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European Arrest Warrant: Implications for EU Counterterrorism Efforts[1]

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Introduction

This article provides an analysis of the introduction, implementation and implications of the European Arrest Warrant (EAW) for the European Union (EU) counterterrorism efforts. In addition, it demonstrates that EAW represents the only major practical application of mutual recognition in EU's Justice and Home Affairs (JHA) pillar thus far. As such, experiences with EAW are bound to influence the ongoing debates concerning the most appropriate mode of governance in this pillar. The structure of the article is as follows. It begins with succinct overviews of the origins of EAW and its key features, respectively, followed by an analysis of the implementation delays and complications at the national level. The next section offers an assessment of the value-added of the EAW to the EU's counterterrorism efforts. The principled objections to the EAW are summarized in section five. The implications of the adoption of EAW for the ongoing debates concerning the most appropriate mode of governance in Justice and Home Affairs are summarized in section six. The article concludes with a list of lessons learned from the introduction of EAW for both the EU's current counterterrorism efforts in particular and future developments in the Justice and Home Affairs pillar in general.

The Origins of the European Arrest Warrant

When the (then) European Communities (EC) Member States (MSs) began to develop what could be termed as an EC counterterrorism policy in the late

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1960s and early 1970s,[3] they did so at two key levels: the legal and the operational.[4] At the legal level, however, the EC MSs immediately encountered significant complications due to the fact that they all traditionally upheld the view that terrorism is predominantly a political crime and therefore upheld the principle that extradition should not be guaranteed.[5] This position was also enshrined in the 1957 Council of Europe Convention on Extradition that provided the right to refuse extradition in cases where the offence for which extradition was being requested was a political offense or an offence connected with a political offense.

The first step towards abandoning this principle in regard to terrorist crimes came in 1977 with the adoption of the Council of Europe's European Convention on the Suppression of Terrorism (ECST), which, at least on the face of it, required ratifying states to apply the principle of *aut dedere aut judicare* (extradite the suspect or bring the suspect before your own judicial authorities) in the case of a terrorist offence or an offence connected with a terrorist offence. A closer examination of ECST, however, reveals that it is full of loopholes that have "bedeviled all efforts to strengthen European-wide cooperation against terrorism."[6] To overcome these weaknesses, the EC Member States adopted a strategy designed to ensure that the existing international anti-terrorist legal provisions would be fully applied within the EC. Moreover, since the respective national criminal codes and definitions of terrorism diverged so greatly, "the aim was to inject a degree of predictability into the EC's public position vis-à-vis terrorism."[7] To this end, in 1979, the EC Member States negotiated the so-called Dublin Agreement that ensured the ECST would be applied uniformly within the EC.[8] The implementation of both the Dublin Agreement and ECST was, however, beset by difficulties as a number of EC Member Sates refused to ratify these agreements, primarily due to concerns over potential loss of

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3 Malcom Anderson, "Counterterrorism as an Objective of European Police Cooperation," in *European Democracies Against Terrorism: Governmental Policies and Intergovernmental Cooperation*, ed. Fernando Reinares (Burlington, U.S.: Ashgate Publishing Company, 2000), 229.

4 The operational level is not further discussed in the article but it has been well covered elsewhere. See for example Mathieu Deflem, "Europol and the Policing of International Terrorism: Counterterrorism in a Global Perspective," *Justice Quarterly* 23, no. 3 (September 2006): 336-59; J. Peek, "International Police Cooperation Within Justified Political and Judicial Frameworks: Five Theses on TREVI," in *The Third Pillar of the European Union*, ed. Jörg Monar and R. Monar (Brussels: European Interuniverstity Press, 1994), 201-07; G. Rauchs and D.J. Koenig, "Europol," in *International Police Cooperation*, ed. D.J. Koenig and D.K. Das (New York: Lexington Books, 2001), 43-62.

5 Paul Wilkinson, *International Terrorism: The Changing Threat and the EU Response*, Chaillot Paper No. 84 (European Security Studies Institute, October 2005), 29.

6 Wilkinson, *International Terrorism: The Changing Threat and the EU Response*, 30.

7 Juliet Lodge, "Terrorism and the European Community: Towards 1992," *Terrorism & Political Violence* 1, no. 1 (January 1989): 30.

8 For further information, see Meliton Cardona, "The European Response to Terrorism," *Terrorism & Political Violence* 4, no. 4 (Winter 1992): 251.

autonomy to deal with terrorism either on their own or on bilateral basis.[9] As Doron Zimmerman noted:

> European countries in general were deeply suspicious of allowing any external organization to interfere in their politically sensitive internal security, as opposed to criminal justice, affairs. This is irrefutably borne out by the necessity of the Dublin Agreement: terrorists were one's own affair; only "apolitical" criminals could be extradited.[10]

Consequentially, it was not until the mid-1980s when the idea of a European judicial area was seriously entertained under the banner of the completion of single European market.[11]

When the Maastricht Treaty on European Union was signed in February 1992, the previously informal cooperation frameworks were brought together under the new legal and structural framework of the EU and formed the basis of the Justice and Home Affairs Pillar. As Peter Chalk pointed out, integral to the situating of counterterrorism competencies in the Third Pillar was the notion that terrorism was, if no longer exclusively a domestic criminal issue of Member States, then certainly an *internal security problem* of the Union.[12] The Maastricht Treaty specifically referred to terrorism as a serious form of crime to be prevented and combated by developing common action in three different ways:

1. Closer cooperation between police forces, customs authorities and other competent authorities, including Europol;
2. Closer cooperation among judicial and other competent authorities of the Member States;
3. Approximation, where necessary, of rules on criminal matters.[13]

Prior to 9/11, some progress had been made in developing common actions in all three areas but their practical implementation was often painfully slow.

In the area of judicial cooperation, two important legal instruments were adopted in the 1990s: the Convention on Simplified Extradition Procedure

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[9] M.P.M. Zagari, "Combating Terrorism: Report to the Committee of Legal Affairs and Citizens' Rights of the European Parliament," *Terrorism & Political Violence* 4, no. 4 (Winter 1992): 292.

[10] Doron Zimmermann, "The European Union and Post-9/11 Counterterrorism: A Reapraisal," *Studies in Conflict & Terrorism* 29, no. 2 (2006): 126.

[11] Lodge, "Terrorism and the European Community: Towards 1992," 32.

[12] Peter Chalk, "The Third Pillar on Judicial and Home Affairs Cooperation, Anti-Terrorist Collaboration and Liberal Democratic Acceptability," in *European Democracies Against Terrorism: Governmental Policies and Intergovernmental Cooperation*, ed. Fernando Reinares (Burlington, U.S.: Ashgate Publishing Company, 2000), 175.

[13] Article K.1. After subsequent Treaty of Amsterdam revisions, Article 29.

between the Member States of the EU (1995) and the Convention Relating to Extradition between Member States of the EU (1996). The main purpose of both Conventions was to supplement and improve the application of both the 1957 European Convention on Extradition and the 1977 European Convention on the Suppression of Terrorism by imposing a lower threshold for extraditable offences, and by specifying those offences for which extradition may not be refused.[14] The 1996 convention, for example, obliged EU Member States to abandon the right to use political exemption as grounds for refusing extradition. As such, the two conventions represented yet another attempt to ensure uniform application of existing key anti-terrorist provisions within the EU.

In the second half of the 1990s, however, the EU made only slow progress in constructing a true area of "freedom, security and justice." Thus, in 1999, the first-ever European Heads of Government summit dedicated just to JHA issues was convened in Tampere in order to give the EU a clear policy direction to what had been hitherto an incoherent approach. It supplied an ambitious five-year plan with a number of targets and deadlines for the implementation of policies on immigration, border control, police cooperation and asylum. In addition, and most importantly for this article, the idea of a European Arrest Warrant also originated from the Tampere European Council, in which leaders of all EU MSs expressed their desire to improve judicial cooperation in the EU by abolishing the formal extradition procedures for persons "who are fleeing from justice after having been finally sentenced."[15] Prior to the September 11, 2001 terrorist attacks (9/11) in the United States (U.S.), however, the idea of a European Arrest Warrant proved to be highly controversial in a number of EU MSs,[16] rendering impossible the necessary unanimous agreement on a Framework Decision. As Monica den Boer observed, "[t]he 'Euro-warrant' had already been on the shelves but the coordinated fight against terrorism provided a window of opportunity for political decision-making on this instrument."[17]

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[14] Monica Den Boer and Jörg Monar, "Keynote Article: 11 September and the Challenge of Global Terrorism to the EU as a Security Actor," in *The European Union: Annual Review of the EU 2001/2002*, ed. Geoffrey Edwards and Georg Wiessala (Oxford, UK: Blackwell, 2002), 21.

[15] European Commission, "Extradition & Surrender Procedures Across the EU – European Commission," European Commission, <http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm>, 2004.

[16] Italy was the most reluctant of all EU Member States to give its assent to the EAW. It claimed that the 32 offenses were too many and wanted the warrant's 32 offenses reduced to six, including terrorism but excluding financial crimes. Press reports speculated that this position was due to allegations of corruption and tax evasion pending against Prime Minister Berlusconi in Italy and elsewhere in Europe. Kristin Archick, "Europe and Counterterrorism: Strengthening Police," <http://www.law.umaryland.edu/marshall/ElectronicResources/crsreports/crsdocuments/RL31509_07232002.pdf>, 23/07 2002.

[17] Monica Den Boer, "The EU Counterterrorism Wave: Window of Opportunity or Profound Policy Transformation?" in *Confronting Terrorism. European Experiences, Threat Perceptions and Policies*, ed. Marianne van Leeuwen (The Hague: Kluwer, 2003), 188.

Thus, it may be argued that it was only because of the momentum generated by 9/11[18] – which forced the European leaders to finally recognize that the EU's open borders and different legal systems allowed terrorists and other criminals to move around easily and evade arrest and prosecution – that the Council was able to reach a political agreement in December 2001 on the Framework Decision on the European Arrest Warrant.[19] The binding Council Framework Decision was duly approved in June 2002,[20] and in January 2004, the EAW began to replace the formal extradition procedures among the Member States.

Key Features of the European Arrest Warrant

The EAW is based on the principle of mutual recognition of judicial decisions among the EU MSs and *de facto* represents the first application of this originally Single Market/First Pillar governance mode in the EU's Third Pillar. Being faced with a rise in threats such as cross-border crime and terrorism, yet not being able to agree on harmonization of appropriate national legal countermeasures, the EU MSs decided to make mutual recognition the cornerstone of judicial cooperation. In essence, mutual recognition allows for the application of one Member State's law on the territory on another Member State. As it is stated in Article 1 of the Framework Decision on the European Arrest Warrant:

1. The European arrest 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 of detention order.
2. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision…

In practice, EAW is expected to enhance the free movement of criminal investigation, prosecutions and sentences across EU borders by replacing the existing instruments on extradition between the Member States. Extradition requests via EAW can be issued for two purposes: 1) for conducting a criminal

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[18] Some contend that the European Arrest Warrant is not so much the result of the 9/11 attacks, as it is the consequence of the Union's hasty implementation of counterterrorism-related measures in response to the attacks in the United States. Others would yet go still further and suggest that the quickened pace of its implementation was the result of U.S. diplomatic pressures following 9/11. See Zimmermann, "The European Union and Post-9/11 Counterterrorism: A Reappraisal," 131.

[19] Council of the European Union. *Proposal for a Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member States, Outcome of Proceedings of the Council*, EN 14867/1/01 REV1 (2001)

[20] Council of the European Union. *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States - Statements Made by Certain Member States on the Adoption of the Framework Decision*, EN 2002/584/JHA 0001 (2002)

prosecution; and 2) for executing a criminal sentence. For the purpose of prosecution, an EAW 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. There are strict time limits for the execution of the EAW, which should lead to a significant speeding up of the entire extradition process. The state in which the person is arrested must return him/her to the state issuing the warrant within 90 days of the arrest. Moreover, if the detained person gives his consent to the surrender, the extradition shall occur within 10 days.

This acceleration is achieved by requiring only one judicial decision for both arrest and surrender.[21] As a result of this innovation, which excludes any political involvement of the Ministers of Justice and/or Foreign Affairs, it is possible to argue that the entire EAW procedure is completely "judicialized." In addition, the EAW considerably simplifies the entire extradition procedure for thirty-two serious criminal offenses by abolishing the traditional principle of dual criminal liability, which means that the crime for which the convicted person is requested no longer needs to be recognized in both the requesting and the requested states.[22] These offences, not all of which are harmonized at EU level, include participation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography; trafficking in arms, ammunition and explosives; corruption, fraud, money laundering and counterfeiting of money. The EAW also abolishes the classification of political offense and nationality as legitimate criteria for refusal for extradition, further ensuring a smooth extradition process. In practice, this also means that EU Member States can no longer refuse to surrender to another Member State one of their own citizens who is suspected of having committed a serious crime, on the ground that they are nationals.[23] As implied by the principle of mutual recognition, the merits of the EAW are taken on the basis of mutual trust, which is supposed to lead to a quasi-automatic recognition of extradition requests within the entire territory of the EU.[24]

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[21] In contrast, the traditional international extradition procedure requires a separate procedure for arrest and surrender.

[22] It is important to note however, that the principle of double criminality still applies to for all other offences. It may also apply for the 32 listed offences to the extend they are not punishable in the Member States issuing the EAW by a deprivation of liberty of three years or more. For a detailed legal analysis of EAW, see Wouters and Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After ´11 September´," 909-35.

[23] The EAW Framework Decision does, nonetheless, specify a certain number of exceptions. For example, the implementation of extradition can be postponed for humanitarian reasons. Specific provisions were also made in the Framework Decision to ensure adequate protection of human rights.

[24] Julia Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, Paper Presented at

Implementation Delays and National Transposition Complications

While it is too early to provide an authoritative assessment of the practical impact of the EAW on the judicial cooperation of EU MSs, some preliminary observations can already be made. To begin with, there has been a significant delay in implementing the EAW in a number of Member States. Even though the Framework Decision set January 1, 2004 as the final deadline for implementation, only eight Member States (Belgium, Denmark, Ireland, Finland, Spain, Sweden, Portugal, and the UK) incorporated all of the required provisions of the EAW in their national legislation by this date.[25] France, Luxemburg, Austria, and the Netherlands passed their implementing legislation by May 21, 2004, but Greece, Italy and Germany still had not and the Framework Decision contains no provisions on how to deal with such delay.[26] Consequentially, the EAW has been fully operational in most of the cases planned only since April 2005, when Italy became the last EU Member State to transpose the EAW into national law.

There are two possible explanations for these considerable implementation delays. Firstly, in several countries the enactment of the necessary constitutional provision took longer than expected. In July 2005, for example, the German Constitutional Court rescinded the German law transposing the EAW on the grounds that it did not sufficiently consider the fundamental rights of the German citizens. Although the actual EAW Framework Decisions as such was not contested by the court's ruling[27] and the German government had subsequently duly changed the transposing law to comply with the German constitution, at least one person wanted by the Spanish government via an EAW had to be released in Germany in the interim period in-between the courts ruling and new transposition law adoption. In response, the Spanish National Court issued a ruling that Spain will not apply the fastened EAW procedures for extradition request from Germany, because under Spanish Constitutional law extradition is permitted only on the basis of reciprocity. This *de facto* put the traditional

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the EUSA Tenth Biennial International Conference, Montréal, Canada, 17 – 19 May 2007, 20. 05. 2008 <http://www.unc.edu/euce/eusa2007/papers/sievers-j-08i.pdf>, 11.

25 European Commission, "Extradition & Surrender Procedures Across the EU - European Commission."

26 Wouters and Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After ´11 September´," 917.

27 Annegret Bendiek, "EU Strategy on Counter-Terrorism," German Institute for International and Security Affairs, November 2006, <http://www.swp-berlin.org/en/common/get_document.php?asset_id=3477>, 22. The German government subsequently drafted a new transposition law for the EAW. It was adopted in July 2006.

lengthy extradition processes back in place,[28] confirming that mutual recognition and reciprocity have to go hand in hand.

On the judiciary side, the EAW was also considered by the Polish Supreme Court (in April 2005), by the Belgian *Cour d'Arbitrage* (in July 2005),[29] and by the Constitutional Court in Cyprus (in November 2005).[30] In other countries, the EAW implementation delays were at least partly due to the objections of conservative opposition parties that feared that "their fellow citizens will be exposed to the whims other judicial systems that they consider less than trustworthy."[31] Some European legal scholars have also argued that the introduction of EAW was a "step too far too soon", warning that a number of practical problems are already beginning to emerge, in particular in relation to the protection of individual rights and legal certainty in the European judicial space.[32] A Belgian association of lawyers, the *Advocaten voor de Wereld* challenged the Belgian implementing legislation before the Belgian Court of Arbitration, which subsequently made a reference to the European Court of Justice in a case challenging the *vires* of the EAW Framework Decision and the legality of the partial abolition of dual criminality. This challenge was 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 was at issue.[33] In the end, the ECJ decided that the Framework Decision was perfectly valid.[34]

Secondly, although the EAW only applies within the territory of the EU and relations with third countries are still governed by extradition rules, EAW's introduction has also raised some concerns outside of the EU. The U.S. government, in particular, has been concerned that with the EAW in place, the EU Member States would give extradition and assistance requests from other EU Member States a higher priority than requests from the United States and

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[28] Wilhelm Knelangen, "Die Innen- un Justizpolitische Zusammenarbeit der EU und die Bekämpfung Des Terrorismus," in *Die Europäische Union Im Kampf Gegen Den Terrorismus: Sicherhiet Vs. Freiheit*, ed. Erwin Müller and Patricia Schneider (Baden-Baden: Nomos, 2006), 152.

[29] Detailed information on the Polish case is available at: http://www.statewatch.org/news/2005/apr/poland.pdf. More details on the Belgian case are available at http://www.libertysecurity.org/article370.html.

[30] Poland and Cyprus eventually had to change their national constitutions.

[31] Archick, "Europe and Counterterrorism: Strengthening Police," 7, 12.

[32] Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant," European Law Journal 10, no. 2 (March 2004): 200-17.

[33] European Union Committee UK House of Lords, "European Arrest Warrant - Recent Developments," 30th Report of Session 2005-06. 04.04.2006, <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/156/156.pdf>, para. 33.

[34] European Court of Justice, "Judgement of the Court (Grand Chamber): Case C-303/05," 04.05. 2007, 01.05.2008 <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79929496C19050303&doc=T&ouvert=T&seance=ARRET>.

other third parties. As before 9/11, the death penalty has been a particularly controversial issue that has hindered the negotiation of a workable transatlantic standard for extradition and legal assistance.[35] Bilateral treaties with individual EU members have generally contained assurances that suspects extradited to the United States will not face the death penalty, but U.S. officials have been reluctant to agree to such a blanket guarantee in a treaty negotiated with the EU as a whole.[36] According to Archick, the Bush administration's main objective for an eventual extradition accord was to secure a provision permitting any EU national to be handed over to U.S. judicial authorities.[37] The EU officials, however, remain largely circumspect on whether they would be prepared to meet such a requirement given the national sensitivities involved and the likely objections of some EU Member States.[38]

Value-added Due to the Introduction of the European Arrest Warrant?

The aforementioned critiques and implementation difficulties notwithstanding, EAW clearly makes the EU legal process of extradition and surrender more legible and transparent than the previous myriad of extradition conventions and bilateral agreements. According to an initial assessment by the European Commission, EAW's hitherto impact has been positive in terms of depoliticization, efficiency, and speed in the procedure for surrendering people who are sought:

> The effectiveness of the EAW can be gauged provisionally from the 2 603 warrants issued, the 653 persons arrested and the 104 persons surrendered up to September 2004. … Since the Framework Decision came into operation, the average time taken to execute a warrant is provisionally estimated to have fallen from more than nine months to 43 days. This does not include these frequent cases where the person consents to surrender, for which the average time taken is 13 days.[39]

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[35] EU law bans capital punishment among EU Member States and prohibits the extradition of suspects to countries where they could face the death penalty.

[36] Nora Bensahel, "The Counterterror Coalitions: Cooperation with Europe, NATO, and the European Union," RAND, <http://www.rand.org/publications/MR/MR1746/MR1746.pdf>, 2003.

[37] Archick, "Europe and Counterterrorism: Strengthening Police," 15.

[38] Berlin, for example, insists that even basic legal assistance provided by German authorities to the United States should not lead to the pursuit of a capital case or contribute to the application of the death penalty. In the past, German judicial officials refused to respond to U.S. requests for evidence in the case against Zacarias Moussaoui, who faced a possible death sentence in the United States for his alleged involvement in planning the 9/11 attacks. Archick, "Europe and Counterterrorism: Strengthening Police," 16.

[39] European Commission, "How Has the EAW Been Implemented by Member States?". European Union, <http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm>, 06/04/2006.

The Commission did not provide a break down of the data for specific criminal offences but in the arguably most high profile terrorist application of EAW – the extradition of Hussain Osman from Italy to the UK following the terrorist attacks in London in July 2005 – the whole process took 60 days.[40] More detailed statistics have been subsequently presented in an annual report by the General Secretariat of the Council.[41] The data in this report is based on a compilation of replies from MSs to a standardized questionnaire on quantitative information on the practical operation of the EAW. Unfortunately, for several reasons, the final product is not perfect. Some MSs do not collect data in all fields covered in the questionnaire and in other areas the data provided suggest that different MSs have interpreted the questions in different ways. There are also some obvious discrepancies in the figures,[42] which the Council Secretariat is unable to explain because it merely collected the data. Overall, however, it is clear that EAW is being increasingly utilized by EU MSs.

The Commission, nevertheless, warned that this overall success should not make one lose sight of the effort that is still required by some Member States to comply fully with the EAW Framework Decision. The problem is, however, that as a Third Pillar instrument, the EAW Framework Decisions only provides the main guidelines of how mutual recognition should work in practice, but it has no direct effect. Consequentially, it needs to be implemented by national parliamentarians, who have some leeway in interpreting the Framework Decision's provisions. Available Commission reports indicate that the fact that EAW has not led to a quasi-automatic recognition of extradition requests within the entire territory of the EU as originally expected is indeed at least partly explicable by the fact that some national parliaments have added new procedures which hamper cooperation. Some Member States, for example, considered that, with regard to their nationals, they should reintroduce a systematic check on dual criminality or convert their sentences. Noticeable in some Member States is also the introduction of supplementary grounds for refusal, which are contrary to the Framework Decision, such as political reasons, reasons of national security or those involving examination of the merits of a case. In particular, some MSs have implemented the Framework Decision in a way which gives priority to their national constitutions or which appears to favor their own

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[40] Home Affairs Committee UK House of Commons, "Justice and Home Affairs Issues at European Union Level," para. 162.

[41] Council of the European Union, "Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant - Year 2006," 11371/3/07 Rev 3. 03.10. 2007, Statewatch, 01.05.2008 <www.statewatch.org/news/2007/oct/eu-arrest-warrant-stats.pdf>.

[42] One glaring discrepancy is in the case of the 2006 figures for France: the document states that 1552 EAWs were issued and then explains that 918 EAWs were transmitted via Interpol and 1300 via the Schengen Information System.

nationals.[43] (For specific examples of additional safeguards by the German and British legislature on EAW transposition, see tables 1 and 2.) Moreover, there are cases in certain Member States where the decision-making powers conferred on executive bodies are not in line with the Framework Decision. Lastly, by ruling out the EAW's application to acts that occurred before a given date, a few Member States did not comply either with the Framework Decision. The extradition requests which they continue to present therefore risk being rejected by the other Member States.[44]

Table 1: Additional Safeguards in the German Europäisches Haftbefehlsgesetz (EuHbG 2006)

Procedure	**EuHbG**	**Framework Decision**
Three-step procedure including a judical and an administrative authority	§ 79	Pure judical procedure, no administrative authority involved
Ground for refusal	**EuHbG**	**Framework Decision**
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

Source: Sievers 2007, p. 14.

Little information is available about the actual practice of day-to-day judicial cooperation, which is surprising given that according to the EAW's conception of mutual recognition, it is the judge of the national judicial authority who is in charge and who has a duty to accept foreign decisions as equivalent. In other words, since politicians are no longer allowed to interfere and judicial cooperation is now a purely judicial procedure that ought to be characterized by direct contact from judge to judge, national judges become actors in their own right in the international system. As a result, mutual recognition should create "a *legal*

[43] Italy, for example, has 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. European Union Committee UK House of Lords, "European Arrest Warrant - Recent Developments," 30th Report of Session 2005-06. 04.04. 2006, 17/04/2008 <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/156/156.pdf>, para. 26.

[44] European Commission, "How Has the EAW Been Implemented by Member States?", European Union, COM(2005)63, <http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_063_en.pdf>. 01/08/2006.

system of horizontal cooperation which operates with more or less precise and binding rules."[45] In practice, however, the cooperation between judges has not always been smooth. According to one recent study, for example, the German judges in charge of running the mutual recognition system pointed to problems caused by heterogeneity of judicial systems and cultural differences:

> [W]ith 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 … [C]ooperation 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. … Issuing an EAW for such an offence was regarded as completely out of proportion. 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. … 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.[46]

The fact that heterogeneity is regarded as a major problem by German judges was also highlighted in an article of a German criminal law journal in 2006, where several judges expressed their fears about the misuse of EAWs and concern of mutual recognition against the background of heterogeneity of criminal law across 27 EU Member States.[47]

The aforementioned study also covered the opinions of British practitioners dealing with the EAW requests on daily basis. They complained that Germany and Austria allow issuing an EAW if the police had "a strong suspicion" that a person committed a crime, meaning that an EAW would be issued in the investigation stage of the process and lead to interviewing a suspected person instead of prosecuting an accused. There was also more 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 by the Brits was Ireland, primarily due to the shared common law tradition and the fact that the UK and Ireland could built on a longstanding extradition

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[45] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 7.

[46] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 22-23.

[47] Hackner et al., "Das 2. Europäische Haftbefehlsgesetz," *Neue Strafrechts Zeitung (NStZ)* 12 (2006): 663-69.

tradition on special conditions, based on the Backing of Warrants Act of 1965.[48] This resonates with the observations made by the German judges, who claimed that due to a shared legal tradition and the same language, judicial cooperation was most successful with Austria and Switzerland, even though Switzerland was not part of the EU mutual recognition system.[49] Thus, it appears that the more similar the national legal systems are, the more likely it is that judicial cooperation proves successful. This, in turn, suggests that in order to succeed in practice, mutual recognition requires at least some level of harmonization of substantive criminal law and justice procedures across all EU Member States.

Table 2: Additional Safeguards in the UK Extradition Act 2003

Ground for refusal	Extradition Act 2003	Framework Decision
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 extraterritorial jurisdiction of issuing state and the offence is punishable by less than12 months *by UK law*	Section 64	FD does not contain such a regulation
Additional assurances for person convicted in absentia 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

Source: Sievers 2007, p. 18.

Principled Objections to European Arrest Warrant

The EAW has also been criticized on grounds of it principle key underlying principles. The first set of critiques concerns the fact that EAW abolishes

[48] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 25.

[49] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 23.

the requirement for dual criminality in the formal extradition processes across the EU. Dual criminality, however, derives from the principle of *nullum crimen sine lege* (no crime without law), which is constitutionally enshrined in a number of EU Member States and which also found expression in the EU in the 1957 European Convention on Extradition. A number of commentators have therefore argued that is constitutionally unacceptable to execute an enforcement decision relating to an act which is not a crime under the law of the executing state. For example, as noted in a UK House of Commons report, under the EAW a UK citizen can be extradited for an act which they commit in the territory of another EU state which is illegal under the law of the other state, but not under UK law:

> For example, if a UK citizen dressed in Nazi uniform in Germany they could subsequently be surrendered back to Germany from the UK since the act is a criminal offence in Germany and is covered by the racism and xenophobia dual criminality exemption of the EAW. This works both ways. So, for example, another EU national could be surrendered to the UK for having sex with a person under 16 years old in the UK, even though the age of consent might be lower in the country from which they are surrendered. The act would be covered by the rape dual criminality exemption of the EAW.[50]

The report also pointed to a grey area in cases where it is not legally evident on whose territory the act was committed, such as the internet publications. It gives the example of a UK national publishing material on the internet which denies that the Holocaust took place, an offence under Austrian law, where it may be unclear in whose territory the act has occurred. Here, the rules of the EAW are not clear-cut, although it should be noted that the scale of such cases is pretty small and there is no evidence that such cases have actually occurred thus far.[51]

The second set of objections to EAW concern the very principle of mutual recognition that was established by the 1999 Tampere European Council as the cornerstone of judicial cooperation. According to Jan Wouters and Frederick Naert, the fact that Member States automatically recognize each other's judicial decisions ordering the arrest of a person reflects a genuine paradigmatic shift in legal cooperation in the EU:

> Traditionally, such cooperation is based on the rule that one State does not execute or enforce decisions of another State, unless otherwise agreed, e.g. in extradition treaties. As the UK Home Secretary expressed it, this

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[50] Home Affairs Committee UK House of Commons, "Justice and Home Affairs Issues at European Union Level," Third Report of Session 2006-07, Volume I. 24.05. 2007, 17/04/2008 <http://www.statewatch.org/news/2007/jun/eu-uk-hasc-report.pdf>, para. 171-2.

[51] Home Affairs Committee UK House of Commons, "Justice and Home Affairs Issues at European Union Level," para. 174.

> dates from 'an age when suspicion and distrust characterized relationships between European nations and the courts saw their role as to protect those fleeing from despotic regimes.' In contrast, … [the EAW's principle] is fundamentally based on a "high level of confidence between Member States.[52]

The problem is that available analysis of the hitherto implementation of the EAW Framework Decision, as well as the daily practice of judicial cooperation, offer many examples of the prevalence of mutual distrust among EU MSs. To a certain extent, as noted above, this distrust is caused by the view that national standards of penal and procedural law in individual EU MSs differ too much to be mutually recognized. But apart from the lack of harmonization of criminal legislation across EU, further problems in some of the EAW cases can also arise due the fact that at least six offences (terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling) of the 32 serious offences, for which EAW abolished the principle of dual criminality, are poorly defined.[53]

The literature on mutual recognition also suggests that mutual trust is just one of at least four important prerequisites that need to be met in order for EAW to work well in practice. According to Sievers, the other three important prerequisites are equivalence, compatibility and institutional support structures:

- *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 JHA, the entire legal system must be recognized as equivalent and affording all the appropriate protections, notably in the area of fundamental rights.

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[52] It is important to note however, that the principle of double criminality still applies to for all other offences. It may also apply for the 32 listed offences to the extend they are not punishable in the Member States issuing the EAW by a deprivation of liberty of three years or more. For a detailed legal analysis of EAW, see Jan Wouters and Frederick Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September"," *Common Market Law Review* 41, no. 1 (August 2004): 919.

[53] This has been heavily criticized by Germany already during the negotiations before the actual introduction of EAW. In the end, Germany negotiated an exemption for five years, during which period courts in that country will examine whether the requirement of dual criminality is met for these six offences. Home Affairs Committee UK House of Commons, "Justice and Home Affairs Issues at European Union Level," para. 170.

- *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 (the UK and Ireland) and civil law countries (continental EU Member States). 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.
- *Institutional support structure.* 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.[54]

Concerning equivalence and compatibility, in a comparative case study of the implementation and operation of the European Arrest Warrant in Germany and the UK, Sievers found that these prerequisites of mutual recognition not been met fully thus far:

> [D]espite 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.[55]

She also noted that the European Judicial Network and Eurojust can be regarded as institutional support structures enhancing EU judicial cooperation, but neither has been used extensively in this role thus far.

Finally, some believe that the scope of EAW far exceeds the fight against terrorism and therefore they see it as threat to national sovereignty. Jonathan Stevenson, for example, suggested that the EAW, "although proposed on the

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[54] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 8-9.

[55] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 10.

pretext of counterterrorism, appears to be part of a larger agenda, one that aims ... to expand the EU's supranational legal jurisdiction," and warned that this could lead to significant backlash from member states that "are becoming more worried about hemorrhaging national authority."[56] In contrast, while admitting that the new model "implies the transfer of another element of intergovernmental cooperation to the supranational level," Filip Jasinski argued that the EAW "would not be a breach of national sovereignty in respect of extradition decisions, since surrender of a suspect within the Union would not be regarded as classic extradition."[57] In this context, it has been also submitted that the adoption of EAW represents the demise of conventions in the JHA Pillar. Others, however, see this rather as "welcome development, bringing Third Pillar lawmaking closer to that in the First Pillar and making it more effective."[58] Finally, it should be also noted that the optimists are convinced that by reinforcing the internal EU procedures to act coherently and cooperatively, the EAW will significantly increase the credibility of the EU as a major player in the global fight against international terrorism and improve EU abilities to investigate and prosecute other transnational crimes.[59] The problem is, as Paul Wilkinson noted, that while the value of EAW in the fight against international terrorism "is *in theory* all too clear … in *practice* … [it] has been somewhat undermined by the reluctance and unwillingness of some key member states [sic!] to ratify it and by the continuing desire of certain member states [sic!] to maintain total national political control on these matters."[60]

Modes of Governance in Justice and Home Affairs: Mutual Recognition or Harmonization?

As noted above, mutual recognition was expressly endorsed as the cornerstone of cooperation in criminal matters at the European Council in Tampere in 1999. This was re-stated in the Hague Program[61] and the Lisbon Treaty enshrines the principle of mutual recognition in the Treaties for the first time

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56 Jonathan Stevenson, "How Europe and America Defend Themselves," *Foreign Affairs* 82, no. 2 (March/April 2003): 83.

57 Filip Jasinski, "The European Union and Terrorism," *The Polish Quarterly of International Affairs* 11, no. 2 (2002): 44.

58 Wouters and Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September", 915.

59 Archick, "Europe and Counterterrorism: Strengthening Police," 2.

60 Wilkinson, *International Terrorism: The Changing Threat and the EU Response*, 31.

61 European Union Committee UK House of Lords, "The Treaty of Lisbon: An Impact Assessment," 10th Report of Session 2007-08. 13.03. 2008, 17/04/2008 <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf>.

in the area of judicial cooperation in criminal matters.[62] Recently, however, a number of European policy-makers have expressed the opinion that mutual recognition is reaching its limits as a fundamental underlying principle of co-operation. Instead, some would like to see more harmonization between the law and policy of EU Member States, while others would advocate practical co-operation measures alone.

In essence, these views reflect a key dilemma of EU's counterterrorism policy: the need to cooperate more closely to fight terrorism and the reluctance to agree on, and/or duly implement, centralized solutions at the EU level. This dilemma, in turn, represents one important strand in the ongoing debate concerning the most appropriate mode of governance in Justice and Home Affairs. It therefore seems useful to analyze available forms of governance[63] which may provide solutions to this dilemma. The problem is that while there is a solid body of literature addressing the potential of alternatives to centralized decision-making, emphasizing multi-level governance[64] and governance via EU policy networks,[65] until recently,[66] mutual recognition as a mode of governance has not been in the center of attention. Moreover, most existing studies focus at the potential of mutual recognition in the First Pillar[67] and there are only few

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62 European Union Committee UK House of Lords, "The Treaty of Lisbon: An Impact Assessment," 10th Report of Session 2007-08. 13.03. 2008, 17/04/2008 <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf>.

63 I am not referring to the debate on "new modes of governance" focused on the role non-state actors because in the JHA domain, there has been no significant involvement of non-governmental/private actors. Instead, following Sievers and Monar, I use the concept of governance as a form of social coordination. The emphasis is on analysis of systems of institution-based internal rules that shape the actions of interdependent societal actors. Julia Sievers, Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs, Paper Presented at the EUSA Tenth Biennial International Conference, Montréal, Canada, 17 – 19 May 2007. 2007, 20.05.2008 <http://www.unc.edu/euce/eusa2007/papers/sievers-j-08i.pdf>; Jörg Monar, "Specific Actors, Typology and Development Trends of Modes of Governance in the EU Justice and Home Affairs Domain," *New Modes of Governance Project*. 31.05. 2006, 30.05.2008 <http://www.eu-newgov.org/database/DELIV/D01D17_Emergence_NMG_in_JHA.pdf>.

64 See Liesbet Hooge and Garry Marks, "European Integration from the 1980's: State-. Centric v. Multilevel Governance," *Journal of Common Market Studies* 34, no. 3 (1996): 341-78; Liesbet Hooge and Garry Marks, *Multi-Level Governance and European Integration* (Boulder, CO: Rowman & Littlefield Publishers, 2001).

65 Kohler-Koch, B. et al. Interaktive Politik in Europa. Regionen Im Netzwerk der Integration. (Opladen: Leske & Budrich., 1998); John Peterson, "Policy Networks," ed. Antje Wiener and Thomas Diez (Oxford, UK: Oxford University Press, 2004), European Integration Theory.

66 The 2007 special issue of the Journal of European Public Policy (vol. 14, no. 5) was entirely devoted to the topic of *Mutual Recognition as a New Mode of Governance*.

67 Kalypso Nicolaidis, "Trusting the Poles? Constructing Europe Through Mutual Recognition," *Journal of European Public Policy,* 14, no. 5 (August 2007): 682-98; Fritz W. Scharpf, *Governing Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); F. Schioppa, Principles of Mutual Recognition in the European Integration Process. (Houndmills:

studies investigating its application in JHA.[68] The following paragraphs of this section provide a succinct overview of the key points of these studies.

From the governance perspective, *mutual recognition* is a choice for a specific institutional set up among a set of alternatives. In the context of EU integration, at least two additional modes of governance can be identified: the *territoriality principle* (also called national treatment or host country rule) and *harmonization*. As Sievers noted, the difference between these strategies is the definition of the rule which is to apply in cooperation between EU Member States:

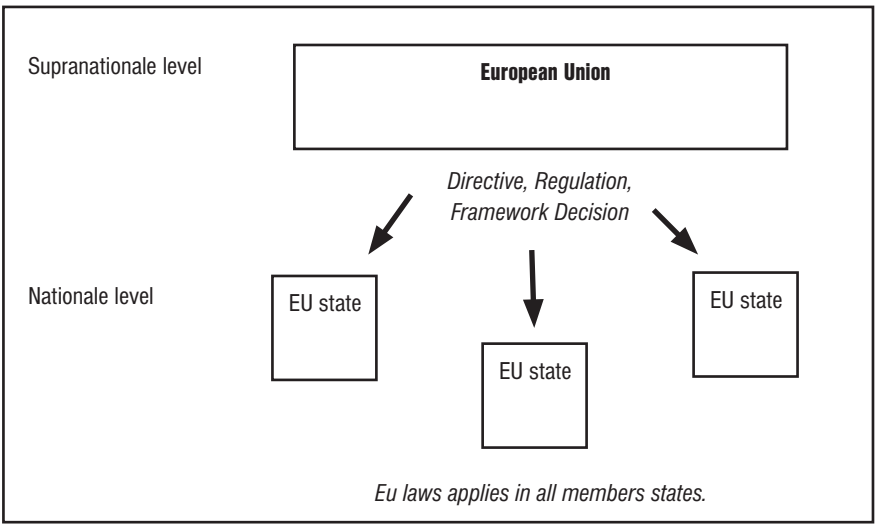
- *The territoriality principle* states that in the cooperation between the EU Member States the rule of the host country applies. This mode of governance is based on the rule of national sovereignty: States do not interfere in each others' affairs and territory determines jurisdiction. It is the classical form of intergovernmental cooperation on which most of the EU's Third Pillar was built until late 1990s.
- *Harmonization* of national law implies the agreement of all EU Member States on common EU-wide rules. These are then enforced by the Commission, which is in charge of monitoring the correct implementation and application and is enabled to start infringements proceedings at the European Court of Justice in cases of severe violation of the rules. This mode of governance is embodied in the classic Community method, which was the dominant integration strategy of the EU/EC's internal market until the 1980s. (For a graphic illustration, see figure 1)
- *Mutual recognition* requires an agreement among all EU Member States to recognize and enforce foreign law. This can take different forms. In the First Pillar, EU-foreign national law is recognized in form of the recognition of products produced according to EU-foreign national standards. In JHA, decisions of foreign judicial authorities in the form of European Arrest Warrants are to be recognized and enforced in the host state (see the EAW chapter). As a result, the laws of one EU Member State takes effect on the territory of another EU country; territory and national jurisdiction are no longer identical.[69] (For a graphic illustration, see figure 2)

Palgrave Macmillan, 2005). Susanne K. Schmidt, "Mutual Recognition as a New Mode of Governance," *Journal of European Public Policy,* 14, no. 5 (August 2007): 667-81.

[68] Sandra Lavenex, "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy," *Journal of European Public Policy,* 14, no. 5 (August 2007): 762-79; Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*.

[69] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 4-5.

Figure 1: Harmonization



Source: Sievers, 2007.

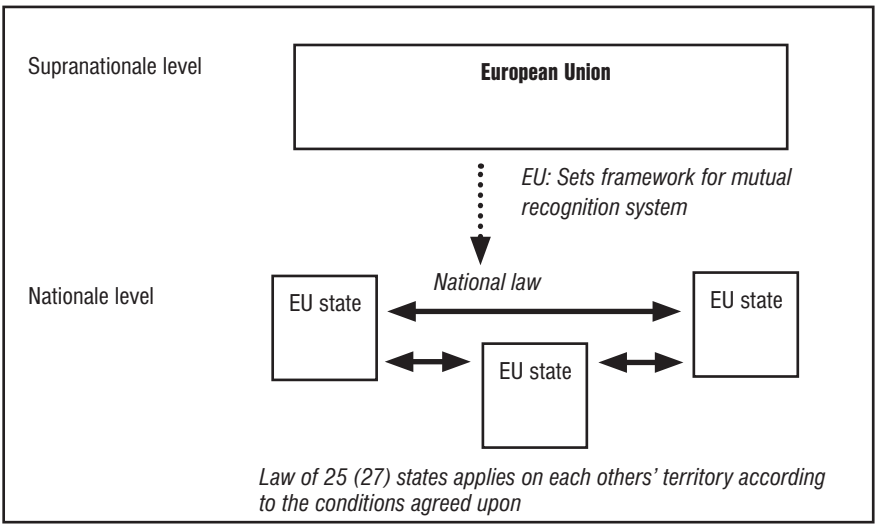
All three modes of governance have their strengths and shortcomings. Due to the strong national sovereignty concerns, the *territoriality principle* of international cooperation principle intentionally leaves a wide margin for political discretion to the Member States. As such, it is considered not very helpful when aiming at creating a common market, a common judicial sphere or a common counterterrorism policy:

> [T]errorism in the EU is essentially a transnational phenomenon. National legal provisions to counter terrorism can be examined to study their effectiveness or otherwise in countering the current threat. However, just as the post-Westphalian model of the nation-state no longer serves us in the economic arena, the cracks between the laws of different jurisdictions in countering terrorism that provide opportunities for terrorists to exploit should, to the extent that is humanly possible, be avoided.[70]

Harmonization (sometimes also called approximation), in contrast, significantly infringes on national sovereignty and that is perhaps the key reason why it has not been the favorite governance mode in EU Justice and Home Affairs, a policy area which belongs to the core functions of statehood and as such has traditionally been characterized by strong sovereignty concerns.

[70] O'Neill, "A Critical Analysis of the EU Legal Provisions on Terrorism," 26.

Figure 2: Mutual Recognition



Source: Sievers, 2007.

To a certain extent, mutual recognition can be seen as a middle ground between the principle of territoriality and harmonization. In contrast to harmonization it is perceived to be less infringing on national sovereignty and thereby easier to agree on (see figures 1 and 2). In the EU's First Pillar, where mutual recognition has been the central mode of governance, it 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 cooperation in the Third Pillar. They hoped that mutual recognition will enable the EU to build the promised Area of Freedom, Security and Justice because agreeing on centralized rules to address the existing cooperation problems did not prove politically feasible thus far.[71] In other words, the hope is that mutual recognition will provide answers to the aforementioned key dilemma of EU counterterrorism policy, e.g. how to manage diversity of national legal systems while avoiding demanding harmonization measures at the EU level?

Concluding Remarks: Lesson Learned from the Introduction of the European Arrest Warrant

The analysis of the EAW presented in this article suggests that although it is certainly not flawless, it has the potential to offer genuine value added to the EU

[71] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 2-3.

counterterrorism efforts. Moreover, from the larger Justice and Home Affairs perspective, EAW represents the hitherto only practical application of mutual recognition in the third pillar. The experience with EAW, however, also reveals that even though it has been difficult enough for the EU heads of states manage to agree to the introduction of mutual recognition in principle, the real challenge is to put a mutual recognition system into work in practice. Specifically, this study has identified at least four reasons that explain the difficulties encountered during the process of actual implementation of the EAW. Firstly, the national parliaments in several EU Member States did not share the enthusiasms for mutual recognition in judicial cooperation and used their leeway in transposing the EAW Framework decision to national law to add extra procedures and safeguards (see table 2). Secondly, because of the prevailing heterogeneity of judicial systems and cultural differences across the EU Member States, the practical cooperation between judges has not always been as smooth and automatic as expected. Thirdly, the very principle of mutual recognition has been challenged on legal grounds in several EU Member States and there are still some concerns that the abolition of dual criminality in the formal extradition processes across the EU introduced by EAW contradicts the "no crime without law" principle, which is constitutionally enshrined in a number of EU Member States. Fourthly, and perhaps crucially, the problems with EAW's implementation and practical execution suggest that the four important prerequisites for a successful application of mutual recognition (1. mutual trust, 2. equivalence, and 3. compatibility of national criminal law and criminal procedures, and 4. institutional support structures) have not been fully met thus far. Thus, as Nicolaidis and Sievers noted, mutual recognition as a governance mode entails a paradox:

> 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.[72]

The limits of mutual recognition were also acknowledged in a recent report by the British House of Commons, which argued that the mutual recognition principle does not appear to enjoy the full support it once did when the Framework Decision on the EAW was adopted in 2002. Some experts interviewed by the writers of the report actually went so far as saying that "the mutual recognition principle as a basis for police and criminal justice co-operation is doomed."[73]

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[72] Sievers, *Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs*, 3.

[73] Home Affairs Committee UK House of Commons, "Justice and Home Affairs Issues at European Union Level," Third Report of Session 2006-07, Volume I. 24.05. 2007, 17/04/2008 <http://www.statewatch.org/news/2007/jun/eu-uk-hasc-report.pdf>.

While the British may be once again too pessimistic, it is clear that mutual recognition in Justice and Home Affairs cannot function when it is not used by national judges. Over time, the judges may learn more foreign languages, acquire better e-skills and perhaps even start to trust their foreign counterparts a bit more than they do now. Eurojust, whose primary task is to provide "immediate legal advice and assistance in cross-border cases to the investigators, prosecutors and judges in different EU Member States,"[74] could also offer some remedies to the increased transactions costs that the EAW *de facto* transferred from the political decision-making stage to the implementation and application stages, e.g. to national judges. However, neither Eurojust, nor multiple foreign-languages fluent national judges, can do away with the heterogeneity of national criminal justice systems across Europe. Thus, although wholesale harmonization in the JHA pillar appears to be both impractical and politically unfeasible, the experience with the implementation of EAW suggests that some common EU-wide minimum standards defined on the European level may be necessary for mutual recognition to work in practice.

[74] In cases of assistance in cross-border judicial cooperation, Eurojust is working alongside another recently established unit – the European Judicial Network (EJN), which became operational in 1998. While EJN is essentially a decentralized information sharing network connecting EU lawyers and judges working on criminal cases, Eurojust is a centralized unit. European Commission, "Eurojust Coordinating Cross-Border Prosecutions at EU Level," http://europa.eu.int/comm/justice_home/fsj/criminal/eurojust/fsj_criminal_eurojust_en.htm>, 2004.