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## Negative and Positive Integration in EU Criminal Law Co-operation

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**Abstract:** The distinction between negative and positive integration that has played a pivotal role in understanding the dynamics of the common market is also instrumental in explaining the dynamics of criminal law co-operation in the EU. Despite manifold differences between common market governance and criminal law cooperation, the introduction of mutual recognition as the lead principle has privileged the abolition of obstacles to cross-border law enforcement (negative integration) over the adoption of common standards (positive integration). As an analysis of the measures taken thus far demonstrates, criminal law cooperation has been biased towards law enforcement at the expense of individual rights.

**Keywords:** security/internal; governance; fundamental/human rights; negative integration; positive integration; qualified majority; Council of Ministers

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### Introduction<sup>1</sup>

The distinction between negative and positive integration has almost exclusively been used to explain the dynamics of economic governance. This article aims at demonstrating that the distinction also contributes to a more comprehensive understanding of the dynamics of criminal law co-operation in the EU. Complementing, rather than replacing existing explanations, the distinction between negative and positive integration in particular helps to explain the inbuilt bias towards law enforcement at the expense of individual rights.

The distinction between negative and positive integration has played a pivotal role in explaining the dynamics of the EU's common market. Fritz Scharpf in particular has argued that negative integration, i.e. the removal of obstacles to free and undistorted competition, has been systematically privileged over positive integration, i.e. the adoption of common regulatory standards.<sup>2</sup> The 1979 ECJ *Cassis de Dijon* ruling has been a milestone in this regard. Until that ruling, negative integration required the harmonization of regulatory

<sup>1</sup> Support for this research from the Centre for Comparative Social Studies of the Faculty of Social Sciences at the Vrije Universiteit Amsterdam is gratefully acknowledged. Moreover, I would like to thank the participants of the political science staff seminar at the Vrije Universiteit and of the workshop "Policy Change in EU Internal Security" at the European University Institute Florence on May 12/13 2011 as well as Roderick Parkes and Susanne Schmidt for helpful comments and suggestions.

<sup>2</sup> See especially Scharpf 1999: 43-83 and the recent collection of his numerous contributions in Scharpf 2010.

standards and was therefore severely hampered by cumbersome decision-making in the Council.<sup>3</sup> In the absence of harmonized European standards, member states remained free to restrict market access on the basis of national regulations. In *Cassis de Dijon*, the ECJ revolutionized common market governance by declaring that free movement did not require harmonized regulatory standards. Instead, a principle of mutual recognition would apply to the common market according to which all member states were generally obliged to open their markets for products that were lawfully marketed in one member state.<sup>4</sup> The underlying assumption is that “member states’ regulations present alternative solutions to the same underlying problem” (Schmidt 2007: 672). Whereas the creation of a common market was thus facilitated, the adoption of market-correcting measures remained hampered by the requirement of unanimity or super-majorities in the Council.<sup>5</sup> As a result, the balance between the market and the state, between neoliberal deregulation and social-democratic interventionism, shifted towards the former at the expense of the latter.<sup>6</sup>

Twenty years after *Cassis de Dijon*, the EU member states agreed on the introduction of the principle of mutual recognition to an entirely different policy area, namely criminal law co-operation. At the 1999 Tampere European Council they declared that mutual recognition should “become the cornerstone of judicial co-operation in both civil and criminal matters within the Union”.<sup>7</sup> The introduction of the principle of mutual recognition reflected the dissatisfaction of numerous member states with previous efforts at approximation and harmonization<sup>8</sup> of criminal law that had dominated criminal law cooperation since the establishment of the third pillar with the Maastricht Treaty (Calderoni 2010: 16ff.). Agreements on common definitions of criminal offences and on minimum sanctions proved difficult to achieve with individual member states endowed with veto power and eager to preserve the peculiarities of national systems of criminal law (Mitsilegas 2009: 86). Since then several key documents reaffirmed the EU’s resolve to re-organize criminal law co-

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<sup>3</sup> Although the Rome Treaty provided for Qualified Majority Voting after a transition period, member states preferred to adopt measures by consensus, especially after the crisis of 1965/66 that led to the so-called Luxemburg compromise. As a consequence, decisions by the Council de facto required unanimity.

<sup>4</sup> Prohibitions and restrictions remain possible but require justification, most importantly on grounds of safety, health, environment or consumer protection (Pelkmans 2007: 702).

<sup>5</sup> As Fritz Scharpf (1999: 45) points out, measures of negative integration are, by and large, synonymous with market-creating measures. In contrast, measures of positive integration are mostly but not necessarily exclusively market-correcting, as harmonized standards may help to overcome barriers to free competition and thus to create markets.

<sup>6</sup> For the opposite argument that the ECJ in particular has helped to establish a supranational embedded liberalism see Carporaso/Tarrow 2009.

<sup>7</sup> Presidency Conclusions, Tampere European Council, 15/16 October 1999, No. 33.

<sup>8</sup> According to André Klip (2009: 32), approximation leaves the member states more discretion in the choice of means than harmonization but the dividing line between harmonization and approximation has remained unclear. Even though the treaty provisions on criminal law cooperation make no reference to harmonization (but to approximation), they are frequently discussed under this heading (e.g. by Mitsilegas 2009).

operation on the basis of mutual recognition.<sup>9</sup> The principle was hardly contested in the Constitutional Convention and was placed prominently in the Lisbon Reform Treaty. According to article 67 (3) of the Treaty on the Functioning of the European Union,

“[t]he Union shall endeavor to ensure a high level of security [...] through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.”

Differences between common market governance and criminal law co-operation abound. One of the most significant concerns the role of the ECJ: In criminal law co-operation, the principle of mutual recognition was not introduced by the ECJ but by the member states. Moreover, the ECJ has not been tasked (nor has it sought to assume such a role) to enforce mutual recognition.

In this paper I argue that the distinction between negative and positive integration is instrumental in explaining the dynamics of EU criminal law co-operation. Despite all differences between common market governance and criminal law co-operation, the introduction of mutual recognition as the lead principle has privileged the abolition of obstacles to cross-border law enforcement (negative integration) over the adoption of common standards (positive integration). As a consequence, criminal law co-operation has been systematically biased towards law enforcement.

Section 1 introduces the theoretical argument. The privileging of law enforcement over individual rights in criminal law co-operation does not result from a constitutionalization of European treaty provisions and a pro-active ECJ (as the common market analogy would suggest) but from the specific constellation of interests in the Council: because the Home Affairs Ministers themselves have a lot to gain from the mutual recognition of warrants etc., negative integration is privileged even under conditions of unanimous decision-making.

Section 2 presents empirical evidence that the introduction of mutual recognition to criminal law co-operation has indeed privileged measures of negative integration over those of positive integration. In order to do so, it first gives an overview of all measures proposing the application of mutual recognition to criminal law in the decade between the Tampere European Council 1999 and the entry into force of the Lisbon Treaty 2009. As the discussion of the various measures demonstrates, the overall effect is indeed one of privileging the

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<sup>9</sup> Cf. The Hague Program. Strengthening Freedom, Security and Justice in the European Union, Annex I to the Presidency Conclusions, Brussels, 4/5 November 2004 (OJ C 53 of March 3, 2005); Program of measures to implement the principle of mutual recognition of decisions in criminal Matters (OJ C 12 of 15.1.2001); European Commission, Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, Brussels, 19.5.2005 (COM(2005) 195 final); The Stockholm Program – an Open and Secure Europe Serving and Protecting Citizens (OJ C 115 of 4.5.2010).

executive's security interests over citizens' rights (2.1). It then goes on to demonstrate that attempts to adopt common minimum standards for criminal proceedings have indeed failed (as expected from the perspective assumed here) (2.2).

Section 3 summarizes the argument and concludes with a brief assessment of the institutional reforms introduced by the Lisbon Treaty and their likely effect on the balance between law enforcement and individual rights.

## **1. Theoretical Argument: Negative and positive integration in criminal law co-operation**

Whereas the balance between neoliberal deregulation and social-democratic interventionism lies at the heart of common market governance, it is the balance between security (i.e. the executive's interest in effective law-enforcement) and freedom (i.e. citizens' and particularly defendants' interest in safeguarding individual rights vis-à-vis the executive) that is characteristic for criminal law co-operation. A brief glance at the member states of the EU makes clear that the balance found between security and freedom differs no less across the member states than the balance found between producer and consumer interests.

At first glance, it might seem surprising that criminal law co-operation should be characterized by a similar imbalance between negative and positive integration as was found in the common market. Whereas the free movement of goods, labour and capital is considered "low politics", criminal law and security cooperation more broadly go to the very core of state sovereignty. This is also reflected in the institutional setting: the ECJ that played such a pivotal role in facilitating negative integration in the common market has been marginalized in criminal law co-operation.<sup>10</sup> In contrast to common market governance, each measure of negative integration in criminal law co-operation thus required unanimous agreement in the Council.

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<sup>10</sup> If the Commission considers that a member state has failed to fulfil an obligation in common market governance, it can eventually bring this matter before the ECJ. In the third pillar which includes criminal law co-operation, the Commission lacked such a competence. By abolishing the pillar structure, the Lisbon Treaty in principle extends the Court's jurisdiction to rule on infringement proceedings to criminal law cooperation. However, for a transition period of five years, this new provision only applies to newly adopted measures. In a similar vein, the treaties of Maastricht, Amsterdam and Nice only allowed preliminary rulings of the ECJ on cases referred to it from national courts if member states have made a respective declaration (which several member states did not). The Lisbon Treaty again extends the system of preliminary rulings that was instrumental in creating the common market to criminal law cooperation but exempts measures already adopted until 2014. The provision according to which the ECJ "shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" remained unchanged by the Lisbon Treaty.

However, I will draw on the work by Fritz Scharpf, Klaus Dieter Wolf, Andrew Moravcsik, Virginie Guiraudon and Sandra Lavenex to argue in this section that the principle of mutual recognition causes a similar dynamic in criminal law co-operation despite all differences in institutional settings. With a view to European integration in general, Wolf and Moravcsik have argued that “international co-operation tends to redistribute domestic political resources toward executives” (Moravcsik 1994: 7). From this perspective, internationalization may have the counter-intuitive effect to “strengthen the executive by establishing an additional political arena which is dominated by government representatives” (Wolf 1999: 336). Executives are therefore interested in internationalization if this enhances their autonomy vis-à-vis their particular societal environment because they are driven by an “organizational self-interest”, i.e. an interest in “organizational survival, autonomy and growth” (Scharpf 1997: 64).<sup>11</sup> In the area of migration policy, Sandra Lavenex has argued that Justice and Home Affairs officials are driven by a desire “to circumvent domestic obstacles to political reforms which resulted from the constitutional foundations of humanitarian policy frames and their defence by political parties” (2006: 332). In a similar vein, Virginie Guiraudon has demonstrated that internationalization can be understood as a “case of ‘venue shopping’” in which “law and order official gain from operating in international venues” (2000: 252), mainly because they face fewer opposition and judicial constraints than in national politics.

In order to explain the dynamics in criminal law co-operation, differences across issue areas have to be introduced to the general argument by Wolf and Moravcsik. Because the initial distribution of domestic political resources differs widely across issue areas we should, *ceteris paribus*, also expect member states’ preparedness to transfer competences to a European level to differ accordingly.<sup>12</sup> Put differently, to the extent that an expected redistribution of political resources is driving government policies on European integration, we should expect governments to be particularly interested in the Europeanization of issue areas where domestic constraints are most pronounced. As Sandra Lavenex has pointed out, “the autonomy-generating effects of internationalization are especially strong for democratic states, and may be particularly important in the fields that are close to its liberal core, such as migration policies” (2006: 332). From this perspective, the same can be expected for criminal law co-operation because law enforcement is equally circumscribed by domestic judicial constraints.

The dynamics in criminal law co-operation can then be explained by the extraordinary gains member state executives and home affairs ministers in particular can expect from

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<sup>11</sup> In a similar vein, Wolf follows Claus Offe in regarding governments not primarily as problem solvers but as “strategic actors with an *a priori* interest in themselves” (1999: 334), namely in securing “the greatest possible degree of autonomy vis-à-vis their particular societal environment” (*ibid*: 335).

<sup>12</sup> Mathias Koenig-Archibugi (2004) has made a similar argument with a view to differences among member states. According to Koenig-Archibugi, member states’ preparedness to establish a Common Foreign and Security Policy has been a function of the degree of domestic constraints in this issue area, especially by parliaments whose competencies in foreign and security policy differ widely across member states.

Europeanization. The expected redistribution of political resources is particularly high because executives are themselves the main subject of regulation in criminal law. Whereas European regulations in economic governance mainly affect private actors (producers and consumers, employers and employees), European regulations on criminal law directly impacts the executive's capability to fulfill one of its key functions, namely the enforcement of the law and the provision of internal security. By implication, deregulation, i.e. the relaxation or abolition of legal or administrative obstacles to cross-border law enforcement, directly enhances the executive's autonomy vis-à-vis its societal environment. Whereas ministers may fight lonely battles in their respective national cabinets over the deregulation of law enforcement, they tend to meet like-minded colleagues in the Council. Notwithstanding divisions among member states, the justice and home affairs ministers therefore share a common organizational self-interest in such deregulation. As a consequence, even the lowest common denominator of the justice and home affairs ministers lies significantly above the status quo, characterized by a balance between the state's law enforcement capabilities, on the one hand, and individual rights constraining state activity, on the other hand.

Before the principle of mutual recognition was introduced and harmonization was the main instrument in criminal law co-operation, European measures brought about significant costs of amending national systems of criminal law. However, mutual recognition no longer requires such amendments and therefore eases criminal law co-operation significantly. Just as in common market governance, the principle of mutual recognition facilitates the creation of a common area in which the validity of national regulations (for example on gathering evidence or arresting persons) no longer stops at national borders. Under the pre-mutual recognition regimes, a state could request other states to assist them in cross-border law enforcement but the requested state retained considerable discretion in doing so. In contrast, the principle of mutual recognition replaces the distinction between requesting and requested states with a distinction between issuing and executing states thereby indicating that the latter is no longer supposed to review the validity of any warrant or order issued by the former (Peers 2006: 433). It is the combination of significant gains in law enforcement effectiveness and very little sovereignty costs coming with it that has made mutual recognition so attractive to the member states.

Of course, the dynamics of criminal law co-operation cannot be explained exclusively with reference to the principle of mutual recognition and the distinction between negative and positive integration. Indeed, a prioritization of security and a tendency to redefine freedom in terms of a right to security have been discernible since the establishment of Justice and Home affairs as a third pillar of the European Union.<sup>13</sup> Instead, additional driving forces have had an impact on criminal law co-operation. As Jörg Monar has pointed out, new challenges in the

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<sup>13</sup> Cf., among many others, the contributions to Balzacq/Carrera 2006 and the work done in the context of project "CHALLENGE –The Changing Landscape of European Liberty and Security" that the European Commission funded under the Sixth Framework programme ([www.libertysecurity.org](http://www.libertysecurity.org)).

fight against organized crime have increased the demand for European co-operation. In addition, the completion of the single market, the full implementation of free movement and the establishment of the Schengen area had spill-over effects for Justice and Home Affairs (2001: 753-755). Moreover, interior ministers' calls for additional executive competences in law-enforcement have resonated well with European publics, not the least since the terrorist attacks of September 11, 2001. Thus, the establishment of an Area of Freedom, Security and Justice also appears as a welcome opportunity for the EU to demonstrate its utility to a European public whose support for a deepening of European integration has otherwise been dwindling. Therefore, the aim of this paper is not to replace existing explanations of the emergence of criminal law co-operation but to advance a more complete understanding of its dynamics by pointing out the peculiar effect that the introduction of mutual recognition has on the balance between law enforcement and the protection of individual rights. The remainder of this paper explores empirically whether the introduction of mutual recognition has indeed shifted the balance between security and freedom at the expense of the latter.

## 2. Empirical evidence

### 2.1. Mutual recognition in criminal law co-operation: the record thus far

Under the treaties of Amsterdam and Nice, eleven measures of mutual recognition have been proposed in the field of criminal law co-operation (see appendix for a complete list).<sup>14</sup> Four of these measures were proposed by the Commission, four by groups of two or more member states and three by individual member states. Of the eleven measures, nine were adopted and two abandoned. It is noteworthy that all abandoned measures had been proposed by individual member states thereby underlying the notion that individual member state initiatives are often driven by domestic considerations with insufficient attention paid to common European concerns.

The measures adopted cover various stages of a trial: during the pre-trial period, the freezing order and the evidence warrant help to secure evidence needed at a later stage. The arrest warrant and the supervision order help to prevent defendants from escaping justice. The assimilation of convictions is designed to influence the trial itself: when deciding on a sentence, prior convictions from other member states are to be given the same status (thus

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<sup>14</sup> This figure does not include the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81 (27.3.2009), 24-36) because this measure only marginally modifies three existing framework decisions (namely those on the arrest warrant, the confiscation order and on financial penalties).



“assimilated”) as those from the member state of the actual trial.<sup>15</sup> The Framework Decision on financial penalties and the confiscation order aim to enforce sanctions decided in one member state in another one. Finally, the enforcement order facilitates serving a prison sentence in another member state than the one where the sentence has been ruled. The probation order extends this rationale to alternative sanctions (such as obligations to report at specified times to a specified authority, not to enter certain localities, or accept limitations on leaving the country).

With the exception of the European Arrest Warrant that was agreed upon in the wake of 9/11 in less than a year, agreement typically took several years. However, compared with the time it took the member states to agree on third pillar conventions, decision-making has speeded up rather than slowed down (although no systematic data exist).<sup>16</sup>

#### *Mutual Recognition to the benefit of the defendant: the European Supervision Order*

Of the nine measures adopted, only one improves the standing of the defendant. Indeed, the European Supervision Order demonstrates that the principle of mutual recognition can be used to enhance the freedom of defendants: In the absence of that measure, non-residents have been more likely to be subjected to provisional detention than residents because of concerns that they might escape justice otherwise. For a person who resides in one member state but is subject to criminal proceedings in another one, the supervision therefore facilitates to remain at large as the authorities of the state of residence can assume responsibility for the necessary supervision measures.

What is striking, however, is that the European Supervision Order has remained the only application of the principle of mutual recognition that has served the interest of the defendant. In contrast, all other measures have served the interests of law enforcement at the expense of the defendant.

The Greek initiative to adopt a framework decision on *ne bis in idem* also had the potential to enhance defendants’ rights. After all, the *ne bis in idem*-principle aims at preventing states from prosecution if the person under consideration has already been brought to justice for the same act in another state. The mutual recognition of prior convictions thus “serves the interest of mainly the convicted or acquitted person” (Klip 2009: 226). The comprehensive case law of the ECJ demonstrates that the concrete application of the principle raises a lot of questions

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<sup>15</sup> One of the abandoned measures, namely the Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the “ne bis in idem” principle (*OJ C 100*, 26.4.2003, p. 24–27) also addressed the trial itself.

<sup>16</sup> Furthermore, conventions suffered from slow ratification in the member states. At the time of adopting the European Arrest Warrant, Ireland, Italy, and France had not yet ratified the ‘Convention Drawn up on the Basis of Article K.3 of the Treaty on European Union Relating to Extradition between the Member States of the European Union’ of 1996 that the EAW replaced.

each of which can be either decided in favour of defendant or in favour of the prosecuting authority. Thus, a framework decision on this aspect could have been beneficial for defendants. It fits the overall picture, though, that this initiative did not find sufficient support from among the member states and therefore lapsed. (It was then left to the ECJ to further specify *ne bis in idem*, and in doing so the court by and large ruled in favour of the defendant (Mitsilegas 2009: 143-153; Klip 2009: 231-246).)

*False claims to benefit the defendant: the enforcement order and the probation order*

The recitals of two measures, the enforcement order and the probation order, mention the sentenced person's enhanced prospects of being reintegrated into society as the measure's aim,<sup>17</sup> thus claiming to act to the benefit of the defendant. A close look at both measures, however, raises serious doubts about this. In fact, the initiators of the enforcement order were first of all concerned about reducing the number of foreigners in its own prisons. The main thrust of the enforcement order is to facilitate the serving of sentences in East European member states that would otherwise have been served in West European member states. Given the inhuman conditions in some East European prisons,<sup>18</sup> prisoners are unlikely to benefit from such a transfer. Most importantly, the enforcement order facilitates the transfer of prisoners by severely circumscribing the requirement of the prisoner's consent. Whereas the 1983 Council of Europe Convention on the transfer of sentenced persons required the consent of the sentenced person, the enforcement order stipulates that "his or her involvement in the proceedings should not longer be dominant by requiring in all cases his or her consent" (recital 5). In fact, article 6 of the enforcement order holds that the consent of the sentenced person shall not be required where the judgement is forwarded to the member state of nationality, the member state to which (s)he will be deported once released or the member state to which he or (s)he has fled. Michael Plachta thus concludes that "[a]lthough prisoners' rehabilitation was mentioned briefly in the Preamble, the provisions that follow do not reflect this idea" (2009: 343). The probation order extends this rationale to alternative sanctions (such as obligations to report at specified times to a specified authority, not to enter certain localities, or accept limitations on leaving the country).

*The flagship of mutual recognition: The European Arrest Warrant*

The five remaining measures of mutual recognition are all measures of negative integration that ease the cross-border effectiveness of law enforcement at various stages of the criminal procedure. The European Arrest Warrant has become the flagship of these measures. According to then Belgian Prime Minister Guy Verhofstadt, "the European Arrest Warrant

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<sup>17</sup> Recital 9 of the Enforcement order and Recital 8 of the Probation order.

<sup>18</sup> See the reports on Bulgaria and Latvia by the Committee for the Protection against Torture (CPT) in Łazowski/Nash (2009: 42-44).

will be for the European Justice and Home Affairs exactly as significant as the euro will be in the economic and monetary union” (quoted from Kaunert 2005: 459f.). Since the EAW was the first measure of mutual recognition in criminal law that entered into force and whose effectiveness has been studied by both the European Commission and academics, its impact on the balance between security and freedom can be studied.

The EAW facilitates extradition (now called surrender) by abolishing various obstacles that characterized extradition politics up to this point. Most importantly, for a list of 32 offences, dual criminality is no longer required. Thus, defendants can be surrendered to a requesting state even if the offense under consideration is not punishable under the laws of the defendants country of nationality and/or residence. In addition, the EAW abolishes the political phase inherent in any extradition procedure that left the ultimate decision to the Foreign Ministry of the requested country. The EAW instead foresees direct communication between the issuing and the executing judicial authorities.

Although the EAW aims at facilitating surrender, some limited grounds for refusal remain. According to article 3, the EAW shall be refused if the offence under consideration is covered by an amnesty in the executing state or if the person has already been convicted for the offence under consideration in another member state. Because the EAW is “based on a high level of confidence between Member States” (recital 10), article 3 (“grounds for mandatory non-execution of the EAW”) does not address human rights violations. However, the preamble holds that

“No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” (recital 13)

“Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.” (recital 12)

The EAW has indeed revolutionized extradition in the EU, as implementation studies by the European Commission (2006; 2007) document. Even though data for Belgium and Germany were still missing, the Commission reported 6.900 arrest warrants and 1.770 subsequent arrests in 2005. Whereas in 2004, 60% of arrested persons were surrendered to the requesting state, this figure rose to 86% in 2005.<sup>19</sup> Moreover, whereas the average time between request

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<sup>19</sup> This includes the prominent case of Hussain Osman who was found guilty of the July 2005 London bombings. Osman had fled to Italy but was surrendered to the United Kingdom within only three days.

and surrender used to be roughly a year before the introduction of the EAW, the procedure took an average of 43 days.

In depth-studies of the EAW in practice have shown that courts have remained mistrustful of other member states' judicial system. British courts, for example, have criticized German and Austrian courts for issuing EAWs on the basis of "strong suspicion" (Sievers 2008: 124). In a similar vein, German courts have criticized Eastern European colleagues for issuing warrants for *bagatelle* offences. However, with a view to the law-enforcement bias under discussion here, it is important to note that courts nevertheless try to avoid non-execution as far as possible. Thus, another study of the EAW in practice concludes that courts in general trust that the individual rights are respected and therefore execute warrants unless they have evidence to the contrary (Łazowski/Nash 2009). For example, a British court refused to follow the argument of a Spanish terrorist-suspect that he will be maltreated in Spanish prisons by arguing:

"If our courts were to accede to such arguments, they would be defeating the assumption which underpins the Framework Decision that member states should trust the integrity and fairness of each other's judicial institutions. This is a course that we should not take." (quoted from Łazowski/Nash 2009: 46).

In a similar case, the court held that:

"Spain is a western democracy, subject to the rule of law, a signatory to the European Convention on Human Rights and party to the Framework Decision; it is a country which applies the same human rights standards and is subject to the same international obligations as the United Kingdom. These are surely highly relevant matters which strongly militate against refusing extradition on the grounds of the risk of violating those standards and obligations" (quoted from Łazowski/Nash 2009: 46).

In conclusion, the EAW has facilitated extradition within the European Union because courts feel obliged to limit non-execution of warrants as much as possible even though the confidence in member states' judicial systems is more assumed than actually present.

### *The European Evidence Warrant*

Of the remaining measures, the European Evidence Warrant (EEW) is the most significant for individual rights. It does not come as a surprise therefore that it has also been the most controversial: it occurred seven times as a "B item" on the Council agenda, i.e. the ministerial level had to be involved in the negotiations<sup>20</sup> and it attracted significant scholarly criticism.<sup>21</sup>

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<sup>20</sup> In comparison, the confiscation order appeared six times, the FD on financial penalties five times, the EAW three times, the enforcement order twice, the FD on the assimilation of prior convictions once and the freezing order was never discussed at ministerial level but passed as an "A item".

<sup>21</sup> Gazeas 2005; Spencer 2005; Ahlbrecht 2006 and Belfiore 2009.

The EEW enables judges or public prosecutors in one state to obtain objects, documents or data in another member state by issuing a respective warrant. This implies, that coercive measures such as house searches are carried out by the police in one state on the basis of a document issued in another state.

For the same 32 offences that the EAW lists, the double criminality requirement is abolished, i.e. the executing state is expected to seize and transfer evidence for offenses that may not be punishable under its domestic law. As the EAW, the EEW requires a high level of confidence among the member states (which is acknowledged in recital 8) because it is in the issuing authority's responsibility to ensure "an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case" (recital 11) and that "the least intrusive means to obtain the objects, documents or data sought" (recital 12) is used.

In contrast to the EAW, however, the EEW met with more opposition from the ranks of the member states. Thus Germany, where criminal law scholars had been highly critical of the proposal (see Gazeas 2005; Ahlbrecht 2006), opted out of non-verification of double criminality in the cases of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling whenever the execution of a warrant required search or seizure.

In the Stockholm Program, the European Council envisions a "comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition." This new system "could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned." In particular, this means that types of evidence that currently are explicitly excluded from the EEW would come into its remit. This includes, for example, DNA samples, fingerprints and real time information gained by covert surveillance or monitoring of bank accounts

The remaining measures have received less attention and in some cases little is known about their actual effectiveness.<sup>22</sup> There can be little doubt, however, that to the extent they are applied, they facilitate the trans-border effectiveness of repressive measures – taking into account prior convictions for sentencing or enforcing financial penalties – without adopting concomitant minimum standards of individual rights.

## **2.2. Obstacles to positive integration in criminal law co-operation**

The previous section has demonstrated that the introduction of mutual recognition to criminal law co-operation has facilitated the free movement of warrants, orders and judgements and

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<sup>22</sup> The Commission has published studies on the implementation of the European Arrest Warrant. An implementation report on the confiscation order is scheduled for 2010/2013 (Action Plan Implementing the Stockholm Program, p. 18).

thus the creation of a common area of law-enforcement. However, the facilitation of law enforcement would not by itself change the balance between ‘security’ and ‘freedom’. Only in the absence of accompanying high procedural standards would the balance between ‘security’ and ‘freedom’ tilt towards the former. Therefore, this section demonstrates that the adoption of common standards (positive integration) has indeed failed.<sup>23</sup>

On a programmatic level, there is no disagreement among EU institutions that the implementation of the principle of mutual recognition requires common standards. In the Hague Program, the member states acknowledge that the “further realisation of mutual recognition as the cornerstone of judicial co-operation implies the development of equivalent standards for procedural rights in criminal proceedings.”<sup>24</sup> More recently, in its Action Plan on the Implementation of the Stockholm Programme, the European Commission re-emphasises that

“The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods.”<sup>25</sup>

Briefly after the adoption of the European Arrest Warrant, the Commission started working on a measure on procedural rights in criminal proceedings. After a period of consultation in 2002 and a Green Paper in 2003, the Commission proposed a respective framework decision.<sup>26</sup> Already in this first phase of the policy-cycle, the Commission gave up its initial ambition for a comprehensive regulation. The Commission instead explains that “whilst all the rights that make up the concept of “fair trial rights” were important, some rights were so fundamental that they should be given priority at this stage” (European Commission 2003: 15). The Commission proposal thus focuses on those rights that are of particular importance to defendants abroad because of their unfamiliarity with the legal system and the language (Rudolf/Giese 2007: 113). This category includes the right to interpretation, to legal advice and assistance, to consular assistance and to inform relatives. However, even in this less ambitious version, the Commission proposal met considerable opposition in the Council (see,

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<sup>23</sup> This section focuses on the period between the Tampere European Council and the entry into force of the Lisbon Treaty. The effects of the Lisbon reforms will be discussed in the next section.

<sup>24</sup> The Hague Program. Strengthening Freedom, Security and Justice in the European Union, Annex I to the Presidency Conclusions, Brussels, 4/5 November 2004, p. 38.

<sup>25</sup> Delivering an area of freedom, security and justice for Europe\*’s citizens. Action Plan Implementing the Stockholm Program. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 20.4.2010 (COM(2010) 171 final, p.4

<sup>26</sup> Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. Green Paper from the European Commission (COM(2003) 75 of 19 February 2003. Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union, COM (2004)328 F of 28.4.2004.

also for the following, Jimeno-Bulnes 2008). Ireland, the United Kingdom, Malta, the Slovak Republic, the Czech Republic and Cyprus in particular argued that the provisions in the European Convention for Human Rights were sufficient and any additional EU measure unnecessary. In early 2007, the German Presidency tried to reach consensus by dispensing with obligations to ensure a high quality of translations and to have interpretation recorded but even that draft did not find sufficient support. As expected from the theoretical perspective assumed here, the unanimity requirement in the Council made any agreement above the lowest common denominator rather unlikely. Whereas the lowest common denominator for law enforcement measures usually differs significantly from the status quo, it was set for procedural rights by those states that were unwilling to consider any regulation.

The Commission therefore withdrew its proposal in July 2009. In a “Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings,”<sup>27</sup> the Council announced its intention to instead adopt a series of measures focusing on specific rights, namely “translation and interpretation”, “information on rights and information about charges”, “legal advice and legal aid”, “communication with relatives, employers and consular authorities” and “special safeguards for suspected or accused persons who are vulnerable”. The Commission’s Action Plan Implementing the Stockholm Programme envisages the period between 2010 and 2013 for this purpose. Because the Commission considered translation and interpretation to be the least controversial procedural right, it tabled a respective proposal in mid-2009.<sup>28</sup> However, the legislative procedure could not be finalized before December 1<sup>st</sup>, 2009 when the Lisbon Treaty entered into force. Therefore, the measure had to be proposed anew (see next section).

### **3. Outlook: The Lisbon reforms and the future of criminal law co-operation**

Despite all pledges to the contrary, criminal law co-operation post-Tampere has not preserved the balance between law enforcement and individual rights that has characterized the member states. To the contrary, European criminal law co-operation has privileged law enforcement over individual rights because the adoption of repressive measures has been eased by the principle of mutual recognition, whereas the introduction of common standards of defendants’ rights has until recently been hampered by unanimity in the Council.

However, the new imbalance between law-enforcement and individual rights has also led to problems in the transposition of European measures into national law and in their application in day-to-day criminal law co-operation. Thus, the European Arrest Warrant was challenged

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<sup>27</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295 of 4 December 2009.

<sup>28</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280 of 26.10.2010).

in the constitutional courts of various member states. Germany's Federal Constitutional Court, for example, declared the implementing legislation to the European Arrest Warrant void because the Bundestag had not used all discretion allowed by the Framework Decision to protect own nationals (Komárek 2007). Moreover, judges have occasionally refused to follow the letter of the EAW and surrender persons without any check of dual criminality. Moreover, criticism from judges, lawyers, NGOs and scholars has not gone unnoticed by the member states. As a consequence, negotiations on the EEW have proved to be much more cumbersome than those on the EAW before.

These difficulties in implementing European law enforcement measures have underlined the need for mutual trust as a basis for mutual recognition (cf. also Lavenex 2007) and helped to prepare the ground for the institutional reforms of the Constitutional Convention and the Lisbon Treaty. Whereas the principle of mutual recognition attracted no discernible opposition during the debates of the constitutional convention, its members frequently called for a more even balance between law enforcement and individual rights protection.

The Lisbon Treaty that entered into force on 1 December 2009 indeed provides for a number of changes in criminal law co-operation.<sup>29</sup> Most importantly, the distinction between a supranational community pillar and an intergovernmental pillar for criminal law and police co-operation has been by and large abolished. Future legal acts applying mutual recognition to further areas of criminal law will therefore be taken under the ordinary legislative procedure, i.e. with a majority of 55% of the member states in the Council (representing at least 65% of the population of the EU) and with full co-decision powers of the European Parliament. The latter is particularly significant as the European Parliament has frequently asked for a better protection of individual rights.<sup>30</sup>

The Lisbon Treaty also strengthens the judicial review of measures in criminal law co-operation in several ways: First of all, the Lisbon Treaty requests accession of European Union to the European Convention on Human Rights (ECHR) (art. 6 (2) TEU). The European Court of Human Rights in Strasbourg would then be competent to establish whether EU laws violate the standards of the ECHR. Second, the Charter of Fundamental Rights obtains the same legal value as the treaties themselves (art. 6 (1)). Although exceptions apply to a few member states, the Charter is now directly binding for the European institutions (e.g. the Commission when proposing new legislation on criminal law cooperation) and the member states when implementing EU law (Kaunert 2010: 172). Third, the European Court of Justice gains additional competences. The obligation of member state courts to ask the ECJ for

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<sup>29</sup> For an overview cf. Mitsilegas 2009: 36-56 and Kaunert 2010: 171-173.

<sup>30</sup> The EP's determination to defend individual rights' protection in Justice and Home Affairs is illustrated by its rejection of the agreement on sharing bank transfer data between the EU and the USA ("SWIFT agreement") (see Monar 2010). Ariadna Ripoll Servent (2010), however, has demonstrated that the EP has become more susceptible to a security rationale since it was granted co-decision powers in some areas of Justice and Home Affairs.



“preliminary rulings” on issues that involve the interpretation of Community law is extended to criminal law co-operation. However, the ECJ shall still not have “jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security“ (art. 276 TFEU).

Thus, the reforms of the Lisbon Treaty are likely to ease the adoption of higher common standards of individual rights protection. The recent adoption of a minimum standard for interpretation and translation – the first measure in criminal law cooperation adopted under the new provisions – also points into this direction:<sup>31</sup> Briefly after the entry into force of the Lisbon Treaty (that brought an end to the legislative procedure on a respective Framework Decision, as discussed in the previous section), both the member states and the European Commission tabled proposals for a directive. Within only a few months, agreement was reached and a directive adopted.<sup>32</sup> Because the Council now decided with qualified majority and had to reach a compromise with the European Parliament, the most reluctant member states were no longer able to block the adoption of more ambitious common standards. As a result, the directive, among other things, now extends the right to interpretation to meetings between the accused and a lawyer on which the member states had failed to agree before the Lisbon Treaty entered into force. The case of the “interpretation directive” thus confirms the expectation that measures of positive integration benefit from a change in decision-making rules in the Council.

However, even though the adoption of common standards has been eased by the new decision-making rules, the shared organizational self-interests of the home affairs ministers still stand in the way of high regulatory standards. Although the home affairs ministers realized that common minimum standards of individual rights protection would help to overcome deficits in implementing mutual recognition in criminal law cooperation, their prime concern remains the provision of security and the effectiveness of cross-border law enforcement. Even with qualified majority voting, therefore, the common standards preferred by the Council is likely to be below the one in many member states.

Moreover, the net effect that European criminal law co-operation has had on the balance between law-enforcement and individual rights protection is likely to change only incrementally as the *acquis* built up over the last decade serves as a default position for blocking minorities of member states reluctant to accept more demanding standards of individual rights protection. The costs of non-agreement will therefore remain higher to those

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<sup>31</sup> A detailed account of the negotiations is given by Cras/De Matteis 2010.

<sup>32</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280 of 26.10.2010).

advocating high standards of rights protection than to those interested in the abolition of obstacles in cross-border law enforcement.

Taken together, distinction between negative and positive integration helps to explain the imbalance between law enforcement and individual rights protection that has emerged in EU criminal law cooperation between the Tampere European Council 1999 and the entry into force of the Lisbon Treaty. The reforms in decision-making that the reform Treaty brought about can be expected to mitigate but not to offset this imbalance. Although the adoption of common standards has been facilitated by the Lisbon reforms, the requirement of positive integration, namely the building of (qualified) majorities in the Council and the European Parliament for measures that require changes in domestic criminal law, remain more demanding than the application of mutual recognition.

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## Appendix

**Table 1: Measures of mutual recognition in EU criminal law co-operation**

Short title	Initiator	Date of proposal	Date of adoption by Council	Publication OJ
freezing order	France, Sweden, Belgium	30 November 2000	22 July 2003	L 196 (2 August 2003)
financial penalties	UK, France, Sweden	11 July 2001	24 February 2005	L 76 (22 March 2005)
arrest warrant	COM	19 September 2001	13 June 2002	L 190 (18.7.2002)
confiscation order	Denmark	13 June 2002	5 October 2006	L 328 (24.11.2006)
ne bis in idem	Greece	13 February 2003	Abandoned	
evidence warrant	COM	14 November 2003	18 December 2008	L 350 (30.12.2008)
prohibitions for sexual perpetrators	Belgium	05 November 2004	Abandoned	
enforcement order	Austria, Finland, Sweden	24 January 2005	27 November 2008	L 327 (5.12.2008)
assimilation of convictions	COM	17-mrt-05	24 July 2008	L 220 (15.8.2008)
supervision order	COM	29 August 2006	23 October 2009	L 294 (11.11.2009)
probation order	France, Germany	20 April 2007	27 November 2008	L 337 (16.2.2008)