

Comparing the mutual recognition and country of origin principle

- No single MRP or COOP. Different ways of dealing with obstacles to the free movement because of disparities between national legal systems.
- Cross-border provisions of services includes potential application of more than 1 legal system. Private International law dimension.

Mutual recognition in a nutshell

- Based on ECJ case law.
- If product/service lawful in MS 1, then lawful also in MS 2.
- The doctrine of mutual recognition is complemented by mandatory requirements.
- 1. MRP – Scope of free movement (art 28/49), (discrimination test)
- 2. Mandatory requirements – Scope of derogations (justifications) for MS national derogations. (derogation test)
- MRP creates wide scope for free movement, but also allows great scope for MS derogation.

1. discrimination test in services

- Early ECJ case law, narrow test, based on comparison between MS, no double level of regulation.
- Later ECJ case law, broader test, effect-based, abolition of any restriction, but complemented with doctrine of "mandatory requirements".
- Unclear ECJ case law when to apply which test.

2. mandatory requirements

- Four-stage test (including the discrimination test)
- 1) the national rule in issue apply to those established in the MS as well as those who are established in another MS (indistinctly applicable);
- 2) the rules protect the public interest;
- 3) they are proportionate;
- 4) account is taken of home MS regulation.
- Public policy provisions in MS is balanced by proportionality.

COOP compared with MRP

- Unconditional requirement to apply home country law. COOP Changes presumption to a fixed rule.
- Eliminates the balancing doctrine of mandatory requirements (making MS derogations regulated).
- COOP in its origin focus on control and supervision of undertakings. MRP does not say anything about supervision.
- Reducing the role of the national court?

Gebhardt's proposal

- Positive to change MRP from COOP
- Usage of annexes clearer scope
- Problem
 - Which discrimination test to use?
 - Labour law approach?

Gebhardt Labour law problems

- 1) Labour law within directive or not?
- 2) Definition of labour law?
- 3) Keeping labour law outside directive the best strategy?

Other Gebhardt problems?

- The derogation from the general principle:
 - Object to the performance of a service provider
 - How will the information system relating to derogations work practically? Difference from today?

Gebhardt and Professional recognition

- Gebhardt based on professional recognition MRP?
- Differences?
 - The general provision of free movement wider in Gebhardt? “Hindrances”
 - PR strong assumption of host MS regulation. Not as manifested in Gebhardt