EU LAW STORIES

Through an interdisciplinary analysis of the rulings of the Court of Justice of the European Union, this book offers 'thick' descriptions, contextual histories and critical narratives engaging with leading or minor personalities involved behind the scenes of each case. The contributions depart from the notion that EU law and its history should be narrated in a linear and incremental way, to show instead that law evolves in a contingent and not determinate manner. The book shows that the effects of judge-made law remain relatively indeterminate and each case can be retold through different contextual narratives, and shows the commitment of the European legal elites to the experience of legal reasoning. The idea to cluster the stories around prominent cases is not to be fully comprehensive, but to re-focus the scholarship and teaching of EU law by moving beyond the black letter and unravelling the lawyering techniques to achieve policy results.

Fernanda Nicola is Professor of Law and Director of the Program on International Organizations Law and Diplomacy at American University, Washington College of Law. She is a member of the American Society of Comparative Law (ASCL), the International Academy of Comparative Law (IACL) and Fernand Braudel Senior Fellow at the European University Institute (EUI).

Bill Davies is Associate Professor of Justice, Law & Criminology at American University. He is the author of *Resisting the European Court of Justice* (Cambridge University Press, 2012).

EU Law Stories

CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE

Edited by

FERNANDA NICOLA
Washington College of Law, American University

BILL DAVIES
School of Public Affairs, American University

CAMBRIDGE
UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi - 110002, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

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www.cambridge.org
Information on this title: www.cambridge.org/9781107118898
DOI: 10.1017/9781316340479

First published 2017

Printed in <country> by <printer>

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
NAMES: Nicola, Fernanda, 1972- editor author. | Davies, Bill, (Law teacher), editor author.
TITLE: EU law stories : contextual and critical histories of European jurisprudence / edited by Fernanda Nicola, Washington College of Law, American University, Bill Davies, School of Public Affairs, American University.
OTHER TITLES: European Union law stories
DESCRIPTION: New York, NY : Cambridge University Press, 2017. | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2016047805| ISBN 9781107118898 (hardback : alk. paper) | ISBN 9781107545038 (pbk. : alk. paper)
SUBJECTS: LCSH: Law–European Union countries–Cases. | Jurisprudence–European Union countries–History.
CLASSIFICATION: LCC KJE958 .E885 2017 | DDC 341.242/2–dc23 LC record available at https://lccn.loc.gov/2016047805

ISBN 978-1-107-11889-8 Hardback
ISBN 978-1-107-54503-8 Paperback

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The *Cassis* Legacy

Kir, Banks, Plumbers, Drugs, Criminals and Refugees

KALYPSO NICOLAÏDIS

Who has never tasted Kir Royal, an elixir that combines Champagne and the French liquor Cassis de Dijon? The European law story told in this chapter starts from the shocking fact that until 1979, not a soul had been allowed to experience the joys of Kir on German soil. It is a story that has been told countless times, although differently by lawyers and political scientists. For Euro-Kir not only comes in differently shaped bottles (Court decisions, Council-EP decisions, Commission communication and single country regulations); it also comes in shades of red. Political scientists tend to see the bottles, legal scholars the subtle variation in shades. The former focus on the balance between free movement and local safeguards, market integration and regulation, the European economic constitution and state autonomy – and in between, many degrees of equivalence and subtle assessments of proportionality.[1] Political science, on the other hand, asks about the before and after, the role of politics in legal judgments and vice versa – the 'why' and the so 'what'. Of course, the 'so what' feeds back into the 'why' as the European Court of Justice (ECJ) considers the plausible institutional alternatives to its own decisions, and the ways in which the jurisprudence can be translated into laws. This conversation between lawyers and political scientists is what Miguel Maduro and Loïc Azulai sought to capture in their 2010 book. This current volume in turn brings together historians of law who can best capture the dance between these two worlds as analyzed by Joseph H. Weiler in 1991.[2]

[1] Since the first version of this chapter was written, Christine Janssens published an impressive review of the jurisprudence which starts by citing Kir Forever. See C. Janssens, The Principle of Mutual Recognition in EU law, Oxford University Press, 2013.

[2] J. H. H. Weiler (1991) 'The Transformation of Europe'. Yale Law Journal, Vol. 100, No. 8, pp. 2403–83.

In this chapter I ask: How did a judgment about a liquor end up changing the European constitutional order? And after almost four decades, have the expectations created by the groundbreaking 1979 ECJ ruling been fulfilled?

My recounting of the legacy of Cassis de Dijon seen through an impressionist account of its ripple effects in the political sphere puts perhaps more emphasis on the legacy than the genesis of the case.[3] But I hope that my use of a personal venture points as a heuristic can provide an interesting variation for legal scholars and historians concerned as the editors of this volume are with the embeddedness of Europe's jurisprudential saga. I proceed one decade at a time, with my own journey in the landscape of mutual recognition, moving from the Single Market to Justice and refugees, to transatlantic affairs: Cassis in Action (1980s), Cassis Fever (1990s), Cassis on Trial (2000s); Cassis Stress Tests (2010s) and Cassis across the Seas (2015). I conclude with some reflections on European democratic politics.

CASSIS IN ACTION (1980S): FOUNDING MYTH, CONSPIRACY AND REVOLUTION

We are in 1989.

Is it too grand to believe that mutual recognition will be the future not only of regional integration but also of multilateralism?[4] When I recently asked Lord Cockfield, Commissioner for the internal market, what he considered the greatest achievement of his career, he answered without a beat: to have exported Cassis from the European Court of Justice and goods to the single-market Europe 1992 program. Indeed, there are many like him in the Commission who seem to believe that without Cassis and the aura of legitimacy it lent to their 'new approach', they would not have been able to pull through the legal coup spelled out in Cockfield's White Paper as endorsed by Member States through Delors' Single Act only three years ago. An EU without Cassis may have had to endure a loss of several points of GDP growth, otherwise known as the 'cost of non-Europe'.[5]

Well, that might be true, but the Cassis story as it is told in the shadow of the Europe 1992 project rests on a number of widely held myths which end up obscuring the true import of this famous case. .

[3] Case120/78 Rewe Zentral AG v Bundesmonopolverwaltung fur Branntwein [1979] ECR 649.

[4] "Mutual Recognition: The Next Frontier of Multilateralism?," Project Promethee Perspectives, Paris, July 1989.

[5] 1988 Checchini Report on the "cost of non-Europe" as an incentive for the completion of the single market.

First myth, the *Cassis* judgment itself is not quite what the pan-Cassis rhetoric would lead us to believe. True, the facts of the case seem strikingly straightforward: the blackcurrant liqueur produced in France as Crème de cassis had been banned from Germany because it contained 15 per cent to 20 per cent alcohol by volume, and German law stipulated that products sold as fruit liqueur had to contain at least 25 per cent alcohol by volume – leading the German Ministry of Finance to advise Rewe that it could not market Cassis in Germany. The ECJ not only held that this could be considered "a measure having an effect equivalent to a quantitative restriction on imports" of the type banned by Article 30; it also took it upon itself to spell out its thinking in more general terms, what would come to be referred to as a principle of equivalence: "There is therefore no valid reason why, *provided that they have been lawfully produced and marketed in one of the member states*, alcoholic beverages should not be introduced into any other member state." Nowhere in the judgment does it call this a duty of mutual recognition. But the message is clear.[6]

What the pan-Cassis rhetoric forgets to say, however, is that *Cassis* was not only about casting the net of Article 34 TFEU more widely (after all, this had been done earlier in *Dassonville*), but most importantly, it was about widening the Article 36 TFEU holes in the net through which fishy state regulations would be able to escape the rigors of liberalization. Indeed, the judgment started by explaining very clearly that "obstacles to movement within the Community resulting from disparities between the national laws . . . must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer". In short, an open-ended list of "mandatory requirements" covering the public interest would have to be examined before considering home rules as equivalent to host rules and therefore host rules as equivalent to quotas. It was only because the (German) requirements relating to the minimum alcohol content of alcoholic beverages did not "serve a purpose which is in the general interest" (lowering alcohol consumption), that it was OK to bypass them. Here is the

[6] Clear except for a complication at the outset with regard to the notion of equivalence. As the attentive reader will note, equivalence in the legal lexicon refers to two different things. On the one hand, the "equivalent effect" between a regulatory measure X and a quantitative measure Y (both presumably taken in the host state); on the other, the "(functional) equivalence" between that measure X (in the host state) and measures Y (in the home state) that underpin the "lawfully produced and marketed". The two equivalences are not, of course, equivalent, but it is a finding of the first that leads to an assessment of the second.

reasoning: (1) non-discriminatory (or "indistinctly applicable") measures can favour domestic traders over importers; (2) this does not imply that they are obstacle free movement; (3) they can be justified if they satisfied mandatory requirements; (4) to assess that we need a Rule of Reason whereby the court performs a proportionality exercise to determined whether the effects of the national legislation on the free movement of goods is justified in light of that legislation's stated goals.

This leads us to the second myth. Cockfield's white paper peddles the myth that Cassis 'introduced' mutual recognition in the EC legal landscape. Well, of course lawyers know that the real radical breakthrough came in 1972 with *Dassonville*, in which the court had to decide once again what was meant by the Treaty of Rome's summary statement, "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States" (Article 30). At the time, it boldly struck down a Belgian provision (requiring that imported goods bearing a designation of origin be accompanied by a certificate of origin) with a sweeping approach: "all measures with an equivalent effect to quotas" were to be struck down! This was already and much more radical than Cassis in terms of results, an obligation of recognition. But it did not enunciate mutual recognition, and was in fact set aside as too bold. In this sense, *Cassis* was not a continuation but a break from *Dassonville*, which sought to impose an *obstacles-based approach* to national regulation, whereby all national rules are potentially subject to an assessment of illegality.

More to the point, mutual recognition can be found in the Treaty of Rome itself, referring to the mutual recognition of diploma, a task finally tackled seriously this year with the general system directive. Indeed, the whole philosophy was defended with great passion by Ralph Dahrendorf, who was able to make limited progress in applying mutual recognition in the professions when he became Commissioner in 1974.

The third myth is that the gap is even wider between the pan-*Cassis* rhetoric and the actual ECJ jurisprudence of the last ten years when reviewing MEQRs (Measures equivalent to a quantitative restriction) under Article 34 and then Article 56 TFEU for services. Take one of my favourites, the *Woodworking machines* decision.[7] French workers will not have the privilege of using those automated German machines built for their better-trained counterparts across the Rhine. Simply put, the characteristics of the machines

[7] ECJ, Case 188/84 Type approval for woodworking machines [1986] ECR 419

themselves combined with the respective training systems are simply not equivalent. This is wise if the judges do not relish the prospect of receiving a finger in the mail! As for services, not a modicum of liberalization has survived the tests of mandatory requirements and the rule of reason. Even in the *insurance* decision three years ago,[8] the judges felt that recognition could be applied to non-mass risk but shied away from doing it themselves. Of course, they know that even businesses cannot always read the fine print in their insurance contracts. Indeed, the Court has stepped back from the recognition abyss even in the beverage and foods department, as with cheese additives (Nisin) banned by the Dutch.[9] No matter that most Europeans, indeed most human beings, while they delight in very different tastes, find the same poisons poisonous. Even then, different publics, consumers and societies might accept different levels of risk. And when the Court did strike with a duty of recognition – it did often enough to ensure the free movement of beer, butter, oil and pasta – not everyone was happy.[10] 'Ah, I cannot recognize as *pasta* anything which comes so gluey out of the pot,' a well-loved Italian ECJ judge confided in me the other day. Ultimate recognition lies in the eye of the beholder – or in this case, in his stomach. After all, the ECJ is involved in a continual reshaping of the legal-constitutional landscape to keep the law abreast with social change.

Since 1986, the media coverage of the EC and the single market has increased by orders of magnitude, along with the mentions of *Cassis* in the popular press, but no one seems to have noticed these discrepancies. Why? How did we get here?

A first part of the answer lies with the strategic triangular relation between the Commission, the ECJ and the national court that was taking shape in the 1970s.[11] Indeed, as the story goes, the 1974 oil crisis led states to resort to various kinds of hidden or regulatory protectionism, and Germany, in particular, had been very resistant to the bypass of its national laws in the name of free trade.[12] Thus it was becoming increasingly clear that attempts at Euro-wide harmonization of product and services standards were a losing battle. As a result, the idea of mutual recognition instead of market regulation through Community law was becoming increasingly attractive. By 1978–79, the Commission was fishing around for a case like *Cassis*, and when it found it, it worked closely

[8] Judgment of the Court of 4 December 1986, Commission v Germany, Case 205/84.
[9] ECJ Case 53/80, ECR 409. [10] See inter alia the "Beer purity law" case, Case 178/84.
[11] See John Temple Lang's chapter in this volume.
[12] See, inter alia, Bill Davies, Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949–1979, Cambridge University Press, 2012.

with the plaintiffs to bring this case forward, with some confidence that the ECJ would oblige when faced with such an egregious German protection.[13]

No wonder, then, that as soon as the Court issued its verdict, the Commission was ready in turn to issue a communication on its implications beyond alcoholic products, suggesting a detailed game plan that would generalize the judgment to most regulated goods, including through an information and consultation procedure between national regulators and legislators.[14] From our 1989 venture point, in the space of ten years this crucial 1979 Commission communication seems to have been all but forgotten. As a providential single market genius, Lord Cockfield has "(re)discovered" the *Cassis* judgment. We can legitimately infer that the initial conspiracy worked including as a conspiracy of silence – myths cannot afford to lose their innocence.

To be sure, the Court had been engaged since the 1960s in an incremental "constitutionalisation of the treaties" which gave *Cassis* its full import.[15] It is because of *direct effect* of the Treaties that the Court was able to force the import of the French liquor on German soil without the need to wait for legislation. And the Commission's legal services had been working hand in hand with the Court to give effect to the principle on the ground. But it is also true that the 1979 communication would not have led to the single-market program without two crucial intervening factors, namely growing lobbying for the "Cassis approach" on the part of the businesses and importers and the push towards market liberalization by the likes of the British government led by Margaret Thatcher.

The Court's cautious jurisprudence, even after *Cassis*, is not surprising: the Court is in the business of putting forward principles, testing how acceptable they might be politically and passing the buck to the political process when it comes to generalizing them. Its power lies with its blueprints, not with binding pronouncement and judicial *fiat*. The question then is not why the Court has shied away from extending 'recognition of equivalence' to a wide array of cases beyond *Cassis*, but how were Cockfield and his friends able to use *Cassis* in

[13] See Kalypso Nicolaidis, "The Emergence of Managed Mutual Recognition: Legal Precedent and Political Innovation in the European Community", Paper presented at European Community Studies Association, May 1993.

[14] Communication from the European Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), OJ 1980 C256/2. For a discussion, see Karen Alter and Sophie Meunier-Aitsahalia (1994), "Judicial Politics in the European Community: European Integration and the Path-Breaking Cassis de Dijon Decision", Comparative Political Studies, Vol. 26, No. 4, 535–61; see also Kalypso Nicolaidis, 1993, op cit.

[15] See Bill Davies and Ann Boerger's chapter in this volume.

spite of the subsequent record, as if this was a matter of choosing a new bottle and not of exploring the shades of red.

The reason is simple. Like all enterprises calling for individual sacrifice in the name of a collective, the new single-market program required its galvanizing founding myth. *Cassis* happily obliged. The court provided single-market warriors with a single formula, a motto easy to understand: "all ... products lawfully produced and marketed ... must be recognized as equivalent". Freedom has always been a good rallying cry, no matter the full story about "mandatory requirements", "public interest" and "the rule of reason". Founding myths are about agreeing on what to forget.

In short, taken together, the Commission's 1979 communication and 1986 White Paper simply took the ECJ *Cassis* decision to its ultimate logic in both *scope* and *depth*:

1. *Scope*: Generalizing it in three directions: from alcoholic products to all products, from underlying standards to the authorities entitled to authorize or stamp them and crucially, from goods to services.
2. *Depth*: Turning this judicial principle of "recognition of equivalence" into a legislative-political principle of "mutual recognition". When turned into a political principle, *Cassis* obviously continues to imply an assessment of *equivalence* between home and host countries' rules, but the word "equivalence", and thus the strictly legal constraint, is removed. Recognition becomes a political judgement, which does not necessarily need to be made on a careful case-by-case basis, but can be predicated on a host of other factors like trust, solidarity, proximity, political mood, linkage politics, paternalism, etc.

Brilliant! Why did Member States buy this? Apparently a majority of them did not even like the *Cassis* judgment in the first place, let alone this dual extension as engineered by the Commission. Whether designed in advance or improvised step by step, strategy there is. More visibly and strategically than *Dassonville*, *Cassis* introduces (or "uncovered", depending on your legal school of thought) constitutional limits to state intervention beyond the bounds of "intended discrimination". Europe 1992 then sets these limits into legislative stone through majority voting!

Political scientists have it all wrong when they say that mutual recognition was one of several options available out there, and that with *Cassis* the Court provided a new focal point for legislators. In fact, there are no other options. The hype seems warranted, as *Cassis* has truly proved to spell the start of a revolution in European affairs. Thanks to the supranational conspiracy uniting the Court, the Commission, and big business, it has

set off a revolution in decision-makers' thinking about market integration that simply cannot be stopped.

And of course, if we move from static to a dynamic analysis, the picture is even starker. How will national regulators, their political master and their market clients react to this new state of affairs? Will such competition between rules rather than products only significantly affect the ways rules are designed in the first place? How will regulators and legislators reconcile the contradictory pulls between competitiveness or cost effects of high standards (which could lead to a race to the bottom) and their reputational effects (which could lead to a race to the top)? My prediction today in 1989, for what it is worth, is that such radical horizontal transfer of sovereignty between states is highly conflictual and will not happen without serious resistance.[16]

CASSIS FEVER (1990S): THE ERA OF MANAGED MUTUAL RECOGNITION

We are in 1999.

In the last ten years, old questions have been clarified while new ones have arisen. Clearly, the progress made towards a single market in services through the White Paper directives owes a lot to the adoption of mutual recognition as a guiding core principle. And there has been no blatant "race to the bottom", and even in some cases a "race to the top". It has become clear, in other words, that mutual recognition does not necessarily mean deregulation.

But resistance there has been! Indeed, when I asked in 1989 why did the Member States buy it, I identified the wrong "it". What Member States have imported from the Court's *Cassis* jurisprudence has had little to do with the mere extension of the *Cassis* formula ("all products . . . must be recognized as equivalent") to other products and services, an outcome which we can call "pure recognition" (considering the labelling requirement as *de facto* not a costly adaptation). Instead, Member States see the costs of pure recognition as simply too high. They have therefore taken in the entire *Cassis* judgment as well as the rest of the "rule of reason" jurisprudence with all its caveats and "yes, buts" and translated it in law. This process of translation is fascinating. Instead of "pure" recognition, they have adopted a highly politicized version of recognition involving complex sets of rules and procedures that may serve precisely to reduce, if not eliminate, the open-endedness of mutual recognition. This I have called managed mutual recognition.

[16] See Kalypso Nicolaidis, Mutual Recognition Among Nations: Trade in Services in the European Union. PhD thesis, Harvard University, 1993.

I came to the concept of managed mutual recognition from analyzing not only single-market directives in services but also the attempts by the EU to export *Cassis* beyond its borders. As an outcome, managed mutual recognition can be contrasted with "pure" mutual recognition in the same sense as managed trade can be contrasted with absolute free trade. Pure mutual recognition implies the granting of fully unconditional and open-ended rights of access (or of action) to private market agents in their dealings with the consumer protected in the host state. This would be considered the result of a free trade contract between states. In contrast, managed mutual recognition introduces conditionality in the contract. Accordingly, the four main dimensions along which mutual recognition can be managed or fine-tuned are:

1. *Prior conditions* for equivalence, from *de facto* convergence, to minimal harmonization to inter-institutional agreements.
2. Varying degrees of *automaticity* of access (for example, residual host country requirements for lawyers such as entry exams or training period in the host state).
3. *Scope* of activities or features covered by recognition (say, company risk but not mass risks in insurance).
4. *Ex post* guarantees or safeguards, including mutual monitoring and ultimately provisions for reversibility.

In short, with managed mutual recognition, the burden of co-operation is shifted in time from *ex ante* to *ex post* costs, so that liberalization can appear to occur immediately, while it will need to be managed to be sustainable. I have come to believe that a better understanding of these trade-offs and their dynamic adaptation over time is key to reaching agreements on mutual recognition in the first place.

Clearly then, "managed" mutual recognition belongs to the political, not the judicial, sphere. Nevertheless, it bears the deep marks of the Court's footprints. Even when deciding not to strike down a given state regulation as an obstacle to free movement, the Court shapes the alternatives. What are the building blocks of this translation exercise?

1. Prior conditions: First, it is the Court which traces the frontier, or what I call the "equivalence threshold", beyond which it cannot decree recognition by judicial fiat and beyond which political decisions will be necessary in order to ensure free movement on the basis of a home country rule. The Court also makes clear that such political action might not necessarily be harmonization or centralized regulation.

2. Automaticity of access: When it finds in favor of recognition, the Court does not necessarily decree unconditional access. Instead it often limits automaticity through its favorite condition; adequate labelling. The commonsensical principle of proportionality leads the judge to strike down the application of some blunt host state standard only to turn around and suggest another "more proportional one". The legislator in turn has a wider palette at its disposal to limit automaticity and has the luxury to lay out what such "residual host country controls" (or residual national treatment) may look like.
3. Scope of application: The ECJ judges my find that they need to draw the line. For some product or service they can play the game of proportionality and for some they cannot: host country control will have to stay until the legislator intervenes. Such careful delineation of scope can inspire the legislator either through sequencing (we apply mutual recognition first to where the ECJ said it was more warranted) or through outright separating where recognition will apply and where it will not.
4. *Ex post* safeguards: Even after mutual recognition is imposed through a court judgment, the court can always revisit similar cases and find that home country regulation is no longer satisfactory ("equivalent") to assuage the concerns of the host country. On this count, the legislator does not have to leave it to chance. Built-in mutual monitoring, or mutual spying, is the name of the game.

While it is important to analyze the role of the rulings of the ECJ in the European story of mutual recognition, and how the conversation between the ECJ and domestic Courts played out through preliminary references, it is also true that all the Court could do when it came to designing this more sophisticated understanding of the principle was to provide a *road map* for politicians and technical experts later crafting legislation. Only by migrating from the judicial to the legislative arena is it possible to spell out the full panoply of instruments for the management of recognition. The Court had not imposed judicial recognition, but pointed to the possibility of using this distinction to reduce the initial scope of recognition and introduce it in a progressive manner. If and when the political arena generates a demand for effective liberalization, the Commission takes the politicians at their word, in fact "upping the ante" by proposing a radical generalization of the Court's approach to complete the single market, which is after all what the political masters are asking for. When generalized through the legislative process, most of the ECJ jurisprudence post-*Cassis* translates as managed recognition, not

pure recognition, whereby recognition is not an alternative to national treatment and harmonization but an overarching principle, which retains residual host country control (e.g. national treatment) and residual harmonization.

This political backdrop of the 1990s in turn sheds light on the subsequent Court jurisprudence governing Article 34 TFEU on Measures equivalent to quantitative restrictions (MEQRs). The debate has continued over whether the Court should apply a lenient non-discrimination test or a more constraining balancing test to national measures. Even when apparently restricting decisions to an anti-discrimination test, the Court always weighs costs against benefits and balances between the desirability of centralization versus decentralization, deregulation versus sustained regulation.[17] Such balancing tests might lean towards a decentralized approach (as opposed to harmonization) and yet determine that national treatment (or a pure anti-discrimination test) does not suffice to ensure free trade; the judges might point to the need for sustained regulation in a given sector but assess a home country approach to be sufficient, if the necessary safeguards are taken. In both cases, the Court may call for mutual recognition through legislation while stopping short of its judicial imposition. In other words, since negotiators have taken these matters in hand, the ECJ does not set out the limits of mutual recognition, but rather the limits of its own role in bringing it about.

Keck and Mithouard, a 1993 judgment duly considered as Cassis' heir in the vast jurisprudence on MEQRs, is illustrative of such a deferential approach.[18] Fourteen years after *Cassis* and the same year as the alleged "completion" of the single market, the Court felt it necessary to remind everyone that traders were not to abuse *Cassis* and invoke article 34 of the TFEU on the drop of a hat in order to challenge any national rule whose effect was to limit their commercial freedom. In *Keck*, the defendant wanted to be exempt from a French law prohibiting resale at a loss, or the resale of unaltered products at prices lower than the actual purchase price. Intent on "clarifying" its position,

[17] See Maduro, 1998 We the Court, Donald H. Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause', 84 Michigan Law Review 1091 (1986); This reasoning is often compared to the US dormant commerce clause but while this one is mainly concerned with protectionism in the proportionality balancing the ECJ managed to insert a multiplicity of other interests and of course mandatory interests. For a fascinating comparative overview See Egan, Michelle. Single Markets: Economic Integration in Europe and the United States. Oxford University Press, 2014.

[18] 24 November 1993 judgment in B Keck and D Mithouard, cases C/267 and 268/191. See inter alia Mattias Derlen and Johan Lindholm, Article 28 E.C; and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions, 16 Colum. J. Eur. L. 191, 196. (2010); Felicitas Parapatits, The Influence of the (post) Keck Case Law on the Freedom to Provide Services, p. 15 (Stiftung)

the Court stated that (non-discriminatory) measures creating an equal burden for nationals from the country in question would not be caught by the wide net of liberalisation through recognition of equivalence – clearly no resale-at-loss rules in the home country were not the same as the existence of such rules in the host country! Even if *Keck* only concerned the marketing of product – the "selling arrangement" exception – the case was critical in narrowing *Cassis* to "product requirements" and rebalancing it away from the most extreme implications of *Dassonville*.[19]

Throughout the 1990s, managed mutual recognition has become the name of the game in the field of services, whether through residual host country control (professions), reduced scope (finance) or *ex post* monitoring (media). In the field of goods, it has led not only to the new approach and agreement on minimal standards as prior condition but also to the *global approach* whereby certification bodies throughout Europe can sustain recognition without undue fear of lowered standards thanks to an extensive process of mutual monitoring – mutual spying, as I like to say. In spite of these collaborative networks between certifiers, recognition has been far from automatic in many instances.

This is *a forciori* true when mutual recognition has been exported beyond the EU through mutual recognition agreements (MRAs) signed with countries like Australia, Canada, Japan, New Zealand, Israel, the United States or Switzerland. Even though in this external realm recognition is restricted to certification (through the certification of Conformity Assessment Bodies), rather than recognition of the underlying standards, it has been highly "managed". It should come as no surprise that the negotiations over the EU-US MRAs, signed in 1999, were particularly tough, for instance stopping short of denying the Federal Drugs Administration its right of residual control over pharmaceuticals even if only at the last stages of the approval process.[20] And transatlantic MRAs have simply floundered when it comes to services.

At the global (WTO) level, under TBT (technical barriers to trade) and GATS (the services agreement), recognition is optional and conditional, not subject to MFN, and has been cumbersome to apply. Non-discriminatory mutual recognition could appear as an oxymoron to the non-legally trained eye.[21] Perhaps in

[19] See Daniela Caruso, "Lochner in Europe: A Comment on Keith Whittington's 'Congress Before the Lochner Court'," 85 Boston University Law Review 867 (2005).

[20] See Egan and Nicolaidis, "Regional Policy Externality and Market Governance: Why Recognize Foreign Standards?" in Journal of European Public Policy, August 2001.

[21] See Nicolaidis, "Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon?" in Petros Mavroidis and Patrick Blatter, eds, Non Discrimination in the WTO: Past and Present, Journal of World Trade, University of Michigan Press, The World Trade Forum series, 2000.

order to counter the natural inertia of regulators and their resistance to any trade-induced assault on their autonomy, the OECD trade directorate – which has appointed me as their "mutual recognition expert" – has launched a multi-year program on the promotion of trade-friendly regulatory reform around the world. It is fascinating to see attempts at the liberalization of professional services meet resistance to horizontal approaches, precisely because each believes their particularities require a specific approach to managing recognition, from fiddling with acceptable titles to the need for additional training, adaptation periods and the like. Yet, what is a "trade-friendly" regulatory reform if not one where modes and avenues for recognizing foreign standards and actors are embedded in the very process of drafting law?

CASSIS ON TRIAL (2000S): POLISH PLUMBERS, ITALIAN MOTORISTS AND SWEDISH JET SKIERS

We are in 2009.

This time around *Cassis* has truly been invoked in vain. If the recourse to mutual recognition has long been wrongly considered by scholars of law and politics as a 'path of least resistance', , we can no longer doubt its highly contentious character. Twenty years after Lord Cockfield, another liberal Commissioner, Fritz Bolkestein considered the export of mutual recognition to the realm of all services trade worthy of a personal crusade. But contrast to 20 years ago, mutual recognition has not been hailed as the magic bullet but has been put on trial along with Polish plumbers and Polish butchers seeking temporary work in France and Germany, or Baltic workers in Scandinavian countries. To the extent that they are 'posted workers' they do need to comply with host state laws (under the posted workers directive of 1996) but it is not clear what happens if they fall outside this kind of status as with the infamous Laval case enforcing the application of home rules which has given mutual recognition a very bad name with workers.[22]

The public hysteria and PR disaster spurred by the Commission's "Frankenstein" directive can be attributed to many factors, including the propensity of some trade unions to play up their members' fears of globalization and unfair competition in order to resist the perfidious "neo-liberal" recognition principle. Moreover, the radical enlargement of the EU may well have

[22] In the Laval judgment, the ECJ states that a Latvian company, Laval, which posted workers to Sweden, is not required to adhere to the collective agreement within the Swedish construction industry.

lowered the 'mutual recognition tolerance threshold' while at the same time increasing the social, economic and regulatory diversity of the Union. The problem of course is that many workers from these new Member States are eager to take advantage of the EU's free movement rules work under home country state of mind and work habits as well as home rules, leading to *face to face social dumping* whereby workers operating under different constraints nevertheless interact within the same work environment.[23]

But given these factors, the Commission made a crucial mistake: to depart from its experience with managed mutual recognition discussed above and to press for a radical form of recognition across the board. It should have been clear by now to Brussels law drafters that a blanket application of home country jurisdiction is not faithful to the *Cassis* spirit. Under the Court's jurisprudence, recognition was a conditional process and did not have the either-or character of the country-of-origin principle. In fact, the final draft that emerged from the European Parliament's negotiations amounts to endorsing the Court's jurisprudence, prescribing the usual proportionality and necessity tests for host country rules—a glass half full for advocates of a cautious and progressive approach to liberalization, but half empty for those who believed that, 50 years after the Treaty of Rome, political actors could afford to take a bolder step than judges. To a highly disgruntled EU legal community, the simple elimination of the principle of "mutual recognition" by the European Parliament appeared as a public pillorying of *Cassis*. And yet, and at least, by issuing a clear political endorsement of the Court's *Cassis* jurisprudence, the services directive succeeded in bringing EU services consumers closer than ever to the *Kir* fans of yesteryear.

While the ball was in the political court this decade, the ECJ Court continued to scrutinize both services regulations and MEQRs throughout the 2000s.

On the services side, it has made clear that the very existence of national restrictions were not in question, only their added value in regulatory terms and the extent to which they create "additional administrative and economic burdens."[24] So for instance, a requirement for social security documents from the home state to be translated into the host state language amounts to a wrongful denial of recognition but not the translation of a promotional text into the languages spoken where the service is sold.

[23] Kalypso Nicolaidis and Suzanne Schmidt (2007) "Mutual recognition 'on trial': the long road to services liberalization", w/ Susanne Schmidt Journal of European Public Policy, 14:5, 717–734, August"

[24] Paid leave fund (C-490/04) [2007] E.C.R. I-6095 at [68].

On the products side, perhaps most prominently in this decade, the Court dealt with differences in national "rules on use" of certain products which in effect may amount to non recognition of home rules if these rules are left to the host country's discretion.[25] In *Commission v. Portugal*, a company was allowed to market tinted window film in Portugal but national rules barred consumers from affixing it to the windscreens alongside the passenger seats in motor vehicles, a restriction justified by the aim of combating crime and ensuring road safety. The Court followed the Commission in its view that Portugal had not produced any evidence to show that the measure was either necessary or proportionate to the objectives pursued. And to be fair, Portugal was in the process of relaxing the rule anyway.

In contrast, in *Italy vs Commission*, an Italian highway code came under attack that made it unlawful for motorcycles to tow trailers, essentially prohibiting the use of such types of trailers. This time, the Court came back to *Keck* and first asked the Member States to give their opinion on whether the same idea (e.g. that host country rules on selling arrangements were in principle outside the scope of the prohibition of MEQRs) should be extended to rules on the actual use of products. Many countries opined: a bit of a ring fencing off regulatory sovereignty was not a bad thing in these difficult political times. The ECJ disagreed. In this particular case, it held that the restriction on the use of motorcycle trailers did fall under the broad net of Article 34 TFEU because consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, would have no interest in buying such a trailer (just like tinted film in Portugal). But this time around (unlike Portugal), the restriction was justified on the grounds of road safety. A bemused commentator quipped that it might be more effective for safety's sake to inform motorists in Rome that those pretty red, yellow and green lights are not just decorative but seek to convey some driving instruction!

Finally in *Mickelsson*, Sweden's rule laying down that jet-skis could only be used on "general navigable waterways" came under scrutiny, since the latter are relatively few and very busy with commercial traffic, thus basically outlawing the actual use of jet-skis. As with the Italian case, the ECJ refused to go against the Swedish coast guard service which had charged the plaintiffs for violating the Swedish Jet Ski regulations, finding the ban could be justified in the light of the aim of protecting the environment. Moreover, it was for the national court to make this determination, a classic deferential move by the ECJ.

[25] Case C-265/06 Commission v. Portugal, 2008 E.C.R. I-2245; Case C-110/05, Moped Trailers - Commission v. Italy 2 C.M.L.R. 34 (2009). Case C-142/05, Aklagaren v. Mickelsson, 2009 WL 1543966, P 14 (June 4, 2009)).

So here again – as with the rest of the decade's decisions – we are back to *Cassis*' two-pronged approach: a broad net catches most national measures as liable for Court scrutiny, but a broad allowances are carved out to allow them. In all three cases, the Commission was not asked have to prove exactly why and how it was that, as a result of the host state rules, products from other Member States end up with a disadvantage, only that national measures were liable to have this effect. And while the burden of proof is born by the host state which must give an objective justification, it does not seem overly onerous. The Court tends to oblige.

Nevertheless, legal scholars do not seem satisfied by the consistency of the Court's jurisprudence, noting that "in the overwhelming majority of free movement judgments, the Court is working on a legal instinct, on a pragmatic sense of logic, maybe even on something as amorphous as a gut-feeling."[26] In other words, "we are approaching the unhappy position where, just as in the pre-Keck era, national courts are understandably baffled as to exactly what is expected of them when faced by speculative claims that national measures infringe Art [34]."[27]

And yet, to the (admittedly superficial) political scientist, there seems to be a method to this madness. First, as the Court never tires of explaining, the Treaty aims at an internal market across states in which conditions are similar to those of a single market where operators can move freely, not at a market without any rules at all.[28] Second, this implies that "mutual recognition" is always conditional on some protection afforded by the home state's regulations that can be recognized in the first place. If there is nothing to be recognized in the first place, there is no point in the aim of "avoiding a dual burden". The regulatory "discount" granted to the exporter can be full or partial depending on the extent to which the aims of the host Member State's legislation and controls have already been achieved by those applied in the home state. Proportionality assessment is applied to the host states' measures. Third, in the absence of such home regulation, the requirements of the host State apply without such a "discount", and we are back to national treatment. With each step, the devil is in the detail, and in particular who bears the burden of proof between the host state justifying its measure or the exporter justifying its complaint. Makes sense.

[26] N. Nic Shuibhne, ann. to C-76/05 in (2008) 45 C.M.L. Rev. 771, 783.
[27] S. Weatherill, "Free movement of goods" (2009) 58 I.C.L.Q. 985, 986
[28] Caixa-Bank France v Ministre de l'Economie, des Finances et de l'Industrie (C-442/02) [2004] E.C.R. I-8961; [2005] 1 C.M.L.R. 2, Opinion at [63].

CASSIS STRESS TESTS (2010S): TRUST, CRIMINALS AND REFUGEES

We are in 2015.

In the summer, European publics were suddenly invited to the very visible and tragic human side of the recognition saga. Refugees from Syria and elsewhere were risking their lives in despair to knock at Europe's door, but no one seemed to know if this door was the only point of entry or the first of many. If Greek officials grant a refugee stamp to someone in Lesbos or Athens, will this stamp become a "single refugee passport", recognized everywhere in Europe? What happens to the principle of recognition when dealing with individuals moving around Europe for a purpose other than selling or buying goods and services? Liberal-minded readers might not approve of lumping refugees with alleged criminals, since the point of international laws is precisely that refugees are not criminals! Yet for the purpose of this story, criminals and refugees belong to the same overarching category of non-single-market expressions of *Cassis* – from criminal justice to asylum law. Both categories raise the same question in terms of "equivalence": Is your human rights protection as good as mine? And if not, should I care?

European police and judicial bodies have long asked their political masters to help them to better deal with the bad guys. Indeed, the principle of *ne bis in idem*, otherwise known as double jeopardy, contained in the Convention implementing the Schengen Agreement in 1985 and which implies that a person ought not to be prosecuted more than once for the same act, opened the way for mutual recognition in criminal affairs. But it was not until October 1999 that the European Council decided at its Tempere Summit that "the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the EU". Twenty years after *Cassis*, what was proclaimed a "new" strategy was in reality a complex exercise in translation from the single market to the justice realm.[29]

As a result, Schengen obligations have been interpreted as a duty of mutual recognition by the ECJ since 2001, whereby criminal authorities have been required to recognize each other's criminal decisions and in effect each other's criminal law provisions and prosecutorial policy.[30] But it was the state of emergency that followed 9/11 that dramatically imposed recognition upon the transnational extradition regime. Within a few weeks of the Twin Towers' collapse, EU leaders passed a framework decision on the European Arrest

[29] For a thorough appraisal, see Janssens, op.cit.

[30] *Gozuntok* and *Brugge* cases. See Janssens, op.cit., pp. 134–66.

Warrant (EAW) whereby if a "home country" requests the arrest of someone who happens to be caught in another member state (a kind of involuntary "host country"), the warrant has to be recognized by the host (with caveats, of course). Indeed, an EAW issued in one Member State is valid in all of them. And the warrant needs to be respected by the whole chain of criminal decision – from the police to national courts – involved in criminal matters (including financial matters and money laundering, which were dealt with separately).

Unsurprisingly for Cassis-aficionados, the criminal justice world has had to face the same kind of challenges than custom officers in the good old days of Cassis-bans. What happens when the ("host") state receiving the request is not truly confident in the requester's criminal procedures? What if that state is asked to pursue or prosecute a criminal for a crime that does not even exist in its own laws? The core problem here is that the EAW was not adopted following a long period of mutual familiarization, convergence of national systems and ultimately trust building between national criminal justice agents. Instead, in the frenzy following 9/11, the rules of recognition pertaining to arrest warrants *assumed* trust rather then *built* it over time as had been the case for the single market.

What does the EU do in this case? Well, we do know what it has done with goods and services when having to accelerate the completion of the single market in spite of national regulators not being quite "ready". In the absence of prior convergence, EU lawmakers fine-tuned variants of managed mutual recognition, allowing for safeguards to make up for the wide judicial discrepancies at hand. First, the scope of the EAW has been circumscribed. The EAW allows the issuance of an arrest warrant on the basis of one of thirty-two outlined crimes leading to a dual EU criminal system: one for the bad guys where mutual recognition applies, and one for the even worse guys (e.g. murderers and rapists) where it does not. In addition, we have EU-level cooperation for major crimes affecting all Member States (such as terrorism, drug trafficking, human trafficking and organized crime). Importantly, the host is not obliged to recognize the warrant automatically. Its authorities can assess whether the country requesting extradition truly applies the "same acts" and, if not, invoke mandatory grounds for non-execution. Member States have used this right often; whether they have abused it is, of course, a matter for Court judgment.

In light of the inevitable disputes that have ensued, the ECJ has initially been reluctant to give in to the "host state" that refuses to implement mutual recognition. Take, for instance, the *Mantello* case concerning the German authorities' refusal to surrender Gaetano Mantello to the Italian judicial

authorities who issued the arrest warrant.[31] Yes, the Germans argued, he was a member of an organized cross-border narcotic-trafficking ring between Italy and Germany, but he could not be sent back on the principle of *ne bis in Idem*. The ECJ did not agree, stating that it is the Member State in which the judgment is delivered that determines whether or not a person has been finally judged.[32] Nevertheless, five years later, the German Constitutional Court forcefully reiterated its right to protect Germany's constitutional identity guaranteed by the Basic Law, asserting that the principle of individual guilt was simply "not open to European integration".[33] It forcefully refused to comply with an Italian request to extradite an American sentenced in absentia twenty-two years earlier who under Italian law would not be able to provide new evidence in the appeals proceedings. The Court reasserted that "the principle of mutual trust does not apply without limits even according to Union law", and that "this trust is shaken if there are factual indications that the requirements that are absolutely essential for the protection of human dignity will not be met if the requested person is extradited."

Negotiated extraterritoriality comes with its own challenges.[34] Even while functional pressures call for transferring sovereignty away from host states in both realms of the single market and justice, their reluctance to do so may be heightened when protecting human rights rather than consumer rights and when the recognition in question involves the full foregoing of jurisdiction over the freedom of citizens. If a Polish engineer wants to get into Britain (host), Britain must recognize her home rule in order to let her in; if a British citizen has committed a crime in Poland, recognizing "home" rule (the home of the crime) means kicking him out of Britain, although he has not yet be proven guilty. Mutual recognition is liberal in the market realm, illiberal in the justice realm.[35] To be sure, the ECJ restated in its *Mantello* judgment that the national courts are bound by the guarantees of European law and fundamental rights standards when exercising judicial control relating to the EAW.[36] But whose standards are we talking about? Should the principle of mutual recognition mean extraterritoriality without a safety net?

[31] Mantello ECLI:EU:C:2010:683

[32] See the *Mantello* case, for instance. Judge Sinisa Rodin, Useful Effect of the Framework Decision on the European Arrest Warrant, p. 12.

[33] 2 BvR 2735/14. Judgment December 2015

[34] For a discussion, see contributions in JEPP special issue on democratization, Journal of European Public Policy 22.1 (2015).

[35] Sandra. Lavenex, "Mutual recognition and the monopoly of force: limits of the single market analogy", Journal of European Public Policy 14.5 (2007): 762–79.

[36] Id., p. 13.

The EAW raises the fundamental question yet again: When are the costs of managing diversity through horizontal transfers of sovereignty and mutual recognition too high? The political answer seems obvious: when gains in integration are too small compared to their costs (in this case, the comfort level of European publics on the human rights front). This in turn rests on a second part of the answer: when socio-political-regulatory differences are too high – in other words, when there is no true equivalence. When the Commission criticizes Member States for their "abuse" of safeguards, their public opinions may ask: What other recourse is there if a judge mistrusts the standards of another EU country for issuing an arrest warrant?

We are on even more sensitive ground when it comes to refugees. It is one thing to trust other countries with their standards for healthy cheese, perhaps even for potential criminals, but should the same logic apply for the most vulnerable persons on European soil, namely asylum seekers? It is important to note that under the incomplete Common European Asylum System (CEAS) agreed as part of the 2009 Lisbon Treaty, Member States recognize only negative asylum decisions, not positive ones. The Orban government says no to 90 per cent of applications for asylum, and the rest of Europe must bow. If it says yes, the refugee will not be recognized as such elsewhere in Europe and thus has to stay in Hungary.[37] The European Asylum regime goes back to 1990 Dublin Convention (revisited in 2003 and 2013), which dealt with determining the State in Europe responsible for processing asylum application but unfortunately did not consider mutual recognition as part of the system. The 2013 Dublin III Regulation in turn establishes a hierarchy of criteria of responsibility for processing asylum claims, leading to "Dublin returns" when refugees are sent back to their country of entry. As Cathryn Costello aptly concludes, "Member States use mutual recognition as a selective tool, to limit responsibility, rather than to share it."[38]

Presumably this would make it more difficult to recognize a positive asylum decision in the future. For example, if a person is denied asylum in one Member State and returns to another, say, two years later and receives asylum, she would not be given asylum recognition in all the other Member States. In the wake of the Syrian refugee crisis, some Member States – Germany and the Czech Republic, specifically – decided to suspend application of the

[37] Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals. Exceptions were carved out in the provisions amending the Long-Term Residents Directive (Directive 2011/51/EU)

[38] Cathryn Costello, Dublin-case NS/ME: Finally, an End to Blind Trust Across the EU?, 2 A&MR 83, 90 (2012).

regulation in order to process asylum applications themselves. Conversely, Hungary and Poland announced their continued adherence to the Dublin regulation. Italy has called for a full amendment to the Dublin regulation by changing the competence to examine asylum applications from the Member States where the asylum seekers enter to the country where they would eventually like to end up. The Commission has called for a reevaluation of the Dublin system by mid-2016.

In the meanwhile, the ECJ has had to pronounce on the current system, including regarding the exercise of what is colloquially known as the sovereignty clause, which allows states to derogate from the point of entry allocation of responsibility system. In the groundbreaking *NS/ME* case,[39] the ECJ was asked whether (under this negative recognition premise) transfers of asylum seekers back to the original country of entrance can nevertheless be barred under the Dublin regulation if the standards for refugee protection in the state in question are not satisfactory. After all, under the Dublin Regulation, all Member States are meant to operate under the assumption that they share the same asylum scheme and enforce similar conditions in their respective processing centres. Nevertheless, in this case and other subsequent ones, the ECJ ruled that Member States and national courts cannot transfer asylum seekers where they "cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of Article 4 of the Charter".[40] While this ruling assumes that mutual recognition is the core basis of the CEAS, we are yet again in the realm of "managed" mutual recognition whereby it is right and proper for the Court not to require blind trust.[41] Not only can a host Member State withhold the duty to recognize if the conditions found in the country of return exhibit "systemic deficiencies", but there is even a "duty not to return" under such conditions. Here again blind trust cannot trump fundamental rights.[42] The principle of mutual confidence must remain an aspiration not an assumption.

In the absence of a single EU agency administering asylum decisions, something that Member States are not likely to agree to anytime soon, what is a "uniform status . . . valid throughout the Union" if not a system of positive mutual recognition? We are again faced with a fundamental tension between functional need for applying mutual recognition in emergency situations and

[39] Joined Cases-411/10 NS v. Secretary of State for the Home Department and C-493/10 ME et al v. Refugee Application Commissioner & Minister for Justice, Equality and Law Reform.
[40] Id. at para. 94. [41] Costello, op.cit. [42] ibid.

the fear among Member States of relinquishing their sovereign prerogative to control the movement of people across borders.

CASSIS ACROSS THE SEAS (2015): EXPORTING MUTUAL RECOGNITION

Today.

The negotiators involved in the Transatlantic Trade and Investment Partnership (TTIP) discussions, which have taken place since the 2013, seem to have forgotten the lessons of the late 1990s, when the EU and the United States tried to export mutual recognition to the transatlantic realm (see *Cassis* Fever, 1990s, earlier in the chapter). The lead-up to the MRAs agreed to in 1999 demonstrated how challenging mutual recognition could be between such different regulatory cultures and institutions.[43]

This time around, mutual recognition is not stated as the core norm of the system, but is implied under the broader umbrella of international regulatory cooperation. The Commission referred to mutual recognition for chemicals (to dismiss it), and in textile labelling (to embrace it). And it defends continued expansion of recognition of inspection in the case of, for example, medical devices, or oysters. It is true that mega regional trade agreements can take stock of the growth of international standard setting over the past couple of decades since the first-generation MRAs. And yet, Europeans do understand that, short of full harmonization, mutual recognition is the name of the game when we speak of "regulatory cooperation". What else would a "regulatory cooperation body" be for, beyond exchanging information? When considering the trade-hindering effect of regulatory duplication, US negotiators say they want a "negative list" approach (measures not listed are fair game), but being less familiar with the workings of mutual recognition than their EU counterparts are, they seem to also try to impose their own regulatory approach in the process! Other government would do better, US negotiators argue, to adopt a US own style of over-arching regulatory oversight (such as notice-and-comment rulemaking) through the Office of Information and Regulatory Affairs (OIRA).[44] There is a lot of talk about selecting best practices, experimental governance, mutual learning, global policy laboratory and the

[43] See Egan and Nicolaidis, op.cit.; Fernanda Nicola, "The Politization of Legal Expertise in the TTIP Negotiations"; Nicolaidis and Shaffer, "Transnational Mutual Recognition Regimes: Governance without Global Government," Michigan Review of International Law, Vol 68 (2005), pp. 267–322.

[44] See Nicola, op.cit.

democratic accountability of these processes. But it would be foolish to rely on the convergence between, say, *ex ante* vs. *ex post* approaches to regulating markets between EU and US types of capitalism. What else can the parties do but negotiate the contours about "managed mutual recognition"?

Isn't it a sign of the times that, in February 2016, the parties did come to an agreement to apply mutual recognition to clearinghouses for financial derivatives, reckoned to be worth $553 trillion worldwide?

CASSIS IN SPIRIT: EUROPE AS A DEMOI-CRATIC POLITICS

What would EU law have been without *Cassis*? Indeed, what would the EU be without *Cassis*? In the late 1970s, at a time when the EC was ripe for a new approach that would deliver the completion of a market promised twenty years earlier, I believe there would have been another similar case, sooner or later. Perhaps the greatest irony today is that while questioned in the single-market area, the spirit of *Cassis* thrives elsewhere. For one, we are witnessing an extension of the principle of mutual recognition to the realm of justice and home affairs, in other words the acceptance by judges and police forces throughout Europe of each other's procedures and judgments. To be sure, "wanted in one EU country, wanted everywhere in the EU" does not sound as liberal as its *Cassis* forbearer, and we do not yet have refugees "admitted here, admitted everywhere". But the time will come. Meanwhile we must live with the "rejected here, rejected everywhere".

More generally, however, we are increasingly confronted with the democratic ramifications of mutual recognition. I have defined elsewhere the EU as a demoi-cracy in the making – a union of peoples who govern together but not as one.[45] The demoi-cratic credentials of recognition depend on the institutional foundations of mutual trust bolstered by mutual monitoring and on the belief that national adjustment is often more sustainable through changed incentive structures rather than bargaining over set preferences. To generalize, the demoi-cratic quality of the EU's various integration methods hinges not only on their domestic democratic anchoring but also on the capacity of individual *demoi* to compensate for cross-national asymmetries of power when they decide. In a Union where mutual recognition has been adopted as a core operating principle, we need to continue to ask how its reach and limits are designed and when should judge-made law give way to politics.

[45] See Nicolaidis, "We, the Peoples of Europe...", in Foreign Affairs, November/December 2004, pp. 97–110; Nicolaidis, "European Demoicracy and Its Crisis," Journal of Common Market Studies March, Vol. 51, no. 2 (2013), pp. 351–69.