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Mutual recognition and the monopoly of force: limits of the single market analogy

Sandra Lavenex

ABSTRACT The introduction of the principle of mutual recognition in EU justice and home affairs co-operation has been associated with a ‘revolution’ in internal security co-operation and has raised as many expectations as concerns. Whereas most discussions focus on the legal coherence of the concept in third pillar legislation and its potential tensions with procedural law and human rights standards, this article goes two steps back and questions at a more fundamental level the transferability of a principle of market integration into a core area of statehood and analyses the institutional preconditions for its implementation. Juxtaposing the different constellations of interdependence and governance modes in the economic and internal security spheres, it is argued that what functions as an instrument of liberalization in one sphere becomes a tool of governmentalization in the other, yet hampered by an unsettled tension between supranationality and states’ prerogatives.

KEY WORDS Criminal law; judicial co-operation; justice and home affairs; governance; mutual recognition; third pillar.

INTRODUCTION

The adoption of the principle of mutual recognition in European Union (EU) justice and home affairs (JHA) co-operation can be seen as a typical case of institutional isomorphism where a policy concept that has proved useful in promoting integration in one area, the single market, has been borrowed to realize another area of integration, the ‘area of freedom, security and justice’ (AFSJ). With the Tampere European Council of 1999, it was decided that the principle of mutual recognition should become a cornerstone of judicial co-operation in both civil and criminal matters within the EU. Before, this principle had been realized in the system of state responsibility for the examination of asylum claims, the 1990 Dublin Convention, and later turned into a European Community (EC) Regulation. In a nutshell, the implementation of this principle removes a major obstacle to cross-border law enforcement because

different national standards with regard to refugee law or criminal codes no longer obstruct judicial co-operation and extraditions between member states. At a first glance, the motives for adopting the principle in market integration and the AFSJ are similar: it allows for co-ordination despite the impossibility of agreeing on the harmonization of rules and a fully supranational integration. This perspective, together with the ambitions to turn JHA co-operation into a genuine European public order (Kaunert 2005; Lavenex and Wallace 2005) have led observers to compare the dynamism implied with that of the single market project.

These developments have not only induced an increasing number of scholars to work on the topic, but have also raised a number of concerns regarding the substance and potential effects of this deepening area of co-operation on both the balance between human rights and security considerations (e.g. Albrecht 2004; Guild 2004; Lavenex and Wagner 2005; Mitsilegas *et al.* 2003; Wagner 2007) and notions of sovereignty (Jachtenfuchs *et al.* 2006; Kaunert 2005). Although these two dimensions are crucial for any discussion of the principle of mutual recognition in JHA, the scope and limits of the single market analogy implied in this process have hitherto remained largely unreflected upon, so have the more structural preconditions for applying this principle in this area.

This article starts with a discussion on the viability of the single market analogy, that is, how far the principle of mutual recognition that we know from market integration retains the same meaning when transferred to the sphere of internal security. In other words, what is the purpose of mutual recognition, what is its object, and what are the effects on inter-state relations? There is a fundamental difference between the mutual recognition of regulations regarding trade products and the mutual recognition of judgments and judicial decisions that strike a balance between the interests of the issuing state and a person's rights and liberty. It will be argued that what serves as an instrument of liberalization in one sector, expanding the societal *vis-à-vis* governmental sphere, may work exactly in the opposite direction in another sector. The second section turns to the preconditions for an efficient and legitimate application of this principle in the various fields of the AFSJ (asylum policy and judicial co-operation in criminal matters) and its relations with other principles of integration such as harmonization and approximation. Introducing the main legal arguments of the debate, it will be argued that these preconditions may best be understood by adopting a governance perspective on co-operation that emphasizes the need for a strong institutional (decision-making rules) and normative (trust) embedding. The limits of the current framework of co-operation are then exemplified using evidence from the first practical experiences with mutual recognition in JHA, with an emphasis on the European Arrest Warrant (EAW). The conclusion situates this analysis in the context of the relationship between states' sovereignty and integration and discusses the prospects for mutual recognition in the context of an open constitutional future.

THE LIMITS OF THE SINGLE MARKET ANALOGY

The justification of the introduction of the principle of mutual recognition in JHA draws on the analogy with single market integration, its dynamism and success. Noting the slowness and intricateness of traditional forms of judicial co-operation, the Commission argued in its first Communication on the introduction of the principle that 'borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial co-operation might also benefit from the concept of mutual recognition' (Commission 2000: 2). The simple analogy would be that 'a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case' (Commission 2000: 4). The limits of the single market analogy have to be sought at three levels: first, the question as to who benefits from mutual recognition, that is, the wider purpose of applying this principle; second, the scope of state regulations, structures and activities affected when applying mutual recognition; and third, the implications of mutual recognition in terms of its functional equivalence to other, alternative modes of integration.

Who benefits from mutual recognition and for what purpose?

The first set of questions relates to the subjects whose cross-border interactions benefit from mutual recognition, and the implications of adopting this principle for the relationship between sovereignty and liberalization in the process of European integration. In the single market, mutual recognition facilitates the cross-border flows of economic goods and services. It is an instrument to facilitate economic transactions between societal actors in spite of partly differing state regulations. In the AFSJ, mutual recognition promotes the free movement of judgments and judicial decisions; that is, state acts. In asylum matters, the member states agree to recognize the outcome of the asylum determination procedure issued in the state responsible for the examination of the claim under the Dublin Convention/Regulation. In criminal law, the member states accept final judicial decisions, e.g. an arrest warrant or other decisions laying down sanctions issued under the law of that state. Those benefiting from mutual recognition are hence not societal actors but state representatives. As stated in a recent JHA discussion paper by the Finnish Presidency: 'The advantages of mutual recognition over traditional forms of international co-operation are considerable ... As a result of the application of the principle of mutual recognition, judicial decisions can be enforced much more quickly and with greater certainty. The amount of discretion is reduced, as is the scope of grounds for refusal' (Finnish Presidency 2006: 1).

There is thus a fundamental difference in the nature of the flows addressed: in the first case, single market integration, mutual recognition eases the cross-border movement of societal interaction, thus contributing to processes of

liberalization and socialization. The private sphere and the rights of individuals engaged in trade and consumption are enhanced while the regulatory scope of the member states is reduced. In the case of judicial co-operation in JHA, in contrast, the introduction of mutual recognition does not expand the rights of individuals *vis-à-vis* the state. On the contrary, it facilitates the cross-border movement of sovereign acts exercised by states' executives and judicial organs. The relationship between the principle of mutual recognition and the balance between state and society, liberalization and sovereignty is thus reversed. Fritz Scharpf's well-known criticism of the detrimental effects of mutual recognition and, more broadly, 'negative integration' on states' regulatory capacities and the dangers of a race to the bottom in the level of regulations (Scharpf 1999) thus needs to be revised in relation to the AFSJ. Instead of increasing individual freedoms in relation to the regulatory scope of government, in the AFSJ, mutual recognition boosts the transnational enforcement capacity of governmental actors. As will be argued below, in the absence of a complementary approximation of minimum standards, the application of this principle may also engender a race to the bottom, not with regard to regulation but to human rights and legal procedural guarantees. At this stage it shall suffice to point out that what used to be a tool of liberalization in one sector may become an instrument of governmentalization in another one.¹

What is being mutually recognized?

The second important difference concerns the 'object' that governments agree to mutually recognize and its scope in terms of sovereignty implications for the participating states. In the economic sphere, the object of recognition are another country's rules on products and production methods. In its landmark *Cassis de Dijon* decision, the European Court of Justice (ECJ) ruled that all member state regulations, whatever their differences in detail, should be deemed equivalent in effect. Consequently, products produced legally in one member state should be considered equally safe, environmentally friendly, etc. as those produced legally in any other member state. If one member government prohibits the sale of a product produced legally in another member state, the producing firm can challenge that prohibition under European law. The issue at stake are hence member states' laws that enshrine regulatory standards; these are clearly discernible legal texts that can be easily accessed by other member states and, if necessary, courts. In JHA, by contrast, the object of recognition reaches much further as it applies to sovereign acts of the judiciary in their interpretation and application of a whole set of material and procedural laws. By applying mutual recognition, another member state not only recognizes a law as being equivalent but recognizes the judicial act in its interpretation of all relevant provisions in a given case. In other words, mutual recognition not only implies that member states recognize other norms as equivalent to their own but that they accept the need to co-operate in the enforcement of other states' systems of law. For instance, under the EAW (see below), the member state

issuing the warrant delegates the act of arresting a suspect to another. The latter, by arresting the suspect, puts its monopoly of force into the service of the former (Jachtenfuchs *et al.* 2006: 24). 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. The object of recognition is extended to another country's legal and political system as such in its function as both warrant of internal security and protector of individual rights.² This, of course, requires a much higher degree of mutual trust than in the area of economic integration (see below).

The lure of sovereignty

The third problem with the single market analogy concerns the relationship between mutual recognition and other mechanisms of integration. At this functional level, the analogy suggests that mutual recognition would fulfil the same function as in the single market: it would allow for policy co-ordination and sectoral integration without the need for uniform legal and institutional standards. The apparent safeguarding of national sovereignty under the principle of mutual recognition in contrast to supranational harmonization was a major motive in the eyes of its promoters in the run-up to the Tampere summit, in particular the UK government. The idea that mutual recognition would allow for co-operation despite the many obstacles to harmonization, and thus would represent a more realistic and easily achievable alternative to the latter, permeates the earliest to the latest documents dealing with the issue. Although not completely denying the interplay between the two modes of co-ordination, the Commission, in its 2000 Communication, noted that

Not always, but often, the concept of mutual recognition goes hand in hand with a certain degree of standardization of the way states do things. Such standardization indeed often makes it easier to accept results reached in another state. On the other hand, mutual recognition *can to some degree make standardization unnecessary.*

(Commission 2000: 4; emphasis added)

In a similar vein, the relevant article of the (stalled) Constitutional Treaty reads: 'The Union shall endeavour to ensure a high level of security through . . . the mutual recognition of judgments in criminal matters and, *if necessary*, through the approximation of criminal laws' (Art. III-257(3); emphasis added). On the surface, the adoption of mutual recognition appears easier than harmonization or the adoption of minimum standards since it does not imply the creation of supranational rules and thus appears less compromising for state sovereignty.

Yet, as Kalypso Nicolaïdis suggests, mutual recognition 'is both about respecting sovereignty' (by forgoing the option of total harmonization and centralization) 'and radically reconfiguring it – by delinking the exercise of sovereign power from its territorial anchor' (Nicolaïdis 2007: 685). From this

perspective, the exercise of mutual recognition constitutes a reciprocal allocation of jurisdictional authority to prescribe and to enforce, or a horizontal transfer of sovereignty (see also Schmidt 2005: 190). Jurisdiction is disjoined from national territory, and hence also from the people and their democratic polity.

The framing of mutual recognition as the 'easier' and less demanding way to achieve co-ordination not only underestimates the importance of legal harmonization and approximation for the realization of mutual recognition in the single market as complementary mechanisms of integration (Majone 1994: 83; Nicolaïdis 1993; Schmidt 2005: 192), it also fails to see that for a number of institutional and normative reasons, these complementary mechanisms are much more difficult to achieve in JHA than in economic co-operation. These barriers are discussed in the next section.

PRECONDITIONS FOR MUTUAL RECOGNITION IN THE AFSJ

The temptation to regard mutual recognition as an alternative to harmonization neglects the fact that the application of mutual recognition never occurs in an institutional void but is always managed (Nicolaïdis 1993). This 'management' concerns first its relation with other, more formal principles of integration, along with the institutional prerequisites for their realization. The second dimension is more informal, and refers to the societal prerequisites of mutual recognition as trust and confidence in each other's legal systems. This section first summarizes the state of the art of the academic debate on mutual recognition in the AFSJ, which has a predominantly legal focus. Questioning this literature's expectations in the positive effects of a widening of the Union's legislative mandate the following sections emphasize from a governance perspective the institutional and normative preconditions for mutual recognition.

The legal argument: mutual recognition versus approximation and harmonization

Most discussions of mutual recognition in the AFSJ existing so far take a legal perspective and concentrate on its legal basis. This literature converges in an important observation, namely that the competences for facilitating law enforcement measures between member states, and thus the 'security' element of the AFSJ, are much stronger than that for approximating 'freedoms' or 'justice', especially human and procedural rights in criminal proceedings (i.e. Alegre and Leaf 2004; Guild 2004; Lööf 2006; Weyembergh 2005). Whereas Article 31 (1) a and b, Treaty on the European Union (TEU) provides an explicit legal basis for 'facilitating and accelerating co-operation between competent ministries and judicial or equivalent authorities of the Member States in relation to ... the enforcement of decisions' and 'facilitating extradition between Member States', the Commission has had to appeal to a (contested) logic of implied competences for action in the area of procedural rights.

A look at official documents introducing mutual recognition in the AFSJ shows that despite the principle's framing as an alternative to approximation or harmonization (see above), the need for certain common minimum standards on the suspects' rights has been recognized. The Tampere European Council argued, without further specification, that 'enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.' The common ground for this assumption is the European Convention on Human Rights (ECHR) to which all member states abide and in particular its Articles 5, 6 and 7. However, the Commission argued already in 2000 that 'Some specific aspects of procedural law could nevertheless be spelled out in more detail, for instance the conditions under which legal advice and interpretation are provided. The same can be said for particular types of procedures' (Commission 2000: 16). Another objection relates to procedural guarantees contained in Protocol 7 of the ECHR which is unevenly ratified amongst the member states. As Elspeth Guild notes, the Draft Constitutional Treaty, which would have made some progress in this direction, contains numerous weaknesses. It only partially incorporates the due process rights contained in the ECHR, and does not mention its seventh Protocol. What is more, the list of areas where minimum standards should be agreed according to Article III-166(2) is flawed because it misses key questions related to the implementation and exercise of law enforcement (Guild 2004: 231).

Despite differences in the exact motivation for their claims, both the Commission and most legal scholars converge in their conclusions that mutual recognition has unbalanced effects and that it requires a stronger level of legal approximation. Analysing the modes of governance predominant in JHA co-operation, and drawing parallels with other existing examples of 'positive' integration in this area, the next section argues that the effects of such exclusively legal reforms should not be over-estimated.

The governance perspective: institutional and normative embeddedness of mutual recognition

From a governance perspective, the scope for mutual recognition in JHA is constrained by a range of institutional and ideational factors that shape member states' co-operation in this field. The governance perspective emphasizes the role of formal and informal principles, norms, rules, and procedures in a system of co-operation and allows us to highlight the interplay between these structures and the contents of co-operation (Jachtenfuchs and Kohler-Koch 2004: 97; see also Wagner 2007). The institutional modes of policy-making have implications for the likelihood that common standards are adopted in the first place and also affect the contents of common rules. At a more informal level, the ideational or normative foundations of co-operation circumscribe the societal basis of mutual recognition and in particular the requirement of

transnational trust in its realization. It will be argued that the predominance of transgovernmentalism in JHA co-operation limits the scope for legal approximation as a complement to mutual recognition, whereas the lack of mutual trust between member states' judicial organs circumscribes the application of the principle of mutual recognition.

Intensive transgovernmentalism, positive integration and mutual recognition

The mode of policy-making in JHA has been characterized as intensive transgovernmentalism (Wallace 2000; Lavenex and Wallace 2005).³ In general terms, this mode underlines the prominent role of bureaucrats and state officials below the level of government representatives in establishing networks with their counterparts in other member states that develop a certain degree of autonomy in decision-making and implementation. Although important differences exist between those aspects of JHA that have moved to the first pillar and those that remain in the third, a common characteristic is the importance of such networks in both legislation and operational co-operation. This has implications for the scope and the consequences of applying mutual recognition in JHA and its 'management' in relation with other modes of positive integration such as harmonization and approximation of laws. On the one hand, transgovernmentalism gives the 'policemen of sovereignty' (van Outrive 1995: 395), the Ministers of Justice and the Interior, a particular weight in the legislative process, thereby limiting the scope for supranational legislation. On the other hand, transgovernmentalism emphasizes the role of operational co-operation that operates below the level of legislation. Again, this works against the idea of complementing mutual recognition through common supranational standards and enforcement institutions.

At the legislative level, intensive transgovernmentalism manifests itself in the limitation of supranational decision-making procedures. In the first pillar, the introduction of the exclusive right of initiative for the Commission, decision by qualified majority voting in the Council and co-decision by the European Parliament (EP) were only realized after a transition period of five (in practice seven) years. As a consequence, the so far most important directives establishing minimum standards were still adopted through the intergovernmental method and important reservations remain on the powers of the ECJ. Likewise, the third pillar still operates with unanimity which, with the EU's enlargement, has become increasingly difficult to achieve (Finnish Presidency 2006: 2). Another legacy of earlier modes of co-operation that prevails in both the first and third pillars is the working structure of the Council. This includes a fourth level of decision-making, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), which gives a crucial role to member states' high-level law and order officials.

Intensive transgovernmentalism inhibits the scope for the adoption of supranational policies or 'positive integration' in two ways. First, by privileging governmental actors' respective interests over a comprehensive vision of a policy field, not all relevant aspects of a policy become subject to approximation, but

only those where actors' interests converge. Second, if a legal text is finally adopted, it will usually reflect the lowest common denominator and reserve the member states a large degree of discretion in implementation. The lack of consistency in approximation is well reflected in the area of criminal law where most of the approximation has concerned substantive criminal law, and, in particular, the definitions of offences. By contrast, the areas of criminal sanctions and of criminal procedure, that are at the core of national sovereignty, have been largely neglected (Weyembergh 2005: 1585). Furthermore, the types of crime covered by this substantive approximation tend to reflect political conjunctures rather than objective criteria in terms of severity or the cross-border nature of crimes.⁴ The second characteristic of positive integration measures in JHA is the weakness of obligations implied. Definitions are often formulated in a vague manner, so to rule out substantial adjustment of domestic legislation, the legal texts contain many exemption clauses and the member states retain a high margin of discretion in interpretation and application. This can be retraced both in third (Weyembergh 2005) and first pillar legislation (Lavenex 2006).

It seems that the Commission has noticed this lack of political will when it concedes in its report on the implementation of the Hague programme on JHA co-operation of June 2006 that results in legal approximation both in asylum and criminal law matters have remained behind expectations. A good example of the limits of positive integration in first pillar issues is the directive on minimum standards in asylum procedures adopted after multiple delays in December 2005. Fraught with exemption clauses, vague formulations and providing for minimum standards below those usual in national legislation, the directive has been criticized by the EP for constituting a threat to human rights and refugee law principles and for containing too many exceptions.⁵ In the case of third pillar legislation, the Commission Report of 2006 notes that 'major delays . . . sadly arose with the adoption of two flagship measures: political agreement on the Framework Decision on the evidence warrant was reached only in June 2006, and the one relating to certain procedural rights is still under discussion. Neither of them was adopted in 2005 as planned in the Hague programme' (COM(2006) 333 final §51). Whereas the evidence warrant extends the principle of mutual recognition to a new field, the Commission proposal for a Framework Decision on procedural rights applying in proceedings in criminal matters throughout the EU constitutes an attempt at legal approximation in procedural law. Already defensive in its wording, the Commission proposal has been criticized by the EP and the UK House of Lords for being too vague and non-committal (European Parliament 2005; House of Lords 2005: § 42). Indeed, its support among the member states can be questioned. Whereas some argue that the ECHR provides enough protection, others are concerned that such a measure would impose constraints on their domestic criminal justice systems and would thus infringe the subsidiarity principle (Morgan 2004). Stating the lack of progress in Council negotiations, a number of observers have voiced the concern that without a shift to qualified majority voting, it would become nearly impossible to agree on common provisions. An attempt by

the European Commission and the Finnish Presidency to realize this shift through the application of the so-called *passerelle* of Art. 42 TEU, allowing for the introduction of supranational procedures, was however rejected in the informal JHA Council in September 2006.

Pending the introduction of supranational procedures, which is foreseen in the Constitutional Treaty, it seems that a majority of member states concentrate on operational co-operation which serves as one main avenue of integration next to legislative decision-making. Operational networks of law enforcement officials are created for exchanging information, for conducting joint investigations to enforce the law and for setting standards of co-operation in the form of memoranda of understanding. Originally developed 'bottom-up' between the relevant authorities of the member states, such operational networks have been complemented by more vertical structures created on the European level to spur their operations (den Boer 2005). The most prominent examples of vertical co-ordinating structures are Europol⁶ and Eurojust.⁷ These bodies fulfil the main purpose of exchanging information between the member states, and of co-ordinating the implementation of joint law enforcement activities. The clear distinction between operational and legislative integration in the Draft Constitutional Treaty suggests that the former is seen as an alternative to legal approximation. With regard to mutual recognition, network organizations such as Europol or Eurojust could fulfil the role of bundling and diffusing necessary information on laws, legal judgments, authorities or contact points. Whereas this would increase the transparency of legal systems, it would not reduce the problem of unbalanced effects of mutual recognition in the absence of legal approximation.

Trust and the normative foundations of mutual recognition

The horizontal transfer of sovereignty implied by applying mutual recognition is only possible if a high degree of trust exists among the participating countries (Majone 1994: 75; Scharpf 1997: 137f.). The requirement of trust is particularly important in the area of JHA, where mutual recognition not only means that member states accept that they will co-operate in the enforcement of each other's laws (see above), but where the judicial decisions at stake have immediate implications for human rights and fundamental freedoms (on trust and JHA, see also Anderson 2002; Walsh 2006). As pointed out by the ECJ in its first response to a preliminary reference on mutual recognition under third pillar legislation, 'there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied.'⁸ In this case, the issue at stake was the mutual recognition of decisions to discontinue proceedings. Thus, whereas in one member state, a crime would lead to a court judgment, the former may be bound to recognize the solution in another member state, where a settlement is accepted for certain categories of crimes.

According to some observers, the realization of mutual recognition would imply 'a genuine paradigm shift in legal co-operation between member states' (Wouters and Naert 2004: 919). A look at relevant court decisions shows that the necessary level of trust in each other's judicial systems cannot be presupposed. A good example of this is the *Rachid Ramda* case of 2002 relating to an extradition warrant issued by France against Mr Ramda, an Algerian national, to stand trial for participation in terrorist bombings in France in 1995.⁹ After stating the probability of ill-treatment in the gathering of evidence by the French police, a UK Division Court decided to quash the Secretary of State's decision to extradite Mr Ramda to France for want of proper consideration by the Home Secretary of the issue of the fairness of the evidence against him (Alegre and Leaf 2004: 200; Guild 2004: 227). Similar decisions can also be made by French judges in respect of Spanish extradition requests or by German courts in respect of French extradition requests, where the national courts have failed to be satisfied that the claim of the right to punish the individual made by another EU member state is justified (*ibid.*). The prevalence of mutual distrust is also visible in the second JHA area where the principle of mutual recognition has been codified: asylum law. As mentioned above, the implementation of the Dublin system of responsibility allocation for the examination of asylum claims presupposes the equivalence or at least acceptability of asylum determination standards among the member states. In reality, however, there is great variation between the level or procedural safeguards as well as differences in the interpretation of what constitutes a refugee, which will only partly be approximated once the recent directives on refugee status and asylum procedures are implemented. Meanwhile, a significant amount of jurisprudence shows the limits of the application of the Dublin system. In 1999, the British Court of Appeal quashed the Home Office's decision to transfer several applicants to France and Germany, noting that the applicants concerned could, in principle, have been entitled to refugee status in the United Kingdom, whereas this was not possible in Germany and France because of their more restrictive policies (Danish Refugee Council and European Commission 2001).¹⁰ By 2006, the courts of nine member states had blocked transfers under the Dublin Regulation to Greece on protection grounds (ECRE 2006). Needless to say, enlargement to 27 + member states, with partly unconsolidated principles regarding the rule of law, will only exacerbate this problem. This is the reason why the JHA ministers, when debating about the introduction of the EAW, proposed limiting its use to the 'old' member states. This decision was later reversed by the Committee of Permanent Representatives on political grounds. The next section turns to the experience gathered with this instrument in practice.

THE PRACTICE OF MUTUAL RECOGNITION IN JHA

The first and also the most symbolic measure to officially apply the principle of mutual recognition in JHA is the Framework Decision of 13 June 2002 on the EAW and the surrender procedures between the member states. This will be

followed by the European Evidence Warrant and framework decisions on freezing property or evidence, confiscation and financial penalties. What have been the experiences with the implementation of the EAW, and how far have its implementation and the further codification of mutual recognition been impeded by the lack of legal approximation and mutual trust? The relatively open wording of the EAW makes it a good indicator for assessing the desire on the part of the states to commit themselves on the route to the mutual recognition of judicial decisions in the law enforcement area. Since the Framework Decision only sketches the main guidelines, its realization is dependent on the behaviour of two main players: the national legislators who are responsible for the successful transposal of the European text and the competent judicial authorities for the application of the warrant.

The transposition into national law

On the surface, the implementation of the EAW has proceeded relatively smoothly. Whereas only half of the member states complied with the time limit laid down, by 22 April 2005 all member states had transposed the Framework Decision. Several member states had to revise their constitutions to do this. Nevertheless, in its first report on the implementation of the EAW, the Commission took a rather critical stance on domestic transpositions. In an annexe to its Report the Commission has set out a detailed, article by article, analysis of how the Decision has been implemented in the law of the member states (SEC(2006) 79). One manifestation of member states' reluctance to fully apply the EAW is the extension of grounds for non-execution of a surrender request by other member states. Whereas some countries have transformed the optional grounds for non-execution of Art. 4 EAW into mandatory grounds, others have included non-execution clauses that were not part of the Framework Decision. British law says that after the decision to surrender on the part of the judge, the minister may decide not to execute if the person acted 'in the interest of national security'. Italian legislation stipulates that the judge must not only check the conformity of the procedure with regard to the fundamental principles of Italian law but he must also check the grounds of the affair to ensure that there is sufficient evidence of proof. Furthermore, the grounds for non-execution provided for in the EAW such as the violation of fundamental rights (article 1) or discrimination (preambles 12 and 13) have been sometimes implemented in a manner exceeding the wording of the Framework Decision. Under the third pillar, the Commission has no competence of appeal in the case of default by states who have not transposed the Framework Decision correctly.

The practice of national courts

By September 2004, 2,603 warrants were already issued, 653 persons arrested and 104 persons surrendered (COM(2006) 8: 4). Beyond these general numbers, however, few data exist on the actual application of the EAW by national courts. Nevertheless, two sources point to the existence of several difficulties with this

practice: Eurojust's Annual Report and national constitutional courts' rulings. Eurojust has no competence to gather data on the number of EAWs issued, but member states must report failures to meet EAW deadlines to this body. Yet, in 2005, only seven out of the 25 member states responded to the Eurojust questionnaire, thus limiting the scope for interpretation (Eurojust 2005: 35). A more indirect way to monitor implementation has been the organization of strategic meetings arranged by Eurojust with practitioners of the member states. At these meetings, many grounds for refusal to execute the EAW were mentioned, among which were those typically invoked in cases of limited mutual confidence such as insufficient description of facts and lack of complementary information (Eurojust 2005: 41).

In several member states constitutional courts ruled the Framework Decision to be incompatible with the provisions of the constitution, in particular concerning the extradition of nationals. In April 2005 the Polish Constitutional Tribunal found that the EAW offended the Polish Constitution's ban on extraditing Polish nationals. The Supreme Court of Cyprus has found that the EAW falls foul of a clause in the Constitution of Cyprus prohibiting their citizens from being transferred abroad for prosecution. In July 2005 the German Constitutional Court annulled Germany's law transposing the Framework Decision because it did not adequately protect German citizens' fundamental rights. The case concerned the surrender of a suspected terrorist of German/Syrian origin to Spain. As a result of the decision, German nationals could not be extradited until new legislation was adopted. Within a short time, the Spanish Parliament took retaliatory measures, banning the surrender of Spanish nationals to Germany and demonstrating that national sovereignty is still very much the point of departure for European co-operation in criminal matters. As noted in a report by the House of Lords:

if one Member State refuses to execute an EAW on grounds which are not permitted under the Framework Decision then other Member States might well feel justified in doing likewise. Were such practice to become widespread then the whole regime could break down and its benefits would be lost. Mutual recognition and reciprocity would seem to go hand in hand.

(House of Lords 2006: § 29)

Finally, the legality of the EAW has been called into question. On 13 July 2005, in response to an annulment action challenging the Belgian legislation implementing the EAW, the Belgian Constitutional Court referred a preliminary question to the ECJ. It asked whether removal of the double criminality requirement for 32 types of offence was contrary to the principle of non-discrimination and equality, and whether this derogation would be contrary to the principle of legality in criminal matters.

The questions raised by the Belgian Constitutional Court and the verdict handed down by the German Constitutional Court point to the tension between adopting mutual recognition in the absence of complementary positive integration such as approximation of substantive criminal law and procedural safeguards, and the development of rules on criminal jurisdiction.

CONCLUSION: AN EVOLUTIONARY APPROACH TO MUTUAL RECOGNITION?

This article has sought to show the limits of the single market analogy implied in the imitation of the principle of mutual recognition as an instrument of integration in JHA. These limits were retraced at three levels: the semantics of the term; the institutional and normative preconditions of the instrument; and its operation in practice. The semantic analysis showed that whereas mutual recognition functions as an instrument of liberalization in single market integration, its realization would amount to an instance of governmentalization in JHA. Here, it is not the societal sphere and its cross-border transaction that are facilitated but governments' cross-border law enforcement activities. This has much deeper implications in terms of horizontal transfers of sovereignty than in economic regulation. Whereas existing, mainly legal analyses of mutual recognition in JHA denounce its uneven effects on the balance between state prerogatives and individual rights, the governance perspective emphasizes institutional and normative obstacles to its full realization. In institutional terms, the modes of governance prevailing in this area prevent the adoption of strong complementary legislation promoting necessary legal approximation or harmonization. In normative terms, the agents responsible for the implementation of mutual recognition, national courts and judicial authorities, often lack the necessary degree of trust and transnational socialization for its full application. Therefore, its effects in the long run should not be over-estimated. But does this mean that mutual recognition has been just wishful thinking in the ambitions to realize an 'area of AFSJ'?

The difficulties encountered with the implementation of the EAW, and the failure to agree on accompanying minimum standards, have indeed slowed down co-operation on mutual recognition (House of Lords 2006; Finnish Presidency 2006). A good example of the caution that member states now apply towards this principle are the difficult and protracted negotiations surrounding the second measure implementing it, the European Evidence Warrant.¹¹

Yet, these difficulties should not suggest that governments have completely given up on their support for mutual recognition. On the contrary, most of them have continued to issue EAWs, and legal reforms are sought to remedy the negative rulings by Constitutional Courts. At the same time, the Commission has intensified its efforts to surmount the main institutional and normative obstacles to its realization. Among these count the (failed) attempt to introduce supranational decision-making procedures in the Council and various initiatives to spur mutual trust among the member states. These include, for instance, judicial training, the exchange of judges between the member states, as well as enhanced communication between Eurojust and the member states in the implementation of common instruments. Even though these measures may promote judicial authorities' knowledge of each other's laws and procedural standards, and thus improve the necessary level of trust, they only tackle the implementation aspect of mutual recognition. Without the political will to agree on common minimum standards on substantive or procedural criminal

law, the application of mutual recognition will not only have uneven effects on the balance between suspects' rights and states' discretion, it will also remain limited to those aspects where an acceptable level of equivalence exists.

Taking these difficulties into account, and the lack of political will on the part of the member states to take on binding supranational commitments in these core areas of sovereignty, there might be a third perspective on prospects for mutual recognition in JHA. Against common interpretations that the principle's adoption might have been 'a step too far too soon' (Alegre and Leaf 2004), its premature endorsement might be a strategy in itself: a measure to change the rules of the game on the ground so as to increase the functional pressure for approximation or harmonization in the future. Seen from this perspective, the primary ambition of the supranational promoters of mutual recognition could be less its immediate effectiveness than the long-term promotion of judicial communication, mutual learning, and ultimately also approximation and trust. As it was hoped in the single market, legal approximation would thus be achieved by default, through a decentralized diffusion mechanism that circumvents the politicized debates in the Council of Ministers (see Benz 2005; Scharpf 1997). Here again, however, the single market analogy has its limits. The reason is that for such approximation to occur, participating actors need to see the benefits of changing their laws that outweigh the costs of adaptation. Such an evolutionary approach to mutual recognition relies on market dynamics in a competition for the 'better' kind of regulation (Benz 2005). Contrary to, for example, consumer protection standards, where one may expect a certain public pressure for upward approximation, however, no comparable incentives exist in areas such as refugee law or the rights of criminal suspects. In addition, it may be questioned how far a strategy that consciously counts on imperfections at the beginning in order to increase pressure for adaptation in the future is legitimate in the light of its direct repercussion on human rights and individual freedoms.

To conclude, it remains the task of national constitutions and eventually the European constitution to circumscribe the scope for the transnationalization of states' monopoly of force. For the reasons outlined above, mutual recognition may not carry far without the move towards truly supranational structures. Whether the member states are willing to go this step towards a political Union, in the current context of enlargement and constitutional perplexity, however, is doubtful.

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NOTES

- 1 This argument that European integration strengthens the governmental sphere resonates with liberal intergovernmentalism (Moravcsik 1994) and Klaus-Dieter Wolf's thesis of a new '*raison d'état*' (Wolf 1999). For a discussion in the context of JHA, see Lavenex (2006); Lavenex and Wagner (2005); Wagner (2007).
- 2 I owe this point to Miguel Maduro.
- 3 Nicole Wichmann (2006) analyses the consequences of the shift from looser forms of transgovernmental cooperation to mutual recognition for Schengen associates.
- 4 For example, the Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children adopted in the aftermath of the Belgian Dutroux case; the Framework Decision and Directive of 28 November 2002 concerning the facilitation of unauthorized entry, transit and residence, adopted after the death of 58 illegal immigrants in a container lorry at Dover; or the Framework Decision of 13 June 2002 on combating terrorism in the aftermath of 9/11; see Weyembergh (2005: 1585f.).
- 5 European Council on Refugees and Exiles (ECRE), ECRAN Weekly Update of 17 March 2005, online at <http://www.ecre.org/Update/Index.shtml>. Similar criticisms have also been raised with regard to the minimum standards directives adopted in the area of legal migration (on family reunification and long-term residents; see Brinkmann 2004).
- 6 Europol is the EU's criminal intelligence agency. Its aim is to improve the effectiveness and co-operation between the competent authorities of the member states primarily by sharing and pooling intelligence to prevent and combat serious international organized crime.
- 7 Eurojust is a body of senior prosecutors, judges and police officers from each member state, whose main role is to help national authorities work together on investigations and prosecutions of serious crimes.
- 8 Joint ECJ rulings C-187/01 and C-385/01 Gözütok and Brügge of 11.2.2003, ECR-1395 §33.
- 9 CO/4894/2001; [2002] EWCH 1278 (Admin.).
- 10 R v. SSHD, ex parte Adan, Subaskaran and Aitseguer, 1999 INLR 472.
- 11 For instance, for a transitional period of five years after the legislation comes into force, Germany will be allowed to check whether offences mentioned in a warrant are offences under German law, if they fall within six categories which Germany says are poorly defined. The Netherlands, afraid of being swamped with requests about the purchase of drugs, insisted on a clause saying that a country need not provide the requested evidence if the crime in question occurred wholly or partly on its own territory.

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