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MUTUAL RECOGNITION, UNEMPLOYMENT AND THE WELFARE STATE

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ENEPRI Working Paper No. 13

FIORELLA KOSTORIS PADOA SCHIOPPA[1]

HERALD OF AEGYPTUS
The prey is mine, unless force rend it from me. […]
THE KING OF ARGOS
Know that if words unstained by violence
Can change these maidens' choice, then mayest thou,
With full consent of theirs, conduct them hence.
But thus the city with one voice ordained-
No force shall bear away the maiden band.
Firmly this word upon the temple wall
Is by a rivet clenched, and shall abide:
Not upon wax inscribed and delible,
Nor upon parchment sealed and stored away.-
Lo, thou hast heard our free mouths speak their will:
Out from our presence-tarry not, but go! […]
DANAUS
Ye, to the many words of wariness
Spoken by me your father, add this word,
That, tried by time, our unknown company
Be held for honest: over-swift are tongues
To slander strangers, over-light is speech
To bring pollution on a stranger's name.

Aeschylus (VI B.C.), *The Suppliants*

From the strain
of binding opposites
comes harmony.

Heraclius (V B.C.), *Fragments*

From wherever the glance looks up at the sky,
the distance between human and divine is always the same […]
the most beautiful things shall follow us everywhere:
universal nature and one's own virtue.

Seneca (V A.C.), *Consolatio ad Helviam Matrem*

From everywhere it is the same distance to Heaven.

Th. Moore (1515), *Utopia*

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1. Introduction

From an historical, logical and cultural point of view – as the Appendix to the present paper shows – there are three forms of integration of the "alien" in an "homogenous" community of nationals, who have been residing in a country "for ever":

- *ghettoisation* or *apartheid*, where diversity is recognised but not valued and is therefore even marginalised to the point of segregating it completely from the "core society";
- *assimilation* (in the forms of *closed* or *open*), where diversity is not accepted, it has no value (in the closed form), or has a limited value (in its open form); therefore it is completely (or partially) unrecognised or even eliminated to the point that the minority is fully assimilated into the identity of the triumphant majority (or in a process of osmosis and transformation the minority adopts the manners of the majority, but the latter changes to a limited extent when in contact with the minority);
- *mutual recognition*, accepting and valuing diversity without segregating it; this is a more significant phenomenon than tolerance, because tolerance implies asymmetry between the tolerator and the tolerated, while in mutual recognition there is a reciprocal respect.

In the post-war process of its economic and social construction, the European Union has been following different paths ranging between open assimilation to mutual recognition. The former arises in the attempts, either negotiated between partners or proposed by Community institutions, to attain harmonisation, co-ordination, convergence, strengthened co-operation, through peer pressures or moral suasion, looking at benchmarks or at best practices[2]. These are all forms of mediation, compromise, variable geometry between Member States, which show a certain degree of success, but also many failures, mainly because they are unable to accept unity in diversity making the large, existing heterogeneity in Europe a form not of weakness but of wealth. This is indeed the very gist of the principle of mutual recognition: its symbolic value can be easily perceived simply by thinking that, if the American currency bears the caption "*ex pluribus unum*", the Euro motto becomes "unity in diversity", as stated in her May 4 2000 speech by Mme. Nicole Fontaine, Chairperson of the European Parliament.

Mutual recognition has irreversibly entered the European Union markets since the 1979 European Court of Justice ruling on the *Cassis de Dijon*. Since then, it has prompted an innovative and effective convergence process on the commodity, service, capital sectors: the latter derives from the elimination of

[2] On this issue, see the "Introduction" to the ISAE 2002 *Annual Report on the State of the European Union* (see Kostoris Padoa Schioppa, hereafter labelled as FKPS, 2002a).

barriers to entry, from the competition of different standards and country-systems, with consequent enhancing of the goods' quality and quantity, cost reduction, knowledge enlargement. Mutual recognition helps the Union finding its original spirit, namely making competition an harmonious instrument for economic, social and civil development, where efficiency and equity grow together.

The principle of mutual recognition, by revealing the acceptance of the sovereignty of European Member States and of their rules on a perfectly equal basis, not only is already operational in many fields, but it is also potentially applicable in various others, from economics to law, from private markets to Welfare States. Indeed, we share Delors' White Paper (European Commission, 1985) idea that "mutual recognition of national provisions, according to agreed procedures, should be the fundamental principle" on European markets. It is no coincidence that, as stressed in the Presidency Conclusions of the European Council in Tampere (European Council, 1999), the Union is widening its scope even going towards "enhanced mutual recognition of judicial decisions…The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities" (Point. 33 of the "Concluding Remarks").

Apparently the principle of mutual recognition seems able to promote the four fundamental freedoms foreseen by the Treaty of Rome. However – unlike what happens on the commodity, service and capital markets – not only it is far from being adopted in the labour market, but the European Union endorses in this sector an opposite principle, named "equal treatment", while labelling the mutual recognition as a form of "social dumping". Given that the labour market problems cannot be discussed without a joint consideration of social protection policies, one has also to add that European Welfare States generally utilise host rather than home country rules, contrary to the principle of mutual recognition. However, there are no deep, logical reasons for using opposite principles in one of the four fundamental European freedoms. Quite the reverse, on a logical ground, it is unlikely that, in spite of different standards and legislations, European Member States are able to be equivalent in protecting health, environment and the cultural heritage, but not workers' rights. Thus, Nicolaïdis (2000) seems correct in saying (the italics is ours) "formally, mutual recognition can be defined as…a transfer of regulatory authority from the host State (or jurisdiction) where a transaction takes place, to the home State (or jurisdiction) from which a product, *a person*, a service or a firm originate. This in turn embodies the general principle that if a *professional* can operate, a product be sold or a service provided lawfully in one jurisdiction, they can operate, be sold

or provided freely in any other participating jurisdiction, without having to comply with the regulations of these other jurisdictions".

In what follows we will analyse the main reasons for the observed facts concerning the advantages of mutual recognition in three out of the four European freedoms (Section 2). We will then see the disadvantages of using an opposite principle in Union's labour markets and Welfare States. Some possible extensions of the principle of mutual recognition in these fields will thus be proposed: using a simple theoretical game theory model, the positive implications on labour mobility and on the fight against the European classical unemployment will be shown (Section 3). Section 4 will illustrate some policy-conclusions.

2. Rules and regulations on mutual recognition in the European Union markets

As is well known, mutual recognition[3] entered the judicial and applicative *corpus* of the Union in an irreversible way after the publishing of the famous European Court of Justice (ECJ) ruling, called *Cassis de Dijon* (Court of Justice, 1979). Up to then, the *Cassis* sale was forbidden in Germany, as the German law envisaged a mandatory minimum alcohol content (at least 32°) for alcoholic beverages to be marketed: strangely enough, the proliferation of low alcohol percentages was thought to induce an addiction towards alcohol more than highly alcoholic beverages. This provision, hampering the import of the *Cassis de Dijon* originating in France – with an alcohol percentage of 15/20% – was alleged to protect German consumers, but in fact was likely to protect the interest of beer producers.

In the absence of common rules, the ECJ, though recognising that each Member State has the right to autonomously legislate the sale of products within its own territory, affirms that this national regulation cannot counter art. 28[4] of the

[3] This wording is traditionally accepted. However Weiler (1997) prefers the term "functional parallelism", because for imports-exports the existing standards of one Member State have to functionally correspond to those of the others. According to Weiler, this explains "the practical failure of the principle of mutual recognition. In many cases, there are lines of products created on the basis of regulatory regimes with substantial differences, among which there does not exist a functional parallelism. In this situation, only standard harmonisation may solve the question and it cannot be reached through the jurisdictional instruments; moreover, in some cases, the very nature of the product requires one standard for the whole of Europe". Admittedly, the implicit assumption of the present paper is different from Weiler's position.

[4] The legal fundaments of the principle of mutual recognition in the commodity and service markets derive from arts. 28-30 (ex arts. 30 and 36) within Part Three – Title I (*Free movement of goods*), Chapter 2 (*Prohibition of quantitative restrictions between Member States*) of the Treaty, which prohibit any restriction on imports and exports or any "measure

Treaty (ex art. 30), which would be violated whenever the import of a good lawfully produced and marketed in another Member State is impeded, unless this is justified by "emergency measures".[5] Specifically, one cannot state that, if the *Cassis de Dijon* is not damaging French citizens, it could damage German people. Each State is free in choosing its own regulation, but in a system based on mutual recognition, when importing a good, it has to acknowledge the rules adopted by others and, if national standards are different from foreigners', the sending (home) country and not the receiving (host) country rules have to be applied.

Mutual recognition, equivalence, competition and harmonisation

Before 1979, the existing regulations were identically utilised both for domestic and imported goods and services and therefore this seemed to have no discriminatory or protectionist implications within Member States. In practice, on the contrary, by hampering the access to national markets of commodities produced elsewhere in Europe with different standards, they eventually proved discriminatory. The Court underlines that not only the Union body of laws prohibits any restriction to intra-Community trade, but also stresses a positive

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having equivalent effect". Upon initiative of the Commission, in 1983 an agreement between European countries was reached, as set in Directive n. 83/189/EEC, now replaced by the wider Directive n. 98/34/EC of the European Parliament and Council. This started a mutual information and consulting procedure between Member States putting the Commission at the centre of the system and having the objective to prevent – upon adoption of technical ruling on the part of Member States – the emerging of any trade barrier mining the Single Market development. In practice, Member States have to notify to Brussels and to their partners any product which is not mutually recognised, which assumes that renouncing to objections on a given product is a signal of readiness to let it be marketed in one's territory. It was not necessary to officially introduce the principle of mutual recognition in capital movements, because capital mobility is almost perfect: its globalisation – and the fact that *pecunia non olet* – make it difficult to understand the origin and destination of capital flows and therefore imply that this area is an effective Single Market. On the basis of arts. 56-60 of the Treaty (ex art. 73 B-73 G), great progress was made to fully attain free capital movement. In particular, art. 56 prohibits any restriction to capital movements. To this end, for example in the banking sector, Directive n. 89/646/EEC of the Council states the mutual recognition of authorisations. The exceptions to free capital movement are mainly limited to movements with third countries and are subject to Community decisions. Member States – in keeping with art. 58 letter (b) of the Treaty (ex art. 73 D) – maintain the faculty to take all required measures, which are justified on grounds of public policy to prevent infringements of national laws and regulations, in particular in the field of the taxation and the prudential supervision of financial institutions.

[5] Derogations to the principle of mutual recognition and to the consequent free movement of goods depend on justified reasons of public morality, public policy or public security. "Such prohibitions or restrictions – says the Treaty – shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

task,[6] i.e. mutual recognition between Member States: the presumption has to be that goods, services and capital produced by each of them with a different regulation can and must have access to all Union countries, provided in their home country they do not damage the consumers' health, do not cause irreversible harm to the natural and artistic environment, protect ownership and economic agents in incomplete and asymmetric information. This confirms the idea that legal harmonisation is not always necessary for the European construction and that the substitution of national with Community norms is not a must. Delor's White Paper (European Commission, 1985) strongly reiterates that the harmonisation of national laws through the definition of common rules at a European level should remain an exception limited to specific areas, stating in particular for the goods market that "in the future, legal convergence (Council Directive pursuant to art. 100, art. 94 since the Treaty of Amsterdam) will be limited to the setting of the main requisites in health care and safety which will be mandatory in all Member States…Whenever harmonisation of legislations is not considered essential either in terms of health care or safety or in terms of industry, the immediate and full recognition of different quality standard rules, of different provisions on food composition, etc. must be the rule".

A new approach based on the respect of different national regulations is, therefore, emerging: each legislation has its own (same and different) ways to protect public interests. Thus, harmonisation must limit itself to minimum, sometimes only optional, standards and has to concern only fundamental aspects. Moreover, mutual recognition, being an instrument of competition in regulation, in the end leads to regulation convergence within the European Union without any top-down harmonisation process.

Reciprocal recognition of technical rules, procedures and certificates within the Union assumes that there exists a similarity in the level of protection of different Member States or, as Nicolaï dis (2000) puts it, that there exist «"equivalence", "compatibility" or at least "acceptability" of the counterpart's regulatory system». This aspect is thoroughly illustrated in many European official documents. For example, the Council in July 1984 states that "the objectives pursued by the Member States are generally equivalent" (European Council, 1984).

Thus, it is sufficient for Member States to share their public interest and regulatory goals, in order to accept mobility flows and promote trade. This is, indeed, an ongoing process for three out of the four freedom areas defined by art. 14 (ex art. 7 A, Point 2) of the European Community Treaty referring to the

[6] Some authors, including J. Pelkmans, identify within the structure of the Treaty of Rome mutual recognition as a negative complementary form of integration rather than as a substitute to harmonisation.

internal market: no frontiers exist in it for goods, persons, services and capital. This strong implication of the principle of mutual recognition is often reiterated by the European institutions, although with some oscillations and ambiguity. For example, the Commission's Communication of June 16, 1999 (European Commission, 1999a) states that "the principle of mutual recognition plays a central role in the Single Market by ensuring free movement of goods and services without making it necessary to harmonise national legislation…The principle of mutual recognition plays a key part in opening the Single Market in all the sectors which have not been the subject of harmonisation measures at Community level or which are covered by minimal or optional harmonisation measures…It is perfectly in keeping with the Single Market philosophy, whereby the home State principle prevails".

“Equal treatment” and “social dumping”

Today mutual recognition in Europe is adopted in (almost) all markets of goods (a partial exception concerns pharmaceuticals) and services (think to higher education diplomas or to professional equivalence), while the capital market already enjoys quasi-perfect mobility and globalisation. It is not, however, extended to the labour market and social protection, where assimilation is the general rule: specifically, an individual who decides to move from one European Member State to another to reside and be active has the right to work[7] in the host State at the same conditions of a national (arts. 3, Par. 1, letter c); 14 – ex art. 7 A -; art. 39 – ex art. 48 -; art. 43 – ex art. 52 – of the Treaty, Community Regulation n. 1612/68 of the Council and Regulation n. 1251/70 of the European Commission). In particular, Community workers must be treated as national workers in terms of job conditions, wages, firing and hiring clauses (Regulation n. 1612/68 of the Council, art. 7, Par. 1 and 4), social security benefits and contributions, housing opportunities, minimum income support, family allowances etc. (Regulation n. 1612/68 of the Council, art. 7, Par. 2 and 3 and art. 9) and, finally, in terms of trade union membership and workers' representation, with the only exclusion of their participation in the management of bodies governed by public laws.

This avoids many risks (but also many more opportunities) of social competition in Europe (Gorce, 2000; Marini, 1999). According to this approach, the principle of mutual recognition in the European labour markets and Welfare States is labelled as “social dumping”: thus, a German firm today can import the

[7] The Treaty (art. 39, ex art. 48, Par. 3) states that the Member States may refuse to a Community citizen the entry and stay in their territory exclusively on grounds of public policy, public security or public health. With Directive n. 64/221/EEC of February 25 1964 of the Council, and in particular by means of a thorough Court of Justice number of cases, those limits are strict and well identified.

Cassis from Dijon, but if it asks Dijon workers to emigrate to Germany and produce the *Cassis* in the Rhein valley, it cannot pay them the French wage, granting the French national holiday of July 14 and promising the French pension; paradoxically, having to pay the German wage, it can even offer less than the French minimum income because, otherwise, it would be accused of discrimination. This almost absurd situation stems from a peculiar interpretation of the principle of "equal treatment". Indeed, while stating at art. 12 (ex art. 6) of the Treaty that "any discrimination on grounds of nationality shall be forbidden", the factual result is to protect national workers from other European workers' potential competition, letting these foreign people believe that this is the only way to protect them from any possible exploitation in host countries: inexplicably this competition is called "unfair", as if guaranteeing a worker coming from a European Member State the economic and social settings he/she would receive in his/her home State would lead him/her to be like a Third World immigrant without guarantees. This approach would be adequate for more heterogeneous situations in the home and host countries, but it seems hard to adapt to the Single Market, where the fundamental social rights are clearly defined and are similar everywhere.

A concrete example of how mutual recognition was denied in this field on the basis of a misunderstood concept of "social dumping" refers to the well-known episode occurred in the nineties in the building sector, during the reconstruction of Eastern German regions (ex GDR). The latter was prompting large flows of foreign firms and labour force, because – on the basis of the existing rules – competition was open to all Europeans. As these job-seekers were ready to accept lower wages and less privileged employment conditions compared to Western German workers, the direct advantage of these unemployed would have also implied a lower cost of new buildings and therefore additional benefits for German consumers and firms. Nevertheless, the phenomenon worried German trade union leaders who, to protect their basis, asked and obtained from the German Government a law – named *Arbeitnehmer-Entsendegesetz* (Law on Posted Workers) of February 26 1996 – imposing[8] a minimum wage for posted

[8] The German Law on Posted Workers envisages that even employers residing outside the area of competence of bargaining agreements must respect statutory minimum standards on minimum wage, minimum length of holidays, minimum holiday bonuses and on any system of holiday funds (*Urlaubskassen)* for payments of holiday bonuses. This holds true provided those collective bargainings have obtained the so-called *erga omnes* effectiveness. At present, this pre-requisite applies to German collective bargaining in the sectors of construction and other construction-related services (electric, fitting, installation, etc..). Any breach of the provisions is punishable as an administrative offence and implies a fine up to one million of Euros. The minimum wage for construction, determined through a Decree law, amounts on September 1 2000 to approximately 37 Euros per hour in old Federal *Länder* and to 33 Euros per hour in new Federal *Länder*. Since September 2001, it has grown. In 1999, according to the *Bundesanstalt für Arbeit* (Federal Institute on Labour), more than 19,000 proceedings

workers living in Germany. The result of that initiative was a loss in efficiency and in wellbeing, also because the degree of social protection offered to ex GDR German workers decreased. That situation gave rise to a subsequent intervention on the part of the Commission, which produced Directive n. 96/71/EC of the European Parliament and Council: though restating the principle of the free movement of workers, the legitimacy of those provisions was confirmed under the assumption that any form of foreigners' exploitation should be avoided, as indicated in what are known as European "social clauses".

Without denying – and indeed restating – the legal and civil value of non-discrimination, the univocal interpretation provided by the Community legislation and by the ECJ rulings on labour and social protection policies does contribute, in our opinion, to limit free circulation of persons within the European Union. So workers who decide to move to another Member State have the right to be fully assimilated to residents in the host State, while they have no right to maintain their original home country identities. In other words, the right to diversity is not recognised in the receiving State, assimilation remaining the only feasible solution. Equal treatment does not hold for all those who are born in the same State, but only for those who work in the same country, which means that legislation and geographical localisation always coincide.

The minimum threshold

The adoption of the principle of mutual recognition in the European labour markets and Welfare States would not mean denying the "equality of treatment" objective, but criticising its current European interpretation. Something different should be proposed, whereby the identities of single citizens coming from different Member States and the peculiarities of national laws would be respected.

To this end, it is worth recalling that the principle of mutual recognition requires two well-separated phases: a minimum threshold – namely a hard "core" common to all legislation, for example in the *Cassis de Dijon* case, the health care goal – plus additional elements which may differ but are accepted under the assumption that nobody tries to impose a super-identity aimed at violating the infra-identity, on the basis of the mutual confidence of different participants (individuals, communities, States) in the construction of the same social, economic and political Community.

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were started for violations to the *Arbeitnehmer-Entsendergesetz*. Fines and penalties amounted to about 152 millions of Euros. Data prove to what extent this law is binding.

It is, therefore, of the utmost importance to understand how to set this minimum standard in the employment and social protection sectors[9] knowing that, in order to be shared and efficient, such a minimum cannot annul the European acquisitions in terms of Welfare and fundamental social rights; conversely it must be used to support the smooth and fair labour market functioning.

Should the European economic-social convergence process take place in the absence of an agreement on such a hard "core", with the only (second phase of) mutual recognition, the competitive game between country-systems in European labour markets and Welfare States would lead to a "minimum of minima" which would not represent, however, a situation of unacceptable lack of civil cohesion or of "social dumping", as this minimum would correspond to a standard of workers' dignity and safety guaranteed by the laws of the least protective country in Europe.

Theoretically, there are various alternatives for the identification of the minimum threshold in the European labour markets and Welfare States. A first one consists of setting minimum standards through a selective harmonisation process, with a Community-level concertation between the representatives of the European institutions, national Governments and social parties. A second one derives from a mediation between Member States through a benchmarking aimed at identifying "good or best practices" under the hypothesis of transferability. Something of this kind is under way,[10] although inspired by

[9] It would be misleading to face those questions only in terms of wage and job conditions. One should go beyond and tackle problems such as health care and pension at the same time: it is for this very reason that labour market problems should be dealt with together with social protection ones.

[10] This is part of the European employment strategy, initially launched by the European Council during its Luxembourg summit of November 1997. The European Union identified four areas of action (four pillars): improve employability; develop entrepreneurship; encourage firms' and employees' adaptability; strengthen policies for equal opportunities. In 2000, also the debate on common social policies became more demanding: the responses were the European Councils in Lisbon (March), in Santa Maria de Feira (June) and in Nice (December). In this phase, indicators and benchmarks were fixed to evaluate the situation reached and progress made in each Member State. The Commission's Document drawn up for the European Council in Lisbon proposes quantity objectives not only for employment, but also for social exclusion. In June 2001 all Member States submitted their National Action Plans on Social Inclusion in response to the common objectives on poverty and social exclusion agreed by the European Union at Nice (see European Council, 2000b). The Lisbon strategy – which embodies the Koln and Luxembourg processes – represents an important reference point for the innovations in European labour markets and social policies. It is carried out through the "small-step method" suggested by Jean Monnet since the very beginning of the European creation. But it would be wrong to think that those steps have already triggered a change,; as Pelkmans (2001) says: "The Luxembourg process does not really face the legal overprotection of insiders on the labour relevant market and other

different purposes, through the method known as open co-ordination in keeping with the Lisbon strategy[11] (European Council, 2000a). A third possibility consists of referring to already-existing common rules in the European Union, with reference to the labour market and social protection: the alternatives range from the very wide so-called *acquis communautaire*[12] – including the whole body of political and legal frameworks arising in the European Union in this area – to the narrower set established in the Charter of Fundamental Rights of the European Union (European Parliament, Council and European Commission, 2000), to a possibly intermediate one, such as the Community Charter of Workers' Fundamental Social Rights (European Council, 1989) or the European Social Charter (Council of Europe, 1961). If the *acquis communautaire* seems excessive as a minimum threshold on which mutual recognition should be based – moreover, there are too many elements in it contrasting with this principle -, the recent Charter of Fundamental Rights risks to be insufficient, because it is too concise and ambiguous. Suffice it to think to the difficulties of interpretation raised in a multi-ethnical and multi-religious society by its art. 3, Point 1, stating that "everyone has the right to respect for his or her physical and mental integrity". So, those who draw inspiration from the so-called Jewish-Christian tradition would be ready to respect the choice of infibulation? And if not, why should one consider more acceptable circumcision, which is practised by Jews and Muslims? And the latter couldn't discuss the mental integrity of those who base their deepest love belief on a cruel act such as crucifixion?

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rigidities, but only identifies the answers to structural unemployment in the development of competencies, employability and active policies".

[11] Admittedly, since that European Council (March 2000) a series of objectives and priority actions have been fixed for labour and social protection. In particular, three areas of actions were identified: the development of a competitive and dynamic economy, based on knowledge; the modernisation of the European social model, through interventions to enhance the human capital quality and to construct an active Welfare State (the first objective being to bring the European employment rate from the present figure of 61% to 70% and female employment rate from 51% to 60% by 2010); the co-ordination of macroeconomic policies with the goal of consolidating the public finance equilibrium, guaranteeing its sustainability and improving its quality.

[12] The main legal acts to which the *acquis communautaire* may be traced back with reference to employment and social protection policies are the *Treaty of Rome* (1957); the first *Social Action Programme* (1974); the *Treaty on European Union* (1986); the *second Social Action Programme* and the *Community Charter of the Fundamental Workers' Social Rights* (European Council, 1989); the *Treaty of Maastricht* "Protocol on Social Policy" (1992); the third *Social Action Programme* (1994); the *Treaty of Amsterdam* (1997).

3. Proposals for the introduction of mutual recognition in the European labour markets and welfare states

The principle of mutual recognition is sometimes used or proposed with reference to the free circulation of human capital in European markets. Examples are witnessed in the area of university and higher education curricula and diplomas, in professional qualifications as well as in corporate taxation.[13] Its adoption in these fields favours – as pointed out in other papers of this volume – the quality and the quantity of human capital; in particular, self-employed are encouraged to move and be active within the European Union. As we already explained, the current situation is totally different for employees, who represent the majority in the employment pool. This is why the present analysis concentrates on the potential utilisation of the principle of mutual recognition more generally on the labour market and on social protection, the two being, for intuitive reasons, strictly related one to the other.

But, first, let us recall that there already exist few examples in Europe of factual adoption of the principle of mutual recognition both in health care and in pension schemes, even though this is by no means the general rule. The latter is mainly found in Council Regulations n. 1408/71 and 574/72,[14] which concern social protection of employees, self-employed and members of their families moving within the European Union.

In particular, two criteria are usually followed in European Welfare States: "affiliation" and "totalisation". According to the former, the worker's treatment is disciplined under the legislation of one Member State in turn, namely the State where the individual is working[15] (even though he/she resides in another

[13] Two opposite fiscal approaches are proposed in Europe, namely the competition-based and the harmonisation-based ones. On the one hand, tax competition *à-la-Tiebout* (Tiebout, 1956) favours factor mobility, though probably causing losses in tax revenues and is closer to the mutual recognition viewpoint; on the other hand, tax harmonisation provides Member States "more effective instruments to fight against erosion" (European Commission, 1996), though tax co-ordination at the European level is no easy goal. With regard to corporate taxation, the Stockholm Group (1999) outlines that mutual recognition applied to it could be a useful instrument to avoid double taxation, reduce transaction and administrative costs, favour foreign direct investments and growth.

[14] An updated version of all the modifications of these Council Regulations can be read in the *Official Journal of the European Commission* n. 28 of January 30 1997. A simplified description of those provisions are provided in European Commission (2000).

[15] An exception to this rule occurs when the working period abroad lasts less than 12 months and for particular categories of workers: public employees who continue to be covered by their reference administration; people employed on board of vessels who are insured in the State which the ship belongs to; persons serving in the armed forces; persons employed by diplomatic missions and consular posts. People usually working in more than one Member State are ensured with (and thus subject to the legislation of) the Member State of residence,

Member State). This means that, for the whole working period in one European country, contributions are paid and rights are acquired on the basis of the legislation enforced in that country.

This goes alongside with the "totalisation" of the years of contribution paid throughout the whole individual life-cycle, so as to satisfy the conditions for entitlement to benefits in kind or in cash.[16] Art. 25 of the 1971 Regulation states that persons resigning from their jobs are subject to the legislation of the Member State in whose territory they reside. Art. 10 adds that "with regard to invalidity benefits, old-age and survivors' pensions, acquired under the legislation of one or more Member States, they shall not be subject to any reduction, modification, suspension, withdrawal or confiscation"; and the recipients will not be penalised by the fact that they might reside in the territory of a Member State other than that in which the institution responsible for payment is located. Art. 19 says that, with regard to sickness and maternity benefits, European workers "residing in the territory of a Member State other than the competent State" or who are abroad or wish to receive medical treatment elsewhere, are entitled to obtain benefits in kind or cash in a Member State other than the competent State under specific circumstances and according to specific modalities.

Existing general rules for social protection in Europe

Thus, workers moving within the European Union are usually subject to the host State rules of social protection in general and of health care and pension schemes in particular, but their past contribution history is considered. This partial recognition of the worker's origin perhaps paves the way to the possible creation of a Welfare System fully based on mutual recognition, which would enable not only contributions but also all the social protection eligibility criteria and benefit formulas enforced in the country of origin to maintain their validity in the destination State. In any case the general principle of continuity, valid for all Welfare instruments, marks a fundamental step in the European legislation, as it lays the basis for labour mobility within the Community, without penalising the Union workers and without compromising their social security benefits. In particular, Title III "*Special provisions relating to the various categories of benefits*" states this continuity criterion in the European citizens' active life-cycle: the whole working history (spent in whichever Member State of Europe) is considered while evaluating the eligibility and contributive conditions for

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if he/she carries out part of his/her work in that country. For workers employed in one State and self-employed in another State, the rules of the State of employment prevail.

[16] All contribution periods are considered: those envisaging at least one year of contribution are afferent to the country where they were paid, those with shorter length are afferent to the country where the worker became eligible to pension.

sickness and maternity benefits, invalidity and old-age transfers, survivors' pensions, benefits in respect to work accidents and occupational diseases, death grants, unemployment benefits and family allowances. This principle of continuity has two consequences. Firstly, in case of social benefits covering specific risks (death grants, sickness benefits, occupational diseases or unemployment benefits) and general risks for which special benefits are provided without a fair actuarial basis contribution, the Member State where the worker is active upon the emerging of the circumstance is responsible for the payment of the whole benefit. Secondly, for funded benefits closely linked to the contributions paid by each worker, the minimum eligibility requisites must take due account of the whole active life, though it is up to each Member State to get the economic responsibility for the benefit payment in proportion to the working life portion which the citizen spent in that specific State.

The 1971 Council Regulation also comprises specific rules (Title II, “Determination of the legislation applicable”) in favour of employees temporarily posted to another Member State.[17] The posting duration is important as, if the period of posting abroad does not exceed 12 months, it creates a situation which derogates to the general rule whereby, with regard to social protection,[18] employees and self-employed are subject to the legislation of the Member State where they carry out their activities: in fact, posted employees are insured in their home Member State and continue to pay their mandatory social security contributions to their home State; however, they are entitled to all health care benefits in kind in the country where they work irrespective of their transferring their residence or not, and to receive the family allowances in the country where they are insured irrespective of their families' place of residence.

It already appears that, in spite of the general regulation on social protection which usually applies the host country criteria, there are some noticeable derogations. Few additional traces of mutual recognition exist in some European health care and pension rules. We now discuss about these particular sectors.

[17] A posted employee is a person employed in the territory of a Member State by an undertaking to which he/she is normally attached, whose main location is in the territory of another Member State, to perform work for a maximum period of 12 months; the latter may be prolonged to 24 months in exceptional cases.

[18] What stated only concerns social protection of posted employees. As for the labour legislation regarding them, the central document is Directive n. 96/71/EC of the European Parliament and of the Council, which gives binding rules on the minimum working conditions which an employer in the host Member State must guarantee to posted temporary employees. The Directive states that the latter have to receive the same employment conditions offered to others in the Member State where the work is carried out (maximum work periods, minimum paid annual holidays, minimum wage, safety and hygiene at work, equality of treatment between men and women etc.); obviously there are no obstacles to supplying even more favourable terms.

Health care

Within the European Union, the National Health System (NHS) is exclusive responsibility of Member States, on the basis of the principle of subsidiarity and of other norms stated in the Amsterdam Treaty. However, the Community legislation on the Single Market and some recent rulings of the Court of Justice (the 1998 Kohll-Decker and the 2001 Smits-Peerbooms judgements) significantly influence NHS policies.

In each Member State, the NHS consists of many sub-markets subject to the European rules on the four fundamental freedoms of persons, capital, goods and services. While the impact of the Union regulation has always been felt, to some extent, in the supply of health care services from the viewpoint of the means of production (think to rules concerning the partially free movement of pharmaceuticals or the ongoing process on mutual recognition of University diplomas regarding medical staff), up to the 1998 Kohll-Decker ruling the performance of health care from the viewpoint of demand, namely of patients, has not been a central part of the European Union legislation.

To facilitate the free movement of workers,[19] Regulations 1408/71 and 574/72 envisage a co-ordination of Member States' NHS. In particular, they foresee what follows:

- cross-country commuting workers and the members of their families are entitled to receive health care both in their home country and in their host country;
- European Union citizens requiring medical attention for emergency reasons may have access to the NHS of Member States during any temporary stays abroad ;
- an individual from one Member State is entitled to medical support on the same basis as nationals in another Member State if authorised by the competent institution in his/her own State.

In those three situations, the cost of the treatment is covered initially by the Member State providing it and then the latter is refunded by the home country. The host country principle is enforced, as the citizen is treated according to the conditions and tariffs of the destination State and not according to the modalities of the sending State NHS (otherwise, there would be mutual recognition on the

[19] In the past there were no European-level initiatives aimed at developing a specific legislation on the distribution of health care services for all the population of the Union. Notice that, on the basis of Regulations 1408/71 and 574/72 – except for emergency situations or for situations where a prior authorisation was required (and *de facto* this authorisation was limited and was under the full discretion of the competent institution of the Member country concerned)- , the right to have access to medical treatment in another Member State derived from the working status of the individual more than from the European citizenship.

NHS). This setting is however strongly mined by the two recent judgements of the Court mentioned above.

In the Kohll-Decker ruling, the ECJ awards two Luxembourg citizens the right to obtain reimbursement for health care services provided in another Member State on the basis of the reimbursement tariff applicable in their home country, without prior authorisation having been given by these individuals' health insurance fund. The ruling also declares that the prior authorisation system constitutes a barrier to the four freedoms (the ECJ considers medical treatment as a service) and that Regulation 1408/71, though remaining in force, is no exhaustive list of all cases when European citizens may have access to the NHS of other Member States.

Thus, for the time being, there is a double reimbursement system for medical costs paid in Member States other than those of “affiliation”:

a. Regulation 1408/71 states that costs must be reimbursed according to the tariffs of the country where medical treatment is provided;
b. the Kohll-Decker ECJ ruling envisages that costs must be reimbursed according to the tariffs of the home country.

This ruling apparently implies a principle of mutual recognition because, according to the procedure created by the ECJ, patients are not integrated in the host country NHS, but they are treated abroad following the modality and tariffs of their own NHS.

The subsequent Smits-Peerbooms judgement of July 2001 – concerning the cases of two Dutch citizens who received medical treatment abroad without prior agreement from their health care providers -, on the one hand, reiterates that the rules on the free movement of services also concern medical treatment and services in kind, and that prior authorisation is justified so as to enable Member States to have an adequate planning of medical care activities, but, on the other hand, it is more innovative: indeed, the Court clarifies the conditions under which the prior authorisation must be granted, thus narrowing the ample discretion competent bodies have had before. According to the 2001 ECJ ruling, the authorisation granting is no longer an exception but the rule, as for all medical treatment considered "normal" at an international level it may only be refused whenever the NHS of “affiliation” can provide the same or equally effective service without undue delay or lengthy waiting lists.

Admittedly, the recent developments on the free movement of patients within the European Union, on the one side, give hope to the adoption of the principle of mutual recognition, but, on the other side, they require a legal intervention

aimed at consistently and unambiguously specifying the conditions under which the authorisation to be treated abroad must be granted.[20]

Mandatory pension schemes

The criteria of "affiliation" and "totalisation", when applied to mandatory pensions, imply that a worker receives the benefit from each country where he/she was insured for at least one year. Each Member State calculates the overall pension benefits the worker can obtain on the basis of its own legislation, after a number of years of contribution equalling the overall seniority reached in all Member States and pays the pension share corresponding to the years spent on its own territory. A worker is entitled to single pension shares whenever he/she has satisfied the conditions (in terms of age and seniority) foreseen by each State legislation. The computation of the theoretical pension benefit is based on wages (or contributions, if national legislation envisages so) paid in each of the Member States where the worker was insured, as if the worker had completed his/her whole insurance record in that country. However, the formula to revaluate wages or contributions is the one adopted in his/her country of origin according to various ECJ rulings (among which C-251/94 and C-31-32-33/96): in this case the continuity principle becomes close to the mutual recognition one.

On the basis of the above-mentioned Regulations of 1971 and 1972, of later amendments,[21] updating or extensions[22] of those provisions and of the ECJ rulings expressed through the years, one might describe in detail the mechanisms of mandatory pension schemes and their coverage in case of workers moving within the European Union. In particular, the most important rules concern the retirement age, the pre-requisites – in terms of minimum contribution years – for pension entitlement, the general benefit formula and any minimum floor or maximum ceiling imposed on it, finally the possibility to cumulate pension benefits with other incomes.

[20] To enhance the opportunity to receive medical treatment abroad and to overcome the problems stemming from the interpretation of Regulation 1408/71, bilateral agreements were concluded between the Netherlands and Belgium, between Luxembourg and its neighbours and between the United Kingdom and Ireland. The European Union programme INTERREG aims at prompting the economic development of border regions and foresees measures and initiatives to promote co-operation in medical treatment between those regions.

[21] A fundamental reform proposal of the 1971 and 1972 Regulations is found in the Commission's Draft COM(98) 779, which envisages, among other things, the possibility to extend the Union rules on social security to all persons rather than to all active people and to all sectors defined by the BIT Convention number 102, including pre-retirement pensions

[22] An example is the extension of the Community legislation on the co-ordination of social security schemes for General Government employees.

With regard to the first point, the effective retirement age is the one set in the host country, where the concerned person works. However, if he/she has worked in a country where the pensionable age is higher (lower), the right to the pension benefit or rather the pension share acquired in that country is available only upon reaching the age requisites foreseen in that State.[23]

The adoption of the "totalisation" criterion enables to take into account the contribution years paid in other Member States, should the insurance period in a State be insufficient[24] to be entitled to pension benefits (as confirmed by many ECJ rulings, the latest of which is judgement C-55/00 of January 15 2002). That does not hold true for seniority pensions, i.e. pension benefits based on a minimum number of contribution years. However, the Draft Reform on the co-ordination of pension schemes submitted by the Commission in 1998 – COM(98) 779 – states that the area of application of Community provisions be enlarged also to pre-retirement pension schemes.

With regard to any possible minimum floor of pension benefits, the host country legislation prevails. Indeed, the sum of the pensions due by the various Member States cannot fall short of the minimum amount foreseen by the State of residence, provided at least a share of the overall pension benefit was acquired in it (art. 49). Conversely, the legislation of the country with the most generous pension scheme among those where the working activity has been carried out prevails for the application of the upper limit. Indeed, the Union provisions impose that the overall pension benefits do not exceed the highest theoretical amount which would be reached had the pensioner worked throughout his/her whole life in one single country and, in particular, in the country with the most advantageous scheme.

Regarding the possibility to cumulate pensions and labour incomes, the reduction, suspension or withdrawal clauses foreseen by the legislation of one Member State may be invoked to retirees even in the case of benefits in kind or cash obtained in another Member State (art. 12). A derogation to that principle is found in art. 46, whereby the reduction, suspension and withdrawal clauses cannot be applied whenever the benefit is computed *pro rata*, a method which must be always adopted if it guarantees a larger benefit as against a formula

[23] This means that, if a person has worked in a Member State where the pension age is 67 and later is working in another State where the pension age is 60, he/she retires at 60 by receiving the pension benefits acquired in the latter State and will wait till he/she is 67 to receive the pension benefit share acquired in the former State (see European Commission, 2000).

[24] "Totalisation" also affects the pension benefit in other cases: for example, the working periods spent elsewhere in Europe are considered if this enables to reach a higher benefit amount (art. 49 of the Regulation confirmed by many ECJ rulings, among which judgement C-244/97).

taking account of the legislation of only one Member State (on these aspects see also, among others, the ECJ judgement C-107/00 of March 7 2002).

Supplementary pension schemes

Apart from mandatory pensions, voluntary insurance schemes have been a topic the European Union has been debating since the early-nineties, because it crosses many areas, from capital markets to Welfare, from the transferability of vested rights to labour mobility. Art. 9 of the Council Regulation n. 1408/71 states that "the provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of the State shall not apply to persons resident in another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employee or self-employed persons". Besides – art. 9 continues – "where under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of a period of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required as if they were completed under the legislation of the first State".

This article, using the continuity principle in a way close to the home country mechanism, mirrors the will to eliminate any obstacle to labour mobility due to the different functioning of supplementary pension schemes in Europe, thus trying to avoid the risk that the various systems "do not speak at all with each other". The latest proposals of the European Commission on this subject go further – although with some ambiguity – stressing the fact that the worker should be entitled to maintain the voluntary pension scheme in the Member State which he/she has originally chosen, irrespective of his/her movements within the Union. The initial supplementary pension fund is located very often in the home State, where most workers are likely to start their careers, precisely as stated by the principle of mutual recognition.

Many laws and regulations were issued in the European Union on supplementary pensions. They have determined some necessary but not sufficient conditions for the introduction of the principle of mutual recognition on voluntary pensions. In this area, the introduction of this principle should be even easier[25] than in mandatory pensions, as complementary ones are a form of financial saving and should share all the advantages the smooth-functioning Single Market for capital has.

[25] This does not apply to cases, such as the Italian one, where voluntary insurance is based on closed funds not subject to competitive mechanisms.

The Commission took its first initiative on voluntary pension schemes on October 21 1991, through a Draft Directive on freedom to manage and invest pension fund contributions. The proposal was pursuing the target of strengthening the free capital circulation, which at the time was scarce in Member States. However, the times were not mature for a positive solution and the proposal was withdrawn after three years' frantic discussions.

On December 17, 1994 the Commission published a Communication titled *A Single Market for Pension Funds.* Upon petition of the French Government , this was annulled by the ECJ on March 20 1997, as it was not suitable to impose obligations to Member States.

June 10, 1997 marks the first fundamental step in the Community-level organisation of supplementary pension schemes, with the publication on the part of the European Commission of the *Green Paper on Supplementary Pensions in the Single Market*. The document is a well-organised and pragmatic survey on the matter. With its *Green Paper*, the Commission for the first time clearly incentivates the development of pillar 2 in the construction of European pension systems. In particular, it sets some guidelines which should be followed both at a legal and at an economic level, so as to prompt the gradual liberalisation of the pension funds and the investments done for social security goals, taking in due account the connected labour market variables.[26] The Commission identifies two main obstacles: the former concerns the complexity of the pre-requisites for eligibility to a supplementary pension scheme, for example the (long) minimum contribution length; the latter is a fiscal problem and regards the differential tax[27] treatment on pension incomes which the same worker might receive from funded insurance schemes operating in different Member States.

The first Community Directive on voluntary pension schemes is dated June 29, 1998 (Council Directive n. 98/49/EC) and intends to safeguard the supplementary pension rights of employed and self-employed persons moving

[26] The *Green Paper* deals with topics such as the regulation and prudential control on pension funds operating in Europe, in particular minimum obligations on the pension funds pattern of investments; the need to match a good rate of return with stability and risk minimisation; the need to allow portability of vested rights for workers withdrawing from a supplementary pension fund because they move to another Member State, at least to the extent guaranteed to those who stop making contributions but remain within the same Member State; the need to guarantee in other Member States the payment of the benefits deriving from all contributions paid within all supplementary pension schemes the worker has subscribed during his/her working life.

[27] It is worth noticing that in the *Green Paper* the European Commission (1997) leaves open the discussion on the opportunity to diversify the fiscal treatment of pension funds from those of other forms of life insurance schemes implying life annuities.

within the Community. In its fundamental articles (arts. 4, 5 and 6),[28] it aims at eliminating the obstacles hampering the free movement of workers, while underlining the importance of maintaining the pension rights built up through both voluntary and mandatory pension schemes.

The subsequent step is on May 11, 1999, with the Commission Communication *Towards A Single Market for Supplementary Pensions* – COM(99)134. It surveys many relevant aspects for pension funds, including the workers' freedom to choose the managing service provider in any preferred State of the Union and the equality of treatment for equivalent products offered by different providers. An analysis is suggested by kind of performances, guarantees, exposure, activity management supplied by pension funds; a co-ordination of supplementary pension schemes similar to the one already adopted for pillar 1 is proposed for migrant workers within the Union, together with the elimination of all possible penalisations to transfers of accumulated capitals; a gradual fiscal treatment convergence of supplementary pension schemes and of other forms of insurance investments is suggested and the convergence of the conditions to build up pension rights is examined. Overall, the spirit of this Communication seems much nearer to the harmonisation approach[29] than to the mutual recognition principle.

In October 2000, the European Commission proposes another Directive on the activities of the Institution for Occupational Retirement Provisions (IORP), with the aim of guaranteeing a high level of protection for pensioners, creating a Single Market for financial services and complementary pensions and eliminating obstacles to the cross-border provision of professional pensions. The supervision is left to the authorities of the State where the pension fund is located, not necessarily equal to the country of work.

The Draft Directive is followed on April 14, 2001 by a Commission Communication – COM(2001) 214 – on the elimination of tax obstacles to the cross-borders provision of occupational pensions, where the need to have a fully functioning Single Market for occupational pensions is stressed. As outlined in the Communication, the tax treatment of occupational pensions in different Member States is very different in terms of deduction of contributions and

[28] Apart from those already mentioned, they state the following principles-obligations: the Member States adopt the necessary measures to allow posted workers to maintain a supplementary pension scheme in one Member State during the period of their posting in another Member State (portability of a supplementary pension scheme within the Community); whenever this is applicable, posted workers and their employers are exempted from any obligation to make contributions to a supplementary pension scheme in the Member State where the worker is posted.

[29] In 1999, an Action Plan on financial services is also defined: it explicitly sets the objective of defining a consistent European-level legal framework on pension funds.

benefit taxation, and might give rise to double-taxation problems in case of workers' mobility within the Union.[30] Furthermore, there are relevant differences in the tax treatment of pension funds according to whether they are national or established in another Member State[31], which is a violation[32] of the principle of free circulation of workers, services and capital (apart from goods). From this viewpoint, the Commission advocates[33] a convergence towards EET schemes (Exempt contributions, Exempt investment income and capital gains of pension funds, Taxed benefits), which are prevailing among Member States[34].

On June 5 2002 the ECOFIN Council reaches a political agreement on the Commission Draft Directive of October 2000. The European Parliament still has to decide. In such an agreement, according to an expert's point of view (Capuano, 2002), "the Directive is an instrument of minimum harmonisation between different complementary pension systems and tends to reach the result that all Member States adopt a common set of rules in management and control of the pension funds". It is clear even from this wording that there is a lot of ambiguity in the ECOFIN position because, while the "minimum harmonisation" approach is consistent with the first step of mutual recognition, the "common set of rules" is likely to be opposite to it. In any case, it appears really relevant in a mutual recognition perspective, that all European institutions

[30] For instance, this may happen if a worker, after working in a TEE (Taxed contributions, Exempt investment income and capital gains of pension funds, Exempt benefits) country, becomes pensioner and moves to an EET country. *Vice versa*, cases of total tax exemptions might emerge.

[31] For instance, in some Member States tax deductions granted at national level are not extended to contributions paid to pension funds located in another Member State; in others, tax relief varies or is subject to requisites different from those adopted for national regimes.

[32] The Commission's Communication of 2001 explicitly mentions the Safir judgement (C-118/96), whereby a Swedish rule penalising premiums paid to a life insurance company established in another Member State creates an unjustified obstacle to the free movement of services, and the Bachmann judgement (C-204/90), whereby the Court holds that the Belgian legislation making the deductibility of pension and life insurance contributions conditional upon the institution being located in Belgium violates the principle of free movement of workers.

[33] In the same document, the Commission proposes to create pan-European pension institutions (see European Federation for Retirement Provision, 2000) regarding complementary pensions of multinational companies. Single workers, even after mobility, would continue to be enrolled to the same pension fund, though the enforced legislation would change. However, some might find it smoother to remain in the home country section, which is the principle which sometimes inspires the Commission in the area of complementary pension schemes and is welcome in a mutual recognition perspective.

[34] Eleven Member States have the EET system, three have the ETT scheme (among others, Italy) and two the TEE one, while Germany adopts both the EET and the TEE. Those acronyms are used in the European Commission Communication of 2001.

seem to agree nowadays on the necessity to "let the workers free, if they so like, to choose pension funds on countries different from the one where they work, under the conditions allowed in the Directive and in national norms".

Summarising, as far as European complementary pensions are concerned, four major goals appear to exist in the Union at the moment: first, to identify the measures for the "coexistence" of heterogeneous schemes, for instance eliminating a possible differential (and double) taxation; secondly, to make supplementary pension funds consistent with free capital circulation; thirdly, to make them consistent with the free movement of workers and, finally, to let them be an instrument to alleviate the Welfare State from obligations which the European public finances are unable to sustain in the forms and ways adopted so far for mandatory pensions. It is extremely important, in our opinion, that the Commission intends to make really effective and inexpensive the portability of supplementary pension schemes set up in the country of origin during intra-Community movements. If and when the process of mutual recognition of supplementary pension systems were completed, the participation in pillar 2 would not be interrupted by mobility reasons and the insured worker would know that benefits only depend on the amount and on the length of the period of contributions. This should avoid all the problems and costs connected to the transfer of individual positions from one pension scheme to another. Admittedly, the portability would remain on a voluntary basis and workers might give up whenever they wish.

The creation in Europe of supplementary pension systems where workers have the option to maintain pillar 2 in their home countries corresponds to the introduction on a European scale of the principle of mutual recognition in this area. However, the combination of the current Union legislation on mandatory and on supplementary pension schemes seems very complicated in the long and medium-term. Normally, pillar 2 is connected, in its structure, in its functioning and sometimes in the determination of the levels of the involved variables, to pillar 1 and to the labour market regulation. Therefore a question emerges: is in the long or medium-run portability of supplementary pension funds, as it is conceived by the Commission, really feasible or shouldn't some sort of portability of rights be extended to mandatory pensions, to the health care and to the labour market variables as well?

In our opinion, an overall and thorough reform project based on the principle of mutual recognition should necessarily tackle sooner or later the whole employment problem as much as the Welfare State. Smaller steps are, however, welcome in the short run, either in terms of fields of application (for example we can start with health care and complementary pension rules) or in terms of eligibility criteria (for example the mutual recognition could be initially adopted only for those employees at a professional level comparable to the self-

employed professionals who already benefit from these mutual recognition provisions), or in terms of number of partners involved (a strengthened co-operation in these sectors seems easier to start in countries like the United Kingdom or Ireland, where the Welfare States' competition is more appreciated).

Classical unemployment and labour mobility

While in social protection policies mutual recognition is by no means the general rule, but it is not even excluded from Community standards and in some cases it is even adopted, quite the reverse, according to the present European legislation, it is absolutely banned in the labour area. Thus, we deal with this problem in view of a potential reform, as the principle of mutual recognition may prove more effective than the current host country approach to increase the Union workers' mobility and employment, hence to raise efficiency and equity at the same time. Indeed, this is what happens if the following three, very plausible, assumptions hold true: a) in every European country there is some weak component of the labour force (some region, some gender, age or skill group) which is unemployed; b) unemployment is everywhere mainly of a classical kind, namely it is due to lack of entrepreneurial profitability (to an excess of labour costs, due to wage and regulatory rigidities); c) only job-seekers are ready to migrate, provided they find a job in the receiving country. Under these hypotheses, as we shall stress later through a very simple model, the adoption of the principle of mutual recognition in the European labour markets increases the mobility of (classical) unemployed, raises the labour market competition and reduces unemployment, while importing some flexibility in European countries with relatively higher wages and more rigid regulation.

Mutual recognition and labour market rigidities: a theoretical model

The objective of the hereafter theoretical model is to examine the impact on labour force mobility and consequently on employment of the adoption in the labour market of two alternative principles, namely the *host* State and the *home* State approaches, among Union countries all suffering of some (classical) unemployment, but differing in their wage and regulatory rigidities.

Consider the case of two European countries, A and B, having heterogeneous labour market and Welfare settings, and suppose that country A (think for example of Italy) is characterised by high real wages and regulatory rigidities (particularly, overprotection on hiring and firing), while country B (Ireland, for instance) is characterised by flexibility and lower wage costs. It is well known, even at an intermediate textbook level like Blanchard's (Blanchard, 2000), that there exists a one to one correspondence between real wage and regulatory rigidities (Blanchard's Z factor), in terms of their implications on labour costs and consequently on classical unemployment. From this viewpoint, Italy and

Ireland are chosen because they are, to some extent, polar cases of rigidities[35] in Europe, as indicated by Table 1.

Table 1
Labour Market Regulatory Rigidities and Unemployment

Country	Average and standardised unemployment rate	Nickell indicator based on the rigiditiy of "labour standards"[b]	EPL indicator of rigidity in the OECD version 1[c]		Freyssinet indicator of rigidity in the OECD version 2[d]
	2000	1989-94	Late-eighties	Late-nineties	Late-nineties
	(1)	(2)	(3)	(4)	(5)
EU-14[a]	*(VII) 7.2*	...	...	...	...
Belgium	*(VIII)* 7.0	*(IV)* 4	*(VI)* 3.1	*(VIII)* 2.1	*(VII)* 2.5
Denmark	*(XI)* 4.7	*(V)* 2	*(X)* 2.1	*(X)* 1.2	*(XI)* 1.5
Germany	*(VI)* 7.9	*(II)* 6	*(V)* 3.2	*(VI)* 2.5	*(VI)* 2.6
Greece	*(II)* 11.4	…	*(III)* 3.6	*(II)* 3.6	*(II)* 3.5
Spain	*(I)* 14.1	*(I)* 7	*(II)* 3.7	*(IV)* 3.1	*(IV)* 3.1
France	*(V)* 9.5	*(II)* 6	*(VII)* 2.7	*(V)* 3.0	*(V)* 2.8
Ireland	*(XII)* 4.2	*(IV)* 4	*(XI)* 0.9	*(XI)* 0.9	*(XII)* 1.1
Italy	*(III)* 10.5	*(I)* 7	*(I)* 4.1	*(III)* 3.3	*(III)* 3.4
Netherlands	*(XV)* 2.9	*(III)* 5	*(VII)* 2.7	*(VIII)* 2.1	*(IX)* 2.2
Portugal	*(XIII)* 4.1	*(IV)* 4	*(I)* 4.1	*(I)* 3.7	*(I)* 3.7
United Kingdom	*(X)* 5.5	*(VI)* 0	*(XII)* 0.5	*(XII)* 0.5	*(XIII)* 0.9
Austria	*(XIV)* 3.7	*(III)* 5	*(IX)* 2.2	*(VII)* 2.2	*(VIII)* 2.3
Finland	*(IV)* 9.7	*(III)* 5	*(VIII)* 2.3	*(IX)* 2.0	*(X)* 2.1
Sweden	*(IX)* 5.9	*(I)* 7	*(IV)* 3.5	*(VII)* 2.2	*(VI)* 2.6
OECD (for reference only)					
United States	4.0	2	0.2	0.2	0.7
Japan	4.7	1	…	2.4	2.3

Sources and Notes:

a. Luxembourg is not taken into account because there are no data on its labour market rigidity. For data on unemployment in the year 2000 see OECD (2001). The notation … means unavailable data. European countries' rankings are written in italics in parenthesis in every column. All regulatory rigidities in Table 1 refer to private employment. For corresponding indicators in the public sector European labour markets, see ISAE (2002).

b. See Nickell (1997), based on OECD (1994). This is a synthetic indicator on the rigidity of the legal framework on private employment. Its maximum value is 10 and it refers to 5

[35] FKPS (2000) stresses the positive correlation existing in Europe between the unemployment variation in the nineties and the labour market degree of overprotection. The present paper highlights the positive correlation between the labour market regulatory rigidities and the unemployment rate in the year 2000.

dimensions, namley working time, fixed-term contracts, labour potection, minimum wage and workers' bargaining rights. Each of those items has a value ranging between 0 (no legislation) and 2 (strict legislation): values are cumulated.

c. See OECD (1999). This is computed as the average of the indicators referring to regular contracts (procedure difficulties, pre-notice and indemnity applicable to individual firings, firing difficulties) and to fixed-term contracts (full time or part-time). EPL means employment protection legislation.

d. See Freyssinet (2000) and OECD (1999). This is computed as the average of the indicators referring to regular contracts (procedure difficulties, pre-notice and indemnity applicable to individual firings, firing difficulties), to fixed-term contracts (full time or part-time) and to collective firings.

Turning now to examine a less specific case than the one described so far, consider the worker M of a generic country K and the worker N of a generic country J. The analysed combinations of wage and regulatory rigidities in the two countries are four.[36] each country can face a situation of rigidity with overprotection and high wages or of flexibility with softer regulation and lower wage costs. Unemployment is supposed to be of a classical nature,[37] being caused by rigid labour costs, independent of the unemployment rate. By assumption, some unemployment emerges in every European country even in the most flexible one. Job-seekers are ready to move, provided they find a job, that is provided there exists a positive labour demand for them, as their reservation wage is assumed to be in every country lower than the market wage offered to them in any other European country (hence there always exists a positive labour supply – with migration – on the part of the unemployed).

Mobility is here analysed both under the host State principle – that is the European *status quo* – and under the home State principle – i.e. when the principle of mutual recognition is potentially adopted -.

If the **host State principle** holds true, the following scheme, illustrated in Table 2, emerges in the labour demand and supply game:

[36] A more general case would be one where each country finds itself in one out of four, rather than out of two possibilities (high wages-low protection, low wages-high protection, high wages-high protection, low wages-low protection): without loss of generality, we treat only the two extreme cases, because they are sufficient to show that mutual recognition in the labour market enhances mobility, competition, employment. Again, without loss of generality, we only treat the case of two, rather than n countries.

[37] There is a large literature on this topic: among the most recent papers see, for example, Malinvaud (2000).

Table 2

		Worker N Country J			
		High wages High protection		Low wages Low protection	
Worker M Country K	**High wages High protection**	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement
	Low wages Low protection	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement

The cases along the main diagonal (top left – bottom right) identify situations of non-mobility, where the choice between home and host State principles is by definition immaterial, because the two countries are the mere image one of the other (either both rigid or both flexible): the positive labour supply (given the status of unemployed in the worker's country of origin) is counterbalanced by the null demand, as there is an excessive labour supply in the country of destination. Off-diagonal, on the contrary, no movement is observed but for different reasons: job-seekers would be ready to move and to work also in the country where protection and wages are lower than in their home country (*a fortiori* in the country where wages and protections are higher); however, given that, once they move, they are treated as national workers of the host country (where by assumption there already exists some classical unemployment), there is no labour demand for them as there is no demand for the unemployed national labour force. Thus, under these hypotheses, the host State principle never helps job-seekers to find a job through mobility and consequently mobility is not observed.

If, however, the **principle of mutual recognition** were applied, the demand and supply game would be the one indicated by Table 3:

Table 3

		Worker N Country J			
		High wages High protection		**Low wages Low protection**	
Worker M Country K	**High wages High protection**	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement	M (positive supply, null demand) no movement	N (positive supply, positive demand) **movement**
	Low wages Low protection	M (positive supply, positive demand) **movement**	N (positive supply, null demand) no movement	M (positive supply, null demand) no movement	N (positive supply, null demand) no movement

In this event too, along the main diagonal (top left – bottom right) there are situations of non-mobility for reasons similar to those listed before: the worker brings all his/her characteristics with him/her, which coincide with those of the host State. But now there is a difference on some of the off-diagonal cases: if the job-seeker of a low-wage/low-protection country moves to look for a job in the country where wage and regulatory rigidities are higher, by bearing with him/her the labour market conditions of his/her home State, he/she would get a job, because the receiving country's employers would find profitable to hire newcomers at lower wages and protections than those holding in the host State, which is also in classical unemployment. Thus, there would be labour mobility, the overall employment would grow, unemployment would decrease.

Hence, thanks to the principle of mutual recognition, not only would the classical unemployed of a flexible European country be hired elsewhere, but this would take place by raising competition and importing flexibility in rigid Union countries, thus leading to maximise employment of people whose home countries are more flexible than the average[38] in Europe. It is very likely that in

[38] In the case of n countries, should the principle of mutual recognition be applied, all the unemployed of the countries which are more flexible than the average are likely to find a labour demand in the high-wage/high-protection countries, starting, of course, with the full employment of the least rigid European country. In this case too, there would be an

the medium-long run the adoption of the principle of mutual recognition in the European labour markets and Welfare States would induce the national (classical) unemployed of the receiving countries to ask to be non-discriminated and to be treated as immigrants coming from more flexible Member States. Therefore, under the mutual recognition assumption, initially the Irish unemployed would be hired in Italy at the Irish conditions, while later the Italian unemployed would look for and find an employment opportunity in Italy at the Irish conditions. In the end, classical unemployment would tend to decline and possibly to disappear. Thus, one might say with FKPS (2001a) that "initially, workers of different nationality with different labour contract and social security provision would be found within the same firm. Soon, however, each worker, regardless of nationality and residence, would be likely to begin to shop around for the best labour contract and social security provision". The principle of mutual recognition in the European labour markets and Welfare States, therefore, would imply a positive-sum game, whereby losers could be subsidised by winners. This contrasts with the outcome of the host State present approach, where no advantage emerges in labour mobility, and no possibility exists to decrease classical unemployment through migration.

4. Policy conclusions

The present paper carries out a law-and-economics analysis on the impact of the potential (and sometimes factual) introduction of the principle of mutual recognition in the European labour markets and Welfare States.

Up to now, the principle of mutual recognition has been fully or partially adopted in Europe in three of the four areas of the fundamental freedoms envisaged by the Treaty of Rome, with relevant implications for the elimination of trade barriers and for the circulation of goods, services and capital. Since the 1979 *Cassis de Dijon* judgement and its aftermath, competition between similar but not identical commodities has been spreading around and this has caused various effects which, from the viewpoint of an economist, are perfectly expected, namely price reduction, quality improvement and quantity enhancement. Perhaps this has damaged some producers, but certainly has increased efficiency together with equity, definitely to the advantage of the consumers' wellbeing. Admittedly, what is interesting is that all these excellent results have been obtained without asking different countries to give up to their revealed preferences expressed in their regulations and laws. Each country may keep its own rules, but it cannot refuse to allow – according to the principle of mutual recognition – not only that different rules are enforced elsewhere, but also that those same rules have to be accepted for imported products and

employment growth which would benefit particularly the unemployed of highly flexible countries.

services, provided the latter are not harmful to health, to natural and artistic environment and the like, the only possible derogations being "emergency reasons". Therefore, if one proves that the *Cassis de Dijon* does not damage French consumers' health, German consumers may have their way to determine the alcohol percentage of a beverage, but they cannot hamper the import of French alcoholics to Germany, as what does not harm French drinkers will not damage German drinkers neither.

This conclusion, once generalised, shows two elements: first, in the transfers of commodities and services within Europe mutual recognition makes the home State rules more important than the host State ones, while a Single Market practically exists already for capital; second, mutual recognition – i.e. the mutual acceptance of one's diversity – is based on a minimum threshold of common laws and principles which, in the case of the *Cassis de Dijon*, concern the safeguard of people's health, assumed to be a shared value taken care in equivalent if not identical ways everywhere in the Union.

On the contrary, in one of the four sectors of the European fundamental freedoms, namely in the labour market, mutual recognition is not only ignored, but it is banned as "social dumping", while the opposite principle – the so-called "equal treatment" – is adopted, in spite of the fact that mutual recognition might give rise to a much fairer treatment. Nowadays, European workers moving to a different Member State are granted the right to be fully assimilated to the host State nationals, while they are not entitled to maintain their identities created in their home State. They have no right to diversity in the receiving country, assimilation being their only option: indeed, on the basis of the interpretation of art. 39 of the Treaty, any form of employment, remuneration or protection condition different for workers residing in the same Member State on grounds of different nationalities is considered discriminatory. Hence the equality of treatment is set not for all those who are born in the same Member State, but for all those who are working in the same country, with full identity in terms of labour and social protection, between law and localisation. It is as if the old alternative between *ius loci* and *ius sanguinis* emerged again in a new way, with a systematic prevalence of the former norm. The ECJ rulings have always corroborated this stand, repressing any competition in the European labour markets due, for example, to different wages or different Welfare instruments (and the two are clearly interconnected), as if it were unfair.

In our opinion, this approach is out of keeping with Delors' White Paper (European Commission, 1985), when it states that free movement cannot be limited in any sector within the European Union, while "the immediate and full recognition of different quality standards, of different legislations…must be the rule". If this holds true for goods, services and capital, it must hold true for the human capital as well, particularly in a European area where the fundamental

social rights are similar everywhere, as they represent a solid standard network where nobody falls short of the minimum threshold. Indeed, there are some fields of human capital where mutual recognition has already been adopted or at least has already been proposed by European institutions, for example in the equivalence of professional qualifications of self-employed, or in some complementary pension and health care rules, because these fields are considered parts of the service or of the capital markets. But the contiguity between the status of self-employed and the one of employed or between complementary and mandatory pensions is so big that it appears impossible to avoid at least asking what would be the potential effect of using the principle of mutual recognition more generally in the European labour markets and Welfare States.

What would then be the correspondent of the minimum threshold, were the principle of mutual recognition applied to the labour market and social protection in Europe? The minimum "core" should regard current and future wages, that is labour incomes and pensions, working time, holidays, maternity and sickness leaves, besides other fundamental benefits and social rights. There are many ways to define the minimum threshold, for instance one might let the market reach the standards of the most flexible European country through competitive pressures or one might use already existing common rules belonging to the wider set of the *acquis communautaire,* or one could adopt a system of limited negotiations between countries, just as it is happening after the Lisbon summit through the open co-ordination in labour and Welfare matters.

There should be a package of rights to be guaranteed everywhere in Europe, beyond which each country should be left free to rule its own employment and social protection strategies, while respecting the others', thanks to mutual recognition. Accepting standards beyond the minimum package means that, if the principle of mutual recognition were enforced, a country could employ a worker from another European Member State not at its own conditions, but honouring the sending country rules and regulations.

A very simple theoretical model is set up with two countries and two conditions for the labour market and Welfare State (one with high wages – high regulatory rigidity, the other with low wages – high regulatory flexibility). The model shows the effects obtained in terms of labour mobility and employment by turning from the present system – based on "equal treatment" (the host country principle) – to an opposite one – based on mutual recognition (the home country system): under the assumption that in all European countries there exist some unemployed of a classical type (due to excessive rigidities) and that job-seekers of a Member State are ready to move to another Member State provided they get a job, one finds that labour mobility in Europe would rise as would employment. There would be no unequal treatment, because the present concept of "equal

treatment" states that "all workers living in one country are equal", while the principle of mutual recognition would mean that "all workers coming from one country are equal".

In particular, the model illustrates why an unemployed living in a low-wage and low-protection State nowadays does not move elsewhere in Europe, the reason being that he/she would not find a job: with the host country principle there are no reasons for the employers of a high-wage and high-protection country to hire foreign workers coming from the rest of Europe, because once they have moved, they become absolutely identical to national workers. For example, Italian employers would never hire Irish job-seekers (though coming from a flexible and low-wage country) at Italian conditions, but they would hire them at Irish conditions, namely under the hypothesis of mutual recognition. Italians would maintain their own rigidities because mutual recognition enables that, but after a while they would possibly change their attitude, particularly under the pressure of the weakest components of the Italian labour force (women, youngsters, Southern): indeed, after some time, also the Italian unemployed would not accept to be "discriminated" compared to Irish job-seekers and would require to be treated as any other European unemployed. This should be allowed out of social justice. The principle of mutual recognition would then trigger the paradoxical, and yet hopeful result of stopping to treat an Irish active person in Italy as an Italian worker and eventually treat an Italian active person like an Irish worker (if he/she wishes so). Such a system would in the end reduce (perhaps eliminate) the European classical unemployment, particularly strong in highly rigid countries like Italy.

What is important is that beyond the minimum threshold there would exist in the European labour markets and Welfare States a mutual recognition system which would no longer be labelled as "social dumping" or unfair competition just because it is not welcome by some powerful insiders who are *de facto* rent-seekers. All these people advocating rigidities – irrespective of their intentions to protect the weak brackets of the labour force, but certainly protecting the strong brackets of it, namely themselves – would oppose the adoption of mutual recognition because this would increase competition in the labour market, just as it happens in the commodity market, with the effects which any competition rise entails, i.e. enhancing the wellbeing for the society as a whole, particularly for the unemployed and first job-seekers, but certainly worsening it for those who already have a job highly protected and well paid.

Should the principle of mutual recognition be adopted – at least as a worker's right, not as a duty – one would observe that in the same firm of a given European country heterogeneous wage and Welfare conditions would be applied to similar workers. This should not raise fears, because it would bring about the

exercise of a right and the benefit of being no longer unemployed, at least if the labour force were ready to accept wage and regulatory flexibility.

Orthodox thinkers would pretend that all that is unfair, because the living cost is different in different countries, so that in each of them wages should be proportional to prices and social security contributions to benefits. However, if competition fully pervaded the European labour markets and Welfare States – as it is not the case nowadays, but as it would happen as a consequence of mutual recognition – there would be a fall in rigid countries' prices and labour costs, probably a rise in flexible countries' prices and wages, so that this problem would trend to gradually disappear. In any case, in order to reduce the inevitable opposition of the conventional wisdom and specially of insiders of the most rigid countries, one could envisage that mutual recognition might be initially introduced in the European labour markets and Welfare States only of a limited number of countries (in strengthened co-operation) and only for some categories of workers and sectors. Indeed, the latter process is already under way for self-employed workers with skills certified by law (doctors or lawyers) and for some components of health care and pensions. That formula might initially be extended to employees with qualifications comparable to those of the recalled self-employed (for example to University professors and the like), according to a method of variable geometry.

To conclude, the socio-economic differences one may observe between various European labour markets and Welfare States depend on disparities which are not only unavoidable, but which have to be exploited in order to create those opportunities for exchange and competition which are necessary to reduce production costs, raise efficiency, eliminate artificial obstacles to the free movement of workers, increase employment hence equity, improve quality of life and wellbeing particularly for consumers and for the weakest components of the labour force. In the long run, the final result would be an *a posteriori* harmonisation of the European labour markets and Welfare States reached in a bottom-up process, not in a top-down one as it is usually the case with harmonisation. Were the principle of mutual recognition applied "to all sectors", as proposed by the European Commission Communication (1999b), each European citizen might use both the *ius loci* and the *ius sanguinis*, without being always compelled to opt for the former one.

Appendix[*]

> Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.
>
> **Exodus 22, 21**

> The man who finds his country sweet is only a raw beginner; the man for whom each country is as his own is already strong; but only the man for whom the whole world is as a foreign country is perfect. (Myself, a Bulgarian living in France, borrow this quotation from Edward Said, a Palestinian living in the United States, who himself found it in Erich Auerbach, a German exiled in Turkey.)
>
> **T. Todorov (1992),** ***The Conquest of America***
>
> (And in turn myself, the daughter of a Greek-speaking mother, a German-speaking father and four grandparents of different nationalities, none of which was Italian, borrow the quotation.)

The three forms – *ghettoisation, assimilation* (either *closed* or *open*) and *mutual recognition* discussed in Section 2 – have emerged in the course of time and have also been present in the twentieth century.

Indeed, there not only exist oscillations in history or returns to the past, but, as it hopefully will become clear in what follows, there is also a *continuum* for example between philosophies advocating assimilation, those favourable to tolerance and the principle of mutual recognition. Perhaps only the extremes – represented by mutual recognition and ghettoisation – are truly disconnected.

However, in Western societies, the passage from the first to the second and to the third form of the combination of unity with diversity seems to correspond to the transition from a more archaic conception to a more modern form of acceptance of diversity according to the neo-positivist idea (or utopia) of the "magnificent destinies and progressions". The thesis is correct but is spoiled by simplistic optimism if it takes the view that movements are irreversible. The Roman Empire was certainly able to assimilate a North African and make him an Emperor, but it could not but ghettoise (before Constantin's Edict of

[*] This text is the English translation of an updated version of a paper published in Italian partly in *Lettera Internazionale* (FKPS, 2001b) and partly in *Il Mulino* (FKPS, 2001c). It is forthcoming in French in *Transcultura* (FKPS, 2002b) and in Chinese in *Tractatus* (FKPS, 2002c). I am grateful to Eloi Laurent, Sascia Lubicz, Nicola Salerno, Grazia Sgarra and particularly to Paolo Reboani for the collaboration given in the writing of Chapter 2 of FKPS (2001d), which includes an old version of this text and of the present paper's Sections 2 and 3.

Toleration) the Christians because, as the Jews, they questioned the basic power of the Emperor.

If it is true that the Old Testament recognises such a value to diversity as to induce God to destroy the Tower of Babel because, having one single language, that society risked believing itself omnipotent ("Come, let Us go down and there confuse their language, so that they will not understand one another's speech", *Genesis* 11, 7), it is also true that the Catholic Church after Paul did not know, and did not want to know, how to cultivate that noble idea. Indeed, it rejected as elitist the Hebrew view that "one must convert no-one" and showed itself disposed to accept everybody by "generously offering" to each individual – without distinction of race, colour, culture, origin – the possibility of salvation through baptism. In substance, it was operating a form of closed assimilation, aimed at saving people irrespective of the implied destruction of previous identities (think of the end of the Aztecs, the Mayas, the Incas), according to an ethical whereby intentions are profoundly different from results (even "the road to hell is paved with good intentions").

And if it is true that open assimilation, to some extent more respectful of the role of diversity, is fundamentally the daughter of the Renaissance (Marsilio Ficino, 1473, justifies the variety of religions by stating that "Divine Providence does not permit any part of the world at any time to be completely without religion, although it does allow rites to differ. Perhaps variety of this kind is intended as a beautiful ornament" and Pico della Mirandola, 1486, conceives the idea of a religious syncretism), it is also true that open assimilation also existed in the pre-Christian world, where "*Grecia capta ferum victorem coepit*". To a certain degree, it was practised in Cordova and Toledo in the fifteenth century before the arrival of the highly Catholic king and queen Ferdinando of Aragon and Isabella of Castilla (but perhaps even after 1492 there emerged a sort of tolerance towards the *moriscos* and the *marrani*, not always denounced by the Spanish pure blood Arians). It was also practised outside Europe, for example in China, which traded with the Western world, adopting some of its rules and exporting some of its own.

As for the logical continuity of the three forms of unity-diversity combination, it is enough to think of the thread binding the Levinas-styled humanistic monotheism rooted in the Old Testament, with Pauline monotheism and indeed this last one with the position expressed by Plato and the neo-platonic movement of the fifteenth century. However, since *c'est le ton qui fait la musique*, one cannot but note a remarkable dissonance between Levinas and the triumphant sense of assimilation "to one" in neo-platonic Cardinal Nicholas of Cusa's *coincidentia oppositorum*.

"With a non Jew who leads a moral life – says Levinas (1976) – a Jew can communicate as intimately and religiously as with a Jew. The rabbinical

principle whereby the just of all nations participate in the world to come does not only express an eschatological point of view. It affirms the possibility of extreme intimacy beyond the dogma affirmed by one group or another…This is our universalism…We have the reputation to think of ourselves as a chosen people and this reputation does much hard to such universalism. The idea of being a chosen people should not be taken as a form of pride. It does not represent the recognition of exceptional rights, but of exceptional duties…the Hebraic concept of the election of Israel is not anterior to the universalism of a homogenous society where the difference between Jews, Hellenics and Barbarians is abolished. It encompasses this abolition, but remains for a Jew at any moment an indispensable condition for that abolition, a condition which must be recreated in any moment".

Conversely, Plato wrote in his *Parmenide*: "Again, the like is opposed to the unlike. And the other to the same…And to be the same with the others is the opposite of being other than the others And in that it was other it was shown to be like …Then the one will be both like and unlike the others; like in so far as it is other, and unlike in so far as it is the same". More than one thousand and eight hundred years later Cardinal Nicholas of Cusa in his *Apologia doctae ignorantiae* (Cusa, 1440) reiterates the concept of the "coincidence of opposites" when he affirms that "there cannot be one maximum of all maxima. Maximum is something that is not opposed by anything else, where maximum and minimum coincide. Thus, the infinite unity is the *complication* of all things (something embracing all things) and it is called unity because it unifies everything". The dissonance of Cardinal Nicholas of Cusa becomes in open contrast to Levinas, when in his *The Healing Power of Faith* (1453) recalls that the Jews who reject some Christian beliefs, being "scarcely numerous…will not be able to upset the whole world with arms". But approximately 500 years later, thanks to John XXIII first and Paul VI later, the Church position seemed to have completely changed (through it is still unclear whether that change is irreversible or not). Indeed, the *Declaration on the Relation of the Church to non-Christian Religions, Nostra Aetate,* proclaimed by His Holiness Pope Paul VI on October 28, 1965 says: "Since in the course of centuries not a few quarrels and hostilities have arisen between Christians and Moslems, this sacred Synod urges all to forget the past and to work sincerely for mutual understanding and to preserve as well as to promote together for the benefit of all mankind social justice and moral welfare, as well as peace and freedom…Since the spiritual patrimony common to Christians and Jews is thus so great, this sacred Synod wants to foster and recommend that mutual understanding and respect which is the fruit, above all, of biblical and theological studies as well as of fraternal dialogues" (Paul VI, 1965).

And how not to see the continuity-discontinuity dualism in the multi-culturalism implicit in the "separate but equal" doctrine (according to the US Supreme Court's landmark *Plessy v. Ferguson* ruling of 1896 acknowledging the right of blacks to accommodations identical to those for whites though without the right to share them) and the apartheid emerging in the principle "equal but separate" (according to the 1954 ruling *Brown v. Board of Education* of 1954), both originated by that dark and yet fascinating concept which is the American *melting pot*?

If we wish to quickly follow the path leading from culture to politics and to economics, it is worth noticing that the principle of the *a priori* coincidence of opposites, characterising the divine synthesis, is transformed and yet maintains its own nature in the shift from harmony-by-faith to harmony-by-law made by Graziano, XII-century monk from Bologna, author of the gigantic work *Concordia discordantium canonum*, which has been for centuries the Single Text of the Canonic Law. Once again, the non-contradiction principle is used with the aim of assimilating (namely reducing, if not eliminating) differences.

The elaboration of the political doctrine corresponding to the *Great Inquisitor* culture seems to reach its apex in Hegel's idealism, where the step from unity conquered through a dialectic process of thesis-antithesis-synthesis to the one obtained through the ethical State is more immediate. The nineteenth century creation and strengthening of National States is its historical-political expression. Indeed, also the aberrations of the twentieth century dictatorships, from the Nazi/Fascist one to that of proletariat, though being neither intrinsically not necessarily correlated to that philosophy, seem to be consistent with that principle (for instance, Hegel, 1821, finds "the ethical moment of war, which is not to be considered as the absolute evil…it has its highest meaning inasmuch it maintains the ethical health of peoples").

In economic terms – and that is an aspect worth noticing – those aberrations become assimilation-based policies or approaches favouring apartheid. More precisely, closed assimilation – aiming at including the different provided it stops being different and converts himself/herself, which is the only way to safety – has been characterising real socialism up to 1989. Stalin's USSR exports its own economic planning model by imposing it on Centra and Eastern Europe with the aim of prompting the regeneration of the "Socialist man". Apartheid emerges in the Fascist autarchic regimes (similar to pre-market societies, to agricultural civilisations of self-production and self-consumption): the other remains the other; no form of interchange is even attempted with it; there is no need for it (the regime is absolutely – or thinks to be – self-sufficient).

More deeply, on the level of values, the principle of mutual recognition is based on the awareness of the benefits deriving from diversity and it is deeply rooted in a basic – though minoritarian – stand of the European cultural tradition. It

runs over a 2000-year span, which is temporal, geographic, ideal and linguistic at the same time. It ranges from Horace's *Epistolae* (around 20 B.C.) wondering *quid velit et possit rerum concordia discors* (what the discordant harmony of circumstances would and could do) to Nietzsche's *Gay Science* (1882), where he is grateful "to stand in the midst of this *rerum concordia discors* and of this whole marvellous uncertainty and rich ambiguity of existence".

Humanism and liberalism both contribute to the idea of harmony *a posteriori*, meant as a way to meet the other and as a balance of powers. Major contributions come from Galilei's scientific spirit (1632, "for my part I consider the earth very noble and admirable precisely because of the diverse alterations, changes, generations, etc. that occur in it incessantly"), with the consequent modern evolutionism, and from Montesquieu's spirit of law (1748), with his idea of the separation and independence of the executive, legislative and judiciary powers. The ethics of results of protestant origin and the one inspired to Machiavelli's *The Prince* (1513, "he who neglects what is done for what ought to be done, sooner effects his ruin than his preservation"); Vico's heterogenesis of ends (1725, "this world without doubt has issued from a mind often diverse, at times quite contrary, and always superior to the particular ends that men had proposed to themselves"), but also Adam Smith's "invisible hand" (1776) and the whole English empirism. Levinas' *Humanism of the Other* (1972) puts together the ancient and modern humanist heritage, from the Old Testament to the Italian Renaissance to French Enlightenment.

Nobody seems better than Todorov (1992) – or Braudel in his *Grammaire des civilisations* (1993) – to describe this patrimony in his European historic path: "Western Europe has sought to assimilate what is alien, to force the disappearance of the exterior being and, for the most part, it has succeeded. Its way of life and its values have been spread around the world. As Columbus wanted, those who have been colonised have adopted out customs and clothes…I think that this period of European history is disappearing today.

The representatives of Western society no longer believe so ingenuously in their own superiority and the assimilation movement is coming to an end…We are seeking to bring together what we feel are the best terms of the alternative, that is we want equality without it meaning identity, but we also want difference without it to become superiority/inferiority…we want to resume the sense of a society without losing the sense of individual". The recognition of what is alien and diverse – Todorov recalls (1989) – is but the result of the awareness that "each human being is multi-fold and any attempt to unify him/her ends in mutilation".

Thus, the principle of mutual recognition is, in some aspects, as old as the Tower of Babel, but, for other aspects, is a new discovery of the twentieth century and is an ongoing social and political conquest. This is because

globalisation has brought about the daily contact with diversity and only now the idea of belonging to heterogeneous civilisations is labelled as a richness, which would be absurd to throw away, though we all are (and want to be) part and parcel of a single society. Mutual recognition is the privileged instrument transforming each individual into a citizen of the world, a *n*-component vector which cannot be found identical in any other human being. Like DNA, those components belong to one single individual who – despite all this – is also part of the surrounding society[39]. If one looks at ghettoisation or assimilation, each single member of a group must be (and preferably is) represented by an *n*-component vector (almost) identical to the one characterising any other individual of that same group. Today the real challenge – for example, in our continent – is making European citizens of Italian language, of Serb-Orthodox religion, of French culture, living in England, residing in a country Dutch-styled manor, live in harmony.

Only mutual recognition can do that, as it separates rights (duties) and geographical location: the law enforced in a Member State is enforceable in another Member State thanks to the circulation of goods, services, capitals, or even mobile workers (if our proposals are accepted). Should mutual recognition enter the labour market or the social protection schemes, whenever an individual moves within Europe, he/she bears with him/her also a *social* capital consisting of the whole economic-judicial aspects of his/her home State. Rights would no longer be constringent on geography, as each worker would bear them with him/her when he/she moves within Europe, thus embodying the motto "*omnia mea mecum porto*".

The intention of mutual recognition in Europe is therefore clear, but it remains unclear how we will get there, how to permanently reconcile individual diversities with a cohesive society, how to identify that minimum common framework possessing the various *n*-component vectors to arrive at a point where each can live with the other in civility and harmony. Perhaps the solution is a wise, pragmatic mixture of logic and experimentation, of deduction and induction, of small steps subject to trials and errors.

To find a theoretical, and yet operative, response to those questions means to go towards the future in a vision that, if not historical-theological, is at least evolutionary-innovating. The European society is asking for this response ever more pressingly, as recently indicated by the Eurobarometer survey (SORA, 2001), where "the number of those considering immigrants as people able to enrich the life of one's own country has grown from 33% in 1997 to 48% in

[39] The exhibition "*Tous parents tous différents*" organised at the *Musée de l'Homme* in Paris illustrates the idea that race distinctions are pointless, and not because races do no exist, but because there are too many races, as they are not five, but more than 5 billions, that is as many as our DNAs.

2000”. But even more Europe needs that – in spite of what we have just stated – because only 39% of the population is ready “to accept immigrants coming from other Member States in one's own country of residence without restrictions". We therefore have the duty to learn and teach”.

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