

**‘Bringing process back in’: investigating the formulation,
negotiation and implementation of the European Arrest
Warrant from a policy analysis perspective**

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Introduction

The purpose of this paper is to complement the increasing and important literature on the development of the European Union's policy competence in justice and home affairs (JHA) with an examination of the policy making process (or processes) that have emerged in this policy space. Rather than analysing the institutionalisation of the macro policy space over time, this paper examines the dynamics of how policy in this area is made through its analysis of the formulation, negotiation and implementation of the European Union (EU)'s European Arrest Warrant (EAW), a key instrument of the EU's police and judicial cooperation in criminal matters. In order to dissect in detail how the policy process in this policy area is animated across all phases of the policy cycle, the paper applies a number of different perspectives derived from both comparative public policy analysis and the study of EU integration to the case study of the European Arrest Warrant.

The European Arrest Warrant, which has replaced EU member states' national systems of extradition with a European system of surrender based on the principle of mutual recognition of judicial and extra judicial decisions, was on the table since the Tampere summit in 1999 but progress of any nature was slow. The Al Qaeda attack on the Twin Towers on 11th September 2001 ensured that this proposal moved to the top of the European JHA ministers' agenda and agreement on the instrument was rapidly reached. The systematic examination of a number of propositions and their observable implications derived from competing analytic frameworks helps answer key questions concerning the policy process in this transgovernmental sphere. Such questions include: where does power truly lie within this case across all phases of the policy process? Are supranational actors such as the European Commission and European Parliament (EP) as marginalised in this sphere as liberal intergovernmentalists would suggest? How have the governance arrangements present in this domain shaped the outcome of the EAW? Can the application of frameworks such as advocacy coalitions and policy network analysis shed any light on the dynamics between policy-actors in this case study? In this way, insights are gleaned into the roles of actors and the effects of the rules of the game in the EU's policy on police and judicial cooperation in criminal matters.

In the late 1990s, analysing the effects of European integration on domestic systems of governance became a new core issue in political science. This school of thought became known as Europeanisation and many EU scholars turned away from looking at the process of EU-level institution and policy building to a more variegated examination of the effects of EU membership on the member states themselves, be it affecting their politics, policy and polity (Börzel and Risse 2003). The term itself quickly became a contested concept amongst scholars (see for instance Featherstone and Radaelli 2003; Graziano and Vink 2006), with at least four perspectives having been adopted, including the impact of the EU on member states (top-down), policy transfer across states and institution and policy building at the EU level (Olsen 2002). The most common interpretation of Europeanisation is the top-down ‘institutionalist’ perspective where the EU is seen to impact on domestic policies, administrative structures and patterns of intermediation of EU member states. The jury is still out on the question of whether Europeanisation research is a ‘passing fad’ or rather a more permanent part of the study of European politics (Graziano and Vink 2006, 3). Nevertheless, as a research agenda, it has increasingly shifted the attention of EU scholars away from the European to the domestic level. As its title suggests, the primary purpose of this paper is to ‘bring process back in’ by examining the process of EU decision making at the supranational level in an important and dynamic policy domain, JHA.¹ Following the lead of legal scholars, JHA as a policy domain is only beginning to receive systematic attention from those interested in the EU’s policy process.

The EU is a negotiation system: to see the policy process fully animated we must examine specific instances of negotiation. But how do we do this? In order to analyse the EU policy process in a dynamic way, it is important to move beyond mere description of instances where policy is agreed at the EU level. Making comparisons and drawing generalisable conclusions across policy cases is always difficult in such circumstances. A number of different tools of analysis have been developed in order to help us analyse instances and processes of policy and decision making, from both the study of the EU

¹ This is not to say that attention to EU level decision making has been wholly neglected (see for example Peterson and Bomberg 1999; Mattila 2004; Thomson et.al 2006).

itself (starting off with the so-called integration theories) and the study of public policy in general. Perspectives range from highly specified theoretical frameworks emanating from the EU literature such as liberal intergovernmentalism and supranational institutionalism (with its roots in neofunctionalism) to the frameworks offered from the study of public policy analysis such as multiple streams, advocacy coalition frameworks, policy network analysis and the concept of epistemic communities. Taking seriously the twin tasks of theoretical investigation and empirical testing (Jupille, Caporaso and Checkel 2003), this paper applies a number of these perspectives to formulation, negotiation and implementation of the EAW in a structured way. Through careful process tracing this paper evaluates the efficacy of a number of these theoretical perspectives, most particularly liberal intergovernmentalism and supranational institutionalism, in helping us analyse and explain EU policy making in this area. While some would contend that the application of such perspectives to the study of the EU's policy making process is not what their creators originally set out to do (e.g. Moravcsik, 1999; Schimmelfennig 2004), in reality it is possible to refocus and reconnect integration theory with the study of EU governance and infuse integration theory in the study of governance.

The application of integration theories and other tools of public policy analysis to instances of EU decision making does help illuminate the process of policy making in action and enable comparisons to be drawn. In so doing, the insights gained from such analyses into the actual interplay between the EU's policy actors such as the Commission, the Council of Ministers and the European Parliament and the institutional structure of individual policy spaces allows us to learn more about the character of the EU's policy making process and in the context of this paper, JHA policy-making.

A commonly-held assumption is that the JHA policy area is primarily intergovernmental (Kuijper 2004), but is this really true? Monar (2001, 763) has characterised JHA as a special policy regime, a 'hybrid between the Community and the intergovernmental method marked by a high degree of differentiation'. Lavanex and Wallace (2005) also point to the transgovernmental nature of JHA policy in the EU. In spite of the reforms

instigated at Amsterdam (most notably bringing visa, asylum and immigration policy into the first pillar) and continued in the Tampere and Hague programme agendas, JHA as a policy domain suffers from a number of pathologies which serve to undermine its coherence and efficacy. Lack of resolve on the part of member state executives is accompanied by an ambiguity in the division of powers between the institutions and between the pillars and a confusing variety of legal instruments available. This, alongside the phenomenon of variable geometry whereby member states have opted in and out of certain provisions, such as the Schengen area, as well cooperating outside the structures of the EU altogether (e.g. the Treaty of Prüm) have a further complicating effect on what one law expert has described as a ‘baffling field of the law’ (Kuijper 2004, 623). Finally given the sensitive nature of the issues at stake, negotiations on JHA proposals can drag on for years, until lowest common denominator agreement is reached.

The key question to be investigated, in light of these institutional changes and pathologies, is whether we can see any evidence of Europeanisation or ‘communitarisation’ of this policy domain, in particular through an analysis of the initiation, negotiation and implementation of the EAW, described by former Commissioner Vitorino as ‘a landmark in criminal judicial cooperation throughout the EU’ (2005, 4). The paper proceeds as follows. In Section 1, the analytical framework adopted in this paper is outlined. Section 2 unpacks the formulation, negotiation and implementation of the EAW, focusing on the dynamic interplay between the institutional actors involved.² In section 3 the results of the analysis are presented.

Section 2 – Analytical Framework

A key question on the minds of many students of the EU is who are the winners and losers in EU policy making. It is clear that both member states and supranational institutions both ‘matter’ in EU policy making. Yet their roles differ and their degree of influence varies across different modes of EU policy making. Theoretical explanations

² As well as an extensive survey of secondary and primary sources, the policy case study is based on a series of semi-structured interviews were undertaken with officials involved in the negotiation of the EAW in a number of member states, along with officials from the Irish EU Permanent Representation, the Council Secretariat and the European Commission (DG JHA) in the course of 2002 as part of an EU Fifth Framework Project, Organising for EU Enlargement (cf Payne et.al. 2005).

such as intergovernmentalism and supranationalism offer rival interpretations as to who are the winners and losers of EU policy making and why. Does the application of these tools enhance our understanding of EU policy making? Which approach offers greatest insight into the dynamics of JHA policy making in the EU? Putting them to the test in comparative analyses of actual behaviour of EU policy actors in the day to day conduct of their executive, judicial and legislative powers can help to uncover the underlying relationships between actors within the policy making process and across policy spaces. At the same time, the application of the methods used in the study of public policy also helps illuminate the interplay between actors at specific stages of the policy making process.

The question is then how we are to apply these tools? The method employed in this study is qualitative and involves structured process-tracing of the empirical evidence in the policy case in an explicitly ordered way. Process tracing can be defined as the chronological description and analysis of policy case study evidence. The important exercise of 'soaking and poking' such case study evidence is not enough for policy analysts however. Such an exercise must be accompanied by a greater emphasis on theory testing. Deriving propositions and observable implications and applying this to empirical evidence is one way of helping us draw conclusions as to the nature of policy making and at the same time the utility of approaches such as liberal intergovernmentalism and supranational institutionalism to the study of the EU's policy process. Every theory or theory-based construct has implications about the observations one would expect to find if the theory is correct (King, Keohane and Verba 1994, 28). Each implication provides a qualitative test of the theoretical framework under consideration, which can be judged a success or failure and be used to evaluate the usefulness and applicability of the theoretical framework as a whole. This enables us to observe hypothesised causal mechanisms at work within each case in more detail.

The cycle of EU policy making is divided into three distinct phases to facilitate analysis: pre-negotiation, negotiation and post-decision. It involves the generation of clear, testable propositions from liberal intergovernmentalism and supranational

institutionalism for each of the policy making stages, i.e. what each proposes at each of the stages of policy making. Practical or observable implications of what we would expect to observe if the propositions were correct are also generated. These propositions and observable implications are then tested against the empirical evidence of the policy case material in order to systematically evaluate the explanations in each of the policy areas and across the phases of policy making. Attempts to draw conclusions as to the performance of competing theories on the basis of a one case must always be done with great caution. Even so, the case analysed will provide some insight into the EU's policy making process in JHA. As the findings of the empirical analysis are evaluated, conclusions are also drawn as to the 'goodness of fit' of the competing theoretical explanations of how policy is produced in the EU in this specific instance.

Liberal intergovernmentalism and EU policy making

It has been claimed that the most comprehensive and compelling theoretical treatment so far of the puzzle of European integration, namely to explain why sovereign governments in Europe have chosen repeatedly to coordinate their core economic policies and surrender sovereign prerogatives within an international institution is to be found in the work of Moravcsik, especially in his large study *The Choice for Europe* (Moravcsik 1998; see Scharpf 1999, Rosamond 2000 and Schimmelfennig 2004 for full explorations and evaluations of the approach). With its roots firmly in the realist intergovernmental perspective of the 1960s which pitted member states to be in control of EU policy making, Moravcsik's liberal intergovernmentalism (LI) rests on the assumption that the EU is essentially a passive tool of the member states. In this view, member state governments are the crucial actors in European integration (and most particularly the governments of Britain, France and Germany). According to Moravcsik, in the history of the EC, the most important of such choices are five treaty-amending sets of agreements that propelled integration forward and his central claim is that the broad lines of European integration since 1955 reflect three factors: patterns of commercial advantage, the relative bargaining power of important governments, and the incentives to enhance the credibility of interstate commitments. Most fundamental of these was commercial interest. European integration resulted from a series of rational choices made by national

leaders who consistently pursued economic interests – primarily the commercial interests of powerful domestic economic producers and secondarily the macro-economic preferences of ruling governmental coalitions – that evolved slowly in response to structural incentives in the global economy. When such interests converged, integration advanced (Moravcsik 1998, 3).

For the most part, Moravcsik's integration framework is successful in explaining the grand bargain negotiations based on the empirical evidence with its use of intergovernmental decision-making. Moravcsik was very clear to limit the scope of LI to treaty negotiations and other issues of unanimous decision making – only one piece (albeit an important one) of the EU puzzle (Moravcsik 1999, 174-5). It is an obvious criticism that LI is not able to explain all of EU politics, in particular its day-to-day policy making under the first EC pillar. Moravcsik, in concentrating on treaty bargains, does not explicitly examine EU policy making and therefore omits empirical evidence that could point to certain autonomous roles for EU supranational actors in policy making.³ Yet he did not ignore supranational actors completely, acknowledging that supranational actors play a delegative role in EU policy-making and the scope of delegation is explicitly limited by national governments (Moravcsik, 1993, 511-13).⁴ Indeed, while he did not explicitly examine the process of institutionalisation below the level of grand bargaining, this does not mean that his theory cannot be applied to other types of decision making situations (Schimmelfennig 2004: 84) and particularly in policy areas that are traditionally perceived as 'intergovernmental'. Even for decisions made in the EU's highly institutionalised settings, as in the first pillar, LI is useful in explaining sources of member state preferences. Moravcsik himself went so far as to suggest (albeit

³ Similarly, Moravcsik's tendency to talk of the generic 'supranational entrepreneurs' highlights his omission to disaggregate these actors and look at their individual roles and influence – for they may influence the process of intergovernmental bargaining in different, more informal ways (see most notably Beach 2005).

⁴ In the common commercial policy of the EC for example, the Commission is the EU's external representative, but this delegation is strictly monitored by the Article 113 Committee. The decision to delegate the power of proposal to the Commission provides a means of setting the agenda, and thereby avoiding time-consuming or inconclusive 'cycling' between difficult proposals or an arbitrary means of proposal selection. Finally, he also acknowledged that with regard to enforcement (the ECJ), by taking the definition of compliance outside of the hands of national governments, a supranational legal system strengthens the credibility of national commitments to the institution.

in a footnote) that ‘it remains an open question to what extent the pattern of national preferences (while mitigated by institutional constraints) remains a, perhaps *the*, decisive factor in daily decision-making’ (Moravcsik 1999, 179). The possibility exists, therefore, that LI does have something to offer when it comes to analysing EU policy making at the ‘day to day’ level, particularly in the negotiation stage and in policy sectors such as JHA where member states have greater institutional prerogatives than supranational actors.

Testing Liberal Intergovernmentalism

At the heart of LI lies the following thesis: member state executives control policy-making processes and outcomes. For Moravcsik, the following sequence encompasses virtually all that is important: Rising interdependence > domestic politics and national preference formation > intergovernmental bargaining > delegation to supranational authorities > consolidation (Stone Sweet and Sandholtz 1997, 302). Policy-making thus consists of the negotiation of a set of bargains among executives of independent-nation states. Domestic interests, normally of a commercial nature, determine preferences. In order to ensure efficient consolidation member state governments delegate powers to the EC organisations, such as the Commission and the European Court of Justice (ECJ), who act as faithful agents of these intergovernmental bargains.

Pre-negotiation

Proposition A: The Commission proposes legislation that conforms with the wishes of the rationally-acting member state executives based on domestic economic interest, cooperating to solve a collective action problem, who wish to ensure credible commitments. Preferences for such policies come from domestic political conflict.

Negotiation

Proposition A: Policy outcomes result from the distribution of bargaining power among governments and are the result of lowest-common denominator bargaining between them all.

Proposition B: Member state executives are the only important actors at this stage and their bargaining power decreases with the availability of outside options and as the

intensity of issue-specific societal preferences increases (Schimmelfennig and Rittberger 2006, 84).

Post-Decision

Proposition A: Implementation – The Commission is delegated implementation of policy outcomes to ensure adherence to commitments but is tightly controlled by member state executives through mechanisms such as comitology, in order to ‘lock-in’ implementation and enforcement of decisions on which governments might later be tempted to cheat.

Proposition B: Adjudication – The ECJ adjudicates disputes but does not act outside the preferences of the member states.

Observable Implications

In pre-negotiation, therefore, we would expect that the Commission would only propose legislation in reply to calls from the member state executives in response to an economically-based collective action problem. Member state preferences would be defined by domestic commercial interest and the EP would have no input into policy formulation. In negotiation, the central players would be the national executives of the member states and bargaining would be shaped by the relative powers of member states, as well as preferences. Decisions would be taken unanimously, on either a formal or informal basis and would result from the convergence of national interests of key players in the Council. In the post-decision phase, for example, we would expect that in mechanisms such as the comitology committees, the member state executives, as principals, would monitor and control, where necessary, the agent, i.e. the Commission’s operation if the Commission deviates in any way from what was agreed in the negotiation stage and attempts to put forward further policy changes.

Supranational institutionalism

An alternative way of looking at European integration and governance was that adopted by neofunctionalists and more recently those who espouse supranational institutionalist thinking (see for full accounts Stone Sweet and Sandholtz 1997; Sandholtz and Stone Sweet 1998 and Stone Sweet, Sandholtz and Fligstein 2001). Sandholtz and Stone Sweet

in particular hold that in the EU supranational organisations will ‘work to enhance their own autonomy and influence within the European polity, so as to promote the interests of transnational society and the construction of supranational governance’ (Sandholtz and Stone Sweet 1998, 26). They acknowledge that in some policy domains of the EU, competence is organised relatively exclusively at the national level (along the lines of intergovernmentalist thinking), but in other policy domains, authority is mixed and a new supranational politics has emerged. Supranational politics is specified as the political processes that take place, in multiple arenas, once supranational governance has been established’ (Sandholtz and Stone Sweet 1998, 145). Their label of supranational politics refers to the politics that goes on in arenas organised at the EC level, ‘once authority to make rules has been transferred to that level. ‘Supranational governance’ is one of the products of those politics’ (Sandholtz and Stone Sweet, 1999). Their theoretical construction that incorporates this mode of supranational governance is ‘neofunctionalist’ in that they underplay the role of governments and they echo theories of spillover. Supranational institutionalism is also rooted in theories of pluralism and new institutionalisms: groups, not states are key actors and competition amongst interest groups helps drive the political process and the growing density of supranational rules (the logic of institutionalisation) reduces the ability of member states to control outcomes as the EU game is played (Schimmelfennig and Rittberger 2006, 87).⁵

Testing supranational institutionalism

The essence of supranational institutionalism, therefore, lies in the proposition that supranational organisations such as the Commission, the EP, the ECJ and transnational actors generate political processes or outcomes of importance above the nation-state that constrain the behaviour of member state executives behaviour in policy-making. The role of transnational exchange (e.g. trade, the development of Euro-groups, networks and

⁵ Supranational institutionalism was held to be a mirror image of LI with its attendant weaknesses, i.e. privileging supranational actors to the expense of member state executives (Branch and Øhrgaard 1999, 125). The causal link between increasing transnational exchange and integration in specific areas also was underspecified. While as an approach it did offer an alternative to the LI, it was similar to LI in its rationalist assumptions.

associations) is highlighted in pushing the EC's organisations to construct new policy and new arenas for policy-relevant behaviour.

Pre-negotiation

Proposition A: Rising transnational exchange pushes supranational organisations such as the Commission to propose and construct new policies.

Proposition B: The deepening of one policy can lead to spill over in another.

Negotiation

Proposition A: Policy outcomes are based on negotiation between member state executives and EP within a logic of institutionalisation i.e. bargaining takes place in a mediated context, with different actors having an input into the bargaining outcome depending on institutional prerogatives (such as the decision rule specified by the original treaties and subsequent amendments).

Post-Decision

Proposition A: Implementation – The Commission exploits comitology procedures and other institutional obligations, to dominate implementation process and enforcement of legislative outcomes.

Proposition B: Adjudication – The ECJ rules against the preferences of the member states:

- When it can make use of a constituency of subnational actors (litigants, national courts) that support its decisions independent of the control of national governments;
- When the Treaty is clear, and/or when there are strong precedents and legal norms it can draw upon to support its reasoning.

Observable Implications

In pre-negotiation, for example, for the supranational propositions to be true, we would expect that the expansion of transnational exchange, e.g. trade investment, the development of European groups, networks and associations, leads to a push by member

state executives to substitute supranational for national rules and generate pressure on the EU's organisations to act. The absence of European rules will be seen as an obstacle to the generation of wealth and the achievement of other collective gains. Supranational organisations such as the Commission will propose policies that capitalise on this desire. In addition, once fixed in a given domain, European rules can generate a self-sustaining dynamic that leads to a gradual deepening of integration in that sector and to spill over into other sectors. In negotiation, we would primarily expect that policy outcomes do not solely reflect member state executive's preferences and would be more than the sum of lowest common denominator bargaining. Preferences can be endogenously affected by the institutional structure within which negotiation takes place. Depending on the institutional context, e.g. decision making rules, supranational organisations may be able to potentially shape either formally or informally both specific policy outcomes and the rules that channel subsequent policy-making behaviour. In post-decision, we would expect the Commission to reassert its position in comitology committees, for example, to move implementation procedures closer to its original policy proposals. In line with its institutional function, the Commission will carefully monitor the enforcement of legislative acts and will not shirk from bringing disputes before the ECJ. The ECJ would also be expected to interpret the Treaty so as to permit the expansion of supranational policy domains (even where no legislation or treaty base exists).

Explanations from the study of public policy

Richardson has firmly rejected the notion that one theoretical framework can account for policy making in the EU. Instead, he puts forward the idea that the complexity of the EU's policy process means that 'we must learn to live with multiple models and learn to utilise concepts from a range of models in order to at least accurately describe the policy process' (Richardson 1996, 20). This is where EU policy enthusiasts can learn from the study of public policy in general and the application of the approaches or theories derived from the study of public policy can add to our insights into how policy is made in the EU.

In dividing the policy process into four stages – agenda setting, policy formulation, policy decision, and policy implementation – Richardson suggests that we might need to

use rather different conceptual tools in order to fully understand the nature of the policy process at each stage (the so-called stages heuristic of public policy). These include group and network approaches, socio-economic approaches, institutional rational choice and ideas-based approaches (e.g. epistemic communities, multiple streams and policy advocacy coalitions). These approaches are not rivals as such: they can complement each other and be part of an overall explanation (this has been the case in the study of public policy). Of the group and network based approaches to the study of public policy, policy networks has become the most well-known and applied to the study of the EU (apart from pluralist and corporatist interpretations of interest-group activity. See Chari and Kritzinger 2006).

The term policy network is used to describe ‘a cluster of actors, each of which has an interest or ‘stake’ in a given policy sector and the capacity to help determine policy success or failure’ (Peterson and Bomberg 1999, 8). EU policy networks can bring together a diverse variety of institutional actors and other ‘stakeholders’: private and public, national and supranational, political and administrative. Rhodes and Marsh conceptualised networks as a continuum, ranging from loose issue networks to tightly defined policy communities (Marsh and Rhodes 1992). Policy communities are ‘networks characterised by a stability of relationships, continuity of a highly restrictive membership, vertical interdependence based upon shared delivery responsibilities and insulation from other networks and invariably from the general public (including parliament)’ (quoted in Richardson 1996, 7). Issue networks, on the other hand, involve a large number of actors, who are in irregular contact with each other and where there are significant asymmetries in resources held by actors in the network. The network approach is a useful toolbox for characterising the shape of EU policy-making and also testing the basic proposition that the way in which networks are structured in any EU policy sector will determine, and thus help explain and predict, policy outcomes (Peterson 2004, 119). However, on its own, policy network analysis has been deemed insufficient in explaining the EU’s policy process. Critics point to its status as a ‘useful metaphor’, as opposed to being a model or a theory and bemoan its lack of a theory of power (with concomitant normative and predictive elements). Nevertheless, in its

application in the context of the EU, policy network analysis helped focus minds on the idea of EU as a system of multi-levelled and networked governance.

Three ideas-based approaches provide useful insights into the workings and dynamics of the EU's policy process. Multiple streams (also known as the garbage can approach) is usually applied to the study of policy primarily in the policy formation (agenda setting) stage. Adapting and elaborating the ideas of Cohen, March and Olsen (1972) to the US federal government, Kingdon (1984) proposed that three process streams flow through the policy system: problems, policies and politics. Each is conceptualised as largely separate from the others, with its own dynamics and rules. The first stream, problems, refers to the occurrence of dramatic events or crises that can occasionally call attention to a problem that needs to be solved. The second stream, policies, refers to the wide variety of ideas floating around in the 'policy primeval soup'. Ideas are generated by specialists in policy communities – this brings in the idea of networks that include bureaucrats, academics and researchers in think tanks who share a common concern in a single policy area. The third stream, politics, consists of three elements: national mood, pressure group campaigns, and legislative or administrative turnover (Zahariadis 1999, 73). Issues arise on the agenda when these streams are joined together (or coupled) at critical moments in time and defined them as 'policy windows' – fleeting opportunities for advocates of proposals to push their favoured ideas, or to draw attention to their special problems (Kingdon 1984). When windows open, policy entrepreneurs can seize on the opportunity to initiate action. Of course some windows can be predictable (e.g. budgetary cycles) but others are unpredictable (e.g. human disasters such as the attack on the twin towers in September 2001).

Two similar approaches, the advocacy coalition framework (Sabatier 1988) and epistemic communities (Haas 1992) also draw attention to the importance of ideas and policy communities in policy making. The advocacy coalition framework, as elaborated by Sabatier, analyses policy making from the perspective of policy subsystems, which consist of actors from a variety of public and private organisations who are actively concerned with a policy problem or issue and who regularly seek to influence public

policy in that domain. As with multiple streams, this approach seeks actors such as researchers and journalists as part of the policy process. Advocacy coalitions have been defined as ‘people from a variety of positions (elected and agency officials, interest group leaders, researchers) who (i) share a particular belief system (i.e. a set of basic values, causal assumptions and problem perceptions – and who (2) show a non-trivial degree of coordinated activity over time (Sabatier 1988, 139). This framework assumes that advocacy coalitions seek to change the behaviour of governmental institutions in order to achieve their policy objectives and also allows for ‘policy oriented learning’ within and between coalitions. Of course, learning about a topic is filtered through pre-existing beliefs (Sabatier and Jenkins-Smith 1999, 145).

Epistemic communities also highlight the ‘politics of expertise’ and the importance of knowledge in policy making. ‘Epistemic’ communities are communities of experts who transmit and maintain shared beliefs about the verity and applicability of particular forms of policy-relevant knowledge within policy areas. Knowledge and ideas are important because ‘the diffusion of new ideas and information can lead to new patterns of behaviour and prove to be an important determinant of international policy coordination’ (Haas 1992, 3). They tend to operate in fields of policy where science matters (Farrell and Héritier 2005, 276). An example is the community of experts who identify problems and propose solutions to the international problems of the environment, such as global warming and climate change. The increasing complexity of such issues can lead policy actors to rely on such experts, especially under conditions of uncertainty. The transmission by these experts of policy knowledge can affect policy choices being made, although it must be acknowledged as a concept, epistemic communities does not specify the mechanism by which the influence of epistemic communities translates into policy outcomes. In this sense, it is theoretically incomplete. In addition, while epistemic communities play an important role in providing information and ideas they are constrained by the need for policy makers to involve other forms of actors (Richardson 1996, 16). In the coming sections we will see whether these frameworks do indeed have explanatory purchase when applied to the EAW.

Section 2 - The EAW Policy Narrative

According to the Commission, ‘the European Arrest Warrant is the first and most symbolic measure applying the principle of mutual recognition [in police and judicial cooperation in criminal matters]’ (COM(2005)63 final). The immediate impetus for the EAW lay in the 9/11 terrorist attacks on the US. The terrorist attacks not only highlighted the importance of effective EU measures on internal security, but also put enormous pressure on the EU’s JHA decision making system to produce substantial legislative action in a very short period of time. This included the introduction of a Framework Decision on Combating Terrorism and a Framework Decision on the European Arrest Warrant, which would replace national extradition procedures.

The EAW replaced existing extradition procedures on 1 January 2004 for all EU member states.⁶ Its main objective was to simplify and speed up the process of surrender of criminals between member states. The warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. An arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. In addition, a list of 32 offences (including terrorism, homicide, fraud, acts of trafficking in human beings and racism) give rise to surrender without verification of double criminality of the act, provided they are punishable in the issuing Member State by a custodial sentence of a maximum of at least three years. As will be seen below, a number of member states and the Commission had hoped for the total abolition of the requirement of dual criminality

⁶ Extradition procedures between EU member states have been governed by a diversity of instruments, including: the European Extradition Convention (13 December 1957, ratified by all 15 Member States) and its two additional protocols (15 December 1975, ratified by seven Member States and 17 March 1978, ratified by 11 Member States); the Convention on the simplified extradition procedure between the Member States of the EU (10 March 1995, ratified by nine Member States), the Convention on the extradition between member states of the EU (27 September 1996, ratified by eight member states); the extradition provisions of the Schengen Convention and the bilateral conventions between the EU Member States. The extradition procedures between the EU Member States and the US are governed by their bilateral agreements.

(that the offence for which extradition is sought is recognised and penalised by both the requesting and requested states) but several member states were opposed to this and the above compromise was reached. The EAW also raised constitutional issues for some member states with regard to the possible extradition of their own nationals.

The EAW was negotiated under the auspices of the EU's third pillar. Institutionally, under Article 34(2) EU, in this pillar the Commission shares its power of legislative initiative with the Member States, unanimity is required in the Council and Parliament merely consulted (and the outcome of such consultation is not binding). Judicial oversight by the European Court of Justice (ECJ) is also limited. Member states must agree to give jurisdiction to the ECJ to give preliminary rulings on the validity and interpretation of measures referred from a national court. Not all member states have done this (e.g. Ireland, UK, Denmark).

Pre-negotiation: the birth of the EAW

To a degree, the decision to put meat on the bones of the principle of mutual recognition in criminal matters through the EAW echoes the spillover effect of the development of the internal market in the EU's first pillar. The lifting of internal borders also triggered a new framework of cooperation among EU member states to combat increased cross-border crime. However, this desire for cooperation collided with traditional extradition law concepts and procedures as laid down in the Council of Europe Conventions which were seen to be 'old fashioned, outdated and bureaucratic' (Apap and Carrera 2004; Plachta and Van Ballegooij 2005, 36). The establishment of the Schengen Information System and the 1995 and 1996 extradition conventions endeavoured to simplify extradition processes amongst EU member states but left the basic mechanism of extradition intact, which in essence was intergovernmental and political in nature (Plachta and van Ballegooij 2005).

The principle of mutual recognition received a fillip in the Treaty on Amsterdam which explicitly called for common action on judicial cooperation in criminal matters, including facilitating extradition between member states (Article 31(b)). Plans to simplify

extradition law within the EU were also set out in the 1998 Vienna Action Plan, the 1999 conclusions of the Tampere European Council, the 2000 strategy on the prevention and control of organised crime. The idea for a EAW⁷ framework decision itself was first mooted at the Tampere European Council of 15 and 16 October 1999 where member states stated that:

‘the formal extradition procedure should be abolished among Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence’.

The introduction mutual recognition of judicial decisions between member states was not completely unheard of. On 20 July 2000, the Ministers of Justice of Spain and Italy signed a Joint Declaration on the creation of a common area of freedom, security and justice between the two countries where criminal convictions and court orders involving deprivation of liberty handed down in each of the two states are fully valid, recognised and effective in the territory of both states (Plachta and van Ballegooij 2005, 31).

Until 9/11, however, while the proposal for an arrest warrant had been in preparation, progress had been extremely slow. The Commission had almost finished working on a proposal for an EAW when the attacks took place in September 2001 (Vitorino 2005, 1-2). 9/11 provided a political window of opportunity for the introduction of the proposal and created considerable political momentum and pressure on member states to achieve agreement (Occhipinti 2004, 189; Grabbe 2004; Den Boer 2003; Dubois 2002, 327). In the words of EU Justice Commissioner Antonio Vitorino, the terrorist attacks led to a ‘giant leap forward’ for EU cooperation in JHA (quoted in Den Boer 2003, 1). On 20 September, the JHA Council announced its determination to reach agreement on the Terrorist package, which included the warrant, by 6 December 2001. This speed of decision making (less than ten months) and the setting of an explicit deadline by which time agreement must be reached was unprecedented in JHA negotiations (Peers 2001, 2). Member state delegations were reluctant to be seen to come out against the proposal in

⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ C 332 E, 27.11.2002.

light of the political climate of the time, i.e. the aftermath of 9/11 (Interview with national official, member of Article 36 Committee, 17 October 2002).

The Commission was charged with the responsibility of producing a proposal for an EAW in the immediate aftermath of the attacks. The Commission's proposal for a framework decision (COM (2001) 0522) went much further than previous calls to facilitate and simplify extradition procedures by advocating the suppression of the principle of dual criminality. Each member state, however, would be allowed to establish a 'negative list' of infringements for which it would refuse extradition (Vitorino 2005, 2; Agence Europe 13 October 2001).⁸ The Commission also proposed that the person arrested under the EAW should be transferred by simple request from one judiciary to another. If the person refused to be transferred, he or she would be heard by a judge, in the knowledge that the procedure as a whole should not exceed 90 days proposed by the Commission.

Negotiation

Negotiations on the proposal began on 25 September 2001, following the JHA Council's intention that agreement on the terrorist package, including the EAW, was to be reached by 6 December 2001. Actual negotiations between the member states began on 1 October. Negotiations primarily took place on the warrant within the institutions of the Council. Although the European Council was involved in the negotiations at certain stages, within the Council itself negotiations on the EAW took place at three levels: the Article 36 Committee (the working group on JHA), the Committee of Permanent Representatives (COREPER II) and the JHA Council of Ministers. Most of the controversies were, in fact, resolved in the Article 36 Committee. Officials involved in the negotiations emphasised the unique nature of these EU level negotiations, the fact that an agreement had to be reached on an arrest warrant no matter what and the fact that the time to negotiate was extremely tight (Payne et.al. 2005).

⁸ Such as abortion and euthanasia which had been decriminalised in some member states under certain conditions.

Three controversial issues emerged in the Council during the negotiations: the abolition of dual criminality; linked to this the list of offences no longer to be subject to dual criminality; and finally whether the EAW should allow nationals to be surrendered (see figures 1, 2 and 3). It became clear to the Belgian Presidency early on in the negotiations that agreement on the full abolition of the principle of dual criminality was not possible and to continue on this line of negotiation was not constructive. Indeed, the content of the original Commission proposal was discarded by the Presidency in late October 2001 when it became clear that it was not conducive to achieving agreement (Interview, National official 2 July 2002; Agence Europe 10 November 2001). The Presidency then proceeded with its own proposal (even though its own preferences were close to the Commission proposal).

All member states had expressed support for the idea of an EAW in principle but in the Article 36 meetings a number of reservations became clear, particularly over the abolition of dual criminality. Italian objections throughout the whole negotiations were based on a number of factors, principally the position of Prime Minister Berlusconi regarding charges of fraud and corruption in other member states and also the lack of coordination of policy at the national level in Italy between the different ministries that handle Justice and Security affairs. Indeed, the Italians were the only delegation to object to the final agreement by the other 14 member states at the December JHA Council meeting. They proposed an alternative of reducing the list to 12 offences where the principle of dual criminality would not apply and that the warrant would be valid for six of these offences by 1 January 2004 and the other 6 by 1 January 2008. This was rejected and the Italians finally agreed to the EAW on 11 December 2001.⁹

The Portuguese, Greek, and Austrian delegations also had difficulties with the idea of the arrest warrant as a whole, due to constitutional difficulties (the Austrians found the idea of the extradition of nationals problematic and were able to secure a derogation on this issue until 2008) (Agence Europe 29 November 2001). On this issue and most other

⁹ Commissioner Vitorino and the Belgian Presidency went as far as threatening to adopt the EAW without Italy using the strengthened enhanced cooperation procedure (Agence Europe 8 December 2001).

issues, member states divided into two camps, with the UK, Spain, Sweden, Belgium and the Commission most disposed to changing the status quo (Agence Europe 17 November 2001). Spain wanted a strong, immediate and effective measure and the situation with Basque terrorist group, ETA, was given as a possible reason for this. Spain argued vociferously for a change in the status quo regarding the principle of dual criminality and felt it was an issue of mutual trust of all member states. The Belgians, as holders of the EU Presidency, were conscious that agreement had to be achieved and that it had to be something more than the status quo (in other words the new legislation change could not be cosmetic).

The dual criminality issue was finally settled in early November when the Belgian Presidency decided that the issue of the list, as a compromise, should be put to the November JHA Council. The discussion on dual criminality then continued under the aegis of the discussion of the list. There were no real arguments over the size of the list, apart from the Italian objections. The Irish delegation had a problem with the weak definitions of fraud/swindling and the idea that racism and xenophobia on their own constituted crimes (Agence Europe 29 November 2001). Other member states such as the Netherlands and Denmark shared the concern that many of the offences included on the list were not strictly related to terrorist crimes.

The entry into force of the EAW was not contentious and was agreed very rapidly. There was unanimity on the part of the member states on this as they said it was too difficult to put the warrant into national legislation in the timeframe specified by the Commission, i.e. from 31 December 2001. The retroactive nature of the application of the warrant (i.e. should it only apply to crimes committed after it comes into force) was not particularly controversial, and issues related to human rights were also not very contentious (the European Convention on Human Rights was seen as being sufficient to protect these rights).

European Parliament

The weak position of the EP in third pillar issues was clearly evident in the negotiation stage of the EAW. Indeed, in interviews conducted for this study the EP was not considered a relevant actor in the negotiations themselves. Nevertheless, the EP was involved in the process of shaping the final version of the document in two ways (Plachta 2003, 180-3). Firstly, members of the EP addressed a number of written questions to the Commission regarding such problems as the legal basis of the new mechanism (the use of a framework decision with no direct effect), possible involvement of Europol and immunities from the warrant.¹⁰ In its consultations on the Commission proposal, the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs voiced serious objections to several ideas and provisions included in the draft framework decision. Indeed the minority opinion included in the official Report pointed out that the Commission proposal encroached significantly on Member State rules of criminal procedure, entailing a significant risk of undermining legal certainty. Parliamentarians were also wary of the fact that the real political reason for submitting the proposal and requesting the urgent procedure, i.e. 9/11, did not constitute genuine grounds for urgent procedure as the legislation proposed was to cover numerous criminal acts with no connection with anti-terrorism measures.¹¹ Many of the Committee's amendments to the Commission proposal reflect the general unease amongst the EP as regards the protection of human rights and the safeguarding of fundamental freedoms in the framework decision.¹²

After having considered the proposal in December 2001 and January 2002, the Committee adopted the draft legislative resolution by 27 votes to 4 with no abstentions. The EP's weak position in this policy negotiation is evident in the fact that its discussions were based on the original Commission proposal which, as we have seen, was abandoned by the member states early on. Given the speed of the negotiations, the decision was taken by the Council to reconsult the Parliament and on 9 January 2002 the Committee

¹⁰ E.g. Written question E-0530/02, O.J. C 309 E/26, 12.12.2002 (2002/C 309 E/029); Written question E-2652/01, O.J. C 147 E/35, 20.06.2002 (2002/C 147 E/033).

¹¹ See EP Report A5-0397/2001.

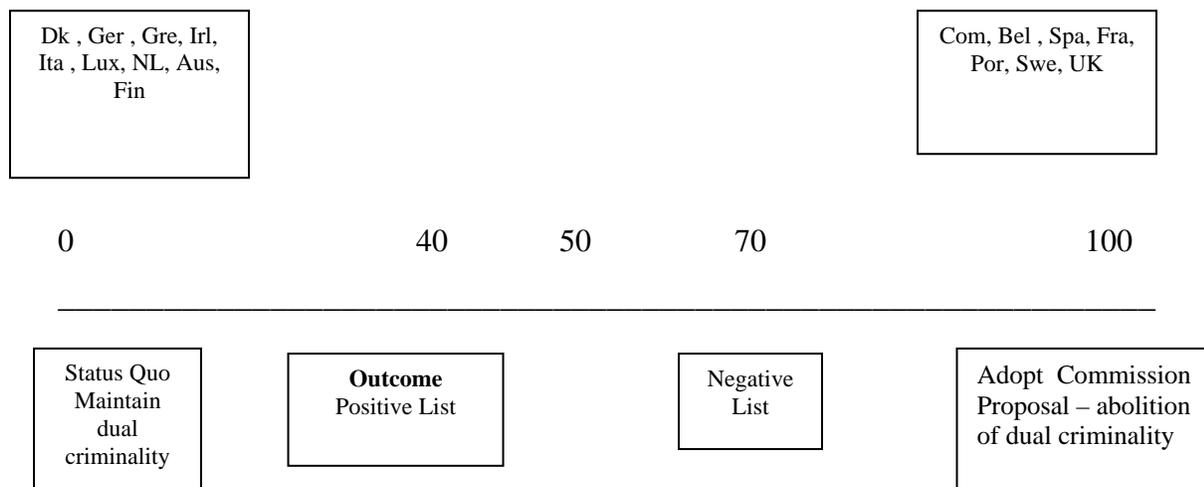
¹² These concerns were echoed by human rights organisations, civil society groups and academics. See Peers 2001; Apap and Carrera 2004.

submitted its new report which contained the EP legislative resolution approving the Council draft framework decision.¹³

Conduct of the negotiations

The unprecedented nature of the EAW negotiations is clear in the negotiation stage of the process. Indeed, given the unusual circumstances surrounding the 9/11 crisis and the need for the EU to respond to it in some way and rapidly, the normal process whereby the Commission sounds out national delegations of the shape of a proposal before it is submitted for consideration did not occur in this case (Payne et.al. 2005). Unlike in first pillar negotiations, the Commission found itself stymied by its loss of the right to withdraw a proposal. Instead, the Belgian presidency played a key role of mediator and arbitrator in the negotiations, demonstrating an effective ability to reach a compromise across the member states under severe time constraints. The speed and closed nature of the negotiations also largely excluded civil society groups from the policy process.

Figure 1: Should the principle of dual criminality be removed?



¹³ See EP Report A5-0003/2002.

Figure 2: How should the list of offences be constituted?

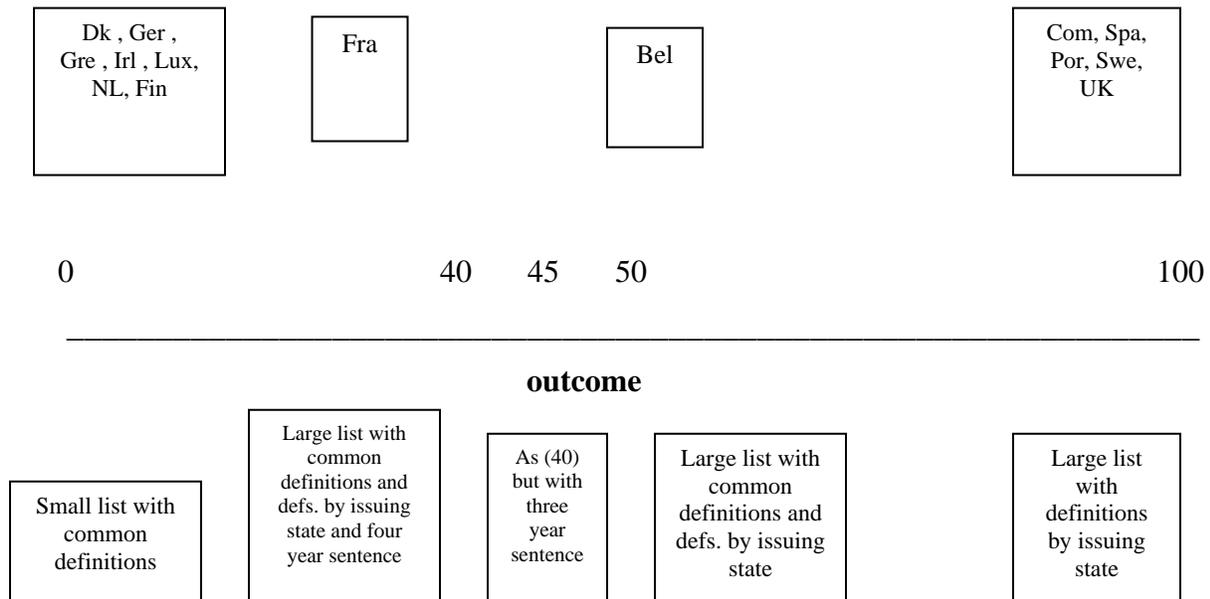
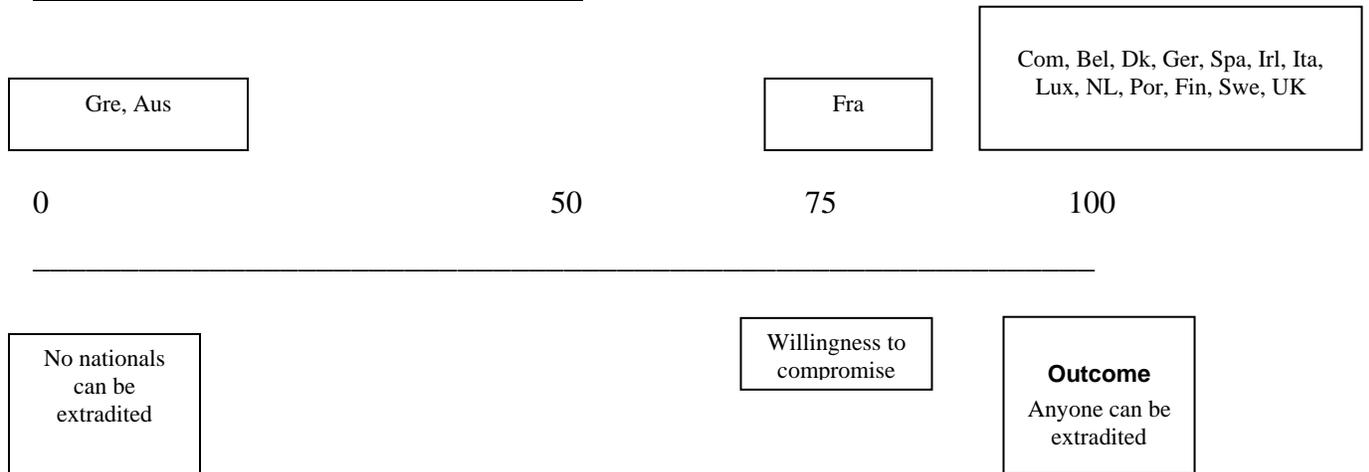


Figure 3: Should nationals be extradited?



Post-decision: towards the establishment of a European judicial area?

The speed and context within which the legislation was agreed meant that the proposal gave rise to less controversy than could possibly have been the case without the political momentum that arose after the attacks of 9/11 (Apap and Carrera 2004, 3). However, the

implementation of the EAW has proved somewhat problematic as problems soon began to surface. In the first instance, the EP, civil society groups and academics continued to have fears regarding the implications of the EAW for human rights in the implementation phase. It seems that the firm words by member states in the immediate aftermath of 9/11 have translated into somewhat slippery implementation (Grabbe 2004, 6). Member States were required to implement the framework decision by 31 December 2003 yet only eight (Belgium, Denmark, Ireland, Finland, Spain, Sweden, Portugal and the UK) complied with this. By 21 May 2004, France, Luxembourg, Austria and the Netherlands had also passed implementing legislation but Greece, Italy and Germany still had not. Cyprus, Hungary, Lithuania, Poland and Slovenia had also adopted their implementing legislation by this date.

The use of the new instrument of a framework decision had consequences for the extent of Commission power and leeway in exhorting member states to implement the EAW on time and in full, in contrast to its institutional prerogatives regarding implementation in the first pillar. Article 34 of the framework decision charged the Commission with the responsibility of writing a report on the measures taken by member states to comply with this instrument. The Commission produced its assessment in February 2005 (COM (2005) 63, subsequently updating this analysis in 2006 to take account of the delayed Italian implementation in April 2005 (COM (2006) 8). Based on Council Secretariat and member state information, in the period up to September 2004, 2,603 warrants were issued, 653 persons arrested, and 104 persons surrendered. The time to execute a Warrant had also decreased from nine months to 43 days on average. High profile cases such as the surrender of 7/7 suspect Hussein Osman from Italy to the UK have demonstrated the efficacy of the new EAW provisions. However, overall in its report the Commission criticised member states for incomplete and inadequate implementation of the EAW.

Difficulties in the implementation phase emerged on a number of different fronts. In the Commission's view, member states were guilty of limiting the partial abolition of dual criminality (with confusion surrounding the definitions of crimes), granting decision-

making powers to executive (rather than judicial bodies) and providing for additional grounds for refusal (relating to human rights) (see also Peers 2006, 471). A particular problem emerged around the obligation for member states to surrender their own nationals. A number of member states' constitutions contain provisions restricting the extradition of nationals: Portugal and Slovenia, for example, had to amend their constitutions in order to give effect to the EAW. The Commission noted that some member states had implemented the framework decision in such a way that gave priority to their national constitutions or which appeared to favour their own nationals (e.g. Italy provided that execution of an EAW may be refused where the requested person is an Italian citizen who did not know that the conduct was prohibited). Such approaches go beyond the original scope of the framework decision.

Along with the Commission, experts are also sceptical as to whether the 'high level of confidence' (10th Recital of the preamble) necessary for the framework decision does indeed exist given the difficulties that have arisen in implementation of the EAW (Wouters and Naert 2004; Apap and Carrera 2004). This is illustrated by the variety of national arrangements put in place for surrenders – some member states have placed extra conditions and have on occasion refused surrender even when assurances have been given (COM(2005) 63). Different procedural requirements regarding the format, execution and transmission of the warrant, and the time limits imposed are also evident. The Commission report and the member states' response to it (COPEN 11528/05) triggered extensive discussion in the JHA Council meeting held in September 2005 where the member states asked the Commission to produce a further report on the EAW and a peer review of member state performance (yet to be published).

The EAW has also come under attack in a number of national courts and has given rise to additional legal uncertainty due to the difficulties a number of member states' constitutional courts have had with the notion of extraditing nationals. In April 2005 the Polish Constitutional Tribunal found that the EAW offended the Polish Constitution's

ban on surrendering Polish nationals.¹⁴ In July 2005 the German Constitutional Court annulled Germany's law transposing the framework decision because it too did not adequately protect German citizens' fundamental rights.¹⁵ The Court was of the view that it would be possible for the EAW to be implemented in a way that complied with the Basic Law but until this was done no German national could be surrendered to an EU Member State under an EAW as it stood. Instead, the EAW approach must be replaced by a procedure under which all circumstances of the case and also the system of criminal justice of the requesting State would be examined (Komárek 2007, 25). In November 2005 the Cypriot Supreme Court also found that the EAW contravened the Cypriot Constitution prohibiting their citizens from being transferred abroad for prosecution.

Finally, in July 2005, the Belgian Court of Arbitration made a reference to the ECJ in a case challenging the *vires* of the Framework decision and the legality of the partial abolition of dual criminality (on foot of an application by NGO *Advocaten voor de wereld* for the Belgian legislation implementing the Framework Decision to be annulled). This is potentially far more serious than the German, Polish and Cypriot cases because the very use of a Framework Decision, instead of a Convention, to adopt the EAW is at issue (House of Lords 2006). At the time of writing, the ECJ has yet to rule on the case. However in his opinion of 12 September 2006 (Case C-303/05), Advocate General Colomer took the view that on foot of the Amsterdam provisions for the use of new framework decisions (instead of conventions), the Council was obliged to use such a mechanism for the EAW. Similarly, he dismissed the idea that the abolition of dual criminality for 32 offences did not breach the principle of equality before the law and non-discrimination.

¹⁴ The Court delayed the application of the judgement for eighteen months so that the national legislation (or the constitution) could be modified.

¹⁵ Decision of 18 July 2005, upon an application by a German national, Mamoun Darkazanli, whose extradition was sought by the Spanish authorities on alleged al-Qaeda terrorist charges (Tomuschat 2006). In response to the German decision, the Spanish High Court subsequently refused to recognise warrants issued by Germany (Doobay 2006).

Section 3 – Lessons learned?

What does the application of various tools of policy analysis help us to learn about the formulation, negotiation and implementation of the EAW and of the policy-making process in Third Pillar EU matters? The separation of the policy process into discrete stages and the application of the analytical frameworks to each of these stages helps isolate the decision-making dynamics between the actors involved. We can see that to a certain extent an indirect trigger for the abolition of extradition between member states in this manner could be said to have indirectly emanated from certain spillover pressures relating the rise in the mobility of criminals across the EU, in line with supranational institutionalism. However, in line with liberal intergovernmentalism, the reforms contained in the Amsterdam Treaty and the provisions of the Tampere process reflected the desire for member states to speed up and simplify extradition procedures. However, given the institutional prerogative of unanimity and the prevalence of lowest common denominator bargaining in JHA issues, movement was very slow. The immediate trigger for the EAW was the perceived need by heads of government and state to respond to the tragedy of 9/11 and show solidarity with the US. This is clearly in line with the precepts of LI which emphasises the process of cooperation amongst member states to solve collective action problems.

The application of the multiple-streams perspective with its convergence of the notions of ‘problem, policies, politics’ is also appropriate in the pre-negotiation stage. Member state executives were faced with a problem and a clear need to react to it quickly. At the same time, the idea of an EAW was one that had been ‘floating about in the policy primeval soup’, and the member states and the Commission seized on this idea, amongst others, in order to serve their needs, even though in a strict sense it was not directly related to the fight against international terrorism (or in the views of many legal scholars, the resulting EAW and the Commission proposal to abolish dual criminality went beyond what was demanded as a response at the time). At the same time, the political climate also played a role in that, given the desire to show solidarity with the US, member states wished to act quickly and were united in purpose. Member states such as the UK and

Spain in particular, through their strong support of the EAW, acted as an advocacy coalition for the proposal.

In the negotiation phase, the intergovernmental nature of the negotiations on the EAW and third pillar negotiations on police and judicial cooperation in criminal matters and the sidelining of the EP and the Commission is clearly evident. The institutional constraints of unanimity and consultation meant that the main bargaining arena on the warrant was the JHA council and its attendant committees. The concerns within the EP regarding the implications of the EAW for human rights were put to one side by the Council. For its part, the Belgian Presidency played a key role in refining the proposal for the framework decision, brokering agreement between the member states, in particular dealing with the Italian recalcitrance. Whatever problems emerged in this stage of the process, i.e. member state opposition to elements of the proposals, stemmed from difficulties the warrant would pose at the national level, e.g. the extradition of nationals. It is true that the narrative of the EAW shows how the practice of policing, long considered a core element of the legal and political sovereignty of modern states, has been unhitched from the national level and resituated within a network of actors operating across national frontiers (Loader 2002). However, the closed nature of the JHA policy network was clearly evident during the EAW negotiations, with Council officials in effect insulated from the normal consultative processes evident in the EU's first pillar, including national parliament, civil society and media scrutiny. The complexity of the legal issues at stake also meant that officials across all the member states were reliant on the advice of legal experts.

The unusually fast pace of the negotiations and the urgent political push for agreement served to camouflage certain problems that were bound to arise in implementation. Now that the pressing political situation has passed, member state reservations in this sensitive policy area resurfaced and implementation itself has proved protracted. The challenges to the EAW in national constitutional courts due to the prohibition of the extradition of own nationals by certain member states has also rendered the process problematic and given rise to serious legal uncertainty. This jealously-guarded notion goes to the heart of

national sovereignty and presupposes 'the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment' (Plachta quoted in Komárek 2007, 15). This somewhat undermines the principle of mutual trust in member states' systems of criminal justice which lies at the heart of the EAW and the Area of Freedom, Security and Justice. Institutionally, the Commission and ECJ's hands are tied in this policy domain as unlike in first pillar matters, the weapons of Articles 226 and 228 are unavailable in the third pillar. Implementation as such is heavily reliant on the will of member state executives.

The EAW laboratory is a good example that demonstrates a number of pathologies of the JHA policy domain. It illustrates how JHA can be seen as an area of weak legislative, democratic and judicial control. It also shows the complexity inherent in JHA matters and the problems that can arise (particularly in implementation) from the separation of competences among the pillars. Police and judicial cooperation in criminal matters as it stands is weakly Europeanised. The reforms contained within the Constitutional Treaty (e.g. the communitarisation of police and judicial cooperation in criminal matters with codecision, QMV and placing these matters fully under the jurisdiction of the ECJ) would have considerably Europeanised and thereby improved this policy area (Guild and Carrera 2005; Brady 2007). Indeed, despite having signed up for these major reforms in the constitutional treaty, it is not certain that the member states will renew the deal in any future treaty (Brady 2007, 25) as the recent and unsuccessful efforts of Commissioner Frattini to introduce QMV in this sensitive area of policing and criminal justice demonstrate.

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