Chapter 4

Negotiating the European Evidence Warrant

‘… everything was regulated to the very, very, very, very small and concrete detail. It was not good any more. Too many exceptions! (…) And what was the basic discussion? (…) It was about 'mutual recognition'. About 'mutual trust'!” (Head of the International Cooperation Unit, Ministry of Justice of a member state, interview, 5 May 2011, Brussels).

4.1 Introduction

The decision-making process leading to the adoption of the Framework Decision on the European Evidence Warrant (hereinafter: ‘EEW’) was long and arduous. It started in November 2003, when the Commission tabled a proposal for an EEW decision (Commission 2003). In December 2008 the process ended formally with the adoption of the so-called Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters by the Council (Council 2008a). The negotiations however ended already in June 2006, when the Council agreed on the general approach. It thus took eighteen months more for the formal adoption to take place. The main reason for this delay was that in some member states prior parliamentary approval was required before governments could go to Brussels for the formal voting.

The drafting and adoption of the EEW framework decision took place in the institutional context of the former third pillar of the EU. In that institutional setting unanimity was the voting rule and the European Parliament had only consultative power. Furthermore, the Commission had to share the competence to initiate legislation (on justice and police cooperation) with the member states. As a consequence, the Commission lacked the clout to make its voice heard whenever the outcome of the negotiations in the Council deviated too much from the Commission’s proposal.

The aim of the EEW decision is to set in place a mechanism that was intended to facilitate the exchange of evidence in cross-border criminal cases. It was EU’s ninth instrument in the series of framework decisions adopted on the basis of the principle of mutual recognition. Among the mutual recognition instruments adopted before were the Framework Decision on the European Arrest Warrant, the Framework
Decision on the freezing of assets and evidence, the Framework Decision on the confiscation of crime-related proceeds and property, the Framework Decision on the application of the principle of mutual recognition to financial penalties and the Framework Decision on the application of the principle of mutual recognition to confiscation orders.

The principle of mutual recognition implies that a decision taken by a judicial authority in the course of a criminal procedure in one member state would be recognized and enforced by a judicial authority in another member state as if it was taken by a judicial authority of the latter member state. Ideally, the mutual recognition principle would then mean that the law of the issuing state should be paramount in the exchange of, in this case, evidence. In other words, it ensured admissibility in court of the issuing state. Compared with the traditional instruments of mutual assistance, such as the European Convention on Mutual Assistance of 1959, a mutual recognition arrangement for exchanging evidence would provide more guarantees for the execution of evidence warrants, and for faster procedures. The mutual recognition principle was considered an appropriate response to the many differences in national procedural rules in criminal law (Council 2001: 10). The principle presupposes that member states have trust in each other’s diverse criminal justice systems and hence enables member states to cooperate without necessarily changing adapting or harmonizing their respective penal systems according to a common set of procedural rules.

The aim of the proposal for the EEW decision was in line with the conclusion of the Tampere European Council of October 1999. There, it was agreed that the principle of mutual recognition “should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one member state’s authorities should be admissible before the courts of other member states, taking into account the standards that apply there” (European Council 1999: 9).

This credo was repeated in a subsequent programme adopted by the Council in 2001 and granted the highest priority (Council 2001: 14). This program identified measures that were needed for implementing the mutual recognition principle. It also mentioned another instrument that was to be put in place prior to the adoption of an EEW instrument. The former instrument would provide the recognition of orders of the freezing of evidence. It was considered a first step leading to a fully-fledged arrangement for transfer of evidence between member states. In March 2001, a group of member states tabled a proposal for such an instrument. It resulted in the adoption, in July 2003, of a framework decision on the execution of orders freezing property or
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evidence. The Commission reminded in its proposal for the EEW that the framework decision on freezing orders provided only for “provisional action” (Commission 2003: 6). The freezing order instrument only dealt with one part of the spectrum of judicial cooperation, namely judicial action aimed at the prevention of destruction, transformation, moving, or disposal of evidence, and not transfer between national authorities itself.

With the EEW proposal the Commission took a next step in the gradual shaping of a single instrument that would have to replace all traditional instruments of mutual assistance in criminal matters (Commission 2003: 10; see also De Hert et al. 2009). Like the European Arrest Warrant replaced the traditional extradition procedure, the purpose of the EEW was to replace the “slow and inefficient” traditional mutual assistance procedure. The traditional procedure of exchanging evidence between states for use in national criminal procedures posed many problems which the Commission hoped to remedy with the EEW proposal.

The main legal framework that regulated the traditional procedure in Europe since 1959 was the Council of Europe Convention on Mutual Assistance in Criminal Matters. One of the salient deficiencies of this convention was that it provided for numerous grounds for refusing assistance, including the reservation of double criminality. This reservation ensured that a request from another state for evidence – or any other form of assistance – could be refused if the act for which evidence was requested was not punishable in the state receiving the request. Moreover, due to the many declarations attached to the 1959 Convention, “different rules apply to different Member States to different extents” (Williams 2005: 71).

Still, the Commission’s proposal for a European evidence warrant was “not a complete legal revolution” (Williams 2005: 71). It was limited in scope in that it only provided a legal basis for the transfer of objects, documents or data already obtained under various procedural powers, including seizure, production or search powers. The EEW proposal was not intended for the transfer of data or material that still needed to be collected through such methods as interviewing of suspects, taking of statements, hearing of witnesses and victims or taking of DNA samples. All forms of gathering evidence that entailed further (forensic) examination were excluded. Still, the use of coercive measures was thus not entirely excluded from the proposal. Exchange of evidence that has been obtained by search and seizure or a production order would be possible.

Like the preceding mutual recognition instruments, also the EEW proposal sets a time limit for the procedure of issuing and executing a request. Decisions to refuse
the recognition are to be notified within ten days of the receipt of the warrant. In cases where the warrant would be accepted for execution, it would then have to take place within 60 days. To ensure speedy processing of requests for evidence, these are to be standardized by the use of a single form in the annex to the framework decision proposal. The Commission also introduced a restricted number of grounds on which requests for evidence could be refused. Only two grounds for refusal were provided in the proposal. It was provided in cases where the ne bis in idem principle would be violated and in cases where an immunity or privilege under the law of the executing state makes it impossible to execute.

Like the European Arrest Warrant Framework Decision the Commission also included a provision whereby the double criminality requirement was limited to the extent that it could not be used as a ground for refusal in relation to 39 offences (for which there was no common criminal code at the EU level to fall back on). Seven more crimes were added to a list that already contained 32 offences that were identified in the European Arrest Warrant decision. With the expansion of the crimes list prohibiting the double crime check the Commission hoped to diminish further the grounds for refusal. The Commission also included a so-called sunset clause in the proposal, according to which the double criminality check could be used as a ground for refusing evidence warrants only within a five-year transitional period. Afterwards, it was to be banned completely – at least, only with regard to the 39 offences listed in the proposal.

As the discussions on the EEW proposal took place in the third pillar, where the Commission and European Parliament did not have much influence on the final drafting of the proposal, the locus of the discussions on the drafting was exclusively situated within the Council. Therefore, there was no substantive interaction at the interinstitutional level between Council, Commission, and Parliament. Discussion proceeded in a series of meetings at various levels in the Council, from the national expert level meetings at the working party level, upwards to national senior official level of the CATS, subsequently the diplomatic level of the Coreper and the JHA Counsellors’ group and the ministerial level of the JHA Council. These subsidiary and principal bodies of the Council were engaged in over fifteen (sometimes closely interrelated) issues.

In the next section an overview is presented of the various issues that have featured on the EEW agenda. In that light, thirteen discussion threads have been identified and analysed. Of each discussion thread a short summary of the issue is
Negotiating the EEW

provided in Table 4.1. The aim of this section is to chart the changes and shifts that have occurred in each of the discussion threads, as well as the frequency, duration, size, and/or the composition of meetings. The analysis is based on the coding and structuring of data enclosed in 75 policy documents.

In the third section, findings are presented on the nature or mode of discussion and the conditions of the various settings in which the EEW discussions took place. The aim of this part of the analysis is to present a narrative of how the discussion at each of the policy levels were conducted and in what sort of setting they took place. This analysis is based on the coding and structuring of data enclosed in thirteen interview transcripts. This chapter concludes with an overall analysis of the changes that have occurred in the course of the process in conjunction with the nature of the discussions and the factors that have conditioned the nature of discussion.

4.2 The unfolding of the EEW process

The theoretical focus of the analysis in this section is on systematic interaction and reorientation. With regard to systematic interaction, frequencies of discussions were examined at the various levels of discussion on each of the issues. In order to conduct this analysis a number of discussion threads were first identified. Then, findings were presented of the examination of instances of documented change, that is: of reported occurrences of shifts in position, acceptances of parts of compromises, or complete agreements in various stages of the process. The analysis presented in this section is entirely based on the examination of data collected from 75 policy documents. The overall picture provided in this section is therefore an analysis of the process as it has been formally documented in policy documents.

Even though the documents did not provide accurate verbatim accounts of the discussions, they did provide an account so rich that key subjects, outstanding issues, and negotiation positions of each and every official meeting – in the Council working structures – could be identified. It enabled this analysis to formulate quite a complete picture of the appearance of the various (key) issues on the agenda of meetings and of the shifts and changes in negotiation positions that occurred in the process.

In the next subsection, a timeline of the process is first presented. Then, in Subsection 4.2.2, an overview of the fifteen discussion threads and an outline of the issue dominating in each discussion thread is provided. In Subsection 4.2.3 the findings of an examination of the frequencies of the formal meetings and of the appearances of the issues at the meetings are presented. This section concludes with an overview of the shifts and changes in negotiation positions that occurred in the process.

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4.2.1 The timeline of the EEW process

The EEW process was launched with a meeting of the Council Working Party on Cooperation in Criminal Matters (hereinafter: ‘Copen’) on 25 June 2004. The process came to an end when the JHA Council reached political agreement on 2 and 3 June 2006. In reaching this political agreement, 51 meetings at various Council levels had been held. The period between June 2004 and June 2006 is the period during which all interested parties were actively involved in the negotiations on the EEW instrument.

The legislative process involved four Presidential cycles. The first Presidency actively involved in the process was held by the Netherlands. On 1 July 2004, it took over from Ireland’s EU rotating Presidency – just a week after the EEW process started with Copen’s first discussions of 25 June 2004. The EEW dossier did not feature on the agenda of any of the Council meetings at ministerial level during the Dutch Presidency. From 1 January 2005 until 1 July 2005 it was Luxembourg’s turn. In that period two ministerial Council meetings took place where the EEW draft was discussed. The first ministerial Council meeting in that period took place on 24 February 2005 and the other on 2 to 3 June 2005.

The UK was next, from 1 July 2005 until 31 December 2005. Also in this period, two ministerial Council meetings were scheduled where the EEW draft featured on the agenda. One on 12 October 2005 and one on 2 to 3 December 2005. The UK Presidency attached high importance to the EEW draft for the December meeting. It reminded the other delegations that according to the Hague Programme the end of 2005 was set as the deadline of the legislative EEW process. In anticipation of the December meeting discussions were intensified. To no avail, however. It was only during the subsequent Presidency, held by Austria, that a political agreement was reached. During this Presidency – which lasted from 1 January until 1 June 2006 – three ministerial Council meetings were held. One on 21 February, one on 27-28 April and one on 1-2 June 2006. It was at the latter meeting that political agreement was reached.

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Before discussions started, the European Parliament had already its first Report on the EEW proposal issued on 22 March 2004. (European Parliament 2004) It appointed the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (the LIBE Committee) as the committee responsible for preparing the Report. The Committee proposed six amendments and approved the proposal as it was amended by the Commission. A second Report was issued in October 2008. The second Report was needed because “the Council had significantly modified the proposal after the adoption of the first opinion.” The Rapporteur responsible for the second Report, (Gérard) Deprez, expressed a rather dismissive view on the outcome reached in the EEW process. In the Report he observed that “It seems to the rapporteur that the text approved by the Council not only reflects an initiative void of any ambition, but also proposes the introduction of muddled and even inconsistent arrangements” (European Parliament 2008a: 35). The Parliament was only heard and the Council pursued its own course. The influence of the Parliament in the process was virtually non-existent. As the Rapporteur, Deprez, himself has put: “nobody was interested in the position of the EP. There was no contact whatsoever”.

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16 Deprez was member of the liberal-centrist Political Group of the Alliance of Liberals and Democrats for Europe (ALDE).
17 Interview 1/3/2011 (Qt 89:2).
4.2.2 Identifying issues, frequencies and changes in the EEW process

Throughout the EEW drafting process fifteen discussion threads have been identified. Table 4.1 provides an overview of the discussion threads and an outline of the issues that dominated in each of the discussion threads (for a more detailed account see Appendix 3). The number of appearances of these issues in meeting agendas ranged from two to well over twenty. Some of them were short-lived – they required only a handful of meetings. Others covered a longer time span. There were even discussion threads that took the entire legislative process (two years). Discussion threads with long lifespans, sometimes with intervals, kept the delegations engaged at various levels of policy making.

Overall, 51 meetings at various Council levels were held where the issues regarding the EEW instrument appeared. The largest share of the discussions on the EEW dossier was held at the working party level. The Copen convened sixteen times to discuss the file. The discussions at this level took place on average once every month. Second came the CATS and Coreper. The EEW file appeared ten times at each of these levels. The frequency with which the EEW file appeared on the CATS agenda was quite irregular. During the first two presidencies of the EEW process it appeared once a month. During the third (British) Presidency, the senior officials discussed the file once every quarter. During the last ‘EEW’ Presidency (the first half of 2006), the file was discussed only once at this level. The appearance of the EEW dossier on the Coreper agenda was also irregular. It was only during the last Presidency of the EEW process that the file appeared frequently on the Coreper’s weekly agenda. Of all the preparatory bodies in the Council involved in the EEW discussions, the number of official appearances was the least at the JHA Counsellors level. The file appeared in nine of their official meetings. Appearance were also quite irregular there. It appeared only twice during the British Presidency (the second half of 2005) and seven times during the Austrian Presidency. The EEW file appeared also seven times at the ministerial level. The frequency of the ministerial Council meetings (in the composition of JHA) was twice each half year.

In terms of appearance of the various EEW issues, the national experts of the Copen working party dedicated most frequently attention to almost all fifteen EEW issues. Thirteen of the fifteen issues appeared 43 times in the working party meetings (see Table 4.2). The EEW issues were least debated at the CATS level. There, the senior officials paid attention to the issues only 31 times. They appeared 36 times at the Coreper level. The ambassadors of the Coreper dedicated most of their time on the ‘common definitions’ and ‘territoriality clause’ issues. EEW issues appeared 38
Table 4.1 Overview of discussion threads in the EEW process

<table>
<thead>
<tr>
<th>Discussion thread &amp; issue(s)</th>
<th>Outcome</th>
<th>Length discussion thread</th>
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</thead>
<tbody>
<tr>
<td>1. ‘Mixed Committee Procedure’</td>
<td>Should the EEW proposal at Council working party level be negotiated in the Copen Working Party or in the ‘Mixed Committee’, where in addition to the EU member states also the countries participating in the Schengen cooperation are allowed to negotiate?</td>
<td>The EEW dossier remains in the Copen.</td>
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<tr>
<td>2. ‘Scope of the EEW’</td>
<td>Should there be a step-by-step approach whereby the EEW instrument is but one of several legal instruments regulating cross-border transfer of evidence? Or should the EEW instrument provide one single legal framework regulating all kinds of cross-border transfer of evidence?</td>
<td>A step-by-step approach is the only way forward.</td>
</tr>
<tr>
<td>3. ‘Number of Offences on the List’</td>
<td>Should the crimes list (for which double criminality requirement was to be abolished) be reduced from 39 to 32 offences?</td>
<td>The crimes list of 32 offences was maintained.</td>
</tr>
<tr>
<td>4. ‘Sunset Clause’</td>
<td>Should the ‘sunset clause’ be maintained?</td>
<td>The sunset clause was dropped from the text.</td>
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The ministers of the JHA Council were the least engaged in the EEW discussions. EEW issues appeared twenty times altogether on the agenda of the JHA Council.

Still, the findings established so far are not conclusive on the degree of systematic interaction at each level in the EEW process. The number of appearances of the EEW file and the attention to each single issue identified at each level are not a
Chapter 4

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<td>5. ‘Threshold for double-criminality check’</td>
<td>Should there be a threshold for the offences of the crimes list, by virtue of which the double-criminality check would be allowed if the maximum punishment for the offence concerned would be lower than the minimum threshold laid down in the EEW instrument? The threshold (as provided in for instance in the European Arrest Warrant decision) was maintained.</td>
<td>It covered a total of two meetings (1x Copen; 1x ministerial Council meeting).</td>
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<tr>
<td>6. ‘National Security Interest’</td>
<td>Should there be a clause according to which an evidence warrant may be refused if execution would prejudice national security interest of the executing state? The clause was included in the text, and also recital according to which member states were expected to use the clause only when it would be used in a similar domestic case.</td>
<td>It covered a total of fifteen meetings (2x Copen; 3x CATS; 5x JHA Counsellors; 4x Coreper; 1x Council meeting).</td>
</tr>
<tr>
<td>7. ‘Jurisdiction Electronic Data’</td>
<td>Should there be the possibility of disclosing electronic (customer) data of a person, upon production of an evidence warrant, by a member state where the data is stored but where the person does not live? The provision concerned was dropped from the text, but the definition of ‘data availability’ was broadened (so as to cover also electronic accessibility). Concurrently, a separate declaration was to be adopted whereby the Council agrees to vouch for a quick adoption of a legislative instrument facilitating cross-border investigation into international information networks.</td>
<td>It covered a total of nine meetings (3x Copen; 1x CATS; 1x JHA Counsellors; 2x Coreper; 2x Council meeting).</td>
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complete representation of the discursive effort made at each Council level. This is for two reasons. Firstly, there were considerable differences in terms of agenda constraints. At the CATS and Coreper levels, discussion time was much more restricted. For both the senior officials of the CATS and for the ambassadors of the Coreper, the EEW dossier was just one of the various topics of the agenda of their meetings.
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<th>Outcome</th>
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<tbody>
<tr>
<td>8. ‘Co-existence with treaties on mutual assistance’</td>
<td>A recital in the preamble of the text was inserted, stating that the EEW instrument should co-exist with existing mutual assistance procedures (like those provided by the 1959 European Convention on Mutual Assistance).</td>
<td>It covered a total of five meetings (3x Copen; 2x CATS).</td>
</tr>
<tr>
<td>9. ‘Privileges and Immunities’</td>
<td>A recital in the preamble of the text was inserted that would clarify the scope.</td>
<td>It covered a total of seven meetings (1x CATS; 1x JHA Counsellors; 4x Coreper; 1x Council meeting).</td>
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<tr>
<td>10. ‘Retained Telecommunications Data’</td>
<td>Retained telecommunications data was excluded from the scope.</td>
<td>It covered a total of twelve meetings (2x Copen; 2x CATS; 4x JHA Counsellors; 3x Coreper; 1x Council meeting).</td>
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<tr>
<td>11. ‘Legal Remedies’</td>
<td>A recital in the preamble of the text was inserted that would clarify the scope.</td>
<td>It covered a total of nineteen meetings (5x Copen; 3x CATS; 4x JHA Counsellors; 3x Coreper; 4x Council meeting).</td>
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</table>
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<tr>
<td><strong>12. ‘Definition of Issuing Authority’</strong>&lt;br&gt;Should the definition ‘issuing authority’ be broadened so as to cover also police authorities (or only judges, prosecutors and magistrates)?</td>
<td>Whenever a warrant is issued by a policy authority, validation by a judge or magistrate is required (only in cases where search and seizure is needed). This requirement is premised on the basis of reciprocity (i.e. if one member state requires from another member state a validation procedure, then the latter is also entitled to demand the same from the former in similar cases).</td>
<td>It covered a total of twenty meetings (9x Copen; 5x CATS; 3x JHA Counsellors; 3x Coreper).</td>
</tr>
<tr>
<td><strong>13. ‘Proportionality Principle’</strong>&lt;br&gt;a. Should there be a clause according to which an evidence warrant may be refused in cases where the warrant would not have been issued or executed in a similar, domestic case?</td>
<td>A clause on proportionality was inserted.</td>
<td>It covered a total of sixteen meetings (6x Copen; 2x CATS; 3x JHA Counsellors; 4x Coreper; 1x ministerial Council meeting).</td>
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<tr>
<td>b. Should the executing state be obliged to execute coercive measures that would not have been possible in a similar domestic case?</td>
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<td><strong>14. ‘Common Definitions’</strong>&lt;br&gt;Should there be a list with legal definitions of all the (32) offences listed in the crimes list?</td>
<td>An opt-out clause for Germany in which it is allowed to reserve its right to make the execution of warrant subject to verification of double criminality in certain cases.</td>
<td>It covered a total of twenty-one meetings (1x Copen; 4x CATS; 8x JHA Counsellors; 5x Coreper; 3x ministerial Council meeting).</td>
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When the EEW file appeared at a Coreper meeting, for instance, it was one of about five JHA agenda items which, in their turn, formed one among a myriad of other
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The national experts of the working party and the JHA Counsellors were less constrained by their agendas. National experts usually had two full days to discuss in full detail all the ins and outs of the EEW instrument and the JHA Counsellors also had more time to concentrate on EEW issues (more detail on the latter, see next section).

Secondly, an indefinite number of exchanges on the EEW file also took place outside these formal, plenary settings. In fact, several documents, which are in principle reports of the official, plenary meetings, also referred to instances of “informal consultations” or “bilateral consultations”. On two occasions informal discussions were reported at CATS level. Yet, most passages in policy documents reported bilaterals or informal consultations at the JHA Counsellors and Coreper levels. The joint meeting of the JHA Counsellors and Coreper ambassadors on 8 December 2005 was documented as a plenary session that winded up a round of “informal consultations” on a

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<td>15. ‘Territoriality Clause’</td>
<td>A restricted version of an optional clause was included in the text. It was agreed that warrants may be refused only if the decision/refusal concerned is taken “in exceptional circumstances and on a case-by-case basis, having regard to the specific circumstances of the case”. Moreover, member states which would transpose the clause into national law, were required to submit a notification to the Council Secretariat. On top of that, if a national judicial authority would decide to refuse a warrant on the ground of territoriality, it was obliged to first consult Eurojust and if the authority were not to agree with the ensuing opinion of Eurojust it would then have to inform the Council about its motivation.</td>
<td>It covered a total of twenty-seven meetings (4x Copen; 5x CATS; 8x JHA Counsellors; 6x Coreper; 4x ministerial Council meeting).</td>
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</table>

policy items. The national experts of the working party and the JHA Counsellors were less constrained by their agendas. National experts usually had two full days to discuss in full detail all the ins and outs of the EEW instrument and the JHA Counsellors also had more time to concentrate on EEW issues (more detail on the latter, see next section).

selection of the thorniest issues of the EEW agenda – including the ‘common definitions’ and ‘territoriality’ issues.\textsuperscript{20} Informal discussions at the Coreper and JHA Counsellors levels were also reported in the first half of 2006, when all parties prepared for the final Council meeting in June 2006.

Identifying a theoretically meaningful variation in the occurrence of interest change across fifteen discussion threads debated in 51 meetings across five levels of Council decision making, appears to be a challenge (for an overview see Table 4.3). If one takes into account the transition from one stage to another that can be distinguished at the halfway point of the EEW process, interesting conclusions can still be drawn. Halfway the process there was a marked transition from the initial stage where the national experts of the Copen working party and the senior officials of the CATS were the principal interlocutors to the final stage where the JHA Counsellors and the ambassadors had an almost exclusive role in the discussions. The transition was identified at a point when the Copen working party had its last meeting on 3 and 4 November 2005 and the JHA Counsellors had their first official meeting on 9 November 2005. From then on the EEW discussions were practically taken over by the JHA Counsellors and the ambassadors.

In the initial stages, when the ‘capital-based’ discussants of the Copen and the CATS held sway, two full agreements – on the ‘coexistence of EEW’ and ‘the scope of the EEW instrument’ – were detected. Other agreements in that stage concerned a preservation of status quo or an institutional decision (on the ‘Mixed Committee Procedure’ issue). As regards the status-quo agreements, delegations agreed to actually

Table 4.3 Overview of the discussions in the EEW process

<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
<th>Issues Discussed</th>
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<tbody>
<tr>
<td>1. Copen 25 June 2004</td>
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<tr>
<td>2. Copen 1 July 2004</td>
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<td>3. CATS 25 &amp; 27 July 2004</td>
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<td>4. Coreper 28 August 2004</td>
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<td>5. Copen 25 September 2004</td>
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<td>6. Copen 15 September 2004</td>
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<td>7. Copen 16 September 2004</td>
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<td>8. CATS 7 October 2004</td>
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<td>9. Copen 13 &amp; 14 October 2004</td>
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<td>10. CATS 11 &amp; 12 November 2004</td>
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<td>12. Copen 21 December 2004</td>
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<td>13. CATS 17 &amp; 18 January 2005</td>
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<td>15. CATS 7 February 2005</td>
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<td>16. Council 24 February 2005</td>
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<td>18. Copen 12 &amp; 13 April 2005</td>
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<td>21. Coreper 19 May 2005</td>
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<td>22. Copen 26 &amp; 27 July 2005</td>
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<td>23. CATS 20-22 September 2005</td>
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Table 4.3 Overview of the discussions in the EEW process

<table>
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<tr>
<th>Date</th>
<th>Discussion topics</th>
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<tr>
<td>36. Coreper 8 December 2005</td>
<td>'co-existence EEW' discussed</td>
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<td>37. JHA Counsellors 14 February 2006</td>
<td>'common definitions' discussed</td>
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<td>38. Coreper 16 February 2006</td>
<td>'jurisdiction electronic data' discussed</td>
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<td>39. Council 21 February 2006</td>
<td>'national security interests' discussed</td>
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<td>40. JHA Counsellors 17 March 2006</td>
<td>'number list offences' discussed</td>
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<tr>
<td>41. Coreper 12 April 2006</td>
<td>'proportionality &amp; measure availability' discussed</td>
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<td>42. JHA Counsellors 24 April 2006</td>
<td>'retained telecommunications data' discussed</td>
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<tr>
<td>43. Council 27 &amp; 28 April 2006</td>
<td>'scope of EEW' discussed</td>
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<td>44. CATS 16 and 17 May 2006</td>
<td>'sunset clause' discussed</td>
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<td>45. JHA Counsellors 22 May 2006</td>
<td>'territoriality' discussed</td>
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<td>46. Coreper 24 May 2006</td>
<td>'threshold' discussed</td>
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<td>47. Coreper 31 May 2006</td>
<td>'accuracy' discussed</td>
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<td>48. JHA Counsellors 29 May 2006</td>
<td>'privacy &amp; confidentiality' discussed</td>
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<tr>
<td>49. Coreper 31 May 2006</td>
<td>'performance' discussed</td>
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<tr>
<td>50. Council 1 &amp; 2 June 2006</td>
<td>'reliability' discussed</td>
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*discussed = state of play remains unaltered (differences and/or partial agreements maintained)
*acc. (acceptance) = agreement has partially been reached
*Agr. = complete agreement reached*
re-establish elements that were missing or modified in the Commission proposal and which featured in previous instruments such as the European Arrest Warrant. Such was for instance the case with the number of offences on the crimes list. While the Commission proposal aimed at a further restriction of the double-criminality check through extension of the crimes list (by adding yet another seven offences), the delegations in Copen agreed to maintain the erstwhile number of 32 offences. As regards other instances of interest change in the initial stage, eight shifts in position were reported, of which three were of importance for the progress (three consecutive movements on the ‘territoriality’ issue).

In the period after November 2005, which covered only one quarter of the EEW process, ten agreements were struck of which three were partial agreements. Nine shifts were detected in that stage, of which five were significant in that they involved a position change of several delegations or the lifting of one remaining reservation. Also in this stage, some of the agreements then reached did not modify substantially the situation for any of the delegations. It was on two occasions that it was agreed to remove the issue from the EEW agenda and to defer discussions to a later, apparently more opportune moment. It concerned the question of ‘jurisdiction electronic data’ and the issue of ‘retained telecommunications data’.

4.3 Identifying the nature of discussion in the EEW process
In order to examine whether the occurrences of position change and agreement identified in the previous section were indeed instances of reorientation – flowing from occurrences of deliberation – the focus in this section is on the evidence regarding instances of deliberative exchange (i.e. reciprocity and reflexivity). Through the analysis of thirteen interview transcripts interpretations of participants, observers and first-hand accounts of the EEW discussions were examined. Alongside possible occurrences of reciprocity and reflexivity, the transcripts have also been assessed on qualifications referring to conditions: insulation, systematic interaction, non-state access, and voting rule. Taking into account the consideration made in the previous section that the data in policy documents reporting frequencies of issues and meetings did not provide a complete picture of systematic interaction, further inquiry is needed on this condition as well.
4.3.1 Institutional setting and the role of the Presidency

As noted earlier in this chapter, the ‘communicative space’ of the EEW process was exclusively situated in the Council structures. The national experts of the Copen working party, the senior officials of the CATS, the JHA Counsellors, the ambassadors of the Coreper and the ministers of the JHA Council had a joint role in moulding the EEW proposal into an instrument that was to work for all member-state justice authorities. Since the legislative process regarding the EEW fell under the rules of the consultation procedure, no discussion at all took place between the Council and the European Parliament. As the Rapporteur who was responsible for the Parliament’s Report on the EEW Framework Decision has pointed out: ‘There was no contact whatsoever.’

Two opinions were nevertheless issued by the European Parliament. It issued a first Report in March 2004, before the Council started discussions. (European Parliament 2004) Just after the Council reached agreement on the EEW draft, the Parliament’s LIBE Committee adopted a second opinion, because it held that “the Council had significantly modified the proposal after the adoption of the first opinion.” In this report a rather dismissive view was expressed on the outcome reached in the Council. In the Report the Rapporteur observed that “that the text approved by the Council not only reflects an initiative void of any ambition, but also proposes the introduction of muddled and even inconsistent arrangements” (European Parliament 2008a: 35). An interpretation of what the Rapporteur noted is that the EEW discussions, which took place exclusively in the Council, lacked any effort to shape an interinstitutional understanding on the outcome. Unfortunately for the Parliament, it was not able to affect the discussions in the Council, since it was not a co-legislator in the field of justice cooperation and was therefore not considered a serious partner in the discussions.

By the time the EEW draft was hammered out by the Council working structures, nobody in the Council saw the need to discuss it all over again with the Parliament. As a respondent, who participated as national expert in the Copen discussions on the EEW instrument explained:

‘It is not that we don’t care about the Parliament, it is that the process makes it like that. We were unable to take into account the opinion of the Parliament, because we had already almost an

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21 Interview 1/3/2011 (Qt 89:2).
Even though the Commission tabled the legislative proposal, its role in the EEW discussions was not significant either. Unlike the first pillar setting, where it could use the potential of collaboration with the European Parliament to influence the process, the Commission was not considered a full partner in the discussion. It was observed that no threat, in whatever form, from the Commission to withdraw its proposal could be taken seriously by the delegations in the Council.

The role of coordinator and honest broker in helping to ‘move things forward’, that often in literature has been ascribed to the Commission, was in the reporting of the EEW negotiations not demonstrated either. Rather, policy documents reported, on occasion, that the Commission took sides with either of the parties according to the issue under discussion. It showed ownership during negotiations in formal settings. During informal consultations, the Commission’s role was insignificant. A Commission official explained that:

“We had a stake! And we had actually a very strong import into the working party discussions. But those were the formal settings! [But the] informal bilateral talks. […] This is where you make the breakthrough! And there you can’t invite the Commission (…).”

Generally, the officials representing the Commission in the EEW discussions were not fully involved in the frequently held informal consultations at one of the, as it turned out, influential levels in the Council structures: the JHA Counsellors’ level. As there was for each proposal always a different person representing the Commission, Commission officials were usually not that closely involved in the informal network of the JHA Counsellors (who were always the same persons). An official who represented the Council Secretariat at JHA Counsellor level observed that: “from the Commission, for each file there is a new person; it is difficult to establish contacts.”

To conclude on the Commission’s role, no indication has been found of it having a serious effect on the
nature and course of the discussions – or the occurrence of deliberation for that matter – in the EEW process.

As far as the role of the Presidency, it appeared that it took up exclusively the role of honest broker. Its role of compromise broker seemed almost ‘all-pervasive’ in the EEW process. Of the 75 policy documents there is not one document that leaves the Presidency’s role of compromise broker unmentioned. As someone who at the time acted as representative on behalf of the Commission noticed: “it is the requirement from any Presidency to try as best as it can, as hard as it can, to come to a compromise solution which is acceptable to everyone.”

Various observations about the behaviour of the Presidency during the EEW discussions substantiate the finding that it played persuasively the role of compromise broker. Reference was made on how the Presidency tried to “isolate specific difficulties”, “find solutions individually” and “then consolidate them in a compromise package”. This way it ensured that, considering the unanimity rule, any amendment proposed by a member state delegation was taken into account. Which was quite demanding, since not all proposed amendments could be included, at least not integrally, into the consolidated EEW text. Just as all delegations, the Presidency was involved in a process where, as it was put so aptly by a Commission official: “any amendment in the discussion process would have to be taken into account, unless you could convince a given member state that this was really unnecessary.”

Clearly, the constraints of the unanimity rule forced the Presidency – and other delegations – to at least take seriously the position of the other, even though at times the motivation of a delegations’ position was questioned. In that respect, it has often been referred to that this focus on each single amendment, and the discursive effort to keep the number of amendments to the barest minimum possible, resulted in a watering down of the EEW proposal. As it was observed by a senior official of the Council Secretariat:

“[…] it was just a normal classical intergovernmental by unanimity negotiation. And what happened was that we watered down, watered down, watered down, watered down. And found exceptions, and then exceptions to the exceptions, and so on.”

29 Interview 29/4/2011 (Qt 92:17) with an official of the European Commission who was temporarily seconded to a Permanent Representation of a country that held the half-year Presidency (see also Qt 92:20).
30 Ibid. (Qt 92:3).
31 Interview 18/6/2010 (1) (Qt 88:7).
The Presidency seemed to be crucial in trying the keep number of amendments – i.e. exceptions and grounds for refusal – as low as possible. In that light, it was reported that the Luxembourg Presidency showed the skill and knowledge to challenge successfully delegations at working party level in their attempts to have their amendment included in the text. A delegate observed that at a Copen meeting the Luxembourg chairman:

‘was a magistrate. He really knows well the German law, the Belgian law, … and sometimes when the delegates were saying something, he was really able to say ”but that’s not what is in your law”. He was sometimes really able to say ”What’s your real problem! Explain it!” And the delegation was not really able to explain what was the reason behind its reservation.”

Basically, this text passage represents an instance whereby the Presidency invited the delegation to present arguments which would induce the Presidency – and other delegations – to understand and accept the delegation’s position and related amendment. Similar observations were also made by another respondent.

It has also been reported, however, that invitations of presidencies to delegations to argue their positions, were viewed as pressure by presidencies “pushing for it to happen”. This was reported at the JHA Counsellors’ level. Respondents who reported this, thought that this practice inevitably resulted in a watering down of the text “until everyone agreed in one way or another”.

The workload of the Presidency for achieving a successful outcome in the EEW process was big. It not only had to manage an unusually large number of formal meetings at all levels in the Council structures. The Presidency also had to manage an undetermined number of “bilateral, multilateral meetings with specific delegations” which was particularly substantial in the later stages of the EEW process. On top of that, it had to see to it that amendments were processed in drafts and positions of national delegations processed in working documents. In that light it was observed that the Presidency had to ensure that it was “be given time between the meetings to reflect. To present new proposals.”

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32 Interview 25/2/2011 (Qt 90:41).
33 Interview 6/6/2012 (Qt 2:12).
34 Interview 27/6/2011 (1) (Qt 98:8) and 27/6/2011 (2) (Qt 99:12).
35 Ibid.
36 Interview 7/4/2011 (Qt 94:1 and 94:4).
37 Ibid.
As with most if not all legislative processes, the Presidency determined the pace, structure and progress of the EEW drafting process. Presidencies, especially the UK and Austria Presidencies, had a keen interest in moving the agenda forward. As there was little progress and the presidencies were keen on bringing the process to a close, the EEW discussions were in a later stage transferred to the Brussels-based levels. As the policy documents have shown, this period witnessed a shift from the working party and CATS levels to the JHA Counsellors group and the Coreper level, as well as an intensification of debate at the latter levels. A JHA Counsellor noted in that regard that even though “some delegations were never happy and were still trying to return it to the experts, to try to get an agreement, but this depended on the Presidency.”

Evidence has shown that the General Secretariat of the Council enjoyed, in assisting the Presidency, significant influence on the progress of the discussions. It always participated in informal consultations, also at the ministerial level. It was present during the discussions that were held separately, between a smaller group of delegations, at the final Council meeting of 2 and 3 June 2006. On these occasions, the Secretariat provided expertise, alternative solutions and focus in helping out the Presidency and the delegations involved in order to find a compromise.

Moreover, the Secretariat’s unit on ‘Fundamental Rights and Criminal Justice’ of Directorate-General ‘H’ – dealing with all aspects of the entire JHA field – was considered to be at the centre of the network of ‘Brussels-based’ and ‘capital-based’ communication. It prepared formal and informal meetings at various levels. Its central role in the Council’s working structures and its expertise and knowledge in the JHA field made the Secretariat’s services indispensable for the presidencies’ efforts to move the agenda forward. It sometimes helped the Presidency to create momentum by singling out delegations that grew tired of stalled negotiations and were sensitive to the Presidency’s (and Secretariat’s) compromise proposals. It also helped in working out compromise texts that worked for delegations as a face-saving alternative – even though its contents boiled down to the same content.

Often, referral was made to the facilitating role of the Secretariat in providing a network of communication and social contact at the JHA Counsellors’ level. It

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38 See interviews 7/4/2011 (Qt 94:74); 12/5/2011 (Qt 96:3) and 28/6/2011 (Qt 100:47).
39 Interview 28/6/2011 (Qt 100:47). With a JHA Counsellor of the Luxembourg Permanent Representation.
40 Interviews 18/6/2010 (1) (Qt 88:5), 12/5/2012 (Qt 96:46), 27/6/2012 (1) (Qt 98:26).
41 Interview 5/7/2012 (Qt102:10).
42 Ibid.
43 Interviews 4/7/2011 (Qt 94:38); 5/5/2011; 27/6/2011 (1); 27/6/2011 (2).
thereby created a sort of ‘we-feeling’ among the JHA Counsellors as the ‘Brussels-based experts’ of criminal justice. Organizing regularly informal meetings and even social events outside office hours by the Secretariat was considered to be designed to make discussions at this level easier. A former JHA Counsellor illustrated this practice as follows: the Secretariat “tried always to set these JHA Counsellors meetings, in criminal law, as a kind of ‘family’ [...].”

4.3.2 The formal and informal settings of discussion

Even though much has been said in the previous section on systematic interaction, findings based on the interview transcripts seem to overlap pretty much with the findings already reported in the previous section. Firstly, it has been observed by almost all respondents that the EEW process covered an unusually large number of meetings, especially at the working party and JHA Counsellors levels.

The number of formal meetings at working party level was considered particularly high. The large number, as the respondents explained, was attributed to the high degree of difficulty of the subject matter. A delegate to the Copen working party noted that the Brussels-based share of the EEW discussions was unusually high. One respondent even confused the number of official JHA Counsellor meetings with an average volume of EU negotiations on a single legislative instrument. At first he thought there were only two to four formal, plenary meetings at the JHA Counsellor level, but then he realized that in the case of the EEW the number was unusually high (totally nine).

It also appeared from the interviews that, due to the many informal talks, the share of discussions in the Brussels-based final stage of the EEW process was even larger than that of the discussions in the initial, capital-based stage. As pressure for a final agreement was mounting, the number and frequency of meetings increased. Exchange at that stage became intense, given the growing number of informal consultations, bilateral contacts and multilateral meetings between the JHA Counsellors themselves and of the many contacts between them, on the one hand, and their respective ambassadors in the Permanent Representation and their respective national experts in the home capitals, on the other.

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45 Interview 27/6/2011 (2) (Qt 99:15).
46 Interviews 18/6/2010 (1) (Qt 88:56), 5/5/2011 (Qt 95:15) and 4/11/2011 (Qt 101:12).
47 Interview 12/5/2011 (Qt 96:75).
As will be discussed later, the number of informal consultations at the JHA Counsellors’ level alone was significant: they met from once a week to every second day.\textsuperscript{48} It has even been observed by a former national delegate who was involved in the EEW discussions at expert level, that as a ministerial Council meeting drew nearer there was more exchange in shorter time spans between the JHA Counsellor and his or her ambassador and there was less time for consultation with the capital-based expert.\textsuperscript{49}

In short, discussions became more Brussels-based not only because of the shift towards meetings at the JHA Counsellors and Coreper levels. They became Brussels-based also because consultations with the home capital decreased in conjunction with an increase of the volume of both formal and informal consultations at the Brussels-based levels, between the JHA Counsellors and ambassadors.

4.3.3 Involvement of delegations during discussion

There is evidence of varying degrees of involvement of delegations during discussions. It was reported that at working party level “a very limited number of delegations”, three to five delegations, took the lead in the discussions.\textsuperscript{50} Another respondent made almost exclusively referral to instances of discursive interaction between Presidency and single delegations at the working party level.\textsuperscript{51}

Also, respondents referred to situations at the JHA Counsellors’ and Coreper level where a group of key discussants carried discussions further on the thorniest of issues in smaller meeting rooms and informal settings.\textsuperscript{52} A respondent noted that at the Council meeting of June 2006 “real interaction” occurred among only four delegations on the territoriality issue.\textsuperscript{53} He noted that “in that discussion there was a sense of ownership.” Telling is the way how a JHA Counsellor official described, as an ‘outsider’, the heated talks on the territoriality issue among some key discussants at the JHA Counsellor level:

\textit{Quite a few member states who felt really strongly about this, at that time. (…) I had the feeling that there were things that I didn’t personally understand. During that time, because the debate...}
Negotiating the EEW

was so heated. As I remember it. And I really didn’t understand what the big problem was. In the sense that it seemed much more, to me, there seemed to be said things which weren’t said during the meetings. Which were sort of laying behind the scenes. 54

It was however also reported that discussants at the JHA Counsellors’ level got involved in a group-wide exchange of views and arguments. 55

Low involvement during discussion was related to a low degree of importance a member state attached to a certain issue. Delegates at the national expert level explained that delegations whose member state had a small stake on a particular issue were less inclined to engage in the discussion. 56 A relation has also been indicated between the degree of involvement and the qualities of a discussant displayed during discussion. Discussants who were less well-prepared or less well-versed in debating were less involved. 57 Personal qualities of a delegate could even make up for the size of the member state the delegate represents: a national expert observed that the delegates’ personal qualities enabled relatively small member state delegations such as the Luxembourg or Austrian delegations to actively participate in the EEW discussions. 58

The same was noted about the Luxembourg representation (in the person of the Minister for Justice Luc Frieden) at the ministerial level. 59 A national expert noted that at the JHA Counsellor level, a delegate possessed the ability to catch the attention of the Presidency and to entertain good relationships with other delegates in order to secure a place in small-setting discussions. 60

Another element that was identified in relation to the degree of delegation involvement was the limited experience in EU decision making of the delegations of the (then) ten newly acceded member states. At the time of the EEW discussions the delegates of the ten member states that acceded in 2004, still had to get used to the ways and customs of negotiating in the EU. A delegate of one of the ten newly acceded member states at the time admitted that:

‘we had to learn how to deal with this. At the very beginning, I would say, we were really learning. And it was the case in the evidence warrant as well. So of course we knew it was necessary to

54 Interview 27/6/2011 (1) (Qt 98:46).
55 Interview 27/6/2011 (2) (Qt 99:38).
58 Interview 4/11/2011 (Qt 101:34).
59 Interview 5/7/2012 (Qt 102:11).
60 Ibid. (Qt 101:45).
know the positions of others. To find alliances. But we were not very, I would say, we were not very effective.\textsuperscript{61}

All in all, these findings reveal a picture that discussions were mostly held among a restricted number of discussants who either took the lead during plenary sessions or were more frequently and actively involved in informal consultations and separate discussions. In that way, insulation during the EEW process worked in that there was detachment of discussion from the plenary setting, conducted within a restricted group of key discussants.

4.3.4 General nature of EEW discussions in the Council

Before analysing various aspects of the discursive setting and dynamics at each level of the Council working structure, it is worth noting that the overall EEW discussions got off on the wrong foot. What was not helpful for the discussions on the EEW proposal, was that when the Commission presented the proposal, it was not welcomed with open arms. According to some respondents, the member states were not yet ready for this step. A member of a Permanent Representation attending JHA Counsellors’ meetings thought “less is more” would always have been better than adopting an EEW instrument.\textsuperscript{62} There was a general mood, as it was noted by a few respondents, that could best be described with the one-liner “stop the MOP\textsuperscript{63}” A JHA Counsellor considered it “psychologically a huge step the fact that you have to execute a measure the other member state is requesting, despite the fact that the crime for which the measure is sought, in your country is not criminalized.”\textsuperscript{64} To him this concern went further than concerns related to sovereignty.

As the Commission EEW proposal was meant as a step towards a more comprehensive judicial framework for evidence exchange and criminal investigation procedures, there was widespread concern that any sort of concession would set a precedent with unforeseen consequences.\textsuperscript{65} In that light the head of unit at the Council Secretariat, (Hans) Nilsson, noted that:

\textsuperscript{61} Interview 12/05/2011 (Qt 96:10).
\textsuperscript{62} Interview 16/6/2011 (Qt 97:17).
\textsuperscript{63} ‘MOP’ is the French acronym for evidence warrant: mandat d’obtention des preuves.
\textsuperscript{64} Interview 28/6/2011 (Qt 100:9).
\textsuperscript{65} Interview 27/6/2011 (1) (Qt 98:3).
people had also the future in mind. So we did not, psychologically speaking, negotiate only on the text that we actually had. But also on possible future developments that the Commission would propose. That was the reason why people wanted to already put in a lot of grounds for refusal. Grounds for non-recognition. Which were strictly not necessarily in relation to the instrument that was at hand. But people negotiated as if it were the future.”

Despite the adverse negotiation climate, reference was routinely made to the all-pervasive presence of argument at all decision-making levels in the Council in the EEW process, also in policy documents. There were Council notes and documents issued by delegations which contained elaborate memoranda on the motivation of their position. These Council notes summarized arguments brought forward by delegations in support of their positions. Interview transcripts as well, show how discussants quite naturally engaged in discussions through the use of argument. A former national expert explained how important it was for him and for the ministry to be well-prepared for the discussions at working party level. More in particular, he attached great importance to consultation with his JHA Counsellor of the delegation before attending a meeting in the Copen working party:

“If I am the one taking the floor at the working group level, I can say what I want. If I have to communicate to somebody else the ideas, the arguments, I have to convince somebody else of the “bien fondée” of my grounds! So, this process [of consultation; slb] between her [the JHA Counsellor; slb] and myself was really, really, really important. And it has been the case for all the negotiations we had been following together. And there have been many. Ten or fifteen.”

Many sorts of grounds have been brought into the discussion over the EEW instrument to justify one's own position. Most of them boiled down to a reference to the specificity or integrity of the national legal (and constitutional) system in support of a proposal or amendment. Delegations invested much of their discursive effort in explaining “why our legal system is different” or “why for our country it is constitutionally impossible to accept”. Obviously, the delegates representing non-state institutions like the Com-

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66 Interview 18/6/2010 (1) (Qt 88:38).
68 Interview 4/11/2011 (Qt 101:10).
69 Interviews 18/6/2010 (1) (Qt 88:42); 29/4/2011 (Qt 92:12); 12/5/2011 (96:9); 27/6/2011 (1) (Qt 98:29; 98:27); 27/6/2011 (2) (Qt 99:23).
mission or the Council Secretariat were more concerned with references to common values or the EU ‘acquis’, or a ‘common judicial space’.\textsuperscript{70}

Although arguments were widely used, it still remains to be seen whether deliberative discourse did actually prevail in the EEW discussions. In other words, the question still is whether the discussants were disposed to listen and take in the arguments of the other discussant. A former member of a Permanent Representation who attended EEW discussions at all Council levels, observed a kind of tenacity lawyers (who, obviously, were predominantly present in the EEW discussions) were used to display:

‘my evaluation (…) is like this: everyone grows up with certain legal traditions, in a certain legal system. He or she is taught certain truths about the law. Not about positive law (…) just about the concept ‘law’. How law should look like. What it is all about. But this concept, though it is based on the same philosophical writings, it is taught in each country in a different way. With different conclusions. So, with people [at the negotiation table; slb] who found themselves to be an expert, and believe me, I think you will agree, …. with lawyers, it is extremely difficult, they are very self-confident that they are right, and others are wrong. So with lawyers, debate is really very intensive.’\textsuperscript{71}

In the following subsections the findings of the examination of the setting and nature of discussion at each of the five levels of decision making in the Council are presented: the Copen working party, the CATS, the JHA Counsellors group, the Coreper, and the JHA Council. These findings are examined in light of the key theoretical notions of the deliberative model. While reorientation and some aspects of systematic interaction have already been discussed in the previous section, insulation, other aspects of systematic interaction, reciprocity, and reflexivity are at the centre of analysis in the following subsections.

4.3.5 Discussions in Copen

As noted earlier in this chapter, the Copen working party, or ‘Working Party on Cooperation in Criminal Matters’, was designated to deal with the EEW dossier. More specifically, it was a sub-formation of Copen. It consisted of experts or desk officers of the at the time 25 national ministries who were assigned to jointly work on the

\textsuperscript{70} Interview 6/18/2010 with the head of a unit at the Council Secretariat; Interview 9/5/2011 with a Legal Adviser at the European Commission.

\textsuperscript{71} Interview 12/5/2011 (Qt 96:9).
EEW file. Usually, for each legislative proposal always the same expert came to discuss it. This was also the case with the sub-formation of the Copen that discussed the EEW instrument.

Copen was the ‘lowest’ level in the Council’s hierarchy of decision making on the EEW file. Yet, reviewing observations made by respondents on the role and importance of the Copen working party in the EEW process, the conclusion is that it formed the ‘backbone’ of the EEW discussions. As it has been put by an official of the Council Secretariat who was involved in the EEW discussions at JHA Counsellor level, “the working party is the main structure for carrying out negotiations.” Discussions at working party level were considered the engine of the legislative process to the extent that the higher levels, of CATS, JHA Counsellors, or Coreper, could only act if the national experts had something for these levels to discuss. A former JHA Counsellor, who also acted as a national expert, noted that only when the national experts defined a problem, the JHA Counsellors then knew what to do.

A member of a Permanent Representation noted that it was for the Presidency to decide on the debate: when to “take that away from the experts, because normally the experts don’t really find solutions, they find the problems.” This is, as more respondents have pointed out, considered to be just as important.

The main reason for the inclination of national experts to detect problems is, as almost all respondents have referred to, their habitual focus on the legal-technical details of the subject matter. The usual way to proceed at working party level is to discuss a set of provisions per each session. “Two articles per two full days” as it has been figuratively observed by a former official of the Council Secretariat. According to a delegate who participated the EEW discussions at working party level, the reason for working party discussions is “to give expertise to the text”. Still, for all the expertise they had, the national experts were not allowed to attend meetings at Coreper and JHA Counsellors’ levels – while JHA Counsellors did attend working party meetings.

This being close to legal detail and text did have its drawbacks. As ‘legal technicians’ of the Council, national experts have their own personal, culturally

72 Interview 9/5/2011 (Qt 93:22).
73 Interview 25/2/2011 (Qt 90:47).
74 Interview 7/4/2011 (2) (Qt 94:47).
75 Interview 12/5/2011 (Qt 96:60).
76 Interview 27/6/2011 (1) (Qt 98:33).
77 Interview 5/7/2011 (Qt 102:3).
78 Interview 4/11/2011 (Qt 101:67).
79 Interview 25/2/2011 (Qt 90:36).
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imprinted convictions about (national) law.\(^{80}\) It has even been observed that, more than instructions from their respective ministries in their home capitals, it was the difficulty of distancing from the legal-technical complexity of the subject matter that made the national experts show less flexibility in the discussions on the EEW instrument.\(^{81}\) As a matter of fact, in several delegations the national expert was free to make his or her own instruction, albeit that validation by a higher ranking official in the ministry was still needed.\(^{82}\) This would mean that the ability of the national expert to detach from legal detail may have been at least as critical to her or his ‘*marge de manoeuvre*’ as the rigor or leniency of the instructions from superiors. A JHA Counsellor who attended working party meetings described the situation in the working party in that regard as follows:

‘I mean, one way of looking at it, is saying: there is less flexibility. But it is not always true. It is also the fact that they probably know more. To see the problems! And if you start changing at one end of the scale it has repercussions on the other end of the scale. And that is what the experts see. So, as soon as you try to rebalance something, they see new things evolving.’\(^{83}\)

This situation was especially problematic in the case of the EEW discussions, since the subject matter was considered to be extremely complicated.\(^{84}\) The subject concerned a legal framework that had to combine 25 different subsystems of procedural law of which each was deeply nested in the respective national legal system.\(^{85}\)

For all the concern for practical detail, especially in relation to the respective national system of procedural law, the interest of the final user, the judge, magistrate or prosecutor was not within the purview of the national expert. A delegate who was national expert at the time, found that both the basic issues and the interest of the final user were lost out of sight:

‘Some member states wanted to be very precise, to regulate every single, small … whatever thing. Which could never be doable in practice. And everything was regulated to the very, very, very, very, very, very, very…’

\(^{80}\) Interview 12/5/2011 (Qt 96:16).
\(^{81}\) Interview 28/6/2011 (Qt 100:11).
\(^{83}\) Interview 27/6/2011 (1) (Qt 98:38).
\(^{84}\) Interview 28/6/2011 (Qt 100:11); 5/7/2012 (Qt 102:1).
\(^{85}\) Interview 5/7/2012.
very small and concrete detail. It was not good any more. Too many exceptions! (...) And what was the basic discussion? (...) It was about 'mutual recognition'. About 'mutual trust'. Which means that if I send to you a request based on a mutual recognition instrument, you have to trust me. That I really need that what I ask from you. And without any further procedure, you will recognize and fulfil my request. But (...) we all were trying to find as much as possible grounds not to recognize.'

More or less the same observation was made by another delegate who acted also as national expert at the time. He pointed to the fact that even though all discussants had legal backgrounds, there was little awareness of what the implications would be for legal practice. The former national expert of the above cited quotation was convinced that most national experts were “law drafters” or “policymakers” and not practitioners.

Reference was recurrently made to the almost exclusively formal setting of the debates at working party level. It was noted that discussions at this level almost always took place in official settings where informal consultation rarely occurred. Discussions, therefore, were almost entirely subject to the rules on the conduct of meeting such as time limits on interventions or restrictions on full table rounds, which made it difficult to have a vivid discussion on any sort of issue. The size of the rooms, the physical distances between the discussants and the presence of interpreters did certainly not ease discussion. In that light, a member of a national delegation who attended the working party meetings on the EEW draft noticed that:

‘[…] the formal meeting is always very formal […], I mean, because you can’t escape this. You have interpretations. Simultaneous interpretations. It is in a real big room. You’re only talking in the micro. You see your own face on the computer because the room is so big that you can’t see everyone. So you have a small screen. You know! It’s formal! Because it is!’

Against this background, it is an arduous, if not impossible, affair for national experts who were well-versed in the complexities and legal intricacies of their own respective national legal systems to meaningfully exchange thoughts on evidence gathering and
admissibility of evidence in the European context. Rather, they seemed to be caught in a national legal reasoning that made them less attentive to the arguments of the other delegation. As an official of the Council Secretariat has put, the national experts “always try to achieve the best results for their country”.

They even lost sight of the sense and purpose of the EEW instrument, that is: they missed the basic point of mutual recognition and, hence, of mutual trust. Instead of developing the idea of mutual recognition into a practical instrument for the final user, ways were sought to build in yet another ground for refusal. On that aspect the JHA Counsellor who at the time participated in the EEW discussions as national expert, said that:

‘we were talking words about mutual trust and how we had to trust each other. But in practice we were trying to find whatever obstacles not to trust each other. And making it more complicated. After all, what is a ‘ground for refusal’? It means: “I don’t trust you!”’

Of course, during the discussions the national experts did not put it that bluntly. Rather, as the respondent of the above quoted passage explained, they mostly referred to the limited room they had for reflecting on the others’ arguments, due to the instructions. Often, they concluded their interventions with the assurance that they “inform the capital about the discussions we’ve had here these two days”.

A JHA Counsellor who attended the working group discussions, was more straightforward in her observation: ‘they are very obstinate, they say: “this is our national position. We cannot move!”

Interestingly, if a shift or a ‘move’ in positions at working party level was reported – for instance in relation to discussions on ‘national security interests’ and the ‘proportionality principle’ – then such moves were considered to have taken place in the context of an intervention of one delegation, and not of a group-wide exchange of thoughts and arguments that would pave the way towards a reasoned common understanding. In one instance, change was mentioned that followed from an intervention of a delegate who enjoyed credibility and clout in the group. However, a respondent who was a national expert at the time, attributed this change not only to eloquence or knowledgeability of a single discussant, but also to inadequate preparation of the other delegations. The respondent considered it to be a general feature of any discussion at working party level that:

92 Interview 7/4/2011 (Qt 94:30).
93 Interview 5/5/2011 (Qt 95:10).
94 Ibid. (Qt 95:21).
95 Interview 16/6/2011 (Qt 97:12).
‘not all of them are well prepared. (...) But in general, sometimes you feel that the discussion may … goes in one way … and just because one delegation said something in a very persuasive way at the beginning of the discussion and then they all follow. Then, suddenly there is someone who thinks that what the first said is stupid. So he says something else. And you feel that the others who followed the first, change. Sometimes it’s just the intervention of one person who is more persuasive. You know, that may have an effect on the whole discussion’.96

Another respondent, also a national expert at the time, related successful intervention and ensuing shift in orientation to the reflexive behaviour of the Presidency:

‘In the discussion between 25 delegations, it is always the case that only several interventions are really influencing the debate. And the chair who is responsible for summarizing the discussions, will consciously or not consciously be influenced by these decisive interventions.’97

Somehow, individual interventions were thought to be decisive also if they would be taken up by the Presidency in its reflection on the way forward.98

Except for interventions of a very few knowledgeable discussants, no general reference has been made to reflexive behaviour among delegations in general. Rather, national experts seemed to be caught in national legal reasoning of which not only the meaning and nuances were difficult to convey to their counterparts but also because of which they were less able to be attentive to the arguments of the others. A member of the Luxembourg Permanent Representation very pointedly described in that regard the way of reasoning at the working party level during the EEW negotiations:

‘Yes, it’s a formal way of negotiating. And also …. their mind-set is less focused to listening to the other and finding a compromise than to presenting their own position and trying to get your own wishes into the text. Trying to get your own wishes into the text that remained until the very end. But there is a difference, if you just reason them without taking into account what you’re hearing in the room or if you present them while you take into account what the others say. That’s a huge difference! And I think, at the experts level, at the working party level, the member states are more presenting their positions rather than interacting with the others. It is more of ”I’m coming here. I’m giving you my speech about my position on article 5. Explaining what my problem of article 5 is. And I turn to article 6.” It is not about really listening to what are the other people’s problems.

96 Interview ’25/2/2011 (Qt 90:28).
97 Interview 4/11/2011 (Qt 101:43).
98 Interview 25/2/2011.
And it’s not thinking how do I make sure that what I am asking for can be taken into account by the others who are bound to have a different position.99

4.3.6 Discussions in CATS

The idea was that discussants at CATS level would be, as higher ranking officials from respective ministries, more able to step back from detail and acquire more an overview of the subject matter than the national experts.100 At the same time, compared to the ambassadors of the Coreper, they were viewed as experts in the field of justice and police cooperation, who were more focused on the subject matter. For the ambassadors, justice and police cooperation was still “one of the 25 issues on the daily agenda”.101

Several references were made in policy documents to the supposed capacity of the CATS to provide direction to the discussions at working party level.102 For instance, in light of the discussions on the ‘scope of the EEW’ it “instructed the Working Party (…) to consider carefully whether the taking of statements of persons could be integrated in the European Evidence Warrant”.103 During the discussions on the definition of ‘judicial authorities’ it invited the national experts “to make explicit what other “judicial authorities” should be included next to a judge, a court, an investigating magistrate or a public prosecutor.”104

Various instances of the CATS instructing the working party to “explore further possibilities” were found in documents in relation to other issues.105 The CATS was also considered a “transmission committee” or a “filter” between the working party and the Coreper.106 If issues could not be resolved by the national experts and they were ‘political’ in nature, then the CATS would send them to Coreper. “Political” in this case meant “not technical”.107 The CATS very rarely sent this sort of issues to the JHA Counsellors, as the latter “were always viewed as the persons attached to the Coreper”.108 If

99 Interview 28/6/2011 (Qt 100:38).
100 Interview 9/5/2011 with a senior Commission official; Interview 5/7/2012 with former official of Council Secretariat.
101 Interview 9/5/2011 (Qt 93:17); 5/5/2011 (Qt 95:37).
102 Interview 7/4/2011 (Qt 94:95); Interview 5/7/2012 (Qt 102:8).
105 For example, Council document st08863 of 17/5/2005 or st11288 of 19/7/2005.
106 Interview 5/5/2011 (Qt 95:38); 27/6/2011 (2) (Qt 99:9); 5/7/2012 (Qt 102:15).
107 Interview 5/7/2012 (Qt 102:5).
108 Interview 12/5/2011 (Qt 96:72).
outstanding issues were ‘technical’ in nature then they would be sent back to the working party with further instructions.\textsuperscript{109} There was little appreciation for CATS’ role in the EEW process. One respondent observed that “usually a CATS debate will decide on minor technical issues and perhaps one orientation on issues of principle.”\textsuperscript{110} Another found that “very rarely progress” could be expected from this committee.\textsuperscript{111} Other respondents said much the same about CATS’ contribution to discursive progress.\textsuperscript{112} One respondent even wondered whether discussion at Committee level would ever have any added value: “nothing has ever been gained. There is no added value. Decisive action has never been taken.”\textsuperscript{113} He noted that the Committee or CATS level is one decision-making level too much. It is, in his view, either the CATS or the JHA Counsellors but certainly not both. One clear indication that the CATS played not much of a significant role in the entire discursive progress was the following observation:

“The problem with the CATS was, (…) which was the intermediary level, the aim of which was to settle the things that were unsettled by the working parties, (…) that simply the CATS repeated what was said at the working party level. It was not finding solutions. That was the problem! And this is why it has now no role in the legislative process. (…) it happened also with the evidence warrant. (…) more difficult matters were solved by the [JHA] Counsellors than by the CATS.”\textsuperscript{114}

It should not be surprising either that, assuming the low returns, discussions at this level were not seen as really demanding. The CATS merely settled for a simple majority in order to come at an agreement on a referral of an issue to either the Coreper or the working party.\textsuperscript{115} More discursive effort was not demonstrated. A JHA Counsellor observed that even though he saw more movement at the CATS level than at the Copen level, “people were sticking more to their position. Rather than trying to find a compromise […] It was rather still too rigid the way that things were done.”\textsuperscript{116}

It is to be noted that circumstances were not favourable at this level. Time limits seemed to have a constraining effect on discussions in the CATS. The examina-

\textsuperscript{109} Interviews 7/4/2011 (Qt 94:95; 5/5/2011 (Qt 95:38); 12/5/2011 (Qt 96:72).
\textsuperscript{110} Interview 9/5/2011 (Qt 93:17).
\textsuperscript{111} Interview 5/7/2012 (Qt 102:15).
\textsuperscript{112} Interview 7/4/2011 (Qt 94:95); 5/5/2011 (Qt 95:37).
\textsuperscript{113} Interview 6/6/2012 (Qt 2:31).
\textsuperscript{114} Interview 12/5/2011 (Qt 96:59).
\textsuperscript{115} Interview 12/5/2011 (Qt 96:69) and interview 5/7/2012 (Qt 102:19).
\textsuperscript{116} Interview 28/6/2011 (Qt 100:54).
tion of the various, diverse EEW issues was not only constrained by the low frequency of meeting at this level (on average once a month in the initial stage and once every quarter in the more advanced stages of the EEW process). Also, the EEW file, as such, was one of some twenty JHA items of an average CATS agenda which the senior officials had to discuss in two days or sometimes even only one day.117

4.3.7 Discussions in the JHA Counsellors’ Group

Strictly speaking, the group of the JHA Counsellors did not have a formal status in the working structures of the Council. Unlike the other preparatory bodies of the Council, such as the Coreper, CATS or working parties, the group did not have a legal basis. Their informal status would even imply that, at least in theory, agreements reached at the JHA Counsellors level could be ignored in the decision-making process.118 And yet, in the EEW process, data clearly demonstrated that this did not occur. Rather, the contrary was true. Evidence on the EEW case suggest that the group of the JHA Counsellors had significant influence in the EEW process, more than for instance the CATS.

The (informal) role of the JHA Counsellors was mainly to brief as legal experts their respective ‘bosses’, the ambassadors, on the legal subjects in the JHA field. Also, as Brussels-based ‘diplomats’ they assisted the national experts, who came to Brussels only once a month, in solving outstanding issues.119 Far more than only briefing or advising others on decision making, the JHA Counsellors themselves were quite actively involved in the decision making on the EEW file. In later stages of the process, exchanges on the file took place even on a daily basis. As it has been put by a JHA Counsellor who first was a national expert, the JHA Counsellors met “every day, or every week or every second day, to find a measure, to try to find out a solution.”120 Partly because of the high frequency of their informal meetings and their constant availability, the JHA Counsellors had a key role in the negotiations. An official at the Council Secretariat who frequently attended JHA Counsellor meetings during the EEW process, illustrated their importance in the decision-making process with the following observation:

118 Interview 7/4/2011 (Qt 94:75).
119 Interview 12/5/2011 (Qt 96:35).
120 Interview 5/5/2011 (Qt 95:41).
They might be less present at the beginning of the negotiations. But as the negotiations advance, their presence is more and more required. Why? Because at a certain stage it is them who take the lead of the negotiations, you could put it this way. It is an informal group. Their meetings can be called any time. On very short notice. They can be called by e-mail, saying: "guys, we meet within an hour!" But of course it is understood that there needs to be a reason. I mean, there is first a Coreper meeting and an issue to be solved. At Coreper, the President of the Coreper and, or, the ambassadors says: "okay, we need the JHA Counsellors examining the issue. And then, we will meet them here. In the afternoon. To discuss it." These are the people, who are at constant availability.

More reference has been made to the ease with which the JHA Counsellors could be called together for discussion. A former national expert referred to the advantages that made the convening of JHA Counsellors during certain stages of the process generally more preferable to working party meetings. She particularly observed that in the weeks leading up to a Council meeting at ministerial level the Presidency felt “that there is no sense any more to organize big meetings. Those whole working party meetings with full translation.”

While working party meetings were costly and required big rooms, interpreters and much more preparing time to organize, JHA Counsellors meetings could be prepared with a day’s advance notice and without taking recourse to large rooms and the services of interpreters. It has been said that the costs of a working party meeting may amount to up to € 40,000 per day, while an informal meeting between a few JHA Counsellors could easily be arranged on a moment’s short notice in the ‘delegates’ bar’ on the fifth floor of the Council building.

In the case of the EEW process, as the moment for a political agreement drew nearer, the more the need was felt to arrange more of these JHA Counsellor meetings. This was not only felt by the Presidency, or the Council Secretariat, also the Coreper ambassadors needed, in the run-up to a ministerial Council meeting, more and more the involvement of the JHA Counsellors. JHA Counsellors were even involved in separate, informal discussions held in the margins of ministerial Council meetings where ministers and ambassadors tried to reach a last-ditch compromise. A former national expert referred to this stage of the EEW process as “the political part” and

121 Interview 7/4/2011 (Qt 94:7).
122 Interview 5/5/2011 (Qt 95:42).
123 See interviews 18/6/2010 (2) and (3) (Qt 104:84) and 7/4/2011 (Qt 94:51).
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witnessed how discussions in that stage became more intense and, so to say, more ‘Brussels-based’:

’So, let’s say the political part, the so-called political part, during that process, it really goes fast. (...) the ambassadors can give an orientation in five minutes time, (...). And then the JHA Counsellors will have to work on that basis two hours later. To find a proper compromise. And then, they meet together with the ambassadors two days later. Just because the date of the JHA Council is approaching! So we have that deadline and everybody has to work to be ready on time. In that process, really, things are getting faster and faster. And during that part it is really difficult to ensure proper involvement of the capital. Because if you want to keep this involvement of the capital, of the expert, you have to be quick. Because things are done in several hours. In Brussels.’

In addition to the ease of convening JHA Counsellor sessions in Brussels, there were frequent contacts between the Brussels-based JHA Counsellors and their respective capital-based national experts. It enabled the ease of communication between Brussels and the national ministries of justice.

In the earlier stages of the EEW process, the JHA Counsellors very often joined national experts in their meetings at working party level. Even in some delegations, it was the JHA Counsellor, instead of the national expert, who took the floor during working party negotiations on the EEW file. Also, in the intermittent periods between the monthly working party meetings there was frequent contact and exchanges of documents between the Brussels-based JHA Counsellors and the national experts who returned to their capitals.

In later stages of the process, when the JHA Counsellors held more of their own meetings and the national experts less, these contacts continued, whether it was by telephone, email, social media or video link. Personal contact with the home capital even took place while the JHA Counsellors were attending a meeting. They then asked for an adjournment so that they could call, by mobile, their colleagues in the home capital. In many of these instances, the JHA Counsellors wanted to make sure whether they could lift a reservation on an issue. In other of these instances,

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125 Interview 4/11/2011 (Qt 101:33).
128 Interviews 7/4/2011 (Qt 94:9).
129 For example: interview 4/11/2011 (Qt 101:17).
130 Interview 5/5/2011 (Qt 95:24); 9/5/2011 (96:80).
JHA Counsellors sought to convince the national expert and/or senior official at the ministry that maintaining a reservation would harm the country’s position. Sometimes, JHA Counsellors tried to “sell” a concession or a change of position to the capital. Not always with success, because the instruction did not allow for a change of position. One JHA Counsellor had even the luck to have a high ranking official of the ministry in the home capital on the line:

‘there was really a minor thing, I think it was about the evidence or some condition, and they really wanted to have certain reservations lifted. It was one of these meetings that are organized at 18h30. So about 19h30 I left the meeting room. I said: "okay I will make a few phone calls." I did a few phone calls. I was lucky that I caught two persons, that is the director and deputy minister. They were still in the office. And they said:" okay, yes you can lift it". So, that looked like magical work of the Counsellor. What was not true of course, because in fact I was just transmitting! But of course, it was like convincing. I said, "come on, look, this is really looking very badly." I used some arguments.'

For all the benefit of these contacts between the Brussels-based JHA Counsellor and the capital-based national expert during meetings of the JHA Counsellors’ group, reference has also been made to its downside. One respondent noticed that when during a meeting a JHA Counsellor of another delegation asked for an adjournment of the meeting, in order to ask the capital for further instructions, it had a disruptive effect on the discussions. In the respondent’s opinion, this sort of interventions broke off the dynamics of developing an understanding in the group.

Reference was recurrently made, nevertheless, to the advantages of these regular contacts with home capitals. There was reference, for instance, to circumstances where a lot of negotiation rounds followed quickly one after the other and pressure for an agreement was mounting, which necessitated quick and easy contact between the two levels.

It has also been pointed out that close contact between JHA Counsellor and national expert improved considerably the bargaining position of a delegation. Such

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132 Interview 4/1/2011 (Qt101:63).
133 Interview 27/6/2011 (2) (Qt 99:12).
134 Interview 12/5/2011 (Qt 96:79).
135 Interview 27/6/2011 (2) (Qt 99:37).
136 Interview 7/4/2011 (Qt 94:9).
was the case with the French delegation, where the JHA Counsellor also negotiated with the support of the national expert at working party level during the EEW process, which enabled the delegation to “ensure the consistency of the French position”. It also ensured that the JHA Counsellor enjoyed a comfortable “marge de manœuvre” during the JHA Counsellors’ discussions. Other delegations, such as Austria and Germany, experienced at the JHA Counsellor level more difficulty in being flexible during discussions, due to more distant contacts with the national expert in the capital.

During the EEW process, it was not only the availability of the JHA Counsellors to ambassadors, the national experts and the ministries in the home capitals that made their role crucial for progress of the discussions. Their importance resulted particularly from their being mutually available on a constant basis. JHA Counsellors were constantly in contact with each other. They met also outside office hours, even on weekends and at social events (e.g. barbecues). It has even been noted by a member of a Permanent Representation that she saw more frequently her fellow JHA Counsellors of the other Permanent Representations than the colleagues at her own Permanent Representation working on other policy fields.

There is convincing evidence that discussions at the JHA Counsellors level were generally held in an informal, cordial and constructive atmosphere. Due to their frequent contacts and their building up of “social networks around files” it has been observed by several respondents that in the plenary meetings there is a “group feeling”. The following comparison to the Copen working party meeting by a JHA Counsellor is telling:

> What is clear. What is also the truth for many other files, the JHA Counsellors are in a way a great bunch of people! Not because of themselves. But as a group. Because the fact that you have people here at the PermReps who see each other several times a week. And if you go to all the working parties on different files that are organized. Plus the JHA Counsellors’ meetings themselves. So you see your colleagues a lot! A lot. You’re based in Brussels. There is a good spirit of working together and a group feeling in some sense. Which, obviously, makes discussions easier. Because although, and that’s especially true for the evidence warrant, although positions of member

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137 Interview 4/11/2011 (Qt101:19)
138 Interview 27/6/2011 (1) and interview 5/7/2012.
139 Interview 7/4/2011.
140 Interview 27/6/2011 (2).
141 Interviews 7/4/2011 (Qt 94:12); 5/5/2011 (Qt 95:43) and 28/6/2011 (Qt 100:15).
state were very strict, very hard to defend, you can do it in a much more [...] ... humane way than if you are at the level of the working party.¹⁴²

These cordial exchanges of points of view were eased by the absence of formal aspects that was considered to form a hurdle to communication at other levels. Usually, during plenary JHA Counsellors’ meetings the discussions were held in relatively small rooms with small delegations and conducted in one language, English, and sometimes also French.¹⁴³ Interpreters were therefore not needed, which made the meetings not only less costly and relatively easy to organize. It also helped to make the exchange of thoughts, arguments and ideas between the delegations more “natural”.¹⁴⁴

Still, it has also been pointed out that arguing in English can also be a challenge, if one is not a native speaker of English. As a former JHA Counsellor has pointed out, while “in your own mother tongue you can make a variety of degrees in hardening or softening your proposition”, this would not be possible if English is not one’s mother tongue.¹⁴⁵

In addition to their constant availability to each other and to other Council levels, JHA Counsellors were considered experts who enjoyed a ‘horizontal view’ on the subject under discussion.¹⁴⁶ Even though they were considered experts in the field of JHA, they were also considered generalists to the extent that their discussions were not limited to one JHA file alone. In the EEW process, the JHA Counsellors had to discuss several other JHA related files, such as the Environmental Crime Directive or Data Protection Directive. Unlike the specialized national experts, who only came to Brussels to discuss one file alone, the JHA Counsellors were conscious of the possible effects a discussion on one file could have on discussions on another file. Consequently, JHA Counsellors were more able at cross-linking issues and solutions within one file and across more JHA files.¹⁴⁷

On top of that, JHA Counsellors were more able to distance themselves from the legal-technical details of a single file. As Brussels-based discussants, being more acquainted with EU policy and legislation and the daily practice of EU decision making, the JHA Counsellors were more able to move discussion beyond the mere exchange of national position and national legal-technical detail towards a meaningful exchange of thoughts on evidence gathering and admissibility of evidence in the

¹⁴² Interview 28/6/2011 (Qt 100:15).
¹⁴³ Interview 7/4/2011 (Qt 94:22).
¹⁴⁴ Interview 28/6/2011 (Qt 100:22 and 100:25).
¹⁴⁵ Interview 27/6/2011 (2) (Qt 99:21).
¹⁴⁷ Interview 12/5/2011 (Qt 96:30); 5/5/2011 (Qt 95:43).
European context. In other words, compared to national experts, JHA Counsellors were more able to identify common problems and solutions at the European level. The respondent who referred to the difficulty for national experts to alter or ameliorate drafts for the reason they see more quickly the problems for their own national legal system, also observed that the JHA Counsellors:

‘might not be as expert oriented to see that straight away. And that creates less resistance to finding solutions.’

However, even though JHA Counsellors enjoyed an adequate degree of independence from the legal-technical detail of the texts under discussion, they still were not entirely free to conduct their own negotiations. They still had to ascertain whether their respective colleagues in the home capitals, i.e. the national experts at the ministry, could live with the compromise achieved in Brussels. As discussed earlier in this section, prior to, during and just after their meetings the JHA Counsellors maintained contact with the capital-based national experts. The JHA Counsellors’ informal status in the Council working structures even implied that, at least in theory, agreements reached at JHA Counsellors level could be ignored, if the Presidency would choose to do so. Nevertheless, there is generally a certain understanding that it is the role of the JHA Counsellors to manoeuvre more freely than the national expert. As it has been observed:

‘their role is also understood by the capital that they sometimes need to give in, that they are allowed to give in.’

Evidence convincingly demonstrated that discussions between JHA Counsellors had markedly different features to the extent that they showed more advanced levels of understanding than the discussions at the working party level. In terms of interaction, there is conclusive evidence that the JHA Counsellors were seriously engaged in a mutual exchange of perspectives on the EEW file. Discussing, in only English, in relatively small rooms where delegations each consisted of only one person (the JHA

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148 See interviews 7/4/2011 (a representative of the Council Secretariat at JHA Counsellors level) and 27/6/2011 (2) (a former JHA Counsellor of a national Permanent Representation).
149 Interview 27/6/2011 (1) (Qt 98:40).
150 Interview 12/5/2011 (Qt 96:80); 7/4/2011 (Qt 94:28).
151 Interview 7/4/2011 (Qt 94:75) and 12/5/2011 (Qt 96:62).
152 Interview 7/4/2011 (Qt 94:65).
The exchange of views extended beyond the 'small rooms' of discussion, that is: the interaction between the JHA Counsellors themselves alternated with interaction between JHA Counsellors and national experts and between JHA Counsellors and ambassadors. In that regard, an official of the Council Secretariat who attended many JHA Counsellor meetings, portrayed quite minutely the following situation:

'The JHA counsellors don't repeat their positions anymore, because we all know it. So we really have a discussion on the drafting. We have suggestions like "And if we could change this word into that one?" Then: "If we delete this line and instead put in that line?" Now, I don't remember exactly the situation, I would need to look and see whether it was exactly on territoriality or on another issue. But this is how it worked. Then they say: "Okay! So this is the line? Right. Can you read it out loud?" And he or she reads it out loud. And all, the Presidency, the Secretariat, the delegations may say: "Okay, we have this paragraph now. What do you think?" The others: "No, it is still not good. We still need something stronger!" Or: "We need something softer." "Okay, let's see. Maybe this way?" Everyone! You see, it is a kind of brainstorming situation!

And the others may say: "This? I don't know". Sometimes they are able to say: "Yes, it could fly!" Or sometimes they say: "I don't know. Let's have a break." We break up for ten minutes. Then they all stand up. They all run into different corners of the room. Calling back their capital. Asking their experts: Can we have it? Do you have some other suggestions? Sometimes they are texting. Or now, with their blackberries, it's even easier. You know, getting some feedback! Immediately! Some new drafting suggestions. Of course, they come very well prepared. Sometimes they will say: "Look, guys! I can't have it!" The others may say: "we cannot offer more." "Well. Then maybe I need to convince my expert." Another break. Calling again the capital.'

This passage forms an exemplary instance of the various referrals made by other respondents to similar situations in the EEW process. This portrayal not only makes it clear that the JHA Counsellors' group is considered to be in the hub of communication networks in the EEW process. The portrayal also refers to instances where JHA Counsellors went clearly beyond a mere repeating of their country’s position.

Another passage, from another respondent, reflects much the same situation:

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Chapter 4

“You always try to explain and if you try to explain, you convey your arguments. Your arguments may have some weaknesses. The others will react. They will make a new proposition. You can then perhaps estimate what will be the reaction of your capital. And react, if such a proposition would be made by the Presidency. ‘What would then be the reaction of my capital?’ So that certain options can be contemplated. And perhaps disregarded if they see that it will not fly. But you can also point out where perhaps some flexibility lies.” ¹³⁶

This portrayal came from one of the delegates who was deeply involved in the discussions on one of the thorniest EEW issues. This passage clearly indicates that the discussants seriously committed themselves to an exchange of points of view and to trying to convince the others.

Moreover, there is evidence on the willingness of others to actually let themselves convince through serious deliberation. While less convincing or even no evidence has been found at other levels, a few instances of discussants willing to rethink their positions (due to argumentation) have indeed been found at JHA Counsellor level. There is, as one of the JHA Counsellors has put, “always some kind of a willingness to work on finding a solution”. ¹³⁷ The JHA Counsellor considered this to be one of the typical features of the JHA Counsellors setting:

“There is a certain incentive to be part of the compromise. If you are working in this environment where you see these people, every day, and your colleagues you’re trying to find the best solution for everyone.” ¹³⁸

A few other respondents observed the same sort of “incentive”. The willingness to, as another JHA Counsellor has put, “find a solution that suits you and that suits me and which can resolve this conflict.” ¹³⁹ It was reported that in the discussions on ‘privileges and immunities’ and on ‘legal remedies’ delegations actually changed their positions because they understood the point made by other delegations. ¹⁴⁰ In the case of the ‘privileges and immunities’ debate, it even changed the course of events, as a former JHA Counsellor explained:

¹³⁶ Interview 27/6/2011 (2) (Qt 99:12).
¹³⁷ Interview 27/6/2011 (1) (Qt 98:12).
¹³⁸ Ibid. (Qt 98:19).
¹³⁹ Interview 28/6/2011 (Qt 100:60).
We had there, I think, an hour, ninety minutes long lasting discussion. Where I, again and again, said the same. And the others said their instructions back to us. To my recollection, no move at all. And then, [one] JHA Counsellor (…) said suddenly: "now I understand the problem (…)!Perhaps we should solve this in that direction." That was the point where the negotiation process changed!

Both the respondent of the passage just cited and another respondent attributed the preparedness to reconsider the issue concerning ‘privileges and immunities’ to the comfortable ‘marge de manoeuvre’.

As a matter of fact, it has been noted in relation to that particular event that progress towards a better understanding could only happen because delegations did not ask for an adjournment that would have enabled them to “call back” to the capital for further instructions. If the delegations would have done that, it would have broken off the dynamics of developing an understanding in the group. In that light, the respondent observed that:

“That is the real, powerful mechanism of JHA Counsellors. Of Counsellors in our field. That you can have some ideas already contemplated in a first manner without having the bureaucratic machinery of each and every member state looking into it.”

Still, for all the conditions that habitually ease the debating in the JHA Counsellors group, in the case of the EEW process discussion was not always that easy. Despite the traditional group feeling, the negotiations on the EEW proposal at JHA Counsellors’ level were more cumbersome than usual.

There were unusually strict instructions from the home capitals, due to the complex subject matter of evidence transfer. It seemed that the JHA Counsellors were tied down to sometimes mutually irreconcilable instructions that continually reminded them of the diversity in specific rules on admissibility of evidence and fundamental rights of their respective member states. This predicament compelled at times the JHA Counsellors to say ‘no’, while they were used to build bridges.

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161 Interview 27/6/2011 (2) (Qt 99:33).
162 Interviews 5/12/2011 (Qt and 27/6/2011 (2) (Qt 99:36).
163 Interview 27/6/2011 (2) (Qt 99:37).
164 Ibid. (Qt 99:38).
165 Interview 28/6/2011 (Qt 100:18).
166 Interview 5/7/2012.
was particularly the case for the debates on ‘common definitions’ and the ‘territoriality clause’. A JHA Counsellor has put this difficulty as follows:

‘it takes a lot for a country to say 'no'. Even if there is a veto, under unanimity. In theory, you have a veto. But it takes a lot for member states to actually use their veto and to say 'no'.’

It seemed that under the unanimity rule the JHA Counsellors, who were used to explain and explore possibilities, had to make an extra effort to explain why it can’t be a ‘yes’ when they had to say ‘no’ to the others and for the others an extra effort to convince a delegation to abandon its veto position. And it is not only the daunting challenge of seeking to explain and convince the others within the group. The JHA Counsellors also faced the challenge to explain and convince their respective national experts in the capital and their ambassadors at the Permanent Representations. The exasperation of another respondent who was a delegate in the JHA Counsellors’ group, is telling:

‘Your friends are sitting there and have a proposition which seems to be plausible to them and you have to say ‘no’, because your stubborn, idiotic, narrow minded capital just says ‘no’.

In that regard, the experience of the JHA Counsellors’ setting as an environment where everyone knows everyone and is used to make the effort to understand each other, was felt as oppressive in the difficult context of the EEW discussions. JHA Counsellors were, as a delegate has put, “liable to pressure” resulting from the intimate links that have been built up in the group. Another respondent reported the following in that regard:

‘I think everybody in the Council business is trying to have the JHA Counsellors meetings in that way: explaining the position in a friendly atmosphere, where you know each other. Not only by name, but you have seen each other through many negotiations. Perhaps you were invited to barbecues. And to parties. So, there are people who frequently meet each other and also, to a certain degree, on a personal basis. (...) And this mechanism is used to make the work, the life

167 Interview 27/6/2011 (1) (Qt 98:10).
169 Interview 27/6/2011 (2) (Qt 99: 16).
170 Interview 27/6/2011 (1) (Qt 98:18).
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more difficult for the person who has to argue against the majority of the group. It is a certain psychological pressure.\textsuperscript{171}

4.3.8 Discussions in the Coreper
In the period from July 2004 to June 2006 – during which the EEW process took place – Coreper (II) convened 72 times, with a frequency of once (or sometimes twice) a week. According to the Council documents, the EEW file featured on the Coreper agenda in ten of its regular plenary meetings.\textsuperscript{172} It also featured on a few irregular meetings, such as a joint meeting with the JHA Counsellors.\textsuperscript{173} In an average Coreper meeting JHA items were one of 30 to 70 agenda items. The EEW file appeared (ten times) as one of the about five JHA agenda items. Items of the average Coreper agenda ranged across various policy fields of the EU, from foreign policy, to trade and cooperation with third countries or transport or financial and economic affairs.\textsuperscript{174}

Like the JHA Counsellors, the Brussels-based Coreper is the venue where the building of social networks among its members is a characteristic feature. Earlier research has extensively shown that the Coreper habitually operates in a climate of cordiality, informality and confidentiality (see e.g. Lewis 2005: 946-7). Like the JHA Counsellors, the ambassadors have a similar incentive to be part of the compromise. As it has been put by a senior Commission official:

\begin{quote}
The Coreper is a club! It is a closed club where you don’t fight in the same manner as you do in the working party. In Coreper the ambassadors call each other by name. They know that they can be isolated. And yet, the idea is that we work on the basis of consensus. Therefore, we do everything as to facilitate a decision to be taken.\textsuperscript{175}
\end{quote}

\begin{flushright}
\textsuperscript{171} Interview 27/6/2011 (2) (Qt 99:12).
\textsuperscript{172} For a provisional agenda of a regular Coreper meeting where the EEW has been set as an agenda item: see for instance “Provisional agenda for 2121st meeting of the Permanent Representatives Committee (Part 2)” in: Council Document st15373 of 6/12/2006.
\textsuperscript{173} See for example Council Document st15002/re01 of 1/12/2005.
\textsuperscript{175} Interview 9/5/2011 (Qt 93:21).
\end{flushright}
As committed as they were to finding a common understanding, the ambassadors of the Coreper were more oriented to ‘Europe’, than the discussants at other Council levels. Like the JHA Counsellors, they:

‘are in principle more European. They have a more European touch. They want to have a certain degree of success in their work. And success, in European terms, means always that the proposition will be adopted in the end. So they are more open for agreements, for compromises, than the official civil servant in the capital, who is sitting behind his desk looking on the Spree in Berlin or the Seine in Paris.’

The cordial and confidential atmosphere of Coreper meetings is, just as with the JHA Counsellors’ meetings, helped by such practical aspects as the absence of interpretation and the use of only three working languages (English, French, and German).

The weekly plenary meetings of the Coreper and the frequent informal contacts between its ambassadors suggest a high level of involvement in the discussions, including those on the EEW proposal. However, the horizontal nature of the Coreper agenda, covering over 25 policy fields, made it impossible for the ambassadors of the Coreper to examine in-depth the specific subject matter concerning the EEW proposal. As it has been explained by a respondent:

‘(…) at the Coreper level, you have ambassadors. Twenty-seven, who are working every week on the agendas composed of some 25 points, different policy areas, on agriculture and so on. And at one point the JHA. For not more than 20 minutes! So it has to be fast, straight to the point. You can’t make a difference between what is crucial and what is accessory. (…) It means that the ambassadors can give an orientation in five minutes time, based on one intervention. Of the French ambassador for instance. And then the JHA Counsellors will have to work on that basis two hours later.’

Thus, on behalf of the Coreper, it was the JHA Counsellors’ group as experts in the field that conducted the EEW discussions. In that light, it is understandable that it was the Coreper, and not the JHA Counsellors, to whom the CATS or the Copen working party (or any other specialized working party for that matter) always referred outstanding issues. In a way, the Coreper acted as a sort of interface between the JHA

176 Interview 27/6/2011 (2) (Qt 99:14).
177 Interview 28/6/2011 (Qt 100:31).
178 Interview 4/11/2011 (Qt 101:33).
179 Interview 12/5/2011 (Qt 96:72).
Counsellors’ group and the other, formal working structures of the Council. As their senior specialized assistants, the JHA Counsellors were tasked to do basically the substantive part of Coreper’s work.

This, however, should not lead to the conclusion that the Coreper was not involved at all in the discussions on the EEW proposal. As a matter of fact, the Copen and the CATS sent an unusually considerable number of outstanding issues to the Coreper.\(^\text{180}\) Moreover, it had to decide whether to forward certain issues to the ministerial level, i.e. the JHA Council, or to return them to the working party.\(^\text{181}\) Issues that proved too ‘political’ or too big to resolve for the national experts were parked at the Coreper level and discussed, with the assistance of the JHA Counsellors.\(^\text{182}\)

This implied that the Coreper would never work on technical details. Where necessary, issues were referred to the ministers of the JHA Council. Before referring an issue to his or her minister for further discussion, each ambassador would have to make sure whether it was worth making a case for it at the Coreper level. A respondent of a national delegation explained that “there is nothing worse for an ambassador bringing it up again for discussion” and, later on, finding out that the minister gave in without putting up much of a fight at the JHA Council level.\(^\text{183}\)

It also meant that the ambassadors, if they engaged in a discussion at the Coreper level, made sure that there was room to manoeuvre. As an official of the Council Secretariat observed:

> The ambassador will always still be presenting the official ministerial position. Keeping some reservations, of course: “Well, here we are not going to die in the ditch for that! And so on”. So you understand that there is a margin.\(^\text{184}\)

In safeguarding a ‘marge de manoeuvre’ for discussion at the Coreper level, the ambassadors also defined margins for further discussion for their respective JHA Counsellors.\(^\text{185}\) Actually, in the JHA field there is an intimate working relationship between the ambassadors and the JHA Counsellors. The ambassadors provided the JHA Counsellors with direction on the way forward, while the JHA Counsellors provided the ambassadors with solutions, and the ambassadors in their turn validated the solu-

\(^\text{180}\) Interviews 18/6/2010 (1); 25/2/2011 and 29/4/2011.

\(^\text{181}\) Interview 5/5/2011 (Qt 95:35).

\(^\text{182}\) Interviews 4/11/2011 (Qt 101:33) and 5/7/2012.

\(^\text{183}\) Interview 19/7/2010 (Qt 103:26).

\(^\text{184}\) Interview 7/4/2011 (Qt 94:31).

\(^\text{185}\) Ibid.
tions found by the JHA Counsellors. Joint meetings between Coreper and JHA Counsellors’ group were moreover held.

Yet, for all the latitude the ambassadors were used to acquire from the capitals for their own mandate and for that of the JHA Counsellors, and the habitual ease with which they generally engaged in discussion, in the EEW process the Coreper debates did not yield substantially more than what already was achieved by the JHA Counsellors. Respondents reported a repeating of positions already taken earlier on mainly the issues regarding ‘common definitions’ and the ‘territorality’ clause. While the discussions in the Coreper on the ‘territorality clause’ was described as “a lot of arm twisting”, those on ‘common definitions’ were referred to as an “enduring confrontation”.

To be sure, the EEW process appeared to be an extraordinary situation. Respondents referred to it as an exceptional case. In the discussions on the ‘territorality clause’ it was observed that the ambassadors, who were used to see certain progress in the discussion, grew annoyed at the ongoing stalemate. Apparently, taking into account the “club feeling” that was reported at the Coreper level, the ambassadors seemed to be just as much driven by the urge to be “part of a compromise” as the JHA Counsellors were. It was likely that the ambassadors were just as “liable to pressure” as the JHA Counsellors were.

Perhaps in view of the habitual ease of negotiating, the drive to find solutions to outstanding issues and to avoid isolated positions, it was reported that the ambassadors kept the discussions on one of the most contentious EEW issues vivid and interactive. It was observed that:

‘It all remained concentrated on the substance of the issue. (...) You’re keeping the contact. The eye contact. And listening! There was a real debate! I remember Coreper sessions on the territordiality clause. Where it was a fight! But a good one, in the sense that it was a loyal one, according to the rules. A real discussion! I mean you could feel interaction! One saying and the other saying, reacting, reacting again the first, and then reacting again, reacting again. You know, not

188 Interviews 18/6/2010 (1) (Qt 88:2, 88:4); 16/6/2011 (Qt 97:14); 28/6/2011 (Qt 100:32).
189 Interviews 9/5/2011 (Qt 93:5) and 4/11/2011 (Qt 101:56).
190 Interviews 18/6/2010 (1) and 16/6/2011 (Qt 97:13).
191 Interviews 9/5/2011 (Qt 93:8).
192 Interview 25/5/2012.
just presenting a position, then the other delegations speak, and then you're going to the next article! There was a real thrashing out the issue! To find the solution!"\[193\]

4.3.9 Discussions in the JHA Council

At the apex of the decision-making structures of the Council stands, of course, the Council of Ministers itself. In the field of JHA it convenes in the formation of the member states’ ministers of Justice and Interior. JHA matters, in particular the most difficult ones, fell also within the remit of another top-level body the Council, the European Council – which consisted of the heads of state or government of the member states and the President of the Commission. Even though the EEW dossier was referred to as an extraordinarily difficult case, there was no evidence of the dossier being referred to the European Council. It was the JHA Council that arrived at a political agreement on the EEW draft text on 2 and 3 June 2006. The formal adoption of the EEW draft was, apparently for scheduling reasons, handled by the Council in the formation of Fisheries and Agriculture in December 2008.\[194\] As noted in the previous section, the Council of justice ministers discussed the EEW proposal seven times. In each Council meeting, the EEW file featured as one of the about ten to fifteen agenda items.\[195\] The Council meeting that rounded off the EEW decision-making process took place on 2 and 3 June 2006. Then, a so-called ‘general approach’ on the final proposal was adopted.

Usually, during ministerial meetings there is not much discursive effort. Most respondents pointed out that much of the work has already been done at the subsidiary levels. Usually, the national experts and the JHA Counsellors have done much of the groundwork and the Coreper has devoted much of its effort to ‘cleaning up’ files, i.e. seeing to it that outstanding issues have somehow been resolved before they reach the JHA Council.\[196\] It should therefore not be surprising that talks at the ministerial level have been described as "a purely superficial debate without any real, meaningful discussion."\[197\] Or in less harsh wordings, ministerial talks mostly take the form of a ‘tour de table’. In that regard, it has also been noted that for the sake of

\[193\] Interview 28/6/2011 (Qt 100:35).
\[194\] Press Release 16916/1/08 REV 1 of 18 and 19 December 2008.
\[196\] Interview 12/5/2011 (Qt 96:52).
\[197\] Interview 9/5/2011 (Qt 93:20).
(public) appearances so-called ‘false B-points’ were ‘discussed’ at ministerial level.\textsuperscript{198} It means that an agreement has already been reached at subsidiary levels, and yet the ministers still wish to talk about it. One respondent observed in that regard:

‘(…) often there is no interaction! There is no real interaction at the ministerial level. They come. They read their speaking notes. They present their positions. They present their file. But they are not interacting with the others. You know, they are not getting up from their chair to see the other side of the table, inviting him or her: “listen, how do we solve this?” If they present their positions they rely a lot on the Presidency who, maybe, presents only a compromise or something. But they do not engage themselves in an interactive discussion that much! That happens rather rarely at that level.’\textsuperscript{199}

One of the other explanations that has been suggested for the low level of discursive engagement at the ministerial level was the “very stiff instructions” a minister receives from government and ministry.\textsuperscript{200}

The reason for this ‘tour de table’ has also been attributed to the material setting of the ministerial discussions. It seemed that discussions at ministerial level were held under circumstances similar to those at working party level. Large delegations and big rooms, the formal atmosphere, the presence of interpreters and limited time seemed to have just as much (if not more) constraining effect on discussion here as in working party meetings.\textsuperscript{201}

In terms of time, the ministers usually had even less time to spend on one JHA file for they had to run over several policy instruments or items of the JHA agenda, instead of only one. In that regard it has been noted that it “is a long and a very tiring process” if ten out of the 27 (or, at the time, 25) delegations wanted to speak.\textsuperscript{202} It occurred very rarely that a minister intervened more than once in such settings.\textsuperscript{203} More interaction was reported in the margins of ministerial meetings, during breaks, on a bilateral basis. These discussions, however, were rarely related to subjects that were on the agenda of the plenary discussion.\textsuperscript{204}

\textsuperscript{198} Interviews 9/5/2011 (Qt 93:20); 12/5/2011 (Qt 96:37).
\textsuperscript{199} Interview 28/6/2011 (Qt 100:49).
\textsuperscript{200} Interview 12/5/2011 (Qt 96:42).
\textsuperscript{201} Interview 16/6/2011 (Qt 97:5).
\textsuperscript{202} Interview 28/6/2011 (Qt 100:4).
\textsuperscript{203} Ibid. (Qt 100:1).
\textsuperscript{204} Interview 12/5/2011 (Qt 96:52).
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The ministerial talks over the EEW dossier on 2 and 3 June 2006 were an exception to that rule.205 There was, as was observed by a JHA Counsellor who attended the June 2006 Council meeting, “really the willingness (...) to find a solution”.206 Another respondent even stressed how, against all expectations, substantial the outcome of the Council meeting was on some of the thorniest EEW issues – those concerning ‘common definitions’ and the ‘territoriality clause’:

‘Before the meeting of the JHA Council, there was no agreement, no possible agreement at all. Which is really exceptional. Usually you have an indication of what possible agreement can be achieved before the JHA Council. Helas! Here, in no way! There was no way to predict what will happen.’207

One of the explanations found for this apparently extraordinary event was that the proposal for an opt-out clause for Germany as a way out of the stalemate on the ‘common definitions’ issue (for more details see Table 4.1) was unprecedented.208 Never before was an instrument of secondary EU law, whether a directive or a regulation of the first pillar or a framework decision of the third pillar, adopted that included an opt-out clause for one member state (or a few of them). Only the ministers were considered to be capable to resolve this legal anomaly.209 The showdown between the French and Dutch delegations on the issue concerning the ‘territoriality clause’ that also needed to be resolved at the highest political level, was just as much an explanation for this singular event.210

Still, not all ministers were involved in the ‘real’ discussion. It was reported that there was “even a break” during the plenary meeting, of June 2006, in order to allow a few delegations directly involved in the conflict to discuss separately, in another room, the two most contentious issues.211 Not only the directly involved delegations, i.e. French, German, and Dutch, participated in these separate discussions. Also the Presidency, high-ranking officials of the Council Secretariat, and the Justice Minister of Luxembourg, as a disinterested third party, took part in these discussions.212

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205 See interviews 18/6/2010 (1) (Qt 88:6); 16/6/2011 (Qt 97:5); 28/6/2011 (Qt 100:1); 4/11/2011 (Qt 101:60).
206 Interview 28/6/2011 (Qt 100:49).
207 Interview 4/11/2011 (Qt 101:60).
208 Interviews 18/6/2010 (1) (Qt 88:22); 28/6/2011 (Qt 100:13).
209 Interview 18/6/2010 (1) (Qt 88:22).
211 Interview 28/6/2011 (Qt 100:2).
212 Interviews 18/6/2010 (1) (Qt 88:51); 28/6/2011 (Qt 100:50); 5/7/2012 (Qt 102:11).
It was observed that during these separate discussions, the Presidency and Council Secretariat ensured that there was a continuous exchange of views and exploring of possible solutions.\textsuperscript{213} On that event the head of unit on ‘Justice Cooperation’ at the Council Secretariat, Nilsson, told that:

\begin{quote}
‘we were explaining to the ministers. And Gilles [de Kerchove\textsuperscript{214}] was persuading them. And I drafted at the same time. I produced a draft. And we then came back with drafts. And showed them to the ministers. And we were working on the drafts. And so on.’\textsuperscript{215}
\end{quote}

It was reported that during this discussion, there was “a real discussion on the substantive issues”, including the ‘territoriality clause’.\textsuperscript{216} Another respondent noted however that in the discussions on this issue the use of pressure was not absent altogether.\textsuperscript{217} There was still the threat of the reciprocity principle with which the French delegation tried to compel the Dutch delegation to accept a more limited version of the territoriality clause.

More reference has been made to the use of pressure in the discussion on the ‘common definitions’ issue. There, the pressure was more blunt.\textsuperscript{218} The German delegation, who wanted the opt-out clause (in order to be able to refuse incoming evidence warrants if these did not comply with common definitions clause), preferred to replace the explicit referral “opt-out clause only for Germany” with the more generic referral “Member State”. A respondent observed that the discussion on that issue boiled down to a “take-it-or-leave-it” debate. If the German delegation wanted the opt-out clause so badly, then, as it has been bluntly put, the wording in the draft text was to be such that it was clear that “we name and shame you!”\textsuperscript{219}

4.4 Conclusion

On the overall, it can certainly be said that the EEW process did not represent a typical case where discussants were induced to go beyond their initial interests in a pursuit to shape a reasoned consensus on the outcome. Instead, delegations ended up

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{213} Interview 27/6/2011 (1) (Qt 98:3).
\item \textsuperscript{214} Gilles de Kerchove was, at the time, Director at the Council Secretariat in charge of police and judicial cooperation in criminal matters.
\item \textsuperscript{215} Interview 18/6/2010 (1) (Qt 88:8).
\item \textsuperscript{216} Interview 18/6/2010 (1) (Qt 88:53).
\item \textsuperscript{217} Interview 29/4/2011 (Qt 92:4)
\item \textsuperscript{218} Interview 18/6/2010 (1) (Qt 88:53).
\item \textsuperscript{219} Interview 29/4/2011 (Qt 92:11).
\end{itemize}
\end{footnotesize}
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in a dynamics where they were motivated by the desire to realize their own individual preferences. The prevalent mode of discussion was, in a way, geared up to ‘non-reasoned consensus’: a final text was adopted that was full of grounds for refusal and “exceptions to exceptions”, which made the EEW instrument unworkable for practice. The opt-out clause for one member state alone in the EEW framework decision was exemplary in that regard.

This all was not really surprising. After all, the EEW case was selected for it being a least likely case of deliberation and endogenous change. The conditions of theoretical interest - which were the reasons for selecting this case – were after all not expected to be propitious. Indeed, it appeared that in most settings there was little incentive for delegations to go beyond their initial preferences and to shape a standing on the outcome based on a common reasoning. Apart from the findings in relation to stringent time constraints and insufficient room for engaging in informed debates, there was also the factor that the negotiators, especially at the Coreper, the JHA Counsellors’, and the JHA Council levels, had to cope with the politically hardest imaginable issues in the shortest possible time under the mounting pressure of reaching a final political settlement. This was particularly evident in the last stages of the EEW process.

Moreover, the mind-set of the negotiators at working party level was not much help either. For national experts who were well-versed in the specifics and complexities of their own respective national legal systems concerning evidence law it was an arduous affair to meaningfully exchange thoughts on a future European arrangement regulating evidence gathering and admissibility of evidence. A situation that was further compounded by the comprehensive, sensitive and complex nature of the subject matter related to rules of admissibility of evidence in court and fundamental rights.

Yet, for all the adverse circumstances, pathways were still identified – albeit on rare occasions – where the conditions that were expected to promote deliberation and change did actually trigger such a dynamic. These pathways support the argument that the socially and institutionally dense environment of the EU deliberative discourse and endogenous change actually occurs in the daily practice of EU everyday decision making, even under adverse circumstances.

In terms of systematic interaction, evidence of the EEW case demonstrated a marked variation across the decision-making levels. While it was weakest at the CATS and JHA Council levels, it was strongest at the JHA Counsellors’ level where instances indicating both reciprocity, reflexivity and resulting shifts in position or understanding
were mainly found. Evidence on systematic interaction at the Copen and Coreper levels yielded a more mixed picture. While systematic interaction at the Coreper level scored high on the ability to entertain informal and cordial contact also outside their official meetings, it scored low on the ability to commit itself to a full examination of the EEW file and its various issues—due to agenda constraints. Evidence on systematic interaction at the Copen level showed exactly the reverse. While national experts lacked the ability, time and means to build up an informal, cordial and constructive working atmosphere, the agenda of their monthly meetings permitted them to examine the EEW file in more detail because for each meeting they had two full days to discuss. It enabled them to keep the discussions focused on the legal and technical details of the file.

In comparison to the degree and quality of systematic interaction at the Copen and the Coreper levels, the JHA Counsellors scored high on both accounts. It appeared that both the quality to construct informal, cordial and constructive working contact and to focus on legal and technical details of the file were necessary for deliberative discourse to occur—as it actually happened in the JHA Counsellors’ group. If only one of the two conditions of systematic interaction were to be satisfied then there was the likelihood that deliberative exchange would be hindered—as the situations at the Copen and the Coreper levels have demonstrated.

More or less the same reasoning could be applied to the variation that has been found in terms of insulation. In measuring the degree and quality of insulation a factor is included into the analysis which was theoretically not anticipated, namely the proximity to technical detail of the subject matter. In that regard, the examination of variation between the Copen and the Coreper levels was interesting in conjunction with the assessment of the degree and quality of insulation at the JHA Counsellors’ level. Whilst the national experts at the Copen level scored low on the ability to manoeuvre flexibly because of proximity to national legal-technical detail, the Coreper ambassadors scored low on the ability to detach themselves from the wider political environment. Under neither of these circumstances deliberative exchange and ensuing (endogenous) change appeared to have prospered. The JHA Counsellors, on the other hand, scored at times high on both accounts.

On occasion, the JHA Counsellors were far more flexible than the national experts as they were more able to detach themselves from national legal-technical detail and were more familiar with the technicalities and practice of European policy, law, and procedure which provided them with a common knowledge base to which they could make successfully reference in substantiating their views and arguments. At
the same time, political pressure was less on their minds as they were still focused enough on the subject matter to be able not to be led by the wider political implications of the issues they discussed. Evidence has shown that under both conditions – i.e. proximity to subject matter in conjunction with a common knowledge base and detachment from the wider political environment – the JHA Counsellors were able to explore alternatives and reconsider their position in light of these alternatives. This was not always the situation, though. In times of mounting pressure, the exchange among the JHA Counsellors turned into a debate where pressure was applied on delegates who still had to maintain a reservation on a certain issue.

The fact that instances indicating deliberative discourse and endogenous change were still found at the Copen level – although very limited in number – despite the above detected shortcomings, was attributable to the facilitating role of the Presidency. Even though it consisted of a delegation of a member state, evidence has amply shown that in representing, where possible, collective interests of the group it managed to induce delegations in the Copen to engage in more productive exchanges (mostly on a bilateral level). Its role as facilitator appeared to be necessary for the few occurrences of deliberation and change at that level. Apparently, as chairman of official meeting the Presidency provided impetus to engage in interactive exchange of argument by maximizing the time needed for such interactive discussion and by providing it – undoubtedly with the help of the Council Secretariat – with a common knowledge base which occasionally enabled discussants in the Copen to substantiate their views and arguments.

As regards the role of other non-state actors, evidence has not been found on a facilitating effect of the Commission’s involvement nor any evidence of the involvement of the European Parliament at any of the levels. Neither could the conclusion be drawn, at least from this case study, that the absence of the Parliament’s involvement or the reduced involvement of the Commission had adverse effects on the occurrence of deliberation and endogenous change (such effects may come to light if decision-making events are examined in which they had substantial involvement – such as those discussed in the subsequent chapters).

Evidence on the effects of the unanimity rule showed that it had adverse effect. The rule constrained the discussions at all levels to the extent that much of the discursive effort was focused on giving serious attention to each amendment (for an exception, a ground for refusal, or an escape clause) regardless the soundness of the position supporting that amendment. It often prevented discussions from reaching higher levels of reasoned understanding on a resolution of issues. What happened was,
as was noted by one of the respondents, the EEW proposal was “watered down, watered down, watered down, watered down” and “exceptions, and then exceptions to exceptions” were proposed and eventually accepted.