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The judicial influence of the principle of mutual recognition for the free movement of goods in European Union Law and its workability¹

La influencia judicial del principio de reconocimiento mutuo en la libre circulación de mercancías en el Derecho de la Unión Europea y su operacionalidad

Philipp Peter Haubold

hauboldp@gmx.de

Universidad de Heidelberg, alumno de intercambio en la facultad de Derecho de la Universidad de Chile durante el año 2015.

Abstract: The principle of mutual recognition concerning the free movement of goods has played a key role for the development of doctrine in European Union Law. With the cases *Dassonville*, *Keck* and *Cassis de Dijon* the European Court of Justice has founded this principle of mutual recognition which has been more and more in competition with direct regulations of European bodies. The principle has often been questioned due to a large amount of problems resulting from this non-regulative principle whose legal bases are not even clearly defined and require a judicial interpretation.

Key words: Free movement of goods – Mutual recognition – European Union Law

Resumen: El principio del reconocimiento mutuo relativo a la libre circulación de mercancías ha tenido un rol clave en el desarrollo de la doctrina en el Derecho de la Unión Europea. Con los casos *Dassonville*, *Keck* y *Cassis de Dijon*, la Corte Europea de Justicia ha dado lugar a este principio, el cual ha entrado más y más en competencia con las regulaciones directas emitidas por los órganos europeos. Él ha sido a menudo cuestionado debido a la gran cantidad de problemas que surgen de tratarse de un principio no-regulatorio cuyas bases legales no están aun claramente definidas y requieren de interpretación judicial.

Palabras clave: Libre circulación de mercancías – reconocimiento mutuo – Derecho de la Unión Europea.

¹ Artículo enviado el 06.07.2015 y aceptado el 10.12.2015.

1. Introduction: Contextualization of mutual recognition

Mutual recognition is one of the three approaches on how to promote the free movement of goods in the European Union along with harmonization and liberalization². It originates from the idea to facilitate the exercise of the fundamental freedoms in the European Union (EU)³. Named principle is based on the (mutual) trust⁴ that Member States have equivalent regulatory objectives in health, safety, environment and consumer protection⁵. The principle of mutual recognition's aim is to promote market integration and to eliminate the dividing effect of different standards of Member States without harmonizing them and shortening the Member States' autonomy⁶. The principle of mutual recognition exerts its function in particular in areas, where national characteristics are not to be standardized EU-wide, but the omission of unification of law reduces the adjustment pressure in favor of national sovereignty aspects⁷.

Historically, the principle of mutual recognition has passed three functions: it first served to justify national sovereignty, afterwards as a mode of intergovernmental cooperation and only then as European Law, which will be the focus of this research paper⁸. The EU first started to establish a customs union⁹ in 1957 building the heart of the Single Market of the European Union (art. 28 I f. Treaty on the Functioning of the European Union, TFEU)¹⁰. The abolition of customs duties on imports and exports and of all measures having equivalent effect as well as the adaptation of a common customs tariff in their relations with third countries built the basis of the free circulation of goods¹¹. However, the free movement of goods has still not been absolutely fulfilled, as norms exist in Member States which are opposed to it¹².

² PELKMANS, Jacques. "Mutual recognition: economic and regulatory logic in goods and services", *Bruges European Economist Research Papers*, 24. Brugge, College of Europe, 2012, p. 5.

³ SCHEUERMANN, Sandra. *Das Prinzip der gegenseitigen Anerkennung im geltenden und künftigen Europäischen Strafrecht*. Hamburg, Verlag Dr. Kovac, 2009, p. 5.

⁴ MÜLLER-GRAFF, Peter-Christian. "Gegenseitige Anerkennung im Europäischen Unionsrecht", *ZyglRWiss*, 2012, (111): p. 73.

⁵ PELKMANS, "Mutual recognition...", *op.cit.*, p. 5.

⁶ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 5.

⁷ STREINZ, Rudolf. *Schwerpunktbereich Europarecht*. 9^{te} ed. München, C.F. Müller Verlag, 2012, recital 960 ff.

⁸ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 5.

⁹ Treaty of Rome, (298 U.N.T.S. 11) (1957).

¹⁰ SCHMIDT, Susanne. "Gefangen im 'lock in'? Zur Pfadabhängigkeit des Europäischen Gerichtshofs". *dms – der moderne Staat – Zeitschrift für Public Policy, Recht und Management*, 2010, (2): p. 570.

¹¹ In general about the free movement of goods e.g. MAYER, Franz. "Die Warenverkehrsfreiheit im Europarecht. Eine Rekonstruktion". *EuR*, 2003, (5): pp. 783 ff.

¹² JANSSENS, Christine. *The principle of mutual recognition in EU law*. Oxford. Oxford University Press, 2013, p. 109.

2. Cornerstones in the jurisdiction of the European Court of Justice

The free movement of goods is part of the primary legislation of the EU and is regulated in art. 26 ff. TFEU¹³. It has direct validity and establishes direct rights and obligations for all citizens of the EU¹⁴. As for the free movement of goods, according to art. 30 ff. TFEU, custom duties on imports and exports as well as “measures having an equivalent effect are prohibited between Member States” and mentioned regulations are directly applicable¹⁵. In contrast to secondary legislation, Member States do not have to enforce measures and do not have any discretion in the area of the four freedoms according to art. 288 II TFEU¹⁶. National administrative authorities or courts have to respect and apply the free movement of goods just like all the other organs, according to art. 34 TFEU¹⁷, “as measures having equivalent effect” are prohibited¹⁸. It turned out that not only discriminating measures, which hinder the free movement of goods, are forbidden, but also that by the judgments *Dassonville*, *Cassis de Dijon* and *Keck* the discrimination ban, according to art. 34 f. TFEU (based on art. 18 TFEU) evolved to a restriction ban¹⁹. A restriction ban goes much further than a discrimination ban making it possible to have the interpretation of “measures” not only of the home country but also of the host country revised²⁰. Hence, by this wider interpretation of a restriction ban, the Member States are unable to possess any longer the competence to freely regulate imports and exports of national and EU citizens²¹. The three judgments merely paved the way for mutual recognition as the European Court of Justice (ECJ) used its discretionality to regulate the free movement of goods in the EU developing the principle of mutual recognition and making EU legislation or harmonization for many cases superfluous²².

2.1. The case *Dassonville*

2.1.1. *Facts*

In *Dassonville* the ECJ was confronted with the fact, that Belgian law provided that goods bearing a designation of origin could only be imported if they were accompanied by a certificate from the government of the exporting country certifying their right to such a

¹³ ECJ, Case C-83/78, Pigs Marketing Board (1978) ECR I-2347; EHLERS, Dirk. *Europäische Grundrechte und Grundfreiheiten*. 3a ed. Berlin. Verlag de Gruyter Recht, 2009, § 7. recital 7 ff..

¹⁴ EHLERS, *Europäische Grundrechte...*, *op.cit.*, § 7. recital 7.

¹⁵ EHLERS, *Europäische Grundrechte...*, *op.cit.*, § 7. recital 7.

¹⁶ STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 448 ff.

¹⁷ Former Article 28 EC.

¹⁸ STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 448 ff.

¹⁹ EHLERS, *Europäische Grundrechte...*, *op.cit.*, § 7. recital 28.

²⁰ SCHMIDT, Susanne. “Notwendigerweise unvollkommen – die Realisierung des Binnenmarkts”, *Zeitschrift für Staats- und Europawissenschaften*, 2005, 3(2): p. 188.

²¹ SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 188.

²² SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 189.

designation²³. Dassonville imported Scotch whisky into Belgium from France without being in possession of the requisite certificate from the British authorities²⁴. Such a certificate would have been very difficult to obtain in respect of goods which were already in free circulation in a third country²⁵. Dassonville was prosecuted in Belgium and argued by way of defense that the Belgian national penal provisions²⁶ are in breach against the EU law- guaranteed free movement of goods, as it constituted a measure that has an equivalent effect to a quantitative restriction of trade and is therefore inapplicable²⁷.

2.1.2. Judgment and importance

Although in *Dassonville* the principle of mutual recognition is not explicitly mentioned, it still is the central foundation for the development of mutual recognition²⁸. The judicature of the ECJ in the case *Dassonville* forms the basis of the principle of mutual recognition²⁹. Before the *Dassonville* judgment in 1974 for a long time the term of a “measure having equivalent effect”³⁰ was hotly disputed and was increasingly clarified in the recent years³¹. By defining a measure that has an equivalent effect to a quantitative restriction of trade as “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade” (*Dassonville*-formula), it interpreted a “measure” according to the arts. 28 and 30 TEEC³². It was judged that such a provision is incompatible with the free movement of goods³³.

As for this very broad *Dassonville*-formula, almost all advertising and traffic prohibitions of the Member States affect the free movement of goods, as they may be likely to hinder the volume of trade, since they limit the opportunity of selling products³⁴. The wide interpretation of the ECJ of *measures* causes that any product that is manufactured in a Member State in accordance to local law and placed on its market is to be marketable in any other Member State³⁵. It would be an unjust limitation of community trade, when a regulation hinders the marketability of a product, which has already lawfully entered another Member States’ market³⁶. Thus, the Member State can no longer apply national law relating to the infringement of the free

²³ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

²⁴ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

²⁵ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

²⁶ Art. 1 of the Belgian Royal Decree Nr. 57 of 20. December 1934.

²⁷ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837; HECKER, Bernd. *Europäisches Strafrecht*. 3â ed. Berlin. Verlag C. H. Beck, 2010, § 9. recital 10 ff.

²⁸ GLESS, Sabine. “Zum Prinzip der gegenseitigen Anerkennung”, ZStW, 2004, 116 (2): p. 354.

²⁹ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 24; SCHÜTZ, Hans-Joachim. “Die klassische Entscheidung Cassis de Dijon”, *Jura*, 1998, pp. 633 f.

³⁰ ECJ, Case C-3/69, Social Fonds voor de Diamantarbeiders (1969) ECR I-211.

³¹ GROEBEN, H., THIESING J. and EHLERMANN, C. D. *Kommentar zum EWG-Vertrag*. 3â ed. Baden-Baden. Nomos, 1983, p. 253.

³² SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

³³ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837; SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

³⁴ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

³⁵ PELKMANS, “Mutual recognition...”, *op.cit.*, p. 6.

³⁶ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

movement of goods, after the product entered lawfully the market and must follow the norms of other Member State³⁷. It is this obligation under EU law, to accept the law of another Member State to overcome the divisive effect of different, non-harmonized national standards, which forms the content of the principle of mutual recognition³⁸.

The ECJ also said that such measures must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States³⁹. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties⁴⁰. The question whether the measures adopted for that purpose are proportionate or not, they logically remain separate issues which has further on been proved in several judgments⁴¹. The particular statement in the *Dassonville* judgment, defining that a Member State in general is allowed to take measures to prevent unfair (commercial) practices, is subject to the condition that these measures should be reasonable⁴². Therefore, *Dassonville* is to be seen as a forerunner of the rule of reason, as developed in *Cassis de Dijon* and subsequent case law⁴³.

2.2. The case Keck

In the *Keck* judgment, the ECJ tried to clarify the scope of art. 34 TFEU almost 20 years after *Dassonville* and restricted the purview of the principle of mutual recognition considerably by limiting the *Dassonville*-formula⁴⁴.

2.2.1. Facts

In the judgment *Keck*, two businessmen were being prosecuted in France for reselling products in an unaltered state at prices lower than their actual purchase price including taxes (“resale at a loss”), which is prohibited by French national law⁴⁵. In their defense, the prosecuted argued that this general prohibition on a resale at a loss reinforced by the Strasbourg Regional court is incompatible with art. 34 TFEU⁴⁶.

³⁷ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

³⁸ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

³⁹ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

⁴⁰ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

⁴¹ GORMLEY, Laurence W. “Free Movement of Goods and Their Use – What is the use of it?”, *Fordham International Law Journal*, 2011, 33 (6) Article 1: p. 1593 f.

⁴² ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837.

⁴³ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 13; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 817.

⁴⁴ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097; compare with: ECJ, Case C-155/80, Oebel (1981) ECR I-1993; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 881.

⁴⁵ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁴⁶ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

2.2.1. Judgment

The ECJ stated that certain selling arrangements⁴⁷ to products from other Member States fall outside the purview of the prohibition laid down by art. 34 TFEU⁴⁸. This is the case “so long as those provisions apply to all relevant traders operating within the national territory [...] so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States” (Keck-formula)⁴⁹. This implies, that selling arrangements do not establish an infringement as they have no major impact on imports than on national goods and consequently are not contained in art. 34 TFEU. Hence, there would no longer be a duty of mutual recognition, which would apply to the latter category of rules⁵⁰. For the first time, the ECJ made a reduction of facts of *measures* according art. 34 TFEU in *Keck*⁵¹.

2.2.1. Importance

The justification of *Keck* was established on two bases. Firstly, the ECJ explained that such rules are not designated to determine inter-state trade⁵². Secondly, it was argued that such rules do not limit market access, or at least not to a greater extent for imports than for national goods⁵³. For that reason, they are not measures having an equivalent effect⁵⁴. Art. 34 TFEU consequently solely applies to rules that have a greater effect on foreign than on national goods (discrimination)⁵⁵. Nevertheless, product norms would be subject to an obligation to mutual recognition, whereas particular norms on selling arrangements- which applied to all relevant traders operating within the Member States’ territory and which influenced the marketing of foreign and domestic products in the same manner – would no longer be part of the purview of art. 34 TFEU⁵⁶.

The difference of selling arrangements and product rules has often been proven difficult to apply in practice⁵⁷. Further on, the ECJ did not dare to introduce a third category of measures, which would fall outside the scope of art. 34 TFEU and its mutual recognition mechanisms⁵⁸.

⁴⁷ Selling arrangements are measures which are associated with the marketing of the good rather than with the characteristics of the good, see: ECJ, Case C-441/04, A-Punkt Schmuckhandel (2006) ECR I-2093.

⁴⁸ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁴⁹ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁵⁰ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097, paras 15-16; commenting: GORMLEY, Laurence. W. “Reasoning Renounced? The remarkable judgment in Keck and Mithouard”, *European Business Law Review*, 1994, (3): p. 63-7; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 44.

⁵¹ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁵² ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁵³ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁵⁴ ECJ, Case C-268/91, Keck and Mithouard (1993) ECR I-6097.

⁵⁵ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 45.

⁵⁶ CRAIG, Paul. *EU law, text, cases, and materials*. 5th ed, Oxford, Oxford University Press, 2011, p. 655 f.

⁵⁷ ECJ, Case C-82705, Commission v Greece (2006) ECR I-93.

⁵⁸ GONZÁLEZ VAQUÉ, Luis. “La sentencia Mickelsson y Roos del TJCE: Good Bye, Keck y Mithouard!”, *Revista española de Derecho Europeo*, 2009, p. 389 ff.

Only recently has the ECJ shifted its case law towards another crucial element that was the base of the ECJs reasoning when judging national trade barriers since *Keck*, namely the market-access test⁵⁹.

2.3. The case Cassis de Dijon

2.3.1. Facts

In the case *Cassis de Dijon*, the applicant intended to import a liqueur, “Cassis de Dijon”, into Germany from France⁶⁰. A European regulation of the production and processing of this fruit liqueur did not exist at that time⁶¹. The German authorities refused to allow the importation because the French drink was not of sufficient alcoholic strength to be marketed in Germany⁶². The applicant argued that the German rule was a measure equivalent to quantitative restriction since it prevented the French version of the drink from being lawfully marketed in Germany⁶³.

2.3.2. Judgment

The ECJ constated that there is “no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State”⁶⁴. It was clarified that “obstacles to the movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer” (Cassis-formula)⁶⁵. Since obstacles must be accepted only in the presence of certain mandatory requirements, the ECJ draws the conclusion that “(goods)⁶⁶ lawfully produced and marketed in one of the Member States should be admitted into any other Member State without restriction and the product may not be subject to a legal prohibition of national rules”⁶⁷. Consequently, Member States had to recognize the foreign product standards, as it was incompatible with art. 34 TFEU⁶⁸. With this closing statement the *Cassis* judgment encapsulated the principle of *mutual recognition*⁶⁹.

⁵⁹ WEATHERILL, Stephen. “After-keck: Some thought on How to Clarify the Clarification”, *Common Market Law Review*, 1996, 33 (5): p. 885 ff; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 45.

⁶⁰ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-649; affirmed in Directive 70/50/EEC.

⁶¹ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 26 f..

⁶² ECJ, Case C-120/78, *de Dijon* (1979) ECR I-649.

⁶³ ECJ, Case C-8/74, *Procureur du Roi v Benoît and Gustave Dassonville* (1974) ECR I-837.

⁶⁴ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-649; HUMMER, W. and VEDDER, C. *Europarecht in Füllen – Die Rechtsprechung des EuGH, des EuG und deutscher und österreichischer Gerichte*. 4ª ed. Baden-Baden. Nomos Verlag, 2005, p. 458.

⁶⁵ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-664.

⁶⁶ Changed by the author and replaced by the word “goods”.

⁶⁷ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-664.

⁶⁸ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 25.

⁶⁹ BARNARD, Catherine. *The substantive law of EU, The Four Freedoms*. 3ª ed. Oxford. Oxford University Press, 2010, p. 624.

2.3.3. Importance

The *Cassis de Dijon* judgment particularly was a development and clarification of the scale of the Dassonville-formula⁷⁰. Already in *Dassonville* the possibility was apparent of applying art. 34 TFEU to indistinctly applicable rules⁷¹. The definition of a measure having an effect equivalent to quantitative restrictions in paragraph 5 of *Dassonville* did not require a measure to be discriminatory⁷². It stated that art. 34 TFEU could apply to national rules that did not discriminate against imported products, but rules that at the same time inhibited trade because they were different from the trade rules applicable in the country of origin⁷³. Hence, the basic idea of the *Dassonville-doctrine*⁷⁴ was further developed in the seminal *Cassis de Dijon* case with the affirmation of paragraph 5 *Dassonville*⁷⁵.

In general, the doctrine of the *Cassis* case-law was absolutely coherent with the *Dassonville* judgment⁷⁶. Furthermore, this was confirmed as the *Cassis* ruling is based on paragraph 6 of *Dassonville*, in which the “rule of reason” was established containing that in the absence of harmonization, reasonable measures could be taken by state to prevent unfair trade practices⁷⁷.

Besides, *Cassis de Dijon* established four mandatory requirements which could prevent a trade rule inhibiting the free movement of goods from being covered by art. 34 TFEU⁷⁸. The ECJ wisely chose the word “particular”⁷⁹ indicating a non-exhaustive enumeration of the unwritten justification reasons which replenish the written reasons⁸⁰. It paved the way for additional justification reasons over the years, which normally are of non-economical nature such as road safety⁸¹, maintainance of press⁸² or environmental protection^{83 84}.

ECJ also introduced a three-step test in *Cassis de Dijon*⁸⁵. It is checked if firstly, there is no harmonized European measure on the matter that prevents the Member State from

⁷⁰ CRAIG, *EU law...*, *op.cit.*, p. 649.

⁷¹ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837; CRAIG, *EU law...*, *op.cit.*, p. 647.

⁷² ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837; CRAIG, *EU law...*, *op.cit.*, p. 647.

⁷³ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 13.

⁷⁴ Coherent with the Dir 70/50, (1970) O.J. L13/29, Art 2(3).

⁷⁵ ECJ, Case C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (1974) ECR I-837; CRAIG, *EU law...*, *op.cit.*, p. 647.

⁷⁶ GROEBEN, THIESING and EHLERMANN, *Kommentar...*, *op.cit.*, p. 263; ECJ, Case C-220/81, Robertson and others (1982) ECR I-2349.

⁷⁷ CRAIG, *EU law...*, *op.cit.*, p. 649.

⁷⁸ CRAIG, *EU law...*, *op.cit.*, p. 649.

⁷⁹ ECJ, Case C-120/78, Cassis de Dijon (1979) ECR I-664.

⁸⁰ CRAIG, *EU law...*, *op.cit.*, p. 649.

⁸¹ ECJ, Case C-314/98, Sneller's Autos Valgemeen Directeur van de Dienst Wegverkeer (2000) ECR I-8633; ECJ, Case C-110/05, Commission v Italy (2009) ECR I-173.

⁸² ECJ, Case C-368/95, Familiapress (1997) ECR I-3709.

⁸³ ECJ, Case C-302/86, Commission v Denmark (1988) ECR I-4607.

⁸⁴ *Vid.* SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 28.

⁸⁵ KAPTEYN, P. J.G. *et al.* *The law of the European Union and the European Communities*. 3rd ed. London. Kluwer Law International, 1998, p. 645 ff.; JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 13.

regulating⁸⁶. Secondly, an acceptable mandatory requirement of the Member State is required⁸⁷. Thirdly, the ECJ checks if this national measure is adequate and proportionate to satisfy the mandatory requirement⁸⁸. It is to state, that the test does indeed guarantee that the free movement of goods and mutual recognition are counterbalanced with interests considered worthy of protection from a EU and a Member State's viewpoint⁸⁹. Due to this test a restriction of the *Dassonville-formula* itself is limited due to the principle of proportionality^{90,91}. It also allows the ECJ to exercise a great deal of discretion – usually with the result that the conclusions that the national measures concerned are unjustified⁹². Summing it up, *Cassis de Dijon* had a great impact being continued by numerous cases applying the *Cassis principles* to various trade rules where it was approved over and over again, leading to a reinforcement of the principle of mutual recognition⁹³.

2.3.4. *The origin principle*

With the *Cassis* judgment also the country of origin principle was founded⁹⁴. It serves as a base for the mutual recognition of provisions and has been approved in further judgments⁹⁵.

In combination with the Single Market, the origin principle says that goods, which have been prepared properly under the legislation of a Member State and placed on the market, may generally be introduced to the EU market, excluding certain exceptions⁹⁶. This principle implies that Member States, when developing trade regulations or technical regulations, which might affect the proper functioning of the free movement of goods, must not only consider them from a national perspective alone and take into account the needs of domestic products but also the legitimate aspirations of the other Member States⁹⁷. It means that it is a kind of negative obligation not to apply a Member State's regulation in case that its rule would establish an unjustified obstacle to the free movement of goods⁹⁸. Finally, every Member State should aim to consider the rules of other EU countries in order to prevent its national rules of becoming unjustifiable impediment to the access of goods to another Member State's market⁹⁹. Due to the revision of the host country, all rules of their home country, which are subject to

⁸⁶ KAPTEYN, *The law of the European Union...*, *op.cit.*, p. 645 ff.; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 13.

⁸⁷ KAPTEYN, *The law of the European Union...*, *op.cit.*, p. 645 ff.; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 13.

⁸⁸ KAPTEYN, *The law of the European Union...*, *op.cit.*, p. 645 ff.; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 13.

⁸⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 13.

⁹⁰ Existing of: suitability, necessity, adequacy and proportionality in the narrow sense.

⁹¹ ECJ, Case C-272/80, Frans-Nederlandse Matschapij Biologische Producten (1981) ECR I-3277.

⁹² GORMLEY, Laurence W. "Free Movement of Goods..." *op.cit.*, p.1593.

⁹³ GROEBEN, THIESING and EHLERMANN, *Kommentar...*, *op.cit.*, p. 263.

⁹⁴ REICH, Norbert. *Understanding EU Law, Objectives, Principles and Methods of Community Law*. Antwerpen, Intersentia, 2005, p. 102.

⁹⁵ ECJ, Case C-220/81, Robertson and others (1982) ECR I-2349.

⁹⁶ ECJ, Case C-120/78, Cassis de Dijon (1979) ECR I-649.

⁹⁷ Communication from the Commission concerning the consequences of the judgment given by the ECJ on 20 February 1979 in Case C-120/78 (Cassis de Dijon) O.C. J- 256, 03.10.1980, p. 3.

⁹⁸ MANKOWSKI, Peter. "Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt". *IPRax*, 2004, 24 (5): p. 392.

⁹⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 39.

EU foreigners as producers of goods, become important¹⁰⁰. In order to avoid double controls, which are disproportionate, all requirements of the country of origin have to be mutually recognized¹⁰¹.

The objective behind the concept of mutual recognition with expression in the country of origin principle is to eliminate trade barriers, which result from different product or qualification standards of the Member States. As a consequence, it should create the conditions for a functioning Single Market without forcing harmonization or an unnecessary over-regulation¹⁰². This preserves both regional characteristics and ensures trust between Member States¹⁰³.

3. Legal Basis of European Union Law and interrelating principles

In the former European Community (EC) Treaty, the term “mutual recognition” was referred to twice concerning companies (former art. 293 EC, abrogated by the Treaty of Lisbon) and diplomas (currently art. 53 TFEU¹⁰⁴)¹⁰⁵. Nonetheless, these two norms were not meant to function as a general judicial principle of mutual recognition rather as an “incentive” for the Member States and the Council to take the necessary (legislative) measure to promote the Single Market process¹⁰⁶. It is therefore, that they cannot serve as a legal basis to the principle of mutual recognition¹⁰⁷.

However, the former Treaty art. 100 B EC, which was introduced by the Single European Act and abrogated by the Treaty of Amsterdam, could have served as a legal basis¹⁰⁸. In this former Treaty measure, the Council was given the competence to decide that national provisions should be recognized as equivalent measures applied in other Member States when not having been harmonized with former art. 100 A EC by 1992 deadline¹⁰⁹. Ultimately, the Council never applied the former art. 100 B EC¹¹⁰. Although this provision was partly seen as a threat to the *Cassis* case-law concerning mutual recognition, it could have also functioned as a “trailblazer” for the jurisdiction of the principle of mutual recognition with regard to the measures the

¹⁰⁰ BEHRENS, Peter. “Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht”. *EuR*, 1992, (2): pp. 145 ff.; SCHNEIDER, Hartmut. “Zum Funktionswandel der Grundfreiheiten des EGV und zu seinen Auswirkungen auf das nationale Recht”. *Neue Justiz*, 1996, (50): p. 515.

¹⁰¹ BEHRENS, “Die Konvergenz...”, *op.cit.*, pp. 145 ff.; SCHNEIDER, “Zum Funktionswandel...”, *op.cit.*, p. 515.

¹⁰² SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 192.

¹⁰³ SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 192.

¹⁰⁴ Former Article 47 EC.

¹⁰⁵ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

¹⁰⁶ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

¹⁰⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

¹⁰⁸ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

¹⁰⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

¹¹⁰ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 24.

Council would have considered appropriate¹¹¹. art. 100 B EC, former art. 293 EC, and art. 53 TFEU at least may have inspired the ECJ for its case law and represent the relevance of mutual recognition for the Single Market idea¹¹².

3.1. Mutual Trust

Due to the transfer of sovereignty, mutual trust is fundamental for the functioning of mutual recognition and the facilitation of the Single Market¹¹³, as the EU depends on the loyal cooperation of its Member States and their administrations for the establishment and application of common rules¹¹⁴. Because the reliance on mutual recognition both reflects and is grounded on the mutual trust between Member States that the European bodies claim¹¹⁵, it can be said that mutual trust is a precondition for mutual recognition¹¹⁶.

The ECJ emphasized the importance of mutual trust insisting that Member States trust each other to realize inspections on their respective territories¹¹⁷. The ECJ stated that the prohibition of dual burdens and double controls, as developed in its previous jurisdiction¹¹⁸, was a particular application of the broader principle of mutual trust between Member States authorities¹¹⁹. Although there was no reference to the legal base upon which this principle had been established in the EU law, the *Cassis* case law can certainly be qualified as a legal base, apart from the principle of sincere cooperation¹²⁰.

3.2. Principle of sincere cooperation

Although the ECJ neglected reference to Art 4 (3) TEU besides the diploma framework, it still has not kept various authors from claiming that the principle of mutual recognition can be considered as an expression of art. 4(3) TEU¹²¹. Nevertheless, in consideration of the wide

¹¹¹ MATTHIES, Heinrich. “Zur Anerkennung gleichwertiger Regelungen im Binnenmarkt der EG (art. 100b EWG-Vertrag)”, in: BAUR, J. F. and MAILANDER, K. P. (eds). *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*. Berlin. Verlag DeGruyter, 1990, pp. 1287 ff.

¹¹² JANSSENS, *The principle of mutual recognition, op.cit.*, p. 25.

¹¹³ SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 193 f.

¹¹⁴ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹¹⁵ *Green Paper of the Commission - Criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor*. COM (2001) 715 final.

¹¹⁶ KÜHN BACA, Werner. “The principle of mutual recognition of judicial decisions in EU Law in the light of the ‘Full faith and credit’ clause of the US constitution”, p. 11. Biblioteca Digital Andina [on line] <<http://www.comunidadandina.org/BDA/docs/CAN-INT-0061.pdf>> [accessed: Dec 20, 2015].

¹¹⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28, originating from: ECJ, Case C-46/76, Bauhuis (1977) ECR I-5, para 22.

¹¹⁸ ECJ, Case 272/80, Frans-Nederlandse Matschapij Biologische Producten (1981) ECR I-3277; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹¹⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹²⁰ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹²¹ KAPTEYN, *The law of the European Union...*, *op.cit.*, p.155.

wording of this provision, one cannot persuade that the principle of sincere cooperation alone could be sufficient as a legal basis for the principle of mutual recognition¹²². If at all, it might be considered as a co-legal basis for the principle of mutual recognition, along with the specific free movement provisions¹²³.

3.3. Principle of proportionality

It has been claimed that the principle of proportionality forms part of the basis of the principle of mutual recognition¹²⁴. When investigating the rule of reasons test¹²⁵, the ECJ analyses if a national measure serves a mandatory requirement and in the positive case, whether it is necessary and appropriate¹²⁶. In case that the purpose that the national measure intends to safeguard is already protected by an equivalent rule in the Member State of origin, it is the principle of mutual recognition that dominates¹²⁷. Thus, the principle of mutual recognition can be considered as originated from the principle of proportionality¹²⁸.

However, it is argued that the purview of mutual recognition cannot be reduced to a proportionality test, as it evolves relevant at an earlier point, particularly as a starting point when analyzing national measures potentially establishing obstacles to the free movement of goods¹²⁹.

Consequently, mutual recognition both prevails when dual burdens or equivalent legislations are regarded as unreasonable to a certain imperative requirement and apart from this, in the case of lacking any proportionality test, there is no solid mandatory requirement to defend the non-recognition or non-application of national legislation of other Member States¹³⁰. Thus, the principle of proportionality is undoubtedly important, although inadequate as a legal basis for the principle of mutual recognition¹³¹.

3.4. Principle of subsidiarity

The principle of subsidiarity may be regarded as a legal basis for mutual recognition due to the Amsterdam Treaty and the Commissions' "New Approach"¹³², manifesting subsidiarity¹³³.

¹²² JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹²³ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 28.

¹²⁴ KAPTEYN, *The law of the European Union...*, *op.cit.*, p.145.

¹²⁵ Hereinafter mentioned as: "three step test".

¹²⁶ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 25.

¹²⁷ ECJ, Case C-251/78, Denkavit (1979) ECR I-3369, para 3; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹²⁸ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹²⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹³⁰ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹³¹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹³² Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Treaty establishing the European Community, O.J. 1997, C-340/1, para 8; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

Actually, mutual recognition as a judicially established principle is applied by the ECJ only where no harmonized measures exist and the national legislation of at least two Member States guide the conflict¹³⁴. Subsidiarity, as a guiding principle for distributing the application of competence between the Member States and the EU, might be a point of departure of the EU's legislative approach to the free movement of goods, but it has little influence on the judicially established principle of mutual recognition. It is consequently insufficient as legal basis¹³⁵.

3.5. Treaty provisions

Due to the great amount of principles interrelating with the principle of mutual recognition, it cannot be stated clearly what the legal basis of mutual recognition for the ECJ is¹³⁶.

Having analyzed the three most markable judgments of the ECJ on the free movement of goods, it seems that the Treaty provisions could be considered as the legal basis to the principle of mutual recognition. The ECJ seemed to ground its judgments on the wide interpretation of art. 34 TFEU¹³⁷. In all cases, where the Member State had not respected the equivalent rule to which a product applied to in the country of origin, the ECJ justified it with a violation of art. 34 TFEU¹³⁸. Simultaneously, obligations closely affiliated with mutual recognition, such as the requirement of an active approach or the obligation of cooperation with other Member States' bodies, can be connected with the free movement of goods¹³⁹. Besides, the ECJ has expressly recognized in recent judgments that art. 34 TFEU demonstrates the duty to respect the principle of mutual recognition¹⁴⁰.

Therefore, the principle of mutual recognition is basically a principle fundamental to the free movement Treaty concerning the free movement of goods, without independent purview or independent existence¹⁴¹ and thus is the most probable legal basis from the point of view of the ECJ for the principle of mutual recognition¹⁴².

¹³³ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 26.

¹³⁴ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 27.

¹³⁵ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 27.

¹³⁶ Example for combining several principles: Opinion of AG la Pergola in: ECJ, Case C-184/96, *Commission v France* (1998) ECR I-6197; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 29 f..

¹³⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 30.

¹³⁸ In contrast to a some parties of the following cases who claimed a breach of „the principle of mutual recognition, the ECJ only referred to the Treaty provisions: ECJ, Case C-30/99, *Commission v Ireland* (2001) ECR I-4619, para 22; ECJ, Case C- 243/01, *Gambelli* (2003) ECR I-3031, para 29.

¹³⁹ ECJ, Case C-432/03, *Commission v Portugal* (2005) ECR I-9665, para 47 and 52.

¹⁴⁰ ECJ, Case C-345/08, *Peśla* (2009) ECR I-11677, para 38.

¹⁴¹ MATTERA, Alfonso. “The principle of mutual recognition and respect for national, regional and local Identities and Traditions“, in SCHIOPPA, Fiorella (ed.). *The Principle of Mutual Recognition in the European Integration Process*. Palgrave Macmillan, 2005, p. 9; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 31.

¹⁴² JANSSENS, *The principle of mutual recognition, op.cit.*, p. 31.

4. Limits of Article 34 Treaty on the Functioning of the European Union

The importance of mutual recognition for the Single Market of the EU can barely be overestimated¹⁴³. In the areas where, at Community level, no harmonized laws exist, only the principle of mutual recognition ensures the free movement of goods. Nevertheless, it is for the Member States to establish a level of protection that they consider appropriate to legitimate objectives, such as environmental, health or consumer protection, to counterbalance the mandatory requirements with the free movement of goods by the principle of proportionality¹⁴⁴.

The import of a product that has been manufactured properly in another Member State and placed on the market can therefore be legally prevented only in two cases¹⁴⁵. Firstly, if unequally applicable measures to foreign and national products exist, it is to regard the exceptions in art. 36 TFEU¹⁴⁶ (which must be strictly interpreted)¹⁴⁷: the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, consumer protection and environmental protection¹⁴⁸.

In the opposed case of equally applicable measures to foreign and national products it is to refer to art. 36 TFEU and additionally to the mandatory requirements of public interest of the *Cassis* case law concerning its inherent non-exhaustive limits which are directly applicable¹⁴⁹.¹⁵⁰ The list developed of overriding requirements to the public interests under the *Cassis*-jurisdiction is still ongoing and continues to evolve¹⁵¹. Examples include environmental protection in the case of “*Danish bottle recycling system*”¹⁵² or the maintenance of media diversity in the event of “*Familia Pres*”¹⁵³.

¹⁴³ CRAIG, *EU law...*, *op.cit.*, p. 649.

¹⁴⁴ ECJ, Case C-333/08, *Commission v France* (2010) ECR I-757, para 87.

¹⁴⁵ STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 831 ff.

¹⁴⁶ Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property Article 36 TFEU.

¹⁴⁷ ECJ, Case C-113/80, *Commission v Ireland* (1981) ECR I-1625; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 832.

¹⁴⁸ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-649, para 8.

¹⁴⁹ ECJ, Case C-309/02, *Radelberger* (2004) ECR I-11763; ECJ, Case C-178/84, *Commission v Germany* (1987) ECR I-1227, para 583; ECJ, Case C-67/74, *Bonsignore* (1975) ECR I-297; ECJ, Case C-215/03, *Salah Oulane* (2005) ECR I-1215; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 841.

¹⁵⁰ ECJ, Case C-120/78, *Cassis de Dijon* (1979) ECR I-649, para 8.

¹⁵¹ SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 191.

¹⁵² ECJ, Case C-302/86, *Commission v Denmark* (1988), ECR I-4607, paras 6 ff..

¹⁵³ ECJ, Case C-368/95, *Familiapress* (1997), ECR I-3689, paras 24 ff..

A Member State can only justify an infringement of this latter rules when fulfilling both elements of the principle of proportionality. Member States may differ from the principle of mutual recognition only under very strict conditions when taking measures to prevent or restrict access of a product from the national market¹⁵⁴.

For this purpose, the relevant provision must fulfill both elements of the principle of proportionality, implying necessity and appropriateness¹⁵⁵. Concerning necessity, the regulation must firstly be based on scientific and technical relevant arguments and be necessary for others to ensure the protection of the consumer, health, etc.¹⁵⁶. A rule is then appropriate (or proportionate in the narrow sense) if there is no alternative that protects the interest to be protected equally and as little impairing the free movement of goods¹⁵⁷. Different national protection systems of the country of origin and destination do not play any role in examining the proportionality¹⁵⁸. Only the goals or chosen level of protection of the determiner state are relevant for the analysis of necessity and appropriateness of the provision¹⁵⁹. In examining the means-end relation of trade restrictions, the ECJ has increasingly applied the guarantees of the European Convention on Human Rights¹⁶⁰. As requirements for the content of press products must be compatible with the protection of media diversity that guarantees freedom of expression according to art. 10 ECHR^{161, 162}. Ultimately, the Member State authorities must be able to be judicially reviewed for legality under EU law (effective legal protection in accordance with the Union fundamental rights)¹⁶³.

5. Problems on mutual recognition and criticism

While the ECJ is absolutely convinced to continue with the integrationist effects of intra-Union market penetration, it cannot be negated that problems exist in how the free movement of goods in the Single Market, and the basis forming principle of mutual recognition operate in practice¹⁶⁴. The EU did not meet the high expectations predicted by the Commission in its 1985 White Paper and it has always been emphasized that the practical application of mutual

¹⁵⁴ *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee – Second biennial report on the application of the principle of mutual recognition in the Single Market*. COM (2002) 419 final, p. 5.

¹⁵⁵ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 30 f.; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 845.

¹⁵⁶ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 30 f..

¹⁵⁷ STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 845 f.

¹⁵⁸ Shown in the ECJ judgments.

¹⁵⁹ SCHEUERMANN, *Das Prinzip der gegenseitigen...*, *op.cit.*, p. 30 f..

¹⁶⁰ ECJ, Case C-260/89, *ERR v DEB* (1991) ECR I-2925; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 845.

¹⁶¹ ECJ, Case C-368/95, *Familiapress* (1997) ECR I-3689, paras 24 ff..

¹⁶² HERDEGEN, Matthias. *Europarecht*. 4ª ed. München. Verlag C. H. Beck, 2002, p. 242.

¹⁶³ ECJ, Case C-260/89, *Kraus v Land Baden-Württemberg* (1993) ECR I- 1663, para 40; STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 845.

¹⁶⁴ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 23.

recognition has been difficult¹⁶⁵. In fact, there is a great variety of reasons for the imperfect functioning of the principle of mutual recognition in the EU¹⁶⁶.

5.1 Transfer of sovereignty

Due to mutual recognition states do no longer control their markets independently as a horizontal transfer of sovereignty is caused from country A to country B by the concept of the origin principle¹⁶⁷. Therefore, the decision on regulations is no longer taken necessarily in the jurisdiction where its consequences are noticeable¹⁶⁸. The national state is no longer responsible and competent for the legislation on its own territory due to the home country control, as some of its consumers operate transactions with companies controlled by other Member States¹⁶⁹. This transfer of sovereignty makes mutual recognition at a very precondition a full integration principle and also shows the origin of the problems, which the Single Market has to overcome¹⁷⁰.

5.2. National thinking of administration correlating with distrust

One of the problems is the fact that the heads of state and government do not ensure their administrations to execute their political will into positive concrete results¹⁷¹. This includes the requirement to make the administrations think and act “European” rather than national¹⁷². This aspect is directly connected with the requirement of mutual trust among all Member States and discloses an alarming ignorance of the implications both of the principle of mutual recognition and a disturbing lack of trust in products or documents originating from other EU countries¹⁷³.

¹⁶⁵ Report from the Commission to the Council, the European Parliament and the Economic and Social Committee – Second biennial report on the application of the principle of mutual recognition in the Single Market. COM (2002) 419 final, p. 2.

¹⁶⁶ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 106.

¹⁶⁷ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 106.

¹⁶⁸ APPELBAUM, R., FELSTINER, W. and GESSNER, V. *Rules of Networks. The Legal Culture of Global Business Transactions*. Oxford. Oxford University Press, 2001, p. 48.

¹⁶⁹ SCHMIDT, “Notwendigerweise unvollkommen...”, *op.cit.*, p. 192.

¹⁷⁰ NICOLAÏDIS, Kalypso. *Mutual Recognition Among Nations: The European Community and Trade in Services* (PHD Dissertation). Harvard, 1993, p. 490 ff.

¹⁷¹ *Second Report from the Commission to the Council and the European Parliament – The implementation of the Commission’s White Paper on completing the internal market*. COM (1987) 203 final, p. 24.

¹⁷² See for instance: *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions- Internal Market Strategy priorities 2003-2006*. COM (2004) 22 final, p.7.

¹⁷³ JANSSENS, *The principle of mutual recognition*, *op.cit.*, p. 107f.

5.3. Legal uncertainty

Member State officials do seem to feel a considerable degree of uncertainty about the scope and potential of the (judicial) principle of mutual recognition¹⁷⁴. This deficit is promoted by the absence of specific procedural rules and the fact that there is no extra paperwork, which can be both considered as a strength or, in this case, as a weakness¹⁷⁵. It prevents market operators from relying on the principle of mutual recognition forcing them to choose a market strategy of “risk avoiding”¹⁷⁶. Therefore, many companies abstain from investing in and exporting to other Member States often due to an incalculable financial risk¹⁷⁷.

5.4. Insufficient transparency

Thirdly, there is still very little transparency of the procedures concerning the free movement of goods¹⁷⁸. No clear procedure exists for a company to follow in challenging negative decisions and no common standards to evaluate if different levels of protection are equivalent¹⁷⁹. This also applies to areas where the ECJ has already delivered unequivocal judgments sentencing a specific measure or practice¹⁸⁰.

5.5. Discrimination of residence and race to the bottom

Due to the applicability of the fundamental freedoms only to cross-border situations, according to art. 34 TFEU¹⁸¹, residence of other Member States may be better off in a particular case than nationals¹⁸². Because of the primacy of art. 34 TFEU, it may happen that Member State legislation are not applicable on imported goods while domestic products remain subject to strict regulations. However, it is argued that the TFEU does not preclude discrimination of residence¹⁸³. The admissibility of discrimination of residence in such cases is only determined according to national law¹⁸⁴. However, discrimination of residence violates the national principle of equality, and regulatory requirements appear disproportionate¹⁸⁵.

¹⁷⁴ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107f.

¹⁷⁵ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107f.

¹⁷⁶ WAGNER, Gerhard. “The Economics of harmonization: the Case of Contract law”. *Common Market Law Review*, 2002, (39): p. 1004.

¹⁷⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107f.

¹⁷⁸ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107f.

¹⁷⁹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107f.

¹⁸⁰ EUROPEAN COMMISSION. “Internal Market Scoreboard”, [on line] <http://ec.europa.eu/internal_market/score/index_en.htm> [accessed: Dec 20, 2015].

¹⁸¹ “...between Member States”.

¹⁸² STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 819 f.

¹⁸³ ECJ, Case C-175/78, *The Queen v Saunders* (1979) ECR I-1129; ECJ, Case C-36/82, *Morsan and Jhanjan* (1982) ECR I-3723; contrary: STREINZ, *Schwerpunktbereich...*, *op.cit.*, recital 810.

¹⁸⁴ ECJ, Case C-64 and 65/96, *Uecker and Jacquet* (1997) ECR I-3182.

¹⁸⁵ ECJ, Case C-64 and 65/96, *Uecker and Jacquet* (1997) ECR I-3182.

5.6. Race to the bottom problem

In general, the question of the race to the bottom problem is if market participants develop a tendency to select countries with the most permissive legislation which might result in attempts of other Member States to deregulate and abolish higher standards¹⁸⁶. It is to be taken into account that in a legislative framework, both the existence of the translation of certain requirements into EU standards and harmonization measures establish important counterweights to the process of “downward harmonization”¹⁸⁷. Reality has shown that Member States have begun to act in order to improve the reputation of their home country’s systems¹⁸⁸. Hence, circumstances are developed for the incremental loosening of host Member State compensatory requirements, and consequently for the growing expansion of the influence and automaticity of the of principle mutual recognition¹⁸⁹.

6. Solutions

The problems delineated are still being tackled by EU bodies¹⁹⁰. Over the years, certain measures have been taken to overcome the obstacles and to reach to a principle of mutual recognition that functions well¹⁹¹. The solution to the former mentioned problems can be subdivided into five measures henceforth described.

6.1. More effectiveness by introducing a better defined framework

The first step on the solution to first successfully apply mutual recognition on national level is to give the principle a specific text to be applied with well-defined corresponding duties¹⁹². Short but sound procedures are required that each competent authority planning to take restrictive measures in relation to goods will be obliged to follow¹⁹³. Furthermore, mutual evaluations could promote the effectiveness by obliging Member States to notify the Commission of the results of national legislation assessments. It will allow Member States to compare their regulatory approaches and to simplify, where necessary, their national legal frameworks.

¹⁸⁶ JANSSENS, *The principle of mutual recognition, op.cit.*, p.104.

¹⁸⁷ PELKMANS, Jacques. “Mutual recognition in goods, on promises and disillusion”. *Journal of European Public Policy*, 2007, 14 (5): p. 708.

¹⁸⁸ NICOLAÏDIS, Kalypso. . “Globalization with Human Faces: Managed Mutual Recognition and the free Movement of Professionals”, in SCHIOPPA, *The Principle of Mutual Recognition...*, *op.cit.*, p. 142; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 109.

¹⁸⁹ NICOLAÏDIS, “Globalization with Human Faces...”, *op.cit.*, p. 142.

¹⁹⁰ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 109.

¹⁹¹ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 109.

¹⁹² JANSSENS, *The principle of mutual recognition, op.cit.*, p. 116; *Communication from the Commission to the European Parliament and the Council – First Report on the Application of Regulation, 764/2008 (n 17)*, p.10.

¹⁹³ ECJ, Case C-391/09, Wardyn-Vardyn (2011) ECR I-3787.

6.2. Seeking for a better understanding

The base of a functioning principle in general is to guarantee that all parties have a sound knowledge of their rights and duties¹⁹⁴. The first step has been done by the Commission having implemented a large amount of initiatives, which aimed at increasing the diffusion of relevant information about the principle of mutual recognition¹⁹⁵. Another measure urged by the Commission to get to a better understanding of mutual recognition were so-called “mutual recognition clauses”¹⁹⁶. Although hotly disputed and partly considered as superfluous because they are a simple confirmation of the Treaty and directive contents¹⁹⁷, practice has shown that the use of such non-obligatory clauses¹⁹⁸ has enhanced legal certainty and transparency, as they call the attention of national authorities and businesses¹⁹⁹.

6.3. Gaining an overview imminent hindress

A great variety of procedures has been established both *a priori* and *a posteriori* to enable the EU to detect any paucity in the mutual recognition mechanism when Member States do not respect the EU dimension drafting their national instruments²⁰⁰. This two-divided attempt implies regular meetings with the competent national administrators during the implementation period (example of *a priori*)²⁰¹ or measures such as mutual evaluations (example of *a posteriori*)²⁰². By supervising presistently the application of the principle of mutual recognition on the ground of notifications, anual reports, and gatherings, the Commission is now able to detect the specific category of goods for which mutual recognition is still problematic and for which further measures are required²⁰³.

¹⁹⁴ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 109.

¹⁹⁵ A practical guide to the concept and application of arts. 28-30 EC [on line] <<http://ec.europa.eu/growth/single-market/goods/>> [accessed: Dec 20, 2015]; *Report from the Commission – Economic Reform: Report on the functioning of the Community product and capital markets*, COM (2001) 736 final, p.13; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 110.

¹⁹⁶ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 110; as for DIR 98/34/EC.

¹⁹⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 111.

¹⁹⁸ ECJ, Case C-184/96, *Commission v France* (1998) ECR I- 6197, para 28; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 111.

¹⁹⁹ GONZÁLEZ VAQUÉ, Luis. “Naturaleza y efecto de las clausulas del reconocimiento mutuo incluidas en las normativas nacionales relativas al mercado interior”, in: *Gaceta Jurídica de la CE*, N° D-27, 1997, pp. 141 ff.; ECJ, Case C-358/01, *Commission vs. Spain* (2003) ECR I-13145.

²⁰⁰ Commission Communication- The non-respect of certain provisioins of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J.C-245, 01.10.1986, p. 4; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 112.

²⁰¹ Communication from the Commission - A Europe of Results – Applying community Law, COM (2007) 502 final, p. 5 f..

²⁰² Article 39 DIR 2006/123/EC; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 112.

²⁰³ Communication from the Commission to the European Parliament and the Council - First report on the Application of Regulation 764/2008 (n 17), p. 1-12.

6.4. Stimulating administration cooperation

In order to ensure a proper functioning of compliance control, it is to solve the problem of practical barriers - for instance different administrative and working cultures, language barriers and a deficiency of exactly identified partners in other EU countries – which still impede cooperation frequently²⁰⁴.

The Single Market Information system (IMI)²⁰⁵ was a first step into the direction of stimulating administration cooperation²⁰⁶. Concentrating on the non-harmonized areas the perspective is by some means less promising. Still there exist no well-functioning standardized cooperation between national authorities, regardless of the ECJ jurisdiction on the matter²⁰⁷.

6.5. Harmonization

Reality has shown that mutual recognition has certain limits, which must be detected and which can only be overcome by harmonization²⁰⁸. Therefore, a coherent combination of the principle of mutual recognition and (minimum) harmonization in procedural law is required²⁰⁹.

The horizontal transfer of sovereignty mentioned before is only acceptable if Member States can be sure that EU-wide standardization is not abused by either side to their advantage²¹⁰. Harmonization also has the function to guarantee this²¹¹. As harmonization and mutual recognition are complementary integration mechanisms, which are based on the same objectives, it is therefore that harmonization can be considered a solution to the mutual recognition²¹².

²⁰⁴ ECJ, Case C-200/02, Zhu and Chen (2004) ECR I-9925; JANSSENS, *The principle of mutual recognition, op.cit.*, p. 20.

²⁰⁵ Proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System, COM (2011) 883 final.

²⁰⁶ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 118.

²⁰⁷ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 118.

²⁰⁸ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 113.

²⁰⁹ ECJ, Case C-318/07, Persche (2009) ECR I-359, para 49.

²¹⁰ SCHMIDT, "Notwendigerweise unvollkommen...", *op.cit.*, p. 192.

²¹¹ SCHMIDT, "Notwendigerweise unvollkommen...", *op.cit.*, p. 192.

²¹² MAJONE, Giandomenico. "Mutual Recognition in Federal Type Systems", in: MULLINS, A. and SAUNDERS, C. (eds). *Economic Union in Federal Systems*. Sydney. The Federation Press, 1994, pp. 83 and 75.

7. Conclusion

Summing it up, the ECJ case law has played a key role to promote the principle of mutual recognition concerning the free movement of goods in EU law. Since the *Cassis de Dijon* judgment, mutual recognition has evolved into the cornerstone of the Single Market – in the judicial (and legislative) fields²¹³. As demonstrated, the principle of mutual recognition is presumably the most important guideline for the ECJ giving a uniform and autonomous interpretation of provisions of EU law. It can be said that the principle of mutual recognition helps to overcome legal inequalities between Member States as long as a uniform level of protection is ensured. It will especially find an easier application when provisions are already largely harmonized and only formal differences must be overcome.

It has been shown, that the principle of mutual recognition continues to play the pivotal role in the Single Market context despite some difficulties in daily practice indicated by the great amount of judgments. The displayed solutions give a hint of the quantity of options and work which is to be done in order to entirely fulfill the principle of mutual recognition. Late legislative instruments which seek to improve the workability of mutual recognition indeed approved its value and indicate that it stays an issue of high interest for the European legislator²¹⁴. It is to wait what role the ECJ will play in the future concerning the development of the principle of mutual recognition in terms of the free movement of goods.

²¹³ JANSSENS, *The principle of mutual recognition, op.cit.*, p. 107.

²¹⁴ MONTI, Mario. “A new strategy for the Single market”, 2010, p. 20, [on line] <http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf> [accessed: Dec 20, 2015].