



## ARTICLES

### SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (FIRST PART)

# HORIZONTAL FEDERALISM, MUTUAL RECOGNITION AND THE BALANCE BETWEEN HARMONIZATION, HOME STATE CONTROL AND HOST STATE AUTONOMY

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ABSTRACT: The – vertical – relation between the central level and sub-central levels of government is a key issue in federal-type systems, including the EU. A question which usually attracts much less attention is how the – horizontal – relations between the sub-central levels are shaped. In this contribution, the legal arrangements in the US and EU legal orders to shape the horizontal relations between the (Member) States (“horizontal federalism”) will be analysed and compared. Whereas the US legal system contains a variety of arrangements, the EU relies rather exclusively on the principle of mutual recognition. The central question is how legal arrangements of horizontal federalism balance harmonization (or control by the central/federal level), recognition and acceptance of foreign rules and (host) State autonomy. From the perspective of the host (Member) State, the question is thus to what extent it may apply its own rules (host State autonomy) or whether it must comply with central rules (harmonization) and foreign rules (from other States). This article examines how this balance is struck in different policy fields, what mechanisms are applied (especially in the US context) and which factors determine the choice for a particular balance.

KEYWORDS: mutual recognition – horizontal federalism – full faith and credit – State autonomy – Area of Freedom, Security and Justice – internal market.

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## I. INTRODUCTION

Federal-type systems need arrangements to regulate the relations between the sub-central levels. The concept of horizontal federalism has been coined to capture these relations.<sup>1</sup> This has been in part a reaction to the abundant attention in scholarly work for the vertical dimension of federal systems. Indeed, this represents the central issue in constitutional studies. The vertical relation between the central level and sub-central levels is equally key in most public and political debates. In the EU, the division of authority between the EU level (“Brussels”) and the Member States outweighs the attention for the effects of EU membership on the relations between the Member States by far. The effects of EU membership on national sovereignty has become for many the single most important issue in this regard.

This underexposure of the horizontal dimension of federalism is also reflected in domestic constitutional law. The US Constitution, for instance, is “quite detailed in explaining what the federal government can do and what States cannot do, but is relatively spare in defining how the existence of multiple States possessing equivalent powers limits the scope of those powers”.<sup>2</sup> Ebsen has defined horizontal federalism as the branch of constitutional law (in the US) that deals with the issue of how the existence of multiple States limits the power of each when interacting with the other or with the others’ citizens.<sup>3</sup> Although Ebsen acknowledges that horizontal federalism is entangled with vertical federalism, he nevertheless contends that horizontal federalism can be distinguished from that and considers it is indeed analytically useful to do so to fully understand the complexities of the federal system.<sup>4</sup>

The concept of horizontal federalism is relevant for the EU – as a federal-type system in its own right – as well. It allows us to assess how the relations between the Member States are regulated in the EU legal order. It highlights the specific and rather exclusive position of mutual recognition in regulating the relations between the Member States in the EU. It may be argued that the principle has acquired a constitutional status, because it now overarches distinct policy areas of the EU and applies in both the internal market and the Area of Freedom, Security and Justice (AFSJ). Moreover, the CJEU has balanced mutual recognition (and mutual trust) with EU constitutional principles, thereby confirming a similar status of the former. This has not been unproblematic, however. The CJEU has been criticized for a number of decisions in the field of EU criminal law<sup>5</sup> and migration law<sup>6</sup> in which mutual recognition prevailed over fundamental

<sup>1</sup> A. ERBSEN, *Horizontal Federalism*, in *Minnesota Law Review*, 2008, p. 508 *et seq.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ivi*, p. 501.

<sup>4</sup> *Ivi*, p. 505.

<sup>5</sup> Court of Justice, judgment of 26 February 2013, case C-339/11, *Melloni*.

<sup>6</sup> Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. and M.E.*

rights protection. The fundamental status of mutual recognition in the EU legal order has, however, been confirmed the Opinion 2/13 on the Draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR).<sup>7</sup> The CJEU labelled it, together with the connected principle of mutual trust, as a “special characteristic” of EU law, that would be affected by accession to the ECHR in the way foreseen by the Draft Agreement.<sup>8</sup>

The widespread application of mutual recognition in the EU may be explained by its ability to balance unity and diversity (unlike harmonization, it leaves national regulatory regimes largely intact). Thus, it is generally seen as less intrusive on Member States’ autonomy and in that light often considered as the ideal “third way” between EU centralization and pure Member State discretion without any arrangements for cross border situations. In practice, however, mutual recognition arrangements regularly include both a degree of harmonization and a measure of national discretion. Whereas mutual recognition is mostly combined with a level of minimum harmonization in the internal market, in the AFSJ a comparable common level of norm equality between the Member States is the result of fundamental rights. It may occur that Member States must adopt a formal decision on admission even if the foreign services or persons have been subjected to harmonized EU rules. For the purposes of this contribution, however, mutual recognition will be assumed to involve at least some level of norm diversity between host and home States. Only in this way it makes sense to distinguish it analytically from harmonization and from national discretion. The latter may consist of mutual recognition regimes allowing the (host) Member State to make exceptions, to place additional requirements or to otherwise diverge from the principle.

The earlier mentioned concept of horizontal federalism will be adopted from US constitutional doctrine. The theoretical foundations of this concept will neither be explored, nor will the ability of the concept to be applied in the EU context be examined. Rather, it will be used to analyze how horizontal relations between the sub-central levels in the EU and US legal orders are shaped. The alternative would have been to start from EU mutual recognition and assess which similar principles exist in the US legal system. The Full Faith and Credit principle in US constitutional law would have been an obvious choice in such an approach as it is in various ways similar to EU mutual recognition. Horizontal federalism allows for a broader window on the relations between (Member) States, however, and it highlights other arrangements of horizontal relations between the US States. The US legal system includes indeed a variety of arrangements to shape horizontal federalism, as we will see (section II).

The central question is how legal arrangements of horizontal federalism balance harmonization (or control by the central/federal level), recognition and acceptance of foreign rules and (host) State autonomy. From the perspective of the host (Member)

<sup>7</sup> Court of Justice, opinion 2/13 of 18 December 2014.

<sup>8</sup> See *infra* section III.2.

State, the question is thus to what extent it may apply its own rules (host State autonomy) or whether it must comply with central rules (harmonization) and foreign rules (from other States). This article examines how this balance is struck in different policy fields, what mechanisms are applied (especially in the US context) and which factors determine the choice for a particular balance. The focus of the EU part of this article (section III) will be on the development of mutual recognition in various policy domains of the internal market and the AFSJ.

## II. HORIZONTAL FEDERALISM IN THE US

### II.1. FULL FAITH AND CREDIT

A key element of horizontal federalism is established by Art. IV, Section 1, of the US Constitution, known as the “Full faith and Credit Clause”. This provision creates a general Mutual recognition type of obligation as it obliges US States to respect each other’s public acts, records, and judicial proceedings. The Article also creates a general legal basis for the US Congress to enact general laws to prescribe “the manner in which such acts, records, and proceedings shall be proved, and the effect thereof”. The Supreme Court has interpreted the clause to mean that it may oblige a State to take *jurisdiction* over a claim involving an interstate aspect; to determine the *laws of which State* are applicable to a case; and to force States to *acknowledge and enforce court decisions* of other States.<sup>9</sup>

The Supreme Court has described the Full Faith and Credit Clause as “a nationally unifying force” that “altered the status of the several States as independent foreign sovereignties, each free to ignore rights and obligations created under the laws [...] of the others”. Indeed, the rationale behind the clause may be described as follows: “in drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states”.<sup>10</sup>

The Full Faith and Credit Clause has been at issue in cases in which the States hold – or held – political diverging views. The recognition of same-sex marriages has been a prominent example.<sup>11</sup> In the 2015 *Obergefell*<sup>12</sup> case, the Supreme Court concluded that same-sex couples may exercise their right to marry in all States and that no State may

<sup>9</sup> E. CORWIN, *The “Full Faith and Credit” Clause*, in *University of Pennsylvania Law Review*, 1933, p. 371 *et seq.*

<sup>10</sup> *Full Faith and Credit Clause*, in *West’s Encyclopedia of American Law*, 2008, legal-dictionary.thefreedictionary.com.

<sup>11</sup> See e.g. S. SANDERS, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, in *Indiana Law Journal*, 2014, p. 95 *et seq.*

<sup>12</sup> US Supreme Court, judgment of 26 June 2015, *Obergefell v. Hodges*.

refuse to recognize a lawful same-sex marriage concluded in another State on the ground of its same-sex character. However, the Supreme Court based its decision on the fundamental right to marry, instead of the Full Faith and Credit Clause. In other, “European”, words, uniformity instead of mutual recognition was the basis for the decision. By contrast, in a recent decision on same-sex couples’ adoption rights the Supreme Court reversed a decision of the Supreme Court of Alabama, thereby reinstating an adoption decree issued by a Georgian court.<sup>13</sup> The Supreme Court explicitly based its decision on the Full Faith and Credit Clause this time.

The Full Faith and Credit Clause is subject to public policy exceptions. In 1939, the Supreme Court already held:

“[T]here are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy”.<sup>14</sup>

The Full Faith and Credit Clause covers judgements and statutory law, but the level of protection differs. The Full Faith and Credit command is strict with respect to final judgements rendered by courts with adjudicatory authority over the subject matter and persons governed by the judgment.<sup>15</sup> When it comes to the application of laws, however, the Supreme Court allows State courts more discretion. It has decided that a State may apply its own laws if applying a sister State's laws would violate its own legitimate public policy.<sup>16</sup> After a period in which the Supreme Court undertook the appraisal and balancing of State interests itself,<sup>17</sup> it now grants State courts more freedom in this regard, enabling them to lawfully apply either the law of one State or the contrary law of another.<sup>18</sup>

This begs the question whether the Congressional power enshrined in Art. IV of the Constitution includes the power to harmonize substantive law in order to facilitate the Full Faith and Credit Demand. Art. IV of the Constitution suggests a narrow interpretation of the Congressional power as it only allows Congress to “[...] prescribe the *manner*

<sup>13</sup> US Supreme Court, judgment of 7 March 2016, *V.L. v. E.L.*

<sup>14</sup> US Supreme Court, judgment of 27 March 1939, *Pacific Employers Insurance v. Industrial Accident*. See also US Supreme Court, judgments of: 14 May 1888, *Wisconsin v. Pelican Insurance Co.*; 12 December 1892, *Huntington v. Attrill*; 6 April 1903, *Finney v. Guy*; 21 May 1900, *Clarke v. Clarke*; 21 February 1910, *Olmsted v. Olmsted*; 1 June 1915, *Hood v. McGehee*; cf. US Supreme Court, judgment of 24 April 1918, *Gasquet v. Fenner*.

<sup>15</sup> US Supreme Court, judgment of 13 January 1998, *Baker v. General Motors Corp.*, p. 233: “[in case of statutes] [...] the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events”.

<sup>16</sup> US Supreme Court, judgment of 5 March 1997, *Nevada v. Hall*, p. 424.

<sup>17</sup> See, e.g., US Supreme Court, judgment of 16 May 1932, *Bradford Elec. Light Co. v. Clapper*.

<sup>18</sup> US Supreme Court, judgment of 15 June 1988, *Sun Oil Co. v. Wortman*.

*in which* such acts, records, and proceedings shall be proved, and the *effect thereof*.<sup>19</sup> Congress has not made extensive use of this power. Illustrative is the Parental Kidnapping Prevention Act (PKPA) enacted in 1980 to establish what State has jurisdiction to decide on child custody measures. It further requires States to give full faith and credit to child custody determinations of other States. Prior to the adoption of the act, the recognition of such determinations was a problem as courts did not consider them as “final” acts (since they might be modified if necessary for the best interests of the child).<sup>20</sup> There is an element of what in EU law would be called harmonization in the recognition process, as recognition is dependent on those determinations being consistent with the criteria established by Congress.

The 1996 Defense of Marriage Act (DOMA) has been a much more controversial use of the Congressional power under Art. IV of the US Constitution. DOMA defined marriage for federal purposes as the union of one man and one woman, and allowed States to refuse to recognize same-sex marriages granted under the laws of other States. Thus, DOMA not only drew attention for its political sensitivity, but also for the application of the Full Faith and Credit provision as a legal basis for actually *limiting* the obligation to recognize same-sex marriages. In 2013, the Supreme Court held DOMA to be unconstitutional on the ground that it violated the Due Process Clause of the Fifth Amendment.<sup>21</sup> Although the Supreme Court addressed its prior decisions on marital affairs belonging to State rather than federal powers, the unconstitutionality was not founded on DOMA being *ultra vires*, thus leaving the question open whether such an act may at all be based on Art. IV of the US Constitution.

## II.2. EXTRADITION

The interstate transfer of suspects of crimes is not covered by the Full Faith and Credit Clause. A separate provision, Art. IV, Section 2, regulates this situation. It requires that:

“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime”.

The provision has a long history, but its relevance has been limited during most of it. The Supreme Court decided on the application of the clause in *Kentucky v. Dennison* in 1860.<sup>22</sup> The case involved a man who had helped a slave escape in Kentucky and sub-

<sup>19</sup> Emphasis added.

<sup>20</sup> P.E. CHABORA, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, in *Nebraska Law Review*, 1997, p. 633.

<sup>21</sup> US Supreme Court, judgment of 26 June 2013, *United States v. Windsor*.

<sup>22</sup> US Supreme Court, judgment of 14 March 1860, *Kentucky v. Dennison*.

sequently fled to Ohio. The governor of Ohio refused to extradite the man to Kentucky. The Supreme Court asserted the constitutional responsibility of the governor under the Extradition Clause to return the man to Kentucky, but held that federal courts could not issue a court order to force the governor to comply with the clause. However, the Supreme Court did make an important decision on the scope of application of the Extradition Clause. It dismissed the claim that the clause would apply only if the double criminality requirement would have been fulfilled.<sup>23</sup> The Court argued that “under such a vague and indefinite construction, [...] the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion”. Thus, the Extradition Clause applies to “every offence made punishable by the law of the State in which it was committed”. Moreover, it gives the right to the authorities *to demand* the fugitive from the asylum State. This implies it concerns an *obligation* to deliver, “without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled”.<sup>24</sup>

Obviously, this decision greatly limited the relevance of the Extradition Clause, a situation that ended only in 1987 when the Supreme Court reversed its *Kentucky v. Dennison* decision in *Puerto Rico v. Branstad*.<sup>25</sup> The Supreme Court ruled that *Dennison* was outdated and that federal courts now indeed did have the power to enforce the constitutional duty to extradite.<sup>26</sup> Interestingly, the Supreme Court based its reversal on the changed nature of the relations between the federal level and State levels of government. The Supreme Court ruled that at the time *Dennison* was decided,

“the practical power of the Federal Government was at its lowest ebb since the adoption of the Constitution. Secession of States from the union was a fact, and civil war was a threatening possibility. The other proposition for which *Dennison* stands – that the Extradition Clause’s commands are mandatory and afford no discretion to executive officers of the asylum State is reaffirmed. However, the *Dennison* holding as to the federal courts’ authority to enforce the Extradition Clause rested on a fundamental premise – that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns – which is not representative of current law”.<sup>27</sup>

Since the Supreme Court enabled federal enforcement of the Extradition Clause in *Puerto Rico v. Branstad*, it has become a forceful instrument of interstate criminal cooperation. Moreover, States have only very limited possibilities to refuse to deliver a suspect. In *California v. Superior Court of California*, the Supreme Court ruled that there are only four grounds for refusal. It held that:

<sup>23</sup> *Ivi*, paras 102-103.

<sup>24</sup> *Ivi*, para. 103.

<sup>25</sup> US Supreme Court, judgment of 23 June 1987, *Puerto Rico v. Branstad*.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

“The Extradition Act prohibits the California Supreme Court from refusing to permit extradition. The language, history, and subsequent construction of the Act establish that extradition is meant to be a summary procedure, and that the asylum State’s courts may do no more than ascertain whether (a) the extradition documents on their face are in order; (b) the petitioner has been charged with a crime in the demanding State; (c) the petitioner is the person named in the request for extradition; and (d) the petitioner is a fugitive”.<sup>28</sup>

Thus, extradition may only be refused on purely formal reasons. The criminal law system of the requesting State is leading: in the absence of any double criminality requirements or any “harmonized” list of recognized crimes, neither federal nor asylum State law are relevant.

### II.3. INTERSTATE COMMERCE

The Interstate Commerce Clause, which is part of Art. I, Section 8, Clause 3, of the US Constitution, is the key provision for trade relations between the States in the US. The provision allows Congress to regulate trade issues between the States. In the 19<sup>th</sup> century, Congress adopted the Interstate Commerce Act and the Sherman Antitrust Act which lie at the heart of the subject matter, on the basis of the clause.

Similar to Art. 114 TFEU, the Interstate Commerce Clause has, however, been given a broad interpretation and has been applied in intrastate<sup>29</sup> and non-commerce contexts as well. Illustrative is a Supreme Court decision to halt price fixing in the Chicago meat industry, a local market, by arguing that business done at a purely local level could become part of commerce that involves the interstate movement of goods and services.<sup>30</sup> Under the New Deal, the Interstate Commerce Clause became the legal basis to regulate worker hours and wages. During the Civil Rights Movement, the clause has been applied to pass the 1964 Civil Rights Act which outlawed segregation and prohibited discrimination against African-Americans.

The link with interstate trade has been weak in such cases: in a case on the application of such civil rights legislation to a restaurant, the interstate link was found in the fact that the restaurant served food that had previously crossed State lines.<sup>31</sup> Such tenuous argumentation to unlock the commerce clause was not accepted in 1995, when a defendant successfully claimed that the Gun Free School Zones Act of 1990 should be declared unconstitutional by arguing that the government lacks the authority to regulate firearms in local schools. The Supreme Court denied the federal government’s ar-

<sup>28</sup> US Supreme Court, judgment of 9 June 1987, *California v. Superior Court*.

<sup>29</sup> Already in 1824 the US Supreme Court decided that intrastate activity could be regulated under the Commerce Clause in as far as it is part of a larger interstate commercial scheme: US Supreme Court, judgment of 2 March 1824, *Gibbons v. Ogden*.

<sup>30</sup> US Supreme Court, judgment of 30 January 1905, *Swift and Company v. United States*.

<sup>31</sup> US Supreme Court, judgment of 14 December 1964, *Katzenbach v. McClung*.



gument that firearm possession in schools affected the general economic climate (*Lopez v. United States*).<sup>32</sup>

The Supreme Court has been alternating more and less flexible usages of the provision, depending on its political composition. The Interstate Commerce Clause has remained controversial and politically salient: in recent years, it has been in particular the Patient Protection and Affordable Care Act ("*Obamacare*") that has been scrutinized. The Supreme Court decided that a key element of the law, the requirement for citizens to purchase health insurance, fell outside the scope of the Interstate Commerce Clause. It did fall within the federal legislature's taxation power, however, on the basis of which the law was upheld.<sup>33</sup>

Key element of legislation adopted under the Interstate Commerce Clause is the application of uniform rules in all the States. In European terminology, this would be labelled as harmonization. It has been applied extensively to create uniform product standards at the federal level. The Consumer Product Safety Act established the United States Consumer Product Safety Commission, an agency that has the power to develop safety standards for over 15000 products (it may ban products as a last resort measure). It may not regulate products that are subject to the jurisdiction of other agencies, such as foods, drugs, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts and boats.<sup>34</sup>

Interstate trade is, furthermore, facilitated by the so-called Dormant Commerce Clause. This provision implies that the States may not adopt legislation that improperly burdens or discriminates against interstate commerce. It is inferred from the Congressional power to regulate interstate commerce. Non-discriminatory State laws (discriminatory State laws are prohibited *per se*) are subject to a balancing test which is very similar to the EU proportionality test. If the burden imposed by State laws is "clearly excessive" in relation to State benefits, and if the State interests can be promoted as well with a lesser impact on interstate commerce, the State law at issue will be declared incompatible with the Interstate Commerce Clause. In *Granholm v. Heald* the Supreme Court ruled that the Michigan and New York bans of direct shipment of wine to in-state customers posed an excessive burden compared to the benefits.<sup>35</sup>

<sup>32</sup> US Supreme Court, judgment of 27 May 1963, *Lopez v. United States*.

<sup>33</sup> US Supreme Court, judgment of 28 June 2012, *National Federation of Independent Business v. Sebelius*.

<sup>34</sup> United States Consumer Product Safety Commission, *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, [www.cpsc.gov](http://www.cpsc.gov).

<sup>35</sup> US Supreme Court, judgment of 16 May 2005, *Granholm v. Heald*. Other applications include US Supreme Court, judgment of 2 March 1970, *Pike v. Church*: Arizona bans shipment of loose cantaloupes to California for packaging which was also qualified as an excessive burden; US Supreme Court, judgment of 21 January 1981, *Minnesota v. Clover Leaf Creamery Co.*: MN bans retail sale of milk in plastic, nonreturnable, non-refillable jugs. The Supreme Court ruled that this does not violate the Interstate Commerce

#### II.4. INTERSTATE COMPACTS

Unlike in the EU, no general mutual recognition obligation exists that applies to areas in which no federal legislation has been adopted and in which the dormant Commerce clause provides no protection. Such areas may be regulated by so-called interstate compacts. These are agreements between the States, in most cases subject to Congressional consent, and constitute a curious hybrid between international law and constitutional law instruments.<sup>36</sup> It has been contended that in issues which are “supra-State”, but “sub-federal” in nature, interstate compacts states are the only way for the states to preserve their autonomy by sharing sovereignty and work together.<sup>37</sup> The substance of these compacts may differ substantially. A few examples will clarify what issues may be regulated under an interstate compact.

a) Insurance products: an example is found in the field of insurance products in which 44 States have concluded an interstate compact. The Interstate Insurance Product Regulation Compact (IIPRC) is “a vehicle to (1) develop uniform national product standards that will afford a high level of protection to consumers of life insurance, annuities, disability income and long-term care insurance products; (2) establish a central point of filing for these insurance products; and (3) thoroughly review product filings and make regulatory decisions according to the uniform product standards”.<sup>38</sup> Thus, the IIPRC itself does not set standards to insurance products; it has instead created a uniform standard-setting process on the basis of which a Management Committee can take decisions on standards for insurance products.

b) Professional qualifications: interstate recognition of professional qualifications is regulated by interstate compacts and reciprocity agreements. The Nurse Licensure Compact applies to 24 Member States, with an additional four States with a pending application to the compact. All compact member States mutually recognize nursing licenses, meaning that nurses registered in State A may legally practice in State B without additional requirements.<sup>39</sup> With regard to educators, some States have entered into reciprocity agreements for licensing and the NASDTEC (National Association of State Di-

Clause on account of the fact that it regulates “even-handedly” by prohibiting all milk retailers from selling products in plastic jugs, irrespective of origin.

<sup>36</sup> Art. 1, Section 10, of US Constitution regulates interstate compacts. On the one hand the conclusion of interstate compacts has been recognized as belonging to the inherent powers of the states as “inherent the age-old treaty-making power of independent sovereign nations” (US Supreme Court, judgment of 25 April 1938, *Hinderlider v. La Plata Co.*, para. 104); on the other such compacts are regulated in the federal constitution and mostly require consent of Congress.

<sup>37</sup> M.L. BUENGER, R.L. MASTERS, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, in *Roger Williams University Law Review*, 2003, p. 107 *et seq.*

<sup>38</sup> Interstate Insurance Product Regulation Commission, *Frequently Asked Questions About the Interstate Insurance Product Regulation Commission*, [www.insurancecompact.org](http://www.insurancecompact.org).

<sup>39</sup> National Council of State Boards of Nursing, *NLC FAQs*, [www.ncsbn.org](http://www.ncsbn.org).

rectors of Teacher Education and Certification) Interstate Agreement<sup>40</sup> has been designed to facilitate interstate mobility of educators. It is a collection of one-way declarations by States that they will accept certifications from other States. In other words, the Interstate Agreement is not a reciprocity agreement through which educators may simply trade in their license from State A for that of State B. It also contains harmonization elements (on what the education minimally should comprise of).

c) Driver's licenses: the allocation of driving privileges is a prerogative of the States. However, in accordance with the Full Faith and Credit Clause of the Constitution, all States must recognize out-of-State driver's licenses.<sup>41</sup> Other aspects of driver's licenses are not subject to the Full Faith and Credit Clause though. These therefore depend on States' initiatives. Under the Driver License Compact (to which all but 5 US states are members), States share information on traffic violations and license suspensions, and violations committed out-of-State will be treated under home-State law in the driver's home State.<sup>42</sup> This means that information on license suspensions and traffic violations of non-residents are forwarded to the State where they are licensed (home State). The home State treats offenses as if they had been committed at home, applying home State laws to the out-of-State offense.

d) Criminal law: as extradition is the only form of interstate criminal cooperation that has been regulated by the Constitution, other forms of cooperation depend on State initiatives. An example is the interstate compact on Adult Offender Supervision.<sup>43</sup> It establishes a governing authority, the Commission, which can make rules regulating the terms and conditions under which the supervision of adult offenders can be transferred between States, collect and manage data, assist in dispute resolution, and bring enforcement actions against a Member State. The powers of this authority are therefore wide-ranging and have a substantial impact on adult offenders and on the States alike.

### III. HORIZONTAL FEDERALISM IN THE EU: MUTUAL RECOGNITION

#### III.1 CONSTITUTIONAL PRINCIPLE BY ACCIDENT?

The principle of mutual recognition may be classified as a general, constitutional principle of the EU. It has stretched beyond individual policy areas and is founded on case law (*Cassis de Dijon*), secondary EU legislation and nowadays even on the basic Treaties (with regard to the AFSJ). Groussot, Petursson and Wenander argued that the principle

<sup>40</sup> NASDTEC *Interstate Agreement for Educator Licensure 2010-2015*, c.ymcdn.com.

<sup>41</sup> X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law – Adopting the Level of Protection of the Other?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 865 *et seq.*

<sup>42</sup> Perlmutter, McGuinness P.C., *Interstate Driver's License Compact*, newyorklegaldefense.com.

<sup>43</sup> M.L. BUENGER, R.L. MASTERS, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, cit.

had this potential already from the outset, as it has been inspired by the GATT rules.<sup>44</sup> Still, the development of mutual recognition into a general and constitutional EU principle has been the result of deliberate, political choices rather than of some sort of “natural” evolution of the principle into what it is today. Three political choices in the history of European integration have been key in this regard.

First, the decision of the CJEU in *Cassis de Dijon* to embrace mutual recognition was not so much a logical and inevitable consequence of the EEC Treaty as it was a deliberate choice of the Court. Weiler qualified it as an “intellectual breakthrough” as it has signified a fundamental shift in attitude of the CJEU. This qualification may also be understood in light of the EEC Treaty that indeed contained no reference to mutual recognition whatsoever.<sup>45</sup> Moreover, the system of Treaty provisions suggests that the Treaty drafters had considered that harmonization would be the method to achieve the internal market objectives. For the CJEU to arrive at mutual recognition as a key principle it had to make several argumentative steps, some of which it had already made in previous judgements. The granting of direct effect to Treaty provisions was arguably the most important thereof. In other words, mutual recognition was a construction of the CJEU and was not inherent to the system of the Treaties.

Second, the transformation of mutual recognition from a judicial into a legislative principle in the 1980s has equally been a deliberate political choice. The Commission in its White Paper on the Completion of the Internal Market took the initiative for this transformation and stated that: “[T]he general thrust of the Commission's approach in this area will be to move away from the concept of harmonization towards that of mutual recognition and equivalence”.<sup>46</sup> Mutual recognition was, thus, introduced as an alternative to harmonization. The latter strategy entailed the adoption of specific and detailed rules for individual aspects of the internal market. This had proven to be inflexible; difficult for Member States to accept in light of the “vertical transfer of sovereignty” it entailed;<sup>47</sup> but most of all the legislative processes had been extremely cumbersome. The main reason for the transformation of mutual recognition into a legislative principle was therefore a pragmatic one. In any case, mutual recognition spread quickly across the internal market. A good example is the area of the recognition of professional qualifications in which the initial approach has been to harmonize qualifications for specific professions (and, thus, the requirements of the education necessary to qualify for these pro-

<sup>44</sup> X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law*, cit., p. 865 et seq.

<sup>45</sup> J.H.H. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, in F. KOSTORIS, PADOA SCHIOPPA (eds), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke and New York: Palgrave Macmillan, 2005, p. 43.

<sup>46</sup> Commission, *White Paper on the Completion of the Internal Market*, COM(85) 310 final, p. 3.

<sup>47</sup> S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007, p. 672.

fessions). Following the Commission's White Paper a new, and general, system of diploma recognition was set up which was based on the principle of mutual recognition.<sup>48</sup>

Third, the decision to adopt mutual recognition as a leading principle in the AFSJ has been the result of political decision-making by yet another authority. It was the United Kingdom government that took the initiative to apply mutual recognition as the central principle in the AFSJ.<sup>49</sup> This initiative was subsequently endorsed by the European Council of Cardiff<sup>50</sup> and taken up by the Commission.<sup>51</sup> The Member States saw it as a great advantage that mutual recognition would leave national justice systems intact whilst at the same time being able to address common challenges in the field. In the Tampere program the European Council stated that mutual recognition "should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union".<sup>52</sup> With the Treaty of Lisbon, this approach gained a constitutional status. Art. 81 TFEU provides that EU civil cooperation is to be based on mutual recognition and Art. 82 TFEU provides the same for criminal law.<sup>53</sup> With regard to the latter, the TFEU provides that mutual recognition is the *general* principle and minimum harmonization the approach with regard to the *specific* topics mentioned in Arts 82, para. 2 and 83 TFEU.

This was not an obvious choice. First, in the internal market mutual recognition had not proven to be the success the Commission in the 1980s had anticipated it to be. Commentators criticized mutual recognition for its lack of success in actually achieving internal market objectives.<sup>54</sup> Not all went as far as Weiler who claimed that mutual recognition has been a "market failure",<sup>55</sup> but the conviction that mutual recognition has not been an unambiguous success story in the internal market is widely shared.<sup>56</sup>

<sup>48</sup> H.E.G.S. SCHNEIDER, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, Maastricht: Rijksuniversiteit Limburg, 1995 (doctoral thesis).

<sup>49</sup> V. MITSILEGAS, *EU Criminal Law*, Oxford: Hart Publishing, 2009, p. 116.

<sup>50</sup> European Council Conclusions of 15-16 June 1998, in particular para. 39.

<sup>51</sup> Communication COM(2000) 495 final of 26 July 2000 from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters.

<sup>52</sup> European Council Conclusions of 15-16 October 1999, para. 33.

<sup>53</sup> With regard to migration law, the Court considered that mutual trust is underlying the Common European Asylum System as well: *N.S. and M.E.*, cit. The approach of the Court demonstrates that it considered mutual trust to be a principle that applies to the AFSJ as a whole: K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (The fourth annual Sir Jeremy Lever Lecture All Souls College), 30 January 2015, [www.law.ox.ac.uk](http://www.law.ox.ac.uk).

<sup>54</sup> C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, pp. 106-120.

<sup>55</sup> J.H.H. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, cit., p. 25 *et seq.*

<sup>56</sup> Pelkmans distinguished judicial mutual recognition and legislative mutual recognition and argued that the latter has been more successful than the former: J. PELKMANS, *Mutual Recognition in Goods and Services: An Economic Perspective*, in F. KOSTORIS, PADOA SCHIOPPA (eds), *The principle of mutual recognition*, cit., p. 85 *et seq.*

Especially the troublesome concrete application of the principle by competent authorities and the lack of knowledge in business circles were seen as the main problems. Second, there is a fundamental difference in the nature of the principle between the internal market and the AFSJ. In the former case, mutual recognition promotes free movement and therefore benefits individuals, whereas in the latter case it promotes the exercise of Member States' powers outside their territory.<sup>57</sup>

### III.2. APOGEE AND AFTER

The result of the decisions by the CJEU, the EU legislature and the Treaty drafters has been that mutual recognition is now firmly rooted in EU law and has reached the status of a general, constitutional principle. Arguably, this development culminated in Opinion 2/13 of the CJEU on the Draft Accession Agreement of the EU to the European Convention of Human Rights.<sup>58</sup> The CJEU considered that mutual trust, on which mutual recognition is based, was one of the "specific characteristics" of the EU that had been insufficiently considered in the Draft Accession Agreement.<sup>59</sup> Mutual trust requires the Member States to presume that all other Member States are "complying with EU law and particularly with the fundamental rights recognised by EU law". Only in "exceptional circumstances" the Member States may set this presumption aside. The Opinion has been criticized precisely on the constitutional status that the CJEU granted to mutual trust.<sup>60</sup>

Since then, mutual recognition and mutual trust have gradually lost some of their rigorousness. The migration crisis has challenged the Dublin system (for determining which EU Member State is responsible for examining an asylum application) in a very fundamental way, and some Member States have even set it completely aside. In the field of EU criminal law, mutual recognition has been affected as well, but here in a more gradual and less fundamental sense. The EU legislature and the CJEU have been the drivers of this development.

The EU has harmonized various aspects of criminal procedure following the Roadmap on Procedural Rights adopted in 2009 (the Roadmap).<sup>61</sup> Issues such as the right to legal advice and legal aid, to translation and interpretation and the protection of vulnerable suspects have now been regulated at the EU level. The EU legislature, as well

<sup>57</sup> S. PEERS, *Mutual Recognition and Criminal Law in the European Union: has the Council Got it Wrong?*, in *Common Market Law Review*, 2004, p. 5 *et seq.*; and S. LAVENEX, *Mutual Recognition and the Monopoly on Force: Limits of the Single Market Analogy*, in *Journal for European Public Policy*, 2007, p. 814 *et seq.*

<sup>58</sup> Opinion 2/13, *cit.*

<sup>59</sup> *Ivi*, para. 191 *et seq.*

<sup>60</sup> S. PEERS, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, in *EU Law Analysis*, 18 December 2014, [eulawanalysis.blogspot.nl](http://eulawanalysis.blogspot.nl).

<sup>61</sup> Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

as others,<sup>62</sup> argue that these minimum harmonization measures support mutual recognition as they aim to increase mutual trust between authorities of the Member States. It would, nevertheless, be fair to argue that such legislation is based on harmonization instead of mutual recognition, especially when mutual recognition is perceived as a mechanism to promote integration while preserving diversity and Member States' autonomy. Mutual recognition in a context of harmonized procedural rights is indeed no longer based on the idea that foreign criminal procedural rules must be accepted on the argument that they serve the same objectives as domestic rules. Instead, foreign decisions are accepted because they result from a judicial system that offers the same minimum guarantees. The effects of the "trust-enhancing" legislation may thus be qualified as an increase of harmonization (unity) and a decrease of mutual recognition.

Also the CJEU has impacted mutual recognition, especially in light of the Council Framework Decision 2002/584/JHA on the European Arrest Warrant,<sup>63</sup> which is still one of the key legislative acts in the field. For the purposes of this point, two strands of argumentation that the CJEU has pursued may be distinguished: one stressing mutual recognition and the other the protection of fundamental rights and principles. The decision of the CJEU in *Melloni*<sup>64</sup> is a milestone for the former strand of cases, as the CJEU ruled that differences in the level of fundamental rights protection as were at issue could not override the mutual recognition obligation that is central to the Framework Decision. Other key decisions of the CJEU fit this strand of case law as well, such as *Radu*<sup>65</sup> (in which the CJEU decided that Member States cannot refuse to surrender a requested person on the ground that the requested person was not heard in the issuing Member State in case of a criminal prosecution) and *Lanigan*<sup>66</sup> (on the obligations of the executing Member State after expiry of the prescribed time limits and the possibility to keep requested persons in custody after the expiry of these limits to ensure surrender).

In other cases, especially more recent ones, the CJEU has put more emphasis on issues of fundamental rights protection. The recent landmark decision in joined cases *Aranyosi and Căldăraru*<sup>67</sup> obliges the executing Member State authorities to consider whether the requested person will be subject to a "real risk" of inhuman or degrading treatment because of poor detention conditions in the issuing State. In practice this means that the executing authorities will request additional information and guaran-

<sup>62</sup> See e.g. K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 9.

<sup>63</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>64</sup> *Melloni*, cit.

<sup>65</sup> Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*.

<sup>66</sup> Court of Justice, judgment of 16 July 2015, case C-237/15, *Lanigan*.

<sup>67</sup> Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, *Aranyosi and Căldăraru*.

tees from the issuing authorities that the requested person will not be subject to degrading detention conditions.

This shift to a greater appreciation of fundamental rights is not limited to issues of degrading detention conditions. Other fundamental rights and principles benefit from this approach as well, most notably the right to a fair trial. On the basis of the recent decision of the CJEU in case *Bob-Dogi*<sup>68</sup> the executing State must consider whether a national arrest warrant (triggering national forms of judicial protection) underlies the European Arrest Warrant. In *Dworzecki*,<sup>69</sup> the CJEU decided that the conditions for sentences handed down *in absentia* constitute autonomous concepts. The effect thereof is that executing authorities must verify whether these conditions have been met when they decide on an incoming European Arrest Warrant based on an *in absentia* sentence. Recently, in case *Poltorak* the Amsterdam district court asked the CJEU for a preliminary ruling on the term “judicial authority” from the Framework Decision in order to determine which authorities are competent to issue a European Arrest Warrant.<sup>70</sup> The case concerns a European Arrest Warrant issued by police authorities, but it is also an open question whether public prosecutors would be considered to be competent authorities for the purposes of the European Arrest Warrant. In the light of the above mentioned decisions, it would hardly be a surprise if the CJEU would conclude that the term “judicial authority” is indeed an autonomous EU concept resulting in limits as to who may issue a European Arrest Warrant. This would imply that executing authorities would need to examine whether the issuing authority was actually competent to issue the European Arrest Warrant instead of simply assuming – on the basis of mutual trust – that this is the case.

The result of this case law is that executing authorities have a greater responsibility in scrutinizing European Arrest Warrants and the possible implications of their execution. Admittedly, this does not automatically imply that executing authorities should refuse to execute European Arrest Warrants on these grounds. At least in first instance, it leads to an obligation to scrutinize such aspects and to request additional information and guarantees from the issuing Member State authorities if necessary. Conversely, the latter may not simply rely on mutual trust of the executing Member State authorities, but must comply with the standards formulated by the CJEU and cooperate to fulfill the legitimate requests for additional information of the executing Member State.

The deeper fundamental consequences of this case law are that mutual trust is increasingly being replaced by CJEU definitions and conditions it attaches to European Arrest Warrants. This may be qualified as judicial harmonization as it implies – just as legislative harmonization – a higher level of unity in criminal procedure among the EU

<sup>68</sup> Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*.

<sup>69</sup> Court of Justice, judgment of 24 May 2016, case C-108/16 PPU, *Dworzecki*.

<sup>70</sup> Court of Justice, not yet decided, case C-452/16 PPU, *Poltorak*.



Member States. Consequently, mutual recognition loses much of its automatism and leads to increased levels of scrutiny by executing authorities.

### III.3. MUTUAL RECOGNITION, HARMONIZATION AND NATIONAL AUTONOMY. A DECISION-MAKING TRIANGLE

EU mutual recognition originated as an alternative to harmonization to achieve EU internal market objectives.<sup>71</sup> It has remained close to harmonization ever since: in the internal market the *nouvelle approche* has combined mutual recognition with minimum harmonization. Above, the gradual shift from mutual recognition to – legislative and judicial – harmonization in relation to the European Arrest Warrant has been elaborated. The third element that needs to be considered is national autonomy. Most mutual recognition obligations are not absolute and give host Member States the possibility to apply exceptions, to make an assessment of their own and to scrutinize the foreign decisions that are the object of mutual recognition systems. Thus, a decision-making (or constitutional) triangle emerges between EU harmonization, mutual recognition and (host) State autonomy. The balance between these elements differs between and even within areas.

The balance in this decision-making triangle depends first of all on whether the area at issue has been the subject of EU legislation. If not, the Treaty provisions and their interpretation by the CJEU determine the level of national autonomy. Groussot, Petursson and Wenander focus in their contribution in this special issue on how the CJEU has established and defined host State autonomy in this context, especially in light of the proportionality principle.<sup>72</sup> In areas which have been subject to harmonization the level of host State autonomy may still be considerable.

The area of the recognition of professional qualifications demonstrates well which considerations and factors may determine the balance between harmonization, mutual recognition and (host) State autonomy. Following a fragmented approach aimed at regulating specific professions and specific qualifications,<sup>73</sup> the current Directive 2013/55/EU<sup>74</sup> now entails an integral approach to the recognition of professional qualifications. The first relevant factor is under what freedom the person concerned pursues

<sup>71</sup> S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, cit., p. 667 *et seq.*

<sup>72</sup> X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law*, cit., p. 865 *et seq.*

<sup>73</sup> Directive 89/48/EEC of the Council of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and Directive 92/51/EEC of the Council of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, and a number of other directives regulating specific professions.

<sup>74</sup> Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

his or her activities in the host Member State. Given the deeper and more permanent link with the host country in case of establishment, the host Member State has more options to impose requirements. In case of – temporary – provision of services such options are smaller. Art. 5 of the Directive contains a general prohibition on obstacles to the free movement of services, thus favoring mutual recognition over host State autonomy. For activities qualifying as establishment, host Member States have greater possibilities to impose their own standards.

But the recognition of professional qualifications in the context of establishment has not been regulated in a uniform manner. Some professions qualify for automatic recognition in accordance with chapter III of the Directive which sets out minimum requirements for the diplomas and other requirements that persons need to fulfill to be able to exercise the profession at issue. These are the professions of doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, pharmacist and architect. These professions had previously been regulated by sector-specific legislation. Universality is the common characteristic of these professions and the degree of diversity in national legislation regulating these professions was, therefore, limited before the adoption of EU legislation. The level of diversity in national legislation is thus the second factor that determines the level of host State autonomy.

Conversely, host Member States enjoy a higher level of autonomy within the general system of recognition, i.e. professional qualifications which are not covered by specific provisions or, alternatively, in the event that the applicant has not satisfied the conditions of those provisions. Under the general system, host Member States may impose compensation measures to comply with host State regulation. These compensation measures may be significant, as is the case in many Member States with regard to the professional qualifications of lawyers. Yet, these measures may never go as far as requiring the applicant to comply with all the standards of the host Member State without taking into account the standards underlying the foreign qualification. In other words, the core of mutual recognition needs to be respected, even in case of substantial differences between qualifications.

In other EU legislation, substantial differences in national legislation have been a key factor in granting host Member States more autonomy as well. The Council Framework Decision 2008/947/JHA on the Mutual Recognition of Probation Measures and Alternative Sanctions is a good example as it demonstrates various forms of autonomy granted to the host Member States.<sup>75</sup> This Framework Decision is based on the model of Council Framework Decision 2002/584 on the European Arrest Warrant, but grants host Member States more autonomy. First, the Member States enjoy discretion to de-

<sup>75</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

cide which types of alternative sanctions and probation measures they will recognize. The Council had argued that the differences that exist between the Member States in probation measures and alternative sanctions and even in the nature of such measures and sanctions are so substantial that a general recognition requirement would be undesirable.<sup>76</sup> Instead, the Framework Decision 2008/947 now contains a limited list of measures and sanctions that must be recognized (Art. 4). Member States may decide what other measures and sanctions it will recognize (if any).<sup>77</sup> Moreover, the host Member State may adapt the measure or sanction (in terms of nature and duration) if the original decision is "incompatible with the law of the executing State".<sup>78</sup> Unlike the European Arrest Warrant, the Member States may even decide to apply the double criminality requirement for all incoming requests.<sup>79</sup> National autonomy may, thus, be related to more than exceptions on the mutual recognition requirement. It may also be linked to the freedom of the Member States to decide on the scope of application of the obligation and the possibility to place additional requirements on the applicant.

#### IV. CONCLUSIONS

The US has a wider array of institutional mechanisms to shape horizontal federalism than the EU which relies more exclusively on mutual recognition. This has a limiting effect on accommodating the tension between national autonomy and EU objectives. It also limits the potential of the EU to deal with increased demands for differentiated integration. In particular, the EU generally lacks mechanisms which leave the initiative to deal with this tension to the Member States. The legal phenomenon of the Interstate compact and its widespread application across diverse policy fields is a remarkable element of the US legal system. Mutual recognition is in this sense a fully supranational principle, imposed by the CJEU, the EU legislature (or both) and applicable by default to all Member States (save Treaty exceptions). It is true that EU Member States have retained the power to conclude international treaties among themselves. In the field of economic and financial governance some key examples are now in force (the ESM treaty, the Stability and Governance Treaty and the International Agreement on the Single Resolution Fund). Yet, these agreements have an uncomfortable place in EU law and are in any case not likely to become a general way to regulate interstate relations within the EU on the scale that interstate compacts in the US regulate the relations between the US States.

The variety in horizontal federalism in the US is not only manifested in institutional mechanisms. It is equally varied in balancing central control, home State control and host State autonomy. The interstate compact involves a very limited central element

<sup>76</sup> European Council Conclusions of 8 December 2010, p. 5.

<sup>77</sup> Art. 4, para. 2, of Council Framework Decision 2008/947, cit.

<sup>78</sup> Art. 9 of Council Framework Decision Decision 2008/947, cit.

<sup>79</sup> Art. 10 of Council Framework Decision Decision 2008/947, cit.

(although Congressional consent should not be underestimated) whereas extradition is in the US a federally imposed, almost absolute form of mutual recognition.

A remarkable difference between the US and EU regards the object of recognition. In the US, the Full Faith and Credit Clause primarily requires the States to recognize foreign court decisions. The recognition of foreign legislation is far less obvious and depends on the existence of specific federal legislation adopted in the area at issue or on the existence of interstate compacts. The rationale behind this is that the public interests that State legislation pursues may – legitimately – differ from one State to the other. By contrast, mutual recognition obligations in the field of the EU internal market extend primarily to legislation. Both the EU legislature and the CJEU have obliged the Member States to accept goods, persons, services and capital that abide with foreign *regulatory standards*. When mutual recognition obligations flow from EU legislation, the presumption is even that the scope for national balancing of public interests has been absorbed by the EU legislature. No general obligations to recognize foreign court decisions exist in the EU legal order, however. This has been regulated only by specific directives and regulations (and framework decisions). The adoption of these legislative measures has often been a cumbersome process and has in any case been a much more recent development compared to the internal market mutual recognition obligations. The substantial differences between national judicial systems may explain why EU law is restrained in this regard. Thus, it may be argued that in the US mutual trust in judicial systems between the States is higher than in the balancing of public interests by State legislatures whereas in the EU the opposite is the case.

There are also similarities between the EU and the US systems. A key similarity is what may be qualified as the “harmonization pull”, i.e. the tendency of centralization of regulation. In the EU this is manifested in a change from mutual recognition regimes to harmonization. In EU criminal law a “harmonization pull” recently emerged as a result of legislative initiatives (the Roadmap) and of CJEU decisions. The result of this is a decrease of home State control as judicial decisions are increasingly being scrutinized. The decrease of home State control does not necessarily translate into an equivalent increase of host State autonomy though. Rather, host State authorities transform into EU agents that must oversee compliance of EU norms and of EU “autonomous concepts”.

The “tool box” for balancing home State control, host State discretion and central control is limited in the EU. Central control is achieved through harmonization and home State control through mutual recognition. Nevertheless, the substantive balancing shows a much diverse picture. Differences exist across and even within policy areas and, furthermore, they change over time. Differences in national legislation and in political sensitivities inform the decision-making. Also the centrality of a policy issue in light of achieving EU policies is a key factor, as is the harmonizing effect of fundamental rights protection.

This contribution started with a quote from the US Supreme Court on the Full Faith and Credit Clause. The Supreme Court considered that precisely this constitutional provision – one of the key manifestations of horizontal federalism in the US – would “fuse the sovereign States into one nation”. These are not the times in which we could indulge ourselves in the thought that for the EU a similar scenario would be possible. However, the *vertical* division of authority between the EU and its Member States has perhaps been a bit too much the focus of attention in the last two decades. The suggestion that we may need to shift that focus somewhat more to the horizontal relations between the EU Member States may well be a relevant cue for the EU that may be taken from the US Supreme Court.

