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Mutual Recognition: economic and regulatory logic in goods and services

Jacques Pelkmans

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About the authors:

Jacques Pelkmans holds the Jan Tinbergen Chair in Economics of European Integration and is Director of the Economics Department at the College of Europe in Bruges. He is also Senior Fellow at the Centre of European Policy Studies (CEPS) in Brussels.

Prof. Pelkmans has published on various aspects of European economic integration and on international trade policy and investment. His current research interests are the EU internal market, EU economic regulation, including mutual recognition and 'regulatory impact assessment', and regulatory reform in the EU, economic regionalism (including ASEAN & AFTA), EU trade policy and the economics of technical standards.

Address for correspondence:

Prof. Jacques Pelkmans: jacques.pelkmans@coleurope.eu

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MUTUAL RECOGNITION:

ECONOMIC AND REGULATORY LOGIC IN GOODS AND SERVICES

BEER n° 24

Jacques Pelkmans

Abstract

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

This BEER paper attempts to explain the rationale and logic of mutual recognition in the EU internal goods market, its working in actual practice for about three decades now, culminating in a qualitative cost/benefit analysis and its recent improvement in terms of 'governance' in the so-called New Legislative Framework (first denoted as the 2008 Goods package) thereby ameliorating the benefits/costs ratio. For new (in contrast to existing) national regulation, the intrusive EU procedure to impose mutual recognition is presented as well, with basic data so as to show its critical importance to keep the internal goods market free. All this is complemented by a short summary of the scant economic literature on mutual recognition. Subsequently, the analysis is extended to the internal market for services. This is done in two steps, first by reminding the debate on the origin principle (which goes further than mutual recognition EU-style) and how mutual recognition works under the horizontal services directive. This is followed by a short section on how mutual recognition works in vertical (i.e. sectoral) services markets.

Keywords: *mutual recognition*, *EU internal market*, *free movement of goods*, *free movement of services.*

JEL codes: F15, F23, K2

1. Introduction and purpose

Mutual recognition is one of the most appreciated innovations of the EU. The idea is that one can pursue market integration, indeed "deep" market integration, while respecting 'diversity' amongst the participating countries. Put differently, in pursuing 'free movement' for goods in the EU internal market and hence going beyond merely removing tariffs and quotas, Mutual Recognition facilitates free movement by disciplining the nature and scope of 'regulatory barriers', whilst allowing some degree of regulatory discretion for the EU Member States. Compared to alternative options of 'deepening' market integration, this solution is attractive and, in principle, welfare increasing. Mutual recognition might also be appreciated because, in avoiding EU regulation, it tends to limit centralisation, while facilitating 'regulatory competition' between Member States and, possibly, lower the costs of the incredible regulatory heterogeneity business faces in the EU internal market. Nevertheless, mutual recognition (= MR) is many things to many people. [1] [2] The present contribution will not cast the net so wide. The focus will be on the successful and far-reaching examples of the EU internal market for goods and services.

The paper attempts to explain the (1) rationale and logic of mutual recognition in the EU internal goods market (section 2), (2) its working in actual practice in the EU for more than 25 years, culminating in a qualitative benefit / cost analysis (section 4) and (3) its recent improvement in terms of 'governance' in the so-called 2008 Goods package (section 5), thereby ameliorating the benefits / costs ratio. Lest it be forgotten, mutual recognition in the EU ought to be applied both to existing national regulation and *new* national regulation emerging from the Member States. For the latter, the EU has created an intrusive mechanism
which has successfully protected the internal goods market from serious erosion over time (section 3). . Where possible and useful, this chapter will refer to notions sometimes seen, particularly by economists, as closely related to mutual recognition such as regulatory competition and 'better'

[1] In the literature one finds that MR is a rule about conflicts of law between 2 or more countries, or a rule of choice concerning what country law applies, or, simply (functional) 'equivalence', or, a form of 'decentralized policing'. Authors distinguish 'pure', 'rootless' and 'managed' MR from (just) 'recognition', to mention only some examples.

[2] MR can be very limited in scope, too, and this might not always be appreciated. Thus, WTO promotes mutual recognition agreements (MRAs) but all they do is to underpin MR solely for conformity assessment of a trading partner's technical requirements of a good (for purposes of im/export). The disappointment about making MRAs work effectively in world trade, despite their limited scope, can be better understood when understanding how the EU has solved quality requirements and mutual trust in this sensitive domain. However, this is a very demanding regime, perhaps too intrusive for many WTO partners. See e.g. section 5 and the references there.

regulation. The scant economic theory of MR is summarized in a Box in section 4. It will be shown that mutual recognition, rather than being inspired by academic theory, has emerged from the profound frustrations in EU circles about the first two decades of the internal market. Sections 6 and 7 attempt to extend the analysis to services. The former will show how the application of MR has spilled over from goods to services markets, culminating in the debate about a horizontal liberalisation directive (the Bolkestein draft of 2004) and the later services directive 2006/123. The meaning for the internal services market is not yet fully clear, as will be shown. Section 7 will briefly set out MR as applied in vertical (i.e. sectoral) services directives, with some examples. Section 8 concludes.

2. Rationale and logic of mutual recognition

2.1 The fundamental problem

The EU first established a customs union in the period 1958 – 1968. Internally, it implies 'free trade', the removal of all tariffs and quotas. Further deepening of goods market integration is required by the treaty because, unlike the WTO, the treaty incorporates the obligation to establish 'free movement'. Free movement implies the 'right' for EU economic agents to move goods (or, services, as the case might be) into any national market in the EU, that is, to have unhindered market access. This concept is therefore much more radical than free trade as such. That right overrides the powers of EU Member States to put in place or maintain any access barrier, except if and insofar as the treaty specifies such instances or allows for certain derogations of free movement.

In more general economic parlance, free movement goes beyond free trade in that non-tariff barriers are forbidden or made irrelevant. Radical as that certainly is, free movement is not unlimited or unconditional. Simplifying, Member States may have two types of non-tariff barriers : those that can*not* be justified by market failures or exceptions to the internal market (such as national security or public order) and those that *can* be justified. The design of the treaty, subsequent case law and secondary legislation (like Directives) should effectively eliminate the former, sooner or later. But what about the latter ? In traditional thinking, there are three ways of addressing 'justified' national interventions in their markets causing access barriers: national treatment, prohibitions and harmonisation. [3] Each one has drawbacks. If one wishes to protect the national regulatory autonomy (perhaps assuming that national regulation and other interventionism faithfully expresses the preferences of voters in a representative democratic system and these ought to be respected), the

[3] See e.g. Schmidt, 2007 and Schmidt, ed., 2007 for elaboration ; see also various contributions in Kostoris Padoa Schioppa, ed., 2005.

solution is to apply 'national treatment'. It means that EU Member States would allow "free" movement of goods (and services) if the providers comply with the rules of the destination (host) country. Discrimination is forbidden in this approach. This approach would imply, at best, a very truncated instance of 'free movement'. Economically, it would lead to major trading costs incurred before having market access, due to costs of adaptation ; indeed, the tariff equivalents of such costs may well imply a significant degree of factual protection from exposure to competitive imports from other EU countries. The EU internal market would largely remain fragmented except for goods (and services) which are not or only lightly regulated. Apart from non-discrimination in e.g. host country regulation, it differs little from (free) trade under the WTO. In other words, if one really wants 'deep' market integration, the national regulatory autonomy will have to be compromised to some degree.

In traditional thinking, there are two ways of compromising national regulatory autonomy for the purpose of 'free movement' : prohibitions and 'harmonisation'. When prohibiting all regulatory or other non-tariff barriers in the EU, even when 'justified' by (say) market failures, welfare is bound to fall. The whole point of subjecting markets to regulation in the event of market failures is to prevent sub-optimal functioning of markets. The costs of not overcoming market failures vary enormously, dependent on the issue and the kind of market failure, so it is hard to generalize.
However, the very purpose [4] of the EU and a properly functioning internal market as its principal means is to stimulate higher productivity increases and more economic growth, which is inconsistent with an approach of all-out prohibitions lowering welfare over a broad spectrum of applications. Indeed, an internal market with plenty of market failures is pointless.

This leaves a third way: harmonisation. The origin of the term reflects a sophisticated response to the fundamental problem of 'deep' market integration. The term used to refer to the idea that national regulation of the Member States would need to be 'brought into harmony' in such a way that 'free movement' could be accomplished without all the costs of adaptation, etc. The English treaty term 'approximation' similarly expresses this idea. However, in the early history of the EU, harmonisation degenerated into full uniformity due to mistrust (or bargaining tactics, under veto threat) of Member States and the initial refusal to accept the full consequences of 'deep ' market integration, including some degree of regulatory adaptation. Harmonisation became excessively detailed and 'heavy', causing high costs of (EU) regulation, and without any cost/ benefit analysis. Nowadays, there is a far greater awareness of the need to make 'proportionate' (EU) regulation, e.g. no more than necessary for the market failure.

[4] Other than the broader political considerations of post-war peace and being a 'Community of values'.

Today, the European Commission is held to subject every proposal to strict Regulatory Impact Assessment. [5] The lesson of four decades of (EU) harmonisation is that one has to find a suitable balance between, on the one hand, not suppressing the preferences of the (or some) Member States too much (as this may be welfare decreasing), and, on the other hand, avoiding overly costly common regulation by incorporating each and every specific element of national (often diverse) rules, prompting 'regulatory failure'.

The treaty incorporates all three options (see below section 2.2.). There is a general prohibition of what one might call regulatory barriers, but with derogations, as well as a broad harmonisation provision. National treatment might apply as well, once derogations of free movements can be invoked, and if these derogations are not disciplined in other ways by case-law. However, usually, one should expect that derogations will prompt proposals for harmonisation of some kind. Certainly in goods, few areas are left over where derogations have remained without eventually having resulted in harmonisation (or at least attempts to do so). In other words, national treatment is no longer of much significance when speaking about free movement. But it ought to be noted that, in services, the mode of 'establishment' is far more important than free movement (due to the need to satisfy clients' preferences of proximity of providers and of building relations of trust). In establishment, national treatment (host country rules) make more sense and normally cause fragmentation less easily. Thus, such national treatment is typically disciplined by general regulatory principles under the treaty (including non-discrimination in a wide sense) and sometimes by basic common rules, leaving scope for local variation and discretion.

After some 20 years of building the EU internal (goods) market, the balance between the three options and the results for free movement looked anything but promising. To put it simple, a huge number of regulatory barriers were still place because the general prohibition was undermined by countless derogations, invoked by member States almost without discipline, whilst harmonisation proved costly and very slow (also due to vetoes). It is against this background that MR as an innovation has to be understood. First, the CJEU interpretation of the prohibition was significantly tightened from a narrow legalistic to a more economic interpretation of what a (regulatory) barrier was. This meant that the burden of proof for Member States of what is a justified barrier, was made more difficult – it had simply been too easy before.

[5] This is a subject of its own. For Detailed Guidelines of the Commission, see http://ec.europa.eu/governance/impact/docs_en.htm For a very careful evaluation of the Commission impact assessments since 2003, see the report by the EU Court of Auditors, 2010, http://eca.europa.eu/portal/pls/portal/docs/1/5372733.pdf.

Second, the CJEU imposed a duty on Member States to 'think internal market', so to say, and not solely national. The criterium became '*equivalence*'. Even if derogations were justified by overcoming market failures, this would not automatically mean that imports could be blocked. As it turned out, numerous instances appeared to exist where other Member States acted very similarly in response to the same market failures. If such national responses were 'equivalent' in terms of avoiding the market failure(s), neither harmonisation nor the refusal of market access would be justified. Free movement ought to be allowed, even if the details of national laws were distinct, as long as their objectives of e.g. protecting consumer or workers were "equivalent". A fourth option had been born, Mutual Recognition, not undermining national regulatory autonomy, nor leading to harmonisation, yet 'deepening' market integration.

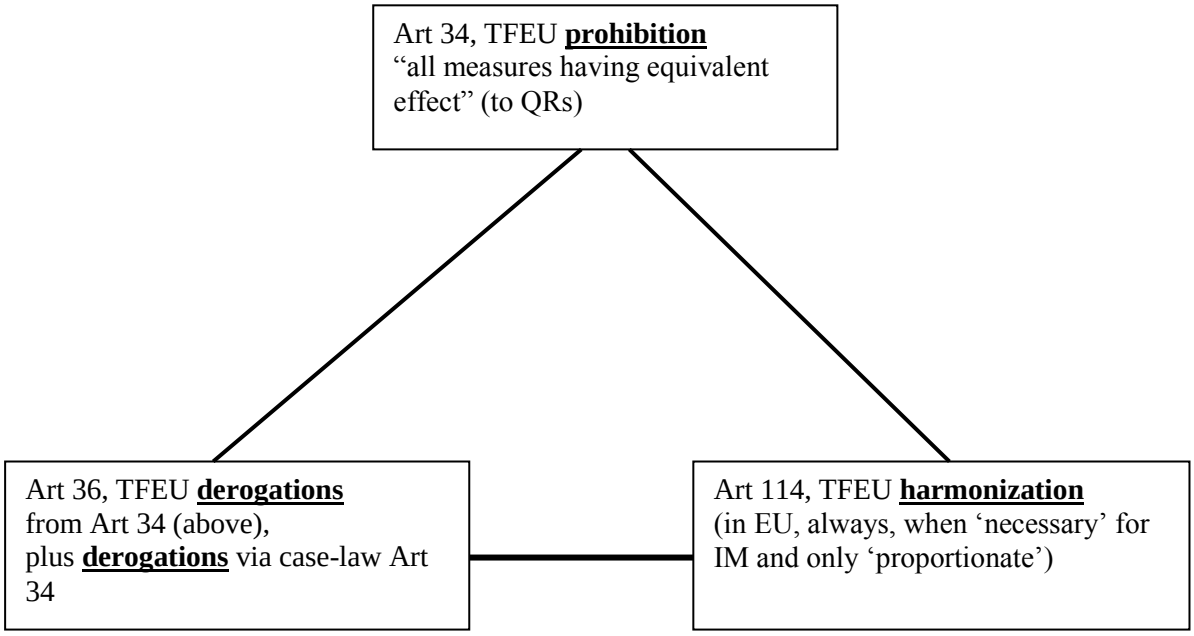
2.2 Case-law on the fundamental trilemma and Mutual Recognition

This section will discuss the same fundamental problem in the context of the treaty as well as CJEU case law, explaining in greater detail the logic of MR.

As noted , the three options (before MR emerged) can be found in the treaty. The second option – prohibition of 'other' barriers - is laid down in art.s 34 and 36, TFEU. Art. 34 TFEU is not merely about forbidding quotas but also about "all measures having equivalent effect" (to quantitative restrictions). If all 'other barriers' would fall under this term, an all-out prohibition would amount to a revolutionary amputation of national regulatory autonomy making it impossible to uphold the Member States' obligations (often in their constitutions) with respect to a number of risks such as safety and health aspects of goods. Such aspects can credibly relate to market failures. Therefore, in the light of the first option – respect for national regulatory autonomy, hence, national treatment - CJEU was initially very prudent in its case law on art. 34, TFEU, leaving ample scope for 'justified' exceptions for Member States. Moreover, and hardly surprising, Art. 36 TFEU comprises a series of derogations e.g. about health and intellectual property rights.[6] As to the third option – harmonisation - Art. 114, TFEU (Art. 95, EC) forms the legal basis for 'approximation' for purposes of "… the establishment and functioning of the internal market". Figure 1 visualizes the 'trilemma' of the EU in effectively realizing and guaranteeing 'free movement of goods'.

[6] Art. 34 TFEU was Art. 28, EC and Art. 30, EEC ; Art. 36, TFEU was Art. 30, EC and Art 36, EEC. These texts were never amended.

Figure 1: EEC's free-movement-of-goods trilemma



Mutual recognition has emerged from the tensions, problems and profound dissatisfaction in combinating these three fundamental treaty provisions. Putting it simple, the Union was caught into a seemingly impossible trilemma: Art. 34 could not be relied on in a blanket form as this would erase the capacity of Member States to regulate, if only for correcting or overcoming market failures. Art. 36 could not be relied on too much either since this would make a mockery of the common market idea, with more holes than a good Emmenthaler cheese; but Art. 114 was not a panacea either as it would imply building a vast EU regulatory regime over many decades, amounting to a drastic de-facto centralisation, with all the costs that this would entail. Moreover, the decision-making (in the Council in the 1970s) ex Art. 114 was still under veto and the mistrust amongst Member States as well as vis-à-vis the Commission was such that EU rules were only acceptable to all if no discretion for escape or disguised protectionism would remain (the so-called Old Approach, going into extreme detail and with full technical specifications). So, when harmonisation *was* decided under unanimity, it was bound to generate excessive regulatory costs and – due to veto tactics and resistance to specific aspects which were left out for political reasons – relatively minor (net) benefits, while requiring disproportionate efforts by EU bodies, and fuelling considerable discord. Risking regulatory failure with net benefits so small (or even negative) and going at snail's pace, this approach to harmonisation would never accomplish the internal goods market.

In order to appreciate the CJEU case law from which mutual recognition emerged, one has to understand this trilemma but also remember the difference between the treaty concept of 'free movement' and free trade. Had the Rome treaty relied on free trade, mutual recognition might never have been invented or at best in an intolerably crippled version.[7]
Free movement is much more compelling than free trade[8] as it forces the country into a different position: the *right* of market access (here: inside the EU) is not negotiable but *guaranteed as such to economic agents*, and the country can only deviate by explicit derogations as specified in the treaty or CJEU case law.

Thus, free movement needs to be ensured by stringent prohibitions of the panoply of regulatory barriers. Otherwise, it would degenerate into free trade inside the EU customs union. In the early days, Art. 34, TFEU was legalistically interpreted : the term 'measures with an equivalent effect' did not catch anywhere near the number and types of 'regulatory barriers' required to render free movement economically meaningful in the internal goods market. Once the CJEU understood that free movement requires an 'economic' interpretation of this prohibition (rather than a formal and too literal one), it ruled in Dassonville (case C-8/74) that such measures (i.e. what we call "regulatory barriers") refer to trading rules "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". Such a formula is capable of covering practically all regulatory obstacles. This strict prohibition is balanced by derogations for Member States, which need to be *respected* at EU level. However, the Commission's 'guardian' role and the CJEU case law also have the effect of *disciplining* the recourse to such derogations in terms of scope and interpretation, otherwise they would undermine the accomplishment of free movement. Mutual recognition is one critical principle disciplining the derogations of Member States, so that free movement (often) prevails.

This discipline emerged with the Cassis-de-Dijon (C-120/78) case law, leading to mutual recognition (MR). See also Figure 2. Following logically from Dassonville, the CJEU first defines what is now called the "origin principle": "Member States must allow a product lawfully produced and marketed in another Member State into their own market..". Member States can block imports or condition them but only if "justified" (the derogations listed in art. 36, TFEU, and the case law, based on the rule-of-reason, on art. 34, TFEU itself). As noted above, the issue is how to respect *and* discipline the recourse to these derogations. Case law since Cassis de Dijon does both (!) by asking whether a

[7] An insightful elaboration of how far one might go under free trade is provided by Alan Sykes (1995). Under free trade, a country agrees not to impose tariffs and quotas and can bind itself under a treaty but remains autonomous otherwise. Such (mainly regulatory) autonomy can be further constrained in limited ways under the WTO. See e.g. Weiler, 2005 ; Sykes, 1995 ; Trachtman, 2007.

[8] Parts of the following and Figure 2 are adopted, with changes, from Pelkmans, 2007a.

formally justified recourse to derogations really matters for the risks consumers or workers run in the internal market.[9] The overwhelming majority of the exceptions invoked relate to what could be called "SHEC" type regulation, that is, related to objectives of Safety, Health, Environment or Consumer protection.[10] SHEC regulation is in essence 'risk regulation'. If the risk reduction aimed for by SHEC objectives is similar between two or more Member States, the regulatory objective is essentially the same (equivalent), and a good can be freely imported without affecting regulatory preferences of the importing EU country. If equivalent, CJEU case law says that the derogation cannot be invoked. After all, the effect in terms of risks to consumers, workers, etc., is then similar so that the 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 CJEU implies that MR amounts to the combination of the *origin principle and equivalence*. This is *'judicial mutual recognition'* (left bottom boxes in Figure 2).

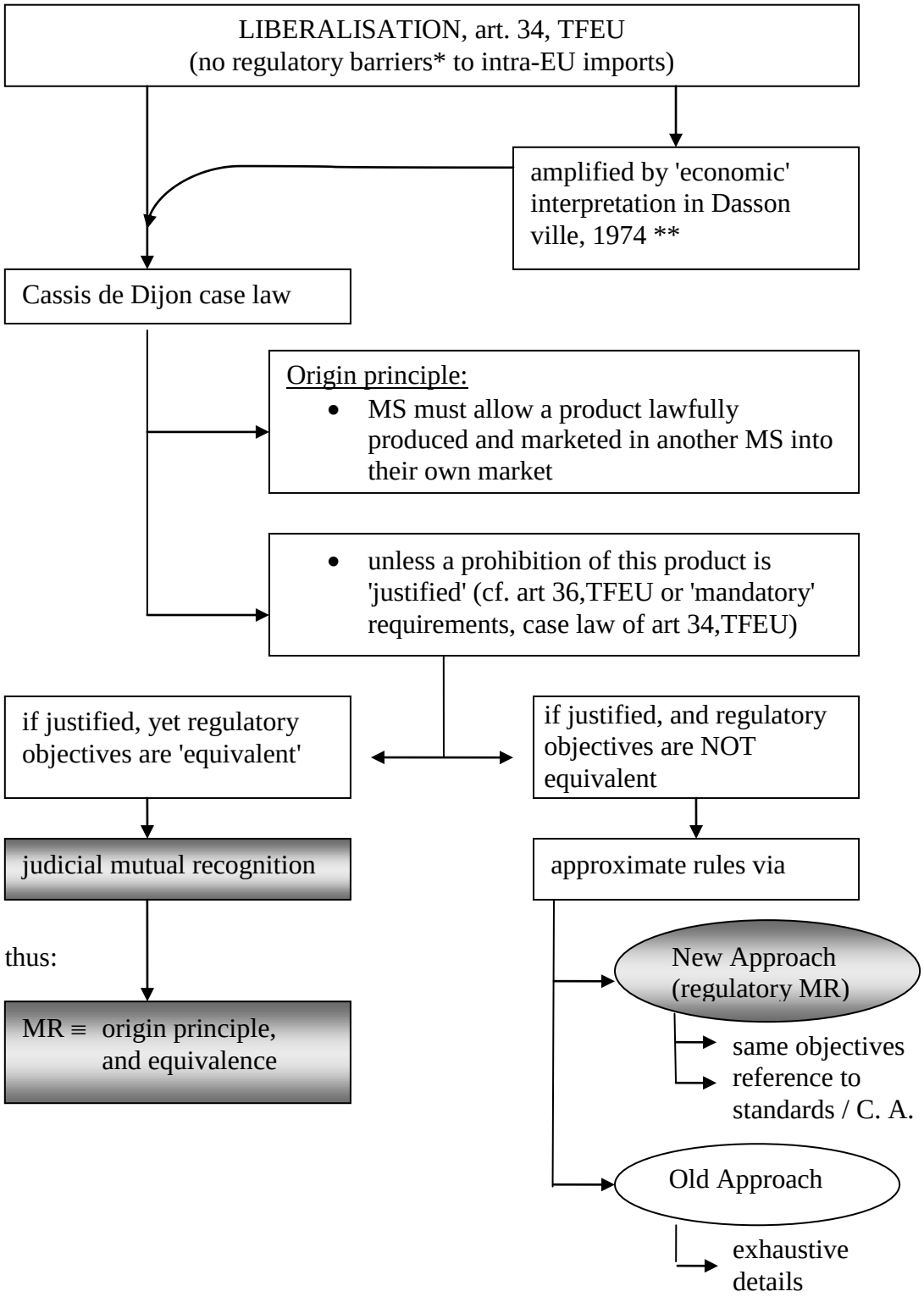
If *not* equivalent, the derogations do apply and the only way to restore free movement is 'approximation'. However, even here MR can (and did) lead to a highly significant simplification. Thus, the New Approach is based on directives where the joint definition of regulatory (SHEC) *objectives* is what matters in the text. Once objectives are commonly defined, the lack of equivalence is by definition removed and can no longer be a reason to hinder intra-EU imports. The Old Approach (mainly developed before Cassis de Dijon), by contrast, harmonizes by attempting to unify almost all technical aspects of (SHEC) regulation, including extremely detailed technical specifications, testing, approvals, inspection and certification. This is unnecessarily costly and rigid. It is also exceedingly difficult to accomplish in Council decision-making and far more difficult still in a Council where Member States were insisting on veto power. The quality of this overly specific and detailed regulation suffered for the simple reason that 'bad regulation' with superfluous or excessively costly requirements would be forced into EU law via the use of veto power. The Old Approach also violates any respect for diversity, even where it would have been possible.[11]

[9] Note that this test can be regarded as an early manifestation of a shift from form-based legalistic justifications to effects-based economic approaches, as is now customary in e.g. EU competition law.

[10] The notion of SHEC is a simplification but it catches the large bulk of regulatory issues related to MR. It is also relevant in services, be it that investor/ saver protection should be added as a special case (see section 7). In Art. 36, TFEU the key references are to health and safety and possibly elements of environmental policy. The rule-of-reason case law ex. Art. 34, TFEU explicitly underpins environmental and consumer protection. All other justifications are either of trivial importance (e.g. arts trade) or relate to IPRs. For legal analysis, see Barnard, 2007, chapters 6, 7 and 19 and Weiler, 2005.

[11] For details, see Atkins (1997). See Pelkmans (1987) for the many drawbacks of the Old Approach. Typical examples of this approach are the 23 tractor directives, the 1973 chocolate directive (meanwhile revised considerably), several other prescriptive food directives, the more than 50 car and car components directives enacted during the 1970s and 1980s (also revised since then), chemicals and pharmaceuticals regulation.

Figure 2: Logic of Mutual Recognition goods



* Art. 34, TFEU speaks of 'measures having an equivalent effect' to 'quantitative restrictions' . Since Dassonville, this is tantamount to regulatory barriers

** What we call 'regulatory barriers,' are defined by the CJEU as "all trading rules enacted by MS which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."

C.A. = Conformity Assessment MS = Member States Source : Pelkmans, 2007 a(as adapted)

The Old Approach can only be justified economically in cases of extreme risks where uncertainty is potentially too costly: the high costs of extreme specification are overcompensated by the benefits of avoiding unacceptable risks. The New Approach is a lot easier to negotiate since it is predominantly about regulatory *objectives*. There is, in addition, a learning process among the Member States precisely because they cannot normally fall back on specific technical solutions, driven by engineers, but have to focus on risks, risk reduction and (much less restrictive) performance requirements.

Thus, with the New Approach, the market failures are addressed whilst the costs of EU regulation fall considerably compared to the Old Approach. The New Approach is therefore not synonymous with MR but the underlying thinking is closely related, which is why it can be referred to as *'regulatory mutual recognition'*. This phrase refers to the common definition of regulatory objectives in a light directive.[12] The absence of further technical details implies that different technical requirements are subject to MR. The sensitivity of this type of risk regulation is such that both Member States (e.g. inspectors where relevant) and business are in need of far greater practical guidance about what exactly is 'recognized' in markets; after all, one light directive might refer to many thousands of quite distinct goods. Indeed, in actual practice, when shipments arrive at a border or in harbours, civil servants or inspectors will typically focus on the detailed specifics in their *national* laws, presumably that is even their routine instruction or impulse. This problem turned out to be paramount for the practical working of judicial MR (see further), though barely realized at first. In regulatory MR it was addressed rightaway. Since the New Approach was regulatory in nature and an alternative to the Old Approach, all stakeholders immediately realized that the specifics – no longer incorporated in law as in the Old Approach – had to be known for producers in other ways, before actual production would take place.

Thus, in the New Approach, the common objectives in light directives are complemented by 'reference to standards'. A carefully structured regime of 'co-regulation' has been set up which develops (voluntary) European technical standards on the basis of 'mandates' issued by the European Commission, in turn derived from the SHEC objectives in the relevant directive(s). Market participants, and not Eurocrats or national civil servants, develop standards for the EU. The Commission recognizes these standards (if a correct follow-up of the mandate, hence, serving SHEC objectives for the EU) and, after official publication, business can rely on them for intra-EU free

[12] A typical case is the toys directive 88/ 378/EEC, recently revised as dir. 2009/48/EC of 18 June 2009. An extremely broad application is the machines directive 98/37/EC covering more than 40 000 types of machines.

movement.[13] This regime is much appreciated because it provides business with guidelines and certainty. European standards incorporated in a regulatory MR regime are also attractive because they do remain voluntary. In case a company is innovative and creates novel aspects or techniques or uses new materials not foreseen in a European standard, the new good can be tested directly (and certified) on the compliance with the SHEC objectives in the relevant directive(s).

Unlike the Old Approach, innovation is not throttled for two reasons: (i) performance standards are expected and they provide a lot of room for product differentiation and innovation[14] and (ii) a company is, even with the flexible performance standard, still free to construct 'around' the standard (though it needs to acquire certification from a so-called Notified Body, assigned to fulfil these tasks). In short, as Figure 2 sets out, 'judicial mutual recognition' amounts to the origin principle in its pure formulation, together with equivalence of existing regulatory objectives of Member States, whereas its main alternative, 'regulatory MR', consists of the common regulation of SHEC objectives, together with mutual recognition of all the specific technical requirements in national laws facilitated by recognized European performance standards. In both approaches, the quite sensational result is that existing technical details in national laws, supposedly to be enforced by the responsible inspectors or civil servants, *cannot* be used to block intra-EU imports, except if that good does not comply with recognized European standards or clearly violates SHEC objectives themselves.

2.3 A digression on how MR case law works

In stylizing the MR case law with Figure 2, the logic of focussing on equivalent objectives stands out. The objectives reflect the market failures to be overcome, providing justified reasons to regulate in the first place. In an economic perspective, this is what matters. However, European lawyers would probably find such a presentation of the CJEU case law wanting. Although there can be no doubt that the CJEU has emphasized time and again that Member States ought to think and act in terms of equivalence in a number of ways, there are also numerous CJEU cases about restrictions of the free movement of goods where equivalence considerations are absent. Does that imply that MR is not relevant i.e. Figure 2 would not apply? The answer is that restrictions may be declared illegal under EU law for many other reasons, which, in standard case law proceedings, tend to be verified *before*

[13] This is legally referred to as the "presumption of compliance". For European business, this is cost saving in terms of information and incentivising in terms of legal certainty. Companies, when making technical products, will have few difficulties in following European performance standards in their in-factory manuals. If done faithfully, the goods will then enjoy intra-EU market access, without the need to master complex EU case law.

[14] Indeed, the use of (prescriptive, hence, restrictive) design standards has to be justified. The result is that they have become exceedingly rare nowadays.

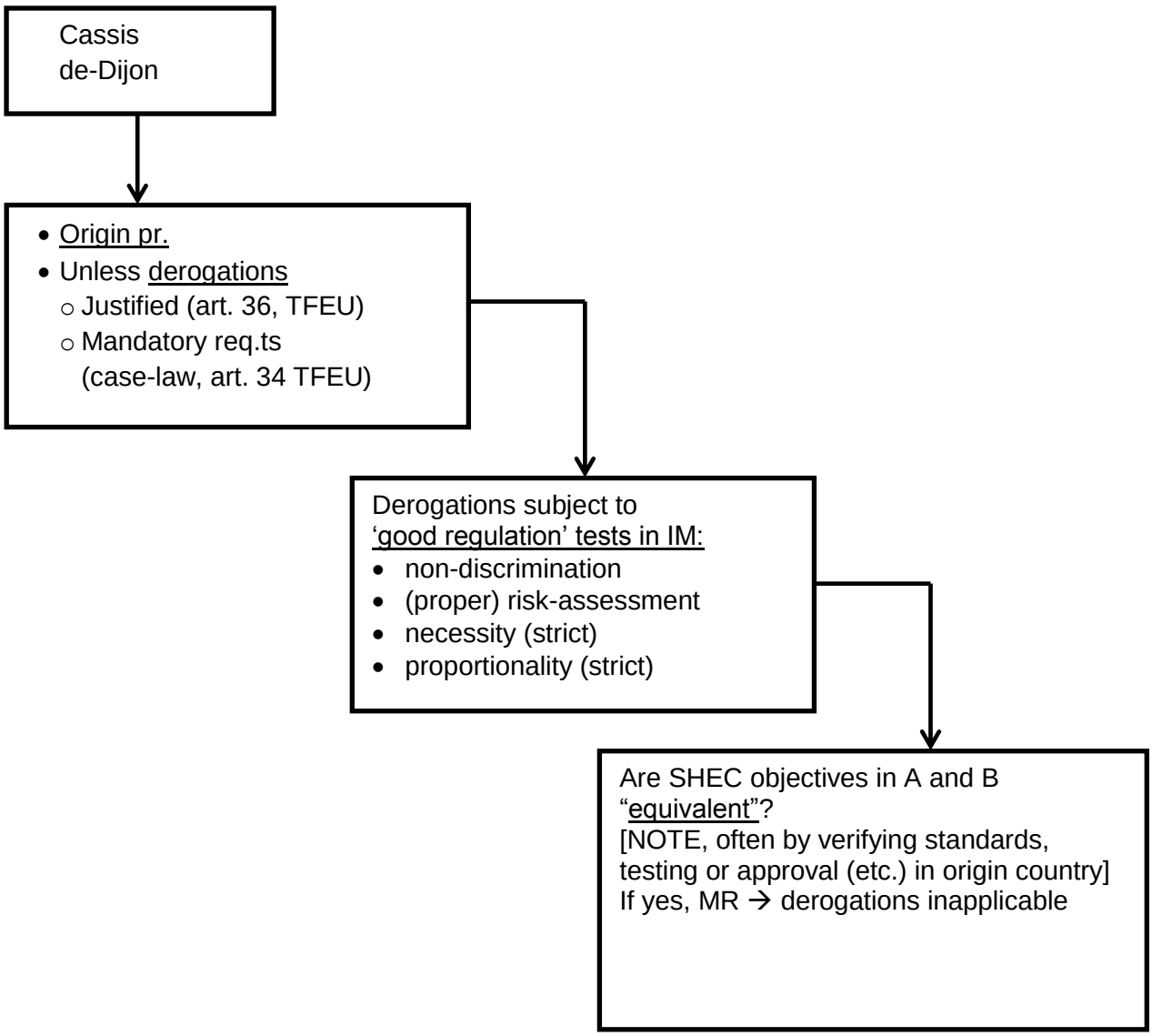
arriving at an equivalence test. See Figure 3. If a Member State claims that its restrictions of free movement are 'justified' (see the upper left box) by derogations, routine case law will first test these derogations against a number of core principles and conditions of EU law, arising from the treaty or case law itself (see central box). The most prominent one is non-discrimination on grounds of nationality (Art. 18, TFEU) on the basis of which the CJEU has developed strict and extensive case law ever since the outset of the EU. Member States have learnt, by now, to avoid discrimination in goods markets but this has taken decades and remains less than perfect. If a restriction is caught as discriminatory, it is illegal and no equivalence test is needed.

The second condition is spelled out in modern regulatory parlance: proper risk assessment (i.e. science based by independent experts and in tune with internationally expected rigour in analysis). The idea is that, since SHEC is risk regulation, the risk(s) have to be underpinned by state-of-the-art scientific analysis, as the basis for risk-reducing national regulation, in order to be evaluated by the CJEU. In cases of 'disguised' protectionism, this test is an effective way to reveal that restrictions of free movement based on national regulation do not offer consumers or workers any (greater) protection in terms of SHEC. Initially, systematic risk assessment was not practiced in Europe (except in e.g. pharmaceuticals) and ad-hoc testimonies by scientists in court would accomplish analogue results. [15]

Third, the 'necessity' test aims to verify that regulatory interventions by the EU country are 'necessary' given the risk reduction preferences. The CJEU tends to assume a strict position. It might also verify whether the measures are actually suitable to bring down the risks to the desired level. Finally, and decisive in numerous cases, the CJEU applies a "proportionality" test in an ever stricter fashion over time. Narrowly conceived, proportionality is equated with "no more than necessary" on order to achieve the regulatory objective. In many cases the CJEU could avoid having to render a judgment on national objectives (expressing national preferences) by focussing solely on the relation between instruments and objective(s). In particular, the restrictive effect on free movement (hence, the costs inflicted on actual or potential competitors from other Member States) can often be avoided or reduced by other regulatory options. More widely conceived, the CJEU has insisted that Member States take into account the internal market context of their measures, that is, imposing a duty on (a) Member State(s) to cooperate in pre-empting regulatory barriers.

[15] Example : in the nisine case (Koninklijke Kaasfabriek Eyssen, Case 53/80 [1981] E.C.R. 409) the Netherlands was allowed to keep its restrictive approach to nisine as an additive to cheese, only after scientific testimonies on the possible hazards and risks turned out to be split, and the country got the benefit of the doubt.

Figure 3: Mutual Recognition CJEU analysis in goods



This is a critical step towards MR. Altogether, these four tests (in the central box of Figure 3) can be said to amount to "good regulation principles in an internal market context". Adhering to those principles already reduces the restrictions to free movement of goods a great deal. In other words, besides the national economic benefits of 'good regulation', the static and dynamic benefits of actual and potential cross-border competition in the internal goods market can be enjoyed as well.

Following these tests one can shift to the third box in Figure 3: the question of 'equivalence'. In principle, this is about equivalence of objectives but, in actual practice, it usually takes the form of practical verification of instruments reflecting these objectives.

Thus, the CJEU has a long track record in prohibiting identical testing in the destination country compared to proven tests in the origin country. Similarly, verifications can refer to (European or equivalent national) standards, (type) approvals, certification or inspection reports. In this operational approach, this test comes very close to the duty, sometimes imposed as a result of the proportionality test, of Member States to work together in a spirit of avoiding barriers when equivalence renders them superfluous.

3. Preventing new regulatory barriers from arising

MR, whether judicial or regulatory, pays attention to the *stock* of regulatory barriers in the internal goods market. But focussing on the stock is rather narrow-minded. Perhaps it is too little realized but Member States have grown into genuine 'regulatory machines'. The painstaking case law based on MR and the enormous European standardisation work linked to the New Approach - no matter how helpful - completely ignore that Member States tend to create a steady *flow of new* regulatory barriers year after year. In the days of unanimity, given a very low speed of harmonisation removing barriers, the Commission began to fear that the fragmentation of the internal goods market was increasing, not decreasing. Even before the EU would succeed in its rethink of the method of harmonisation (the New Approach), a mechanism was set up to ensure that the flow of *new* national regulation would be subjected by a kind of MR, and, in so doing, not add new restrictions of free movement. It is possible to show convincingly that the internal goods market would long have been hopelessly constricted, if the EU would not have introduced an amazingly tough control and correction system for new national legislation in process.[16]

This system is based on ideas underlying MR, topped up by an intrusive and stringent notification system (with tough sanctions in case of non-notification, emerging from firm rulings by the CJEU), close monitoring by the Commission of failures to notify, detailed scrutiny of draft laws of Member States by a special Committee chaired by the Commission, and – most remarkable of all – automatic or semi-automatic suspension of the national legislative process for periods varying from 3 months to as much as 18 months, dependent on the need for remedies and their nature. This contribution is not the place to discuss all the features of the regime [17] but it is difficult to overestimate its merits.

[16] The Mutual Information directive 98/34 (before 83/ 189/EEC), recently amended as dir. 2006/96/EC, OJEU 2006, L 363, p. 81. The Committee is still called the 98/34 Ctee.
[17] See Pelkmans, Vos & di Mauro, 2000, for an extensive explanation and discussion of this control mechanism.

What matters for present purposes is how central MR is to the remedies sought. The basic requirement for these (new) national regulations is that there be explicit and clear clauses on MR or 'equivalence'. After all, regulations where Member States still have regulatory autonomy (in goods) must be in the 'non-harmonized area' [18] and that is *where MR ought to apply*. Such clauses can be attached to the objectives or the technical standards referred to. Reference to standards becomes more effective over time as CEN and CENELEC [19] increasingly write standards which, by definition, are valid for all EEA countries, Turkey (due to the customs union with the EU), Switzerland (due to bilateral agreements) and several other European countries. In a rising number of instances, such standards may be identical with world standards.[20] When world standards are used in such instances, MR extends to imports from third countries if adherence to these standards is ensured by credible conformity assessment. The large majority of national draft laws passing the 98/34 committee either contains equivalence clauses by now or are adjusted after insistence by the committee (Pelkmans, Vos & di Mauro, 2000). If the enacted laws, later, do not have such clauses, they infringe EU law, and are unenforceable against intra-EU imports. The conclusion is that the regime, backed up by significant resources and efforts as well as by strict CJEU rulings, forms a powerful and credible agent for mutual recognition to be maintained and to become more 'visible' for business over time.

The numbers are impressive. Between 1988 and 1998 the total number of national notifications was about 5000 and the trend was upward (Pelkmans, Vos & di Mauro., 2000, p. 274). In the period 1999 to 2005, the annual rate was close to 600 a year and moved up once the new Member States came in (Pelkmans, 2007a, p. 707). The 'comments' and so-called 'detailed opinions' from other Member States and the Commission during those seven years suggest that some 2100 national draft laws were suspected to cause barriers in future. These staggering quantities of national regulations and decrees, if gone unchecked, would have made a mockery of the internal goods market. [21]

[18] If an issue is subject to harmonized EU regulation, Member States lose their regulatory autonomy.
[19] These two and ETSI (telecoms and internet standards) are the three European standardisation bodies, linked to the New Approach and other EU regulatory initiatives via Memoranda of Understanding.
[20] CEN, CENELEC and ETSI have agreements (e.g. the Dresden and Vienna ones) with ISO and IEC as well as the ITU which facilitate the fullest possible use of world standards when writing European standards. In reality, it is often the other way around : European standards are quite often used as (a basis for) world standards. The EU is far more active than e.g. ANSI, the American Standards body in ISO, in world standardisation. For example, according to Renda & Schrefler, 2006, 27 % of CEN standards reflect ISO standards and 57 % of CENELEC standards is identical to IEC standards. See also WTO, 2005.
[21] That Member States are regulatory machines is realized even better if one knows that these new regulations relate to only one-third of all goods traded in the EU. Some 50 % fall under harmonized rules (hence, Member States can no longer enact alone in these areas) and some 20 % are unregulated goods markets.

The newest report[22] shows an average of 663 notifications for the years 2006 through 2008 (so, almost 2000 such draft laws for about one-third of the goods traded in the EU!). Commission and Member States reacted 1215 times to these notifications, with 'detailed opinions' (where the suspicion of emerging barriers is strong) totalling no less than 321! What would have become of the single goods market without MR, as the basis for this procedure?

4. Benefits and costs of EU mutual recognition until 2008

It is insightful to subject MR in goods to a benefit/cost analysis. This is done in Table 1 and briefly elaborated in the text of the present section.[23] There are many benefits to MR, whether judicial or regulatory. Table 1 suggests three categories of benefits. First, regulatory benefits, in the sense of 'better regulation'. If MR is purely judicial, Member States' autonomy with respect to regulatory objectives is retained due to their 'equivalence', even though free movement prevails. If MR is regulatory, Art. 114/3 TFEU prescribes a high level of protection (typically, in SHEC-type risk regulation), so that there can be no race to the bottom via bargaining. Moreover, there will be a bias against regulatory failure of Member States because technical specifications (which might lead to overregulation) are no longer in directives, whilst the technical standards referred to are based on performance criteria rather than design (i.e. prescriptive detail).

Second, strategic benefits relate to the deepening and quality of the internal market. If MR is judiciary, the breakthrough was and is that free movement prevails whereas it was hindered or blocked before. It accomplishes this without adding any EU regulation, that is, it avoids centralisation. Moreover, judicial MR disciplines Member States' overregulation, since their rules cannot stop intra-EU imports originating from regimes with lighter rules (as long as the objectives are equivalent). Finally, judicial MR forms the basis for 'regulatory competition' without a race to the bottom which goes further than MR in a static sense.[24] If MR is regulatory, the deepening of the

[22] See COM (2009)690 of 21 December 2009, The operation of directive 98/34 from 2006 to 2008, and COM Staff Document SEC (2009) 1704 on the same date.
[23] This section, including Table 1, is adapted from Pelkmans, 2007a, with relatively minor changes.
[24] See Sun & Pelkmans, 1995, for an elaborate assessment of the conditions for regulatory competition in the EU internal market for goods to occur, and improve welfare, with a case study in goods and one in services. It is crucial to first realize that regulatory competition in the internal market can only work if equivalence of objectives is ensured, that is, if MR applies. If not, Member States will tend to invoke the derogations and intra-EU trade will be impeded. However, this invocation is only legal if based on a market failure, usually a problem of SHEC, in turn based on a credible risk assessment with scientific evidence. Thus, miniscule residues of catalizers for large-scale beer brewing as well as preservatives (when beer travels long distances) violate the German beer purity law, but have no consequences for

internal market is accelerated because lengthy negotiations can be avoided (especially blockages on technical details) and agreement on goals is far easier. This is so because ministers in Council or MEPs are not hindered by a lack of technical expertise or deep asymmetries of information when it comes to setting regulatory objectives, instead of an ocean of technical detail. After 1985, when Council began to apply qualified majority voting, agreement became relatively easy to accomplish. Furthermore, regulatory MR disciplines overregulation at both levels of government, since the focus is on objectives and the reliance on European performance standards reduces considerably the scope for idiosyncratic (or, protectionist?) specifics. Regulatory MR does add EU rules but minimally so, and drastically less than the Old Approach would do.

The third benefit concerns economic welfare which is what the internal market is all about: MR is pro-competitive, if not strongly pro-competitive at times compared to its alternatives, be it that strategic quality games cannot be excluded (given that equivalence of objectives is to be satisfied). Box 1 elaborates on the scarce economic analysis available in the literature. With this litany of advantages, MR seems almost too-good-to-be-true. Indeed, this is how, naively, MR is often portrayed among economists. Unfortunately, there is an inclination to neglect the considerable drawbacks of MR in actual practice, both for business and authorities, whether EU or national. It is important to appreciate the costs of MR for business and authorities.

Table 1 distinguishes three types of costs. First, information costs, which are especially large for judicial MR. After all, MR is 'invisible' to economic agents, unless specific laws contain clear equivalence clauses, be it on objectives or standards. What economic agents 'see' are the requirements in local laws. Since judicial MR is developed in CJEU case law, numerous businesses have no idea about MR or that it might matter to them, let alone that companies would know how to verify whether it is applied to their goods. One costly consequence of this ignorance is that many SMEs fail to consider MR and thus either refrain from exporting to countries, or, do export but after costly adaptations, which is exactly what MR aims to avoid. For companies which do know about MR, the costs of verifying whether MR would apply to their goods can be high and/or lead to uncertainty.

health or safety. Thus, whilst Germany can maintain its beer purity law for domestic producers, that law cannot be a reason to stop the import of beer from other Member States. It does not follow, however, that beer brewers located in Germany are immediately and powerfully exposed to price competitive imports of 'other' EU beer. Beer distribution in German pubs is entirely in the hands of local breweries and, more often than not, Germans stick to beer made according to the purity law. What one observes is some marginal penetration in supermarkets (bottles/cans) and patrol stations along highways and its pro-competitive impact is probably modest. Therefore, regulatory competition should be subjected to a careful industrial economic analysis before jumping to conclusions about the removal of local (over?) regulation prompted by local industry 'suffering' from local rules stricter than rules in other Member States. Stronger, the larger German breweries do not have to apply the purity law to exports (which for some of them is their lifeline of business) and therefore remain competitive in the internal market.

Table 1: Benefits and Costs of mutual recognition

types of **BENEFITS**	**judicial MR**	**regulatory MR**	*types of* **COSTS**	**judicial MR**	**regulatory MR**
regulatory	autonomy MS retained for objectives	common SHEC objectives ensured bias against 'regulatory failure'	**information**	MR 'invisible' for economic agents, except at high costs (w/o clear MR clauses) even if info is collected, many 'grey areas'; uncertainty (e.g. case law) for business and MSAU no rule book imposed on MSAU	some modest uncertainty, if European standards are lacking or innovation is used
strategic	free movement prevails over-regulation of MS disciplined basis for regulatory competition w/o race to the bottom no (add'l.) EU rules	internal market deepening accelerated over-regulation MS & EU disciplined only minimal (extra) EU rules	**transaction**	monitoring extremely costly, evidence anecdotal at best When MSAU refuse, reputation and waiting costs, little (EU) help (except SOLVIT) assuring rights for business unattractive, costly and slow	regulatory & standardizers' networks monitor and solve, partly (with delays)
economic welfare	pro-competitive	pro-competitive	**compliance**	unknown, possibly serious costs for existing rules	

Notes: MS = Member States; MSAU = MS Authorities
N.B. This table merely assesses MR of existing rules (that is, section 2 and not section 3 of this paper)

BOX 1: Mutual recognition and economic welfare

Despite the appreciation for mutual recognition that economists often show, there is scant economic analysis in the literature. A number of case studies for the Cecchini report (esp. MAC Group, 1988) and as well as for the Monti ex-post-1992 report (esp. Atkins, 1997) comprise fairly careful cost estimates of the failure to apply mutual recognition. Anecdotal and qualitative evidence about similar instances can also be had from UNICE (2004) and EFTA (2008).

There are scattered attempts to develop economic theory but it is disjointed and no 'body' of economic analysis is available yet. One 'strand' which has received some attention is based on the cost-increasing effect of regulatory barriers rendering market entry more difficult. Abraham (1991) shows graphically and for homogeneous goods that, dependent on the costs of adjustment to enter national markets inside the internal goods market, that the latter may well remain effectively fragmented, with permanent price disparities. The Old Approach, with vetoes, is likely to prompt calls for a level-playing field, which is bound to push up the overall EU level of regulation and thereby "raising rivals' costs", in turn significantly reducing the competitive threat for the least competitive country. Mutual recognition would thus be clearly pro-competitive. Falvey (1989) and Abraham (1991) consider SHEC regulations as 'quality signalling'. With mutual recognition, consumers in the high price country have an information problem : they might distrust the low price as a signal of lower quality. This is likely to induce the low-price exporters to invest in reputation building (e.g. voluntary certification) or to announce to systematically test & certify their goods on compliance with standards from the high cost country. Perhaps unexpectedly, this leads to what David Vogel (1995) has observed and called "trading up", a convergence to higher quality levels between trading countries. Theoretically more sophisticated but even further removed from the practice of MR in the EU, is Lutz' (1996) model of vertical product differentiation. He shows, under restrictive assumptions, that mutual recognition can generate a higher economic welfare than both no regulation and full harmonisation. But the case is not a general one e.g. his model can even produce the result that entry deterrence can be achieved by strategically choosing quality. Yet another study by Suwa-Eisenmann & Verdier (2002) introduces a political support function (only having regard to the producer interest). With distinct institutional capacities, implicit regulatory protection inside the Union can emerge. Finally, Felbermayr & Jung (2008) introduce technical barriers and mutual recognition in the new trade models with heterogeneous firms. The authors are interested in unravelling the effects of e.g. mutual recognition on industry productivity but strictly within the rigour of this new family of models. One result, based on a calibrated version of their model, is that lower technical barriers (so not necessarily mutual recognition only) lead to reallocation of market shares from more to less productive firms.

In addition, there are costs because of 'grey areas' about when 'equivalence' applies, both for business and the authorities, even when national authorities do act in a spirit of MR. Unfortunately, the lack of a 'rule book' for MR, in particular for national inspecting agencies or other officials, causes most civil servants not to act in that spirit; rather, they often attempt to enforce local rules. The Commission has gradually come to realize the downside of judicial MR and issued reports and soft guidelines, it has also greatly improved the information on its (TRIS) website[25], promoted seminars and launched a special campaign for the new Member States. Vis a vis business this is unlikely to help much because many SMEs tend to ignore such general campaigns. For officials the utility is greater. For regulatory MR, information costs are far lower.

Second, transaction costs are also substantial for judicial MR. However, hard evidence about transaction costs is scattered and/or anecdotal, with little idea of how representative these data are, as the Commission cannot monitor judicial MR. Case studies indicate that in particular SMEs are deterred by actual transaction costs as well as by uncertainty. The deterrent effect is greatest when Member States' authorities routinely refuse market access if a good does not match local technical requirements. Imposing withdrawal implies a loss of reputation for the company at stake. This is followed by waiting costs, which can only be reduced drastically if bilateral cooperation between Member States is quasi-automatic or the Commission intervenes. Waiting costs can be sensitive if time-to-market matters a lot in sales and marketing. The recent SOLVIT voluntary cooperation procedures [26] are beginning to help fill this gap.

Furthermore, business is often hesitant to ensure their rights under Community law. One reason is that future business in the destination country ought not to be jeopardized. Besides, the pursuit of one's rights under Community law is very slow and costly. Business often rightly notes that legal progress about free movement should not be conquered by them but reasonably guaranteed by the system.[27] It is striking that these costs are arising, in part, from the absence of networking between

[25] The TRIS website provides information on the removal or prevention of regulatory (mainly technical) barriers to free movement. See http://ec.europa.eu/enterprise/tris/index_en.htm

[26] SOLVIT is an on-line problem-solving network of national officials, coordinated by the Commission. It tackles complaints about the misapplication of internal market (and other EU) law by public authorities but without legal proceedings, in a period of no more than ten weeks. In September 2006, SOLVIT claimed a success rate of 75 % of cases solved 'informally', a clear incentive to use it, although some Member States leave their SOLVIT units understaffed, thereby frustrating the process. Some 16 % of the cases are about market access of goods. See http://ec.europa.eu/solvit/site/index_en.htm .

[27] The frustrations about the practical problems or indeed neglect of MR were so strong that European business began to turn away from MR. A first manifestation of this turn-around can be found in the Monitor report (1995) and the UNICE (1995) regulation report. With a delay the Commission started to recognize these issues, once it moved away from a narrow case-law based mindset about MR. See COM(1999)299 of 16 June 1999, on MR in the internal market and COM(2002)419 of 23 July 2002, the

Member States and sound investment in bilateral cooperation inside the Union. The contrast with regulatory MR is significant. In sectors covered by the New Approach, regulatory and standardizers' networks broadly monitor, contacts are not anonymous, occasional network meetings take place and some problem solving does occur, be it with delays. As a result, assuring one's rights is rarely necessary.

Third, compliance costs typically exist when judicial MR fails; under regulatory MR they are exceptional. However, there is no reliable evidence on compliance costs.

Until 2008, MR in the EU goods market was therefore characterized by multiple and substantial benefits and a number of costs which, for business, tended to accumulate to often deterrent levels. There are also costs for national authorities when they enforce rules in the spirit of MR. The disturbing conclusion, at least for judicial MR, is that the very companies relying on MR in the internal market are hardly 'protected' by its regime. The incentives were in some ways *perverse* and they will have to be altered into positive ones for judicial MR to engender the much wanted benefits for the Union. The picture for regulatory MR is far brighter.

5. Restoring mutual recognition incentives under proper EU governance

For about a decade, the Commission and stakeholders[28] have cooperated in relative tranquility in order to introduce appropriate 'governance' systems ensuring that MR would work much better in the single market. The outcome[29] consists of three pieces of EU legislation : one on the application of MR by Member States and the obligations of companies (Regulation 764/2008), and two on overcoming the imperfections of the New Approach (Regulation 765/2008 and Decision 768/2008).[30]

second bi-annual report on MR. Examples were published in the Internal Market Scoreboard no. 10 of May 2002. How deep business frustration ran, however, is clear from UNICE, 2004, under the telling title : "It's the internal market, stupid!", with many examples of neglect or misapplication of MR. Indeed, it appears from interviews of businesses having relied on MR that "firms find themselves unwillingly appointed as guardian of the Treaty (here, free movement under MR), chasing violations at their own costs" (Pelkmans, 2005, p. 123).

[28] Including European business, standardisation bodies, testing and certification bodies (including Notified Bodies, assigned by the EU to execute conformity assessment under the New Approach), accreditation networks in Europe, consumers, the EU Economic and Social Committee as well as Council working groups and the IMCO committee of the European Parliament.

[29] The so-called 2008 Goods Package, also referred to as the New Legislative Framework.

[30] Reg. 764/2008 (the *Mutual Recognition regulation*) of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, in OJEU of 13 August 2008, L 218, pp. 21 – 29 ; Reg. 765/2008 (the *accreditation & surveillance regulation*) of 9 July 2008 setting out the requirements for accreditation and

After a brief note on the latter two pieces of EU legislation, the focus will be on MR regulation 764/ 2008. The accreditation & market surveillance regulation 765/2008 addresses four concerns of the New Approach: accreditation, market surveillance, import controls and CE marking. None of these affect the fundamental link between the New Approach and MR (the agreement on common objectives, hence equivalence) but two of them are relevant for secondary instances of MR in the New Approach. The first one is concerned with the MR of certificates issued by Notified Bodies (EU approved certification bodies) which is extremely convenient for European business. It turned out that not all Notified Bodies had been subjected to strict eligibility criteria by 'their' Member States and this has led to various problems and a lack of credibility. With a new, permanent, high- quality European system of accreditation as well as peer review, the consistent and high degree of credibility of Notified Bodies will be ensured. With respect to CE marking, consumers and their associations have often complained about confusion with other marks, the evasion of the manufacturers' responsibility (in the value chain) and unreliable self-certification (hence, sticking a CE mark) in the case of certain imports. Regulation 765/2008 tackles these problems and tightens import controls.[31]

The Mutual Recognition regulation 764/2008 constitutes a response to the numerous complaints and criticisms about the factual working of MR on the 'ground' (see section 4). The purpose of the regulation is to significantly reduce the various costs of MR to European business and, in so doing, enhance the internal market benefits. It does this via two routes : (a) information obligations (e.g. on technical requirements in rules for the relevant goods) are imposed on EU countries in order to help EU-based companies intending to access the local market as well as administrations of other Member States; (b) a detailed specification of how a correct application of MR brings with it extensive procedural safeguards, such that the burden of proof of not granting MR is essentially on the importing Member State. The first track lowers or eliminates the information costs so that companies merely incur the ordinary business risks when accessing a national market in the EU: good for them and good for (actual or potential) competition in the single market as a whole. The second track respects the national regulatory autonomy and the public interest pursued via regulation (as the MR case law does as well), but *imposes disciplines* on the Member States in shifting the burden of proof for not respecting MR, even when goods have already been marketed elsewhere in the internal market, onto those authorities. The required proof is subjected to EU rules which protects the companies against arbitrary or too hastily decided barriers.

market surveillance relating to the marketing of products and repealing Reg. (EEC) 339/93 in OJEU of 13 August 2008, L 218, pp. 30 – 47 ; Decision 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC in OJEU of 13 August 2008, L 218, pp. 82 – 128.

[31] For details, see Pelkmans, 2009.

Moreover, the rules impose transparancy and facilitate appeal. For all these reasons, the regulation is a genuine relief for business, in particular SMEs. Figure 4 summarizes the key provisions.

Figure 4: Mutual recognition regulation 764/2008

Procedural safeguards for Mutual Recognition via

- Information oblgations to companies from other Member States (entrants)
- Proper application mutual recognition

General :

- deals with 'technical rules' not harmonized at EU level
- specific exceptions and 'general prohibitions' (public morality or security, e.g. weapons)

Information obligations (Member St. & COM)

- ***purpose*** is to reduce information costs drastically and, in so doing, facilitate the exploitation of free movement and MR
- accessibility of national technical rules (esp. for SMEs)
- system of 'contactpoints' (see item 29, pre-amble); info free, within 15 days, sufficient means, explicit reference to SOLVIT
- Commission draws up indicative, non-exhaustive list of products falling under the 'non-harmonised sector'

plus: electronic system for exchange of technical information between contactpoints of the Member States [encouragement, not compulsory]

Mutual recognition and reversal of the burden of proof

- ***purpose :*** Member States have the burden of proof for non-conformity in case the product has already been lawfully marketed elsewhere in de EU
- Art. 4, economic operator provides information (on request of the EU country of destination) about the properties of the product and the lawful marketing (earlier, elsewhere in the EU)
- Mutual recognition of the certification by accredited bodies (viz. Reg.. 765/2008)
- (Art. 6) various procedural safeguards for a company about to access the market of Member State X, in the event X wants to prohibit the product (written, technical or scientific evidence, on the basis of the 'essential requirements' [CJEU language for regulatory objectives], etc..)
- plus a period of 20 days, no temporary suspension during procedures (except for 'serious risk"); failing a response within 20 days, access granted automatically
- appeal possible

N.B. In force as from. 13 May 2009

The information obligations for Member States have to be organized structurally via so-called "contact points", behind which a system has to be set up making it possible to access and provide highly specialized technical information (what laws and decrees? what (national or European) standards ; what institutions involved ?). Such information has to be given for free (as a right) and within two weeks. The back-up system has to dispose of sufficient means in order to be capable of delivery throughout the year. The 27 contact points are expected to be in touch with one another routinely (a new electronic system might be set up for that purpose) so as to make MR work much better and without much ado. This should be an effective underpinning of mutual trust, indispensable for smooth MR. A further 'service' to European business is the Commission announcement of a list of goods falling under MR, in eurospeak the "non-harmonized sector". Meanwhile, a first version of such a list has become available but it is not improbable that improved and refined lists will follow in the future since the identification of exactly what does and does not fall under MR is not always easy.[32]

The reversal of the burden of proof is new but can, in fact, be traced back to an Interpretative Note of the case law on MR in 2003.[33] The procedures are prescribed in considerable detail and avoid that a company is left in limbo : suspension of the import is not allowed unless there is a 'serious risk' and long delays (beyond a total of 40 days) will result in automatic market access. One does not need to read more than the UNICE reports (op. cit.), the two Commission communications on MR of 1999 and 2002 (op. cit.) as well as the Interpretative Note to appreciate what a great difference the reversal implies for European business : apart from the psychological effect, Member States will be forced to alter their administrative conduct at all levels and firms will be able to enforce their rights under much greater legal certainty and with lower costs, if any.[34]

It is important to underline that nothing in these procedures affects the SHEC objectives of national regulations. If there is a genuine issue of non-conformity, the Member State has every right to take the good from the market and the Commission will normally support that.

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[32] This only goes to show that, in some cases, European business was, and to some extent still is at times, uncertain about the relevance of MR to their products. The list can be found at http://ec.europa.eu/enterprise/intsub/a12/ .

[33] Interpretative Communication on easier access for goods, practical application of the MR principle, in OJEC C 265 of 4 November 2003, in which also many instances of improper conduct by national authorities are discussed, showing the necessity of the reversal for business. The reader should also realize that the CJEU is wary of employing the term "mutual recognition", even though it is the very source of the idea. However, in the Pre-able of Reg. 764/2008, the term MR is employed without reservation.

[34] More examples of problems caused by Member States are found in Atkins, 1997 and in Pelkmans, 2005.

Finally, a subtle difference between Reg. 764/2008 and the previous rules consists in the MR of certificates. From now on, this general term covers voluntary certification as well (that is, outside the New Approach and therefore possibly of relevance to [unharmonized] national regulation). For business, this is an efficiency improvement since companies often insist on testing other properties than the EU SHEC requirements (for example, durability or consistent quality, especially for components). More often than not, Member States refused to recognize such voluntary certification done elsewhere where it mattered for their national requirements.

It would seem that the MR regulation has rightly been applauded as the appropriate 'governance' to make MR work as intended and thereby deepening the internal market for goods, whilst improving its effective functioning.

6. Mutual recognition in services : horizontal liberalisation

Negative and positive market integration in services has always fallen behind the deepening of the internal market in goods ; it has also been less wide in scope and less firm. It is only in the last two decades that the CJEU and, more hesitantly, the EU legislator have begun to address the barriers in earnest. In the context of the present contribution, the focus will merely be on aspects relevant to MR, thereby inevitably leaving out many other interesting elements needed for a fuller appreciation of the gradual emergence of a functioning internal services market. The present section will discuss what is called "horizontal services liberalisation": the achievement of free movement and the effective exercise of the right of establishment in sectors which are regulated only relatively lightly. The term suggests that the EU legislator (Council & EP) would not need to regulate or perhaps only with 'minimum harmonisation'. The CJEU should be able to ensure these economic freedoms, possibly with MR as well. Section 7 will briefly discuss MR in (vertically) regulated services such as financial services, transport and professional services.

CJEU case law in services is complicated and, at times, confusing.[35] The following cannot be but a stylized presentation of its logic. The CJEU has gradually tightened its rulings with the effect of disciplining more effectively national services regulation in the internal market. It is useful to keep Figure 3 (on goods) in mind because the analogy with services is close. If we ignore the objective of investor and saver protection – which falls under vertical regulation of financial markets anyway, hence not under horizontal liberalisation - the objectives Member States pursue in national services

[35] The reader is referred to surveys such as Andenas & Roth, ed.s (2001), Hatzopoulos & Do (2006) ; Hatzopoulos (2008), Maydell (2008), Snell (2008), Barnard (2008) and Klamert (2010).

regulation amount to SHEC. But this is not nearly as clearcut as it is in goods, and case law also goes beyond SHEC. In the treaty section on services, there is no article comparable to Art. 36, TFEU (identifying specific derogations) ; in the treaty section on establishment, Art. 52, TFEU only specifies derogations on the general grounds of "..public policy, public security or public health". Provisions on the economic freedoms are similar to that in goods (i.e, Art. 34, TFEU), without employing the convoluted wording "measures with an equivalent effect to .. quantitative restrictions". Art. 56, TFEU states that ".. restrictions on freedom to provide services within the Union shall be prohibited..". It is the same in Art. 49, TFEU : "… restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited". Establishment is also subject to 'national treatment' (Art.s 49, 54 and 55, TFEU). If derogations to the free movement of services are applied, non-discrimination is compulsory (Art. 61, TFEU). Note that all these provisons have never been revised since 1957.

In case law on services, the lack of detail in the treaty has had two crucial consequences, apart from an initial hesitation on the part of economic agents to challenge restrictions imposed by Member States. First, hindering or blocking free movement of services or establishment was initially assessed by the CJEU with a view to direct or indirect discrimination.

One might say that national services regulation was gradually 'cleansed' from discriminatory provisions, a much needed but nonetheless modest achievement.[36] Second, with almost no specifications on possible derogations, a body of 'rule of reason' justifications was built up, regarded as "imperative reasons relating to the public interest" or, much the same, "imperative requirements in the general interest".[37] Over time, the list has become quite long and the wording is often rather general.[38] One may indeed argue on the grounds of legal certainty or for the deepening of the internal services market that the treaty ought to be revised yielding more specific guidance, and/or secondary EU law be enacted (in other words, a more active and agile EU legislator, creating legitimacy for the rules and unburdening the CJEU from such creative constructions). Sooner or later, a more sweeping approach was bound to emerge since early case law kept numerous barriers in place. In order to understand the essence of the greater determination since the beginning of the 1990s, two modes of disciplining national regulation are important : disciplining 'restrictions' and the

[36] Note that, in exceptional instances, and based on a strict CJEU interpretation, discriminatory provisions may be justified for 'public policy, public security or public health' under Art. 52, TFEU.

[37] The first formulation can be found in e.g. Case C-58/98 Corsten [2000] ECR I-0000 para 35 ; the second in e.g. Case C-55/94 Gebhard [1995] ECR I-4165 para 39.

[38] Known as the 'general good' approach framed in very broad objectives, and subsequently assessed strictly, it includes e.g. intellectual property, consumer protection, protection of workers, conservation of national heritage, sound administration of justice, cohesion of the tax system, requirements of road safety, the financial balance of the social security system and language requirements (for dentists, in the interest of patients). The reader will observe that many of these are inspired by the approach in goods.

'country-of-origin-principle'. The first one became more prominent since the Saeger ruling (1991) and also plays a role in the services directive 2006/123, whereas the second one is employed in the e-commerce directive, the TV-without-frontiers directive and the Bolkestein draft directive.

The Saeger ruling [39] sharpens CJEU case law by employing language reminiscent of Dasssonville : "… Art. [now 56, TFEU] ..requires…the abolition of any [non-discriminatory] restriction … liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services". Wording like "less advantageous" or "more difficult" has also been used. Observe that this ruling disciplines restrictions but does not go as far as Cassis-de-Dijon where the origin principle is first pronounced. Nevertheless, the difference is slim because 'otherwise impede' or 'more difficult' casts the net very wide indeed. Both in Cassis-de-Dijon (see Figure 2) and in Saeger, it is really the justified derogations which matter, but the set of derogations in services seems larger. Subsequent case law (and to some extent, already before) strictly analyzes the application of derogations, in analogy with the central box in Figure 3. If non-discriminatory, measures have to be necessary [40], proportionate ("not go beyond what is necessary")[41] and, what comes close to the same thing, "it must not be possible to obtain the same result by less restrictive rules" [42].

In a third step (in analogy with Figure 3, right-bottom box), the CJEU tests for a simple form of MR via explicit proofs such as (identical) tests on standards, licensing and its conditions or approvals in the EU country of establishment of the provider. Rather than MR of precise 'objectives', the CJEU refers to the 'public interest' as pursued in the country of origin. Thus, the treaty freedom to provide services "may be restricted only by rules justified by the public interest… in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established".[43] In the Mediawet case[44] the Court held that restrictions of the freedom to provide services are prohibited "… if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established". In a simpler form e.g. by forbidding duplication of tests or a new certificate of solvency[45] or guarantees already furnished by the provider in his home country,[46] this MR test goes back three

[39] Case C-76/90 [1991] ECR I-4221.
[40] In Saeger, the CJEU speaks of "objectively necessary" ; in Case C-222/95 Parodi [1997] ECR I-3899, para 31, the wording is "indispensable for attaining the objective pursued".
[41] For example, in Case C-424/97 Haim [2000] ECR I-0000 para 60 and many other ones.
[42] Case C-288/89 Mediawet I [1991ECR I-4007 para 15
[43] From Case C-355/98 Commission vs. Belgium [2000] ECR I-1221, para 37. Similar wording can be found in the Saeger case and many other cases.
[44] Case C-288/89 Mediawet [1991] ECR I-4007, para 13.
[45] In the German insurance cases : Case C-205/84 Commission vs. Germany [1986] ECR 3755, para 37]
[46] Case C-279/80 Webb [1981] ECR 3305, para 20.

decades. The main effect of the gradual sharpening and widening of this MR test during the 1990s and later was to stimulate economic agents to reveal (by going to court) the many restrictions they were subjected to. The increasing awareness of a thick and very wide web of restrictions in the internal services market eventually led to the 2002 Commission report[47] on those barriers, as a stepping stone for the draft Bolkestein directive.[48]

The underlying conviction of the Bolkestein draft was that case law would not suffice to establish a well-functioning internal market for services and that the EU legislator had to act firmly. The 'restrictions' approach was replaced by the more radical origin principle (= CoOP) in Art. 16: "Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field". This 'field' was widely drawn[49] and the origin country was to be responsible ".. for supervising the provider and the services provided by him, including services provided by him in another Member State." (Art. 16/3). Given the CoOP, the design of the directive consisted in accompanying it with a complicated list of various types of derogations, and, in a few instances, harmonisation (in consumer protection, simplification of 'red tape' and two black lists, one for free movement restrictions and one for restrictions of the right of establishment). Realizing that the CoOP and its supervision provisions would require a high degree of mutual trust between Member States, far-reaching provisions about administrative cooperation between EU countries were introduced by organizing the allocation of supervisory tasks, exchange of information and mutual assistance.[50] The economic impact of the CoOP in this design hinges critically on (a) whether EU countries impose sufficiently different regulatory requirements to the services falling within the coordinated field (if not different, MR would do; if different or revised to lower them in some countries, the question becomes whether market failures will be re-introduced, hence, the public interest would be harmed, without having a duty to harmonize); (b) the number and importance of the derogations specified in the directive (indeed, such a radical approach forms a standing invitation to lobbies or Member States to insert more derogations, which is exactly what happened). On the first point, based on Kox & Lejour (2005) 's regulatory heterogeneity index for intra-EU services, De Bruijn. Kox & Lejour (2007) show that the CoOP as originally envisaged in the draft would significantly reduce intra-EU regulatory heterogeneity for intra-EU services trade. Since

[47] COM (2002) 441 of 30 July 2002, The state of the internal market for services.
[48] COM (2004) 2 of 13 January 2004, Proposal for a directive on services in the internal market.
[49] Art. 16/2 stated ".. national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the bahaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability."
[50] The draft also encouraged the drawing up of EU-wide 'codes-of-conduct', provisions which survived the turbulent legislative process all the way to directive 2006/123. For the meaning of such provisions, see Delimatsis, 2010.

such heterogeneity entails fixed entry costs for providers for each Member State of destination, the fall of the index due to the CoOP yields extra trade growth and jobs. On the second point, once derogations multiply, the relevant 'field' shrinks to services with relatively few serious obstacles and the CoOP largely looses its purpose. It also matters what eventually happens with these derogations. In one politically prominent but economically minor instance, cross-border health services, a separate vertical directive has been proposed [51] and adopted after much debate by the European Parliament on 19th January 2011. Other specific draft directives are likely to follow (e.g. on security services).

There are many reasons why the Bolkestein strategy failed and a modest reformulation of Art. 16 was opted for. The reader is referred to the literature.[52] But two considerations are worth mentioning here. One is whether the CoOP in the Bolkestein draft was really identical to that introduced in a few previous directives (see also Klamert, op. cit.). Art. 3/2 of the e-commerce directive[53] stipulates that ".. Member States may not…restrict the freedom to provide information society services from another Member State". Clearly, this is not identical to the Bolkestein draft : dependent on the derogations, this is a narrower or wider application of the restrictions approach. Similarly, in the TV directive, now revised as the Audiovisual Media Services directive,[54] Art. 2a sets out the so-called 'country of transmission' principle : Member States ".. shall ensure freedom of reception and shall not restrict retransmissions…of audiovisual services from other Member States..". Again, some derogations follow, of course. Apart from the legal issue of national courts having to interpret the rules of origin countries under the Bolkestein formulation, and *not* in the two directives quoted here, one wonders whether a far-reaching degree of discipline of restrictions is economically very different from a CoOP approach with (too) many derogations. The second consideration is about the derogations in the Bolkestein draft. Apart from derogations due to sectoral regulation and other enumerated instances, one would expect the derogations having emerged from case law on services to be respected. However, this was not the case : no reference or explicit summary was included, which left the very general derogations based on public policy, public security or public health from the treaty as the *only* ones applicable. This caused a lot of consternation : can secondary EU law override case law (normally, not) and, just as important, does all this imply that this case law did not

[51] COM (2008) 414 of 2 July 2008, Proposal for a directive on the application of patients' rights in cross-border health care. This draft directive remains rather close to established case law.
[52] See the references in footnote 36 and e.g. Nicolaidis & Schmidt (2007), Pelkmans (2007b) and Chang, Hanf & Pelkmans (2010).
[53] Directive 2000/31/EC, OJEU L 178/1 of 17 July 2000.
[54] Dir. 2007/65/EC of 11 Dec. 2007, amending Dir. 89/552/EEC, OJEU of 18 Dec. 2007, L 332/27. Note that para 27 of the Pre-amble says that the CoOP should remain the core of the directive.

refer to market failures, hence, had always been unjustified? However, if both these questions are answered in the negative, the economic meaning of the CoOP would be curtailed and a degree of legal uncertainty would not help the internal market. MR does not entail these problems because of the basic idea of 'equivalence'. However, MR beyond what case law in services had achieved, would almost certainly require minimum harmonisation in a range of services, going against the very idea of horizontal liberalisation.

Dir. 2006/123 removed the CoOP from the draft and replaced it with a restatement of the treaty rules and *some* case law. Art. 16/1 says that "Member States shall respect the right of providers to provide services in a Member State other than in which they are established … [and] .. ensure free access and free exercise of a service activity within its territory". Restrictions are subject to non-discrimination, the necessity test and the proportionality test as case law does. After specifying a black list of seven restrictive measures, Art. 16/3 is now explicit on the derogations from the treaty (public policy, security or health) and adds two: environment and employment conditions (incl. collective agreements). This is remarkable, to say the least. In a clause merely (re)stating the freedom to provide services in the internal market (and not the CoOP), a huge list of established case law derogations are simply left out. Some of these are dealt with by the black lists of restrictions on free movement (Art. 16/2) and on establishment (Art. 14), but otherwise this set-up is simply aggravating legal uncertainty. The hope is that the extensive screening of national (and local !) regulation up to 2008 inclusive as well as the 'mutual evaluation' between Member States conducted in 2010 has done away with most of the reasons why, once, the case law was developed.[55] Finally, it is regrettable that Art. 16/1 does not explicitly mention a basic form of MR, namely, in close cooperation with other Member States, the duty to verify provisions in EU countries of origin as well as their supervision. There are different ways of specifying this duty, the most rigorous one being the analogy with Figure 4 on the Mutual Recognition directive for goods, assigning the burden of proof to the Member State where the service is provided. A partial compensation of this omission is found in the provisions on administrative cooperation, going much further than CJEU case law. Art.s 28 and 29 of the directive are useful in underlining the cooperative obligations of the country where the

[55] In its report on Mutual Evaluation, the Commission holds that Member States, alone, together and with the Commission, have achieved a lot: "… a major step forward in terms of removing barriers and the modernisation / simplification of legislation. Hundreds of discriminatory, unjustified or disproportionate requirements existing throughout the EU have been abolished in important service sectors such as retail, the services of the regulated professions, the construction sector, the tourism or business sector. This has been carried out via more than 1000 implementing laws…[ ]..Many Member States have also set up specific mechanisms to prevent new barriers from emerging in the future…". COM(2011) 20 of 27 Jan. 2011, Towards a better functioning Single Market for servics – building on the results of the mutual evaluation process of the Services directive, p. 4. For details, see the extensive survey of all Member States in SEC(2011)102 of 27 Jan. 2011, Accompanying Document (to COM(2011) 20).

provider is established. Called 'mutual assistance', it goes some way towards MR. This is going to be supported by the (electronic) Internal Market Information system (for the national officials), which has meanwhile begun to operate for a number of internal market purposes. What is lacking in these two articles is the emphasis on the *duty* of the country where the service is provided, to verify details in the origin country and finding them wanting, with a formal reasoned decision and appeal options, before imposing restrictions in the first place. That obligation would render it similar to the measures in Figure 4 ensuring MR for goods.

7. Mutual recognition in EU sectoral services regulation

The present section will remain brief on the application of MR in sectoral EU services regulation. In financial markets, transport and professional services, MR has assumed meanings and forms somewhat distinct from horizontal MR. Financial market liberalisation and EU regulation (as well as supervision) has gone through four stages. The first stage only concerned the right of establishment, took place during the 1970s and hardly induced cross-border intra-EU financial market liberalisation. During the EC1992 process, the free movement of services was tackled in a novel way. With exchange restrictions removed by 1988, the financial markets regime built by 1992 consisted mainly of directives ensuring 'sound' financial institutions such as banks, insurance companies and investment houses (merchant banks), based on solvency requirements, capital requirements, avoiding large exposures to single companies (or countries), etc. Market players' trust (including consumers) in the soundness of such institutions is critical : they themselves cannot verify that and this asymmetry of information is so important that it can be paralyzing for the internal financial markets. Once such institutions are very big, contagion might also occur and in that event financial stability might be impaired. Hence, for micro and macro economic reasons, the EU had to arrange common minimum rules on supervision, too. The novel aspect was the move from host to home country control (of the supervision of banks,etc.). It works as follows: the home country of a bank (where the headquarters is established) is obliged to supervise, following the EU rules, and cooperate in a joint EU Committee of national supervisors ; in order to establish and maintain mutual trust, information (on those banks, etc.) will flow freely and fully in the Committee whenever needed. Based on these provisions, the bank receives a kind of 'EU passport' to do business anywhere in the EU, and if that is done with subsidiaries, the supervision of the home country is "mutually recognized" by the host country of the subsidiary.

During the second stage, the services as such in the four financial markets (banking, insurance, investment services and asset management) were usually not EU regulated, with the exception of consumer credit and mutual funds.

The third stage consisted of the EU Financial Services Action Plan (2000 – 2005) with a major upgrading programme in 43 Directives and Regulations, mainly on wholesale markets (whilst tightening investment services, with far less host country control, a protectionist legacy of national stock exchanges[56] and again, institutions. This time, much greater attention was paid to detailed risk assessment of many specific financial products.[57] As we now know, the basics (e.g. on capital requirements) were far too lax, however, and have been tightened after the financial crisis. No less than three successive capital requirement directive upgrades are being legislated over 2010 and 2011. Moreover, several financial players were unregulated (e.g. equity and hedge funds; credit agencies, which turned out to have been influenced by conflict of interest), a number of new financial products (e.g. CDS) contained huge and hidden risks and the EU supervision cooperation failed hopelessly. The fourth stage (since 2008) is repairing these flaws and omissions with a flurry of new EU legislation as well as (slightly more centralized) common supervision in the European System of Financial Supervisors, plus a new body for permanent surveillance of financial stability (the European Financial Stability Board). Whether this is going to be sufficient is as yet unclear. The much greater emphasis on risk assessment (see e.g. the Solvency II insurance directive with thousands of pages of applications at the 3rd level of implementation, to be available by 2012) and the much needed centralisation for 50 or more European (rather than national) banks would seem to be inevitable for sound functioning of financial markets in Europe and for trust of market players to return.

The form and details of MR in financial markets require a high degree of mutual trust, not least because during the financial crisis it turned out that national supervision had been too lax and cooperation between national supervisors was deficient, to the point of breaking down when it mattered most. Greater centralisation in combination with stricter (and more uniform) EU rules seems to be the only way to ensure renewed mutual trust, but, ironically, that also leaves less scope for MR.

[56] Especially the MIFID directive : Dir. 2004/39/EC, OJEU L 145/1 of 30 April 2004. See e.g. Casey & Lannoo (2006)

[57] In the so-called Lamfalussy procedures, levels of 2 and 3 would regulate numerous risk assessment models or methods. This was also linked to practical aspects of Basel II (on capital requirements). Thus, again, the products themselves were not regulated, but now their risks were addressed, technically.

In transport services, regulation is more limited, that is, mainly safety rules for transport equipment, environmental rules and minimum qualifications of firms and persons providing services (as well as strict rules for working hours while flying, riding or driving). Again, licensing and supervision of safety and environment is national (although the latter can of course be randomly inspected by other Member States) and mutually recognized. In this sector, the MR system seems to work well. This is a major achievement. The treaty calls for a common transport policy but this has anything but the characteristics of a heavy, imposing set of rules and prescriptions. [58] Quite the contrary, focussing on essential regulation only and combined with MR of home-country-control, a relatively smooth and highly competitive single transport market has emerged. Only rail freight is moving only slowly.

In professional services, the rules are national. More often than not, these rules are a mix of public regulation and private codes of conduct, with internal sanctioning regimes for purposes of reputation and consumer trust. Because of this mix, it is exceedingly hard to unravel the possibly anti-competitive elements from the ones justified by market failures. This is rendered even more difficult due to the nature of these services consisting of 'experience' goods (but not always with repeat purchasing) or 'credence goods' with strong asymmetries of information. Following the powerful Europeanisation of business, professional services are much more active across borders than one or two decades ago and therefore less resistant to a gradual Europeanisation of codes of conduct. Still, codes as well as national regulation frequently maintain idiosyncratic characteristics which tend to segment the internal market and render cross-border services expensive or impossible. The sector has long attempted to apply MR to its diploma's. Art. 53, TFEU employs the term 'mutual recognition' for this purpose ever since the Rome treaty. At first, this MR lacked any credibility, due to a lack of trust, a lack of willingness on the part of providers (presumably, a protection of 'their' markets) and a lack of demand from European business. What was practiced, boiled down to "maximum harmonisation" in endless negotiations, resulting in a throttling of free movement or establishment. Since 1989 a new approach reflects a MR spirit, which has culminated in an overarching directive 2005/36.[59] It is based on an 'equivalence' approach, promotes more automatic recognition as well as simplification of red tape and organizes stronger inter Member State cooperation. A recent evaluation demonstrates the many lingering difficulties of various forms of recognition under the directive.[60]

[58] In the late 1960s and 1970s, however, some EU countries were insisting on such an approach.
[59] On the recognition of professional qualifications, OJEU L 236 of 23 September 2005.
[60] Meeting report, Evaluation of directive 2005/36/EC, 13 Sept 2010, with annexes including comments from professionals themselves, on website DG Markt, European Commission, Markt-D4/IW D(2010) 361557, http://ec.europa.eu/internal_market , go to professional qualifications.

Diploma recognition is of course only one amongst several reasons why the internal market of professional services does not easily open up. The example of accountancy services, whether by persons or firms, is perhaps exemplary of the deep-rooted obstacles which have to be overcome. MR could never be expected to accomplish this without many other routes. [61]

8. Conclusions

Mutual recognition is a great invention of the EU. However, before it works *beyond* some obvious instances of disguised protectionism,[62] MR requires considerable refinement. The EU has gradually developed judicial and regulatory MR in goods. The latter, in the forms of the New (and Global) Approach and the new (more horizontal) food legislation after 1985, has been very successful over time. The 2008 Goods package contains what can be held as the completion of a system grown deeper and wider over more than 2 decades, with solid underpinning of mutual trust via accreditation in an EU-wide network and other improvements, not least at the EU external border. A remarkable, though little known, track in regulatory MR is the *prevention of future* regulatory barriers from arising in the internal goods market. The combination of an ever more effective approach to existing barriers and an intrusive and targeted pre-emption policy for future ones has effectively spared the single goods market a process of destructive erosion.

Judicial MR in goods has long remained somewhat problematic. It has worked quite well in the food sector but only very selectively in other areas. Business criticism in the 1990s was often bitter because the legal tradition of basing everything on case law completely missed out on the day-to-day reality in cross-border market access in the EU.[63] Three types of costs were incurred by European business, severely discouraging the exploitation of MR (and hence losing a good deal of the potential benefits for the internal market). Once the Commission began to realize this, it started to complement a steady stream of infringement procedures with the building of MR governance together with the Member States and many stakeholders. The new governance edifice was accomplished in a decade via a highly consensual approach. Reg. 764/2008 on (judicial) MR was packaged together with the betterment of regulatory MR (see above).

[61] See e.g. Philipsen, 2009 for an overview of the economics of accounting regulation in OECD countries, with much attention to the EU case. See also Delimatsis, op. cit.
[62] Remember the typical cases of Cassis de Dijon, Italian pasta of durum wheat, a Dutch refusal to import certain types of German bread or the French prohibition of aspartam in light-cola, etc.
[63] One phrase used being that MR is "a phantom in the court room."

The new governance of judicial MR drastically reduces these costs and gives far-reaching legal certainty, inter alia via a reversal of the burden of proof for non-conformity of goods already allowed on the market in other Member States. Together with the high quality, yet competitive system of certification over the entire EU, and the expected consolidation of the Notified Bodies, market access in goods regulated only at the national level will significantly further improve and this should incentivize in particular SMEs keen (but deterred in the past) to operate in a range of countries in the single market.

In services, MR has assumed different forms. Therefore, it is hazardous to generalize. As far as horizontal services liberalisation is concerned, case law on the freedom to provide services in the internal market has long remained shallow. Over time, a stepwise logic comparable with (horizontal) goods liberalisation as in Figure 3 was developed. However, based on the inevitability of creating a philosophy of the (EU) 'general good', given the absence of any specification in the treaty, CJEU case law built up a huge list of 'rule-of-reason' derogations, in turn disciplined (as in goods) by non-discrimination, necessity and proportionality. A modest form of MR was added, by insisting that provisions, guarantees, approvals, testing or licencing conditions in the EU country of origin had to be verified first. However, with an enormous increase in CJEU cases during the late 1990s and the five years thereafter, it became clear that barriers in the internal market for services were far too numeous and restrictive, for this case law to be effective. The Bolkestein draft directive responded to this observation by a design centred around the origin principle, more radically than applied before in some other directives. This failed in a highly turbulent process of legislation. Directive 2006/123 would seem to be modest in its core Art. 16, but upon further reflection this is not clear at all. The directive has removed the 'general good' derogations in a single stroke, except environment. It is now unclear what the status of these derogations will be, although it would be remarkable if the CJEU would revise its case law following this piece of secondary legislation. If these derogations still apply, Art. 16 means little. Moreover, many sectoral derogations were included in the text of the directive itself, shrinking the scope of the directive to relatively unproblematic areas. The directive is still valuable, if only because of the two black lists (both for services and establishment restrictions), the point-of-single-contact for business and the elaborate administrative cooperation stipulated (a soft form of MR). However, MR could have been pushed much further in that provisions similar to the MR Regulation in goods (Figure 4) – in particular, a duty on the country where the services are provided, to assume the burden of proof based on verification in the origin country, with reasoned decisions and appeal options – should have been included. Still, the mutual evaluation between the Member States has proven to be remarkably sucessful and has led to countless instances of removing barriers.

Finally, some attention is paid to MR in sectoral services regulation. In financial services and in transport, not the services tend to be regulated but the firms or market institutions providing services. It is the supervision of these provisions which is mutually recognized (home country control and an EU passport for establishment). The high degree of mutual trust of this approach necessitates tight cooperation, if not some centralisation, of the organisation. In transport, this seems to work, with less centralisation in road haulage and more in air transport or rail. In financial services, several stages in building EU financial markets have not prevented the financial crisis. It has revealed that further tightened and tougher rules with respect to risk management are badly needed. Also, better common supervision is a conditio-sine-qua-non for MR to be applied in a credible fashion. For professional services, the relevance of MR relates to diploma's. After fake attempts to apply MR (realizing 'maximum harmonisation' in endless negotiations, without much hope of any economic impact for cross-border services), a more MR-driven approach has been built up since 1989, culminating an overarching 2005 directive. However, to make this work effectively remains exceedingly hard. It might well be indispensable that EU-wide codes-of-conduct (also encouraged in the 2006 services directive) and further harmonisation be accomplished, possibly aided by EU competition policy, before genuine MR in this domain works.

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