**FROM HARMONIZATION TO MUTUAL RECOGNITION:**

**LEGAL ASPECTS[[1]](#footnote-1)**

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**Summary**

The article concerns legal and commercial aspects of trade between the EU-member states. The attention is paid to its barriers such as physical barriers (customs formalities and border control); technical barriers; fiscal barriers; multicurrency. The author emphasizes that the ways for solving these barriers are harmonization and mutual recognition.

Special attention is paid to the case law of the European Court of Justice, in particular Case 120/78 (Cassis de Dijon). This case provides key elements for mutual recognition. The effects of this precedent are as follows: (1) Products lawfully manufactured or marketed in one of the Member States must, in principle, move throughout the Union without hindrance. It should be noted that such products must comply with levels of protection equivalent to those established by the Member State to which the products are destined; 2) Barriers to free movement are allowed. However, they (barriers) can only be acceptable if: a) they are necessary to meet mandatory requirements (eg health, safety, consumer protection and the environment); b) can be justified in relation to a legitimate aim and are proportionate to the aims; c) have a legitimate aim which justifies disregard for the principle of free movement of goods; (3) In the absence of harmonized Union legislation, Member States have the right to impose requirements on their territories which must comply with the rules of the Treaty on the free movement of goods (Articles 34 to 36 of the Treaty on the Functioning of the European Union).

The principle of mutual recognition is not just the principle of commercial law inside the European Union. It is also widely spread outside EU. It is explained in the article that the EU has signed a number of agreements on mutual recognition of technical standards with countries such as Japan, Canada, Israel, the United States and others. However, they do not provide for the unification of technical norms and standards of the contracting countries. According to these agreements there is a mutual recognition of product certification procedures, which significantly facilitates the terms of trade between the parties to the agreement and eliminates the need for manufacturers-exporters of products to undergo such a procedure in the importing country.

The author concludes that  mutual recognition principle ensures market access for goods that are not, or are only partly subject to EU harmonization legislation. It guarantees that any good lawfully sold in one EU country can be sold in another. The only permitted exception to the principle of mutual recognition is if such a good (or service) poses or may pose a threat to the health of consumers or the environment.

**Keywords:** commercial law, mutual recognition, harmonization, European Union, standardization, freedom of goods

**Relevance of research.** The European Union has many advantages taking into account its supranational nature. One of them is the freedom of movement of goods. Due to the freedom of movement of goods, trade between states increases, the cost of production decreases. In this context, it is crucial to take into account relevant trends in order to improve national legislation.

Free movement of goods is an element of the customs union. Its implementation is to remove all barriers to the free movement of goods. Among the main barriers are: physical barriers (customs formalities and border control); technical barriers; fiscal barriers; multicurrency.

Following the abolition of customs formalities and border controls, technical barriers remain the main obstacles to the ultimate freedom of movement of goods. They are very diverse in individual countries and are constantly evolving.

There are two ways in which potentially negative effects of standards on trade may be reduced: harmonization or mutual recognition. These questions were discussed by such authors as Gianluca Orefice, Roberta Piermartini, Nadia Rocha, C. Barnard and many others. But as usual the legal aspects of mutual recognition were outside their scientific interests.

Therefore the **object of the article** is the legal aspects of harmonization or mutual recognition as the ways of elimination of the technical and tax barriers.

The EU is in favor of unifying technical norms and standards at the international level. The Community's progress in this regard is its accession to the Agreement on Technical Barriers to Trade in the WTO, in the practice of signing agreements on mutual recognition of technical standards with third countries. Occupying a leading position in the world trade and actively defending its position in the WTO, the EU is largely the initiator of a global culture of standardization and certification of products. Under the Agreement on Technical Barriers to Trade, the EU advocates the development of common global technical standards through the unification of national laws or the mutual recognition of national standards and procedures, and actively participates in the relevant WTO committee.

The EU has signed a number of agreements on mutual recognition of technical standards with countries such as Japan, Canada, Israel, the United States and others. However, they do not provide for the unification of technical norms and standards of the contracting countries. According to these agreements there is a mutual recognition of product certification procedures, which significantly facilitates the terms of trade between the parties to the agreement and eliminates the need for manufacturers-exporters of products to undergo such a procedure in the importing country.

Common standards lower the information costs faced by consumers and increase their confidence about the quality of imported products[[2]](#footnote-2). This fact is also confirmed when to look at business-to-business relationships. The harmonization of some standards enhances communication effectiveness between the parties[[3]](#footnote-3).

Harmonization of standards between two countries implies a common definition of both the policy objective and the technical requirements to achieve it. Mutual recognition, instead, refers to the reciprocal acceptance of the measures applied in both countries[[4]](#footnote-4).

Harmonization may be defined as making law, the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar. It is one response to the problems arising from policy/regulatory differences of commercial activity among political units; it is also one of the forms of inter-governmental cooperation.

Harmonization, also known as standardization or approximation, refers to the determination of EU-wide legally binding standards to be met in all Member States. The creation of an internal market, which has been one of the main objectives of the EU, requires the harmonization of some rules concerning inter-State trade.

The initial push for the harmonization of national norms and standards in the Community was given by Commission Directive 70/50 and the Dassonville case. They interpreted technical barriers to trade between Member States of the Community as measures having equivalent effect to quantitative restrictions and to be eliminated in accordance with Art. 28 of the Treaty. However, until the mid-1980s, harmonization processes were extremely slow. The reasons for this were, firstly, the technical complexity of the process, due to the need to form uniform rules for each category of goods and, secondly, the adoption of relevant directives of the Council should be unanimous. However, these difficulties were resolved by the adoption on 7 May 1985 of a Council Resolution on a new approach to technical harmonization and standardization.

Therefore mutual recognition became so popular. It should be mentioned that there are different types of mutual recognition : mutual recognition of court judgments, mutual recognition in company law etc.

For example, the Brussels Convention on Mutual Recognition of Companies of February 29, 1968, was to solve the problem of recognition of foreign legal entities. The Convention proposed the EU member states to recognize legal entities mutually with: 1) a certain legal relationship with one of the EU member states (formed in accordance with its legislation); 2) legal and factual connection with the territory of the EU member state; 3) economic activity for profit (Articles 1 and 2). Such legal entities could enjoy the freedoms granted within the EU. The 1968 Brussels Convention also aimed to regulate the recognition of companies without legal personality (Article 8). But above mentioned type of mutual recognition has nothing with trade and standardization.

Mutual recognition in the field of technical barriers is a process which allows conformity assessments (of qualifications, product…) carried out in one country to be recognized in another country.

Suppose that two countries A and B adopt different standards to achieve the same level of car safety. Suppose as well that there is a fixed costs associated with the adoption of each type of standard. Without an agreement, a firm that wants to sell in both market needs to pay two fixed costs (the one associated with the standard in country A and that associated with the standard in B). However, if country A and B chose one common standard (harmonization) or recognize as equivalent each other standard (mutual recognition), the firm will be able to sell in both markets paying only one fixed cost of entry in the market. The firm will also be able to better exploit economies of scale, thus producing at a lower marginal cost. On the consumer side, harmonized standards or mutual recognition should both be steps toward increased confidence for the foreign product. Therefore, trade between the two countries will increase[[5]](#footnote-5).

The principle of mutual recognition applies to the free movement of goods: a State may not prohibit the sale in its territory of goods which have been lawfully manufactured in the territory of another Member State, even if such goods differ in quality from domestic goods. This principle is based on mutual recognition of quality and standards set in another EU Member State.

Mutual recognition is the principle of EU law under which goods that are legally sold in one EEA country can be marketed and sold in any other. For the exporter, this means that a product legally on sale in one country should not have to meet a second set of requirements in the country to which they are exporting.

For example, a Certificate of Mutual Recognition shows that your vehicle is suitable to be driven on the  roads of the EU member-state. Mutual Recognition legislation only applies to those who are importing a car to the UK that was originally manufactured and registered for use in the EU. The certificate is issued by the Vehicle Certification Agency.

Or another example. Article 53(1) of the TFEU provides that the mutual recognition of the diplomas and other qualifications required in each Member State for access to regulated professions can be used to facilitate freedom of establishment and the provision of services. That is a consequence of such EU freedom as movement of workers.

The mutual recognition principle ensures market access for goods that are not, or are only partly subject to EU harmonization legislation. It guarantees that any good lawfully sold in one EU country can be sold in another. Some authors explain it as an integral part of non-discrimination[[6]](#footnote-6).

The principle of mutual recognition applies to 20% of industrial production and 26% of mutual trade in industrial goods. It should be noted that the costs of companies to assess the conformity of products are quite significant. Their size depends on the type of product, technical characteristics, market capacity of the consumer country and the size of the enterprise. Costs can reach up to 2% of the total turnover of the consumer market on average annually. Costs for companies that do not specialize in the production of one type of product are higher. The reason is that they do not benefit from economies of scale. For such companies, the costs of adhering to the principle of recognition can reach 10-15% of the total annual turnover. In 2000, 28% of mutual trade in industrial goods fell under the principle of mutual recognition.

The implementation of the principle of mutual recognition proved to be the most successful in the industries that produced the safest goods. The principle of mutual recognition plays a special role in such industries as the food industry, the production of electrical machinery, building materials, and the chemical industry.

The case law of the European Court of Justice, in particular Case 120/78 (Cassis de Dijon), provides key elements for mutual recognition. The effect of this precedent is as follows:

1) Products legally manufactured or marketed in one of the Member States must, in principle, move throughout the Union without hindrance. It should be noted that such products must comply with levels of protection equivalent to those established by the Member State to which the products are destined;

2) Barriers to free movement are allowed. However, they (barriers) can only be acceptable if: a) they are necessary to meet mandatory requirements (eg health, safety, consumer protection and the environment); b) can be justified in relation to a legitimate aim and are proportionate to the aims; c) have a legitimate aim which justifies disregard for the principle of free movement of goods;

3) In the absence of harmonized Union legislation, Member States have the right to impose requirements on their territories which must comply with the rules of the Treaty on the free movement of goods (Articles 34 to 36 of the Treaty on the Functioning of the European Union).

However, despite the significant contribution to the free movement of goods within the single market, the principle of mutual recognition cannot solve all problems and even now there is room for further harmonization, as can be seen from the comments of the Monti Report.

The case of Cassis de Dijon is widely known for its important role in promoting the principle of mutual recognition. This case has also played a huge role in changing the EU's approach to technical harmonization on such fundamental provisions:

1. In stating this principle, the Court has clearly placed the burden of proving that products do not meet the essential requirements on national public authorities. The court has also raised the issue of appropriate means of demonstrating conformity in a proportionate manner.
2. Noting that Member States may justify a ban or restriction on the sale of products from other Member States only on the basis of non-compliance with the "essential requirements", the Court has defined the content of future harmonized legislation: should not appear in the texts of EU Harmonized Legislation in the future. This opened the door to a New Approach as to what constitutes an essential requirement and how to formulate it in such a way that compliance can be demonstrated;
3. noting that Member States are obliged to accept products from other Member States, with the exception of clearly defined conditions, the Court has defined a legal principle but has not provided the means to build trust in products could not vouch. This has led to the need to develop a conformity assessment policy[[7]](#footnote-7).

The legislative approach of the New Approach, approved by the Council of Ministers on 7 May 1985 in its Resolution on the New Approach to Technical Harmonization and Standards, became a logical legislative continuation of the Cassis de Dijon case.

This regulatory technique has established the following principles:

Products manufactured in accordance with harmonized standards benefit from the presumption of conformity with the relevant essential requirements of applicable law, and in some cases the manufacturer may use a simplified conformity assessment procedure (in many cases the manufacturer's declaration of conformity becomes more acceptable to public authorities, product liability legislation);

The application of harmonized or other standards remains voluntary and the manufacturer can always apply other technical specifications to ensure compliance (but will bear the burden of proving that these technical specifications meet the essential requirements, often through a third party conformity assessment procedure);

Harmonized legislation should be limited to the essential requirements (preferably in terms of performance or functional requirements) that products placed on the EU market must meet if they enjoy the right to move freely within the EU;

Technical specifications for products that meet the essential requirements set out in the legislation should be set out in harmonized standards that may be applied in conjunction with the legislation.[[8]](#footnote-8)

The only permitted exception to the principle of mutual recognition is if such a good (or service) poses or may pose a threat to the health of consumers or the environment.

The principles of the New Approach laid the base for European standardization in support of the Harmonized Union legislation. The role of harmonized standards and the responsibilities of European standardization organizations are currently defined in Regulation (EU) №1025/2012[[9]](#footnote-9) together with the relevant Harmonized Union legislation.

The World Trade Organization (WTO) has also adopted the principle of relying on standards in technical regulations. In its Agreement on Technical Barriers to Trade, WTO encourages the use of international standards.[[10]](#footnote-10)

Negotiations on the first texts of the Harmonized Union legislation, based on the New Approach, immediately demonstrated that the definition of essential requirements and the development of harmonized standards were not sufficient to build the necessary level of trust between Member States. States agreed that appropriate horizontal conformity assessment policies and tools should be developed. This was done in parallel with the adoption of directives. Therefore, in 1989 and 1990, the Council adopted Resolution on the Global Approach and Decision 90/683 / EEC (updated and amended by Decision 93/465 / EEC), which sets out general guidelines and detailed conformity assessment procedures. To date, they have been repealed and updated by Decision №768 / 2008 / EC of 9 July 2008 on a common framework for the sale of products.[[11]](#footnote-11).

**Conclusions.**  The mutual recognition principle ensures market access for goods that are not, or are only partly subject to EU harmonization legislation. It guarantees that any good lawfully sold in one EU country can be sold in another. In opposite to mutual recognition harmonization, also known as standardization or approximation, refers to the determination of EU-wide legally binding standards to be met in all Member States.

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