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Cross-Border Cooperation and the European Administrative Space – Prospects from the Principle of Mutual Recognition

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ABSTRACT

With the introduction of the territorial cohesion objective and under the redesign of the new cohesion policy, cross-border cooperation has become an increasingly important level of "horizontal" European integration. Representing at the same time a specific transnational pattern of the European Administrative Space (EAS), however, its practical functioning is still hindered by various factors amongst which the diverging national legal and administrative framework conditions of the participating actors represent the major obstacle with regards to the development of effective cross-border governance regimes. Based on the analysis of central challenges of practical cross-border governance, the article examines the question whether the application the principle of mutual recognition, initially developed for the free movement of goods in the non-harmonized area, could provide a basis for substantial improvement in European cross-border cooperation. Four fields of application are designed, allowing for a new quality of transnational administrative cooperation and a new understanding of the laboratory role that cross-border territories might play both for the EAS and further European integration.

Keywords: *European administrative space, cross-border cooperation, principle of mutual recognition, territorial cohesion*

JEL: H73, H77, H83

1 Introduction

The concept of the European Administrative Space (EAS) has gained increasing interest both from academia and practitioners during the last 30 years of European Integration. Originally directly linked to the notion of an ever intense integration of European gover*nment* and thus assuming/predicting a process of increasing convergence and harmonization of the different national administrative systems towards a more unified reference model

in Europe (Siedentopf & Speer, 2003; Olsen, 2003), it has constantly evolved over time and is now discussed under the light of the broader perspective of European gover*nance*.

Although the term is often applied, the very definition of EAS in the literature is yet quite diverse: some see the EAS as a "harmonized synthesis of values realized by the EU institutions and Member States' administrative authorities through creating and allying EU law" (Torma, 2001, p. 1), others are focusing on the fact, that it would be an "area in which increasingly integrated administrations jointly exercise powers delegated to the EU in a system of shared sovereignty" (Hofmann ,2008, p. 671) and are underlying in this regard the "coordinated implementation of EU law and the Europeanization of national administrative law" (Hofmann, 2008, p. 662), while a more neutral perception stresses the raise of a "multilevel Union administration" (Egeberg, 2006). Other authors focus on the emergence of a vertically and horizontally more and more differentiated European multi-level Governance (Kohler-Koch & Larat, 2009) or suggest "a systematic distinction between direct administrative policy and indirect influences of EU policies on domestic administrations and the distinction between the respective constellations between supranational and state actors" (Heidbreder, 2011, p. 711), hereby suggesting a conceptual distinction with regards to the relationship between the *governing* and the *governed*, while demanding for a combination of the dimensions of policy instrumentation in the EAS with the actor constellations and Europeanization mechanisms (Heidbreder, 2011, pp. 711–714).

With regards to the historical development of the EAS, Hofmann (2008, p. 663) underlines the process of deterritorialization following the increasing supranationality: "formally closed systems of public law of the territorial states opened up through the emergence and establishment of a supranational legal order" (p.664) which took place during three main yet overlapping phases: firstly the establishment of the Community legal order, secondly the "horizontal" opening of Member States legal systems and thirdly the development of integrating administrations and the conditions of the modern European administrative space which can be closely linked to the evolution of the principle of "subsidiarity".

With regard to administrative law, Sommermann differs between a process of *direct* Europeanization – both at the level of substantive administrative law (starting with technical norming, the implementation of basic liberties and the structuring of the internal market), at the level of administrative procedural law (starting in the 1980ies with the introduction for instance of the European environmental impact assessment) and the level of administrative organization law (increasingly since the 1990ies at the level of secondary law) – and a process of *indirect* Europeanization – functional adaption of administrative norms and procedures in relation to the cooperation principle, spill-over effects from EU-law to other national law domains, adaption due to competition phenomena of an increasing transnationalization of

administrative relations, leading to an increasing transculturalization of the existing national legal and administrative systems in Europe – (Sommermann, 2015, pp. 256–260). Although, with regards to administrative culture, however, a recent study suggests (Beck & Larat, 2015) that transnationalization seems to lead to a *hybridization* rather than a European *transculturation* in the proper sense of the term, transnational administrative relations can be perceived as a specific horizontal pattern of the EAS – be it at the level of bilateral interstate relations (Larat, 2015) or – where this paper will focus on – in the form of cross-border cooperation between administrative units coming from border zones of two or more *directly* neighbouring states.

2 Cross-Border Cooperation – A Transnational Pattern of the European Administrative Space

2.1 The Relevance of Cross-Border Regions in Europe

Border regions play an important role within the context of European integration: 40% of the EU territory is covered by border regions and approximately 30% of the EU population lives there. Out of the 362 regions registered by the Council of Europe and its 47 member states more than 140 are cross-border regions (Ricq, 2006). The effects of the progress of European integration can be studied here: horizontal mobility of goods, capital and people are very obvious in border regions, but also the remaining obstacles to this horizontal mobility. This is why the border regions have often been described as the laboratories of European integration (Lambertz, 2010).

Beyond this EU-wide dimension, border regions are characterized by a very specific structural situation: natural and/or socio-economic phenomenon like transport, labour market, service-delivery, individual consumption, migration, criminality, pollution, commuters, leisure-time behaviour etc. have typically a border-crossing dimension, directly both affecting and linking two or more neighbouring states in a given transborder territory. These negative or positive spill-over effects of either structural or everyday policy problems require a close cross-border co-operation between those actors, which are competent and responsible for problem solution within the institutional context of the respective neighbouring state. In its recent survey, the European Association of Border Region has listed more than 200 cross-border territories in Europe. The wide range of possible inter-institutional and problem-specific constellations in Europe's border regions, however, does not allow a uniform classification of what the characteristics of this type of regions look like: not all border-regions, for instance, are isolated rural territories facing important structural problems which are ignored by the respective national government. During the last years many border regions have become rather important junctions of the socio-economic exchanges between the neighbouring states and their historical role as "crossing points" has even been positively reinforced (MOT, 2007, 2013).

Cross-border co-operation has a long tradition in the old member states of Europe and it has been gaining fast significance for the new border regions – especially in the eastern European regions. This history, constant changing institutional challenges and the specific preconditions have in each case led to the development of specific solutions of the respective cross-border governance (Beck, 2014). In contrast to the national context, where regional co-operation is taking place within a uniform legal, institutional and financial context, cross-border governance is characterized by the challenge to manage working together politico-administrative systems which have a distinctive legal basis and share a different degree of vertical differentiation both in terms of structure, resources equipment and autonomy of action (Eisenberg, 2007).

In addition, cross-border co-operation is still confronted and finds itself sometimes even in conflict with the principle of territorial sovereignty of the respective national state (Beck, 1999). Thus, even legal instruments aiming at a better structuring of the cross-border co-operation by creating co-operation groupings with a proper legal personality (Janssen, 2007), like for instance the newly created European Grouping of Territorial Co-operation (EGTC) or the euro-regional co-operation grouping" (ECG), created by the Council of Europe under the 3rd protocol to the European Outline convention, do not allow an independent transnational scope of action: regarding budgetary rules, social law, taxation, legal supervision etc. the details of the practical functioning of an EGTC depend fully on the domestic law of the state, in which the transnational grouping has finally chosen to take its legal seat.

Even in those regions where the degree of co-operation is well developed, cross-border co-operation is therefore rather a transnational politico-administrative subsystem, created by and composed of the respective "domestic" national partners involved (Beck, 2008a). Both, institutions, procedures, programmes and projects of cross-border co-operation depend – in practice – on decisions, which are still often taken outside the closer context of direct bi- or multilateral horizontal co-operation. In most transnational constellations – also where federalist states are participating – cross-border policy-making cannot be based on a transparent delegation of proper competences from the domestic partners towards the transnational actors, but the domestic partners must still rather recruit, persuade and justify their actions and their legal and financial support for each and every individual case. The "external" influence on such a sub-system of co-operation has, thus, to be considered as being relatively important. Cross-border co-operation can therefore be interpreted as a typical principal-agent constellation (see Czada, 1994; Chrisholm. 1989; Jansen & Schubert, 1995; Marin & Mayntz, 1990): with the principals being the national institutional partners of this co-operation (regions, state organizations, local authorities etc.), representing the legal, administrative, financial and decisional competences and interests of their partial region, and the agents being the actors (cross-border project partners,

members of transnational bodies or specific institutions, programme officers and co-ordination officers etc.) responsible for the preparation, the design and the implementation of the integrated cross-border policy (Beck, 1997). Cross-border co-operation thus has always both an inter-institutional and an interpersonal dimension, requiring the co-operation of both, corporate and individual actors with their specific functional logic, motivated by special interests in each case (see Coleman, 1973; Elster, 1985; Marin, 1990).

The reference level of this sub-system is founded through a perception of cross-border regions as being "functional and contractual spaces capable of responding to shared problems in similar and converging ways, so they are not political regions in the strict sense of the term" (Ricq, 2006, p. 45). On the other hand, the fact that cross-border co-operation is not replacing but depending on the competence and the role of the respective national partners (see also Blatter, 2000; Rausch, 1999) does not automatically mean, that this co-operation is a priori less effective than regional co-operations taking place within the domestic context. Research on multi-level policy-making in Europe has shown, that a productive entwinement and networking of different actors coming from distinct administrative levels and backgrounds can be as effective as classical institutionalized problem-solving (see Benz, 1998; Benz, Scharpf & Zintl, 1992; Grande, 2000). Yet, the institutional and functional preconditions of cross-border governance are far more complex and depend on very distinct conditions, as I will show in the next chapter.

2.2 The Challenges of Horizontal Cross-Border Governance

In light of the impressive career of the governance concept in Social Sciences (see Blatter, 2006), governance is today one of the central concepts being discussed and implemented in the practical and theoretical field of cross-border cooperation too. It is striking, however, that in most literature on European governance, especially in the case where the notion of multi-level governance is highlighted, the perception of the vertical dimension is predominant. Mostly, both in literature and practice, multi-level governance is perceived and discussed not only in a normative way but also – especially in the case of cross-border cooperation being part of the European integration process – with a special focus on the "vertical" dimension: different territorial levels should better cooperate in order to better taking into account the fact, that in most states (thematic) power is shared between different territorial levels and that this internal differentiation is more and more extended to – and thus becomes impacted by – the European level of policy-making. What is overseen in many recent reports and political statements on the future of cross-border cooperation in Europe, however, is the horizontal dimension of multi-level governance. Especially in the case of cross-border territories this dimension is crucial.

Compared to domestic policy-making, cross-border governance is characterized by a number of quite distinct patterns (Beck & Pradier, 2011).

The first distinctive feature is that cross-border governance initially always has a territorial dimension (Casteigts, 2010). The observed cooperation and coordination processes are constituted within a spatial parameter including areas of different bordering countries. Each given cross-border spatial context (e.g. presence of natural boundaries, population density, degree of socioeconomic integration, poly-centricity) determines the resulting challenges to be matched with regards to the production of joint spatial solutions (development given potentials, creating infrastructure conditions, complementarity of sub-regional spatial functions, etc.) and thus constitutes the functional framework of this type of cooperation. Characteristically, however, the territorial dimension of cross-border cooperation has a strong inter-relation to the given politico-administrative boundaries which makes is more difficult to handle socio-economic spill-over effects that typically exceed these limits. This creates the challenge of adapting the spatial parameters of the cooperation to the scope and content of different levels of functional integration. In a way, a cross-border territory does not exist *per se* – it is constructed by the voluntary acts of the actors coming from either side of the border. However, this creates the practical difficulty that a "regional collective" (i.e. the mobilization/integration of all relevant intermediary actors of a territory which is a precondition for a sustainable territorial development approach see Fürst, 2011) is hardly emerging on a cross-border basis, which is a distinct pattern compared to "classical" regional governance taking place within a single domestic context (Kleinfeld, Plamper & Huber, 2006).

The second feature of cross-border governance is that this type of regional governance takes place within a context that involves relations between different countries. The transnational dimension of cross-border governance is a specific characteristic, which greatly contributes to the explanation of the specific patterns and functionalities of this cooperative approach. Unlike "classic" regional governance, transnational governance is characterized by the fact that decision areas of different political and administrative systems are connected to each other. The resulting cross-border bargaining systems are marked by a clearly stronger principal-agent problem, compared to the national regional governance. The challenge here, however, is not only to coordinate different delivery-mechanisms of different politico-administrative systems but also to manage the complex "embeddedness" of the cross-border territorial sub-system with the respective national politico-administrative systems (Frey, 2003; Beck, 2013a). In addition, the intercultural mediation and communication function, which is also closely linked to the transnational dimension of cross-border governance, is a real source of complexity. This refers not only to the interpersonal but also to the inter-institutional components of the cross-border negotiation system and includes the open question about the possibilities and limits in matching divergent administrative cultures in Europe (Beck & Larat, 2014). Finally, features such as the strong consensus principle, the delegation principle, the non-availability of hierarchical conflict resolution options, the principle of rotation

of chairs in committees, the tendency to postpone decisions rather than implementing them can also be explained by this transnational dimension. Cross-border governance obviously shares largely general features which were highlighted in the research on international regimes and with regards to the functionality of transnational bargaining systems. At the same time this allows to explain, why it is sometimes so difficult for cross-border actors to agree on even the very basic components of the governance approach: terms such as "actors", "networks", "decision rules", "civil society", "project", "cluster" etc. in fact represent deeply culturally bound concepts upon which inter-cultural differences and conflicts very quickly can arise.

The third constitutive feature of cross-border governance can be seen in its European dimension (Lambertz, 2010). Stronger than national patterns of regional governance, which may also refer to European elements especially when incorporating issues like external territorial positioning strategies and/ or the use of appropriate European support programs, the characteristics and finalities of cross-border governance are much more interlinked with the project of European integration. Cross-border territories are contributing a specific horizontal function to the European integrations process (Beck 2011). European notions, objectives and policy approaches such as "Europe is growing together at the borders of Member States ", "Europe for Citizens", "Territorial cohesion" or "European Neighborhood Policy" are concepts that relate directly to the European dimension of cross-border cooperation. Cross-border cooperation today is a specific level of action within the multi-level context of the European Administrative Space. In addition, the Interreg program with its characteristic, "externally defined" functional principles, is determining the cross-border governance to a large extend. This European action model characterizes the cooperation in general much stronger than it is the case within the national context, where also other than European funding opportunities (i.e. national programs with much less administrative burden) do exist. Yet, this leads to a certain convergence with regards to the practical functioning of cross-border cooperation in Europe. This convergence is mainly caused by the procedural logic of the financial promotion programmes of the European Commission with regards to the ETC objective ("Interreg") leading to more or less unified practices regarding the implementation of elements like the partnership-principle, the principle of additionality, multi-annual programming based on SWOT-analysis, project-based policy-making, project-calls, financial control etc. As a consequence we can observe during the last two decades or so a general pattern of CBC policy-making that is characterized by a shift from informal exchanges to more concrete projects, from general planning to attempts for a more concrete policy-implementation, from rather symbolic to real world action, from closed informal networks to more transparent and official institutions.

The fourth feature of transnational governance can finally be seen in its thematic dimension. Cross-border cooperation does not represent

a distinctive policy field but consists of more or less integrated approaches of cooperation between different given national policy areas. The character of these regulatory, distributive, redistributive or innovation-oriented policies not only enhances the respective constellation and the corresponding degree of politicization of the factual issues in question; it also determines crucially different institutionalization requirements of the governance structures (Beck, 1997). These vary considerably by policy field, and make it very difficult, to develop an integrated, cross-sectorial governance approach at the cross-border level (Casteigts, 2010) The complexity of such a governance is increased by the fact that the (variable) policy type may determine the interests and strategies of the actors involved directly, thus also affecting the interaction style, the applied decision rules, and ultimately the efficiency of cross-border problem-solving significantly. The difference to the functionality of collaboration patterns taking place within a single institutional system context must be seen in the fact, that the systemic determinants and thus the intersection of actors, decision skills, resources for action and the synchronizing of strategic interests in the cross-border context can vary widely by policy-field and the partners involved. Constellations of action and actors, which are evident within the national context and which allow for the development of "social capital" and a constructive and productive problem-solving within a specific territorial/or sectorial governance approach are often completely different in the perspective of a cross-border governance. This leads to very specific patterns of cross-border (non-) policy-making, which is characterized by much higher complexity and informal dynamics of the processes on the one hand and a decoupling of thematic and interest-related interaction on the other, which can be described as a distinct cultural cooperation pattern (Beck & Larat, 2014).

The challenge of practical cross-border governance is to keep the interdependencies between these four constitutive dimensions in equilibrium. However, a holistic approach of cross-border governance is much more complex and difficult to achieve compared to the case of governance approaches taking place within the territorial context of a single jurisdiction. This is due to a situation, where the role and the perception of the very concept of the border has changed considerably during last years: the separating function is less important today but more and more replaced by an integrated 360° perception of the cross-border territory and its unused potentials.

An important element in this perspective is the fact that most legal areas which are relevant for cross-border cooperation remain within the focus of the Member State competence. Areas such as health-care, urban and special planning, public transport, social security, taxation, labour market-policies, scientific research and development, environmental protection, professional education and training, housing etc. are either not at all harmonized at the supranational level or are based on conceptual EU-policy approaches but implemented via national law and thus de facto reproducing – and implicitly

even reinforcing – existing national systems and standards (Beck, 2014). From the perspective of cross-border cooperation, this leads to numerous important practical obstacles. In a recent study, issued by the Council of Europe, more than 160 of such obstacles have been identified (COE/CDLR, 2013) and which can be studied on the newly created website EDEN. Beside economic and other obstacles, legal and administrative obstacles are playing a central role. It is generally agreed amongst cross-border actors that the legal toolbox for cross-border cooperation both at the European and national level and with regards to public and private law is well developed (see for instance the contributions in Tschudi et al., 2014, pp. 3–259) – yet the main challenge here still remains with the finding of joint implementing provisions. Rather it is the inflexible domestic legal frame (leading to diverging national thematic definitions) and the different politico-administrative systems at the national level which are considered as the main challenge for cross-border cooperation. In addition, it is often considered as difficult / impossible to really delegate proper implementing functions to existing cross-border bodies in the area of public law, due to different domestic control systems.

In the past, cross-border governance was not really able to overcome these legal and administrative obstacles. Especially in the field of administrative law, there was only limited or no scope to compensate the lack of European harmonization via bilateral innovations, developed on a cross-border basis. Still, often problems and obstacles identified under cross-border regimes led to the notion of CBC territories being laboratories (Lambertz, 2010), identifying areas where a future European harmonization and standardization would be needed. In practical terms, however, in most of these policy-fields it was not the Commission, Council, Parliament or the national legislator who finally took the action on its own initiative, but the European Court of Justice (ECJ). A number of cases – mostly handled during the 90ies and with a clear thematic link to process of the implementation of the internal market, and which in the following lead to a change of the respective thematic perception situation – came actually from cross-border territories, mostly because individual actors (persons or enterprises), wanting to practice cross-border mobility, witnessed practical obstacles caused by national regulations, and thus went befor the Court.

The case-law of the ECJ thus played an important role as motor of integration, defining and/or applying new sectorial cross-border principles in areas such as health-care, social security, taxation, recognition of diploma and academic degrees etc. One principle, however, that has been developed by the ECJ and which has a much more fundamental meaning for the functioning of the European construction, is the principle of mutual recognition. This principle has not been applied yet for the case of public cross-border cooperation so far, but can have – as I will show in the following chapter – a high potential to overcome many practical systemic obstacles, still characterizing the transnational dimension of the European Administrative Space.

3 Cross-Border Territories and the Principle of Mutual Recognition – Towards a New Quality of Transnational Administrative Cooperation

3.1 The Principle of Mutual Recognition within the Context of European Construction

The elimination of technical obstacles to the free movement of goods is one of the main objectives of the internal market-policy of the European Union (European Commission, 2010): Article 34 TFEU prohibits obstacles to free trade and Article 36 TFEU provides a closed list of justifications for such obstacles. One of the means of ensuring the free movement of goods within the internal market – besides the principle of non-discrimination (prohibition to maintain distinctive State measures hindering trade between Member States) and the principle of free access to national market (beyond discrimination, impossible to maintain state measures which substantially restrict the possibility to sell a product or a service on another market) – is the *principle of mutual recognition*. The principle derives from the case-law of the Court of Justice of the European Communities and applies to products which are not subject to Community harmonization legislation, or to aspects of products falling outside the scope of such legislation (so called non-harmonized products). 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."[1] Only on the basis of overriding reasons of public interest and which are proportionate to the aim pursued, a Member State can refuse the free movement or justify a domestic regulation or technical specification going against this principle.

The principle usually applies, when actors such as companies or professionals offer non harmonized goods or services abroad. The area of free movement of non-harmonized goods is of great economic importance to the functioning of the internal market: approximately 21% of industrial production or 7% of GDP inside the EU is covered by mutual recognition and about 28% of intra-EU manufacturing trade. It is estimated that the failure to properly apply the principle of mutual recognition reduces trade in goods within the Internal Market by up to 10% or €150 billion[2]. Accordingly, the Commission has set up a proper policy for analysing and enforcing the application of this principle. On the grounds of evidence that the principle is not working smoothly

1 See Alinea 3, REGULATION (EC) No 764/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 July 2008; the principle originated in the famous *Cassis de Dijon* judgment of the Court of Justice of 20 February 1979 (Case 120/78 Rewe-Zentral [1979] ECR 649) and was the basis for a new development in the internal market for goods. While at the beginning not expressly mentioned in the case-law of the Court of Justice, it is now fully recognised (see, for example, Case C-110/05 *Commission vs. Italy* [2009] ECR I-519, paragraph 34).

2 See Proposal for a DIRECTIVE 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, Impact assessment COM(2007) 36 FINAL, p. 42.

(a supporting study of an Impact Assessment identified in 2007 around 11.000 technical exceptions at Member State level and a high number of technical, procedural and information related obstacles)[3] the European Union issued in 2008 a regulation laying down procedures and actions to enforce the functioning of the principle. The philosophy of the Regulation followed the twofold approach of "combining transparency and efficiency: transparency of information to be exchanged between enterprises and national authorities, efficiency by avoiding any duplication of checks and testing" (European Commission, 2012, p. 6).

The importance of the principle of mutual recognition increased constantly during the last decades – leading even to popular concern when it was again enforced after the enlargement of the Union via the so called "Bolkestein" directive[4] – and at least in a normative perspective some academic observers even estimate, that the EU has de facto in the meanwhile become a "mutual recognition space" (Nicolaidis, 2007, p. 687). Beyond the single issue-orientation of allowing the free movement of goods and services in the non-harmonized area – what are the implications of mutual recognition from the broader point of European construction and the EAS ?

Firstly, it is evident that mutual recognition constitutes a very pragmatic alternative to harmonization. With the Treaty of Lisbon the functional division of labour between the European and the national level with regards to policy-competences has been re-adjusted and many observers come to the conclusion that the degree of supra-nationalization that has been achieved by the Lisbon-Treaty will be the working basis for the next decades or so. It is not very realistic to expect any significant efforts of further harmonization at the EU-level going beyond approaches that aim at a level-playing field in very specific sectorial areas. A horizontal analysis of the Impact Assessments carried out by the Commission during recent years[5] may demonstrate the efforts of the European law-maker to search for alternatives to classical regulatory approaches and rather implement a "soft-law" policy within the context of the "smart regulation" strategy[6]. In this context, Member States who do not want to delegate further competencies to or share domestic competencies with the European level may indeed consider mutual recognition as a feasible alternative when aiming at a better horizontal cooperation with other Member States in such areas, where functional equivalence can be deemed. Especially in the administrative reality where for the case of transnational administrative cooperation it is not realistic or possible to develop substantive legal "exemptions" (avoidance of new borders and risks befor the constitutional

3 DIE ZEIT, 18. October 2007, p. 32.

4 DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market.

5 See: www.europa/IA; The author has been – on behalf of the SEC GEN – for 10 years trainer and consultant on European Impact Assessments and has accompanied several Impact Assessment projects at EU-level.

6 See Commission communication "Smart Regulation in the European Union" – COM(2010)543 (8 October 2010).

courts of the member states – how can a transnational exemption be justified at all?), mutual recognition can give – as I will show in the next chapter – a new dimension to the horizontal functioning of the EAS, allowing for a smarter inter-organizational cooperation of administrative bodies depending on different but functionally equivalent jurisdictions.

Secondly, mutual recognition creates extraterritoriality (Nicolaidis & Shaffer, 2005, p. 267). Territoriality constitutes a classical *criterium* of the Westphalian State, guaranteed by an external border and limiting the competence of both the state and its administration. Mutual recognition, on the other hand, extends de facto the regulation, defined by one member state onto the territory of another member state that recognizes it. Mutual recognition regimes thus can be seen as a constitutive element for an emerging global administrative law regime: "Mutual recognition represents the operation of a third, 'middle-way' of transnational economic governance… (it constitutes)… an extension of the territorial principle of national treatment and a cooperative 'mutualized' approach to the inherent demand for and challenge of extraterritoriality in a global economic order" (Nicolaidis & Shaffer, 2005, p. 267). Such a notion of extraterritoriality based on mutual recognition can also strengthen the transnational dimension of the EAS, which itself goes already into this direction but gives it a specific new dimension: The functional enlargement of a national administrative competence to the territory of another Member state, however, is new and not yet existing in the area of public law but it can lead to new and interesting forms of managed and negotiated forms of transnational administrative cooperation (Beck & Larat, 2015).

This leads to the third dimension of mutual recognition which can be understood as a new mode of governance (Schmidt, 2007): Transnational cooperation is an example for what has been described in the context of international cooperation as governance without government (Rosenau & Czempiel, 1992), e.g. the need to develop cooperative solutions in a non-hierarchical way. One central category of such a mode of cooperation in transnational governance (Beck & Wassenberg, 2011) is social capital, built on mutual trust. Mutual recognition both depends on and contributes to the emergence of trust. The inherently difficult definition of where functional equivalence starts and where it may end needs to be negotiated amongst the partners concerned: "Instead of agreeing on common regulatory solutions, governments agree on a patchwork of equivalent national rules. It is only by focusing on this alternative to hierarchy that the growing transnational activities of national administrations become a focus of analysis" (Schmidt, 2007, p. 670). In a broader sense, this transnational governance may lead to a new perception within the European Administrative Space which I describe elsewhere as "Horizontal Subsidiarity" (Beck, 2014): When a transnational or cross-border phenomenon needs a specific e.g. adapted and thus diverging solution, the concerned neighbouring jurisdictions give priority to it compared

to the domestic regulatory frame. Mutual recognition can strengthen such a perspective of horizontal subsidiarity within the EAS: The "managed recognition" may lead to pragmatic choices of the best solution on either side of the border.

Finally, as the notion of governance indicates, transnational mutual recognition can also develop and/or strengthen the mode of transnational policy-making in its relation to other economic and societal actors. Based on mutual recognition, the necessary horizontal and vertical differentiation that is inherent to the notion of multi-level-governance within the European context, can finally lead to a rationalization of new transnational relations between administrations and its respective economic and/or social environment: if more and more new transnational needs of enterprises, citizens, associations, consumers, patients etc. are articulated, which cannot effectively be handled by a single administrative approach only, mutual recognition can contribute to the emergence of new negotiated and pragmatic solutions for the transnational EAS. Innovation thus can both occur on the basis of new transnational arrangements and or the diffusion and integration of good practices of the neighbour state.

The key element of mutual recognition, as derived from the *Cassis de Dijon* doctrine, is the notion of functional equivalence which could indeed contribute to the strengthening of the transnational dimension of the EAS. The prospective element here would be to go beyond a case by case perspective, related to the horizontal mobility of persons, services capital and goods and develop an integrated transnational – e.g. cross-border perspective. The principle could bring clarity to many cross-border constellations where the unproductive back and forth between neighbouring administrations *de facto* leads to a high level of red rape and administrative burden, which makes cross-border activities still much less attractive than a domestic orientation – both from the perspective of individual (citizens, commuters, enterprises) and corporate (public and private organizations) actors. Combined with the principle of proportionality (only where it makes sense and where it is relevant, mutual recognition will be applied) mutual recognition has a strong potential to improve transnational and cross-border cooperation, especially, when it is based on mutually agreed *de minimis* levels: if a cross-border and/or transnational administrative case constitutes/represents not a mass-phenomenon (which in reality is exactly the case: the level of cross-border activity phenomenon is in many policy-fields clearly lower than 5% compared to the domestic context[7]) but the typical exception to the administrative rule (because the individual case comes from a different administrative context) then – if it is the case of a neighbour administration – the public servant in charge should have the right to accept the "incoming" administrative standards. The only exception allowed then would refer to administrative standards which differ too much

7 For instance the 91.000 cross-border commuters in the Upper-Rhine region are representing only 3% of the entire active population!

and which would constitute a case of non-equivalence. At first glance, one could expect a high number of such cases of such non-equivalence due to the big differences between the politico-administrative systems in Europe, both in terms of structure and administrative culture. On the other hand, having the case of the new member states who accepted and implemented the democratic European administrative standards relatively quickly in mind, one could argue, that all administrative systems of the European Union today are based on basic principles of the EAS which in turn are derived from the *Acquis Communautaire* (see König, 2008, pp. 120, who refers to the notion of a Continental-European administrative family). Differences between national administrations in Europe certainly do exist and actually we are witnessing both processes of convergence and persistence of historically developed systems (Kuhlmann & Wollmann, 2013), but it must be questioned if, at the beginning of the 21st century, they are really constituting a case of non-equivalence in the functional sense of the term or still rather symbolize the case of non-cooperation, the lack of willingness and/or incentive of mutual exchange and learning.

3.2 Fields of Application within CBC and the EAS

With regards to typical problem constellations – which at the same time represent specific types of transnational cooperation – the following fields of application of the principle of mutual recognition seem to be promising in the context of cross-border cooperation.

Simplifying citizen's mobility. It is amazing to see, that the level of transnational mobility of individuals in Europe still is clearly below 1% but that a large part of this phenomenon is actually taking place within the European border regions (European Commission, 2009). Assuming that citizens in border-regions would like to perceive and use the cross-border territory in the same way as they can do on the domestic ground of a member state – e.g. choose their place of work, residence, childcare, medical treatment and practice their consumer behaviour independently from national borders – the public services responsible for these issues on both sides of the borders should not constitute obstacles in the sense that they are practicing different standards and regulations, but should provide for a coherent administrative framing of this horizontal mobility of persons, services and goods in the cross-border perspective. However, the reality still looks different, mostly due to the fact, that the legal areas which are covered by this mobility are mostly still within the remit of national competence. Mutual recognition could bring a lot of practical facilitating for the everyday life of citizens with a border-crossing live-orientation: If, for instance, a citizen from Member State A moves to Member State B and has a technical control certificate for his car valid for another two years, Member State B still asks to carry out a new technical control as a precondition for the admission of the car on its territory – why could Member State B not simply recognize (and trust) the technical control

certificate of Member State A[8]? Or, if a Professor moves from Member state B to Member State A and continues to teach at his University in Member State B, he will have to obtain and deliver every month (!) a certification from Member State A to the national payment body in order to still receive the child benefit from Member State B – why could Member State B not just treat the Professor like his colleagues and recognize one justification from Member State A? If a public employee with the nationality of and working in Member State A moves to Member State B and wants to benefit from the option of a medical treatment in his residential state B, he has to apply for a membership in the public health-insurance of member State B – why does the public health assurance of Member State B not simply recognize the certificate of the public health insurance of Member State A but still asks to deliver a long list of documents. And why does – in the same constellation – the tax administration of Member State A consider him taxable in Member State A but not his colleague having the nationality of Member State B? Why does a construction worker living in Member State B and working at a firm in Member State A have to pay his annual income tax to Member State A only because he has worked on a construction site in Member State A outside the border zone for more than 41 days? Why does a school class from Member State A who wants to visit the local swimming pool in the neighbouring town of Member State B not get a permission from the school authority of Member State A with the substantiation that the security standards in Member State B would not be the same – instead of simply recognizing the standards of Member State B where – empirically not more accidents with swimming-classes are happening?

This list of everyday obstacles caused by the lack of mutual trust and recognition between national (deconcentrated) state administrations could easily be extended with many other and sometimes even more complex cases – not to mention all the paperwork, red tape and administrative burden this is creating both at the level of the citizens, their employers but also the competent administrations themselves. This leads to a situation that finally hinders cross-border mobility. One thing is certainly to install contact points like INFOBEST or GenzINFO (Hansen, 2014) where citizens can get the relevant information about the administrative conditions in the neighbouring state. However, these are often of rather limited practical use, when citizens are confronted with the diverging administrative conditions and the burden of proof remaining with themselves as individuals.

Simplifying the management of CBC bodies. A second field of optimization which could be achieved via the application of the principle of mutual

8 In principle, national approval procedures for motor vehicles which have already obtained a national approval in another Member State and for motor vehicles that were already registered in another Member State, must comply with Articles 28 and 30 of the EC Treaty. According to the jurisprudence of the Court of Justice, the existence of such national procedures is, as such, not necessarily contrary to these Articles but must fulfill specific procedural conditions, see: COMMUNICATION FROM THE COMMISSION Interpretative communication on procedures for the registration of motor vehicles originating in another Member State, SEC(2007) 169 final.

recognition is the case of cross-border bodies. Here the target groups are mostly local and regional authorities who want to improve cross-border cooperation by approaches of integrated and joint institution building. These approaches are per se representing a joint political will and thus can be perceived as symbols of mutual trust: by creating a joint organizational undertaking with a commonly managed budget and personnel that works exclusively for the jointly defined transnational tasks the partners want to actively overcome a standalone approach and develop joint functional provisions. When these bodies are even equipped with a proper legal form, the case of mutual recognition form a formal point of view is implemented: both the national and European as well as the public or private legal forms that can be applied for such bodies finally depend on the choice of one national jurisdiction, usually determined by the spatial seat of the body in one of the two neighbouring states. By joining such a cross-border body with a legal status, all participating parties are mutually recognizing the law and the jurisdiction of the country of domicile (usually this is even explicitly mentioned in the legal conventions). On the other hand, as empirical evidence from the application of the European EGCT-Directive shows, the practical functioning of such bodies is very often still limited by the difficulty to define joint implementing provisions: The symbol of a joint approach is counteracted by numerous practical difficulties when it comes both to the authorization of such a transnational body, the every-day management of its human and financial resources and the legal supervision of its functioning. At these levels, very often a doubling and complexification of administrative procedures, formal requirements and/or reporting obligations is taking place which can be considered as one of the main reasons of the still very limited acceptance of these legal forms and which could be solved if the principle of mutual recognition was not only implemented by the signing partners, but also the administrative frame of both states involved.

Stimulating the development of cross-border shared services. A third field of application where the principle of mutual recognition could bring a substantial innovation is the relatively new area of cross-border shared services. In the past, cross-border cooperation was mainly concentrated either on a single-project approach (INTERREG has promoted this approach significantly in the past and will certainly continue to do so in the future) or on a cross-border body approach, allowing for the coordination of partners with regards to overall development objectives of a territorial unit. Compared to this, the idea of cross-border shared services focusses on the optimization of both the quality and the delivery of services based on an integrated cooperative approach across national borders. Mostly classical "non-sovereign" local service categories like water and electricity supply, waste disposal, social and health services, maintenance of public buildings or green spaces, transportation, internal administrative services such as salary statements, accountancy of IT-management or even public procurement could be reorganized between neighbouring local communities with the

objective to develop new economies of scale and/or to maintain services, which under a single organizational approach, would no longer be affordable (e.g. in rural and/or peripheral regions suffering from demographic change). In all these areas, when neighbouring local authorities will try to develop cooperative an innovative approaches again the question of how to integrate different administrative standards, practices and traditions will occur. Mutual recognition, if considered openly, could stimulate mutual learning and innovation, leading to new combinations and/or choices of good practices to be adopted by one of the partners via real processes of mutual Bench-Learning. As for the case of CBC bodies, however, the dimensions of the legal choice and the administrative framing of such joint undertakings will be the sticking points with regard to a trustful mutual recognition practice here.

Optimizing thematic cooperation between sectorial administrations. The starting point for this fourth pillar for application of mutual recognition lays in the challenge, that the integrated development of a cross-border territory (360° perspective) covers a large number of different policy fields which require a coordinative approach of sectorial administrative actors. The structural preconditions for such an approach, however, are again not very favourable because in most cases thematic administrative law – which is finally the basis for sectorial action – is either fully characterized by national standards, or a situation, where Member State A may meet EU-standards and Member State B or C may even go beyond this, like it is with the case of air-pollution protection, renewable energy-regimes, financing of transportation infrastructure, environmental protection, spatial planning, science and research promotion, education and training etc. As it is the case for the mobility of citizens, in these areas mostly (deconcentrated) state administration is competent, often however, on a multi-level basis with a rather complex mix of public, private, national, regional and local actors to be involved too. A first approach could be here to insert mutual recognition clauses in areas where cross-border legal provisions are missing in thematic law, as it is for instance the case with spatial planning in the Upper-Rhine region where in Germany and Switzerland territorial development plans at local and regional level have to be coordinated with the neighbour state, while in France there is no such legal obligation. Mutual recognition could lead here to a dissemination of the same standards within a given cross-border territory. The other constellation are areas where a territorial cross-border need for optimization is given and the absence of a joint standard leads to comparative disadvantages of the cross-border territory compared to is national "competitors". This could be the case with the area of professional training, when for instance in Member State A there is a lack of qualified people and in Member State B a high unemployment rate between young people exists: mutual recognition here would not only refer to formal diploma but also cover the very educational content, allowing for an increase of horizontal mobility dramatically and for the same career chances in the neighbouring state – if Member State A would recognize the qualification standards of Member State B fully (in the case of professional

training the chambers of industry and commerce together with the national standardization body for professional training of Member State A would have to make this effort!). A third field of application in this respect is finally the case where economic or scientific actors actively ask for more flexibility of the legal framework with regards to the development of joint projects/ initiatives that create added value from a cross-border point of view. If two Universities, for instance, from Member State A and B would like to deliver a double PhD-degree in order to stimulate the thematic cooperation between professors, the inter-institutional mobility of PhD students and to become more attractive at the European level, both University administrations and the competent Ministries will have to practice a mutual recognition approach of the respective examination regulations consequently. Finally: Mutual recognition could also promote the emergence of multi-thematic sectorial governance regimes in the interest of territorial development in various areas such as health, tourism, transport, infrastructure, environmental protection, economic promotion, renewable energy, in which a joint reflection of national standards by the competent sectorial actors from both sides of the border could lead to innovations in the sense that mutual recognition will result in combination of the best practice elements from either side of the border. Such a managed mutual recognition will finally also contribute to the emergence of a managed functional extra-territorialisation within a cross-border territory which constitutes an innovative element for the prospects of a transnational EAS. The idea of horizontal subsidiarity could be further developed on a sectorial case by case basis in areas where a real added value can clearly be demonstrated by the cross-border territory.

4 Conclusion

The principle of mutual recognition has often been criticized for its danger of softening standards according to the lower level of one of the participating partners (Nicolaidis, 2007). This can indeed be a risk when it comes to the question of the free movement of such goods that have been produced according to lower social and/or environmental standards – an issue that was especially discussed within the context of the political decision process of the Bolekstein service-Directive. However, as shown above, this article has argued that the principle of mutual recognition must not be interpreted in a single-way perspective. As the very term indicates its content must always mutually be discussed and voluntarily decided on a bi- or multilateral level. This is why it contains a specific potential for the case of transnational cooperation within the context of the EAS. Different to the application at the level of Member States a limitation to the specific needs of cross-border territories in Europe could both facilitate its application and avoid its possible negative consequences. On the other hand, the arguments presented above were also underlying the necessity of a close cooperation between neighbouring member states willing to apply it in a given cross-border territory.

This leads us to the question of how such an approach could best be realized in the real world situation of transnational policy-making. Given the institutional competences of most Member States in Europe it is evident, that such an approach will have to be decided and agreed mutually by the governments of the respective neighbouring countries in order to set a solid framing. In addition, it seems also important, to demonstrating the political will to allow for flexible solutions at the level of cross-border territories from the point of view of all relevant jurisdictions. In this respect bilateral joint communications, like for instance in the case of Germany and France, could lead to a programmatic fixation of the will to experiment the principle of mutual recognition in the so called German-Franco Agenda? Secondly, and on this basis, a careful study of sectorial fields where the principle could indeed create a real added value and in which form functional equivalences are feasible would be necessary. This could lead to the fixation of *de minimis* standards (both territorially and thematically) in the form of bilateral (sectorial) agreements, defining and embellishing the concrete levels/thresholds within a mutual recognition practice by the competent administrations in the future. A third step would then require the codification of the principle with regards to administrative standards and procedures at the level of prescription law within the given national thematic law framework in the form of so called opening clauses.

The notion of trust and proximity – both preconditions for building social capital – is usually better given in a cross-border than an a more global interstate context: it is not an anonymous administration here, that asks for a mutual recognition of foreign procedures, but the administration from the "next door neighbour", which actors can easily learn to know better (Beck, 2008a), where exchanges of both practices and personnel can take place at a formal and informal basis (Larat, 2014), and where the necessary administrative capacity can be built up and trained in order to effectively handle cross-border policy-problems in a professional and flexible way. On the other hand it is evident, that administrative law is still strongly linked with the classical concept of territoriality. It must be questioned if Member States are at all willing to overcome this principle and enter into an open reflection on mutual recognition in order to spoon out the potentialities which I have tried to sketch above. The strong protectionist attitude of both Member States and some enterprises in the area of non-harmonized goods and the necessity of the Commission to launch together with the regulation of 2008 a proper mutual recognition policy[9] demonstrates the strong opposition that may be emerging. On the same time, this shows that the principle of mutual recognition is indeed a very meaningful and strong concept. The key word for the application of mutual recognition in the transnational cross-border context, however, must therefore be its evidence base. It will be necessary to carry out ex ante impact assessments in order to identify both areas and magnitudes of a meaningful implementation, especially with regard to

9 See: http://ec.europa.eu/enterprise/policies/single-market-goods/free-movement-non-harmonised-sectors/mutual-recognition/index_en.htm

the definition of the right *de minimis* level allowing for its application on a cross-border basis (Taillon, Beck & Rihm, 2010). If, however, based on the application of the mutual recognition, a cross-border phenomenon over time will exceed a defined de minimis level, e.g. when the exception tends to becomes the rule, it will then be ripe for the other alternative which is harmonization at EU level. This could indeed lead to a new understanding of the laboratory role that cross-border territories might play for the future of both the EAS and European integration.

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POVZETEK

1.01 Originalni znanstveni članek

Čezmejno sodelovanje in evropski upravni prostor – perspektivnost načela vzajemnega priznavanja

Koncept evropskega upravnega prostora (EAS – *European Administrative Space*) je v zadnjih 30 letih evropske integracije pritegnil večje zanimanje tako akademskih krogov kot praktikov. Prvotno je bil neposredno povezan s pojmom neprestano intenzivnega povezovanja evropske vlade in je tako predpostavljal/napovedoval proces vedno večjega zbliževanja in usklajevanja različnih nacionalnih upravnih sistemov v smeri bolj enotnega referenčnega modela v Evropi, nenehno se je razvijal skozi čas, zdaj pa se ga obravnava v luči širše perspektive evropskega upravljanja. Transnacionalne upravne odnose je mogoče razumeti kot poseben horizontalni vzorec EAS – pa naj bo to na ravni dvostranskih meddržavnih odnosov, ali – na kar se osredotoča ta članek – v obliki čezmejnega sodelovanja med upravnimi enotami, ki prihajajo iz obmejnih območij dveh ali več sosednjih držav.

Obmejna območja imajo pomembno vlogo znotraj okvirja evropske integracije: 40 % ozemlja EU pokrivajo obmejna območja in približno 30 % prebivalstva EU živi tam. Od 362 regij, registriranih pri Svetu Evrope, in njenih 47 držav članic je več kot 140 čezmejnih območij. Učinke napredovanja evropske integracije lahko proučujemo tukaj: horizontalna mobilnost blaga, kapitala in ljudi je zelo očitna v obmejnih regijah, očitne pa so tudi preostale ovire za to horizontalno mobilnost. To je razlog, zakaj obmejna območja pogosto opisujejo kot laboratorije evropske integracije.

V resnici pa se čezmejno sodelovanje še vedno sooča in se včasih znajde celo v nasprotju z načelom teritorialne suverenosti posamezne nacionalne države. Zato celo pravni instrumenti, namenjeni boljšemu strukturiranju čezmejnega sodelovanja z ustvarjanjem sodelovalnih združenj z ustrezno pravno osebnostjo, kot je na primer novoustanovljeno Evropsko združenje za teritorialno sodelovanje (EZTS) ali evro-regionalno sodelovalno združenje (ECG), ki ga je ustanovil Svet Evrope na podlagi 3. protokola k Evropski okvirni konvenciji, ne omogočajo neodvisnega transnacionalnega področja delovanja: kar se tiče proračunskih pravil, socialnega prava, obdavčenja, pravnega nadzora itd. Podrobnosti praktičnega delovanja EZTS so povsem odvisne od domačega prava države, za katero se je transnacionalno združenje končno odločilo, da bo tam njegov pravni sedež.

Pomemben element v tej perspektivi je dejstvo, da večina pravnih področij, ki so pomembna za čezmejno sodelovanje, ostaja v obsegu kompetenc države članice: zdravstveno varstvo, mestno in posebno načrtovanje, javni prevoz, socialna varnost, davki, trg dela – politike, znanstvene raziskave in razvoj, varstvo okolja, izobraževanje in usposabljanje, stanovanja itd. bodisi sploh niso usklajeni na nadnacionalni ravni bodisi temeljijo na konceptualnih

pristopih EU-politik, vendar se izvajajo preko nacionalnega prava in s tem *de facto* reproducirajo – in implicitno tudi krepijo – obstoječe nacionalne sisteme in standarde. Z vidika čezmejnega sodelovanja to vodi v številne pomembne praktične ovire. V nedavni študiji, ki jo je izdal Svet Evrope, je bilo prepoznanih več kot 160 takih ovir (COE/CDLR 2013), ki jih je mogoče preučevati na novoustanovljeni spletni strani EDEN. Poleg ekonomskih in drugih ovir imajo osrednjo vlogo pravne in upravne ovire. Čezmejni akterji se na splošno strinjajo, da je pravna zbirka orodij za čezmejno sodelovanje tako na evropski kot na nacionalni ravni ter v zvezi z javnim in zasebnim pravom dobro razvita – vendar je pri tem še vedno glavni izziv najti skupne izvedbene določbe. Neprilagodljiv domači pravni okvir in različni politično-upravni sistemi na nacionalni ravni so tisti, ki veljajo za glavni izziv čezmejnega sodelovanja. Poleg tega pogosto velja, da je težko/nemogoče dejansko prenesti pravilno izvajanje funkcij na obstoječe čezmejne organe na področju javnega prava zaradi različnih domačih nadzornih sistemov.

V preteklosti čezmejna uprava ni bila sposobna v resnici premagati teh pravnih in upravnih ovir. Zlasti na področju upravnega prava je bilo le malo ali nič možnosti za nadomestitev pomanjkanja evropske uskladitve prek dvostranskih inovacij, razvitih na čezmejni ravni. Sodna praksa Sodišča evropskih skupnosti (SES) je tako imela pomembno vlogo kot motor integracije pri opredelitvi in/ali uporabi novih sektorskih čezmejnih načel na področjih, kot so zdravstveno varstvo, socialna varnost, obdavčitev, priznavanje diplome in akademskih stopenj itd. Eno načelo, ki ga je razvilo Sodišče evropskih skupnosti in ki je veliko bolj temeljnega pomena za delovanje evropske zgradbe, je načelo vzajemnega priznanja. To načelo do sedaj še ni bilo uporabljeno na primeru javnega čezmejnega sodelovanja, vendar ima lahko – kot kaže članek – velik potencial za premagovanje mnogih praktičnih sistemskih ovir, ki so še vedno značilne za nadnacionalno razsežnost evropskega upravnega prostora.

Odprava tehničnih ovir za prost pretok blaga je eden od glavnih ciljev notranje tržne politike Evropske unije: Člen 34 TFEU prepoveduje ovire za prosto trgovino, Člen 36 TFEU pa podaja zaprt seznam opravičil za take ovire. Eden od načinov za zagotavljanje prostega pretoka blaga na notranjem trgu – poleg načela nediskriminacije (prepoved ohranjati določene državne ukrepe, ki otežujejo trgovino med državami članicami) in načela prostega dostopa do nacionalnega trga (onkraj diskriminacije, nemogoče ohraniti državne ukrepe, ki znatno omejujejo možnost prodaje izdelka ali storitve na drugi trg) – je načelo vzajemnega priznavanja. Načelo izhaja iz sodne prakse Sodišča evropskih skupnosti in se uporablja za izdelke, ki niso predmet usklajevalne zakonodaje Skupnosti, ali za vidike izdelkov, ki ne sodijo v področje uporabe te zakonodaje (tako imenovane neusklajene proizvode). V skladu s tem načelom »država članica na svojem ozemlju ne sme prepovedati prodaje proizvodov, ki se zakonito tržijo v drugi državi članici, tudi če so bili ti proizvodi proizvedeni v skladu s tehničnimi pravili, ki se razlikujejo od tistih, ki veljajo za domače proizvode.« Samo na podlagi zelo pomembnih razlogov javnega interesa, ki so sorazmerni z zastavljenim ciljem, lahko država članica zavrne prost

pretok ali upraviči notranjo ureditev ali tehnično specifikacijo, ki nasprotuje temu načelu.

Ključni element vzajemnega priznavanja, kot izhaja iz doktrine *Cassis de Dijon*, je pojem funkcionalne enakovrednosti, ki lahko dejansko prispeva tudi h krepitvi nadnacionalne razsežnosti EAS. Predviden element tukaj bi bilo iti dlje od perspektive primera do primera v povezavi s horizontalno mobilnostjo oseb, storitev kapitala in blaga ter razviti integrirano transnacionalno – npr. čezmejno perspektivo. Načelo lahko prinese jasnost v številnih čezmejnih situacijah, v katerih neproduktivno podajanje naprej in nazaj med sosednjimi upravami *de facto* vodi k visoki ravni rdečega posilstva in upravnega bremena, kar povzroča, da so čezmejne dejavnosti še vedno precej manj privlačne od domače usmerjenosti – tako z vidika posameznih (državljani, migranti, podjetja) kot korporativnih (javne in zasebne organizacije) akterjev. V kombinaciji z načelom sorazmernosti (samo, kjer je to smiselno in primerno, se bo uporabljalo vzajemno priznavanje) ima vzajemno priznavanje velik potencial za izboljšanje nadnacionalnega in čezmejnega sodelovanja, še posebej, ko temelji na medsebojno dogovorjenih stopnjah *de minimis*.

Kar zadeva tipične problematične konstelacije – ki hkrati predstavljajo posebne vrste transnacionalnega sodelovanja – se zdijo naslednja področja uporabe načela vzajemnega priznavanja obetavna v okviru čezmejnega sodelovanja: Poenostavitev mobilnosti državljanov, poenostavitev upravljanja organov CBC, spodbujanje razvoja čezmejnih skupnih služb, optimizacija tematskega sodelovanja med sektorskimi upravami.

Načelo vzajemnega priznavanja je bilo pogosto kritizirano zaradi svoje nevarnosti za mehčanje standardov glede na nižjo raven enega od sodelujočih partnerjev. To dejansko lahko predstavlja tveganje, ko gre za vprašanje prostega pretoka takih proizvodov, ki so bili proizvedeni v skladu z nižjimi socialnimi in/ali okoljskimi standardi – vprašanje, o katerem se je še posebno razpravljalo v okviru procesa političnega odločanja v Direktivi o storitvah Bolkestein. Vendar članek trdi, da načela vzajemnega priznavanja ne smemo interpretirati z enosmernega vidika. Kot ponazarja že sam izraz, je o njegovi vsebini vedno treba razpravljati vzajemno in se prostovoljno odločati na bi- ali multilateralni ravni. To je razlog, zakaj ima poseben potencial v primeru transnacionalnega sodelovanja znotraj okvirja EAS. Za razliko od uporabe na ravni držav članic bi omejitev za posebne potrebe čezmejnih ozemelj v Evropi lahko tako olajšala njegovo uporabo kot preprečila njegove morebitne negativne posledice. Po drugi strani pa to poudarja potrebo po tesnejšem sodelovanju med takimi sosednjimi državami članicami, ki so ga pripravljene uporabiti na določenem čezmejnem območju.

Pojem zaupanja in bližine – oboje je pogoj za izgradnjo socialnega kapitala – je običajno bolje podan v čezmejnem kot v bolj globalnem meddržavnem kontekstu: pri tem ne gre za anonimno upravo, ki prosi za vzajemno priznanje tujih postopkov, ampak za upravo »najbližjega soseda«, katere akterji se lahko zlahka naučijo, kje lahko pride do izmenjave tako praks kot osebja na formalni in neformalni ravni in kje je mogoče vzpostaviti in usposobiti upravne

zmogljivosti za učinkovito reševanje težav čezmejnih politik na strokoven in prilagodljiv način. Po drugi strani pa je očitno, da je upravna zakonodaja še vedno tesno povezana s klasičnim konceptom teritorialnosti. Vprašati se je potrebno, ali so države članice pripravljene iti preko tega načela in začeti odprt premislek o vzajemnem priznavanju, da bi razvile njegove potenciale v okviru čezmejnega sodelovanja. Močan protekcionistični odnos tako držav članic kot nekaterih podjetij na področju neusklajenega blaga in potreba, da bi Komisija skupaj z uredbo iz leta 2008 sprožila ustrezno politiko vzajemnega priznavanja, kaže na močno nasprotovanje, do katerega lahko pride. Istočasno pa to kaže, da je načelo vzajemnega priznavanja v resnici zelo pomenljiv in močan koncept. Prav zato pa mora biti ključna beseda za uporabo vzajemnega priznavanja v nadnacionalnem čezmejnem kontekstu njegova podlaga dokazov. Izvesti bo potrebno predhodne ocene učinka za določitev področja in obsega smiselnega izvajanja, zlasti v zvezi z opredelitvijo prave stopnje *de minimis*, ki dopušča njegovo uporabo na čezmejni ravni. Če pa bo čezmejni pojav na temelju uporabe vzajemnega priznavanja sčasoma presegel določeno stopnjo *de minimis*, npr. ko izjema postane pravilo, bo postal zrel za drugo alternativo, ki je usklajevanje na ravni EU. Ta perspektiva lahko privede do novega razumevanja laboratorijske vloge, ki bi jo čezmejna ozemlja lahko imela za prihodnost tako EAS kot evropske integracije.