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## EL PRINCIPIO DE RECONOCIMIENTO MUTUO EN EL DERECHO DE LA UNIÓN EUROPEA SEGÚN LA CLÁUSULA DE “PLENA FE Y CRÉDITO” DE LA CONSTITUCIÓN DE ESTADOS UNIDOS\* *THE PRINCIPLE OF MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN EU LAW IN THE LIGHT OF THE “FULL FAITH AND CREDIT” CLAUSE OF THE US CONSTITUTION*

Werner MIGUEL KÜHN BACA\*\*

**RESUMEN:** El presente artículo muestra un análisis comparativo del derecho de los Estados Unidos de América y de la Unión Europea enfocado en el principio de reconocimiento mutuo, el cual ha servido como base para lograr el reconocimiento y la aplicación de decisiones judiciales por parte de las autoridades de los distintos Estados miembros. Se ilustran los orígenes y la evolución de este principio en el ordenamiento jurídico de los Estados Unidos, así como su reciente implementación en el sistema de integración europeo con miras a crear un espacio común de libertad, seguridad y justicia. Para ello se enumera y analiza un número importante de actos jurídicos adoptados hasta hoy en materia civil y penal. Igualmente se realza la influencia que ha tenido la jurisprudencia de la Corte Suprema de EU y del Tribunal de Justicia de la UE en el desarrollo de este principio. Asimismo, se hace hincapié en la función que este principio ejerce como elemento unificador de una nación, planteándose la cuestión de la posible aplicación de este concepto a un sistema de integración regional de claros matices federales como la UE.

**Palabras clave:** reconocimiento mutuo de decisiones judiciales en materia civil y penal, derecho de integración regional.

**ABSTRACT:** *The paper shows a comparative analysis of the law of the United States of America (US) and the European Union (EU) focusing on the principle of mutual recognition, which has served as a basis in order to achieve the enforcement of judicial decisions by the authorities of the different Member States. It illustrates the origins and evolution of this principle within the US legal system, as well as its recent implementation within the European integration system with the aim of creating a common space of freedom, security and justice. The paper lists and analyzes a substantial number of legal acts adopted so far in the area of civil and criminal law. Furthermore, it highlights the influence the case-law of the US Supreme Court and the Court of Justice of the EU has had on the development of this principle. Moreover, it elaborates on the function of this principle as a nation-building element, raising the question whether this concept could be possibly transposed to a regional integration system with clear federal traits such as the EU.*

**Keywords:** *Mutual Recognition of Judicial Decisions in the Area of Civil and Criminal Law, Law of Regional Integration.*

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SUMMARY: I. *Introduction*. II. *The Constitutional Concept of Federalism*. III. *Mutual trust as a Precondition for Mutual Recognition*. IV. *Comparative Approach*. V. *Final Remarks*.

## I. INTRODUCTION

The present article aims at shedding light on the so-called “principle of mutual recognition”, known in the legal systems of both the United States of America (US) and the European Union (EU), however showing characteristics of its own depending on the area in which it respectively applies. For that purpose, the present article will elaborate on the constitutional concept of federalism, in which the principle of mutual recognition is often applied. Subsequently, it will examine the advantages of this principle with regard to the mechanism of approximation of national/state legislation. A brief analysis of the principle of mutual recognition of judicial decisions in US law will serve as the starting point for a detailed narration of the efforts done by the EU in order to implement this principle in its own legal system. This narration will be complemented by an overview of some of the main legal acts so far adopted. Particular emphasis will be given as well to the role the judiciary has played in the shaping of this principle. An analysis of the relevant case-law will prove relevant, as it shall be maintained that the doctrinal basis for this principle was to a large extent developed by the highest courts in the US and the EU.

## II. THE CONSTITUTIONAL CONCEPT OF FEDERALISM

“Federalism” in the sense used in the present article is meant to be construed as a political system based on the categories universally recognized in general theory of state. Today federalism is a concept with multiple nuances. The US constitutes a classic model of federation, itself being composed of fifty self-governing States and several territories. The EU is an international organization<sup>1</sup> established by twenty seven sovereign

<sup>1</sup> Klein, E., in Graf Vitzthum, Wolfgang (ed.), *Völkerrecht*, Berlin-New York 1997, p. 246, classifies the EU as an international organization. He points out that the EU does not distinguish itself much from other international organizations in terms of the nature of its constituency. However, the author admits that the EU represents a unique case in

States, some of them formally organized along federalist principles (Austria, Belgium and Germany), while others have a longstanding tradition of centralized governmental power (France). A third intermediate category comprises those EU Member States currently immersed in a process of gradual evolution into more decentralized political systems (Spain, Italy and the United Kingdom),<sup>2</sup> the reason being mainly an increasing demand for autonomy by certain historical regions (Catalonia, South Tyrol and Scotland).

Federalism is characterized by a division of powers between member units and common institutions.<sup>3</sup> Unlike in a unitary state, sovereignty in federal political orders is non-centralized, often constitutionally, between at least two levels so that units at each level have final authority and can be self governing in some issue area. Citizens thus have political obligations to, or have their rights secured by, two authorities. Federally constituted states are characterized by their “multi-level legal system”, in which federal law and the law of the member units complement each other.<sup>4</sup> The divi-

public international law in the sense that never before in the history of international organizations a similar extensive conferral of sovereign rights has taken place.

<sup>2</sup> See on the process of Devolution in the United Kingdom Leyland, P., “La devolution britannica: integrazione, responsabilità e controlli”, *Unione europea e autonomie regionali – Prospettive per una Costituzione europea*, Torino 2003, p. 91; Birkinshaw, P., “Devolution in the United Kingdom: Processes, problems and consequences for the UK constitution”, *L'Europa tra federalismo e regionalismo*, Milan 2003, p. 67.

<sup>3</sup> Redish, M., *The Constitution as Political Structure*, New York-Oxford, 1995, p. 25, explains that decentralization of political power makes perfect sense in a system premised on the fear of, and the desire to avoid, tyranny. Placing all sovereign authority in one governmental unit is an invitation to dictatorial rule. Federalism tends to avoid tyranny in two ways. First, by dividing sovereign power between two levels of government, a federal system reduces the likelihood that the superior governmental level will be able to control all aspects of its citizens' lives. Second, if the inferior governmental level attempts to impose tyrannical rule, its citizens have available the safety valve of interstate mobility. Federalism is therefore, according to the author, a means to assure individual liberty.

<sup>4</sup> German speaking authors often refer to “Mehrebenensysteme” when describing complex federal legal systems and the way how national and regional law is intertwined. This concept is being nowadays applied as well to the relation between supranational and national law, see Di Fabio, U., “Nationales Arbeitsrecht im Spannungsfeld von Grundgesetz und Grundrechtecharta”, *Recht der Arbeit*, 2012, p. 263; Schröder, M., *Gesetzesbindung des Richters und Rechtsweggarantie im Mehrebenensystem*, Tübingen 2010, p. 130; Ottvanger, T., “The (multilayered) public interest and the law of the European Union”, *Today's multilayered legal order: Current issues and perspectives, Liber amicorum in honour of Arjen W. H. Meij*, Paris, 2011,

sion of power between the member unit and center may vary, typically the center has powers regarding defense and foreign policy, but member units may also have international roles. The decision-making bodies of member units may also participate in central decision-making bodies. Much recent attention is spurred by renewed political interest in federalism, coupled with empirical findings concerning the requisite and legitimate basis for stability and trust among citizens in federal political orders. Federal arrangements are seen as interesting solutions to accommodate differences among populations divided by ethnic or cultural cleavages yet seeking a common, often democratic, political order.<sup>5</sup>

As European integration moved forward during the past decades it became obvious to policymakers and scholars that the EU was gradually evolving into an entity showing an institutional structure similar to the ones existing in federal states around the globe.<sup>6</sup> An recognition of this process was the landmark judgment of 12 October 1993, in which the German Constitutional Court referred to the EU as a “compound of States” *Staatenverbund*,<sup>7</sup> in an attempt to categorize it as a new type of political system, to be found somewhere between a “federation” a “confederation” and in which a delicate balance is struck between enhanced cooperation and State sovereignty.

Recent calls by high ranking political leaders as the president of the European Commission *José Manuel Barroso* in his speech of 12 September 2012 at the European Parliament to embark on a new project giving rise to a “European Federation of Nations” have given positive momen-

p. 243; Rösler, H., *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts*, Tübingen, 2012, p. V.

<sup>5</sup> Stein, E., *Thoughts from a Bridge – A retrospective of writings on New Europe and American federalism*, 2003, p. 311, points out the fact that even while constructing a more centralized order to replace a disintegrating confederation, the drafters of the American Constitution were worried about preserving regional diversity.

<sup>6</sup> Rovná, L., “Constitutionalisation: The case of the Convention as a Network Analysis”, *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002-2005 – anatomy, analysis, assessment*, p. 20, describes the EU as “more than a classical international organization and less than a full-fledged federal state, which derives its legitimacy from both its member states and their citizens”.

<sup>7</sup> Judgment of 12 October 1993 regarding the compatibility of the Treaty of Maastricht with the German Basic Law the German Constitutional Court referred to the EU as a “compound of States” (*Staatenverbund*).

tum to this development. Suited with supranational bodies sharing legislative powers with the Member States, the EU as an entity of its own and endowed with international legal personality had been conferred the competence to adopt binding legal acts in certain delegated policy areas, which were to be applicable in the territory of all the Member States. Following a development analogical to the evolution of some federal states, the EU founding treaties became —not least due to the concept of primacy of EU law over national law developed by the European of Justice (ECJ)—<sup>8</sup> the paramount law of the Member States, setting the constitutional framework of a future political union. This development implied for the Member States a duty to make their national provisions, including those ranking as constitutional law, conform to EU law. At the top of the institutional system the ECJ was placed, entrusted with the task of ensuring the uniform and correct application of EU law by the national authorities. This implied for the ECJ the attribution of the competence to settle disputes between the EU bodies and the Member States and even to sanction Members States in breach of their obligations resulting from EU law. In the area of external relations the EU soon replaced the Member States by assuming essential functions which were reserved to them in the past, as the creation of a customs union and, by doing so, adopting a common trade policy. In addition, institutional arrangements were made in order to enable the governments of the Member States to speak for the first time with one voice. The attribution of international legal personality —initially implicitly and ultimately by adding an express provision in Article 47 of the EU-Treaty in the context of the amendments introduced by the Lisbon Treaty—<sup>9</sup> has enabled the EU to conclude various agreements

<sup>8</sup> Judgments of the ECJ of 15 July 1964, case 6/64, *Costa/ENEL* [1964] ECR 585; of 9 March 1978, case 106/77, *Simmenthal* [1978] ECR 629; of 8 September 2010, case C-409/06, *Winner Wetten* [2010] ECR I-8015.

<sup>9</sup> Before the entering into force of the Lisbon Treaty the question relating to the international legal personality of the EU was a matter of discussion among scholars. Schoutheete, P. de and Andoura, S., “The Legal Personality of the European Union”, *Working Paper – European Affairs Program, Royal Institute for International Relations*. Most of them agreed however that the EU had implicitly acquired legal personality, as it fulfilled the conditions set by international law, in particular the International Court of Justice (see *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion of 11 April 1949, ICJ Reports [1949]), for the recognition of this status. The EU had been conferred functions it could only exert if it had been granted

with States and regional integration schemes. European integration has thus led to a significant shift of power in favour of supranational bodies and to an increased cohesion among the Member States. The successive revision of the treaties over the past years gave rise to a process scholars commonly characterize as “constitutionalisation” of the EU, in the sense that on the one hand it has helped consolidate its institutional structure and legal order; on the other hand it has defined the set of values which are at the core of the integration process. This process culminated in the enactment of the Charter of Fundamental Rights of the EU with entering into force of the Lisbon Treaty, which made the Charter legally binding on both the EU bodies and Member States when implementing EU law. The Charter has nowadays become the cornerstone of the EU legal system and a symbol of identification among EU citizens.

The fact that the EU had originally been founded as an international organization of public international law<sup>10</sup> and for that reason lacked the essential characteristics of statehood was no obstacle that would prevent Europeans from adopting solutions previously developed in federal states in an attempt to ensure the consistent application of EU law while at the same time respecting the remaining sovereignty of the Member States. Inevitably, the focus of interest turned towards US federal constitutionalism and its longstanding tradition, which ultimately became a source of inspiration for those policymakers and scholars involved in the process of designing the future of Europe. The comparative approach pursued made sense, given the fact that the US had faced similar challenges as the EU in their early days of constituency. Alike the EU, the US’ major interest consisted from the very beginning in creating an integrated economic area by eliminating regulatory barriers likely to obstruct the free trade between the several States. The achievement of this goal constituted a milestone in US history as was in the framework of the European integration

legal personality. Practice translated into two specific characteristics: the capacity to contract agreements with other international actors (treaty-making power) and the capacity to entertain bilateral diplomatic relations with those international actors (active and passive right of legation).

<sup>10</sup> In its judgment of 5 February 1963 in the case 26/62, *Van Gend & Loos* [1963] ECR, p. 1, the ECJ indicated that the European Economic Community (EEC) constituted “a new legal order of international law”.

process.<sup>11</sup> However the approach followed on both sides of the Atlantic was slightly different.

### 1. *The Power of US Congress to regulate Commerce*

The approach pursued in US law resided basically in the idea that competence to regulate interstate commerce rested exclusively on Congress as the federal legislative body. The US Constitution conferred this competence to Congress by virtue of Article I, § 8, cl. 3 (Commerce Clause) and it has exercised this power ever since. The challenge to inconsistent State action rests on both the exercise of this legislative power and the pre-emptive effect of the federal legislation under the Supremacy Clause of Article VI, § 2 of the US Constitution. The Commerce Clause has been interpreted by the US Supreme Court as excluding any State competence on a determined the matter from the moment on Congress has made use of its legislative power. In other words, conflicts between domestic State law and the law adopted by Congress have usually been resolved by invoking the primacy of federal law over state law.

In the absence of congressional pre-emption the US Supreme Court invalidates “protectionist” state legislation by invoking the so-called “Dormant Commerce Clause”.<sup>12</sup> The US Constitution nowhere explicitly gives the Supreme Court this task. Article I, § 10 bars States from imposing duties on imports or exports in foreign commerce without the consent of Congress. And the Privileges and Immunities Clause of Article IV bars State discrimination against out-of-state citizens. But the text of the Constitution nowhere expressly divests the States of the power to regulate interstate commerce. For such limitations, the US Supreme Court has drawn on the negative implications of the grant of power to Congress to regulate interstate commerce. Article I, § 8, cl. 3 provides, “The Congress shall have power [to] regulate Commerce [among] the several States”. Into that affirmative grant the Court has read judicially enforceable limits on state legislation when Congress has not acted. To justify these implications

<sup>11</sup> Steiner, J. and Woods, L., *EU Law*, 10<sup>th</sup> ed., Oxford 2009, p. 360.

<sup>12</sup> Farrar, T., *Manual of the Constitution of the United States of America*, Boston, 1867, p. 330, explains the reason behind the rule giving Congress the sole power to regulate commerce, excluding State competence.

from the Commerce Clause, the Court has relied largely on history and on inferences from the federal structure envisaged in the US constitution.<sup>13</sup>

The importance of this case-law becomes even more obvious if it is taken into account that the US Supreme Court has for the most part interpreted the powers of Congress to regulate interstate commerce extensively, as the landmark judgment in the *Gibbons v. Ogden*<sup>14</sup> case shows.<sup>15</sup> In subsequent judgments the US Supreme Court went so far as to say that even activity entirely within one state could be regulated by the federal government if the activity had an effect on interstate commerce.<sup>16</sup> Commentators suggest that the intention behind this broad interpretation of the Commerce Clause was to strengthen the powers of the federal legislator, ultimately fostering national unity.<sup>17</sup> As Justice Cardozo explained in the judgment *Baldwin v. G.A.F. Selig. Inc.*,<sup>18</sup> “The Constitution ... was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division”. For this reason, any State law aiming at protecting internal economic interests of a State to the detriment of the economic interests of other States is believed to run counter to the intention of the Founding Fathers to eradicate the risks of an economic war between the States.<sup>19</sup>

## 2. *Fundamental freedoms and harmonisation in the EU*

The EU, on the other hand, has over the past decades pursued its goal of creating its internal market to a large extent by enforcing the so-called fundamental freedoms (free movement of persons, services, establishment and capital) against national rules interfering with this objective. By conferring primacy to the Treaty provisions granting these freedoms

<sup>13</sup> Sullivan, K. and Gunther, G., *Constitutional Law*, 17<sup>th</sup> ed., New York, 2010, p. 124.

<sup>14</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>15</sup> Stone, G. *et al.*, *Constitutional Law*, 3<sup>rd</sup> ed., Boston, 1996, p. 189; Nowak, J. and Rotunda, R., *Constitutional Law*, St. Paul, 2000, p. 176.

<sup>16</sup> See *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) and *United States v. Darby*, 312 U.S. 100 (1941).

<sup>17</sup> Zoller, E., *Les grands arrêts de la Cour suprême des États-Unis*, Paris, 2010, p. 91, 93.

<sup>18</sup> *Baldwin v. G.A.F. Selig. Inc.*, 294 U.S. 511 (1935).

<sup>19</sup> Zoller, E., *Les grands arrêts...*, *cit.*, p. 93.

over national legislation, the EU was able to gradually dismantle the most discernible barriers in trade. National legislation putting up obstacles to free trade was considered not in compliance with EU law. However, this dismantling approach could hardly be considered sufficient. Legislative measures had to be adopted in order to create uniform conditions of trade throughout the internal market. Besides, the process of creating the internal market had to take place in an uniform, progressive and gradual manner in order to reduce as much as possible the potential threat of a “downward spiral” in standards arising from producers and service providers seeking to move their base to the Member State with the lowest regulatory burden.<sup>20</sup>

Approximation of national legislation via Directives, commonly known by the French term “harmonisation”, was the solution to this challenge. Directives as legal instruments only known in the EU legal system are characterized by the fact that they contain a legislative program which requires transposition by all Member States. By virtue of Article 288, Paragraph 3 TFEU,<sup>21</sup> Directives are binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. Directives manage to strike the delicate balance between the need to approximate national laws while taking into account differences in traditions as well as the specificities of national legislation. This constitutes an advantage, particularly in federal structures, in which different legal systems coexist, parallel to each other. In addition to this, Article 288, Paragraph 2 TFEU provides for the possibility to adopt Regulations. A Regulation has general application, is binding in its entirety and directly applicable in all Member States. Where a Regulation is adopted as a legislative act, it generally confers executive tasks on national authorities (or EU bodies). Their main advantage compared to Directives is that they automatically form part of the highest provisions of a Member State’s legal order without it being necessary to transpose it in any way.<sup>22</sup> This ensures the unification of law and its uniform application in all Member States.

<sup>20</sup> Steiner, J. and Woods, *EU Law, cit.*, p. 360.

<sup>21</sup> The acronym “TFEU” stands for “Treaty on the Functioning of the European Union”.

<sup>22</sup> Lenaerts, K. and Van Nuffel, P., *European Union Law*, 3<sup>rd</sup> ed., London, 2011, p. 893.

The harmonizing effect of ECJ case-law should not remain unmentioned in the context of market integration. Approximation of national legislation is pointless if the harmonised law is not applied in the same manner by all courts EU-wide. Only if this happens will the final goal of legal certainty and of uniformity be achieved.<sup>23</sup> Identical interpretation of harmonised law by all courts however does not occur automatically. Even within national jurisdictions, the interpretation of legal rules varies greatly, in particular, amongst the lower instance courts. In an EU of twenty seven or more grown legal systems, the differences may be even stronger. Especially in the field of private law, national courts seeking for continuity may be rather inclined to follow their legal traditions and adapt EU legislation to their national legal systems other than the other way around. The ECJ has managed to counter this trend by resorting to a series of principles born out of the rationale of integration. These are, among others, the principles of autonomous interpretation of EU law<sup>24</sup> and of interpretation in light of the relevant Directive.<sup>25</sup> By means of the preliminary judgment procedure in Article 267 TFEU, the ECJ has answered questions referred by national courts on matters of interpretation. It is then for the national court to apply EU law as interpreted by the ECJ to the instant case. Even though according to established ECJ case-law, it is not the responsibility of the ECJ to decide national cases but only to interpret EU law,<sup>26</sup> the impact of this mechanism on the process of harmonisation has been remarkable.

<sup>23</sup> Rott, P., “What is the Role of the ECJ in EC Private Law? – A Comment on the ECJ judgments in *Océano Grupo*, *Freiburger Kommunalbauten*, *Leitner* and *Veedfald*”, *Hanse Law Review*, 2005, núm. 1, vol. 1, p. 6.

<sup>24</sup> In essence, the principle of autonomous interpretation means that there is only one correct interpretation of a term used in EU legislation, and that this one correct meaning must be found independently from national or other interpretations of the same term. Exceptions are only made where a Directive explicitly refers to national law.

<sup>25</sup> Under the principle of interpretation of national law in the light of the relevant Directive, national courts are required to interpret their national law in the light of the wording and the purpose of the relevant Directives in order to achieve the result referred to in Article 288 Paragraph 3 TFEU.

<sup>26</sup> In its judgment of 12 June 1980 in the case 1/80, *Salmon*, the ECJ declared that in connexion with the task entrusted to it by [Article 267] the Court has no jurisdiction to review the application of the provisions of [EU law] to a given case or to criticize the way in which a national court applies [EU law]”. Lenaerts, K. and Arts, D./Maselis, I., *Procedural Law of the European*, 2<sup>nd</sup> ed., London, 2006, 6-026, p. 192, explain that it falls in any event to

The nature of harmonisation itself is quite varied. The form of harmonisation by which a common standard is introduced is sometimes referred to as ‘positive’ harmonisation, because new standards are introduced. The removal of existing barriers by striking down of national laws is known as ‘negative’ harmonisation. Moreover, regarding the degree of harmonisation, it is possible to distinguish between total and minimum harmonisation. The first option leaves the Member States with no scope for further independent action in the field covered by the harmonising measure. In other words, Member States’ competence to act has been preempted by EU action. As far as the area covered by a total harmonisation Directive is concerned, Member States must ensure that their domestic legal system provides exactly what is required by that Directive, with the consequence that it is not possible to introduce a stricter standard. In a minimum harmonisation, the EU will set down a minimum standard with which all the Member States must comply. Beyond this minimum level, Member States are free to set their standards, subject to the requirements of the EU-Treaties.<sup>27</sup>

### III. MUTUAL TRUST AS A PRECONDITION FOR MUTUAL RECOGNITION

Where harmonisation of legislation finds its limits in the lack of political will on the part of the States —often due to sovereignty concerns or constitutional constraints— despite the need to strengthen the integration in a single economic space, federal structures may be more inclined to apply the principle of mutual recognition in order to overcome obstacles created by the diversity of legislation. Depending on the degree of interest a single Member State has in integration, one or more advantages of this approach are likely to be emphasized: The idea that one can pursue

the national court to dispose of the case. In that sense, the judgment giving a ruling on interpretation, no matter to what extent it determines the outcome of the main proceedings, is always “preliminary”, that is to say, given before the national court gives final judgment in the main proceedings. However, the ECJ does not shrink from giving guidance base on the case-file and the written and oral observations which have been submitted to it, with a view of enabling the national court to give judgment on the application of EU law in the specific case with which it is having to deal.

<sup>27</sup> Chalmers, D. *et al.*, *European Union Law*, 2<sup>nd</sup> ed., Cambridge, 2010, p. 700.

market integration while respecting “diversity” amongst the participating States, is bound to be attractive to many. In fact, for those opposing harmonisation, mutual recognition may appear useful as it can provide results for judicial authorities when cooperating across borders, while *prima facie* Member States do not have to change their domestic law to implement EU standards. For others, the advantage of the notion will be found in the combination of far-reaching economic integration and relatively limited centralisation. After all, under pure mutual recognition, Member States recognize (“horizontally”) one another’s regulatory regimes and forego centralized regulation. Furthermore, mutual recognition may be regarded by some as a necessary condition for “regulatory competition”<sup>28</sup> between the Member States, which, in turn, may prevent them from succumbing to interest groups advocating costly regulation not justified by market failures. As we can see, the advantages of the mechanism of mutual recognition are numerous and cannot be overemphasized.

However, mutual recognition comes at a high price, as it presupposes admitting the equal status of other States, as well as the outspoken trust in the correctness and legitimacy of their internal decision-making processes. The central element of the mechanism of mutual recognition is that an individual national standard, judgment or order—and not a negotiated general standard—must be recognized by other Member States. In recognizing these standards in specific cases, national authorities implicitly accept as legitimate the national regulatory/legal/justice system which has produced them in the first place. In that sense, mutual recognition represents a *journey into the unknown*, as some commentators have rightly noted,<sup>29</sup> where national authorities are in principle obliged to recognize standards

<sup>28</sup> “Regulatory competition” can be defined as a process whereby legal rules are selected and de-selected through competition between decentralised, rule-making entities, which could be nation states, or other political units, such as regions or localities. A number of beneficial effects are expected to flow from this process. Insofar as it avoids the imposition of rules by a centralised, “monopoly” regulator, it promotes diversity and experimentation in the search of effective laws. In addition, by providing mechanisms for the preferences of the different users of laws to be expressed and for alternative solutions to common problems to be compared, it enhances the flow of information on what works in practice. Deakin, S., “Legal Diversity and Regulatory Competition: Which Model for Europe?”, *European Law Journal*, núm. 12, 2006, p. 441.

<sup>29</sup> Mitsilegas, V., “The constitutional implications of mutual recognition in criminal matters in the EU”, *Common Market Law Review*, 2006, p. 1282.

emanating from the national system of any Member State on the basis of mutual trust, with a minimum of formality.

Although accepting and applying foreign law has always been a central element in private international law, this *journey into the unknown* in mutual recognition is different and raises a number of concerns in other areas, particularly in the sensitive field of criminal law, where a high level of legal certainty is required and the relationship between the individual and the State is at stake. The adoption of criminal law and the sanctioning faculty of a State (*ius puniendi*) being still considered matters which remain at the core of national sovereignty, quite a few States may be reluctant to accept decisions taken by foreign judicial authorities which may even affect their own nationals. An evidence of this is the refusal of several countries around the globe, like France<sup>30</sup> and Japan,<sup>31</sup> to extradite their own nationals facing prosecution abroad, notwithstanding the nature of the criminal charges brought against them. Some of them have elevated the prohibition to extradite own nationals even to constitutional status, as is the case of Switzerland,<sup>32</sup> Germany<sup>33</sup> and Russia.<sup>34</sup> These countries often have laws in place that give them jurisdiction over crimes committed abroad by or against citizens.

The difficulties the principle of mutual recognition faces become obvious in extreme cases in which the legal systems involved appear irreconcilable because they reflect different sets of moral values. An example of this difficulty would be the duty to recognize a judicial order aiming at enforcing in another State a right conferred in the legislation of the issuing State to same-sex marriages although this kind of personal union is unknown in the other State's legal system.<sup>35</sup> Another example of a per-

<sup>30</sup> Article 696-4, Paragraph 1 of the French Code of Criminal Procedure.

<sup>31</sup> Article 2, Paragraph 9 of the Japanese Law of Extradition.

<sup>32</sup> Article 25, Paragraph 1 of the Swiss Federal Constitution.

<sup>33</sup> Article 16, Paragraph 2 of the German Basic Law.

<sup>34</sup> Article 61, Paragraph 1 of the Russian Constitution.

<sup>35</sup> This issue has raised questions in the US on the scope of the Full Faith and Credit Clause. Traditionally, every state honoured a marriage legally contracted in any other state. However, in 1993, the Hawaii Supreme Court held that Hawaii's statute restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to strict scrutiny if challenged on Equal Protection grounds (*Baehr V. Lewin*, 852 P.2d 44, 74 Haw. 530). Although the Supreme Court did not recognize a constitutional right to same-sex marriage, it raised the possibility that a successful equal protection

ceptible incompatibility of legislations would be an arrest warrant issued by one State against the citizen of another State on grounds of an alleged offence not expressly penalized in the State of residence of the individual concerned.<sup>36</sup> Lastly, human right concerns can in some cases lead to an absolute denial of international judicial cooperation, as shows the refusal by Member States of the Council of Europe<sup>37</sup> and the EU<sup>38</sup> to grant extradition if the person concerned faces the death penalty in the requesting State. Legal practice in the US and the EU show that those and similar cases can happen anytime. That explains why most legal instruments implementing mutual recognition do still provide for safeguard clauses

challenge to the state's marriage laws could eventually lead to state-sanctioned same-sex marriages. In response to the Baehr case, Congress in 1996 passed the Defense of Marriage Act (110 Stat. § 2419), which defines marriage as a union of a man and a woman for federal purposes and expressly grants states the right to refuse to recognize a same-sex marriage performed in another state. Some commentators have drawn a parallel with the mutual recognition of interracial marriage, banned in some States until 1967, when the US Supreme Court struck down all statutory bans in its judgment *Loving v. Virginia*, 388 U.S. 1 (1967). However, it is important to bear in mind that in the *Loving* judgment the US Supreme Court did not base its reasoning on the aforementioned clause but on the fundamental right to marry and the Due Process Clause enshrined in the 14th Amendment. Although the case involved a Virginia couple prosecuted for violating that state's ban on interracial marriage by visiting the District of Columbia, which allowed such marriages, the Supreme Court did not suggest that Virginia was obliged to recognize the marriage by virtue of the Full Faith and Credit Clause.

<sup>36</sup> See the series of possible cases the German Constitutional Court referred to in the hearing held 13 and 14 February 2005 in the case on the constitutionality of the European Arrest Warrant (2 BvR 2236/04), reproduced by Schorkopf, F., *Der Europäische Haftbefehl vor dem Bundesverfassungsgericht*, Tübingen 2006, p. 218.

<sup>37</sup> Article 11 of the European Convention on Extradition, signed in Paris on 13 December 1957, stipulates that extradition may be refused if the offence for which extradition is requested is punishable by death under the law of the requesting country.

<sup>38</sup> Article 13 of the Agreement on extradition between the European Union and the United States of America (OJEU L 181/27), signed on 25 June 2003 and in force since 1 February 2010, stipulates that where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

conferring national authorities the power to deviate from this principle in exceptional cases.

Mutual trust can however be promoted through harmonisation, for instance of procedural guarantees. Harmonisation of procedural safeguards taking due account of individual rights can convince the authorities of the requested State of the “equivalence” of legal protection<sup>39</sup> or, at least, of a common interest in pursuing similar objectives. Both approaches —mutual recognition and harmonisation— do not preclude each other but can be used in a complementary manner. Harmonisation can be pressed forward to a degree which seems acceptable to all States concerned. Minimal harmonisation of standards can be a first step. The US and EU have used both approaches in a number of areas including civil, criminal and administrative matters. Before elaborating in the manner how the principle of mutual recognition has been applied on some of areas of EU law it seems convenient to explain the meaning of the Full Faith and Credit Clause enshrined in Article IV, section 1 of the US Constitution in its interpretation given by the US Supreme Court. Explaining its functioning will help understand the reason why the EU has been eager to emulate it in its own legal order.

#### IV. COMPARATIVE APPROACH

##### 1. *The “Full Faith and Credit” clause in the US Constitution*

The Full Faith and Credit Clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof”. The first sentence of the clause closely tracked language contained in Article IV of the Articles of Confederation, the precursor of the present US federal constitution. The second sentence, which authorizes Congress to enact implementing legislation,

<sup>39</sup> Morgan, C., “Where are we now with EU procedural rights?”, *European Human Rights Law Review*, núm. 4, 2012, p. 428. explains that mutual recognition can not function optimally without a high level of trust and that such trust can only be achieved if common standards in the area of procedural right are in place.

was new. “Faith and credit” was a familiar term in English law where it had been used on occasion for some centuries to describe the respect owed to judgments and other public records. Its precise meaning, however, was obscure; it was not clear whether it was concerned only with the admission of public records, including judgments, into evidence or whether it was intended to deal likewise with the effect as *res judicata* to which a judgment was entitled. There is similar uncertainty with respect to the meaning which the term was intended to bear in the Articles of Confederation.

The subject of full faith and credit evoked little discussion in the US Constitutional Convention, and it seems unlikely that there was any general understanding among the delegates of what the clause was designed to accomplish. In any event, Congress was quick to exercise its power to pass implementing legislation. This is the case of the *Full Faith and Credit Statute*, 28 USCS § 1738. The initial statute was enacted in 1790 by the First Congress. It provided for the manner of authenticating the acts of the legislatures and of the records and judicial proceedings of the several states and concluded that “the said records and judicial proceedings shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.” The second congressional act, that of 1804, extended the scope of full faith and credit by requiring that the same measure of respect should be given to the records and judicial proceedings of the territories of the US and of the countries subject to its jurisdiction.

Judicial decisions have made clear many aspects that the full faith and credit clause and its implementing statutes left uncertain. The Supreme Court has decided that, provided the requirements of jurisdiction, notice, and opportunity to be heard have been satisfied, a judgment rendered in one state, territory, or possession of the US shall in general be given the same *res judicata* effect that it has in the state of its rendition. Exception to this rule, if any there be, are few indeed. A state cannot, for example, deny effect to a judgment on the ground that the underlying claim was contrary to its public policy. Initially, some might have wondered whether Congress was empowered to extend the protection of full faith and credit to the records and judicial proceedings of territories and possession of the US. The full faith and credit clause itself gives no such authority, but the Supreme Court has held that this is to be found in those provisions of the US

Constitution that afford the US with judicial power (Article III), authorize legislation that is necessary and proper to execute the powers entrusted to the federal government (Article II, section 8), and provide that the Constitution and the laws and treaties of the US shall be the supreme law of the land (Article VI). Neither the clause nor the implementing statute refer to judgments of the federal courts. The Supreme Court has filled this gap by holding that these judgments are entitled to the same respect that is owed to state judgments.

The character of this clause as a symbol of national unity was been repeatedly pointed out by the Supreme Court in its case-law. In the judgment of 1839 in the *McElmoyle v. Cohen* case<sup>40</sup> the Supreme Court ruled that the following was to be deduced from that clause:

[T]he judgment of a state Court carries with it into every state all its original attributes, energies, and incidents; that it goes forth armed with the powers of the Court that pronounced it, and clothed with the authority of the laws under which it was pronounced; that it is at home withersoever it goes, through the whole length and breadth of the Union; that, in relation to judicial proceedings, the states are not foreign to each other.

A clear distinction must be drawn between the recognition and the enforcement of judgments. With respect to recognition, the Supreme Court has held, as has already been said, that a judgment must be given the same *res judicata* effect that it enjoys under the law of the state of its rendition. On the other hand, the method of enforcing a judgment is determined by the law of the state of its rendition. On the other hand, the method of enforcing a judgment is determined by the law of the state where enforcement is sought. It is therefore for this latter law to determine whether a new action in the nature of debt must be brought on the judgment or whether it can be enforced by means of a registration procedure.

Full faith and credit is not owed to the judgments of foreign countries. Each state of the US determines for itself the measure of respect that such judgments are to receive in its courts. US Courts are believed to be particularly liberal in giving respect to the judgments of other countries, mainly because of their experience in giving full faith and credit to federal and sister State judgments. The intentions of the original framers of the

<sup>40</sup> *McElmoyle v. Cohen*, 38 U.S. 312 (1839).

clause may have been obscure. But the Supreme Court has said that full faith and credit clause should become a *nationally unifying force* by establishing “throughout the federal system the salutary principle of the Common Law that litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered”. As the Supreme Court has declared in its judgment of 1935 *Milwaukee Country v. M. E. White*<sup>41</sup>

the very purpose of the purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single national throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

The characteristic of the clause as a cornerstone in the process of forging national unity became particularly clear in the *McElmoyle* judgment rendered in 1839, in which the Supreme Court analyzed the clause in the light of the reason and spirit of it:

The framers of that instrument foresaw that there would be a perpetual change and interchange of citizens between the several states. They had confederated a number of bodies politic; they had secured to each a similar form of government; they had placed over all, in some respects, a controlling, and, in all respects, a protecting power. They had therefore sundered some of the strongest ties that bind man to his native land, and left him free to choose a climate congenial of this constitution, and an occupation suited to his taste of habits, without forfeiting the protection of his own laws. To have incorporated no provision in the Constitution which would prevent men, thus circumstances, from eluding the operation of a judgment, by a simple change of residence, would have argued a blindness in the sages who framed that instruments, that might be better imputed to any other body of men that ever lived.

It will have been noted that whereas the full faith and credit clause speaks of “*public Acts, Records and judicial Proceedings,*” the implementing statutes of 1790 and 1804 required only that full faith and credit be given to

<sup>41</sup> *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935).

records and judicial proceedings. No definite information is available on why public acts were omitted, but it can be surmised that this omission was deliberate and stemmed from the realization that the circumstances, if any, in which one state should be required to apply another's law presented considerations infinitely more complex than those involving the recognition and enforcement of judgments. After some years the Supreme Court held that the clause was self-executing and that there were limited circumstances in which a state was required to apply another's laws. By and large, the Supreme Court has now withdrawn from its earlier opinions and today command of full faith and credit with respect to public acts is slight indeed. The Supreme Court has, however, held that full faith and credit imposes limitations upon the power of a state to refuse on public policy grounds to entertain suit on a claim arising under the law of a sister state.

The implementing statute remained substantially unchanged from 1804 to 1948. In the latter year, it was amended as part of a general revision of Title 28 of the United States Code. This revision was not intended to make controversial substantive changes in the law. Nevertheless, the implementing statute was amended to require that full faith and credit be given not only to records and judicial proceedings, as had been the case heretofore, but to acts as well. In the recent past the clause has been applied to new matters. Child custody determinations had historically fallen under the jurisdiction of state courts and before the 1970's other states did not accord them full faith and credit enforcement. As a result, a divorced parent who was unhappy with one state's custody decision could sometimes obtain a more favourable ruling from another state. This was an incentive for a dissatisfied parent to kidnap a child and move to another state in order to petition for custody. In response to this situation, legislation has been adopted during the 1980s and 1990s on both federal and state level so as to ensure enforcement of child custody decisions by providing that valid custody decrees are entitled to full faith and credit enforcement in other states. The *Uniform Child Custody Jurisdiction Act (UCCJA)* was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968.<sup>42</sup> This approach aimed at an approximation of state

<sup>42</sup> The NCCUSL is a non-profit, unincorporated association commonly consisting of commissioners appointed by each state, the District of Columbia, the Commonwealth

laws. By 1984, every state had adopted a version of the UCCJA, although a number of adoptions significantly departed from the original text. In 1980, the federal government enacted the *Parental Kidnapping Prevention Act (PKPA)*<sup>43</sup> to address the interstate custody jurisdictional problems that continued to exist after the adoption of the UCCJA. In 1997 the NCCUSL adopted the *Child-Custody Jurisdiction and Enforcement Act (UCCJEA)* in order to eliminate inconsistent state interpretations.<sup>44</sup>

## 2. *The principle of mutual recognition in EU law*

### A. *European internal market*

Mutual recognition is a principle familiar in different areas of EU law. Its origins date back to the time when the European internal market was in the process of being put in place with the fundamental freedoms ensuring its functioning. The early concept of mutual recognition, which derives from the case-law of the ECJ, was one of the means of ensuring the free movement of goods within the internal market. It was introduced by the ECJ after attempts to establish free trade through harmonisation (commonly known as the “Old Approach”) had failed, being a demanding unanimity requirement within the Council, as well as the insufficiency of a non-discrimination approach towards technical barriers to free movement provisions some of the reasons for this failure. Attempting to unify almost all technical aspects of regulation, including extremely detailed technical specification, testing, approvals and certification proved extremely difficult to accomplish in general and far more difficult in a Council where Member States were insisting on veto power. The principle of mutual recognition was supposed to breathe new life into the internal market project. Nowadays harmonisation is following a completely different approach, as it has been restricted to laying down health and safety

of Puerto Rico and the US Virgin Islands. The purpose of the organization is to discuss and debate in which areas of law there should be uniformity among the states and territories and to draft acts accordingly. The results of these discussions are proposed to the various jurisdictions as model legislation or uniform acts.

<sup>43</sup> Parental Kidnapping Prevention Act (PKPA), 28 USC 1738 A.

<sup>44</sup> See a detailed explanation of UCCJEA in Hoff, P., *Juvenile Justice Bulletin*, US Department of Justice, December 2001.

standards (the so-called “New Approach”),<sup>45</sup> while European standardization is being promoted. Standardization is important because it reduces barriers to intra-EU trade and because it increases the competitiveness of European industry.<sup>46</sup>

Mutual recognition applies to products which are not subject to EU harmonisation legislation, or to aspects of products falling outside the scope of such legislation. According to that principle, a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. The only exceptions to that principle are restrictions which are justified on the grounds set out in Article 36 TFEU, or on the basis of other overriding reasons of public interest and which are proportionate to the aim pursued.<sup>47</sup> Given its monopoly in interpreting EU law, it is up to ECJ to confirm whether the conditions for mutual recognition are met in a specific case. After critically inspecting the national measures amounting to restrictions on the basis of principles such as non-discrimination and proportionality, the ECJ usually verifies whether the regulatory objectives in the origin and destination countries are “equivalent”. If equivalent, the derogation cannot be invoked. After all, the effect in terms of risks to consumers, workers, etc., is then similar so that the trade barrier cannot be justified. The importing Member State ought to “recognize” that the regulatory regime of the exporting Member State does not increase risks in an appreciable way. In so doing, the ECJ implies that mutual recognition amounts to the combination of origin principle and equivalence.

It is important to note that, by creating a non-exhaustive list of justification grounds written down in the TFEU, the ECJ has stressed from the very beginning the non-automatic or conditional nature of the principle of mutual recognition. This principle gradually gained a primary status in the other free movement areas, including the mutual recognition of diplomas, which falls within the scope of the free movement of persons. At present, mutual recognition in the area of fundamental freedoms only ex-

<sup>45</sup> Chalmers, D. *et al.*, *European Union...*, *cit.*, p. 696.

<sup>46</sup> Craig, P. and Búrca, G. de, *EU Law – Text, cases and materials*, 4<sup>th</sup> ed., p. 620 f.

<sup>47</sup> Dashwood, A. *et al.*, *European Union Law*, Oxford, 2011, p. 412.

ists as a concept defined by the ECJ's interpretation of the EU treaty and it is not explicitly enshrined in the treaty.

### B. *Judicial cooperation in specific areas of law*

Mutual recognition is far from being restricted to intra-EU trade and has been extended by way of analogy to the area of judicial cooperation in civil and criminal matters, while taking into account the specificities of these new areas. In the field of judicial cooperation this principle means in simple terms that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure—in so far as it has extranational implications—would automatically be accepted in all other Member States, and have the same or at least similar effects there.

The strategy for its application was established at the European Council meeting in Tampere (Finland) on 15 and 16 October 1999. Inspired by the concept developed originally in the context of the single market, the essential objective of this approach consists in establishing closer cooperation between the authorities of Member States. It seeks to eliminate obstacles deriving from incompatibilities between the various legal and administrative systems, and thus facilitate access to justice. Judicial cooperation in this area is meant to contribute to the creation of an “area of justice, freedom and security with respect for fundamental rights and the different legal systems and traditions of the Member States”, as governed by Title V of the TFEU. Its cornerstone in civil matters is the mutual recognition and enforcement of judgements and of decisions resulting from extrajudicial cases. For this purpose, the general provision in Article 67 Paragraph 4 TFEU in conjunction with Article 81 TFEU provides, in a similar way as in the US Constitution, for a legal basis allowing the legislator to adopt legal acts implementing this principle.<sup>48</sup> The EU legislator has exercised his competence by adopting a series of legal acts, which will be listed up later. Something similar applies to the area of criminal law, serving Article 67 Paragraph 3 TFEU in conjunction with Article 82 Paragraph 1 TFEU as the legal basis for legislative action.

<sup>48</sup> Hess, B., “The Brussels I Regulation: Recent case law of the Court of Justice and the Commission’s proposed recast”, *Common Market Law Review*, núm. 49, 2012, p. 1076.

### C. *Judicial cooperation in civil matters*

The Tampere European Council laid the foundations for the European Area of Justice by setting several objectives for the European institutions, including easier access to justice and strengthening mutual recognition of court decisions. Five years later, recognising that institutional constraints and a lack of political consensus had prevented the full implementation of the Tampere Programme, the Hague European Council of 4 and 5 November 2004 launched a new action plan for 2005-2010. In matters of civil justice, the Hague Programme underlined the need to continue the implementation of mutual recognition and to extend it to new areas such as family property, successions and wills. The Hague Programme has been followed by the Stockholm Programme, which represents the roadmap for future developments in the area of freedom, security and justice over the five-year period from 2010 to 2014. The Treaty of Lisbon makes all measures in the field of judicial cooperation in civil matters subject to the ordinary legislative procedure. However, family law remains subject to a special legislative procedure: the Council acts unanimously after consulting Parliament. The Council may decide that certain aspects of family law with cross-border implications can be the subject of regulations adopted in accordance with the ordinary legislative procedure. In this case the proposal is notified to national parliaments. If a single national parliament is opposed then this will prevent it from being adopted.

Legal acts implementing the principle of mutual recognition can be classified into four different categories depending on their respective function:

- a. Determination of the competent court, recognition and enforcement of judgments and of decisions in extrajudicial cases

The main instrument in this area is 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”). This regulation seeks to harmonise the rules of conflict of

jurisdiction within the Member States<sup>49</sup> and to simplify and expedite the recognition and enforcement of decisions in civil and commercial matters. Some commentators actually consider this Regulation to be the *functional equivalent* to the Full Faith and Credit Clause in US civil procedural law.<sup>50</sup> Under this Regulation, a judgment given in an EU Member State is to be recognised in the other Member States without any special procedure being required. “Judgment” means any judgment given by a court or tribunal of an EU country, whatever the judgment may be called, including a decree, order, decision or writ of execution. Under no circumstances may a foreign judgment be reviewed as to its substance. As a matter of exception, a judgment will not be recognised if such recognition is manifestly contrary to public policy in the EU country in which recognition is sought; the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his/her defence; it is irreconcilable with a judgment given in a dispute between the same parties in the EU country in which recognition is sought; it is irreconcilable with an earlier judgment given in another EU or non-EU Member State involving the same cause of action and the same parties.

The Brussels I Regulation is supplemented by Council *Regulation (EC) No 2201/2003* concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels IIa Regulation”).<sup>51</sup> In order to facilitate internation-

<sup>49</sup> In its judgment of 15 March 2012 in the case C-292/10, G, not yet reported, par. 39, the ECJ recalled that “the application of the uniform rules of jurisdiction established by Regulation núm. 44/2001 ...meets the essential requirement of legal certainty and the objective, pursued by that regulation, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued”.

<sup>50</sup> Rösler, H., *Europäische Gerichtsbarkeit ...*, cit., p. 485.

<sup>51</sup> In its judgment of 23 December 2009 in the case C-403/09 PPU, Detiček/Sgueglia [2009] ECR I-12193, the ECJ referred to the principle established by Regulation No 2201/2003 of mutual recognition of judgments given in the Member States, a principle which is itself based, as follows from recital 21 in the preamble to that Regulation, “on the principle of mutual trust between Member States”. In its judgment of 22 December 2010 in the case C-491/10 PPU, Aguirre Zarraga [2010] ECR- I-14247, the ECJ declared that the system established by Regulation No 2201/2003 is based on “the allocation of a central role to the court which has jurisdiction to rule on the substance of the case” (the

al recovery of maintenance obligations by making this speedier and less costly, if not free of charge under certain conditions, in December 2008 the Council adopted *Regulation (EC) No 4/2009*. This regulation brings together in a single instrument uniform rules on jurisdiction, applicable law, recognition and enforcement, as well as on cooperation between national authorities. With a view to improving the efficiency and effectiveness of cross-border insolvency proceedings, the Council adopted *Regulation (EC) No 1346/2000* of 29 May 2000 on insolvency proceedings, which sets out uniform rules on jurisdiction, recognition and applicable law in this area. In order to abolish exequatur for decisions relating to uncontested claims, Parliament and the Council adopted under the co-decision procedure *Regulation (EC) No 805/2004* creating a European Enforcement Order for uncontested claims.

In October 2009, the Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. The aim of this proposal was to eliminate all the obstacles encountered by citizens in the enforcement of their rights in the context of international successions, arising out of the diversity of national rules in this area. The European Parliament's Legal Affairs Committee and the European Parliament plenary voted on a report on the draft legislation in March 2012. The EU's Member State governments, represented in the Council of the EU, adopted the new law on 7 June 2012. *Regulation (EU) No 650/2012* gives Member States three years to align their national laws so that the new EU rules become effective. Denmark, Ireland and the United Kingdom however did not take part in the adoption of the instrument and are not bound by it.

The adoption of European legislation on matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan. The Hague Programme called on the Commission to submit a Green Paper on 'the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition',

national court issuing the judicial decision). In accordance with recital 21 in the preamble to the Regulation, the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust. The ECJ deduced from this principle that "grounds for non-recognition of judicial decisions (by the court required to execute the judicial decision) should be kept to the minimum required".

and stressed the need to adopt legislation in this area. The Stockholm Programme also states that mutual recognition must be extended to matrimonial property regimes and the property consequences of the separation of unmarried couples. Because of the distinctive features of marriage and registered partnerships, and of the different legal consequences resulting from these forms of union, the Commission presented two separate Regulations: one on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and the other on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (same-sex unions). The proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions relating to matrimonial property regimes<sup>52</sup> (of March 2011) seeks to establish a clear legal framework in the European Union for determining jurisdiction and the law applicable to matrimonial property regimes and to facilitate the movement of decisions and instruments among the Member States. Similar to the proposal referred to in the previous paragraph, the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships<sup>53</sup> (also from March 2011) seeks to establish a clear legal framework in the European Union for registered partnerships.

Better access to justice is one of the key objectives of the EU's policy. The concept of access to justice includes promoting the use of appropriate dispute resolution procedures for individuals and business, and not just access to the judicial system. To that end, on 21 May 2008 the Commission, the European Parliament and the Council adopted *Directive 2008/52/EC* on certain aspects of mediation in civil and commercial matters, the purpose of which is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the further use of mediation and by ensuring a balanced relationship between media-

<sup>52</sup> Commission proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions relating to matrimonial property regimes, COM(2011) 126 final.

<sup>53</sup> Commission proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final.

tion and judicial proceedings. Denmark is not taking part in the adoption of this Directive is not bound by it or subject to its application.

*b. Harmonisation of conflict-of-law rules*

After lengthy preparatory work, the European Parliament and the Council adopted *Regulation (EC) No 593/2008* on the law applicable to contractual obligations (Rome I). In this area, the harmonisation of conflict-of-law rules, by improving the predictability of the outcome of litigation, also helps to prevent distortions of competition and protects weaker parties. The laborious adoption process (three readings and more than four years of negotiations between the Council and the European Parliament) for *Regulation (EC) No 864/2007* of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) has enabled the creation of a uniform set of conflict-of-law rules for non-contractual obligations in civil and commercial matters. It thus seeks to improve legal certainty and the predictability of the outcome of litigation. Conflict-of-law rules relating to maintenance obligations are set out in Council *Regulation (EC) No 4/2009* of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. In the area of the law applicable to divorce and legal separation, in December 2010 the Council adopted *Regulation (EU) No 1259/2010*, which represents the implementation of the first enhanced cooperation in the history of the EU. It establishes a clear and comprehensive legal framework for divorce and legal separation in the 14 participating Member States. As mentioned above, the European Parliament and the EU Council have recently approved a proposal for a regulation to determine, inter alia, the law applicable to international successions.

*c. Facilitating access to justice*

In order to improve access to justice in cross-border disputes, the Council adopted *Directive 2003/8/EC* establishing minimum common rules relating to legal aid for such disputes. The purpose of the directive is to guarantee an ‘adequate’ level of legal aid in cross-border disputes for persons who lack sufficient resources. In order to make access to jus-

tice easier and more effective for European citizens and businesses, the European Union has introduced common procedural rules for simplified and accelerated cross-border litigation on small claims and the cross-border recovery of uncontested pecuniary claims throughout the European Union. These are found in *Regulation (EC) No 861/2007* establishing a European Small Claims Procedure, and *Regulation (EC) No 1896/2006* creating a European order for payment procedure. These procedures are optional and additional to the procedures provided for by national law. *Directive 2008/52/EC* establishes common rules on certain aspects of mediation in civil and commercial matters in order to increase legal certainty and thereby encourage use of this method of dispute resolution.

d. Instruments for cross-border cooperation between national civil courts

*Regulation (EC) No 1393/2007* of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is intended to simplify and expedite the transmission between Member States of judicial and extrajudicial documents for service purposes and thus to increase the efficiency and speed of judicial procedures. In order to simplify and accelerate cooperation between courts in the various Member States in the taking of evidence in civil or commercial matters, the Council adopted *Regulation (EC) No 1206/2001*.

To improve, simplify and expedite judicial cooperation between the Member States and to promote access to justice for citizens engaging in cross-border disputes, a European Judicial Network in civil and commercial matters was established by Council *Decision 2001/470/EC* of 28 May 2001. The network is composed of contact points designated by the Member States, the central authorities provided for in some EU instruments, liaison magistrates, and any other authority with responsibilities for judicial cooperation between state actors (courts, central authorities). *Decision 2001/470/EC* was amended by *Decision 568/2009/EC* of the European Parliament and of the Council of 18 June 2009 aimed at enhancing and reinforcing the role of the European Judicial Network in civil and commercial matters. A major innovation introduced by the new decision consists of opening the network to professional associations representing legal

practitioners, in particular lawyers, solicitors, barristers, notaries and bailiffs. Another tool for simplifying judicial cooperation in civil matters consists of the development, at European level, of the use of information and communication technologies in the administration of justice. This project was launched in June 2007 by the Justice and Home Affairs Council and led to the Commission Communication on a European e-Justice Strategy of 30 May 2008. The e-Justice tools cover: the European e-Justice portal, which aims to facilitate access by citizens and enterprises to justice in Europe; the interconnection of criminal records at European level; better use of videoconferencing during judicial proceedings and innovative translation tools such as automated translation, dynamic online forms and a European database of legal translators and interpreters.

#### D. *Judicial cooperation in criminal matters*

##### a. Introduction

Since the coming into force of the Lisbon Treaty, the principle of mutual recognition in criminal matters has gained an explicit legal basis, namely Article 82 Paragraph 1 TFEU. Under Article 82 Paragraph 1 TFEU “[j]udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States”. However, as in many other cases, it was not the EU who made the first step but rather followed the example of other regional arrangements.

The first initiatives intending to create mutual trust and to encourage mutual recognition of decisions in the area of criminal law took place within the framework of the Council of Europe, an international organization of 47 Member States whose primary goal consists in promoting co-operation between all countries of Europe in the areas of legal standards, human rights, democratic development, the rule of law and cultural co-operation.<sup>54</sup> Examples of these are: the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and the European Convention on the Punishment of Road Traf-

<sup>54</sup> Hecker, B., *Europäisches Strafrecht*, Heidelberg, 2005, p. 79.

fic Offences, both of them of 30 November 1964; the European Convention on the International Validity of Criminal Judgments, agreed at The Hague in May 1970; the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972; the Convention on the Transfer of Sentenced Persons of 21 March 1983. There is also a Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991. All the Conventions mentioned above have a regional or subregional scope. They are characterized by the following common aspects: the general rule that enforcement is governed by the law of the requested State; the provision of a number of grounds of refusal; in some of them, the possibility for the State of enforcement to arrest the offender upon request of another State and to seize his assets (subject to conditions and limits); the possibility given to the State of enforcement of converting the penalty provided for by its national law for the same or comparable offences, provided that the penal situation of the sentenced person is not aggravated.

The issue of mutual recognition was at one point moved within the framework of the EU, the reason being that, firstly, the aforementioned Conventions were characterized by what could be called a noncommittal “request principle”, and, secondly, they had seldom entered into force in all Member States due to a lack of ratification by national parliaments. The Amsterdam Treaty had reinforced the powers of the EU in criminal matters to a considerable extent, but the European Council as the EU’s supreme political body was aware that more initiatives were needed to make the new Treaty provisions useful tools for a truly effective judicial cooperation in criminal matters within the EU. Borrowing from concepts that had worked very well in the creation of the Single Market and mixing them with elements from some Council of Europe Conventions, a new strategy at EU level was born: the principle of mutual recognition in judicial cooperation in criminal matters.

The application of this principle has been the motor of European integration in criminal matters in the recent past. The adoption of *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* constituted undoubtedly a milestone in the development of EU criminal law, and was followed by a series of measures aiming at paving the way for mutual recognition between Member States, including the approximation of related national

laws and the application of common minimum rules. The minimum rules mainly relate to the admissibility of evidence and the rights of crime victims as well as of individuals in criminal procedures. At least two crucial features of the EU's view on mutual recognition are perceptible from this. Firstly, mutual recognition does not operate in a legal vacuum but should be supplemented —where necessary— by approximation measures. This shows the complementary nature of both approaches. Secondly, mutual recognition strives for a dual purpose: it is not only aimed at enhancing judicial cooperation, but also pursues the judicial protection of fundamental rights.

*b. Legal acts adopted*

All the legislative measures adopted so far have taken the form a Framework Decision, a legal instrument typical for the formerly intergovernmental area of cooperation in judicial matters, now abolished after the entering into force of the Lisbon Treaty and having basically the same harmonizing effect as an EU Directive. The first instrument of mutual recognition to be created was the European Arrest Warrant, which is applicable both to final judgments and the pre-trial phase. It replaces the extradition system by requiring each national judicial authority (the executing judicial authority) to recognise, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority).<sup>55</sup>

The framework decision defines “European arrest warrant” as any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution, executing a custodial sentence or executing a detention order. The warrant applies where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months or for offences punishable by imprisonment or a detention order for a maximum period of at least one year. If they are punishable in the issuing Member State by a custodial sentence of at least three

<sup>55</sup> See judgments of the ECJ of 5 September 2012, case C-42/11, Lopes Da Silva, not yet reported, par. 28 and 29; of 16 November 2010, case C-261/09, Mantello, [2010] ECR I-11477, par. 35-37.

years, the following offences, among others, may give rise to surrender without verification of the double criminality of the act: terrorism, trafficking in human beings, corruption, participation in a criminal organisation, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, and fraud, including that affecting the financial interests of the EU. For criminal acts other than those mentioned above, surrender may be subject to the condition that the act for which surrender is requested constitutes an offence under the law of the executing Member State (double criminality rule). The European arrest warrant must contain information on the identity of the person concerned, the issuing judicial authority, the final judgment, the nature of the offence, the penalty, etc. The fulfilment of this requirement is simplified by the fact that a specimen form is attached to the framework decision. The framework decision entered into force on 10 January 2004 and replaced the existing texts in this area related to extradition procedure between the Member States. However, Member States remain at liberty to apply and conclude bilateral or multilateral agreements insofar as such agreements help to simplify or facilitate the surrender procedures further.

The introduction of the European Arrest Warrant meant a crucial step towards the establishment of an area of justice, freedom and security, as it has transformed the extradition procedure into a genuinely judicial procedure exempt of political opportunity considerations.<sup>56</sup> Entrusting the extradition procedure to the judiciary with its constitutionally guaranteed independence undeniably contributed to enhancing mutual trust between the Member States.<sup>57</sup> This implies a high degree of responsibil-

<sup>56</sup> See the legal opinions of Advocate General Ruiz-Jarabo Colomer of 12 September 2006 in the case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3633, par. 45, in which he declared in view of the procedure of rendition introduced by the European Arrest Warrant that "... in that situation, *any assessment of opportuneness is irrelevant* and the power of review is limited strictly to the courts. In other words, the political authorities must allow the *judicial authorities* to take the lead and an individual assessment of each case must give way to a more general type of assessment because the Framework Decision assumes that national courts have the jurisdiction to prosecute the offences it lists."

<sup>57</sup> Before the European Arrest Warrant became fully functional important constitutional amendments had to be made in some Member States (Portugal, France, Slovenia and Poland). In other Member States (Germany, Poland, the Czech Republic and Cyprus) difficulties arose at a later stage, as under the Framework Decision there was no exception clause allowing a State to refuse to surrender its own nationals. This happened to be in contradiction with Article 16 Paragraph 2 of the German Basic Law, Article 55 of

ity, as the principle of mutual recognition makes of every national judge or prosecutor a European actor, a status which requires greater familiarity with the reality of European integration and the sharing of a common European legal culture. Therefore, judicial authorities should be encouraged to gain insight into the EU legal order as a whole and to familiarise themselves with the legal and judicial systems of the other Member States. To the same extent as the ECJ and national courts cooperate and engage in a judicial dialogue in the framework of preliminary judgment procedures, aiming at ensuring the uniform and correct application of EU law, national judicial authorities are required to apply the instruments of mutual recognition in a spirit of cooperation and solidarity.

Other instruments within the Mutual Recognition Programme inaugurated with the Tampere Program and further developed with the Hague Program, at the European Council of 4-5 November 2004, can be grouped according to the phase of criminal proceedings to which they apply.<sup>58</sup> The execution of orders freezing property of evidence,<sup>59</sup> confiscation orders,<sup>60</sup> non-custodial pre-trial supervision measures and the European Evidence Warrant<sup>61</sup> all belong to the pre-trial phase. The Frame-

the Polish Constitution, Article 14 Paragraph 4 of the Czech Constitution and Article 11 of the Cypriot Constitution which at the time the Framework Decision was adopted still banned the extradition of own nationals. The amendments were necessary after the rulings of the constitutional courts of the aforementioned States which partially annulled the implementing national laws. Nowadays these provisions foresee the surrender of own nationals within the EU, confirming the mutual trust between the Member States. Pollicino, O., "European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems", *German Law Journal*, núm. 10, vol. 9, 2008, p. 1313.

<sup>58</sup> See Blackstock, J., "The European Arrest Warrant. Briefing and suggested amendments", *New Journal of European Criminal Law*, vol. 1, 2010, p. 17; Vernimmen-Van Tiggele, G. and Surano, L., "Introduction", in Vernimmen-Van Tiggele, Gisèle *et al.*, *The future of mutual recognition in criminal matters in the European Union* Brussels, 2009, p. 12.

<sup>59</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJEU L 196).

<sup>60</sup> Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJEU L 328).

<sup>61</sup> Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJEU L 350).

work Directives on financial penalties,<sup>62</sup> confiscation orders, on judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU<sup>63</sup> and on judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions<sup>64</sup> refer to the post-trial phase. It is possible to note some common aspects in all these measures: the provision of a certificate to be completed by the issuing Member State as well as of a standard form, the speeding up of the procedures for recognition and execution of decisions, as well as a limited list of mandatory and optional ground for refusal.

The EU has adopted a number of legal acts aiming at harmonising substantive criminal law in an attempt to make mutual recognition of judicial decisions possible. Article 83 TFEU provides for a new competence of the EU “to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.” These areas of crime are the following: terrorism, trafficking in human beings and 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. Before the Treaty of Lisbon entered into force the legitimacy of some of those legal acts had been questioned by scholars who claimed that the legal acts had been adopted under the former legal basis which did not expressly provide for a competence to penalize the criminal acts in question. By reframing the former provision the EU has finally created an adequate legal basis.

<sup>62</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJEU L 76).

<sup>63</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJEU L 327).

<sup>64</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJEU L 337).

c. The *ne bis in idem* principle

Last but not least, at final comment should be made on the efforts of the EU to implement the *ne bis in idem* principle in the area of justice, freedom and security. According to Article 54 of Agreement Implementing the Schengen Convention (CISA),<sup>65</sup> “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.” Moreover, in situations where Article 54 CISA is not applicable, the “taking into consideration” or “accounting” principle, laid down in Article 56 CISA, comes into play. In accordance with this provision any imposition of a second sentence must deduce relevant time already served in the initial sentencing State and take account of any non-custodial sentence to the extent provided for by national law. Even though the latter principle is to be distinguished from the former, they are complementary and both highly relevant in the light of the mutual recognition principle. The *ne bis in idem* principle constitutes the acknowledgment of a unified space of criminal justice, in which similar values are shared. The ECJ has interpreted the principle of mutual recognition as the corollary of the *ne bis in idem* principle.<sup>66</sup> It is important to stress that in its case-law, beginning with the judgment Gözütok & Brügge,<sup>67</sup> the ECJ repeatedly held that the *ne bis in idem* principle necessarily implies that Member States have “mutual trust” in their criminal justice systems. This shows that all these principles are, as already stated, intrinsically interconnected.

<sup>65</sup> The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJEU L 239)

<sup>66</sup> See judgments of the ECJ of 11 February 2011, joined cases C-187/01 and C-385/01, Gözütok and Brügge, 2003, ECR-1345; of 28 September 2006, case C-150/05, van Straaten, 2006, ECR I-9327; of 11 December 2008, case C-297/07, Bouquain, 2008, ECR-9425; of 22 December 2008, case C-491/07, Turansky, 2008, ECR I-11039.

<sup>67</sup> Judgments of the ECJ of 11 February 2011, joined cases C-187/01 and C-385/01, Gözütok and Brügge, 2003, ECR-1345, pfo. 33.

## V. FINAL REMARKS

For more than a decade the EU has successfully emulated a concept well anchored in US constitutional law: The mutual recognition of judicial decisions between States. Not only have the adequate legal basis been incorporated in EU Treaty law, but also significant steps have been made towards the creation of an authentic area of justice, freedom and security. It should be noted however that this approach has by no means been implement to the detriment of harmonisation. On the contrary, the EU has remained committed to achieving harmonisation in the area of civil and criminal law —both procedural and substantive— up to a degree acceptable to all Member States, following the political objectives set by the European Council. This has taken place in due acknowledgment of the complementarity of both concepts.

Following the model of the US by encouraging mutual recognition within an institutional structure showing federal features might eventually raise the inevitable question regarding the future of the EU, as it needs to be borne in mind that from the perspective of the US Supreme Court the mechanism of mutual recognition constitutes an instrument aimed at strengthening the ties between the several States within the Federation and, in so doing, unifying the American nation. It is doubtful that exactly the same philosophy could ever be transposed to Europe with its diversity of nations, each of them having unique traditions and looking back at centuries or even millennia of history. The academic debate as to whether a common European nation could emerge one day being mostly answered in the negative, policymakers and scholars involved in the process of designing the future of Europe are more than ever called upon to debate on the final purpose of integration.

On the other hand, it cannot be ruled out that, as on many occasions in recent history, situations like the current debt crisis putting at risk the stability of the common currency (the Euro) might eventually push Europeans towards deeper integration in an attempt to face those crises collectively, eventually giving rise to an authentic political union. Should the European nations truly strive for such a political union, which remains to be seen, one might wonder whether the principle of mutual recognition should not start being conceived by the ECJ in the same way as the US Supreme Court does, namely as a nation-building element in EU constitutional law.