



**Organising for EU Enlargement**

A challenge for member states and candidate countries

**NEGOTIATING EUROPEAN ISSUES**

National Strategies and Priorities

The European Arrest Warrant Negotiations  
A case study at the national level in Ireland

**OEUE PHASE I**

Occasional Paper 1.2 – 11.03

Jane O'Mahony  
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Dublin European Institute  
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FIFTH FRAMEWORK PROGRAMME



Dublin European Institute  
A Jean Monnet Centre of Excellence

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Mary Browne  
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### **Organising for EU Enlargement Project**

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Institute for the Study of Social Change  
University College Dublin

## **NEGOTIATING EUROPEAN ISSUES**

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## **ORGANISING FOR EU ENLARGEMENT:**

### **Challenge for the Member States and the Candidate Countries**

The Dublin European Institute, University College Dublin,<sup>1</sup> was awarded, in 2001, a research contract under the EU's Fifth Framework Programme<sup>2</sup> to carry out a comparative study of the impact of the EU on the structures and processes of public policy in six small countries: **Ireland, Greece, Finland, Estonia, Hungary** and **Slovenia**. The Project's partnership, under the direction of Professor Brigid Laffan, Dublin European Institute, University College Dublin<sup>3</sup>, includes: Professor Dr. Wolfgang Drechsler, University of Tartu; Professor Teija Tiilkainen, University of Helsinki; Professor Calliope Spanou, University of Athens; Professor Attila Ágh, Budapest University of Economic Sciences and Public Administration; and Professor Danica Fink-Hafner, University of Ljubljana.

The aim of the research project was to deepen our understanding of the processes of Europeanisation in a number of the existing member states and some of the candidate states.

The research project encompassed the following three objectives:

- The conduct of research which offers immediate policy relevance to key stakeholders in the enlarging Union;
- The conduct comparative, theoretical and empirical research on the management of EU public policy making in three existing member states – Ireland, Greece and Finland – and three candidate states – Estonia, Hungary and Slovenia;
- The shedding light on the capacity of smaller states to adjust and to adapt to the increasing demands of Europeanisation on their systems of public policy-making and thus to identify the barriers to effective, efficient and accountable management of EU business.

### **Research Strategy**

The research design consisted of two phases and within each phase, two levels of analysis. **Phase I** analysed the management of EU business at the macro level of the core executive and was complemented by a micro case study of a recent policy negotiation using decision analysis. **Phase II** of the research broadened the analytical focus to encompass other levels of government – the EU and sub-state – through multi-levelled governance. Here attention was centred upon the emergence of policy networks and the interaction between public actors and the wider civil society in specific, discrete policy sectors.

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<sup>1</sup> National University of Ireland, Dublin (University College Dublin).

<sup>2</sup> European Commission, Community Research Fifth Framework Programme (Socio-Economic Research).

<sup>3</sup> This project forms part of the Governance Research Programme, Institute for the Study of Social Change, University College Dublin, [www.ucd.ie/issc/](http://www.ucd.ie/issc/) and [www.ucd.ie/govern/intex.htm](http://www.ucd.ie/govern/intex.htm).

**Methodology**

The study employed two specific methodologies: historical institutionalism and rational institutionalism in a new and innovative fashion. The use of combined perspectives provided a theoretically innovative and new approach to the study of the Europeanisation process. Both approaches could be used as they were applied to different elements of the empirical research.

**Academic and Policy Implications**

This study's findings provide insight into the manner in which diverse state traditions, institutions and political and administrative cultures influence national adaptation to EU governance and how the interface between national policy processes and the Brussels arena is managed. It is expected that these findings will assist those making and managing policy, thus facilitating adjustments to the changing European Union while also contributing to the growing academic debate on Europeanisation.

At various stages during the course of this project the research findings and analysis were presented to a range of stakeholders and academics to facilitate feedback and enhance the analytical process. Further details about the Organising for EU Enlargement (OEUE) project are available on the project web site [www.oeue.net](http://www.oeue.net), along with i) the Project Report, ii) the OEUE Occasional Papers and iii) a selection of papers by the research partners which draw on various aspects their project research.

## INTRODUCTION

A common research design, facilitated by a model guided approach, was applied to the six micro case studies under the OEUE Project. With respect to the micro case studies of core executive management of negotiations on EU legislation in Ireland, Finland and Greece this common approach was applied to the case of the negotiation of the Framework Decision on the European Arrest Warrant framework decision at the national level in Ireland forms part of the wider research project, Organising for EU Enlargement (OEUE)<sup>4</sup>. The OEUE project has examined processes of Europeanisation in a number of smaller European Union member states, the older member states, Finland, Greece and Ireland, and the new member states, Estonia, Hungary and Slovenia. Europeanisation, or the process of embedding the national in the European and the European in the national as a result of European Union (EU) membership, can be conceptualised as an interactive process that differs across member states, economic sectors and social forces. Agreement on legislation at the EU level is seen in terms of interactive and interdependent processes of bargaining between a number of different levels or locations, in particular the national and European levels.

The primary aim of this case study is the analysis of the negotiation of the European Arrest Warrant<sup>5</sup> framework decision at the Irish level. This is done through the application and comparison of different explanations or models of decision making. The use of models facilitates comparison within one case study, as it allows for the conceptualisation of decision situations in more quantitative and spatial forms. Since the 1980s, several models of collective decision making have been developed within the rational choice approach in political science that provide far reaching insights into the dynamics of decision making processes (for example Bueno de Mesquita et al 1985, Stokman and Van Oosten 1994). The main differences between the models concern the assumptions they make regarding the behaviour of the actors involved in the decision making process. Each of the models within this research tradition requires a number of input variables: quantitative estimates of actors' policy positions on controversial issues within the negotiation, the salience they attach to each of their policy positions and the capabilities or resources they are willing or able to put into effect in order to reach the outcome closest to their preferred positions. Data collection proceeds as follows. First, a preliminary specification of the issues is made based on documentary analysis and key informants are identified. Second, the key informants are then interviewed to obtain estimates of the variables required for the models. This data collection procedure has proved to be a powerful tool for collecting data to test the models of collective decision making, and for gaining insights into a wide range of decision making situations.

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<sup>4</sup> For further information see: <http://www.oeue.net>.

<sup>5</sup> OJ L 190 18.7.2002.

This paper presents the findings of the Irish case study, application of models in Irish case, research process and key findings.

Papers structure

## **THE EUROPEAN ARREST WARRANT FRAMEWORK DECISION**

The impetus for the European Arrest Warrant lay with the terrorist attacks on the United States on 11 September 2002. The importance of effective EU measures on internal security was brought to the fore by the terrorist attacks and enormous pressure was brought to bear on the EU's justice and home affairs' decision making system to produce substantial legislative action in a very short period of time (Monar 2002: 121). EU actions in the areas of immigration and asylum, the fight against organised crime and judicial cooperation in civil and criminal matters had been the subject of the Tampere European Council on 15 and 16 October 1999. The Conclusions of the Tampere European Council presented, for the first time, the idea of a framework decision on a European Arrest Warrant<sup>6</sup>

'the formal extradition procedure should be abolished among Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence'<sup>7</sup>

However, while the proposal for a framework decision on a European arrest warrant had been in preparation during 2001, progress had been extremely slow. The events in the US on 11 September 2001 provided a political window of opportunity for the introduction of the proposal and created considerable political momentum and pressure for member states to achieve agreement. On 20 September, the Justice and Home Affairs (JHA) Council announced its determination to reach agreement, by 6 December 2001, on the Terrorist package, which included the framework decision on a European Arrest Warrant. The speed of the Council's agreement was unprecedented in 'justice and home affairs' negotiations and its commitment also meant that a negotiated outcome had to be reached, no matter what.

Since the 1 January 2004 the European Arrest Warrant replaced existing extradition procedures among all EU member states.<sup>8</sup> Under the Framework Decision the European Arrest Warrant is

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<sup>6</sup> OJ C 332 E, 27.11.2002.

<sup>7</sup> Point 35, Conclusions of the Tempere European Council, 15-16 October 1999.

<sup>8</sup> The extradition procedures between EU member states had been governed by a diversity of instruments, including: the European Extradition Convention (13 December 1957, ratified by all 15 Member States) and its

defined as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.<sup>9</sup> According to Monar, 'the agreement on the warrant represented a major breakthrough for the principle of mutual recognition in criminal matters' (Monar 2002: 131). An arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. In addition, a list of 32 offences (including terrorism, homicide, fraud, acts of trafficking in human beings and racism) give rise to surrender without verification of dual criminality of the act, provided they are punishable in the issuing Member State by a custodial sentence of a maximum of at least three years. A number of member states and the European Commission had hoped for the total abolition of the requirement of dual criminality (that the offence for which extradition is sought is recognised and penalised by both the requesting and requested states) but several member states were opposed to this and a compromise providing for exemptions, as noted above, was reached. The European Arrest Warrant also raised constitutional issues for some member states with regard to the possible extradition of their own nationals.

## **INSTITUTIONAL FRAMEWORK AT THE IRISH LEVEL**

In this research, an important part of the decision analysis is the identification of the institutional framework at the national level within which negotiation takes place. The Irish core executive consists of the Prime Minister (Taoiseach), the Government, ministries known as departments (corresponding to all main areas of policy), and the civil or administrative service. The principle of the 'responsibility of the lead department' governs how the interface with Brussels is managed. Given the reach of the European Union, this means that the EU impinges on the business of all Government departments, albeit to varying degrees. The Department of Finance, the Department of the Taoiseach (Prime Minister's Office) and the Department of Foreign Affairs have been referred to as the 'holy trinity' of Ireland's management of EU business (Laffan 2001) as they are the key departments involved in the macro coordination of Ireland's European policy (the core-core).<sup>10</sup> A clear division of an inner and outer core executive is evident between the remaining operational departments, that is between departments with considerable involvement in EU policy matters and

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two additional protocols (15 December 1975, ratified by seven Member States and 17 March 1978, ratified by 11 Member States); the Convention on the simplified extradition procedure between the Member States of the EU (10 March 1995, ratified by nine Member States), the Convention on the extradition between member states of the EU (27 September 1996, ratified by eight member states); and the bilateral conventions between the EU Member States. The extradition procedures between the EU Member States and the US are governed by bilateral agreements.

<sup>9</sup> See [europa.eu.int/comm/justice\\_home/news](http://europa.eu.int/comm/justice_home/news)

<sup>10</sup> For a detailed study of the Irish core executive and europeanisation see *Managing Europe From Home – The Europeanisation of the Irish Core Executive*, OEUE Phase I Occasional Paper 1.1 – 09.03 available at [www.oeue.net](http://www.oeue.net).

those where the EU impinges less frequently on day-to-day business. Given the significant increase in Justice and Home Affairs' policy instruments emanating from the EU since the Maastricht Treaty, the Department of Justice, Equality and Law Reform (henceforth referred to as the Department of Justice) has become heavily involved in negotiating at the EU level and is now part of the inner core.

The Department of Justice is a large Department with eight divisions, all of whom have EU involvement of some nature. The EU and International Division of the Department services the Article 36 Committee, acts as the coordinating unit for the meetings of the JHA Council and is responsible for ensuring a strategic and coherent policy with regard to the Department's EU activity. It is the main coordinator of JHA business. At the time of this research, the Division was headed by an assistant secretary and had nine staff. In the aftermath of September 11th, additional staff members were appointed on a temporary basis. At the domestic level, all departmental agreement to proposals relating to JHA must receive the rubber stamp of cabinet approval. In addition, in line with a more careful reading of Article 29.4.6 of the Irish Constitution, full approval of EU legislation on matters dealing with asylum, immigration, civil and criminal law by the Dáil (Lower House of Parliament) and Seanad (Upper House of Parliament) is required.<sup>11</sup>

Given the grave nature of the terrorist attacks of September 11 and the need for the EU to show immediate solidarity with the United States of America, the political pressure to produce rapid agreement on the European Arrest Warrant and Combating Terrorism Framework Decisions was immense. In the direct aftermath of the tragedy, it became clear that the negotiation of this package at the European level necessitated more intensive mechanisms within the Irish core executive system. An interdepartmental committee was set up to deal with the European Arrest Warrant negotiations and included officials from the Departments of Foreign Affairs, Finance, Justice, the Attorney General's office and the Department of the Taoiseach. While the Department of Justice was the lead department on this issue in the EU negotiations, the Committee was chaired and serviced by the EU and International Division of the Department of the Taoiseach. Once the European Arrest Warrant negotiations were concluded, this committee became the Interdepartmental Committee on Justice and Home Affairs and generally meets before every Justice and Home Affairs Council meeting.

## **THE RESEARCH DESIGN – DATA AND MODELS**

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<sup>11</sup> Article 29.4.6:

The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas (Parliament)'.

The micro case study, which is the subject of this paper, examined and sought to explain how the Irish position in respect to the European Arrest Warrant was negotiated at the national level. As applied in this case, the OEUE Project micro study research questions addressed

- How stakeholders in the Irish core executive organised themselves at the domestic level to ensure the effective preparation of the national policy position?
- How stakeholders in the Irish core executive negotiated their policy positions at the domestic level?

With regard to the first of these research questions, the rationalist literature suggests there may be two mechanisms for understanding the nature of policy co-ordination between policy actors in a policy network. One mechanism is the existence of formal procedures for monitoring and sanctioning. A second mechanism is the existence of cohesive policy networks of decision making. The types of network ties between actors may be linked with different types of collective decision making strategies. Both mechanisms may be complementary.

With regard to the second of these research questions, this research suggests that the key to understanding policy decision outcomes is to focus on the underlying mechanisms at work which facilitate the collective decision-making process. The overall policy process is perceived as a chain of collective decision-making processes around important issues. In such processes, outcomes are determined by the interaction and interdependence of stakeholders with varying capabilities, preferences and levels of salience to shape the collective policy outcome. These stakeholders are willing to use their capabilities, only if the issues are of sufficient interest to them and if their preferred outcome deviates from the one expected. Moreover, this approach stresses the potential internal conflicts between actors of different political levels, rather than presuming their unity.

### **Data Collection**

In keeping with the common research design applied in respect to the micro case studies a model guided approach was applied to the examination of the negotiations on the proposal for the European Arrest Warrant in Ireland. This approach required the careful identification and selection of the main policy issues in the negotiations (Thomson et al. 2002) with each belonging to one and only one decision set. These policy issues are represented as a one dimensional continua on which both outcomes and the policy preferences of the actors are represented. Policy experts, including senior government officials were consulted to identify both the public and private actors for whom these policy issues are salient. Among the actors identified were those who could affect the negotiations outcome.

The salience of the issues for the actor, along with the actor's policy positions on the issue, were combined in a utility function for each actor given two underlying assumptions. First, the actor's policy positions can be represented as a point on a one dimensional continuum and second, this position is a single peaked function. Furthermore, the actor's capability is defined in terms of their ability to influence the negotiations and reflects their formal powers and informal weight in the decision making process.

### **Modelling Approach**

Under the common research design applied to the micro case studies the three models selected to guide the research and analysis. There are various methods of calculating the outcome of the negotiating process. The choice of method depends upon the sort of negotiations which are being modeled and the extent of information that each actor has about the positions, salience and power of the other actors. The modeling approach used in this research differs from other procedural approaches in that it includes both the formal *and* informal means by which actors exert influence. Formal decision making rules still matter in terms of accounting for the capabilities of actors, i.e. the power of each actor to influence the outcome. However, the models also encapsulate how actors may also use other more informal means to influence outcomes, such as the power to influence other actors by persuasion, bargaining skills, levels of information and trust between actors. The bargaining models used in this analysis focus on how these capabilities are deployed through the particular modes of interaction between actors: the use of compromises or challenges, through which initial positions of stakeholders are transformed into voting positions in the final voting stage (Payne and Bennett, 2003)<sup>12</sup>. On the basis of the accuracy of the models' forecasts of decision outcomes, we make inferences about the relevance of the influence strategies they posit.

The *compromise* model predicts the collective decision outcome as the mean of all actors' weighted positions, capability and salience. This model ignores the differences of utility between actors and of any challenges to positions during negotiations (Stokman and Van den Bos 1992, Payne and Bennett, 2003). In the *conflict* model, actors must decide whether they will challenge other actors' policy or voting positions (Bueno de Mesquita 1994, Payne and Bennett, 2003). This decision to challenge another actor(s) is based on the actor's own evaluation or perception of the expected benefit of challenging or not challenging the position of the opponent (Bueno de Mesquita 1994). Actors challenge opposing positions if they think this will result in (utility) gains for themselves. This repetitive process of evaluation, challenges and shifts of voting positions stops if a state of equilibrium is reached and a dominant outcome emerges. After the negotiation process, the outcome is determined as if a weighted voting procedure had taken place, i.e. the outcome is an average, weighted by the capability and salience of the voting positions.

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<sup>12</sup> In the Irish case study we do not apply the Stokman and Van Oosten Exchange model (1994) as the research identified that the Irish national level negotiations revolved around one key controversial issue only. The application of the exchange model requires two or more issues in the negotiations.

## **IRISH NEGOTIATIONS ON THE EUROPEAN ARREST WARRANT**

### **Data collection**

Research for this case study and the findings are based on extensive primary interviews along with a synthesis of the primary policy documents and secondary literature. Preliminary research identified relevant experts in the Office of the Attorney General, the Department of Justice, Equality and Law Reform, the Irish Permanent Representation to the EU, the Department of Foreign Affairs and the Department of the Taoiseach. Structured interviews were conducted with the key officials who were involved in the discussions on the proposals for the European Arrest Warrant at a national level from the Departments of Justice, Equality and Law Reform, Foreign Affairs, and the Taoiseach along with the Irish Permanent Representation to the EU. The interview process was complemented by the use of primary and secondary published sources including Oireachtas (Parliamentary) debates, Council documentation (including COREPER and Justice and Home Affairs Council minutes and press releases), press coverage at the national and European level and material on non governmental actor involvement available through the internet. This extensive process of data collection over a substantial period of time allowed the researcher to gain a comprehensive knowledge of policy making through the complementary use of quantitative analysis and qualitative research.

## **The Actors**

The experts consulted identified a number of key actors were as being involved in the discussions on the European Arrest Warrant at the national level. These included the Department of Justice, the Department of Foreign Affairs, the Department of the Taoiseach and the Office of the Attorney General. However, no non-governmental or private sector actors were identified by the experts. Given the small size of the Irish central administration, certain key individuals in each department were charged with discussing the proposed warrant. Therefore, the unitary actor assumption can be applied to the national level.

The Department of Justice was the first key actor to be specified by all experts interviewed for this study. This stems from its position as lead department in managing Justice and Home Affairs negotiations and the European Arrest Warrant negotiations in particular. Also identified, given its role as key coordinator of day to day EU business, was the Department of Foreign Affairs, which includes the Irish Permanent Representation to the EU. The European Arrest Warrant was discussed extensively in the Article 36 Committee and in COREPER II. While a senior official from the Department of Justice's EU and International Division sits on the Article 36 Committee the permanent representative, of ambassador rank, represents Ireland on COREPER II and maintains strong links with the Department of Foreign Affairs. Thus the Permanent Representation shared the burden of negotiating the European Arrest Warrant with the senior official from the Department of Justice. Other actors identified as involved in the discussions at the national level, due the political and legal issues associated the proposal, were the Department of the Taoiseach and Office of the Attorney General. The extremely political nature of the negotiations and their context in the aftermath of the September 11<sup>th</sup> attacks saw the participation of officials from the Department of the Taoiseach, representing the Irish Prime Minister in the discussions. The significant impact on the existing extradition procedures necessitated the involvement of the Office of the Attorney General. In response to the importance and urgency of the subject an ad hoc interdepartmental committee was established within the core executive immediately following the submission of the European Commission proposal to the Council and the European Parliament at the end of September 2001. For the purpose of the negotiations the committee was composed of officials representing the departments noted above, the departments of Justice, Foreign Affairs, the Taoiseach and the Office of the Attorney General, additionally officials from the Department of Finance were also on the Committee. Notably, while the Department of Justice was the lead department in the EU negotiations on the proposal, this national committee was chaired and serviced by the EU and International Division of the Department of the Taoiseach.

The Attorney General's interpretation Article 29.4.6 of the Irish Constitution required the Dáil and Seanad's approval of the European Arrest Warrant. In late November 2001 the Joint Oireachtas Committee on European Affairs and the Joint Oireachtas Committee on Justice, Equality and Law reform discussed the European Commission proposal for a Framework Decision on the European

Arrest Warrant.<sup>13</sup> Debates were held in both houses of the Oireachtas on 12 December 2001 following the political agreement at the European level on the Decision the previous day.<sup>14</sup>

While members of both Houses were broadly supportive of the European Arrest Warrant, the Fianna Fáil/Progressive Democrat Government was criticised for what was seen by opposition party deputies such as Alan Shatter (Fine Gael) as rushing the proposal through the Oireachtas. According to Deputy Shatter

If I have any complaint to make about what we are doing today – it may not be the fault of the Minister [Mr John O’Donoghue, Fianna Fáil] – it is that it is far too rushed. Deputy Brendan Howlin (Labour Party) and myself, representing the main Opposition parties, were presented with two very complex European Union proposals at around five o’clock yesterday evening. We were given some background information but we were given very limited time to have them vetted and to take a detailed and considered view of any difficulties or defects that may arise. Effectively, what is presented to us is a *fait accompli*. (Dáil Eireann Debates, Volume 526, 12 December 2001).

The European Arrest Warrant was discussed in the Oireachtas at a time when it possessed weaker powers of scrutiny than those that have operated since the introduction of new institutional procedures in July 2002. Therefore neither the Dáil nor its committees can be considered to have been important actors in the national level negotiations on the Warrant. Furthermore, civil society was absent from the negotiations unlike the case in other EU member states.<sup>15</sup> The consideration and discussion of the proposal for European Arrest Warrant at the national level were characterised by the negotiations being confined to core executive circles.

### **The Policy Issues**

A preliminary review of primary and secondary documentary sources revealed the number of controversial issues associated with aspects of a European Arrest Warrant. Among such issues were the abolition of the principle of dual criminality<sup>16</sup>; a list of offences to which dual criminality would not apply; the entry into force of the warrant; the retrospective application of the warrant; the

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<sup>13</sup> European Commission proposal for a Framework Decision on the European Arrest Warrant and the surrender procedures between Member States. COM/2001/0522/final/2 [see [europa.eu.int/eur.lex/en/com/pdf/2001](http://europa.eu.int/eur.lex/en/com/pdf/2001)]

<sup>14</sup> Political agreement on the Framework Decision on the European Arrest Warrant was reached on 11 December 2004 after all Member States, except Italy, agreed to the compromise proposal at a meeting of the Justice, Home Affairs and Civil Protection Council, 6 & 7 December 2001 under the Belgian Presidency.

<sup>15</sup> The role of civil society in relation to the Finnish national negotiations on the proposed European Arrest Warrant is discussed in the OEUE Project micro case study available at [www.oeue.net](http://www.oeue.net)

<sup>16</sup> ‘The dual criminality principle – which means that both the country requesting extradition and the country that should arrest and return the alleged criminal recognize and accept that what he or she is alleged to have done is a crime’ quoted from Europa – Justice and Home Affairs – Freedom, Security and Justice-Extradition.htm [[www.europa.eu.int](http://www.europa.eu.int)]

authority to issue a warrant; human rights concerns; the speciality principle.<sup>17</sup> and the extradition of nationals.<sup>18</sup> However, all the national experts interviewed for this case study agreed that the only issue that was discussed extensively at the national level was that of maintaining or removing the principle of dual criminality. This issue was discussed in the interdepartmental committee and an Irish position on this issue was reached immediately before the Justice and Home Affairs Council of 16 October 2001. From this point onwards, national negotiations as such did not take place within the interdepartmental committee. According to one of the key experts interviewed, the role of the interdepartmental committee was to provide information across departments as to the state of play of the negotiations and to air concerns of the various departments. The committee had a 'clarifying role' and was set up 'to keep people up to date' (interview material<sup>19</sup>). Nevertheless, considerable coordination of the Irish position did occur at an informal level right up until the conclusion of the negotiations in early December 2001 (interview material<sup>20</sup>).

### **National Level Issue Specification**

The European Commission proposed the abolition of the principle of the dual criminality in its proposal, at the end of September 2001, for a Council Decision on a European Arrest Warrant. All discussions on the proposed arrest warrant focused on this issue until the Ghent European Council on 19 October when it was

The European Commission's draft European Arrest Warrant Framework Decision proposed the abolition of the principle of dual criminality. Until the Ghent European Council of 19 October 2001, all discussions on the European Arrest Warrant focused on this issue. Once the decision to remove the principle of dual criminality by means of a positive list (a list of offences where the principle would not apply) was taken, negotiations at the European level addressed the content of the list right up until the end of November/beginning of December. The negotiations were so compressed in time that issues such as the speciality principle and the extradition of nationals were dealt with relatively quickly and more technical issues such as the entry into force of the warrant were 'shot through' (interview material).<sup>21</sup> However, two issues in particular gave rise to concern among Irish negotiators and were concluded on a more bilateral basis towards the end of the negotiations: the notion of investigative detention and the issue of the respect of fundamental human rights (i.e. possible limitation of grounds for refusal to surrender, Article 6 of Treaty on European Union). The Irish delegation was concerned with the provision relating to investigative detention and a declaration on this issue was attached to the annex of the decision taking into account Irish concerns on 6 December 2001. The Irish delegation was joined by the Nordic and Dutch delegations

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<sup>17</sup> The speciality principle – an individual once extradited cannot be prosecuted for an offence not included in the arrest warrant.

<sup>18</sup> Extradition of nationals – the right of a state to refuse to hand over its own nationals

<sup>19</sup> Interviews with Irish national experts 17 and 30 October 2002.

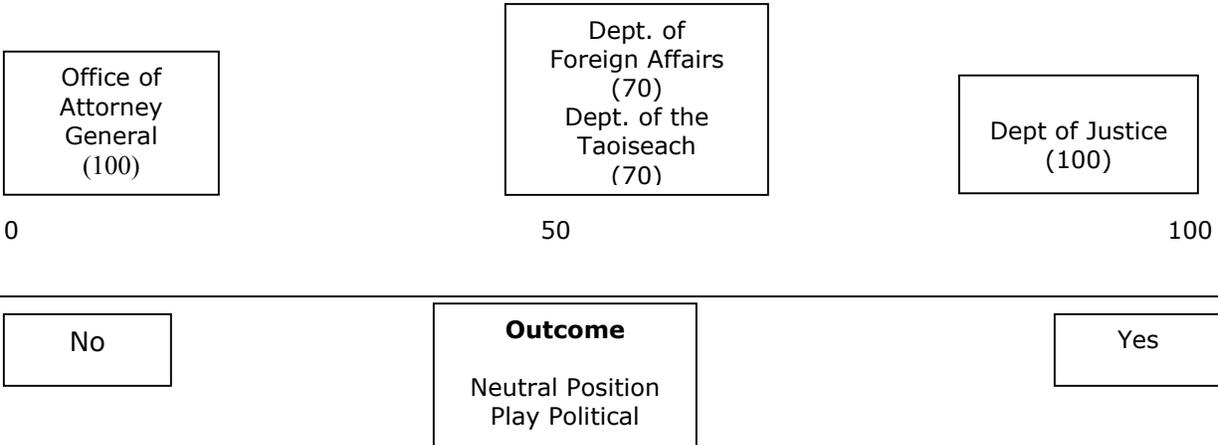
<sup>20</sup> Interviews with Irish national experts 17 October 2002.

<sup>21</sup> Interview with Irish national expert 17 October 2002.

in highlighting concerns of fundamental human rights and these were incorporated in Recital 12 of the Preamble to the Framework Decision.

**Figure 1:** Issue Specified at Irish Level:  
Principle of Dual Criminality (Salience scores in parentheses)

***Should Ireland agree to the Commission proposal to suppress dual criminality?***



As mentioned above, the stance to be taken on the principle of dual criminality was the sole issue of a controversial nature at the Irish level and was resolved before the October JHA Council. After this, the Department of Justice negotiator and the Permanent Representative were given the lead in negotiations at the European level.

**Specification of Policy Positions at the National Level**

Experts identified the policy positions for the following actors: the Office of the Attorney General, the Department of Foreign Affairs, the Department of the Taoiseach and the Department of Justice. The key experts we interviewed found this list of actors to be an appropriate description of the constellation of actors involved at the national level. It is important to note that the expert judgments outlined refer to the policy alternatives actors favoured most, rather than the ones they were willing to accept or eventually accepted in the form of the decision outcome. The positions taken by each of the actors are closely related to their institutional roles within the Irish core executive. The Office of the Attorney General, similar to its counterparts in every other Member State, took a more cautious and vigilant approach to the Commission proposal to abolish dual criminality (Interview, National Official, 28 June 2002). The then Attorney General, Mr Michael McDowell (now Minister for Justice, Equality and Law Reform) has been vocal in his support for the determination of criminal law at the national level. He has often spoken of the need to examine carefully and proceed cautiously with any move towards the harmonisation of criminal legislation at the EU level. On the 2 December, at the Academy of European Law Ten Years Celebrations in Trier,

Germany, he spoke of the fundamental legal and constitutional issues posed by attempts by the EU to gain the competence to criminalise, investigate, arrest, prosecute and try to punish EU citizens. According to Minister McDowell,

In the area of police and judicial cooperation in criminal matters the Union must respect the fact that there are 15 different systems [in the EU], 17 if you count the different systems in the UK, and two distinct legal traditions, the common law and the civil law. ...Any proposals in these areas must respect the realities which exist. This is not to suggest that no change is possible. Of course it is, but it must be based on an appreciation of underlying realities (as reported in the Irish Times, 2 December 2002).<sup>22</sup>

As Attorney General, Mr McDowell also made his concern as to the speed and nature of the European Arrest Warrant negotiations public. At a law conference in the University of Trier in December 2001 and again at a law conference at the Irish Centre for European Law, Trinity College Dublin, as Attorney General he spoke of the lack of consultation of the Irish government over the arrest warrant (as reported by Carol Coulter, The Irish Times, 15 April 2002).

According to the key experts interviewed for this study, the Department of Foreign Affairs and Department of the Taoiseach took the neutral or midpoint position of 50. They were both aware of the need to play the political game and move away from the status quo. Both Departments were cognisant of the immense pressure and need to conclude the negotiations satisfactorily and speedily. The need for the member states of the EU to be seen to be supportive of the United States in the face of such tragic events meant that the option of not signing up to an arrest warrant was impossible. The Department of Foreign Affairs was aware of the need to be seen to be constructive in the negotiations (Interview, National Official, 30 October 2002). The Department of Justice was placed at the other extreme position, that of 100. This position was taken, according to experts interviewed, in order to ensure that the overall Irish position in negotiations moved away from the status quo position. According to a key expert interviewed for this study, the Department of Justice was aware of the positions of other delegations within the Council, in particular the desire of member states such as the UK and Spain to move well beyond the status quo. It was felt this position was necessary to take at the national level in order to reinforce the awareness of other national actors that holding on to the position of the status quo, i.e. the maintenance of dual criminality, was untenable in the medium to long term (Interview, National Official, 4 November 2002).

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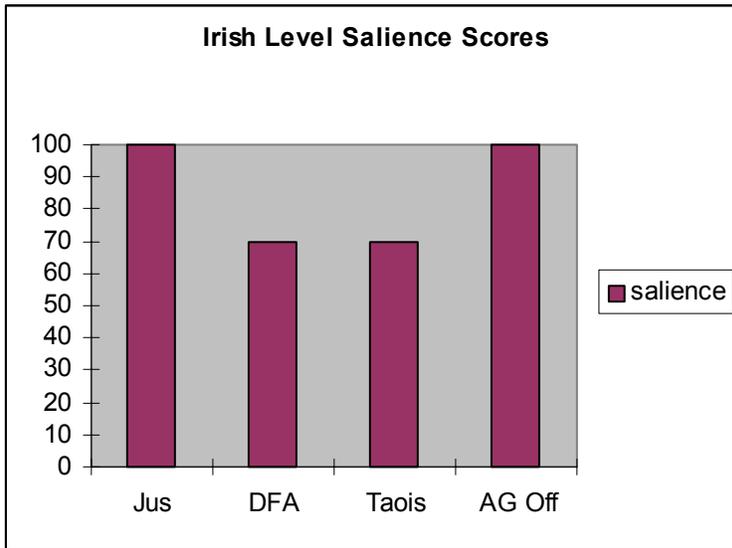
<sup>22</sup> Other speeches given by Minister McDowell in a personal capacity relating to the EU's competence in JHA include:

Address at a meeting of the Institute of European Affairs' European Lawyers Group, 18 June 2001.  
Speech to Institute of European Affairs, Dublin, 4 November 2002. See <http://www.iiea.com>.

### Specification of Saliency at the National Level

Experts were also asked to estimate the level or saliency or importance each of the actors attached to the issue. The figures below were provided by a key expert in the Department of Justice. Figure 1 illustrates the saliency scores on the dual criminality issue at the Irish level.

Figure 1: Irish Level Saliency Scores



*Figure Key:* Jus= Department of Justice  
DFA=Department of Foreign Affairs  
Taois=Department of the Taoiseach  
AG Off=Attorney General's Office

The Department of Justice and the Attorney General's Office both attached high levels of saliency or importance to the issue of dual criminality. According to experts interviewed, the difference in saliency between these two actors and the Departments of Foreign Affairs and the Taoiseach lay in their institutional roles. The Departments of the Taoiseach and Foreign Affairs, as coordinating, rather than operational departments, would be more concerned with the need to secure agreement at the national level and yet protect the Irish national interest, rather than maintaining the principle of dual criminality per se.

### *Specification of Capabilities of Actors at the national level*

Data on the overall capabilities of the actors at the national level were collected, as well as actors' powers of bargaining, trust and information skills. See Figures, 2, 3, 4 and 5 below. In terms of overall power or capability, the Department of Justice was ranked highest of the four actors, given its role as lead department in all matters relating to Justice and Home Affairs in the EU.

Figure 2: Irish Level Capability (measure of overall power)

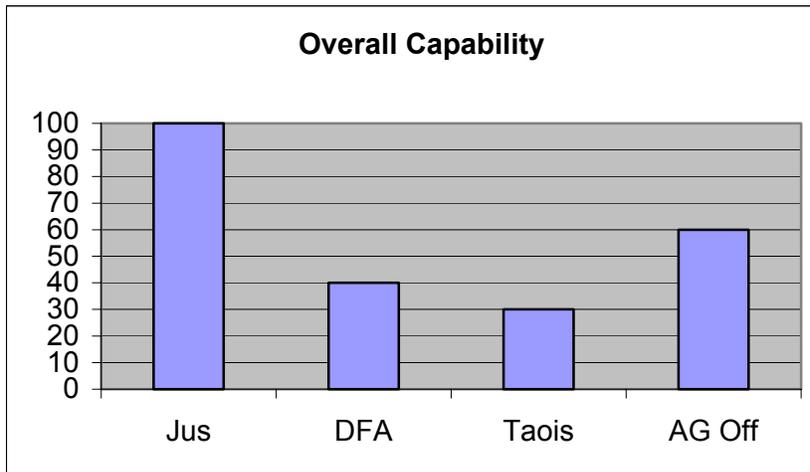


Figure Key: Jus= Department of Justice  
DFA=Department of Foreign Affairs  
Taois=Department of the Taoiseach  
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The Department of Justice also has considerably more informational resources than the three other actors as a result of this role. Both the Department of the Taoiseach and the Department of Foreign Affairs are stretched in their resources as they must key an eye on the extremely wide range of policies at the EU level. As a result, while their bargaining skills have been rated highly and there is a large degree of mutual trust in existence, their informational resources are poor.

Figure 3: Irish Level Bargaining Skill

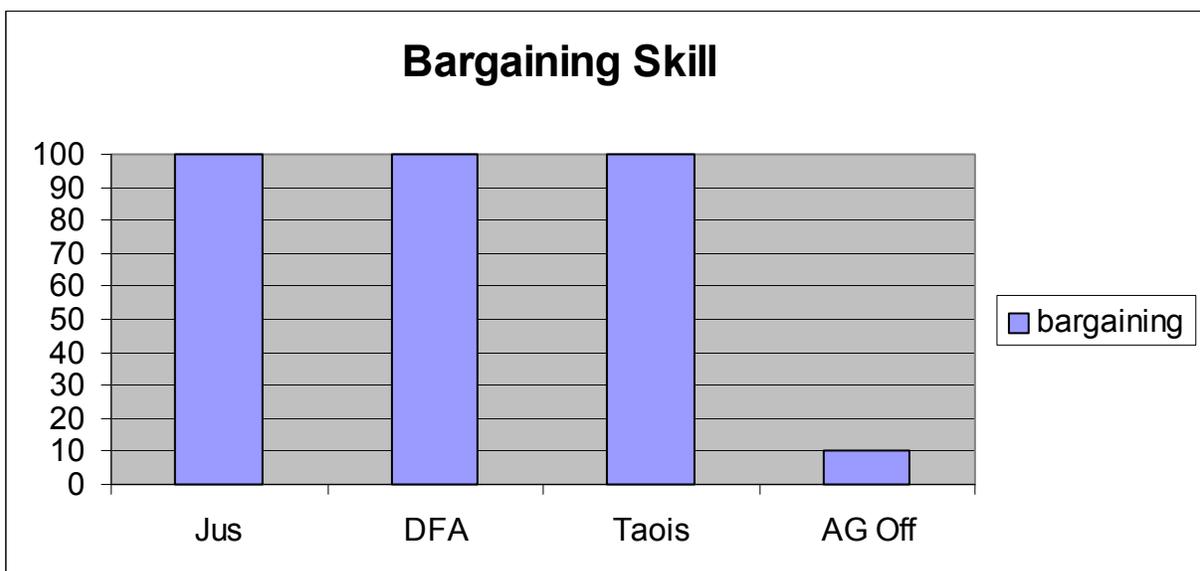


Figure Key: *Jus= Department of Justice*  
*DFA=Department of Foreign Affairs*  
*Taois=Department of the Taoiseach*  
*AG Off=Attorney General's Office*

The lower scores of the Attorney General's Office was also attributed to its limited operational resources (Interview, National Official, 4 November 2002).

Figure 4: Irish Level Information

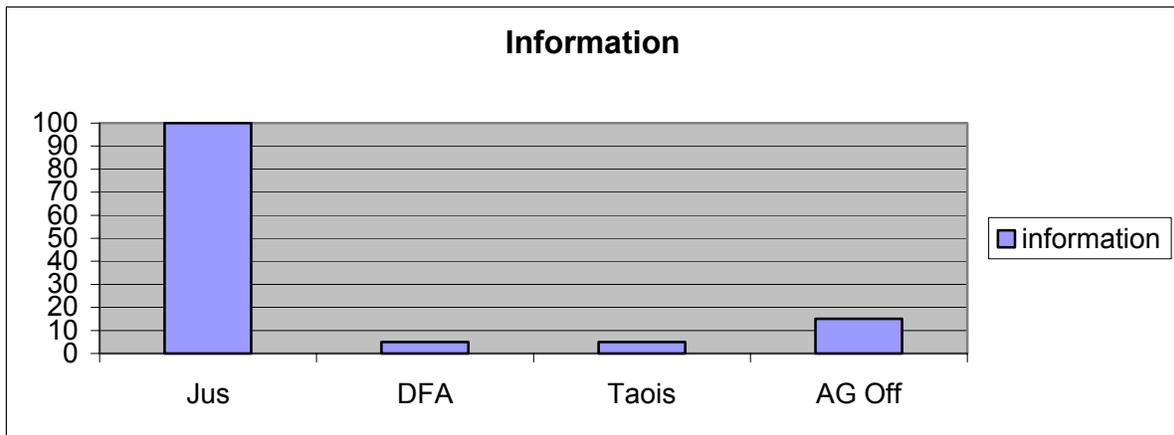


Figure 5: Irish Level Trust

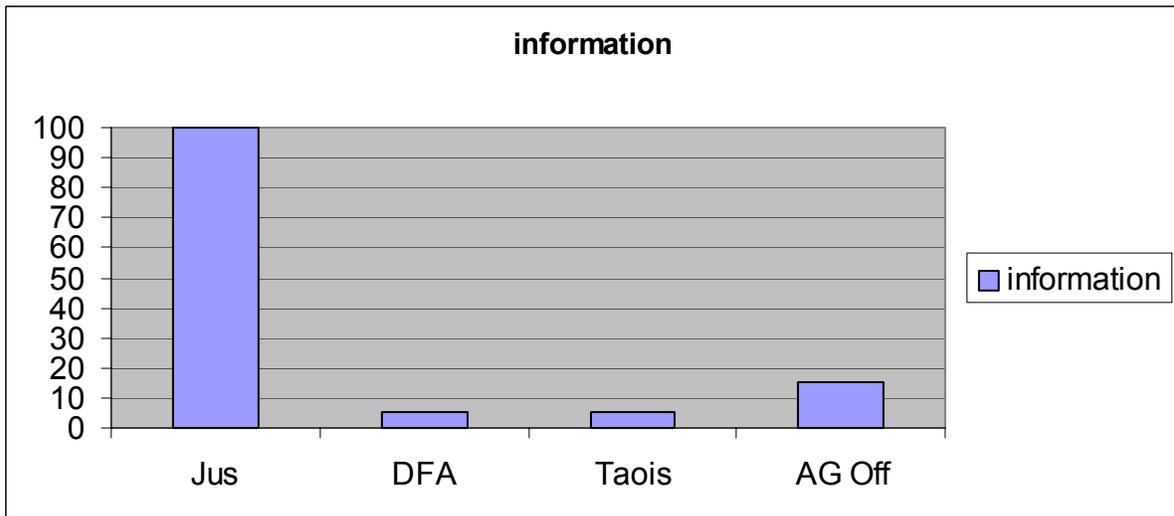


Figure Key: *Jus= Department of Justice*  
*DFA=Department of Foreign Affairs*  
*Taois=Department of the Taoiseach*  
*AG Off=Attorney General's Office*

### **Data Analysis and Findings at National Level**

In this case study we applied two decision models, the compromise and conflict models, to simulate the negotiation process. The results of this model application are presented in Table 1 below, which indicates the model predicted outcomes, the real outcome and the error term for each model prediction. In the application of the models, we used the four different measures of capability presented in Figures 2-5 above (overall capability, bargaining skills, informational resources and levels of trustworthiness). The results presented in Table 1 suggest that the simple compromise model was the most successful in predicting accurately the real decision outcomes. For the most part, the conflict model predicted a decision outcome which was more extreme than the negotiating position actually initially taken by the Irish member state at the European level negotiations of the European Arrest Warrant. It is only when the measure of trustworthiness as actor capability is used with the conflict model, that the accuracy of this model's predictions are improved. At the time of the negotiations, the relationship between the Attorney General's office and the Department of Justice was quite strained, where the Attorney General's office was strongly opposed to a "rush-through" of the negotiations. On the other hand, the Department of the Taoiseach and the Department of Foreign Affairs,

**Table 1:** Model Outcomes, Real Outcomes and Error Term (in numerical format)

<b>Decision Model</b>	<b>Compromise Model</b>	<b>Conflict Model</b>	<b>Real Outcome</b>
<b>Decision Outcomes</b>			
All models*	50	100	50
Model b (trust)	50	50	
<b>Absolute Error Term</b>			
All models*	0	50	N/A
Model b (trust)	0	0	

\* Department of Justice as veto player

argued that a more pragmatic approach had to be taken to the European Arrest Warrant negotiations, given the political crisis presented internationally by the terrorist attacks in the USA on September 11<sup>th</sup>. The higher shared level of trust between these Departments and the Department of Justice meant that there was a greater chance of coalition formation between these actors in finding a common agreed and winning negotiating position at the national level, even given the continuing objections of the Attorney General’s Office. Indeed the Irish Attorney General office (as did the comparable offices across different Member States) continued to query and raise some objections to the European Arrest Warrant Framework Decision, even after agreement had been reached at the European level.

## **CONCLUSION**

The European Arrest Warrant negotiations put the Irish government, as well as the governments of the other Member States, under considerable pressure to respond quickly and firmly and in particular, to respond positively to the call for a unified European response to the political turmoil created by the events of September 11<sup>th</sup>. This case study particularly focused on how the preparation of the Irish negotiating position for these European level negotiations proceeded. The Irish-level negotiations were handled by a small group of actors within the Irish core-executive, meeting within the format of an Interdepartmental committee specifically set up to deal with the European Arrest Warrant negotiations. In particular, the research found that there were four key departments involved with responsibility for European business and in particular, the Justice and Home Affairs policy arena. The negotiations were conducted by the most senior level civil servants within these departments, directly reporting their progress to the Taoiseach and the Minister for Foreign Affairs. These research findings demonstrate very clearly the flexibility with which the Irish administrative system was able to respond professionally to the rapid series of events evolving at the time. However, the research also demonstrated the closed nature of this system of negotiation, where there was relatively little involvement or scrutiny of the Irish negotiating position afforded to

the wider group of elected members of the Dail (Irish parliament) or indeed other societal actors. While the Irish Attorney General's Office vehemently urged caution to the Irish government against agreeing to the European Arrest Warrant, in the end a pragmatic and essentially political stance was taken by the Irish government at the European level. The findings suggest that the legacy of this stance and indeed rejection of the position of Attorney General's Office left a legacy which only reinforced the perception of this Office as not sufficiently resourced to manage the political business of European negotiations.

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