

Summary

This article analyzes European countries' experience of introducing mediation in criminal law. There are determined main characters and principles of the restorative justice, its advantages in comparison with the simple procedure of resolving legal disputes (in court order). There are prospects of mediation introduction in Ukraine characterized.

Key words: restorative justice, mediation, resolving disputes, tension.

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**THE PRINCIPLE OF MUTUAL RECOGNITION IN THE SINGLE EUROPEAN MARKET:
NATIONAL TECHNICAL REGULATIONS AND FREE MOVEMENT OF GOODS**

1. Introduction

The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition, set out in Article 34 (ex Art 28) of the Treaty, of quantitative restrictions on imports between Member States and all measures having equivalent effect thereto. In the past, each Member State imposed different technical specifications for all industrial products. The harmonisation of the existing technical standards in the Member States is essential to eliminate a large number of obstacles to Community trade in goods. In general, the rules of the Member State of origin prevail. This guarantees compliance with the principle of subsidiarity by avoiding the creation of detailed rules at EU level and by ensuring greater observance of local, regional and national traditions and makes it possible to maintain the diversity of products and services. It is thus a pragmatic and powerful tool for economic integration.

In intra-EU trade in goods, mutual recognition is the principle that a product lawfully marketed in one Member State and not subject to Union harmonisation should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination. Member States conceived mutual recognition as still more favourable than the original idea of full harmonization. Today, a quota of 25 % of traded goods is still not harmonized and a further yet unknown amount of products are only partly harmonized¹. For these goods, before passing the Mutual recognition Regulation, the case law principle of mutual recognition was constitutive.

This article is divided into two sections. The first section is about development of the principle of mutual recognition through the case – law of the ECJ. The second section deals with the establishment of the regulation rules by law-makers in Union which are directly applicable in all Member States.

2. The principle of free movement of goods

Article 34 of the Treaty² (before Treaty of Lisbon, article 28) represents a general provision for acting of the principle of free movement of goods in the Internal market of the European Union. This article states:

“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

The internal market comprises an area without internal frontiers, in which the free movement of goods is ensured under the Treaty, which prohibits measures having effects equivalent to quantitative restrictions on imports. That prohibition covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade in goods.

Furthermore, Article 36 of the Treaty (ex Article 30 TEC), allows some exceptions from abovementioned prohibition:

“The provisions of Articles 34 and 35 (prohibition of the restrictions on exports) shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

Obstacles to the free movement of goods between Member States may be unlawfully created by the Member States' competent authorities applying, in the absence of harmonisation of legislation, to products lawfully marketed in other Member States, technical rules laying down requirements to be met by those products, such as rules relating to designation, form, size, weight, composition, presentation, labelling and packaging. The application of such rules to products lawfully marketed in another Member State can be contrary to the Treaty, even if they apply without distinction to all products.

The principle of mutual recognition, which derives from the case-law of the Court of Justice of the European Communities (ECJ), is one of the means of ensuring the free movement of goods within the internal market. Mutual recognition applies to products which are not subject to Community harmonisation legislation, or to aspects of products falling outside the scope of such legislation. According to that principle, a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. The only exceptions to that principle are restrictions which are justified on the grounds set out in Article 36 (ex.30) of the Treaty, or on the basis of other overriding reasons of public interest and which are proportionate to the aim pursued.

The mutual recognition principle, not to be mistaken for mutual recognition agreements, is a main driver for facilitating the market access in other Member States.

3. Development of the principle of mutual recognition through the case-law of the Court of Justice of the European Communities (ECJ)

While the ECJ formally only applies the treaties to practical questions, in fact, the judicial lawmaking regularly changes the meaning of the primary law. To sum up the evolution of the Internal market in the light of the relation of negative and positive integration in the Single European Market, it were essentially the legal doctrines of the European Court of Justice that specified how to understand the fundamental freedoms. Based on the direct effect, supremacy, and pre-emption of Community law, the Court defined the concepts of non-discrimination, mutual recognition, as well as justifiable exemptions. In its judgments the ECJ decided that in general the level of protection of national product regulations is equivalent in all Member States and therefore they must be recognized by market authorities after the import of a product. Deviating from this principle is only possible when the authority reasons that the intervention ensures a public interest that is provided for by the exceptions of Art 30 of the TEC (Art. 36. of the TFEU) or the judicially established 'compelling reasons'. The ECJ therefore developed its case law from the original understanding of nondiscrimination to a notion of mutual recognition³. The ECJ case law doctrines are more important because later secondary legislative decisions on principle of mutual recognition are influenced by these fundamental ECJ judgments.

3.1. Dassonville-ruling: first step towards the principle of mutual recognition

Before its famous *Cassis-de-Dijon* decision, the *Dassonville*-ruling in 1977⁴ was the main Court's interpretation of goods' free movement principle, that as long as the conditions did not discriminate against the origin of the product, national regulations could be applied to foreign goods as well as to domestic products.

The ECJ said that in the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals. The requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

3.2. The Cassis de Dijon principle

The *Cassis-de-Dijon* decision makes a legal rule, that national products when providing an equivalent level of protection have to be recognized in other Member States. The *Cassis de Dijon* judgement belongs to the fundamental decisions pointing the way of the Court of Justice to the interpretation of the European goods traffic liberty. By this decision the Court shifted away from the previous *Dassonville*-ruling which was main interpretation goods' free movement.

The principle is based on a judgment by the European Court of Justice in 1979 on case number 120/78. The German food manufacturer REWE had been prevented from importing the French liqueur known as *Cassis-de-Dijon* (20% alcoholic content) by the Bundesmonopolverwaltung für Branntwein (federal monopoly administration for spirits) because German law required a minimum alcoholic content of 32 %. In the absence of common rules relating to the production and marketing of alcohol, it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Regards the protection of public health the German government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

The Court of Justice concluded that the import embargo imposed by the federal monopoly administration infringed Article 30 (which was later Art. 28.) of the EC Treaty. Article 30 stipulates that barriers to the free movement of goods produced according to different rules on the manufacture and sale of alcohol are only admissible if they are necessary to satisfy mandatory requirements. Such requirements are effective tax regulation, protection of public health, purity of traded goods, and consumer protection. The requirements regarding the purity of traded goods and consumer protection could be adequately met by the less extensive measure of compulsory marking. As such, a complete ban on the movement of the goods was not necessary (not met the principle of proportionality). The ECJ judgment proved critical in terms of making the free movement of goods inside the single European market a reality.

Hence, the ECJ stated that in general the level of protection of national product regulations is equivalent in all Member States and therefore they must be recognized by market authorities after the import of a product. Deviating

from this principle is only possible when the authority reasons that the intervention ensures a public interest that is provided for by the exceptions set out in TEC (today Art. 36 TFEU) or the judicially established 'compelling reasons'. This decision was the basis, as for the future decisions of the ECJ related to the principle of mutual recognition, and for the future regulation of which will be discussed later.

¹ European Commission (14.02.2007). "Commission Staff Working Document. Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC.

² The Treaty establishing the European Community (TEC, the Treaty of Rome). The Rome Treaty was renamed to the Treaty on the Functioning of the European Union (TFEU, The Treaty of Lisbon) in 2007.

³ Вјсрп Schreinemacher, *The negotiation of EU legislation against the background of ECJ case law: The cases of the 2008 Regulation on mutual recognition in goods and of the 2004 Directive on Union citizens' rights*, Collaborative Research Centre 597 «Transformations of the State», University Bremen, June 2010, p. 9.

⁴ Case 8/74 (Dassonville), 11.07.1977

Резюме

Вільний рух товарів між державами-членами є фундаментальним принципом угоди, який знаходить своє вираження в забороні, визначеній у ст. 34 Угоди (перед Лісабонською Угодою, ст. 28) значної кількості обмежень щодо здійснення імпорту між державами-членами та всіх заходів, які мають еквівалентний характер імпорту. Між державами-членами можуть бути незаконно створені перешкоди вільному руху товарів, компетентними органами держав-членів, при посиланні на відсутність гармонізації законодавства стосовно продуктів, які законно продаються у державах-членах, технічних правил, які встановлюють вимоги, яким мають відповідати вказані продукти. Взаємне визнання принципу, гарантує вільний рух товарів та послуг без необхідності гармонізації національного законодавства держав-членів. Товари, які законно виготовляються у державі-учасниці не можуть бути заборонені у продажі на території іншої держави-учасниці, навіть якщо вони виготовлені відповідно до інших технічних та якісних специфікацій, ніж тих, які передбачені в іншій державі-учасниці. Єдиний виняток стосується загальних інтересів, а саме: здоров'я, захисту споживача чи навколишнього середовища, що є предметом жорсткого регулювання. Принцип взаємного визнання витікає з прецедентного права Суду Юстиції Європейських Співтовариств (ЄСЮ), і є одним із способів забезпечення вільного руху товарів на міжнародному ринку. Після майже тридцяти років з відомої справи Кассіса де Діжон в ЄСЮ 1979 р., правовики ЄС вирішили визначити цей принцип в Правило, яке передбачає процедурні правила для національних адміністрацій у випадку, коли останні захочуть застосувати ці правила до продукту, який не відповідає загальним правилам гармонізації.

Ключові слова: вільний рух товарів, гармонізація законодавства, взаємне визнання.

Резюме

Свободное движение товаров между государствами-членами является фундаментальным принципом соглашения, которое находит свое выражение в запрещении, определенном в ст. 34 Соглашения (перед Лиссабонским Соглашением, ст. 28) значительного количества ограничений относительно осуществления импорта между государствами-членами и всех мероприятий, которые имеют эквивалентный характер импорта. Между государствами-членами могут быть незаконно созданы препятствия свободному движению товаров, компетентными органами государств-членов, при ссылке на отсутствие гармонизации законодательства относительно продуктов, которые законно продаются в государствах-членах, технических правил, которые устанавливают требования, которым должны отвечать указанные продукты. Взаимное признание принципа, гарантирует свободное движение товаров и услуг без необходимости гармонизации национального законодательства государств-членов. Товары, которые законно изготавливаются в государстве-участнике не могут быть запрещены в продаже на территории другой страны-участницы, даже если они изготовлены в соответствии с другими техническими и качественными спецификациями, чем тех, которые предусмотрены в другой стране-участнице. Единственное исключение касается общих интересов, а именно: здоровья, защиты потребителя или окружающей среды, которая является предметом жесткой регуляции. Принцип взаимного признания вытекает из прецедентного права Суда Юстиции Европейских Содружеств (ЕСЮ), и является одним из способов обеспечения свободного движения товаров на международном рынке. После почти тридцати лет из известного дела Кассиса где Дижон в ЕСЮ в 1979 г., права ЕС решили определить этот принцип в Правило, которое предусматривает процедурные правила для национальных администраций в случае, когда последние захотят применить эти правила к продукту, который не отвечает общим правилам гармонизации.

Ключевые слова: вільний рух товарів, гармонізація законодавства, взаємне визнання.

Summary

The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition, set out in Article 34 of the Treaty (before Treaty of Lisbon, article 28), of quantitative restrictions on imports between Member States and all measures having equivalent effect thereto. Obstacles to the free movement of goods between Member States may be unlawfully created by the Member States' competent authorities applying, in the absence of harmonisation of legislation, to products lawfully marketed in other Member States, technical rules laying down requirements to be met by those products. The mutual recognition principle guarantees free movement of goods and services without the need to harmonise Member States' national legislation. Goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products. The only exception allowed – overriding general interest such as health, consumer or environment protection – is subject to strict conditions. The principle of mutual recognition derives from the case-law of the Court of Justice of the European Communities (ECJ), and is one of the means of ensuring the free movement of goods within the internal market. Almost thirty years after famous Cassis de Dijon judgement of the ECJ in 1979, the EU legislators decided to translate this principle into Regulation which provides procedural rules for national administrations in case the latter want to apply a national regulation to a product, which has not been subject to full harmonization.

Key words: free movement of goods, harmonisation of legislation, mutual recognition, case-law of the ECJ, Cassis de Dijon judgement, Mutual recognition Regulation.

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