The principle of mutual recognition: it doesn't work because it doesn't exist

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*E.L. Rev. 224 Abstract

Noria Distribution Srl , a judgment of the First Chamber of the Court delivered on 27 April 2017, appears trivial. The company had been prosecuted in France for supplying products which were not authorised; the Court found a violation of EU law because the relevant French law offered the company no adequate procedures through which to challenge this impediment to its commercial activity. And it is trivial. That, however, is where the interest lies. How can such a straightforward and obvious blockage to the functioning of the internal market be cluttering up the courts in 2017, a quarter of a century since the EU's internal market was supposed to be complete? The reasons lie in the structure of EU free movement law—most of all, that there is no principle of mutual recognition, but rather only a conditional or non-absolute principle of mutual recognition. This means that the internal market requires management, in order to sift out and, better still, prevent barriers to inter-State trade which cannot be shown to meet the standards of justification embedded in the conditional pattern of mutual recognition asserted by EU law. The EU's most obvious instrument for controlling intervention of the type pursued by the French authorities is Regulation 764/2008 , the (unfortunately named) "Mutual Recognition Regulation", which lays down procedures relating to the application of national technical rules to products lawfully marketed in another Member State. Yet the Regulation is not even mentioned in the questions referred or in the answers given in Noria . This deepens the intrigue attached to this trivial but illuminating ruling.

The litigation

Noria Distribution Sàrl, a French company which markets food supplements throughout the EU, was the subject of criminal proceedings in France for having supplied products which, though marketable in other Member States, were not authorised in France because their nutrient content was too high. It sought to defend itself on the basis of EU law, specifically art.34 TFEU and Directive 2002/46 , an orthodox measure of legislative harmonisation which establishes common EU-wide rules governing the marketing of food supplements, in particular vitamins and minerals, in replacement for diverse national treatment of such matters. A court in Perpignan made a reference to the Court of Justice. It readily found an obstacle to trade within the meaning of art.34, and turned to questions of justification. [1] It stated the orthodox procedural requirement imposed by EU free movement law that traders must be able to apply for authorisation to market non-compliant food supplements and, if refused, that they shall have access to challenge before the courts; and added that a refusal is permitted only if the supplements pose a genuine risk to public health. The French rules in question offered no such accessible procedure, and consequently they could ***E.L. Rev. 225** not be saved by reliance on the public health justification provided by art.36 TFEU. The Court also answered two further questions associated with more detailed aspects of the operation of Directive 2002/46 concerning scientific assessment of risk.

The principle of mutual recognition does not exist

All this seems perfectly straightforward, and the Court was able to cite familiar case law in similar vein. [2] The Court has long made clear that even if systems of prior authorisation, which plainly act as obstacles to inter-State trade, may be justified, it is nevertheless incumbent on the regulating State to provide a transparent and non-discriminatory process which is capable of completion within a reasonable time, supplemented by receptivity to judicial review in the event that authorisation is denied. The case law has commonly involved justifications rooted in the protection of public health, but it is not limited to that particular regulatory concern, [3] and these requirements are accordingly properly treated as principles of general application. In this sense free movement law imposes obligations on Member States which combine both substantive and procedural elements.

The referring court asked explicitly about the application of EU "principles of free movement of goods and of mutual recognition" to the French practices. The Court prefers not to use the label mutual recognition. For in fact the whole point of *Noria* is to emphasise that there is no principle of mutual recognition in EU free movement law. Primary EU law does not dictate that if products are good enough for one Member State, then they are good enough for all Member States. Instead it demands only that the more fastidious State shall demonstrate why they are not good enough for it and, as part of that process of justification, it must as a matter of EU law comply with the procedural disciplines which the Court has attached to the basic free movement norms, and which were missing in *Noria* .

In short, EU law applies a principle of conditional or non-absolute mutual recognition. States are locked into a set of reciprocal commitments, but these do not go so far as to strip them entirely of their competence to regulate domestic markets. The space within which States are allowed to show justification for trade-restrictive practices is of crucial importance to ensuring that the EU's internal market is not a process of remorseless deregulation, but rather a site within which diversity in national regulatory choices is managed, checked but, provided it is shown to be sincere, respected. [4] This in turn secures a proper role for the

EU legislative process in shaping harmonised standards which promote an integrated trading space while also accommodating the regulatory anxieties that prompted Member States (in different but justified ways) to intervene in the market. There is no principle of mutual recognition, but rather only the much more constitutionally subtle and institutionally sensitive principle of conditional and non-absolute mutual recognition, and therefore there is much to be said for expunging all references to the "principle of mutual recognition" from EU law discourse. ***E.L. Rev. 226*** [5]

The costs and benefits of non-absolute or conditional managed mutual recognition

There is much to admire in this carefully crafted model of economic integration through law. Most of all, the use of EU law to secure the disapplication of unjustified national measures-and, to be clear, most cases on the record are of this type-opens up the EU internal market to trade in diverse products, and serves to transfer power to the consumer, able to choose between familiar and newly available goods and services, and away from regulating public authorities. There is no need to establish harmonised EU standards in these areas: free movement law does the job of integrating markets. Harmonisation can be targeted at those areas where national measures have adequate worth to survive inspection conducted in the name of free movement. The promise is of a relatively lightly regulated market: unjustified national measures are simply set aside, and not replaced, whereas EU measures are confined to areas where regulation is justified. However, there are costs. The problem, in short, is that this model has an elegance on paper that is not matched by success in practice. According to the model of non-absolute or conditional mutual recognition, a trader is expected to press the public authorities in his or her target market to set aside obstructive rules and, if they do not, to commit time and money to litigation, albeit with no firm expectation of victory given that there is always room for the public authorities to try to justify their rules. Some traders do this: the European Court Reports prove that they do. Noria did. However, we do not know how many traders, especially smaller ones, give up in the face of such daunting obstacles to the development of an integrated commercial strategy for the entire EU. The point, then, is that abandoning aspirations to build the internal market on a comprehensive web of harmonised rules has genuine benefits, but it comes with costs too, because traders are expected to plan their strategies on the basis of an unstable litigation-driven trading environment of inter-State regulatory diversity which is more uneven than a market constructed on harmonised rules.

The Commission today is perfectly well aware of this. With hindsight, its 1985 White Paper "Completing the Internal Market" was over-ambitious, even complacent. [6] Its para.77 is incautiously entitled "Mutual recognition", and includes the claim that goods "must be allowed free entry into other Member States", before it concludes with embrace of the "principle of mutual recognition". The solecism is repeated in para.79. A careful reading of the document as a whole makes clear that the intent is not to deny that there is room for States to justify restrictive national measures nor that harmonisation is sometimes required —in fact it is clear to the attentive reader that managed mutual recognition is simply intended as one element in the overall framework for constructing the EU's internal market. [7] However, use of the phrase "mutual recognition" is unhelpful and, moreover, there is no hint in the White Paper of the real practical obstacles that confront traders wishing to rely on EU law to crack open jealously regulated national markets.

Gratifyingly, a more sober appreciation of the practical deficiencies of the model of conditional or non-absolute mutual recognition has emerged. In 2003, in one of the more perceptive contributions to be found among the blizzard of documentation addressing the making of the internal market which the Commission has produced since the 1985 White Paper, it explained that:

"Mutual recognition is a corner stone of the Internal Market. It enables products to circulate freely on the basis of conformity with the national laws in the Member State where the product is first marketed. The principle is that there are no specific procedural rules and no extra paperwork. This is its strength, but at the same time its weakness. When problems occur, there is little or no transparency, there is no commonly agreed approach to evaluating whether levels of protection are equivalent and there is no clear procedure for a company to challenge a negative decision. As a result, ***E.L. Rev. 227*** many companies decide to abandon certain markets or are forced to modify their products to comply with local requirements." [8]

The Court's case law goes some way to help. The grafting of a procedural dimension on to the basic rules of free movement, visible in *Noria* , counts as recognition that promoting the effective application of the free movement rules in practice is part of the aim pursued. Moreover, services such as "SOLVIT" seek solutions to problems encountered in the internal market through administrative co-ordination without the need for litigation. [9] It remains clear that traders will commonly face an arduous task when they are confronted by national rules and practices that obstruct their access to a market. *Noria* is a perfect example. That such a simple case of impeded trade could require the attention of the Court of Justice in 2017 is vivid proof of the deficiencies

in the fabric of the internal market. That it should arise in the market for goods, which as a general observation is significantly more integrated than the market for services in the EU, accentuates the sense of dismay.

The issue here is whether a functioning internal market can be built and maintained in the absence of a State-like institutional and constitutional infrastructure at EU level. Can this market, founded on an optimistic assumption of administrative co-operation across borders, be effectively *managed* ? What is needed is a more sophisticated and elaborate set of rules designed to govern the situation faced by a trader such as Noria, unable to persuade the public authorities in one Member State to accept products on to their market which are widely accepted elsewhere. [10] But there is such a set of rules! It is Regulation 764/2008 , which lays down procedures relating to the application of national technical rules to products lawfully marketed in another Member State. [11] This instrument of market management is commonly, if infelicitously, termed the " Mutual Recognition Regulation "; the Commission's webpage hosting the Regulation is entitled "Mutual Recognition". [12] Yet the Regulation is not mentioned by the referring court in *Noria* and it is absent from the Court's judgment too. AG Bobek mentions it, noting in mildly perplexed tones that neither the national court nor any of the parties had referred to the Regulation, and he contents himself with five brief paragraphs in which he summarises the measure's scheme.

Why did this dog not bark?

Regulation 764/2008

The Regulation's aim, as stated in its art.1 , is "to strengthen the functioning of the internal market by improving the free movement of goods", and it achieves this by stipulating the rules and procedures to be followed when the public authorities in a Member State take or intend to take a decision (as defined) which would hinder the free movement of a product lawfully marketed in another Member State. In short, it adds a degree of concrete operational detail to the basic scheme envisaged by art.34 TFEU. Dialogue is to be pursued. The public authority is required to give written notice of its intended action, including the supporting reasons, whereupon the trader is allowed at least 20 working days in which to submit comments. According to art.6(2) , the public authority, if it decides to take action, must notify both the ***E.L. Rev. 228*** trader and the Commission within a period of 20 working days from the expiry of the time-limit for the receipt of comments and, taking due account of any comments submitted by the trader, this shall include reasons for rejecting any arguments put forward by the trader and, moreover, the Regulation directs that the trader be advised of remedies available under the law of the Member State concerned. It is specified by art.6(4) of the Regulation that failure to notify the trader of a relevant decision within this period of 20 working days results in the product being "deemed to be lawfully marketed in that Member State" insofar as the application of the technical rule on which decision is based is concerned.

There is further intricacy to the Regulation, including provisions dealing with temporary suspension of the marketing of a product and the establishment of product contact points in the Member States, but this does not call for further examination here. The roots of Regulation 764/2008 are plainly to be found in the Court's case law, which attaches a procedural dimension to the Treaty provisions governing free movement, but the Regulation creates a more sophisticated, if not fully comprehensive, regime for managing a situation in which a trader seeks to penetrate a new market with goods that are lawfully marketable elsewhere in the EU but finds that local rules and practices are obstructive. The aspiration is plainly that the stipulated pattern of dialogue will lead to a much quicker and cheaper resolution of a dispute between a trader and the regulating authority than occurs under the orthodox and heavy-handed route of formal litigation. Traders, it is hoped, need not lose heart when faced with a target State's unamended rulebook and obstinate bureaucracy. In short, the Regulation hopes to make access to target product markets the norm rather than the exception which it too often seems to be in practice.

The Regulation, which replaced an earlier less elaborate EU measure, [13] complements the long-standing Notification Directive, as its own Preamble makes explicit. [14] The Notification Directive, the first form of which was adopted in 1983, [15] is today Directive 2015/1535. [16] It requires Member States to give advance notice to the Commission of plans to introduce new technical specifications and imposes an obligation to comply with a "standstill obligation" for a defined period after notification of draft measures before they may be brought into force. The purpose of the "early warning system" demanded by Directive 2015/1535 is to forestall the introduction of new measures that will harm the internal market. The Directive operates ex ante, whereas Regulation 764/2008 applies ex post facto: the Regulation addresses the concrete application of national rules to particular batches of goods lawfully marketed in another Member State. The two measures share an aspiration to promote dialogue and transparency in cases of hindrances to trade in order to improve the functioning of the internal market. Neither legislative measure subverts the basic point that a Member State may justify practices that restrict access to its market by goods that are

lawfully marketed in other Member States, but they place that prerogative in a carefully managed and procedurally transparent framework.

Regulation 764/2008 was introduced on the basis that its predecessor, Decision 3052/95 , had been "largely unsuccessful". [17] *Noria* suggests that the Regulation is not working well either. It suggests that it is irrelevant in practice, but the case is plainly only a small piece of evidence. The problem is that it is formidably difficult to gather any evidence at all that would expose whether the Regulation is used very much or even at all. Notifications made pursuant to Directive 2015/1535 are easy to track: there is a dedicated website. [18] There is no equivalent applicable to the notification procedure under Regulation 764/2008 . All that is publicly available is a Report prepared by the Commission on the application of the ***E.L. Rev. 229*** Regulation, which was published in 2012. [19] This claims that "It is generally perceived to be a helpful piece of legislation and has contributed towards an increased awareness of the principle of mutual recognition [*sic*]" and that "that the Regulation works by and large in a satisfactory way and that there is no need for amendments at present".

The more detailed, albeit limited, data presented in the 2012 Report tells a murky quirky story. The report states that in the period between the entry of the Regulation into force on 13 May 2009 and the end of 2011, the Commission had received 1,524 notifications pursuant to art.6(2) of the Regulation , and none concerning art.7 , which deals with temporary suspensions. There is, however, a peculiarly uneven distribution. Ninety per cent of the notifications refer to precious metals. The notifications come from seven Member States. However, 1,378 of the total notifications come from one Member State and concern precious metals. The report suggests that,

"the high number of notifications concentrating in the precious metals area can be explained … by the existence in many Member States of permanent and long time ago established control bodies (assay offices) specifically devoted to the assaying (testing), hallmarking and control of articles of precious metals."

Perhaps so-but this does not explain why there are so very few notifications in the many other areas of the economy which are not associated with precious metals. The Commission drily remarks in the Report that "this points to the fact that Member States do not notify all decisions falling under Articles 6(2) and 7 of the Regulation they take". This suggests that *Noria* is not abnormal. The Regulation seems to be widely ignored. A comparison with the Notification Directive is again pertinent. We know, from annual reports published by the Commission, both the total number of notifications made and also the breakdown by Member State and by sector. [20] The total numbers—700 in 2016, 655 in 2014, 705 in 2013—cannot tell the full story, for it is impossible to know how many national measures should have been notified but were not, but the State and sectoral breakdowns reveal a broadly even pattern, with no State and no sector dominating. This is a stark contrast to Regulation 764/2008 , where, according to the 2012 Commission Report, fully 90 per cent of the workload is made up of notifications by one Member State concerning precious metals.

The *"Evaluation of the Application of the Mutual Recognition Principle [sic] in the field of goods"*, a study prepared for and published by the Commission in 2015, [21] offers a number of warm remarks about the virtues of the Regulation, but remains strikingly barren of any detailed information on its actual operation. The Regulation, we are sagely informed "will only fully demonstrate its merits in the long run". [22] Perhaps it will, but its merits are calculatedly hidden right now, if they even exist. In similar vein a public consultation on possible revision of the Regulation, conducted by the Commission in 2016, generated only 153 replies, most (91) from business interests. The Commission's summary of responses strives to adopt a positive tone, but it is forced to confess that "very few economic operators consider that it is easier to sell products in other Member States since the Regulation entered into force". ***E.L. Rev. 230*** [23]

Procedure under Regulation 764/2008 is kept out of the public domain, and whatever happens, happens behind the closed doors of the Commission and the public authorities of the Member States. [24] It is impossible to know what, if anything, occurs in the (infrequent) event that a notification is made, still less what might be the consequences. It is therefore hard to take seriously any claims made on behalf of the Regulation as a valuable contribution to the task of managing the internal market more intensively than is permitted by the existing rules of primary free movement law. *Noria* seems to allow a glimpse of a malfunctioning system. Regulation 764/2008 doesn't bark, and it doesn't bite either.

Improving incentives to participate in market management

Improved operation of the system instituted by Regulation 764/2008 would be encouraged were the model of publication and transparency followed by the Notification Directive copied: legislative overhaul of Regulation 764/2008 does not need to look far for a superior model to copy. One cannot resist noting too that the Court has provided a spectacular incentive to Member States to comply with the obligation of notification under what is now Directive 2015/1535, and musing on whether the same incentives might be extended also to Regulation 764/2008 .

In *CIA Security International SA v Signalson SA* the Court held that failure to comply with the procedural obligations imposed by the Notification Directive robs the offending national measure of enforceability in proceedings before national courts, thereby releasing a private party (*in casu*, a supplier of burglar alarms in Belgium) from an obligation to meet the stipulated national standards. [25] This ruling reaches beyond the explicit text of the Directive, which does not address consequences at national level at all. It was understandably greeted with glee by the Commission, [26] for, by creating incentives for private parties to hold public authorities to account for their failure to comply with EU law, it greatly increases the Commission's ability to operate the system of ex ante scrutiny. This is an application to the management of the internal market of the more general truth that EU law, a constitutionalised system, creates individual rights which in turn improve policing of and therefore compliance with its rules. Might the Court, provided with an appropriate opportunity by an imaginative litigant, be enticed to adopt a similar approach to misconduct by a Member State in the shadow of Regulation 764/2008 -that is, might it rule that national action to impede goods should be ruled to lack binding legal effect by national courts where that action does not comply with the demands of the Regulation in all circumstances, not merely the specific and limited case foreseen by art.6(4) of the Regulation ?

There are two distinct questions: *will* the Court do this and *should* the Court do this. Each question deserves its own speculative paragraph.

Will the Court do this? In *CIA Security* the Court's pursuit of the "effectiveness" of control of national practices that impede free movement served as the basis for interpreting the Directive's impact in national proceedings in a way that extended beyond its explicit terms. [27] The prize on offer, the unenforceability of national rules that cause prejudice to traders, guaranteed that the Court would quickly encounter incentivised litigants eager to discover how much further the Court might be induced to reach. In *Lemmens* the Court, cautious about inflating its new device to monstrous proportions, refused to allow procedural default under the Directive to "have the effect of rendering unlawful any use of a product which is in conformity with ***E.L. Rev. 231*** regulations which have not been notified". [28] It thereby refined its embrace of effectiveness in *CIA Security* by insisting also that its concern in this line of case law was the prevention of obstacles to inter-State trade, not a wider concern to liberalise any kind of use of a regulated product. The Court has also shown caution when invited to define the material scope of the regime instituted by the Directive. Litigants have, naturally, been eager to fit a national measure to which they object within the scope of the obligation to notify, thereby to take advantage of the penalty of unenforceability where the measure has not been duly notified, and the Court has, naturally, been required to tread a careful line in addressing such adventurous claims. There are many examples [29] : a recent one is provided by *James Elliott Construction v Irish Asphalt*, in which the Court refused to place statutorily implied contractual terms governing the quality of products within the scope of the notification regime. [30] In striving to explain why, it fell back on its well-worn and slippery habit of using imprecise qualifying adjectives and adverbs to define jurisdictionally sensitive margins, here insisting on a threshold whereby the national measure must "significantly" influence the composition or nature of the product, rather than merely applying generally. [31] What is at stake here was deftly captured by AG Bobek in another of these borderline definitional cases, *GM, MS* —a risk of judicially led "notification creep" in the scope of the obligation imposed by the Directive similar to that seen in relation to art.34 TFEU. [32] It is a concern that seems normally to weigh on the Court in these references that seek elucidation of the scope of the notification regime—but not always. The Court has decided—anything but cautiously—that a Member State's disregard of the requirements laid down by the Notification Directive may have an impact in litigation before national courts involving purely *private* parties. In *Unilever* it ruled that a contracting party could not refuse to accept delivery of goods which failed to comply with locally applicable labelling requirements where those requirements had not been notified to the Commission in accordance with the Directive. [33] *Unilever* is not formally inconsistent with the Court's long-standing refusal to acknowledge the horizontal direct effect of Directives, because in *Unilever* , as in all of the cases in the niche that was opened up in *CIA Security* , the Directive operates to suppress the application of a national measure rather than to create a right enforceable by the individual. [34] But *Unilever* is damaging to the legal certainty of private parties, which the Court presents as one (and probably the most compelling) reason for excluding the horizontal direct effect of Directives. [35] This has ***E.L. Rev. 232*** led to criticism that the Court lacks a

principled understanding of just when and how Directives should and should not exert an impact on domestic proceedings [36] and more generally these cases are pivotal to the argument that the very nature, purpose and scope of the doctrines of direct effect and supremacy remain contested more than 50 years since the Court first asserted their existence. [37] Surveying the twists and ambiguities in the case law since *CIA Security* , one can only conclude that if the Court were invited to rule that an intervention into the market which fails to respect the procedural demands of Regulation 764/2008 should be treated by a national court as devoid of legal effect, it *might* do so.

However, *should* it do so? I think it should. Provided the case follows the relatively straightforward model of *CIA Security* , I think the same solution should apply to the misapplication of Regulation 764/2008 as the Court has applied to malpractice under the Notification Directive. That is, where the matter falls squarely within the material scope of the regime, and where a national authority has simply obstructed the marketing of goods without due regard for the express and precise terms to which all Member States agreed in the process of adoption of a Regulation which is designed to improve the good functioning of the internal market, then the consequence should be a finding that the obstruction has no binding legal force. There would be no issue associated with disturbance of private rights which did not induce (but should have induced) judicial caution in *Unilever* . Compliance with EU law would be improved, with no corresponding damage to legal certainty, were the Court to rule that mishandling of the obligations imposed by Regulation 764/2008 leads to a national court treating the intervention as unenforceable.

At this point I conclude in the hope that a trader will one day light this firework before the Court. [38]

Conclusion

What does *Noria* tell us? It tells us that the internal market is incomplete. That is, of course, not news, but the case reminds us that it is mundanely incomplete on a daily basis. It confirms that the elegant beauty of the EU's model which mandates that public authorities shall tolerate regulatory regimes that differ from their own, subject only to the exceptional possibility that a sufficient justification may be found for insisting on compliance with local rules, is sometimes cold comfort to the trader faced by local bureaucratic intransigence. There is no principle of mutual recognition! The space allowed by EU law for justification is simultaneously a laudable expression of managed but admitted regulatory diversity and a serious obstacle to confident cross-border trading. More is needed—reform of Regulation 764/2008 to make its scope more precise, its procedures more intricate and the opportunity to challenge refusals more robust might help, though more fundamentally strenuous attempts to advertise its very existence are much needed, which should include publicity for notifications made, replicating the model of the Notification Directive; and the Court would add some spice were it to export the approach pioneered in *CIA Security* to sanction also malpractice in matters covered by the Regulation. Strategies that reach beyond litigation and legislation as means to manage the internal market deserve warm embrace. The Commission's documentation has for many years pressed the need for more faithful national implementation of the rules of the internal market. "Transparency, peer pressure and administrative co-operation are the silver bullets in this area", as the 2010 Monti report ("A New Strategy for the Single Market: at the service of Europe's Economy ***E.L. Rev. 233*** and Society") put it. [39] "SOLVIT" is of exactly this type. [40] It is perfectly sensible to reflect that the very nature of the internal market, built on EU rules that fall to be implemented in a decentralised manner through diverse national administrative cultures, dictates that it will never be as easy to trade across borders as it is locally. *Noria* illustrates that. As the Commission has insisted, the internal market "is evolving, it will never be finalised". [41]

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Footnotes

1 *Criminal proceedings against Noria Distribution Sàrl (C-672/15) EU:C:2017:310; [2017] 3 C.M.L.R. 32* .

2 *Noria (C-672/15) EU:C:2017:310* at [22] cites *Commission v France (C-24/00) EU:C:2004:70; [2004] 3 C.M.L.R. 25* ; *Criminal Proceedings against Greenham and Abel (C-95/01) EU:C:2004:71* ; and *Commission v France (C-333/08) EU:C:2010:44; [2010] 2 C.M.L.R. 43* .

3 See e.g. *Nationale Raad van Dierenkwekers en Liefhebbers v Belgium (C-219/07) EU:C:2008:353; [2009] Env. L.R. D2* (concerning the welfare of animals); *Criminal Proceedings against Ince (C-336/14) EU:C:2016:72; [2016] 2 C.M.L.R. 48* (betting).

4 This sentence plainly condenses a huge amount of detailed assessment and case law: see more fully *S. Weatherill, The Internal Market as a Legal Concept (Oxford: Oxford University Press, 2017), Ch.8, "Justification"*.

5 *S. Weatherill, "Why there is No 'Principle of Mutual Recognition' in EU Law (and Why that Matters to Consumer Lawyers)" in K. Purnhagen and P. Rott (eds), Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz (Heidelberg: Springer, 2014), pp.401–418*.

6 Commission, "Completing the Internal Market" COM(85) 310.

7 See e.g. Commission, "Completing the Internal Market" COM(85) 310, paras 13, 63, 64, 65, 71.

8 Commission, "Internal Market Strategy, Priorities 2003–2006" COM(2003) 238, p.6.

9 See http://EC.Europa.EU/Solvit/Index_EN.htm [Accessed 25 February 2018]. See also M. Egan and M. Guimarães, "The Single Market: Trade Barriers and Trade Remedies" (2017) 55 J.C.M.S. 294.

10 I note, but do not here explore, that there is another (re-regulatory) side to this (deregulatory) coin—that products suspected of non-compliance with safety and other standards in one Member State should be the subject of investigation too in other Member States. In this vein see C. Barnard and N. O'Connor, "Runners and Riders: The Horsemeat Scandal, EU Law and Multi-level Enforcement" (2017) 76 Cambridge Law Journal 116.

11 Regulation 764/2008 [2008] OJ L218/21 .

12 See Commission, "Mutual recognition", http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition_en [Accessed 25 February 2018]. See similarly Commission, "Upgrading the Single Market: more opportunities for people and business" COM(2015) 550.

13 Decision 3052/95 [1995] OJ L321/1 .

14 Regulation 764/2008, Recital 21 .

15 See Commission, "Completing the Internal Market" COM(85) 310, paras 74–76 for its place in the internal market strategy from the beginning.

16 Directive 2015/1535 [2015] OJ L241/1.

17 Regulation 764/2008, Recital 36 . The Commission's only published Report on the Decision, covering its operation in 1997 and 1998, admits that only five Member States had made notifications: COM(2000) 194.

18 See http://ec.europa.eu/growth/tools-databases/tris/en [Accessed 8 March 2018].

19 COM(2012) 292, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0292&from=EN [Accessed 25 February 2018].

20 E.g. for 2016, see [2017] OJ C162/4; for 2014 see [2015] OJ C174/2; for 2013 see [2014] OJ C145/7; for 2012 see [2013] OJ C165/5. Statistics for 2015 were not published.

21 See *Commission, "Evaluation of the Application of the Mutual Recognition Principle [sic] in the field of goods" (1 June 2015)*, http://ec.europa.eu/DocsRoom/documents/13381 [Accessed 25 June 2018].

22 *Commission, "Evaluation of the Application of the Mutual Recognition Principle" (1 June 2015), para.4.4.1*.

23 *Commission, "Public consultation on the possible revision of the Mutual Recognition Regulation (EC) No 764/2008" (30 September 2016), p.9*, http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8831 [Accessed 25 June 2018].

24 This was confirmed to me in a polite but brief email in response to an inquiry I addressed to the Commission at grow-mutual-recognition@ec.europa.eu, the address given on the webpage entitled "Mutual Recognition", http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition_en [Accessed 25 February 2018].

25 *CIA Security International SA v Signalson SA (C-194/94) EU:C:1996:172; [1996] 2 C.M.L.R. 781* .

26 For its citation in conjunction with notifications published in the Official Journal see e.g. [2001] OJ C152/4; [2004] OJ C230/3; [2005] OJ C259/4.

27 *CIA Security (C-194/94) EU:C:1996:172* especially at [48].

28 *Criminal Proceedings against Lemmens (C-226/97) EU:C:1998:296; [1998] 3 C.M.L.R. 261* at [35].

29 E.g. *Bic Benelux SA v Belgium (C-13/96) EU:C:1997:173; [1998] Env. L.R. 22* ; *Ivansson (C-307/13) EU:C:2014:2058* ; *Ince (C-336/14) EU:C:2016:72* ; *Municipio de Palmela v ASAE (C-144/16) EU:C:2017:76* .

30 *James Elliott Construction v Irish Asphalt (C-613/14) EU:C:2016:821*. It is an argument dear to my heart: I suggested it in a case note on *Unilever* published 16 years ago in this review: S. Weatherill, "Breach of Directives and Breach of Contract" (2001) 26 E.L. Rev. 177. This is of course not mentioned by the Court, but, having been relied on by Irish Asphalt in the domestic proceedings, it is mentioned by the Irish Supreme Court (*[2014] IESC 74*) which made the reference, albeit in a mildly sceptical tone that chimes with the Court's subsequent ruling.

31 *Irish Asphalt (C-613/14) EU:C:2016:821* at [69]. In fact the test is drawn from art.1(4) of Directive 98/34 , the Notification Directive in force at the time, though the Court does not say this. On the general patterns of reasoning see *S. Weatherill, "The Court's Case Law on the Internal Market: 'A Circumloquacious Statement of the Result, rather than a Reason for Arriving at It'" in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds), Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice (Oxford: Hart Publishing, 2013), pp.87–108*.

32 Opinion of AG Bobek in *GM, MS (C-303/15) EU:C:2016:531* at [62]. The Court's ruling in the case, *EU:C:2016:771* , is in a cautious vein and finds no obligation to notify, though typically it avoids the broader reflective style of its Advocate General.

33 *Unilever Italia SpA v Central Food SpA (C-443/98) EU:C:2000:496; [2001] 1 C.M.L.R. 21* .

34 In *Berlington Hungary Tanacsado es Szolgaltato kft v Hungary (C-98/14) EU:C:2015:386; [2015] 3 C.M.L.R. 45* the Court also concluded that the Directive is not intended to confer rights on individuals in such a way that their infringement by a Member State gives rise to a right to obtain compensation for damage suffered.

35 *R. on the application of Wells v Europarecht Secretary of State For Transport, Local Government and the Regions (C-201/02) EU:C:2004:12* .

36 See e.g. P. Craig, "The Legal Effect of Directives: Policy, Rules and Exceptions" (2009) 34 E.L. Rev. 349; O. Mörsdorf, "Unmittelbare Anwendung von EG-Richtlinien zwischen Privaten in der Rechtsprechung des EuGH" (2009) 2 Europarecht 219; E. Dubout, "L'invocabilité d'éviction des directives dans les litiges horizontaux" (2010) 46 Revue Trimistrielle de Droit Européen 277.

37 See e.g. M. Dougan, "When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy" (2007) 44 C.M.L. Rev. 931; K. Lenaerts and T. Corthaut, "Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law" (2006) 31 E.L. Rev. 287.

38 Though I cannot promise more joy than that felt by the last litigant to follow my lead—cf. *Irish Asphalt (C-613/14) EU:C:2016:821* and see explanation at fn.30, above.

39 *M. Monti, "A New Strategy for the Single Market: at the Service of Europe's Economy and Society" (May 2010), pp.98–99*, http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf [Accessed 25 February 2018].

40 See http://ec.europa.eu/solvit/index_en.htm [Accessed 25 February 2018].

41 "A Single Market for Citizens, the interim report to the Spring 2007 European Council" COM(2007) 60, pp.3, 10.

