WAGENINGEN
UNIVERSITY & RESEARCH

August 8, 2019

MSc Thesis

LAW-80436, Law and Governance group, 36 ECTS

Mutual Recognition of Food Information

How does mutual recognition work and is it a suitable concept for the area of food information?

Carmen Lok – 950805526060

Mutual Recognition of Food Information

How does mutual recognition work and is it a suitable concept for the area of food information?

Carmen Lok – 950805526060

Master Food Safety
Specialisation Food Law and Regulatory Affairs

Chair Group: Law and Governance group
Course code: LAW-80436 – 36 ECTS

Supervisor and First Examiner: dr. Kai P. Purnhagen LL.M.
Second Examiner: dr. Hanna Schebesta

August 8, 2019

Image frontpage: (Micromax Design and Consulting Inc., 2019).

WAGENINGEN
UNIVERSITY & RESEARCH

Acknowledgements

I would hereby like to thank my supervisor Kai Purnhagen and examiner Hanna Schebesta for providing helpful feedback that aided me to improve the content of this thesis. During the courses they taught they have sparked my interest for the field of food information as well as for the principle of mutual recognition. Furthermore, I would like to express my gratitude to everyone who has supported me and listened to me during this challenging period. Because of them, I was able to persevere and can now proudly present the outcome of my research in this thesis.

Carmen Lok
August, 2019

Abstract

Due to the eagerness of Member States to regulate the area of food information, national differences exist that hinder the free movement of goods and deprive businesses and consumers of the benefits a Single Market can provide. The purpose of this thesis is to determine how the principle of mutual recognition works and whether it is a suitable concept for the area of food information. By using doctrinal research, it was investigated how mutual recognition was established and how its legal basis has evolved, the influence the establishment had that affected food information law, and the functioning of the principle in the area of food information. Mutual recognition has made positive improvements to the free movement of goods, but due to a lack of application and enforcement and failure to justify and notify national measures, inconsistences between Member States' rules are still present. Furthermore, the interpretations and unofficial standards on food information that are being enforced by national authorities and organisations hinder the free movement of food. This thesis identified the issues mutual recognition faces in the area of food information but further research is needed to determine if mutual recognition is the best solution for coping with national measures on food information in practice, and if so, how the use of the principle can be strengthened in this particular area.

Keywords: mutual recognition, food information, national measures.

Summary

Creating a Single Market or internal market has been the European Union's (EU) most ambitious plan and their greatest achievement. The EUs internal market aims, among others, at creating an area without internal frontiers where goods can move freely. Food law has always been at the core of Single Market law and it is food information law that is predominantly regulating the area of food. The area of food has the complex task to balance the free movement of goods with the protection of the consumer. Currently, there are still important differences between the Member States' food laws that may impede the free movement of food or create unfair competition and thereby affect the functioning of the internal market.

Member States are still eager to have control and the food sector is the leading area where they want to regulate on a national level. Food information is a sensitive area because it directly affects all EU citizens. Additionally, the current food information law system is not sufficiently taking the Member States' different interests into account. As a result, national differences still exist. The principle of mutual recognition is supposed to overrule these differences to facilitate free trade. However, because food companies are being pressured to comply with national rules and because food information law has many grey areas, the Single Market remains a concept that is marked by heterogeneity. These differences cause non-tariff barriers to trade that hinder the free movement of goods within the EU, which will diminish competition and counteracts the aim of the Single Market.

In the history of European integration, attempts to develop the Single Market aimed at facilitating decision making. Additionally, the Court contributed to the proper functioning of the Single Market by declaring national rules incompatible with the Treaties. This was shown in *Dassonville* where every measure that had even the mere potential of restricting the free movement of goods was prohibited, as well as in *Cassis de Dijon* where all goods would be legal regardless of the national system or technical standards they complied with. These developments in favour of the free movement of goods were intrusive on the Member States' sovereignty as they had to accept decisions made by others, sometimes without limitation. The judgement in *Cassis de Dijon* that established the principle of mutual recognition became so important for the EUs development that the ruling gained regulatory status in the Mutual Recognition Regulation.

The establishment of mutual recognition has had various effects on the area of food information. It allowed exemptions to the restriction of measures having equivalent effect to quantitative restrictions, which includes the main goal of food information law: consumer

protection. By removing national barriers to trade that could not be justified as an exemption, mutual recognition caused more extensive deregulation than was meant by the TFEU. The issues that were caused by excessive deregulation led to horizontal regulation – also in the area of food information – which proved to be more successful in facilitating the free movement of goods than the prior vertical standards. The ruling in *Cassis de Dijon* also led to the information paradigm or permit but inform strategy that formed the basis on which EU food information law is build.

Mutual recognition has had great influence on the area of food information as well as on the functioning of the EUs internal market by ensuring that Member States maintain part of their sovereignty by giving them the right to apply their regulatory diversity to domestic products and uphold these rules on imports when they can be substantiated to protect the public interest. However, the general lack of awareness of mutual recognition and its functioning have led to weak application and enforcement of the principle. This in turn has affected the mutual trust between Member States, which is a prerequisite for the functioning of mutual recognition. In addition, national measures are often not properly justified or notified but yet are still being upheld. This causes restrictions to the free movement of goods to still be in place. Additionally, unofficial national measures, such as interpretations from national competent authorities and industry guidelines, contribute to the legal uncertainty in this area, creating difficulty for companies to freely bring their product onto several markets.

This thesis identified the issues that mutual recognition faces in the area of food information. Before the identified problem areas have been improved, a clear conclusion on the suitability of mutual recognition for this area in practice cannot be drawn. It is currently too soon to establish whether the recent actions taken by the Commission to strengthen the awareness and application of mutual recognition, as well as the general enforcement of EU law have the desired effect. Generally, the system surrounding mutual recognition that was set in place to ensure its proper functioning, such as the TRIS database, should be simplified to make it easily understandable for those that do not have extensive knowledge of (EU) law. A practical research is needed to gather primary data on the suitability of mutual recognition specifically for the area of food information. If the principle of mutual recognition turns out not to be suitable for this area, it may be necessary to achieve the goal of protecting the consumer while facilitating free trade without mutual recognition.

Table of Contents

List of abbreviations

ECJ or the Court	European Court of Justice
EU	European Union
FBO	Food Business Operator
FIC	Regulation (EU) 1169/2011 on Food Information to Consumers
GATT	General Agreement on Tariffs and Trade
GFL	Regulation (EC) 178/2002, known as the General Food Law
GMO	Genetically Modified Organism
MRR	Regulation (EU) 515/2019 on Mutual Recognition
NHCR	Regulation (EC) 1924/2006 on Nutrition and Health Claims
old MRR	Regulation (EC) 764/2008 on Mutual Recognition
PCP	Product Contact Point
RASFF	Rapid Alert System for Food and Feed
SOLVIT	Internal Market Problem Solving System
SPS (Agreement)	(Agreement on) Sanitary and Phytosanitary measures
TBT (Agreement)	(Agreement on) Technical Barriers to Trade
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIS	Technical Regulations Information System
UCPD	Directive 2005/29/EC, known as the Unfair Commercial Practice Directive
WTO	World Trade Organization

Chapter 1

Introduction

1.1 Introduction

Creating a Single Market[1] has been the European Union's (EU) most ambitious plan and their greatest achievement (European Commission, 2018; Chapman, 2018). The internal market was established in **Article 3(3)** of the **Treaty on the European Union** (TEU) which laid down that:

> *"[the internal market] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."*

One aspect of the internal market it highlighted in **Article 3(2) TEU** and **Article 26** of the **Treaty on the Functioning of the European Union** (TFEU) where the internal market is described as an area without internal frontiers. The **Preamble** of the **TFEU** outlines that the internal market is aimed at strengthening the Union, harmonising to diminish differences between its Members and elevating the restrictions on trade. What contributed to the creation of the Single Market was the establishment of the four fundamental freedoms[2], including the free movement of goods. When the EU created a Single Market, goods accounted for 70% of the trade, making them the primary focus of the free movement rules that were laid down in the **TFEU** (European Commission, n.d.-a; European Commission, n.d.-b)**.** As food or foodstuffs can be subject to commercial transactions and can be valued in money, they fall within the category of 'goods'[3] (Purnhagen & Schebesta, 2019).

Title II TFEU on the free movement of goods covers the provisions that are supposed to ensure free movement and thereby facilitate the functioning of the Single Market. With the main objective of the Single Market being liberalising trade within the EU, many rules were harmonised and the provisions on the free movement of goods were aimed at preventing unjustified barriers to trade (European Commission, n.d.-a; European Commission, n.d.-b). Under the **TFEU**, not only a customs union was created where tariff barriers were removed, but also non-financial barriers were prohibited under **Article 34 and 35 TFEU.**

[1] In this thesis, internal market and Single Market are used interchangeably.

[2] The four fundamental freedoms include the free movement of goods, persons, services and capital (Article 26(2) TFEU).

[3] As established in Case 7/68, *Commission of the European Communities v Italian Republic,* ECLI:EU:C:1968:51.

As Margaret Thatcher[4] (1988) mentioned in her infamous Bruges speech during the opening of the Single Market Campaign, not the classic barriers of tariffs but rather the barriers caused by diverging national standards are the ones that create difficulty in achieving a Single Market. These so-called non-tariff barriers form the major obstacles to trade (Cuyvers, 2017). By removing borders and regulatory obstacles between its Members, the Single Market has brought several advantages to the European businesses and consumers. Integration of the Single Market has led to more choice for consumers, increased competition, encouraged innovation and quality, and lower prices (European Commission, 2018; European Parliament, 2019). The European Council recognised in the **Edinburgh Guidelines**[5] that the internal market is ever evolving and must be adapted and improved to fit the changing circumstances.

The EUs food market is a heavily regulated, complex legal area that tries to balance the free movement of goods with the protection of the consumer (Rørdam, 2013; Unberath & Johnston, 2007). Food law has always been at the core of Single Market law and is highly harmonised within the EU (Purnhagen, 2014; Rørdam, 2013). **Regulation (EC) 178/2002**, commonly called the General Food Law (GFL), includes besides a high level of protection of consumer interests also the main objective of the Single Market by aiming at the free movement of safe food.

Trade in goods covers the biggest part of intra-union trade with food products being included in the top five of the most exported products[6] (Eurostat, 2019). As integrative steps are more likely to be taken in areas where Member States trade more, it is not surprising that **Regulation (EU) 1169/2011** on Food Information to Consumers (FIC) is the most well-known EU legislation that has harmonised an area at the European level (Lelieveldt & Princen, 2015, p. 32; De Witte, 2014). Even though it consists of a complex web of different legislation and standards, it is food information law that is predominantly regulating the area of food (Purnhagen & Schebesta, 2019).

[4] Margaret Thatcher was the Prime Minister of the United Kingdom during the developing years of the EU (1979-1990) (Margaret Thatcher Foundation, 2019). Even though she was critical of the EU, she was not anti-EU (Austrian Economics Center, 2019).

[5] The Edinburg Guidelines were created during a meeting of the European Council in the Scottish Edinburgh on 11 and 12 December 1992 to discuss major issues on the European Community's agenda.

[6] Food has been part of the top five of most exported goods within the EU from 2014 to 2018 behind Motor vehicles, trailers and semi- trailers, Chemicals and chemical products, Machinery and equipment n.e.c, and Computer, electronic and optical products (Eurostat, 2019).

The definition of food or foodstuffs as established in **Article 2 GFL** includes any substance or product that can 'reasonably expected to be ingested by humans'[7]. The most important requirement of food law, laid down in **Article 14 GFL**, is that food shall not be placed on the market if it is unsafe, with regards to *inter alia* the information provided to the consumer. As per the **FIC**, food information means:

> *"[i]nformation concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication".*

Food information has its nature in consumer law (Purnhagen & Schebesta, 2019). Because it is difficult to establish the level of knowledge or understanding a consumer has, the *average consumer benchmark* was established. **Recital (18)** of the **Unfair Commercial Practices Directive**[8] (UCPD) describes the average consumer as someone who is 'reasonably well-informed' and 'reasonably observant and circumspect'. It provides food companies with an expectation of the type of consumer their food information should be aimed at but is a normative benchmark as consumer behaviour is hard to predict and may vary depending on the circumstances (Unberath & Johnston, 2007; Schebesta & Purnhagen, 2017). **Article 8 GFL** lays down the protection of consumer's interests by stipulating:

> *"[f]ood law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume."*

This article finds its ground in **Article 169 TFEU** on consumer protection, which establishes that the EU has to promote the right to information of consumers to ensure a high level of protection. As food information is already harmonised and provides consumer protection by laying down the minimum labelling requirements, Member States do not have much room to intervene (Rørdam, 2013). Nonetheless, **Recital (4) GFL** explains that there are important differences in the Member States' food laws and that these may impede the free

[7] As established in Case 83/78, *Pigs Marketing Board v Redmond* ECLI:EU:C:1978:214 agricultural products fall under the Common Agricultural Policy (CAP), which takes precedence over other common market rules. This research therefore does not include agricultural products when addressing 'food' or 'foodstuffs'.

[8] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

movement of food or create unfair competition and thereby affect the functioning of the internal market. The principle of mutual recognition as established in *Cassis de Dijon*[9] that determines Member States must in principle allow goods onto their market that can be legally produced and marketed in one of the other Member States, is a tool that can be deployed to ensure the functioning of the internal market and the free movement of goods (Kidmose, Sylvest, Culver, Teichler, Kosk & Männik, 2015).

[9] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* ECLI:EU:C:1979:42.

1.2 Problem statement

With continuous development and the involvement of many national views, achieving a Single Market where Member States can trade freely does not exist without challenge (European Commission, 2018; European Parliament, 2019). Member States are still eager to have control and the food sector is the leading area where they want to regulate on a national level (De Brito & Pelkmans, 2012). Food information is a sensitive area because it directly affects all EU citizens (Rørdam, 2013). The current food information law system is not sufficiently taking the Member States' different interests into account, leading to national differences (De Brito & Pelkmans, 2012; Purnhagen & Schebesta, 2019; EU Food Comply, n.d.). Mutual recognition is supposed to overrule these differences to facilitate free trade (Van der Meulen, 2014, p. 205). However, Member States uphold their national measures because they want to protect their domestic production (Kidmose et al., 2015; World Trade Organization, 2012; Öberg, 2016). Additionally, food information has many grey areas leading to different national interpretations (BEUC, 2014; Jacobsen, 2015). This shows that even in the highly harmonised area of food information there is room for Member States to regulate and the Single Market remains a concept that is marked by heterogeneity (Rizcallah, 2019; Ankersmit, 2013; Weatherill, 2017-b).

According to **Article 3(3) GFL**, it is the food business operator (FBO) who is responsible for ensuring that their business meets the requirements of food law. **Recital (30) GFL** explains that competent authorities of the Member States perform control activities to ensure the FBOs fulfil their responsibilities. Food companies are being pressured to comply with national legislation or interpretation, complicating the legal landscape and making it difficult for them to freely market their products within the EU (Kidmose et al., 2015). A food company's biggest concern is often not related to liability but rather to the PR risk they may be exposed to (Chasen, 2018). As a result, they rather adapt their products to the national markets to avoid facing costly legal procedures and to prevent the loss of consumer trust (Fortuna, 2019; Kidmose et al., 2015; Chasen, 2018).

National differences cause non-tariff barriers to trade and hinder the free movement of goods on the EUs market (Kidmose et al., 2015). It is possible that traders, especially smaller ones, will give up on trying to access a certain market when faced with these obstacles (Weatherill, 2017-a). Diminished competition will in turn lead to economic inefficiency, higher costs and prices and limited choices for consumers. The restrictions on trade that these national measures on food information cause are counteracting the aim of the EUs Single Market (Allen, Gasiorek & Smith, 1998; European Commission, n.d.-b).

1.3 Research design and scope

This thesis is the result of extensive literature research. It is a qualitative research concerning the principle of mutual recognition, particularly in the area of food information. The objective of this research is to determine whether mutual recognition is a fitting principle for the area of food information and to give recommendations to improve its functioning in this area. As there are still many national differences in the area of food information law that impede the free movement of goods, the question that remains is: *How does mutual recognition work and is it a suitable concept for the area of food information?*

Chapter 2[10] focuses on why and how the principle of mutual recognition was established by looking at the history of EU integration, the events that contributed to the establishment of mutual recognition and the development of its legal basis. Chapter 3[11] continues by outlining the changes that mutual recognition caused and the influence it had, particularly in the area of food information. Finally, Chapter 4[12] evaluates how mutual recognition and the aspects related to it are being used in the area of food information. This last chapter has some overlap with the first two chapters because Chapter 4 includes an evaluation of how certain aspects described in Chapter 2 and 3 are being used in practice. The thesis will conclude with policy and research recommendations.

To answer the research questions the method of doctrinal research was used. Doctrinal research looks at the reforming of the law over time since it is required to change according to the circumstances to fit the new challenges that society is facing. It is a form of pure theoretical research, using secondary data from legal history, case law and reports of committees, among others (Gawas, 2017). The society aspect does not only apply to the EU as a society but also to the local societies of the Member States that established (additional) legal measures on food information. The literature used in this research are primarily published articles in European food law related journals, books related to the EU, food law and/or trade, and researches issued by European institutions. Eur-Lex, N-Lex and the national governmental and competent authority websites were used to consult the relevant guidelines, legislation and case law.

---

[10] Sub-question 1: How was the principle of mutual recognition established and how has the legal basis evolved as a result?

[11] Sub-question 2: What changes has mutual recognition caused, particularly in the area of food information?

[12] Sub-question 3: How is mutual recognition being used and what difficulties does it face in the area of food information?

For the research at hand 'food information' will include the **FIC** as food information law, as well as **Regulation (EC) 1924/2006** on Nutrition and Health Claims (NHCR), which according to **Recital (3)** compliments the **FIC**[13] and states that nutrition and health claims should comply with the general labelling provisions as laid down in the **FIC**. Additionally, 'food information' will also include national measures on food information, as well as interpretations and guidance by authorities and organisations that are not necessarily law. This research excludes more specific regulations on other topics that also include food information, such as **Regulation (EU) 2018/848** on the production and labelling of organic products to limit the scope and ensure feasibility.

The research is about mutual recognition on food information within the EU. Extra-Union trade will not be part of this research. The World Trade Organization (WTO) of which the EU and its 28 Member States are a part will be used as a source for general information regarding (barriers to) trade but its Agreements that are applicable to the area of food such as the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) do not fall within the scope of this research.

[13] Then still Directive 2000/13/EC.

Chapter 2

Establishment and Evolution of Mutual Recognition

How was the principle of mutual recognition established and how has the legal basis evolved as a result?

2.1 A brief background on European integration

The EU is a supranational organisation, meaning that its Members have pooled their sovereignty to allow for joint decision-making. Entering into internationally binding agreements is something countries do not undertake without hesitation. As the currently still 28 Member States of the EU are aware, it includes a limitation on a country's sovereignty and freedom to act (Schebesta, Van der Meulen & Van der Velde, 2014, p. 76, p.100; Lelieveldt & Princen, 2015, p. 7). When a Member State decides to confer their sovereignty in a certain area to the EU, they also entrust the EU with legal supremacy, which is a necessity when trying to reach integration between many sovereign states. It means that EU law takes precedence over national law when they are contradicting. Some scholars believe that Member States did not give up their sovereignty by joining the EU but simply chose to exercise their sovereignty in a different way (Tokár, 2001; Avbelj, 2011). As **Article 4(2) TEU** lays down:

> *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."*

Albeit European integration should not be taken too far with respect to sovereignty, as Member States have voluntarily joined the EU, they are not against integration either (Purnhagen, 2014; Sterck, 2018). A balance needs to be found between purely domestic sovereignty and sovereignty that is in favour of European integration and wants to see EU law enforced at a domestic level. Ergo, the 'national identity' that **Article 4(2) TEU** speaks of has transformed by joining the EU (Tokár, 2001; Sterck, 2018). To prevent integration from intruding to deeply into the Member States' sovereignty, the EU only has the authority to make decisions in areas where Member States have given up their sovereignty, as is generally the case with the area of food (Schebesta, Van der Meulen, Van der Velde, 2014, p. 76, p.100; Lelieveldt & Princen, 2015, p. 7).

During the starting years of the European Community, integration was approached with caution by trying to reach unanimity on all harmonisation decisions. This positive harmonisation aimed to create similar standards for all Member States and to remove national differences that are capable of distorting competition (Van der Meulen, 2014, p. 205; Öberg, 2017). To create a level regulatory playing field standards were harmonised through (mostly vertical) legislation that provided detailed rules at a product level. Harmonised rules increase consumer confidence as they can shop across borders while knowing what to expect and therefore serve the functioning of the internal market (Rørdam, 2013; Unberath & Johnston, 2007). Once the internal market started to change and

became more modern with more variety in goods, this 'old approach' was no longer suitable (Messerlin, 2011).

When harmonisation soon appeared to be too time consuming and sometimes even impossible, more rapid *integration through law* was used to reach integration (Glinski & Joerges, 2014, p. 287). *Integration through law* was partly reached by the introduction of the **Single European Act**, or SEA, which revised the Treaty of Paris and the Treaty of Rome. The **SEA** facilitated decision-making in all policy areas of the internal market by prescribing decision-making by majority vote instead of unanimity with the goal to remove trade barriers (Lelieveldt & Princen, 2015, p. 16; Schebesta & Van der Velde, 2014, p. 129). In the **Edinburgh Guidelines** it was said that the introduction of quality majority voting was proven indispensable for the timely completion of the internal market. Introducing quality majority voting might suggest that decisions to create a Single Market are not important enough to impose a challenge to sovereignty. However, all EU harmonisation decisions influence the Member States and by introducing quality majority voting they lose a part of the control that they previously had (Tokár, 2001; Rørdam, 2013). It also led to more EU legislation to which the Member States were subject as it became easier to adopt decisions (Rørdam, 2013).

The **SEA** also recognised consumer protection as a legitimate reason to harmonise and facilitate free trade. This was important for the area of food information as food information is used to prevent misleading and adequately inform the consumer about the food that is marketed. Nonetheless, extensively harmonising under the guise of correcting market failures and protecting the consumer is not acceptable (Rørdam, 2013; Unberath & Johnston, 2007).

In addition to the **SEA**, several famous ECJ judgements have contributed to *integration through law* (Glinski & Joerges, 2014, p. 287). With the ECJ having the ability to not only apply and interpret EU law but also contribute to its development, they took on an important role in harmonising the law on the EUs Single Market. By applying negative harmonisation through declaring national rules incompatible with the Treaties, the ECJ ensured the proper functioning of the Single Market and facilitated free trade (European Parliament, 2017). This negative integration driven by the Court could be even more intrusive to Member States' sovereignty than vertical integration as it requires Member States to accept choices made by others, sometimes without limitation (Rizcallah, 2019).

2.2 The Dassonville formula

The establishment of mutual recognition was, although radical, not abrupt. The EUs legislative environment and ECJ decisions prior to *Cassis de Dijon* formed the foundation for the ruling either because it presented a continuation of the line of judgement or because it provided a break from it (Purnhagen, 2014). This is in particular true for the judgement made in *Dassonville*[14]*,* a case prior to *Cassis de Dijon,* which had a significant influence on deregulating the market and facilitating free trade (Glinski & Joerges, 2014, p. 287).

With it being the second most cited case by the ECJ[15], *Dassonville* is seen as a top judgement and one that is key when it comes to European integration (Derlén & Lindholm, 2014; Schütze, 2018). *Dassonville* concerns **Article 34 TFEU**, which states that quantitative restrictions on imports and measures having an equivalent effect to quantitative restrictions are prohibited. The case took place in 1974 when a public prosecutor instituted proceedings against Benoit and Gustave Dassonville, a father and son who imported *Scotch Whisky* from France to bring onto the Belgian market. They were prosecuted for forging certificates of origin on the whiskey, which were required to accompany the product under Belgian law. In this case, the ECJ interpreted **Article 34 TFEU** as follows:

> *"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."*

This interpretation became known as the *Dassonville formula* and is a fundamental judgement in favour of free trade (Kidmose et al., 2015). It was seen as giving a broad meaning to 'measures having equivalent effect' and became an effective tool in deregulation as it enabled traders to challenge any national rule that had even the mere potential of restricting the free movement of goods (Van der Meulen, 2014, p. 203; Schutze, 2018). It meant that all national laws which had not yet been harmonised at EU level would be subject to judicial scrutiny under **Article 34 TFEU,** even those that were not protectionist or discriminative against foreign products (Purnhagen, 2014; Schütze, 2018). The deregulation put great weight on the judicial means to construct an internal market instead of having EU law play a supplementary role in the process (Weatherill, 2014). After

[14] Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

[15] Meaning that the Court used it as a source of law in other cases (Derlén & Lindholm, 2014).

Dassonville, the effect on the Member States sovereignty was even deeper because the trading rules that were brought to the Court often had a very limited effect on trade (Purnhagen, 2014).

According to the **Edinburgh Guidelines** the most central justification for EU action is the need to maintain and create an internal market. The internal market justification is very broad because any difference in national law can be seen as a barrier to trade. It is not only the likelihood of risks of obstacles that matter but whether the measure is *capable* of affecting cross-border trade. In contrast to the *Dassonville* formula, this would mean that potential obstacles are too uncertain and indirect to fall within the scope of the EUs power to regulate the internal market. In the case *Tobacco Advertising*[16] this was confirmed as 'abstract' cross border effects or risks to free movement were not seen as sufficient to take action at EU level (Öberg, 2017).

[16] Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:2000:544.

2.3 Mutual Recognition as established in Cassis de Dijon

One judgement that had the power to change internal market law and still forms the cornerstone of the EUs Single Market was established in a leading case concerning the free movement of goods (Purnhagen, 2014). The French Rewe-Zentral AG wanted to market fruit liquor, called Cassis de Dijon, in Germany but was not allowed to do so according to the Bundesmonopolverwaltung für Branntwein. The Bundesmonopolverwaltung found that the alcohol percentage was too low for it to be marketed as liquor and that this would mislead the consumer. Rewe-Zentral AG went to the ECJ, which ruled in favour of the plaintiff stating:

> *"There is […] no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [goods] should not be introduced into any other Member State."*

With this famous ruling the ECJ established the principle of mutual recognition: a form of negative harmonisation where all goods would be legal, regardless of the national system or technical standards they complied with (Van der Meulen, 2014, p. 205; Messerlin, 2011). However, simply eliminating national laws may threaten other values such as consumer protection (Lelieveldt & Princen, 2015, p. 190). Where the judgement in *Dassonville* stated that all national measures that had the possibility of obstructing trade would need to be removed, *Cassis de Dijon* brought a more lenient view by providing exemptions[17] when disparities between national laws would be allowed (Schütze, 2018). The exemptions covered trade barriers necessary to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. Albeit mutual recognition was established in a case concerning foodstuffs, it forms an important judgement for all areas of the internal market (Purnhagen, 2014).

According to **Article 114 TFEU**, any national measure may be harmonised if this contributes to the functioning of the internal market (Weatherill, 2014). As evidence of a correlation between national divergences and barriers to trade is non-existent, the divergences alone are not enough reason to justify harmonisation at EU level (Öberg, 2017). *Cassis de Dijon* introduced a decentralised approach to the regulation of goods and can contribute to keeping the Member States' national identity in tact (Ankersmit, 2013). Although mutual recognition may contribute to preserving national identities and diversity,

[17] The exemptions will be elaborated on in Chapter 3.1.

it also leads to ex-post harmonisation, which does not entail transferring less sovereignty to the supranational level but rather changes the manner in which it is transferred (Maduro, 2007).

In areas that have not (yet) been harmonised and when a national measure cannot be justified, mutual recognition can apply (European Commission, n.d.-a; Cafaggi, 2014, p. 276). Both harmonisation and mutual recognition can achieve market integration by removing trade barriers (World Trade Organization, 2012). However, only mutual recognition ensures that Member States maintain part of their sovereignty by giving them the right to apply their regulatory diversity to domestic products and uphold these rules on imports when they can be substantiated to protect the public interest (Ankersmit, 2013). According to **Recital 2** of the **Mutual Recognition Regulation**[18], harmonisation and mutual recognition are not only alternatives to each other but also work complementary to facilitate the free movement of goods, especially in areas that have both harmonised and non-harmonised aspects (such as the area of food information).

Free trade between Member States in essence means that the goods should cross the border of their domestic Member States. Neither harmonisation nor mutual recognition should therefore be about domestic issues but should solely apply to transnational issues (Unberath & Johnston, 2007; Öberg, 2017). If Member States choose to keep their stricter national measures they would only apply to domestic products, causing those products to experience a competitive disadvantage compared to the (cheaper) imports (Ghibuţiu, 2017). This also means that mutual recognition helps ensure that European consumers can buy goods against the lowest reasonable price (Purnhagen, 2014). Subsidiarity[19] requires proof that a problem is transnational and can thus not be adequately solved by the action of a single Member State. Only when this can be established, EU intervention is permitted (Öberg, 2017).

A distinguished case in which the interpretations of both *Dassonville* and *Cassis de Dijon*, and thus the principle of mutual recognition was applied concerned a famous German provision on the purity of beer, called the *Reinheitsgebot*. This 500-year-old piece of legislation states that beer can only be produced using barley, hops, yeast and water.

[18] The Mutual Recognition Regulation is elaborated on in Chapter 2.4.

[19] The principle of subsidiarity acts as a constraint to limit the EUs powers in areas where the aim is equally served by national authorities. However, it does not balance the national with the EUs interests but is only concerned with *who* should implement the measure to achieve the EUs objective (Schebesta & Van der Velde, 2014, p.116; Öberg, 2016).

Imported products that contained more or other ingredients could not be marketed in Germany as beer. As other Member States did lawfully allow other ingredients in beer, the ECJ ruled that the German prohibition was prohibited under **Article 34 TFEU** (Van der Meulen, 2014, p. 206). The establishment and application of mutual recognition formed an important turning point for food labelling as rulemaking shifted from a vertical agenda – which had not been very successful – to horizontal harmonisation[20] (Macmaoláin, 2008; Messerlin, 2011).

Mutual recognition is a unique feature of intra-Union trade. Other trade agreements, such as those made by the WTO, do not make use of mutual recognition but rather include national treatment. National treatment only includes the non-discrimination requirement[21] of mutual recognition where standards imposed on foreign companies may be no stricter than those imposed on domestic companies (Geng, 2019).

[20] The shift to horizontal regulation is elaborated on in Chapter 3.3.

[21] The non-discrimination requirement is elaborated on in Chapter 3.1.

2.4 Gaining regulatory status: the Mutual Recognition Regulation

Regulation (EC) 764/2008 rehashed the judgements of *Dassonville* and *Cassis de Dijon* and is commonly known as the **Mutual Recognition Regulation** (European Parliament, 2019). The regulation lays down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State. From the 18th of April 2019, **Regulation (EU) 2019/515** has entered into force, repealing **Regulation (EC) 764/2008** and is thus the new **Mutual Recognition Regulation**. It will apply from the 19th of April 2020 to allow for authorities to adapt to the new procedures.

Article 1 of the new regulation adds to the goal of the old regulation that it aims to strengthen the functioning of the Single Market *"by improving the application of the principle of mutual recognition and by removing unjustified barriers to trade."* The new regulation is more specific and adds detail as compared to the old regulation, which is reflected by more than just the increase in length of the document. It can for example be seen in **Article 2** on the scope where it was specified that national technical rules can either be de facto (in fact) or de jure (in law) and is more specific about the administrative decisions that this regulation concerns.

The new regulation also aims at improved coordination between national authorities and more cooperation between them under supervision of the Commission (Fortuna, 2019). In the new regulation it is emphasised that the competent authority should make the least restrictive decision possible when it comes to national technical rules. To help Member States decide when a national measure is in the public interest and thus allowed, the Commission will provide guidance on which the competent authorities can provide feedback. To facilitate the application and create awareness of mutual recognition, the new regulation advises national authorities to provide a 'single market clause' in their national technical rules. **Recital 48** of the new regulation also suggests campaigns, trainings, exchange of officials and other related activities aiming at enhancing and supporting trust and cooperation between competent authorities, Product Contact Points and economic operators to raise awareness of the principle.

The new **Mutual Recognition Regulation** encourages the use of the already existing Internal Market Problem Solving System (SOLVIT) system. Actors involved would have to rely on SOLVIT as a problem-solving procedure to reach agreement outside of the Court. It is a service provided in each Member State that can be used by individuals or businesses when their rights have been breached by public authorities of other Member States. This was supposed to accelerate resolution of disputes and collaboration between national

competent authorities and facilitate the use of mutual recognition (European Parliament, 2019; Kidmose, et al). **Recital (38)** of the new **Mutual Recognition Regulation** states that:

> *"SOLVIT is an effective non-judicial, problem-solving mechanism that is provided free of charge. It works under short deadlines and provides practical solutions to individuals and businesses when they are experiencing difficulties in the recognition of their Union rights by public authorities. "*

In **Article 5** of the new **Mutual Recognition Regulation** it is laid down that when the competent authority of a Member State determines their national measure is applicable and therefore restricts or denies the product on their market, it should notify[22] this decision to the economic operator. Only after they have been notified does the measure take effect. If the economic operator does not agree with this decision, they are at liberty to use the SOLVIT procedure.

Besides the SOLVIT-procedure, the new **Mutual Recognition Regulation**[23] (henceforth MRR) also tries to promote the use of the Product Contact Points (PCPs) that were established in the previous regulation. The PCPs were established in **Article 9** of the **old MRR** to facilitate communication between Member States and with the Commission. Their aim is to create awareness about regulatory updates and thereby making it easier to comply with them. The PCPs are being deployed to promote knowledge about mutual recognition and its application. They should also make it easier for companies and competent authorities to comply with the specific national rules by providing them the information at request. It is the task of the PCPs to yearly report on the application of mutual recognition to the Commission and meet with the mutual recognition consultative committee about the application of the principle (Kidmose et al., 2015).

[22] The notification requirement is elaborated on in Chapter 4.3.

[23] From here on, '*Mutual Recognition Regulation' (MRR)* will refer to Regulation (EU) 515/2019 unless otherwise specified. Regulation (EC) 764/2008 will be referred to as the 'old *Mutual Recognition Regulation' (old MRR).* Both Regulations will be used as sources in this paper as they are currently both in force.

Chapter 3

Influence of Mutual Recognition

What changes has mutual recognition caused, particularly in the area of food information?

3.1 Exemptions to mutual recognition

National measures causing barriers are often in place to reap the benefits from protectionism. By harmonising an area at EU-level, the protectionism is removed and as a consequence consumer choice is often expanded. However, this is not an automatic consequence as national regulatory measures are still permitted. For European integration to work and to facilitate free trade, national measures are actually needed. The **TFEU** never intended to have unregulated economic freedom, which is why the free movement of goods is balanced with the possibility to have national barriers in place (Weatherill, 2014). As mentioned in Chapter 2.3, mutual recognition changed the view that resulted from the Dassonville formula by allowing exemptions to mutual recognition on the grounds of which national measures are allowed (Schütze, 2018).

According to **Article 36 TFEU**, a trade barrier may be allowed if it is justified on the *"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".* Additionally, **Article 114 TFEU** adds that barriers can also be justified on grounds related to the protection of the environment or working environment. With regards to food information, **Recital (2) MRR** specifies that the principle of mutual recognition applies to technical rules including the presentation and labelling of products. **Article 39(1) FIC** clarifies that additional national measures on mandatory particulars are allowed, but only if they are justified on the grounds of the protection of public health, the protection of consumers, the prevention of fraud, and the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.

Food information forms the medium of communication between the producer and the consumer and is an important aspect in the trading of foodstuffs, which it why it has been regulated at EU-level since the onset of the Union (Macmaoláin, 2008). Where free trade is the most important objective of the internal market, the most relevant grounds to justify[24] a national measure that diverges from this objective relates to consumer protection, specifically the protection of their health and safety[25]. This reason is most often relied upon

[24] Chapter 4.2 elaborates on how the stakeholders involved make use of the justification requirement.

[25] As established in Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*. ECLI:EU:C:1993:905.

in relation to the free movement of goods. Consumer protection was not mentioned in the treaties before the Treaty of Maastricht, making it a newer and in a sense also secondary[26] goal of the EU (Rørdam, 2013). That both the **FIC** and the **NHCR** are the only secondary legislation that contain the average consumer benchmark as established in the **UCPD**, reflects that the consumer is of particular importance in the area of food information (Schebesta & Purnhagen, 2016). By introducing exemptions to mutual recognition, Member States are still allowed to protect their consumers, as long as they have a good reason to do so (Unberath & Johnston, 2007). Rules on food information are primarily concerned with correcting market failures resulting from information asymmetry to protect the consumer (Rørdam, 2013). However, because **Article 114 TFEU** already takes a high level of consumer protection as a base, the Court is stricter on national measures to protect the consumer when they (have the possibility to) affect trade (Unberath & Johnston, 2007).

Member State authorities are allowed to set aside rules of other Member States when this is needed to safeguard the values of their legal system (Rizcallah, 2019). Trading under mutual recognition can give rise to an efficiency loss as in some cases it is more efficient to allocate standards depending on national preferences (Geng, 2019). However, under **Article 114(6) TFEU** the Commission shall reject the national provisions when they *"[…] are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market."* Restrictions on market access must in the same way affect the marketing of domestic and imported products (Unberath & Johnston, 2007). Having strict technical requirements in place can be discriminatory to less technologically advanced Member States or companies (Messerlin, 2011). From the judgement in *Keck and Mithouard*[27] where criminal charges were made against two men who broke a French national measure, it became clear that rules that lay down requirements for goods are seen as measures having equivalent effect and are thus subject to mutual recognition, whether they are discriminatory or not (European Commission, 2010). When trade barriers are justified and the national measure is thus indeed for the good of the public, it is in the common interest to re-shape the regulatory environment (Weatherill, 2014). In this way, mutual recognition is often link to essential harmonisation (Maduro, 2007).

Restricting the free movement of goods is certainly allowed as long as the measure serves a legitimate aim in a proportionate manner (Weatherill, 2014). The principle of

[26] Secondary to free trade.

[27] Joined cases C-267/91 and C-268/91. *Criminal proceedings against Bernard Keck and Daniel Mithouard.* Judgment of the Court of 24 November 1993.

proportionality that requires the EUs legislative organs and the Court to evaluate whether the measures they establish or judgements they make are the least restrictive way to achieve their aim does not only apply to the EU as a legislative organ but also to the Member States when they wish to establish national measures (Harbo, 2010). The proportionality test is at least two-fold consisting of 1) the suitability and 2) the necessity of the measure to achieve the aim it pursues. Suitability evaluates whether a measure is actually capable of achieving its aim in a consistent and systematic manner. If the Court wants to, it could impose a consistency test, scrutinising whether the measure is consistent compared to other measures. Necessity on the other hand concerns whether the same objective cannot be achieved using a less restrictive measure. The necessity aspect gives some flexibility to allow Member States to adopt measures in sensitive areas but it is also where the ECJ can be extra strict and can require the Member State to prove that there was indeed not a less restrictive alternative (Cuyvers, 2017).

It is laid down in **Article 69 TFEU** that National Parliaments should ensure that their legislation is in accordance with the principle of proportionality. The **GFL, FIC** and **NHCR** all include the principle of proportionality in their Recitals stating amongst others that in accordance with proportionality the regulations will not go beyond what is necessary to achieve their objectives. In the **GFL**, proportionality is part of the precautionary principle in **Article 7(2)** where it is also specified that the measures adopted while scientific uncertainty persists can be *"no more restrictive to trade than is required to achieve the high level of protection chosen in the Community"*, which is applicable to both EU law and when Member States adopt measures in areas covered by EU law (Unberath & Johnston, 2007).

3.2 Deregulation

Mutual recognition is diverse, meaning that it depends on policies, actors and other variables in a certain area what the principle can contribute and which consequences it may lead to. Rules on products, including labelling rules, have externality effects that process rules do not necessarily have (Maduro, 2007). Maduro (2007) believes that whether mutual recognition leads to more or less regulation and higher or lower standards depends on the dynamics of participation generated by the process of decision-making.

Negative harmonisation is used to liberalise trade and leads to deregulation (Unberath & Johnston, 2007). In favour of the internal market, the Court has a deregulatory impulse. By introducing exemptions to mutual recognition, the Court showed that sometimes deregulation needs to be balanced by reregulation (Weatherill, 2014). National measures are being replaced with harmonised EU legislation, advancing further integration (Weatherill, 2014; Purnhagen, 2014). It is not proven that replacing national measures with EU law is necessary for the functioning of the internal market but it is used to remove barriers to trade (Unberath & Johnston, 2007). From the requirement in the *Cassis de Dijon* judgement it is clear that deregulation was not the intention of the ECJ (Ankersmit, 2013). Nonetheless, deregulation was the result of how both *Dassonville* and *Cassis de Dijon* were interpreted by the Commission. When this is taken too far, it can have a serious effect on the sovereignty of the EUs Member States (Purnhagen & Schebesta, 2019).

The **GFL** and the **FIC** approach market regulation with maximum harmonisation rather than minimum harmonisation as mutual recognition does in terms of uniform consumer protection (Purnhagen, 2014). Balancing free trade through deregulation with reregulation to protect the consumer lies at the core of internal market food law (Purnhagen & Schebesta, 2019). By replacing national measures that restrict trade, consumer protection is enhanced (Rørdam, 2018). Trying to protect the consumer more effectively, usually leads to more extensive regulation. However, in most cases, providing information suffices to adequately protect the consumer (Unberath & Johnston, 2007). Removing unjustified trade barriers also allows the consumer to have more choice as imported goods are added to the range of domestic goods (Weatherill, 2014).

The establishment of mutual recognition takes trade liberalisation much further than the **TFEU** meant it to go by saying that all national measures are presumed to be equal. Taking deregulation too far in the internal market can damage the reputation of the EU and risk disrupting the balance with the regulatory autonomy of Member States (Weatherill, 2014; Purnhagen, 2014). Costinot (2008) showed that global welfare is higher under mutual recognition when consumption externalities are small. However, in his research he did not

take country heterogeneity into account. Geng (2019) showed that when heterogeneity *is* taken into account, the opposite could occur. With the growth of the EU, heterogeneity increases and mutual recognition can be a better option for the higher levels of externalities as opposed to national treatment (Geng, 2019; Bieber & Maiani, 2014).

Where deregulation causes unregulated areas, reregulation could prevent a potential *race to the bottom* (Weatherill, 2014; Purnhagen, 2014). If companies fulfil the technical standards of their home Member State but do not comply with the stricter standard of the importing Member State, under mutual recognition they would still be allowed to bring their products onto the importing Member States' market (Ankersmit, 2013). Mutual recognition drives regulatory competition as – contrary to harmonisation – it does not establish a regulatory outcome (Maduro, 2007). By applying this lowest common standard to products, the quality of the goods will diminish (Young, 2006; Rørdam, 2013). EU action would then be needed to correct distortion of competition (Öberg, 2017). Where politicians often refer to the consequences of deregulation as a race to the bottom, economics have a different view on this. They see the desire to prevent unfair competition as an excuse for countries to limit the competition on their market (Messerlin, 2011). However, EU law does not necessarily diminish national measures to the lowest standard because the principle is conditional [28] (Weatherill, 2014). From the case *DreiGlocken* [29] it became clear that consumer preference leads to a demand for higher quality food products and hence not necessarily causes a race to the bottom (Monier-Dilhan, 2018; Weatherill, 2014).

[28] See Chapter 4.2.

[29] Case 407/85, *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano*, ECLI:EU:C:1988:401.

3.3 Horizontal structure of food information law

A substantial part of the EUs food legislation is harmonised, but out of the body of law relating to food, it is labelling that forms the most important legal issue. This explains why food information is a highly regulated area (Rørdam, 2013; Unberath & Johnston, 2007). The rules surrounding food labelling were first governed through directives. Directives cause less interference with the national systems of the Member States, allowing them to more easily regulate areas that are difficult to harmonise while protecting their national consumers. They allow Member States to customise standards because they need to be transposed into national legislation and permit a degree of flexibility that can be used to overcome political differences. However, they also led to accumulating, contradictory legislation and were often not implemented correctly at national level, which complicated the situation for food companies that wanted to bring their product onto several markets (De Brito & Pelkmans, 2012; Unberath & Johnston, 2007). As a result, regulations became the preferred method to reach harmonisation (Unberath & Johnston, 2007). Also the directives concerning food labelling have been converted into one Regulation: the **FIC** (Rørdam, 2013).

The issues that were caused by excessive deregulation led to horizontal regulation meant to govern the food market, which was far from the intent of mutual recognition (Purnhagen, 2014). Both the **FIC** and **NHCR** are horizontal regulations that focus more on the goals to be achieved rather than the means of regulation by providing general requirements and principles (European Commission, 2016; Van der Meulen, 2014, p. 219). These horizontal rules take prevalence over vertical standards. Harmonisation of vertical standards was generally considered unnecessary because of mutual recognition (Branen, Davidson, Salminen & Thorngate, 2001, p. 121). Even though both the establishment of mutual recognition and the first horizontal food labelling legislation have facilitated the free movement of goods within the EU, the declaration made in *Cassis* was not radical enough, causing it to face similar issues as vertical legislation as it still includes a harmonisation component (Messerlin, 2011; Purnhagen & Schebesta, 2019).

Labelling requirements lend themselves to positive harmonisation because many cases made it to the Court, suggesting that there are too many national measures and Member States are acting paternalistic (Unberath & Johnston, 2007). The exemptions to mutual recognition cannot be relied upon when an area has been completely harmonised at EU level. Food information law is an area that does not cover all aspects because under the principle of subsidiarity, the national regulator is better capable of determining what is best for the consumer in this area (Rizcallah, 2019; Karsten, 2015). This is for example the case with rules surrounding foods that are not “pre-packed” according to the **FICs** definition.

These areas that have not been standardised create difficulty in complying with food information law, especially for smaller and medium sized businesses (Karsten, 2015). However, the area of food is so highly harmonised within the EU that it has decreased the importance of the principle of mutual recognition. Diminished use of mutual recognition also deprives the EU of the benefits that an internal market can provide (Żurek, 2011, p. 45).

According to Maduro (2007), mutual recognition becomes more difficult when regulatory objectives differ. When Member States have to change their regulatory ideals to achieve integration, mutual recognition is more intrusive. According to Geng (2019), national treatment is relatively more attractive for agreements between countries with a high degree of heterogeneity. He showed in his research that when applying mutual recognition instead of national treatment, a mismatch of standards arises that worsens with increased national differences and reduces welfare. This is due to the fact that mutual recognition forces countries to accept each other's standards. However, his research considered only vertical standards, which makes it unsure whether this is also true for the horizontally regulated area of food information.

When measures share the same regulatory objective, mutual recognition goes less far compared to a situation where a Member State would have to change their regulatory ideals to achieve integration. This suggests that different interpretations based on the same requirements laid down in food information law cause less difficulty, as Member States are not required to change their goals but need to only recognise rules that pursue the same aim (Maduro, 2007). More barriers to trade were in place before food information was regulated, indicating that food information law positively contributes to the EUs internal market (De Brito & Pelkmans, 2012).

3.4 The information paradigm

Cassis de Dijon did not just give rise to the principle of mutual recognition but also to a concept that later became known as the *information paradigm.* It meant that information-related rules would be preferred over content-related rules when this is sufficient to protect the public interest (Purnhagen, 2014). In the case of *Cassis* this means that the content related rule of the cassis liquor having a certain alcohol percentage could be easily replaced by providing the alcohol percentage of the liquor on the label to allow the consumer to make an informed choice (Weatherill, 2014). The information paradigm as established in *Cassis de Dijon*, also called the 'permit but inform' strategy, formed the basis on which EU food information law is build (Purnhagen & Schebesta, 2019).

In cases where uncertainty remains as to the extent of the risk that persists the Court will usually choose free trade over consumer protection because it is assumed that the average consumer is capable of making an informed decision (Weatherill, 2014; Unberath & Johnston, 2007). The *information paradigm* shows that fulfilling **Article 14 GFL** should be mainly achieved through information-related measures, but the Court will only allow national measures when they are strictly or in every aspect necessary to protect the consumer (Purnhagen, 2014; Unberath & Johnston, 2007). The information paradigm is almost an extension of proportionality, as it prefers the rules that are the least restrictive to trade (Unberath & Johnston, 2007). In areas where transparency is lacking and there is informational asymmetry, the Court allows national measures to protect the consumer from unexpected consequences (Weatherill, 2014).

The **NHCR** regulation deviates from the information paradigm because it includes besides information-related regulation also authorisation requirements (Purnghagen & Schebesta, 2019; Purnhagen, 2015). When it comes to claims related to diet and health, consumers are seen as more vulnerable as such statements will give a positive impression of food, making consumers more susceptible for misleading practices (Edinger, 2016). As **Article 4(2) FIC** stipulates:

> *"When considering the need for mandatory food information and to enable consumers to make informed choices, account shall be taken of a widespread need on the part of the majority of consumers for certain information to which they attach significant value or of any generally accepted benefits to the consumer. "*

Based on this provision, what should or should not be mandatory food information strongly depends on the consumer (Purnhagen & Schebesta, 2019). These insights from consumer

studies were first applied in *Teekanne*[30] and hence moved towards a more realistic average consumer with respect to their vulnerabilities (Schebesta & Purnhagen, 2016). It has been argued that the Commission's consumer policy in combination with maximum harmonisation enforces a concept of "the economically efficient consumer" rather than only the concept of the average consumer. This view is based on consumers who are cross-border shoppers and active participants in establishing a complete internal market (Rørdam, 2018).

Pelkmans (2007) suggests that mutual recognition is only applicable when there is equivalence between different national measures. Maduro (2007) disputes that this is applicable in the EU as the ECJ has declared national measures imposing product requirements as unjustified based on the information paradigm. Rules surrounding product requirements are not equal to rules concerning consumer information. According to him, the ECJ does not use mutual recognition to assess whether the different national measures are equal but rather uses it to introduce the interest of market integration that the national measure failed to take into account.

[30] Case C-195/14, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG*, ECLI:EU:C:2015:361.

Chapter 4

Utilisation of and Challenges for Mutual Recognition

How is mutual recognition being used and what difficulties does it face in the area of food information?

4.1 Application and enforcement of mutual recognition

Due to harmonisation, trade within the EU is twice as big as extra-Union trade (Kidmose et al., 2015). Mutual recognition is supposed to be the key to effective cooperation between Member States. It should give certainty that the courts of other Member States will enforce judicial decisions (Andenas, 2006). However, many published articles on mutual recognition all have one message in common: the EU has not sufficiently enforced one of their most innovative concepts (Messerlin, 2011). The issues with compliance and enforcement increase with the growth of the EU (Bieber & Maiani, 2014). Weak enforcement of mutual recognition imposes a *dual regulatory burden* upon traders who are consequently required to comply with legislation in the Member State of marketing, without taking the regulatory environment of their home Member State into account (Weatherill, 2014).

For the Single Market to optimally work and provide all the (economic) benefits it can, effective enforcement of and compliance with EU law, including the principle of mutual recognition, are highly important (European Commission, 2013; De Brito & Pelkmans, 2012). Mutual recognition is more successful when several institutions manage the principle and political control can be regained of policy issues that have been delegated to the courts. For mutual recognition to properly function it would be best if other institutions and modes of governance are available, but it is usually in areas where this is not the case that integration through mutual recognition is chosen (Maduro, 2007).

A general lack of awareness of mutual recognition prevails among national competent authorities and companies. As a consequence, the principle is not being fully or correctly applied, leaving EU integration incomplete. Among the sectors that have particular issues with the application of mutual recognition is the area of foodstuffs. This is reflected by the results of a European Commission issued research on the application of mutual recognition. It showed that the difficulties that mutual recognition faces on the food market are primarily caused by the differences in national legislation between Member States (Kidmose et al., 2015). **Preamble (6) old MRR** clarifies that this has been a longer prevailing issue:

> *"The Council Resolution of 28 October 1999 on mutual recognition (3) noted that economic operators and citizens did not always make full and proper use of the principle of mutual recognition because they were not sufficiently aware of the principle and its operational consequences. […]."*

Resistance to mutual recognition may origin from the idea that it disrupts the balance of power within a Member State (Maduro, 2007). In the 2000 White Paper on Food Safety it was stated that Member States had a wide variety of implementation and enforcement measures for EU legislation, which made it difficult to establish their effectiveness (Commission of the European Communities, 2000). The new **MRR** attempts to improve the application of mutual recognition but has only recently gone into force.

Research showed that companies are also not adequately using the SOLVIT procedure. Only a small amount of SOLVIT cases are submitted by businesses relative to individuals, and even less concern the free movement of goods. It was found that the reason for this is that businesses prefer more legal certainty, technical expertise and formal powers than SOLVIT centres can provide. Additionally, national authorities are not complying with the notification procedures of administrative decisions resulting in obstacles to the free movement of goods. Additionally, **Recital (7) MRR** explains that the PCPs are barely known or used by traders and that national authorities do not cooperate sufficiently in the PCP network to ensure its functioning (Kidmose, et al.).

According to the Commission, the absence of specific procedural rules and paperwork is both the strength and the weakness of mutual recognition. The lack of specific rules surrounding the principle enables the free movement of goods, but at the same time means a lack of transparency and clear route that companies can take when they wish to challenge a decision (Weatherill, 2017-b). According to companies from several sectors, entering into discussion about the fairness of additional national standards was too costly and too lengthy and therefore not an option (Kidmose et al., 2015). Consequently, companies change their products so they comply with national requirements or refrain from entering certain markets (Weatherill, 2017-b). For companies and national authorities it is often unclear whether mutual recognition applies in a specific situation. Because mutual recognition is based on ECJ case law, a list of products to which the principle applies does not exist. To be able to determine whether their situation falls within the scope of mutual recognition, extensive knowledge of EU legislation is needed but often not available (Kidmose et al., 2015). National ministries often have trouble understanding EU law or the free movement of goods, which can cause laws to be interpreted more widely than they were meant to, conflicting with the internal market (De Brito & Pelkmans, 2012).

The EU lacks powerful enforcement measures to ensure mutual trust and compliance with mutual recognition (Spreeuw, 2012). Additionally, the fact that the principle of mutual recognition is not (fully) being applied within the EU reflects an increase in mistrust among the Member States (Messerlin, 2011). Mutual recognition is based on the trust that the

standards of the Member States are equal to each other and only works because the EU Member States in principle operate under the same (EU) law (Rizcallah, 2019; Dunt, 2018). The relationship between mutual recognition and mutual trust depends on a degree of common identity because mutual trust is a necessary basis for countries to recognise standards that differ from their own (Maduro, 2007). Even though a difference of opinion prevails on whether mutual trust is a condition or a consequence of mutual recognition, it is clear that the two concepts are inseparable (Ostropolski, 2015; Spreeuw, 2012). By harmonisation of various areas under EU law, trust is created among the Member States and can be used as a tool for integration through the principle of mutual recognition (Rizcallah, 2019).

It addition to differences in national definitions and standards, obstacles with mutual recognition in the food-related sector are primarily caused by this lack of trust in the authorities of other Member States. National measures can contribute to a lack of trust between Member States because one cannot assume the standards are equal to their own (Kidmose et al., 2015). In case of more national differences, mutual recognition will be more difficult and face greater resistance, but is also more needed to achieve integration (Maduro, 2007). That the heterogeneity of the EU and its legislative landscape have only increased over the last 30 years seems a logical result of more countries joining the EU. This affects mutual trust, as it is less attractive to have mutual recognition when countries have different levels of development, since not every country has an equally trustable enforcement body. From an economic perspective, increased heterogeneity of the EU actually makes trade more attractive (Messerlin, 2011). Although there is no proof that less developed Member States are also the ones with the lower standards, there is empirical support that countries with a higher income per capita prefer higher quality products (Messerlin, 2011; Geng, 2019).

On July 17th, 2019, the European Commission issued a press release that they will strengthen the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement. They see this as a prerequisite for citizens to enjoy EU law and to maintain mutual trust between Member States. The Commission has called on all Union institutions, Member States, and the civil society to enforce the rule of law (European Commission, 2019-a).

4.2 Interpretation and utilisation of the justification requirement

Weatherill (2014) believes the Commission and the Court have misinterpreted the principle of mutual recognition. He argues that there is no absolute right to the free movement of goods – and thus no absolute principle of mutual recognition – because barriers to trade are in fact allowed as long as they are justified. The principle is what he calls *conditional* because **Article 36 TFEU** gives Member States the right to put in place obstructive national measures when they have a good reason to do so. He finds only **Recital (22)** of the then still **old MRR** shows the nuance of the principle of mutual recognition and is what he calls well balanced:

> *"In accordance with the principle of mutual recognition, the procedure laid down in this Regulation should provide for the competent authorities to communicate in each case to the economic operator, on the basis of the relevant technical or scientific elements available, that there are overriding reasons of public interest for imposing national technical rules on the product or type of product in question and that less restrictive measures cannot be used*[31] *[…]."*

By claiming that there is an absolute principle of mutual recognition, the room that the internal market law left for national measures that have been put in place for good reasons in the public interest is being overlooked. He emphasises that he does not believe the Court is wrong in any of the mutual recognition related rulings but he feels that after identifying a barrier to trade, the evaluation of the justification for the barrier is often neglected. This pattern can be seen in many Commission communications where the conditional character of mutual recognition – if it is mentioned at all – is often downplayed.

That the principle of mutual recognition is not absolute is often forgotten because few regulators succeed in justifying their barriers. This causes the focus of the Court to be on the aspect of removing the barrier, rather than the justification for it. This is not only due to the burden of proof resting on the regulator but also because their justifications are often absurd (Weatherill, 2014). According to the Commission, national measures largely vary in their level of protection, which makes it difficult to properly apply mutual recognition (Żurek, 2011, p. 45). National measures may have been justified when they were adopted but can become out-dated. When mutual recognition applies in such a situation, the Member State

[31] Emphasis added by the author of this thesis.

is forced to re-evaluate its measure. This can be difficult as the measure has become custom and may be resistant to change (Maduro, 2007).

With the main objective of the Single Market in mind, the Court's analysis on the proportionality of national measures is biased in the direction of European integration (Harbo, 2010). Where national measures were originally meant to protect the quality of the products and protect the consumer, after establishing the Single Market they were viewed as measures to protect the domestic producer and as a hindrance to harmonisation (Weatherill, 2014). The Court does not accept many national restrictions and removes the ones that are not necessary (Unberath & Johnston, 2007). In some recent cases the ECJ has left it to the national courts to determine whether the measure is justified to protect the consumer, which may be more inclined towards accepting national rules impeding market access (Unberath & Johnston, 2007).

Because **Article 34 TFEU** and its interpretation are very broad, it is capable of catching many national measures (Cuyvers, 2017). Mutual recognition applies when a measure hinders the free movement of goods in an area that has not been harmonised and when this barrier is not justified (World Trade Organization, 2012). The broad ground on which measures may be justified puts a limit on EU competences and subsidiarity (Öberg, 2017). Justification is important to ensure not all national measures are blindly set aside (Cuyvers, 2017). That a national measure is justified does not mean that maintaining them will not contribute to fragmentation of the Single Market; it just means that there is a good reason in the public interest to have the trade barrier in place (Weatherill, 2014). However, the existence of externalities does not necessarily justify a ban. National differences cannot simply be eliminated as they often serve a social purpose (Rizcallah, 2019; Purnhagen, 2014). Some Court cases that are not about consumer protection still take political and social diversity into account. They admit space in free movement law to judge whether national measures are justified on these political and social grounds and are thus in line with Weatherill's conditional mutual recognition (Weatherill, 2014, Purnhagen, 2014).

Contrary to Weatherill, Messerlin (2011) finds that the **TEU** has always been clear on the fact that free movement should not go at the expense of the public interest. He concludes that the principle that was declared in *Cassis de Dijon* is unconditional but incorporates a negative list with exemptions. Unlike Weatherill, he feels that true unconditional mutual recognition would be a solution that could provide huge welfare benefits by delivering the lowest costs with the widest choice range for consumers. Additionally, Peter Loosen who is Chair of the Board of Food Supplements Europe feels that mutual recognition and the internal market are very successful but just have not been advertised well (Fortuna, 2019).

4.3 Notification procedure for national provisions

When a Member State believes their measure is justified on one of the grounds laid down in **Article 36 TFEU** and they wish to uphold this measure, they are obligated to notify the Commission (Rørdam, 2013). Where harmonisation and mutual recognition focus on removing existing barriers to trade, the notification procedure is aimed at preventing new barriers (De Brito & Pelkmans, 2012). That the notification procedure and the Commission have the ability to prohibit the introduction of new national measures helped prevent and remove barriers to trade (Rørdam, 2013). **Article 114(4) TFEU** lays down that the Member States "*shall notify the Commission of these provisions as well as the grounds for maintaining them.*"

Directive (EU) 2015/1535 that lays down a procedure for the provision of information in the field of technical regulations states that the Commission as well as the other Member States should be provided with the necessary information about the measure before the Member State adopts it. **Article 1(f)** of the directive distinguishes between technical regulations for services and technical specifications for goods. Technical specifications[32] are defined as:

> *"[A] specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures."*

In **Article 5** the Directive lays down that Member States should notify the Commission about any draft of technical measures they wish to establish. A notification obligation is also present in the **MRR** where it concerns national decisions that affect an economic operator. Under **Article 6(2) old MRR** both the Commission and economic operator should be notified of the decisions and the (technical or scientific) grounds for it within 20 working days. The duty to notify the Commission about national technical measures was placed with the competent authority of the Member State in **Article 6(1) old MRR**.

[32] In this thesis technical regulations, national measures/rules/provisions and equivalents will all refer to technical specifications as defined in this Article.

Article 45 FIC lays down the specific notification procedure for measures on food information. Member states need to notify the commission and other Member States of the measure and its justification. The measure is allowed if after three months the Member State has not received a negative opinion from the Commission. If the opinion is negative, the Commission will determine whether modifications on the measure could change the opinion. Measures that fall within the notification procedure specified in this article do not fall within the notification procedure of **Directive (EU) 2015/1535**.

According to a research from the Centre of European Studies in 2012, the notification procedure was an amazing mechanism that prevented thousands of new barriers to the free movement of goods (De Brito & Pelkmans, 2012). However, the results of a European Commission issued research on the application of the principle of mutual recognition three years later were very different. The research showed that Member States are not sufficiently using the notification procedure. A discrepancy was found between the number of decisions on market access the Member States have made and the number of notifications the Commission had received. This results mostly from the misunderstanding of the **MRR** and its relation to other EU legislation (Kidmose et al., 2015). **Recital (7) MRR** also states that the notification requirement is rarely complied with. According to **Recital (17) MRR**, food companies and all economic operators *"would benefit from a self-declaration that provides competent authorities with all the necessary information on goods and on their compliance with the rules applicable in that other Member State."*

In *CIA Security International*[33] the Court held that the national court *"must decline to apply a national technical regulation which has not been notified in accordance with the Directive."* This means that if national authorities fail to notify their national measures, they should not be enforced (De Brito & Pelkmans, 2012; Weatherill, 2017-a). This was also included in the **old MRR** where **Article 6(4)** specified that:

> *"When the competent authority fails to notify the economic operator of a decision as referred to in Article 2(1) within the period specified in paragraph 2 of this Article, the product shall be deemed to be lawfully marketed in that Member State insofar as the application of its technical rule as referred to in paragraph 1 of this Article is concerned."*

[33] Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL*, ECLI:EU:C:1996:172.

Once the national measure has been adopted, the **Directive (EU) 2015/1535** lays down a procedure on how the other Member States should be informed to ensure legal certainty. In order to prevent national measures from interfering with these binding acts from the Commission, a three-month stand still period starts before the measure can be adopted and in which the Commission and other Member States can respond to the draft (European Commission, 2015). Under the notification procedure the Commission receives a draft of national measures from the Member State, the Commission and other Member States identify possible barriers to trade and the Commission requests the relevant Member States to amend the draft to prevent such barriers. Striking in the opinions that Member States give about these drafts is the fact that they do no pay attention to the internal market aspects or mutual recognition, which has the possibility of creating a barrier to trade (De Brito & Pelkmans, 2012). **Directive (EU) 2015/1535** covers mutual recognition in **Recital (15)** stating that when the principle cannot be implemented, the Commission adopts or proposes the adoption of binding measures. In the case *Unilever*[34] it was ruled that when a Member States fails to respect the stand still period the measure could be declared inapplicable to individuals by national courts (European Commission, 2015).

The **MRR** also includes RASFF and requires competent authorities to keep applying the system, in particular **Article 50(3) GFL** and **Article 54 GFL**. **Article 50(3) GFL** covers the notification obligation of Member States and requires them notify the Commission of the measures they adopted to restrict the placing on the market or withdrawal from the market, a recommendation or agreement with professional operations aimed at preventing limiting or imposing specific conditions on the pacing on the market, and any rejection of the batch, container or cargo at a border post within the EU related to the risk. However, RASFF is a notification system for incidents that cause a food safety issue. They occur (mostly) by accident and even if it was intentional, they are not the result of national measures (on food information) put in place by one of the Member States (European Commission, 2017).

The Technical Regulations Information System (TRIS) is a tool to view notifications made by Member States and was established to help companies find technical regulations in the area they wish to market their product (NSAI, 2019; European Commission, 2014). In the period 2010-2011 agriculture and foodstuffs had the highest number of notifications, amongst others on labelling (De Brito & Pelkmans, 2012).

[34] Case C-443/98, *Unilever Italia SpA v Central Food SpA*, ECLI:EU:C:2000:496.

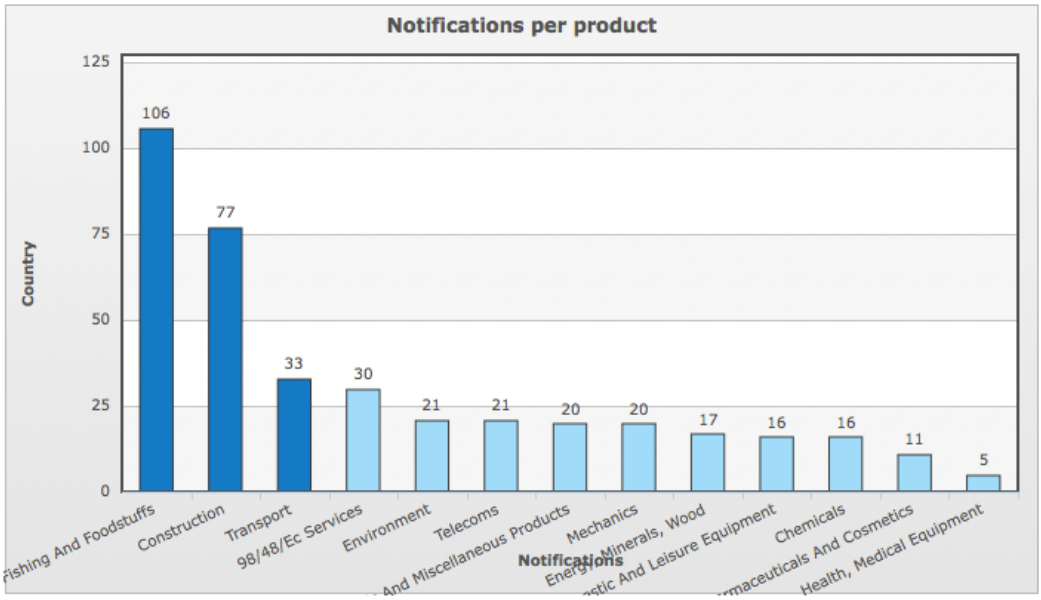

Figure 1. Notifications in the TRIS database per product category.

In 2019, most notifications in the TRIS database have been made in the category of foodstuffs (see figure 1). Since **Directive (EU) 2015/1535** went into force on September 9th, 2015, the category of foodstuffs has the second most notifications, after construction (European Commission, 2019-b). The use of the database was tested with an example from France.

France has many national measures in place, which is confirmed by the amount of notifications of technical regulations under **Directive (EU) 2015/1535** (De Brito & Pelkmans, 2012). As part of a law to protect the population from the dangers of junk food France aims to introduce a mandatory Nutri-Score[35] labelling scheme. During the second meeting of the *Assemblée nationale XVe legislature Session ordinaire de 2018-2019* of the French Parliament it was said that it is general knowledge that making the Nutri-Score labelling scheme mandatory on packaging is not possible due to EU regulations. Having this additional requirement in place for only the French market would constitute a barrier to trade. As an alternative it was proposed to make the Nutri-Score scheme mandatory on all food advertisements through all mediums. This proposed **Amendment N°44** of the **Protéger la Population des Dangers de la Malbouffe (2019)** was adopted by the French Parliament in February of 2019. The 'Order laying down the additional form of presentation of the nutrition declaration recommended by the State pursuant to Articles L3232-8 and

[35] Nutri-Score is a nutritional labelling scheme where more parameters than those in the nutrition declaration are considered to calculate a score and colour for the food, ranging from a dark green 'A' to a dark orange 'E' (Robini & Coutrelis, 2017).

R3232-7 of the Public Health Code' in which France tried to make the Nutri-Score mandatory on packaging was notified on April 24th of 2017 and can thus be found in the TRIS database (European Commission, n.d-c; Robini & Coutrelis, 2017). From the notification in the database it does not become clear whether this rule was adopted and is being enforced or if it was rejected by the Commission. The new amendment applicable to advertisements is not (yet) present in the database[36] (European Commission, n.d.-c). By searching the database in the category "labelling" or "foodstuffs" with the search term "nutrition labelling" the national measure could not be found. The "old" Order referred to above does come up when searching for "nutri score" but one would then already need to know what nutritional labelling scheme to look for in a certain country.

European businesses are complaining about barriers but do not realise how important the notification system has been in preventing even more fragmentation of the internal market of goods. Obstacles for businesses that remain are not formed by measures notified and present in the database but rather by those that are not notified as this creates difficulty for national competent authorities and businesses to be aware of them (De Brito & Pelkmans, 2012).

[36] As of July 31, 2019.

4.4 Unofficial national measures

There has been an increase in the amount of national standards, code of practice, interpretations, guidance, etc. on rules surrounding food information (Rørdam, 2013). However, these different documents, henceforth referred to as unofficial national measures, create difficulty for food companies to be up-to-date on all the national provisions that are being enforced and bring new risks to the free movement of goods (Rørdam, 2013; De Brito & Pelkmans, 2012; Kidmose et al., 2015). Because these documents are not official national measures they are also not notified under **Directive (EU) 2015/1535**. National mandatory measures, whether imposed by the Member States' governments or by private bodies, impose costs on countries and form a barrier to trade (Messerlin, 2011). Interpretation of regulations and guidelines are often ambiguous for food companies but also for enforcement bodies. This is why they should communicate to bring clarity on how to implement these rules (Küster, 2018).

What contributes to the challenge of complying with food information law for food companies is the pace at which regulatory change – often driven by consumers – occurs (Foley, 2018; Chasen, 2018). Food companies are not necessarily concerned with free trade but are instead focused on unfair competition caused by stricter standards in their Member State (Messerlin, 2011). Although a balance needs to be found between the interests of the different parties involved, in the *Weintor*[37] case where German wine was labelled as 'easily digestible' when wine is not allowed to bear such a claim according to the **NHCR**, the Court found that consumer protection weighted more that the rights of the business (Purnhagen & Schebesta, 2019). A large Swedish food company that contributed to a Commission issued research on the application of mutual recognition stated that not the national authorities but their clients confront them with specific demands for certain Member States (Kidmose et al., 2015). The EU actually favours industry-based initiatives rather than more extensive regulation (Karsten, 2015).

That different interpretation of EU law is an issue in the area of food information can be shown by an example related to GMO-free labelling. According to the Commission, voluntarily labelling a product GMO-free is allowed, as long as it is not misleading (European Commission, n.d.-d). The Livmedelsverket is the national food agency of Sweden and the competent authority when it comes to food (Livsmedelsverket, 2019). On their website they state that the European Commission does not allow GMO-free labelling according to **Article 7(1)(c) FIC**. All products that do contain (more than 0,9%) GMOs

[37] Case C-544/10, *Deutsches Weintor eG v Land Rheinland Pfalz*, ECLI:EU:C:2012:526.

should be labelled as such, which is why they believe it is misleading to claim that a product is free from GMOs when in fact all products without a GMO claim have the same characteristic (Livsmedelsverket, 2017). GMO-free labelling is thus prohibited in Sweden but allowed in (for example) Germany. A study conducted on behalf of DG SANCO found that *"different approaches to negative labelling operating in the EU may present challenges for consumers and food business operators across the food chain."* One of the issues they identified was the existence of different GM(O)-free schemes in several Member States (DG SANCO, 2013).

Even though the horizontal labelling legislation has contributed to the free movement of goods, regulating through setting essential requirements can still cause inconsistencies, making it more complex for food companies to understand and comply with the legislation (Messerlin, 2011; Purnhagen & Schebesta, 2019). An example is the "no added sugar claim". The EUs High Level Group on Nutrition and Physical Activity[38] (2011) published a document stating that added sugars *"can be described as providing energy while not significantly contributing other nutrients to foods."* This would exclude sweeteners. However, in the **NHCR** it is said that the claim *"may only be made where the product does not contain any added mono- or disaccharides or any other food used for its sweetening properties."* This seems to be including sweeteners. In the Netherlands, there is a wide range of products, including fruit drinks, cordials, sauces, ice cream, etc. that claim "no added sugar" but do include sweeteners (or sugar alcohols) such as sucralose, xylitol and ascesulfaam-K (Jumbo, n.d.). However, according to a guidance published by the Belgian competent authority sweeteners are not allowed in a product bearing a no added sugar claim (DG4 Dier, Plant en Voeding, 2018).

In the example of Nutri-Score in France mentioned in Chapter 4.3, the French Parliament strongly feels that this measure is justified and necessary to protect the public health. When it was questioned during the third reading of the French Parliament[39] whether making Nutri-Score on food advertisements would be allowed by the EU, it was said that by the time the Court would have made a decision on the matter, several food companies would have already adapted and the French Parliament would still (partly) accomplish their aim. This

[38] The High Level Group of Nutrition and Physical Activity is a group composed of Members from the EU and the European Free Trade Association, led by the European Commission, that focuses on the improvement of health and sharing knowledge concerning health between governments, among others (European Commission, n.d.-e).

[39] Assemblée nationale XV^{e} legislature Session ordinaire de 2018-2019. Compte rendu integral. Troisième séance du jeudi 21 février 2019.

reflects the eagerness of Member States to regulate the area of food information (De Brito & Pelkmans, 2012). That this is an area that is also important to consumers is shown by the seven European consumer organisations that started a petition to demand the use of Nutri-Score. Research has shown that this particular nutritional labelling scheme has a positive effect of consumer purchases while simultaneously push food manufacturers to create healthier products to achieve a better Nutri-Score (RetailDetail, 2019). Additionally, several supermarkets and food manufacturers have pronounced their preference for the Nutri-Score system over other nutritional labelling schemes (Foodmagazine, 2019; Kwasniewski, 2019). A completely opposite situation was seen in Germany where the government forced a food manufacturer to remove the Nutri-Score labelling from packaging because they see it as a health claim rather than just nutritional labelling (Kwasniewski, 2019).

It seems that areas that have not yet been harmonised at EU level do not need to be because mutual recognition will ensure free movement. However, mutual recognition of standards creates more difficulty in marketing products for companies than when the law would be harmonised. For food companies this would usually mean an extra burden in their process (Weatherill, 2014). If they want to market their product, they need to take a risk because the legislation is ambiguous. Most of the time, consequences of risks that have been taken are reputational and cause a loss of consumer trust (Chasen, 2018). In the EU, different languages are involved, which makes the situation even more complex. This is for example the case with the legal name of a food, which will most likely not be the same in the Member State of production as in the Member State of marketing (Rørdam, 2013). The requirement laid down in **Article 15(2) FIC** where Member States are allowed to stipulate that the mandatory particulars are given in one or more EU languages within their territory, can significantly impede the free movement of goods (Karsten, 2015).

Chapter 5

Conclusion, Discussion and Recommendations

5.1 Conclusion

The objective of this research is to determine how mutual recognition works and whether it is a suitable concept for the area of food information. The main question is answered by means of three sub-questions.

Sub-question 1: How was the principle of mutual recognition established and how has the legal basis evolved as a result?

In the years before *Cassis de Dijon,* changes in European integration had taken place. The negative integration that was driven by the ECJ was intrusive on Member States sovereignty and the ruling in *Dassonville* was strict on prohibiting national measures having an equivalent effect to quantitative restrictions. The principle of mutual recognition that was established in *Cassis de Dijon* allowed Member States to regulate their domestic markets and have national measures in place when these are in the public interest, while facilitating the free movement of goods. The judgement went from case law to a legislative text when almost 40 years after its establishment the Mutual Recognition Regulation went into force.

Sub-question 2: What changes has mutual recognition caused, particularly in the area of food information?

The various developments that mutual recognition has brought about, also influenced the area of food information. The establishment of mutual recognition provided a more lenient view to the prohibition on national measures by introducing exemptions. The most relevant ground to justify a national measure that restricts the free movement of goods is also the main aim of food information law: consumer protection. By removing national barriers to trade that do not fall within the exemptions, mutual recognition caused deregulation. The issues that were caused by excessive deregulation led to horizontal regulation – also in the area of food information – which proved to be more successful in facilitating the free movement of goods than the prior vertical standards. The ruling in *Cassis de Dijon* also led to the information paradigm or permit but inform strategy that formed the basis on which EU food information law is build.

Sub-question 3: How is mutual recognition being used and what difficulties does it face in the area of food information?

There are various aspects surrounding the principle of mutual recognition that can help ensure the functioning of the principle. These include correct application by using for example the SOLVIT system and PCPs, strong enforcement measures, correct justification of national measures by Member States while the Court guards that they do not blindly remove all national measures, and proper use of the notification system. Generally, a lack of knowledge and utilisation of all of these aspects prevails – primarily caused by a lack of

awareness and understanding of EU law and the principle of mutual recognition itself – causing regulatory differences to still form barriers to trade. Additionally, unofficial national measures that do not fall within the system contribute to legal uncertainty and hence to the restriction on the free movement of food.

Main question: How does mutual recognition work and is it a suitable concept for the area of food information?

Mutual recognition facilitates free trade within the EU by overruling differences in national standards when these are not necessary to protect the public interest. Mutual recognition has positively influenced the functioning of the EUs internal market and the specific area of food information by facilitating the free movement of goods while respecting the Member States' national identity and sovereignty. However, due to a lack of application and enforcement and failure to justify and notify national measures, inconsistences between Member States' rules are still present. Furthermore, the unofficial national measures that are being enforced by national authorities and organisations hinder the free movement of food. Albeit mutual recognition achieves its aim in theory, the principle still faces many challenges in the area of food information in practice, which is why this thesis cannot definitively give an answer on the suitability of mutual recognition in this area.

5.2 Policy and research recommendations

This thesis identified the issues that mutual recognition faces in the area of food information. Before the identified problem areas have been improved, a clear conclusion on the suitability of mutual recognition for the area of food information in practice cannot be drawn. Recommendations are made on how to improve the policy area to strengthen mutual recognition and on further research that is needed to achieve an answer to the question.

This thesis has shown that very recently the Commission has taken steps to improve the awareness and application of mutual recognition. This first step has been taken by strengthening the **MRR** to include ways to raise awareness and improve the use of the SOLVIT system and PCPs. It is currently too early to determine whether this will truly improve the functioning of mutual recognition. When the new **MRR** has been in force for a few years, it should be researched whether it has sufficiently improved the awareness and the application of all aspects concerning mutual recognition. Because the results of this research showed that the stakeholders involved often do not have enough knowledge of EU law to apply and understand it, it is recommended to publish a simplified guidance for the regulation and create more publicity surrounding its renewal.

What has not been (sufficiently) included in the **MRR** is proper enforcement of the principle. Stronger enforcement will increase mutual trust between Member States and thereby improve the functioning of mutual recognition. The enforcement of mutual recognition should not only be the responsibility of the ECJ. The recent attempt of the European Commission to create awareness and strengthen the rule of law through more effective enforcement is a step in the right direction but it cannot yet be determined how effective this will be. As this thesis showed, the civil society does contribute to enforcement but enforces mostly the wrong rules. Organisations, industry groups, etc. enforce unofficial national measures rather than EU food information law, leading to new obstacles to trade. The Commission should monitor more closely which warnings are being issued and whether they are justified, since companies are hesitant to take action against these (sometimes unfounded) warnings and fines. More contact between the Commission and Member States and between Member States themselves may contribute to better alignment and understanding of the principle. Under the **MRR** responsibilities on awareness, application and enforcement lie with the Member States, but since national competent authorities lack knowledge of EU law, it should be determined whether it is possible for the Commission to have a bigger role, especially in enforcement.

The unofficial national measures are missing from the updated **MRR**, even though these have shown to be restrictive to trade. These measures that go against EU law and are not official national measures should become subject to regulation. This can be done for example by including them in the **MRR**, through a Commission guidance or by a separate regulation. What the best way is to include these unofficial national rules in regulation should be determined through research. Also, food information law should be made more specific based on the current discrepancies to leave less room for interpretation.

Additionally, creating more awareness about the TRIS database could help traders be more aware of national measures as well as have Member States make better use of the notification system. The database is easy to use but should also be made easy to understand for all traders. It should be clear from the database whether a measure is allowed by the Commission and a simplified summary of the new measure should be added to ensure that the information is also understandable for those that do not have extensive knowledge of (EU) law. If the database clearly indicates whether or not a measure is justified, more knowledge about what is and is not allowed is created. It could be considered to also create a similar database for unofficial national measures. If all traders (with a special account) can contribute to this database it will be easier for the Commission to supervise and catch rules that hinder the functioning of the internal market. To determine whether this is a fitting solution, a trial should be held. It should also be researched why the Member States are not sufficiently using the notification system. If this is for example because the Court is too strict on the justification requirement, targeted solutions can be found.

This thesis briefly touched upon voluntary food information and GMO labelling through examples. This showed that these areas are problem areas and that there may be other specific areas that are more prone to insufficient application of mutual recognition. It should be researched which areas this would apply to. Based on this, the existing regulations can be improved or new regulations can be established. Even though the intent of mutual recognition is to reduce regulation, more political control and rules could benefit mutual recognition to bring clarity surrounding the principle.

It has become clear that extensive research on mutual recognition in the area of food information is lacking, particularly research on its functioning in practice. Because of this, definitive policy recommendations cannot be made in this thesis. To increase the knowledge of the practical situation, a practical research should be performed where primary data is gathered to determine the suitability of the principle for the area of food information. The thesis at hand identified the problem areas for mutual recognition in the

area of food information, which can be used as a starting point for further research. Further research should be aimed specifically at the area of food information to determine the level of awareness of mutual recognition in Member States, companies and organisations, as well as the reason for not complying with the system surrounding mutual recognition. After establishing the underlying cause of the problem, research can be performed to determine and test possible solutions. Even though this thesis did not include specific regulations on topics that include labelling (e.g. the Organic Regulation), when primary research is performed these should be included to identify specific problems and to determine whether these raise new concerns surrounding the principle of mutual recognition in these specific areas.

If the principle of mutual recognition turns out not to be suitable for the area of food information, it may be necessary to achieve the goal of protecting the consumer while facilitating free trade without mutual recognition. Currently food companies comply with EU legislation, are challenged by national authorities for not complying with certain national measures, and as a consequence need to adapt their label. This takes resource and is cumbersome. It should be considered whether it is not less restrictive to bring products onto markets when companies immediately comply with national legislation (e.g. because labels need to be translated for the new market anyway). In theory, this is not the case because this would hinder the free movement of goods but whether this is less restrictive in practice is still unclear.

5.3 Strengths and weaknesses of the research

Many studies have been performed on the principle of mutual recognition but few specifically concerned the area of food information. That this is still an important research area was noticeable by the researches and papers that were published and developments in legislation that occurred during the period of this thesis. Including these recent changes helped ensure the relevance of this thesis. However, because of the lack of research on mutual recognition in this specific area, drawing concrete conclusions and answering the research question was more difficult. Many researches about mutual recognition have been performed in the years after its establishment. Because of this, some sources date back to pre-FIC. When these sources were used it was determined whether or not it was still correct information and applicable to today's situation.

The problem that is central to this thesis is of a practical nature. However, the research is purely theoretical and only made use of secondary data. It was unexpected how little knowledge and research there is on mutual recognition in relation to food information in general but specifically about its functioning in practice. To fill this gap, the practical information had to come from other sources, such as interviews held for magazines, theoretical researches where formulas were used to simulate the practical situation, or practical researches that were performed by others. However, none specifically researched mutual recognition in the area of food information. A solution was found to determine whether the challenges for mutual recognition also apply to the area of food information. This aspect was incorporated into the thesis by making use of practical examples of national standards on food information that hinder the free movement of goods. This research can be the base for future practical research as it has taken the first steps to identify the challenges mutual recognition faces in the area of food information.

This thesis did not include specific regulations on other topics that also include labelling to limit the scope and make the research feasible. However, it would be interesting to see how mutual recognition functions in these areas and which challenges are encountered. Although the scope was limited, due to the lack of available data it is unlikely that the results would have significantly changed if these specific regulations were included in this particular research. As recommended, in future research these should be included to also expand the knowledge on the functioning of mutual recognition in these areas.

References

Allen, C., Gasiorek, M., Smith, A. (1998). *European Single Market: how the programme has fostered competition.* Retrieved on March 28, 2019, from https://watermark.silverchair.com/economicpolicy13-0440.pdf

Andenas, M. (2006). National Paradigms of Civil Enforcement: Mutual Recognition or Harmonization in Europe?. *European Business Law Review*, *17*(3), 529-544.

Anders, S. M., & Caswell, J. A. (2009). Standards as barriers versus standards as catalysts: Assessing the impact of HACCP implementation on US seafood imports. *American Journal of Agricultural Economics*, *91*(2), 310-321.

Ankersmit, L. (2013). What if Cassis de Dijon were Cassis de Quebec? The assimilation of goods of third country origin in the internal market. *Common Market Law Review*, *50*(5), 1387-1410.

Austrian Economic Center. (2019). *30 Years after Bruges: Margaret Thatcher's Vision for Europe Revisited.* Retrieved on May 5, 2019, from https://www.austriancenter.com/thatcher-europe/

Avbelj, M. (2011). Supremacy or Primacy of EU Law—(Why) Does it Matter? *European Law Journal*, *17*(6), 744-763.

Branen, A. L., Davidson, P. M., Salminen, S., & Thorngate, J. (2001). *Food additives*. Boca Raton: CRC Press.

Bieber, R., & Maiani, F. (2014). Enhancing centralized enforcement of EU law: Pandora's Toolbox?. *Common Market Law Review*, *51*(4), 1057-1092.

BEUC. (2014). *Food Labels: Tricks of the Trade. Our recipe for honest labels in the EU.* Retrieved on July 13, 2019, from https://www.beuc.eu/publications/beuc-x-2018-049_our_recipe_for_honest_labels_in_the_eu.pdf

Cafaggi, F. (2014). Does Private Regulation Foster European Legal Integration? *In Varieties of European Economic Law and Regulation, pp.259-284.* Basel: Springer International Publishing Switzerland.

Chapman, B. (2018). *EU single market: What is it and why should we care if the UK leaves it?* Retrieved on May 4, 2019, from https://www.independent.co.uk/news/uk/politics/single-market-brexit-eu-trade-deals-what-is-uk-leave-european-union-why-a8557176.html

Chasen, R. (2018). Managing regulatory and data privacy compliance challenges in the food industry. In *Regulatory Compliance Magazine.* Retrieved on June 11, 2019, from https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-rfa-mini-roundtable-managing-regulatory-compliance-challenges-food-industry-reprint.pdf

Commission of the European Communities. (2000). *White Paper on Food Safety.* Retrieved on May 4, 2019, from https://ec.europa.eu/food/sites/food/files/safety/docs/gfl_white-paper_food-safety_2000_en.pdf

Costinot, A. (2008). A comparative institutional analysis of agreements on product standards. *Journal of International Economics*, *75*(1), 197-213.

Cuyvers, A. (2017). Free Movement of Goods in the EU. In *East African Community Law* (pp. 326-344). Brill Nijhoff.

De Brito, A.C., & Pelkmans, J. (2012). *Pre-empting technical barriers in the Single Market.* CEPS Policy Brief No. 277, 11 July 2012.

Derlén, M., & Lindholm, J. (2014). Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments. *European Law Journal*, *20*(5), 667-687.

De Witte, B. (2014). Internal Market Law and National Language Policies. In *Varieties of European Economic Law and Regulation.* (pp. 419-435). Basel: Springer International Publishing Switzerland.

DG4 DIer, Plant en Voeding. (2018). *Vragen en antwoorden over sommige bepalingen omtrent voedings- en gezondheidsclaims.* Retrieved on July 16, from https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/2018_04_faq_claims_final_nl.pdf

DG SANCO. (2013). *State of play in the EU on GM-free food labelling schemes and assessment of the need for possible harmonisation*. Retrieved on April 4, 2019, from https://ec.europa.eu/food/sites/food/files/plant/docs/gmo-traceability-gm-final_report_en.pdf

Dunt, I. (2018). *Let's be honest: There are no new Brexit ideas to save us.* Retrieved on March 6, from https://www.politics.co.uk/blogs/2018/06/04/let-s-be-honest-there-are-no-new-brexit-ideas-to-save-us

Edinger, W.H. (2016). Promoting Educated Consumer Choices. Has EU Food Information Legislation Finally Matured?. *Journal of consumer policy*, *39*(1), 9-22.

EU food comply. (n.d.). *On EU food law and compliance.* Retrieved on April 20, 2019, from http://foodcomply.eu/onfoodlaw/

European Commission. (2010). *Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods.* Retrieved on June 6, 2019, from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjwtcT45dTiAhWLZlAKHULYDCUQFjAAegQIARAC&url=http%3A%2F%2Fec.europa.eu%2FDocsRoom%2Fdocuments%2F104%2Fattachments%2F1%2Ftranslations%2Fen%2Frenditions%2Fpdf&usg=AOvVaw0XLTGBIskd6d-uEGoGLiC7

European Commission. (2013). *A single market for growth and jobs: an analysis of progress made and remaining obstacles in the member states: Contribution to the Annual Growth Survey 2014.* Retrieved on May 2, 2019, from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0785&from=EN

European Commission. (2014). *Search results.* Retrieved on May 9, 2019 from *http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.results#*

European Commission. (2015). *The notification procedure in brief.* Retrieved on May 9, 2019 from http://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/the-notification-procedure-in-brief1/

European Commission. (2016). *Report from the Commission to the European Parliament and the Council on food intended for sportspeople.* Retrieved on July 12, 2019, from https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_special_report-2016-402_en.pdf

European Commission. (2017). *The Rapid Alert System for Food and Feed 2017 Annual Report.* Retrieved on June 12, 2019, from https://ec.europa.eu/food/sites/food/files/safety/docs/rasff_annual_report_2017.pdf

European Commission. (2018). *Single Market.* Retrieved on May 4, 2019, from https://publications.europa.eu/en/publication-detail/-/publication/6ee5fa6b-95fd-11e8-8bc1-01aa75ed71a1/language-en/format-PDF/source-85807840

European Commission. (2019-a). *Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement.* Retrieved at July 27, 2019, from http://europa.eu/rapid/press-release_IP-19-4169_en.htm

European Commission. (2019-b). *Statistics on all EU countries.* Retrieved at August 3, 2019, from https://ec.europa.eu/growth/tools-databases/tris/en/the-20151535-and-you/being-informed/interactive-statistics/statistics-on-all-eu-countries/#

European Commission. (n.d.-a). *The European Single Market.* Retrieved on March 26, 2019, from https://ec.europa.eu/growth/single-market_en

European Commission. (n.d.-b). *Free movement in harmonised and non-harmonised sectors.* Retrieved on April 25, 2019, from https://ec.europa.eu/growth/single-market/goods/free-movement-sectors_en

European Commission. (n.d-c). *De database doorzoeken.* Retrieved on May 16, 2019, from http://ec.europa.eu/growth/tools-databases/tris/nl/search/

European Commission. (n,d.-d). *Traceability and labelling.* Retrieved on April 16, 2019, from https://ec.europa.eu/food/plant/gmo/traceability_labelling_en

European Commission. (n.d.-e). *High Level Group on Nutrition and Physical Activity.* Retrieved on July 20, 2019, from https://ec.europa.eu/health/nutrition_physical_activity/high_level_group_en

European Parliament. (2017). *Briefing: The EU as a community of law. Overview of the role of law in the Union.* Retrieved on May 7, 2019, from http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf

European Parliament. (2019). *Briefing EU legislation in process. Mutual Recognition of goods.* Retrieved on May 4, 2019, from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwiFqMX38oHiAhXGUlAKHalJB4UQFjACegQIBRAC&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2FBRIE%2F2018%2F614671%2FEPRS_BRI(2018)614671_EN.pdf&usg=AOvVaw1KeSL4Zkq0RR-u7QWVN_eX

Eurostat. (2019). *Intra-EU – most traded goods.* Retrieved on May 17, 2019, from https://ec.europa.eu/eurostat/statistics-explained/pdfscache/39713.pdf

Foley, S.R. (2018). Managing regulatory and data privacy compliance challenges in the food industry. In *Regulatory Compliance Magazine.* Retrieved on June 11, 2019, from https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-rfa-mini-roundtable-managing-regulatory-compliance-challenges-food-industry-reprint.pdf

Foodmagazine. (2019). *Nederland massaal achter Nutri-Score.* Retrieved on May 22, 2019, from https://www.foodmagazine.nl/achtergrond/nieuws/2019/01/nederland-massaal-achter-nutri-score-1014999?vakmedianet-approve-cookies=1&_ga=2.63034668.2095426990.1558552354-7476330.1558552354

Fortuna, G. (2019). *Food industry hails new EU rules on Mutual Recognition of goods.* Retrieved on May 18, 2019, from https://www.euractiv.com/section/agriculture-food/news/food-industry-hails-new-eu-rules-on-mutual-recognition-of-goods/

Gawas, V.M. (2017). Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards the Research Development. *International Journal of Law, 3*(5), 128-130.

Geng, D. (2019). International Agreements on Product Standards Under Consumption Externalities: National Treatment Versus Mutual Recognition. *Economic Inquiry*, *57*(3), 1284-1301.

Ghibuţiu, A. (2017). EU and the challenges of rising global protectionism. *Romanian Economic and Business Review*, *12*(1).

Glinski, C., Joerges, C. (2014). European Unity in Diversity?! A Conflicts-Law Re-construction of Controversial Current Developments In *Varieties of European Economic Law and Regulation.* (pp. 285, 314). Basel: Springer International Publishing Switzerland.

Harbo, T. I. (2010). The function of the proportionality principle in EU law. *European Law Journal*, *16*(2), 158-185.

High Level Group of Nutrition and Physical Activity. (2011). *Annex II: Added Sugars.* Retrieved on July 20, 2019, from https://ec.europa.eu/health/sites/health/files/nutrition_physical_activity/docs/added_sugars_en.pdf

Jacobsen, H. (2015). *Consumer organisation expose misleading meat labelling.* Retrieved on July 13, 2019, from https://www.euractiv.com/section/agriculture-food/news/consumer-organisations-expose-misleading-meat-labelling/

Jumbo. (n.d.) *Zonder toegevoegde suiker.* Retrieved on July 20, 2019, from https://www.jumbo.com/zoeken?SynchronizerToken=f48f2f2916d3978f010cbfda059c7f5f054b6294bc7ba9bf850dd5414e62d9bd_OKUcIoN5yws%3D%7CTCj%2B3WMppJUFz2mPfFuAww%3D%3D&SearchTerm=zonder+toegevoegde+suiker

Karsten, J. (2015). *EU-food information regulation – implementing measures by Member States.* Retrieved on July 20, 2019, from https://www.kneppelhout.nl/media/rtf/11114916_buchblock.pdf

Kidmose, B.; Sylvest, J.; Culver, J.; Teichler, T.; Kosk, K. & Männik, K. (2015). *Evaluation of the Application of the Mutual Recognition principle in the field of goods.* Retrieved on March 30, 2019, from https://ec.europa.eu/docsroom/documents/13381/attachments/1/translations/en/renditions/pdf

Küster, N. (2018). Managing regulatory and data privacy compliance challenges in the food industry. In *Regulatory Compliance Magazine.* Retrieved on June 11, 2019, from https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-rfa-mini-roundtable-managing-regulatory-compliance-challenges-food-industry-reprint.pdf

Kwasniewski, N. (2019). *Iglo darf Nährwertkennzeichnung nicht nutzen.* Retrieved May 22, 2019, from https://www.spiegel.de/wirtschaft/service/nutri-score-bei-iglo-gericht-stoppt-naehrwertkennzeichnung-a-1263159.html

Lelieveldt, H.; Princen, S. (2015). *The Politics of the European Union.* Cambridge: Cambridge University Press.

Livsmedelsverket. (2017). *Labeling of GMOs*. Retrieved on April 2, 2019, from https://kontrollwiki.livsmedelsverket.se/artikel/228/markning-av-gmo#F%C3%A5r%20man%20m%C3%A4rka%20med%20%E2%80%9Dfri%20fr%C3%A5n%20GMO%E2%80%9D?

Livsmedelsverket. (2019). *About us.* Retrieved on April 2, 2019, from https://www.livsmedelsverket.se/en/about-us

MacMaoláin, C. (2008). Waiter! There's a beetle in my soup. Yes sir, that's E120: Disparities between actual individual behaviour and regulating food labelling for the average consumer in EU law. *Common Market Law Review*, *45*(4), 1147-1165.

Maduro, M.P. (2007). So close and yet so far: the paradoxes of mutual recognition. *Journal of European Public Policy*, *14*(5), 814-825.

Margaret Thatcher Foundation. (2019). *Biography.* Retrieved on May 5, 2019, from https://www.margaretthatcher.org/essential/biography.asp

Messerlin, P.A. (2011). The European Union single market in goods: between Mutual Recognition and harmonisation. *Australian Journal of International Affairs*, *65*(4), 410-435.

Micromax Design and Consulting. (2019). Adapted from *Blue Green Wave.* Retrieved on May 4, 2019, from http://www.build.micromaxdesign.com/product/blue-green-wave/

Monier-Dilhan, S. (2018). Food labels: consumer's information or consumer's confusion. *OCL*, *25*(2), D202. Retrieved on July 20, 2019, from http://www.ocl-journal.org/en/articles/ocl/full_html/2018/02/ocl170055/ocl170055.html

NSAI. (2019). *Notifications under EU Directive 2015/1535.* Retrieved on May 9, 2019, from https://www.nsai.ie/standards/notification-and-registration-schemes/notifications-under-eu-directive-2015-1535/

Öberg, J. (2017). Subsidiarity as a Limit to the Exercise of EU Competences. *Yearbook of European Law*, *36*, 391-420.

Ostropolski, T. (2015). The CJEU as a defender of mutual trust. *New Journal of European Criminal Law*, *6*(2), 166-178.

Purnhagen, K. (2014). The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny. *In Varieties of European Economic Law and Regulation.* (pp. 315-342). Basel: Springer International Publishing Switzerland.

Purnhagen, K. (2015). The EU's Precautionary Principle in Food Law is an Information Tool! *European Business Law Review*, 6. Forthcoming; Wageningen Working Papers in Law and Governance 2015/11.

Purnhagen, K., & Schebesta, H. (2019). *Food Labelling for Consumers. EU Law Regulation and Policy Options.* Retrieved on May 11, 2019, from http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608871/IPOL_STU(2019)608871_EN.pdf

Rizcallah, C. (2019). The challenges to trust- based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration. *European Law Journal*, *25*(1), 37-56.

RetailDetail. (n.d.). *Consumer's organisation want Nutri-Score made mandatory.* Retrieved on May 22, 2019, from https://www.retaildetail.eu/en/news/food/consumers-organisations-want-nutri-score-made-mandatory

Robini, L.R., & Coutrelis, N. (2017). France. *European Food and Feed Law Review, 12(*3), 258-259.

Rørdam, M.O. (2013). *EU Law on Food Naming: The Prohibition Against Misleading Names in an Internal Market Context.* Copenhagen Business School [Phd].

Schebesta, H. & Purnhagen, K. (2016). *The behaviour of the average consumer: A little less normativity and a little more reality in CJEU's case law? Reflections on Teekanne.* Wageningen Working Papers in Law and Governance 2015/11.

Schebesta, H., & Purnhagen, K. P. (2017). *Is the 'Behavioural Turn' in Consumer Law Taken by Dutch National Courts?* Retrieved on May 13, 2019, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058637

Schebesta, H., Van der Meulen, B., & Van der Velde, M. (2014). International Food Law. In *EU Food Law Handbook, pp. 107-138.* Wageningen: Wageningen Academic Publishers.

Schebesta, H., & Van der Velde, M. (2014). The foundations of the European Union. In *EU Food Law Handbook, pp. 107-138.* Wageningen: Wageningen Academic Publishers.

Schütze, R. (2018). 'Re- reading' Dassonville: Meaning and understanding in the history of European law. *European Law Journal*, *24*(6), 376-407.

Spreeuw, M. (2012). Do as I Say, not as I Do. The Application of Mutual Recognition and Mutual Trust. *Croatian yearbook of European law & policy*, *8*(8), 505-530.

Sterck, J. (2018). Sameness and selfhood: The efficiency of constitutional identities in EU law. *European Law Journal*, *24*(4-5), 281-296.

Thatcher, M. (1988). *Speech to the College of Europe ("The Bruges Speech").* Retrieved on May 4, 2019, from https://www.margaretthatcher.org/document/107332

Tokar, A. (2001). Something Happened. Sovereignty and European Integration. *In Extraordinary Times: IWM Junior Visiting Fellows Conferences, 11*, (2).

Unberath, H., & Johnston, A. (2007). The double-headed approach of the ECJ concerning consumer protection. *Common Market Law Review, 44*(5), 1237-1284.

Van der Meulen, B. (2014). Food law: development, crisis and transition. In *EU Food Law Handbook, pp. 199-220.* Wageningen: Wageningen Academic Publishers.

Van der Zee, E. (2016). Legal limits on food labelling law: comparative analysis of the EU and the USA. *European Business Law Review*, *27*(3), 295-323.

Weatherill, S. (2014). Why There Is No 'Principle of Mutual Recognition' in EU Law (and Why that Matters to Consumer Lawyers). *In Varieties of European Economic Law and Regulation.* (pp. 401-418). Basel: Springer International Publishing Switzerland.

Weatherill, S. (2017-a). The several internal markets. *Yearbook of European Law*, *36*, 125-178.

Weatherill, S. (2017-b). The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist. *European Law Review,* Forthcoming. Oxford Legal Studies Research Paper No. 43/2017.

World Trade Organization. (2012). *World Trade Report 2012: Trade and public policies: A closer look at non-tariff measures in the 21st century.* Retrieved on April 3, 2019, from https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf

Young, A.R. (2006). The Politics of Regulation and the Internal Market. In *Handbook of European Union Politics.* (pp. 373-389). London: SAGE publications.

Żurek, K. (2011). *European food regulation after enlargement: facing the challenges of diversity.* Leiden: Martinus Nijhoff Publishers.

Legislation

EU legislation

Consolidated version of the Treaty on European Union. *OJ C 202, 7.6.2016, p. 13–388.*

http://data.europa.eu/eli/treaty/teu_2016/oj

Consolidated version of the Treaty on the Functioning of the European Union. *OJ C 202, 7.6.2016, p. 1–388.*

http://data.europa.eu/eli/treaty/tfeu_2016/oj

Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (Text with EEA relevance). *OJ L 218, 13.8.2008, p. 21–29.*

http://data.europa.eu/eli/reg/2008/764/oj

Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the Mutual Recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (Text with EEA relevance). *OJ L 91, 29.3.2019, p. 1–18.*

http://data.europa.eu/eli/reg/2019/515/oj

Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. *OJ L 31, 1.2.2002, p. 1–24.* Consolidated version of 01/07/2018.

http://data.europa.eu/eli/reg/2002/178/2018-07-01

Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance. *OJ L 304, 22.11.2011, p. 18–63.* Consolidated version of 01/01/2018.

http://data.europa.eu/eli/reg/2011/1169/oj

Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods. *OJ L 404, 30.12.2006, p. 9–25*. Consolidated version of 13/12/2014.

http://data.europa.eu/eli/reg/2006/1924/oj

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance). *OJ L 149, 11.6.2005, p. 22–39.*

http://data.europa.eu/eli/dir/2005/29/oj

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance). *OJ L 241, 17.9.2015, p. 1–15.*

http://data.europa.eu/eli/dir/2015/1535/oj

Edinburgh Guidelines. European Council in Edinburgh 11-12 December, 1992. Conclusions of the presidency.
https://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh__eng_.pdf

EU case law

Cassis de Dijon: Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42.

CIA security: Case C-194/94, CIA Security International SA v Signalson SA and Securitel SPRL, ECLI:EU:C:1996:172.

Commission v Netherlands: Case C-508/10: European Commission v Kingdom of the Netherlands, ECLI:EU:C:2012:243.

Commission v Italy: Case 7/68, Commission of the European Communities v Italian Republic, ECLI:EU:C:1968:51.

Dassonville: Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville, ECLI:EU:C:1974:82.

Drei Glocken: Case 407/85, *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano*, ECLI:EU:C:1988:401.

Keck and Mithouard: Joined cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard. ECLI:EU:C:1993:905.

Pigs Marketing Board: Case 83/78, *Pigs Marketing Board v Redmond* ECLI:EU:C:1978:214

Reinheitsgebot: Case 178/84, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1987:126.

Teekanne: Case C-195/14, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG*, ECLI:EU:C:2015:361.

Tobacco advertising: Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:2000:544.

Unilever: Case C-443/98, Unilever Italia SpA v Central Food SpA, ECLI:EU:C:2000:496.

Weintor: Case C-544/10, *Deutsches Weintor eG v Land Rheinland Pfalz*, ECLI:EU:C:2012:526.

National legislation

Assemblée Nationale. Amendment N°44 of the Protéger la Population des Dangers de la Malbouffe. February 18, 2019. [French amendment on the dangers of junkfood.]
http://www.assemblee-nationale.fr/dyn/15/amendements/1561/AN/44

Assemblée Nationale. XV^{e} legislature Session ordinaire de 2018-2019. Compte rendu integral. Troisième séance. February 21, 2019. [Third reading of the French National Assemblée.]
http://www.assemblee-nationale.fr/15/cri/2018-2019/20190162.asp