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Mutual Recognition, Transnational Legal Relationships and Regulatory Models

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Abstract

The evolution of the EU legal system reveals a generalisation of mutual recognition variations. On the one hand, these variations are always based on the same structuring elements: mutual trust, equivalence and country-of-origin. Depending on the subject (e.g. taking into account whether harmonisation exists and the EU freedom concerned), each of these structuring elements acquires greater or lesser significance, ultimately determining the degree of conditionality or automaticity at recognition phase. On the other hand, the function of any of those variations creates the legal conditions to establish transnational legal relationships subject to different national legal orders. All these consequences are the result of two fundamental aspects: 1) The EU option by relational regulatory model which ensures the connection between equivalent national rules, using conflict of laws with special techniques. 2) The conferral of transnational effectiveness to national rules and administrative actions to allow the exercise of freedoms granted by EU law.

1. Introduction

Mutual recognition was born in relation to certain EU freedoms (free movement of goods and provision of services), but has developed to encompass all EU freedoms. The application of the principle has overcome this initial substantive framework to become one of the basic structural elements of the European legal system.[1] Our focus in this essay is the legal provision and functioning of mutual recognition in the internal market, that is to say, the original scope of mutual recognition. The chosen approach matches our interest in the way this principle works when companies and professionals offer their

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1 Leaving aside the nuances of the recognition in each area, I have to mention all the Council Regulations passed at private law matters: Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1 and Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance

goods and services on the internal market in a transnational context. Mutual recognition has thereby become the EU legal instrument for articulating a complete legal regime of transnational legal relationships based on the entitlements conferred by the four EU freedoms.

The development of mutual recognition is the result, as this essay will show, of a common and specific regulatory model. Scholars have focused their interest on certain elements of recognition, such as the principles of equivalence and country-of-origin, rather than on this regulatory issue.[2] However, this perspective has not taken into account that said principles are inherent to the structuring elements of mutual recognition, and that their relevance is a consequence of the legal terms fixed in each case by such a regulatory model.

In dealing with this matter, scholars have sought to explain whether or not the principles of equivalence and country-of-origin are the same as mutual recognition. In our opinion this approach is unclear, if not artificial.[3] Every

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obligations [2009] OJ L7/1. At criminal matters, see the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1. Finally, with a horizontal scope, the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16.

2 There are relevant exceptions. See J Pelkmans, 'Mutual Recognition in Goods and Services: An Economic Perspective' in F Kostoris Padoa Schioppa (ed), *The principle of mutual recognition in the European integration process* (2005) (Pelkmans 2005), 87-88; C Barnard, *The substantive law of the EU: The Four Freedoms* (2013) 658ff and V Hatzopoulos, 'From Hard to Soft: Governance in the EU Internal Market' [2013] Cambridge Yearbook of European Legal Studies 101.

3 It is interesting to observe how A Mattera, The Principle of Mutual Recognition and Respect for National, Regional and Local Identities and Traditions in F Kostoris Padoa Schioppa (ed), *The principle of mutual recognition in the European integration process* (2005) (Mattera), makes an overview of mutual recognition evolution focused on equivalence both in free movement of goods and provision of services, but in page 17 he admits the following: '*... the member state of destination is required to accept products and services that satisfy the rules of the member state of origin* even though these differ from its own rules, provided that: the product or service guarantees a level of protection and meets a legitimate objective *equivalent* to the one required in the Member State of destination...'.
SK Schmidt, 'Mutual recognition as a new mode of governance' [2007] Journal of European Public Policy 667 (Schmidt), also talks about mutual recognition from the perspective of the principle of equivalence (669-670), but then she does the same from the perspective of the country-of origin principle (671 & 675). In K Nicolaïdis and SK Schmidt, 'Mutual recognition 'on trial': the long road to services liberalization' [2007] Journal of European Public Policy 717 (Nicolaïdis and Schmidt), the authors argue about the usurpation of identity of mutual recognition under the label of the country-of-origin principle. However, they admit forms of 'managed' mutual recognition, where home-country control is conditioned, partial and monitored. In K Nicolaïdis, 'Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals' in F Kostoris Padoa Schioppa (ed), *The principle of mutual recognition in the European integration process* (2005) (Nicolaïdis), and in K Nicolaïdis and G Shaffer, 'Transnational mutual recognition regimes: governance without global government' [2005] Law and Contemporary Problems 263 (Nicolaïdis and Shaffer), the authors insist in this idea. Other good example in J Pelkmans, 'Deepening Services Market Integration-A Critical Assessment' [2007] Romanian Journal of European Affairs 5 (Pelkmans 2007), 15, 17 where the distinction shows an obvious overlapping. In fact, Pelkmans 2005 (n 2) 87-88, after an approach from equivalence principle, says as follows: '... from a narrow regulatory point of view it would thus seem as if the importing country *"recognizes" the regulatory regime of the exporting country*'.

variation of mutual recognition is based, inherently or explicitly, both on the principle of equivalence and that of the country-of-origin. The regulatory model specifies how and to what extent these principles determine each variation of mutual recognition. The greater the strength given to one principle, the lesser strength held by the other.

The first part of this article is centred on this issue. In this respect, this article will show how, according to the way mutual recognition is envisaged (by the EU legal order, including the case-law of the ECJ) different patterns of mutual recognition may be identified. These legal circumstances favour different degrees of automaticity or conditionality in recognition. The concreteness of this aspect materialises either in greater relevance given to the equivalence principle and, hence, to the control exercised by the host country administrative authorities or, on the contrary, to the country-of-origin principle, conferring greater control to the home country authorities.

The notion of mutual recognition variations embraces very different types of a single legal reality. The second part of this article will disclose solid grounds to support this conclusion. In fact, I am talking about a legal reality with multipolar relevance.[4] On the one hand, a subjective relevance with the exercise of EU freedoms whose legal nature requires legal solutions to enter into transnational legal relationships beyond the national boundaries. On the other hand, a normative relevance to give a complete legal regime to those legal relationships. In this regard, EU law (thanks to previous harmonisation or based on EU freedoms' direct effect) has developed a specific regulatory model which brings different national legal orders together to provide a complete legal regime for transnational legal relationships.[5] At the same time, this regulatory model modulates the degrees of automaticity or conditionality given to recognition and, to this extent, modulates the strength conferred on the equivalence and country-of-origin principles. Finally, the regulatory model also has legal relevance at an administrative level. Different national authorities are connected when enforcing their own legal orders under mutual recognition patterns. Thus, the application of mutual recognition is a good example of cooperative enforcement

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Apparently, this is different from what happens in certain services, where 'a regulatory form of mutual recognition, based on approximation of "essential requirements", coupled to 'home-country control' has been opted for. Home-country control adds another innovative twist to the originality of mutual recognition' (110).
C Janssens, *The Principle of Mutual Recognition in EU Law* (2013) (Janssens), focused on a detailed analysis, finds different nuances that, in some cases, make possible to distinguish the principle of mutual recognition from the principles of equivalence and country-of-origin. These nuances in many cases are very specific and do not prevent identifying that we are dealing with a same legal reality, with a common regulatory model and common legal consequences.

4 An extensive study from this perspective in J Agudo, 'La articulación de las relaciones jurídicas transnacionales mediante las variantes del reconocimiento mutuo' in J Agudo (ed), *Relaciones jurídicas transnacionales y reconocimiento mutuo* (2019) (Agudo 2019), 181-310.

5 A close idea to the one maintained here, in Nicolaïdis and Shaffer (n 3) 266.

of administrative functions between the authorities of both the home and the host countries. In this regard, the key topic is that the regulatory model enables, by means of recognition, the transnational legal effectiveness of the home country's actions.[6]

2. Mutual recognition variations

2.1. The wide range of legal circumstances under which mutual recognition variations can be detected are: '*nomen iuris*', harmonisation, EU freedoms

Article 57.1 of the old EEC Treaty (Article 53.1 TFEU currently in force) established the Council's power to release directives for the mutual recognition of diplomas, certificates and other qualifications issued by the Member States, and of the necessary conditions for accessing and practising certain professions. This reminder aims to highlight the fact that the initial statement on the principle of mutual recognition was already in the Treaty itself.[7] A different matter is that the case C-120/78 *Cassis de Dijon* has been much more influential in the evolution and development of this principle.

Reference to this old provision also enables us to counterpose the dissociation that certain doctrines have artificially maintained between harmonisation and mutual recognition. If the literal nature of the old Article 57 proved anything, it was that these two mechanisms complemented each other '*in origine*'. The European Commission's adoption of the regulatory strategy known as the 'New approach' is the best example.[8] Such was the significance of the 'New approach' that some scholars have accepted the opposite, that is, that mutual recognition can only operate following harmonisation. The latter, of course, overlooks the fact that the principle was shaped on the '*Cassis de Dijon*' case, precisely in those areas lacking harmonisation of technical standards.[9]

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6 The connection between mutual recognition and extraterritorality already in Nicolaïdis and Shaffer (n 3) 267-268.

7 This statement must be completed with Article 220 EEC Treaty (referred to the mutual recognition of companies within the meaning of the old Article 58, as well as the reciprocal recognition and execution of judicial decisions and of arbitral awards) and with Article 100B Single European Act (concerning mutual recognition of provisions in force in Member States as being equivalent to those applied by others).

8 Communication from the Commission concerning the consequences of the judgment given by the ECJ on 20 February 1979 in case 120/78 ('*Cassis*') (Official Journal 3.10.1980 C 256) and the *White Paper* '*Completing the Internal Market*' (Milano, 28/29.6.1985) [COM (85) 310].

9 This happened also with the provision of services and free establishment freedoms. See cases C-2/74 *Jean Reyners v Belgian State* EU:C:1974:68 (*Jean Reyners v Belgian State*); C-71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris* EU:C:1977:65; C-33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* EU:C:1974:13 (*Johannes Henricus Maria van Binsbergen*); C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* EU:C:1987:442;

Harmonisation has played a determining role in extending and strengthening mutual recognition. Levels of harmonisation may vary both in normative density and in terms of the content subjected to regulation. Where no substantive harmonisation is present (*e.g.*, the regulation of essential requirements for products in the case of the 'New Approach' directives), harmonised measures are focused on 'formal' issues, such as the communication of information, or on the accreditation system to guarantee mutual acceptance of the conformity assessment bodies' activity.[10] In short, mutual recognition is foreseen in both non-harmonised and harmonised areas, supporting the notion of mutual recognition variations.

Many other directives concerning other EU freedoms have followed, including a similar legal reality, but referring to different '*nomen iuris*'. This circumstance has contributed to the existing confusion on this topic. Despite different opinions, the ECJ has identified that all these cases take part of the same legal reality. To mention but a few, a significant range of different labels are used to refer to certain specialisations within the operability of recognition:

1. In some cases, EU law specifically uses the label 'mutual recognition'. This happens, for instance, in Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions,[11] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms,[12] or in Directive 2001/83/EC of the European Parliament and of the

C-340/89 *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* EU:C:1991:193; C-104/91 *Colegio Oficial de Agentes de la Propriedad Inmobiliaria v José Luis Aguirre Borrell and others* EU:C:1992:202, etc.

10 This is the case of the in force Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC [2008] OJ L218/21. The Regulation establishes the procedures that Member States have to fulfill when they intend not to apply mutual recognition, by virtue of a national technical provision. The failure of Regulation (EC) No 764/2008 has obliged to the Commission to present a 'Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State' (COM/2017/0796 final). Regulation (EC) No 764/2008 is supplemented by Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products [2008] OJ L218/30. Finally, I must also mention the Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services OJ L241/1. All these legal norms make up what has been called '*Global Approach*'. A complete overview in the Commission Notice The 'Blue Guide' on the implementation of EU products rules 2016 (2016/C 272/01).

11 See case C-85/12 *LBI hf v Kepler Capital Markets SA and Frédéric Giraux* EU:C:2013:697 for instance.

12 See case C-594/16 *Enzo Buccioni v Banca d'Italia* EU:C:2018:717 and related to the previous Directives in this topic, cases C-222/95 *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie* EU:C:1997:345 and C-688/15 and C-109/16 *Agnieška Anisimovienė and Others v bankas „Snoras" AB, in liquidation and Others* EU:C:2018:209.

Council of 6 November 2001 on the Community code relating to medicinal products for human use.[13]

2. In other cases, secondary EU law is referred to an 'automatic recognition' and, in addition, a 'conditioned recognition' can be foreseen or deduced. This occurs, for example, in Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.[14]
3. There are other examples in which the term 'reciprocal recognition' is used to refer to mutual recognition. At least, this is the case in the Spanish version of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.[15]
4. Lastly, there are cases in which European Directives do not qualify recognition and, what is more, they do not even mention it. Nevertheless, these rules incorporate a similar regulatory model to that of previous cases. They regulate mutual recognition variations implicitly. For this reason, and only by virtue of this special regulatory technique, I will refer to these cases as 'implicit recognition'. This group includes both Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,[16] and paradoxically the 'New Approach'

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13 See cases C-567/2016 *Merck Sharp & Dohme Corporation v Comptroller General of Patents, Designs and Trade Marks* EU:C:2017:948 and C-557/16 *Astellas Pharma* EU:C:2018:181.

14 This matter is actually more heterogeneous. Directive 2005/36/EC also refers to mutual recognition. For example, the preamble refers to the 'Freedom of movement and mutual recognition of the evidence of the formal qualifications of physicians, nurses responsible for general care, dentists, veterinarians, midwives, pharmacists and architects'. In case C-675/17 *Ministero della Salute v Hannes Preindl* EU:C:2018:990 that denomination is used to refer to the recognition of doctor's titles, which is also qualified as automatic and unconditional. In a similar sense, case C-365/13 *Ordre des architectes v État belge* EU:C:2014:280 for the profession of architect. On this subject, one can also refer to Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. Cases C-58 y 59/13 *Torressi* [2014] states that '*Directive establishes a mechanism for the mutual recognition of the professional titles of migrant lawyers*'.

15 Article 1(2) Directive 91/439/EEC of 29 July 1991 on driving licences, precedent of the in force Directive, stated the following: 'Driving licenses issued by Member States *shall be mutually recognised*'. The Spanish version is referred to '*reciprocal recognition*'. With the in force Directive 2006/126/EC happens the same in both versions. In cases C-476/01 *Kapper* EU:C:2004:261 and C-467/10 *Baris Akyüz* EU:C:2012:112 both types of recognition –mutual and reciprocal- are considered as sinonimous. Another example is the repealed Directive 2003/37/EC of the European Parliament and of the Council of 26 May 2003 on type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery. The Directive referred to reciprocal recognition, but case C-513/15 *Agrodetalé* EU:C:2017:98 states that it is based '*on the principle of mutual recognition*'.

16 On the debate whether mutual recognition is incorporated into this Directive, see Nicolaïdis and Schmidt (n 3) 717ff, who argue that the Directive recovers the spirit of mutual recognition, but paradoxically, by eradicating mutual recognition altogether from the legislative text. See also F Kostoris, 'Dominant losers: a comment on the services Directive from an economic perspective' [2007] Journal of European Public Policy 735 and P Delimatsis, 'Thou shall not... (dis)trust': codes of conduct and harmonisation of professional standards in the EU' [2010] Common Market Law Review 1049.

directives[17] regarding the free movement of goods.[18] Related to the latter, there are some exceptions, such as the repealed Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment, and the mutual recognition of their conformity, where mutual recognition is expressly mentioned as a core element of the Directive.[19]

This brief overview brings to light a further obvious consideration that must be examined: mutual recognition functions in relation to all EU freedoms. Mutual recognition has assumed different patterns according to several legal elements, one of which is the freedom linked to the scope of harmonisation mentioned above. Some scholars maintain that, in general terms, the ECJ has assumed a more flexible application of mutual recognition in relation to those freedoms that imply a temporary action in the host country. By contrast, mutual recognition has been applied, subject to conditions, in cases where EU freedoms imply a lasting or permanent relationship in the market of the host country, *e.g.* free movement of labour and establishment.[20] In practice, however, this statement has many nuances.

Depending on all the above circumstances (among others) scholars have inaccurately distinguished mutual recognition from other principles that, in fact, are inherent structuring elements of mutual recognition: equivalence and country-of-origin. Generally speaking, and leaving aside for the moment a more nuanced exposition, those cases concerned with free movements of goods in non-harmonised areas (*e.g.* '*Cassis de Dijon*') have been analysed with a focus on the principle of equivalence.[21] On the contrary, cases related to the provision of services in harmonised areas have been addressed with a focus on the

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17 According to JHH Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in F Kostoris Padoa Schioppa (ed), *The principle of mutual recognition in the European integration process* (2005) (Weiler), 50 the '*New Approach*' Directive's central feature is the adoption at the legislative level of the '*Cassis*' rationale.
The structure of all these norms follows the model established in Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products. All of them establish that, if the regulated products comply with the essential requirements established by the European norms, the consequence will be the conformity assessment granted by the conformity assessment bodies, and the 'CE' labelling of the product. This confers the right to market the product across the EU. To this end, the Decision also establishes the guidelines for the assessment of conformity, in accordance with the aforementioned Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products.

18 The use of harmonization at the service of mutual recognition was a strategy adopted within the free movement of goods, by virtue of the policy of the socalled '*New Approach*'. Therefore, it is striking that the '*New Approach*' rules do not usually refer to mutual recognition.

19 See at this regard case C-388/00 and C-429/00 *Radiosistemi Srl v Prefetto di Genova* EU:C:2002:390.

20 Nicolaïdis and Schmidt (n 3) 717ff remember this general opinion.

21 Good examples in Weiler (n 17) and Pelkmans 2005 (n 2).

country-of-origin principle.[22] However, this distinction is not accurate. Regarding free movement of goods, the last generation of 'New approach' directives shows that very similar cases to those described for the provision of services can be identified. Secondly, at least since the direct effect of the freedom to provide services was declared, identical situations to those dealt with in '*Cassis de Dijon*' have been brought before the ECJ.

The fact is, however, that depending on how the above-mentioned legal circumstances are envisaged, different variations of a single legal reality are at play. Despite these special features, one may state that the configuration and application of mutual recognition is common to all its variations. The elements giving structure to its configuration and ruling its application are, and have been, the same.[23] The long-standing discussion comparing mutual recognition with equivalence and country-of-origin principles is artificial, to the extent that each variation of mutual recognition involves both aspects, albeit with different relative weights. In some cases, recognition is, to a certain extent, automatic.[24] This favours the recognition of the country-of-origin action, limiting the intensity and scope of the control granted to the host state's authorities. In most cases, recognition is conditional. In these cases, greater and more intense control is conferred to the host country authorities. This control is oriented toward determining whether equivalences exist between the country-of-origin action, based on its own legal order, and a similar action in the host country as per materially coincident norms within that country's legal order.[25]

2.2. Structuring elements of mutual recognition variations

Article 3.2 TEU proclaims the constitution of a 'European legal space'.[26] This reference, closely connected with the area of freedom, secu-

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22 Pelkmans 2005 (n 2) 110ff.

23 See J Agudo, 'Free Movement of Professionals: the Mutual Recognition Administration' and 'The Cooperative Administration in the Internal Market: In Search of a Tipology', both in F Velasco (ed), *The Public Administration of the Internal Market* (2015).

24 L de Lucia, 'Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts' [2012] Review of European Administrative Law, 21-24 maintains that the automaticity of recognition usually coincides with areas with intense harmonization.

25 This distinction between automatic and conditional recognition also in N Bassi, *Mutuo Riconoscimento e Tutela Giurisdizionale* (2008), 7-39 and G Vesperini, *Il vincolo europeo sui diritti amministrativi nazionali* (2011), 29-52. The same in Nicolaïdis (n 3) 144 but with different terminology: 'pure' *versus* 'managed' mutual recognition.

26 The different language versions of the Treaty do not coincide in the terminology used. The English version uses the concept '*justice*', the French one the term '*justice*', the Spanish one '*justicia*' and the Italian '*giustizia*'. However, the German one refers to an area (a space) of law ('*Die Union bietet* (...) *einen Raum* (...) *des Reschts*'). This has allowed to the German scholarship to deduce the notion of the 'European legal space' (an 'European legal area' according to the English version of the Treaty).

rity and justice, has been interpreted widely.[27] In accordance with Article 3.3 TEU, the establishment of an internal market can be proclaimed as one of the most significant expressions of such a legal space due to the high level of exchange among both legal orders and administrative authorities.[28] Mutual recognition is a basic principle of the internal market for articulating these exchange relationships.

This notion of a 'European legal space' expresses the mutual influence and interdependence that the various (supranational and national) legal orders have been forging in the process of building the EU as a 'community of law'.[29] Within this legal area, national legal orders maintain a relationship of mutual dependence, while national legal systems coexist independently.[30] In any case, EU law has gradually eliminated discrepancies and has generated increasing homogeneity in national legal orders. This process would not have been possible but for the fact that all the national legal systems share a common body of rights and principles. On this premise, an integrated system was built up based on the Member States' common constitutional legal traditions, which are currently reflected in the common principles of Article 2 TEU and the rights and freedoms recognised by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.

The shared principles supporting the concept of 'legal space' are sufficiently clear to allow us to see that the reciprocal influences at play contribute to consolidating mutual trust among Member States. This trust enables States to set up a relationship model that differs from the classic parameters of bilateral international relationships. Reciprocity, under the logic of '*do ut des*', has traditionally functioned as a condition for compliance with Treaties obligations. The European legal space is built on deeper and broader mutual trust,[31] providing

27 A Von Bogdandy, 'La transformación del Derecho Europeo: El concepto reformado y su búsqueda de la comparación' [2016] Revista de Derecho Comunitario Europeo (Von Bogdandy), 441.

28 This integration has been concretised with a more specific concept: the 'European administrative space'. See, E Schmidt-Assmann, *La teoría general del Derecho Administrativo como sistema* (2003), 384; HCH Hofmann, 'Mapping the European Administrative Space', [2008] West European Politics (Hofmann 2008); M Chiti, 'Lo Spazio amministrativo europeo' in M Chiti and A Natalini, *Le pubbliche amministrazioni dopo il Trattato di Lisbona* (2011) (Chiti and Natalini).

29 Chiti and Natalini (n 28) 10.

30 See Opinion 2/13 on the Draft Agreement on the EU Accesion to the European Convention on Human Rights [2014] (Opinion 2/13), specially paragraph 167.

31 See J Pelkmans, 'A grand design by the piece? An appraisal of the internal market strategy' in R Bieber *et al.* (ed), *1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy* (1988), 379 or Mattera (n 3) 11. See also cases C-25/88 *Bouchara* EU:C:1989:187 and C-491/10 *Joseba Andoni Aguirre Zarraga v Simone Pelz* EU:C:2010:828. Nowdays this principle is integrated into the principle of sincere cooperation and full mutual respect – Article 4(3) TEU.

a basis for the 'horizontal opening-up' of national legal orders and the establishment of 'pathways' among them.[32]

The principle of mutual recognition is one of the main mechanisms for establishing horizontal connections within the European legal space. In fact, mutual recognition is built on a regulatory model based on relationships. It is relational because the enforcement of mutual recognition requires rules in Member States' legal orders to become interconnected. This relationship is only possible because suitable conditions have been established in the European legal space for the comparability of the legal orders involved.[33] In other words, the conditions to ensure comparability among national rules, and to promote the acceptance of a presumption of equivalence between Member States' laws, concur.

This starting point explains why the relationships among legal orders resulting from the characteristic regulatory model of mutual recognition are based on equivalence among legal orders. Despite the fluctuations in ECJ case-law and some exceptions, it seems plausible to suggest that equivalence is a premise for mutual recognition in any of its variations.[34] This has led to mutual recognition being equated with equivalence, which, as I will discuss later, is only partially true.

Equivalence does not require total equalisation, nor does it presuppose full correspondence between laws. Mutual recognition carries an important feature regarding the traditional operability of the reciprocity principle: equivalence does not involve identity, coincidence or complete resemblance, but means comparability, *i.e.*, a shared correlation of aims and goals, as well as a similar level of protection, although legal means are not necessarily identical.[35]

The above does not rule out encouraging paths of convergence that lead to a *cuasi* perfect concomitance. This will depend on each individual case. By and large, one can state that the degree of equivalence depends on the freedom of

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32 According to S Cassese, cited by L de Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009) (de Lucia), 4.

33 See Von Bogdandy (n 27) 447ff.

34 See Mattera (n 3); SK Schmidt (n 3); Pelkmans 2005 (n 2) and Pelkmans 2007 (n 3); R Kovar, 'L'incidence du principe communautaire de la reconnaissance muttuelle sur l'efficacité internationale des decisions na Estationales', in *Sécurité des produits et mécanismes de contrôle dans la Communauté Européenne* (1990), 35-44, and M López, 'El mercado interior: cuestiones generales' in M López and J Martín (eds), *DerechoComunitario Material* (2000), 36.

35 See M Gardeñes, *La aplicación de la regla de reconocimiento mutuo y su incidencia en el comercio de mercancías y servicios en el ámbito comunitario e internacional* (1999) (Gardeñes) 86.

movement in each case,[36] as well as the risks that are protected against.[37] Similarly, in harmonised areas,[38] this also depends on both the object of such harmonisation and the degree of detail reached in the alignment of laws.[39] In such cases, equivalence between legal orders is presumed for the object of harmonisation.[40]

The defining nature of equivalence enables the effective application of mutual recognition. On the contrary, the absence of such equivalence is the framework of non-application of mutual recognition: 1) In non-harmonised areas, by virtue of implementing the doctrine of mandatory requirements and Article 36 TFEU; and 2) In harmonised areas, depending on the degree of harmonisation, based on the exceptions provided for in secondary EU law.

As I mentioned previously, mutual trust among States and equivalence among laws enable relationships to be engaged among the rules of the different national legal orders. This link is variable, since it depends on the factors that give rise to mutual recognition variations. In general terms, it arises from the comparison of normative content (as occurs when no substantive harmonisation on the matter exists) and is related to a specific act when applying the rule to

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36 Scholars have not achieved unified vision related to the requiered level of equivalence between national legislations. As Gardeñes (n 35) 88-90 pointed out, the solution is casuistic. This option is deduced from the ECJ's case-law. The ECJ, generally speaking, has assumed a flexible application in relation to the free movement of goods and services, and stricter for the free movement of workers and the freedom of establishment. See cases C-178/84 *Commission of the European Communities v Federal Republic of Germany* EU:C:1987:126; C-105/94 *Ditta Angelo Celestini v Saar-Sektkellerei Faber GmbH & Co. KG* EU:C:1997:277; C-188/84 *Commission of the European Communities v French Republic* EU:C:1986:43; C-293/93 *Ludomira Neeltje Barbara Houtwipper* EU:C:1994:330; C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* EU:C:1991:72; C-272/94 *Guiot* EU:C:1996:147, etc.

37 In non-harmonised areas Member States have to decide the aspects on which to demand equivalence. For instance, J A Gutiérrez, 'Las cláusulas de reconocimiento mutuo: la perspectiva comunitaria del Derecho nacional' [2005] Revista Electrónica de Estudios Internacionales 21 (Gutiérrez) distinguishes three aspects in relation to the free movement of goods: 1) Measures related to the manufacture, marketing and destruction of the product; 2) The test and assessment requirements; and 3) The accreditation of the conformity assessment bodies.

38 Harmonised areas can cause the aspects on which equivalence is required to vary. Gutiérrez (n 37) 22 states that, if the harmonization is applied to the technical rules, then the equivalence will be required in relation to the assessment, tests and conformity assessment bodies. On the contrary, if the harmonization takes place in these last aspects, then the equivalence will be fulfilled related to the technical regulations.

39 It is the difference between Directive 2006/123/CE, the aforementioned services Directive, which incorporates a partial harmonization, and other Directives that harmonize with different level of detail the framework for the provision of specific services. This is the case of the Directives cited in Arcicle 2(2) of the own services Directive, in which case the application of the services Directive is excluded.

40 See M Guzmán, 'Un elemento federalizador para Europa: el reconocimiento mutuo en el ámbito del reconocimiento de decisiones judiciales' [2001] Revista de Derecho Comunitario Europeo 416 (Guzmán). Even those who apparently enclose mutual recognition to non-armonised areas, admit this conclusión. For instance, Weiler (n 17) 93 admits that 'under the "new approach", approximation can be viewed as a written agreement in Council on equivalence'. Similar reflections in 96.

the case in hand[41] (which generally occurs in non-harmonised situations and is usual in the presence of harmonisation).

One of the consequences of such relationships is the choice of law. This conclusion clearly shows that mutual recognition is not only a question of substantive law (the requirement of equivalences and the avoidance of demands that are unjustified and/or disproportionate), but is also a question of selecting and implementing rules. Note that we are working from the concurrence of two legal orders regulating a single issue, but the transnational scope of the legal relationship points to the incompleteness of State law to comprehensively cover all the phases in that relationship. Without a context of integration such as the EU, and in the absence of an international treaty, the States would have successively subjected the legal relation to their rules, causing a double burden to fall upon the affected parties.

Despite this, in a context such as the EU, the culmination of this scenario of transnational legal relations is reached thanks to relationships between legal orders based on the principle of mutual recognition. Mutual recognition variations allow legal orders to connect and select the appropriate national rule to be applied to each phase of the legal relationship. This has decisive consequences in the enforcement of rules, to the extent that the recognition of another State's rule, directly or by means of an administrative act, will hinder the full implementation of the State's own rule.

Rules are selected according to the country-of-origin principle. This principle implies that the country-of-origin (where the product is marketed for the first time or the services are initially provided) exercises control *a priori* on the fulfilment of its own national rules. Home country control has consequences that affect other legal orders. Mutual recognition variations grant extraterritorial effects to home country legislation and to acts passed in accordance with the same.[42] Logically, this presumes the obligation for the host country to accept the effects of the applying foreign laws that, as a general rule, are materialised in an administrative act.

The above considerations uncover another specific aspect of mutual recognition. The idea of selecting the enforcing rule within the framework of hori-

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41 The term 'act' must be understood in a broad sense according to two elements. Firstly, due to the particular conception that each Member State assumes about the concept of an administrative act. Secondly, regarding that the administrative-nature actions that can be recognised do not always correspond with the authorization, as the classic example of an administrative act, but can be specified in certificates, statements, minutes, etc., even granted by accredited private entities.

42 See R Baratta, 'L'equivalenza delle normative nazionali ai sensi dell' art 100 B del Tratatto CE' [1994], Resvista di Diritto Europeo 727ff ; LG Radicati di Brozolo, 'L'influence sur les Conflits de Lois des Principes du Droit Communataire en matiére de Liberté de Circulation' [1993] Revue Critique de Droit International Privé, 401ff; H Muir-Watt, 'Les principes généraux en Droit international privé français' [1997] Journal du Droit International 413 or Gardeñes (n 35) 178.

zontal relationships between national legal orders shares, with some singularities, the legal nature of conflict of laws. This aspect will be dealt with later.

2.3. Reflections on the definition of the principle of mutual recognition in connection with the country-of-origin principle or the principle of equivalence

The following considerations take into account the doubts that are still raised regarding the compatibility of these two principles as defining elements or as alternative elements from mutual recognition.[43] One should not ignore that several factors have contributed to this debate. The first of these, discussed above, was the significance of the principle of legal equivalence in non-harmonised sectors and ECJ case-law, regarding the degree of equivalence required in order to accept mutual recognition. Focusing the problem on the existence of equivalences, part of the doctrine chose to identify mutual recognition with the principle of equivalence.[44] The focus on equivalence, however, prevented them from appreciating that the country-of-origin principle has been one of the keys to mutual recognition from the outset. However, its subsequent incorporation to secondary EU law has served to confirm what could already be inferred from ECJ case-law.[45]

The second factor is closely related to the incorporation of recognition rules in secondary EU law. Harmonisation, in blurring the importance of equivalence as a characteristic trait of mutual recognition, caused a part of the doctrine to focus its attention on the country-of-origin principle.[46] The turning point in this issue lies in how the services Directive proposal incorporated the country-of-origin principle. Leaving aside the reasons for making the above statement, it is now necessary to highlight two aspects. Firstly, that the EU norms that invoke the country-of-origin principle do not refrain from expressly referring to the recognition of equivalent actions from another Member State (with

43 A complete approach in Janssens (n 3) 31ff.

44 See, for instance, A Bernel, *Le principe d'equivalence ou de 'reconnaissance mutuelle' e droit communautaire* (1996).

45 In '*Cassis*' (n 8), the ECJ settled the foundations of the rhetoric of mutual recognition: a good lawfully produced and marketed in one of the Member States, should be introduced into any other Member State. The reference to production in accordance with the standards of the country in which it was marketed for the first time, does it not imply an inherent allusion to the application to the principle of the country of origin? This issue resembles us to the one occurred related to the equivalence principle. P Oliver, Free Movement of Goods in the European Community: under Articles 28 to 30 of the EC Treaty (2003) 95, considered that the principle of equivalence could be deduced from *Cassis de Dijon*, even though the ECJ did not mention it. This opinion was debated in that moment, but there is no doubt that the incorporation of the principle of equivalence in relation to mutual recognition takes place in case C-27/80 *Fietje* EU:C:1980:293. Today there's is nobody who questions such an affirmation.

46 See Gardeñes (n 35) 178 and 185 or Pelkmans 2005 (n 2) 110ff.

changeable terminology, as I have already shown). In addition to this, I have also shown that the ECJ has identified those cases with 'mutual recognition'.

Four decades later, scholars continue to debate the same issue. Identifying mutual recognition with one of its structuring elements is a reductionist view, because it implies non-acceptance of the full transnational operability of mutual recognition (focusing on the actions that take place only in one of the countries where the legal relationship develops). Similarly, attempting to differentiate mutual recognition from some of those elements (generally speaking, from the country-of-origin principle) is altogether unsatisfactory. Country-of-origin is an inherent element of recognition, as is equivalence. Finally, placing the focus on uncommon cases (*e.g.,* cases in which the equivalence requirement is missing in ECJ case-law) is a simplistic approach. Exceptions should always be interpreted strictly, and should certainly not be used to condition the understanding of the overwhelming majority of cases.

Without prejudice to the above assessment, it is clear that this controversy is still going strong. For years, this debate was focused on the free movement of goods, in particular, the identification of mutual recognition with the principle of equivalence. This controversy was meaningful at a time when mutual recognition was associated to non-harmonised areas (*Cassis de Dijon*). I should stress once again that mutual recognition has subsequently become characterised by an increase in the substantive harmonisation of essential requirements that began with the 'New approach' in the free movement of goods. In short, this debate is losing its meaning, both in free movement of goods and in other EU freedoms, where harmonisation supports mutual recognition.

Regarding this controversy, from the outset some authors identified mutual recognition with the equivalence of national technical regulations in the framework of the free movement of goods. Those of this opinion suggested that equivalence between legal orders should be 'strong'. This requirement for 'strong' equivalence enabled the host country to disallow within its territory the marketing of goods produced in compliance with country-of-origin regulations not equivalent to its own. This is where the case-law of mandatory requirements came into play.

Nonetheless, the ECJ has not always rated the required level of equivalence with the same rigour. These differences could be interpreted as an easing that would allow an interpretation of the principle of equivalence, understood in a flexible sense. According to this trend, all products lawfully produced in accordance with country-of-origin regulations could be marketed in the host country, independently of the strict equivalence between the two countries' rules (viewing the equivalence requirement in a lax sense). This interpretation has led to the understanding that mutual recognition is equal to the country-of-origin principle, granting greater automaticity to recognition.

Neither of these positions is entirely incorrect. Mutual recognition has adopted various different patterns, but the same structuring elements are present in them all. A different aspect is the relative 'weight' conferred upon any of

these elements. This leads to an adaptable degree of automaticity in recognition depending, *e.g.*, on the provision of more or less complex administrative procedures and the need for formalised or simply '*de facto*' actions by host country authorities.

Not even when mutual recognition has been traditionally referred to as 'strong' equivalence between legal orders, the country-of-origin principle has not been absent. Equivalence allows the comparison between two legal orders, thus enabling two possible explanations. The first (which identifies mutual recognition with equivalence), stresses that if the country-of-origin legal conditions are comparable and have been controlled in the home country, the host country shall cease to apply its regulations as a tool for easing the rigid application of rules and favouring free movement of goods. This version, however, cannot preclude a second interpretation: the host country is actually not only accepting that it will cease to apply its rules, but it is also accepting the implementation of the country-of-origin's rules on the grounds that these are equivalent to the regulations that would have been applied by the host country. This second interpretation is supported by the fact that mutual recognition variations forbid interventions that are similar to those already carried out in the country-of-origin. This could be considered a disproportionate constraint to the free movement of goods.

A comprehensive interpretation can also be made, based on cases in which mutual recognition is equated to the country-of-origin principle. In such cases, the aim is to endow recognition with greater automaticity, limiting host country control. It is thus accepted that strict equivalence between regulations in the home and host country is not necessary. This in turn allows us to assume that the legal order that determines how a product is marketed or a service is provided is that of the country-of-origin.[47] However, this is not fully the case, since prior (flexible) equivalence is still a premise. Thereby, the host country has always been able to take into account the case-law regarding mandatory requirements. This would happen precisely in those cases in which the country-of-origin had not guaranteed a specific legal interest (among those identified by the ECJ) as would have been guaranteed by the host country legal order. In such circumstances, these interests would not have been safeguarded with the equivalent guarantee, thus empowering the host nation to impede recognition.

It should be remembered that both the implementation of the doctrine of mandatory requirements and of Article 36 TFEU is conditioned by the existence of harmonising rules. When harmonisation is exhaustive or utmost, these exceptions cannot be applied, on the understanding that harmonisation itself would have protected the general interests at play, having foreseen the exceptions relating to recognition. In such cases, therefore, the country-of-origin regulations

47 This understanding is assumed by International Private Law scholars. See Guzmán (n 40) 411.

will necessarily be equivalent to those of the host country, insofar as this effect is inherent to harmonisation. Otherwise, we would probably be facing a scenario of non-execution or inadequate implementation of EU law.

For these reasons, areas where harmonisation has not been developed and, particularly, where it is absent, provide the natural field for case-by-case exceptions, by virtue of the host country's assessment of the potential equivalence of legal orders. In other words, mandatory requirements can be understood as provisional exceptions that only function until a EU norm is adopted.[48] This is a meaningful statement given that its '*raison d'etre*' stems from the need to protect certain interests until they fall under the protection of harmonised EU law.

These reflections link back to the issue posed earlier regarding the country-of-origin principle, as envisaged in the services Directive proposal. Stating that the country-of-origin principle has no correspondence with mutual recognition is correct if compared to the country-of-origin principle as expressed in the aforementioned proposal. According to this proposal, the country-of-origin principle should be understood to imply full recognition entailing the application of country-of-origin legal order in the host country. This principle, as envisaged in the proposal, was difficult to identify.

One cannot forget that, even in the hypothesis that expressed a flexible approach to mutual recognition (understood as country-of-origin),[49] it has always been possible to turn back to mandatory requirements and to maintain the equivalences evaluation.[50] It is true that once the services Directive came into force, this was no longer possible within its scope. However, a new kind of consideration is now coming into play dealing with the harmonisation of exceptions to recognition. Here we would enter the debate on whether these excep-

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48 LW Gormley, 'Quantitative restrictions and measures having equivalent effect. Recent cases on articles 30-36 of EEC Treaty' [1985] European Law Review 221; PJG Kapteyn and P Verloren Van Themaat, *Introduction to the Law of the European Communities* (1989), 653 and N Emiliou, *The principle of proportionality in European Law* (1996), 251.

49 This approach is in line with the evolution of ECJ case-law in the area of freedom to provide services. According to this case-law, the ECJ assumes a broad interpretation of the concept of limits to freedom to provide services, as well as a rigorous application of the principle of proportionality.

50 This is obvious in the framework of the free movement of goods, but also of the provision of services and free establishment. At least since in case C-33/74 *Johannes Henricus Maria van Binsbergen* (n 9) the direct effect of the old Article 59 of the EEC Treaty (Article 56 TFEU) was recognised related to the freedom to provide services, and since *Jean Reyners v Belgian State* (n 9) has done the same with Artcile 52 of the EEC Treaty (Article 49 TFEU), regarding free establishment. In the absence of harmonization, therefore, the exercise of these freedoms could only be limited by the concurrence of overriding reasons of general interest (cases C-58/98 *Corsten* EU:C:2000:527; C-215/01 *Schnitzer* EU:C:2003:662; C- 514/03 *Commission v. Spain* EU:C:2006:63, etc.).

tions are as wide-ranging as those foreseen in ECJ case-law.[51] But this is a vain discussion, merely highlighting that exceptions to mutual recognition can vary in correlation to the degree of harmonisation in place.

In brief, the structuring elements of mutual recognition are shared, although they vary, giving rise to mutual recognition variations. The following general conclusions can be drawn: 1) The greater the substantive harmonisation in a sector, the greater the likelihood of automatic recognition. In such cases, the presumption of equivalence on which harmonisation is built is key, and control falls mainly to the country-of-origin authorities; 2) When harmonisation is absent or is only partial, recognition is usually conditioned, so that only limited equivalence can be presumed. As a result, the host country maintains the powers to verify such equivalence when recognising the home country's actions.

3. Mutual recognition and regulatory models

Up to this moment, I have endeavoured to show the extent to which EU legal order has incorporated different variations of a single legal reality that can be broadly referred to as mutual recognition variations. Mutual recognition variations always operate in a similar manner, due to the fact that their structuring elements are common.

In the next section, our aim is to show that mutual recognition variations are an instrumental result produced by a specific regulatory model. To this end I will deal with the following points. Firstly, I provide a context for the selection of regulatory models at EU level, setting our reflections against the backdrop of a complex scenario such as the European legal space. Secondly, I will determine the types of relationships between legal orders taking place in that scenario, showing to what extent traditional Theory of State criteria are no longer applicable. Among the different regulatory models the EU legislator has to choose from, I will show that only one –that I refer to as '*relational*'– is suitable to articulate the relationships between national legal orders that are necessary for mutual recognition. A number of relevant issues will be brought up. I should bear in mind that these are relationships between different legal orders with their own legal sources of validity and effectiveness (in a 'Hartian' or a 'Kelsenian' sense), hence the need to analyse the normative techniques used for applying one or another legal order. In this analysis, the notion of conflict of laws based on the country-of-origin principle will be applied. Lastly, I will

[51] Scholars have been divided on whether the services Directive would have harmonised the compendium of exceptions identified by the ECJ's case-law at this respect. In favor of this opinion see G Davies, The Services Directive: extending the country-of-origin principle and reforming public administration [2007] European Law Review 234 and V Hatzopoulos, 'Que reste-t-il de la Directive sur les services?' [2007] Cahiers de Droit Européen, 345-346.

examine how a foreign administrative action adjudicated according to a specific national legal order may become effective in another member State. Mutual recognition variations are able to operate when all these legal gears engage.

3.1. The European legal space

The European legal space is far from establishing a clear-cut concept to convey the precise legal meaning of the reality that it aims to define. Nevertheless, this concept is useful to contextualise the functioning of mutual recognition. This concept confirms that the 'community of law' established under the Treaty of Rome was constituted in a 'political and legal domain' that neither responds to the statist paradigm nor adjusts (as asserted at an early stage by the ECJ) to the criteria of International Law.[52] The European legal space undergirds the two pillars on which the EU stands. On the one hand, it confirms the legal and institutional autonomy of the EU. On the other hand, it corroborates the validity of the independent source of EU law to which the Member States submit (Article 1 TEU).[53] Both of these ideas have been used to address European integration as a 'constitutionalisation' process of the Treaties.[54]

The European legal space concept is also useful in that it provides an alternative to the formation of a legal order based on statist criteria, *i.e.,* a single, self-referential and hierarchical normative order. Within the EU, several legal orders with different law-generating sources concur. While national Constitutions set forth their system of normative sources and establish the validity of such norms, the Treaties do likewise with regard to EU law. National legal systems coexist autonomously, while the various legal orders maintain relationships of mutual dependence within the framework of EU law.

Admittedly, one cannot speak of a single European legal order, but the notion of a common system governing a plurality of legal orders.[55] This idea is grounded primarily on the identity of superior values that uphold Member States' constitutional legal traditions. These common values, hailed initially by the ECJ, today reinforce the thesis on the 'constitutionalisation' of the Treaties. However, the

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52 Both the evolution of Treaties into 'Treaties-Constitution' and the normative autonomy of the EU law proclaimed by the ECJ, cut the 'connections' of EU law with International Law. HCH Hofmann, 'Conflicts and Integration: Revisiting *Costa v ENEL* and *Simmental II*' in L Azoulai and M Maduro (ed), *The Past and Future of EU Law* (2010) (Hofmann 2010), 63 has revisited this issue and emphasised the notion of integration derived from cases C-6/64 *Flaminio Costa v E.N.E.L* EU:C:1964:66 (*Costa v. ENEL)* and C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49 (*Simmenthal II*).

53 See again Opinion 2/13 (n 30) para 158, 166.

54 See at this regard R Schütze, 'On "Federal" Ground: The EU as an (Inter)National Phenomenon' [2009] Common Market Law Review 1080 (Schütze), who proclaims that the Treaties have evolved into 'Treaties-Constitution', and 'constitutionalization' means that States have lost their '*Kompetenz-Kompetenz*'.

55 See de Lucia (n 32) 2-3 and Chiti and Natalini (n 28) 10.

idea of a common system also stems from an intensive process of Europeanisation of national law.

The European legal system integrates national systems without replacing them, in complex mutual-transference coexistence. This complex normative system is not lacking in internal structure. It is the remit of EU law, as the prevalent legal order,[56] to establish the mechanisms that govern relationships between legal orders (between supranational and national systems, and among the latter). EU law governs the plurality of national legal orders providing legal solutions that enable an equivalent regulation throughout the European legal space in order to reach common goals.

It is important to bear in mind that these common goals can neither be achieved independently and autonomously by EU law, nor by national legal orders. Only through integrative relationships can a comprehensive normative order be reached.[57] These relationships between legal orders in the European legal space may be vertical or horizontal. The former refers to the relationships between EU law and the national orders, conditioned by the primacy granted to EU law allowing it to govern relationships with 'inferior' (national) legal orders, as well as relationships among these.[58] In horizontal relationships, two alternatives are open to the EU lawmaker: 1) To harmonise and substitute the implementation of 'inferior' legal orders through pre-emption. This regulatory strategy establishes a trend toward uniformity across national legal orders; and 2) To limit regulation and set legal criteria for relationships among national orders without substituting the latter. In these cases, the 'superior' (EU) legal order establishes the conditions for relations between 'inferior' legal orders, striking up horizontal relationships among Member State legal orders.[59]

3.2. Horizontal relationships between national legal orders

Traditionally, State legal order is defined by the assumption of its completeness and systematicity, and characterised by its uniform, self-sufficient and hierarchical nature. In States with a complex territorial organisation, the legal order structure is complemented with competence-based relation-

56 *Costa v. ENEL* (n 52) and *C-106/77 Simmenthal II* (n 52).

57 See G Robles, *Pluralismo jurídico y relaciones intersistémicas. Ensayo de teoría comunicacional del Derecho* (2007) 77ff.

58 Hofmann 2010 (n 52) 62 affirms that *Costa v. ENEL and Simmenthal II* '... transformed the understanding of how conflicts between Community law and Member States' law would be decided', so 'Community law thus itself defines its rank within the legal system of its Member States'.

59 ibid 65-66 exposes it clearly: '... the supremacy of Community law obliged Member States to allow for trans-territorial effect of other Member States' law within their legal system. Thereby, Member States had opened their territory to the application of public power not only from the Community level, but also horizontally from other Member States'.

ships established between State rules and sub-State legal orders. To address relationships between legal orders within the European legal space, one might be tempted to find a comparison with the relationships among normative sources within a given State. However, the relationships analysed here respond to different criteria. Firstly, one cannot speak of hierarchical relationships between EU and national laws. EU law primacy does not govern relationships of hierarchy, but of preferential application.[60] For this reason, national rules that breach EU rules are not invalid, but inapplicable.[61]

As far as horizontal relationships are concerned, national legal orders neither maintain relationships of hierarchy nor of shared competence. From the classic view of State Theory, the principles of territoriality and exclusivity of State law generate indifference toward the validity and effectiveness of the law of another State. However, the process of European integration has fractured the foundations that served to consolidate the nation-States. Both the primacy of EU law and, more specifically, the 'horizontal opening-up' to other State legal orders, has significantly conditioned the enforcement of national law.

Focusing on the relationships between national legal orders, these relations overcome the legal parameters underpinning the territoriality paradigm in State law.[62] Invalidity is the legal consequence that guarantees the priority of legal sources and gives internal meaning to a structured unitary legal order. However, this logic is not applicable to the relationships between national legal orders: to justify this opinion, it is necessary to insist on the notion of territoriality as a determining element for the validity and effectiveness of legal norms. The principle of territoriality has been the baseline for determining the scope of validity and effectiveness of State law and, of course, of administrative acts issued on the basis of this legal order. In other words, the scope of effectiveness has been linked to that of validity. Note, in this regard, how the principle of territoriality instils a near-perfect symmetry between the territory and the validity/effectiveness of rules and administrative acts, and of citizens' rights granted by the State legal order.[63]

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60 At this regard see, *e.g.* the Declaration of the Spanish Constitutional Court 1/2004, 13 December.

61 Notwithstanding it is posible that the State law settles the invalidity as legal consequence to those administrative acts that, having been dictated according to the internal rules, breach the provisions of EU law. *E.g.* Article 48(1) of the Spanish Administrative Procedure Act can be interpreted in this way when qualifying as voidable the administrative acts that 'incur in *any infraction* of the legal order'. About this question in Italy, see G Pepe, 'Principi generali dell'ordinamento europeo: profili teorici e applicativi' [2015] Cuadernos de Derecho Transnacional, 311ff.

62 See J Agudo, 'Regulatory foundations for transnational administrative law' [2018] European Review of Public Law 313.

63 The reference to this 'near-perfect' symmetry deserves an additional comment. In the legal-private sphere that symmetry has not been real within the framework of the relations ruled by Private International Law. Moreover, within the framework of Public Law, it is also possible to pass rules that regulate situations or legal relations that take place beyond national borders. Regarding this second issue, if a rule typifies crimes with respect to facts held outside the borders of the State, this does not condition that this rule is only valid on the State territory

This symmetry has been broken in the context of the European legal space. It is increasingly common for State rules and procedures adopted in accordance therewith to have extraterritorial effects. This is not a consequence of the State legal order conferring on itself such far-reaching effects. The reason lies in that, within the European legal space, EU law confers supranational effectiveness to Member States' rules and administrative acts. This results in a superposition of effects, as those deriving from the defining territoriality of the sovereign State overlap with those stemming from European supranationality.

Before going beyond, a previous reflection is needed concerning the concept of 'supranationality'. Supranationality embraces different meanings thanks to the flexible nature of its defining criteria. Beyond a standardised notion,[64] other forms of supranationality appear on another stratum within the EU legal system indicating that Member States' rules and administrative actions acquire extraterritorial effects on the basis of the extended scope granted to them by EU law ('transnationality'). These situations regulate the transnational legal relations that are of interest here, characterised by several features: 1) The selection of a less incisive regulatory model in State legal orders; 2) The powers granted to the EU institutions are shared with the Member States (power sharing causes separate areas of validity to be maintained –European versus national– which govern and are concretised when the EU law is executed in each territory), and lastly, 3) The primacy of supranational rules is decisive in the extended effectiveness granted to States' norms and administrative acts. It should be noted that, at all events, this transnational effectiveness has a clear supranational grounding. Firstly, because the goals pursued are not strictly national, although the States retain the powers to reach them. Secondly, because the legal relationships subject to this complex normative scheme are a consequence of exercising rights that by nature are supranational,[65] without prejudice to Member States'

and that it would be only effective and enforceable in that same territory. That is to say the supraterritorial connection of the facts considered does not condition the former conclusion on the symmetry of validity and effectiveness ambits.

64 From this perspective the notion of supranationality embodied a terminological alternative to conceptualize the exercise of public authority '*pro unione*', as distinct from the exercise of sovereign power in the territory of each State and power within the framework of relationships subject to International Law. At this regard, see Hofmann 2008 (n 28) and Schütze (n 54). It should be reminded that, to a large extent, supranationality reproduces State territoriality patterns. Rules and administrative actions, as well as rights, are supranational when their validity is rooted in EU law, whose scope is the entire territory of its Member States, and whose effectiveness prevails by virtue of the primacy of EU law. Supranationality thus maintains the symmetry between the European legal space and the validity/effectiveness of EU law.

65 Article 15(2) of the Charter of Fundamental Rights of the EU provides that 'Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services *in any Member State*'. The European citizens are therefore, entitled with rights, included certain EU freedoms, that are only identifiable in a European context. In other words, these rights' territorial scope is European, and this is part of their very essence (Article 52(2) of the Charter). Something similar must be maintained related to the rest of the economic freedoms not integrated into the legal status of European citizenship. At this respect, see Agudo 2019 (n 4) 186ff.

remit to grant them in each particular case. And thirdly, because it is EU law that enables the mechanisms for relationships among national legal orders, so that Member States' rules and administrative actions may be effective throughout the European legal space, granting full effectiveness to the rights exercised.

This special type of supranationality that 'transnationality' is, sums up the transnational legal relationships' specific legal regime. This legal regime connects three factors: 1) The granting of rights with supranational effects, generally of an economic nature (EU freedoms); 2) The exercise of these rights in the territory of several Member States; and 3) The subsequent submission of the holders of those rights to different legal orders and different States' administrative actions.

3.3. Regulatory models and legal sources of validity and effectiveness

The above-mentioned factors are the legal consequence of two fundamental aspects: 1) The regulatory model adopted, and 2) The source of legal validity both of rights with a transnational scope and administrative acts duly adjudicated to grant effectiveness to those rights in each specific case.

3.3.1. Regulatory models

The term 'regulatory model' refers to regulation model types and the normative strategies these involve to achieve European objectives. The classification of regulatory models is conditioned by several factors. The first of these is the distribution of powers among European institutions and the Member States. Another is whether harmonisation exists, and if so, whit what degree of detail. A further element to bear in mind is the legal form in which rules are adopted by EU institutions (Directives *vs.* Regulations). A less decisive factor is who holds the power to implement the rules adopted. Despite the increasingly complex nature of EU law in this regard, it cannot be ignored that the Member States continue to maintain a high significance (Article 291.1 TFEU).[66]

At the core of the European legal space, three regulatory models can be identified:

a. The 'centralised' model. This model features regulatory powers concentrated at the EU level, assuming an extensive normative formulation. It is therefore based on in-depth harmonisation that replaces Member States' internal rules. The rules adopted take their source of validity directly from

66 See at this regard Agudo 2015 (n 23).

the Treaties and their effectiveness is supranational. The essence is that EU law, through the effect of pre-emption, substitutes national law. In this regulatory model, EU institutions and agencies can execute directly EU law. However, for most matters, national administration's actions are essential to implement EU rules in each Member State (the traditional indirect implementation of EU law). For this reason, this regulatory model upholds a compartmentalised implementation of EU law in each national territorial jurisdiction.

This regulatory model appears in matters that are the exclusive competence of the EU, but has also been common in shared matters with recourse to extensive, itemised and uniform harmonisation that, by virtue of the primacy of EU law, leaves few regulatory options open to the Member States. These considerations explain why the use of Regulations is a suitable legal strategy in these cases. This is not to say, however, that one cannot find cases in which the European institutions have adopted Directives with such a broad harmonising effect as Regulations.[67]

The main drawback in this regulatory model is the tendency to render national legal orders uniform. The resistance and problems generated by this regulatory model explain why EU law is moving toward incorporating other integration strategies.

b. A second regulatory model is the 'decentralised' model. In this case, the Member States usually hold shared competences with the EU. The prototypical example is the transposition of Directives understood as the common minimum normative framework, with varying levels of detail but always guided by an approximation strategy for national legislations without fully replacing them. As a result, Member States maintain sufficient normative margins to prevent the elimination of regulatory diversity among them.

This regulatory type also appears in cases where, without harmonisation, Member States maintain their regulatory power as long as it is not entirely or partially substituted by EU law. In these cases, national rules should be adopted and ultimately interpreted in accordance with the principles that govern the European legal system.

In all these cases, the Member States take on a prominent role in regulatory enforcement and a key role in administrative enforcement. These cases are also typical examples of the indirect implementation of EU law, since each Member State proceeds to enforce EU law in its own territory, both normatively and administratively. Accordingly, this regulatory model maintains the implementation of EU law by national territorial jurisdictions.

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67 Recall the 'Directives-Regulations' which were named this way specially in environmental matters due to the detail contents of the Directives. Despite time goes through, it remains a paradoxical reality that one can observe behind several 'framework' Directives.

c. The last regulatory model I will refer to as 'relational', and is a variation of the previous two models. When the relational model is a variant of the decentralised model, differences are observed according to the degree of harmonisation or the lack of it.

In some cases, EU law is limited to establishing a regulation at a basic level. In other sectors even when no prior harmonisation exists, EU law is limited to the provisions of the Treaties with direct effect (EU freedoms). In other cases, EU law can extend its regulation through harmonised legislation. Harmonisation may vary but never replace the regulatory functions of the Member States. Therefore, as a general rule, Directives are the EU norms that rule in these sectors. Harmonisation can cover different areas not necessarily presented jointly in all cases. These are scenarios in which harmonisation serves to approximate legislations in substantive aspects such as the essential requirements for certain products or for certain activities, professions, etc. Likewise, harmonisation addresses formal issues such as conformity assessment or supervision procedures, or the prerequisites for the bodies responsible for these functions.

In response to this variant of the relational model, in recent years we are witnessing the extension of the relational model to areas where the EU is the centre point (and often has almost full exclusivity) for substantive regulation in a given matter. I will refer here to a relational model variant based on the centralised model which, of course, does not preclude Member States from their role as main players in the implementation of EU law.[68] Notwithstanding, the more centralised the regulation of a matter in the EU institutions is (not necessarily exclusive EU matters but also shared matters with recourse to itemised Regulations), the more blurred the reference to a relational regulative model.

What is the defining feature of a relational model, and what makes it different from the other two regulatory models? This feature is found in the fact that EU law incorporates, whether by virtue of EJC case-law (in non-harmonised areas) or expressly provided for in a secondary EU rule (in areas that are partially or fully harmonised), mechanisms for recognising the effectiveness of the Member States' rules and/or administrative acts, which allow its effectiveness to extend beyond the borders of each State.

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68 *E.g.* in the context of the free movement of goods, see Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L269/1 (Regulation (EU) No 952/2013), art 26; Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods [2009] OJ L39/1 (Regulation (EC) No 116/2009), art 2(3), and Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. In the area of free movement of persons [2009] OJ L134/1 (Regulation (EC) No 428/2009), art 9(2), the best example is found in Article 10(1) Convention implementing the Schengen Agreement of 14 June 1985 (Convention implementing the Schengen Agreement).

By virtue of the primacy of EU law, it is foreseen that full legal effects will be generated from the administrative rules and/or actions of any Member State beyond its own territory.

This regulatory model also gives decisive weight to State implementation of EU law, but this cannot be said to be founded on strictly compartmentalised enforcement by Member States. This regulatory model facilitates the transnational implementation of EU law. In other words, the relational regulatory model links the production of supranational effects that are characteristic to EU law with the enabling of relationships among the various State legal orders, thanks to the actions taken by the various national authorities.

These features are visible in different ways. In the relational regulatory model, as a variant of the decentralised model, they are expressed through mutual recognition variations. However, in the relational model, as a variation of the centralised model, one cannot truly speak of mutual recognition due to the absence of a connection between national legal orders. In such cases, EU law envisages similar recognition mechanisms, which are generally automatic, for the transnational effectiveness of Member States' legally relevant actions. However, these mechanisms do not fully respond to the structuring elements of mutual recognition variations.[69] This matter is addressed in the next paragraphs.

3.3.2. Normative sources of validity and effectiveness

The aim, in referring to sources of validity and effectiveness, is to analyse the scope of validity and effectiveness in the various regulatory models to determine in which of them can be observed the rupture of symmetry between validity and effectiveness mentioned earlier in relation with State law.

Administrative rules and actions enjoy the validity and the scope that correspond to each State and the European legal space, respectively, both with regard to State territoriality and European supranationality, upholding the notion of symmetry as referred to herein.[70] In EU law, this is a characteristic feature of centralised models. However, in the transnational relations under study, this overlap between validity and effectiveness areas is lost. In such cases, different

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69 The dividing line between both cases is not easy. Good examples are identified in several Regulations, where without prejudice being Regulations, mutual recognition is foreseen. See, e.g., Council Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market [2009] OJ L309/1, art 40. See, in this sense, Cases C-244/16 *Industrias Químicas del Vallés, SA v European Commission* EU:C:2018:177 and C-384/16 *European Union Copper Task Force v European Commission* EU:C:2018:176.

70 In relation to European administrative proceedings, this statement must be understood as referring to cases that have traditionally been known as direct implementation of EU law.

combinations occur in the layers of validity and effectiveness at the supranational and State levels. Only the relational regulatory model fits this asymmetry:

a. When the European legislator opts for a relational regulatory model that functions as a variation of the centralised model, EU law usually exhausts the regulation on the matter. These norms establish both the rights and powers exercised in transnational relationships, such as State authorities' mode of action to recognise, in each specific case, those rights with transnational effectiveness. In these cases, the relational model only appears in the application of EU law, because Member States either have no law-making powers or only a slight margin to regulate the matter, despite being empowered to execute EU law. I will name this as 'full transnationality'.

In the 'full transnationality' context, EU law endows Member States' actions with similar effects to those inherent to an action taken by the European Commission or any EU agency or EU body. This means that individuals may enter into a legal relationship with national authorities of any EU country by exercising the rights that EU freedoms confer to European companies and citizens. This last point is highly significant. Focusing on rights, this issue should be viewed on two distinct levels: the validity and general effects of supranational rights, and their effectiveness and applicability to the case in hand. The first level, pursuant to the centralised regulatory model, falls within the domain of EU law. The second, however, introduces decentralised execution at the Member State level. Member States' authorities are therefore competent to grant rights as required in each case according to EU legislation. The difference between the general recognition of rights at a supranational level and the specific granting at a national level is manifestly clear.

The combination of these two levels is achieved by means of adopting norms that are fully binding and directly applicable, that is to say, Regulations.[71] This explanation is relevant given that the direct application of a Regulation may render it unnecessary for Member States to regulate its implementation,[72] thus avoiding greater legal and material heterogeneity. The more intense the regulation within the EU, the weaker the relational nature of the regulatory model. From this point of view, and contrary to what I will show in the cases analysed below, due to the direct application of Regulations, applicative connections do not arise *a priori* between national legal orders. The matter is regulated under the EU norm, without leading to the 'horizontal opening-up of national legal orders'.

Nonetheless, the relational aspect is still present in these cases. It takes a

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71 For instance, the aforementioned Regulation (EU) No 952/2013 (n 68); Regulation (EC) No 116/2009 (n 68), and Council Regulation (EC) No 428/2009 (n 68).

72 Recall, however, the Regulations that enable States to adopt development rules.

limited form, solely at the level of administrative enforcement. The source of validity that grants recognition of rights over administrative actions is, as I have explained, a EU norm. Despite this, the effectiveness of rights recognised at a supranational level is achieved by granting transnational effects to administrative actions by the State conferring this right in each case. Such effects are extended to the rest of the Member States with no regulatory or administrative enforcement intermediation by those Member States (at least on the formal level, but not necessarily on the material level where a mere verification, supervision or documentation screening may occur).[73] In this scenario, formulas must be addressed for the implicit and automatic recognition of actions taken by national administrations. Strictly speaking, however, one cannot speak of mutual recognition, but rather of the transnational effects that EU law grants to national authorities' actions, that arise through formulas that practically automate the recognition of foreign administrative actions.

Apparently, one could state that 'full transnationality' is characterised by the correlation between the framework of validity for the regulatory source that recognises the rights and regulates the actions of Member State authorities, and its scope of effectiveness (transnational and, hence, supranational). This statement, however, is not correct. Due to the direct applicability of Regulations, the validity of national administrative actions is twofold: their substantive validity is fundamentally predetermined by EU norms, while their formal validity is conditioned to the national organisational and procedural regime (institutional and procedural autonomy principles). For this reason, the actions taken by national authorities will be challenged in accordance with the internal system of appeals, without prejudice to the fact that, in substantive aspects, the validity of the action should be determined pursuant to the Regulation.

b. The second kind of transnationality I will refer to as 'horizontal transnationality'. The relational regulatory model is a variation of the decentralised model, which explains why EU rules usually take the form of Directives.[74] It is here that, *sensu stricto*, mutual recognition operates as an instrument for articulating transnational legal relationships.

The symmetry between the scope of validity and effectiveness is likewise fractured, but the articulation is different: 1) There is a supranational and prevalent rule that recognises rights with a transnational vocation and

73 Automaticity depends on each norm. For example, Article 25 of the Convention implementing the Schengen Agreement (n 68) limits automaticiy conferring on national authorities the powers of refusing the entry of an alien for whom an alert has been issued.

74 Some examples in the first section of this essay. Recall, however, that the decentralised-relational model also functions in the lack of harmonization, by virtue of the direct effect of the rights and freedoms recognised by the Treaties and the ECJ's case-law.

grants the same effectiveness to normative and administrative actions taken by Member States to ensure full effects for citizens' legal rights in each specific case; 2) There are usually no directly applicable rules to regulate this subject-matter that substitute Member States' legal orders. A bond is thus formed between national legal orders (*via* the norms which implement Directives). This bond allows the full regulation of both the recognition and the exercise of rights through transnational relationships; 3) Precisely because there is no prevalent supranational law that displaces State law, it is the national administrations' decisions in each case that grant the rights foreseen in the national law (according to the EU Directives); and 4) The 'transnationality' of these rights presupposes the transnational effectiveness of the actions taken by the competent State authorities.

'Horizontal transnationality' is the best example of the relational regulatory model. This case involves relative, partial or minimal harmonisation. This harmonising rule also establishes the linking mechanisms among national legal orders, allowing the recognition of actions regarding rights granted in other States. The validity of these administrative actions is based exclusively on national law, but the link between legal orders enables their effectiveness to extend beyond national territory.

It is, therefore, convenient to differentiate the following two levels. 1) The supranational level in the general recognition of rights, but also in the definition of effectiveness given for the normative and administrative decisions that grant full effects to those rights in each specific case. 2) The territorial echelon in the regulation, granting and recognition of these rights in the case in hand. Rights are generally foreseen on the supranational level (*e.g.* EU freedoms), but exercising this entitlement must be authorised or approved in each case by the national authorities in accordance with each State law. These national administrative actions entail potential effectiveness beyond the State territory. Action at the 'lowest level of territorial jurisdiction', by definition with sole effects within that same territorial jurisdiction, could be said to display an effectiveness trend in line with the 'greatest level of territorial jurisdiction' (the European legal space). However, although the territorial scope of effectiveness could be predetermined *ex ante* as described, it does not necessarily materialise in practice in all Member States' territories. It is a potential effect. Translating this into practice will depend on the recipients of administrative actions conferring rights in each specific case, and therefore, on the recipients' will to exercise their rights in one or several countries.

In all the above cases, one cannot pose this question in terms of the validity of the rules or decisions of a foreign State. 'Transnationality' operates at the effectiveness level, preventing the successive and repeated national law enforcement in the territory of each Member State. Differences aside, these

scenarios remind us of the determination of the applicable law under International Private Law.

3.4. 'Horizontal Transnationality' and conflict of laws. Mutual recognition

'Horizontal transnationality' evokes situations in which the object of administrative law does not fit within the paradigm of territoriality. The concept of 'transnationality' underscores the idea of surpassing traditional territoriality and the exclusivity of administrative law as the statutory Law of the State.

The immediate consequence of adopting the relational regulatory model (as a variation of the decentralised model) reveals a key issue: the impossibility for State administrative law to fully regulate all the stages in legal relationships engaged in between administrations and citizens in a supranational context. The relational regulatory model overcomes this limitation by combining the regulatory decentralisation in Member States with normative techniques that link national legal orders as potentially applicable laws in different phases of a pre-existing legal relationship set up in one of the Member States.

To tackle this question, I need to link up some of the structuring elements of mutual recognition variations with the features of the relational regulatory model. As mentioned above, the foundation for the notion of a European legal space is not only the basis for forging mutual trust between Member States, but also for generating equivalence between their legal orders, increasingly consolidated thanks to European institutions' harmonisation initiatives. Mutual recognition is articulated thanks to the fact that the conditions generated in the European legal space allow for comparisons between the Member States' legal orders. The terms of application for mutual recognition require such comparisons to identify rules that are equivalent. In short, mutual recognition facilitates the submission of transnational legal relationships, throughout all their stages, to equivalent legal orders.

I still need to identify the normative technique alluded to, whose function is to link national legal orders. Where several national legal orders concur, the relational regulatory model articulates the link between the Member States' legal orders by means of normative techniques akin to the 'conflictual method'. With this technique, the relational regulatory model connects the different legal orders, determines how to choose the applicable law[75] and, in consequence, transnational relationships' legal regime is thus rendered complete.

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75 This is not unknown for administrative law. E Schmidt-Assmann, 'La ciencia del Derecho Administrativo ante el reto de la internacionalización de las relaciones administrativas' [2018] Revista de Administración Pública 33 affirms that the selection of the applicable norm is intrinsic to the State administrative law.

It is important to stress that the 'conflictual' nature of the relational regulatory model has specific traits that distinguish it from the traditional conflict of laws and the classic rules of conflict in International Private Law. Here one cannot refer, strictly speaking, to the classic tradition of Von Savigny, in which the applicable law is selected according to the closest ties with the legal relationship. The relational regulatory model comprises a specific normative technique that can only be likened in a broad sense to the 'rules of conflict'. The comparison is enlightening.

International Private Law works on the presumption that conflict of laws arises when State legislators find themselves in normative concurrence with the legislators of another State. Conflicts between national laws arise when two valid norms, adopted in compliance with their respective normative sources of validity, affect the same legal relationship and, in doing so, give rise to dissimilar legal consequences. For this reason, the joint application of both laws is not feasible. In such cases, International Private Law appeals to the rules of conflict to select the law with the strongest ties, respecting the element of foreignness.

Rules of conflict are rules of referral. The rule does not regulate the legal consequence applicable to the factual situation, but is limited to referring to the applicable legal order, called upon to rule the pertinent consequences. In sum, the key lies in determining to which legal order a situation or legal relationship is most closely related to, and, consequently, is subject to (whether it be the national law or *lex fori*, the foreign law or *lex causae*). To establish this connection, the rule of conflict identifies the points of connection that allow this selection.

In the conflict of laws, therefore, two valid regulations that *a priori* are applicable collide. There are two rules from two different legal orders, with different sources of legal validity. Moreover, there is a rule governing the resolution of conflict. Traditionally, and leaving to one side the international conventions that have addressed this matter in recent decades, in International Private Law this rule has traditionally been a State law and, in this regard, it coincides with one of the conflicting rules.

This information has been key in upholding, as has usually been the case, that State and foreign law were not in a position of equality at the time the conflict of laws was resolved. As State law has traditionally regulated how to resolve conflict of laws, only internal law can establish the application of the foreign law. Related to this, and due to the classic recourse to points of connection such as nationality or national territory, it is clear the preference for *lex fori*.

Having referred briefly to this normative technique that is characteristic to International Private Law, let us now move on to analyse the specific features of the conflictual technique within EU administrative law.

In defining the variations of mutual recognition, the relational regulatory model establishes the conditions for links between legal orders that affect a

given legal relationship. Only in this way do transnational legal relationships become fully subject to law: in fact, to the law of several Member States, to be precise, since the law of each of these States needs to be used in conjunction with the law of other countries in order to comprehensively regulate transnational relations. It is here that collisions between laws occur, since transnationality means that several State legal orders are susceptible to being applicable.

Before continuing, I should insist that I am now focusing on a relational regulatory model in combination with the regulatory decentralisation in the Member States. Moreover, I should also remember that the relational regulatory model articulates the collision of laws through mutual recognition. Thus, I am working on the premise that the colliding laws are equivalent. This does not mean that such rules are identical. The degree of uniformity will logically depend on the degree of harmonisation, if any, reached in each material sector.

From this starting point one can observe that the relational regulatory model contains the 'conflictual' dynamic to select the applicable law from among those that become connected in a particular case when striking up transnational relations. This normative technique brings to mind the traditional technique in International Private Law, albeit with significant nuances. Two valid State rules likewise concur and collide, since both are potentially applicable, and it is necessary to determine which is the appropriate law. It is from this perspective that mutual recognition incorporates a 'conflictual' facet.

The differences with International Private Law are evident. An initial consideration relates to the position upheld by the legal orders that have clashed. Here I find a fundamental difference: in the cases of our interest, the national legal orders are in a position of equality. Let us remember that, in the classic version of rules of conflict, State law decided which rule should be applied by selecting points of connection and, to that extent, it could not be asserted that *lex causae* was on an equal footing with *lex fori*.

The reason for this difference is related to the fact that the rule used to resolve the conflict is no longer a State rule, but instead a rule whose validity and effectiveness is on a supranational level. This is a 'conflictual' solution 'from above', since EU law (or ECJ case-law in non-harmonised areas) determines which rule is to be applied. This is highly significant, firstly, because mutual recognition removes conflict of laws from the general regime of International Private Law. Secondly, it allows for selection of the applicable rule based on criteria that are far removed from the classic national criteria of nationality or territory. This separation from traditional points of connection is due to the fact that conflict of laws occurs between private parties who exercise rights and Member States that are bound to guarantee them. This vests them with the power to appeal to EU law against the legal order of any Member State, even their own native State. Neither territory nor nationality are valid determining criteria in a context of integration and non-discrimination on the grounds of nationality. In conclusion, the solution to conflict of laws does not necessarily

involve selecting the applicable rule featuring the closest links to the legal relationship.

A significant issue in this matter is whether the national legal orders that come into conflict are in a position of equality. It is no coincidence, therefore, as I will show in what follows, that the 'rule of conflict' should assume the rule of the country-of-origin as a criterion for connection. In other words, the solution to the collision of rules does not respond to any criteria granting preference to the application of *lex fori*, but rather to the criteria deemed most useful for giving full effectiveness to the rights exercised.

The relational model for mutual recognition not only connects two rules from two different legal orders on an equal footing, but also links two rules that are comparable and, as a result, are equivalent. This statement overrides the opinion contrary to the transfer of the 'conflictual' method to administrative law on the grounds that International Private Law presumes equivalence among legal orders as a premise to resolve conflicts between rules. This opinion is not correct. As I have stressed, the application of mutual recognition variations implies the presumption of equivalence between legal orders whose 'constitutional' support lies on the mutual trust governing relations among Member States (Article 4.3 TEU).

Equivalence between legal orders generates a presumption favourable to the validity of the foreign rule at origin, as well as the administrative action that applies said rule in a specific case. This is a determinant consequence to mutual recognition.[76] Indeed, exceptions to mutual recognition come into play when this equivalence does not exist. In such cases, the country-of-origin rule cannot be applied because such a rule could never have been approved in the host State, due to the inclusion of a different balance of interests to that derived from its constitutional legal order. This could be referred to, in a wide sense, as a sort of 'implicit assessment of validity', underpinning the prolongation of its effects beyond national territory.[77]

All the considerations made thus far lead us to a clear conclusion: the relational regulatory model creates the condition for mutual recognition, including the conflictual technique with some evident peculiarities.[78] One of the most

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76 S Nicolin, *Il mutuo riconoscimento tra mercato interno e sussidiarietà* (2005), 207 affirms that mutual recognition 'si pone a la base di un embrionale dovere di *full faith and credit* tra i sistema giuridici degli Stati membri'.

77 G della Cananea, 'From the Recognition of Foreign Acts to Trans-national Administrative Procedures' in J Rodríguez-Arana (ed), *Recognition of Foreign Administrative Acts* (2016), 233 affirms that '*the differences that exist between their own laws and regulations, of administrative precepts and technical standards concerning goods and services are acceptable. Accordingly, those precepts can be regarded as being legally valid outside their normal sphere of validity*'.

78 The doctrine is divided between those who maintain that mutual recognition affects or replaces the application of Private International Law, and those who directly try to justify it as a new norm of conflict. R Michaels, 'Public and Private International Law: German views on Global Issues' [2008] Journal of Private International Law 121, 135-136, affirms as follows: '*... conflicts are no more defining of private international law than of other disciplines [...]. But it seems that a system of conflicts rules for administrative law is more similar to a conflicts system for private law*

noticeable differences lies in the way the choice of applicable law is envisaged. On applying mutual recognition variations, the 'rule of conflict' identifies the country-of-origin as the connection criterion.

The differences with the classic rules of conflict are obvious. Firstly, unlike the logic that has prevailed in International Private Law, the country-of-origin does not necessarily correspond to the rule most closely connected to the situation or legal relationship in question. This statement seems to confirm that opting for the country-of-origin as the connection criterion implies the deliberate avoidance of the criteria traditionally applied in International Private Law. Indeed, in looking closely at these criteria, the most plausible conclusion is that the solution to the conflict should follow the rules of the host country.[79] Secondly, unlike legal and private relations under Private International Law, here the solution to conflict can be summarized in the acceptance and consideration of this rule as it was passed and applied in its original country. To sum up, the host administration does not formally apply the country-of-origin law, but recognises the result of its application in the form of an administrative action (an administrative decision, a certification or any other administrative-nature measure).

This has been the most debated result in equating the rules of conflict with mutual recognition. From the perspective of International Private Law it has been pointed out that mutual recognition should not be considered 'conflictual' because it only requires that the rules of the host country are not applied.[80] Despite this, however, two legal effects can be inferred from the articulation of mutual recognition that impinge on the law applicable and that are essentially 'conflictual' in nature: 1) Accepting and recognising the application of the country-of-origin principle involves assuming the legal consequences deriving from such a rule (in our case, this could be the decision, certificate or any other

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rules than it is similar to public international law. In this sense, the development of conflicts rules for areas outside of private law as a field signifies a rise of private international law as a method'. See also J Basedow, 'Conflicts of Economic Regulation' [1994] American Journal of Comparative Law 423; M Guzmán and others, 'El reconocimiento ¿Una alternativa al Derecho Internacional Privado?' [2016] Cuadernos de Derecho Transnacional.

79 Cases C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen EU:C:1999:126; C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti EU:C:2007:772 and C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* EU:C:2007:809 show that the law with the greatest connections is the one of the market where the activity is carried out. According to the ordinary conflict of laws governed by Private International Law, should have been applied the law of the host country. However, these cases applied the most favorable norm for the exercise of EU freedoms: the country-of-origin norm. At this regard, see M Virgós and FJ Garcimartín, 'Estado de origen vs. Estado de destino. Las diferentes lógicas del Derecho internacional privado', [2004] InDret.

80 At this regard see M Guzmán and S Gardeñes, 'Reconocimiento mutuo y principio del Estado de origen: su incidencia en el ámbito del Derecho aplicable' in J Martín (ed), *El Tratado de Lisboa: la salida de la crisis constitucional* (2008), 527ff.

act issued pursuant to said rule). 2) Accepting and recognising the application of the country-of-origin's rules involves not fully applying the country's own law. The host authority does not apply the country-of-origin principle, but to the extent that the application of that rule is equivalent to the application of its own law, it ceases to apply its legal order, without prejudice to the controls and verifications which empower that administration for mutual recognition.

4. Final remarks

The relational model creates the legal conditions for the application of mutual recognition. From a normative perspective, specific conflict of laws techniques are used to connect equivalent national legal orders. At the same time, this regulatory model selects the principle of the country-of-origin as the criterion to determine the legal order that must be applied. From an administrative point of view, the scope of effectiveness of the administrative actions taken by the country-of-origin authorities is expanded. In other words, the regulatory model enables the effectiveness of administrative actions to go beyond their scope of validity.

Depending on the terms in which EU law deals with a specific sector, the regulatory model gives rise to different variations of a single legal reality: mutual recognition. Equivalence and country-of-origin are structuring elements of all mutual recognition variations, as both elements are inherent in the relational regulatory model. On the one hand, mutual recognition structuring elements are the result of a specific regulatory model. On the other hand, mutual recognition is an instrument at the service of such a regulatory model. As such an instrument, mutual recognition is oriented toward reaching an objective at EU level: enabling the exercise of transnational-nature rights to enter into transnational legal relationships. Thanks to this regulatory model, mutual recognition enables the articulation of a complete legal regime of transnational legal relationships.