structural Funds.

The international trade between the EU and third countries makes it even more important to invest in this area and to find a structured and systematic approach to respond effectively to all the threats by reinforcing the synergy between the existing infrastructures and resources at EU and national level, as well as international organizations.

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