

**Managing diversity:  
The European Arrest Warrant and the potential of  
mutual recognition as a mode of governance in EU  
Justice and Home Affairs**

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## **1. Introduction**

Mutual recognition is the central mode of governance in the Single Market which helped to overcome trade barriers caused by differences in national product regulation. Based on the positive experiences with mutual recognition in the Single Market, the EU heads of state decided to copy this mode of governance and make it the “cornerstone” of judicial cooperation in criminal matters. Being faced with a perceived rise in threats such as cross-border crime and terrorism, mutual recognition is expected to enhance the free movement of criminal investigation, prosecutions and sentences across EU borders. The European Arrest Warrant is the first application of this new mode of governance in EU Justice and Home Affairs. Yet, many more measures such as the European Evidence Warrant are to follow. However, can a mode of governance which worked well in the Single Market improve judicial cooperation?

The goal of this paper is to analyze the potential of mutual recognition as a governance mode in EU Justice and Home Affairs, a policy area which belongs to the core functions of statehood and is traditionally characterized by cumbersome cooperation procedures and strong sovereignty concerns. As a horizontal mode of governance, mutual recognition is primarily concerned with governing via a network of national judges who mutually accept and enforce each others’ judicial decisions. The introduction of mutual recognition raised hopes among member states to eventually improve judicial cooperation since agreeing on centralized rules to address the existing cooperation problems did not prove politically feasible. My research question is under what conditions mutual recognition is able to improve judicial cooperation in criminal matters and solve governance problems. To answer this question I draw on empirical evidence on the implementation and application of the European Arrest Warrant which has been in operation for three and a half years now.

My study thereby contributes to the literature on the potential of non-hierarchical, horizontal forms of cooperation as alternatives to the centralization of decision-making power. In the 1980s, it became clear that the traditional Community Method has its limits: There was a need for more cooperation to solve collective problems but at the same time reluctance to further transfer competences to the EU level (Majone 2004). This is especially true for the EU’s intergovernmental third pillar. Since the 1990s, a broad literature evolved which analyzed the potential of alternatives to centralized decision-making, emphasizing multi-level governance (Marks 1992, 1993, Hooghe 1996, Marks and Hooge 2001) and governance via EU policy networks (Kohler-Koch et al. 1998, Peterson 2004). However, mutual recognition as a mode of governance has not been in the center of attention. Currently, most studies analyzing the potential of mutual recognition focus on its

application in a market situation (Nicolaidis 1997, 2005, Scharpf 1999, Schmidt 2004, 2007, Schioppa 2005). Very few studies investigate its application in Justice and Home Affairs a notable exception being Sandra Lavenex (Lavenex 2007). Given the dilemma between the need to cooperate more closely and the reluctance to agree on centralized solutions, it is important to study forms of governance which might provide solutions. Mutual recognition as a horizontal mode of governance addresses this dilemma: It aims at managing diversity by avoiding demanding harmonization measures.

My paper will help to explore the potential of mutual recognition as a mode of governance in judicial cooperation. I analyze the implementation and day-to-day application of the European Arrest Warrant in the UK and Germany. I chose these two countries because they represent two different legal traditions: The common law system and the civil law system respectively. Given that mutual recognition aims at managing diversity, its potential can best be observed when focusing on two very different countries.

Based on the comparative case study, I argue that some important prerequisites of mutual recognition are not yet met. Mutual recognition relies on the idea of mutual trust and confidence in each other's legal systems (Peers 2004, Maduro 2007). However, the implementation of the Framework Decision on the European Arrest Warrant as well as the daily practice of judicial cooperation offer many examples of the prevalence of mutual distrust. This distrust is often caused by the view that national standards of penal and procedural law differ too much to be mutually recognized. Moreover, concerns regarding democratic legitimacy are expressed. As a result, two effects can be observed. First, national legislators introduce new grounds for refusal when implementing the Framework Decision on the European Arrest Warrant. Second, national judges become gate-keepers in the operation of the mutual recognition regime and show uncooperative behavior if they regard a request as not in line with national standards, thereby undermining the envisaged European extradition system.

My analysis of the two cases shows that mutual recognition as a governance mode entails a paradox (Nicolaidis 2005): On the one hand, it aims at managing diversity without demanding harmonization; on the other hand, the preconditions of mutual recognition are more likely to be met where the degree of divergence is low. This indicates that, given the heterogeneity of EU criminal law systems, mutual recognition as an easy-to-agree-on alternative to harmonization has its limits: The transactions costs are transferred from the decision-making stage to the implementation and application stage. The real challenge for a mutual recognition system therefore is to put it into work.

The paper is structured as follows. In the first part, I introduce the principle of mutual recognition as a mode of governance, present its characteristics and preconditions and briefly discuss the concerns of democratic legitimacy associated with it. In a second part, I conduct the empirical analysis. The first part of the empirical analysis focuses on the implementation of the European Framework Decision on the European Arrest Warrant into national law by parliamentarians in Germany and the UK. The second empirical part analyzes the operation of the actual mutual recognition system: The horizontal judge-to-judge cooperation in extradition matters from a German and British perspective. In the final part, I will discuss my findings and present a research outlook.

## **2. Mutual recognition as a mode of governance**

It is useful to analyze mutual recognition from a governance perspective. The governance perspective emphasizes the system of rules that shape the actions of societal actors (Mayntz 2004). It allows for analyzing the role of formal and informal principles, norms and procedures and the interplay between the different actors involved (Jachtenfuchs 2001). From this perspective, mutual recognition is a choice for a specific institutional set up among a set of alternatives. In this text, I am not referring to the debate on “new modes of governance” which focuses on governance modes which include non-state actors such as the open method of coordination (OMC), comitology or independent regulatory authorities.<sup>1</sup> I use the concept of governance more general as a form of social coordination and will shortly introduce the three general modes of governance in EU integration among which decision-makers could choose when creating a “European public order” (Kaunert 2005). I will then turn to the preconditions of mutual recognition. In a last step, I will briefly discuss questions of democratic legitimacy and accountability which are associated with mutual recognition in Justice and Home Affairs. .

### *2.1 Modes of Governance: Territoriality, harmonization and mutual recognition*

With regard to the goal of EU integration, three broad modes of governance can be identified: the territoriality principle (also called national treatment or host country rule), harmonization and mutual recognition. The difference between these strategies is the definition of the rule which is to apply in cooperation between EU member states. The first mode of governance, the *territoriality principle*, states that in the cooperation between the EU member states the rule of the host country applies (Schmidt 2004). This mode of governance is based on the rule of national sovereignty: States do not interfere in each others’ affairs and territory determines jurisdiction. The territoriality

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<sup>1</sup> For an overview on the current state of this debate see the “NewGov”-Project: [www.eu-newgov.org](http://www.eu-newgov.org).

principle is the classical form of intergovernmental cooperation and for a long time it was the mode of governance on which most of the third pillar was built. The “request-principle” which is the underlying principle of the classical legal assistance agreements is based on this mode of governance. An example here is the 1959 European Convention on police and judicial cooperation. Due to its diplomatic dimension, this cooperation principle leaves a wide margin for political discretion. This traditional mode of governance is not very helpful when aiming at creating a common market or a common judicial sphere.

The second mode of governance in the European Union is *harmonization*. When national law is harmonized, the member states agree on common rules, which apply as EU rules in all member states. EU rules are enforced by the Commission which is in charge of monitoring the correct implementation and application and is enabled to start infringements proceedings in cases of severe violation of the rules. This mode of governance is reflected in the classic “Community method” which was the dominant integration strategy of the internal market until the 1980. In Justice and Home Affairs, it proved to be not feasible to agree on harmonization measures to create the envisaged “Area of Freedom, Security and Justice”.

The third mode of governance which can be identified is *mutual recognition*. In its pure form it is based on the thought of home country rule. Home country rule means that the rules of the home country are applied in the host country. Moreover, the national authorities of the host country agree to recognize and possibly enforce foreign law. This can take different forms. In the Single Market, EU-foreign national law is recognized in form of the recognition of products produced according to EU-foreign national standards. In justice and home affairs, decisions of foreign judicial authorities such as e.g. arrest warrants are recognized and enforced in the host state. Thereby, member states accept to cooperate in the enforcement of other States’ systems of law. As a result, the law of one country takes effect on the territory of another EU country; territory and national jurisdiction are no longer identical. Mutual recognition is a governance instrument which aims at managing diversity by avoiding demanding harmonization. In contrast to harmonization it is perceived to be less infringing on national sovereignty and thereby easier to agree on. However, since mutual recognition has a strong operational dimension and cannot function when it is not used by national judges, the transaction costs of cooperation are transferred from the implementation stage to the operation stage (Nicolaidis 1997). The following figures will illustrate the difference between harmonization and mutual recognition.

Figure 1: Harmonization

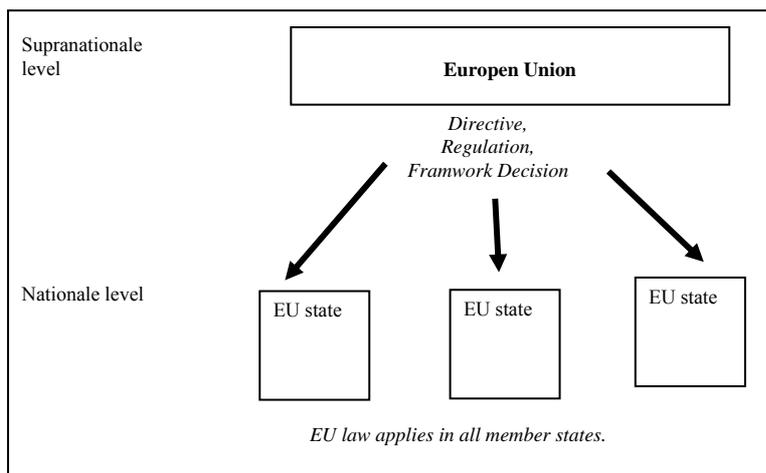
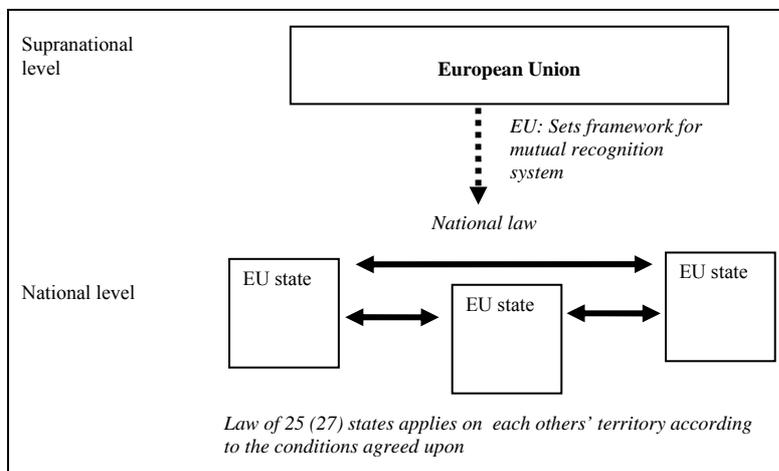


Figure 2: Mutual recognition



## 2.2 Properties of mutual recognition in Justice and Home Affairs

In Tampere 1999, the European heads of state decided to make mutual recognition the “cornerstone” of judicial cooperation since they could not agree on harmonization measures. However, abolishing the territoriality principle in favor of mutual recognition reflects “a genuine paradigm shift” in judicial cooperation between member states (Peers 2004: 919) or even a “revolution” (Wichmann 2006:95). In contrast to the old principle, mutual recognition allows for the application of one state’s law on the territory on another state. As a result, national law becomes part of the European legal system. In addition to the introduction of mutual recognition, the EU decided to abolish the diplomatic dimension and make judicial cooperation in the EU a purely judicial procedure.

This has several effects. Mutual recognition is a governance instrument copied from the Single Market. Traditionally, it is understood as being a market-making instrument. In the market, mutual recognition is often associated with liberalization of markets and a race to the bottom (Radaelli

2004). Based on Fritz Scharpf's thesis on the consequences of the gap between positive and negative integration (Scharpf 1999), supporters of the race-to-the-bottom argument claim that mutual recognition forces states with higher standards on labour and environmental law to change to lower standards due to competitive pressures caused by countries with lower standards and similar effects might be observed in judicial cooperation (Schünemann 2003, Wagner 2005, Guild 2004). However, some scholars make the opposite argument, saying that mutual recognition might also lead to a race to the top when consumers favor high quality products (Vogel 1995). Comparing the effects of mutual recognition in the Single Market and Justice and Home Affairs, Sandra Lavenex points out that mutual recognition in judicial cooperation does not lead to liberalisation but strengthens the governmental sphere: "[W]hat used to be a tool of liberalization in one sector might become an instrument of governmentalisation in another one" (Lavenex 2007). She argues that in the case of judicial cooperation, cross-border movement of sovereign acts exercised by judicial authorities were facilitated. She concludes that in Justice and Home Affairs, mutual recognition "boosts the transnational enforcement capacity of governmental actors".

These governmental actors are the national judicial authorities assigned by each member state. According to the EU's conception of mutual recognition in Justice and Home Affairs, the national judiciary becomes the central actor in judicial cooperation. It is no longer the foreign ministry's decision whether to comply with a request; it is the judge of the national judicial authority who is in charge and who has a duty to accept foreign decisions as equivalent. Politicians are no longer allowed to interfere. Moreover, since judicial cooperation now is a purely judicial procedure it is characterized by direct contact from judge to judge. National judges become actors in their own right in the international system. This leads to the emergence of a *transgovernmental network* of national judges (Slaughter 2004).<sup>2</sup> As a result, mutual recognition creates a *legal system of horizontal cooperation* which operates with more or less precise and binding rules.

However, the European Framework Decisions only provide the main guidelines of how mutual recognition should work in practice. Framework Decisions have no direct effect and need to be implemented by national parliamentarians. Thereby, national legislators have some leeway in interpreting the Framework Decision and may add new procedures or additional grounds for refusal which hamper cooperation. To make a mutual recognition system work, the cooperation of two central actors is required: National legislators who implement the Framework Decision in national law, and the judges in charge of day-to-day cooperation. As Susanne Schmidt points out,

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<sup>2</sup> More detailed information on the concept of "transgovernmental networks" see: Slaughter (2004). Slaughter sees great potential for governance through a complex global network of governmental and judicial actors such as e.g. national regulators and judges.

mutual recognition transfers transaction costs of dealing with heterogeneity from the decision-making stage to the implementation stage. Instead of dealing with heterogeneity at the EU level within a relatively closed group of decision-makers, mutual recognition diffuses the confrontation with heterogeneity to numerous national judges (Schmidt 2006). As a result, these judges are faced with a variety of different legal systems the most of which they are not familiar with. Given this lack of knowledge and often the lack of trust, national judges may act as gatekeepers of their national legal system and show uncooperative behavior, as I will show in my case studies. The real challenge, therefore, is not agreeing on a mutual recognition system on the European level but to put it to work.

### *2.3 Preconditions of MR: trust, equivalence, compatibility, institutional support structures*

What are the conditions for mutual recognition to work? One characteristic of mutual recognition is the demanding prerequisites which need to be met to make a mutual recognition system work. According to the literature, four conditions need to be met: First, the different national actors need to have reciprocal confidence in the quality of the foreign law, the legal system and the reliability and trustworthiness of foreign judicial authorities, second, national criminal law and criminal procedures need to be accepted as equivalent, third, national criminal law and criminal procedures need to be compatible, and fourth, an institutional support structure is needed to reduce transaction costs.

**Trust:** “Mutual trust is an important element, not only trust in the adequacy of one’s partners rules, but also that these rules are correctly applied”, stresses the European Commission (COM 2000 495 final: 4). Mutual recognition can only work efficiently in a climate of trust among the participating states (Alegre/Leaf 2004, Guild 2004, Impalà 2005, Peers 2004, Gay 2005, Martin 2006, Schmidt 2006). When another state is supposed to cooperate in the enforcement of other State’s systems of law, trust and confidence in the correct application of rules and procedures are essential. Given that mutual recognition of judicial decisions touches upon citizens’ fundamental rights, the required degree of trust is notably higher than in the Single Market.

**Equivalence:** The member states not only have to trust each other, in addition they need to accept each others legal systems as equally legitimate. Legislators and national judges need to acknowledge that a common goal such as efficient criminal prosecution and fundamental rights protection may be attained in an equal measure by the different policies of the foreign state. This requires legislators and judges to accept that different policies are not necessarily inferior. In Justice and Home Affairs, the entire legal system must be recognized as equivalent and affording all the appropriate protections, notably in the area of fundamental rights.

**Compatibility:** The legal system of one member state needs to be compatible with the formal rules and procedures of other member states. This might cause problems between very different systems, e.g. between common law and civil law countries. One problem in this respect might be the different competences assigned to police and public prosecutor, or the different kinds of evidence accepted in different phases of a court proceeding.

In addition to these three preconditions, a mutual recognition regime requires an **institutional support structure** (Schmidt 2006). Given the heterogeneity national authorities face, there need to be institutions that address problems which arise if the three preconditions are not yet fully met. These institutions foster the necessary trust; collect and provide information on foreign legal systems, help solve conflicts of jurisdiction and deal with problems arising from incompatibilities between justice systems. Institutional support structures thereby mitigate the transactions costs arising from putting a mutual recognition system into work. In judicial cooperation, it seems unrealistic to expect individual judges to be familiar with the procedural requirements of large numbers of different jurisdictions, let alone to co-ordinate complex cases involving a number of different member states. The European Judicial Network and even more so Eurojust can be regarded as institutional support structures to enhance EU judicial cooperation.

#### *2.4 Mutual recognition and questions of democratic legitimacy*

Mutual recognition aims at managing diversity by avoiding demanding harmonization measures. It is usually presented as a mode of governance which does not interfere with national sovereignty and political autonomy. When states opt for mutual recognition as a governance mode, no immediate change of national law is required. This is why on the European level it is so much easier to agree on a mutual recognition system than on harmonization measures.

Following Nicolaidis (1997) I argue, however, that a mutual recognition system leads to a *horizontal transfer of sovereignty* since a member state is no longer in full control of the law which applies on its territory.<sup>3</sup> Moreover, this horizontal transfer of sovereignty has different effects in Justice and Home Affairs compared to the Single Market. It is comparably easy to accept foreign law taking effect on a state's own territory in form of goods and production standards. In the end, it is the citizens' choice to either buy a product produced according to foreign law or to opt for a national product. If a German citizen believes in the advantages of the purity requirements of German beer, she has the choice to refuse buying Czech or Belgian beer. This, however, is

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<sup>3</sup> The horizontal transfer of sovereignty was acknowledged by the European governments. The Italian Government for example had previously blocked the idea of mutual recognition, claiming it would jeopardise national sovereignty. Italy wanted the European arrest warrant to be limited to terrorism.

different in Justice and Home Affairs. If a national judge enforces and applies foreign criminal law, the accused has no choice as to whether to obey foreign law or not. Different to the Single Market, mutual recognition in Justice and Home Affairs does not lead to an increase in individual choices but results in broadening the territorial coverage of a state's criminal law, or a "governmentalization" as Lavenex (2007) put it. This raises the question, if democratic legitimacy is still guaranteed if people are subject to foreign laws, the creation of which they could not influence. It requires us to review mutual recognition in "the lights of its mechanisms of accountability, participation and representation" (Maduro 2007).

There might be no problem after all if foreign and national law were very similar in goals, policies and procedures. In this case, all the appropriate protections, notably in the area of fundamental rights were ensured. Here I come back to the preconditions of mutual recognition and argue that due to the heterogeneity in criminal law systems, the requirements of trust, equality and compatibility are much harder to achieve in Justice and Home Affairs than in the Single Market and even more institutional support by agencies such as Eurojust is needed. Given this situation and the fact that a mutual recognition in the Justice and Home Affairs system needs the support of national parliaments and national judges to work in practice, I argue that too much heterogeneity might lead to distrust and uncooperative behavior of national parliaments and judges, as I will show in the following case studies.

### **3. The mutual recognition system in practice: The application of the European Arrest Warrant**

In a comparative case study of the implementation and operation of the European Arrest Warrant in Germany and the UK, I will show that despite the general support the new European extradition system gains, concerns among national parliamentarians and judges prevail. These concerns are caused by the heterogeneity of the European criminal justice systems parliamentarians and judges face. As a result, parliamentarians demand additional safeguards to ensure a high fundamental rights protection, and national judges act as gate-keepers of the national legal system and use their leeway to reject a European Arrest Warrant which diverges too much from well-known national standards.

I chose the UK and Germany because they are both large member states and active in issuing and receiving extradition requests. However, the two countries represent the heterogeneity in the European criminal justice systems since the UK belongs to the common law systems and Germany belongs to the continental civil law system. Since mutual recognition is a governance mode which

aims at managing this diversity, it is useful to analyze the implementation and operation of the EAW system in two very different member states.

I will analyze the application of the European Arrest Warrant (EAW) since it is “the first and most symbolic” application of the principle of mutual recognition (Commission 2005:2). Analyzing the launch of the EAW system is therefore expected to provide insights for the operation of mutual recognition in the field of judicial cooperation more generally. Moreover, according to Corinne Gay (2006), the operation of the EAW can be seen as an “indicator of desire of the member states to commit themselves to mutual recognition of judicial decisions in the law-enforcement area”.

### **3.1 The European Arrest Warrant**

To speed up European extradition procedures and enhance judicial cooperation, in 2002, the Council agreed on the Framework Decision on the European Arrest Warrant which came into force on 1 January 2004. The European Arrest Warrant replaced the existing instruments on extradition between the member states. The central feature of this mutual recognition instrument is: Extradition now is declared a pure judicial procedure.<sup>4</sup> The issuing state does not have to prove that there is a case to answer. The merits of the request are taken on trust and there are only limited grounds for refusal which is supposed to lead to a quasi-automatic recognition of European extradition requests. Extradition requests can be issued for two purposes, first, for conducting a criminal prosecution, and second for executing a criminal sentence. Thereby, different rules apply: An EAW for the purpose of prosecution can only be issued if the offence on which it is based is punishable in the issuing state with at least one year imprisonment. An EAW for the purpose of executing a criminal sentence can only be issued if the offence will lead to a minimum sentence of four months imprisonment. The EAW also applies to nationals. A list of 32 categories is introduced for which double criminality is removed if the respective offence is punishable in the member state for at least three years. Moreover, strict time limits for the execution of the EAW apply. The final decision has to be taken within 60 days after the arrest which can maximally be extended for another 30 days. If this time expired, the person has to be set free.

### **3.2 Implementation and National Debate**

When transposing the Framework Decision in national law, parliaments have exhausted their leeway to different extents, as reports of the Commission indicate. Comparing the implementation

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<sup>4</sup> The EAW, in a standard form, is sent directly from on judicial authority to another without the involvement of foreign ministries or any other diplomatic channel. The EAW can also be distributed via the Schengen information system (SIS) or Interpol. In this case, the original EAW needs to be filed subsequently within given time frames.

process in Germany and the UK, I will subsequently show that, both Germany and the UK significantly diverge from the terms of the Framework Decision.

## **Germany**

Germany transposed the European Arrest Warrant twice. The first transposition was late already and came into force 21 July 2004, six month after the implementation deadline had expired. After applying the European Arrest Warrant for one year, the German Constitutional Court declared the German transposition of the Framework Decision void (Ruling No. 2236/04, 18 July 2005). As a result, Germany dropped out of the European extradition system and reintroduced the old and cumbersome request principle. Following an intense debate, on 2 August 2006 the second version of the Act on the European Arrest Warrant (*Europäisches Haftbefehlsgesetz – EuHbG*) came into force and Germany rejoined the mutual recognition regime.

### *Parliamentary Debate*

The German government and its administration strongly support the principle of mutual recognition and with it the European Arrest Warrant. Therefore the implementing legislation which has been drafted by the Ministry of Justice aimed at transposing the European Framework Decision as closely as possible into national law. The transposition of the Framework Decision required changing the German constitution (*Grundgesetz - GG*) which took place in 2000 already to allow Germany to sign the Rome Statute on the International Criminal Court.

During the first implementation round, the German parliament perceived itself as having no leeway of changing a bill based on a European Framework Decision. Representative is the speech of CDU opposition leader Siegrid Kauder, during the bill's last reading in March 2004, saying: "We are in a difficult situation. The Framework Decision is valid law. [...] The German Parliament can only grudgingly support what Brussels has put on the table. [...] We will support this bill which transposes the Framework Decision into national law grudgingly and with tears in our eyes since we have no other opportunity as to do so."<sup>5</sup> As a result of the perceived lack of influence, very few parliamentarians gained expertise in the subject and there have hardly been any debates in parliament on the principle of mutual recognition and its consequences.<sup>6</sup> The main concern was whether mutual recognition would work in practice, given the heterogeneity of the European criminal justice systems. Therefore, the experts invited by the Legal Committee were practitioners who mostly focused on operational aspects. Despite some criticism, most parliamentarians regarded the bill as a necessary means to enhance judicial cooperation. When

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<sup>5</sup> Protocol of the Plenary Session of the German Bundestag, 11 March 2004, p. 8748.

<sup>6</sup> Information obtained by interviews.

parliament had to vote, a broad majority including opposition parties supported the bill, even though some parliamentarians did this “grudgingly”.

After one year of operation, the German Constitutional Court declared the *EuHbG 2004* unconstitutional and thereby void. The law was not in accordance with the German Basic Law. According to the Court, the German implementation encroaches upon the freedom from extradition (Article 16.2 GG) in a disproportionate manner; to be in line with the German Basic Law, stronger safeguards for German nationals would be needed. Moreover, the Court directly addressed parliament and accused it of not having exhausted the margins afforded to it by the Framework Decision in such a way that “the implementation of the Framework Decision shows the highest possible consideration of the fundamental right concerned”.

This came as a shock to parliament, government, and administration and caused a debate on the differences between the European legal systems and the conditions under which German nationals could be extradited. When drafting the second bill, the government tried to fully comply with the Court’s ruling by literally including whole passages of the judgment. In addition, the attitude of parliament toward implementing European law changed with the ruling of the German Constitutional Court. Sabine Leutheusser-Schnarrenberger, MP and former Minister of Justice, FDP, stated: “The German parliament is traditionally very pro-European. We pay attention to complying with basic thoughts of European law when transposing European law into national law. However, I think it will become more difficult now. You can no longer anticipate the German parliament to transpose European laws quasi automatically as in an assembly line, quietly waving through one bill after the other. These times are over.”<sup>7</sup> Therefore, the new bill was scrutinized more intensely. The Legal Committee discussed differences in EU legal systems, the lack of common procedural standards, and the principle of mutual recognition more thoroughly. Several parliamentarians highlighted the prevailing lack of trust in foreign legal procedures and demanded minimum harmonization measures as a basis for mutual recognition. It was argued that as long as common European standards were missing, further safeguards in the implementing legislation were needed.<sup>8</sup> In the end, the parliamentarians demanded several changes to the bill. As a result, the new implementing legislation entailed more rights of appeal, more complicated procedures to protect the accused person and new grounds for refusal, thereby especially strengthening the position of German nationals and “equated persons”.<sup>9</sup> The following paragraph will give a more detailed overview on the content of the new law.

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<sup>7</sup> Interview 17 August 2006 in Berlin.

<sup>8</sup> Information obtained by interviews and an analysis of the Protocol of the Plenary Session of the German Bundestag, 11 March 2004.

<sup>9</sup> Equated persons are non-German nationals who are married to a German or lived in Germany for several years.

*Content of EuHbG 2006: More complicated procedures, new grounds for refusal*

To comply with the Court's ruling and give the accused person more rights, the two-step procedure was replaced by a three-step-procedure in which the accused person is now entitled to appeal against the decision of the Chief Public Prosecutor (*Bewilligungsentscheidung*).<sup>10</sup> This procedure is not in full compliance with the Framework Decision and does not contribute to the Framework Decision's goal of a simplified extradition procedure (Wasmeier 2006:26). Moreover, new grounds for refusal were introduced: A European Arrest Warrant has to be refused invariably if the offence committed has taken place on German territory. In case the offence has taken place on German territory and the territory of other states, the judicial authorities have to determine the state on whose territory the most grievous violations took place. When central parts of an offence have been committed in Germany, an Arrest Warrant has to be refused. Moreover, a warrant has to be refused now if the official form was presented but the information given was incomplete. In addition, the list of required documents was expanded when a German national was involved: If a requesting state asks for a German national or an equated person to be extradited, it is now mandatory to provide a written certificate saying that the requesting state is willing to return the person in order to serve the custodial sentence in Germany. The following table will summarize Germany's additional safeguards.

*Additional safeguards in the German Europäisches Haftbefehlsgesetz (EuHbG 2006)*

<b>Procedure</b>	<b>EuHbG 2006</b>	<b>Framework Decision</b>
Three-step procedure including a judicial and an administrative authority	§ 79	Pure judicial procedure, no administrative authority involved
<b>Ground for refusal</b>	<b>EuHbG 2006</b>	<b>Framework Decision</b>
If a German national is involved and the offence committed has (mainly) taken place on German territory	§ 80 (1) 2	No such limitation envisaged
No written confirmation presented that a German national will be returned to serve the sentence in Germany	§ 80 (1) 1	Art. 5: Guarantees do not require a written confirmation
Non-reciprocity: If another state cannot be expected to surrender in a similar situation	§ 83b, 1d	FD contains no such regulation

<sup>10</sup> In an article published by Hackner et al. (2006) in a German law journal, the authors criticise the new procedure, saying: "The result is a cumbersome procedure which is not in accordance with the Framework Decision's aim of speeding up cooperation. The result may enhance the rights of the individual. However, this level of protection would have been more appropriate for extradition requests from non-EU states." (Translation by author.)

After having analyzed the German implementation of the Framework Decision on the European Arrest Warrant, I will now turn to the implementing legislation and the accompanying debate in the United Kingdom.

### **The United Kingdom**

The UK is one of the few states which met the implementation deadline. Parliament passed the *Extradition Act 2003* in November 2003 and it entered into force on 1 January 2004. In the UK, no court challenged the *Extradition Act 2003* as result of which UK is among those countries who are running the new European extradition system for the full three and a half years now.

#### *Parliamentary debate*

In 1999 at the European Council in Tampere, the UK government suggested to introduce the principle of mutual recognition to the third pillar. According to the UK government, mutual recognition was a good alternative to harmonization, which it strongly opposed in judicial matters. The opposition to harmonization was strengthened by fact that the UK, as one of only two common law countries in the EU, feared to be pressured into adopting more features of the continental inquisitorial criminal law systems. The principle of mutual recognition of judicial decisions was regarded as a measure to allow for enhanced judicial cooperation by avoiding a “European judicial superstate”.

Nevertheless, it was a difficult task for the government to persuade parliament to pass the bill on the European Arrest Warrant since the Framework Decision turned out to attract the simultaneous opposition of the eurosceptic right and the libertarian left (Spencer 2003/2004). Analyzing the parliamentary debates during the second and third reading of the bill, three main objections can be identified.<sup>11</sup> First, the assumption of a general inferior quality of criminal justice systems in continental Europe, second, the abolition of the dual criminality requirement<sup>12</sup> in respect to the 32 offences as a gateway for continental law, and third, the deficiencies of parliamentary scrutiny in EU third pillar issues which directly touch upon citizens’ fundamental rights.

The first major objection, the alleged inferiority of the legal systems of continental Europe, can be traced back to both a lack of knowledge and major distrust (Spencer 2003/4). Some of these arguments were ideological rather than well-grounded. Oliver Letwin, Conservative MP and

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<sup>11</sup> Analysis based on the following documents: House of Commons debates, Second Reading on the Extradition Bill, 9 December 2002, and Third Reading on the Extradition Bill, 25 March 2003. House of Lords debates, 6 May 2003 on the Extradition Bill.

<sup>12</sup> The dual criminality rule says that an offence has to be punishable by the criminal law of both countries to extradite a person. When the dual criminality rule is abolished, a person can be extradited for an offence which is an offence in the issuing state but not in the requested state.

Shadow Secretary of State for Home Affairs, was among those who strongly emphasized the inferiority of the judicial systems of continental Europe. According to him, inquisitional systems were based on a presumption of guilt which then would need to be disproved by the investigation. He said he was wondering why the European Court of Human Rights in Strasbourg held them in conformity with the presumption of innocence clause. Comparing the adversarial and the inquisitional systems<sup>13</sup>, he stated that, as a matter of fact, the British system was clearly superior. His general criticism towards some continental jurisdictions was shared by many. Referring to cases such as the British plane spotters in Greece<sup>14</sup>, many MPs from both Labour and the Conservative Party argued that some foreign courts could not be trusted as much as British courts. Countries which were assumed of having a lower level of human rights standards included Greece, Spain, Italy, France and Belgium. On more general terms, it was argued that EU countries were too different to subscribe to mutual recognition of judicial decisions. If mutual recognition should be applied nevertheless, more safeguards were needed.

The second major objection was the abolition of the dual criminality requirement. The list of 32 offences which were exempted from dual criminality was regarded as a gateway for inferior continental criminal law to apply on British territory. The Conservative Party took the view that dual criminality is an important and necessary safeguard to prevent injustice when dealing with requests from other EU countries. Several MPs were especially concerned with the offence of “xenophobia” which is not known as an offence in British law. Introducing xenophobia into the list was regarded as a risk to the fundamental right of free speech. This, as Spencer (2003/04:15) put it, “gave rise to one of the most astonishing europhobic scare-stories of all time”: Parliamentarians feared that British newspaper editors could be extradited for publishing an anti-European editorial. The European Arrest Warrant could be used, so was said, to prevent British newspapers telling the truth about Europe. Spencer quotes a eurosceptic British MEP, saying that the European Arrest Warrant “would give the EU total power to deal with its critics”.<sup>15</sup> In addition, fears were

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<sup>13</sup> The adversarial system (or adversary system) of law is the system of law, generally adopted in common law countries, that relies on the skill of the different advocates representing their party's positions and not on some neutral party, usually the judge, trying to ascertain the truth of the case. The inquisitorial system that is usually found on the continent of Europe among civil law systems (i.e. those deriving from the Roman or Napoleonic Codes) has a judge or a group of judges who work together whose task is to investigate the case before them.

<sup>14</sup> In November 2001, a group of 12 British and two Dutch plane-spotters were arrested as suspected spies in Greece. The group of tourists had pursued their hobby of plane-spotting at a Greek military air show. However, taking pictures of military planes is forbidden in Greece to prevent espionage. As a result, eight of the group had been arrested for 37 days and sentenced to three years in jail for espionage, and the other six to one year in jail, suspended for three years, for aiding and abetting. In December 2001, all had been allowed to return home to prepare their appeals. After a year-long battle to prove their innocence, the tourists were cleared of spying. Source: BBC online, report of 8 December, 2001, Telegraph online, report of 12 April 2003.

<sup>15</sup> Spencer (2003/04:15) quotes Jeremy Titford MEP (UKIP) who wrote an article in the *Herts Mercury*, 21 January 2003. Interestingly, Polish Prime Minister Jarosław Kaczyński obviously thought an EAW could be issued in such situations. In 2006, he suggested issuing an EAW to silence a German journalist of the left-wing

expressed that tabloid editors could be arrested and extradited for provocative remarks about “Frogs” and “Huns” on the day of a football match.<sup>16</sup> Despite arguments from the government which emphasized that double criminality would only be abolished for severe offences that attract a one-year penalty in the requesting state, most MPs remained skeptical.

The third major objection concerned parliament’s role in the implementation process of third pillar Framework Decisions. Several parliamentarians criticized the perceived deficiencies of parliamentary scrutiny in EU third pillar issues. According to them it is the responsibility of parliament to decide on issues which directly touch upon citizens’ fundamental rights. They declared that government was not in a position to let parliament off the hook in these questions. The Labour government reacted to these demands and presented the bill at a very early stage in the process. This gave both houses enough time to scrutinize the bill. Despite the British majoritarian system, the bill was not supported by all Labour parliamentarians; among the critics was Chris Mullin, the Chairman of the Home Affairs Select Committee. In the end, the Labour government managed to keep most characteristics of the original bill. However, as a result of parliamentary scrutiny, changes had to be made and some additional safeguards were introduced. The following paragraph gives a short overview on the content of the *UK Extradition Act 2003*.

#### *UK Extradition Act 2003*

In the UK, the central judicial authority is the *National Criminal Intelligence Service* and in Scotland the *Scottish Crown Office*. The decisions will be taken by *District Judges*. The UK was criticized by the Commission for not allowing direct transmission of an EAW when assigning these two institutions. The UK itself, however, argued that it was known to be useful to have a central authority to coordinate and advise local police forces that have no experience of EAW cases and need to be guided through the arrest process (Home Office 2006). The Home Office thereby referred to Article 7(2) of the Framework Decision which allows for making a central authority responsible for the administrative transmission and reception of EAWs. The Distrust towards other member states is expressed by explicitly including human rights concerns (Section 21) and the arrest of a person due to religious and political opinions (Section 13) as grounds for refusal. Interesting is Section 64 which refers to the extra-territorial jurisdiction exercised by a member state in a non-EU country. In this section, the UK expresses its discomfort with a general extra-territorial jurisdiction in criminal matters, as some member states such as Belgium and Spain exercise. In these cases, the UK diverges from the principle of mutual recognition and declares its

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German daily TAZ who wrote a satire on the Polish President Lech Kaczyński, comparing him with a potato. However, in the end Polish judicial authorities never issued a warrant.

<sup>16</sup> Lord Norman Lamand, member of the House of Lords, in an article in *Daily Telegraph*, 4 December 2001.

own law to be applicable: Only if the offence on which the EAW is based is punishable by more than 12 month *according to British law*, the EAW will be accepted. The additional safeguards are summarized in the following table.

*Additional safeguards in the UK Extradition Act 2003*

<b>Ground for refusal</b>	<b>Extradition Act 2003</b>	<b>Framework Decision</b>
Person was arrested for race, religion, gender, sexual orientation or political opinion	Section 13	FD refers to ECHR
Human rights concerns	Section 21	FD refers to ECHR
Requested person was acting in the interest of the UK or had an authorisation given by the UK State Secretary	Section 208	FD does not contain such a regulation
Hostage Taking Considerations	Section 16	FD does not contain such a regulation
If EAW is based on extra-territorial jurisdiction of issuing state and the offence is punishable by less than 12 months <i>by UK law</i>	Section 64	FD does not contain such a regulation
Additional assurances for persons convicted <i>in absentia</i> such as right to defend himself in person on retrial, legal assistance on his own choosing, financial support if necessary, right to examine witnesses against him etc.	Section 20	Article 4 (7): Right to retrial without these additional assurances

**Result: Concerns of national parliaments**

As the two case studies on the national transposition in Germany and the UK have demonstrated, the preconditions of mutual recognition are not yet met. As a result, both parliaments stressed the differences between national legal systems and the need for additional safeguards to protect their own citizens’ from allegedly inferior criminal law. However, in Germany, it was the Constitutional Court that called upon parliament to include additional safeguards. The legal system reflects the fundamental values and norms of a nation state. This is especially true for criminal law and procedures which reflect a national consensus on what a society regards as still acceptable and what qualifies as a criminal offence. Moreover, every criminal law system has its own priorities among the different goals of punishment, deterrence, incapacitation, and rehabilitation. According to Maduro (2007), there is always an identity policy hidden behind different national rules. As political science research has shown, identity issues are not negotiable. Against this background, national parliaments might want to make sure that foreign legal systems meet their own standards and respect a society’s choices. If in the eyes of a national parliament the preconditions of mutual

recognition are not yet met, a parliament is very likely to opt for additional safeguards such as the UK's approach to the exercise of extraterritorial jurisdiction of member states.

Moreover, a debate addressing the dilemma between input and output legitimacy – to speak in Fritz Scharpf's words (Scharpf 1999) – could be observed; that is a debate addressing the tension between a national parliament's rights as legitimate representative of the "will of the people" in decision-making which touches upon fundamental rights (input legitimacy), and the need to implement the Framework Decision correctly to improve judicial cooperation in Europe (output legitimacy). Here is the dilemma: When introducing too many safeguards and grounds on which cooperation can be denied, the goal of better judicial cooperation will not be met. Facing this dilemma, it can be observed that the UK parliament emphasized input legitimacy when it demanded to have sufficient time to scrutinize the bill and introduced additional safeguards to make sure fundamental rights standards were met. The German parliament, however, followed the logic of output legitimacy when pointing to the larger goal of enhancing judicial cooperation, and even the opposition parties declared that they would subscribe "grudgingly" to what "Brussels had put on the table". In this case, it was the German Constitutional Court that demanded more input legitimacy when it called upon parliament to use the leeway afforded by the Framework Decision to better protect the fundamental rights of German citizens.

Moreover, given the choice between reaching the goal of enhanced judicial cooperation in Europe either via harmonization of national criminal and procedural laws or via mutual recognition, the UK parliament stressed the benefits of mutual recognition since it seems to interfere less with national autonomy. Maduro (2007) argues that the legitimacy of mutual recognition is reinforced the more the debate takes place in the context of alternative modes of governance. Nevertheless, reflecting on the consequences of mutual recognition, the German parliamentarians called for some common European minimum standards defined on the European level as a further precondition for mutual recognition.<sup>17</sup> The establishment of a Fundamental Rights Agency might be a step to address these problems.

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<sup>17</sup> Several authors argue that mutual recognition systems might be a trigger for new safeguards on a European level such as e.g. minimum harmonization of procedural rights or common definitions of offences (Lavenex 2007). However, in Justice and Home Affairs, agreement on common minimum standards is especially hard to reach as the reactions to the Commission's proposals on a Framework Decision on common procedural rights (COM(2004) 328 final) show. The current text of a Framework Decision on procedural rights, presented in February 2007 by the German presidency is less ambitious than the Commission's draft. Nevertheless, even the watered down text might not find consensus. Commissioner Frattini even suggested to use the form of "enhanced cooperation" and adopt the text with eight member states only (statement on an ERA conference on 22 February in Berlin, see Press Release at [www.era.int](http://www.era.int)).

### 3.3 Operation of the mutual recognition system

Surprisingly little is known about the day-to-day cooperation of member states' judges in the implementation of mutual recognition. The Council is currently conducting a study on the practical application of the European Arrest Warrant. Based on first evidence, the Commission calls the mutual recognition on the European Arrest Warrant "a great success".<sup>18</sup> However, it acknowledges that difficulties in relation to the surrender of nationals can be observed in some countries. Germany, Poland, and Cyprus had constitutional problems with their implementing legislation. In addition, Belgium has referred preliminary questions to the European Court of Justice (ECJ) on the correct interpretation of the EAW. Nevertheless, the European Arrest Warrant is applied increasingly by the member states. Statistics provided by the Commission help us to gain first insights in the operation of the mutual recognition system. In 2005, 6800 European Arrest Warrants had been issued and since one warrant can address several countries even more warrants had been received, namely 8300.<sup>19</sup> The actual numbers will be even higher, because Germany, Belgium and Greece were excluded from the statistics since they did not report their numbers for 2005. In 2004, the member state that issued most EAWs was Germany with more than 1300 warrants issued. Excluding Germany, in 2005, France issued most warrants (1009), followed by Poland with 1004 and Austria with 975 EAWs issued.

The countries addressed most in 2005 were Spain with 500 incoming warrants and France with 452. Germany received 372 extradition requests but opted out of the mutual recognition system in July 2005.<sup>20</sup> The UK declared to have received 5986 incoming warrants. However, when analyzing the number more closely, it turns out that only 187 have been exclusively addressed to the UK.<sup>21</sup> According to the European Commission, in 2005 a quarter of the cases lead to the localization and arrest of the person, and 85 percent of the localized persons were surrendered effectively (2004: 60 percent). In every second case of surrendering a national, a guarantee under article 5 (3) of the Framework Decision was requested.<sup>22</sup> The new mutual recognition system did lead to a speeding up of extradition procedures. If a person consented, in 2005 it took on average two weeks from arrest to extradition. If a person did not consent, the average procedure took 42 days.

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<sup>18</sup> Presentation of Isabelle Pérignon, European Commission, on an ERA conference on 24 October 2006 in Trier.

<sup>19</sup> This data focuses on 22 countries only and excludes Belgium, Germany and Greece since these three countries did not provide all necessary data for 2005. Source: Presentation of Isabelle Pérignon (see above).

<sup>20</sup> Bundesministerium der Justiz (2006): Bekanntmachung der Auslieferungsstatistik für das Jahr 2005, Bundesanzeiger 2006, S. 7366.

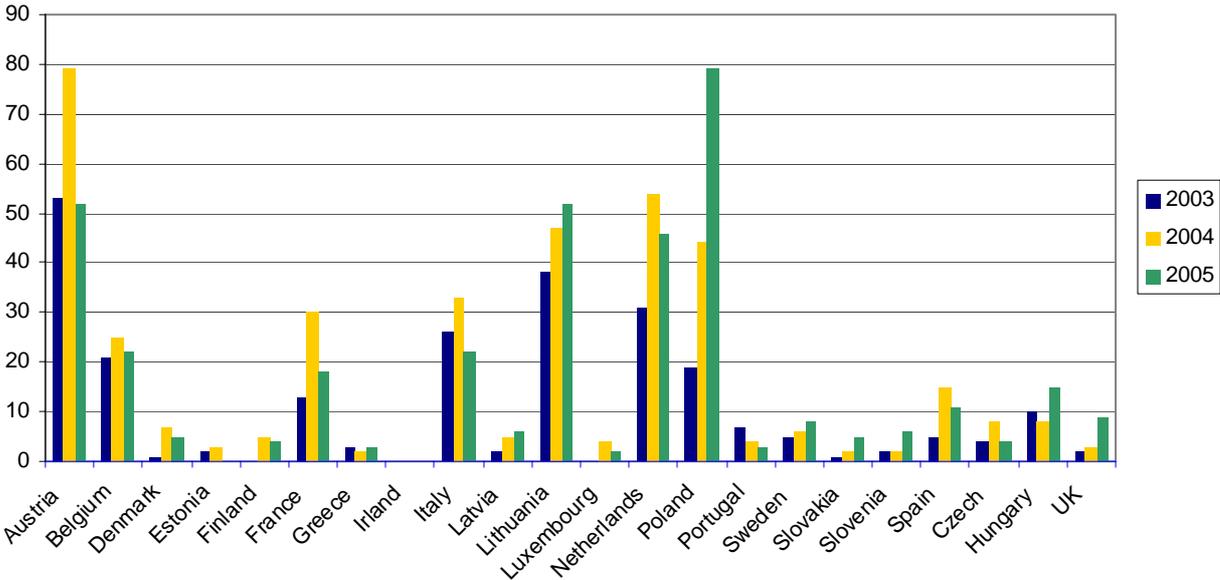
<sup>21</sup> Despite the high number of incoming European Arrest Warrants in the UK, according to Karen Townsend, Crime Reduction and Community Safety Group of the Home Office, only 187 of them were directly addressed to the UK. The other warrants have been Interpol diffusion notices not exclusively addressed to the UK.

<sup>22</sup> Article 5 (3) says: "Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing member state, surrender may be subject to the condition that the person, after being heard, is returned to the executing member state in order to serve there the custodial sentence or detention order passed against him in the issuing member state."

**Germany**

When analyzing the operation of the mutual recognition system in Germany, a lack of good data becomes evident. The Ministry of Justice publishes an annual extradition statistic, which allows for calculating the broad figures (BMJ 2004, 2005, 2006). However, the statistics do not differentiate between extradition procedures based on traditional bilateral agreements and EAWs, as a result of which the following data can only provide limited insights into the operation of the EAW system. When looking at Germany as an issuing state, Germany is the country which in 2004 issued the most EAWs by a wide margin, approximately 1300.<sup>23</sup> It can be observed that the introduction of the mutual recognition system doubled the extradition requests issued by Germany. The number of incoming extradition requests increased as well, but not to such extent.<sup>24</sup> The following table will give an overview on incoming extradition requests in the year preceding the EAW and in the first two years after the EAW was introduced.

**Extradition requests to Germany**



When comparing the number of requests with the actual extraditions, the rate of rejection seems quite low given the assumption of low trust and compatibility problems. In 2004, only four percent of the concluded extradition procedures were rejected.<sup>25</sup> The country whose requests were rejected the most was Italy. In 2005, the number of rejections increased to 15 percent. The country rejected

<sup>23</sup> Council of the European Union (2005): Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant, 7155/05, COPEN 49 EJM 15 EUROJUST 15, published 9 March 2005, Brussels.

<sup>24</sup> BMI (2006), BMI (2005), BMI (2004)

<sup>25</sup> It is very likely that many of these procedures started before 2004 and were not based on a European Arrest Warrant. Unfortunately, Germany does not indicate which procedures were based on an EAW and which were based on traditional bilateral extradition agreements. The same might be true for the numbers for 2005.

the most was Poland, followed by Italy. The increase in rejections might be traced back to the German drop-out of the mutual recognition system. After the Constitutional Court's Decision in July 2005, Germany no longer accepted European arrest warrants. However, not all other concluded procedures result in an extradition, according to the statistics several procedures were concluded due to "other grounds".

A of the German Ministry of the Interior stated that the low rejection rates do not adequately reflect the "situation on the ground". This evaluation was confirmed by German judges in charge of running the mutual recognition system.<sup>26</sup> They acknowledged the advantages of the new extradition system but also pointed to problems caused by heterogeneity of judicial systems and cultural differences. Moreover, with an ironical undertone, some stereotypes were expressed: The Spanish legal system still suffers from the Franco dictatorship, the Italian system is slow and corrupt, detention conditions in Latvian prisons are unbearable, and the British adversarial system is of lower quality compared to the continental system as the miscarriage of justice in the Birmingham Six case shows.<sup>27</sup> Some judges were still skeptical as to whether establishing a mutual recognition system was the best strategy to create a European judicial area.<sup>28</sup>

Concerning day-to-day cooperation, some problems caused by difference were mentioned. It was stated that cooperation with Eastern Europe was still a problem. Cases were reported in which the Polish authorities issued an EAW based on minor offences which according to German law would not qualify for an EAW.<sup>29</sup> According to Polish law, however, the offence was punishable for at least three years and fell under the list of 32 categories for which double criminality was diminished. The judge criticized the EAW system for allowing an extradition in this case. Issuing an EAW for such an offence was regarded as completely out of proportion. Moreover, judges expressed their concern towards the Polish criminal system more generally and referred to the suggestion of Przemyslaw Gosiewski, Polish parliamentary leader of the government party PiS, to issue an EAW to prosecute a German editor who wrote a satire on the Polish president which

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<sup>26</sup> The following information is obtained by interviews with four German judges and a representative of the Ministry of the Interior. These interviews are not representative and can only provide for first anecdotic evidence as to how the mutual recognition system operates in practice in Germany. Anonymity was assured.

<sup>27</sup> The Birmingham Six Case is one of the most well known miscarriages of justice in the UK. The Birmingham Six were six men sentenced to life imprisonment in 1975 for two pub bombings in Birmingham, England on November 21, 1974 that killed 21 people and injured another 160. On March 14, 1991, the Court of Appeal quashed their convictions for the murder of 21 people and the six were freed after 16 years of imprisonment for a crime they did not commit. The perpetrators of the Birmingham bombings were never revealed. (Source: BBC online)

<sup>28</sup> Information was obtained from judges and practitioners, anonymity was assured.

<sup>29</sup> According to a Council official, several countries reported problems in cooperating with Poland due to EAWs issued for minor offences. One prominent example was a case in which Poland issued an EAW for a person who thieved two car tyres. The Council official said that it was a surprised to find out that some countries frequently apply the EAW for minor offences. This was not envisaged by the FD. As a result, further measures based on mutual recognition might include a proportionality clause (interview 11 April 2007, Brussels).

raised concerns that Poland might misuse the EAW system.<sup>30</sup> Contrary to these concerns, the surprisingly good cooperation with the Czech Republic was stressed.

In addition to the Eastern European countries, the UK was mentioned as a country with which cooperation in extradition matters would still be especially cumbersome. “The English Channel separates us – and it is deep”, was pointed out. However, it was not the quality of the British judicial system that was criticized but the differences in procedures and division of competences between police and judicial authorities which would cause problems in practice. The division of competences between police and judicial authorities was mentioned as a problem in the cooperation with France as well. Thus, in an interview it was pointed out that the French Alsace region was an exception since good personal contacts would improve information exchange and therefore compensate for differences in legal systems. The Scandinavian countries were praised for their good English skills and their technical standards. It was highlighted that the willingness to use e-mail and other new techniques instead of formal letters would shorten the procedures. The countries with which, according to these first interviews, judicial cooperation was most successful were Austria and Switzerland, even though Switzerland was not part of the mutual recognition system. It was pointed out that a shared legal tradition and the same language would help. Heterogeneity is regarded as a problem. In an article of a German criminal law journal in 2006, several judges expressed their concern of mutual recognition against the background of heterogeneity. They feared the misuse of EAWs and argued that judges will increasingly use the legal institute of the *ordre public* as “an emergency brake” to reject an EAW which they regard as being out of proportion.<sup>31</sup>

This shows two things, first, being directly confronted with the heterogeneity of European criminal justice systems lead to an increased knowledge of differences. Second, being confronted with these differences might lead to more skepticism among judges towards the quality of other member states’ criminal justice systems. In other cases, however, good cooperation is able to overcome prejudices and stereotypes. Moreover, the reference of the judges to the good cooperation record with Austria and Switzerland suggests that the more similar a system is, the more likely it is that judicial cooperation proves successful.

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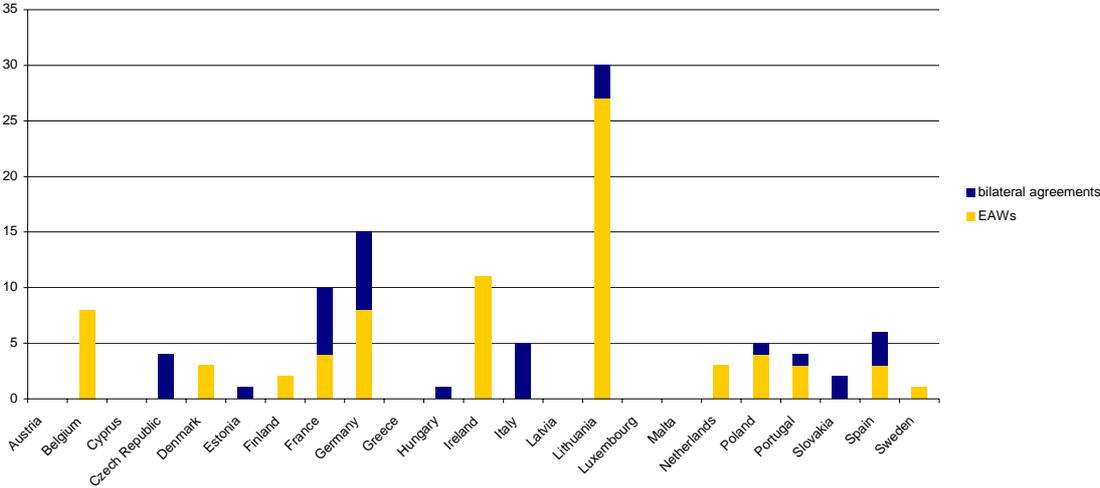
<sup>30</sup> The Polish parliamentary leader of the government party PiS, Przemyslaw Gosiewski, to issue an EAW to prosecute the German editor Peter Köhler. In 2006, Köhler wrote an article in the leftwing *German Tageszeitung (Taz)* in which he satirized the Polish president by comparing him with a potato.

<sup>31</sup> See e.g. Hackner et al. 2006, page 668: „Against the background of an EU which soon will be comprised of 27 member states, we are not so sure if the Council and the national legislatures have been aware of what they were doing and what kinds of behaviour were de facto penalised by the vague catalogue. [...] Given this situation, it cannot be excluded that the vague norm of the national *ordre public* will serve as an emergency-brake.” Hackner et al. also refer to the case of the potential Polish arrest warrant for the German TAZ editor, saying this illustrates the potential of misuse of EAWs if they fall in the wrong hands. (Translation by author).

**The United Kingdom**

Similar to Germany, I will first give some general numbers on the operation of the EAW in the UK. According to the questionnaire of the Council, in 2004, the UK surrendered 23 persons based on an EAW.<sup>32</sup> Based on a House of Lords’ Report, 5 EAWs were rejected in 2004. According to numbers provided by the Home Office, the number of extradited persons based on an EAW increased to 77 in 2005.<sup>33</sup> Another 29 EAWs were rejected by British Courts. In addition to the 77 extraditions based on an EAW, another 34 persons have been surrendered to member states based on bilateral agreements. In the first two months of 2006, another 11 persons have been surrendered.<sup>34</sup> The following tables will show the number of extraditions in 2005 differentiated by country. Unfortunately similar statistics are not available for 2004.

**Number of people extradited by the UK in 2005**



Source: UK Home Office (2006)

According to the House of Lords’ report, in the period 1 January 2004 to 22 February 2006, the UK received 5732 EAWs. Compared to the high number of EAWs received, the number of arrests is comparably low. In the above mentioned period, only 176 EAWs resulted in an arrest in the UK which in the end led to 88 extraditions. However, the large discrepancy between the number of EAWs received and the number of arrest and extraditions is, according to the House of Lords’ report due to the fact that the UK also counted the large number of EAWs posted as alerts on the

<sup>32</sup> Council of the European Union (2005): Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant, 7155/05, COPEN 49 EJM 15 EUROJUST 15, published 9 March 2005, Brussels.

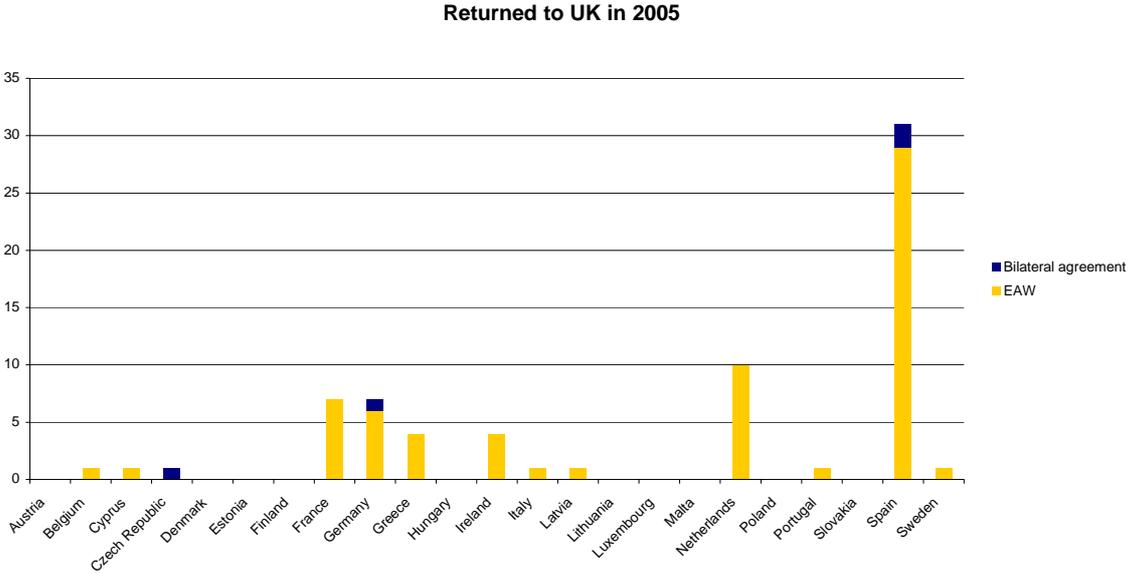
<sup>33</sup> On 19 July 2006, Joan Ryan, Parliamentary Under-Secretary, Home Office, provided the extradition statistics for 2005 due to a request of David Drew, MP Labour. Source: <http://www.theyworkforyou.com/wrans/?id=2006-07-19b.83822.h>

<sup>34</sup> House of Lords (2006): European Arrest Warrant – Recent Developments, Report with Evidence, European Union Committee, 30th Report of Session 2005-6, published 4 April 2006, p.9

Schengen Information System (SIS) or via Interpol that were not directed at one member state. Unfortunately, there are no data available on the number of requests by country.

Interviews with practitioners shed some light on the cooperation problems with different member states.<sup>35</sup> Germany and Austria were said to allow issuing an EAW if the police had “a strong suspicion” that a person committed a crime. As a result, an EAW would be issued in the investigation stage of the process and lead to interviewing a suspected person instead of prosecuting an accused. This practice was highly criticised as a misuse of the EAW system. Moreover, there was some general criticism towards some member states on their interpretation of the offences falling under the list of 32 categories. The country which was mentioned to be the best cooperation partner was Ireland. It was pointed out that it would help that Ireland shared the common law tradition. Moreover, the UK and Ireland would look back on a longstanding extradition tradition on special conditions, based on the Backing of Warrants Act of 1965.

Looking at the UK as an issuing country, the judicial authority in charge, the National Crown Investigation Service (NCIS), evaluates the mutual recognition system as working well.<sup>36</sup> The following table will give an overview of the persons returned to the UK in 2005.



Source: UK Home Office (2006)

The UK made 201 requests which led to 90 arrests and 69 surrenders between 1 January 2004 and 22 February 2006. Among the persons was the high profile case of Hussain Osama, a Portuguese who was returned to the UK after having fled to Italy. Hussain Osama was suspected of being

<sup>35</sup> Information obtained from interviews of judges who participated in the conference “Mutual recognition and the role of the national judge”, organised by the Academy of European Law (ERA) in Trier, October 2006.

<sup>36</sup> House of Lords (2006).

involved in the second failed London bombings. Nevertheless, it was said that there was still variation in the amount of time the procedure has taken and not all cases had gone swiftly.<sup>37</sup> Moreover, the constitutional problems which arose in Germany, Poland, Cyprus and Belgium and stated these were regarded with concern since they raised legal uncertainty. The UK authorities fear that until the legal uncertainty is resolved, the benefits of the EAW will not be fully felt across the whole Union. The House of Lords' report states in its conclusion: "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."

### **Result: Concerns of national judges**

Despite the Commission's vision of the quasi-automatic mutual recognition of judicial decisions, national judges do have some discretion in their decisions. Therefore, they are in a position to either comply with a cooperation request or deny it. As a result, if a mutual recognition system will work in practice it first of all depends on the behavior of national judges. If a national judge repeatedly receives EAWs which he evaluates as a misuse of the mutual recognition system, the judge will challenge that a member state's criminal justice system qualifies as equivalent, compatible and trustworthy. As a result, a judge will be more likely to use his or her margin of discretion and show uncooperative behavior. Therefore, national judges can be regarded as veto-players and gate-keepers over the jurisdiction on the national territory.

As the interviews have shown, being part of an international cooperation system is a new role for most national judges. Usually, they are trained in national law and do not have a deeper knowledge of foreign European legal systems. Moreover, traditionally, it was not necessary for a national judge to learn foreign languages. Therefore, not every judge is able to speak English or another foreign language on a working-level basis. Based on a general lack of knowledge in foreign legal systems and some prior experiences based on bilateral cooperation agreements, prejudices and stereotypes on the quality of a foreign criminal system prevail in some cases. Given this situation, I argue that national judges act as veto-players and show uncooperative behavior if in their eyes the preconditions of mutual recognition are not met and they have concerns about the criminal justice system of another member state.

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<sup>37</sup> House of Lords (2006), p.10.

### 3.4 Support Structures - Eurojust

Institutional support structures might help to overcome these problems to a certain extent by fostering trust, providing information on different legal systems, helping to solve conflicts of jurisdiction, and dealing with problems arising from incompatibilities between justice systems. As Susanne Schmidt (2006) argues, mutual recognition systems need institutional support structures to address the high transaction costs of horizontal cooperation. The European Judicial Network<sup>38</sup> but especially Eurojust<sup>39</sup> can be regarded as such an institutional support structure in EU judicial cooperation. Eurojust's explicit task is to improve cooperation between the judicial authorities in the member states, bring better coordination of cross-border cases and exchange information. According to the EAW Framework Decision, Eurojust is explicitly entrusted with a number of tasks regarding the operation of new European extradition system: Its advice might be sought if there are competing arrest warrants by more than one member state, and it must be informed if there are delays in the execution of warrants. Therefore, I will focus on Eurojust. I will analyze as to what extent Eurojust is accepted by Germany and UK and in how far the two countries use Eurojust's support to enhance judicial cooperation. As an indicator, I will use case referrals to Eurojust and the participation in Eurojust coordination meetings. The following table gives an overview on development of the general number of cases referred to Eurojust by all member states, and shows that the services of Eurojust are increasingly called upon.

#### *Cases referred to Eurojust*

2001	1 March – 31 December	192
2002		202
2003		300
2004		382
2005		580
2006	1 January – 15 October	700

Source: Presentation of Annette von Sydow, Eurojust. Conference of the Academy for European Law, 23 October in Trier.

According to Eurojust, a typical case in which member states contact the agency is when problems arise on where to surrender a person to in case of multiple requests. Moreover, Eurojust is also

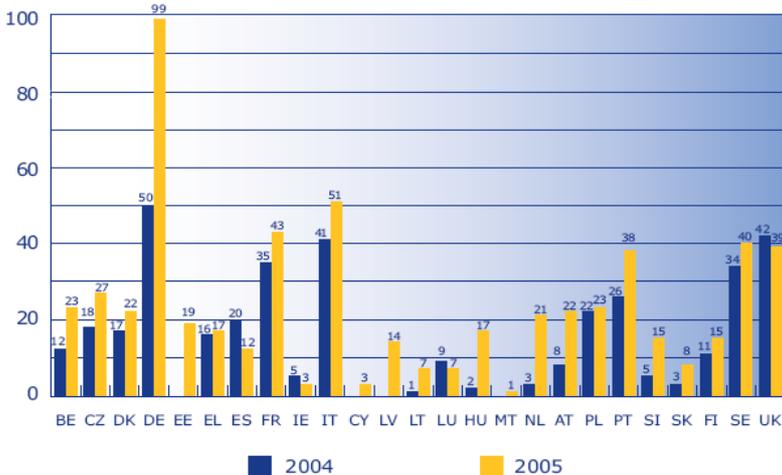
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<sup>38</sup> The European Judicial Network (EJN) is a network of national contact points in all EU member states composed of judges and prosecutors appointed by their governments. Moreover, the EU runs an exchange program for magistrates and officials who are posted in another member state ("liaison magistrates").

<sup>39</sup> Eurojust is a European Union body established in 2002 to enhance the effectiveness of the competent authorities within member states. It is located in Den Haag, Netherlands. Eurojust itself has not operational competences. Its task is to support national authorities and to coordinate complex cross-border cases. Eurojust is a permanent network of judicial authorities. Its core is the College which is composed of 27 national members, one nominated by each EU member state.

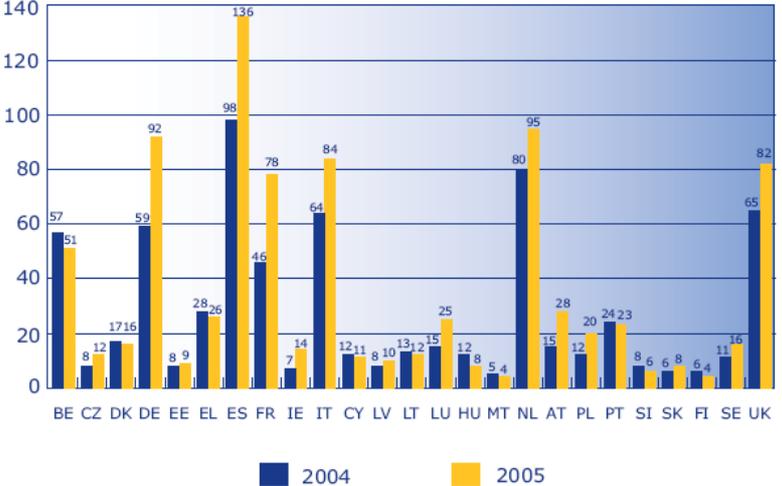
contacted to more generally improve cooperation with a specific member state, especially with regard to facilitating the execution and implementation of extradition requests. Using the services of Eurojust by referring a case to the agency therefore is a sign that a state actively aims to solve cooperation problems arising in a mutual recognition system. The following two tables show which countries very actively use the services of Eurojust (requesting countries) and how often a country is contacted by Eurojust on behalf of the requesting countries (requested countries).

*Requesting countries*



Source: Eurojust Annual Report 2005, p. 31

*Requested countries*



Source: Eurojust Annual Report 2005, p. 31

In Germany and the UK, Eurojust is highly valued and parliamentarians as well as judges point to the added value of the institution. Nevertheless, in Germany, the implementation of the Eurojust

Decision (2002/187/JHA) has proven very complicated. This can be traced back to Germany's federal system where most of the competences for criminal law prosecution lie at the level of the 16 Länder. As a result, it took Germany until May 2004 to assign a national member and participate in the system. Germany is the most active country when it comes to seeking advice and referring cases to Eurojust. In addition, Germany is the country that is requested the most by a member state via Eurojust. In 2004, 98 requests were made and in 2005, the number increased to 136. According to interviews, this can be traced back to legal uncertainty caused by Germany's late implementation and the opt-out of the system in July 2005. As a result, member states might have been confused as to what rules to apply when extraditing nationals from and to Germany. Moreover, another reason might be Germany's complicated division of competences between the federal and the Länder level. This supports the argument that institutional support structures are necessary for judges to cope with the heterogeneity of a mutual recognition system in daily cooperation.

The UK also regularly requests Eurojust. In 2004, 42 requests were made and in 2005 39. In addition, the UK is among those countries requested most with 65 requests in 2004 and 82 in 2005. The UK often participates in Eurojust coordination meetings. Moreover, Eurojust is regarded as an alternative to a European Public Prosecutor as demanded by Germany. The House of Lords report states: "In our view Eurojust is a model of how to make progress in an area where the differences between national jurisdictions are so great that it would be unrealistic to aim for harmonization. It is also an example of the sort of effective practical cooperation that an EU agency can provide, which is sometimes lost in the more ideological debates" (House of Lords 2004:39).

## **5. Mutual recognition and diversity: Research Outlook**

Based on the comparison of the implementation and first interviews, cooperation is best among countries which are most similar such as Austria and Germany or Ireland and UK. Moreover, the heterogeneity between legal systems might cause mistrust and the rejection to accept another member state's system as equivalent and comparable. Given this situation, however, what are the differences that lead to problems when running the mutual recognition system, and what differences can be neglected since they have only little or no effect? Summarizing the differences which have been mentioned most, differences in the following four categories can be identified which have an effect on a judge's willingness to recognize a judicial decision: First, differences in the criminal justice system, second, differences in language skills, third, a prior tradition of judicial cooperation based on bilateral cooperation agreements, fourth, the attitude of the respective judicial authority towards new communication and information techniques and "E-Justice". I

therefore assume that member states will not treat every other member states the same way. I assume that the general reluctance or willingness to recognize another's member states judicial decision depends on differences in the four categories mentioned, whereas the first category, differences in criminal justice systems, impacts most.

*Differences in the criminal justice systems* The more similar a criminal justice system, the more trustworthy it seems for those who are in charge of applying its rules and the better the cooperation record in a mutual recognition system. When it comes to differences in legal systems, two dimensions of differences are mentioned. First, differences in material law such as the definition of an offence, and second, differences in procedures, such as for example the competences attributed to the police vis á vis the public prosecutor. The main differences here are between common law countries with their adversarial system of law (Ireland, UK), and civil law countries with an inquisitional system (continental Europe). However, even among civil law countries, there is a variety of versions of the inquisitional system.

*Prior tradition of bilateral judicial cooperation* According to political science research, repeated interactions in which the cooperation partners show a cooperative behaviour enhances trust.<sup>40</sup> Based on these results and interviews with judges, I argue that prior bilateral judicial cooperation agreements between two states have an impact on the cooperation behaviour of judges under mutual recognition. Given that two states already have a successful history of judicial cooperation, this interaction may have led to a better knowledge on the other state's criminal justice system. And knowledge increases trust. However, when the cooperation experience was rather negative, this might also have a negative impact on the willingness to recognize judicial decisions of that state. Therefore, I argue that member states which prior to mutual recognition already had a successful judicial cooperation based on bilateral agreements are more likely to trust each other and show a positive cooperation attitude.

*Different Languages* According to the EU's conception of mutual recognition in Justice and Home Affairs, judicial cooperation relies on direct contact judge to judge. Direct contact, however, requires either a common working language or translation. Practitioners state that if both parties share a common language, cooperation will run a lot more smoothly. In this case, documents need not be translated immediately, and national judicial authorities can use the phone or e-mail to directly discuss and clarify the situation with their counterparts. This allows problems to be solved more straightforwardly which results in faster cooperation procedures. This view is confirmed by

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<sup>40</sup> See political science literature on game theory, e.g. Robert Axelrod (1984): *Evolution of cooperation*, New York, Basic Books.

the Council, currently running an evaluation study.<sup>41</sup> Therefore, I assume that language has an impact on the cooperation record. I argue that countries which either share a common language (either the same mother tongue or a common foreign language) or in which one party is able to speak the other party's language, direct communication as a problem solving and trust building strategy will take place more often which, in the end, leads to less reluctance in accepting another member state's judicial decision.

*Attitude towards new communication and information techniques / "E-Justice"* In addition to differences in criminal justice systems, a prior cooperation record and language skills, some judges mentioned that the willingness to apply new communication and information techniques would enhance judge-to-judge cooperation. Similar to language skills, using new technologies such as e-mail and electronic data exchange would provide for more direct and faster cooperation. Some judges had the impression that member states characterized by a culture of low hierarchies such as the Scandinavian states are more willing to use new techniques which simplify direct horizontal cooperation. Member states which traditionally value clear hierarchies are less willing to switch to a more informal and direct communication via e-mail. Based on these considerations, I argue that the willingness to use new techniques might have an additional effect on the smoothness of cooperation. However, I expect the differences in criminal justice systems and the experiences due to prior cooperation to be more important factors.

Given this analysis I come to the conclusion that mutual recognition as a governance mode entails a paradox. On the one hand, it aims at managing diversity without demanding harmonization measures, and it is a governance mode perceived as being respectful of diversity and states' autonomy. On the other hand, the preconditions of mutual recognition are more likely to be met where the degree of divergence is low. It is easier to trust a state's criminal justice system and accept it as equivalent and compatible if similar rules and procedures exist. Moreover, the more similar the rules and procedures, the lower the transaction costs of day-to-day cooperation. As an analysis of the implementation in Germany and the UK as well as interviews with national experts suggest, the more heterogeneous legal systems are, the more likely it is for mutual recognition to face resistance from parliamentarians and judges. This indicates that, given the heterogeneity of EU criminal law systems, mutual recognition as an easy-to-agree-on alternative to harmonization has its limits. The question here is: How much difference between the member states is acceptable for a mutual recognition system to operate successfully in EU Justice and Home Affairs? What level of minimum harmonization is required to foster trust and reduce transaction costs? Will a mutual recognition system with the help of institutional support structures such as EJM and

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<sup>41</sup> Information obtained via interview with a Council official, 11 April 2007, Brussels.

Eurojust be able to improve the cooperation even among those countries which have significantly different judicial systems, a former poor cooperation record based on bilateral agreements, and that do not share a common language?

My study on the implementation and application of the European Arrest Warrant in two countries can only provide first hints on the potential of mutual recognition as a governance mode in judicial cooperation. A systematic analysis of the cooperation between very different countries in a mutual recognition system over time, including a higher number of countries and mutual recognition measures, will provide further insights. When conducting such a study, it will be more evident if iterated interaction between judges in a mutual recognition regime will eventually provide trust and confidence, and a functioning transgovernmental network of judges will emerge. Some political scientists such as Anne-Marie Slaughter (2004) see great potential in governance through networks of judges, even on a global scale. Thus, the conditions under which mutual recognition as a governance mode is accepted as legitimate and efficient by legislators and judges need further investigation.

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