# The principle of mutual recognition: from the internal market to the European area of freedom, security and justice

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***Abstract***

*The principle of mutual recognition represents one of the brilliant creations of the Court of Justice of the European Union, which has significantly contributed to the achievement of the free movement of goods, in the absence of the approximation of national laws, and which is impressive even today by its depth and vocation to extend to new fields of European integration. Mutual recognition is one of the efficient solutions in order to have unity in diversity and also common objectives to reach. We find the principle of mutual recognition in the sphere of the fundamental freedoms of the internal market and in very different domains of the internal market too. Judicial cooperation in civil and criminal matters uses this principle in order to ensure the free movement of judgements and the effectiveness of criminal proceedings. The application of the principle in very different fields has illustrated its utility, as well as the particularities of each area. By observing these particularities, we can better understand the European integration specificity in various fields and its challenges. Our research is descriptive, explanatory and comparative, being accompanied by the relevant case law of the Court of Justice of the European Union.*

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## 1. Introduction

The principle of mutual recognition is one of the brilliant creations of the Court of Justice of the European Union, which has become "an institutional rule of eminent importance in dealing with the diversity of Member States"[2] and a "mode of governance"[3]. This principle has significantly contributed to the achievement of the free movement of goods in *the absence of the harmonization of national laws* and still impresses today by its depth and vocation to expand to new areas of European integration. The principle has been applied to the free movement of workers with regard to the recognition of diplomas and professional qualifications obtained in another Member State of the European Union (*section 1*).

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[2] Nora Gevorgyan, *The role, impact and development of the principle of mutual recongnition in EU law*, p. 68. The study is available at http://ysu.am/files/08N_Gevorgyan_e.pdf (last accessed 29.10.2021).

[3] Miguel Poiares Maduro, *So close and yet so far: the paradoxes of mutual recognition*, Journal of European Public Policy, p. 816, vol. 14, issue 5, 2007, cited by Nora Gevorgyan, *op. cit*., p. 68.

Those who exercise the fundamental freedoms of the internal market know the social, political, legal and cultural realities of other Member States of the European Union. Sometimes, they face them and even go to court. The more different the court procedures in the host States than in the home State, the more they become a deterrent in the exercise of the freedoms of movement specific to the internal market. For this reason, Member States began to cooperate in the field of justice. The Treaty signed in Maastricht and entered into force on 1 November 1993 established a European Union consisting of three pillars: the European Communities, the Common Foreign and Security Policy, and the Cooperation in the field of justice and home affairs. On the occasion of subsequent treaties, the last pillar gradually shifted from the sphere of intergovernmental cooperation to that of European integration.

Judicial cooperation implies the *mutual recognition* of judgments and decisions in extrajudicial cases pronounced by the authorities of the Member States of the European Union, in other states of the same Union, so that the decisions can "circulate" freely, together with their addressees/beneficiaries. To this end, the 1968 Brussels Convention, which was replaced by Regulation 44/2001 (also called Brussels I)[4], which was in turn replaced by Regulation 1215/2012[5], eliminated exequatur proceedings between Member States for all judgments in civil and commercial matters. Pursuant to art. 82(1) TFEU, judicial cooperation in criminal matters within the Union is based on the principle of mutual recognition of judgments and judicial decisions. The European Commission has defined the principle of mutual recognition in criminal matters as the *belief* that even if a Member State did not treat a particular matter in the same or similar way in terms of regulation, the results of the procedure are equivalent to those obtained in the Member State where the request was made. In this matter, the Court of Justice of the European Union has tried to find the optimal balance between the principle of mutual recognition and the protection of fundamental rights (*section 2*).

## 2. The internal market - the original field of application of the principle of mutual recognition

### 2.1 Free movement of goods

European integration is, at its core, economic integration. It started in the economic field and has embraced the most advanced forms of manifestation in this field too. The customs union, the internal market, the economic and monetary union are the most visible forms of expression of European integration. The internal market means, first of all, the free movement of the factors of production: goods, workers, services and capital.

[4] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force on 1 March 2002.

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (OJ L 351, 20.12.2012, p. 1). It is considered a reformed version of the Brussels I Regulation and contains a number of significant changes to the original text of the Brussels I Regulation.

Free movement of goods. In a first stage, the common market involved the achievement of the customs union, by the progressive abolition of customs duties and other taxes or restrictions having equivalent effect. Secondly, measures such as "quotas, levies, aid or other measures, more or less attached to national markets and intended to ensure their direct or indirect protection"[6] had to be abolished. Common rules on competition and taxation, Community policies and "a beginning of approximation of national economic policies"[7] make the distinction between the common market and the single or internal market, by the degree of integration achieved. Customs duties remained only the "tip of the iceberg"[8]. Numerous technical, legislative or regulatory obstacles continued to persist.

The contribution of the European Court of Justice in the application of the specific freedoms of the internal market and in its fulfilment has been decisive. The Court recognized the direct vertical and horizontal effect on all the basic articles of the Treaties, which guaranteed the specific freedoms of the common market, with certain mitigations regarding the movement of goods. It has strengthened fundamental economic freedoms through a broad interpretation, but has also created, for the benefit of the States, the possibility of justifying possible restrictive measures for reasons other than those provided for in the Treaty. At the same time, the Community court developed a triad of principles, which were later found in secondary law: *the principle of mutual recognition, the principle of national treatment and the test of necessity and proportionality*. The role of these principles has been essential for the achievement and functioning of the internal market.

The free movement of goods entailed the elimination of customs duties on imports and exports, customs duties of a fiscal nature, duties having an effect equivalent to customs duties between the Member States of the European Communities, as well as discriminatory or protectionist internal taxes with regard to goods from other states. Secondly, the quantitative restrictions on imports and exports, as well as the measures having an effect equivalent to quantitative restrictions, were removed. Thirdly, the *negative integration* achieved through the elimination of the duties and measures listed above has been complemented by *positive integration*, i.e. regulatory action and non-regulatory action of the Community institutions with a view to partial or total harmonization of the laws of the Member States, affecting the movement of goods.

The principle of mutual recognition has allowed the free movement of goods prior to the European legislative harmonization process and continues to do so in the case of products not subject to Community harmonization legislation or those aspects of products not covered by that legislation. *From this perspective, the principle is a simple and effective tool for the achievement of the internal market, which observes the legislative diversity of the Member States.* "Mutual recognition starts from the

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[6] Jean Boulouis, *Nouvelles réflexions à propos du caractère préjudiciale de la compétence de la Cour de Justice des Communautés européennes statuant sur renvoi des juridictions nationales*, Mélanges offerts à Pierre-Henri Teitgen, Edit. A. Pedone, 1984, p. 60.

[7] Jean-Michel Favret, *Droit et pratique de l'Union européenne*, Edit. Gaulino, 2003, p. 47.

[8] See Christian Philip, *Les Institutions européennes*, Ed. Masson, 1981, p. 148.

idea that member states have equivalent regulatory objectives in safety, health, environment and consumer protection (...) which (...) is very often correct. (...) a good entering one member state from another EU country must be allowed unhindered access, even if the detailed specifications in the relevant domestic regulation differ from those in the country of origin, as long as the regulatory objectives are equivalent: from a narrow regulatory point of view, it would thus seem as if the importing country 'recognises' the regulatory regime of the exporting country"[9]. The burden of proving that the objectives in the Member State of origin are not equivalent is the responsibility of the authorities of the Member State in whose territory the goods are to be marketed.

The "birth" of the principle is associated in the European law literature with the *Cassis de Dijon*[10] judgment, but elements of the judicial reasoning on which mutual recognition is based appeared prior to this case. In Dassonville[11], the ECJ ruled that "the requirement of a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty"[12]. In the same sense, Member States may not refuse certificates or test reports issued by a conformity assessment body accredited for the relevant field of conformity assessment activity on grounds relating to the competence of that body[13].

Rewe-Zentral AG, a German law company based in Cologne, wanted to import a consignment of 'Cassis de Dijon' liqueur originating in France for marketing in its country of origin. For that purpose, Rewe-Zentral AG applied to the Federal Monopoly Administration for Spirits for authorization to import that product. The public authority did not issue the requested authorization because the product did not have the necessary qualities to be marketed in Germany due to its

[9] Jacques Pelkmans, *Mutual Recognition in Goods and Services: An Economic Perspective*, p. 2. The study is available at http://aei.pitt. edu/1852/1/ENEPRI_WP16.pdf (last accessed 29.10.2021).

[10] Case 120/78, judgment of 20 February 1979, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A61978 CJ0120.

[11] Case C-8/74, judgment of 11 July 1974, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0008-1974-200802151-05_00.pdf.

[12] The European Commission has defined measures having an effect equivalent to quantitative restrictions as those measures resulting from any type of act issuing from a public authority (legislative, administrative or a simple recommendation), as well as administrative practices which, once applied, preclude importation from other Member States or make it more difficult or more costly than the disposal of domestic production, without this being necessary in order to achieve an objective which remains within the competence of the Member States to enact trade rules (Commission Directive 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports in pursuance of the EEC Treaty (OJ L 13/29 of 31.05.1970, pp. 3-5)).

[13] Art. 5 of 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/CE (https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32008R0764&from=EN, last accessed 29.10.2021).

insufficient alcoholic strength. German law required a minimum alcohol content of 25% in the case of the marketing of fruit liqueurs such as 'Cassis de Dijon'. The product which Rewe-Zentral AG wanted to import for marketing purposes in Germany had an alcoholic strength of 15% up to 20%.

Having been referred for a preliminary ruling by the Financial Court of the Land of Hesse relating to the application of the concept of "measure having an effect equivalent to quantitative restrictions" in the case of the alcoholic strength requirement in German law, the Court of Justice started its reasoning by finding the absence of common European laws on the production and marketing of alcohol and spirits. In a second stage, the Court examined the reasons put forward by the German Government in justifying the minimum alcoholic strength and concluded that they did not pursue an objective of general interest such as to take precedence over the requirements of the free movement of goods, which is one of the fundamental rules of the Community. Subsequently, the judges described the requirement for a minimum alcohol content for the marketing of spirits as an obstacle to the free movement of goods[14]. The principle of mutual recognition was set out in a single paragraph of the judgment. According to paragraph 14(4), "there is therefore 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; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules."

*Also called the rule of the country of origin, the principle of mutual recognition implies that a good lawfully put into circulation in one Member State be admitted into any other Member State without further restrictions, even if the State of destination has stricter rules, and yet, certain exceptions of general interest are allowed if they are in compliance with Community law. The burden of proving compliance with the rules of the country of origin lies with the importer.*

The Community court has pointed out that the rules which a Member State imposes on products marketed in its territory may give rise to additional costs for economic operators wishing to import those products from other Member States, since the imported products must comply with both the rules of the State of origin and the rules of the State of destination, which is likely to discourage intra-Community trade.

In the absence of Community rules on the manufacture and marketing of products, Member States take regulatory measures in this regard. National regulations will always be a source of obstacles, of various intensity, to the free movement of goods simply because they are different. The resulting obstacles are even allowed under certain conditions. "Obstacles to movement within the Community resulting from disparities between the national laws relating to the

[14] The Court of Justice subsequently changed its approach to restrictive measures in the way of the fundamental freedoms of the internal market by determining whether there was such a measure and subsequently verifying whether it could be justified by the objectives invoked by States and was within a relationship of necessity and proportionality with them.

marketing of the products in question must be accepted in so far as such 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"[15]. The subsequent evolution in the case law of the Court of Justice has demonstrated that this list has not been exhaustive. "(...) Therefore, in order to be justified with regard to the fundamental principle of the free movement of goods within the internal market, a mandatory prior authorisation procedure should pursue a public-interest objective recognised by Community law, and should be non-discriminatory and proportionate; that is to say, it should be appropriate to ensure achievement of the aim pursued but not go beyond what is necessary in order to achieve that aim."[16]

"The difficulty consists in that it could be said that all rules which directly or indirectly concern trade, affect the free movement of goods in one way or another"[17]. Starting from this remark, the economic agents challenged before the ECJ all kinds of national trade measures, an evolution that also demonstrated the shortcomings of the Cassis de Dijon case law[18]. Fourteen years after that judgment, the Court of Justice revived its case law on the free movement of goods in *Keck and Mithouard*[19]. "(...) contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and 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"[20].

This case law revival relied on the distinction between internal rules and practices concerning the substance/content of a product and those concerning the

[15] *Rewe-Zentral*, cit. supra., par. 8.

[16] 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 (https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32008R0764&from=EN, last accessed 29.10.2021).

[17] Paul Craig, Grainne De Burca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină,* 4th ed., Ed. Hamangiu, 2009, p. 848.

[18] Marianne Dony made an inventory of the measures sanctioned by the ECJ, according to the Cassis case law: the ban on the sale of pasta obtained from durum wheat, the obligation to sell margarine in cubic packaging, the reservation of the right to use the name "yogurt" only for fresh yogurts, etc. (Marianne Dony, *Droit de la Communauté et de l'Union européenne*, Edit. ULB, 2001).

[19] *Keck and Mithouard*, joined cases C-267 and 268/91, judgment of 24 November 1993. In the main litigation, Mr Keck and Mr Mithouard were brought before the French courts for the sale of goods at a lower price than the purchase price, an operation prohibited by French law. The two claimed that this ban violated the free movement of goods, and the ECJ was notified by way of reference for a preliminary ruling.

[20] *Keck and Mithouard*, cit. supra, par. 16; See also a more recent case C-441/04, *A-Punkt Schmuckhandels GmbH*, judgment of 23 February 2006.

marketing of products. The latter usually cause a lower impact on intra-Community trade and do not constitute double-duty rules for traders, since they must comply with the provisions of the State in which they intend to sell the goods. In exchange, the requirements related to the content of the product make trade more costly, because those who trade must ensure compliance of the product with both the rules of the country where it was manufactured (country of origin) and those of the country where the sale is intended (country of destination). This type of restrictions has been called by the doctrine, *double-duty rules*. The difference in treatment between the two categories of rules "could be explained by the fact that the rules on product conditions prove to be more restrictive for the free movement than those on the methods of sale" [21]. The restrictions which, together with Keck, were removed from the scope of art. 34 TFEU, seem to have rather an uncertain, hypothetical restrictive effect on trade.

The Keck and Mithouard case law has allowed the prohibition of pharmacists to advertise parapharmaceuticals outside their offices[22], as well as the prohibition of advertising in general for a particular product, not to be considered measures having equivalent effect[23]. Internal regulations concerning the packaging of a product are not considered sales arrangements and may represent measures having an effect equivalent to quantitative restrictions (MEEQR) [24].

The distinction between the rules on product content and the sale methods is not always easy. If a marketing method affects the very content of the product, it can become MEEQR. "The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in Keck and Mithouard"[25]. The measures related to the presentation of the products are presumed to be MEEQR, based on the *Cassis and Keck* doctrine, but can be justified by binding requirements of general interest.

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[21] Louis Dubois, Claude Blumann, *Droit matériel de l'Union Européenne*, Edit. Montchrestien, 2006, p. 247.

[22] A code of ethics which prohibits pharmacists from advertising parapharmaceuticals outside their offices is not intended to regulate trade in goods between Member States and does not affect the possibility for economic operators other than pharmacists to advertise such products. Although such a regulation is likely to restrict the volume of sales and, as a consequence, of parapharmaceuticals coming from other Member States, this possibility is not sufficient for a measure to be considered a MEEQR. The Court also held that this rule applied without distinction to domestic and imported products, without affecting the latter in any other way (Hünermund, Case C-292/92, judgment of 15 December 1993).

[23] *Leclerc-Siplec*, case C-412/93, judgment of 9 February 1995.

[24] *Morellato*, case C-416/00, judgment of 18 September 2003. The regulation of a State which requires the modification of the packaging or label of products lawfully manufactured and marketed in another Member State as a condition of access to its market cannot be regarded as a method of sale which, by its nature, is not capable of directly or indirectly, actually or potentially, obstructing trade between Member States.

[25] *Vereinigte Familiapress*, case C-468/95, judgment of 26 June 1997, par. 11.

The Court emphasized that the *Keck* judgment concerned only the methods of sale and not the body of national measures aimed at regulating trade in goods between Member States or the conditions which the goods had to fulfil in order to be marketed[26]. "(...) all trading rules enacted by Member States, that are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, are to be considered to be measures having an effect equivalent to quantitative restrictions"[27]. The Court of Justice has also ruled in the sense that any regulation of the Member States may constitute a MEEQR, under already known circumstances, without adding the mention "commercial"[28].

### 2.2 Free movement of workers

Diplomas are the "invisible" [29] barrier to the free movement of workers, a barrier which European Union law has tried to remove by developing the principle of mutual recognition.

Training is often a necessary condition for pursuing an employed or self-employed professional activity. This involves completing or performing studies and/or practical activities, the graduation of which is attested by a diploma or certificate. Member States have the legislative competence over education and training, and the EU has only the power to support the action of the States[30]. In the absence of Community harmonization measures, "(...) the Member States remain, in principle, competent to define the general, commercial or professional knowledge and ability necessary in order to engage in the activities (...) and to require production of diplomas, certificates or other formal evidence attesting that applicants possess such knowledge and ability"[31]. This set of factors has proven to be the source of many obstacles to the free movement of workers.

The Court of Justice has emphasized that making access to certain professions dependent on a diploma is an obstacle to the effective exercise of the workers' freedom of movement. The solution adopted at Community level consisted in the implementation of a system of directives on the *mutual recognition* of diplomas, certificates and other evidence of formal qualifications by the Member States. The States have undertaken to accept the training obtained by European citizens in other Member States, on the basis of a comparison mechanism and, depending on the situation, to complete this training. Secondly, the aim was to establish minimum professional training conditions at European level in certain domains. Even in the absence of specific directives, Member States cannot refuse access to the labour market of nationals of other Member States, being obliged to apply the provisions of primary law[32] or to recognize the diplomas earned in other

[26] *Commission/Italy*, case C-158/94, judgment of 23 October1997.
[27] *Guarnieri*, case C-291/09, cit. supra, par. 15.
[28] *Frabo*, case C-171/11, cit. supra, par. 22.
[29] The expression belongs to professor *Jacques Pertek* (cited in Dubois, Blumann, *op. cit*., p. 100).
[30] See art. 165, 166 TFEU.
[31] *De Castro Freitas and Escallier*, joined cases C-193/97 and C-194/97, judgment of 20 October 1998.
[32] See also *Vlassopoulou*, case C-340/89, judgment of 15 October 1987.

Member States in accordance with national law. "The basic idea is that if the person is qualified to pursue a profession in a particular state - which will most often be the State of origin - he is also qualified to pursue it in any Member State of the European Union"[33]. The principle has been applied by several sectoral directives[34], especially on the liberal professions, and by a general directive[35]. The purpose of these directives was to allow nationals who have completed their training in other Member States to carry out economic activities in the host States, either by accepting the professional qualifications obtained or by recognizing national authorizations for services issued in the State of origin.

Recognition is based on the presumption that the educational and/or professional training which the Community national has acquired in a certain Member State is *comparable* to that which the host State usually imposes on its nationals. As a result, the competent authority of the host State must allow the national of another Member State to pursue that profession in its territory under the same conditions as national workers, if he holds a professional qualification obtained in another EU State, equivalent to at least, the level immediately below that required by the host State for its nationals. The rule is not absolute, as the host State may make the recognition of professional qualifications conditional on the fulfilment by the applicant of a *compensatory* measure. The possibility of ordering such measures is limited by the Directive to three situations: the duration of the training is at least one year shorter than that required in the host State; the training received in the State of origin or in another Member State covered subjects significantly different from those studied in the training program in the host State; the profession comprises in the host State one or more professional activities which are not included in the exercise of that profession in the State of origin and which require specific training. The compensatory measures are the aptitude test and the adaptation stage, the Community national being able, in principle, to choose between the two.

The automatic recognition of qualifications occurs if mandatory minimum training conditions have been implemented at Community level and there are no substantial differences, in terms of content and duration, between the training obtained in another Member State and the reference profile in the host State[36]. The procedure for recognizing the equivalence of qualifications is intended to enable national authorities to objectively ensure that a diploma earned in another Member State certifies for the benefit of its holder knowledge and qualifications, if not identical, at least equivalent to those attested by a national diploma. The criteria taken into account are the nature and duration of the studies, as well as the practical training[37]. The decisions taken by national authorities, following the procedure for the recognition of qualifications, are subject to judicial control.

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[33] L. Dubois, C. Blumann, *op. cit.*, p. 100.
[34] Directives 362, 363/1975; 452, 453/1977; 384/85; 249/77; 5/1998, etc.
[35] 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 30.09.2005).
[36] *Commission/Italy*, case C-145/99, judgment of 7 March 2002.
[37] *Heylens*, case 222/86, judgment of 15 October 1987.

## 3. Judicial cooperation - the principle of mutual recognition is the "cornerstone" in a Union of diversity of national legal systems

### 3.1 Judicial cooperation in civil matters

Those who exercise the fundamental freedoms of the internal market know the social, political, legal and cultural realities of other Member States of the European Union. They sometimes (or often) face them and go to court. The more different the judicial proceedings in the host States than in the State of origin, the more they become a discouraging factor in the exercise of the freedoms of movement specific to the internal market. For this reason, Member States began cooperation in the field of justice. The Treaty signed in Maastricht and entered into force on 1 November 1993 established a European Union consisting of three pillars: the European Communities, the Common Foreign and Security Policy and the Cooperation in the field of justice and home affairs. On the occasion of subsequent treaties, the last pillar gradually moved from the sphere of intergovernmental cooperation to that of European integration.

Art. 114 TFEU (ex. Article 95 TEC), *lex generalis* for the adoption of legislative measures on the internal market, was the legal basis for the adoption of several normative acts in the field of civil judicial cooperation. *Judicial cooperation has been seen as a necessity for the proper functioning of the internal market*. It has not been an independent goal of European integration.

The European Union is more than an internal market. It symbolizes a system of democratic, social, legal, cultural values. In this context, judicial cooperation aims to lead to that *area of freedom, security and justice* - an emblem of the European Union. *It thus becomes an instrument for achieving a different reality from the economic one*. The area of freedom, security and justice involves respect for fundamental rights and the various legal systems and legal traditions of the Member States. *Given the current division of competences between the European Union and the Member States, the Union is developing judicial cooperation in civil matters in cross-border legal relations and also in conjunction with the functioning of the internal market.*

Pursuant to art. 81 TFEU, *lex specialis* for European civil cooperation, "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. (...) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of

evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff (...)".

*Civil procedure is an area of national competence. Being strongly rooted in the political, social and economic organization of each nation, in its constitutional identity, civil procedure is difficult to harmonize. For this very reason, the principle of mutual recognition is used.*

Judicial cooperation in civil matters involves the *mutual recognition* of judgments and decisions in extrajudicial cases pronounced by the authorities of the Member States of the Union in other states of the same Union[38], so that the decisions can "circulate" freely with their addressees/beneficiaries. For this purpose, the 1968 Brussels Convention, which was replaced by Regulation 44/2001 (also called Brussels I)[39], which was in turn replaced by Regulation 1215/2012[40], eliminated exequatur proceedings between Member States for all judgments in civil and commercial matters. In this area, as a rule, judgments given in one Member State are recognized in the other Member States and are enforced if they are enforceable in the Member State in which they were given[41].

*The principle of mutual recognition is not absolute, and its application is removed in cases of refusal of recognition or enforcement of a civil judgment*. Pursuant to art. 45 of the Regulation, the recognition and enforcement of a judgment is refused if public policy is violated; if the judgment was delivered in absentia and the act of referral to the court or an equivalent act was not communicated to the defendant so that he could prepare his defence; if the judgment is irreconcilable with other judgments given in the requested Member State, in another Member State or in a third country, under certain conditions.

At the same time, non-compliance with the exclusive rules of jurisdiction and special rules of jurisdiction in the case of consumer contracts, individual employment contracts and insurance contracts constitute grounds for refusal to recognize judgments given in other Member States of the Union, to the extent that the defendant was the protected party by establishing special jurisdiction, rules provided by Regulation 1215/2012. In the case of protection measures in civil matters, the grounds for refusal were restricted to infringements of public policy and the contrary of the judgment with another judgment given or recognized in the

[38] Art. 67(4) TFEU provides expressly the application of the principle of mutual recognition in civil matters.

[39] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force on 1 March 2002.

[40] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1). It is considered a reformed version of the Brussels I Regulation and contains a number of significant changes to the original text of the Brussels I Regulation.

[41] See art. 36-44 of Regulation (EU) No. 1215/2012, *cit. supra*.

requested Member State[42].

Mutual recognition of judgments and decisions in extrajudicial cases is possible because there are, although not explicitly formalized, *minimum procedural standards* between the Member States of the Union that guarantee a *fair trial*. The existence of these standards gives content to and makes possible *mutual trust* between the judicial and extrajudicial authorities of the Member States. Procedural standards have been articulated and developed around fundamental values, such as the rule of law and the right to a fair trial. The enshrinement of the right to a fair trial was initially achieved through the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights.

The guarantees of the fair trial mentioned in art. 6 of the Convention have become a common European model of procedural guarantees, also taken over in the domestic laws of the Member States and in sources of EU law. The European Convention on Human Rights itself is a source of EU law. From 1 December 2009, the date of entry into force of the Treaties signed in Lisbon, the European Union also has a Charter of Fundamental Rights which has taken over and developed the fair trial model mentioned above. The Charter has the legal force of the Treaties and must be respected by the EU institutions and the Member States when implementing European law. On this basis, mutual trust is built and cultivated.

### 3.2 Judicial cooperation in criminal matters

Pursuant to art. 82(1) TFEU, judicial cooperation in criminal matters within the European Union is based on the principle of mutual recognition of judgments and judicial decisions. The second stage of cooperation in this matter involves the "approximation" of the laws and regulations of the Member States, by *establishing minimum rules*, in the following areas: mutual admissibility of evidence between Member States, rights of persons in criminal proceedings, rights of victims of crime, as well as other special elements of criminal procedure. The purpose of this minimum harmonization is precisely to facilitate the application of the principle of mutual recognition. The second category of areas in which the Member States have agreed to implement the minimum common criminal rules, is provided by art. 83 TFEU, namely: defining offences and sanctions in areas of particularly high cross-border crime[43]; as well as when it is indispensable to ensure the effective implementation of a EU policy in an area which has been the subject of harmonization measures.

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[42] See Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, published in OJ L 181, 29.06.2013, pp. 4-12.

[43] Pursuant to art. 83(1), second par. TFEU, the areas of serious crime include: terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. This list may be extended by a decision of the Council, adopted unanimously, after obtaining the consent of the European Parliament.

The European Commission has defined the principle of mutual recognition in criminal matters as the *belief* that even if a Member State did not treat a particular matter in the same or similar way in point of regulation, the results are equivalent to those obtained in the requested Member State. Mutual trust, not only for the quality of the rules of the other State (which may be different), but also for their correct application, is an important element[44]. Therefore, Member States must trust the legal systems of the other Member States, as well as the institutions and people who apply the legal rules. "The almost natural and traditional mistrust of everything, which is 'foreign' and 'unknown', is to be replaced by trust – an inversion ordered by law for the good of the creation of a common European judicial space"[45].

In criminal matters, the principle of mutual recognition is based on the presumption that all Member States are able to ensure equivalent and effective protection of fundamental rights recognized at the Union level, in particular in the Charter of Fundamental Rights of the European Union. In the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, one of the essential instruments of judicial cooperation in criminal matters, the European legislature set limits on the principle of mutual recognition, consisting in grounds for non-enforcement, both mandatory and optional, without explicitly mentioning the fundamental rights.

Although the Court of Justice has strengthened the principle of mutual recognition, it has ruled that the protection of fundamental rights justifies cases in which the requested Member States may refuse to apply it. In *Melloni*[46], the Court of Justice ruled that a Member State could not make the execution of a European arrest warrant issued for the purpose of the enforcement of a judgment delivered in absentia, subject to conditions resulting from a higher level of protection of fundamental rights guaranteed by its constitution. In the *Radu*[47] case, the European Court stated that the enforcing judicial authorities could not refuse to execute a European arrest warrant issued for the purpose of prosecuting on the grounds that the wanted person had not been heard in the issuing Member State prior to the issuance of this arrest warrant.

The *Aranyosi and Căldăraru* [48] judgment expresses the current relationship between the principle of mutual recognition and the protection of fundamental rights. On this occasion, the Court ruled that the application of the Council Framework Decision of 13 June 2002 on the European arrest warrant could not have the effect of altering the obligation to respect fundamental rights, as enshrined in particular in

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[44] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 26.07.2000 COM (2000). The document is available at https://eur-lex.europa.eu/LexUriServ/LexUriServ. do?uri=COM: 2000:0495:FIN:EN:PDF (last accessed 4.11.2021).

[45] Helmut Satzger, *Is mutual recognition a viable general path for cooperation?*, New Journal of European Criminal Law 10 (1), 2019 https://doi.org/10.1177/2032284419836516, p. 46.

[46] *Melloni*, case C-399/11, judgment of 26 February 2013, ECLI:EU:C:2013:107.

[47] *Radu*, C-396/11, judgment of 29 January 2013, ECLI:EU:C:2013:39.

[48] *Aranyosi and Căldăraru,* joined cases C-404/15 and C-659/15 PPU, judgment of 5 April 2016, ECLI:EU:C:2016:198.

the Charter. "(...) where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in Melloni, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment"[49].

The enforcing court must support its refusal to execute the European arrest warrant on objective, reliable, precise and up-to-date elements regarding the conditions of detention prevailing in the issuing Member State and which prove the reality of deficiencies either systemic or widespread or affecting certain groups of people or even certain detention centres. In exchange, the finding of a real risk of inhuman or degrading treatment as a result of the *general* conditions of detention in the issuing Member State cannot justify the refusal to execute a European arrest warrant.

Only the concrete situation of the person concerned can justify such a decision. "On the one hand, mutual recognition is not absolute, but it can be set aside only in exceptional circumstances"[50]. Professor *Stefano Montaldo* has pointed out that the recent trend of the Luxembourg Court is towards a more mature understanding of the principle of mutual recognition, given that the presumption of an equivalent level of protection of fundamental rights is not irrefutable. The Court has replaced the dogma of trust with a concrete examination of the protection of fundamental rights at national level. "Such control, which has been described as a form of horizontal *Solange* test, strengthens the EU system of protection of fundamental rights, on the basis of common EU standards"[51].

## 4. Conclusions

The principle of mutual recognition is extremely interesting due to its simplicity, depth and unifying vocation. It expresses the spirit and motto of the European Union: "Unity in diversity!". We believe that its essence refers to the *need for a culture of mutual trust between the Europeans*, in the absence of which the European Union seems to make no sense. Within the internal market, the principle invites national authorities and citizens to trust the national rules of all other Member

[49] Ibid, par. 88.

[50] Stefano Montaldo, *On a collision course! Mutual Recognition, mutual trust and the protection of fundamental rights in the recent case-law of the Court of Justice*, European Papers, Vol. 1, 2016, No. 3, p. 984. The study is available at https://www.europeanpapers.eu/ it/e-journal/on-a-collision-course-mutual-recognition-mutual-trust-and-the-protection-fundamental-rights (last accessed 7.11.2021).

[51] *Stefano Montaldo*, cit. supra., p. 993.

States on the production and marketing of goods and the entities of the States that ensure compliance with these rules. When we refer to the free movement of workers, trust aims at the organization of the education and training systems of the Member States, the quality and equivalence of training to that of the host State.

Judicial cooperation, which has emerged and developed as a necessity for the proper functioning of the internal market, is notable for the diversity of national legal systems, which is much higher in relation to the economic areas specific to the internal market. In this context, the principle of mutual recognition has become the "cornerstone" of judicial cooperation[52]. The principle is combined with the partial harmonization of national procedural rules, but only in cross-border areas. The more advanced the harmonization, the greater the mutual trust in the legal systems of the other Member States.

Mutual trust, imposed in accordance with the case law of the CJEU and EU law, is not absolute, and regulates cases in which the competent authorities of the requested Member State may refuse to recognize and enforce judicial or extrajudicial decisions given in another Member State. Secondly, the beliefs that Member States pursue equivalent objectives for the safety and quality of goods and ensure minimum standards that guarantee a fair trial and respect for fundamental rights cannot be axiomatic. In particular, fair trial and fundamental rights standards need to be assessed on a case-by-case basis. Mutual trust is also a goal that is built every day. It is not limited to the regulatory and procedural systems of the other Member States, but encompasses the institutions and people who actually apply the rules.

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