THE ROLE, IMPACT AND DEVELOPMENT OF THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW

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Introduction

The principle of mutual recognition is one of the most avowed novelties of the European Union (EU) legal order, which has gained substantial importance first in the EU internal market area and more recently in the area of justice and home affairs.

Having originally developed in the EU internal market law, particularly due to renowned Cassis de Dijon landmark judgment, however, nowadays aside from internal market area, the principle is also extended to judicial cooperation in security and criminal matters.

The main purpose of the paper is to analyze the role and development of the principle of mutual recognition in the EU legal order and to describe its effect and importance in EU law. Given the divergent way of establishment, development and impact of the principle of mutual recognition, the paper will focus specifically on two areas of EU law - the internal market, particularly the free movement of goods, and home and justice area. Tracing it back to the Cassis de Dijon judgment, firstly the paper looks at the way how this principle was developed over time, secondly, it provides comparative analysis of divergent outcomes of its implementation in the context of free movement of goods and justice and home affairs.

The principle of mutual recognition in the internal (goods) market area

Given the profound potential to pursue market integration, while respecting "diversity" amongst the participating countries, mutual recognition is considered as one of the most appreciated innovations of the European Union[1].

The principle of mutual recognition establishes an institutional rule of behavior arranging a particular behavior among Member States in the EC/EU. In the area of single market, under this principle all Member States are required to make their national technical rules regarding importing and exporting goods freely available. In other words, Member States must allow goods that are legally produced and marketed in another Member State to be also sold in their own territory.

[1] **J. Pelkmans**, Mutual Recognition: economic and regulatory logic in goods and services, «Bruges European Economic Research Papers», 24/2012, p. 2.

According to A. Héritier, "Mutual recognition as an institutional rule governing market integration allows for the free movement of goods, services and persons, based on home country rule and the recognition of the legitimacy of different, but equivalent, regulation in the other Member States. As such, it is different from the institutional rules of harmonization and national treatment, and represents an institutional rule of eminent importance in dealing with the diversity of Member States"[2]. M. Maduro defines mutual recognition as "a mode of governance". Moreover, as the author argues, "the different variables of participation and representation in mutual recognition explain the variety of forms of mutual recognition highlighted in the different contributions and its higher or lower success in different policy areas" [3].

Discussing the establishment of the principle in the area of internal market, it should be referred to the regulatory diversity of Member States that initially hampered market integration in trade. After some 20 years of building the EU internal market, a huge number of regulatory barriers were still in place. In the 1960s, the European Commission, which had first aimed at harmonization, but found the process costly and very slow, started to consider mutual recognition to stimulate market integration. However, given the historical context when internal market integration process was being hindered by unanimity requirement within the Council and when other mechanisms in tackling obstacles from divergent national legislation appeared insufficient, the mutual recognition principle in the single market area was introduced through the case law.

The milestone in the European Court of Justice's (ECJ) mutual recognition case law regarding the goods sector is linked to the Cassis de Dijon judgment, in which the ECJ for the first time defines the "origin principle" - Member States must allow a product lawfully produced and marketed in another Member State into their own market.

In this famous case the ECJ expanded the scope of EU law by introducing the principle of mutual recognition into the area of free movement of goods. Particularly, the ECJ was asked whether Germany was allowed to refuse the import of the French liquor on the ground that it didn't correspond to the minimum alcohol percentage required by German law. In its judgment the ECJ stated that, the German provision was prohibited under Art. 34 of TFEU, adding that in principle, "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"[4]. This statement clearly embraces the principle of mutual recognition. Along with this, it is generally acknowledged that with this statement the ECJ introduced the principle of equivalence. The idea behind is that Member States must allow a product lawfully produced and marketed in another Member State into its own market, thus

[2] **A. Héritier**, Mutual recognition: comparing policy areas, «Journal of European Public Policy», 2007, p. 801.

[3] **M. Maduro**, So close and yet so far: the paradoxes of mutual recognition, „Journal of European Public Policy", 2007, p. 816.

[4] ECJ, Case 120/78, Rewe-Zentrale AG vs Bundesmonopolverwaltung für Branntwein [1979] ECR 649, para 14.

it can't refer to specific details of national regulation to imports of goods within the EU, if the objective of the relevant law in other Member States is equivalent to that of the importing country[5].

Another fundamental aspect of the mutual recognition mechanism introduced by the ECJ in the Cassis de Dijon judgment relates to rule of reason or, in other words, to mandatory requirements that Member States were allowed to invoke through national rules which constitute a barrier to the free movement of goods in order to protect important public interests such as health and safety protection, provided that the measure is necessary and proportionate. As it is stated in the judgment, "In absence of common rules it is for the Member State to regulate all matters relating to the production and marketing of alcohol on their territories. Obstacles to movement within the Community resulting from disparities between the national laws must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements"[6].

However, as Ch. Janssen argues, despite the fact that Cassis de Dijon is considered as milestone in the ECJ's mutual recognition case law relating to the sector of free movement of goods, certain previous judgements in this area should be considered as well.[7] Particularly the Dassonville case is of special importance due to its broad definition of Art. 34 TFEU, which resulted in the prohibition of every trading rule enacted by Member States capable to impede – directly or indirectly, actually or potentially – intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions[8], had obviously paved the way for the launch of the principle of mutual recognition in Cassis de Dijon. Moreover, one specific statement in the ECJ's Dassonville judgment, particularly that "a Member State is in principle allowed to take measure to prevent unfair commercial practices subject to the condition that these measures should be reasonable"[9], could be seen as predecessor of the rule of reason/mandatory requirements as later on developed in the Cassis de Dijon case law.

Certain significant features of the principle of mutual recognition, such as equivalence criterion, prohibition of double controls and dual borders, were further developed in the post-Cassis de Dijon case law[10].

Another crucial case that affected the development of the principle of mutual recognition in the area of single (goods) market was the Keck and Mithouard case and its subsequent case law which because of its clarifications

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[5] See, **J. Pelkmans,** Op. cit., p. 2.

[6] ECJ, Case 120/78, Rewe-Zentrale AG vs Bundesmonopolverwaltung für Branntwein [1979] ECR 649, para 8.

[7] See, **Ch. Janssen,** The Principle of Mutual Recognition in the EU, «Oxford University Press», 2013, pp. 13-14.

[8] ECJ, Case 8/74, Procureur du Roi vs Dassonville [1974] ECR 837, para 5.

[9] Ibid., para 6.

[10] Particularly the principle was developed in ECJ, Commission vs Ireland, C-113/80 [1981] ECR 1625.

on a market access and the Dassonville judgement significantly restricted the scope of the principle of mutual recognition[11].

Apparently, the ECJ with its landmark judgments prepared the ground for the further development of the principle of mutual recognition. Subsequently, in response to businesses' complaints and criticism in 1990s regarding the factual working of mutual recognition and the costs which were severely discouraging the exploitation of mutual recognition and therefore losing a good deal of the potential benefits for the internal (goods) market, the European Commission began the building of mutual recognition governance together with the Member States. To make the mutual recognition principle fully operational and to reduce the costs, the European Parliament and the Council adopted the Mutual Recognition Regulation (EC 764/2008).

The Regulation, in force since May 2009, significantly simplifies market entry for enterprises and strengthens the operation of free trade in goods in the EU. It defines the rights and obligations of national authorities and businesses wishing to sell in a Member State products lawfully produced and marketed in another Member State, when the competent authorities intend to take restrictive measures about the product in accordance with national technical rules. In particular, the Regulation focuses on the burden of proof by setting out the procedural requirements for denying mutual recognition[12].

As J. Pelkmans argues, this new governance of judicial mutual recognition gives far-reaching legal certainty, inter alia via a reversal of the burden of proof for non-conformity of goods already allowed on the market in other Member States. According to the author, "the purpose of the regulation is to significantly reduce the various costs of mutual recognition to European business and, in so doing, enhance the internal market benefits. It does this via two routes: (a) information obligations (e.g. on technical requirements in rules for the relevant goods) are imposed on EU countries in order to help EU-based companies intending to access the local market as well as administrations of other Member States; (b) a detailed specification of how a correct application of mutual recognition brings with it extensive procedural safeguards, such that the burden of proof of not granting mutual recognition is essentially on the importing Member State"[13].

As regards to the effects of the principle of mutual recognition in the internal (goods) market area obviously it has been a significant innovation facilitating economic intercommunication across borders. The principle of mutual recognition has an essential impact and plays a fundamental role in the internal market area since it ensures free movement of goods without making it necessary to harmonize national legislation. In the EU's internal market the principle

[11] ECJ, Bernard Keck and Daniel Mithouard, Joined Cases C-267/91 and 2-268/91,[1993] E.C.R. 1-6097.

[12] See, Regulation (EC) No 764/2008 of the European Parliament and the Council of 9 July 2008. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0021:0029:EN:PDF

[13] **J. Pelkmans**, Op. cit., pp. 35-36.

of mutual recognition helped to tackle or avoid the remaining hindrances, in particular regulatory barriers between Member States. As J. Pelkmans puts it "mutual recognition in EU goods markets is well developed and has helped to realize free movement while respecting diversity and some national regulatory autonomy"[14].

The principle of mutual recognition in the area of home, security and justice

Subsequently, the principle of mutual recognition, initially introduced in the Cassis de Dijon judgment, has spilled over from goods to other categories, mainly in free movement of services, persons and capital. Moreover, nowadays the mutual recognition is also a guiding principle in civil and criminal justice matters.

Particularly, in the home and justice area the principle had been realized in the system of state responsibility for the examination of asylum claims in accordance with the Dublin Convention (1990), and later turned into a European Community (EC) Regulation. Later on, at the Tampere European Council in 1999, it was decided that the principle of mutual recognition should become a headstone of judicial co-operation in both civil and criminal matters within the EU[15].

As S. Lavenex argues, the motives for adopting the principle in market integration and the area of freedom, security and justice are similar: it allows for co-ordination despite the impossibility of agreeing on the harmonization of rules and a fully supranational integration. According to the author, "the justification of the introduction of the principle of mutual recognition in justice and home area draws on the analogy with single market integration, its dynamism and success"[16].

Comparing the establishment of the mutual recognition principle in the field of free movement of goods with the case of the third pillar legislation, it becomes evident that, in the course of the introduction of the principle of mutual recognition in EU justice and home affairs there has been no Court activism comparable to the rulings of Dassonville and Cassis de Dijon on the free movement of goods, but primarily the Commission's initiative.

Noting the stagnation and ineffectiveness of traditional forms of judicial cooperation, the Commission argued in its Communication on the introduction of the principle that "borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition"[17]. Mainly, "a deci-

[14] **J. Pelkmans,** Mutual recognition in goods. On promises and disillusions, «Journal of European Public Policy», 2007, p. 713.

[15] See, «Tampere European Council. Presidency Conclusions. 15 and 16 October 1999». http://www.europarl. europa.eu/summits/tam_en.htm.

[16] **S. Lavenex,** Mutual recognition and the monopoly of force: limits of the single market analogy, „Journal of European Public Policy", 2007, p. 764.

[17] European Commission (2000) Communication on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final of 26 July 2000, p. 2.

sion taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case"[18].

Subsequently, the principle of mutual recognition in criminal matters has become the guiding principle in the criminal justice area since the European Council meeting in Tampere. In this domain mutual recognition aims foremost to promote effective cooperation at the levels of criminal investigation, prosecution and conviction in order to guarantee high level of security in the EU, as required by the Art 67 TFEU[19].

The first manifestation of a duty of mutual recognition in criminal matters through ECJ activity was the Gözültok and Brügge case of 2003, in which the Court not only constituted a vivid expression of the concepts of mutual trust and mutual harmonization in criminal matters but also indirectly appealed for some harmonization of the Member States' criminal justice systems. In its famous judgment the Court ruled that the *ne bis in idem* principle outlined in Article 54 of the Convention implementing the Schengen Agreement (CISA) necessarily implies that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied[20]. Moreover, clarifying the rationale behind the principle, the Court underlined that "the integration of the Schengen *acquis* (which includes Article 54 of the CISA) into the framework of the European Union is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which it is its objective to maintain and develop"[21].

However, in spite of the success in the internal market field, the mutual recognition in justice and home affairs has been declared as a loose principle of action which has remained void in practice[22].

As A. Héritier argues, when the heads of state and governments adopted the principle of mutual recognition at the Tampere European Council in 1999 it was simultaneously linked to multiple derogations, given that justice and home affairs are very close to the core of national sovereignty[23].

The more difficult context for mutual recognition in the home and justice area compared to the single market area is also exemplified by S. Lavenex, claiming that, issues of justice and home affairs are close to the very essence of national sovereignty, fundamental human rights and security issues and requires a much broader systems' recognition. Thus, when it comes to accepting the judicial verdicts of other Member States, detention and arresting people Mem-

[18] Ibid., p. 4.

[19] See, «Tampere European Council. Presidency Conclusions. 15 and 16 October 1999». http://www.europarl.europa.eu/ summits/tam_en.htm.

[20] ECJ, Gözütok and Brügget, C-187/01 and 385/01, [2003], para 33.

[21] Ibid, para 37

[22] See, **S. Lavenex**, Op. cit., pp. 775-776.

[23] See, **A. Héritier,** Op. cit., p. 806.

ber States are hesitant to pool sovereignty at the European level. S. Lavenex demonstrates this by claiming that mutual recognition in the area of justice and security is actually mainly an instrument to reinforce the power of national governments over other branches of power within the states. Moreover, in the area of home, justice and security analyzed in her contribution, Member States have to go further than simply recognize other norms and judicial decisions as equivalent to their own. To put it shortly, Member States have to accept and enforce other systems of law. This obviously requires a higher degree of mutual trust than in the area of economic integration [24].

This view is supported by M. Maduro, claiming that "the mutual recognition of judicial decisions is not based simply on the mutual recognition of each applicable norm but on the assumption that the other's judicial and legislative decisions are legitimate in systemic terms. It is the entire system which must be recognized as a system affording all the appropriate protections, notably in the area of fundamental rights. This involves the recognition of rules, goals and the processes and institutions through which they are adopted and implemented in another system"[25].

Not surprisingly, therefore, that the principle of mutual recognition in the area of justice and home affairs was established and developed with multiple grounds of derogations. Besides, the instruments of implementation of the principle of mutual recognition have been incredibly weak.

Under the only loose principle of mutual recognition, for instance in asylum and immigration matters, there are multiple grounds for the refusal of asylum seekers. Moreover, the established principle of mutual recognition in asylum matters – the Dublin system - leaves significant margin of appreciation by Member States, and thus, does not work effectively according to the evaluation report published by the European Commission[26].

As S. Lavenex emphasizes in her article, when it comes to the implementation of the principle of mutual recognition in the home and justice area, only a few effective mechanisms to implement the political decisions have been introduced. The first measure to officially apply the principle of mutual recognition in justice and home area is the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States. This followed by the European Evidence Warrant and framework decisions on freezing of accounts, property or evidence, confiscation and financial penalties. However, since the framework decision is only outlining the main guidelines, its realization is dependent on the national legislators who are responsible for the successful transpose of the European text and the competent

[24] See, **S. Lavenex**, Op.cit., pp. 774-775.

[25] **M. Maduro**, Op. cit., p. 823.

[26] Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system. Brussels, 6.6.2007. COM(2007) 299 final. http://www.eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri= COM:2007:0299:FIN:EN:PDF; European Commission, Commission Staff Working Paper Accompanying the Communication on the Evaluation of the Dublin System SEC(2007)742 Brussels 6 June 2007.

judicial authorities for the application of the warrant[27].

In addition, as A. Héritier claims, the implementation of the principle of mutual recognition in the home and justice area appears to be extremely difficult because of different constitutional traditions[28].

Therefore, predictably, when it comes to the effectiveness of the implementation and effects of the principle the results of mutual recognition in justice and home affairs are mainly modest.

Conclusion

To sum up the above-mentioned, it can be inferred that in the initial phase of the internal (goods) market strategy, as well as in the early stages of the EU criminal justice cooperation in order to tackle the problem of disparity between Member States' jurisprudence the European legislator determined a solely harmonizing approach. Yet in both contexts, such an approach led to disappointing results. Thus, in order to overcome the difficulties arising from a harmonizing approach and with the aim of contributing to the integration process that was held by ECJ in the Cassis de Dijon judgment, the Member States' duty is to recognize goods that are lawfully produced in another Member State. At the same time, in Gözültok and Brügge judgment it was reiterated that each Member State should recognize the criminal law in effect in another Member State. Clearly, these important judgments saw the introduction of the principle of mutual recognition first in the internal market area and later on in the area of freedom, security and justice.

In addition to the ECJ's activity, the principle of mutual recognition was also taken up by the EU institutions, which realized that in view of the impossibility of agreeing on detailed harmonization, the only alternate for more integration was through mutual recognition.

However, the fact that similar motives lay behind the principle of mutual recognition's introduction in the area of internal (goods) market and home and justice sphere, does not necessarily prove that the principle is equally suitable for each context.

As a result of significant differences in the goals and objectives pursued in each area, and of the specific nature of criminal justice, it's obvious that transferring a key idea from an economic integration project to the area of core statehood – the justice and home field – has been ineffective in practice.

Keywords: *European Union, European Law, Principle of Mutual Recognition, Single Market, Home and Justice Affairs, Mutual Recognition Regulation, Tampere European Council*

ՆՈՐԱ ԳԵՎՈՐԳՅԱՆ – *Համատեղ ճանաչման սկզբունքի դերը, ազդեցությունը և զարգացումը եվրոպական իրավունքում* – Համատեղ ճանաչման սկզբունքը եվրոպական իրավունքի կարևորագույն նորամու-

[27] See, **S. Lavenex**, Op. cit., pp. 772-773.
[28] See, **A. Héritier**, Op. cit., p. 811.

ծություններից է, որը, նախ ի հայտ գալով ԵՄ-ի ներքին առևտրային իրավական դաշտում, ներկայումս լայնորեն կիրառվում է նաև եվրոպական իրավունքի այլ ոլորտներում:

Ուսումնասիրելով «Կասսիս դե Դիժոն» հանրահայտ դատական որոշումից հետո եվրոպական իրավունքում տվյալ սկզբունքի զարգացման պատմությունը՝ հոդվածում ներկայացվում է խնդրո առարկա սկզբունքի ազդեցությունը եվրոպական իրավունքում, տրվում է դրա կիրառման արդյունավետության համեմատական վերլուծություն եվրոպական իրավունքի հետևյալ երկու ոլորտներում՝ ընդհանուր շուկա (ապրանքների ազատ տեղաշարժ) և ներքին գործեր ու արդարադատություն:

Բանալի բառեր – *Եվրոպական միություն, եվրոպական իրավունք, համատեղ ճանաչման սկզբունք, ընդհանուր շուկա, ներքին գործերի և արդարադատության ոլորտ, համատեղ ճանաչման կանոնակարգ, Տամպերեի Եվրոպական խորհուրդ*

НОРА ГЕВОРКЯН – ***Роль, влияние и развитие принципа взаимного признания в европейском праве.*** – Принцип взаимного признания – одно из революционных нововведений правового порядка Европейского Союза. Изначально разработанный во внутреннем рыночном праве ЕС, в настоящее время он широко применяется и в других областях европейского права.

В статье прослеживается развитие этого принципа, проделан сравнительный анализ эффективности его реализации в зависимости от сферы применения, в частности в контексте свободного движения товаров и сотрудничества в области юстиции и внутренних дел.

Ключевые слова: *Европейский Союз, европейское право, принцип взаимного признания, общий рынок, сфера юстиции и внутренних дел, регламент по взаимному признанию, Европейский Совет в Тампер*