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ABSTRACT

This paper analyzes the experience of the EU with mutual recognition in the single market for goods and the European Arrest Warrant (EAW) as examples of multi-centered governance. In how far is it possible to respond to the functional needs for transborder mobility while protecting the choices of demoi and individual rights? Does the experience in the EU show that recognition of diversity is an alternative to harmonization and unity? The single goods market has developed far-reaching vertical elements falling short of a multi-centered regime. With a duty to recognize all rules, it may become meaningless to determine own rules. The EAW, in contrast, operates as a horizontal system but violates the rights of individuals, while honouring those of demoi.

KEYWORDS: Demoicracy; mutual recognition; governance; European Arrest Warrant; single market

INTRODUCTION

The crisis of state-building in Europe has made the search for alternative forms of governance more urgent. The concept of demoi-cracy yields great promise by allowing for "unity in diversity". It conceptualizes the EU as a polity of multiple demoi instead of assuming a single European demos and adopts a "transformationalist" perspective (Müller 2011: 192; Cheneval and Schimmelfennig 2013). A supranational polity has to follow other criteria of democracy, it is argued, than a nation state. It is a union of demoi, and nation states will remain important for the time to come. A demoi-cracy not only relies on individual support but also on the support of the multiple demoi. "Demoi-cracy is a specific political order that takes into account the two

fundamental normative references of liberal democracy: citizens and statespeoples. It does not compromise on core fundamental rights of individuals, but it balances the political rights of individuals and statespeoples" (Cheneval and Schimmelfennig 2013: 340). **(← p. 112)** It establishes not only an alternative normative framework for assessing the legitimacy of integration but also an alternative trajectory for integration to pursue. For the EU, it can no longer be the aim to approximate a state, and to merge the identity of the peoples. When the aim is accepting diversity, and reconciling it with integration, the idea of multi-level governance shifts to multi-centered governance. "A demoi-cracy should not be based on a vertical understanding of governance, with supranational constitutional norms trumping national ones and supranational institutions standing above national ones. Instead, our demoi-cracy ought to be premised on the horizontal sharing and transfer of sovereignty" (Nicolaïdis 2004: 8).

As Cheneval and Schimmelfennig (2013) argue, in many respects the EU already achieves demoi-cratic standards. This concerns not only the design of its polity but also of its governance. Next to the community method dominating integration, there have been for a long time alternatives. In particular mutual recognition, on which much of the single market builds, approximates demoi-cratic governance. In line with the questions asked in the introduction to this special issue (Cheneval et al. 2014), it is therefore relevant to assess the workings of demoi-cratic governance. Does it allow for individual political rights while safeguarding the self-determination of demoi? Can the "functional pressure for more integration" be reconciled "with the sovereignty and identity concerns of the national *demoi*?" (Cheneval et al. 2014: 12). Or is "recognition mute" with too much "harmonization and assimilation" (Nicolaïdis 2013: 359)?

This paper analyzes mutual recognition in the single market for goods, where this new mode of governance originated, and compares it with the more recent experience in Justice and Home Affairs (JHA). It thus contrasts an area of low politics with one belonging to the core state powers. Interestingly, the experience in the single market is one where transnational trust was seemingly insufficient to allow for smooth recognition of different regulations. Now regulation

764/2008 forces member states to recognize each others' products, imposing tight time frames and the burden of proof of insufficient regulation on authorities that object to recognition. This risks turning retained responsibility for making rules meaningless. The case of the European arrest warrant contrasts in surprising ways. This horizontal governance regime is hardly permeated by vertical elements, which are only added very recently. A comparison of Germany, the UK and Poland shows the underlying heterogeneity of the system. Its relatively smooth operation cannot be taken as a sign of successful demoi-cratic governance, we argue, as the system does not manage to do justice to the rights of demoi and the rights of individuals at the same time. We conclude with cautious remarks about the possibility that demoi-cracy can rely on mutual recognition squaring the circle. **(← p. 113)**

MUTUAL RECOGNITION AS AN EXAMPLE OF DEMOI-CRATIC GOVERNANCE

European integration mainly relies on the harmonization (or approximation) of laws. Importantly, with harmonization, we have a vertical transfer of sovereignty (Nicolaïdis 1996), as member states effectively lose their capacity to regulate in those areas where harmonized policies exist. This extent of effective centralization of competences calls for a legitimation at the European level, for which the demoi of member states cannot compensate. From here stems the legitimation problem of the EU.

Mutual recognition presents an alternative way of integration. Based on the idea that member states may regulate their markets differently, but normally do so in equivalent ways, mutual recognition leaves the competence for regulation at the member states level, requiring member states to mutually recognize their equivalent regulations. With this mode of integration, companies and their products, services, but also capital are regulated in their home country, that also keeps the authority to monitor regulatory obedience. The host state, on whose territory goods and services are sold and provided or companies become active, has to accept these rules and their control (Nicolaïdis 1996; Schmidt 2007). Territory and jurisdiction are no longer

identical. There is an extraterritorial application of national law. Mutual recognition implies great advantages and challenges. Transnational mobility can be achieved without the need to forego the determination of rules and to agree on harmonization. This safeguards the demoi's competence to determine rules at a lower level. At the same time, the rules of other member states are recognized as equivalent to the national ones. This requires a large extent of trust in the quality of rules and administrative enforcement of other member states.

Nicolaïdis (1996), who has made major contributions both to the study of demoi-cracy and of mutual recognition has pointed out early on that the challenge of mutual recognition is not the agreement on but the working of the system. While harmonization faces high transaction costs in decision-making, mutual recognition is much more demanding in its operation – administrations now have to operate under regulatory diversity. The challenge of this will become apparent in the case studies to follow.

The first case concerns the single market for goods, as the example where mutual recognition started with the Cassis-judgment. The single market with its product regulation, however, is low politics with few legitimation requirements. Product regulations are often subject to forms of private governance, their definition is for instance delegated to standardization organizations. One could therefore expect mutual recognition to be relatively uncontroversial. This is why we take up the example of mutual recognition in justice and home affairs, and more specifically on the European arrest warrant (EAW), as a second case.

As different legal systems and traditions in JHA hampered harmonization, member states responded to growing needs for cooperation across different **(← p. 114)** penal systems with mutual recognition. The most notable example is the EAW. It replaced the previous system of surrenders of the Council of Europe Convention on Mutual Assistance in Criminal Matters. The latter followed the principle of territoriality. Member states checked for double criminality, i.e. whether the alleged crime met national penal standards, when requests for surrenders came up. Nationals were not surrendered. The system was slow but had the advantage that individual's

rights were protected by their own parliamentary laws. The unanimous agreement in the Council on the Framework Directive on the EAW has changed this situation. On receipt of an EAW, member states are held to automatically surrender the person. But arrests constrain individual liberties and face particularly high legitimatory requirements in democracies. Fundamental rights are often guarded by constitutional courts. It can therefore be expected that to mutually recognize each others' judiciary decisions is much more demanding than to mutually recognize goods regulations (see also Lavenex 2007: 763).

MUTUAL RECOGNITION IN THE SINGLE MARKET FOR GOODS

The judgment *Cassis de Dijon* of 1979 was crucial in establishing mutual recognition as an alternative way of integrating the single market. Originally, the freedom of goods had been understood as a rule of non-discrimination, implying that member states could enforce their rules on their territory but were prohibited from discriminating against producers from other member states. With *Dassonville* in 1974 and then *Cassis*, this was changed to a prohibition of restrictions. Member states had to recognize products being already regulated in another member state as equivalent, if they could not raise public policy objectives (Art. 36 TFEU). The Court's reasoning in *Cassis* was taken up by the Commission in a Communication, advertising the completion of the single market through mutual recognition (Alter and Meunier-Aitsahalia 1994). The need for harmonization was diminished to cases where member states could claim public-policy objectives justifying an exemption from mutual recognition. In the goods market, thus, from the beginning, mutual recognition was embedded in a structure with vertical elements as the Court required recognition.

But mutual recognition did not operate smoothly, as reports of the Commission revealed (e.g. Commission 1999). For member-states authorities on the ground it was very difficult to judge whether incoming products conforming to rules of other member states were in fact regulated in an equivalent way. In order to keep heterogeneity between member states' regulations at bay,

there was a notification system established by directive 83/189/EEC (replaced by 98/34/EC), requiring member states to notify each other of planned technical standards and regulations. This allowed deciding early on whether a European approach was needed. As Pelkmans (2007) shows, this directive was central in supporting mutual recognition, and in dealing with the significant transaction costs associated with it. It was also used to ensure that member **(← p. 115)** states included mutual-recognition clauses into all national regulations, giving foreign producers a national legal position (Pelkmans 2007: 706). Nevertheless, it remained difficult, particularly for small and medium-sized firms to trade their products on the basis of mutual recognition. This led to the establishment of the SOLVIT network in 2002, offering unbureaucratic help when facing problems with the single market (Pelkmans 2007: 710). Embedded in different rules with the aim of easing its functioning, mutual recognition in the single goods market can thus be perceived as "managed mutual recognition" (Nicolaïdis 2013: 356).

Notwithstanding these efforts, the Commission perceived problems with mutual recognition in goods markets. In February 2007, it announced a new package for the internal goods market, of which the regulation on mutual recognition for goods (764/2008) was a part. In particular, this regulation deals with the problem of the burden of proof (Schmidt 2011). If a company wants to sell a product regulated in the home country and the host-country authority does not believe its regulation to be equivalent, there had been legal uncertainty of who was to prove its position. Did the company have to prove its equivalent product regulation? Or did the authority have to prove the non-equivalence of the product? The regulation now settles the issue by laying the burden of proof on the authority barring the entry (Art. 6), under strict time limits. Producers have to provide their specifications, but not in the language of the host country (Art. 4b).

Given that member states are now forced to recognize each others' products, the situation seems far removed from the spirit of recognizing diversity inspiring the concept of demoi-cracy. In this respect, the experience of the single market is disappointing for the prospects of demoi-

cratic rule. Multi-centered governance has not worked well, requiring it to be made obligatory. An obligation at mutual recognition, however, casts doubts on the meaningfulness of democratic self-determination: if any rules have to be accepted alongside own rules, is it still significant being able to determine rules?

THE SYSTEM OF THE EUROPEAN ARREST WARRANT

In 1999, the EU heads of states at Tampere declared mutual recognition the cornerstone of judicial cooperation in the EU. This step was motivated on the one hand by the perceived need to foster cooperation, and on the other hand by the difficulty of agreeing on harmonization, given the different legal traditions and the unanimity requirement (Lavenex 2007; Wagner 2011). The EAW is the first application of mutual recognition in judicial cooperation and in force since 2004 (2002/584/JHA). In the following, we will introduce the way that the EAW functions and then discuss its operation in three countries.

The EAW replaced traditional extradition procedures based on the territoriality principle: The country which receives an EAW is supposed to recognize and give effect to the rules of the issuing country in its jurisdiction by searching **(← p. 116)** and surrendering the wanted person. "The underlying assumption is that the requesting states' judicial decisions are both legal and legitimate in the light of shared standards of human rights and procedural safeguards" (Lavenex 2007: 766). There is an extraterritorial application of national law. The competence to issue and enforce warrants is delegated to national courts, the so called issuing and executing authorities. The number of courts involved varies among the EU member states. Some states involve a high number of lower level courts, whereas others entitle only high level courts. Extradition is now declared a pure judicial procedure characterized by direct contact between the judges of the issuing and the executing authority, with no diplomatic interference. The issuing state does not have to prove that there is a case to answer. The merits of the request are taken on trust and there are only limited grounds for refusal.

Extradition requests can be issued for conducting a criminal prosecution or for executing a sentence. Different thresholds apply: An EAW for prosecution requires an offence punishable by at least one year imprisonment. An EAW for executing a sentence needs a remaining term of imprisonment of four months. A list of 32 offences has been introduced (including murder, trafficking in human beings, terrorism, racism and xenophobia) for which no double criminality is required if the offence is punishable for at least three years. Then the executing state has to surrender even if the offence is not punishable based on national criminal law.

As a framework decision, the EAW has no direct effect. Neither can the Commission start infringement proceedings. Only in 2014 will there be direct effect and primacy following the Treaty of Lisbon (Hinarejos 2009). Similarly, the access to the preliminary reference procedure is limited as member states had to allow national courts to refer cases to the ECJ, which only 19 of 28 member states did.

As it has been operating so far, thus, the EAW is a very horizontal system with little vertical obligations. Its operation is supported in the Schengen states by the Schengen Information System (SIS), a common database with information for criminal prosecution. Schengen states can distribute their arrest warrants as 'SIS alerts', if the location of a person is not known and an EAW cannot be sent directly to the authorities in charge. The system distributes a rising number of warrants, in 2010 for 28.666 persons, in 2011 for 31.535 persons, and in 2012 for 34.754.[1]

Thus, the mutual recognition of judicial and administrative acts closely resembles the approach claimed for demoi-cracy. Member states cooperate intensely, although national criminal law and procedure, legitimated by national demoi, stays intact. Open borders limit the effectiveness of national systems, as differing penal systems give scope to circumvent rules using regulatory arbitrage. Given these difficulties in enforcing democratically legitimated rules, mutual recognition helps to close regulatory gaps, with foreign authorities enacting national criminal law. Thereby the system can be seen to provide a 'demoi-cratic' solution. However, national

citizens may be subject to foreign law in the creation of which they had no say. "Jurisdiction is **(← p. 117)** disjoined from national territory, and hence also from the people and their democratic polity" (Lavenex 2007: 767). With few vertical elements to enforce compliance with the EAW, the intensity of cooperation is surprising. Since the EAW replaced the old system of extradition, however, it is only by participating in the EAW system that member states can solve their cooperation needs. Cooperation is largely self-enforcing, driven by the member states' wish to ensure a functioning criminal prosecution in the face of increased mobility (Wagner 2011).

THE WORKING OF THE EAW IN DIFFERENT MEMBER STATES

In the following, the operation of the EAW system is analyzed in three member states: Germany, the UK, and Poland. Among the three of them, they cover significant variance that exists in the 28 member states. These member states represent the civil (Germany and Poland) vs. the common-law system (the UK), established vs. newly established democracies, and a decentralized (Germany, Poland) vs. a centralized (UK) implementation of the EAW system. The closer look into its operation, putting unity in diversity to work, illustrates the challenges that demoi-cratic governance has to cope with.

EAW in Germany

Germany opted for a decentralized system, allowing direct contact between judicial authorities. It is not a pure judicial procedure, since public prosecutors, formally representatives of the government, play a major role in the process. The public prosecutor's offices (Staatsanwaltschaft) at the 656 regional courts issue outgoing EAW.

The execution of incoming EAW is handled by the chief public prosecutor's office (Generalstaatsanwaltschaft) at the 24 Higher Regional Courts in a three-step-procedure: the Public Prosecutor first conducts a preliminary check on potential grounds of refusal, providing

a preliminary decision, against which the accused can appeal. Secondly, the judges at the Higher Regional Court review this preliminary decision and check the formal legal admissibility of the EAW as to the completeness of documentation, its basis on one of the 32 offences with no double criminality, and the minimum-threshold sentence, and whether Germany already started proceedings for the same offences. Third, the final check on potential grounds of refusal and final decision to approve/refuse an incoming EAW is conducted by the public prosecutor.[2] The Council criticized this procedure as cumbersome and slow (Council of the European Union 2009).

Importantly, there are additional grounds for refusal, which were introduced after the German Constitutional Court had declared the first implementation of the EAW void in 2005.[3] The EAW has to be refused if the offence was committed on German territory or if the most grievous violations took place here. When a German national or an "equated" person is involved, the **(← p. 118)** requesting state has to confirm its willingness to return the person to serve the custodial sentence in Germany. The Constitutional Court had found that the first implementation of the EAW encroached upon the freedom from extradition in a disproportionate manner. As a result of the ruling, Germany partially dropped out of the EAW system between 7/05 and 8/06, reintroducing the former request principle for surrenders, but continuing to issue warrants to other countries. During that time, Spain and Hungary refused cooperating for lack of reciprocity (Commission 2007: 5).

With the new grounds for refusal, German nationals and 'equated persons' have to consent to be surrendered to serve a sentence abroad. Few consent as the statistics show: In 2008, Germany surrendered 742 persons, among them only 30 German citizens.[4] Some German judicial authorities treat Polish citizens living in Germany systematically as 'equated persons' – not surrendering them. The Polish authorities highly criticize this, claiming Germany to be "a safe haven for Polish criminals" (interview 20). Treating Polish citizens like German nationals raises questions of sovereignty, as Polish rules lose their general binding character.

The decentralized system leads to significant variation in practice among different judicial authorities (Council of the European Union 2009: 35). In particular, the treatment of warrants for minor crimes varies significantly. Warrants for minor crimes are mainly issued by Poland, some other Eastern European countries and Greece, as in these countries minor offences can be punished with up to 12 months of prison. Only the *ordre public* is a potential emergency break, as foreign decisions cannot be recognized if they violate fundamental norms and principles of the national legal system. It is explicitly included in the implementing law of 2006 but rarely used (just three times in 2008).[5] Thus, the Higher Regional Court Celle refused a Greek EAW threatening a potential life sentence for the possession of seven cannabis seedlings (see OLG Celle 1 ARs 21/08 of 20.5.2008).

The EAW allows surrendering a national who never left his home country to another member state for an offence, which is hardly punished at home. In 2008, a Danish citizen was accused of producing CDs with Nazi music and selling them to German customers. This constitutes a crime in Germany punishable with up to five years in prison. In Denmark, no one has ever been convicted to more than a 60 days suspended sentence for selling racists material. The Danish police arrested the accused based on a German EAW, holding him in custody for four months. In 2009, the Danish High Court decided that the German EAW could not be refused. Being the first time that Denmark surrendered a person for expressing his opinion, the extradition was highly disputed.[6] As much as the case shows the rationale for the EAW in an increasingly integrated market, blocking the bypassing of rules by trans-border transactions, it also underwrites the fears that mutual recognition in JHA leads to a strengthening of the most restrictive system.

Germany uses the EAW system with average frequency. With 2000 warrants issued in 2008, it is one of the major issuing countries in absolute terms, with a **(← p. 119)** success rate of 30 percent (slightly above average). Taking the number of arrests, Germany is among the top three member states in 2008: Spain arrested 1500 persons, Germany 900 and France 500 (Bundestag

2009; Council of the European Union 2009). Once a person is arrested, it will lead to surrender in about 80 percent of all cases.

To conclude, the German example shows that a decentralized system leads to a somewhat uneven application of the EAW. Its strong constitutional court has introduced safeguards for individual rights that add to diversity and emphasize the importance of maintaining competences at the national level.

EAW in the UK

The UK opted for a highly centralized system. The central actor is the *Serious Organized Crime Agency* (SOCA), a governmental agency connected to the Home Office being responsible for issuing and executing EAWs. A proportionality check is always conducted (Council of the European Union 2007: 12-17). SOCA reviews all incoming warrants and "certifies" them. The final decision on executing an EAW is taken by six district judges at the City of Westminster Magistrate's Court in London, and for Scotland by the judges at the Scottish High Court in Edinburgh. Once an EAW has been approved by the courts, SOCA organizes the transmission and is in charge of communicating with the executing authorities.

For outgoing EAW, the drafting standard is very good due to the competence of the centralized agency. But this generates very high expectations on the information included in incoming EAW, leading to frequent requests for additional information (Council of the European Union 2007: 60). British authorities invest considerable resources into identifying the whereabouts of the wanted person before applying to the courts for an EAW. Thus, in most cases, the EAW is directly sent to the respective member state via Interpol. Since the UK is not a member of Schengen, it cannot use the SIS for transmission. But it will join the SIS II when it enters into force (Council of the European Union 2007: 18-19). Almost every second EAW issued results in the surrender of the person sought. Accordingly, the UK government and law enforcement

agencies regarded the EAW system as "a major success", praising it for speeding up extraditions (House of Commons 2007: 49).

The UK was criticized by the Commission for not allowing the direct contact between judges called for in the framework decision and giving so many competences to SOCA (Council of the European Union 2007: 61). But the UK argues that a common-law system requires a central authority to receive EAW, as a common-law system does not allow the judge to be involved in the collection of evidence in the investigation stage (interviews 14–17). The issuing authority in the EAW process is regarded as part of the prosecution. The UK defended their institutional structure by referring to Article 7(2) of **(← p. 120)** the Framework Decision allowing for a central authority to administer the transmission and reception of EAW.

The UK Extradition Act includes a high number of additional grounds of refusal, such as human rights (Section 21), humanitarian grounds (Section 25), in abstentia judgments (Section 20), and the passage of time-clause (Section 14), which states that an offence which would be time-barred *according to British law* is not accepted as a basis for an EAW. This reflects mistrust towards the quality of foreign criminal-law systems. Both, Commission and Council, severely criticize the UK for the high number of additional bars to extradition.

Similar to Germany, the UK also faces the problem of many EAW for minor offences, often sent by Eastern European countries (mainly Poland, Lithuania and Romania). Some of these are rejected right away, not being an extradition offence. However, the UK usually surrenders, honouring the obligations arising from the EAW system. Some of these EAW may have very disproportionate effects as the case of Patrick Reece-Edwards illustrates. The British citizen was stopped at a Polish border, questioned, but allowed to drive off afterwards. Months later he was seized in his home in Dartford under a Polish EAW, charged of possessing a forged motor-insurance certificate. He was kept in custody in Britain for several weeks and eventually surrendered to Poland to face trial. Here it turned out that the matters could be resolved by paying an administrative penalty with no criminal record.[7] The high number of EAW for trivial

offences is causing a growing concern on a potentially unfair and disproportionate nature of the EAW system.[8] "But the corollary has been a lack of scruples about sending individuals to the continent. Britain has meticulously acted on arrest warrants from Poland, often for trivial offences".[9] Another example concerns the case of Andrew Syemou, a young British man accused of having murdered his friend in a Greek disco. Though he claimed not having been at the disco that day, having an alibi, evidence obtained by the Police violently led to an EAW and the surrendering to Greece in 2009. He was finally acquitted in June 2011 after a long time in a Greek prison.[10]

The UK is a country that issues very few EAW given its size, in 2007 only about 250. These EAW, however, are highly successful (almost 50 percent surrender). The UK is a net receiver of warrants with 3534 incoming EAW via Interpol in 2007, of which SOCA certified only 234 EAW (also because many EAW had no connection to the UK). If an EAW leads to the arrest of the person, it will lead to surrender in about 60 percent of all cases.

In summary, like Germany the British example shows the wish to introduce additional bars to extradition. Nevertheless, very controversial and dubious cases occurred. The politically contentious nature of the system has led the current government to consider an opt-out. Given the reciprocal nature of the system, the consequences of such a step are, however, far-reaching.[11] **(← p. 121)**

EAW in Poland

Like in Germany, the first implementing law was declared void by the Polish Constitutional Court in April 2005 as the Constitution does not allow the extradition of a Polish citizen. For offences committed on Polish territory, the surrender has to be refused, and the surrender of nationals requires double criminality. Influenced by the German *ordre public* reservation, extradition of nationals is conditional on compliance with fundamental principles of the rule of

law (Zagrodnik 2009: 256-257). The Commission criticized Poland for the additional safeguards (Commission 2007: 8).

The Polish EAW system is organized decentrally. The 43 circuit courts can issue and execute EAWs. An EAW is issued almost automatically, if the offence was committed on Polish territory. Polish law adheres to the legality principle and does not provide for a proportionality test. Moreover, Polish law is potentially more punitive compared to Western European law systems, as a result of which less serious offences meet the thresholds defined in the framework decision. Thus, an EAW can be issued for drunk driving or driving without the necessary documents, and minor theft, like stealing a piglet, or chicken. This leads to the high number of EAW for minor offences being critically discussed at the European level due to the costs the EAW procedure causes in the executing state. In the UK, SOCA regularly asks for additional information, even relating to the merits of the case and the nature of evidence. Polish warrants are placing increasing strain on the system and "a disproportionate amount of time is expended in cases which do not merit the effort" (House of Commons Library 2009: 4).

Differences in material criminal law and sentencing practices become problematic when nationals are returned to serve the sentence at home based on foreign judgments. For instance, a Pole had been given two life sentences for raping and beating a woman in the UK. In Polish law, the highest sentence is 15 years (interview 20). Does the principle of mutual recognition oblige the Polish authorities to enforce the foreign sentence one-to-one? The underlying conflict is that in practice, a life sentence in Britain is often changed into several years of imprisonment if the convicted person shows good conduct. But this is not conventional practice in Poland. If the Polish authorities would enforce the live sentence in full, the suspect would spend much more time in prison than he would have spent in the UK.

Poland uses the EAW system more than any other member state: from 519 warrants in 2004 to almost 5000 warrants in 2008 and 2009. Only 13 percent of all issued EAW from 2004–2008

actually led to the return of the requested person.[12] But the case studies on Germany and the UK illustrate that warrants for minor offences are not automatically refused.

To conclude: In particular in its interaction with the German and the British cases, the Polish case illustrates the difficulty of achieving integration in the face of diversity. A more punitive legal system following the legality principle, excluding a proportionality test, has in fact overburdened a European system **(← p. 122)** that was intended for serious crimes only. A decentralized implementation, coupled with language problems and an insufficient understanding of the principles underlying the penal systems of the other 27 member states, leads to significant diversity in implementation – a lesson also told by the German case. Moreover, the case shows how mutual recognition in JHA actually has to include a holistic view on the different institutional complementarities of a system. If long sentences are coupled with significant facilitations during imprisonment, this practice has to be transferred in order to bring about fair results.

CONCLUSION: CAN THE CIRCLE BE SQUARED? THE PITFALLS OF DEMOICRATIC GOVERNANCE

Mutual recognition brings an alternative to European harmonization, allowing member states to pursue their political objectives while achieving transnational cooperation benefits in the EU. Along with the introduction of this volume, we have asked how the "functional pressure for more integration" can be reconciled "with the sovereignty and identity concerns of the national *demoi*" (Cheneval et al. 2014: 12). Does mutual recognition require a "shadow of hierarchy" to work? Or does it manage "to strike a balance between the preservation of the will of the statespeoples, expressed in the maintenance of the domestic rule, and the non-discrimination of EU citizens as individuals, regardless of their country of origin" (Cheneval et al. 2014: 12). Interestingly, the experience in the compared fields of mutual recognition in goods and in the EAW is counterintuitive. One should have expected that it is much easier to recognize rules

that are domestically often delegated to private standardization committees than rules infringing on individual freedoms and subject to parliamentary reservation. But the experience in the single market shows that "maximal recognition" (Nicolaïdis 2013: 363) is simply enforced vertically with a strong hierarchical shadow. It is not possible to assess in this context, however, whether the institution of this shadow was due to serious problems in the functioning of more voluntary recognition or due to "the pathology of messianism, grounded in the belief in the cause of deeper integration in and of itself" (Nicolaïdis 2013: 362). A forced recognition of all rules, however, hurts the domestic democratic decision; if any rule counts equally, determining these looses importance.

Mutual recognition in the EAW system shows a very different experience. Although vertical elements are largely missing, there is a surprisingly high level of cooperation. The strong criticism on the part of judicial authorities on the practices of other member states indicates, however, that the system is not build on mutual trust, but on reciprocal dependence. The example thus shows that demoi-cratic, multi-centered governance can even function with little trust. There is no alternative to cooperating in the EAW system as the old system of extradition was abolished. And the experience of Germany after the constitutional ruling on the first implementation act showed that some member states adopt a 'tit for tat' strategy if others do not cooperate. In contrast to the internal market for goods, where the barring of one product from the **(← p. 123)** market does not mean that other exporters will boycott the member state, the cooperation of member states' authorities is exclusive and subject to high levels of reciprocity. Until now the far-reaching horizontal nature of the regime has allowed countries to introduce additional safeguards and exceptions for own nationals. It can be expected that with the introduction of more hierarchical elements after 2014, member states will face problems upholding these.

As such, the EAW thus seems an example of successful multi-centered governance. Yet, the case studies have pointed to several problems. In this concluding section, we would like to

highlight the problem of heterogeneity, and the problem of individual rights. It is here, in reconciling individual rights and those of demoi, that the concept of demoi-cracy may find its biggest challenge.

Multi-centered governance being legitimated by the demoi of the member states poses high demands on member states' judicial authorities in the administration of the system. As is known from mutual recognition, this mode of governance imposes high transaction costs in its operation. The higher the number of the participating member states, and the greater the institutional diversity they represent, the more complex is the system. While being an alternative to harmonization, mutual recognition thus confronts very similar challenges of heterogeneity. A related issue are institutional complementarities for instance between the length of sentences, and the leniency of amnesties. If the UK gives a double life sentence, but generally grants an amnesty after 15 years, these practices have to be acknowledged when mutually recognizing the sentence. Even if different penal systems are equivalent, if mutual recognition leads to a reconfiguration of different elements, equivalence is lost.

Next to administrations, multi-centered governance also subjects individuals to the need to find their way with the penal systems of 28 member states. Wherever they are in the EU, they may be subject to a penal code of a member state, whose territory they have never touched, but to which a relation can be construed. With mutual recognition in JHA, individuals become subject to foreign penal systems, which they could not influence themselves. "…the criminal offence must have been defined by a legal order which the suspected person can be expected to know and by a legislature which he, too, has typically been able to legitimate through democratic election…one must ask to what extent it can really be justified to subject a suspect to the decisions of a (foreign) legal order which he cannot seriously be expected to foresee and which he certainly has not democratically legitimated" (Möstl 2010: 434). It thereby violates a fundamental precept of democratic rule (Besson 2007: 7).

The smooth operation of the EAW can lead to very dubious and unjust results, when individuals are held in custody and surrendered for minor crimes or based on faulty court proceedings, for instance with no translation facilities. When judicial authorities act on demand of authorities of other member states which lack sufficient authorization, serious questions of accountability arise. Who is accountable to the individual deprived of his or her **(← p. 124)** freedom, the authority who acts automatically, or the one who issues the warrant? The high number of complaints about warrants issued and executed for minor crimes underlines this pressing question. Individuals have insufficient means for appeal and for compensation.

Apparent is that the common membership in the European Convention of Human Rights does not provide for sufficient human rights protection. One result has been the harmonization on how to deal with in absentia judgments that had led to difficulties in mutual recognition. A framework decision of minimum harmonization measures for in absentia judgments entered into force in March 2009 (2009/299/JHA). All member states now have accept judgments in absentia. This example supports the argument of Lavenex and Wagner, who claim that mutual recognition in JHA leads to a deterioration of individual protection rights (Lavenex 2007; Wagner 2011). It shows that a mutual-recognition system might facilitate the adoption of minimum-harmonization measures, resulting in 'managed mutual recognition'. Since the scope of national criminal law and procedure is no longer purely national, other member states feel pressured to call for minimum standards. But also rulings of the Court may bolster individual rights increasingly, as the Charter of Fundamental Rights has become binding. Already in the case NS v UK (C-411/10) the Court ruled in early 2012 that given poor conditions for refugees in Greece, member states were not allowed to transfer asylum seekers back, if these risked facing inhuman treatment. Mutual recognition, according to this ruling, should not consist of blind trust.

In summary, the EAW shows that individual rights are being violated while honoring the rights of demoi to continue the self-determination of their criminal systems. And it is only by

institutionalizing measures such as the EAW that self-determination can be enforced: with individual mobility granted in the EU, mobile actors are more equal than immobile ones, being to some extent able to pick the rules under which they operate. This makes it no longer possible to commit the own population to rules (they can simply exit), nor to enforce all rules on the territory. The way the EAW is conceptualized, however, privileges the respect of demoi at the expense of individuals. The experience of the single-goods market in contrast warns that a duty of recognition implies that demoi forego their rights of self-determination. It may be that managed-mutual recognition can avoid both pitfalls by combining minimum harmonization with recognition of diversity. But conceptual work on demoi-cracy should not just assume this, it has to take up the challenge from positive analyses of demoi-cratic governance on how to balance rights of individuals with those of the demoi (Cheneval and Schimmelfennig 2013: 340). It could turn out, in the end, that demoi-cratic governance is like squaring the circle – seemingly possible at times, but not to be achieved in the end.

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NOTES

[1] Schengen information system database statistics, number of warrants pending: Council documents 6162/10, 6434/2/11 REV 2, 8281/12, 7389/13.

[2] Almost all prosecutors criticize the poor translations of incoming EAW. However, language problems hamper direct communication between the cooperating authorities.

[3] The national implementing laws have been challenged in Germany, Poland, Cyprus, and the Czech Republic by constitutional or supreme courts (Commission 2005). Only the Czech court ruled that the implementing law was not in breach with the constitution (Guild 2009).

[4] "Deutsche werden kaum ausgeliefert", TAZ, 16 March 2009.

[5] TAZ, 16 March 2009.

[6] See: http://blog.balder.org/European-Arrest-Warrant-Extradition-Thought-Crimes.php, accessed 25 March 2013.

[7] Daily Telegraph, 21 August 2010.

[8] E.g. Economist, 30 October 2009 and 20 October 2010.

[9] Economist, 23 September 2010

[10] Available at, http://www.fairtrials.net/cases/andrew-symeou/, accessed 22 March 2013.

[11] Available at, http://www.cam.ac.uk/research/news/opt-out-and-suffer-the-consequences-eu-criminal-law-report-warns, accessed 22 March 2013.

[12] Own calculations based on annual EAW Council statistics, years 2004-2008: 7155/4/05 REV 4, 11371/2/07 REV 2, 9005/5/06 REV 5, 10330/2/08 REV 2, 7551/6/10 REV 6, 7551/4/10 REV 4.

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