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Contents

Abstract

Mutual recognition is a shorthand for the obligation of authorities of jurisdiction A to give effect to legal rules or acts passed by authorities of jurisdiction B. Thus, mutual recognition gives rise to cross-border effects of general or individual decisions. Such an obligation can arise from an agreement reached by those jurisdictions, or from a higher law that imposes it upon them. In this paper, I explore the role of mutual recognition between Spanish autonomous regions. The case of Spain is interesting from a comparative standpoint because regions enjoy important competences in the field of market regulation, the implementation of which can create risks in terms of market integration. These risks have traditionally been managed with the principles of cooperation and market unity. In 2013, the Spanish Parliament decided to go beyond that and passed a law establishing a region of origin rule. This was subsequently declared unconstitutional by the Constitutional Court, by virtue of the principle of regional autonomy under Article 2 of the Spanish Constitution. The story of Spain shows the scope, limits and constitutional problems of mutual recognition in a multilevel administrative State.

Keywords

Mutual recognition, Region of origin, Market fragmentation, Market Unity Act, Internal market, Administrative cooperation

1. Introduction

Mutual recognition has been a hot topic in EU law for a long time now, both within the internal market and beyond. However, this regulatory arrangement is far from being an exclusive feature of EU law. In various forms and with different faces, mutual recognition essentially assists in the resolution of specific coordination problems that are common to polities where rule-making and adjudication competences are conferred upon decentralised bodies. Whereas the operation of mutual recognition in EU law – in the internal market,[1] in the area of liberty, security and justice,[2] and in EU law more generally[3] – has been subject to a generous level of attention from academic scholarship, its function and operation in EU Member States with a multi-level regulatory and administrative structure has been given less attention,[4] especially from a comparative standpoint.

This paper explores the role of mutual recognition in Spain, specifically between its autonomous regions. The case of Spain is interesting from a comparative perspective because regions have important competences in the field of market regulation, the autonomous implementation of which may create risks in terms of market fragmentation. These risks have traditionally been dealt with by means of three constitutional principles that we will describe in detail later in this paper. On the one hand, autonomous regions are compelled to cooperate with each other under the principle of sincere cooperation. On the other, they must implement their regulatory and adjudicatory powers without creating discriminatory or disproportionate obstacles to the exercise of the freedoms of movement. Finally, the State authorities – namely, the central government – have the power to approximate and coordinate regional law to a great extent, by virtue of both sectorial and horizontal legal bases provided for in the Spanish Constitution. Although this arsenal

[1] See, for instance, MP Maduro, *We, the Court* (Hart 1998); C Barnard and S Deakin, 'Market Access and Regulatory Competition' in C Barnard and C Scott (eds), *The Law of the Single European Market* (Hart 2002) 197-224; K Armstrong, 'Mutual Recognition' in C Barnard and C Scott (eds), *The Law of the Single European Market* (Hart 2002) 225-267; M Möstl, 'Preconditions and Limits of Mutual Recognition' (2002) 47 Common Market Law Review 405; J Pelkmans, 'Mutual Recognition: Economic and Regulatory Logic in Goods and Services' in T Eger and H-B Schaffer (eds), *Research Handbook on the Economics of EU Law* (Edward Elgar 2012) 113-145; W-H Roth, 'Mutual recognition' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 427-459 and S Weatherhill, 'The principle of mutual recognition: it doesn't work because it doesn't exist' (2018) 2 European Law Review 224.

[2] See A Souminen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia 2011); V Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights after Lisbon' in V Mitsilegas (ed), *Research Handbook on EU Criminal Law* (Edward Elgar 2017) 148-167 and C Burchard, *Die Konstitutionalisierung der gegenseitigen Anerkennung. Die strafjustizielle Zusammenarbeit in Europa im Lichte des Unionsverfassungsrechts* (Klostermann 2019).

[3] See, for a general and cross-sectoral perspective: C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2015), W van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015) and K Nicolaidis, 'The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refuges' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 278-301. See also the contributions published in F Kostoris Padoa-Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave-Macmillan 2005) and in Volume 14(5) of the Journal of European Public Policy (2007).

[4] See, for instance, P Starski, *Der interföderale Verwaltungsakt* (Mohr Siebeck 2014) and L Arroyo Jiménez and A Nieto Martín (eds), *El reconocimiento mutuo en el Derecho español y europeo* (Marcial Pons 2018).

seems sufficient to adequately help to prevent market fragmentation, in 2013 the Spanish Parliament decided to go a step further forward, and passed a law establishing a region of origin rule. The latter was subsequently declared null and void by the Constitutional Court,[5] which held that it infringed the principle of regional autonomy under Article 2 of the Spanish Constitution (or 'SC').

This paper intends to shed some light on the role, limitations, and constitutional problems that mutual recognition may have in a unitary – yet multi-level – administrative State. In particular, I will try to touch upon the following questions: first, when and how does mutual recognition apply in Spanish public law after this process of transformation? Second, does mutual recognition operate under the same standards and give rise to the same legal consequences in Spanish and in EU law? Finally, does all this bring about any useful finding in terms of comparative administrative law?

It is structured as follows: after providing an analytical (2) and constitutional (3) framework, I explore mutual recognition obligations voluntarily agreed upon by the Spanish autonomous regions (4). Next, I focus on the long-standing practice of defining sectoral conflict rules (5), on the 2013 legislation (6), as well as on the Constitutional Court judgments that have declared the latter null and void (7). The paper then faces the abovementioned research questions regarding the role of mutual recognition in Spain, as well as the lessons that can be learnt from a comparative perspective (8 and 9). The final section concludes with a brief summary (9).

2. Concept and forms of mutual recognition

The concept of mutual recognition has been defined in different manners and as having various scopes of application, thus giving rise to a number of ways in which this regulatory arrangement may be understood, both from a formal (focused on its legal effects)[6] and a functional perspective (in view of its political purposes).[7] I will take as the departure point a very wide definition: mutual recognition is a regulatory arrangement, under which the administrative or judicial authorities of jurisdiction A must give legal effects within their territory to norms or acts passed by the legislative, administrative or judicial authorities of jurisdiction B. Mutual recognition, therefore, is the content of a legal obligation incumbent on 'host' authorities (jurisdiction B), namely: (i) to accept that a norm or act passed by 'home' authorities (jurisdiction A) has legal effects in their territory; and (ii) to refrain from applying their own law to a case to the extent that doing so might impede (i). The immediate consequence of this is that rules and acts passed by the authorities of the jurisdictions taking part in this regulatory arrangement will have legal effect in the territory of the others, thus giving rise to cross-border or horizontal interactions. It is readily apparent that using this broad definition of mutual recognition here does not exclude other ways to define it which would certainly be more accurate in particular areas of law, or under certain regulatory frameworks.[8] Nevertheless, it encompasses a number of regulatory arrangements that, despite those differences, have the said common traits.

[5] Judgments of the Constitutional Court No 79/2017, 110/2017, and 111/2017.
[6] Janssens (n 3) 4-5, 123-124.
[7] Janssens (n 3) 257-270. For a general account, see K.Nicolaidis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (2017) 17 Current Legal Problems 1.
[8] See, especially, Janssens (n 3).

Two more points should also be made. First, the legal obligation embodied in this notion of mutual recognition can be from various sources. It can arise from a cooperation agreement between the competent authorities of the jurisdictions that take part in this regulatory arrangement ('agreed mutual recognition'). It may also be imposed on them by virtue of a higher law ('compulsory mutual recognition'). While in the former case mutual recognition arises in a horizontal, voluntary framework, in the latter it has a constitutional or supranational legal authority, and therefore expresses a vertical, hierarchical relationship.[9]

Second, various distinctions can be made within this broad notion; most of them have their origin in EU law scholarship, but they can certainly be reframed more generally. Mutual recognition can be proclaimed on a general basis in a constitutional norm and thus be subject to subsequent interpretation by courts ('judicial mutual recognition') or it can be enshrined in secondary sources of law, either on a general or on a sectoral basis ('legislative mutual recognition').[10] The obligation arising from mutual recognition can also be unconditional and definitive ('absolute mutual recognition') or – as is more often the case – remain subject to certain exceptions ('managed or conditional mutual recognition'); such exceptions can be defined either on a cross-sectoral legal basis, or with reference to only one specific policy area.[11] Finally, mutual recognition obligations sometimes require that the rule or act passed by the home authorities directly and autonomously produces legal effects in the territory of other jurisdictions ('passive mutual recognition'), while in other cases the obligation incumbent on the host authorities to give effect to them requires their incorporation in a specific and subsequent decision-making process ('active mutual recognition').[12]

3. The constitutional framework of mutual recognition in Spain

Now that the analytical framework has been described, it is time to take a look at the constitutional context of mutual recognition in Spain. The Spanish Constitution of 1978 delineated the foundations of a unitary yet decentralised State, based on the simultaneous authority of the principles of unity and autonomy. Article 2 states that

> [the] Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.

Unity and autonomy encompass opposing demands, and thus give rise to a rather complex constitutional framework which requires the legislature and the Constitutional Court to act as intermediaries. This framework reflects both on how powers are distributed between different levels of government, and on how such powers must be implemented.

[9] I leave aside unilateral voluntary mutual recognition arrangements because they play virtually no role in Spain. On its discrete place in EU law, see Armstrong (n 1) 250.
[10] Armstrong (n 1) 240-242; Janssens (n 3) 10 and Möstl (n 1) 410-422.
[11] Nicolaidis (n 3) 278-301; Roth (n 1) 458-459 and Weatherhill (n 1) 224-233.
[12] Armstrong (n 1) 240-242 and L De Lucia, 'From Mutual Recognition to EU authorisation: A Decline of Transnational Administrative Acts?' (2016) 8 Italian Journal of Public Law 90, 94-99.

Legislative and enforcement competences are widely shared by the State and the autonomous regions. On the one hand, the Constitution has allowed the latter to have legislative and enforcement powers in various policy areas, and to use them autonomously through their own institutional systems. Accordingly, through their Statutes of Autonomy – a particularly rigid type of statute passed by the national parliament, and therefore very difficult to amend – all the autonomous regions have many important competences in terms of market regulation.[13] These competences are related to a number of industries, such as: housing; agriculture; fishing; industrial production; distribution; savings banks; education; healthcare; and media. Furthermore, in all these areas, autonomous regions do not only have administrative adjudication prerogatives – such as licensing, supervision, aids and subsidies, and public services provision – but also the competence to pass parliamentary legislation and make administrative rules.

On the other hand, the State also retains important competences in terms of market regulation. First, the national Parliament is empowered to pass legislation in certain areas of law that are not circumscribed to specific economic sectors, but have a market-structuring dimension – such as commercial law, labour law and procedural law.[14] Second, the State also retains the competence to pass basic legislation in the most important economic services areas – such as banking, insurance, transport, healthcare, education, energy, media, and more.[15] In all these areas, the national parliament can pass framework legislation that will subsequently be made more detailed by regional legislation. However, basic or framework legislation cannot be so exhaustive that it completely suppresses regional legislative competences.[16] Finally, the State also has various horizontal legal bases[17] that empower it to pass legislation aimed, among other things, at ensuring a certain degree of equality in the exercise of fundamental rights – such as the right to private property – [18] and at coordinating divergent regional market regulations.[19] In recent years, these powers have been subject to very liberal interpretations by the Constitutional Court.[20]

According to the Constitution, regions can implement their competences under the principle of autonomy, thus giving rise to potentially divergent regulatory policies throughout the Spanish market.[21] Nevertheless, this must also be qualified from two different perspectives. For one, as in most sectors of economic regulation competences are shared by the State and the regions, to a certain degree the central government can manipulate the scope of regional competence depending on how it implements its own regulatory powers. This often unfolds by amending basic legislation, or by using a horizontal legal basis in order to hinder an undesired regulatory policy previously taken

[13] Art 147.1.d) Spanish Constitution [SC].
[14] Art 149(1).6 and 7 SC.
[15] Art149(1).11, 16, 21, 25, 27, and 30 SC.
[16] Judgments of the Constitutional Court No 32/1981, para 6; 1/1982, para 1; 223/2000, para 6; 251/2006, FJ 10 and 68/2017, para 3.
[17] G Fernández Farreres, *La contribución del Tribunal Constitucional al Estado autonómico* (Iustel 2005) 181-193.
[18] Art 149(1).1 SC.
[19] Art 149(1).13 SC.
[20] T de la Quadra-Salcedo Janini, 'La nueva concepción constitucional de la unidad de mercado' (2018) 114 Revista Española de Derecho Constitucional 293.
[21] Judgment of the Constitutional Court No 37/1981, para 2.

by one or some regions.[22] If a regional measure clashes with 'central' legislation, the consequence – provided that the latter complies with the Constitution – is not pre-emption and disapplication, as would be required in an EU law-context. The consequence, rather, is that a regional rule or act violating central legislation is *ultra vires* and is therefore indirectly unconstitutional. Moreover, because constitutional review in Spain occurs under a centralised framework, ordinary courts cannot simply set these rules or acts aside. In turn, a reference must be made either to the competent administrative law court if they are administrative rules,[23] or to the Constitutional Court if they are Parliamentary statutes.[24]

Thus, in spite of the rigidity of Statutes of Autonomy, the State has various ways to broaden or lessen the scope of regional competences depending on the perceived need to adjust regulatory diversity. Furthermore, even within the scope of their own regulatory powers, autonomous regions are bound by two constitutional principles that impose restrictions on how these prerogatives must be implemented. One is the principle of cooperation between different public bodies:[25] cooperation occurs on a voluntary basis, and can have both a vertical (between the State and one or many regions) and a horizontal nature (between various regions). Article 145(2) SC provides for the possibility of two or more autonomous regions to conclude cooperation agreements 'for the management of activities and the provision of services within their competences'. These agreements give rise to legal obligations as to how regions must exercise their competences in their respective territory.[26]

Another limitation on how autonomous regions can make use of their regulatory and enforcement competences is the constitutional principle of market unity, outlined in the Spanish Constitution under two separate provisions. Article 139(1) SC states that 'All Spaniards have the same rights and obligations in any part of the State territory'. This provision does not require strict uniformity irrespective of the region in which individuals and firms are based, but merely impedes regional laws from including discriminatory measures based on their origin.[27] Article 139(2) SC supplements the non-discrimination standard with a rule dealing with restrictive measures: 'No authority may adopt measures which directly or indirectly obstruct freedom of movement and settlement of persons and free movement of goods throughout the Spanish territory'. In sum, the principle of market

[22] T de la Quadra-Salcedo Janini (n 20) 293-296.
[23] Arts 106.1 SC and 27 Act No 29/1998, on Administrative Law Courts (hereinafter 'LJCA').
[24] Arts 163 SC and 35-37 Organic Act No 2/1979, on the Constitutional Court (hereinafter 'LOTC').
[25] Art 2 SC; J Tajadura Tejada, *El principio de cooperación en el Estado autonómico* (Comares 2000) and G Fernández Farreres (n 17) 353-368.
[26] VJ. Calafell Ferrà, *Los convenios entre Comunidades Autónomas* (CEPC 2006); J Tajadura Tejada, 'Los convenios de cooperación entre comunidades autónomas' (2010) 11 Revista d'Estudis Autonòmics i Federals 206; JM Rodríguez de Santiago, *Los convenios entre administraciones públicas* (Marcial Pons 1997); MJ García Morales, 'Artículo 145' in P Pérez and A Saiz (eds), *Comentario a la Constitución Española*, vol. II (Tirant lo Blanch 2018) 1996-2003 and JM Rodríguez de Santiago, 'Artículo 145' in JM Rodríguez-Piñero and ME Casas (eds), *Comentarios a la Constitución Española*, vol. II (Wolters Kluwer/BOE 2018) 1112-1118.
[27] Judgments of the Constitutional Court No 37/1981, para 2 and 79/2017, para 2. See also T de la Quadra-Salcedo Janini (n 20) 281-284.

unity not only forbids discriminatory measures, but also measures that disproportionately restrict freedoms of movement in the national market.[28]

Two points must be made regarding the prohibition of disproportionate restrictions. The first is that regional measures which do not meet this condition are unconstitutional. As mentioned earlier, this implies that instead of setting them aside in the way Member States' measures are set aside under EU law, they shall be declared null and void by the competent court, and consequently be *erga omnes* expelled from the legal order. The second is that the Constitutional Court has favoured a highly deferential approach to the content of this standard of review. Accordingly, a regional measure only violates Article 139(2) SC if it creates a restriction on the freedoms of movement that is, manifestly, not adequate, necessary or strictly proportionate in order to fulfil a public interest.[29] The standard of review is very deferential because there is no closed list of admissible public interests, and the Court requires the measure to evidently not satisfy these conditions.[30] Moreover, sometimes the Court even applies a simple 'rational basis' review, whereby it merely assesses whether the measure is adequate to pursue its goal, without verifying its necessity and strict proportionality.[31] One may wonder why the Constitutional Court has not taken on a more activist role in terms of examining the proportionality of regional measures. The reason probably lies in the fact that the central government has had the tools to prevent regional authorities from taking measures encompassing disproportionate restrictions in the first place – or otherwise to suppress them immediately after – by virtue of its basic legislation and coordination competences. Thus, the risk of regional measures giving rise to market fragmentation has been mainly dealt with by the central parliamentary and executive authorities. Consequently, the burden on the Constitutional Court has been limited.

4. Agreed mutual recognition: cooperation agreements

A first source of mutual recognition-obligations are cooperation agreements concluded by two or more autonomous regions. Those agreements are vehicles for horizontal cooperation arrangements with different aims and scopes.[32] As far as mutual recognition is concerned, the most interesting example is the agreement signed by the autonomous regions of Aragón, Asturias, Castilla y León, Extremadura, Madrid, Murcia, and Valencia – namely seven out of the seventeen autonomous regions – creating interregional hunting and fishing licences.[33] The exclusive competence to regulate these activities is in the hands of the regions, which also hold the exclusive competence to implement them in

[28] JM Baño León, *Las autonomías territoriales y el principio de uniformidad de las condiciones de vida* (INAP 1988); E Alberti Rovira, *Autonomía política y unidad económica* (Civitas 1995) and T de la Quadra-Salcedo Janini, *Mercado nacional único y Constitución* (CEPC 2008).
[29] Judgments of the Constitutional Court No 37/1982, para 2; 88/1986, para 6 and 111/2017, para 4.
[30] E Alberti Rovira 'Artículo 139' in JM Rodríguez-Piñero and ME Casas (eds), *Comentarios a la Constitución Española*, vol. II (Wolters Kluwer/BOE 2018) 1010-1012.
[31] M González Beilfuss, 'Artículo 139' in P Pérez and A Saiz (eds), *Comentario a la Constitución Española*, vol. II (Tirant lo Blanch 2018) 1930.
[32] JM Rodríguez de Santiago (n 26).
[33] This horizontal agreement was first concluded in 2009, but its content was subsequently incorporated into a vertical agreement concluded by these regions and the central government. The text currently in force was published in the Official Journal No 65, March 17, 2017, 19732-19742. See MJ García Morales, 'Convenios de colaboración entre el Estado y las Comunidades Autónomas y entre Comunidades Autónomas' in E Aja, FJ García and JA Montilla (eds), *Informe Comunidades Autónomas 2014* (IDP 2015) 175-190.

terms of both ex-ante and ex-post administrative control. In particular, hunting and fishing licences are issued by the various regional administrative bodies. They can be subject to different requirements and conditions, and in principle they only have effects within the territory of the issuing region. This is reasonable as these regulatory policies may reflect distinct political preferences regarding environmental protection, land planning, and economic development, based for instance on the different role that these activities – closely linked to the territory where they are performed – play in each region from an economic and social perspective.

Regulatory and enforcement fragmentation, on the other hand, clearly restrict the mobility of those holding a hunting or fishing licence since they would need to obtain another licence – and perhaps to comply with different requirements to do so – in case they wish to perform the same activity in the territory of a neighbouring region. Mobility obstacles do not only imply a restriction on the rights of hunters and fishermen, but also on the freedom of undertakings operating in these industries to provide services. As long as these measures create proportionate restrictions to protect the public interests at stake, they are not prohibited by the constitutional principle of market unity.[34]

Nevertheless, the principle of cooperation requires regional administrative authorities to collaborate in the definition and implementation of their respective regulatory policies.[35] Accordingly, the said regions have agreed upon the creation of an interregional hunting and fishing licence. Clause No 14 of the agreement provides that 'signatory regions shall recognise within their territory the interregional hunting and fishing licences issued by other regions'. Consequently, 'licensees may exercise the rights conferred upon them by the interregional licence in the territory of any signatory region, although they shall comply with the legislation in force in each of them'.

The agreement establishes some other supplementary provisions in order to increase the effectiveness of regional cooperation. Although signatory regions will retain their powers to define and implement their own licence's conditions – including the applicable tests[36] – the agreement defines some general conditions,[37] establishes guidelines regarding how to prove compliance with them,[38] and provides common application forms.[39] It also sets out a single fee for the management of the administrative procedure and the expedition of the interregional licence.[40] Finally, the agreement provides for a common database,[41] a system for information exchange,[42] as well as a multilateral board with general monitoring functions.[43]

Not many more mutual recognition agreements signed by Spanish regions exist. Another example is the cooperation agreement signed by the autonomous regions of Andalucía,

[34] Art 139(2) SC.
[35] Art 2 SC.
[36] Clauses No 7 and 5 of the Agreement Creating an Interregional Hunting and Fishing Licence (Official Journal No 65, March 17, 2017, 19732-19742).
[37] Ibid, Clause No 6.
[38] Ibid, Clause No 9.
[39] Ibid, Clause No 8.
[40] Ibid, Clause No 11.
[41] Ibid, Clause No 18.
[42] Ibid, Clause No 16.
[43] Ibid, Clause No 17.

Aragón, Castilla-La Mancha, La Rioja, Castilla y León, Cataluña, Valencia and Islas Baleares – eight out of the seventeen autonomous regions – for the mutual recognition of training certificates of tattoo, piercing and micropigmentation practitioners.[44] Under Spanish law, autonomous regions have both regulatory and enforcement competences in the field of health care and control, including sanitary control of private activities. This agreement establishes that the training certificates issued by any of these regions in the exercise of their enforcement powers in these areas will take effect in the territory of the other.[45]

According to the previously established analytical framework,[46] these are cases of 'agreed mutual recognition'. For one, regional authorities have to recognise the effects of licences or certificates issued by other regions, so the decisions taken by administrative authorities of regions participating in the cooperation agreement must have transregional effects. Interestingly enough, these effects are not only granted to a single-case administrative decision taken by the home administrative authorities; rather, since hunting and fishing licences – as well as training certificates – might be subject to different legal requirements in each region, and might be adjudicated under different administrative practices, the administrative rules and practices of the home authorities will govern access conditions throughout the territory of all participating regions. Licensees, in turn – leaving aside these prior approval requirements and decisions – will have to comply with the law in force in the host region where they are hunting or fishing, for instance, with due regard for how these activities must be performed. Likewise, licensees will certainly be subject to administrative ex-post control and enforcement action from the host region's authorities. With respect to judicial review, administrative rules and single-case decisions must be appealed before the administrative law courts of the territory of the authority that issued them.[47] Accordingly, while administrative rules on access and decisions granting or rejecting licences shall be appealed before the courts competent to review the acts of the home region's administrative authorities, administrative rules governing how these two activities must be performed – as well as ex-post control and enforcement decisions – shall be appealed before the courts competent to review the acts of the host region's administrative authorities. Parliamentary rules, in turn, must in any case be appealed before the Constitutional Court.

Secondly, mutual recognition of these licences or certificates is the content of a reciprocal legal obligation arising from the cooperation agreement.[48] Consequently, a signatory region is forced to give effect to licences granted by other participatory regions, but not to licences issued by other regions. Likewise, regions that do not participate in this agreement are not forced to recognise licences issued by any other region in their territories. Mutual recognition certainly favours horizontal cooperation between jurisdictions,[49] and cooperation is actually a constitutional principle with direct effect.[50] Nevertheless, the specific manner in which cooperation unfolds needs to be further

[44] Official Journal No 251, March 17, 2010, 87645-87663.
[45] Ibid, Clause No 3.
[46] See section 2.
[47] Article 14 LJCA.
[48] J Agudo González, 'La extraterritorialidad de las actuaciones jurídico-administrativas de las Comunidades Autónomas' (2018) 206 Revista de Administración Pública 99, 115-117, speaks about 'conventional' extraterritoriality.
[49] Judgments of the Constitutional Court No 41/2016, para 8.a) and 105/2019, para 5.
[50] Art 2 SC.

specified by autonomous regions on a voluntary basis. Accordingly, the source of this particular obligation of mutual recognition is not the Constitution in and of itself, but the cooperation agreement signed by these groups of regions.

5. Compulsory mutual recognition: Sectoral conflict rules

The territorial scope of the competences conferred upon autonomous regions is circumscribed to their respective territory. Consequently, the legal effects of the rules and acts adopted in the exercise thereof are by default limited to the region's territory.[51] However, when the facts these rules or acts are dealing with have a cross-border dimension, they might have indirect effects on the territory of other autonomous regions, and this can give rise to a need for coordination.[52] A good example of this is the law applicable to certain legal persons, such as associations, foundations, cooperatives, and savings banks. All Spanish autonomous regions have taken in their Statutes of Autonomy non-exclusive rule-making power and exclusive adjudication competences regarding these legal persons. This implies, on the one hand, that such legal persons shall perform their activities according to a legal framework that is jointly defined by the State and the regions; on the other hand, it implies that the competence to implement administrative procedures for the creation of these certain legal persons – licensing, registration, and so on – belongs to the regions by default.

Since the activities of these legal persons can potentially have a cross-border nature, the implementation of regional regulatory and enforcement competences by autonomous regions needs to be coordinated. For instance, which region shall decide on the authorisation of a savings bank, or on the registration of a new foundation that carries out its activity in the territory or various regions? For a long time now, the Constitutional Court has established that, as a rule, in these situations the State cannot simply preempt regional competence;[53] rather, the State must coordinate the scope of particular regional competences. The way to do it is by defining, in the exercise of the State's own Parliamentary rule-making competence in the specific policy area at stake, certain factors that connect the legal person or its behaviour with a specific region (*puntos de conexión*).[54]

Despite the structure and the function of this coordination technique evoking the conflict rules of private international law, the peculiar feature of these 'connecting factors' lies in the fact that they determine which region will be competent to deal with a potential cross-border issue.[55] They are, in sum, State rules that distribute specific powers among autonomous regions in order to fine-tune the provisions on the distribution of

[51] Judgments of the Constitutional Court No 44/1984, para 2; 132/1996, para 4 and 48/1998, para 3. See also L Arroyo Jiménez 'El principio de territorialidad' in F Balaguer et al (eds), *Reformas estatutarias y distribución de competencias* (IAAP 2007) 95-107 and C Velasco Rico, *Delimitación de competencias en el Estado autonómico y puntos de conexión* (IEA 2009) 39-64.
[52] Judgments of the Constitutional Court No 37/1981, para 1; 91/1985, para 4; 48/1988, para 4; 79/2017, para 13.a) and 28/2019, para 6. See also Velasco Rico (n 51) 48-53.
[53] Judgments of the Constitutional Court No 329/1993, para 4; 175/1999, para 6 and 76/2018, para 4.
[54] Velasco Rico (n 51) 145-155.
[55] X Arzoz Santisteban, 'Comunidades Autónomas, puntos de conexión y defensa de la competencia' (2002) 64 Revista Vasca de Administración Publica 11, 14-19; C Velasco Rico, 'Reflexiones sobre el uso de puntos conexión como técnica de delimitación de competencias' (2013) 95 Revista Vasca de Administración Publica 81-114.

competences contained in the Constitution and in the Statutes of Autonomy.[56] For instance, State law often provides that the ex-ante review competence shall belong to the region in which the legal person will exclusively or mainly perform its activities.[57] Once the entity has been created, it will be allowed to act in the territory of other regions.[58] Interestingly enough, the 'connecting factors' chosen by the National Parliament do not seem to follow a single pattern; rather, they are selected on case-by-case basis in view of sectoral legislative preferences.[59]

In view of the previously described analytical framework,[60] it is readily apparent that, by coordinating the exercise of regional competences in these areas of law, State law imposes mutual recognition obligations upon autonomous regions. Administrative decisions on licences, authorisations, registrations, and so on, as well as rules establishing conditions and requirements to create certain types of legal persons or to access an activity passed by home regional authorities, will have transregional legal effects throughout the national territory. Consequently, administrative authorities of the host region will be forced to give legal effects to the licences and permits granted by other regions. This is a form of compulsory mutual recognition because the source of the obligation is not an agreement voluntarily concluded by these regions, but a national Parliamentary Statute with the authority of State law.

6. Compulsory mutual recognition: the 2013 Market Unity Act

Under the framework sketched out in the previous section, compulsory mutual recognition operates on a sectoral basis. This dramatically changed, however, when the national parliament passed the 2013 Market Unity Act.[61] In addition to advancing the agenda of the Services Directive by extending its deregulatory framework to virtually all economic activities,[62] the new Act was aimed at fighting against the allegedly fragmented Spanish market.[63] The legal basis invoked by the national parliament was one of the horizontal State prerogatives, namely the competence to establish the basic principles and to coordinate economic policy.[64] The manner of fighting fragmentation was establishing what might be called a strong version of the region of origin rule.[65] The 2013 Market

[56] Velasco Rico (n 51) 174-266.
[57] See, for instance, Art 25 of Act No 1/2002 (on Associations) and Art 1 of Act No 50/2002 (on Foundations).
[58] Velasco Rico (n 51) 154-155.
[59] Velasco Rico (n 51) 155-174.
[60] See section 2.
[61] Act No 20/2013, for the protection of Market Unity (Market Unity Act). Official Journal No 295, December 10, 2013, 97953-97978.
[62] Art 2 of the Market Unity Act.
[63] Preamble, Section I of the Market Unity Act.
[64] Art 149(1)13 SC. See section 3.
[65] See G Fernández Farreres, 'Unidad de mercado y libertades de empresa y de circulación de bienes en la Ley 20/2013, de 9 de diciembre' (2014) 163 Revista Española de Derecho Administrativo 109; S Muñoz Machado, 'Sobre el restablecimiento legal de la unidad de mercado' (2014) 163 Revista Española de Derecho Administrativo 11; M Rebollo Puig, 'La libertad de empresa tras la ley de garantía de la unidad de mercado' (2014) 163 Revista Española de Derecho Administrativo 23; J Tornos Mas, 'La Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado. En particular, el principio de eficacia' (2014) 19 *Revista d'estudis autonòmics i federals* 144; MJ Alonso Mas, 'La eficacia de los títulos habilitantes en todo el territorio nacional y la aplicación de la regla del lugar de origen"', in MJ Alonso (ed), *El nuevo marco jurídico de la unidad de mercado. Comentario a la Ley de garantía de la unidad de mercado* (La Ley 2014) 293-353; C Padrós Reig and JM Macías Castaño, 'Los instrumentos administrativos de la garantía de la

Unity Act had both political and constitutional weaknesses. As will be explained later,[66] constitutional flaws ultimately led to the Constitutional Court declaring null and void the provisions that proclaimed the region of origin rule. As for the former, the new law seemed to be an offering at the altar of structural policies in the turmoil of the financial crisis. Indeed, leaving aside some quantitative approaches to administrative red tape,[67] no empirical study was carried out supporting that the national market was actually fragmented in a structurally relevant manner. Instead, the project was supported by a theoretical analysis on the general benefits of deregulation[68] and regulatory competition.[69]

The Act expressly proclaimed, on a general basis, the 'principle of national effectiveness': 'rules and acts adopted by the regions with regard to access and performance of economic activities would have legal effects throughout the national territory'.[70] This provision was further specified in view of services and persons, on the one hand, and of products on the other.[71] Hence, an undertaking that is legally established in any region may perform its economic activity throughout the national territory, be it with or without an establishment, 'provided [it] meets the requirements for access to the activity of the place of origin, including when the economic activity is not subject to requirements in said place'.[72] Market access regulation and prior approval administrative decisions – namely, licences, concessions, certificates, and so on – issued by home regional authorities would, therefore, have legal effects throughout the Spanish market. The 2013 Markey Unity Act expressly granted transregional legal effects to any authorisation, licence, permit, prior notification, inscription in public registers etc. of both products and services, as well as to any other condition required to access or to perform an economic activity;[73] only prior approval administrative decisions related to specific physical infrastructure were excluded.[74] Host regional authorities must therefore give effect to these rules and acts, and may not require additional conditions or requirements – even if in the home region there was no ex-ante administrative control.[75]

Once this principle had been established in the 2013 Market Unity Act, two other issues were dealt with in the latter. First, it distributed the competences regarding administrative intervention: whereas home regional authorities were in charge with respect to control procedures of market access conditions – both ex-ante and ex-post –, host regional authorities would have the competence to control the fulfilment of performance

unidad de mercado' (2014) 194 Revista de Administración Pública 113; C Narbón Fernández, 'Los discutibles presupuestos económicos de la Ley de Garantía de la Unidad de Mercado' (2016) 175 Revista Española de Derecho Administrativo 161 and J Agudo González, 'La Administración del reconocimiento mutuo. Un análisis a partir de la libre circulación de profesionales... hasta la unidad de mercado' (2015) 197 Revista de Administración Pública 345.

[66] See section 7.

[67] See e.g. P López, A Estrada and C Thomas, 'Una primera estimación del impacto económico de una reducción de las cargas administrativas en España' [2008] Boletín Económico del Banco de España 82

[68] C Herrero García and P Más Rodríguez, 'Impacto macroeconómico de la profundización en la unidad de mercado' (2013) 871 Información Comercial Española 65.

[69] See e.g. F Cabrillo Rodríguez, 'Unidad de mercado y competencia regulatoria' (2013) 871 Información Comercial Española 25.

[70] 2013 Market Unity Act, Art 6.

[71] Ibid, Art 19.

[72] Ibid, Art 19(1).

[73] Ibid, Art 20(2).

[74] Ibid, Art 20(4).

[75] Ibid, Art 20(1) and (3).

conditions – that is, those related to how the activity must be carried out once the undertaking has accessed the relevant market.[76] Second, the Act also established a framework for administrative cooperation among regional authorities which provided for the following building blocks: (i) integration of all relevant information in the hands of regional authorities into a national database;[77] (ii) creation of an electronic system of administrative information exchange;[78] (iii) regulation of new administrative procedures for administrative information exchange among supervisory authorities;[79] and (iv) creation of a specialised body – the Council of Market Unity – that coordinates national and regional contact points, and before which undertakings can lodge administrative appeals relating to breach of the Act.[80]

In view of the analytical framework that has been defined above,[81] the regulatory arrangement established by the 2013 Market Unity Act had the following four peculiar features. First, unlike regional cooperation agreements, this was a form of compulsory mutual recognition. Host regional authorities were forced to give effect in their territories to the rules and acts issued by other regions, the latter having therefore legal effects throughout the national territory. Insofar as mutual recognition applied, the law of the host region was displaced by the law of the home region. The former remained valid law, yet its applicability to persons, goods, and services coming from other regions was accordingly suspended.

Second, the Act created a form of passive mutual recognition. Indeed, host administrative authorities would not simply be bound to take home regional rules or acts into account when exercising their own prerogatives. Rather, they would be compelled to give them immediate effect without applying any additional conditions or requirements, nor performing subsequent control procedures. This resembles administrative authorisations with automatic transnational effects issued by Member States under specific secondary law measures – for example, for the provision of air transport services.[82]

Third, the region of origin rule established in the 2013 Market Unity Act was a form of absolute and unconditional mutual recognition; the law did not provide for any exception to the obligation imposed on host regional authorities. This strongly contrasts with mutual recognition under primary EU law, which is subject to a rule of reason,[83] as well as under secondary EU legislation that usually provides for safeguard measures:[84] even the first draft of the Services Directive provided for certain exceptions to the rule of origin.[85]

[76] Ibid, Art 21.
[77] Ibid, Art 22.
[78] Ibid, Art 23.
[79] Ibid, Art 24.
[80] Ibid, Art 26.
[81] See section 2.
[82] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3. See also L De Lucia (n 12) 90-114.
[83] Janssens (n 3) 41-66, 310-312 and D Utrilla Fernández-Bermejo, 'El reconocimiento mutuo y el Derecho primario del mercado interior' in L Arroyo and A Nieto (eds) (n 4) 38-48.
[84] L De Lucia (n 12) 95-96; L Arroyo Jiménez and D Utrilla Fernández-Bermejo, 'El reconocimiento mutuo y el Derecho secundario del mercado interior' in L Arroyo and A Nieto (eds) (n 4) 67-72.
[85] Proposal for a Directive of the European Parliament and of the Council on services in the internal market [2004] COM(2004)2 final, Art 19. See also C Barnard, 'Unravelling the Services Directive' (2008) 45 Common Market Law Review 323.

Finally – unlike traditional State legislation coordinating divergent regional legislation through conflict rules on a sectoral basis – the 2013 Market Unity Act provided for a system of general transversal mutual recognition that potentially applied to any economic activity. Presumably, the joint effect of its cross-sectoral and unconditional nature was the most peculiar characteristic of this regulatory arrangement established by the State Parliament. This is certainly also what explains the strong academic criticism that it awakened,[86] as well as the immediate Constitutional Court response.

7. Compulsory mutual recognition: the Constitutional Court's response

The 2013 Market Unity Act was challenged before the Constitutional Court by the regional Parliament of Cataluña, and by the Executives of Cataluña and Andalucía. The claimants argued that the region of origin rule, as had been established in the new law, exceeded the limits of the State competence established in Article 149(1).13 SC: consequently, it violated the competences taken by the autonomous regions in their Statutes of Autonomy under Article 147(2).d) SC, as well as the constitutional principle of autonomy proclaimed in Article 2 SC. In three judgments issued in 2017,[87] the Constitutional Court agreed with the claimants' view.[88] Accordingly, the Court declared the principle of national effectiveness of regional rules and acts – specifically Articles 6, 19, 20, and 21 – null and void. In turn, the Court declared that the administrative cooperation tools provided for by the Market Unity Act in Articles 22, 23, 24, and 26 were fully in line with the constitutional principle of cooperation enshrined in Articles 2 and 145 SC.

The Constitutional Court's response is articulated through a general rule and an exception. The former is the principle of territoriality of regional competences. Accordingly, legal effects of rules and acts issued by autonomous regions are circumscribed to the boundaries of the region's territory.[89] This is grounded on two constitutional principles. The first one is the principle of autonomy: Article 2 SC protects the regions' prerogative to define their own political preferences, and consequently to implement their own regulatory policies in their respective territories. Insofar as it impedes host regions from enforcing their own policies within their territories, the region of origin rule limits regional autonomy. Furthermore, it does so to the extent that it makes it possible for up to 17 different home regulations to be applied in the same territory, displacing the regulation and consequently restricting the autonomy of the host region. Interestingly enough, the Court adds that the limitation is especially acute because, under the 2013 Market Unity Act, the rule of origin was not aimed at dealing with market fragmentations arising in one specific economic sector: rather, it would apply on a horizontal, cross-sectoral basis, to any economic activity, thus potentially restricting

[86] See the references in (n 65).
[87] Judgments of the Constitutional Court No 79/2017, 110/2017 and 111/2017.
[88] T de la Quadra-Salcedo Janini (n 20); 'El principio de reconocimiento mutuo en los sistemas políticos descentralizados' in L Arroyo and A Nieto (eds) (n 4) 38-48; A Cidoncha 'El Tribunal Constitucional y la Ley de Garantía de la Unidad de Mercado: Comentario a la STC 79/2017, de 22 de junio de 2017' (2018) 114 Revista Española de Derecho Constitucional 301; J Ortega Bernardo, 'El acto administrativo con eficacia extraterritorial: su empleo como garantía para la unidad del mercado español' in F Jiménez de Cisneros (ed), *Homenaje al profesor Ángel Menéndez Rexach*, vol. I (Thomson-Aranzadi 2018) 559-574 and Agudo González (n 65) 99-145.
[89] Judgment of the Constitutional Court No 79/2017, para 13.a).

various regional competences of economic intervention. Therefore, the limitation of the principle of autonomy was very intense.[90]

Secondly, territoriality of regional competences is also grounded on the principle of democracy proclaimed under Article 1(1) SC. Autonomous regions have regulatory and enforcement competences over a wide-ranging set of economic activities. The power to select goals and to take measures in order to achieve them is exercised through Parliamentary and executive rule-making procedures that are closely linked with democratic representation and participation. In other words, the regions' capacity to define the law that will apply in their territory is also connected with the democratic principle, under which regional parliaments and executives enjoy a margin of political action whose use would be controlled by the region's citizens. The region of origin rule implied that the host regional authorities were bound to implement in their territory a regulatory framework that had been produced by a political system in which those citizens are not represented and have not participated. Therefore, it short-circuited the processes of democratic representation, participation, and democratic accountability that apply at a regional level.[91]

Although territoriality is the rule, the Constitutional Court also allows exceptions. The Court reiterates its traditional doctrine, according to which the State can coordinate regional regulation by defining factors that connect a certain entity or its activities with a particular region (*puntos de conexión*).[92] In doing so, the State legislature confers legal effects throughout the national territory to rules and acts issued by autonomous regions.[93] This can be decided by the State under the framework of sectoral legal bases – like the power to establish the basic legal framework of specific economic sectors – and horizontal, cross-sectional legal bases – such as the power to pass legislation aimed at coordinating regional market regulations.[94]

However, the Court adds two important conditions to this. The first is that this has to be decided on a sectoral basis, in view of specific coordination problems arising in particular areas. As has been said, the Constitutional Court did not accept a general region of origin rule. The second condition is that the State can only grant transregional legal effects to rules or acts issued by regional authorities provided that home and host regulatory policies have an equivalent level of protection of the relevant public interest. Interestingly enough, the Constitutional Court finds there is an analogy with the case law of the Court of Justice of the EU in order to justify the equivalence requirement.[95]

The equivalence condition might be fulfilled, either when autonomous regions only have competence to implement a common regulatory framework defined either by the State or by the EU; or when autonomous regions can also contribute to define this framework under some common guiding principles established by higher levels of government.

[90] Judgment of the Constitutional Court No 79/2017, para 13.b).
[91] Judgment of the Constitutional Court No 79/2017, paras 7 y 13.a).
[92] See section 5.
[93] Judgment of the Constitutional Court No 79/2017, para 13.a).
[94] Art 149(1)13 SC.
[95] Judgment of the Constitutional Court No 79/2017, para 12.a), with references to Case C-120/78 *Cassis de Dijon* EU:C:1979:42, Case C-188/84 *Commission v France* EU:C:1986:43 and Case C-390/99 *Canal Satélite Digital, S.L.* EU:C:2002:34.

Whereas in the first case regional authorities would only have adjudication prerogatives – for example, regional implementation of State legislation on medicines – in the second they would also have rule-making powers, in order to specify centralised standards that ensure an equivalent level of protection throughout the national territory. This is the case for regional specification of national regulation on regional savings banks. Whether it is the one way or the other, for mutual recognition to be admissible there must be a certain equivalence among regional laws. If there is not, central government must provide for some harmonisation.

These two conditions – sector-specific nature and equivalence of protection – outline which forms of compelled mutual recognition abide by the Spanish constitutional framework. On the one hand, exceptions to territoriality can only arise on a sectoral basis. On the other hand, the State can only impose mutual recognition obligations on the autonomous regions if their regulatory policies provide for an equivalent level of protection. This excludes a cross-sectional, horizontal, and absolute mutual recognition obligation like the one established by the 2013 Market Unity Act. In turn, the equivalence requirement would be satisfied by two forms of sectoral mutual recognition: first, a sector-based and automatic mutual recognition obligation imposed after assessing – and eventually approximating – the respective levels of protection. Second, a sector-based and managed mutual recognition arrangement, wherein the obligation is conditioned through a case-by-case assessment of whether the regional regulatory frameworks are equivalent or not in terms of the level of protection of the public interests at stake.

The Constitutional Court's judgments were unanimous.[96] This is somewhat infrequent in the Court's case law on federalism issues, particularly with regard to the distribution of power between the various levels of government. In fact, these issues are especially divisive matters both in the political arena and in the Constitutional Court's case law. Furthermore, academic commentary has been divided regarding the Court's decision;[97] the 2013 Market Unity Act has actually always been seen as an odd creature in Spanish public law. A general and unconditional mutual recognition obligation was perceived as an extreme response to alleged coordination problems which could have been tackled with softer tools. Likewise, it seemed to put the horizontal cooperation structures of regional administrative authorities under excessive pressure.

Despite the sound outcome, the Court's reasoning can be subject to some criticism. In fact, whilst the Court quashes the mutual recognition obligation because it deems it excessive, the judgments do not frame this view within the principle of proportionality. The principle is the ordinary standard of review when it comes to reviewing State measures aimed at coordinating the exercise of their respective competences by both autonomous regions and local governments, therefore restricting their autonomy.[98] The principle of national effectiveness of regional rules and acts – as well as the obligations and prohibitions that arise from them – are conceived by the Court as restrictions of the

[96] The Judgment of the Constitutional Court No 110/2017 included a dissenting opinion that dealt with a connected but different issue: whether an Organic Act was constitutionally required or not in order to distribute competences between different Courts.
[97] For a vigorous defence of the Court's stance, see T de la Quadra-Salcedo Janini (n 20) and (n 88). A more critical view can be seen in Cidoncha (n 88) 323-332; Agudo González (n 65) 136-139 and Ortega Bernardo (n 88) 559-574.
[98] Judgment of the Constitutional Court No 55/2018, para 11.e).

constitutional principle of autonomy. Accordingly, constitutional review would imply the assessment of whether the measure satisfies the principle of proportionality, and specifically whether it is adequate, necessary and strictly proportionate in order to achieve its purpose.[99]

Instead of verifying these requirements in a transparent and systematic manner, the Court asserts that exceptions in the territoriality of regional competences must be sector-based and strictly subject to an equivalence condition. However, the Court does not elaborate how these two conditions relate to the general requirements arising from the principle of proportionality. It might well be added that a general, horizontal mutual recognition obligation is an overinclusive measure because it may apply to sectors where territoriality does not lead to any form of fragmentation of the Spanish market. Therefore, sector-specific mutual recognition obligations would be equally effective, while generating a lesser restriction of the principle of autonomy. The Court seems to share this view without making this explicit point.

Likewise, the Court requires equivalence for compulsory mutual recognition to be constitutional. It is readily apparent that equivalence is connected with proportionality: an equivalence condition reduces the severity of the restriction imposed on the principle of autonomy, thus making it easier to justify its compliance with the necessity requirement. However, the Court does not tackle the real issue: why a mutual recognition obligation imposed on autonomous regions without an equivalence condition is, in and of itself, a disproportionate measure. The Constitutional Court simply confirms this requirement, and the only justification that it provides for is an analogy with the case law of the Court of Justice. However, it is clear that the Luxembourg Court does not always apply this equivalence condition to the mutual recognition obligations arising from both the fundamental freedoms and secondary legislation.[100] Instead of a hurried – and imprecise – reference to the Court of Justice's case law, the Constitutional Court should have more seriously engaged in a more thorough assessment of the proportionality principle, within which the equivalence condition might play an important, but certainly more limited role.

8. Landscape after the battle

It is now time to come back to our research questions. To what extent does mutual recognition apply in Spain? As a result of the latest Constitutional Court case law, mutual recognition only applies under strict circumstances; the following situations must be distinguished in this respect. It is, first, possible that the State Parliament had provided for some form of compulsory mutual recognition among regional authorities, as long as the two abovementioned conditions – sectoral nature and equivalence – are met. If not, it is also possible that autonomous regions had concluded a mutual cooperation agreement. Second, in the event that there is no mutual recognition arrangement at all, each region will be entitled to define their own regulatory policies within their territory in the exercise

[99] Judgment of the Constitutional Court No 14/2018, para 10.d).
[100] See e.g. Case C-157/99 *Smits Peerbooms* EU:C:2001:404; Case C-42/07 *Liga Portuguesa de Futebol Profesional* EU:C:2009:519; Case C-244/06 *Dynamic Medien* EU:C:2008:85. Even *Cassis de Dijon* was decided without any explicit reference to the equivalence of levels of protection provided for by the specific national legislations in question: See Janssens (n 3) 33-38; Utrilla Fernández-Bermejo (n 83) 39-41 and Cidoncha (n 88) 327-328.

of their respective competences. Rules and acts will apply in the region's territory to any person, activity or product regardless of their behaviour, performance or distribution having or not having a transregional dimension. Therefore, the legal effects of the rules and acts issued by regional authorities in the exercise of the regulatory and enforcement competences they enjoy will be circumscribed to the region's territory. Third, regional measures must in any case comply with the two requirements set out by Article 139 SC: the prohibition of discriminatory measures, and the prohibition of disproportionate restrictive measures.

In these three situations, various standards apply. Compulsory and agreed mutual recognition arrangements give rise to unconditional obligations of mutual recognition; their fulfilment does not require any action on the part of host regional authorities. Consequently, they are forms of absolute and passive mutual recognition. In turn, Article 139 SC involves two standards of review that function as a rule of reason, which would be a peculiar feature of managed mutual recognition. In particular, regional measures are forbidden in case they discriminate against persons, goods or services in view of their origin, or if they create restrictions in the freedoms of movement that cannot be justified under the principle of proportionality.

These scenarios are not only different in view of the applicable substantive rules, but also from the perspective of the legal consequences thereof. Under compulsory and agreed mutual recognition arrangements, regional authorities are bound to give effect to rules or acts passed by other regional authorities. Accordingly, the law of the host region would be disapplied to persons, services or goods coming from other regions. Therefore, the law of the authorities of destination would remain valid, and would normally apply to purely internal situations; mutual recognition would only impact on its effectiveness, and only within cross-border situations. On the contrary, if a regional measure does not comply with any of the two requirements set out by Article 139 SC, the former will not merely be disapplied: rather, it would be unconstitutional and, accordingly, it will have to be challenged – either directly or through a reference for a preliminary ruling on validity – before the competent court – either an ordinary administrative law court, or the Constitutional Court itself – for it to declare the measure null and void.

9. Comparative insights

The other two previously outlined research questions drive us to look at Spanish law from an EU and comparative standpoint. What lessons can we draw from contrasting Spanish law with mutual recognition under EU law? The first and most important difference is that, under the former, a general mutual recognition obligation is not enshrined in the Constitution, nor can it be imposed by the State legislature. Article 139 SC certainly contains a general clause, one that is very similar to the rule/exception scheme designed by the Court of Justice in the interpretation of the fundamental freedoms. In Spain, however, this general clause does not lead to the obligation of regional authorities to disapply discriminatory or disproportionate restrictive measures, but to their unconstitutionality. Accordingly, Article 139 SC does not have an effect on the applicability of the regional measure, but rather it impacts on its validity.

Secondly, the Constitutional Court doctrine on mutual recognition is certainly more cautious than the impressive legal construction achieved by the Court of Justice in the

interpretation of the fundamental freedoms.[101] Since *Dassonville*,[102] the Luxembourg Court has certainly made the most of the Treaty in its endeavour to dominate Member States' protectionist impulses. This has been supplemented by a dense network of secondary EU law rules providing for specific, sector-based legislative mutual recognition arrangements.[103] The Spanish Constitutional Court, by contrast, has basically limited the scope of mutual recognition to voluntary agreements concluded by regional authorities, as well as to those State laws conferring transregional effects upon regional measures in order to solve sector-based coordination problems.

Thirdly, mutual recognition obligations under Spanish law differ from EU law mutual recognition obligations in that the latter are usually subject to certain exceptions: managed – or conditioned – mutual recognition. Indeed, EU law provides for a wider, yet more flexible mutual recognition scheme.[104] Mutual recognition arrangements under Spanish law, in turn, are absolute and passive. Such agreements do not authorise any exception whatsoever to the obligation of giving effect to administrative decisions taken by other regional authorities. Likewise, compulsory mutual recognition obligations imposed by sectoral State legislation are also unconditional, and cannot be exempted on a case-by-case basis by the authorities of the host region.

The last question was whether all this does bring about any useful conclusion in terms of comparative administrative law. The disparities mentioned above certainly originate from the peculiar evolution of both legal orders, and especially of the prominent role played since the 1970s by the Court of Justice in the construction of the internal market. However, they can also be accounted for by structural constitutional differences between the two legal systems. On the one hand, whereas the infringement of the EU law prohibition of both discriminatory and disproportionately restrictive State measures can only lead to the obligation of national authorities to disapply them, under Spanish law regional measures with the same content would be declared null and void by the courts. This crucial difference emerges from the fact that EU and domestic law are separate legal orders, in the following sense: breach of the former does not lead to invalidity of national rules or acts, but rather to disapplication[105] and eventually to derogation,[106] while compliance with the national Constitution is not an applicability or efficacy condition, but a validity requirement of regional rules and acts.[107]

On the other hand, the need for a general, cross-sectoral mutual recognition arrangement is plausibly dependent on how regulatory powers are shared among the different levels of government in the first place. In particular, this need is dependent on two circumstances. The first one is the risk of market fragmentation, which would be higher in those multilevel systems where the inferior level of government has more extensive regulatory competences. Likewise, the risk of fragmentation would also be greater when

[101] Janssens (n 3) 11-65 and Utrilla Fernández-Bermejo (n 83)11-47.
[102] Case 8-74 *Dassonville* EU:C:1974:82.
[103] Janssens (n 3) 67-105 and Arroyo Jiménez and Utrilla Fernández-Bermejo (n 84) 49-72.
[104] Janssens (n 3) 126-130 and L Arroyo Jiménez, 'Reconocimiento mutuo y modelos de regulación' in L Arroyo and A Nieto (eds) (n 4) 173-190.
[105] Case C-106/77 *Simmenthal SpA* EU:C:1978:49 and Case C-103/88 *Fratelli Costanzo SpA* EU:C:1989:256.
[106] Case 167-73 *Commission v France* EU:C:1974:35.
[107] HLA Hart, *The Concept of Law* (Oxford University Press 1997) 103 and H Kelsen, *Pure Theory of Law* (University of California Press 1967) 10-11.

the lower regulatory authorities tend to produce more heterogeneous policies. Member States do not only have more regulatory competences vis-à-vis the EU: rather, these are implemented according to the very diverse political preferences expressed in the national political process, and by means of legal orders that mirror different cultures and traditions. The risk of regulatory divergences leading to market fragmentation is, therefore, higher within the EU's internal market than in the Spanish national market. Accordingly, the need for a robust general mutual recognition arrangement is more acute in the European case than in the Spanish one.

The need for mutual recognition is also a function of a second circumstance, namely the effectiveness of coordination and harmonisation competences of central government. It is well known that negative integration and mutual recognition emerged as a result of the limitations of centralised regulation and positive integration.[108] In turn, the extension of regulatory competences of the Spanish central authorities – as well as the possibility of passing State laws in order to coordinate regional regulatory measures – make mutual recognition a less vital tool in order to prevent market fragmentation than in the EU internal market.

10. Conclusions

This paper has explored the role of mutual recognition in the Spanish multi-level administrative state. Specifically, this section looks back at the abovementioned research questions.

In 2013, the Spanish Parliament passed a law establishing a cross-sectoral region of origin rule, which was subsequently declared unconstitutional by the Constitutional Court, by virtue of the principle of regional autonomy (Article 2 of the Spanish Constitution). After the Constitutional Court's response, mutual recognition obligations can only arise under Spanish law either from statutes passed on a sectoral basis by the national Parliament, or from cooperation agreements voluntarily concluded by autonomous regions. In the absence thereof, the effects of rules and acts issued by regional authorities will be circumscribed to the region's territory. Regional measures, however, cannot discriminate products, services or persons from other regions, nor can they create disproportionate restrictions. In case they do, the consequence will not be the prohibition to apply them in transregional settings: rather, they would be unconstitutional, and accordingly be declared null and void.

Compared with mutual recognition in the EU internal market, mutual recognition arrangements under Spanish law have three peculiar features: (i) they are not enshrined in the Constitution, but established by the national Parliament or the autonomous regions; (ii) mutual recognition can only be imposed on regional authorities in order to deal with coordination problems arising in specific policy areas, and not on a cross-sectoral basis; (iii) while under EU law mutual recognition usually functions as a non-absolute, active, and managed regulatory policy, in Spain mutual recognition obligations are always automatic, unconditional and cannot be exempted on a case by case basis.

[108] Janssens (n 3) 11. See also MP Maduro (n 1) andArroyo Jiménez (n 104).

Finally, one can account for disparities regarding the foundation, scope, and mode of operation of mutual recognition in these two legal orders for several reasons. Some relate to the manner in which regulatory powers are shared among the levels of government, the diverse risk of market fragmentation, and the effectiveness of other coordination and harmonization powers. These criteria also contribute to explaining the emergence of different types of mutual recognition from a comparative standpoint.