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Published in:
European Papers

DOI:
10.15166/2499-8249/109

2016

Document Version:
Publisher's PDF, also known as Version of record

Link to publication

Citation for published version (APA):
Groussot, X., Pétursson, G. T., & Wenander, H. (2016). Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other? *European Papers*, *1*(3), 865-892. https://doi.org/10.15166/2499-8249/109

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ARTICLES
SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (FIRST PART)

REGULATORY TRUST IN EU FREE MOVEMENT LAW: ADOPTING THE LEVEL OF PROTECTION OF THE OTHER?

XAVIER GROUSSOT*, GUNNAR THOR PETURSSON** AND HENRIK WENANDER***

ABSTRACT: The principles of mutual trust and mutual recognition are well established features of EU law. On a technical level, it is clear that the principles may require adoption of foreign levels of protection in individual cases as well as in legislation. At a closer look, however, the principles through "the rule of reason" also may imply quite the opposite: the imposing of domestic requirements on foreign goods, services etc. The CJEU case law following the *Cassis* judgement may be seen as striking a balance between cooperation and Member State self-determination, or between trust and distrust, in different fields. This contribution aims at looking into the regulatory function of the legal principle of trust in EU law. Taking this wider regulatory perspective, the mutual recognition regimes of EU must be seen from a holistic perspective. Rather than dwelling upon harmonized and non-harmonized fields separately, we will approach mutual trust as one, albeit multi-faceted, concept, where harmonization, proportionality assessments and Member State actions in various fields of law form part of the same wider picture. In this regulatory perspective, the law on mutual trust and mutual recognition may be seen as a balancing between the regulatory interests of the EU (promoting free movement and cooperation) and the various Member States (promoting their interests of – alleged – protection of safety of various kinds). Through this perspective, we will be able to address the tension between regulation and deregulation, between integration and disintegration, and between unity and diversity present in EU law on a very general level. The first section of this contribution will look at the constitutional life of mutual trust within the CJEU case law:

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looking at its origins and main logic. The second section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. This section also argues for understanding mutual recognition in terms of Regulatory Trust. The last section focuses on the thorny issue of the levels of protection and attempts to understand which are the key factors used by the CJEU in reviewing the (host) States measures that restrict free movement law and thus may constitute a break to the application of the principles of mutual trust and mutual recognition.

KEYWORDS: mutual recognition – mutual trust – level of protection – regulation – free movement – internal market – Habermas.

I. INTRODUCTION

The work of Giandomenico Majone – a political scientist – on regulatory governance is still of tremendous importance for research in European Union law focusing on federalism and public policies. In his book *Regulating Europe*, he dwells *con brio* with different facets of theories of regulation.[1] A crucial aspect of his book concerns the issue of mutual trust and the cost of distrust.[2] For him, mutual trust and loyal cooperation are supposed to replace the impossible task of harmonizing vastly different national legal systems.[3] The principle of mutual trust is seen as extremely demanding since it requires a higher degree of commitment than the commerce clause in the United States of America. The principles of mutual trust and mutual recognition are well-established features of EU law.[4] On a technical level, it is clear that the principles may require adoption of foreign levels of protection in individual cases as well as in legislation. At a closer look, however, the principles through "the rule of reason" also may imply quite the opposite: the imposing of domestic requirements on foreign goods, services etc. The CJEU case law following the *Cassis* judgement[5] may be seen as striking a balance between cooperation and Member State self-determination, or between trust and distrust, in different fields. This contribution aims at looking into the regulatory function of the legal principle of trust in EU law.

Taking this wider regulatory perspective, the mutual recognition regimes of EU must be seen from a holistic perspective. Rather than dwelling upon harmonized and non-harmonized fields separately, we will approach mutual trust as one, albeit multifaceted, concept, where harmonization, proportionality assessments and Member State

[1] G. MAJONE, *Regulating Europe*, London: Routledge, 1996.

[2] Ivi, pp. 278–279.

[3] Ivi, p. 279.

[4] In this article, we refuse to draw a clear dividing line between the principles of mutual trust and mutual recognition. We often view the use of these two principles as interchangeable though we recognize that the mutual trust may be defined as a meta-principle embodying the principle of mutual recognition.

[5] Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.

actions in various fields of law form part of the same wider picture. In this regulatory perspective, the law on mutual trust and mutual recognition may be seen as a balancing between the regulatory interests of the EU (promoting free movement and cooperation) and the various Member States (promoting their interests of – alleged – protection of safety of various kinds). Through this perspective, we will be able to address trust in the intersection, more precisely the tension between regulation and deregulation; between unity and diversity; and between integration and disintegration, present in EU law on a very general level.

The first section of this contribution will look at the constitutional life of mutual trust within the CJEU case law: looking at its origins and main logic. The second section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. This section also argues for understanding mutual recognition in terms of *Regulatory Trust*. The last section focuses on the thorny issue of the levels of protection and attempts to understand which are the key factors used by the CJEU in reviewing the (host) States measures that restrict free movement law and thus may constitute a break to the application of the principles of mutual trust and mutual recognition.

II. The constitutional life of mutual trust

The concept of mutual trust has come to play an important, if also elusive role in European Union law.[6] In a unitary state, the law needs to base on the presupposition that the different public bodies within the state trust each other and cooperate.[7] Conversely, in the purely international setting, state sovereignty under public international law implies that states are in principle free to choose to cooperate or not to cooperate.[8] The states may decide themselves on the legal prerequisites for carrying out activities relating to their territory. In this way, states may freely decide on their levels of protection for product safety, professional qualifications or procedural safeguards in criminal cases. Neither mutual trust nor distrust is presupposed.[9]

In a legal system with stronger federal traits, there is a need for addressing the matter of trust between the different parts of the state. Federal states may see the need for constitutional provisions on mutual trust and cooperation.[10] Also for European Union law, with its far-reaching form of cooperation between independent states, it is necessary to strike a balance between Member State independence and EU cooperation. The

[6] The following discussion bases in part on H. Wenander, *Recognition of Foreign Administrative Decisions*, in *Heidelberg Journal of International Law*, 2005, p. 755 *et seq.*

[7] This idea is sometimes expressed in constitutional or administrative legislation, see for example Art. 47 of the Swedish 1809 Instrument of Government (now replaced by the 1974 Instrument of Government).

[8] R. Wolfrum, *International Law of Cooperation*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1995, p. 1242 *et seq.*

[9] H. Wenander, *Recognition of Foreign Administrative Decisions*, cit., p. 760.

[10] Cf. Art. IV, Section 1, of the U.S. Constitution or Art. 20 of the German Basic Law.

principles of mutual trust and mutual recognition, notably with the exceptions from trust, serve as legal tools to achieve such a balance.

The fundament for this mutual trust in EU law is the principle of loyalty, laid down in Art. 4, para. 3, TEU.[11] Basing on this principle, the CJEU has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law.[12] Furthermore, there are also examples of this principle of trust being referred to in non-harmonized fields. In *Gözütok*, the Court pointed out that the relevant legal provisions on cooperation in criminal matters did not presuppose harmonization. Therefore, the Member States needed to have mutual trust in their respective criminal systems and respect the outcomes of criminal proceedings of other Member States.[13] This jurisprudential mutual trust is in essence regulatory. Parallel to this development in case law, the EU legislator has at times referred to mutual trust between the Member States in preambles to EU legal acts in various fields, including cooperation in criminal matters.[14] Whereas the CJEU case law seems to presuppose the existence of mutual trust between the Member States, the EU legislator in some preambles states that the harmonization laid down in the legal act aims at strengthening the mutual trust.[15] This indicates the inherent tension between mutual trust *de jure* and *de facto* in EU law.

The concept of mutual trust may be seen as one of the factors behind the principle of mutual recognition. The principle bases on the idea of the Member States striving for the same objectives concerning health, security, public order etc., but with different means.[16] Taking the wide understanding of market restriction as established in CJEU case law,[17] the Member States must justify that the limitations of market access pursue

[11] M. Klamert, *The Principle of Loyalty in EU Law*, Oxford: Oxford University Press, 2014, pp. 22–23. The author argues for the adoption of a broad or narrow understanding of mutual recognition in relation to horizontal loyalty (obligations derived from Art. 4, para. 3, TEU applying between the Member States).

[12] Court of Justice, judgment of 25 January 1977, case 46/76, *Bauhuis*, para. 22; Court of Justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19; Court of Justice, judgment of 29 April 2004, case C-476/01, *Kapper*, para. 37.

[13] Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, paras 32 and 33.

[14] Twenty-second recital to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; sixteenth recital to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); tenth recital to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[15] Third recital *et seq.* to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market; seventeenth recital to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (using the term "mutual confidence").

[16] Commission, *Completing the Internal Market, White Paper from the Commission to the European Council*, COM(85) 310 final, para. 58.

[17] Court of Justice, judgment of 11 July 1974, case 8/74, *Dassonville*, para. 5; Court of Justice, judgment of 30 November 1995, case C-55/94, *Gebhard*, para. 37.

a legitimate aim, and furthermore that this is done in a proportionate way. A key to the understanding of the principle of mutual recognition lies in the proportionality assessment. The CJEU has made clear that it is not proportionate to require from foreign products, workers or service providers that they fulfil domestic requirements if the foreign requirements met are equivalent.[18]

The principle of mutual recognition is not unique to EU law. To some extent, the concepts established in CJEU case law were inspired by the GATT rules. In the same way as some of them – and the later WTO agreement – the principle balances the interests of the public safety etc. and free movement. Concerning the WTO rules, it has been argued that rules implying consideration of foreign legal requirements may as such lead to a greater understanding for different perceptions of safety levels.[19] In EU law, the principle is seen as introduced by the famous *Cassis*[20] ruling of the CJEU within the field of free movement of goods. However, elements of the principle were present already in *van Wesemael*,[21] dealing with the free movement of services, decided a few weeks before *Cassis*. The latter case, however, has not got the same attention as *Cassis*.[22] Nevertheless, this background illustrates that the principle already at the outset had an overarching potential, going beyond distinct fields of EU law. Later on, the principle found its way into EU legislation, adopting, in Weiler's words, the *Cassis* rationale at the legislative level.[23]

The principle has the effect of tilting the balance between EU interests (free movement and cooperation) and Member State interests (protection of safety levels of various kinds) in favour of the former. However, it should be borne in mind that the principle, as being exactly a principle, may not be understood as absolute. Through the principle, the Member States could keep their own safety standards, but without these functioning as barriers to free movement or other cooperation.[24] The Member States retain, to a certain degree, the option of referring to national safety standards. In this way, the principle entails a disintegrative potential. Also, in the legislation basing on mutual recognition, various other mechanisms may be introduced to further fine-tune this balancing. These mechanisms range from what may be called *explicit recognition*, requiring

[18] Court of Justice, judgment of 28 January 1986, case 188/84, *Commission v. France (Woodworking machines)*, para. 16; Court of Justice, judgment of 11 May 1989, case 25/88, *Bouchara*, para. 18.

[19] K. NICOLAIDIS, G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2004-2005, p. 273.

[20] *Cassis de Dijon*, cit.

[21] Court of Justice, judgment of 18 January 1979, joined cases 110/78 and 111/78, *van Wesemael*.

[22] P. PESCATORE, *Variations sur la jurisprudence «Cassis de Dijon» ou la solidarité entre l'ordre public national et l'ordre public communautaire,* in M. MONTI *et al.* (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden: Nomos, 2007, p. 543.

[23] J. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, in F. PADOA SCHIOPPA (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave, 2005, p. 50.

[24] G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI Working Papers*, SPS 93/1, 1993, p. 2.

a manifest formal decision recognizing a foreign legal status or similar, over *single license recognition*, treating a foreign measure as valid as such in the own legal system, to more complex composite decision making procedures, involving foreign agencies in the decision-making leading up to a measure in a Member State.[25]

The fundamental importance of the *Cassis* case and its doctrines has of course been mentioned by numerous scholars throughout the years – and its impact clearly felt both at the legislative and the judicial level in the European Union in many fundamental ways. However, the same goes for *Cassis*, as so many fundamental principles developed by the Court of Justice – its success, and somewhat its scope, is judged by application in *subsequent case law* (and of course for *Cassis* – also in terms of substantial impact in the methodology of harmonisation through secondary law). Additionally, the very *context* of the case matters. In the *Cassis* case,[26] the Court ruled, that requirements relating to minimum alcohol content of the French liqueurs Cassis de Dijon did not serve a purpose in the general interest – despite the fact that the German authorities held that the effects of removing such requirements could potentially mislead the German consumer and pose a risk to their health. Therefore, the Court ruled that:

> "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".

Interestingly, there is not mentioning of the term "principle" or "mutual recognition" in this case, nor is it mentioned in the Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon").[27] That fact, (and the subsequent reluctance to use the term "mutual recognition") cannot be ignored, but apart from that, many academics argue that the *Cassis* case did introduce the principle of mutual recognition into the case law on free movement of goods, while others argue for a more limited role of the *Cassis* case in this respect.[28] Nevertheless, it appears, that as a minimum, the *Cassis* case stands for a principle which grants a certain presumption for market acceptability to products which have been "lawfully produced and marketed in one Member State" in terms of the access to those products into the markets of another Member State. The later Member State, really has to come up with "valid reasons" why an access should not be granted leading to the acceptance of the level of protection of the State of origin of the products.

[25] H. WENANDER, *Recognition of Foreign Administrative Decisions*, cit., p. 783.

[26] *Cassis de Dijon*, cit.

[27] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), OJ 1980 C 256/2.

[28] C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 11.

When placing the *Cassis* ruling in context, another giant case comes automatically in mind, namely the *Dassonville* ruling.[29] The major contribution of *Dassonville* – apart from furthering trade in Scotch Whisky – was the extension of the *scope* of the fundamental principle of free movement of goods (later to be adopted in all fields of free movement). It is undisputed, and in fact confirmed by the Court of Justice itself in *Keck*, that the *Dassonville* ruling resulted in the fundamental principle of free movement operating as a true "commercial freedom" capable of striking down any restriction to free trade in goods, even when such restrictions were "not aimed at products from other Member States".[30] *Cassis* was, however, not only about furthering trade, but also about providing the Member States with some tools to defend against the *Dassonville* doctrine, that clearly had far reaching potentials. These were the deferential instruments of the mandatory requirements, the new set of *interests* with which the Member States could justify the national (still) measures restricting free trade within the (at the time) European Community and consequently keeping their own regulation.

The interests at stake do matter and impact the strictness of the review of the restrictive measures. This method of the mandatory requirements, formed in a non-extensive list, has been used in order to secure respect for deep national interests, such as those related to public policy and public order, interests related to moral, religious and cultural factors (particularly developed in the so-called *gambling cases*), constitutional principles, and last but not least fundamental rights. This will be further discussed below.

Moreover, apart from laying down the foundations of the mutual recognition principle, and "mandatory requirements" approach, the *Cassis* case importantly marks a clear emergence of the proportionality principle. Already in the *Cassis* case, the elements of proportionality, the necessity test, is visible:

> "Obstacles to 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".[31]

Additionally, in cases post *Cassis de Dijon*, the CJEU added two important elements to its approach in terms of introducing the principle of proportionality when reviewing national restrictive measures. In the *Gilli* case,[32] the Court emphasised that requirements for the Member States to invoke the mandatory requirements, were that the national measures at stake applied *without distinction* to national products and the im-

[29] *Dassonville*, cit.
[30] Ivi, para. 14.
[31] *Cassis de Dijon*, cit., para. 8.
[32] Court of Justice, judgment of 26 June 1980, case 788/79, *Gilli and Anders*.

ported products. Importantly, in terms of application of the proportionality principle, in the *Rau* case,[33] the Court came with more explicit language in terms of applicability, and importance of the proportionality principle in the case and held that:

> "It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods".[34]

In the period that followed the ruling of the CJEU in *Cassis de Dijon*, the principle of proportionality started to play an increasingly prominent role in striking the right balance between the fundamental principle of free movement of goods, and rational national interests restricting that free movement.[35] Furthermore, the approach of the CJEU, in the *Cassis* case, had spill-over effects, and was subsequently, and fairly smoothly, applied in the fields of the other freedoms.[36]

A lot may be said about the proportionality principle, but as a judicial tool, it is capable of both securing market integration, as well as preserving diversity as further discussed below. It calls for rationality and argumentation and brings to the surface all the factors that have to weigh in order to reach a fair balance between competing interests. The interests involved clearly seem to matter for the intensity of proportionality assessment and subsequently for the intensity of the review undertaken in general. However, the proportionality analysis and the interests combined play a key role in deciding upon the appropriate *level of protection* – playing perhaps even a greater role than the principle of mutual recognition in the field of free movement.

The *Läärä* case[37] provides a good example of the question of the acceptable level of protection – and who is to set the acceptable standard. The case concerned Finnish legislation which reserved the exploitation of gaming machines solely for a designated public body, and constituted in the view of the Court a restriction to the freedom to provide services, since operators of gaming machines from other Member States were directly and indirectly excluded from the Finnish market. According to the Finnish Government the legislation was intended to limit the "exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes". The Court referred to its earlier case-law, and accepted that these measures represented "overriding reasons relating to the public interest". However, the Court stated that:

[33] Court of Justice, judgment of 10 November 1982, case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PVBA*.

[34] Ivi, para. 12 (emphasis added).

[35] See e.g. T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 142.

[36] *Gebhard*, cit., para. 37.

[37] Court of Justice, judgment of 21 September 1999, case C-124/97, *Läärä*.

> "In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide".[38]

Furthermore, the choice of measure by the Finnish state, was regarded by the Court as "a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued".[39] The Court concluded that the measures did not appear disproportionate to the objective pursued.

In fact, this method, of allowing the Member States a wide margin of discretion is appearing also frequently in cases that concern public health protection, in the field of free movement of goods as recently confirmed in the *Visnapuu* case.[40]

However, if that measure is within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that *it is for the Member States to determine the level of protection* which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed *a measure of discretion*.

In the next milestone *post Dassonville* and *Cassis* – the *Keck* case,[41] the Court of Justice summarised the *Cassis* case as meaning that:

> "[I]n the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods".[42]

So even here there is no mentioning of "mutual recognition" as such. The focus is rather on the fact that "obstacles" meeting products lawfully produced and marketed in

[38] Ivi, para. 36 (emphasis added).

[39] Ivi, para. 39.

[40] Court of Justice, judgment of 12 November 2015, case C-198/14, *Visnapuu*, para. 118. See also Court of Justice, judgment 2 December 2010, case C-108/09, *Ker-Optika*, para. 58 and the case-law cited, and, to that effect also, Court of Justice, judgment of 28 September 2006, case C-434/04, *Ahokainen and Leppik*, paras 32 and 33.

[41] Court of Justice, judgment of 24 November 1993, joined cases C-267/91 and 268/91, *Keck and Mithouard*.

[42] Ivi, para. 15.

one Member State, are measures having an equivalent effect to quantitative restrictions (MEEQRs) prohibited by Art. 34 TFEU. The focus in this case on the market access test significantly restricted the scope of the mutual recognition principle.[43] As discussed before, the proportionality analysis of the public interests raised by the State play a key role in deciding upon the appropriate *level of protection* and the existence or inexistence of a justified restriction. This element is in our view crucial to understand the limited impact of mutual recognition as an explicit principle of adjudication in EU free movement law. Also, the *Keck* ruling may be viewed as creating an exception to the application of the principle of mutual recognition and thus can be seen as another element contributing to its jurisprudential invisibility.[44]

III. Of regulatory trust and mutual recognition

This section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. The principle can be described as a "syntactic norm" that is so internalized that it is invisible. However, other reasons can be relied on in order to explain its invisibility. It then argues for understanding mutual recognition in terms of *Regulatory Trust*.

III.1. Clarifying the invisibility of mutual trust

The principle of mutual recognition is somewhat invisible in the free movement case law. This absence is puzzling given the constitutional importance of mutual trust in the EU legal order and calls for a change of terminology that would reveal not only its true nature but also underscore its functional importance. After a long silence in the case law, in a fundamental case, which, just as in the *Dassonville-Cassis* and *Keck* cases, the scope of Art. 34 TFEU was being delimited, an explicit reference to the mutual recognition principle resurfaced. This was in the case *Commission v. Italy*[45] – the trailers and road safety case, that introduced and accepted that rules concerning *use of products* fell within the scope of Art. 34 of the TFEU – a fact that was not self-evident, as may be seen from the procedure of this case (which ended as a *Grand Chamber* case) and the interventions of numerous Member States.

As a starting point, the Court summarised the *Cassis* and *Keck* rulings (and even *Sandoz*) as to mean that Art. 34 TFEU:

[43] C. Janssens, *The Principle of Mutual Recognition in EU Law*, cit., p. 14.

[44] A. Saydé, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement*, in *EUI Working Papers*, LAW 2015/42, 2015, pp. 5–6.

[45] Court of Justice, judgment of 10 February 2009, case C-110/05, *Commission v. Italy* [GC].

> "[...] reflects the obligation to respect the principles of non-discrimination *and of mutual recognition* of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets".[46]

After having established that the Italian rules fell within Art. 34 TFEU, the Court stated, that the need to ensure road safety, constituted an overriding reason relating to the public interest, and thus were capable in principle of justifying restrictions to the free movement of goods. Thereafter, the Court reiterated that, in the absence of fully harmonized EU secondary legislation, it is for the Member States "to decide *upon the level* at which they wish to ensure road safety in their territory", taking into account requirements laid down in the free movement of goods provisions of the Treaty, including the principle of proportionality.[47] Thereafter, the Court concluded that the Italian Republic had shown that the measures were indeed *appropriate* for ensuring road safety, particularly since no type-approval rules existed at the EU level, and therefore that the prohibition of circulation had to be in place to avoid endangering the driver of the vehicle and other vehicles on the road.[48] On the question of the *necessity* of the Italian prohibition the Court stated that since the Member States were allowed to determine *the degree of protection* which they wished to reach in terms of road safety, and the method of reaching that degree, and since that degree may vary between Member States, Italy was to be allowed "*a margin of appreciation*".[49]

In the view of the Court, Italy had not been contradicted on the fact that the combination of a motorcycle and a trailer was a danger to road safety, and even if the burden of proof was on the Italian Republic, "that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions".[50] Even if the Court could envisage measures which would guarantee a certain level of road safety, in Italy, such as those mentioned by the AG, relating to a more specific ban in terms of specific localities or on particular itineraries, the Court argued that Italy could not be denied the possibility of attaining the objective of road safety "by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities".[51] In this light, the Court dismissed the Commission action.

[46] Ivi, para. 34.

[47] Ivi, paras 59-60 (emphasis added).

[48] Ivi, para. 63.

[49] Ivi, para. 65 (emphasis added). It is particularly notable that the English translation contains the term "margin of appreciation". Similarly, the term is used by the Court in *Tas-Hagen* (Court of Justice, judgment of 26 October 2006, case C-192/05, *Tas-Hagen*, para. 36). In both instances, the French language version contained the term "marge d'appréciation".

[50] Ivi, para. 66.

[51] Ivi, para. 67.

In summary it is clear that eventually the principle of mutual recognition played no, or very little role in the outcome of the case. The case marks a new outreach for Art. 34 TFEU since rules as concerning *use of products* also, as import restrictions, fell within its scope. However, it also meant, at the same time, that traffic rules, a field which would otherwise fall close to core state interests and a field outside clear EU competence, was being scrutinized in the light of the total ban to quantitative restrictions and all measures having an equivalent effect, found in Art. 34 TFEU. The CJEU is here granting the Member State involved, Italy, a real and considerable *margin of appreciation*, that is not curtailed by claims of EU "conceptual autonomy" or otherwise by laying a heavy burden on the Italian government in terms of establishing that the *road safety* objectives, could not have been reached with measures "less restrictive of trade", and thus effectively also applying a weak variant of the proportionality principle.

Interestingly, in the case *Åklagaren v. Mickelson*,[52] which is generally accepted as being the clear sequence to the above discussed case *Commission v. Italy* (although with a more detailed proportionality analysis), there is no mentioning of the principle of mutual recognition. But, in a line of cases such as *Ker Optika*,[53] and *ANETT*,[54] the principle as put forward in *Commission v. Italy*, is being referred to without seemingly having any substantial impact on the outcome of the case. Similar irregularity appears also in the recent case *Scotch Whisky*,[55] where AG Bot, refers to the above quoted passage from the *Commission v. Italy* case as the "standard formula" now "usually employed in the case law".[56] Yet, in its ruling, the Court of Justice does not make an explicit reference to the principle, nor uses the "standard formula", although making a reference to the same case law as is the AG.

The recent cases confirm the absence of mutual recognition as an explicit constitutional principle in EU adjudication of free movement rights. The focus on market access offers an element for understanding this absence. However, it is argued in this contribution that the major element for explaining the absence of mutual recognition in the case law of the Court of Justice is the emphasis on the justificatory aspects of the rule of reason that is the application of the principle of proportionality. Mutual recognition is, in other words, merged within the application of the rule of reason/proportionality and the rhetoric of the rule of reason/proportionality. This explanation is backed-up by our previous interpretation of the *Cassis* ruling. Proportionality has, in fact, cannibalized mutual trust.

[52] Court of Justice, judgment of 4 June 2009, case C-142/05, *Åklagaren v. Mickelson and Roos*.

[53] *Ker-Optika*, cit., para. 48.

[54] Court of Justice, judgment of 26 April 2012, case C-456/10, *ANETT*, para. 33.

[55] Court of Justice, judgment of 23 December 2015, case C-333/14, *The Scotch Whisky Association*.

[56] Opinion of AG Bot delivered on 3 September 2015, case C-333/14, *The Scotch Whisky Association*, para. 58.

III.2. The normativity of regulatory trust

At the normative level, the principle of mutual trust may be praised as an integrative tool of the European Union. In that sense, mutual recognition can be viewed as an instrument for the legalization and institutionalization of regulatory exchange pursuant to which greater confidence may be built and sustained.[57] In a similar vein, Jürgen Neyer in his book *The Justification of Europe* has considered that, "[t]he principle of mutual recognition is the normative cornerstone of the EU's market-shaping practises and can be well observed in its everyday legislative output. It is the legal manifestation of the moral idea of tolerance and respect for the ways that others have chosen to live".[58] For this author, the principle is likely to stay as long as the EU remains a supranational polity.[59] This argument is not a surprise considering that mutual recognition (as an integral part of our economic constitution) has paved the way to regulatory competition between Member States.[60]

Nevertheless, it is important to keep in mind that the principle of mutual recognition is also a contested notion. Notably, the role of the Court of Justice in expanding the economic constitution through the reliance on this principle has been criticized. Constitution-making goes beyond the conventional role of interpretation and application of the judge.[61] The key role of the Court in Luxembourg in developing the economic constitution was recently disapproved by Habermas, who considered as convincing the point that negative integration of different national societies through market freedoms took priority over a positive integration that is accomplished politically through the will formation of citizens themselves.[62] The role of the Court of Justice can also be criticized by using a Hayekian perspective as a lens. What would Hayek think of the Cassis ruling? He would probably condemn this form of judicial activism coupled with a cost-benefit analysis (enshrined within the rule of reason/proportionality).[63]

[57] K. Nicolaidis, G. Schaffer, *Transnational Mutual Recognition Regimes*, cit., pp. 263 and 295.

[58] J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012, p. 21.

[59] Ivi, p. 197.

[60] K. Tuori, *European Constitutionalism,* Cambridge: Cambridge University Press, 2015, p. 143. See also K. Alter, S. Meunier, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, in K. Alter, *The European Court's Political Power*, Oxford: Oxford University Press, 1994, p. 148.

[61] *Ibid*.

[62] J. Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in *European Law Journal*, 2015, p. 546.

[63] S.A. Beulier, P.J. Boettke, C.J. Coyne, *Knowledge, Economics, and Coordination: Understanding Hayek's Legal Theory*, in *NYU Journal of Law and Liberty*, 2005, p. 209.

Similarly the extensive interpretation of *Cassis* by the Commission's communication can likewise be condemned.[64] In this communication, the Commission failed to mention the importance of the rule of reason/proportionality in connection with the application of mutual recognition, thus making this document an apostle of liberalization on steroids. Alter and Meunier rightly stated that without the communication, "the fate of Cassis would have been relatively unknown in wider political circles".[65] According to us, what is also worth underlining here is that only half of the truth about *Cassis* was made known to the politics since the crucial rule of reason aspect of the judgment was not mentioned.

In addition, it is important to stress that the very concept of mutual trust is contested in the most recent cases of the Court of Justice. The *Aranyosi and Căldăraru* cases delivered by the Grand Chamber of the Court of Justice in April 2016 offer, in that sense, an interesting illustration.[66] Here the Court of Justice stated that "[t]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the *mutual confidence* between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter".[67] So the Court relies here on the concept of mutual confidence instead of mutual trust.[68] Trust and confidence are not the same concepts.[69] Does this mean something? Even in the case of a negative answer, it shows that the principle of mutual trust is not a fixed concept in the jurisprudence of the Court of Justice.

Therefore, it appears essential to define the concept of judicial mutual trust in a proper way. This definition must reflect the key role of the rule of reason/proportionality in its understanding and interpretation. In that sense, to understand the principle of mutual recognition in light of the notion of *Regulatory Trust* seems to fulfil this function. If the host State accepts the level of protection of the State of origin, this leads to the (judicial) regulation of non-harmonized areas of EU. By contrast, if the justifications of the host State are reasonable/proportionate, this leads to the

[64] R. Barents, *New Developments in Measures Having Equivalent Effects*, in *Common Market Law Review*, 1981, p. 271.

[65] K. Alter, S. Meunier, *Judicial Politics in the European Community*, cit., p. 147.

[66] Court of Justice, judgment of 5 April 2016, cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], para. 84.

[67] Ivi, para. 77.

[68] See for another reference to mutual confidence, Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S and M.E.* [GC], para. 83. The Court stated that mutual confidence is the *raison d'être* of the European Union and that the creation of an area of freedom, security and justice is based on mutual confidence and a presumption of compliance, by other Member States and the respect, in particular, fundamental rights. See also Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *F.*, para. 50, and, by analogy, with respect to judicial cooperation in civil matters, Court of Justice, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 70.

[69] Though the direct translation of "trust" in French is "confiance" (confidence), we consider that they are not the same concepts since "trust" embodies a notion of risk which is not present in the notion of confidence.

"keeping" in place of the domestic regulation. Mutual trust in EU free movement law is thus intimately connected to the regulation (unity) and deregulation (diversity) of the internal market. This aspect of mutual trust should be clearly understood.

It is true that a part of the doctrine in the past has already attempted to lift up this crucial aspect of mutual trust. For instance, Giandomenico Majone considered that the great merit of the principle of mutual recognition is that it replaces centralized and decentralized decision making, in the spirit of the subsidiarity principle, and thus makes possible competition between different regulatory approaches.[70] This understanding of mutual recognition is very close from what has been called "functional parallelism"[71] where there is no automatic acceptance of the level of protection of the state of origin and where the home state can invoke proportionate public interests requirements (mandatory requirements) in order to maintain its own regulatory space. The system builds on a general presumption of the allocation of regulatory power which can be rebutted by the host State. In a similar vein, Pelkmans lucidly stated that

> "mutual recognition is one of the most appreciated innovations of the EU. The idea is that one can pursue market integration, indeed 'deep' market integration, while respecting 'diversity' amongst the participating countries. Put differently, in pursuing 'free movement' for goods, mutual recognition facilitates free movement by disciplining the nature and scope of 'regulatory barriers', whilst allowing some degree of regulatory discretion for EU Member States".[72]

Our concept of *Regulatory Trust* is useful and necessary in order to improve the understanding of mutual recognition since it establishes a clear link between the issue of regulatory competition (regulation as unity and deregulation as diversity) and the application of proportionality in relation to the Member States justification. The concept of *Regulatory Trust* comes close from what has been called "managed trust". There is also an obvious connection with the Pelkmanian concepts of judicial and regulatory mutual trust. However, our key point is that judicial mutual trust can also be regulatory. In other words, *Regulatory Trust* can be both judicial and legislative. In this contribution, we focus mainly on the judicial aspect of *Regulatory Trust*.[73]

Moreover, the connection between trust and regulation is of utmost importance if we take seriously into consideration the wider debate on regulation. In that regard, Ogus, commenting on the *Cassis* ruling, said that this judgment recognises by implica-

[70] G. MAJONE, *Mutual Recognition in Federal Type Systems*, cit., p. 11.

[71] J. WEILER, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 365 *et seq.*

[72] J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services,* in *Bruges European Economic Research (BEER) Papers*, 24/2012, p. 26.

[73] See K.E. SORENSEN, *Non-Harmonized Technical Regulation and the Free Movement of Goods*, in *European Business Law Review*, 2012, p. 163.

tion the relative failure of the harmonization programme. For this author, "[t]he Court had admitted a policy of national regulation; but to harness that policy to market integration, it had also adumbrated a principle of mutual regulation".[74] The recent scholarship on "Regulation" seems to move towards a proceduralization of "Regulation".[75] The work of Julia Black on this matter is in our view of great interest for the issue of mutual trust.[76] She determines a model of proceduralization of regulation (so-called "thick model") based on a Habermasian deliberative model of democracy.[77] For Habermas, citizens are authors and addresses of their own laws. For him, there is a close relationship between rights, law and political power.[78] Procedural law is here seen as a theory of the deliberative procedures that law both relies upon and has to secure.[79] This deliberative form of proceduralization is orientated towards the mutuality, consensus, and inter-subjective understanding of deliberative democracy.[80] The concept of *Regulatory Trust* fits well the move towards proceduralizing regulations.

Having in mind the functional importance of the proportionality principle in relation to the case law on mutual recognition, is it possible to talk of procedural mutual trust? Of course, this vision implies the transfer of the theory of Habermas in the jurisprudential context. This is not impossible. Mattias Klatt has for instance considered that the model of proportionality analysis and balancing held by Alexy and his disciples is supplemented by a Habermasian discursive theory of legal argumentation.[81] There is thus a link between the principles of mutual recognition and proportionality, on the one hand, and the Habermasian theory of communicative action based on language and reason, on the other. Also, we should not forget that the first and main criticism on the subjective nature of the case law on proportionality was voiced by Jürgen Habermas.[82] This last point brings us to our last section on public interest requirement and proportionality. A host State may reject the level of protection of another State if it is justified

[74] A.I. Ogus, *Regulation: Legal Form and Economic Theory*, Oxford: Hart, 2004, p. 177.

[75] T. Prosser, *Regulation and Social Solidarity*, in *Journal of Law and Society*, 2006, pp. 377-378. The author considers that it would be inadequate to assess the justifications for regulations as commonly based on the identification of market failures (so-called welfare economic approach). Other justifications can be found in the protection of rights reflecting both a procedural approach to regulation and the civic republican tradition. According to Prosser, it is through this that regulation can address the broader substantive concerns (sidelined by the welfare economic approach). A similar result can be found in developing the "public interest" approach.

[76] J. Black, *Proceduralizing Regulations: Part I*, in *Oxford Journal of Legal Studies*, 2000, pp. 597-614.

[77] Ivi, p. 599.

[78] Ivi, p. 611.

[79] Ivi, p. 614.

[80] Ivi, p. 599.

[81] See M. Klatt, *Robert Alexy's Philosophy of Law as System*, in M. Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford: Oxford University Press, 2012.

[82] See K. Möller, *Proportionality: Challenging the Critics*, in *International Journal of Constitutional Law*, 2012, p. 709.

or reasonable. But the reasoning employed by the Court of Justice in the assessment of the market restrictions relied on by the Member States appears then essential to validate the legitimacy of the justification put forward by the host State.

IV. Adopting or rejecting the level of protection of the other

This section looks, first of all, at what are the key principles which may in fact be deduced from the Court of Justice jurisprudence to understand the functioning of the principle of mutual recognition. According to Saydé, "the principle of mutual recognition requires the host State to treat cross-border activities better than domestic activities by restraining itself from applying non-discriminatory measures to incoming goods, services or companies".[83] Secondly, it focuses on the logic of the Court of Justice when it comes to assessing the various defences of the state trying to justify its restriction on free movement. This part scrutinises the prevailing factors in reviewing restrictive measures adopted by the host State and leading to the validity of the justification (and thus leading to the rejection of the level of protection of the State of origin).

IV.1. Mutual recognition and the conundrum of the level of protection

In our view, three cases - *Woodworking Machines*, *Foie Gras* and *Laval,* are paradigmatic to understand the prevailing factors leading to the adoption of the level of protection by the host State. The first two cases concerned free movement of goods whereas the *Laval* case concerned free movement of services. The first important principle for mutual recognition and illustrated by *Woodworking Machines* is that the levels of protection must be equivalent between the host State and the State of origin. The second important principle which resorts from *Foie Gras* is that mutual recognition is feasible even when there is no existing equivalent regulation in the State of origin. The host State regulation must, in that sense, be "other regarding". The third important principle, which derives from *Laval,* is that mutual recognition applies across all the economic freedoms not only in relation to the substantive level of protection but also in relation to the procedural level of protection.

In *Woodworking Machines*, the Court of Justice had to assess the German and French level of protection concerning safety rules for woodworking machines.[84] The French regulation requires manufacturers to take into account safety at the stage of the manufacture of the machines. This regulation is founded on the idea that the users of the machines must be protected from their own mistakes and that the machine must be designed so that the users' intervention is limited to the strict minimum. In Germany, by

[83] A. Saydé, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement,* cit., p. 7.

[84] *Woodworking machines*, cit.

contrast, the basic principle is that the worker should receive thorough and continuing training so that he is capable of responding correctly if a machine malfunctions. The Commission stated that the provisions and measures applying under the French regulations were stricter than those prevailing in other Member States.[85] The French Government replies that it is for the Member States to decide what degree of protection of the health and the life of humans they intend to ensure. A Member State may have its own preoccupations and its own approach to prevention. Although it is true that machines which comply with German standards or provisions are not permitted in France, that is because the French safety experts consider that the protection provided by the German provisions is less effective than that existing under the French rules.

For the Court of Justice, since the area was not harmonised, it was possible for the host State to introduce regulations for the protection of the health and life of users of those machines. In *obiter dictum*, the Court considered that there is a breach of the principle of proportionality when national regulations require imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the host State when those imported products afford users the same level of protection.[86] However, Member States are not required to allow into their territory dangerous machines, which have not been proved to afford users on their territory the same level of protection.[87] In that regard, the Commission has not shown that the importation into France of machines providing the same level of protection as machines manufactured according to the rules at issue has been prevented. Moreover, concerning the legal regulations on safety in force in the other Member States, the Commission merely sated that in its view the provisions and measures applying under the French rules were stricter than those prevailing in other Member States. It conceded that, in view of the differences in the fundamental approach to control, it was difficult to determine whether the measures and provisions in force in other Member States were as detailed as those applied under the French regulations.[88] Therefore, the Commission has established that the machines in free circulation in the other Member States provide the same level of protection for users.[89]

In *Foie Gras*, the French regulation prohibiting the sale of foreign product similar to *foie gras* was under attack by the Commission.[90] The Commission argued that France did not include in the Decree a mutual recognition clause permitting preparations with *foie gras* as a base lawfully marketed in another Member State to be marketed in France. Nevertheless, the Commission acknowledges that the existence of such a clause

[85] Ivi, para. 19.
[86] Ivi, para. 16.
[87] Ivi, para. 17.
[88] Ivi, paras 18-19.
[89] Ivi, para. 22.
[90] Court of Justice, judgment of 22 October 1998, case C-184/96, *Foie Gras*.

would not have had an immediate effect, considering that the other Member States have no equivalent regulations and that the other Community producers would probably comply with the French requirements.[91] The strongest argument of the French government against this claim was that the use of certain trade descriptions must be regulated in order to enable consumers to know the real nature of products and thus to be effectively protected. However, it seems legitimate to think the mere fact that a product does not wholly conform to the requirements laid down in national regulation on the composition of certain foodstuffs with a particular denomination does not mean that its marketing can be prohibited.

AG La Pergola came with an interesting reasoning where he considered that

> "at the present time, outside France there do not exist – still less did there exist in December 1994 on the expiry of the period fixed by the Commission in its reasoned opinion – any national legislative measures concerning the composition, production and trade descriptions of the products concerned. Not until the day that another Member State adopts such legislation, and not before, will it be possible to speak of potential flows of trade from other Member States, capable of being unlawfully hindered or restricted, within the meaning and for the purposes of Art. 30 of the Treaty".[92]

For la Pergola:

> "it will not be until there is an unvarying and fair production of preparations with foie gras as a base – other than that of French origin and in competition with the latter – that we shall be able to say that there exists in the Community any real possibility of a commercial flow of imports on to the French market, in relation to which the Decree will be seen to constitute a measure equivalent to a quantitative restriction".[93]

In other words, the absence of regulation – and therefore the absence of an equivalent level of protection – in the other States renders the French regulation compatible with the free movement rules.

The Court of Justice did not follow the Opinion of the AG and instead found that the French regulation was disproportionate on the ground that it requires a total ban of the products.[94] The Court considered that that the main aim of the national regulation that is the protection of the consumer is not in itself capable of justifying a total prohibition of the sale of such a product in France in order to prevent offences with respect to false descriptions.[95] The Court ruled that by adopting a regulation (Decree) without enshrining in it a mutual recognition clause for products coming from a Member State and

[91] Ivi, para. 13.
[92] Ivi, para. 37.
[93] Ivi, para. 38.
[94] Ivi, para. 27.
[95] Ivi, para. 26.

complying with the rules laid down by that State, France had failed to fulfil its obligation under the provision of free movement of goods.[96] This conclusion is of interest since the Court asks the legislator of the host State to take into consideration the market situation in other States even if there is no existing regulation on the relevant products. There is an obvious link here – though implicit – with the duty of conform interpretation and the obligations flowing from Art. 4, para. 3, TEU. The absence of a regulated level of protection in the country of origin is not a sufficient argument to curtail the application of the principle of mutual recognition, which should then be taken into consideration by the legislator of the host State.

The principle of mutual recognition has also made its way to cross-border activities other than the free circulation of products such as the cross-border flow of services. This spill-over of mutual recognition was not an easy walk in the park. But the Court of Justice has progressively stiffened its case law with the consequence of taming national services regulation in a more operative manner.[97] Still, the case law of the Court of Justice on services can be viewed as granting a wide margin of appreciation for host States' regulations restricting competition. This has the effect of limiting the adoption of the level of protection of the State of origin. A good example of this is the *Alpine Investment* case.[98] The case concerned legislative measures enacted by the Dutch authorities, which prohibited financial services intermediaries from selling commodities futures, through means of "cold calling" (unsolicited contact with prospective clients by telephone). Alpine Investments argued that such a general prohibition was not necessary for achieving the objectives pursued by the Netherlands authorities, which were consumer protection and protection of the reputation of the Netherland's financial markets. Alpine Investment pointed towards the United Kingdom, where less restrictive measures were in place and the financial intermediaries where only required to keep records of telephone conversations. AG Jacobs pointed out that Directives harmonizing consumer protection were usually minimum harmonization Directives, allowing the Member States to put in place more stringent or additional measures. Therefore, where no harmonization had taken place, such as was the case in *Alpine Investment*, the Member States should be allowed to have different levels of protection. If not, the Member States would have to align to the "least onerous requirements" found in the Community, and therefore risk a "race to the bottom".[99] The Court agreed with the AG, and con-

[96] Ivi, para. 28.

[97] J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, cit., pp. 26-28.

[98] Court of Justice, judgment of 10 May 1995, case C-384/93, *Alpine Investments BV v. Minister van Financiën*.

[99] Opinion of AG Jacobs delivered on 26 January 1995, case C-384/93, *Alpine Investments BV v. Minister van Financiën*, paras 88-90.

cluded that "prohibition of cold calling does not appear disproportionate to the objective which it pursues".[100]

A clear break in the Court of Justice case law on free movement of services can be found in the *Laval* case. This ruling is significant in order to understand the prevailing factors used for adopting the level of protection of the other State. It is a paradigmatic case as it concerns not only the substantive level of protection but also the procedural level of protection. As to the substantive level of protection, *Laval* may be seen as a blind reflection of mutual trust since the reasoning of the Court of Justice is "not conditional on the state of establishment of the service provider guaranteeing worker with a level of protection of their rights equivalent to that ensured in the host Member State".[101] The Court of Justice jurisprudence on the posting of workers has undertaken a fundamental change from accepting national treatment (labour law standards) in *Rush Portuguesa*[102] to imposing mutual recognition in *Laval*.[103]

As to the procedural level of protection,[104] the Court in *Laval* ruled that

> "collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective [...] where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are *sufficiently precise* and *accessible* that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay".[105]

In other words, the procedural level of protection of the host State plays a key role for assessing the public interest justifications, which constitute in turn a potential exception to the principle of mutual recognition. Several procedural safeguards have emerged in relation to the justification of measures restricting free movement and can be viewed as reflecting the procedural flank of the principle of mutual recognition.[106]

[100] Ivi, paras 51 and 55 (emphasis added).

[101] O. DE SCHUTTER, *Transnational Provision of Services and Social Dumping: Rights based Mutual Trust in the Establishment of the Internal Market*, in *CRIDHO Working Paper* 2012/5, 2012, p. 18.

[102] Court of Justice, judgment of 27 March 1990, case C-113/89, *Rush Portuguesa v. Office national d'immigration*.

[103] A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement*, cit., p. 15.

[104] See G. MAJONE, *Regulatory Legitimacy in the United States and the European Union. Procedural legitimacy*, in K. NICOLAIDIS, R. HOWSE (eds), *The Federal Vision*, Oxford: Oxford University Press, 2001, pp. 254 and 266–267. Majone discusses procedural legitimacy and regulatory federalism as an optimal allocation of regulatory responsibilities among the different levels of government forming the federal polity.

[105] Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval* [GC], para. 110 (emphasis added).

[106] S. PRECHAL, *Free Movement and Procedural Requirements: Proportionality Reconsidered,* in *Legal Issues of Economic Integration*, 2008, p. 208. The author discusses also the "medical services" cases, including Court of Justice, judgment of 12 July 2001, case C-157/99, *Smits and Peerbooms*; Court of Justice, judgment

In *Greenham and Abel*, for instance, the Court of Justice considers whether the national rules could be justified provided that they fit the requirements of Art. 34 TFEU. The first of these requirements, before the analysis of proportionality, is the availability of an accessible and speedy procedure and judicial review in case of rejection.[107] Already in the *German Beer* case, the Court of Justice concluded that the German rules on additives in beer entail a general ban on additives, their application to beers imported from other Member States is contrary to the requirements of Community law as laid down in the case law of the Court, since that prohibition is contrary to the principle of proportionality.[108] Before coming to such conclusion, the Court stressed that by virtue of the principle of proportionality, traders must also be able to apply, under a procedure, which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.[109] In another context, George Bermann has discussed the procedural reinforcement of federalism via the principle of subsidiary.[110] We do believe that it is also possible to discuss the procedural reinforcement of federalism via the principle of mutual recognition.

Finally, the issue of the levels of protection was recently debated again in the context of public procurements. The *Bundesdruckerei*[111] and *RegioPost*[112] judgments should here be discussed and compared. In *Bundesdruckerei*, the national court asked whether Art. 56 TFEU precludes the application of a national regulation which requires that subcontractor to pay posted workers a minimum wage fixed by that legislation even when the tenderer intend to carry out the public contract by having recourse to workers established in another Member State. A positive answer to this question would entail the application of the logic of mutual recognition. The Court, following *Rüffert* (which as discussed before confirms *Laval*), considered that the regulation at issue is capable of restricting the effect of Art. 56 TFEU. This restriction may be justified in the name of the social protection of employees. However, the Court ruled that it was not justified since the national regulation applies solely to public contracts and there is no information to suggest that employees working in the private sector are not in need of the same wage protection.[113] To put in a nutshell, the level of protection established by the national

of 13 May 2003, case C-385/99, *Müller-Fauré and van Riet*; Court of Justice, judgment of 23 October 2003, case C-56/01, *Inizan*, and Court of Justice, judgment of 16 May 2006, case C-372/04, *Watts* [GC].

[107] S. PRECHAL, *Free Movement and Procedural Requirements*, cit.; Court of Justice, judgment of 5 February 2004, case C-95/01, *Greenham and Abel*, para. 35.

[108] Court of Justice, judgment of 12 March 1987, case C-178/84, *Commission v. Germany*, para. 53.

[109] Ivi, para. 45.

[110] See G. BERMANN, *The Role of Law in the Functioning of Federal Systems*, in K. NICOLAIDIS, R. HOWSE (eds), *The Federal Vision*, cit., p. 191.

[111] Court of Justice, judgment of 18 September 2014, case C-549/13, *Bundesdruckerei*.

[112] Court of Justice, judgment of 17 November 2015, case C-115/14, *RegioPost*.

[113] Ivi, para 32.

regulation was not consistent enough and, therefore, was considered to be disproportionate. The logic of mutual recognition could apply.

In *RegioPost*, delivered later in a similar context, the Court came to a different conclusion by considering the public interest justification to be proportionate. In this case, the Court of Justice, just as in *Bundesdruckerei*, found that a national regulation imposing a minimum wage on tenderers and their subcontractors is falling within the scope of Art. 56 TFEU. However, in contrast to the previous case, it held the restriction to be justified. For the Court of Justice, the minimum rate of pay imposed by the national regulation is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the region irrespective of the sector concerned.[114] The level of protection established by the host State was consistent enough and, by consequence, the logic of mutual recognition could not apply. It is worth noting the Opinion of the AG Mengozzi who linked the public interest justification to the national identity clause under Art. 4, para. 2, TEU. The Court of Justice did not mention Art. 4, para. 2, TEU but came to a similar conclusion.[115] This last point brings us to discuss in more detail, which are the prevailing factors in reviewing national regulation that restricts free movement.

IV.2. Which are the prevailing factors when reviewing restrictive measures?

What may be seen from these cases is that certain deep state interests, may create wide margin of discretion to the State (or a private person, to the extent their activity falls within the scope of the free movement)[116] – that is eventually controlled much through the principle of proportionality – rather than the mutual recognition principle. This may be seen, for example both in the above discussed *Commission v. Italy*, where the State was granted a wide margin of appreciation, and a rather lenient proportionality assessment was undertaken, and *Ker Optika*, where the Court also stated that a wide discretion should be granted,[117] but eventually the Court held that the restrictive national measures exceeded "the limits of the discretion referred to in paragraph 58 of this judgment".[118] Therefore, the Court ruled that the national restrictive measures were not proportionate since going "beyond what is necessary to attain the objective the Member State claims to pursue".[119]

[114] Ivi, para. 75.
[115] Ivi, paras 82-84.
[116] See e.g. Court of Justice, judgment of 12 July 2012, case C-171/11, *Fra.bo Spa*.
[117] *Ker-Optika*, cit., para. 58.
[118] Ivi, para. 75.
[119] *Ibid.*

Generally speaking, the margin of appreciation constitutes an impeccable tool for ensuring legal pluralism since it permits the Court to safeguard the cohesion of EU law and prevent irreconcilable divergences by striking a balance between the European constitutional identity (convergence/unity) and the national identities (divergence/diversity).[120] This unity/diversity conundrum is also deeply enshrined in the function of the principle of mutual recognition. The doctrine of deference or wide margin of appreciation can be detected particularly in the case law of the Court of Justice in some specific areas where the Member States raise legitimate and *deep national interests* like:[121]

– fundamental rights;[122]

– social and employment policy;[123]

– public order, particularly issues involving moral, religious and cultural elements.[124]

These deep national interests reflect the constitutional identity of the Member States and are closely related to civil liberties or fundamental rights, such as the principle of equality (in relation to social and employment policy) and freedom of expression (in relation to public order).[125] To be considered as legitimate objectives, the deep national interests must obviously pass the test of proportionality.[126] The Member State is required here not to manifestly exceed its margin of discretion. It is also worth noting that the case law of the Court of Justice may put restrictions to this wide margin of ap-

[120] M. ROSENFELD, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, in *International Journal of Constitutional Law*, 2008, p. 415.

[121] C. BARNARD, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?,* in C. BARNARD, O. ODUDU (eds), *The Outer Limits of European Union Law,* Oxford: Hart Publishing, 2009, p. 273.

[122] See e.g. Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*, para. 82; Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen*, paras 37–39; and Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*, para. 44.

[123] See e.g. Court of Justice, judgment of 11 September 2003, case C-77/02, *Steinicke*, para. 61, and Court of Justice, judgment of 22 November 2005, case C-144/04, *Mangold* [GC], para. 63. See also General Court, judgment of 12 February 2008, case T-289/03, *BUPA*, and Protocol no. 26 on services of general interest, giving wide discretion to national authorities. See M. ROSS, *A Healthy Approach to Services of General Economic Interest? The BUPA Judgment of the Court of First Instance,* in *European Law Review*, p. 136.

[124] See e.g. Court of Justice, judgment of 24 March 1994, case C-275/92, *Schindler*; *Läärä*, cit.; Court of Justice, judgment of 21 October 1999, case C-67/98, *Zenatti*; Court of Justice, judgment of 6 November 2003, case C-243/01, *Gambelli*, para. 63; Court of Justice, judgment of 6 March 2007, joined cases C-338/04, C-359/04 and C-360/04, *Placanica* [GC], para. 47; and Court of Justice, judgment of 8 September 2009, case C-42/07, *Liga Portuguesa* [GC], para. 57. See also, in relation to cultural policy, Court of Justice, judgment of 13 December 2007, case C-250/06, *United Pan Europe*, para. 44, where the Court of Justice makes an explicit mention of the wide margin of discretion given to the national authorities. See C. HILSON, *The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National European Identity*, in *European Law Journal*, 2008, p. 186.

[125] *United Pan Europe*, cit., para. 44, "[...] it must be noted that, while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, that the national authorities have a wide margin of discretion in that regard" (relying on *Schmidberger*).

[126] See, in relation to overriding reasons, *Gebhard*, cit., para. 37, and for explicit derogations, see Court of Justice, judgment of 7 July 1976, case 118/75, *Watson and Belmann*, para. 21.

preciation when assessing the suitability of the national interest invoked by the Member State. Indeed, following the *Gambelli*, *Placanica*, *Hartlauer Apothekerkammer des Saarlandes* and *Liga Portuguesa* cases, the national interest relied on to justify the restriction on free movement must be of a consistent and systematic nature.[127] This line of cases is also visible in the recent judgements in *Bundesdruckerei*[128] and *RegioPost.*[129] It may be said that this test allows the Court of Justice to test in a way whether the national interest is *deeply* enshrined within the judicial *acquis* and, consequently, whether mutual recognition should be applied.

The interplay between the interests involved and the proportionality assessment is in general strong, when dealing with restrictions to the free movement principles in general. In fact, two fundamental elements of the Lisbon Treaty, may be seen as reinforcing this trend of *strong interests*. In Lisbon, Art. 4, para. 2, TEU was introduced,[130] a provision that increases the ability to respect State margin, with its clear reference to national identities, constitutional structures, and essential State function. The second important factor is the legally binding Charter of Fundamental Rights of the European Union (Charter) that with Art. 6 TEU, as introduced in the Lisbon Treaty was given "the same legal value as the Treaties".

As for Art. 4, para. 2, TEU, it was first applied in the *Sayn-Wittgenstein* case. In that case, the Court regarded the Austrian law on abolition of nobility, "as an element of national identity", to be taken into consideration when striking the balance between legitimate interest and the right of free movement of persons. Additionally the reliance of the Austrian Government on "the Austrian constitutional situation", was to be interpreted as a reliance of *public policy*.[131] The Court finally ruled in favour of the Austrian measures, despite their clear restrictive effects on free movement. Similarly, in the *Runevič-Vardyn and Wardyn* cases Art. 4, para. 2, TEU, was used to justify the objective of protecting the State's national language, and constituted thus "a legitimate objective capable of justifying restriction on the rights of freedom of movement and residence pro-

[127] *Gambelli*, cit., para. 67; *Placanica*, cit., paras 53 and 58; Court of Justice, judgment of 10 March 2009, case C-169/07, *Hartlauer* [GC], paras 55 and 63; and Court of Justice, judgment of 19 May 2009, joined cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes* [GC], para. 42, and *Liga Portuguesa*, cit., para. 61. See also Court of Justice, judgment of 17 July 2008, case C-500/06, *Corporación Dermoestética*, para. 39. National legislation prohibiting advertisements for medical or surgical treatments of a cosmetic nature was considered to be inconsistent and thus inappropriate for the purpose of securing the attainment of the objective of public health.

[128] *Bundesdruckerei*, cit.

[129] *RegioPost*, cit.

[130] "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[131] Court of Justice, judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, para. 84.

vided for in Art. 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law".[132] Therefore, in both the *Sayn-Wittgenstein* and *Runevič-Vardyn and Wardyn* cases the Court is accepting the national measures restricting the fundamental right to free movement, although in the latter case it was of a more principle nature, since the final assessment was left to the national court. Irrespective of that, the *national identity* argument is placed "methodologically" within the justification process as *a legitimate interest*. Finally, in the two Grand Chamber cases, *Commission v. Luxembourg*[133] and *Anton Las*[134], arguments concerning the protection and promotion of the national language, are accepted by the Court by reference to Art. 4, para. 2, TEU. Again, Art. 4, para. 2, TEU is used to substantiate further the legitimate objective of the national measures, as, in principle, an argument justifiable as a restriction to the fundamental freedom at stake. However, in neither of the cases, was this successfully done, and the national measures did not survive the test of proportionality even though the national measures, particularly in the *Anton Las* case, were constitutionally based. In all the cases the proportionality principle is playing the key role in balancing the national interests with the principles of free movement, and as seen, the outcome is not necessarily given, even if these interests are given a high status when they can be substantiated with a reference to Art. 4, para. 2, TEU. Therefore, Art. 4, para. 2, TEU has all the abilities serve as the basis of normatively endorsed diversity, and therefore signifying an increased, and now legalized, state margin – if the Court so wishes. In that way, Art. 4, para. 2, TEU, could serve as the basis for application of the proportionality principle, in cases where it is necessary to show a deferential approach, and thus respect "disintegrative" outcome in particular cases. But we should not forget that Art. 4, para. 2, TEU does not work in a vacuum and the whole context of Art. 4 TEU – particularly Art. 4, para. 3, TEU should be taken into consideration. As discussed before in this contribution, the Court of Justice has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law.[135] The fundament of mutual trust in EU law is in fact the principle of loyalty, laid down in Art. 4, para. 3, TEU. There is therefore a strong link between Art. 4 TEU and the application of the principle of mutual recognition.

To end, the role of fundamental rights in the case law of the Court of Justice, and EU law in general is of course well known, even before the entry into force of the Charter. As for the review of measures restricting the free movement, the *ERT* case, as the pioneer case, stands for the type of cases where the fundamental rights were used as a weighing factor when the compatibility of the restrictive measures was being balanced

[132] Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič -Vardyn and Wardyn*, para. 87.

[133] Court of Justice, judgment of 24 May 2011, case C-51/08, *Commission v. Luxembourg* [GC].

[134] Court of Justice, judgment of 26 November 2002, case C-202/01, *Las*.

[135] See e.g. *Bauhuis*, cit., para. 22; *Hedley Lomas*, cit., para. 19; and Court of Justice, judgment of 29 April 2004, case C-476/01, *Kapper*, para. 37.

with the free movement principles, through proportionality analysis. Furthermore, as seen in the *Schmidberger*,[136] *Familiapress*[137] and *Carpenter*,[138] fundamental rights may *per se* be the very interest or ground, on which a restrictive measure is justified. The Charter has of course already had a profound impact on EU law. It has increased the visibility of fundamental rights, and, of course, has been granted the same hierarchical position as the Treaties, that without a doubt has had an impact, and perhaps the very reason why EU law was firstly annulled with a reference to fundamental rights, shortly after the entry into force of the EU Charter. Furthermore, as held in Opinion 2/13, fundamental rights are "at the heart of that legal structure".[139] Given the role of the interests, and the fact that fundamental rights may both serve as an additional hurdle, and as a *per se* justification ground, it is clear that the existence of the Charter, with substantial number of fundamental rights, that even goes way beyond the number of rights protected in the European Convention of Human Rights, enlarges the availability of recognised motives, that even have a Treaty status.[140] This extension of the availability may have in impact on the adoption of the level of protection in the host State and on the application of the principle of mutual recognition as a whole.

V. Concluding remarks: mutual trust as a regulatory principle

The previous discussion has indicated that mutual trust may well be understood as a substantive regulatory principle. Through its establishment and development – first in case law, then also guiding EU legislation – it provides a regulatory tool-box for balancing the interests between cooperation and member state self-determination. The introduction of human rights protection, most notably through the Charter, has brought another dimension of complexity into the field. Above all, it is clear from the case law of the Court of Justice that mutual recognition, trust, confidence and loyalty, are key terms in securing the true functioning of the objectives of the European Union. However, their

[136] *Schmidberger*, cit.

[137] Court of Justice, judgment of 26 June 1997, case C-368/95, *Familiapress*.

[138] Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter*.

[139] Court of Justice, opinion 2/13 of 18 December 2014, para. 169.

[140] This means that a successful invocation of a fundamental rights would mean that a true balancing exercise needs to be undertaken. This balancing exercise has to be controlled by the principle of proportionality. Art. 52, para. 1, of the Charter is a specific limitation clause, to be applied "horizontally" throughout the Charter, as appropriate. Furthermore, in the Charter, a distinction is made between the Art. 52, para. 1, framework, and Art. 52, para. 2, of the Charter, since in cases where Charter rights, are reiterating rights laid down in the TFEU, they "shall be exercised under the conditions and within the limits defined by those Treaties" as stated in Art. 52, para. 2, of the Charter. See e.g. Court of Justice, judgment of 4 July 2013, case C-233/12, *Simone Gardella v. Istituto nazionale della previdenza sociale (INPS)*, paras 39-41, where the Court stated that since, in that case, Art. 15, para. 2, of the Charter, "reiterates" rights laid down in Art. 45 TFEU (free movement of workers), in the light of Art. 52, para. 2, the case was to be analysed on the basis of Arts 45 TFEU and 48 TFEU.

status, interaction, and scope as principles is less clear, and other principles, such as the principle of proportionality and margin of appreciation doctrines, are very much also present. The current president of the Court of Justice, Lenaerts, has recently, in his personal capacity, held that the principle of mutual recognition is a constitutional principle that pervades the entire Area of Freedom, Security and Justice. However, at the same time he acknowledges that the principle of mutual recognition has to be applied in light of the principle of proportionality. Furthermore, he emphasised that the principle has to respect the margin of discretion left by the EU legislator to national authorities and that it must take into account national and European public-policy considerations.[141] In this contribution we have been dealing with these various concepts, some of which are contested, and have tried to map out what each of these concepts represents, in particular focusing on the case law of the Court of Justice in its wider context. What we endeavoured was to propose a new understanding of this complicated balancing between interests in cases involving mutual recognition and mutual trust in the case law of the Court of Justice. In the light of conceptual economy, and for the sake of coherency in terms of use of terms, this article introduced the concept of *Regulatory Trust* as a framework for understanding EU law in the field.

[141] K. Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The fourth annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, www.law.ox.ac.uk.