



THE JEAN MONNET PROGRAM

Professor J.H.H. Weiler
European Union Jean Monnet Chair

Jean Monnet Working Paper 05/08

Scott Siegel

**Courts and Compliance in the European Union:
The European Arrest Warrant in National Constitutional Courts**

NYU School of Law • New York, NY 10012
The Jean Monnet Working Paper Series can be found at:
www.JeanMonnetProgram.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 1087-2221
© Scott Siegel 2008
New York University School of Law
New York, NY 10012
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**Courts and Compliance in the European Union:
The European Arrest Warrant in National Constitutional Courts**

By Scott Siegel*

Abstract:

The member states of the European Union have expanded the tools they use to cooperate in combating transnational crime and terrorism. Chief among these is the Framework Decision on the European Arrest Warrant, which requires judicial and police authorities to bypass all national extradition procedures involving suspects residing in an EU member state. Only Germany, Poland, Italy, and the Republic of Cyprus experienced severe delays in implementing the required national legislation. Contrary to the expectations of veto players theory, national constitutional courts do not veto EU law, but instruct legislatures on how best to redraft legislation, securing compliance.

* Scott Siegel, Assistant Professor, Department of National Security Affairs, Naval Postgraduate School, Monterey, CA 93943, Email: snsiegel@nps.edu.

1. Introduction

The rise of global terrorism has catalyzed new forms of cooperation in the European Union. The attacks in New York on September 11, 2001 and subsequent ones in Madrid and London led EU member state governments to intensify and deepen their cooperation in the area of criminal and justice affairs. The perceived immediate and dire threat of terrorism propelled European governments to make substantial changes to their national legal systems. As a result, internal security and police affairs, policies traditionally under the sole control of national governments, are now denationalized, whereby courts and legal authorities of one member state exercise their powers through the legal systems of its co-member states.

However, the process of changing national laws and institutions in order to establish this type of cooperation did not proceed as smoothly as both EU and national governments intended. Despite the perceived danger associated with a subsequent terrorist attack, some member states, including Germany, delayed their implementation of an important element of this form of cooperation, the European Arrest Warrant. This paper tests the argument as to whether and how constitutional courts act as veto players in the process of complying with EU law. My findings show that rather than courts acting as veto players and sustaining the status quo, their decisions actually led to significant changes to the constitutions of several member states. The process of European integration and the supremacy of EU law suspended the power of national constitutional courts as veto players. Instead, these courts acted as agents of the European Union by enforcing EU law.

This study of the comparative implementation of the European Arrest Warrant (EAW) shows how national constitutional courts help enforce and generate better compliance with EU law. The first section provides a brief outline of what EU counterterrorism policy looked like

before and after 9/11, highlighting the development of the EAW. Tracing the implementation of this Framework Decision, we observe that most governments implemented the law on time and correctly, but constitutional challenges to the national implementing acts delayed compliance in three very different countries—Germany, Poland, and Cyprus. The next section introduces two alternative arguments for why there are delays in transposition of the EAW. Contrary to the expectations of veto players theory, constitutional courts are engines of constitutional change in order to comply with EU law, rather than preventing it. A comparative study of constitutional review of the EAW conducted in three countries—Germany, Poland, and the Republic of Cyprus—concludes that the veto players theory does not apply when considering the impact of EU law on fundamental constitutional norms. The rapid pace of constitutional change after these courts' rulings as well as legal changes elsewhere should serve as foundation to investigate whether convergence or Europeanization is affecting national legal systems in regards to the rights and liberties European citizens enjoy.

2.1 EU Counterterrorism Policy: Before and After 9/11

Before the attack on the World Trade Center and other US targets, terrorism in Europe was perceived mainly as a domestic rather than an international threat. The EU member states have very long and diverse histories with domestic forms of terrorism. With the exception of the GIA in France and hostage-taking by Palestinian extremists during the Munich Olympics and onwards, the threat of a terrorist attack stemmed mainly from domestic extremist groups. National governments believed they possessed the necessary tools and capacity to prevent and prosecute those who committed terrorist acts. Coupled with a desire to limit any possible encroachments on core elements of national sovereignty, cooperation in internal police affairs specifically related to counterterrorism was quite narrow and shallow before 9/11.

These perceptions changed in the 1970s in response to the Munich massacre and other acts of terrorism by transnational terrorist groups indigenous to Western Europe and the Middle East. EU member states started to take some initial steps towards increasing cooperation in the area of internal security. Legally, EU member states concluded the Dublin Agreement in 1979, which sought to implement the Council of Europe's 1977 European Convention on the Suppression of Terrorism and create a common definition of terrorism across the EU, although it was not ratified by many of its signatories. At the operational level, the TREVI (Terrorism, Radicalism, Extremism and Political Violence) Group was established in 1976. The TREVI group set up institutional linkages between national interior and justice ministers to share information concerning possible threats, the tracking of specific terrorist groups, and facilitated the arrest and prosecution of terrorists, but it did not have any formal legal standing under the EC Treaties (Cardona 1992).

By 1992, the TREVI Group was placed inside the so-called Third Pillar of the Maastricht Treaty, Justice and Home Affairs, which made specific reference to terrorism for the first time in an EU treaty. Article 31(e) of the Maastricht Treaty called for establishing minimum rules related to what constituted an act of terrorism. While a common definition would aid in identifying and punishing terrorist groups, states also agreed to a series of conventions to facilitate the movement of suspects from one national jurisdiction to another. The March 1995 Convention on Simplifying Extradition Procedures and the Convention Relating to Extradition of September 1996 were agreed to in order to ease the process of transferring suspects between national authorities. Finally, at the European Council in Tampere, further calls were made to develop shared extradition procedures based on the principle of mutual recognition, rather than

through harmonized EU law. This process led eventually to the drafting of the European Arrest Warrant.

However, the perceived waning threat of terrorism in the 1990s on European soil due to the end of the Cold War as well as member state reticence to share sovereignty in the area of internal security delayed the development of rigorous counterterrorism policies under the Third Pillar. The diverse histories and types of terrorist groups that national authorities confronted also affected the limited amount of cooperation in the area of internal security within the EU.

Therefore, before the attacks of September 11, little momentum developed to cooperate across the European Union in the area of counterterrorism. What modes of cooperation did exist centered on sharing information between national criminal agencies with some small steps towards mutually recognizing each member state's criminal justice systems (Bures 2006; den Boer 2006; Monar 2007).

2.2 Post-9/11 EU Legislation

The terrorist attacks on the World Trade Center jolted European governments into accelerating the process of developing their own solutions to the problem of international terrorism. After unanimously agreeing to stand “in complete solidarity with the government of the United States and the American people,” the EU Council agreed to some of the core elements of the EU's present-day counterterrorism strategy.¹ In contrast to the United States' response to the threat of international terrorism, the national governments of the EU chose to intensify their efforts to combat terrorism through the use of intelligence and law enforcement methods rather than privileging the use of military force. Consequently, this strategy would require some basic, but limited degrees of legal harmonization.

¹ Special Council Meeting, General Affairs, September 12, 2001, 11795/01.

One of the key pieces of legislation was the Framework Decision on the European Arrest Warrant (EAW), which set the foundation for Europeanizing criminal law in three important ways. First, it required national measures to be implemented that required judicial officials to recognize the legal and judicial institutions of other member states and their decisions as equally legitimate and competent. Second, member states were also required to implement procedures by which citizens or non-citizens residing in one EU member state could be transferred to another member state without undergoing a formal extradition procedure, redefined as surrender. Third, and most importantly, the principle of double criminality was lifted. Surrender to another country was no longer limited by whether the suspect violated a law in the extraditing state. A member state could issue such a warrant under two conditions. First, a member state can request the arrest and transfer of an individual if the suspected crime was punishable by at least 12 months of detainment or where a sentence of at least four months was already handed down. Second, surrender of a suspect could also occur if a series of offenses listed in the Decision was punishable by the issuing member state of at least 3 years of detention. As long as the warrant by the issuing state met these criteria, all extradition procedures for nationals or non-nationals would be waived.

All EU member states implemented the law by November 1, 2004, eleven months after the official deadline of December 31, 2003 listed in the Framework Decision. Italy was the only exception, which passed the necessary legislation more than one year later. Half of all EU member states implemented the EAW on time (BE, DK, ES, IE, CY, LT HU, PL, PT, SI, FI, SE, and the UK), with the Czech Republic and Germany following eight months later. Generally, they implemented the EAW correctly as well, although some states inserted some legislative elements that ran counter to the full meaning of the Framework Decision. For example, the

Dutch parliament's national act stipulated a Dutch national will only be surrendered if a guarantee is provided that ensures that a convicted criminal will be able to serve his or her sentence in Holland. In Ireland, the final recourse for appealing a European Arrest Warrant was a ministry of justice official, a political appointee, and not an independent judge, as stipulated in the Framework Decision.²

On the whole, therefore, the level of compliance with the Framework Decision in terms of implementing the law promptly is quite good for several reasons. First, many of the countries listed above did not have formal bans on extradition, such as the common law countries and France. More importantly, in the aftermath of the 9/11 attacks and subsequent terrorist attacks in Madrid and London, there was an overwhelming interest across the member states to implement legislation that could be used to break up transnational terrorist networks and other crimes. For example, those countries that did have such constitutional bans on extradition—Portugal, Slovakia and Slovenia—amended their constitutions on time before implementing national legislation that gave effect to the Framework Decision.³

Despite the correct implementation of the act by most governments, constitutional courts exercised their power of judicial review in three countries—Cyprus, Germany, and Poland. Nationals in these countries challenged the constitutionality of the EAW when appealing their surrender to other jurisdictions. The national acts implementing the Framework Decision were nullified in Germany and Cyprus. In Poland, although the Polish Constitutional Tribunal's ruled the law unconstitutional, it did not veto the legislation, maintaining the country's compliance with EU law. In the Czech Republic, the Civic Democrats, a minority faction in parliament,

² Report from the Commission, COM(2005)63, February 23, 2005.

³ Deen-Racsmay, Zsuzsanna, "The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges." *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 14/3, 271-306.

requested the constitutional court review the law for its constitutionality before going into effect, but the Czech Constitutional Court ultimately approved of the law and rejected the plaintiffs' claims. Although basic constitutional norms existed that prohibited the exercise of the EAW, constitutional courts either refused to veto the legislation or exercised judicial review such that the legislation would improve in quality and the degree to which it complied with the EAW's objectives.

Out of 25 and then 27 member states, only 3 countries experienced severe delay having effective national legislation in place that implemented the EAW Framework Decision—Cyprus, Germany, and Italy. In two countries, constitutional courts exercised their power of judicial review, which did cause Germany and Cyprus to miss the deadline prescribed in the Framework Decision. Although there was constitutional review in Poland, non-compliance was avoided. If constitutional courts vetoed the national implementing legislation, when and how did these countries comply, if at all, with EU law by implementing the EAW? According to the classic veto players theory account, we would expect constitutional courts to sustain the status quo. Yet, in each of the four countries in which judicial review occurred, national parliaments devised ways of meeting their EU legal obligations, informed by the rulings of these constitutional courts, and quickly removed either statutory or constitutional impediments to the operation of the EAW. As a result, instead of constitutional courts acting as veto players and hindering compliance with EU law, they helped improve their country's compliance with EU law while also making significant changes to the status quo.

3. Non-Compliance and Courts as Veto Players

Existing approaches to non-compliance with EU law consider either the relative interests national governments have in complying or institutional factors not under the direct control of

national governments. First, according to the management school in compliance research, non-compliance results from the inability or incapacity of states to mobilize the necessary resources to comply with international rules (Chayes and Chayes 1995; Chayes, Chayes, and Mitchell 1998; Jacobson and Weiss 1995; Mitchell 1994). In some cases, this incapacity results from insufficient financial, technical and human resources. While there may be ambiguity in the rules or inflexible timetables, it is the state's inability, not unwillingness, which generates delays or incorrect modes of compliance. Since the EAW requires mainly the re-writing of the criminal code and must not devote an extraordinary amount of new resources to implement the EAW, it is not likely that this version of the management school of compliance will explain the delay observed the four countries here.

A second version of the management school of compliance takes into account the ability governments to make decisions promptly. If changes to the national status quo require the consent of multiple actors, the national laws implementing EU law are either delayed or incorrect. For example, studies of the comparative implementation of several EU directives show that as the number of veto points or players increases, the time necessary to pass required measures increases while quality of transposition decreases (Dimitrova and Steunenberg 2000; Haverland 2000; Steunenberg 2006).

There are several versions of the veto players argument, the most prominent of which is that of George Tsebelis's. According to Tsebelis (2002), there are two types of veto players, partisan and institutional ones. Partisan veto players are those elected members of the government who are required to give their consent to policy changes. A faithful adaptation of Tsebelis's veto players theory argues that the number of veto players does not matter as much as ideological "distance" that separates them when comparing the proposed policy to the status

quo.⁴ When the distance separating them is great, then changes in the legislative status are less likely to occur. As a result, governments that perennially require consent for policy change among actors that differ significantly from each other over changes to the status quo are least likely to comply with EU law on time and correctly.

Institutional veto players are collective actors that can veto changes to the status quo as they exercise their role as specified in the constitution or other institutional rules.⁵ They include presidents, different legislative chambers, or, the focus of this study, constitutional courts. These actors exercise their veto as a result of institutional interests being threatened by changes made in the status quo. Institutional veto players are the most common type of veto players cited in the EU compliance literature as hindering compliance. Yet, these studies focus mainly on veto players inside parliamentary governments and bureaucracies (see above), while ignoring other types of veto players, such as courts. For example, few studies of compliance in the EU have examined the role of constitutional courts, veto players *par exemplar*, and whether they hinder or sustain compliance with law beyond the nation-state.

2.1 Courts as Veto Players

All democratic regimes possess more or less independent judicial systems that attempt to settle legal disputes between citizens, between citizens and their governing institutions, and, at times, between institutions of governance. In some regimes, courts can also review national legislation in terms of its constitutionality. As such, courts can behave as veto players when they either have been granted or assumed the power of judicial review, which can be either abstract or concrete. In abstract judicial review, members of parliament can request the constitutional court to render an opinion as to the constitutionality of a proposed law before it goes into effect. In

⁴ See Tsebelis's discussion of the absorption rule (Tsebelis 2002: 26-9).

⁵ Birchfield and Crepaz (1998) distinguish between these two types of veto players as collective versus competitive veto players.

concrete review, courts rely on an appeal by a citizen or group that challenges the constitutionality of an existing law.

There is debate among scholars as to whether courts operate as institutional or partisan veto players (Hallerberg and Basinger 1998; Tsebelis 2002). According to Tsebelis' veto players theory, courts only prevent significant changes to the legislative quo when, as judges, their preferences lie outside the policy "core," beyond the points of acceptance for all other players, which he argues is relatively rare. Since judges on national constitutional courts are often appointed by governments, their political preferences reflect those that appointed them. National courts only act as veto players when either issues unforeseen during the appointment process emerge, and the judges' views on these issues were unknown, or when their positions on issues are secondary to a set of litmus tests (Tsebelis 2002: 227). In most cases, however, courts are "absorbed" under Tsebelis's framework, meaning the justices reflect the policy preferences of governments in power. This approach, however, faces several empirical and theoretical difficulties.

First, Tsebelis presents little evidence that the nominating process produces politicized judiciaries in Europe or that judges automatically align their decisions with incumbent governments. Few would doubt that the process of nominating US Supreme Court justices is highly politicized. But there is little evidence from the European context that those politics carry over into the decisions courts make. In addition, because most, but not all, constitutional courts do not issue dissenting opinions, it is difficult to evaluate the extent to which politics plays any role in their collective decisions. Given that judges are also selected for their competence and professionalism, the political preferences of particular judges, at least in the European context, are not easily revealed. In fact, there is a bias against doing so. Even if their selection is based

on the degree to which their legal philosophy is congruent to the political ideology of governments in power, it is not known when or how a judge's or a court's political preferences will determine how they reach a legally valid decision.

Second, even if national constitutional justices often take political positions, it is not certain that those positions lie on the same policy dimension as that of elected politicians. When testing for political stability, the veto players approaches assumes that all the relevant actors' preferences can be arrayed along one, Left-Right spectrum. Assuming that veto players, whether individual or collective, array their preferences along one dimension, a parsimonious theory of political decision-making is produced. In reality, though, collective or individual actors formulate their preferences over policy outcomes based on political positions that can be placed on at least more than one ideological dimension. In the European Union, multi-dimensionality is becoming more of a reality in political debates. There is increasing debate in the field of EU scholarship, for example, as to whether a second policy dimension, pro- and anti-European integration, has emerged and whether it is salient in European politics, whether within parties or at the voting booth (Hooghe and Marks 2005). So far, the evidence is mixed at best.

It is unlikely that constitutional courts behave as partisan veto players. Instead, they are more likely to behave as *institutional* veto players, vetoing changes to the status quo for reasons that cannot be placed on a Left-Right political dimension.⁶ The first key reason is that a constitutional court exists to check the power of the legislature. The existence of independent judiciaries is often justified to prevent a tyranny of the majority over the minority. Courts also exist to ensure that the policy decisions politicians make fall within an acceptable normative range framed by the constitution. They not only ensure that the minority is protected, but that the actions of the government fall within an acceptable legal range. After acquiring the power of

⁶ In this case, courts are acting more as veto *points*, rather than players. See, for example, (Immergut 1992).

acting as the sole interpreters of their national constitutions, these courts are also not likely to easily surrender this power when EU law is seen as challenging basic constitutional norms that they are responsible for protecting (Stone Sweet 2000).

While requiring some legal sleuthing, it is not impossible to determine where those constitutional limits lie. In the case of the European Arrest Warrant, the constitutional limits are easy to discover. Most continental European countries with a civil law tradition possess explicit bans on the extradition of their nationals. In several countries, such as Portugal and Slovenia, the constitution was amended before courts could decide whether implementing legislation was constitutional or not. Not all civil law countries have an outright ban on extradition. For example, France, the origin of the civil law tradition, as well as Belgium, Greece, Luxembourg, and Spain do not have such provisions in their constitutions. With the exception of Cyprus, all common law countries in the EU (Ireland, Malta, and the United Kingdom) also do not have such provisions. Still, we should expect that those countries with explicit bans on the extradition of its nationals will lead constitutional courts to invalidate national legislation implementing the Framework Decision.

For centuries, most European countries disallowed the practice of extraditing their own nationals for prosecution elsewhere (Plachta 1999). While the norm of non-extradition dates to ancient Greek and Roman times, the ban on extradition was codified into most European countries' legal systems after the French Revolution.⁷ European nations justified the practice of non-extradition on the grounds that there was no guarantee that other countries' legal and judicial systems were fair and just. The standard by which mutual recognition of legal systems could operate had not been reached. Following the end of World War II, many countries retained their ban on extradition for similar reasons, but now out of concern that their own governments

⁷ For a review of the history of non-extradition, see Plachta (1999).

violated fundamental human rights and expelled citizens for political reasons, particularly Germany during the Nazi period as well as Poland during the Communist era. With the exception of the Netherlands and the Nordic countries under specific circumstances or under a country's specific bilateral treaty obligations, many civil law countries disallowed extradition of their own nationals. This leads us to our first hypothesis:

H₁: When countries possess constitutional bans on the extradition of their own nationals, independent constitutional courts will veto the national legislation and cause states to be non-compliant with EU law.

This model of a court's use of veto power assumes that constitutional courts are solely charged with upholding the norms espoused in their respective constitutions. This claim holds for much of the postwar era as newly created constitutional courts in Germany, Italy and Spain assert their authority over national parliaments by serving as the protectors of their respective national constitutional orders (Stone Sweet 2000).

At the same time, however, national courts operating below constitutional courts in the judicial hierarchy increasingly referred questions of EU law to the European Court of Justice, eventually leading to the establishment of a new, supranational legal order (Burley and Mattli 1993; Stone Sweet and Brunel 1998; Stone Sweet and Sandholtz 1998; Weiler 1994). In addition, a series of decisions by the ECJ established the supremacy of EU law to national law (*Costa v. Enel*), the automatic effect of EU law (*Simmenthal II*), and the direct effect of EU law (*Van Gend en Loos*).⁸ Furthermore, and most importantly, the ECJ's decision in *Van Colson and Pupino* required national courts to render decisions in cases of conflict between EU and national law such that the uniform legal order of the EU was maintained as much as possible when

⁸ *Van Gend en Loos*, Case 26/62, ECR (1963) 1; *Costa v. Enel* Case 6/64 ECR (1964) 585; *Simmenthal II*, Case 92-78, ECR (1978) 629.

considering EU law that only has indirect effect.⁹ Under the doctrine of *indirect effect*, national judges are required to interpret national rules such that they are in conformity with EU law. For example, even though the European Arrest Warrant takes the form of a Framework Decision and, therefore, does not possess the quality of direct effect in national legal systems, national governments and courts are required to implement the law on time and correctly, even if it conflicts with national constitutional principles.

It is not inevitable, however, that national constitutional courts would unconditionally accept this new constitutional order, especially when fundamental rights are challenged by new EU legislation. For example, the doctrine of supremacy was not fully accepted by French courts until a ruling by the Council of State in 1989. The Italian Constitutional Court required all national courts to refer cases of conflict between national and EU law to it first, subjecting such cases to notorious delay. Finally, the German Constitutional Court in *Solange I* stipulated that the supremacy of EU law was conditional on the development of fundamental rights that were equal to those listed in Germany's Basic Law (Stone Sweet 2000: 169). The acceptance of the supremacy of EU law over national or constitutional law was not a smooth process, and legal room still exists for courts to invalidate national legislation irrespective of its consequences for compliance with EU law.

Although national constitutional courts have not always or completely accepted the doctrine of supremacy and do not stand beneath the European Court of Justice in a completely rationalized hierarchical legal order, the legal integration of the EU has made national constitutional courts additional agents of the European Union responsible for enforcing EU law. If true, then when national laws giving effect to EU law conflict with basic constitutional norms, national constitutional courts will not jeopardize non-compliance with EU law by vetoing

⁹ *Von Colson*, Case 14/83, ECR (1983) 1891; *Pupino*, Case 105/03, ECR (2005) 5285.

the national legislation giving effect to EU law. If constitutional courts do overrule national courts, they will require national parliaments to draft and pass legislation that is compliant with EU law. The consequences of constitutional courts as enforcers of EU law, thus, are two-fold. First, the veto power of courts is suspended and constitutional change is more likely to occur when they exercise their power of judicial review. Rather than courts preventing constitutional change, judicial review will actually lead to fundamental changes in the status quo in the form of amendments to national constitutions. Second, when there are conflicts between EU law and national constitutions, these courts will devise ways by which national legislation can be improved such that it complies as best as possible with the provision of EU legislation.

H_{2a}: When countries possess constitutional bans on the extradition of their own nationals, independent constitutional courts will not exercise their power of judicial review in favor of maintaining compliance with EU law.

H_{2b}: When constitutional bans on the extradition of nationals exist and constitutional courts exercise their power of judicial review, their decisions will force parliaments to approve of legislation that is more compliant with EU law.

Just as there are good political reasons why courts will invalidate national laws that threaten basic constitutional norms, there are also good legal reasons why they will invalidate EU law, despite the assumed primacy of EU law. The above-mentioned examples show how reluctant national courts have been to accept the supremacy of EU law. As D.R. Phelan argues, national courts have only accepted the supremacy of EU based on the implementation of *national* legislation that grants EU law such status under specific conditions and limitations (Phelan 1993). Furthermore, as W. Phelan argues, national constitutional orders and legal systems can limit the supremacy and control of EU law (Phelan 2006). For example and most famously, the German Constitutional Court has repeatedly ruled that the supremacy of EU law is conditioned upon the respect of human rights contained in the Basic Law. Therefore, there are good *legal*

reasons also to suspect that national constitutional courts will reject EU law with basic constitutional principles are threatened.

2.2 The Enforcement School and the Utility of Complying

In contrast to the management approach, the enforcement approach argues that non-compliance occurs when the benefits of doing so outweigh the costs. Assuming that states concluded an agreement that requires significant changes to the status quo, governments will refuse to comply if doing so would be costly, either politically or economically. The calculation of utility can occur at two levels of analysis. At the international level, states rationally calculate whether compliance is economically or politically beneficial (Abbott et al. 2001; Downs, Rocke, and Barsoom 1996; Martin 1992). At the domestic level, research examining compliance in the EU shows that when directives fail to coincide with the interests of incumbent governments, transposition is delayed (Falkner et al. 2005; Mastenbroek and Kaeding 2006). Conversely, some governments will comply when it strengthens their ability to advance their own domestic interests (Smith 1997).

In order to increase the costs of non-compliance, Jonas Tallberg (2002) finds economic sanctions are necessary, but are often not a sufficient condition for compliance (Tallberg 2002). Under EU law, EU directives enjoy the power of direct effect, but under Article 34.2(b) of the EU Treaty, Framework Decisions seek only to approximate national laws by providing the minimum legal foundation, but does not replace them with supranational law and do not enjoy the power of direct effect, although the European Court of Justice does have jurisdiction over the legal interpretation of these decisions and when they conflict with other types of law. Therefore, states are not likely to face any direct costs as a result of not implementing a framework decision, other than threats that their reputation will be damaged by not complying.

If states do not face the possibility of sanctions from the EU, why would they be unwilling to pass the necessary acts implementing the EAW? What costs are they likely to incur? First, the degree to which the government perceives international terrorism as a potential threat could affect relative compliance. There is no reason to implement new legislation that affects the rights and privileges of a country's citizens and risk upsetting the balance that exists in terms of security and an individual's rights under the constitution or redraft the constitution if neither the threat exists nor the proposed legislation is perceived as necessary. If the perceived threat is low, then it is not likely that governments will not give priority to the national measures necessary to give effect to the Framework Decision on time.

H₃: When a country perceives the threat of terror as low or the effectiveness of the EAW to combat terror, then governments are less likely to implement the EAW on time or at all.

Finally, neither the management nor the enforcement schools would apply if the member states do not have to make to significant changes to the status quo. If Downs et al. (1996) are right and states often craft shallow agreements, then compliance is not likely to be a problem in the first place. If extradition procedures already exist that recognize the standards and decisions of other member states or if there are no bans on the extradition of nationals, then there is no reason to expect non-compliance to occur at all.

In some countries, the EAW was a significant departure from the status quo. Several extradition treaties between EU member states already existed on the books, but they were not ratified by all the member states, and, therefore, never came into force.¹⁰ The EAW Framework Decision was also a decisive break from extradition practices of the past in three crucial ways. First, the EAW would shorten extradition procedures to a period of no more than 60 days.

¹⁰ Wouters and Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals," *Common Market Law Review* 41, 2004, p. 915.

Second, the warrant specifically removes any political actors from participating in the extradition process, precluding political or foreign policy concerns from affecting the decision to extradite a suspect. Third, it removes the principle of double criminal liability for thirty-two types of criminal acts. Under double criminal liability, states would only extradite their own nationals to another country if the crime they are accused of is also a crime in the surrendering state. The EAW Framework Decision effectively stipulated that every member state has an effective and fair criminal justice system such that citizens of any EU member state would be guaranteed a fair trial and be treated humanely in another EU member state.

As such, the EAW establishes the doctrine of mutual recognition in the area of criminal and justice affairs. Rather than harmonizing criminal law at the EU level, mutual recognition attempts to enhance European cooperation by stipulating that the legal and policy decisions made in one EU member state should be recognized as legitimate and enforceable in another. Mutual recognition in the area of criminal and justice affairs has led to a “horizontal transfer of sovereignty,” in that the judicial decisions are enforceable in another country’s territory (Lavenex 2007). This implies that the methods, procedures, and decisions of other member states’ police forces, prosecutors, and courts are not only immediately enforceable in another member state, but it also requires one EU member state to assume that all other member states protect and respect a citizen’s rights and legal privileges to the same degree as the surrendering state, albeit with different methods.

An initial study of the *functioning* of the European Arrest Warrant shows that national governments are skeptical as to whether the conditions for mutual recognition exist. States have refused to execute a European arrest warrant if it believes the civil rights protections afforded in another EU member state are not sufficient according to the perception of judicial authorities in

the surrendering state (Sievers 2007). For example, Julia Sievers finds that in the daily practice of the EAW, British and German courts have rejected many arrest warrants issued by other countries, such as Poland and Italy, because the criminal justice systems of these countries do not reach their respective standards (ibid., 22).

Indeed, a cursory examination of the variation in the protection of civil rights and the quality of the rule of law in the EU points to a high level of variation among EU member states.¹¹

Table 1. Quality of Rule of Law among Old EU-15

Country	Year	Percentile Rank (0-100)	Governance Score (-2.5 to +2.5)	Freedom House Score Rule of Law
AUSTRIA	2006	97.1	1.87	15
BELGIUM	2006	91	1.45	15
DENMARK	2006	99.5	2.03	15
FINLAND	2006	98.1	1.95	16
FRANCE	2006	89.5	1.31	14
GERMANY	2006	94.3	1.77	15
GREECE	2006	67.6	0.64	14
IRELAND	2006	92.4	1.62	15
ITALY	2006	60	0.37	12
LUXEMBOURG	2006	95.7	1.83	16
NETHERLANDS	2006	93.8	1.75	15
PORTUGAL	2006	82.9	0.97	15
SPAIN	2006	84.8	1.1	14
SWEDEN	2006	96.7	1.86	16
UNITED KINGDOM	2006	93.3	1.73	15
OECD	2006	90	1.54	

¹¹ The relative ranking of civil liberties among the original 15 and 12 new member countries, respectively, according to the quality of the rule of law. The scores originate from two sources: Freedom House and the World Bank's Governance Indicators. The Freedom House measure varies from 0 to 16 based on the answers to four questions. For each question evaluating the condition of the rule of law in a country, a score of 0 to 4 is possible. The questions include: is there an independent judiciary, does the rule of law prevail in civil and criminal matters and are the police under civilian control, is there protection from political terror, and, finally, is there equal treatment under the law?¹¹ The World Bank Indicator on the Rule of Law is an aggregate measure of "the extent to which agents have confidence in and abide by rules of society, and in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime and violence," a value that varies from a value of -2.5 to +2.5.

Table 2. Rule of Law Among New EU-12

Country	Year	Percentile Rank (0-100)	Governance Score (-2.5 to +2.5)	Freedom House Score Rule of Law (0-17)
BULGARIA	2006	50	-0.17	12
CYPRUS	2006	81.9	0.93	15
CZECH REPUBLIC	2006	73.3	0.73	14
ESTONIA	2006	80.5	0.91	14
HUNGARY	2006	73.8	0.73	13
LATVIA	2006	63.8	0.52	12
LITHUANIA	2006	61.9	0.45	14
MALTA	2006	91.4	1.47	16
POLAND	2006	59	0.25	13
ROMANIA	2006	50.5	-0.16	12
SLOVAKIA	2006	61.4	0.43	12
SLOVENIA	2006	75.2	0.79	14
OECD	2006	90	1.54	

According to the data, there is a clear cleavage between the new and old member states in terms of the quality of the rule of law. Only Greece and Italy's percentile rank and governance score approaches those of the new EU-12 average. The Freedom House scores demonstrate that all states meet a relatively high minimum in the rule of law. But the World Bank Governance Indicators reveals the subtle variation in the quality of judicial systems in at least the perception of particular actors among the original EU-15. As a result, these countries' rankings may echo the concerns national parliamentarians and judges in some EU-15 countries have when surrendering their nationals to be tried in members of the new EU-12. Therefore, if the enforcement school is correct, we should expect that those countries with relatively high values in terms of the quality of the rule of law and respect of civil liberties have little interest in transferring their nationals to a jurisdiction where those factors are significantly lower in quality.

H₄: When a country's quality of the rule of law is on average higher than the mean among all EU member states, that country is less likely to implement the EAW on time or correctly.

3. Constitutional Review in Germany, Poland, and Cyprus

3.1. The German Federal Constitutional Court and EAW

Judicial review of the EAW implementing legislation took place in four countries, causing delays in compliance in two of them. First, on July 18, 2005 the German Federal Constitutional Court (FCC) declared the national legislation implementing the European Arrest Warrant as invalid. Spanish authorities were seeking the surrender of Mamoun Darkanzali, a German and Syrian national residing in Hamburg, for having ties and helping finance members of Al Qaeda in Spain in connection with the terrorist attacks of 9/11. His actions were suspected of violating Article 515.2 and Article 516.2 of the Spanish penal code. The *Oberlandesgericht* Hamburg issued a warrant for his arrest and planned to surrender him to Spanish authorities under the terms of the European Arrest Warrant. Darkanzali appealed to the FCC by asserting that his rights were violated under Articles 2.1, 3.1, 16.2, 19.4 and 103.2 of the Basic Law (*Grundgesetz*—GG).

The FCC ruled that the law as implemented was unconstitutional and void, releasing Darkanzali from custody.¹² The Second Senate declared the law unconstitutional on essentially two grounds: Article 16.2 and Article 19.4 GG. As it stood in 2005, Article 16.2 explicitly prohibited the extradition of German citizens to another country, while Article 19.4 stated no German could be deprived of the right of judicial review of an administrative action or recourse to the judicial system. Like many other civil law countries, the German constitution explicitly banned the extradition of its own nationals. But the Court's refusal to grant Darkanzali's

¹² Bundesverfassungsgericht (BVerfG, *Neue Juristische Wochenschrift* (NJW), 58 (2005), 2289 (hereinafter *Darkanzali*).

surrender was not based on an absolute reading of the GG. Instead, the Court argued only that the law, as it was written, did not fully protect the fundamental rights of all Germans as much as possible.

The parliamentary legislation that enacted the EAW, the Court argued, disproportionately limited the rights of a German not to be extradited to another country. The legislature had failed to implement an optional component of the EAW, Article 4.7 which stipulated the grounds by which member states could refuse surrender. This included situations in which the criminal activity under investigation took place primarily in the suspect's country of residence or if the crimes could be effectively prosecuted and punished in the surrendering member state. Under Article 16.2 of the Basic Law, a German national is entitled to the full protections of a legal system that they are familiar with and should not be subject to a legal order that is incomprehensible or foreign to them. As a result, if the suspected crime held a significant domestic component, then the implementing law should have provided more legal certainty that a German national would be guaranteed prosecution in German courts.

The FCC also invalidated the law on the grounds that the law as implemented did not allow judicial review of the EAW decision to surrender a German national to another court, as permitted under Article 19.4 GG. Prior to the EAW, the decision to extradite a suspect in Germany was decided by a government official that was solely based on foreign policy grounds, unless covered by a bilateral agreement. The European Arrest Warrant actually incorporated additional rights to ensure that the extradition process was not to be politicized,¹³ but, the Court argued, the legislature failed to ensure that the extradition process contained a right for judicial review. For these reasons, the FCC invalidated the law and released Darkanzali.

¹³ Article 19 of EAW.

The FCC decision received dissenting opinions from three out of the eight justices, but for a diverse set of reasons. Judge Lübke-Wolf argued that it was sufficient to determine the Act implementing the EAW as unconstitutional in specific circumstances and that there was no reason to void the entire law.¹⁴ Judge Gerhardt was the only judge to argue that the law was perfectly valid, since it enabled authorities executing the warrant to refuse surrender if prosecuting in the requesting state placed a disproportionate burden on the rights of the subject.¹⁵ In contrast, Judge Broß argued that the entire EAW was unlawful under Article 23 GG, or the subsidiarity principle. Judge Broß was the only judge to argue that the EAW only applied if the domestic state's claim for criminal prosecution failed for factual reasons.¹⁶

As a result of the Court's decision, the law was ruled null and void and the German government was forced to redraft the law, which they did finally in April of 2006, more than two years past the original deadline imposed by the EU Council.¹⁷ Germans will no longer be extradited if the crime they are suspected has a significant domestic component, while other EU nationals would not enjoy the same rights as those of German nationals when undergoing the surrender process related to the EAW. Until the law was redrafted, Germany was in non-compliance with EU law, but ending the analysis there would be only a partial account of the legal and political process that took place. A faithful application of Tsebelis's veto players theory would predict the legislative process ending there. Instead, the German Constitutional Court's decision actually spurred changes to the Basic Law and revised legislation.

¹⁴ Dissenting Opinion, 58 *Neue Juristische Wochenschrift* (2005) 2299-2301.

¹⁵ Dissenting Opinion, 58 *Neue Juristische Wochenschrift* (2005) 2301-2303.

¹⁶ Dissenting Opinion, 58 *Neue Juristische Wochenschrift* (2005) 2297-2299.

¹⁷ See *Entwurf eines Gesetzes zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz—EuHbG)*, April 31, 2006.

The FCC used its power of judicial review to stipulate how the law could be improved such that it better complied with both national and EU law. First, because the European Arrest Warrant substantively transformed the process by which extradition takes place in Germany by depoliticizing it, the FCC took advantage of both Article 7 EAW and Article 19.4 GG in stipulating that the legislation must allow judicial review of surrender decisions, which the current version did not. The FCC also stipulated that the German legislature did not ensure that German nationals would be free of prosecution for crimes that are defined retroactively. Finally, the FCC also raised doubts as to whether the conditions for mutual recognition of criminal legal systems existed by requiring, under Article 23.1 GG, judicial authorities in Germany to undertake a concrete review as to whether the requesting state substantively respected an EU citizen's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁸

As a result of the FCC's decision, the German parliament redrafted and passed a new version of the EAW. Article 16 GG was revised and approved by both chambers of parliament to allow extradition when agreements exist between Germany and other EU member states. According to a classic view of the veto players theory, we should have expected the German constitutional court to exercise its veto by retaining the ban on extradition to other countries and maintain the legislative status quo. Instead, the Court's guidance on how to improve the national legislation in order for it to become compliant with both EU and national law actually led to more changes to the condition of German extradition law. Thus, the German Constitutional Court acted as an agent of the EU law by ensuring that the national legislation implementing the European Arrest Warrant reflected the requirements of the EAW as much as possible, as well as

¹⁸ *Darkanzali*, para 119.

the German constitution. The FCC did not overturn the EAW, as they could have, but sought a way by which adherence to national constitutional norms and EU law could be maximized.

There is debate among legal scholars as to whether it was necessary for the FCC to invalidate the national implementing legislation in order to do so, causing delays in compliance, as reflected in the dissenting opinion of Judge Lübke-Wolff. In addition, there were costs to the delays in legislation in terms of Germany's reputation for cooperation with Spain and in terms of lesser security of the EU overall. The Spanish government reacted to the FCC's decision and the release of Darkanzali by suspending the operation of the EAW with German authorities (Komárek 2007: 32). While Germany did not technically meet the deadline for transposing the EAW into national law, the result was a piece of legislation that better complied with EU law and changed the legislative status quo.

There is little evidence to support the hypothesis that the German constitutional court was concerned about levels of protection of civil rights in other countries, including in Spain. Although Spain's quality of the rule of law is somewhat lower than that of Germany's, the primary concern of the GCC was to improve the protection of civil rights that the new European Arrest Warrant afforded Germans. While Sievers (2007) shows that many German judges distrusted the protection of a German's civil liberties in other national contexts, the GCC's purpose in invalidating the national legislation transposing the EAW was to increase the degree to which Germans could challenge their surrender to another court's jurisdiction as allowed by the Framework Decision.

3.2. Constitutional Conflict without Vetoing in Poland

In comparison to Germany, Poland's constitution has a similar ban against the extradition of Polish nationals. In January of 2005, the Regional Court of Gdansk submitted a question to

the Polish Constitutional Tribunal (PCT) as to whether the statutes implementing EAW in the Polish Code of Criminal Procedure were constitutional based on a request from the Dutch government for the surrender of a Polish citizen facing charges of fraud. The Polish constitution's ban against extradition is even clearer than Germany's. Rather than a principle meant to be optimized, the language explicitly forbids the transfer of Polish citizens to other national courts (Komarek 2007). The right not to be extradited, the Court argued, also implied that every citizen was entitled to a trial before a Polish court, and extradition would violate this right.¹⁹

Therefore, one would expect a clear veto of the legislation by the Polish Constitutional Tribunal (PCT). According to the PCT, nullifying the law was neither sufficient nor necessary to restore conformity with the Constitution. While the Criminal Code required revision by the legislature, complete annulment of the Polish legislation implementing the EAW would violate another principle of the Polish constitution, Article 9, which requires that “[Poland] shall respect international law binding upon it.” According to the PCT's interpretation of Article 9, annulment of the legislation would violate Poland's obligations under EU and international law.

In response to these two conflicting principles, the PCT ruled that the current provision in the Polish constitution implementing the EAW would stay in place for 18 months until the Polish parliament amended the constitution and passed legislation in conformity with the Constitution. The PCT reasoned that a careful balance between assuring law and order in Poland, guaranteeing the civil rights of Polish citizens, and meeting their obligations under international law had to be reached. In particular, the Court argued, “Argumentation in favor of [the prolongation of the provision] is provided additionally by due care to realize the value consisting of Poland's

¹⁹ Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05, available in English at www.trybunal.go.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf (hereafter EAW Judgement, PCT).

credibility in international relations, as a state respecting the fundamental principle of such relations, namely that of *pacta sunt servanda*.²⁰ In a rather long chain of legal reasoning, the Polish constitutional court argued that the rights Polish citizens enjoyed could only be secured if law and order was provided, which was the central purpose behind the European Arrest Warrant.

In this case, conflicting principles of law located in the constitution allowed the Polish Constitutional Tribunal to develop a legal solution that would maintain compliance with EU, but also respect the constitutional rights of Polish citizens. The Polish tribunal did not just take into account the constitutional revisions of other states as they changed their constitutions to allow the extradition of their nationals. It went further by stating that the purpose of the EAW and increased cooperation at the European level in the area of justice and home affairs, in general, would strengthen the security of the Polish people as well.

The Polish court's decision to uphold the EAW for eighteen months demonstrates how constitutional conflicts are not sufficient to cause a court to exercise its power of judicial review. Despite the clear constitutional prohibition on extraditing Polish citizens, the PCT acted as a legal agent of the EU by upholding the national law implementing the EAW by utilizing Article 190.3 of the Polish constitution to delay the effect of its decision, pending an amendment to the Polish constitution. This amendment was approved by the Sejm on November 6, 2006.²¹ Although the ban on extradition of Polish citizens is still in place, it is now conditioned on the existence of a specific legal agreement or treaty with another state or international organization.

There existed plenty of reasons to veto the legislation and place the country in non-compliance with EU law. First, the ban on extradition contained in the constitution was absolute. Second, because the Constitution, during drafting, did not make a distinction between

²⁰ EAW Judgment, PCT, point 5.2, first paragraph.

²¹ Law of September 8, 2006 on the Change of the Polish Constitution, Polish Law Gazette 2006 No 200 item 1471.

“surrender” and “extradition,” these terms are interchangeable and, therefore, any legislation that refers to the former is just as unconstitutional as if it referred to the latter. Irrespective of these problems, the PCT not only acknowledged the duty of courts to interpret conflicts of EU and national law in favor of maintaining the consistent practice of EU law, it also provided guidance to the Polish legislature as to how generate constitutionally appropriate legislation through its decision by stipulating to the Polish parliament how Article 31.3 needed adjustment. While there are still questions as to whether the implementing legislation raises some additional conflicts with the guidelines of the EAW, such as requiring double criminality in some cases, the Court did not exercise its veto and jeopardize compliance with the Framework Decision and EU law.²²

3.3 *The EAW in Cypriot Courts*

In November 7, 2005, the Supreme Court of Cyprus (SCC) ruled the act implementing the European Arrest Warrant as unconstitutional and null and void.²³ A national with both British and Cypriot citizenship was under arrest and whose surrender was sought by British authorities for suspicion of fraud. The Court upheld a Limassol District Court’s decision that found the extradition of a Cypriot national was not permitted by the constitution.²⁴

According to Article 14 of the Constitution of Cyprus, “no citizen shall be banished or excluded from the Republic under any circumstances.”²⁵ According to the SCC’s ruling, Article 11.2(f) of the Constitution lay out the specific conditions under which an individual may be arrested, and surrender to another national court’s jurisdiction was not listed among them. The Court acknowledged the recent *Pupino* ruling by the European Court of Justice, which stipulated that national courts should construe domestic acts implementing EU framework decisions as

²² I thank Jan Komárek for illustrating this to me.

²³ Cypriot Law 133(I)/2004.

²⁴ Decision No. 591/2005 of the Areios Pagos.

²⁵ Appendix D, Article 14 of the Constitution of Cyprus.

much as possible as consistent with domestic law in order to achieve the goal of the legislation.²⁶ Even in light of this decision, the Supreme Court of Cyprus argued that the implementing act could not be interpreted as constitutional without rendering the text of the act meaningless.²⁷ The Court's decision forced the Cypriot parliament to amend the constitution, which not only reworded Article 11.2 to permit the issuance of European arrest warrants, but the parliament also revised Article 179 of the Constitution such that all EU law, whether having direct or indirect effect, is supreme to national law.

As in the German and Polish cases, the process of transposing the EAW into the national legal order does not end here with a court's veto. The decision by the Cypriot Supreme Court spurred changes to the Cypriot constitution. Instead, the decision led to the Fifth Amendment of the Constitution and starkly asserted the supremacy of EU law in the national legal order by stating, "No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administration function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as [a] Member State of the European Union."²⁸ The decision by the Cypriot court to overturn the national legislation implementing the EAW comes closest to full expression of veto power envisioned for constitutional courts. However, Attorney General Petros Clerides quickly introduced legislation in 2006 that would amend the constitution such that the subordinate relationship between Cypriot and EU law was clarified. Former Attorney General Markides called for changes to the constitution as early as 2003, but attributed delay to

²⁶ Case C-105/03, *Criminal Proceedings against Maria Pupino*, [2005] ECR I-5285.

²⁷ Alexandros Tsadiras (2007) lays out a series of ways in which the SCC could have interpreted the law as consistent with the Constitution (Tsadiras 2007).

²⁸ Article 179 of the Cypriot Constitution.

the “unfathomable conservatism” of the then-president Tassos Papadopoulos (Hazou 2005). In this case, the Court’s veto of the national legislation generated an urgent need to revise the Cypriot constitution such that it was in compliance with EU law, demonstrating the powerful, normative “pull” of international law (Franck 1990).

4.4 Is There Utility in not Complying?

Although most of the delays associated with transposing the EAW on time are a function of some national constitutional courts, Germany and Cyprus, exercising the power of judicial review, non-compliance can occur for reasons associated with the enforcement school as well. Italy is the only example of a country’s government that willfully opposed the law in its drafting stages and then delayed its implementation as a result. Most observers interpreted Italian opposition as reflecting the fears Prime Minister Silvio Berlusconi and his prosecution in other states, who was facing several court investigations in Italy at the time.²⁹ Italian opposition dissolved by the European Council summit in Laeken at the end of the 2001. While the Council achieved unanimity, the Italian legislature, led by Berlusconi, refused to draft the national implementing act. Only pressure from the European Commission, through its annual reports highlighting Italian governmental inertia, and a draft law proposed by opposition parties led to the EAW’s transposition (Impala 2005).

Finally, in one case, non-compliance was avoided because a country was able to secure a temporary opt-out from the Framework Decision until the law could be made constitutional. During the negotiations over the Framework Decision, Austria even succeeded in having its constitutional concerns expressed in the FD itself.³⁰ Like most other civil law countries, Austria had a ban on extradition. According to Article 33, the Framework decision would not take effect

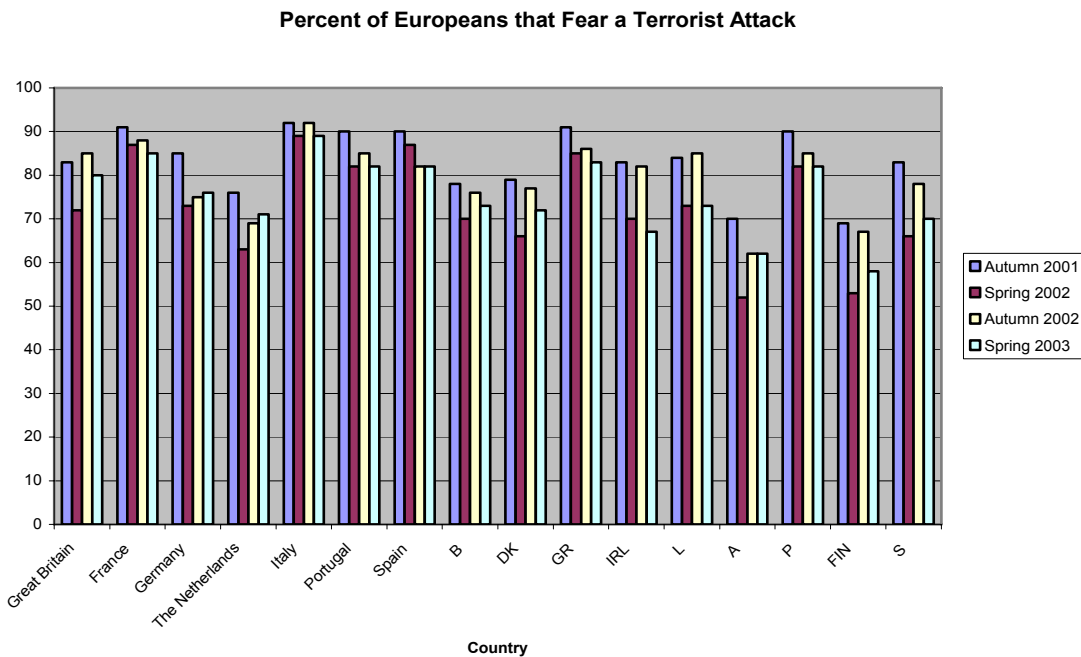
²⁹ Italy was also one of the last states to implement national legislation that gave effect to the Framework Decision. The national parliament passed such legislation on April 22, 2005, almost one year after the official deadline.

³⁰ See Article 33 EAW FD.

until domestic law had been changed. Austria was the only country that succeeded in securing an agreement that had few costs. Thus, the enforcement approach does help to explain why Italy refused to implement the legislation on time. The agreement was also written such that Austria would not face such costs, and why Austria complied when it otherwise would not have.

Do perceptions of the terrorist threat influence whether national governments give implementation of the European Arrest Warrant priority in their legislative programs? Some commentators in the United States as well as national leaders have questioned Europe’s commitment to the “the war on terror.” Preliminary evidence gathered from opinion polls do not support such a conclusion. Chart 1 shows that there is little variation among the EU-15 in terms of the degree to which their citizens personally fear they will experience a terrorist attack.³¹

Chart 1.



³¹ Eurobarometers 56-59, Fall 2001-Spring 2003.

Only in Finland and Austria does less than 60% of the population fear an imminent terrorist attack. Public opinion data from other sources that cover Central and Eastern Europe confirms the view that there is a high level of concern related to the possibility of a terrorist attack across EU member states. Since there is no significant variation in threat perceptions among the member states, this cannot explain why some countries delayed or incorrect transposition of the European Arrest Warrant.

4. Conclusion

The European Arrest Warrant is an important first step in the integration of national criminal legal systems. In this case, an exogenous shock, an act of international terrorism, and the threat of future attacks in Europe accelerated cooperation under the Third Pillar. This Framework Decision also led to a series of constitutional challenges in several countries that prevented EU member states from fulfilling their agreements with other EU member states to remove obstacles to extraditing nationals. Where there were bans on the extradition of one's nationals, constitutional appeals developed. Yet, although the classic veto players approach predicts that permanent non-compliance would result because constitutional courts exercised their power of judicial review, their decisions actually served to transform the legislative status quo. Although there were delays in compliance, the ultimate result was national legislation that complied better with the principles laid down in the Framework Decision.

The rapid approval of changes to national constitutions in light of the legal demands contained in the Framework Decision raises a series of additional issues that further research should address. First, the German Constitutional Court's decision to require concrete review of the quality of legal protections for criminal suspects in other EU member states for (only) Germans during the surrender process illustrates the skepticism judicial authorities have

concerning whether other countries' legal system meet their own standards in terms of protecting a person's rights and privileges. The European Arrest Warrant attempts to address those concerns by specifying a limited number of rights a suspect is entitled to, including the right to legal assistance and to be informed of the charges against him or her. In addition, the FD stipulated in its preamble that all surrender procedures should be in compliance with Article 6 of the Treaty of European Union and the Charter of Fundamental Rights of the EU. These stipulations raise the question as to whether, in reality, other member states meet these standards. If not, is this hindering the process of mutual recognition in criminal affairs and, as a consequence, state efforts to prevent and combat international terrorism? If many countries did not have these rights and other forms of legal protections or lack a professional criminal legal system, has the European Arrest Warrant been an agent of institutional change? If so, can we speak of the "Europeanization" criminal legal systems in the European Union? If national criminal legal systems are being "Europeanized," then some countries may be improving or raising the quality of their protections and treatment of terrorist suspects. At the same time, some countries' citizens may be subjected to prosecution by authorities whose standards do not meet those of the surrendering country. While basic minimum standards of criminal procedure and rights may be espoused and in place, continued divergence in national legal systems may hinder continued cooperation in the Third Pillar, as judicial officials in practice refuse to comply with EU law.

Bibliography

- Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. 2001. *The Concept of Legalization*. In *Legalization and World Politics*, edited by J. Goldstein, M. Kahler, R. Keohane and A.-M. Slaughter. Cambridge, MA: The MIT Press.**
- Bures, Oldrich. 2006. *EU Counterterrorism Policy: A Paper Tiger? Terrorism and Political Violence* 18:57-78.**
- Burley, A-M., and Walter Mattli. 1993. *Europe Before the Court: A Political Theory of Legal Integration*. *International Organization* 47:41-76.**
- Cardona, Meliton. 1992. *The European Response to Terrorism*. *Terrorism and Political Violence* 4 (4):252-53.**
- Chayes, Abram, and Antonia Handler Chayes. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press.**
- Chayes, Abram, Antonia Handler Chayes, and Ronald Mitchell. 1998. *Managing Compliance: A Comparative Perspective*. In *Engaging Countries: Strengthening Compliance with International Environmental Accords*, edited by E. B. Weiss and H. K. Jacobson. Cambridge, MA: MIT Press.**
- den Boer, Monica. 2006. *Fusing the Fragments. Challenges for EU Internal Security Governance on Terrorism*. In *International Terrorism: A European Response to a Global Threat*, edited by D. Mahnke and J. Monar. Brussels: P.I.E. Peter Lang.**
- Dimitrova, A.L., and Bernard Steunenberg. 2000. *The Search for Convergence of National Policies in the European Union: An Impossible Quest? European Union Politics* 1 (2):201-26.**
- Downs, George W., David M. Rocke, and Peter N. Barsoom. 1996. *Is the Good News about Compliance Good News about Cooperation*. *International Organization* 50 (3):379-406.**
- Falkner, Gerda, Oliver Treib, Miriam Hartlapp, and Simone Leiber. 2005. *Complying with Europe: EU Harmonisation and Soft Law in the Member States*. Cambridge: Cambridge University Press.**
- Franck, Thomas M. 1990. *The Power of Legitimacy Among Nations*. New York: Oxford University Press.**
- Hallerberg, Mark, and Scott Basinger. 1998. *Internationalization and Changes in Tax Policy in the OECD: The Importance of Domestic Veto Players*. *Comparative Political Studies* 31 (3):321-353.**
- Haverland, M. 2000. *National Adaptation to European Integration: The Importance of Institutional Veto Points*. *Journal of Public Policy* 20 (1):83-103.**
- Hazou, E. 2005. *UK Extradition Case Forces Cyprus to Amend Constitution*. *Cyprus Mail*.**
- Hooghe, Liesbet, and Gary Marks. 2005. *Calculation, Community and Cues; Public Opinion on European Integration*. *European Union Politics* 6 (4):419-445.**
- Immergut, Ellen. 1992. *Health Politics: Interests and Institutions in Western Europe*. Cambridge: Cambridge University Press.**
- Impala, Franco. 2005. *The European Arrest Warrant in the Italian Legal System: Between Mutual Recognition and Mutual Fear within the European Area of Freedom, Security and Justice*. *Utrecht Law Review* 1 (2):56-78.**

- Jacobson, Harold K., and Edith Brown Weiss. 1995. Strengthening Compliance with International Environmental Accords: Some Preliminary Observations from a Collaborative Project. Global Governances 1 (12):119-48.*
- Komarek, Jan. 2007. European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles." Common Market Law Review 44:9-40.*
- Martin, Lisa. 1992. Coercive Cooperation: Explaining Multilateral Economic Sanctions. Princeton, NJ: Princeton University Press.*
- Mastenbroek, Ellen, and Michael Kaeding. 2006. Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront. Comparative European Politics 4:331-354.*
- Mitchell, Ronald. 1994. Regime Design Matters: International Oil Pollution and Treaty Compliance. International Organization 48 (3):425-458.*
- Monar, Jörg. 2007. Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems. Government and Opposition 42 (3):292-313.*
- Phelan, D.R. 1993. Revolt or Revolution: The Constitutional Boundaries of the European Community. Dublin: Round Hall Sweet & Maxwell.*
- Phelan, W. 2006. Europe's Constitution: Encompassing Institutions and International Public Goods. Dissertation, Harvard University.*
- Plachta, Michael. 1999. (Non-)Extradition of Nationals: A Neverending Story. Emory International Review 13:79-159.*
- Smith, ME. 1997. The Commission Made Me Do It: The European Commission as a Strategic Asset in Domestic Politics. In At the Heart of the Union: Studies of the European Commission, edited by N. Nugent. London: Macmillan.*
- Steunenberg, Bernard. 2006. Turning Swift Policy-making into Deadlock and Delay. European Union Politics 7 (3):293-319.*
- Stone Sweet, Alec. 2000. Governing With Judges. Oxford: Oxford University Press.*
- Stone Sweet, Alec, and Thomas Brunnel. 1998. Constructing a Supranational Constitution. American Political Science Review 92 (1):63-81.*
- Stone Sweet, Alec, and Wayne Sandholtz. 1998. Integration, Supranational Governance, and the Institutionalization of the European Polity. In European Integration and Supranational Governance, edited by A. Stone Sweet and W. Sandholtz. London: Oxford University Press.*
- Tallberg, Jonas. 2002. Paths to Compliance: Enforcement, Management, and the European Union. International Organization 56 (3):609-643.*
- Tsadiras, Alexandros. 2007. Cyprus Supreme Court, Judgement of 7 November 2005 on the Cypriot Arrest Warrant Law. Common Market Law Review 44:1515-1528.*
- Tsebelis, George. 2002. Veto Players. Princeton, NJ: Princeton University Press.*
- Weiler, Joseph H. H. 1994. A Quiet Revolution. Comparative Political Studies 26 (4):510-34.*