

Final Report

Towards a common evaluation framework
to assess mutual trust in the field of EU
judicial cooperation in criminal matters



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Part A

1 The history and content of the pilot project

Alain Renier

1.1 History

In January 2009 at an informal JHA-Council in Prague, the Dutch Minister of Security and Justice intervened on the principle of mutual recognition. He stated that the basis for judicial cooperation in the EU is mutual trust, namely mutual trust in the functioning of each other Member State's legal system and mutual trust between Member States and practitioners. Moreover, mutual trust builds upon the confidence of citizens in effective judicial cooperation, crime fighting and the protection of human rights. As a matter of principle, this trust is presumed. In practice, however, there are doubts about the functioning of some parts of national criminal justice systems. When those doubts keep lingering, it threatens the fundament of judicial cooperation in criminal matters in the EU. Moreover, also the quality of every criminal justice system in the EU is dependant on the quality of the justice systems of the other Member States. Therefore, the Dutch minister proposed that next to training and exchange missions and procedural guarantees, an evaluation mechanism should be developed in order to strengthen mutual trust in the EU.¹

Besides its positive effects on mutual trust, an additional evaluation mechanism can help to improve practical cooperation. Evaluating criminal justice systems will contribute to a better understanding of the Member States' legal order. By comparing the similarities and differences in the implementation of EU measures, it will provide insight on how the criminal law systems work in practice. Next to this, evaluation can help to pinpoint problems in cross-border cooperation and to find solutions when best practises are exchanged. Reciprocal advice and encouragement by positive peer pressure can, when follow-up is guaranteed, contribute to build mutual trust and smoothen practical cooperation.

In the aftermath of the Minister's intervention, a conference in Maastricht was organized to discuss how such an additional evaluation mechanism should be developed.² The conference was organized around three questions:

1. 'What' should the mechanism focus on;
2. 'How' should it be organised, and;
3. 'Who' should be involved?

During the conference, the Dutch initiative was supported by France and Germany. The three countries decided to take further action to elaborate an additional evaluation mechanism and put forward the idea to introduce an additional evaluation mechanism into the Stockholm Programme. It took some effort from the three countries, but the evaluation mechanism has finally been incorporated in the Stockholm Programme³ and the Action plan⁴.

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¹ See the summary of the Minister's intervention in: European Network of Councils for the Judiciary, report of the working group "Strengthening mutual confidence" 2008-2009, p. 10, available at http://www.drj.de/cms/fileadmin/docs/europa_encj_final_report_mutual_confidence.pdf (accessed 15 March 2013).

² See for the conference proceedings: M. Dane and A. Klip eds., *An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust*, (2009) Celsus legal publishers, Tilburg.

³ European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, O.J. C 115 of 4 May 2010, p. 1, 6.

⁴ European Commission, *Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final, p. 65.

After the idea of an additional evaluation mechanism had been anchored in the Stockholm programme and the Action Plan, the concept still had to be further developed. In order to support the European Commission, France, Germany and the Netherlands had suggested to envisage a pilot project for the new evaluation mechanism in the Action Plan. The European Commission was interested in this idea and asked for a project proposal. The pilot project should aim at developing a solid methodology to evaluate various aspects that are related to judicial cooperation in criminal matters and the enhancement of mutual trust between the Member States. After many consultations, the European Arrest Warrant (EAW) was chosen as the subject matter of the evaluation in order to test the methodology. In particular, the pilot should focus on the conditions for issuing a EAW and the principle of proportionality. Based upon this concept, the three Member States submitted their project proposal for a grant under the Criminal Justice Programme in September 2010, and the Commission awarded the grant in May 2011.

1.2 Content of the pilot project and the report

The structure of this report follows the different project phases and is divided into three main parts, namely an overview on the relevant aspects of mutual trust and evaluation methodology (A), the pilot project on the EAW and the principle of proportionality (B) and conclusions and recommendations (C).

In part A of the report an overview is given of the procedural/legislative and institutional aspects which are considered to be relevant for building mutual trust between the EU Member States. The background of the several EU Framework Decisions is discussed and brought into relation with the topic of the pilot namely 'the experiences with the principle of proportionality and the European Arrest Warrant', and the institutional aspects related to mutual trust are described as well. Furthermore, part A addresses the issue of comparative evaluation methodologies, thereby taking into account the preparatory work that has been done on this field, based on the study 'an additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust' (Dane en Klip 2009).⁵ Above and beyond this, part A provides a detailed overview of existing evaluation methods in the area of the justice sector which is considered crucially important for the development of a thorough evaluation framework. The existing evaluation mechanisms vary from 'Rule of law' studies, European studies on the justice sector (e.g. the Verification and Cooperation Mechanism for Bulgaria and Romania, benchmark studies for candidate EU Member States)⁶, justice sector reform studies from the World Bank (for example the Justice Sector Performance Evaluation and Institutional Review (JSPEIR) of Croatia, Justice at a Glance, Doing Business, Governance Matters, BEEPS)⁷, independent evaluations carried out by Civil Society Organisations (see: Justice Sector Benchmarks User's guide for CSO's of the American Bar Association Rule of Law Initiative)⁸,

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⁵ M. Dane and A. Klip eds., *An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust*, (2009) Celsus legal publishers, Tilburg.

⁶ Council of the European Union, Progress Report on the Cooperation and verification mechanism – procedural aspects, MEMO/07/260.

⁷ <http://www.worldbank.org/> (accessed 15 March 2013).

⁸ http://www.americanbar.org/advocacy/rule_of_law.html (accessed 15 March 2013).

the CEPEJ reports on European Judicial Systems⁹, monitoring approaches of the Council of Europe (CPT¹⁰, GRECO¹¹), Euro barometer (for measuring the trust in the justice area), Transparency International (Corruption Index)¹² and the World Justice Initiative (Global Rule of Law Indicators)¹³.

Part B focuses on the pilot project. Based on the overview of EU instruments in criminal matters that contribute to the mutual trust (the procedural and institutional “building blocks” of mutual trust) and the list of available methodologies, the pilot project will define the issues to be evaluated. In particular, this part will elaborate on the methodologies to be applied in the pilot project and present the ‘check lists’ for the peer-review visits and the other evaluation instruments. On that basis, country reports for France, the Netherlands and Germany have been produced. These reports are supplemented by surveys based upon a questionnaire distributed among the contact points of the European Judicial Network and defence lawyers. Part B concludes by a comparative overview of the country reports and surveys.

Part C will present the lessons that can be learned from the pilot project and draw conclusions for the evaluated instrument (the EAW). Based upon the experiences with the pilot project, the final chapter will provide recommendations on the design of a common evaluation framework to enhance mutual trust between the Member States in criminal matters.

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⁹ Council of Europe – Committee of Ministers, Resolution Res (2002) 12 Establishing the European Commission for the Efficiency of Justice (CEPEJ), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=Res\(2002\)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Res(2002)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75) (accessed 15 March 2013).

¹⁰ Committee for the Prevention of Torture, see <http://www.cpt.coe.int/en/> (accessed 15 March 2013).

¹¹ Group of States against corruption, see http://www.coe.int/t/dghl/monitoring/greco/default_en.asp (accessed 15 March 2013).

¹² http://gcb.transparency.org/gcb201011/in_detail/ (accessed 15 March 2013).

¹³ World Justice Project, Rule of Law Index 2012, Washington D.C.

2 Procedural aspects and instruments for enhancing mutual trust between Member States

Pim Albers and Pascal Beauvais

2.1 Introduction

In the area of justice, freedom and security, judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions by Member States. The mutual recognition principle was presented at the Tampere European Council in 1999 as the “cornerstone” of the European judicial area¹⁴. In the future, mutual recognition could extend to all types of judgments and decisions¹⁵. This principle involves the harmonization of related national laws and the implementation of common minimum rules. It involves also mutual trust between the national authorities.

In several documents, speeches and reports the need for strengthening mutual trust is underlined. For example, in the Stockholm program, it is stated that “*mutual trust* between authorities and services in the different Member States as well as decision makers is the basis for efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different systems in the Member States will thus be one of the main challenges for the future”¹⁶. The application of this principle is welcomed by every Member State of the European Union, however one of the difficulties with the terminology is that it is not clear what exactly mutual trust mean and what factors can contribute to the strengthening of mutual trust or influence mutual trust in a negative manner.

2.2 Mutual trust in the criminal law area and the protection of nationals

Often mutual trust is related to a (full) application of the *mutual recognition* principle. Already in the Hague Program, adopted in 2004, the European Council noted that “in order for the principle of mutual recognition to become effective, mutual trust must be strengthened by progressively developing a *European judicial culture* based on the diversity of legal systems and unity through European laws”.

The application of the principle of mutual recognition and acceptance of mutual trust is not automatically guaranteed. A good example for this concerns the non-surrender of nationals and dual criminality under the European Arrest Warrant (EAW). Deen-Racsomány and Blekxtoon are of opinion that many States are traditionally strongly opposed to the extradition of their own nationals. According to the authors the nationality exception to extradition has its origin in “the sovereign authority of the ruler to control his subjects, the bond of allegiance between them, and the *lack of trust in other legal systems*”¹⁷. Under the influence of the European Union it is expected that due to the development of a *European judicial culture* the nationality exception on extradition were to be abolished.

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¹⁴ Tampere European Council (15-16 October 1999), presidency conclusions.

¹⁵ Council of the European Union (2009), The Stockholm programme – an open and secure Europe serving and protecting the citizens, Council Doc. 17024/09, p. 5.

¹⁶ Council of the European Union (2009), The Stockholm programme – an open and secure Europe serving and protecting the citizens, Council-Doc. 17024/09, p. 5.

¹⁷ Deen-Racsomány and Blekxtoon, *The Decline of the Nationality Exception in European Extradition? The impact of the Regulation of (Non-) surrender of nationals and dual criminality under the European Arrest Warrant*, p. 1. See also: Siegel (2008), Courts and Compliance in the European Union: the European Arrest Warrant in national constitutional courts, p. 13. (Jean Monnet Working Paper 05/08)

In the past, there were many conventions and regulations which prevent the extradition of nationals. For example the European Convention on Extradition concluded in the Council of Europe (1957) confirms the *right* of Contracting Parties to refuse the extradition of nationals. Moreover the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters (1962) similarly prevents the extradition of nationals of the contracting Member States. A change in this general rule has been introduced with the Convention on Extradition between the Member States of the European Union (1996). Art. 6 of this Convention declared that “extradition may *not be refused* on the ground that the person claimed is a *national of the requested Member State* within the meaning of Art. 6 of the European Convention on Extradition”. However six Member States have submitted a declaration which refuses the extradition of nationals (Austria, Denmark, Germany, Greece, Latvia and Luxembourg. Other countries, like Belgium, the Netherlands, Portugal and Spain declared that they will extradite nationals under certain conditions (for example a guarantee to serve the sentence in their own country, dual criminality, organized crime, terroristic offences, etc.).

The conclusion of the Tampere meeting in 1999 contributed to the development of a new approach where formal extradition procedures should be abolished as much as possible between the Member States and should be replaced by a simple transfer of persons. In addition to this consideration should also be given to fast track extradition procedures, without prejudice to the principle of a fair trial¹⁸. The abolishment of formal extradition procedures and the replacement by a simple transfer of persons was introduced with the publication of the Framework Decision on the European Arrest Warrant (FD EAW) in 2002¹⁹.

According to the Framework Decision the objective is to abolish extradition between Member States and to replace this by a system of surrender between judicial authorities. The introduction of a new simplified system of surrender (of sentenced or suspected persons) makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. With the introduction of the EAW procedure the surrender of all persons (including nationals) is the general rule and the *non-surrender of nationals* is the exception. Art. 4 (6) of the Framework Decision allows a non-execution of the EAW only in situations where the “European Arrest Warrant has been issued for the purpose of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law”²⁰.

In the beginning, after the recent adoption of the Framework Decision on the EAW, was for certain countries problematic due to problems of constitutional nature. In a majority of countries the EAW Framework Decision was implemented in due time. On the other side there was a number of countries (e.g. Germany and Poland) where the constitutionality of the EAW was challenged. Previously, the German constitution provided that “no German may be extradited to a foreign country”. Under the influence of the ratification of the Rome Statute for the International Criminal Court in The Hague this Art. was re-phrased

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¹⁸ Tampere European Council (15-16 October 1999), presidency conclusions.

¹⁹ Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002, p.1.

²⁰ Other grounds for non-execution are: situations where the act on which the EAW is based does not constitute an offence under the law of the executing Member State, where the person who is the subject of a EAW is being prosecuted in the executing Member State for the same act on which the EAW is based, where the judicial authorities of the executing Member State have decided either not to prosecute for the offence for which the EAW is based, etc.

into the following ruling: “no German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed”. As the result of the change of this Art. there are more possibilities for extraditing German nationals to other EU Member States.

In Poland the Constitutional Tribunal ordered in 2005 the revision of the legislation related to the EAW in such a manner that the civil rights of the Polish citizens are sufficiently guaranteed and that the obligations under the international laws are being reached. In the current situation there is still a ban on the surrender and extradition of Polish nationals to other EU Member States. This ban though is conditioned on the existence of a specific legal agreement or treaty with another state or international organisation²¹.

In the Netherlands nationals can be surrendered under the EAW, however this is bound by an additional condition, namely a *return guarantee*. The Framework Decision on the EAW states that nationals have to be surrendered in order to be prosecuted subject to the condition of being re-surrendered (Art. 5 (3)). This results in a situation that it is impossible to transfer a person when the offence is not punishable in both States. For Dutch persons this means that they will not be surrendered for the prosecution of an offence which is not an offence according to the Dutch law. Moreover surrender of a national is in the Netherlands only accepted if the person concerned can serve his sentence in the Netherlands after his trial in the issuing State and when the issuing State agrees to the conversion procedure of Art. 11 of the Convention on the Transfer of Sentenced Persons (1983 Council of the Europe)²².

In France, the extradition of Nationals presents no difficulty regarding the Constitution: the State Council (*Conseil d'Etat*) has refused to see this rule as fundamental principle recognized by the Constitution²³. According to Art. 695-24 2° of the Code of Criminal Procedure, the execution of a EAW may be refused, if the person wanted, in relation to the execution of a custodial sentence or safety measure, is a French national. And in virtue of Art. 695-32 CCP, the Investigating Chamber can subject the execution of the EAW, for prosecution, to the condition that French nationals will be returned to France for the execution of the sentence imposed upon them in the issuing State (return guarantee). It must be noted that the “return guarantee” concerns only French nationals and not residents²⁴.

Such difference in treatment between French and foreign residents was considered by the Court of Justice in its recent judgement in the case of *João Pedro Lopes Da Silva Jorge*²⁵ as a discrimination on the grounds of nationality, by virtue of Art. 18 TFEU, that cannot be justified by the fact that according to French law, the French authorities can undertake to enforce the execution of a foreign sentence in France only if the sentenced person is a French national.

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²¹ Siegel, *ibid.*, p. 28.

²² See Boaventura de Sousa Santos et Conceição Gomez (eds.), *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area* (2010), p. 262.

²³ Conseil d'Etat, Avis n° 368282, 26 September 2002, Rapport public 2003, La Doc. française, Paris, 2003, p. 192.

²⁴ The peer review revealed only one case where the return guarantee was applied by the Investigative Chamber of the CA of Douai with respect to a German national residing in France.

²⁵ ECJ, Judgment of 5 September 2012, Case C-42/11, *João Pedro Lopes Da Silva Jorge*.

2.3 Mutual recognition and judicial cooperation

At the moment, only a few criminal offences, in the areas of particularly serious crime with a cross-border dimension, are the object of common definitions and common minimum levels of maximum sanctions in the EU Law (human trafficking, drugs, terrorism, sex crimes on minors, discriminations etc.). But generally, there is no common criminal law directly applicable in the EU: national courts in the Member States apply their own national criminal law to the facts and before them and base their judgments on that source of law. According to a European Commission communication to the European Council and the European Parliament²⁶, the application of a final judgment in a criminal matter in a Member State other than the one in which the judgment was given encounters often administrative barriers, slow procedures and even a *lack of trust* between the Member States. However, the principle of *mutual recognition in final decisions* in criminal matters was introduced to reduce these problems.

2.3.1 Mutual recognition of judgments

Judicial cooperation in criminal matters is based on various international legal instruments which are characterized by the request-principle: one State makes a request to another State, which then decides whether or not to comply with it. The European Commission indicated in their document addressed to the European Council and the European Parliament²⁷ that “the principle of mutual recognition is founded on notions of equivalence and *trust*. On this basis, a decision taken by an authority in one Member State may be accepted as it stands in another State”.

In the same document the Commission states that various aspects are related to mutual recognition. First of all, a decision of a Member State will be recognized by other Member States, when it is *enforced*. In practice this means that when a judgment is pronounced in a court this will be enforceable throughout the entire Union or – in certain cases – a foreign decision will be converted in a national judgment and enforced. Secondly, mutual recognition implies also the application of *ne bis in idem*: once a person has been the subject of a decision on the facts and legal norms in a criminal case he or she should not be the subject of further decisions on the same matter.

Not only should the principle of mutual recognition be applied to judgments but also to the execution of sanctions. *Mutual trust* in the execution of sanctions should work in both ways: the Member State enforcing the sentence must have confidence in the decision of the issuing Member State, and the issuing Member State must have *confidence* in the way the executing Member State enforces the sentence. Moreover, mutual recognition can be strengthened when *information on convictions* is circulated freely between the Member States (see the developments in the area of the ECRIS information system).

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²⁶ COM (2000) 495 final.

²⁷ COM (2000) 495 final.

In addition to the promotion of exchange of information on convictions, the need that judgments are effectively enforced and sanctions applied in all the Member States mutual recognition means that *convictions in other Member States are taking into account in the course of (new) criminal proceedings* and that there is a culture where *disqualifications* are mutually recognized. The European Commission is of opinion that previous convictions may influence the course of a trial i.e. the judge may assess the risk of repeat offending, thereby also influencing the nature of the sentence²⁸. Regarding disqualifications the Commission stated that convicted offenders often are subject to disqualifications (e.g. working with children, tendering for public contracts, etc.)²⁹. To enhance mutual trust it is necessary that information on convicted persons and disqualifications will be exchanged via computerized systems³⁰.

2.3.2 Mutual recognition in the pre-trial stage

The principle of mutual recognition is not only limited to the part of a judicial procedure where a final judgment has been made or where is judgment is enforced, but it is also related to the pre-trial stage. In this stage the collection of evidence (in criminal cases) are of main importance, because based on this information a persons can be accused of having committed an offence or is innocent. That's why the Framework Decision of the *European Evidence Warrant* has been adopted.³¹ The European evidence warrant (EEW) is a judicial decision, whereby objects, documents and data may be obtained from other Member States. But the European evidence warrant is only applicable to evidences that already exist. Because of its limited scope, competent authorities can continue to use the traditional mutual legal assistance procedures. Because the European judicial cooperation on evidences is "fragmented and complicated", a new approach has been proposed which "is based on a single instrument called the European Investigation Order (EIO)"³². The EIO applies the principle of mutual recognition to almost all investigative measures.

.....

²⁸ Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM (2005) 195 final).

²⁹ See Communication from the Commission to the Council and the European Parliament - Disqualifications arising from criminal convictions in the European Union {SEC(2006)220} /* COM/2006/0073 final.

³⁰ For this purpose the ECRIS project has been launched (European Criminal Record Information System).

³¹ Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30 December 2008, p. 72.

³² Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters , OJ C 165 of 24 June 2010, p. 22.

2.3.3 Mutual recognition of supervision measures as an alternative to provisional detention, probation measures, and alternative sanctions

The development of mutual recognition in the pre-trial stage implies that non-custodial pre-trial supervision measures should be promoted as much as possible³³. The Council's Framework Decision 2009/829/JHA provides a tool for which makes it possible that Member States mutual recognize a decision on supervision measures issued by other Member States as an alternative to provisional detention. Moreover it is aimed at the monitoring of supervision measures imposed on a person and surrenders the person concerned to the issuing State in case of breach of these measures. In contrast with the EAW, this Framework Decision should generally be applied in case of less serious offences (though all crimes are covered by this Framework Decision)³⁴.

In Art. 8 the supervision measures are listed:

- An obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings.
- An obligation not to enter certain localities, places or defined areas in the issuing Member State.
- An obligation to remain at a specified place, where applicable during specified times.
- An obligation containing limitations on leaving the territory of the executing State.
- An obligation to report at specified times to a specific authority.
- An obligation to avoid contact with specified persons in relation with the offence(s) allegedly committed.

Other supervision measures that are mentioned in the Framework Decision are: an obligation not to engage specified activities in relation with the offence(s) allegedly committed, which may include the involvement in a specified profession or field of employment, an obligation not to drive a vehicle, an obligation to deposit a certain sum of money or to give another type of guarantee, an obligation to undergo therapeutic treatment or treatment for addiction or an obligation to avoid contact with specific objects in relation with the offence(s) allegedly committed.

.....
³³ According to European Commission, in 2006, alternatives to a *pre-trial detention* in situations where the person resides in another Member States are often impossible to use. See: European Commission (2004), Green Paper on mutual recognition of non-custodial pre-trial supervision measures, COM (2004) 562 final and European Commission (2006), proposal for a Framework Decision on the European Supervision Order in pre-trial procedures between Member States of the European Union (COM (2006) 468 final).

³⁴ Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294 of 11 November 2009.

2.3.4 Mutual recognition of probation measures and alternative sanctions

Not only for the pre-trial stage and for the surrender, instruments have been created to improve mutual recognition and mutual trust, but also for other parts of the criminal judicial proceedings. This is for example the case with probation measures, alternative sanctions. The Framework decision 2008/947/JHA is aimed at “facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions in case of offenders who do not live in the State of conviction”³⁵. The mutual recognition of this Framework Decision is focused on the acceptance of judgments related to the imposition of alternative sanctions and probation measures. Since this Framework Decision has been recently introduced, not much information has been available with the common practice in the EU Member States. Since this Decision is also meant to harmonize the types of judgments it is important to know how alternative sanctions and probation measures have been defined:

- A custodial sentence or measure involving the deprivation of liberty, if a conditional release has been granted on the basis of that judgment or by a subsequent probation decision.
- A suspended sentence is defined as a custodial sentence or measure involving the deprivation of liberty, the execution of which is conditionally suspended, wholly or in part, when the sentence is passed by imposing one or more probation measures.
- A conditional sentence concerns a judgment in which the imposition of a sentence has been conditionally deferred by imposing one or more probation measures or in which one or more probation measures are imposed instead of a custodial sentence or measures involving deprivation of liberty.
- An alternative sanction is in the Framework Decision described as a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or an instruction.
- A probation decision is a judgment or a full decision of a competent authority of the issuing State taken on the basis of a judgment granting a conditional release or imposing probation measures³⁶.

.....
³⁵ Framework Decision 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (2008/947/JHA), OJ L 337 of 16 December 2008, p. 102.

³⁶ See FD 2008/947/JHA, Art. 2. In Art. 4 a list of probation measures and alternative sanctions have been provided.

2.4 Towards a better understanding of the definition of criminal offences in Europe (and the proportionality principle)

To improve the mutual trust between the Member States, the establishment of *minimum rules* concerning *the definition of criminal offences and sanctions*³⁷ and a better understanding of the variation in the definitions of criminal offences (and the level of sanctions) are needed.

The Framework Decision of the European Arrest Warrant suppressed the traditional “verification of the double criminality of the act” for a list of 32 offences categories. With this list, a first attempt has been tried to introduce a harmonized list of offences where the EAW should be applied almost automatically and with a very high level of confidence (see table 1 with the list of offences).

Participation in a criminal organisation	Environmental crime	Forgery of administrative documents and trafficking therein
Terrorism	Facilitation of unauthorized entry and residence	Forgery of means of payment
Trafficking in human beings	Murder, grievous bodily injury	Illicit trafficking in hormonal substances
Sexual exploitation and child pornography	Illicit trade in human organs and tissue	Illicit trafficking in nuclear or radioactive materials
Illicit trafficking in narcotic drugs and psychotropic substances	Racism and xenophobia	Trafficking in stolen vehicles
Illicit trafficking in weapons, munitions and explosives	Kidnapping, illegal restraint and hostage taking	Rape
Corruption	Organised or armed robbery	Arson
Fraud	Illicit trafficking in cultural goods	Crimes within the jurisdiction of the International Criminal Court
Laundering of the proceeds of crime	Swindling	Unlawful seizure of aircraft/ships
Counterfeiting currency	Racketeering and extortion	Sabotage
Computer-related crime	Counterfeiting and piracy of products	

.....
³⁷ Council of the European Union, The Stockholm programme – an open and secure Europe serving and protecting the citizens, Council-Doc. 17024/09, p. 5.

One of the problems with the list of offences is related to the fact that in many European Member States these offences are still differently defined in their national criminal codes, even if some criminal offences, in the areas of particularly serious crime with a cross-border dimension, are the object of common definitions and common minimum levels of maximum sanctions in the EU Law (human trafficking, drugs, terrorism, sex crimes on minors, discriminations).

An additional problem is related to the quite extensive conditions for issuing a EAW (according to paragraph 4 of Art. 2 of the Framework Decision, an “European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months ») which is combined with the imprecise definition of the 32 offences categories *without double criminality test*. The abolition of the double criminality test means that *only the issuing State qualifies the offence*³⁸. That opens the door for Member States to issue a EAW for cases that in certain countries are defined as ‘small offences’ or acts that will be treated by using administrative law procedures. In other words, Member State can be obliged to surrender suspects and convicts for acts that are, according to the national laws, regarded as minor offences and not as a criminal act. For example this is the case with certain traffic offences. In the Netherlands those offences are handled via administrative law procedures, whilst in other Member States traffic offences are a part of the list of offences as described in their national criminal codes.

When we look at the current practice of the application of the EAW a comparative study on the Netherlands, Italy, Portugal and Spain showed that in those countries there is a group of ‘big four’ offences, where a EAW is often issued: drug trafficking, organised or armed robbery, murder/grievous bodily injury and participation in a criminal organisation. The second tier of offences, concerned: forgery of administrative documents, kidnapping, illegal restraint and hostage-taking and swindling. According to the authors of this report the third tier of offences is related to rape, forgery of means of payment, trafficking in human beings, laundering and counterfeiting of currency³⁹. What the comparative report also shows is the variety of the executing sentences. When it comes to issuing a EAW to execute a prison sentence the study showed that the Netherland issues warrants for convicts for 3-years of imprisonment, whilst Spain is looking for the higher-sentenced convicts (Portugal is in the intermediate position). Regarding the non-catalogue of offences the study has collected only data from Portugal and Spain. The authors of the study reported that in terms of common non-catalogued offences in the two countries: theft and illegal possession of weapons are often a reason for issuing a EAW, followed by: simple bodily injury, crimes against justice and officers, damage to property, receiving stolen goods, pandering/exploitation of sexual labour and unauthorized entry/burglary⁴⁰.

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³⁸ See De Souza Santos and Gomez (eds.), *The European Arrest warrant in law and practice: a comparative study for the consolidation of the European Law-enforcement Area* (2010), p. 255.

³⁹ De Sousa Santos and Gomez, p. 85-86.

⁴⁰ De Souza Santos and Gomez, p. 89.

The abolition of the double criminality test can also be brought in relationship with the *principle of proportionality*. As can be derived from the previous paragraphs certain countries issues EAWs for minor offences. There are situations known where a EAW is issued for an offence which is regarded by the executing Member State as a case that can be handled by a fine. In a case of the Amsterdam district court of the Netherlands the judges decided in their verdict that the application of the Dutch Surrender Act can be disproportional damaging for the person concerned and that only in special circumstances surrender can be refused because it will constitute a violation of the proportionality principle. The special circumstances refers to individual cases in which the nature of the offence, the duration or the objective of the issuing country could be disproportional with regards to the rights and freedoms of the requested person.

The revised handbook on how to issue a European Arrest Warrant devotes a separate paragraph on the issue of the proportionality test⁴¹. In this handbook it is stated that the Framework Decision on the European Arrest Warrant “does not include any obligation for an issuing Member State to conduct a proportionality check (...) Notwithstanding that, considering the severe consequences of the execution of a EAW, with regards to the restrictions on physical freedom and free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors” (p. 14 of the Handbook EAW). Those factors are:

- The seriousness of the offence;
- The possibility of the suspect being detained;
- The likely penalty imposed if the person sought is found guilty of the alleged offence;
- The effective protection of the public;
- The taking into account of the interests of the victims of the offence.

In the Handbook it is underlined that the EAW should only be used for severe offences and should *not* be chosen where the coercive measure that seems proportionate, adequate and applicable to the case concerned is not preventive detention. A EAW should not be issued when there are other non-coercive custodial measures available, such as the provision of a statement of identity and place of residence.

Alternatives for the EAW that are mentioned in the Handbook are:

- The application of less coercive measures of mutual assistance where possible;
- The use of videoconferencing for suspects;
- The use of the Schengen Information System to establish the place of residence of a suspect;
- The use of the Framework Decision on the mutual recognition of financial penalties⁴² (p. 14-15 of the Handbook).

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⁴¹ Council of the European Union (2010), Revised version of the European handbook how to issue a European Arrest Warrant, Council-Doc. 17195/1/10 REV 1.

⁴² Framework Decision 24 February 2005 on the application of the principle of mutual recognition to financial penalties (2005/214/JHA), OJ L 76 of 22 March 2005, p. 16.

2.5 Legislative measures to reinforce mutual trust

One of the other cornerstones for enhancing mutual trust between the Member States is related to the quality of *national legislation* and the efforts of the European Union to harmonize certain provision of criminal law.

To recognize and apply a foreign criminal decision, a national authority has to accept the legitimacy of another criminal justice system - which is the expression of another system of values. This is why mutual recognition needs basic conditions such as the knowledge and the quality of foreign national laws, but also their harmonization based on minimum, but fundamental, common standards. Before the Lisbon Treaty, harmonization of criminal law was possible according to Art. 31 of the former Treaty on the European Union; and *framework decisions* were the main tool to harmonize. The Lisbon Treaty improves and clarifies the legal basis of harmonization in the criminal law area. From the Amsterdam Treaty, the results of the EU harmonization concerning substantial criminal law are real and significant for several categories of crime with a cross-border dimension : organised crimes, terrorism, drug trafficking, racism, sexual crimes against children, human trafficking, arms trafficking corruption, fraud, laundering, environmental crimes, cybercrimes and illegal immigration.

The quality of legislation in the criminal law area of candidate EU-Member States and recently joined Member States are a part of the negotiation and monitoring process. Often this results in major changes in legislation and the adaption of the current legislation towards European (and international) standards. It is important to note in this respect that for most of the Member States who have recently become member of the European Union the quality of the legislation is set to the European standards. However, there can be still a difference between 'the law in the books and the law in practice' in those States, where (major) improvements are necessary.

With respect to other legislative measures the European Commission seems prefer now an harmonization of the law of the criminal procedure at Community level in such a manner that mutual recognized judgments will meet high standards concerning securing personal rights (e.g. presumption of innocence, decisions *in absentia* and minimum standards for the gathering of evidence)⁴³.

.....
⁴³ European Commission (2005), Communication from the Commission to the Council and the European parliament: communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between the Member States (COM (2005) 195.

2.6 Procedural rights for suspects, offenders and victims

A majority of the EU instruments in the criminal law area that have been introduced in the period 2002/2008 was mainly focused on strengthening the position of the law enforcement institutions and justice authorities in the fight against (international, cross-border) crime: indeed, the EU legislation concerned essentially harmonization of substantive criminal law on the one hand, and procedural measures enhancing cross-border cooperation - the Framework decision on victims rights was the only one measure purely related to domestic proceedings⁴⁴. So that lesser attention was given to the protection of the rights of suspects, offenders and victims.

The 'only' reference that often was made in the Framework Decisions concerned was the fact that – as a part of these proceedings – the fundamental rights as laid down in Art. 6 of the Treaty of the European Union and the Charter for Fundamental Rights of the European Union should be respected. In Art. 47 of the Charter for Fundamental Rights the European standards have been formulated for a proper trial before the courts. As can be seen from the content of this Art., it is inspired by Art. 6 of the European Convention on Human Rights of the Council of Europe:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice⁴⁵”

With the introduction of the Stockholm programme it seems to be that in the current activities of the European Union more attention is given to the protection of the rights of suspects, offenders and victims. In the programme, it is underlined that EU institutions and Member States should ensure that legal activities remain consistent with the fundamental rights throughout the legislative process by a way of strengthening a methodology for a systematic and rigorous monitoring of compliance with the Convention and the rights set out in the Charter for Fundamental Rights⁴⁶. The European legislator considers that although all the Member States are party to the ECHR, it is not sufficient : « strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Art. 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter »⁴⁷.

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⁴⁴ Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ L 82 of 22 March 2001, p. 1.

⁴⁵ Charter of fundamental rights of the European Union (official journal of the European Communities, (2000/c 364/01)). In Art. 48 of the Charter the presumption of innocence and the right of defence is explained, whilst in the Art. 49 and 50 the principles of legality and proportionality of criminal offences and penalties, as well as the right not to be tried or punished twice in criminal proceedings for the same offence is elaborated.

⁴⁶ Council of the European Union, The Stockholm programme – an open and secure Europe serving and protecting the citizens, Council-Doc. 17024/09, p. 12.

⁴⁷ Recitals (6) and (7) of Directive 2010/64/EU, 20 October 2010, on the right to interpretation and translation in criminal proceedings, OJ L280 of 26 October 2010, p. 1.

With respect to the victims, in the Stockholm Programme, the European Commission and the Member States are invited to examine how legislation and supporting measures for the protection of victims can be improved. To reinforce victims' rights, the Commission adopted on 18 May 2011 the « Victims package »⁴⁸. Pursuant to this package of legislative proposals, the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012⁴⁹. The purpose of this Directive is « to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings »⁵⁰. It complements the Directive 2011/99/EU of 13 December 2011 on the European protection order⁵¹. With this Directive, an authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, can issue a *European protection order* enabling a competent authority in another Member State to continue the protection of the person in the territory of that other Member State⁵².

Not only the rights of victims should be strengthened, but also the procedural rights for suspects and accused persons. As a part of the implementation of the Stockholm programme a roadmap has been introduced for strengthening procedural rights of the individual in criminal proceedings⁵³. In this roadmap six actions are proposed:

- **Measure A: translation and interpretation.** Specific instruments should be introduced to guarantee the right to interpretation and translation in judicial proceedings and at the pre-trial stage.
- **Measure B: information rights and information about the charges.** A person who is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing for example by a *Letter of Rights*.
- **Measure C: Legal advice and legal aid.** The suspected or accused should have a right to legal advice and legal assistance at the earliest appropriate stage as possible and the right to legal aid should be guaranteed.
- **Measure D: communication with relatives, employers and consular authorities.** A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person (relative, employer, consular authority) informed of the deprivation of liberty. If the person is detained in another State than his place of residence the person should have the right to have the competent consular authorities informed.
- **Measure E: special safeguards for suspected or accused persons who are vulnerable.** In order to safeguard the fairness of the proceedings it is important that special attention is given to the suspected or accused person who cannot understand or follow the content of the proceedings due to their age, mental or physical condition.

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⁴⁸ IP/11/585 of 18 May 2011, available at http://europa.eu/rapid/press-release_IP-11-585_en.htm?locale=en (accessed 12 March 2013).

⁴⁹ Directive 2012/29/EU, 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime (2001/220/JHA), OJ L 315 of 14 November 2012, p. 57.

⁵⁰ Art. 1 of the Directive 2012/29/EU.

⁵¹ Directive 2011/99/EU, 13 December 2011, on the European protection order, OJ L338 of 21 December 2011, p. 2.

⁵² Art. 1 of the Directive 2011/99/EU.

⁵³ Council of the European Union Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01), p. 3.

- **Measure F: a Green Paper on pre-trial detention.** Since persons can be detained as a part of a pre-trial for an extensive period it is necessary to have a better view on the conditions of detention within the EU Member States. The European Commission is invited to draft a Green paper on this issue.

On 11 December 2009, the European Council made the roadmap part of the Stockholm Programme. The first measure implementing the Roadmap, measure A, was Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings⁵⁴. Concerning the measure B, the Directive 2012/13/EU on the right to information in criminal proceedings was adopted on 22 May 2012⁵⁵. The Commission has made a proposal on a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest which is currently being discussed in the Council and the European Parliament⁵⁶. As an other implementation of the roadmap, a Green paper on pre-trial detention has been published. In the next paragraph the content of the Green paper is further explained.

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⁵⁴ Directive 2010/64/EU of 20 October 2010, on the right to interpretation and translation in criminal proceedings, OJ L 280 of 26 October 2010, p. 1.

⁵⁵ Directive 2012/13/EU, 22 May 2012, on the right to information in criminal proceedings, OJ L 142 of 1 June 2012, p. 1.

⁵⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, (COM (2011) 326/3).



2.7 EU-legislation in the field of detention (EU Green paper)

In June 2011 the European Commission published a green paper on the strengthening of mutual trust in the European judicial area with regards the application of EU-legislation in the field of detention⁵⁷. One of the reasons for introducing this green paper is that there are major differences between Member States on the time that suspects/accused persons have to remain in detention during a pre-trial stage. According to the Commission, a long pre-trial detention period can not only be very harmful for the person concern, but it can also lead to a reduction of the mutual trust.

The main angle of the green paper is the interaction between the conditions for detention and the EU-instruments for mutual recognition, such as the EAW and the Framework Decision on custodial detention. The principle of mutual trust is based on acceptance of the fact that judgments should be recognised and enforced in the same manner in all the EU Member States. Despite the existence of differences between the Member States regarding national procedural laws in criminal matters, the execution of decisions made by judges should be equally applied in the 27 EU States. With respect to instruments like the EAW, this means that the judges in the executing States who have to decide on the warrant and surrender, must be convinced that the decisions taken in the issuing States are correct and fair, and that the (human) rights of the person requested will be fully respected by the issuing Member State when this person is transferred to this State (and detained).

There have been already examples where the surrender based on a EAW was discussed in court, because there were questions raised about the conditions of detention in the issuing State and if these conditions meet the standards that have been described in the European Charter and the European Convention on Human Rights.

It must be noted that the existence of this problem is not only limited to the pre-trial stage, but it relates also to the conditions of detention when a person have been tried. If there are concerns about the prison conditions, this can be an argument for an executing Member State not to surrender a person.

The Council's Framework Decision 2008/909/JHA describes the principle of mutual recognition to judgments in criminal matters imposing a custodial sentence or a measure involving the deprivation of liberty. This Framework Decision should be implemented in all the Member States before 2011. The main aim of the Decision is that it creates an arrangement for the transfer of convicted persons to the Member State where that person normally resides or which is the country of his/her nationality.

Before this Framework Decision will be entered into force, together with Framework Decisions on mutual recognition on custodial sentences and alternative sanctions (2008/947/JHA) and Framework Decision on the European Evidence Warrant (2009/829/JHA), it is necessary to identify potential obstacles in the conditions of detention which can influence the instruments of mutual recognition in a negative manner. Member States are currently invited to provide information to the European Commission on pre-trial custody detention, the existence of alternatives for detention related to juveniles, the supervision on the conditions of detention and the application of European norms on detention (such as the norms developed by the Council of Europe).

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⁵⁷ European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final.

2.8 Conclusions

Over the years the European Union has introduced several legislative instruments to strengthen the mutual trust in criminal matters between the Member States by mainly focusing on harmonization of substantive criminal law on the one hand, and on procedural measures enhancing cross-border cooperation on the other hand. Only few measures were purely related to domestic proceedings⁵⁸. As a result, the European area of justice, freedom and security was more characterized by the objective of efficiency of cooperation than by the objective of protection human rights. But, in this context, the automatic application of the principle of mutual recognition has generated indirect difficulties related to a lack of trust in the level of individual protection in the other legal systems. As a consequence, the implementation of EU instruments strengthening the position of victims, accused or suspect persons and the convicted persons in the criminal proceedings, is now considered as legislative priority in order to improve mutual trust between judicial authorities. And the level of effectiveness of these instruments is one of the cornerstones for setting up a comprehensive evaluation system to assess mutual trust. However, this is not sufficient for a complete picture on the mutual trust between Member States. In addition to the evaluation of procedural aspects related to mutual trust it is important to take notice of institutional aspects of mutual trust as well. In the next chapter elements of institutional aspects related to mutual trust will be described.

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⁵⁸ Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ L 82 of 22 March 2001, p. 1.

3 Institutional aspects related to mutual trust between EU Member States

Pim Albers

3.1 A European judicial culture

Mutual trust is not only enhanced by the introduction of new legislative measures, primary focused on the improvement of certain parts of the criminal procedures, but can also be influenced by measures of *institutional nature* and by the *reinforcement of the evaluation mechanisms* to evaluate properly the practical needs of the justice systems and to identify potential barriers before new instruments are adopted⁵⁹.

These evaluation mechanisms can also look at the practical conditions for implementing new EU instruments and the identification of best practices. In this chapter the mutual trust in relation to the institutional aspects of the judicial systems are being examined.

The mutual trust from the institutional viewpoint can be strengthened in various ways. One of the ways concerns the improvement of the *efficiency of the judicial systems* by encouraging exchange of best practice and the development of innovative projects related to the modernisation of justice⁶⁰.

Another solution for improving the mutual trust (and mutual recognition) between the EU Member States is related to *the exchange of information*. In order to recognise a decision taken in another Member State, the justice institutions in other Member States must know that such a decision exists. For improving the information position of Member States the European Commission suggests a 'two stage' approach. In the first stage standard multilingual forms (are being or) will be introduced to enable practitioners in each of the Member States to obtain information from the authorities of other Member States for example about the situation if a person has a criminal record. In the second stage a genuine European criminal register will be created⁶¹. When looking at the development of the European Criminal Register System (ECRIS) we can conclude that we are already in this stage.

The third instrument that is mentioned by the European Commission concerns the promotion of *networking among practitioners* of justice, such as the European Network of Councils for the Judiciary, the European Network of Supreme Courts, the European Judicial Training Network (EJTN), the Council of Bars and Law Societies of Europe (CCBE) etc. Moreover through investing in *judicial training* in Europe the Commission expects that the European dimension of the judicial function can be improved too⁶².

The institutional measures that the European Union wants to promote (improving efficiency of judicial systems, exchange of information, networking and more attention to judicial training) to enhance mutual trust are important. On the other hand, there are other aspects that needs to be taken into account as well, such as the available *capacity* (budget, human resources, material resources) of the national judicial and justice systems, the *quality of the staff* (police, public prosecutors, judges, etc.), the *general trust of the legal practitioners in the justice systems* of other Member States and the *trust of the citizens* in the national legal systems and the legal systems of the other European Member States.

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⁵⁹ European Commission (2005), Communication from the Commission to the Council and the European Parliament: on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between the Member States (COM (2005) 195 final).

⁶⁰ Council of the European Union 2 December 2009, The Stockholm Programme – an open and secure Europe serving and protecting the citizens (CO EUR-PREP 3, JAI 896, POLGEN 229), p. 25.

⁶¹ European Commission, Communication to the Council and the European Parliament: mutual recognition of final decisions in criminal matters (COM (2000), 495 final).

⁶² See COM (2005) 195 final.

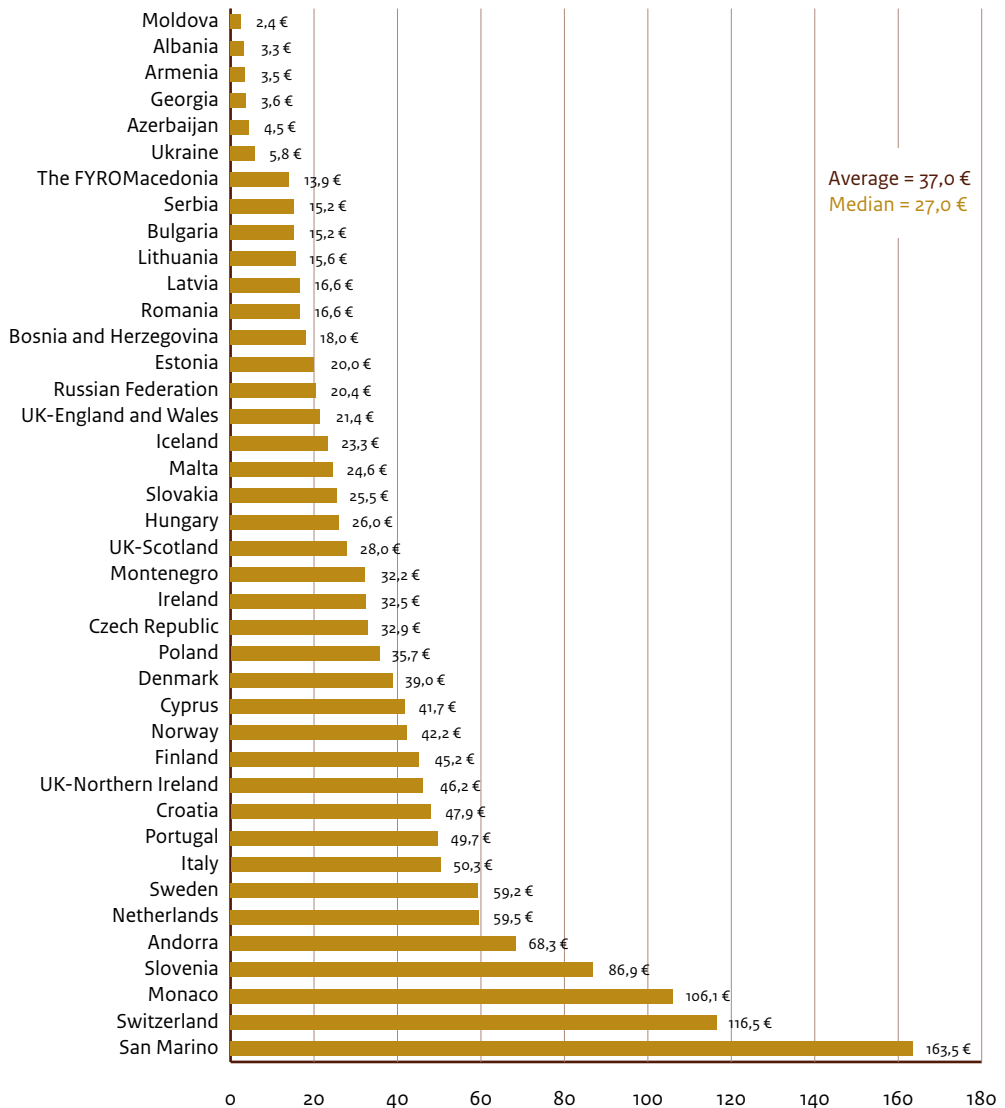
3.2 Promotion of efficiency (and quality) of justice

The promotion of efficiency of justice is not the exclusive topic of the European Union, since the Council of Europe has been working on this issue from 2002 when the European Commission for the Efficiency of Justice (CEPEJ) was created. One of the main tasks of this Commission is to improve the knowledge between the Member States of the Council of Europe with respect to the composition and functioning of the judicial systems. For this purpose an evaluation approach has been introduced where Member States have to provide information (on the basis of a questionnaire composed of more than 200 questions) about the budgeting of the justice systems, access to justice, the functioning of the courts and public prosecution agencies, the practice of legal professionals (lawyers, enforcement agents, notaries, legal translators and interpreters) and the use of mediation to reduce the workload of courts. Every two year a report is published where an overview is given concerning the composition and functioning of the judicial systems in Europe. This overview is used by governments to compare their national systems with similar systems in other countries with a viewpoint of learning from best practices and the identification of areas of improvement⁶³.

When it comes to differences between Member States of the Council of Europe (including the EU Member States) we can identify many variations with respect to the *capacity of the judicial systems*. For example in the following graph the diversity concerning the annual public budget allocated to the courts (excluding the budget for the public prosecution and legal aid) is shown. Similar variations can be found in the field of the available capacity for the public prosecution, the number of professional judges, salaries for judges and prosecutors, etc. One can expect that in countries with a limited number of resources there is a higher chance that the performance of the justice institutions is lower, compared to those countries where more resources are available. This diversity can have a negative influence in situations where a poorly funded country has to cooperate with a 'wealthy' country in the justice area as a part of the mutual cooperation.

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⁶³ See: <http://www.coe.int/cepej> (accessed 13 March 2013) and the last report: CEPEJ, *European Judicial Systems* (Edition 2012), Strasbourg.

Graph 1 Annual public budget allocated to all courts (excluding legal aid and public prosecution) per inhabitant in 2010 (CEPEJ 2012, p. 28)⁶⁴



⁶⁴ European Commission for the Efficiency of Justice, *European Judicial systems* (Edition 2012), Council of Europe publishers, p. 28.

The work of the CEPEJ is not limited to the publication of reports on judicial systems with statistics and descriptive information, because it tries also to cover specific subjects that are important for improving the judicial systems in Europe. For example there exist SATURN, a study centre oriented at the question of delays and backlogs of court cases and several other specialized working groups (for example on the quality of justice and courts (CEPEJ-GT-QUAL), the enforcement of judgments and mediation).

The capacity of the judicial systems can influence the mutual trust between the EU Member States positively and negatively. For example in case that there exist a lack of capacity in the judiciary, this will have an impact on the duration of (pre-) trial procedures. For EAW procedures this implies that in situations where a person surrendered to the issuing Member States, he/she has to be kept longer in custody as a part of a pre-trial procedure than is necessary (unless alternative measures for detention have been applied, such as electronic house-detention). This is why it is important that the duration of all procedural steps are monitored in a systematic manner (see also paragraph 3.7). However, experience showed that it is very complicated to collect this information at a European level.

3.3 The quality of the police, justice and other law enforcement officials (including training and education)

Especially in the field of judicial cooperation in criminal matters it is important that Member States can rely on reliable and properly trained colleagues working in the other Member States. Most ideally, there should exist a European judicial space where police officers, other law enforcement officers (customs, public prosecutors), justice representatives are recruited, selected and trained according to uniform European standards. However, the current practice shows that there is a large divergence between EU Member States on the criteria used to recruit, select and nominate police and justice officials. This is for example the case with the judiciary. Different criteria are applied for the nomination of judges and the level of mandatory training that is needed to become a judge in one of the European countries. Also the level of remuneration varies from country to country. This can be especially problematic in those EU countries where the salaries for judges (and other justice officials as well as the police) are relative low. It can lead to situations where judges are leaving the courts for better positions (for example in a private law practice) or to a higher vulnerability of the judiciary in terms of corruption. Both situations will have a negative impact on the (quality and) performance of the courts and can contribute to a lowering of the mutual trust between Member States.

To get a better mutual understanding of the European police, law enforcement officers and judicial officers *networking* and more attention to *training and education* is needed. With regards to networking there are several professional networks available. Good examples are the: European Network of Councils for the Judiciary, the European Network of Supreme Courts, European Judicial Training Network (EJTN) and the European Judicial Network in Criminal Matters. With respect to the last mentioned network a separate paragraph can be found in this chapter, describing the main roles and functions of the EJN.

The positive aspect on networking is that police and justice officials can exchange practical experiences and can learn from 'best practices' of other EU Member States. In addition to this it will result in a better understanding between the police and justice officials in the EU Member States, which at the end of the day will also contribute to the strengthening of the mutual trust.

As has been indicated at the beginning of this paragraph policy measures related to the training and education of police and judicial officials will have a positive impact on the mutual trust too. A good example concerns the creation of the European Judicial Training Network⁶⁵, where national schools for the judiciary can exchange information about the curricula of the training programmes for judicial officers and have the possibility to create *exchange programmes* between the Member States where judges and prosecutors can learn about the practice in other EU Member States. Since the inception of the EJTN in 2005 till 2010 more than 2200 European judges and public prosecutors have participated in the exchange programme of this trainings network, in the period 2005-2012 even 4300 persons (including judicial trainers and members of the superior councils of justice) took part. The numbers clearly indicate that the exchange has regularly increased.⁶⁶ In addition to this programme special seminars are organised as a part of the criminal justice project of EJTN. These seminars are addressing the subject of the practice of the EAW. As a part of the training simulations are provided recreating a real international environment in judicial cooperation in which EAWs (and Mutual Legal Assistance) requests will be issued and executed.

In the Stockholm programme a special paragraph has been dedicated on the importance of training and education of judges, prosecutors, judicial staff, police, customs and border guards. In this programme, it is stated that the development of systematic *European Training Schemes* will contribute to the creation of a uniform European judicial and law enforcement culture. One of the ambitions expressed in the Stockholm programme is that by 2015 a substantive number of professionals will have participated in a European Training Scheme or an exchange with another Member State.⁶⁷

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⁶⁵ See <http://www.ejtn.net/> (accessed 13 March 2013).

⁶⁶ See also the figures in the 2010 EJTN activity report, p. 2, available at: http://www.ejtn.net/Documents/Exchange%20programme%20documents/Exp%20Facts_figures%202010_EN.pdf (accessed 14 March 2013).

⁶⁷ *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, O.J. C 115 of 4 May 2010, p. 1 (1.2.6.).

3.4 Independence (and accountability) of the judiciary

Respecting the European Charter for Fundamental Rights and Art. 6 of the European Convention on Human Rights requires fair proceedings established by *independent tribunals*. Independence of the judiciary and judges has always been an important criteria to assess legal systems and to determine the quality of the judiciary. In that sense it is an important element in the sphere of mutual trust too. If the independence in a given country is perceived as problematic, this might have a negative impact on the mutual trust between Member States.

When you look at the literature and various documents on independence of the judiciary, one can conclude that there are several viewpoints on this subject possible. First of all, there is the independence in the decision making process of a judge i.e. judges will not be influenced by external powers and can act completely independent in trials. One of the guarantees of independence for this purpose can be a constitutional guarantee, i.e. that the tasks and position of a judge is described in a constitution. Other instruments to enhance the independence of the judiciary are related to: the nomination of judges, their tenure, the existence of provisions of immunity, a freedom of expression of judges, clear disciplinary proceedings, fair salaries, etc. Examples of European standards for independence of the judiciary are a selective number of opinions drafted by the Consultative Council of European Judges (CCJE) and specific Recommendations of the Council of Europe regarding the efficiency of justice⁶⁸.

Protecting independence is not only related to the individual judges, but it also concerns the relationship between the ministry of justice/minister of justice and the judiciary, the role of councils for the judiciary, the management of courts and the financing of courts (institutional independence). It goes too far to describe the relevance here in more detail. More can be found in the reference material listed in the footnotes⁶⁹.

Maintaining a sufficient level of independence of the judiciary will contribute to the mutual trust in the judicial systems of the European Member States. However, it is also important to draw the attention to the subject of accountability, since there is “no independence of the judiciary possible, without a decent level of accountability”. In practice this means that the judiciary i.e. the courts have to present their performance information to the society, ministry of justice (and/or finance) and parliament. To realize this: courts, councils for the judiciary and/or other supervising authorities must collect on a systematic basis information on the key-performance indicators based on principles of efficiency and quality of justice (see also paragraph 3.5). The current practice shows however that not many European member states are able to collect this information on a systematic basis and that improvements in the area of court performance is necessary.

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⁶⁸ See for example: Rec No. 94(12) of the Council of Europe of the Committee of Ministers to Member States on the independence, efficiency and role of judges and Opinion No. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges.

⁶⁹ Consultative Council of European Judges Opinion No. 2 (2001), on the funding and management of courts. CCJE Opinion No. 3 (2002) on ethics and liability of judges, CCJE Opinion No. 10 (2007) Council for the Judiciary on the service of society, etc.

3.5 The right to a fair trial and the quality of legal representation

In Art. 6 of the European Convention on Human Rights (ECHR) it is stated that every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addition to this suspects in criminal procedures have also the right to be informed promptly in a language he or she understands in detail, must have adequate time and facilities for the preparation of his/her defence and the possibility to defend himself in person or through legal assistance of his own choosing or – if he/she has insufficient means – to receive legal assistance for free when the interest of justice so require. A similar line of reasoning can be found in the European Charter for Fundamental Rights (CFR) in Art. 47 and 48. In Art. 47 CFR, the right to a *fair and public hearing* within a *reasonable time* by an *independent and impartial tribunal* is replicated from Art. 6 ECHR, whilst the right to a legal defence can be found in Art. 48 CFR. In Art. 48 (2) CFR it is stated that there should be respect for (and a guarantee of) the rights of the defence of anyone who has been charged (for a criminal offence).

Since all the EU Member States are member of the Council of Europe and have ratified the European Convention on Human Rights, every Member State should promote fair trials and respect the right of a proper legal defence. However, there can always be a difference between what have been stated in the law and what is applied in practice. There may be situations possible where the right to a proper defence is not guaranteed or where the quality of the defence is poor. For example due to the fact that the quality of pro-bono lawyers is low or where lawyers are only willing to assist clients if they can guarantee that their fees will be paid in due time.

With regard to cross-border criminal procedures an extra guarantee might be provided, especially for the EAW procedure. This is related to the level of specific expertise of the lawyer. Since, compared to national criminal law procedures, lawyers may have lesser experience with the legal defence in EAW cases, this can have a negative influence on the quality of the legal representation in these procedures. It is expected that specialized lawyers have a better opportunity to defend clients properly in EAW procedures, compared to lawyers who represents clients in EAW procedures only on an occasional basis. Moreover, due to the cross-border character of a EAW procedure, not only the quality of the defence in the executing State must be guaranteed, but also in the issuing State where the court procedure will take place. If this is not the situation, this can have a negative impact on the mutual trust between countries concerning cross-border criminal procedures.

3.6 The level of proportionality

The level of proportionality, the factors determining the proportionality between the crime committed and the level of punishment and the proportionality of coercive measures will be discussed in a separate chapter in more detail. In this paragraph only the relation with the mutual trust aspect will be discussed.

In Art. 49 of the European Charter for Fundamental Rights the main principles of legality and proportionality is laid down in the rule that no one should be imposed with a heavier penalty than was applicable at the time the criminal offence was committed. Moreover, if a national law provides for a lighter penalty, that penalty should be applicable. Lastly, the severity of the penalties must not be disproportionate to the criminal offence.

When we compare this Art. with the practice in the European Union, there are major differences between countries concerning the type of certain offences and the level of penalties. What is seen in one country as a small criminal offence, i.e. the theft of a package of biscuits from the supermarket or the theft of chickens from a farmer, where a low penalty may be applied (for example the payment of a fine) this can be defined by another country as a major criminal offence which must be punished with an imprisonment of several years. Differences between countries with respect to the level of punishment and the offence committed can have a negative impact on the mutual trust, especially when in cross-border criminal procedures the executing countries receive many requests for executing a EAW which might be seen by those countries as minor offences and where the costs and efforts for implementing a EAW procedure are seen as too high for those type of offences.

3.7 The performance of the police, law enforcement and judicial institutions of the Member States

In paragraph 3.2 the available capacity (budget, financial and material resources) of the judiciary has already been mentioned as one of the factors that can influence the performance of the national legal systems and as such also the mutual trust. The lesser capacity of judges and prosecutors are available the longer criminal investigations and judicial proceeding will last. A similar reasoning can be used with respect to the police, border control authorities and customs. If there are problems with the available number of police officers, border control authorities and officials of the customs in a certain Member State this can have a negative impact on the application of European instruments in criminal matters in situations of European judicial cooperation. To get an overview of the capacity of the police and justice authorities in the Member States comparative figures are needed. For the courts and the public prosecution basic figures are already available as the result of the work of the CEPEJ. However, similar information should also be made available of the capacity of the police, border control authorities and customs.

The performance of the police, law enforcement and judicial authorities is not only influenced by the available capacity. Existing working methods and the cooperation between the various actors in the criminal chain may influence the efficiency and effectiveness of proceedings too. The best performance indicator to identify the efficiency of law enforcement and judicial proceedings is to look at the *duration of*

the proceedings (i.e. how much time is needed to finish a procedural step as a part of the use of a specific European law enforcement instrument (such as the EAW). Often already in the Framework Decisions time limits for the procedures are prescribed. This is for example the case with the Framework Decision on the EAW. In Art. 17 and 23 FD EAW specific time limits are provided for each procedural step in issuing and executing a EAW. The steps that should be taken are the following ones:

1. *Transmission of a EAW*: if the location of the requested person is known the issuing judicial authority may transmit the EAW directly to the executing judicial authority. As a part of this process the issuing judicial authority may decide to issue an alert for the requested person in the Schengen Information System. If the issuing judicial authority does not know the competent judicial authority, it shall make the necessary enquiries through the contact points of the European Judicial Network in Criminal Matters.
2. *Arrest*: when a person is arrested on the basis of the EAW, the executing authority shall take a decision on whether the requested person should remain in detention (in accordance with the law of the executing Member State) or may be released provisionally.
3. *Consent or non-consent to surrender*: the arrested person may formally indicate his consent to the surrender or may refuse to consent his/her surrender. In the last situation the person is entitled to be heard by the executing judicial authority.
4. *Surrender decision of the executing judicial authority*: the executing judicial authority shall decide - within the time-limits – whether the person is to be surrendered. In cases where the requested person consents to his/her surrender the final decision of the execution of the EAW should be taken within a period of *10 days* after the consent has been given. In other cases, the final decision of the EAW should be taken within a period of *60 days* after the arrest of the requested person. The time limits may be extended with *30 days* if the executing judicial authority is not able to deliver the final decision. Moreover the executing judicial authority shall notify the issuing judicial authority *immediately* of the decision on the action to be taken on the EAW.
5. *Surrender and transit*: the requested person shall be surrendered no later than 10 days after the final decision on the execution of the EAW.

When it comes to the monitoring of the performance of issuing and executing a EAW it is necessary that information is collected on the time that has been passed between the several steps, if the time-limits has been met and – in situations of delays – what the reasons are for the delays. One of the factors that can influence the time between the transmission of a EAW and the arrest concerns the whereabouts of the requested persons. If the whereabouts of the person in the executing State is unknown, time is needed to collect the necessary information to identify the place of residence of the searched person. In addition to this the choice of the arrested person to consent or not to surrender will influence the total length of the EAW procedure as well.

The EAW can be issued for the purpose of the execution of a custodial sentence or detention order or the *conduct of a criminal prosecution*. When the last situation is applicable to the cases concerned it is for the mutual trust between the Member States (especially when the cases are related to nationals) important to monitor the duration of the proceedings *after* the transfer and transit of the surrendered person. Evaluation of the duration of pre-trial proceedings is in this respect important (and though the duration of a provisional detention if applied), as well as measuring the length of the criminal proceeding before the courts of first instance, appeal courts and highest courts. This is also the case for measuring the time between the final

judgment and the execution of the judgment. Not only the duration of the court proceedings may be problematic in certain Member States, but also the lack of capacity for the enforcement of judgements can negatively influence the trust in the judiciary.

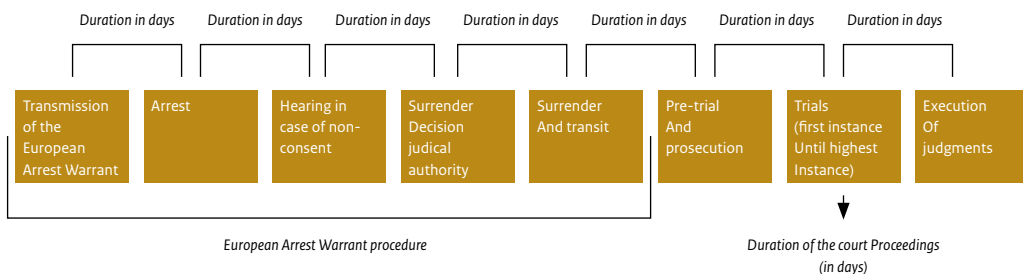
A study of the CEPEJ of the Council of Europe on the duration of proceedings in Nordic countries showed that there may exist a long period between the pre-trial period (where a case is examined by a public prosecutor) and the date of the trial in the criminal court⁷⁰. In certain situations this can be caused by the fact that – despite the situation that the case is finished and prepared by the public prosecutor – the case concerned will be put on a shelf at the courts waiting for further steps to be taken (the authors defined this as ‘stand-still time’). Measures should be taken to reduce the waiting time between the case submitted by the public prosecutor to the court and the date of the trial. Regarding the duration of the proceedings before the courts Art. 6 of the European Convention on Human Rights is of importance. This Art. states that every person is entitled to have a fair trial before an independent tribunal within a ‘reasonable duration’ of time. In order to determine the “reasonableness” it is necessary to collect information on the duration of (criminal) court proceedings. The practice of the work of the CEPEJ of the Council of Europe already shows that it is not easy to collect comparable information on the duration of court proceedings. Even for four ‘standardized case categories’ (robbery, intentional homicide, litigious divorce proceeding, employment dismissal cases) only a very limited number of Council of Europe’s Member States is able to present figures⁷¹. Even basic statistics about the number of incoming criminal cases, pending cases and judgments, many countries are struggling with definition issues. Especially to determine the difference between minor offences and severe ones.⁷² In that sense the case categories that have been introduced under the classified list of cases where a EAW can be issued may help in the future to collect comparable performance data on the number of incoming criminal court cases, pending cases, resolved cases and the duration of the court proceedings. For the non-classified cases under the Framework Decision on the EAW this will be more complicated.

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⁷⁰ Smolej and Johnson , *Time management of justice systems: a Northern Europe study*, (CEPEJ, 2006) Strasbourg.

⁷¹ CEPEJ, *European judicial systems: edition 2010 (data 2008): efficiency and quality of justice*, (CEPEJ 2010) Council of Europe publishers Strasbourg, p. 173-174.

⁷² CEPEJ (2010), p. 160.

When we want to evaluate the complete duration of a procedure where a EAW has been issued it is necessary to collect the following information per procedural step:



Most ideally, this information of the duration from issuing a EAW until the execution of a judgment is collected for each type of the criminal cases that have been listed in the Framework Decision on the European Arrest Warrant (and the unclassified cases). With this information per Member State, delays in some of the procedural steps can be identified (and can be used for the development of concrete recommendations for improvement). As a part of this process also statistical information can be collected of the pre-trial stage, concerning the application of provisional/custodial detentions and on supervision measures as an alternative to custodial detention (FD 2009/829/JHA). Regarding the execution of judgments not only information should be collected about the length of the prison sentence executed, but also on statistics concerning probation decisions and probation measures and alternative sanctions (FD 2008/947/JHA).

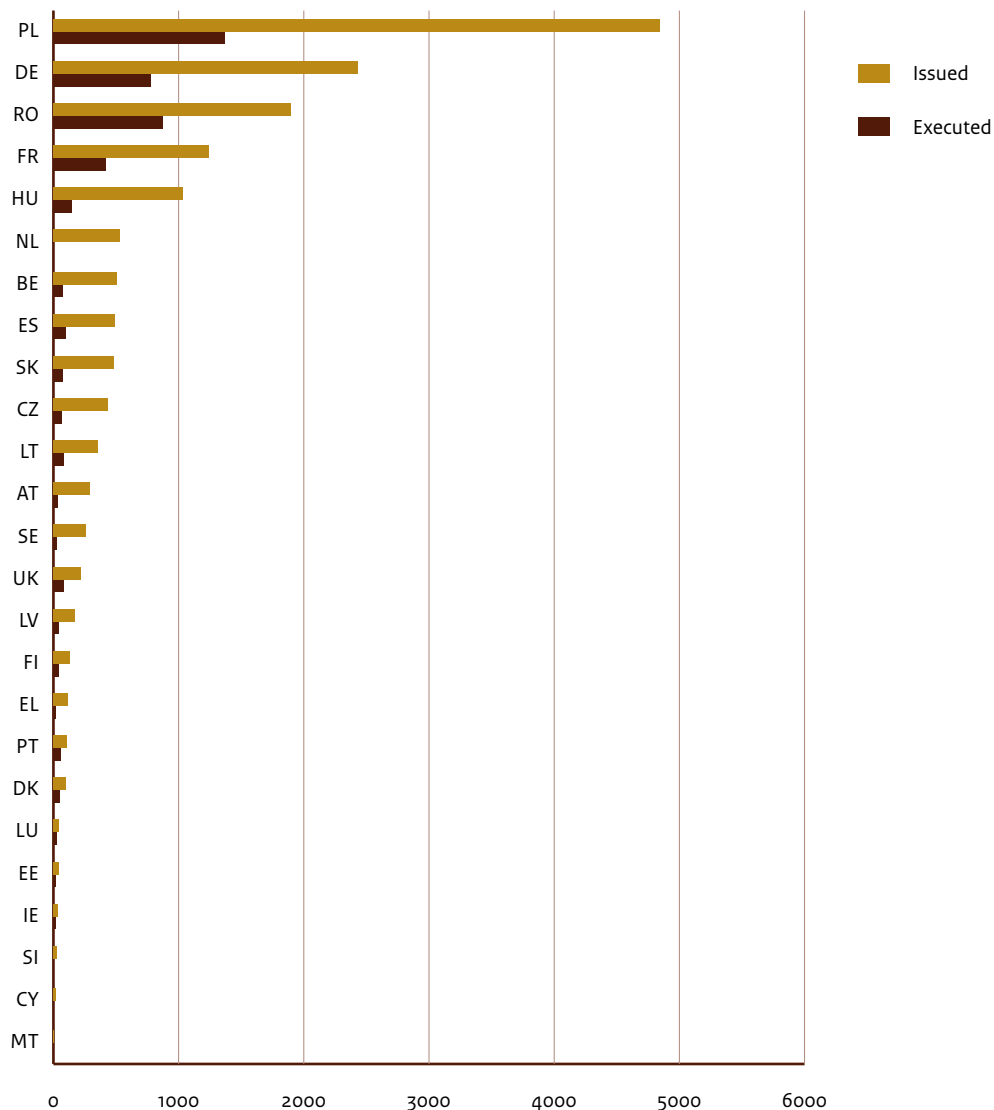
Regarding the collection of statistical data on the EAW limited information is already available. In 2011 the European Commission reported to the European Parliament and the Council a report on the implementation of the Framework Decision on the European Arrest Warrant.⁷³ In this document, general statistical information⁷⁴ is presented on the average time of the surrender procedure in days where the person consented to surrender (2005: 14,7 days; 2006: 14,2 days; 2007: 17,1 days; 2008: 16,5 days and 2009: 16 days) and the percentage of consents to surrender is shown (between 51 percent (2005) and 54 percent (2009)). In addition to this, per country statistics have been reported on the 'success rate' of the EAW (number of issued EAW's and the number of EAW's resulting in the effective surrender of the person sought) per Member State.

⁷³ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM (2011) 175 final).

⁷⁴ Based upon the notifications of the EU Member States to the official EAW statistics of the Council (COPEN).

On the basis of this data from the European Commission a graph can be created visualising the distribution between the countries regarding the number of issued and executed EAWs (graph 2).⁷⁵

Graph 2 Number of issued and executed European Arrest Warrants (2009 data)



⁷⁵ Data is used from COM (2011) 175 final.

This graph shows clearly that for the year 2009 Poland, Germany, Romania and – to a lesser extent – France and Hungary issued a high volume of EAWs. Especially Poland, Germany and Romania are also the countries where many EAWs have been executed. Unfortunately the data does not say much about the success rates of the EAW since a (successful) surrender means that the person sought is found or arrested in another Member State and this will not depend upon the issuing state only. Furthermore the number of executed EAW presented in the graph may include EAWs issued before 2009 as well.

To provide a better insight in the success ratio of the EAW it is necessary to compare the number of completed surrender proceedings and the number of surrenders in a given year. Unfortunately these figures are not (yet) available at a European level.⁷⁶ However for example the German statistics on extraditions composed by the Federal Office of Justice (*Bundesamt für Justiz*) indicate this data on a more systematic basis. The statistics show, inter alia, the number of closed extradition/EAW cases, the number of decisions in relation to the offences of the request, the number of court decisions on extradition/EAW requests and the number of refusals.⁷⁷ This type of information also shows that not all the requests for execution and surrender are automatically granted by Member States.

3.8 European networks in criminal matters

As we have seen, networking is one of the approaches to enhance the mutual trust. In the field of cooperation in criminal matters between prosecutors, the European Judicial Network in Criminal Matters can be seen as one of the first structured mechanisms in the field of judicial cooperation. Thus, it has become one of the most important networks in the cooperation of the judicial authorities in practice. The network was established in 1998 by the Joint Action decision 98/428 JHA concerning the fight against serious crimes. The legal basis of EJN was reinforced with the publication of the Council Decision 2008/976/JHA.⁷⁸ As a part of this Council Decision, the composition of the EJN, the manner of operation of the network and the functions of the contact points has been explained. Moreover, the relationship between the EJN in Criminal Matters and Eurojust is elaborated in Art. 10 of the Council Decision.

According to Art. 2 of the Council Decision, each Member State shall appoint one or more contact points, a national correspondent and a ‘tool’ correspondent. The network promotes judicial cooperation between the national authorities by providing legal and practical information on judicial cooperation and the promotion of training sessions on judicial cooperation. Each Member State has a national correspondent, responsible for the internal functioning of the network and a tool correspondent. The tool correspondent is in charge of providing updated information about their Member State (via the website of the EJN). To exchange experiences regular meetings are held with the national correspondents of the network (Art. 6 of the Council Decision) and on an ad hoc basis with the tool correspondents.

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⁷⁶ A possible revision of the Council’s questionnaire on quantitative information on the EAW is currently debated. It would allow access to more diversified data. However, the provision of numbers of completed EAW cases in a year is currently not at debate. A documentation on the debate can be found at the website of the EJN, cf. <http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14> (accessed 15 March 2013).

⁷⁷ http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Auslieferungsstatistik2009.pdf;jsessionid=9CC6F331B8B4C2F6B78B4F4F89E8B929.1_cid297?__blob=publicationFile

⁷⁸ Council Decision 16 December 2008 on the European Judicial Network (2008/976/JHA), O.J. L 348 of 24 December 2008, p. 130.

One of the means that have been developed by the EJM to strengthen the judicial cooperation between the Member States is the creation of a secure telecommunications connection. This connection makes it possible to exchange 'the flow of data' and of requests between the Member States (Art. 9 of the Council Decision).

At the part of defence lawyers a structured network is developed to a much lesser extent compared to the judicial side. In practice, defence lawyers often resort to personal networks or they ask domestic bar associations or domestic institutions (e.g. research institutes, departments at universities) for help; often contacts are also established by direct informal contacts among the lawyers in the country.⁷⁹ On the international level two main lawyers organisations exist that may be contacted in order to establish an effective defence in cross-border criminal law cases,

The first to name is the European Criminal Bar Association (ECBA). It is an association of independent specialist defence lawyers. Its affairs are managed by an executive committee and advisory board elected by the membership. The primary purpose of the ECBA is to be a leading group of independent criminal defence lawyers in the Council of Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons.⁸⁰ The ECBA has expanded continuously since 1997/1998 and provides today also a network of defence lawyers experienced with transnational criminal law cases. Through the networking opportunities available with membership, members are enabled to establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases.⁸¹ Through its website contact details of individual practitioners who confirm that they are specialist criminal defence practitioners can be searched in EU Member States but also in third countries, such as the Ukraine, Turkey or the USA.

The second organisation is the Council of Bars and Law Societies in Europe (CCBE) that represents bars and law societies in their common dealings before European and other international institutions. Its focus goes also beyond the border of the European Union and includes other European countries.⁸² Among the most important of the CCBE's missions are the defence of the rule of law, human rights and democratic values. Of special concern are the rights of access to justice, and the protection of the client by ensuring respect for the core values of the profession.⁸³ However, the CCBE does not only work in criminal matters, but its work is broader, i.e. it deals with all European cross-border matters as they affect lawyers. Nevertheless, also the CCBE provides for a search form through which contact details of a European lawyer can be found (usually linked with provided websites of the national bar and law societies associations).

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⁷⁹ This was found out by a new study of the Max Planck Institute for foreign and international criminal law; it is based on interviews with defence lawyers in Germany. See Arnold, "Auf dem Weg zu einem Europäischen Strafverteidiger", *Strafverteidiger-Forum* 2013, p. 54 (57).

⁸⁰ Cf. www.ecba.org (accessed 14 March 2013).

⁸¹ http://www.ecba.org/content/index.php?option=com_content&view=article&id=283&Itemid=130 (accessed 14 March 2013).

⁸² According to the information of the website, the CCBE represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them around 1 million European lawyers.

⁸³ www.ccbe.eu (accessed 14 March 2013).

3.9 European e-justice, European criminal registers and other forms of electronic exchange of information

At the website of the European Judicial Network practical country information can be found with respect to the judicial organisation in relationship with judicial cooperation in criminal matters for each of the participating Member States. Next to this information reference material can be found on the legal instruments for judicial cooperation and mutual legal assistance. This can already be seen as a good starting point to realize mutual trust between the Member States, since the provision of information of each of the Member States can contribute to a better mutual understanding.

3.9.1 The Schengen Information System (SIS)

Under the influence of a free movement of persons and goods in the European area it is necessary to have additional information systems and registers available to track offenders and convicted persons. One of those instruments is the Schengen Information System (SIS). The *Schengen Information System* was developed as a part of the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic aiming at a gradual abolition of checks at their common borders and the Convention on the Implementation of the Schengen Agreement of 19 June 1990 (CISA)⁸⁴. This information system allows national border control and judicial authorities to obtain information on persons and objects (Art. 92 et seq. CISA).

The second generation of the Schengen Information System (SIS II) is designed to be the main information system in the cooperation of law enforcement authorities and thus is going to deliver a main contribution to mutual trust. In 2006 and 2007 two legislative measures were adopted in order to introduce a second generation of the Schengen Information System (SIS II)⁸⁵. Similar to the first version of the Schengen Information System, SIS II must be seen as an information system which contains alerts on persons wanted for arrest for surrender purposes and wanted for arrest for extradition purposes (Art. 26 et seq. of the Council Decision on SIS II; see also Art. 95 CISA). SIS II can also contain supplementary information which is needed for a surrender or extradition. Next to the wanted persons, SIS II can store information about missing persons, persons wanted for a judicial procedure and on persons and objects for discreet checks or specific checks and on objects for seizure or use as evidence in criminal proceedings (Art. 32 et seq. of the Council Decision SIS II; see also Art. 97 et seq. CISA).

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⁸⁴ OJ L 239 of 22 September 2000, p. 13 and 19.

⁸⁵ Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), O.J. 2006, L 381 of 28 December 2006, p. 4, and O.J. L 205 of 7 August 2007, p. 63. Both instruments were necessary due to the pillar structure of the EU at that time; however the two legislative basis do not affect that the SIS II is one single information system that operates as such. Therefore, certain provisions of these instruments are identical. At its meeting on 7-8 March 2013, Home Affairs ministers decided the 9 April 2013 as starting date for the operation of the SIS II (cf. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/135901.pdf - accessed 14 March 2013).

Member States have the possibility to ‘flag’ an alert⁸⁶. If this is the case this means that an action to be taken on the basis of the alert (for example arrest for surrender and/or extradition) will not be taken on its territory (Art. 24, 25 of the Council Decision SIS II; see also Art. 95 (3) CISA).

For a good operation of SIS II each Member State has a national Schengen Information II office responsible for a smooth operation and security of NSIS II and a SIRENE bureau (an authority responsible for the exchange of supplementary information and for the verification of the quality of the information entered in SIS II).

Users of the Schengen Information Systems are the border control authorities, the police and customs. Judicial authorities may also have access to the system when public prosecutions in criminal proceedings are initiated and for judicial inquiries prior to a charge (Art. 40 of the Council Decision SIS II).

Next to the border authorities, the police, customs and judicial authorities Europol and Eurojust can have access to SIS II as well (see Art. 41 and Art. 42 of the Council Decision SIS II).

SIS II information (passport data) can be exchanged with Interpol especially to strengthen the cooperation between the European Union and Interpol⁸⁷.

3.9.2 The European Criminal Records Information System (ECRIS)

The SIS II information system is primarily used to identify persons wanted for arrest or for a judicial procedure. Since citizens are living in and travelling more and more between various EU Member States additional information is needed with respect to the criminal history of persons. One of the solutions to solve this problem is the application of the *European Criminal Records Information System* (ECRIS). ECRIS is a decentralized information technology system for the exchange of information on convictions between the Member States⁸⁸. Member States should have such a system in place before 7 April 2012. In the Framework Decision on ECRIS a detailed list can be found on the categories and sub-categories of offences. Member States are required to classify the national offences according to the categories of this list.

One of the reasons to introduce ECRIS is related to the fact that there should be a culture in Europe where for certain cases disqualifications are mutually recognised. In the Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States⁸⁹ this is explained as follows: “Awareness of the existence of the conviction as well as, where imposed and entered in the criminal record, of a disqualification arising from it, it is a prerequisite for giving them effect in accordance with the national law of the Member State in which the person intends to perform professional activity related to supervision of children. The mechanism established by this Framework

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⁸⁶ In Art. 21 of the Council Decision the proportionality check is described, namely “before issuing an alert, Member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II.

⁸⁷ The migration of the Schengen Information System to the Schengen Information System II was implemented in the first quarter of 2013 and it is expected that SIS II will be fully operational from April 2013.

⁸⁸ See Council Decision of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Art. 11 of Framework Decision 2009/315/JHA (2009/316/JHA), O.J. L 93 of 7 April 2009, p. 33.

⁸⁹ Framework Decision of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between the Member States (2009/315/JHA), O.J. L 93 of 7 April 2009, p. 23.

Decision aims inter alia ensuring that a person convicted of a sexual offence against children should no longer, where the criminal record of that person in the convicting Member State contains such conviction and, if imposed and entered in the criminal record, a disqualification arising from it, be able to conceal this conviction or disqualification with a view to performing professional activity related to the supervision of children in another Member State⁹⁰.

It is expected that in the future new electronic instruments and registers will be developed to enhance mutual trust and to facilitate judicial cooperation in criminal matters as a part of the implementation of the European e-justice action plan⁹¹. A major part of this plan is addressed to the development of a European e-justice portal where information about the justice systems and judicial procedures is available for citizens, legal professionals and the judiciary. As a consequence of the implementation of the e-justice action plan already the website of the European Judicial Network in Civil and Commercial Matters will be integrated with the European e-justice portal. A similar development may arise with the website of the European Judicial Network in Criminal Matters. Other foreseen developments are in the area of the electronic exchange of information. The E-CODEX (e-justice Communication via Online Data Exchange) project has been launched in January 2011 with the aim of facilitating the electronic exchange of information between Member States.⁹² This should result in improving the effectiveness and the efficiency of the processing of cross border proceedings, especially in civil, criminal and commercial matters. Moreover, it should lead to an increased collaboration and exchange between the judicial systems of the Member States.

3.10 Public trust in the justice area in Europe and trust between the EU Member States

The general mutual trust between the EU Member States can vary from country to country. This is also the case for the general public trust in the judiciary. It is expected where the quality of justice is high, the level of (perceived) corruption is low and the performance of the courts is good, there will be a higher level of public trust in the judiciary, compared to those countries where this is not the case.

The trust of citizens in the national legal systems can erode if there is a high chance of (perceived) corruption of the police, customs, border patrol officials and the judiciary. This can also influence the trust that other Member States have in these legal systems. The general assumption is that for countries where there is a high level of corruption the mutual trust will be lower, compared to countries where the level of corruption is low or non-existent.

To assess the level of (perceived) corruption there are several instruments available. One of the global instruments to assess corruption in the countries is provided for by Transparency International (an independent civil society organisation leading the fight against corruption). Corruption is defined by

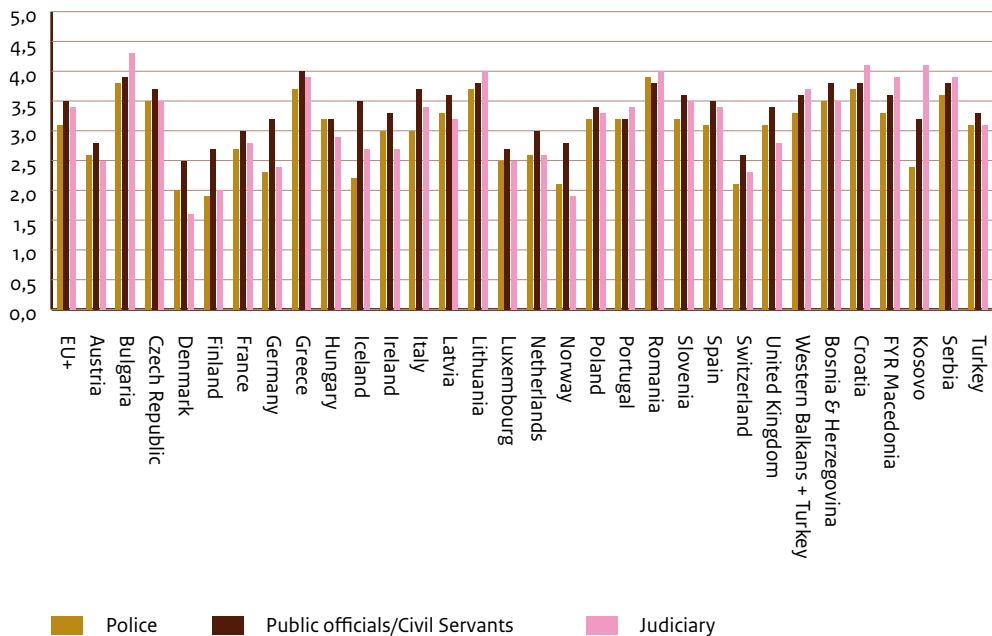
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⁹⁰ Council Decision 2009/315/JHA, paragraph 12.

⁹¹ Council of the European Union (notice), multi-annual European e-justice action plan 2009-2013, O.J. C 75 of 31 March 2009, p. 1.

⁹² <http://www.ecodex.eu/> (accessed 13 March 2013).

Transparency International as "the abuse of entrusted power for private gain"⁹³ One of the instruments that this institute has developed is the corruption perception index and the global corruption barometer.⁹⁴ The Global Corruption Barometer is a survey that assesses the general public attitude towards, and experience of corruption in several countries around the world. In the following graph the results of the corruption barometer are shown for Europe and the candidate EU-Member States.

Graph 3 Global Corruption Barometer (Transparency International): To what extent do you perceive the following institutions/sectors in this country to be affected by corruption? (1 meaning not at all corrupt, 5 meaning extremely corrupt).



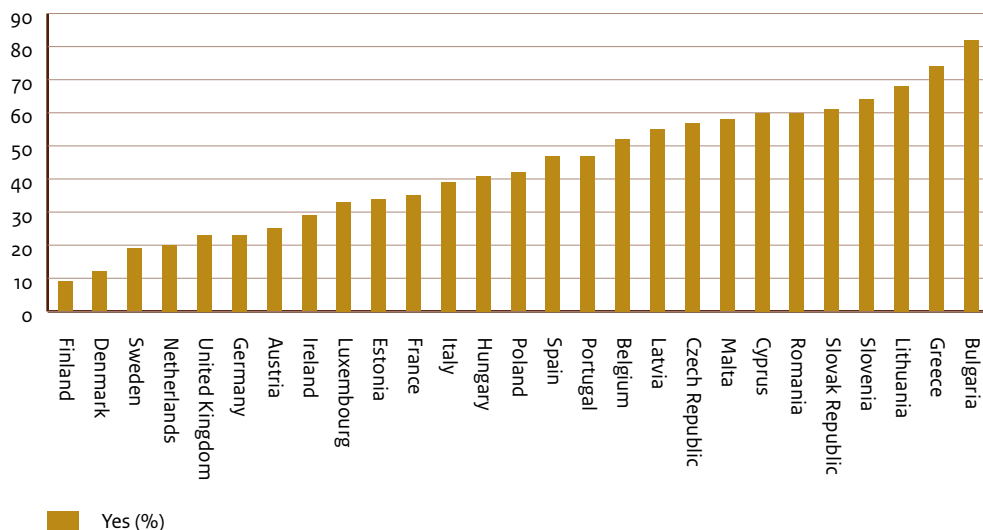
Also in the general opinion poll of the European Union (Euro barometer) specific attention is paid to this subject. For example in this survey a question is asked about the perceived abuse of power for personal gain in the judiciary. Moreover standard-questions are asked about the level of trust in the judiciary in a EU Member State.⁹⁵

⁹³ http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/ (accessed 14 March 2013).

⁹⁴ For the research activities of TI cf. <http://www.transparency.org/research> (accessed 14 March 2013).

⁹⁵ http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=11,1,27,28,17,2,16,18,13,32,6,3,4,22,33,7,8,20,21,9,23,24,12,19,29,26,25,5,14,10,30,15,&startdate=2010.11&enddate=2010.11 (accessed 14 March 2013).

Graph 4 Euro barometer: perceived abuse of power in the judiciary



Another instrument that is available in the area of monitoring corruption is the *Group of States against Corruption (GRECO)* of the Council of Europe. GRECO was established in 1999 to monitor the Member States compliance with the anti-corruption standards of the Council of Europe (GRECO is composed of 45 European Member States and the USA). With the use of a *horizontal evaluation procedure* (based on mutual evaluation and peer pressure) several evaluation rounds has been held to cover specific themes. Currently the fourth evaluation round is implemented by GRECO focusing on corruption prevention in respect to Member of Parliament, judges and prosecutors. The main topics of the questionnaire developed by GRECO are related to:⁹⁶ the recruitment and career of judges and prosecutors, case management and court procedures, conditions of services, ethical principles and rules of conduct, conflicts of interest, prohibition or restriction of certain activities and declaration of assets, income, liabilities and interests.⁹⁷

⁹⁶ The (revised) questionnaire of the fourth evaluation round as well as information on the previous evaluation rounds are available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp (accessed 14 March 2013).

⁹⁷ In a Communication document from the Commission to the European parliament, the Council and the European Economic and Social Committee (COM(2011) 308 final) the Commission describes a package of measures in the fight against corruption in the EU. As a part of this package suggestions are made to improve the monitoring and evaluation mechanisms in this field as well as the collection of more and better statistics.

3.11 The quality of detention facilities

The last factor that will be discussed in this chapter in relation to the institutional aspects of mutual trust concerns the quality of detention facilities and the application of international detention standards. A major point of reference in this area is the work that have been done by the Council of Europe – notably the achievements of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

CPT was set up under the 1987 Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁹⁸ and its main objective is the establishment of a committee which will be responsible for the conduct of visits and examination of the treatment of persons deprived from their liberty with a view to strengthen the protection of these persons from torture, inhuman or degrading treatment/punishment (Art. 1 of the Convention).

The work of CPT must be seen as an integral part of the (non-judicial) monitoring mechanisms of the Council of Europe to protect human rights, in addition to the judicial mechanism of the European Court of Human Rights.

The basis of the work of CPT concerns the implementation of two types of visits to detention facilities of the Council of Europe Member States: periodic and ad hoc visits. Periodic visits are carried out to all the countries who have ratified the CPT Convention and ad hoc visits are organised in countries when the Committee is of the opinion that a visit is “required in the circumstances”. From the moment of establishment of the Committee till January 2013 CPT has conducted 335 visits (200 periodic visits and 133 ad hoc visits).⁹⁹

Based on the experience of more than 300 visits CPT published in 2011 European standards for the prevention of torture and inhuman or degrading treatment or punishment. The focus on these standards are: (1) the law enforcement agencies, (2) prisons, (3) psychiatric institutions, (4) immigration detention, (5) vulnerable groups in detention (juveniles and women), (6) combating impunity and (7) the use of electrical discharge weapons.

As regards the detention facilities of law enforcement agencies (often police stations) CPT recommends that ‘all police cells should be of reasonable size for the number of persons they are used to accommodate, and have adequate lighting and ventilation. Further cells should be equipped with means of rest (chair, bench) and persons obliged to stay overnight in custody should be provided with a clean mattress and blankets¹⁰⁰. In addition to these recommendations for police cells, CPT underlined the right of a person to have access to a lawyer, a doctor and the right to notify a relative or another person that he or she is being kept in custody. Moreover, since the facilities of detention in police cells may differ from regular detention facilities CPT recommends that the time of custody of a person should be limited to the minimum.

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⁹⁸ CPT/Inf/C (2002)1, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: text of the Convention and Explanatory Report*.

⁹⁹ <http://www.cpt.coe.int/en/about.htm> (accessed 13 March 2013).

¹⁰⁰ CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2011, p 7.

With respect to the prisons CPT concludes that one of the major risks of imprisonment concerns the overcrowding of prisons. According to the viewpoint of CPT the overcrowding will lower the overall quality of life in the establishment and may be seen as inhuman or a degrading situation from a physical standpoint¹⁰¹. Besides the topic of overcrowding, CPT urges the application of a satisfactory program of activities for the detained persons and a minimum amount of time that a person per day must spend in an outdoor area. Moreover, good contact with the outside world should be guaranteed and the right of immediate access to a doctor (when necessary).

In addition to the prison conditions, CPT recommends that adequate training is provided to the law enforcement personnel responsible for the security of the detention facilities, which should include education on human rights matters¹⁰². Not only this is important for maintaining proper conditions of detention, but this is also the case with the relationship between the staff of the prisons and the prisoners. According to CPT a real professional attitude of the prison staff requires that they should be able to deal with prisoners in a decent and humane manner while paying attention to matters of security and good order¹⁰³.

When the public country reports of CPT are analysed in view of the EU Member States it is evident that – when looking at the CPT standards – there are major differences between the countries with regard to the conditions of detention for male adults, females, juveniles, persons detained in psychiatric institutions and (illegal) immigrants. In a number of countries the detention facilities meet the European standards, however there are also many countries to detect where there are large problems in the area of overcrowding, ill treatment of prisoners/illegal immigrants, hygienic problems, intimidation and prison violence. One can conclude on the basis of these reports that there is a growing need to develop binding (minimum) standards in Europe on conditions of detention. The Green Paper on the application of EU criminal justice legislation in the field of detention must be welcomed in this respect.¹⁰⁴

EU Commissioner Reding outlined in a speech that in an increasing number of EAW cases extradition is contested on the grounds that the detention conditions in the issuing state are not perceived as conforming to European standards set by the European Convention for the Protection of Human Rights¹⁰⁵. Mutual confidence or mutual trust in the area of detention is absolutely required, because otherwise instruments such as the EAW, the European Evidence Warrant and the European Supervision Order will not work. Moreover, especially this is problematic for persons waiting in pre-trial detention. According to Reding excessive long period of pre-trial detention should be avoided.

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¹⁰¹ CPT Standards, p. 17.

¹⁰² CPT Standards, p. 20

¹⁰³ CPT Standards, p. 22.

¹⁰⁴ COM (2011) 327 final.

¹⁰⁵ Speech 11/45, Viviane Reding, *Towards a Green Paper on detention in the European Union – strengthening mutual trust in the European judicial area* (25 January 2011), available at: http://europa.eu/rapid/press-release_SPEECH-11-45_en.htm?locale=en (accessed 15 March 2013).

3.12 Conclusion

We have already indicated in the second chapter that for a good overview on the mutual trust between Member States it is necessary to look at procedural and institutional aspects related to judicial cooperation in criminal matters. Which of these aspects should be included in an evaluation at a European level is dependent from the scope and purpose of the evaluation. For certain evaluations this means that the main orientation will be the experience of the application of a specific EU-instrument, whilst in other evaluations it is needed to go beyond this, with a view of a general evaluation on the mutual trust between the Member States in judicial cooperation in criminal matters. Of course, a middle-way is also possible where as a part of the evaluation of a concrete EU-instrument other (institutional) aspects related to the mutual trust are included in the evaluation too (for example on the capacity of the judicial and law enforcement systems, key-performance indicators, level of trust from the society, corruption, etc.). In the next table elements of institutional aspects related to mutual trust in judicial cooperation in criminal matters are listed. This list, together with the list of procedural aspects, can be used to select those aspects that are relevant for an evaluation of a specific EU-instrument or a larger evaluation exercise in the field of mutual trust in the justice sector.

Institutional aspects related to mutual trust in judicial cooperation in criminal matters

(Quality) standards for education, recruitment and nomination of police officers, customs, border control officials, prosecutors, judges and staff (including standards for training and education)

Available capacity of the legal systems (financial, human and material resources)

Performance of police, law enforcement and judicial authorities (statistics on key-performance indicators. E.g. the duration of pre-trial procedures and the duration of procedures before the courts).

Right to a fair trial

Level of independence of the judiciary (in law and practice)

Level of (perceived) corruption and trust in the police, law enforcement area (border control, customs, public prosecution) and the judiciary

Level of proportionality (relation between the crime/offence committed and the expected level of sanctions)

The quality of the legal representation

Conditions of detention in the EU Member States

Level of cooperation between EU Member States and the role of European Judicial Networks (including: an effective (electronic) exchange of information between EU-Member States, an effective functioning of Judicial Networks and European law enforcement agencies).

4 Transnational cooperation in criminal matters between EU Member States: developing an evaluation methodology

Pim Albers and Philip Langbroek

4.1 Introduction

In this chapter we will develop a methodology for evaluation of practices in the field of transnational cooperation in criminal matters. Already detailed information about this practice can be derived from a study that has been conducted in 2009, which resulted in the development of this project¹⁰⁶. A key factor for effective evaluation is that the methodologies chosen do fit the specific contexts. In order to create such a fitting methodology, we will first focus on evaluation methodology from a general research perspective (4.2.). We will pay attention to the current practice of evaluation applied by the European Union (4.3.), followed by a description followed by the Council of Europe (4.4.). After that we will give an overview of comparative methodologies in the field of justice applied by several International and European institutes as well as independent organisations (4.5.). In paragraph 4.6., we summarize contextual factors and applicable evaluation methods. In paragraph 4.7., we sketch the outlines of a methodology that can fit. We conclude with paragraph 4.8.

4.2 Evaluation methodology

Evaluation research, like all other kinds of empirical research can be considered as one of the tools for policy development when a policy has reached the stage of implementation. The transnational cooperation in criminal matters is such a policy developed by the European Commission and the European Council, culminating in several Framework decisions and Directives. The European Arrest Warrant (EAW)¹⁰⁷, the European Evidence Warrant (EEW)¹⁰⁸, the European Supervision order¹⁰⁹ and the directive on the European protection order¹¹⁰ are examples in this field. Evaluation studies try to find out how policies are being implemented and try to find explanations for the practices the research focussed on. Furthermore, evaluation studies can be used to assess the outcomes of the evaluation against pre-set policy aims. Policy aims can be quite complex. Reducing international crime and terrorism in Europe is such an aim, but it is hard to measure if such aim is being reached, and when a reduction can be measured at all, it may be quite difficult to prove a causal relation between deployment of policy instruments and the perceived reduction. Especially within the EU context, policy implementation in the criminal justice field is a multi-level affair, as the actual implementation takes place in EU Member States and by transnational cooperation between national authorities. This usually makes evaluation research more complex.

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¹⁰⁶ M.Dane and A.Klip (eds). An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust. Celsius, Tilburg 2009.

¹⁰⁷ Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, O.J. L 190 of 18 July 2002, p.1.

¹⁰⁸ Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30 December 2008, p. 72.

¹⁰⁹ Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. L 294 of 11 November 2009, p. 20.

¹¹⁰ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, O.J. L 338 of 21 December 2011, p. 2.

Policy Evaluation has a long tradition as its focus is on evidence based policy making and enhancing policy efficiency and effectiveness. That presupposes clear aims of the policy to be evaluated. Policies often are implemented via instrumental legislation. Such legislation can be considered policy instruments. This is also the case in transnational cooperation in criminal matters. Evaluation in this field therefore is also evaluation of implementation of EU legislation. This however in those cases is not a direct implementation, because Framework decisions have to be implemented by national legislation and its subsequent implementation to the executive level.¹¹¹

From a methodological perspective, policy evaluations cover a wide range of research methods. Regarding legislation often combinations of positive legal, qualitative empirical and quantitative empirical methodologies are applied.

Positive legal research usually is focussed on developing normative legal constructions to solve a new problem, within the legal system. Examples are the parenthood of children who are genetically from two different persons than the surrogate mother who carried the foetus and gave birth to the child. Such research may result in conclusions containing suggestions for judges or the legislative. In taxation such research may have the tax office or a multinational business company as a client. Usually, lawyers do not have a well-developed methodological vocabulary to explain how they do their research. The juridical knowledge cycle has a dynamic of its own and it is driven by office holders in the legal institutions; judges, advocates, the legislative.¹¹² The methodology used is the analysis of publications, legislation and jurisprudence on the same subject, often fed by information about the context of the research (e.g. societal and technological developments).

Qualitative empirical research is used in sociological disciplines, it is often used in researches within the domains of sociology of law and anthropology. Qualitative empirical research often uses case studies. Qualitative empirical research aims at describing processes: “what is going on?” and at finding explanations for phenomena like football riots, or the difficulties of immigrants with integrating into a village community. For sociology of law, a subject like the behaviour of judges in a first instance court is also a subject fitting a qualitative empirical approach.¹¹³ Legal evaluation studies also use case studies to have a better understanding why a certain type of legislation is successful or not, and often follow a qualitative empirical approach to find out of and why the aims of the legislator have been met. Frequently this is combined with a questionnaire amongst the officeholders and civil servants that have to apply parts of the law. Such questionnaires ask for their experiences and perceptions.

Quantitative empirical research in political science or sociology tries to explain phenomena by developing a model based on previous qualitative and quantitative research. Hypotheses derived from a model describing causations between independent and dependent variables can be tested based on operating hypotheses by measuring selected data. This demands collecting representative data. Statistical analysis will proof hypotheses supported or rejected and the model sustained or rejected. From the perspective of the

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¹¹¹ C. M. Klein Haarhuis, E. Niemeijer, Synthesizing Legislative Evaluations, *Putting the Pieces Together, Evaluation* 15(4), p. 403 -404.

¹¹² For a reflection: Jan.B.M. Vrancken, Exploring the Jurist's Frame of Mind, *Kluwer Law International*, 2006

¹¹³ See for example Luca Verzelloni, Behind the Judges' Desk: An Ethnographic Study On The Italian Courts Of Justice , *International Journal for Court Administration*, Vol. 4 no 2, p. 74-82

knowledge cycle, the outcomes of quantitative research may lead to a further refinement of knowledge about processes or phenomena to be explained. For example, a debate is on-going on the question if courts and judges may be subjected to financing according to production (output) considering constitutional demands for judicial independence and impartiality. This supposes that judges will be sensitive for financial reward or loss for the organisation they work in. Because output is measured quantitatively, it is feasible to design a model explaining the expected judicial behaviour in an output financed organisational setting. This could result in a model where managers are pressing judges to write shorter judgements and conducting shorter hearings, so that more hearings and judgements can be produced. By measuring the number of times managers have urged judges to speed up and by measuring the length of hearings and the length of judgments before and after the ‘managerial urgings’, the hypothesised relationship can be tested. If the relationship is weak or non-existent, alternative explanations for the lack of causality should be found, like for example the ingrained professional habitus of professional judges to concentrate on the content of the case before them and on (almost) nothing else. This alternative explanation can also be tested, etcetera.

For both qualitative and quantitative empirical research an important risk does exist. This risk concerns the *validity* of the analysis in qualitative research. This may be influenced by researcher bias, or by the researchers being influenced by interviewees. This can be counteracted by being open about deployed research methods and e.g. by having research results checked by experts in the field. For quantitative research, the reliability of data is paramount. If the data collected are inaccurate or false, the outcome of the analysis will be invalid. Also if the operation of concepts is wrong, the data gathered cannot reflect what you want to learn from them. In the above example of output financing of the judiciary, a relevant question is if the length of hearings and the length of judgments are good indicators for the quality of judicial work. If they appear to be wrong, for example because there usually is also a relationship between the type of case and the length of the hearing and the length of the judgment, the outcome of the analysis may not be valid or true.¹¹⁴

Especially in the politically loaded context of legal and policy evaluations, reliability of data and concept validity can be considered a threat to sound research. In evaluation studies validity is also based on on-going discussions amongst stake-holders about the essential values to be operated. The operation and interpretation of data is bound by those discussions and their outcomes. Especially in policy evaluations this discursive aspect should not be underestimated. Even so it cannot replace reproducibility and predictability of results of a research, but it should be recognized as the value source that needs appraisal – and hence will be subject to debate, politically or otherwise.¹¹⁵

Hansen made an inventory of evaluation methods and their purpose in different circumstances.¹¹⁶ She discerns models according to a focus on:

- Results (goals and effects)
- Systems (performance as a whole)

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¹¹⁴ For an exposé about conducting quantitative empirical research, see Mandy van der Velde, Paul Jansen and Neil Anderson, *Guide to Management Research Methods*, Blackwell Publishing, 2008.

¹¹⁵ Tanner LeBaron Wallace, An argument-based approach to validity in evaluation, *Evaluation* 2011. Vol 17 (3), p. 244.

¹¹⁶ Hanne Foss Hansen, Choosing Evaluation Models, A Discussion on Evaluation Design, *Evaluation* 2005. Vol 11(4): 447–462

- Explanatory process model (activity level, implementation problems)
- Economic (cost- effectiveness, cost- efficiency, cost benefit)
- Actor (clients, stakeholders, peers)
- Programme/theory

She combines those evaluation focusses with the aims or purposes of the evaluation at hand: control or learning. Typically, evaluations with a learning aim, have a focus on process; initiatives are often taken by stakeholders and the evaluation is conducted as self-evaluation by peers or by consultants. Evaluations with a focus on control are organised top-down, and use quantitative measurement methods.¹¹⁷ This makes outcomes easier to compare. For legislation as a product of democratic decision-making, Hansen asserts that the top-down result oriented control model is appropriate, whereas when professional groups are involved whose autonomy should be respected, a peer review model should be appropriate.

Within the EU-context, a positivist, quantitative approach is dominant in policy evaluations.¹¹⁸ EU policy makers do not have a lot of control over policy implementation in the different memberstates. Hence, hierarchical evaluation methods are most likely to deliver results that may be comparable cross national borders. Monitoring typically belongs to the evaluations with a view to control. Within the EU, monitoring typically serves comparative purposes. For the European Commission, “Quantitative data is suitable and convincing, allowing for easy aggregations, comparisons, and generalizations”.¹¹⁹ This explains why qualitative, constructivist approaches for EU policy evaluations are scarce.

For the development of an evaluation instrument for transnational criminal cooperation within the European Union we take the following perspectives on evaluation as a point of departure:

Evaluations have the purpose of informing democratically controlled public agents. The implementation processes have been given into the hands of juridical professionals – prosecutors and judges. For that reason it is most likely that an effective evaluation methodology in this field combines qualitative and quantitative evaluation methods. Both mutual learning and democratic control are at stake. Because there is a strong, normative juridical context, any evaluation in this field should take an inventory of juridical practice of transnational cooperation norms as a point of departure.

In the next three paragraphs we will investigate what we can learn from evaluation exercises by European Union institutions (4.3.), by the Council of Europe (4.4.) and a few other evaluation researches.

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¹¹⁷ Hansen 2005, p. 451-452.

¹¹⁸ Julian Hoerner and Paul Stephenson, Theoretical Perspectives on Approaches to Policy Evaluation in the EU: the Case of Cohesion Policy, *Public Administration Vol. 90, No. 3, 2012* (699–715)

¹¹⁹ Hoerner and Stephenson 2012, p. 712,

4.3 Evaluation methods applied by the European Union (European Commission and Council of the European Union)

Klip, Versluis and Polak (2009) described the need for a proper monitoring and evaluation mechanism in relation to the need to assess the level of *compliance* of EU Member States with regards to the formal implementation and practical application of EU regulation and instruments. Evaluation must be seen in this context as the process of determining if a policy has been successful in achieving the desired outcomes, whilst monitoring is related to the process of collecting data/information about the extent to which predefined program goals have been met.¹²⁰ In the chapter about the practice of the application of the evaluation and monitoring mechanisms described by Klip, Versluis and Polak, the authors identify five types of evaluation mechanisms:

1. Evaluation conducted by the European Commission of the implementation of legislation by the EU Member States;
2. Peer evaluation, on the basis of the Joint Action 5 December 1997;
3. The Schengen evaluation mechanism;
4. Evaluations undertaken in preparation of the EU enlargement process;
5. Follow up of judgments of the European Court of Justice.

As it shows those evaluations mainly focus on the question if certain standards have been met. They are result oriented evaluations, and have a hierarchical character. Because the implementation depends on juridical professionals, they are involved as peers and by deploying qualitative empirical research methods, such as interviewing. The outcomes per country serve a comparative perspective for National and EU policymakers responsible for the implementation of EU legislation at national levels.

In this paragraph we will only focus on the methodologies of the first *four* evaluation mechanisms applied by the European Union. With regard to the first type of evaluation Klip, Versluis and Polak conclude that the legal instruments do not give any indication on how the evaluation of the implementation of the EU legislation in the Member States should be conducted. Also standards and topics for evaluation are often not mentioned in the relevant Framework Decisions¹²¹. A well applied approach in the area of monitoring and evaluating the process of implementation of EU legislation by the Member States concerns the so-called *scoreboard* mechanism, which gives an overview of the level of compliance and implementation of legislation of the EU Member States. Those scoreboard mechanisms may focus on results primarily but can also pay attention to implementation processes.

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¹²⁰ A. Klip, E. Versluis and J. Polak, Improving mutual trust amongst European Union Member States in the areas of police and judicial cooperation in criminal matters. Lessons Learned from the operation of monitoring, evaluation and inventory mechanisms in the first and third pillars of the European Union: in M.Dane and A.Klip (eds), (2009), p. 109.

¹²¹ Klip, Versluis and Polak in Dane and Klip (2009), p. 155.

The Joint Action of 1997 established by the Council of the European Union¹²² provides a general mechanism to evaluate the practical application of EU instruments in the criminal law area by making use of the *peer review evaluation mechanism*. Since 1998 peer evaluations have been conducted in several rounds. The fourth evaluation round was focused on the application of the European Arrest Warrant. This evaluation mixed hierarchical control with mutual learning purposes. In the Council's decision of 2002 on the establishment of a mechanism for evaluating the legal systems and the implementation at a national level in the fight against terrorism¹²³, a number of elements are mentioned that should be included in a peer review evaluation mechanism, namely: (1) a clear description of the evaluation subject, (2) description of the composition of the team of experts responsible for the peer visit and the support provided by the Council of the European Union and the European Commission, (3) an explanation of the preparation process of a questionnaire, (4) a description of the organisation of the evaluation visit and the preparation, *discussion* and adoption of the report.

In addition to the scoreboard mechanism and the peer-review evaluations the recent developments on the *Schengen acquis evaluation* may be considered interesting. In contrast with previous approaches in the European Union, certain rule of law aspects will be included in the evaluation of the separate EU-Member States. In previous proposals it was not possible to include rule of law elements of the functioning of national justice systems in European evaluations. However in Article 4 of the amended proposal for the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis it is stated that:

Evaluation may cover all aspects of the Schengen acquis, *including the effective and efficient application by the Member States of accompanying measures in the area of external borders, visa policy, the Schengen Information System, data protection, police cooperation, and judicial cooperation in criminal matters* as well as the absence of border control at internal borders.¹²⁴

In the revised proposal for the Schengen acquis evaluation the minimum requirements for evaluation, technical support by the European Commission and a description of the role of experts is also included. The evaluations should be organized by the Member States, supported by the European Commission and can include announced and unannounced on-site visits and the use of a questionnaire. Experts taking part in the evaluation should have appropriate qualifications, including a solid theoretical knowledge and practical experiences in the areas covered by the evaluation mechanism, along with sound knowledge of evaluation principles, procedures and techniques, and shall be able to communicate effectively in a common language (Article 10).

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¹²² Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (97/827/JHA), O.J. L 344 of 15 December 1997, p. 7.

¹²³ Council Decision 2002/996/JHA of 28 November 2002, O.J. L 349 of 24 December 2002, p. 1.

¹²⁴ Council of the European Union (2012), Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, Council-Documents 5754/6/12.

The evaluation of rule of law aspects, mentioned in the revised evaluation method for the Schengen acquis, is already a common approach for assessing EU-candidate Member States. Main point of reference for this evaluation is Chapter 23 of the EU Acquis Communautaire: Judiciary and Fundamental Rights. In this chapter the minimum standards in the area of freedom, security and justice are defined as followed:

“The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure respect for fundamental rights and EU citizens’ rights, as guaranteed by the acquis and by the Fundamental Rights Charter.”

When it concerns the evaluation of candidate EU-Member States, these countries are assessed on: the level of independence of the judiciary, the (financial) resources of the judiciary and training, principles of fair trial, impartiality and high standards on the judicial quality, fight against corruption, the presence of a solid legal framework and respect for fundamental rights for citizens. For two current EU-Member States Romania and Bulgaria also an additional evaluation mechanism has been developed: the Cooperation and Verification mechanism (CVM). This instrument was developed in 2007 to verify the progress within the reform of the judiciary and the fight against organized crime after the accession of the two countries¹²⁵. To evaluate the situation in Romania and Bulgaria four respectively six benchmarks have been prescribed:

Benchmarks to be addressed by Romania:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, nonpartisan investigations into allegations of high level corruption.
4. Take further measures to prevent and fight against corruption, in particular within the local government.

Benchmarks to be addressed by Bulgaria:

1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure code, notably on the pre-trial phase.

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¹²⁵ Council of the European Union, Progress Report on the Cooperation and verification mechanism – procedural aspects, MEMO/07/260.

3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.
4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report internal inspections of public institutions and on the publication of assets of high-level officials.
5. Take further measures to prevent and fight corruption, in particular at the borders and within local government.
6. Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and on-going investigations, indictments and convictions in these areas.

It should be noted that benchmarking is an evaluation strategy derived from quality management. The idea is to compare partners in a business or process and define processes and outcomes and a methodology of data collection and comparative analysis. The outcomes for the best performing partner can be used to improve the functioning (efficiency, effectiveness, service quality, product quality) of partners with a lesser performance. Willingness to share relevant information here is essential.

4.4 Evaluation methods of the Council of Europe

Within the mandate of the Council of Europe there exist several monitoring mechanisms. Good examples of this are: the parliamentary assembly (PACE), the monitoring activities of the Commissioner for Human Rights, the execution department of the Council of Europe responsible for the monitoring of a correct implementation of the judgments of the European Court of Human Rights, the Committee for the Prevention of Torture (CPT), the Group of States against Corruption (GRECO) and the European Commission for the Efficiency of Justice.

Looking at the main orientation of this report on judicial cooperation in criminal matters it is especially interesting to look at the approaches of CPT, GRECO and the CEPEJ.

The *Committee for the Prevention of Torture* has its legal basis from the 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. To monitor how persons are deprived from their liberty and how they are treated in the Council of Europe Member States the CPT visits places of detention (prisons, police stations, mental hospitals, etc.). On the basis of these visits recommendations are provided to improve the conditions of detention. In practice CPT carry out approximately ten visits per year, which means that a country will be visited by CPT every five year. According to Lawson (2009) the working method of CPT is based on the principle of cooperation and confidentiality¹²⁶. Cooperation with the member states is necessary because the main objective of CPT is to improve the conditions of detention of persons deprived from their liberty. To realize this it is necessary that - to certain extent - the findings of CPT are confidential. After so-called authorization of the member states reports of CPT are made public.

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¹²⁶ R. Lawson, How to maintain and improve mutual trust amongst EU Member States in police and judicial cooperation in criminal matters? Lessons learned from the functioning of monitoring mechanisms in the Council of Europe, in: Dane and Klip (2009), p. 290.

The *Group of States against Corruption (GRECO)* was established in 1999 to monitor the compliance of the member states of the Council of Europe with its anti-corruption standards. At the moment 48 European countries and the United States are member of GRECO. The working method of GRECO is composed of two elements:

- a “horizontal” evaluation procedure (all members are evaluated within an Evaluation Round) leading to recommendations aimed at furthering the necessary legislative, institutional and practical reforms;
- a compliance procedure designed to assess the measures taken by its members to implement the recommendations.

The evaluation method of GRECO is based on a well defined procedure, where a team of experts conduct the evaluation in a particular country. The analysis of the situation is based on written replies to a questionnaire and information collected in meetings with public officials and representatives of civil society organisations during on-site visits in a country. The conclusions of GRECO may lead to recommendations which must be implemented within an 18 month period or to observations which countries are supposed to take into account. In addition to the horizontal evaluation aspect, the implementation of the recommendations is examined in the compliance procedure. In a so-called situation report GRECO describes if recommendations have been implemented satisfactory, partly or not have been implemented. If not all the recommendations have been implemented GRECO will re-examine the situation within another 18 months period.

Each evaluation round of GRECO covers specific themes. For example in the first evaluation round (2000-2002) the independence, specialization and means of national bodies engaged in the prevention and fight against corruption was examined, whilst in the fourth evaluation round (started in January 2012) corruption in respect of members of Parliament, judges and prosecutors is studied.

The *European Commission for the Efficiency of Justice (CEPEJ)* was established in 2002. In contrast with monitoring bodies like CPT and GRECO, CEPEJ must be seen as an *evaluative* commission of the Council of Europe. Its main objective is to exchange information and experiences between the Member States on the composition and functioning of judicial systems, to assist countries in the area of administration of justice when requested and to prepare relevant Recommendations¹²⁷. There is a direct relation between the installment of the CEPEJ and the thousands of cases the EctHR receives every year concerning timeliness of justice. The CEPEJ tries to develop justice management methods COE memberstates can apply in their own situation in order to enhance timeliness and quality of justice. For that aim the Saturn studycentre for judicial timemanagement has been launched.¹²⁸

One of the tasks of the CEPEJ is to conduct in a two-year cycle an evaluation of the composition and functioning of the judicial systems. The information received from the member states is based on an (electronic) questionnaire containing approximately 200 questions submitted to the *national contact points* of the Council of Europe’s member states. Often these contact points are representatives of ministries of justice or other relevant justice authorities. They provide qualitative and quantitative information about various aspects that are related to a proper functioning of judicial systems: the budgeting of the justice

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¹²⁷ Res (2002)12 Establishing the European Commission for the Efficiency of Justice.

¹²⁸ http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp, (last accessed) on 10 March 2013.

systems, access to justice, the performance of the courts, the role of judges and public prosecutors, the rights of the users of the courts, the role of legal professionals (enforcement agents, lawyers, notaries and judicial experts) as well as court interpreters.¹²⁹

In the ten years existence of the CEPEJ the evaluation studies have shown their value for stimulating the efficiency and quality of justice in the Council of Europe member states. Many countries have used the information to reform their judicial systems, for example by reducing the number of court locations or increasing the annual budget of the courts. Also the European Commission is more and more using the reports for assessing the situation in candidate EU Member States and in EU Member States where there is a need for technical support and reform as a part of solving the financial crisis. Despite its success with the use of the reports of the CEPEJ by the Member States and European and International organisations there are still methodological weaknesses in its approach. One of the major problems with the CEPEJ data is related to the fact that the information received from countries is provided by only one source: the national governmental institutions. The information delivered is not always reliable, because of interpretation problems of the questionnaire, difficulties in the process of data-collection and sometimes even manipulation of the data to achieve a better comparative ranking in the report (despite the fact that in the report a ranking method is as much as possible avoided). In this respect, the process of data collection still needs improvement. It is entirely dependent on the cooperation of ministries of justice and national court management authorities.

One of the solutions the secretariat of the CEPEJ has introduced concerns the conduct of peer-review visits. The objective of the peer evaluation visits is to reinforce the reliability of the data collected in the framework of the evaluation exercise and to improve the methodology used to collect the statistical data on the national judicial systems. In the period 2008 – 2011 eight of these visits have been conducted. Despite the organisation of these visits the question still remains the same: is the data collected and received from the member states sufficiently reliable if it is not checked by multiple sources of information?

In our opinion, there should be an independent check introduced to verify if the data provided is correct or should be adjusted. Another weakness in the CEPEJ approach is related to the amount of the information that is collected by the member states and the need to reduce the number of questions addressed in the CEPEJ evaluation scheme to key-justice sector indicators. Certain questions asked in this scheme will not change over time and the answers to these questions may remain the same for the countries concerned. However, these questions are still repeated over time and lead to a high workload for the national correspondents. Moreover, certain data – for example court performance data – is not easy to collect, especially for the federal countries. This has already resulted in the choice for one of the larger Council of Europe member states (Germany) not to fill in the survey during an evaluation round. This situation may be avoided if the size of the survey is reduced and also improvements are made in the electronic process of registration of the replies to the questions and the data collection process. Even so, the CEPEJ report on

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¹²⁹ The bi-annual reports can be found on the website of the CEPEJ: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp, (last accessed) on 10 March 2013.

European Judicial systems remains one of the few reports around the world where a detailed comparative overview is given on the composition and functioning of several judicial systems¹³⁰.

Considering the evaluation methods of the Cepej, they basically have the same nature as those of the EU for transnational cooperation in criminal matters within the EU. The methodology combines quantitative and qualitative empirical research methods. Step by step a soft validation method is being applied to enhance the reliability of data, and to reduce the workload of gathering the data every other year. The function of the collection of data, the appeal on experts in the justice administration field and the appeal on judges and prosecutors to participate is not only to show the difference in performances (comparison), but also to stimulate improvement in justice administration in COE memberstates, and to show trustworthiness of the processes, because juridical professionals are involved as peers, so that the outcomes cannot be ignored with reference to constitutionally sanctioned professional autonomy. It should furthermore be noted that this is not so much about monitoring centrally developed policy implementation, but organising mutual learning. The COE and the CEPEJ are hardly in a hierarchical position as the European Commission and the Council of Ministers are to demand explanations for outcomes that are considered undesirable.

4.5 Evaluation methods focussing on stakeholder perceptions (World Justice Project, Euro barometer, Transparency International) and combined approaches (World Bank's Justice at a Glance)

Where the CEPEJ studies on judicial systems are mainly focusing on the supply side of the justice systems i.e. the judicial institutions and judicial professions, other studies are focussing on the user side of the justice systems i.e. the citizens, companies, lawyers (as a user) and citizens-visitors of the courts. A common method for collecting information from these users of the justice systems is the application of opinion polls or general surveys to measure the perceptions or user satisfaction. In the area of justice especially studies from the World Bank, The World Justice project, the European Commission (Euro barometer) and Transparency International, the World Economic Forum are relevant because of their specific quantitative empirical methodologies where perception data, government data and other sources are combined with a view to comparison and informing policymakers.

The perception of the *executives* of companies of various aspects of the functioning of national judicial systems can be identified by looking at the results of *executive opinion surveys* of the World Economic Forum¹³¹. In this survey executives are asked to rate from a 1 to 7 scale (1 = very common to 7 = never occurs) the level of occurrence of irregular payments and bribes of public officials (for example for obtaining a favourable judicial decision), the level of independence of the judiciary from influences of members of government, citizens or firms (1 = heavily influenced and 7 = entirely independent) and the efficiency of the legal

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¹³⁰ See also: P. Albers, Judicial systems in Europe compared, (published as a chapter in Van Rhee C.H. and Uzelaç A. (eds) *Civil Justice between efficiency and quality: From Ius Commune to the CEPEJ* (2008), (Intersentia, Antwerp, Oxford, Portland)

¹³¹ http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf (accessed 15 March 2013).

framework in settling disputes (1 = extremely inefficient and 7 = highly efficient). The results of this surveys shows – in a ranking manner – how 142 countries are scored by CEO's and other managers of companies regarding the functioning of the judicial systems.

The perception of the European *citizens of* certain parts of the national justice systems can be derived from one of the standard questions included in the opinion survey of the European Commission (Euro barometer). One of the standard questions included in the survey is related to the level of trust in the judiciary. Citizens are asked to provide an answer to the question: how much trust to you has in the national justice system (tend to trust, tend not to trust, don't know). On the basis of the comparative overview of the EU Member States it is possible to identify the countries where the level of perceived *trust in justice* is low, compared with the countries where there is a high level of trust.

The (lack of) trust in justice systems is also related to the perceived level of corruption in the judiciary. One of the major information sources for presenting data about the perceived level of corruption is the *Corruption Perception Index* from Transparency International. The Corruption Perception Index has been developed since 1995 as an important indicator to measure the perceived level of corruption in the public sector. To collect the necessary information 13 different sources are used by Transparency International, varying from information received from International organisations (World Bank, Africa Development Bank, World Economic Forum) to NGO's (World Justice Project Rule of Law Index, Bertelsmann Foundation transformation index, etc). Where the corruption perception index shows at a general level the perceived degree of corruption in countries, the *Global Corruption Barometer* shows in more detail information about the level of perceived corruption in institutions such as the judiciary. In contrast with the corruption perception index, the data for the global corruption barometer is received for surveys submitted to more than 100.000 *citizens* in 100 countries around the world. Questions are asked about the level of corruption in the judiciary compared to 10 other institutions (e.g. political parties, parliament, police, military, enterprises, NGO's) and the percentage of the citizens that have paid a bribe in the past 12 months to the judiciary³². The global results of this survey show that 23 percent of the citizens interviewed have paid a bribe to the judiciary for a favourable judgment (2012 data).

Whereas Transparency International and the World Economic Forum collects information on perceptions from business executives and citizens on a limited number of aspects related to the functioning of justice systems, the World Justice Project tries to cover several rule of law aspects in their global survey, according to the following rule of law standards:

- The government and its officials and agents are accountable under the law;
- The laws are clear, publicized, stable and fair, and protect fundamental rights;
- The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;
- Justice is provided by competent, ethical, and independent representatives and neutrals that are of sufficient number, have adequate resources and reflect the makeup of the community they serve³³.

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³² http://gcb.transparency.org/gcb201011/in_detail/ (accessed 15 March 2013).

³³ World Justice Project, Rule of Law Index 2012, p. 236, Washington D.C.

Especially the last normative aspect concerning justice is of relevance for this project in defining common standards for evaluation regarding mutual trust and judicial cooperation. In the 48 rule of law indicators that the World Justice Project have identified, a number of indicators are related to civil justice, criminal justice, the absence of corruption (in the judiciary) and fundamental rights. For the process of data collection the World Justice Project applies five different questionnaires to be submitted to 300 local experts per country and to the general public¹³⁴. The general population poll is conducted by leading local polling companies using a representative sample of 1000 respondents of the three largest cities in a country. The experts (in-country practitioners and academics with expertise in civil, criminal justice, labour law and public health) have to fill in a qualified respondents questionnaire (QRQ) consisting of close-ended questions. The Rule of Law index of the World Justice Project is covering currently 97 countries.

Relevant Justice-related factors developed by the World Justice Project:

Factor 2: *absence of corruption:*

2.2 Government officials in the judicial branch do not use public office for private gain;

Factor 4: *Fundamental rights:*

4.3 Due process of law and rights of the accused;

Factor 8: *criminal justice*

8.1 Criminal investigation is effective;

8.2 Criminal adjudication is timely and effective;

8.4 Criminal system is impartial;

8.5 Criminal system is free of corruption;

8.6 Criminal system is free of improper government influence

8.7 Due process of law and rights of the accused

By making use of these factors countries and regions can be ranked according to their level of rule of law.

A combined approach where data sources derived from the supply side of the justice systems are connected with perception based information (based on surveys from business executives, citizens and experts) can be found in a new evaluation instrument developed by the World Bank: *Justice at a Glance*. The current version of Justice at a Glance is a 1-page country template for justice performance indicators capturing key indicators of justice sector performance focusing on: (1) the demand for judicial services, (2) access to justice, (3) productivity and efficiency of the justice sector, (4) justice sector resources and (5) integrity. Currently it covers 30 countries from Europe and Central Asia and in the near future for other countries justice at a glance data will be collected too. The Justice at a Glance approach tries to bundle different types of data from different information sources to develop a comprehensive overview of the key-performance areas of justice. The main sources of information are data received from the CEPEJ evaluation studies (mainly for the areas of: demand for judicial services, access, productivity and efficiency and resources) and from

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¹³⁴ World Justice Project, Rule of Law Index 2012, p. 12.

Transparency International, Euro barometer, World Economic Forum and the World Bank Life in Transition Survey (mainly for the integrity part of Justice at a Glance).¹³⁵

With regard to the Justice at a Glance methodology it is expected that especially the financial indicators of the justice sector (e.g. the justice expenditure figures) derived from the CEPEJ will be replaced by other sources. Internal studies conducted by the World Bank, comparing key figures from the CEPEJ with data from the ministries of finance of the Council of Europe member states show that for certain countries there are major differences between the figures presented in the CEPEJ report and the figures provided by the ministries of finance for the same type of indicators. Reliability of data provided is a major issue here.

The Justice at a Glance instrument is not the first attempt of the World Bank to cover Rule of Law aspects in comparative evaluation studies, because also in other evaluation methods of the World Bank certain elements of the Rule of Law or functioning of a part of the justice sector can be found in two other methods as well: the *Governance matters* studies and the *Doing Business studies*. The Governance matters studies aim to assess countries on the level of good governance by looking at six aspects of governance: (1) voice and accountability, (2) political stability and absence of violence, (3) government effectiveness, (4) regulatory quality, (5) rule of law and (6) control of corruption.¹³⁶

With regard to the rule of law indicators the *Governance matters* studies examine the extent to which agents have confidence in and abide by the rules in society, in particular the quality of contract enforcement, of the police and the courts as well as the likelihood of crime and violence.

The methodology of the governance matters studies is based on a combined data collection process from various information sources: perception surveys of firms and individuals, the assessments of commercial risk rating agencies, non-governmental agencies, multilateral aid agencies and other public sector organisations. In the 2006 report around 33 different sources were used produced by 30 organisations (in total 310 individual variables).¹³⁷ Especially the fact that the information is gathered from so many different sources enhances the validity of the analyses and its outcomes.

The statistical methodology that the researchers of the governance indicators are using is known as the 'unobserved components model'. This model is applied to construct aggregate indicators for the six dimensions. The aggregate indicators are weighted averages of the underlying data, reflecting the precision of the individual data sources¹³⁸. The Rule of law indicator applied by the researchers of the 'Governance Matters' study is based on a mixture of elements. Some of them are related to the independence of the

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¹³⁵ See the website of JUSTPAL: <http://www.justpal.org/justice-at-a-glance> (accessed 15 March 2013).

¹³⁶ Kaufman, Kraai and Mastruzzi, *Governance matters VI: aggregate and individual governance indicators 1996 – 2006: (2007)*, p. 3 and 4.

¹³⁷ P. Albers, *How to measure the rule of law: a comparison of three studies*. Conference paper Rule of law conference (Hague Institute for Internationalisation and Law, November 2007).

¹³⁸ The governance matters III report used 15 individual data sources, such as: Country Risk Service (Economist Intelligence Unit), the Economic Freedom Index (the Heritage Foundation/Wall Street Journal), Human Rights Report (US State Department, Amnesty International) and 'non-representative sources' such as the Business Enterprise Environment Survey (World Bank), the Voice of the People Survey (Gallup International) and the Global Competitiveness Report (World Economic Forum).

judiciary, fairness of judicial proceedings, speediness of proceedings, judicial accountability and trust in the judiciary as well as the enforceability of contracts; others are related to crime and law enforcement¹³⁹.

The *Doing Business study* was developed for measuring business regulation and the protection of property rights, including their effect on businesses (small and medium sized firms). The reports of Doing Business show how easy it is to start a company in a country (or to close a company). One of the underlying assumptions in the Doing Business studies is that an effective system of enforcing contracts is essential for a healthy economic development of a country. For this purpose a dedicated indicator is used to measure the level of efficiency of enforcing a contract by looking at the following aspects:

- The number of procedures from the moment a plaintiff files a case in a court until the moment of payment;
- The time in calendar days to resolve a (civil) dispute;
- The cost in court fees and lawyers' fees, where the use of a lawyer is mandatory or expressed as a percentage of the debt value.¹⁴⁰

The data for the Doing Business studies is derived from standard questionnaires answered by lawyers at Lex Mundi and Lex Africa member firms. This questionnaire is composed of two parts: (1) a description of the procedure of a hypothetical case and (2) multiple choice questions. The last part of the survey is used to collect additional information and to check the answers at the initial stage of the data collection. Moreover questions are included in the survey about incentives of judges, lawyers and the litigants. With the use of a double check mechanism (where colleague lawyers working at the same law firm are ask to read, approve and sign the questionnaire)¹⁴¹.

Compared to the Justice at a Glance methodology where registered data and perception based information on key aspects of the justice sector is collected are the governance matters studies and the Doing Business studies primarily based on perception based information.

4.6 Summary of international evaluation methods used in the justice sector

In the following table a summary is provided for the various evaluation methods used by European and International organisations as well as non-governmental organisations. For each of the method is indicated if it concerns information based on existing government registered information sources or information based on the perceptions of citizens or experts, experience of participants in the fields and expert knowledge. With reference to the taxonomies of Hansen of evaluations, we summarize the methodologies according to the instrumentation, the aims, the data collection methods and the orientation of the evaluation effort, the latter referring to the justification.

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¹³⁹ See also: <http://info.worldbank.org/governance/wgi/index.asp> (accessed 15 March 2013).

¹⁴⁰ For a detailed description of the Doing Business method see: <http://www.doingbusiness.org/methodology/> (accessed 15 March 2013).

¹⁴¹ See: methodological paper about the courts drafted by Djankov, La Porta, Lopes-de-Silanes and Sleiifer: <http://www.doingbusiness.org/methodology/> (accessed 15 March 2013).

Table Evaluations by institution, instruments, aims, data typologies and orientation

Institution	Instrument	Aim	Data collection method	Perceptions or data from administrative registries	Source of information	Actor orientation: Results, process or both
EU	Peer-evaluation mechanism	Control Comparison Mutual learning Informing policymakers	Expert country visits	Practice Expert perceptions	Peers in practice	Hierarchy and peers: Results
EU	Cooperation and verification mechanism Romania and Bulgaria	Control Comparison Informing national and EU Policy makers	Expert reports	Administrative registries, Expert opinions	Government Data, Experts	Hierarchy Results, process
EU	Schengen acquis evaluation mechanism	Control and mutual learning Comparison Informing EU and national policymakers	Expert reports basis on (on site) country visits	Administrative registries, Expert opinions	Government Data Expert opinions	Hierarchy and peers Results, process
EU	Euro barometer	Control Comparison Informing policymakers	General opinion polls	Citizen perceptions	Citizens	Hierarchy Results
CoE	CPT	Comparison and mutual learning Informing policymakers	Expert visits of countries	Expert opinions	In situ observations and conversations ex	No Hierarchy Results and process
CoE	GRECO	Comparison and mutual learning Informing policymakers	Expert visits, surveys	Perception surveys and government data Expert opinions	Citizens and local expert panels	No Hierarchy Results and process
CoE	CEPEJ	Comparison, mutual learning, Informing policymakers	Survey (data collection from national contact points)	Administrative data and expert opinions	Government data Visiting Validation panels	No Hierarchy Results and process
WEF	Executive opinion survey	Comparison, Informing policymakers	Survey CEO's	Perception survey	CEO's of big businesses	Peers Results
Transparency International	Corruption Perception Index	Comparison, Informing policymakers	Analysis of 13 different info sources	Administrative data, perception surveys and expert opinions	13 different sources	No Hierarchy Results and process
Transparency International	Global Corruption Barometer	Comparison, Informing policymakers	Survey	Perception and experience surveys	Citizens from 100 countries	No Hierarchy Results and process
World Justice Project	Rule of Law indicators	Comparison, informing policymakers and investors	Surveys (experts)	Perception, experience and knowledge	Experts	No Hierarchy Results and process
World Bank	Governance indicators (Rule of law indicators)	Comparison, informing policymakers and investors	Various sources from elsewhere	Perception surveys, government data Experience and expert surveys Interviews	Mixture of various data sources	No Hierarchy Results and process
World Bank	Doing Business	Comparison, informing policymakers and investors	Survey to law firms	Expert experience	Law firm professionals	No Hierarchy Results and process
World Bank	Justice at a Glance	Comparison, informing policymakers and investors	Various data sources from elsewhere	Perception surveys, government data Experience and expert surveys Interviews	Mixture of various data sources	No Hierarchy Results and process

It should be noted that the organisations without formal competences to control authorities in participating member states for the success of attaining goals depend on the willingness of those authorities to compare themselves with the outcomes for other countries and to act accordingly. So the results do not feed external controls and accountabilities, but are designed to stimulate processes of self-improvement of countries within the samples. Or, as Lawson put it, as a result they can lead to the development of mutually recognised performance standards.¹⁴² It is important to note that conclusions are delivered in a non-hierarchical context, as the Council of Europe has no mandate to enforce its member states to comply with such standards. As far as accountability is organised in this process, it is of a weak character.

In the next paragraph we will develop some recommendations for the development of methodologies for evaluations of transnational cooperation in criminal matters.

4.7 Towards a methodology for the evaluation of transnational cooperation in criminal matters within the EU

4.7.1 Standards, purpose, actors

Based on the literature and the experiences described in the previous paragraphs the design of an evaluation methodology is related to different contextual aspects. Basically the main classification of those contextual aspects concern the:

- standards to be measured (the measure of support for standards);
- purpose of the evaluation (accountability and control, mutual learning);
- actor orientation ((expert)peers, policymakers, stakeholders; hierarchy or mutuality)

An essential part of every evaluation methodology concerns the *standards* against which data are going to be assessed in the case of transnational cooperation in criminal matters. A simple point of departure is that the subject of evaluation is a part of the *rule of law* within the EU. This contains aspects of law enforcement and instrumentality, but also of defence rights of suspects and the treatment of suspects and convicts. The good cooperation between national authorities in their daily operation of legislation concerning the European Arrest Warrant, the European Evidence Warrant and the European Supervision Order is a point of attention. Diligence, efficiency and timeliness are essential in decision making concerning sending and answering to warrants and to decision making on custody and supervision of a wanted person before the decision to surrender a person. Mutual trust and the proportionality principle are the basic norms that guide the implementation of the legislation. From an instrumentalist perspective those norms are essential for efficiency and effectiveness because they were incorporated in the legislation. The fact that EU member states are a member of the Council of Europe and the assumption that basic norms of the Human Rights Treaty are implemented in those states are at the basis of the norm of mutual trust in the cooperation between authorities. From a rule of law perspective, those norms also apply to the defence rights and the treatment of suspects and convicts.

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¹⁴² Lawson, in Dane and Klip, 2009, p. 309.

Where so far only instrumental effectiveness has been the subject of evaluations, basic data about the effectiveness of defence rights and the implementation of minimum standards should also be involved. Apart from specific methods of investigation, there needs to be political support for such an approach. Essentially, the type of evaluation at hand is a policy evaluation. The standards to be measured are not fixed but *discursive* and may therefore be subject to change over time.

Applied to the transnational cooperation in criminal matters this can also be applied to aspects that so far have been ignored by EU evaluations. In order to make the rule of law work, it is essential that defence rights and standards for treatment of suspects and convicts are operational and are not being jeopardized by the logistics of the transnational cooperation processes. Even if mutual trust is the point of departure for transnational cooperation, national practices concerning the right to be informed of the accusation, the right to an attorney, the right to adequate translation and prison conditions for suspects and convicted persons, just as timeliness of criminal proceedings can be subject of attention. We have labelled combining assessments focussing on efficiency and effectiveness of the legislative instruments with a focus on the effective enforcement of defence rights and applicable human rights standards the 'holistic approach'. Thus we stress our intention that not only the implementation of the legislative instruments be assessed, but also its contexts and effects for its for stakeholders.

Dane and Klip discuss at the end of their book the question what the *purpose* of evaluation of the cooperation in criminal matters should be: mutual learning or also control and accountability? Dane and Klip, referring to the contributions of Klip, Versluis, Polak and Lawson, have taken as a point of departure that mutual learning should be the focus of evaluations in this context, with a view to setting standards.¹⁴³ This is based on their presumption that each evaluation and monitoring mechanism stands or falls with the commitment to its goals of the EU member states concerning this subject.¹⁴⁴ Considering this specific precondition, one wonders if monitoring and evaluation have to be restricted to this purpose of standard setting. A discursive agreement on standards is methodologically presupposed, even although outcomes of past evaluations can feed discussion about the standards to be set against which assessments of practices should be made. As will be described below, in the hierarchical contexts of the application of EU law the setting of discursive standards is nothing else than a politically willed policy outcome, regardless the arguments pro and contra.

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¹⁴³ M. Dane and J. Krommendijk, Lessons from the functioning of monitoring, evaluation and inventory mechanisms in the EU and the Council of Europe, in: M.Dane and A.Klip (eds). An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust. Celsius, Tilburg 2009, p 321.

¹⁴⁴ A. Klip, E. Versluis and J. Polak, Improving mutual trust amongst European Union Member States in the areas of police and judicial cooperation in criminal matters. Lessons Learned from the operation of monitoring, evaluation and inventory mechanisms in the first and third pillars of the European Union: in M.Dane and A.Klip (eds). An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust. Celsius, Tilburg 2009, p. 226.

Following Hansen's scheme¹⁴⁵, the rule of law in a democratic context is typically a complex set of rules enacted via the main body of a representative democracy. The *actor orientation* is both on policymakers and the persons involved in the cooperation are the main actors and the focus is both on control and accountability within the democratic *hierarchy* of the European Union and on the mutual learning by autonomous professionals (judges and public prosecutors). Such monitoring processes enable policy makers to adapt their policies and possibly their legal instruments if need be, based on data that can be compared over national borders. The Joint Action of 5 December 1997 established a tool for evaluating the application and implementation at national level of international cooperation in the fight against organized crime.¹⁴⁶ Article 34, paragraph 4 of the EAW framework decision¹⁴⁷ is at the basis of the review of its implementation by EU member states under responsibility of the Council of Ministers. To us, that seems to be sufficient hierarchy, especially now that the implementation also touches upon fundamental rights of suspects as they are guaranteed by the Lisbon treaty. There are large general and social interests at stake and they have been regulated at both the EU and at national levels. In short, the purpose of an evaluation in this field is to inform policymakers of the way in which this cooperation actually functions.

4.7.2 Methods

Considering the standards, the evaluation purpose and the actor orientation of transnational cooperation in criminal matters, a combination of qualitative and quantitative evaluation methods is indicated. We need combinations of registered data like the amounts of EAW's filed and executed, the number of inmates per prison surface etc.

The *legal state of affairs* of the implementation – jurisprudence included - was and is a point of attention. Furthermore the perception of participants on implementation practices is relevant, and can be inventoried and analysed based on a question list. This also opens possibility to open the question list for a representative sample of participants. This opens the possibility that not only institutional players will be involved but also advocates. Last but not least, as the major group of institutional players consist of professionals with traditionally a large amount of professional autonomy (judges, prosecutors; advocates), qualitative research methods developed for mutual learning may be of relevance. This would mean that there is a choice to either have a standard questionnaire to be developed and operated by peers - as is the case in the current peer review visits, with the possibility of a reaction and a reflection on outcomes with the peers, or to have this questionnaire developed and interviews conducted by professional researchers. We think it relevant that advocates would also be involved in this part of the research.

From a methodological perspective the validity of such an evaluation does not only depend on the discursive support for the standards against which implementation practices and effects will be assessed. For the legal analysis the validity of the research depends on the extent to which researchers can report on developments in jurisprudence of the highest and the lower courts, in combination with scholarly debates on the subject as well as legal policy debates on the subject. For the empirical methods, the validity of

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¹⁴⁵ Hansen, 2005 p. 454.

¹⁴⁶ The Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (97/827/JHA), J. L 344 of 15 December 1997, p. 7, allows for such an approach..

¹⁴⁷ Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O.J. L 190 of 18 July 2002, p.1.

outcomes also depends on the reliability of the data to be gathered, the accuracy of the questionnaire, the interview performance and the quality of the data analysis. Experience is that using multiple methods, by which also discrepancies between outcomes from different research instruments can be explained leads to a stronger validity of research outcomes. This is called 'triangulation'.¹⁴⁸

4.7.3 Use of data from other evaluations and monitors

Especially for data on, for example, performance of caseload management, access to justice, performance of the justice system, resources of the justice system, quality of justice and integrity as assembled in the Justice at Glance Monitor can be used to make an assessment of the non-instrumental values in an evaluation. The basic issue here is, if EU policymakers want to use this information source as indicators for the values to be assessed in evaluations of transnational criminal cooperation practices. They can be reliable indicators for the quality of the justice systems and they allow for checks against the values to be assessed as a part of a monitor of transnational cooperation in criminal matters.

4.7.4 Outcomes of evaluation and consequences

The realization of values by a policy implementation is a main aim of monitoring and evaluations. Monitoring outcomes are indicators of success and failure. This may lead two types of consequences: adaptation of the ways in which the policy is pursued in practice, and/ or an adaptation of the values to be assessed. The latter may be the case if a policy has unintended side effects that should be counteracted. This refers to the discursive character of evaluation standards, meaning that adaptation of evaluation standards in the context of transnational cooperation in criminal matters must be politically willed.

4.7.5 Developing a pilot methodology

With a view to the pilot we conducted we have developed a methodology within the sketched framework of evaluation methodologies. This pilot combines juridical analysis of practices, next to quantitative and qualitative empirical research elements. Experiences with this pilot evaluation will help to substantiate the recommendations for the EU-wide evaluations in this field.

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¹⁴⁸ For example, Martyn Hammersley, (2008). Troubles with triangulation. In: Bergman, Manfred Max ed. *Advances in Mixed Methods Research*. London: Sage, pp. 22–36p “The original usage of ‘triangulation’, within the literature of social science methodology, referred to checking the validity of an interpretation based on a single source of data by recourse to at least one further source that is of a strategically different type” (p.23).

4.8 Conclusion

In this chapter, we have explored the possible methodologies for evaluation and monitoring for the field of transnational cooperation in criminal matters. We have concluded, that, from a scholarly perspective, the hierarchical setting of this cooperation reflects on aspects of control and accountability. Quantitative methods (administrative data, perception surveys) may lead to outcomes that can be compared over national borders. An evaluation to inform democratically controlled policy makers should therefore follow this approach. Because in this field the most important decisions are being taken by autonomous juridical professionals, qualitative elements, focused on mutual learning should also be implied. This can be done by interviews, but also by expert sessions in order to find the most likely interpretation of the data assembled. Thus aspects of control & accountability can be combined with mutual learning. Because the subject concerns a core element of the EU rule of law, a legal analysis of implementation practices based on jurisprudence, debates on legal policy and scholarly debates should also be part of the evaluation because it is a main source for the interpretation of empirical evaluation outcomes within given legal boundaries.

Part B

5 The pilot project: The principle of proportionality and the European Arrest Warrant

Martin Böse

In the framework of cooperation in criminal matters in the Union, evaluation has focused on the implementation of the Union's policy in the Member States and on the identification of obstacles to the proper functioning of the new instruments (such as the EAW).¹⁴⁹ By ensuring an effective implementation, the evaluation mechanism shall enhance mutual trust and thereby facilitate the application of the principle of mutual recognition (Art. 70 TFEU). It cannot be doubted that proper (or improper) implementation of EU instruments in the Member States has a significant impact on the degree of mutual trust. However, implementation is not the only (or main) aspect relevant for mutual trust, and even a full and effective implementation of EU law might be insufficient to overcome a lack of trust originating in other aspects of the criminal justice system of another Member State.

Mutual trust is a key factor in international cooperation in criminal matters because cooperation requires a minimum of trust in the criminal justice system of the cooperating state. This applies in particular to the European Union where the legal framework shifted from the traditional regime of mutual legal assistance to a new set of instruments developed on the basis of the principle of mutual recognition. These new instruments (e.g. the EAW) rely on a higher level of mutual trust in the criminal justice systems of the other Member States, thereby establishing a new quality of transnational cooperation. This 'paradigm shift' to the principle of mutual recognition notwithstanding, mutual trust in the criminal justice system still remains an indispensable basis for a smooth functioning of cross-border cooperation. Moreover – and this is the basis for the concept of mutual recognition in the Union –, a high degree of mutual trust helps to overcome traditional reservations (e.g. the ban on surrender of nationals or the double criminality requirement). In chapters 2 and 3, a number of procedural and institutional 'building blocks' of mutual trust have been identified. In chapter 4, we have elaborated that the values to be assessed in a policy evaluation should be accepted as discursive truths by the policymakers.

The concept of mutual recognition depends upon mutual trust between the Member States, and trust is based upon facts rather than upon fiction. Correspondingly, the objective of evaluation is to collect and 'valuate' information on the 'building blocks' for mutual trust in the Member States' criminal justice systems and to assess whether there is a solid basis for mutual trust and to make recommendations on how to overcome existing deficiencies of the national criminal justice systems undermining mutual trust. Given the fact that mutual trust depends on various factors ('building blocks'), evaluation should not be limited to the legal and practical implementation of the specific instrument to be evaluated but has to deal with its implications for the whole criminal justice system, its procedural and institutional aspects in particular. The principle of mutual recognition crucially depends upon the Union's and the Member States' willingness and ability to live up to their commitment to respect human rights and the rule of law (Art. 2 and 6 TEU). In so far we call here to re-establish the values evaluation exercises in this field should refer to.

Corresponding to this 'holistic' approach, the design of the pilot project reaches beyond the existing system of mutual evaluation and its focus on whether national law complies with the Member States' obligations deriving from EU legislation. Extending its scope to general aspects of the national criminal justice systems, the pilot project seeks to get the whole picture on the merits and deficiencies of the measure to be evaluated, their human rights dimension and the consequences for the existence and degree of mutual trust. On the other hand, the design of the pilot project had to be adapted to the project's constraints in

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¹⁴⁹ Joint Action 1997/827/JHA of 5 December 1997, O.J. L 344 of 15 December 1997, p. 7.

time and resources. In particular, it has not been considered a feasible approach to conduct an overall evaluation of the criminal justice systems of the participating countries because this would have overburdened the pilot project; instead, the pilot project focuses on the institutional and procedural 'building blocks' which are particularly relevant for mutual trust and have a specific link to the evaluated instrument (see *infra* 5.1 and 5.2).

5.1 Scope

Following the standard design of *ex post* evaluation, the scope of the pilot project is determined by the subject matter of the evaluation and the relevant context (EAW) on the one hand and the intervention to be evaluated (the principle of proportionality) on the other. Of course, we depart from the methodological considerations of chapter 4: in our evaluation methodology, we combine legal analysis, and qualitative and quantitative research methods because they best fit the hierarchical aspect of EU policy implementation in this field.

The **European Arrest Warrant** has been chosen as subject matter of the pilot project for various reasons:

Firstly, the Framework Decision on the European Arrest Warrant was the first measure implementing the principle of mutual recognition. As a consequence, the measure has been implemented into national law not only of the participating countries, but of all Member States. This has been considered quite essential because the pilot project should map the implementation and cooperation practice not only between France, Germany and the Netherlands, but also with regard to countries not participating in the project. Furthermore, the practical impact of the proportionality principle was considered to be best evaluated in the context of an instrument which has been frequently used in legal practice over years so that the study would benefit from the various experiences of judges, prosecutors and defence lawyers.

Secondly, the EAW interferes with the right to personal freedom (Art. 5 ECHR, Art. 4 CFR), a fundamental right which is quite sensitive and, thus, a particularly suitable context to evaluate the impact of the principle of proportionality. It has been the particular intrusive character of this instrument that has triggered severe criticism of defence lawyers and non-governmental organisations¹⁵⁰ and the Council of Europe Human Rights Commissioner¹⁵¹. For the same reason, the issue of proportionality has been raised in the Council's fourth round of mutual evaluation (see *infra*, with regard to the intervention)¹⁵² and the last Commission report on the implementation of the EAW¹⁵³.

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¹⁵⁰ E.g. Fair Trials International, see <http://www.fairtrials.net/justice-in-europe/the-european-arrest-warrant/> (accessed 25 February 2013); see also C. Heard and D. Mansell, "The European Arrest Warrant: The Role of Judges when Human Rights area are at Risk", 2 *New Journal of European Criminal Law* (2011), 133 – 147.

¹⁵¹ See the Commissioner's human rights comment of 15 March 2011 ("Overuse of the European Arrest Warrant – a threat to human rights", available at http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=124 (accessed 25 February 2013).

¹⁵² See the final report of the fourth round of mutual evaluations, concerning the European Arrest Warrant, Council-Doc. 7361/10, p. 4-7.

¹⁵³ COM (2011) 175 final, point 5.

Thirdly, the EAW is an instrument that has already been subject to mutual evaluation, and thereby offered the opportunity to survey experiences with the existing evaluation mechanism and to identify possible alternatives or amendments.

The definition of the intervention is based upon the new approach of evaluation, referring to the whole range of ‘building blocks’ for mutual trust, and their human rights dimension in particular. On the other hand, the pilot project could not cover all of these aspects because this would have overburdened the project. To reconcile the purpose and constraints of the study, evaluating the impact of the **principle of proportionality** on the implementation of the EAW turned out to be the ideal solution.

The principle of proportionality is a general principle of law that is well-established in EU law, in the case law of the European Court of Human Rights, and the national laws of most European States. So, the intervention to be evaluated is based upon a common normative basic concept. The common understanding is also reflected in the recent amendments to the European Handbook on how to issue a European Arrest Warrant that have been adopted to meet the concerns that have been raised on the issue of proportionality.¹⁵⁴ Furthermore, the Handbook regulates the proportionality check and the criteria to applied in a detailed manner which will also provide for more specific evaluation criteria. So, in addition to the the proportionality principle the impact of the Handbook’s guidelines (standard proportionality test by the issuing authority) on court practice in the Member States can be evaluated.

Secondly, the principle of proportionality perfectly represents the human rights dimension of the new evaluation mechanism. It is related to procedural aspects of mutual trust because the right to personal freedom is a very sensitive issue and, thus, subject to procedural safeguards (e.g. the right to assistance by counsel). On the other hand, proportionality of arrest and detention are linked to institutional aspects of mutual trust as well (duration of proceedings, detention conditions etc.). So, the subject matter of the pilot project (the European Arrest Warrant and the principle of proportionality) presents a kaleidoscope of the various ‘building blocks’ of mutual trust.

Nevertheless, by focusing on the proportionality principle, the scope of the pilot project is still limited to issues with a specific link to proportionality (e.g. using the EAW for minor offences, recourse to less intrusive alternatives, surrender of nationals and residents). The project does not address human rights issues in general (e.g. convictions in absentia, inhuman treatments after surrender). Accordingly, the data to be collected shall be closely related to the subject matter of the pilot: An evaluation of the EAW will have to lie a special focus on arrest and detention. Thus, information on the conditions of detention is supposed to be more relevant than a general evaluation of the criminal justice system as a whole (see *infra* 5.3).

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¹⁵⁴ See Council-Document No. 17195/1/10, p. 14-15.

5.2 Topics for evaluation

The pilot project evaluates the impact of the principle of proportionality on the Member States' practice in issuing and executing EAWs. So, the evaluation will not focus on whether national legislation complies with the Framework Decision on the European Arrest Warrant, but refer to this new instrument as a common framework of surrender procedures in the Union.

The principle of proportionality is a general principle of law. However, the concept of proportionality and its role in legal practice may differ from Member State to Member State. Thus, the evaluation of the impact of the proportionality principle on the implementation of the EAW has to deal with the sources, the legal status and the concept of the proportionality principle in the national criminal justice systems. A special focus is given to the proportionality checks carried out by courts and law enforcement authorities in the framework of (domestic) criminal proceedings. So, the first part of the pilot project is about the general impact of the proportionality principle on the national criminal justice systems.

As regards the impact on the implementation of the EAW, the issue of proportionality arises in both the Member State issuing a EAW and the Member State executing a EAW.

In the issuing Member State, the evaluation will focus on whether the competent authority applies a proportionality check before issuing a EAW and the criteria to be applied in that test. The Handbook on the European Arrest Warrant provides some guidance in that respect. However, the implementing legislation and court practice in the Member States might differ from the Handbook. Given the fact that the seriousness of the crime is a crucial aspect when assessing proportionality of arrest and surrender, special attention shall be paid to the offences for which a EAW is issued. Furthermore, the procedural framework can have a significant impact on the decision not to issue a EAW considered to be disproportionate (judicial review, procedural safeguards).

At first sight, the issue of proportionality in the executing Member State seems to play a rather limited role because the proportionality principle is not a ground for non-execution of a EAW explicitly mentioned in the Framework Decision on the European Arrest Warrant. Nevertheless, the issue of proportionality may arise in the executing Member State as well:

First of all, the Framework Decision provides for several optional grounds for refusal (Art. 4, Art. 4bis and Art. 5 FD EAW). When exercising its discretion on whether to have recourse to one of these grounds for non-execution, the executing authority may apply a proportionality test. By contrast, the principle of proportionality does not come into play for dealing with individual cases as far as EU law (Art. 3 FD EAW) or the implementing legislation in the Member States (e.g. with regard to time-barred prosecution, Art. 4 No. 4 FD EAW) provides for a mandatory ground for refusal. The impact of the proportionality principle will, thus, depend upon national legislation and the way the optional refusal grounds have been implemented in the Member States. The assessment of the national laws notwithstanding, the principle of proportionality may be relevant for (inter alia) Art. 4 No. 2 FD EAW (ongoing proceedings in the executing Member State), Art. 4 No. 3 FD EAW (termination of proceedings in the executing Member State), Art. 4 No. 6 FD EAW (surrender of nationals and residents) and Art. 5 No. 3 FD EAW (return guarantee for nationals and residents), and Art. 4 Nr. 7 FD EAW (principle of territoriality). Since nationals (and to some extents

permanent residents) enjoy a special protection from extradition under national (constitutional) law, the principle of proportionality will particularly relevant in that context.

Furthermore, the principle of proportionality may be considered to be part of the European *ordre public* (Art. 1 (3) FD EAW).¹⁵⁵ Accordingly, Member States might refuse to execute a EAW if the prosecution of the person to be surrendered to the issuing Member State does not comply with the principle of proportionality due to (inter alia) excessive punishment (Art. 49 (3) CFR), duration and conditions of detention (Art. 3 and 5 ECHR, Art. 4 and 6 CFR), or the use of the EAW for trivial offences or for reasons that do not justify detention (e.g. interrogation)¹⁵⁶. Admittedly, the interpretation of Art. 1 (3) FD EAW is a highly controversial issue. Nevertheless, the assessment of national legislation and court practice can significantly contribute to the debate on the principle of proportionality as part of the European *ordre public*.

Finally, the execution of a EAW requires both arrest and detention on the one hand and surrender on the other. So, the differences between transnational and national law enforcement have to be taken into consideration. Since the aspects mentioned above are (mainly) related to proportionality of surrender (i.e. transfer to / prosecution in another state), the part on the executing state is supplemented by observations on proportionality of arrest and detention in surrender proceedings (Art. 12 FD EAW). In that regard, the pilot project will focus on the similarities and differences to arrest and detention in domestic proceedings (“national” arrest warrants vs. “extradition” arrest warrants) and the correspondent procedural safeguards (e.g. case monitoring after surrender).

In its final part, the pilot project will draw upon general issues on mutual trust and evaluation, thereby referring to the second aim of the project to develop a general evaluation framework to assess (and strengthen) mutual trust in cooperation in criminal matters. To that end, the pilot project seeks to assess the relevance of the procedural and institutional aspects (supra chapters 2 and 3) for building mutual trust among Member States. Some of these aspects are considered to be particular relevant for the EAW (conditions for issuing an arrest warrant, maximum period of detention, legal remedies, detention conditions) and therefore call for a closer examination whether (and to what extent) mutual trust is well-founded. Last, but not least, the pilot project will collect the experiences with the current evaluation methodology and ask what lessons can be learned from the fourth round of mutual evaluation.

5.3 Used methodologies

The pilot project aims at the evaluation of the impact of the proportionality principle (intervention) on the implementation of the EAW in the participating countries (context).¹⁵⁷ For this purpose, the pilot project shall explore the concept and legal status of the proportionality principle in France, Germany and the Netherlands and describe if (and how) the implementation of the EAW in national legislation and court practice involves explicit or implicit considerations of proportionality. This is the legal analysis of implementation practices.

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¹⁵⁵ See chapter 11.1 for a more detailed analysis.

¹⁵⁶ See the European Handbook on how to issue a European Warrant, Council-Documents No. 17195/1/10, p. 14-15.

¹⁵⁷ See supra 5.1.

As to the methodology, a quantitative empirical approach based on government registrations concerning the implementation of the EAW legislation has not been considered appropriate because statistics on the impact of the proportionality principle are rather limited and do not allow for meaningful conclusions. On the other hand, due to constraints in time and resources, it was simply impossible to conduct quantitative empirical research (e.g. by file analysis) and, thereby, to collect the relevant statistical data in the framework of the pilot. So, the pilot project is predominantly based upon a qualitative empirical approach which is complemented with a survey on the perceptions of key players in the EAW framework implementation processes: public prosecutors, judges and advocates.

In its methodological design, the pilot project draws upon the mutual evaluation mechanism that has been set up by Joint Action 1997/827/JHA¹⁵⁸ and that has been used for the evaluation of the EAW. Like the current evaluation mechanism, the pilot project is based upon a questionnaire and peer review visits in the participating Member States.¹⁵⁹ The pilot project, however, goes beyond that mechanism since it seeks to further develop and differentiate the instruments by adapting them to the information to be collected and the realization of values to be assessed. The pilot project is intended to map the current state of affairs, i.e. the legal situation, current practices and the organisational contexts and functioning, general statistics on the criminal justice systems included. The different types of information require different approaches. To that end, the pilot project employs four different tools: legal analysis, interviews, surveys, general statistics and other information publicly available.

The ‘core’ of the case study are the legal analysis and the peer review visits. The **legal analysis** shall give a survey of the implementation of the EAW in the national law of each participating country, possibly put in the context of documented policies. Insofar, the pilot project will apply the research method of document and text analysis, analysis of jurisprudence and literature review. The “current state” analysis shall consider in particular national legislation, policy documents, administrative guidelines, case law, and academic studies. The legal analysis is intended to prepare the peer review visits. Accordingly, both instruments shall follow the same structure (e.g. the distinction between the perspective of the issuing and the executing authority, see supra 5.2).

The **peer review visit** is the second element of the pilot project which is designed to explore the implementation practice in the participating countries. The peer review visits provide the framework for qualitative data assessment by interviews. Since the interviews shall provide a comprehensive picture of ‘what is going on’ it is quite essential to address the whole range of practitioners dealing with EAWs (judges, prosecutors, officials of the central authorities and the national SIS units as well as defence lawyers). In particular, the interviews shall address both the issuing and the executing authorities. On the other hand, since the peer review visit shall be conducted within five working days and, thus, will not allow for interviews of all issuing and executing authorities, the selection of the institutions and persons to be interviewed shall form a representative sample of the entire group of issuing and executing authorities. In particular, the institutions to be visited should deal with a significant number of cases, have a general competence for all kind of crimes and represent – to the extent possible - the different regions of the

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¹⁵⁸ Joint Action 1997/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, O.J. L 344 of 15 December 1997, p. 7.

¹⁵⁹ See Art. 5 and 6 of Joint Action 1997/827/JHA.

Member State (e.g. the experiences of German courts close to Poland might differ from the experiences of the German courts close to France). Since the questionnaire will also deal with experiences of the current framework evaluation it has been considered useful to address persons that have been involved in former peer review visits.

The peer review visits have been limited to the participating countries (France, Germany and the Netherlands) and could not be extended to other Member States. Thus, the impact of the proportionality principle in other EU Member States could not be assessed by the “peer review method”. Therefore, the interviews have been supplemented by a second set of questionnaires in form of a **survey**. This survey addressed both the judicial authorities and the defence lawyers. The questionnaire for the judicial authorities in the other EU Member States was transmitted via the European Judicial Network in criminal matters to its correspondents. The questionnaire is a short version of the questionnaire that has been used in the interviews, and was designed to provide information on the situation in the Member State as regards the role of proportionality and factors of mutual trust. To some extent, it might also add useful information to the results of the peer review visits to the participating countries and complement their findings (see chapter 9). In addition to the questionnaire for judicial authorities, a questionnaire has been prepared to assess the view of defence lawyers practicing in EAW cases. The European Criminal Bar Association (ECBA) kindly volunteered to transmit the questionnaire via its executive board to defence lawyers of its network. The questionnaire also takes up the aspects of the peer review and the EJM survey, i.e. it addresses both the proportionality issue and factors of mutual trust. After experience of first peer review visits, however, it was decided to streamline the questions to the specific situation of the defence in EAW cases, so general questions on the concept of proportionality etc. were not taken up again. Regrettably, the number of returns has been quite low (till the date of finalizing this report only three defence lawyers had replied).¹⁶⁰ Therefore, it was decided that the results should be supplemented by recent studies on defence rights in transnational criminal cooperation.¹⁶¹ These sources complemented the findings of the interviews with defence lawyers in the participating countries and validated the conclusions to be drawn from the peer review visits. The results on the defence lawyer’s position are summarized in chapter 10. Essentially, the surveys ask for experiences and perceptions of the key players and should be used as a quantitative empirical research tool, in conformity with the points of departure for EU policy evaluation as described in chapter 4.

Finally, the pilot project will rely on **statistical data** on the EAW and the national criminal justice systems of the participating countries (France, Germany, the Netherlands). The collection of statistical data shall complement the results of the peer review visits and prevent misinterpretations or erroneous conclusions. However, the added value of this element will depend on the availability and the reliability of the relevant data in the participating country and also the comparability of collected data. In order to assess the empirical basis for mutual trust, the collection of statistical data is not limited to the implementation of the EAW, but also related to the performance of the criminal justice systems of the participating countries. A special focus lies upon aspects particularly related to arrest and detention (length of detention, duration of proceedings). However, for some aspects statistical data is hardly available or does not allow for conclusions on the situation in the Member State concerned (e.g. with regard to detention conditions). Therefore, the

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¹⁶⁰ Replies were received from defence lawyers in Belgium, the Czech Republic and the United Kingdom.

¹⁶¹ Mainly: JUSTICE report, *European Arrest Warrants – Ensuring an effective defence* (London, 2012); J. Arnold, „Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum* 54-62.

pilot project also considers ‘background information’ that can be derived from **evaluation or monitoring reports** of international organisations. For instance, the reports of the Committee for the Prevention of Torture (CPT) will provide information on the detention conditions in the participating countries; this additional information will be particularly relevant for the analysis of the corresponding institutional building block for mutual trust. Thus, we involve the results of quantitative and qualitative evaluations by institutional organisations different from EU players. An appreciation assessment of the research methodologies and the validity of their outcomes may be necessary.

5.4 Checklist(s)

Like the questionnaire in the current evaluation mechanism¹⁶², the questionnaires in this project (hereinafter called “checklists”) shall ensure that the pilot project covers the topics of the evaluation (supra 5.2) and establishes all information considered to be relevant for the evaluation. Thus, the checklists are essential for the comprehensiveness of the evaluation process.

As follows from the methodological design (supra 5.3), the pilot project employs four different tools (legal analysis, interviews, survey, statistics and other publicly available background information on the criminal justice systems of the participating countries). As a consequence, the pilot project will not refer to one, but to four checklists because each instrument will be used to assess a different set of information. Accordingly, the following text presents separate checklists for the legal analysis, the interviews, the survey, and the statistical data and other background information. As a basis for the national reports, the checklists on the legal analysis, the interviews and statistics are merged into a common structure that can be found at the end of this chapter (5.4.6).

5.4.1 Checklist (Legal Analysis of national legislation and case-law in the participating countries)

General questions on the role of the principle of proportionality in your criminal justice system

1. What is the status of the principle of proportionality in your legal order? What is the content / are the elements of a proportionality check in your national system? What is the source of the principle of proportionality, i.e.
 - a. general principles of law;
 - b. constitutional law;
 - c. statutory law;
 - d. administrative guidelines;
 - e. other legal sources?
2. Are courts and other law enforcement authorities bound by this principle when imposing a criminal sentence?

.....
¹⁶² See Art. 5 Joint Action 1997/827/JHA.

3. Does your national law provide for a proportionality check with regard to investigative measures in criminal proceedings? In particular, are the courts and other law enforcement authorities obliged to assess whether an arrest warrant or detention comply with the principle of proportionality?
4. Does your national law provide for procedural safeguards or other rules to ensure the proportionality of arrest and detention (legal remedies, judicial control ex officio, right to contact a lawyer / another person, maximum periods of detention)?
5. Does your criminal justice system provide for mandatory prosecution (“principle of legality”) or is there a discretion of the competent authority whether to prosecute or not (“principle of opportunity”)?

Questions related to your country as an issuing Member State

6. Does your country *always* use a proportionality check before issuing a European Arrest Warrant? If yes, what is the legal basis, is it
 - a. reference to general principles of EU law
 - b. constitutional law
 - c. statutory law (e.g. implementing legislation, law of criminal procedure)
 - d. the Handbook on the European Arrest Warrant,
 - e. informal national guideline,
 - f. something else?
7. Are there specific procedural rules for issuing a EAW in relation to the proportionality principle?
8. Which authority/authorities is/are competent for issuing a EAW and assessing its proportionality? Is there a judicial control / review ?
9. In the European handbook on how to issue a EAW form (Council doc. 17195/1/10, Copen 275) a number of factors are listed which can determine if in a certain situation a EAW should be issued or not. Are these factors used in determining the proportionality principle and can you indicate for each of the factors which are the minimum standards for deciding not to issue a EAW?
 - a. The seriousness of the offence;
 - b. The possibility of the suspect being detained;
 - c. The likely penalty imposed if the person sought is found guilty of the alleged offence;
 - d. The effective protection of the public;
 - e. Taking into account of the interest of the victims of the offence.
10. Are there other (proportionality) factors that your country takes into account in the decision making process for issuing or not issuing a EAW? In particular, does your country consider the following factors:
 - a. use of less intrusive means to ensure prosecution / alternative measures of mutual legal assistance,
 - b. reasonable chance of conviction,
 - c. previous convictions,
 - d. effective exercise of defence rights (information on defence rights, providing translation and interpretation),
 - e. privacy rights of the suspect (e.g. possibility to have contact with family members),
 - f. age of the person sought,
 - g. cost and effort of a formal extradition proceeding, including extradition arrest.
 - h. others, if yes, which ones?
11. Does your law provide for certain categories of offences that are exempted from the general rule for issuing a EAW? If yes, which categories?

Questions related to your country as an executing Member State

12. Has your country implemented one or more of the optional grounds for refusal (Art. 4 and 5 FD EAW) in a manner that the implementing provision requires a proportionality test or provides for a margin of discretion of the executing authority whether or not to execute the EAW? Does the executing authority apply a proportionality check when exercising this margin of discretion? What is the legal basis (constitutional law, statutory law, reference to EU law)?
13. Which criteria are being used in this proportionality test? Does the competent authority refer to one (or more) of the criteria mentioned in No. 9 and 10?
14. Does your country provide for a general proportionality test referring to the national constitution or to general principles of EU law (Art. 6 TEU)? In particular, does your country assess whether
 - a. the criminal sentence imposed / to be imposed in the issuing state is disproportionate (cf. Art. 49 par. 3 of the Charter of Fundamental Rights),
 - b. the conditions of detention comply with international standards,
 - c. the use of the EAW is adequate (esp. against the background of the possibility to use alternative measures listed in p. 14/15 of the EAW handbook, cf. also No. 5 of the checklist “interview”)?
15. If the issuing authority does not apply a proportionality check, what kind of procedural steps are being taken by your authority? Is this situation covered by a general proportionality check (see No. 12 and 14), does your country in this specific case do an additional proportionality test before executing the EAW or do you always automatically execute these requests? Which criteria are being used in this proportionality test?
16. (In case of a general or additional proportionality test) which authority/authorities(/courts) are competent for conducting the proportionality test? Can the person sought appeal the decision on his/her surrender?

Nationals (and return guarantee)

17. In situations of executing a EAW, does your country always use an additional proportionality test for nationals or residents?
18. Does your country demand a ‘return guarantee’ of nationals or residents?

Proportionality of arrest in the framework of EAW/extradition proceedings

19. Does your country provide for a proportionality check with regard to arrest and detention in the framework of the execution of a EAW? Please indicate the legal basis (constitutional law, statutory law, reference to general principles of EU law, Art. 5 ECHR) and the criteria to be applied!
20. Does your national law provide for procedural safeguards to ensure the proportionality of arrest and detention (e.g. legal remedies, judicial control ex officio, maximum periods of detention)?
21. With regard to proportionality, is there a difference from the rules on arrest and detention in the framework of domestic criminal proceedings? If yes, what is different?

Procedural rights for suspects and offenders (in the light of anticipation of EU measures to enhance the procedural rights) in the application of EAW procedures

22. In case of executing a EAW and the requested person is not able to understand the EAW procedure, does your country apply specific measures with respect to interpretation and translation? How is the right to interpretation and translation guaranteed?

23. Is there a specific information provision (for example a *Letter of Rights*) available to inform the suspect/offender of his/her rights? Is this information available in a language that this person can understand?
24. Are the accused/suspects in a EAW procedure always informed about the possibility of obtaining legal aid and legal representation/legal advice?
25. Do accused/suspects have the possibility to contact a person to inform them that he/she is arrested and deprived from liberty? If yes, can you describe the procedure used and what the possibilities are to contact a person?
26. Do you have specific procedures to protect the right of accused persons/suspects who belong to the category of vulnerable persons? If yes, can you describe them.

5.4.2 Checklist (interviews during peer review visits to the participating countries)

Questions related to your country as an issuing Member State

1. In the handbook of the EAW a number of factors are listed which can determine if in a certain situation a EAW should be issued or not. Are these factors used in determining the proportionality principle and can you indicate for each of the factors which are the minimum standards for deciding not to issue a EAW?
 - a. The seriousness of the offence;
 - b. The possibility of the suspect being detained;
 - c. The likely penalty imposed if the person sought is found guilty of the alleged offence;
 - d. The effective protection of the public;
 - e. Taking into account of the interest of the victims of the offence.
2. Are there other (proportionality) factors that your country takes into account in the decision making process for issuing or not issuing a EAW? In particular, does your country consider the following factors:
 - a. use of less intrusive means to ensure prosecution/ alternative measures of mutual legal assistance, (cf. also the alternative measures under No. 5 below),
 - b. reasonable chance of conviction,
 - c. previous convictions,
 - d. effective exercise of defence rights (information of defence rights, providing translation and interpretation),
 - e. privacy rights of the suspect (e.g. possibility to have contact with family members),
 - f. age of the person sought,
 - g. cost and effort of a formal extradition proceeding, including extradition arrest.
 - h. others, if yes, which ones?
3. Are there (categories of) offences or kinds of cases for which you do not issue EAWs although it might be possible under Art. 2 of the FD EAW?
4. Will the decision not to issue a EAW result in a termination of proceedings or is further action to be taken against the suspect or offender (e.g. summons or consular hearings) ?
5. The handbook of the EAW describes examples of alternatives for situations where the competent authority has decided not to issue a EAW. Do you have guidelines how to proceed in such situations? Can you indicate if and how often the following alternatives are used as less intrusive means?
 - a. alternative means for the interrogation of the person sought, e.g. via summons (using the Schengen Information System to establish the identity and place of residence of a suspect) or via videoconferencing for suspects

- b. alternative means to prevent pre-trial confinement, e.g. by the use of pre-trial supervision order;
- c. enhanced use of enforcement cooperation, in particular on the basis of the Framework Decision on the mutual recognition of financial penalties ;
- d. transfer of proceedings.

Are there any difficulties/obstacles with respect to the application of these alternatives, which can be a ground for not using these alternatives and a reason for issuing a EAW?

6. Do you encounter any problems or obstacles in the execution of the EAWs that have been issued in your Member States? If yes, can you indicate the kind of these problems or obstacles with regard to
 - a. the participating countries (France, Germany, the Netherlands)
 - b. other Member States? Which solutions were found for these problems?

If no problems/obstacles were encountered to the participating countries or any other EU Member State what are/could be the reasons?
7. In your opinion, which judicial authorities should exercise the proportionality check, the judicial authorities of the issuing or of the executing Member State? Do you believe that a proportionality check will extend the execution of a EAW beyond the time limits set in the Framework Decision? Which suggestions for improvements do you have?

Questions related to your country as an executing State

8. Do you have the impression that the participating countries (Germany, France and the Netherlands) use a standard proportionality check before issuing a EAW? If yes, do these countries share information about the procedural rules and standards concerning the proportionality check?
9. Do you receive requests for executing a EAW from Member States which do not apply a proportionality test before issuing a EAW? If yes, please indicate the kind of cases, the involved countries and the problems/obstacles encountered.
10. When this situation arises, which solutions are found, in particular what kind of procedural steps are being taken by your authority? Please indicate whether you will take one (or more) of the following actions
 - a. applying a general proportionality check or an additional proportionality test (for this specific situation) before executing the EAW;
 - b. automatic execution of the EAW;
 - c. starting bilateral negotiations with the issuing state.
11. [In particular for defence lawyers:] Can the person sought appeal the decision on his/her surrender? In which cases appeals are / were successful, in which not? Are there alternative strategies to prevent the execution of possibly disproportionate EAWs?
12. (In case of a general or additional proportionality test) which criteria are being used in this proportionality test?
13. In your opinion, which judicial authorities should exercise the proportionality check, the judicial authorities of the issuing or of the executing Member State? Do you believe that a proportionality check will extend the execution of a EAW beyond the time limits set in the Framework decision? What suggestions for improvements do you have?
14. If surrender of the person sought is subject to a condition (e.g. for trials in absentia, return guarantee) is his/her case followed/monitored by the national authorities (e.g. pre-trial phase, trial, execution of judgment)?
15. Are there specific (communication) problems (or problems related to the transmission of information) with respect to the monitoring?

Nationals (and a return guarantee)

16. In situations of executing a EAW, does your country always use an additional proportionality test for nationals or residents?
17. Does your country demand a 'return guarantee' of nationals or residents?
18. How is the case monitored and who is competent for following the judicial proceeding of the surrendered national or resident in the issuing Member State (e.g. representative of the embassy, official or information sharing, informal information, information via non-governmental organisations)?

Mutual trust

19. In the decision making process by the competent authority to *execute* an mutual legal assistance request the level of 'mutual trust' can be an influencing factor. Which mutual trust aspects were problematic in the traditional extradition scheme or are still problematic in view of extraditions to third countries? What has changed via the EAW? Can you indicate which of the following aspects were/are problematic in terms of trust for the *three participating* (France, Germany and the Netherlands) *countries*:
 - a. The quality of the judiciary (nomination of judges, training and education)
 - b. The available capacity (number of judges, prosecutors, etc).
 - c. The duration of the pre-trial procedure
 - d. The duration of the judicial proceedings before the courts
 - e. The right to a fair trial
 - f. The level of independence of the judiciary
 - g. The level of corruption in the judiciary and law *enforcement organisations*
 - h. The level of proportionality (*relation between the crime/offence committed and the expected level of sanctions*)
 - i. The quality of the legal representation
 - j. The conditions of detention
 - k. The level of cooperation between the Member States
(five point scale: 1 not problematic – 5 very problematic)
20. When the same question is asked for *all* the EU Member States, can you name three (or less) aspects related to mutual trust which are very problematic in relation to the execution of a EAW procedure and can you indicate for each of the aspects listed the level of problems? (use the same list as in question 19)
21. As an executing Member State, do you have any difficulties with other Member States when they issue EAWs? If yes, please indicate the relevant Member States and the kind of problems you are facing! How do you deal with these problems?

Review of the experiences with the current evaluation methodology of the peer-reviews of the European Arrest Warrant

22. Looking at the current evaluation method applied to the evaluation of the EAW by making use of peer-reviews, what are your impressions of this evaluation method in terms of:
 - a. Comprehensiveness (does it cover all the elements of a thorough evaluation)
 - b. Reliability of the information of data collection and qualitative information describing the EAW procedure in a given Member State
 - c. Technical expertise of the experts/peer reviewers on the subject concerned (the EAW)
 - d. Technical expertise of the experts/peer reviewers with respect to research and evaluation experience
 - e. Quality of the assistance provided by the European Commission and the General Secretariat of the Council of the European Union during the peer-review visits

23. Are there specific elements that should be improved in the current methodology of the peer-reviews as a part of the national evaluations of the EAW?
24. Are there specific lessons to be learned for the development of a common evaluation framework for evaluating EU-instruments and the mutual trust between Member States in judicial cooperation in criminal matters?

5.4.3 Checklist (Survey)

5.4.3.1 Judicial authorities (European Judicial Network)

General questions on the role of the principle of proportionality in the national criminal justice system

- 1 Does your national criminal law code provide a standard proportionality check with regard to investigative measures in criminal procedures? (tick box if applicable)
- Yes
 No
- 2 If yes, are the courts and other law enforcement authorities (i.e. the office of the public prosecutors) always obliged to assess whether a national arrest warrant or the execution of a national detention measure comply with the principle of proportionality?
- | | | |
|-----------------------------------|------------------------------|-----------------------------|
| Courts | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| Other law enforcement authorities | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

Questions related to the European Arrest Warrant as an issuing Member State

- 3 Does your country always use a proportionality check before issuing a EAW?
- Yes, because:
 No (if no go to question 6)
- 4 What is the legal basis for this proportionality check in your country? (multiple answers are possible)
- A reference to general principles of European Union Law
 The constitution of our country
 Statutory law (e.g. implementing legislation, Criminal Procedural Law)
 The EU Handbook on the European Arrest Warrant
 (informal) national guidelines
 Other, namely:

5 Are there specific procedural rules for issuing a EAW in relation to the principle of proportionality? If yes, please describe these rules.

- Yes, namely:
- No

6 In the European handbook on how to issue a EAW a number of factors are listed to determine if in a certain situation a EAW should be issued or not. Which of these factors are used in your country to determine if a EAW should be issued? (multiple answers are possible)

- The seriousness of the offence;
- The possibility of the suspect being detained
- The likely penalty imposed if the person sought is found guilty of the alleged offence
- The effective protection of the general public
- The interest of the victims of the criminal offence

7 Are there other (proportionality) factors that your country takes into account in the decision to issue or not issue a EAW? (multiple answers are possible)

- No
- The use of alternative measures of mutual legal assistance
- A reasonable chance of conviction
- Previous convictions of the person concerned
- The effective exercise of legal representation in the executing country (including a guarantee of proper defence rights, such as a right for interpretation)
- The (privacy) rights of the suspect (the possibility to have contact with family members)
- The age of the person concerned
- The costs and effort of a formal extradition procedure, including extradition arrest and transportation costs
- The quality of the detention facilities in the issuing member state
- Other:

8 What are the top three offences where your country is issuing a EAW?

1

2

3

9 Do you encounter any problems or obstacles in the execution of the EAW that have been issued in your member state?

- No
- Yes, because:

Questions related to your country as an executing state of the EAW

10 What are the top three EU member states where you receive requests from for the execution of a EAW?

1

2

3

11 What are the top three offences you receive from other countries for the execution of the EAW?

1

2

3

12 Do you receive requests for execution of a EAW from member states which do not apply a proportionality test before issuing a EAW? If yes, can you indicate the three most listed offences from those countries concerned?

- No
- Yes, namely for the: (three most listed offences):

1

2

3

13 In situations where there is no proportionality test applied by the issuing country, which procedural steps are often undertaken by your country?

- applying a general proportionality check by a court/tribunal before accepting the request for execution
- an automatic execution of the EAW (if all formal requirements of the issuing country are fulfilled)
- contacting the issuing member state and seeking for an alternative solution for the case concerned
- Other steps, namely:

14 In situations of executing a EAW, does your country always use an additional proportionality check for nationals?

- Yes
- No

15 Does your country demand a return guarantee for nationals (e.g. for executing a prison sentence in your country)?

- Yes, because:
- No

16 Are there specific problems of your country concerning the requests from other countries for execution a EAW?

- No
- Yes, namely:

17 Do you monitor the situation of a surrendered person when your country has executed the EAW at the request of another country?

- Yes, because:
- No, because:

18 Can you estimate the average cost for a EAW case for your country (including the time required for prosecution, trial and surrender)?

- No
- Yes, the average cost per EAW case is (in Euro): €

Mutual trust

19 Can you indicate for the following aspects of mutual trust between the EU member states how problematic these aspects are for the cooperation between the member states in criminal matters? (very problematic, problematic, neutral, not problematic, absolutely not problematic)

	Very problematic	Problematic	Neutral	Not problematic	Absolute not problematic
The quality of the judiciary/ judges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The available capacity of the justice systems (judges, prosecutors, staff)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The duration of the pre-trial procedures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The duration of the court procedures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The right to a fair trial	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Level of independence of the judiciary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Level of corruption within the justice sector	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Level of proportionality (relation between crime committed and the expected level of sanctions)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality of legal representation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Conditions of detention	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cooperation between the judicial authorities of other countries	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

20 In situations that you encounter problems in the mutual trust with other EU member states, can you indicate which of the three countries you are facing the most problems with and which of the mutual trust aspects of the country concerned are the most problematic ones for those countries? (select name of the country and problem)

- | | | |
|---|----------------|----------------------------|
| 1 | Country | Mutual trust aspect |
| 2 | Country | Mutual trust aspect |
| 3 | Country | Mutual trust aspect |

21 Do you have specific suggestions for improving the EAW procedure?

- No
- Yes, namely:

5.3.3.2 Defence lawyers (ECBA)

Concept of proportionality related to the European Arrest Warrant when executed

1 Have you experienced cases where the EAW from the issuing authority seemed to be *disproportional*? If yes, can you indicate the kind of cases and the countries concerned?

- Yes, namely
- No

2 Can the person sought appeal the decision on his/her surrender? In which cases of disproportional EAWs appeals are / were successful, in which not? Are there alternative strategies to prevent the execution of possibly disproportionate EAWs or at least the arrest due to a EAW?

3 Are there better defence possibilities to prevent surrender if the person sought is a *national*?

- Yes, because
- No, because

- 4 Are there better defence possibilities to prevent surrender if the person sought is a *resident*?
- Yes, because:
 - No, because
- 5 What are the specific *problems* for the defence in your country concerning the requests from other countries for the execution of a EAW?
- 6 Does the law of your country provide for mandatory legal representation in EAW cases? If yes, under what conditions and how often is it applied in practice?
- Yes, namely:
 - No
- 7 Do you encounter problems of an effective legal representation in a EAW case in your country, e.g. in terms of information of the client on his/her rights, timely access to the client, access to files, etc.
- Yes, namely:
 - No
- 8 In EAW cases the organisation of the legal representation of the client both in the executing and issuing Member State (dual representation) is often essential. Do you encounter problems when setting up representation in the issuing Member State? If yes, could you indicate the kind of problems and the countries where setting up dual representation is most difficult?

Mutual trust aspects

9 Can you indicate for the following aspects of mutual trust between the EU member states how problematic these aspects are for the cooperation between the member states in criminal matters? (rate 1 (very problematic) to 5 (absolutely not problematic))

	Very problematic	Problematic	Neutral	Not problematic	Absolute not problematic
The quality of the judiciary/ judges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The available capacity of the justice systems (judges, prosecutors)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The duration of the pre-trial procedures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The duration of the court procedures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The right to a fair trial	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Level of independence of the judiciary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The level of corruption within the justice sector	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The level of proportionality (relation between the crime committed and the expected level of sanctions)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality of the legal representation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Conditions of detention	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cooperation between the judicial authorities of other countries	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10 In situations that you encounter problems in the mutual trust with other EU member states, can you indicate which of the *three countries* you are facing the *most problems* with and which of the *mutual trust aspects* of the country concerned are the *most problematic* ones for those countries? (select name of the country and aspect related to mutual trust)

- | | | |
|---|----------------|----------------------------|
| 1 | Country | Mutual trust aspect |
| 2 | Country | Mutual trust aspect |
| 3 | Country | Mutual trust aspect |

11 Do you encounter problems when the EAW is executed under conditions, e.g. trials in absentia, return guarantee, speciality rule.

- Yes, namely:
- No

12 Do you have specific suggestions for *improving* the EAW procedure?

- No
- Yes, improvements:

5.4.4 Checklist (statistical data on the participating countries)

Questions related to your country as an executing State

1. For which type of criminal acts the EAW is most often issued?

Questions related to your country as an executing State

2. From which of the European Member States do you receive the highest number of requests for executing a EAW?
3. Looking at the participating States in the pilot project (Germany, France and the Netherlands), the same question can be raised? Which of those three countries are issuing the most EAW's?

Institutional aspects on mutual trust related to the Framework Decision on the European Arrest Warrant

[In this part of the checklist basic information is collected about the composition and performance of the national legal systems and 'trust' related institutional aspects. In addition to this specific information will be collection on institutional aspects that are related to the pilot project (the impact of the proportionality principle on the EAW)]

General institution aspects related to the national legal systems

4. General country information:
 - a. Number of inhabitants;
 - b. Annual State budget;
 - c. Annual budget allocated to courts, public prosecution and legal aid;
 - d. Annual budget allocated to the police, customs, border police, prisons;
 - e. Number of public prosecutors and number of public prosecutors responsible for issuing a EAW;
 - f. Number of police officers, custom officers, border police (in general and more specific the no. of officers responsible for the EAW procedure (for example arrest, transit, etc);
 - g. Total number of (professional) judges and the number of judges responsible for the judicial part of the EAW procedure (to make the surrender decision).
5. Performance:
 - a. Number of EAWs issued in a given year (including information about the category of crimes committed);
 - b. Number of EAWs executed in a given year (including information about the category of crimes committed);
 - c. Average duration of a EAW procedure from the formal transmission of the request until the surrender and transit of the requested person (including information about the duration of the sub-steps) in days;
 - d. Average duration of judicial proceedings (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court), if possible related to certain categories of crime;
 - e. Total number of incoming criminal cases in the courts of first instance courts compared to the total number of EAW cases to be reviewed by a judicial authority responsible for granting or refusing a request to surrender a person;
 - f. Average workload of a judge responsible for the handling of EAW cases;
 - g. Average workload of a public prosecutor responsible for issuing a EAW and/or the pre-trial procedure of a EAW-related case.
6. Arrest and detention
 - a. remand detention rate (detainees / population; detention on remand / detention for other reasons), if possible also immigrant detention rates and juvenile detention rates;
 - b. average duration of detention on remand / average duration of criminal proceedings
7. Information of international organisations
 - a. detention conditions (reports of the Committee for the Prevention of Torture);
 - b. number of convictions by the European Court of Human Rights for violations of Art. 5 ECHR and Art. 6 ECHR (length of criminal proceedings).

5.4.5 Structure of the national reports

1. The principle of proportionality in the national criminal justice system

Legal Analysis – questions No 1 - 5

2. The principle of proportionality and its relevance for the authority issuing a European Arrest Warrant

Legal Analysis – questions No 6 – 11

Interviews – questions No 1-7

Statistics – questions No 1, 4 lit. e, 5 lit. a, c and g

3. The principle of proportionality and its relevance for the authority executing a European Arrest Warrant

3.1 General framework

Legal Analysis – questions No 12 – 16

Interviews – questions No 8-15

Statistics – questions No 2-3, 4 lit. f and g, 5 lit. b and e-f

3.2 Nationals (and return guarantee)

Legal Analysis – questions No 17-18

Interviews – questions No 16-18

3.3 Proportionality of arrest in EAW proceedings

Legal Analysis – questions No 19-21

3.4 Procedural rights in EAW proceedings

Legal Analysis – questions No 22-26

4. Factors relevant for the degree of mutual trust

Interviews – questions No 19-21

Statistics No 5 lit. d, 6 and 7

5. Experiences with the current evaluation methodology of the peer-reviews EAW

Interviews – questions No 22-24

6 Country report France

*Pascal Beauvais and
Vissarion Giannoulis¹⁶³*

This report is based on a legal analysis of the French criminal justice system, interviews with practitioners (judges, prosecutors and defence lawyers) dealing with EAW cases, and a collection of statistical data and other information on criminal proceedings in France. The report is divided in five parts. The first part will explain the legal status and concept of the principle of proportionality in the French criminal justice system (6.1.). The second part will precise the French rules and experiences on issuing a EAW (6.2.). The third part will deal with the execution of EAWs in France (6.3.). The fourth part will analyse the relevant factors for the degree of mutual trust (6.4.). At the end, we will conclude with a summary of experiences with current evaluation methods (6.5.).¹⁶³

6.1 The principle of proportionality in the national criminal justice system

6.1.1 The sources of proportionality in the French criminal justice system

The principle of proportionality is recognized by the French legal order and applied in the context of the criminal justice system. The legal basis of the principle is found either in purely national sources or in European ones.

6.1.1.1 National sources

In French law, the principle of proportionality is a principle of constitutional law. According to Art. 8 of the 1789 Declaration of Human and Civic Rights, which is part of the 1958 Constitution, “The Law must prescribe only the punishments that are strictly and evidently necessary ; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied”. According to Art. 9 of the Declaration of Human and Civic Rights, “As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law”.

Regarding statutory law, the principle of proportionality is codified in the French Code of Criminal Procedure (“CCP”). The preliminary Art. of this code, which has a general application, provides that “(..) The coercive measures to which such a person may be subjected are taken by or under the effective control of judicial authority. They should be strictly limited to the needs of the process, proportionate to the gravity of the offence for which the person is charged and must not violate the person’s dignity”. The preliminary Art. has been inserted recently in the Code by the Statute n° 2000-516 of 15 June 2000.

6.1.1.2 European sources

The principle of proportionality in the context of criminal law is also recognized by the law of both the Council of Europe and the European Union. Indeed the principle of proportionality is a general principle of the European Convention of Human Rights that must be respected in case of restrictions of fundamental rights. Although the principle is not defined in the Convention or in its protocols, the European Court of Human Rights (ECHR) has developed the concept of proportionality and its criteria in its case-law.

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¹⁶³ Paris Ouest Nanterre University, France.

Proportionality is also a general principle of EU law, in particular after the entry into force of the Treaty of Lisbon¹⁶⁴. Moreover Art. 49 (3) of the Charter of Fundamental Rights of the European Union provides especially for the proportionality of criminal offences and penalties.

6.1.2 The application of proportionality in the French criminal justice system

The principle of proportionality applies to every stage of the criminal procedure: prosecution, investigative measures, especially custodial measures, and sentencing.

6.1.2.1 Prosecution

The French Criminal justice system is based on the rule of discretion whether to prosecute or not (“principle of opportunity”). On the basis of the « principle of opportunity », the prosecutor has to conduct a proportionality check when deciding or not to prosecute.

6.1.2.2 Investigation/Deprivation of liberty before judgement

In French criminal procedure, the principle of proportionality applies to investigative measures in virtue of the preliminary Art. of the CCP, but also in virtue of specific provisions of the CCP. According to the preliminary Art., the least intrusive means to conduct the investigation must be opted for. Most of these specific provisions refer only implicitly to the principle of proportionality.

Furthermore, in virtue of the ECHR, which is directly binding in the French legal order, any investigating measure interfering with fundamental rights of the individual has to be legally based upon a legitimate purpose, and the measure must be suitable, necessary and adequate (proportionate in the strict sense) to that end.

6.1.2.2.1 Proportionality control

In the Code of Criminal Procedure, two types of custodial measures are distinguished: the judicial police custody (“garde à vue”) and the pre-trial detention (“détention provisoire”).

According to Art. 63 of the CCP, a judicial police officer may arrest and detain any person against whom exist one or more plausible reasons to suspect that they have committed or attempted to commit an offence, only where the arrest and detention are necessary to an inquiry (judicial police custody). The decision results from balancing fairly competing interests, that of the accused and that of the police. Hence, the measure of constraint must be the only way to achieve at least one of the following objectives: 1° to permit the execution of investigations involving the presence or the participation of the person ; 2° to permit the presentation of the person before the public prosecutor so that the magistrate can determine the action to take ; 3° to preserve material evidence or clues ; 4° to prevent either witnesses or victims or their families being pressured ; 5° to prevent fraudulent conspiracy between persons and their accomplices ; 6° to permit the implementation of measures taken in order to stop the crime or offence.

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¹⁶⁴ Art. 5 TEU, Art. 69 TFEU and Protocol no. 2 to the Treaty of Lisbon.

Pre-trial detention is defined in Art. 143 of the CCP. Pre-trial detention is subjected to the principle of proportionality because it may be ordered or extended in the following cases : 1° The person under judicial examination risks incurring a sentence for a felony ; 2° The person under judicial examination risks incurring a sentence for a misdemeanour of at least three years imprisonment. This type of detention must be requested by the investigating judge (“juge d’instruction”) and be decided by the liberty and custody judge (“juge des libertés et de la detention”). The judge determines whether the conditions as set out in Art. 144 Code of the CCP are met. This Art. requires the competent authority to assess whether less intrusive means are available, which in turn obliges the authority to conduct a proportionality check. According to Art. 144 of the CCP, pre-trial detention may only be ordered or extended if it is the only way to achieve one or more of the following objectives, and if these objectives cannot be achieved by other measures like Judicial supervision or Electronic monitoring : 1° To preserve material evidence or clues; 2° To prevent either witnesses or victims or their families being pressured; 3° To prevent fraudulent conspiracy between the charged Person and their accomplices; 4° To protect the person under investigation ; 5° To ensure the presence of the charged person at the disposal of justice ; 6° To stop the offence or to prevent its renewal ; 7° Only for felonies, to stop a serious and continuing violation to public order caused by the seriousness of the offence, the circumstances of its commission or the extent of the damage it has caused. There are also derogative criminal procedures and specific rules concerning organised crime, terrorism and drug trafficking.

6.1.2.2.2 *Procedural safeguards*

Procedural safeguards are provided by French law regarding both judicial police custody and pre-trial detention. According to the rules applicable to the judicial police custody, at the beginning of the arrest and detention (judicial police custody), the judicial police officer informs the district prosecutor. The person so placed in custody may not be held for more than twenty-four hours. However, the detention may be extended for a further period of up to twenty-four hours on the written authorisation of the district prosecutor. Any person placed in police custody is immediately informed of its rights. He is also informed of the offence he is suspected to have committed and the date of the offence. The information must be given to the person held in custody in a language that he understands. At the start of the custody period, the person may request to talk to and to be assisted by a legal counsel. Any person placed in police custody may, at his request, have a person with whom he resides habitually, one of his relatives in direct line, one of his brothers or sisters, or his employer, informed by telephone of the measure to which he is subjected. Any person placed in police custody may, at his request, be examined by a doctor. Where the police custody is extended, he may request to be examined a second time.

Pre-trial detention must be requested by the investigating judge (“juge d’instruction”) and be decided by the liberty and custody judge (“juge des libertés et de la detention”) after a hearing. An appeal against the decision to be detained is possible before the Investigating chamber of the Appeal Court (“chambre de l’instruction de la Cour d’appel”). Furthermore, in all matters, the person remanded in custody or his advocate may, at any time, request his release. The request for release is sent to the investigating judge, who has alone the power to release. French law provides for different maximum periods of pre-trial detention according to the seriousness of the offence.

6.1.2.3 Sentencing

Prior to the constitutional reform of July 23rd 2008, it was impossible to challenge the constitutionality of a statutory law, once it had come into force. In other words, a person involved in legal proceedings could not challenge a criminal statutory provision on the basis of the constitutional principle of proportionality. Since the 2008 reform, Art. 61-1 of the Constitution provides an « application for a priority preliminary ruling on the issue of constitutionality » (“QPC”) which is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision violates his/her rights and freedoms guaranteed by the Constitution, such as the principle of proportionality. Once conditions of admissibility have been complied with, the *Cour de Cassation* (the highest court for civil and criminal cases) or the *Conseil d’Etat* (the highest court in the administrative legal system) refer the application to the Conseil Constitutionnel (Constitutional Council) which will give its ruling and, if need be, repeal the challenged statutory provision. As a consequence, in its review of the conformity of statutory criminal law to Art. 8 of the 1789 Declaration of Human and Civic Rights, the Constitutional Council can control the proportionality of the penalty regarding the gravity of the activity incriminated.

In parallel, when criminal courts are imposing a criminal sentence on a person, they are bound by the principle of personalization of penalties. According to Art. 132-24 of the Penal Code, the Court imposes penalties and determines their regime according to the circumstances and the personality of the offender. As a result, the sentence has to be proportionate to the personal guilt of the offender.

At the trial stage, the Prosecutor must also conduct a proportionality check when he asks for a measure or a sentence.

Art. 55 of the French Constitution establishes the primacy, over national law, of ratified international treaties, which provisions are as a consequence directly binding. Therefore, the ECHR is directly applicable in the French legal order. In that respect, it is thus interesting to note that the European Court of Human Rights has decided in the *Albert and Le Compte* case that a judge should be competent when imposing a criminal sanction to assess the “proportionality of the sanction”¹⁶⁵.

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¹⁶⁵ ECtHR, Judgment of 24 October 1983, *Albert and Le Compte v. Belgium*, case no. 7299/75 and 7496/76, Series A no. 58, § 36.

6.2 The principle of proportionality and its relevance for the authority issuing a EAW

6.2.1 The proportionality check in the issuance of a EAW

Although no *specific* procedural rules in relation to the proportionality principle when issuing a EAW exist either in the French law implementing the EAW or elsewhere in criminal procedure law (except the general rules of proportionality mentioned above), in practice, the competent judicial authorities proceed to such a control before deciding the issuance of the EAW, whereas the central authority in the absence of any relevant statutory provisions is limited to a purely formal control of the information contained in the issued EAW before transmitting it through the Schengen or Interpol channels.

During the peer review, the issuing judicial authorities (prosecutors) confirm that, in practice, they control the proportionality of the issuing of the EAW especially as common sense rule, and not pursuant to the preliminary Art. of the CCP.

6.2.1.1 National warrant and EAW

In the French criminal justice system, a EAW issued for the purposes of executing a custodial sentence is based on an enforceable conviction, whereas a EAW issued for the purposes of conducting a criminal prosecution is based on an arrest or other national warrant. Such national warrants are issued by a judge and are transformed in EAW by the prosecutor. As a consequence, in order to understand the process of issuance of a EAW, it is necessary to distinguish between these national warrants which can provide a legal basis according to French law for the issuance of a EAW.

In general, the French Code of Criminal Procedure provides for five different types of warrants that a magistrate can issue in order to question or detain a suspected person. However, since they do not share the same effects nor the same coercive force, only three of them can be transformed into a EAW.

The national warrants that cannot be transformed in EAWs are the *mandat de recherche* (research warrant) and the *mandat de comparution* (summons). The first one is issued by the investigative judge or by the prosecutor during a preliminary inquiry or a *flagrante delicto* inquiry in order to place the suspect in police custody. The investigative judge can issue it for every criminal offence, whereas the prosecutor only for offences punished with at least a three years prison sentence. Despite the fact that the *mandat de recherche* (research warrant) results in police custody and thus affects the liberty of the person who is the object of such warrant, no legal provisions indicate that it could serve as a legal basis for a EAW and in practice it does not.

The *mandat de comparution* (summons) is issued by the investigative judge against a person suspected to have committed a criminal offence. The *mandat de comparution* cannot restrain the liberty of the suspected person in any way other than forcing him/her to appear before the magistrate that issued it in order to be auditioned. For this reason it cannot be a legal basis for a EAW.

If during the preliminary inquiry or the *flagrante delicto* inquiry, that takes place under the supervision of the prosecutor (without the investigative judge), there is a need for more coercive measures, such as an arrest warrant which can also give rise to a EAW, there is no other alternative for the prosecutor than to refer the matter to the investigative judge so that he/she can initiate a criminal investigation and he/she can issue an arrest warrant.

The national warrants that can be transformed in EAWs by the prosecutor are the *mandat d'arrêt* (arrest warrant), the *mandat d'amener* (warrant to bring a suspect to justice) and the *mandat de dépôt* (detention warrant). The *mandat d'amener* (warrant to bring a suspect to justice) is very rarely used as a basis to issue a EAW¹⁶⁶.

The *mandat d'arrêt* (arrest warrant) is the most common national warrant to give rise to a EAW. An arrest warrant is the order given to the law-enforcement authorities to find the person against whom it is made and to bring him before the judge, having first taken him, if appropriate, to the remand prison mentioned on the warrant, where he will be received and detained. It can be issued either by a magistrate, usually by the investigative judge, but also by the juvenile court judge, the liberty and custody judge, the president of the investigation chamber, the president of the Assize Court or the sentence enforcement judge, or a court such as the Correctional Court¹⁶⁷ or the Assize Court¹⁶⁸ against a person if strong or corroborated evidence make it likely that he or she may have been involved in an offence either as its perpetrator or as an accomplice. The investigating judge may, after hearing the opinion of the district prosecutor, issue an arrest warrant only against a person who has absconded or who resides outside the territory of the Republic, and if the offence carries a misdemeanour imprisonment penalty or a more serious penalty¹⁶⁹.

The *mandat de dépôt* (detention warrant) may be issued against a person who is under judicial examination and who has been the subject of an order placing him in pre-trial detention. It is an order to the prison governor to receive and detain the person against whom it has been issued. This warrant also authorises the collection or the transfer of the person concerned, as long as it has been previously notified to her/him. In view of the fact that a *mandat de dépôt* (detention warrant) can be considered as a research order pursuant to Art. 122 of the CCP¹⁷⁰, it can be transformed into a EAW by the prosecutor. However such an assumption remains subject to the sovereign appreciation of the French courts. Anyway, the methodological informal

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¹⁶⁶ The *mandat d'amener* is a warrant issued in most cases by an investigative judge, without the opinion of the prosecutor, or by other magistrates such as the liberty and custody judge ("juge des libertés et de la détention"), the president of the investigation chamber or a judge that he/she designates, the president of the Assize Court or the sentence enforcement judge against a person if strong or corroborated evidence make it likely that he or she may have been involved in an offence either as its perpetrator or as an accomplice. Such a warrant authorizes the law enforcement authorities to bring the suspect before the magistrate that has issued it. Since the *mandat d'amener* can be issued only for offences for which pre-trial detention is not permitted, it is not considered as a detention order and therefore the suspect cannot be placed in police custody or pre-trial detention. The *mandat d'amener* is very rarely used According to Art. 695-16 CCP, the *mandat d'amener* (warrant to bring a suspect to justice) can be executed by the prosecutor in the form of a EAW in case when the requested person, that has already been surrendered to France and has not renounced to the speciality principle, is requested by the French authorities also for a different offence than the one for which he/she has been surrendered on the first place.

¹⁶⁷ Art. 410-1, 465, 465-1 CCP.

¹⁶⁸ Art. 379-2 to 379-6 CCP.

¹⁶⁹ Art. 131 CCP.

¹⁷⁰ According to Art. 122 of the CCP a *mandat de dépôt* (detention warrant) can also authorize the research or the transfer of the person to whom it has been previously notified.

Guide of the Ministry of Justice “*Les processus de remise des personnes*”¹⁷¹, recommends the use of the *mandat de dépôt* (detention warrant) as a legal basis of the EAW when surrender is requested for the offence of escape from custody, while it discourages it in case of a decision rendered in absentia where no arrest warrant has been issued according to Art. 465 of the CCP.

6.2.1.2 *The role of the judicial authorities*

Following to the EAW framework decision, the French Code of Criminal Procedure distinguishes in Art. 695-12 between EAWs issued for the purposes of conducting a criminal prosecution or for the execution of a custodial sentence or a detention order¹⁷².

When the EAW is issued *for the purposes of conducting a criminal prosecution*, the prosecutor attached to the investigating chamber, the trial court or the penalty enforcement court, who has issued an arrest warrant (or an other national warrant as mentioned above) implements it in the form of a EAW, either of his own motion or at the request of the court. In such case the prosecutor is certainly in charge of the issuing of the EAW but has no real and full control over it since the decision of the issuing of the national warrant serving as a legal basis for the EAW belongs to another magistrate, in most cases to the investigative judge, or to a court; and the prosecutor cannot control the decision of a judge on substantial grounds. Such a situation, which is specific in the French system of criminal procedure, allows no real margin of discretion to the prosecutor when he must implement a national arrest warrant into a EAW.

This paradox of the French criminal procedure was highlighted, during the peer review, by some judges who pointed out the ambivalence regarding the role of the prosecutor in the EAW scheme. Indeed, the prosecutor, as an issuing judicial authority of the EAW, can not really control neither the decision of a national judge to issue a national arrest warrant, nor its decision to issue a EAW, at least not on substantial grounds.

On the contrary, the prosecutor, as an executing judicial authority of the EAW, is required to control, even implicitly, such a decision taken by a judge of the issuing Member States, when exercising a proportionality test before executing the foreign EAW.

However, this does not mean that there is no proportionality control whatsoever. In fact, since the EAW is based on a domestic arrest warrant, there is an indirect control by the judiciary because this domestic arrest warrant has to be issued by a Court, in particular by the investigative judge. In addition, because the EAW is based upon a domestic arrest warrant, it requires a legal basis for arrest and detention.

¹⁷¹ Ministère de la Justice et des Libertés, Guide Méthodologique Les processus de remise des personnes : extradition et mandat d’arrêt européen, DACG/SDJPS/BEPI/FM (May 2011).

¹⁷² However, since such a measure does not exist in the French legal system the relevant condition will only be applicable for the execution of European arrest warrants issued abroad and in countries which have this type of measure. See *Circulaire de la direction des affaires criminelles et des grâces, présentation des dispositions de la loi n° 2004-204 du 09 mars 2004 portant adaptation de la justice aux évolutions de la criminalité concernant le mandat d’arrêt européen et l’extradition*, p. 9, CRIM 2004-02 CAB/11-03-2004, NOR, JUSDo430039C, Bulletin officiel du Ministère de la justice, n°93 (2004).

When the EAW is issued for the execution of a custodial sentence or a detention order, the public prosecutor is competent to decide to issue a EAW where s/he considers that it is necessary in order to ensure the execution of custodial sentences equal to or in excess of four months imposed by trial courts. In this case the prosecutor assess the proportionality of the issuance of the EAW on his/her own.

Therefore, already at this stage of the EAW issuing procedure, two proportionality filters can be distinguished. First, the mere fact that the decision to issue a EAW is taken by the investigative judge. In this case, the prosecutor is largely bound by the investigative judge's decision and cannot control it on any grounds other than purely formal ones. He can therefore refuse the issuing of a EAW when asked for by the investigative judge if, for instance, the EAW does not comply with all the formal requirements.

However, according to the prosecutors interviewed, such a refuse is very rare and, in the vast majority of the cases, they will proceed with the issuing of the EAW.



Second, the fact that the same conditions that apply to the issuing of a national arrest warrant apply also to the issuing of a EAW. Since the principle of proportionality is a general principle of the French criminal procedure, the prosecutor responsible for issuing the EAW has to assess whether a request for surrender complies with this principle. According to the French methodological informal Guide of the Ministry of Justice “*Les processus de remise des personnes*”, the prosecutors, when they issue a EAW, must conduct a specific proportionality check¹⁷³. However, no specific procedural rules are provided for with regard to such a control by this document.

In general, it appears from the peer review that the French judicial authorities want to make a reasonable use of the EAW. Prosecutors confirmed that a EAW is never issued only for questioning the requested person but always with the view to prosecute him/her or to enforce the execution of a criminal sentence. Moreover, they attested that a EAW will not be issued for minor or dubious offences.

6.2.1.3 *The role of the central authority*

The Bureau of International Legal Assistance (“Bureau de l’entraide pénale internationale (BEPI)”), at the Ministry of Justice, is the central authority designated by France in order to assist the competent judicial authorities with the EAW procedure. The BEPI is responsible for the administrative transmission and reception of EAWs when no information exists on the whereabouts of the requested person. In such case, the EAW issued by the prosecutor is sent to the central authority which must first validate, in a formal and not in a legal way, the EAW before proceeding to its dissemination in the Schengen or Interpol space.

According to the magistrates interviewed, validation by the BEPI of the issued EAW is made after the exercise of a purely formal control regarding the verification of all necessary information contained in the single EAW form and their relevance with information contained in the National Wanted Persons File (“Fichier national des personnes recherchées”). The BEPI does not have the power to control neither the opportunity nor the proportionality of the EAW issued by the competent judicial authority.

Thus the BEPI will validate a EAW issued in disregard of the recommendations found in the methodological informal guide of the Ministry of Justice “*Les processus de remise de personnes*”, which are the one year custodial sentence threshold since this text does not have a legally binding force.

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¹⁷³ Ministère de la Justice et des Libertés, Guide Méthodologique Les processus de remise des personnes: extradition et mandat d’arrêt européen, DACG/SDJPS/BEPI/FM (May 2011), p. 36.

6.2.2 The criteria of the proportionality control

The proportionality control of the competent judicial authorities in the issuing of the EAW is based on criteria provided for in European or national guidelines.

6.2.2.1 EU Handbook criteria

The issuing judicial authorities (prosecutors) revealed not being aware of the Handbook on the EAW issued by the European Union and of the criteria or factors described there in order to assess the proportionality in the issuing of the EAW. They rely almost exclusively on the aforementioned methodological guide issued by the central authority.

However, the practice of the issuing judicial authorities reveals that the EU criteria are, implicitly, taken into consideration when deciding to issue a EAW. Such criteria are:

- The seriousness of the offence ;

The seriousness of the offence is the only factor mentioned for the proportionality test when issuing a EAW in the methodological informal guide of the Ministry of Justice “*Les processus de remise de personnes*”, albeit without minimum standards for EAWs issued for the purposes of prosecution. More specifically, the document indicates that the prosecutor prior to issuing a EAW should exercise a proportionality control in order to ensure that the EAW will be issued only for serious offences and, in particular, for convictions to a custodial sentence of at least one year. This sentence threshold is higher than the one mentioned in Art. 695-12 of the CCP which provides for a custodial sentence of at least four months. However, since the methodological guide has no legal force, the competent judicial authorities for the issuing of the EAW are not bound by its recommendations regarding the sentence threshold in their decision to issue or not a EAW.

For this reason, according to the prosecutors interviewed, sentence thresholds for the issuing of the EAW for the execution of a custodial sentence may vary from 6 to 24 months. Above 18 or 24 months the issuing of a EAW is not questionable. Issuing of a EAW is still possible for the execution of custodial sentences lower than 1 year, but in such case, the prosecutor proceeds to a proportionality control.

- The possibility of the suspect being detained;

The prosecutors interviewed have made clear that the detention of the suspect is inherent in the issuing of a EAW, since they will never resort to such a measure only for questioning the requested person but mainly with the view to prosecute him/her or to enforce the execution of a criminal sentence. Thus all issued EAWs involve the detention of the requested person.

- The likely penalty imposed if the person sought is found guilty of the alleged offence;

According to the prosecutors interviewed, when a EAW is requested by an investigative judge, the prosecution service does not take the penalty into account because in that case, the prosecutor implements the national arrest warrant issued by the investigative judge into a EAW without any possibility of a substantial control of such a request.

- The effective protection of the public;

According to the prosecutors interviewed, the protection of the public is evaluated in particular in the context of investigations in *flagrante delicto* and the subsequent procedural necessities.

- Taking into account the interests of the victims of the offence;

In principle, according to the prosecutors interviewed, the interests of the victims do not play an important role. Nevertheless, in certain cases where there has been a violation of rights of child custody, the interests of the victim may be taken into account but they will not be a determining factor in the decision making.

6.2.2.2 Other criteria

Apart from the criteria found in the EU Handbook, the peer review stressed that the issuing judicial authorities (prosecutors) may also take into consideration other criteria or factors for the assessment of the proportionality of their decision to issue a EAW, despite the fact that no proportionality factors other than the seriousness of the offence are mentioned in the Criminal Procedure Code or in the informal methodological guide of the Ministry of Justice “Les processus de remise de personnes”.

- Use of less intrusive means to ensure prosecution;

As a general rule, resulting from the information received by the prosecution services, there are no alternatives or less intrusive means to ensure prosecution since, on the one hand, there are no relevant official guidelines and, on the other hand, a EAW is never used for purposes other than prosecuting the requested person or enforcing the execution of an already imposed sentence. However, if it is in the interest of on-going proceedings and investigations, in certain cases, prosecutors asserted that other measures such as official denunciation, video-conference, temporary surrender or loaning of prisoners/detainees, notification of the judgement in a foreign country through diplomatic channels according to Art. 562 of the CCP can be used instead of a EAW. The criterion to choose between these alternative measures and the EAW is the proper administration of justice.

However, it should be noted that, in the absence of a relevant legal framework, the issuing judicial authorities are in no way obliged to motivate the choice to issue a EAW over a less intrusive means to ensure prosecution. Therefore, quite a few times they appear to choose the easiest and more efficient way of the EAW instead of other means that are certainly less intrusive but of questionable efficiency. The absence of legal provisions in this matter explains why the only criterion of choice between the EAW and other less intrusive means is the proper administration of justice, which is not only quite vague but also inappropriate in this case, since the proper administration of justice will always justify the use of the most efficient means such as the EAW.

- Reasonable chance of conviction;
- Previous convictions;

The prosecutors interviewed explain that previous convictions in case of repeated infringement may influence the decision to issue a EAW.

- Effective exercise of defence rights (information on defence rights, providing translation and interpretation);
- Privacy rights of the suspect (e.g. possibility to have contact with family members);
- Age of the person sought;
- Cost and effort of a formal extradition proceeding including extradition arrest;

A general cost and benefit analysis is considered inherent of any decision to issue a EAW, according to some of the prosecutors interviewed.

- Others, if yes, which ones :

The prosecutors participating in the peer review have revealed the existence of other criteria such as:

- The location of the requested person: in general, the prosecutors admitted that a EAW will be issued, if the location of the requested person allows for his/hers speedy arrest. If the requested person is of known address, other means less intrusive than the EAW may be preferred such as the notification of the final decision through diplomatic channels¹⁷⁴ in case of EAW for the execution of custodial sentences. If no information about the whereabouts of the person is available, a EAW can still be issued if it is in the interest of the proceedings. For example, regarding fugitives, the issuing of a EAW is equivalent to indictment, while regarding persons sentenced in absentia, the issuing of a EAW interrupts the limitation period and allows for the arrest of the person many years after the issuing of the judgment
- The need to continue investigations in flagrante delicto in case of a crime having a strong impact on public opinion or causing a serious trouble in the public order
- The degree of the requested person's implication to the offence
- Period of time between the offence and the issuing of the EAW: as a general rule, a EAW will not be issued if a long period of time has passed since the commission of the offence.
- Imprisonment of the requested person: according to the prosecutors interviewed, the likelihood of an arrangement for an early release is deterrent for the issuing of a EAW for the execution of a custodial sentence. Likewise, a EAW is not issued for the payment of a fine.

6.2.3 Problems encountered by the issuing authority

The problems encountered by the French judicial authorities in their role as issuing authorities of the EAW concern the execution of the issued EAW, the use of alternative measures and the scope of the EAW.

¹⁷⁴ Since no criteria regarding the choice between issuing a EAW and notifying the final decision through diplomatic channels have been given by the prosecutors during the peer review, we can only assume that the dangerousness of the requested person or the unlikelihood that he/she will return to France on his/hers own will for the execution of the penalty are taken into consideration in this case.

6.2.3.1 *Problems regarding the execution of the issued EAW*

The prosecutors participating in the peer review have identified a number of problems relating to the execution of the EAWs issued by the French judicial authorities.

The transfer of sentenced persons as well as the systematic use of requests for additional information have been highlighted as recurring problems faced by the French judicial authorities. With regards to the latter, it has been noted that there are some Member States (MS), the Netherlands for example, which resort frequently to the request for additional information even though all necessary information has already been given. Such practice slows down the procedure by adding an unnecessary burden and may result in a delayed surrender of the requested person.

As far as the two participating Member States are concerned no specific problems have been observed regarding Germany. On the contrary, concerning the Netherlands, the refuse of this Member States to surrender its own nationals for the execution of a sentence or the issue of convictions in absentia have been reported as problematic for the execution of French EAWs. However, it has been noted that such problems tend to disappear since the appointment of a French liaison magistrate in the Netherlands.

Regarding United Kingdom, the prosecutors interviewed have the feeling that police authorities, other than the London Metropolitan Police, do not engage in an active research for the localisation of persons of unknown address requested by the French judicial authorities on the basis of a EAW. In general, the prosecutors admit that they encounter quite a few problems with the British judicial authorities despite the consultation of Eurojust or the presence of liaison magistrates in both Member States.

Concerning Italy, problems have been encountered with the implementation law, which obliges the issuing judicial authority, in case of surrender of an Italian national, to indicate that the execution of the penalty will take place in Italy. Moreover, the Italian legislation regarding amnesty for acts committed before 2 may 2006 (“Concessione di indulto”) blocks the execution of a EAW issued for such acts.

With Poland, the practical problems with the polish judicial authorities concern the respect of the time limits for surrender of the requested persons.

6.2.3.2 Problems regarding the use of alternative measures

The participating prosecutors have drawn attention to a number of problems relating to the use of alternatives to the issuing of the EAW.

Despite the willingness of the French judicial authorities to use the EAW scheme as a last resort by promoting the use of alternative procedures or alternative conventional frameworks, in some cases the use of such alternatives to the EAW appears quite problematic.

First, EAW alternatives such as the official denunciation¹⁷⁵, may not be preferred by the issuing judicial authority due to differences in terms of criminal policy resulting in differences in the sanctioning of certain offences (for ex. mild sentences for drug offences in some Member States).

Second, resort to other conventional frameworks where it seems more appropriate than the issuing of a EAW, is very difficult due to problems regarding the application of the conventions in question. For instance, the 1983 Convention of the Council of Europe on the transfer of sentenced persons appears to be of limited use because the transfer is authorized only if the person is a national of the administering State, thus a French national if France is the administering State¹⁷⁶. Furthermore, the prosecutors consider the 1990 Convention implementing the Schengen Agreement of 14 June 1985 to be of no use as far as judicial cooperation with the United Kingdom is concerned since this Member States does not participate in all the aspects of the “Schengen acquis”¹⁷⁷.

In general, the EAW is considered as a victim of its own success. Due to its efficiency in the surrender of requested persons, every other alternative to its issuing, in particular, instruments used in the framework of traditional judicial cooperation such as international “letter rogatory” or judicial assistance will be rejected as inefficient or time consuming.

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¹⁷⁵ Official denunciation for the purpose of instituting proceedings is the transmission of criminal proceedings by the judicial authorities of the country where the offence was committed to the judicial authorities of the country where the requested person has been located, requesting them to assume jurisdiction in order to investigate and eventually bring the case into trial, if extradition or surrender of the requested person is not possible.

¹⁷⁶ Art. 3 (1) a of the Convention on the transfer of sentenced persons of 21 march 1983.

¹⁷⁷ However, except from Art. 60 of the 1990 Convention implementing the Schengen Agreement of 14 June 1985 regarding relations between two Contracting parties one of which is not a party to the European Convention on Extradition of 13 september 1957, United Kingdom participates in almost all provisions relevant to extradition and mutual legal assistance of this convention.

6.2.3.3 *Problems regarding the scope of the EAW*

Transposed from the Framework Decision, Art. 695-12 CCP provides that the matters which may give rise to the issuing of a EAW are, in terms of the law of the issuing member state, the following:

- a) Regarding EAWs issued for the purposes of conducting a criminal prosecution:
 - matters punished by a custodial sentence of at least one year
 - matters punished by a safety measure resulting in loss of liberty for at least one year
- b) Regarding EAWs issued for the execution of a custodial sentence or a safety measure:
 - when the sentence imposed is of at least four months' imprisonment;
 - when the duration of the measure is of at least four months' imprisonment.

Although by virtue of the implementing law, a EAW can be issued for any category of offence complying to these conditions, some of the prosecutors have revealed that matters that fall within the scope of the French law might not be recognized as criminal offences by every Member State. In this case, given that the execution of the issued EAW will be refused, the French judicial authorities would rather abstain from using the EAW resulting thus to the impunity of the offender. The problem arises in particular with the criminal offence of escape from custody which is not recognized as such by all EU Member States.

6.2.4 Solutions and propositions

It becomes clear from the information that the prosecutors shared during the peer review that the main reasons for the majority of the problems encountered in the issuing of EAWs by the French judicial authorities and their execution by the executing judicial authorities of other Member States lie in the differences among criminal justice systems and the insufficient knowledge and information about their functioning. Therefore the presence of liaison magistrates as well as recourse to Eurojust are seen as indispensable for the proper functioning of the EAW procedure. Sufficient information about the French legal system by means of these two institutions or by any other means can contribute to a better understanding of the procedure relating to the issuing of the EAW in France resulting in less reluctance to execute the EAW. For instance, common law countries would not refuse to execute EAWs issued on the request of the investigative judge once it is clear that such a EAW does not equal to conviction and that the requested person, still presumed innocent, enjoys all the rights of the defendants while the investigative judge investigates evidence both for and against the allegations.

In addition, harmonisation of substantive criminal law, in particular with regard to criminal sentences, development of guidelines for a common criminal policy within the European criminal area as well as implementation of the other mutual recognition instruments, in particular, the framework decision on the mutual recognition of judgements 2008/909/JAI, would facilitate the use of alternatives to the EAW which, for the time being, remains the only reliable solution for the surrender of persons wanted by the criminal justice system.

Such alternatives are not provided for explicitly in French law and thus it is very difficult for the issuing judicial authorities in France to address the question of the proportionality of the EAW. The existence of a relevant legal framework or even official guidelines would facilitate the proportionality control of the EAW by the issuing judicial authorities which, for the time being have to rely more on a common sense rule and less on positive law when they operate such a control.

Nevertheless, it must be underlined that neither the preliminary Art. of the CCP, which explicitly provides for the proportionality assessment of coercive measures, nor the European Handbook on how to issue a EAW have been taken into consideration so far by the French issuing judicial authorities.

6.2.5 Statistics

In 2010, French prosecutors have issued 1240 EAW¹⁷⁸. In 2011, they have issued 1156 EAW¹⁷⁹. In 2012, the magistrates members of the Public Prosecutor (“Ministère public”) are 1717, including 315 magistrates near the Courts of Appeal (“Cour d’appel”), and 1402 near the District Court (“Tribunal de Grande instance”). Are included in these data, 36 General Prosecutors (“Procureurs généraux”) and 162 District Prosecutors of the Republic (“Procureurs de la République”). In principle, the District Prosecutors are responsible for issuing EAW, but practically many others magistrates, members of the Public Prosecutor can deal with EAW. In any case, EAW counts for a small proportion of the activities of the prosecutors. So, on the basis of the data available, it is not possible to assess the average workload of a prosecutor responsible for issuing a EAW.

6.3 The principle of proportionality and its relevance for the authority executing a EAW

6.3.1 General framework

The French executing judicial authorities, even though they have a very limited margin of appreciation and not a clear legal basis in applying the principle of proportionality in the framework of the execution of the EAW¹⁸⁰, have taken substantial steps to that direction.

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¹⁷⁸ Information communicated by the *Bureau de l’entraide pénale internationale* (BEPI), Ministry of Justice.

¹⁷⁹ Information communicated by the *Bureau de l’entraide pénale internationale* (BEPI), Ministry of Justice.

¹⁸⁰ Neither the EAW Framework decision nor the french implementing law provide for a proportionality control in the execution of a EAW by the french judicial authorities. The preliminary Art. of the criminal procedure code can be considered as a sufficient legal basis for such a control if we accept that the execution of a EAW constitutes a coercive measure within the meaning of this provision.

6.3.1.1 *Proportionality test by the executing judicial authorities*

The French judicial authorities acting as executing judicial authorities may be required to assess the proportionality of a EAW issued by another Member State. Such a situation may arise in particular if the issuing Member State does not proceed to a proportionality control when issuing the EAW.

Both the prosecutors and the judges participating in the peer review confirm that such a situation is unlikely to be produced as far as the participating Member States in this evaluation are concerned. Even though no relevant information with regard to this control has been shared with the French judicial authorities so far, given the acts for which they issue a EAW, one may assume that both Germany and the Netherlands carry out a proportionality check. No problem has ever been encountered by the French judicial authorities with respect to the execution of EAWs issued by these two Member States.

However, this is not the case as far as other Member States are concerned. In fact, according to both prosecutors and judges there are Member States that do not seem to proceed to a proportionality check before issuing a EAW. Such requests are usually made for minor offences, for acts committed long time ago or for acts that do not qualify as criminal offences in French criminal law. The vast majority of disproportionate EAWs come from Member States that apply the principle of mandatory prosecution (such as Poland, Romania and Bulgaria).

The disproportionality of such requests is assessed by means of an informal proportionality test upon reception of the EAW request. Such an eventual control of proportionality, whether general or additional, would be conducted by the executing judicial authorities, the Investigating chamber of the Appeal Court - or the general prosecutor of the Court of appeal during the hearing before the Investigative chamber - which has territorial jurisdiction. The central authority conducts only a formal check of the EAW request without any margin of discretion.

Nevertheless, members of the French executing judicial authorities (both prosecutors and judges) shared their reluctance to proceed to such a control for both conceptual and practical reasons. First of all, such a control is contrary to the principle of mutual recognition and mutual trust that requires the almost automatic execution of the EAW. Grounds of refusal are set out on a restrictive basis in the text of the framework decision.

The legalistic approach of the EAW procedure is reflected into the full compliance to the EU text. Since no relative provisions for the assessment of proportionality exist, it is very difficult for the French judicial authorities to exercise any margin of discretion at all in interpreting the framework decision with a view to ensure the respect of proportionality.

Second, according to the same magistrates, a proportionality control by the executing judicial authorities is believed to be a step backwards to the ancient extradition scheme since it implies a second judgement of the case in question. This, however, is impossible under the EAW procedure since not all the elements of the case are communicated. Still, even if that was the case, the assessment of the proportionality of the request by the executing Member State would hinder the efficiency of the surrender and extend the time limits of the whole procedure, since both judicial authorities in the issuing and the executing Member State would engage in an interminable exchange of information of elements relating to the case. It is therefore believed that the judicial authorities that are the best situated to exercise such a control are the issuing judicial authorities since all the necessary information both factual and legal can be found in the issuing Member State. The executing judicial authorities should only have the possibility to officially consult with the issuing judicial authorities on this matter when needed on a case-by-case basis.



6.3.1.1.1 Legal basis for the proportionality test

In fact, neither the law implementing the EAW in France nor the CCP provide for the exercise of such a control by the executing judicial authorities. In the absence of a specific legal basis regarding the proportionality control of the EAW by the executing judicial authorities, such a control can be founded in the general provision of the French law relating to the principle of proportionality.

However, when they execute a EAW, the French executing authorities have so far never applied explicitly a general proportionality test based either on the French Constitution or on the EU Treaty. Accessible case-law material does not indicate the use of a general proportionality test outside the scope of Art. 8 ECHR regarding the protection of private and family life.

Moreover, according to accessible case-law material, the preliminary Art. of the CCP, that provides for the proportionality control of coercive measures, has not been used by the French judicial authorities in the framework of the EAW in order to assess the proportionality of the criminal sentence imposed or/and of the conditions of detention, or even the adequacy of the use of the EAW.

To summarize, in the context of the EAW proceedings, French judges consider themselves bound only by the letter of the Code of criminal procedure, specifically the provisions relating to the EAW¹⁸¹, and therefore are quite reluctant in applying rules or principles provided for elsewhere, either in the preliminary Art. of the Code of criminal procedure or the ECHR. However, the inflexibility of the judges in the lower courts (courts of first instance and courts of appeal) towards the rules and principles of the ECHR should be differentiated from the judicial practice in a higher level of jurisdiction, such as the Court of cassation. Indeed, the French supreme court is more perceptive, not only in the influence of the ECHR, but also in the application of its provisions, its principles and its case-law, whereas lower instances remain more focused on national law. The legal centralist position of the French judiciary in the lower jurisdictions, which are actually the first to engage in the EAW proceedings, along with the fact that the proportionality principle in the context of criminal procedure was not part of the legal tradition in France until recently explain the difficulties encountered in the assessment of the proportionality of the EAW.

With regards to such particular situations, the French judicial authorities have been reluctant to assess aspects of the principle of proportionality in a *stricto sensu* evaluation of the principle. French case law reflects a black-letter approach to the framework decision and to its implementation law and the spirit of the principle of mutual recognition. As a result, the executing judicial authorities refuse to rule on matters that are outside the scope of the mutual recognition principle and against mutual trust. Therefore, no proportionality control is exercised with regards to the criminal sentence imposed or to be imposed in the issuing Member State¹⁸². The quantum of the sentence is also controlled only with respect to the law of the issuing Member State¹⁸³. The same reasoning applies to the absence of control regarding the compliance of detention conditions in the issuing Member State with international standards. The adequacy of the EAW compared to alternative measures has never been addressed by a French court.

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¹⁸¹ Art. 695-11 to 695-51 CCP.

¹⁸² Court of cassation (Ch. crim.), 17 November 2009, n° 09-86593 ; 18 March 2008, n° 08-81266.

¹⁸³ Ministère de la Justice et des Libertés, Guide Méthodologique Les processus de remise des personnes : extradition et mandat d'arrêt européen, DACG/SDJPS/BEPI/FM (May 2011), p. 52.

On the contrary, the Court of cassation has actually addressed the inadequacy of the EAW from the perspective of the legal qualification of the acts for which the EAW has been issued. In fact, The Court of cassation, in a series of decisions¹⁸⁴, established the rule that the Investigative chamber cannot assess whether the legal qualification of the acts for which the EAW has been issued is well-founded, if these acts fall within the scope of Art. 695-23 CCP (art. 2§2 of the EAW Framework decision) for which the control of double criminality is abolished, except from the case when there is an *obvious inadequacy between the acts and the legal qualification* chosen by the issuing judicial authorities.

Such “obvious inadequacy” refers to cases in which the legal qualification clearly and blatantly does not match to the acts described in the EAW form. Such cases can also result in *obviously disproportionate* EAW requests, since the apparent inadequacy between the facts and the legal qualification allows for the execution of the EAW in cases in which surrender should have been refused by virtue of the double criminality rule. The relevant case-law reveals that the majority of the cases concern acts that do not even qualify as criminal offences under French law¹⁸⁵. The legal qualification of the conduct in question under the label of “fraud” is a common characteristic in these cases, considering the vagueness of this criminal offence category¹⁸⁶. Therefore, even a minimum control of the legal qualification of the act is very important when dealing with manifestly disproportionate EAW requests.

The relevant case-law while in accordance with the letter of the Code of Criminal Procedure and the spirit of the principle of mutual trust on which the EAW mechanism is based, leaves, nonetheless, only a minimal margin to the executing judicial authorities for assessing an obvious inadequacy, in other words an obvious error, between the acts and the chosen legal qualification, or even, as legal doctrine has suggested¹⁸⁷ with respect to the applicable penalty in case where the offence is not punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years.

Indeed, almost all the magistrates interviewed for the peer review pointed out the absence of relevant provisions in the national law implementing the EAW Framework decision, which was incorporated in the Code of criminal procedure, as the main problem with respect to the proportionality control of the EAW.

However, while some of the judges are familiar with the “obvious inadequacy” case-law of the Court of cassation, but didn’t have the opportunity to apply it so far, others admitted ignoring it.

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¹⁸⁴ Court of cassation (Ch. crim.), 15 December 2010, n° 10-88.204 ; 12 May 2009, n° 09-82.484 ; 20 May 2008, n° 08-82.902 ; 18 March 2008, n° 08-81.266 ; 21 November 2007, n° 07-87.540.

¹⁸⁵ For example, one case concerned a Polish citizen who has issued a non-sufficient funds (NSF) cheque. The Polish judicial authorities have qualified the act as “fraud”, but the conduct does not constitute a criminal offense under French law.

¹⁸⁶ In fact, half of the relevant case-law (3 out of 6 cases) concern the category of fraud and in all these cases the EAWs are issued by the Polish judicial authorities.

¹⁸⁷ A. Maron, « Remise non contrôlée », Droit pénal, n° 2 (2008), p.3.

6.3.1.1.2 Criteria

So far case law in France has not considered *stricto sensu* and explicitly the proportionality of the EAW to the seriousness of the offence but rather the impact of the execution of the EAW to the requested person's right to private and family life.

Therefore the criteria that have been used by the French courts for the proportionality test with respect to the assessment of a violation of the right to private and family life are the following:

- the seriousness of the offence;
- the penalty imposed;
- the family status of the requested person;
- the health conditions of the requested person.¹⁸⁸

.....
¹⁸⁸ Court of cassation (Ch. crim.), 24 January 2012, n° 11-89177.



In the context of Art. 8 of the ECHR, prosecutors and judges have confirmed that the executing judicial authorities actually take into consideration the aforementioned criteria found in French case-law relating to the execution of the EAW in their assessment of the proportionality of the EAW to be executed. In addition, other factors are also taken into consideration, in order to establish the disproportionality of the request with the right to private and family life such as:

- Duration of the person's establishment in France
- Exercise of a professional activity
- Absence of any kind of ties with the issuing Member State
- Nationality of the spouse
- Children's schooling in France

Nevertheless, the seriousness of the offence remains the most important factor in the proportionality test. Indeed EAWs issued for minor offences such as petty or common thefts, fraud with little damage, driving under the influence of alcohol, insults, traffic offences like driving without a license, failure to fulfil parental obligations have been considered as disproportionate. It has been mentioned that it is a common practice for Romania, Poland and Bulgaria to issue EAWs for petty traffic offences which would not justify the emission of a EAW in France because they are punishable by a custodial sentence below the 18/24 months threshold. Romania in particular tends to issue EAWs for petty traffic offences committed long time ago.

According to prosecutors and judges interviewed, other criteria outside the scope of Art. 8 of the ECHR may include the lapse of time between the acts and the issuing of the EAW or the age of the requested person when the act was committed. EAWs regarding offences committed by juvenile offenders can be considered disproportionate especially if the offence in question is not very serious.

Sometimes there are problems with the legal qualification of the act for which the EAW is issued, in particular with a majority of Member States of eastern Europe. In fact, those Member States tend to distort or overstretch the acts in order to apply Art. 2 (2) of the FD. A particular problem regarding the category of "fraud" in Art. 2 (2) of the FD has been encountered quite often with regard to EAWs issued by the Polish judicial authorities. In Poland the legal qualification of "fraud" is very broad covering acts that would not qualify as criminal offences under French criminal law (for example, a bank loan that has not been repaid or an abuse of bank withdrawal committed by a bank employee qualified as fraud under the Polish criminal law).

Rules on limitation in Member States of eastern Europe are problematic according to French standards since they allow for long suspension periods. For instance limitation is suspended if a suspect is on the run. Sometimes, it is difficult for the executing judicial authorities to know whether the decision that is to be executed by means of a EAW is final or not.

6.3.1.2 Appeal to the decision on surrender

Strictly speaking, no appeal is available since the decision is made by the Court of appeal. However, a procedure before the Court of cassation (“*pourvoi en cassation*”) remains open. Nevertheless, the Court of cassation does not become a third level of jurisdiction after the courts of first instance and the courts of appeal as it still does not rule on the merits of a case but on the correct application of the rules of law by the lower courts. This is why the Court of cassation does not strictly speaking deliver a ruling on the disputes which are at the origin of the decisions but on the decisions themselves¹⁸⁹.

The requested person can appeal the decision on his/her surrender only in case that s/he has not consented to it. According to Art. 695-31 CCP, the decision by the requested person not to surrender can be challenged only before the Supreme Court by the general prosecutor of the Court of appeal or by the requested person him/herself in accordance with Art. 568-1 and 574-1 CCP (Art. 695-31 CCP) on points of law and on breaches of procedure. No other legal means to prevent the execution of a disproportionate EAW are provided for by the CCP. In practice, the majority of such appeals are rejected by the Supreme Court.

The exercise of right to appeal is subject to strict deadlines pursuant to Art. 17§3,4 of the framework decision. The appeal must be lodged within 3 days after the deliverance of the decision of the Investigating Chamber (art. 568-1 CCP) and the Court of cassation must give its ruling within 40 days of the date of the appeal (art. 574-2 CCP). If no final decision has been delivered within 60 days following the arrest of the requested person, the time limits may be extended by a further 30 days. In this case, the public prosecutor of the Court of appeal informs immediately the issuing judicial authority thereof, and presents the reasons for the delay (art. 695-43 CCP). For reasons of expediency, Art. 568-1 CCP provides that the file of the procedure is transmitted by any means capable of producing written records in the Registry of the Criminal Chamber (“*chambre criminelle*”) within 48 hours from the lodging of the appeal in a form of declaration.

On the contrary, if the requested person has declared his/her consent to the surrender, the decision of the Investigating Chamber cannot be appealed (Art. 695-31 CCP). The guarantees regarding how the requested person’s consent has been obtained as well as his irrevocable nature allow for the exclusion of an appeal against the decision granting surrender under these circumstances.

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¹⁸⁹ http://www.courdecassation.fr/about_the_court_9256.html (accessed 13 March 2013).

Prosecutors and judges have noticed a recent increase of such appeals before the Court of cassation (“*pourvoi en cassation*”) where suspects rely on the following grounds:

- Art. 8 ECHR

For example, old facts, gravity of the offence, integration of the suspect into the French society, absence of ties with the country of origin. However, French courts rarely accept to refuse the execution of a EAW for violation of Art. 8 of the ECHR. When this happens it is usually because the age or the health of the requested person is at issue.

- Torture of witnesses with regard to information used in a EAW

Prosecutors and judges argue that such allegations are quite often in terrorist cases with Spain regarding ETA members, especially since the ruling of the *Cour de cassation* of 18 August 2010¹⁹⁰ that quashed a decision of the Investigative chamber of the Paris Court of appeal that didn't take into consideration the fact some of the information implicating the requested person in the offence for which the Spanish EAW was issued had been obtained by torture. The decision of the Court of cassation in that case set out the rule that the Investigative chambers must follow in similar cases, which is either to examine if there are any on-going investigations or proceedings for such allegations in the issuing country or to request further information. If such investigations or proceedings already take place or if additional information confirms such allegations, then the Investigative chamber should stay proceedings and postpone the surrender or refuse surrender. If that is not the case or if there is no reply to the additional information request, then it should proceed with the surrender of the requested person.

- The nature of the judicial decision to execute

The majority of the judges interviewed insist on the difficulty to understand if the judicial decision on which the EAW to be executed is based, in cases where it is issued for the execution of a custodial sentence or detention order, is a final decision or it can still be challenged by appeal. However, prosecutors and judges have confirmed that surrender has never been challenged on the grounds of the preliminary Art. of the CCP or Art. 49 (3) of the Charter of fundamental rights of the European Union.

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¹⁹⁰ Court of cassation (Ch. crim.), 18 August 2010, n° 10-85717.

6.3.1.3 Proportionality test in applying the grounds for optional refusal

Refusal to execute a EAW is subject to a strict framework in the French CCP. Grounds for mandatory non-execution of the EAW are set out on a restrictive basis in Art. 695-22 and 695-23 CCP. Pursuant to these provisions, French courts are bound to refuse the execution of EAWs in the following cases:

- if the offences for which the EAW was issued could be prosecuted and tried by a French court and proceedings have been dropped under the terms of an amnesty;
- if a final judgment has been passed on the requested person, either by the French judicial authorities or by those of a Member State other than the issuing State, or those of a third State, in respect of the same offences as that for which the EAW was issued, providing that, in the event of conviction, the sentence has been or is currently being served or may no longer be executed under the law of the sentencing State;
- if the requested person was under thirteen years old at the time of the offence for which the EAW was issued;
- if the offence for which it was issued could be prosecuted and tried in a French court and proceedings or the execution of the sentence are statute-barred;
- if it is established that the EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or if that person's position may be prejudiced for any of these reasons;
- if the offence for which the arrest warrant was issued does not constitute an offence under French law, except in cases where the issuing judicial authority has indicated that the offence falls within one of the 32 categories of offences for which the dual criminality requirement has been withdrawn; the French legislator used the margin of discretion provided in Art. 2 (4) FD EAW in order to extend the scope of application of the double criminality requirement to all offences that are not included in the list.

However, the French judicial authorities enjoy a margin of discretion as to the execution of a EAW with regards to the grounds for optional refusal (Art. 4 FD EAW) and the guarantees to be given by the issuing Member State in particular cases (Art. 5 FD EAW). Art. 695-24 CCP provides for grounds for optional non-execution. French courts can therefore refuse to execute a EAW in the following cases:

- 1° if the requested person has been the subject of proceedings by the French authorities, or these authorities have decided not to initiate a prosecution or to put an end to one in relation to the offences for which the arrest warrant has been issued ;
- 2° if the person wanted in relation to the execution of a custodial sentence or safety measure is a French national and the competent French authorities undertake to put it into execution;
- 3° if the matters in respect of which it was issued were committed wholly or partly on French national territory;
- 4° if the offence was committed outside the territory of the issuing Member State and French law does not authorise prosecuting the person for an offence committed outside French national territory.

French case-law, and especially the rulings of the Court of cassation, accept that refusal of executing a EAW is possible also in cases of violation of Art. 8 ECHR¹⁹¹ as well as in cases in which there is an "obvious inadequacy" between the act described in the EAW form and the legal qualification when such act falls

.....
¹⁹¹ See *infra*.

within the scope of Art. 695-23 CCP (art. 2 (2) of the EAW Framework decision) for which the control of double criminality is abolished¹⁹².

According to Art. 695-32 CCP, the execution of the EAW may be conditional upon verification that the requested person is able to:

- 1° oppose a judgment given in his absence in order to be tried when he is present, if he had not been personally summoned or informed of the date and place of the hearing in relation to the matters for which the EAW has been issued;
- 2° be returned to France, if he is a French national, in order to serve the sentence eventually pronounced by the judicial authority in the issuing State in respect of the matters for which the EAW has been issued.

In practice, the margin of discretion of the French judicial authorities when applying the optional grounds for refusal is quite limited. Every time the Investigating Chamber tried to go beyond the wording of Art. 695-24 CCP, the Court of cassation ruled against these judgements. The Court of cassation has considered outside of scope of Art. 695-24 CCP the following matters:

- to examine the conditions in which evidence was acquired in the issuing Member State¹⁹³;
- to examine the legal foundations supporting the decision to prosecute in the issuing Member State¹⁹⁴;
- to assess the risk that the surrender could present for the requested person's life¹⁹⁵;
- to assess whether the procedure relating to the execution of the EAW has or Art. 5 (3) of the ECHR¹⁹⁶;
- to assess the refusal by an Iranian political refugee to surrender in France¹⁹⁷.

Nevertheless, a certain margin of discretion has been exercised by the French judicial authorities with regards to the execution in France of the sentence imposed in the issuing Member State. Indeed, the prosecutor may either not consider this possibility at all¹⁹⁸ or even refuse the execution of the foreign sentence in France¹⁹⁹. However, no further conclusions can be drawn as to the criteria on which these decisions were taken, since we cannot have access to the reasoning of the public prosecutor.

The study of the available case law indicates that no general proportionality test is being exercised by the French judicial authorities in view of the execution of a EAW when it comes to apply the provisions relating to the grounds for optional refusal and the guarantees that may be asked by the issuing Member State. Although the preliminary Art. of the code of criminal procedure provides for the application of the principle of proportionality to the coercive measures to which a suspected or prosecuted person may be subjected, judges are quite reluctant to apply this provision to the execution of a EAW. In reality, the execution of a EAW follows the regulation transposing the Framework Decision to the letter and also with

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¹⁹² See *supra*.

¹⁹³ Court of cassation (Ch. crim.), 5 April 2006, n° 06-81835.

¹⁹⁴ Court of cassation (Ch. crim.), 15 March 2006, n° 06-80927.

¹⁹⁵ Court of cassation (Ch. crim.), 26 June 2006, n° 06-84186.

¹⁹⁶ Court of cassation (Ch. crim.), 8 August 2007, n° 07-84621.

¹⁹⁷ Court of cassation (Ch. crim.), 7 February 2007, n° 07-80162.

¹⁹⁸ Court of cassation (Ch. crim.), 5 August 2005, n° 04-84511; 23 November 2004, n° 04-86131.

¹⁹⁹ Court of cassation (Ch. crim.), 25 January 2006, n° 05-87718.

regard to the spirit of mutual recognition. Therefore a strict proportionality control between the seriousness of the offence and the execution of the EAW is never exercised since the French implementation/transposition law does not explicitly provide for such a control.

Nevertheless, the judicial authorities have exercised a proportionality control on the basis of Art. 8 of the ECHR regarding the protection of the right to private and family life. In many occasions, a EAW has been refused because its execution was considered to be a disproportionate violation of the right to private and family life²⁰⁰. On the basis of Art. 8 ECHR, the judicial authorities were also able to implicitly address the issue of proportionality between the seriousness of the offence and the execution of the EAW because in most of those cases, the seriousness of the offence appeared questionable²⁰¹.

In spite of the aforementioned case law, the situations in which a EAW may be refused are exhaustively provided for in the CCP²⁰². Art. 695-25 CCP sets out that every refusal to execute a EAW must be motivated and the Court of cassation interprets strictly all grounds for refusal. It has been noted that such a rigorous position of the higher court can raise difficulties as to the assessment of the proportionality of a sentence or of a security measure regarding Art. 10 ECHR (liberty of expression) or Art. 8 ECHR²⁰³. In such case, the judge would be in a position where he has to choose between the strict application of the principle of mutual recognition and what he considers to be a breach of the ECHR provisions by way of the proportionality test. However, such a test could result in the addition of a new ground for non-execution not provided for²⁰⁴ neither by the French implementation law nor by the framework decision and would be against the concept of mutual trust that EU Member States have among them. That can explain why so far case-law relating to Art. 8 ECHR has accepted that the execution of the EAW can be disproportionate only in a few cases, while it has denied it on most²⁰⁵.

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²⁰⁰ Court of cassation (Ch. crim.), 10 November 2010, n° 10-87282 ; 22 September 2010, n° 10-86237 ; 12 May 2010, n° 10-82746

²⁰¹ Of the 3 decisions aforementioned in note 8, the second concerns a case of common theft punished by 7 months imprisonment and the third concerns a penalty remaining of 4 months and 18 days to be executed.

²⁰² Art. 695-22 and 695-23 as far as the grounds for mandatory non execution are concerned, Art. 695-24 for the grounds for optional non execution and Art. 695-32 for the guarantees to be given by the issuing Member State in particular cases.

²⁰³ P. Lemoine, « La coopération judiciaire entre Etats », *Revue de science criminelle et de droit pénal comparé*, n° 2 (2009) p. 314.

²⁰⁴ J. Lasserre Capdeville, « Mandat d'arrêt européen et atteinte disproportionnée au droit au respect de la vie privée et familiale », *AJ Pénal* (2010), p. 408.

²⁰⁵ Court of cassation (Ch. crim.), 2 May 2012, n° 12-82452 ; 29 February 2012, n° 12-81030 ; 14 February 2012, n° 12-80388 ; 7 February 2012, n° 12-80174 ; 28 June 2011, n° 11-84100 ; 15 June 2011, n° 11-83572 ; 8 June 2011, n° 11-83622 ; 5 April 2011, n° 11-81073 ; 22 February 2011, n° 11-80428 ; 14 April 2010, n° 10-81968 ; 6 August 2008, n° 08-85077 ; 18 June 2008, n° 08-83595 ; 4 April 2007, n° 07-81767 ; 7 February 2007, n° 07-80162 ;

6.3.1.4 Actions/solutions in case of disproportionate EAWs

Although both the Investigative Chamber of the Court of appeal and the general prosecutor of the same court are the competent authorities for the execution of the EAW, judges revealed that, in practice, it is the prosecution service of the Court of appeal that deals with problems arising from disproportionate requests since the Investigative Chamber has limited margin of discretion in EAW cases as it considers itself bound by the refusal grounds provided in the Framework Decision.

The greater margin of discretion enjoyed by the prosecution services when dealing with disproportionate EAWs can be explained by the large prerogative of action and the flexibility with which they can perform their duties in the context of the EAW scheme. French prosecutors indeed, can engage in bilateral discussions and in a direct cooperation with their colleagues in other Member States, whereas judges are more restrained in their adjudication role within the courts. Moreover, given the fact that French prosecutors operate in a criminal justice system based on the principle of opportunity with respect to the decision to prosecute or not, they enjoy a certain margin of discretion and a certain liberty when formulating their requests before the court.

Nevertheless, despite the margin of discretion of the prosecution services, when it comes to refuse the execution of a disproportionate EAW, the French executing judicial authorities have very limited options. Indeed, statutory law²⁰⁶, in a greater extent, and case-law²⁰⁷, in a lesser extent, provide for strictly enumerated and assessed grounds for refusal.

The Court of cassation's case-law regarding "obvious inadequacy" between the acts and the legal qualification chosen by the issuing judicial authorities could be of use in order to cope with the problem of disproportionate EAW, since the relevant control could reveal cases of manifest disproportionality either between the acts for which the EAW is issued, which in most cases cannot even qualify as criminal offences under French law, and the legal qualification that allow for the non-application of the double criminality rule, or between the offences and the penalties associated with them (for ex. petty offences punished with severe penalties). However, as it has been asserted in French doctrine²⁰⁸, such a control appears quite difficult to operate since it is limited to cases of obvious errors which despite the undisputed nature of what constitutes an "obvious", "blatant" or "manifest" inadequacy cannot satisfy the requirements of legal certainty, it is never easy to distinguish between such "inadequacies" and others of lesser importance.

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²⁰⁶ Art. 695-22, 695-23, 695-24 and 695-32 of the CCP which provide for the grounds of mandatory and optional non execution, as well as for conditions to be met in order for the execution of the EAW to take place.

²⁰⁷ The relevant case-law concerns the manifest error in legal qualification and serious human rights violations (notably, Art. 3 and 8 of the ECHR).

²⁰⁸ V. Malabat, « Absence de contrôle de la double incrimination des faits: étendue du pouvoir d'appréciation de la chambre de l'instruction », J.C.P. G (2008), II 10108, p. 7.

Outside the scope of the grounds for refusal provided for by statutory or case-law, the prosecutors and the judges interviewed admit proceeding to the following actions when dealing with the execution of disproportionate EAWs.

In the majority of the cases, automatic execution of the EAW is the rule. Given the legalistic approach of the French judicial authorities to the EAW procedure and their reluctance to oppose to the principle of mutual recognition and mutual trust by applying controls that are not provided for by positive law resulting to the delay of the automatic execution of the EAW, the execution of the EAW, even when issues of proportionality do exist, is the most frequent outcome. In such cases, the relevant problem may be communicated to the issuing judicial authority, but so far no communication in return has been received and no change of attitude has been observed.

Given the fact that the grounds for refusal are strictly provided for by statutory or case-law, the prosecutors and the judges interviewed referred mostly to specific measures and actions undertaken in order to avoid the execution of a disproportionate EAW and not to court decisions refusing the execution of a EAW. Such actions or measures of administration of justice that are not provided for by the Code of Criminal Procedure try either to deal with the offence that gave rise to the EAW or to negotiate a solution to the proportionality problem with the issuing judicial authorities. However, the judges and prosecutors interviewed admitted that such measures have no clear legal basis, constitute a patchwork and therefore the French judicial authorities acting as executing authorities are reluctant in using them.

The first measure proposed is to start bilateral negotiations with the issuing Member State. This choice depends entirely on the competent executing judicial authority. Some executing judicial authorities are prone to endorse such practice (CA Paris), while others are still very reluctant and engage in bilateral negotiations only to ensure that the EAW request is upheld without discussing about substantive or proportionality issues of the case (CA Douai). That is why, there are differences in the appreciation of the outcome of bilateral negotiations from one jurisdiction to another. In fact, it is true that bilateral negotiations can prove time consuming, if the issuing judicial authorities do not answer promptly or do not answer at all. Such can be the case when there are delays in communication as for ex. with the Italian judicial authorities, which do not have access to professional translators easily and therefore must rely on the Ministry of Justice for translation. However, bilateral negotiations have been evaluated very highly by the CA of Paris in particular with regard to the Italian and Spanish judicial authorities. Indeed, the court usually issues an interlocutory decision requesting information when the prosecution service did not receive all the necessary information. The delay is 10 days, but in the majority of cases, the issuing judicial authority answers rapidly. The presence of a liaison magistrate has also been regarded as very useful in the context of bilateral negotiations.

Other measures are actions that are outside of the legal context of the EAW procedure, which does not leave a margin of discretion when such problems arise, aiming at the extinction of the offence for which the EAW has been issued. For instance, if a person is prosecuted for a civil debt, the prosecution services will summon the person to pay the debt. The proceedings concerning the execution of the EAW will then be stayed until there is evidence that the person has paid.

The interviews revealed also that if the issuing judicial authority forgot to tick the right box in a EAW form, the French judicial authorities could refuse to execute that EAW. According to one judge, in practice, the French executing judicial authorities may refuse to execute a EAW in case of failure on behalf of the issuing judicial authorities to comply to the request for additional information.

Law enforcement authorities that are responsible for processing requests for execution of EAWs transmitted through the Schengen or Interpol systems admitted being aware of the problem with disproportionate EAWs. Therefore, in case of a EAW issued for petty offences, the relevant request is dealt with after all the others.

Nevertheless, according to one judge, in practice, the French executing judicial authorities may refuse to execute a EAW in case of failure on behalf of the issuing judicial authorities to comply to the request for additional information. Until now, two Courts of appeal have refused to execute a EAW issued for petty offences. Their respective decisions have been communicated to the central authority.

Moreover, in case of disproportionate EAWs, the French executing judicial authority will not place the requested person in custody, but only in judicial control, in particular, if the person resides within the French territory and is of known address.

At last, time limits for surrender can be overstretched by means of “ajournement” of the hearing in order to avoid the surrender of the requested person and keep control of the procedure in France until a solution to the disproportionate EAW is found.

6.3.1.5 Propositions

The peer review allowed for the following conclusions to be drawn with respect to the problem of requests to execute disproportionate EAWs.

According to the prosecutors and judges interviewed, the problem of disproportionate requests arises because of discrepancies among the national criminal policy of each Member State. Therefore each judicial authority has a different appreciation of offences committed within its territory. Moreover control of proportionality is also exercised from a clearly national point of view, since no specifically established criteria exist for such purposes on a European level. That explains the issuing of EAWs for acts that are treated in a completely different way regarding both sentencing and legal qualification by the French criminal justice system. Such kind of problems are enhanced by lack of knowledge and information about foreign criminal systems and differences in judicial cultures.

Therefore prosecutors and judges believe that if the issuing judicial authorities are informed of the seriousness and the legal qualification in the French legal order of the acts for which they decide to issue a EAW, like for ex. the fact that although driving without a license may be considered as a serious offence under Romanian criminal law punished with a custodial sentence, under French criminal law is considered a misdemeanour in France, there would be less disproportionate requests. Such information could be obtained either by means of liaison magistrates, through Eurojust or by direct contacts between judicial authorities and, in particular, between issuing judicial authorities.

In the meantime, the lawyers interviewed suggested that the French jurisdictions should not hesitate to refer to the Court of Justice for a preliminary ruling in matters relating to the principle of proportionality in the context of the EAW.

Both prosecutors and judges have regretted that there is no follow-up of proceedings in the issuing Member State after the surrender of the requested person, since such a follow-up is considered very useful for the monitoring and the overall perception of judicial cooperation under the EAW scheme.

Moreover, in cases where proportionality issues may arise, instead of executing the EAW, one of the prosecutors interviewed suggested that the executing judicial authority could use a system of official summons with the agreement of the issuing Member State. Such a system would result in a three-phase procedure. First, an official summons would be delivered by the executing Member State in cases where the execution of the EAW appears to be disproportionate. If the requested person complies with the summons, there would be no need to execute the EAW. At the end, if the requested person does not comply with the summons, the issuing of the EAW would be upheld without any possibility to further control the proportionality of the request for the same EAW in the future.

Another solution proposed by one of the judges interviewed would be to postpone the surrender of the requested person or even to proceed to a conditional surrender pursuant to Art. 24 of the framework decision regarding postponed or conditional surrender. However, the judge in question believes that such options should have been more thoroughly ruled by the framework decision with the view to develop an official procedure of discussions and negotiations between the executing and the issuing judicial authorities in order to resolve matters such as the proportionality of the EAW. Such a procedure would result to a stay of the execution of the EAW for as long as the negotiations or discussions are carried on, but would end up in an automatic execution of the EAW request in case they fail to produce an outcome.

Furthermore, a review of the EAW framework decision is seen as indispensable by both prosecutors and judges interviewed in particular with regard to three aspects. First, an increase of the 4 months sentence threshold with respect to acts for which a EAW can be issued would ensure a better compliance of the EAW to the principle of proportionality, since such a threshold is considered extremely low. Second, the addition of a provision relating to the refusal of the execution in case of a manifest error between the grounds for issuing a EAW and the factual situation would allow the executing judicial authorities to deal with the problem of legal qualifications that do not correspond to the categories of offences listed in Art. 2 (2) of the EAW framework decision. Third, an harmonisation regarding the legal qualification of "fraud" is indispensable since this category of offences is considered by the majority of the magistrates interviewed as being extremely large allowing thus for the execution of EAWs without the control of double criminality for acts that do not even qualify as criminal offences within the executing Member State.

A general prosecutor admitted that while he would not oppose to the re-introduction of the double criminality test when executing a EAW issued by another Member State, he would prefer to be free from complying to this rule when issuing a EAW, since the abolition of the double criminality allows for more efficiency in the surrender of the requested person.

Finally, defence lawyers have underlined the fact that direct contacts with lawyers in the issuing Member State not only strengthen the defence of the requested person but can also facilitate the search for an alternative solution to the execution of the EAW. This direct form of cooperation between defence lawyers, which has already been used in an informal and spontaneous manner for resolving legal complexities due to lack of information about the foreign legal system, can also be used in case of disproportionate requests, especially when the case can be dealt with in the issuing Member State. In this way, for instance, the payment of civil debts for which the polish authorities issue a EAW can be dealt with more easily in Poland if the case is followed not only by a French lawyer but also by a polish one.

6.3.2 Nationals (and return guarantee)

6.3.2.1 Additional proportionality test for nationals and residents

According to Art. 695-24 2° of the CCP, the execution of a EAW may be refused, if the person wanted in relation to the execution of a custodial sentence or safety measure is a French national (statutory law contains no relevant provisions for foreign nationals residing in France) and the competent French authorities undertake to put it into execution.

Such difference in treatment between French and foreign nationals regarding the return guarantee was considered by the Court of Justice in its recent judgement in the case of *João Pedro Lopes Da Silva Jorge*²⁰⁹ as a discrimination on the grounds of nationality, by virtue of Art. 18 TFEU, that cannot be justified by the fact that according to French law, the French authorities can undertake to enforce the execution of a foreign sentence in France only if the sentenced person is a French national. This judgement will certainly contribute in avoiding executing a EAW in cases where, due to the requested person's integration in the French society resulting from his/hers residence or stay for a certain period of time, the execution of the EAW would undermine disproportionately his/hers right to respect for private and family life.

The majority of the prosecutors and judges interviewed admitted that no additional proportionality test is exercised in cases where the execution of a EAW concerns a French national or resident, although some executing judicial authorities (for ex. CA of Paris) may carry out such a control for French nationals only.

In fact, the peer review has revealed the absence of both common doctrine and common practice among French jurisdictions on the application of an additional proportionality test for nationals and residents. While the CA of Paris appears to exercise a more rigorous control on such situations, the CA of Douai, in general, does not proceed to a specific supplementary control as far as the execution of EAWs issued against French nationals or residents is concerned.

Nevertheless, such an additional proportionality test for nationals and residents is inherent to the proportionality control in the light of Art. 8 of the ECHR with respect to the impact that the execution of the EAW may have on the requested person's right to private and family life. Actually, Art. 8 of the ECHR applies to every person subject to a EAW regardless of his/hers nationality or residence. However, the proportionality test for nationals and residents based on this provision is more likely to result in the refusal of the EAW because the criteria used can be met more easily. Such criteria are: the existence of family ties in France²¹⁰ ; having an employment or a legitimate income in France²¹¹ ; the seriousness of the offence and the penalty imposed.

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²⁰⁹ ECJ, Judgment of 5 September 2012, Case C-42/11, *Lopes Da Silva Jorge*.

²¹⁰ Court of Appeal of Toulouse, 9 November 2007, n° 07/00821.

²¹¹ Court of Appeal of Toulouse, 9 November 2007, n° 07/00821.

Executing judicial authorities (both prosecutors and judges) admitted to be unaware of any appeal based on the *Wolzenburg* case²¹².

Furthermore, according to the prosecution services, if a EAW is issued against a French citizen, prosecutors will always check whether the penalty is extinguished by limitation as provided in the French criminal procedure code (art. 695(22)(4) CPP).

However, despite the special treatment reserved for French nationals, prosecutors acknowledge that the relative cases are almost never monitored and the judicial proceedings that take place in the issuing Member State are never followed, although they consider such a follow-up, which was almost systematic in the context of judicial assistance, as very important.

6.3.2.2 *Return guarantee for nationals and residents*

According to Art. 695-32 CCP, the Investigating Chamber can subject the execution of the EAW to the condition that French nationals will be returned to France for the execution of the sentence imposed upon them in the issuing State (return guarantee). It must be noted that the “return guarantee” concerns only French nationals and not residents²¹³. However, the French judicial authorities enjoy a certain margin of discretion regarding the use of the “return guarantee”, and there are cases where the public prosecutor did not make use of this possibility so as to allow the requested person to execute his sentence in France²¹⁴ or even refused it²¹⁵.

Nevertheless, if the requested person of French nationality claims that the execution of the EAW issued against him/her would result in a disproportionate violation of his/her right to family life, the Investigating Chamber must justify its decision not to provide for the execution in France of the sentence imposed in the issuing Member State²¹⁶.

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²¹² ECJ, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621.

²¹³ The peer review revealed only one case where the return guarantee was applied by the Investigative Chamber of the Court of Appeal of Douai with respect to a German national residing in France.

²¹⁴ Court of cassation (Ch. crim.), 5 August 2005, n° 04-84511; 23 November 2004, n° 04-86131.

²¹⁵ Court of cassation (Ch. crim.), 25 January 2006, n° 05-87718.

²¹⁶ Court of cassation (Ch. crim.), 26 October 2005, n° 05-85847.

In practice, it becomes clear from the information received by both prosecutors and judges that the return guarantee, although never applied on the executing judicial authority's own initiative, is almost always granted, if such a request is made by the surrendered person. Nevertheless, such request is not a common practice among defence lawyers in France and a great disparity can be noticed according to the jurisdiction where proceedings for the execution of the EAW take place²¹⁷.

As with cases regarding surrender of French nationals, cases where the return guarantee is applied are neither monitored nor followed in the issuing Member State. According to some of the judges interviewed, only the prosecution services are able to follow the proceedings in the issuing Member State and ensure the monitoring of the case, but prosecutors admit that they have not exercised such prerogative so far. For this reason, problems have been encountered with respect to the return of French nationals in order for them to execute their custodial sentence in France.

Finally, prosecutors in the CA of Paris affirmed that they always request for a guarantee of non-surrender to the State of origin when they have to execute EAWs issued against political refugees.

In fact, the relevant case-law of the Court of cassation confirms the practice of the CA of Paris regarding political refugees by obliging the Investigative chamber to ask for additional information assuring that the requested person who has refugee status will not be extradited to a country where his/hers rights risk to be violated²¹⁸.

6.3.3 Proportionality of arrest in EAW proceedings

As we have already presented, in the French criminal justice system there are two types of pre-trial custodial measures: police custody and pre-trial detention. In the EAW proceedings, the proportionality control of the arrest of the requested person is exercised during the remand of the requested person in custody (6.3.3.1.), but procedural safeguards exist throughout the entire procedure (6.3.3.2.)

6.3.3.1 *Proportionality control with regard to arrest and detention in the framework of the execution of a EAW*

As a general rule to be found in the preliminary Art. of the Code of Criminal Procedure, the principle of proportionality determines the application of every coercive measure in French criminal procedure. A principle of constitutional value as well as a general principle of EU law, the control of proportionality of arrest and detention in criminal procedure is also founded in Art. 5 of the ECHR which has a superior legal force than ordinary national law. According to the preliminary Art. of the French code of criminal procedure, the coercive measures to which a suspected or prosecuted person may be subjected are taken by

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²¹⁷ For instance the Court of Appeal of Douai reports a very rare use of the return guarantee by defence lawyers, whereas in the Court of Appeal of Paris such guarantee is asked for more often.

²¹⁸ Court of cassation (Ch. crim.), 21 November 2007, 07-87499 ; 26 September 2007, n° 07-86099 ; 7 February 2007, n° 07-80162.

or under the effective control of the judicial authority and they should be strictly limited to the needs of the process, proportionate to the seriousness of the offence charged and must not violate the person's dignity.

Therefore, arrest and detention in the framework of the execution of a EAW are, in theory, subject to a proportionality check.

Some of the prosecutors interviewed underline that in the EAW proceedings the maintaining of the requested person in liberty constitutes the rule, while pre-trial detention is exceptional.

According to Art. 695-28 CCP, following the notification of the EAW, the public prosecutor, if s/he decides to remand the requested person in custody, s/he presents him/her to the First President of the Court of Appeal or to a judge designated by the latter. The First President of the Court of Appeal or the judge designated by him/her orders the incarceration of the requested person in a prison within the jurisdiction of the Court of Appeal where the requested person was arrested, unless s/he considers that there are sufficient guarantees that s/he will not try to escape the procedure. In such case, the aforementioned judges can place the requested person under judicial supervision or in house arrest with electronic surveillance, until his/her appearance before the Investigating Chamber. Such a decision is notified orally to the requested person and is mentioned in the minutes of the procedure. It can be challenged before the Investigating Chamber, which must decide no later than when the requested person appears before it.

However, pursuant to Art. 695-36 CCP, these alternative measures can be revoked by the Investigating Chamber, if it appears that the requested person tries to avoid the execution of the EAW issued against him/her. The same applies to the case where the requested person was released from custody and no alternative measure has been imposed.

The French judicial authorities have considered the following criteria when executing a control of necessity, which is an indirect and implicit proportionality test, in cases where they must decide on the arrest and detention of the requested person in view of the execution of a EAW:

- the existence of family ties in France²¹⁹
- having an employment or a legitimate income in France²²⁰
- in case where the execution of the EAW will be refused because a ground for mandatory refusal is very obvious²²¹

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²¹⁹ Court of appeal of Toulouse, 9 November 2007, n°07/00821.

²²⁰ Court of Appeal of Toulouse, 9 November 2007, n°07/00821.

²²¹ Circular of the Ministry of Justice, Presentation of the provisions of Law n° 2004-204 of 9 mars 2004 adapting the justice system to the developments in crime regarding the european arrest warrant and extradition, 11 mars 2004, p. 16, CRIM 2004-02 CAB/11-03-2004, NOR, JUSDo430039C, Bulletin officiel du Ministère de la justice, n°93 (2004).

- adequate guarantee assurance that the requested person will be present during the whole procedure²²²: according to a well established case-law, such an assurance must be considered not only with respect to the executing Member State (France), but also with regard to the issuing Member State; therefore, even if there is no risk that the requested person will try to escape the procedure in France, his/her arrest or detention can be ordered, if such a risk exists with regard to the issuing Member State²²³.

However, some of the judges interviewed insist on considering the adequate guarantee assurance only with respect to France and not with respect to the issuing Member State, since the French executing judicial authorities are responsible only for the part of the proceedings conducted in France.

- ability of the requested person to travel abroad²²⁴: for ex. if the requested person has already travelled many times abroad and has developed activities in other countries, he/she will be more likely to be held in custody ;
- nationality of the requested person: in most cases, foreigners will be held in custody for the time necessary prior to their surrender ;
- the criminal record of the requested person.²²⁵

In principle, the applicable rules regarding proportionality are the same with regard to either domestic criminal proceedings or EAW execution. The Preliminary Art. of the code of criminal procedure which provides for the coercive measures to be proportionate to the seriousness of the offence applies to pre-trial detention and detention in the framework of the EAW to the same extent, although it has not been used so far by the judicial authorities regarding the execution of the EAW.

However, minor differences exist in certain aspects. First, there is a difference concerning the substantive conditions for detention. In domestic criminal proceedings subjection to pre-trial detention is also governed by the condition of necessity which implies a proportionality test for its assessment, but is a more precise rule than the principle of proportionality in the context of coercive measures. According to the condition of necessity, detention must be the only means necessary to attain a number of objectives that are listed in Art. 144 CCP and cannot be attained by less intrusive means. In the framework of the execution of the EAW, the only requirement for detention is the risk that the requested person will not be present at all the stages of the procedure (Art. 695-28 CCP)

Secondly, in domestic criminal proceedings pre-trial detention is allowed only for offences punished with a prison sentence of 3 years or more (art.143-1 CCP), whereas in the framework of the EAW pre-trial detention can be imposed for an offence punished with a one year prison sentence or for an imposed prison sentence awaiting execution of 4 months or more (art. 695-12 CCP).

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²²² Court of cassation (Ch. crim.), 5 April 2011, n° 11-80259 ; 8 July 2009, n° 09-82736.

²²³ Court of cassation (Ch. crim.), 24 October 2007, n° 07-86159.

²²⁴ Court of cassation (Ch. crim.), 5 April 2011, n° 11-80259.

²²⁵ Court of cassation (Ch. crim.), 8 March 2006, n° 06-80753.

6.3.3.2 *Procedural safeguards in order to ensure the proportionality of arrest and detention in the framework of the execution of a EAW*

In principle, arrest and detention in the framework of the EAW is subject to the same safeguards which apply in domestic procedures.

The requested person arrested pursuant to a EAW must be brought before the territorially competent public prosecutor of the Court of appeal within 48 hours. At this stage of the procedure, the requested person enjoys the rights enacted in Art. 63-1 to 63-5 of the CCP regarding Judicial police custody (information on his rights, on the nature of the offence, right to contact a relative, a legal counsel, a doctor).

During this stage of the procedure, the public prosecutor of the Court of appeal is responsible for the due course of this measure. Following his/her identification, the public prosecutor will inform him/her, in a language which s/he understands, of the existence and contents of the EAW against him/her, as well as of his/her right to a legal counsel. The legal counsel can immediately consult the case file and communicate freely with the requested person. The public prosecutor also informs the requested person of his/her right to consent or oppose to his/her surrender and to renounce entitlement to the speciality rule and of the relevant consequences (art. 695-27 CCP).

The decision to remand the requested person in custody or to place him/her under judicial supervision or in house arrest with electronic surveillance is taken by a judge (art. 695-28 CCP) and not by a prosecutor in accordance with the requirements set by the ECHR case-law regarding the timely presentation of an accused or suspect before a judge²²⁶.

If there are sufficient guarantees that the requested person will not try to escape the procedure, the competent judge can order his release or his submission to a measure of control, such as judicial supervision or house arrest with electronic surveillance (Art. 695-28 CCP). Remand in custody appears to be ordered only as a last resort where less coercive measures fail to assure the surrender of the requested person²²⁷.

The decision to submit the requested person to a measure of control, such as judicial supervision or house arrest with electronic surveillance, can be challenged before the Investigating Chamber, which must decide no later than when the requested person appears before it (art. 695-28 CCP).

Although the French implementation law does not provide for a maximum period of detention, the whole procedure is subject to strict time limits in order to minimize the impact of the coercive measures likely to be applied to the right to liberty of the requested person. The requested person must appear before the Investigating Chamber of the court of appeal within 5 working days after his appearance before the public prosecutor (Art. 695-29 CCP). S/he may apply for his/her release at any time before the Investigating Chamber which must decide on this matter as soon as possible or within 15 days at the latest from the reception of the request for release or from his/her first court appearance (Art. 695-34 CCP).

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²²⁶ ECtHR (Section V), Judgment of 23 November 2010, Case no. 37104/06, *Moulin v. France*.

²²⁷ Court of cassation (Ch. crim.), 8 March 2006, n° 06-80753.

The Investigating Chamber may subject the release of the requested person to the execution of a measure of control such as judicial supervision or house arrest with electronic surveillance (Art. 695-34 CCP). However, if the requested person refuses to execute these control measures or, in case where no such measures have been ordered and release is unconditional, tries to avoid the execution of the EAW, the Investigating Chamber can issue a national arrest warrant against him/her. Following the arrest of the requested person, the Investigating Chamber must examine the case as soon as possible and within 10 days at the latest from his detention pending execution of the EAW. It can revoke the control measures and remand the requested person in custody. Failure to comply with the above time limit results in statutory release (Art. 695-36).

If the requested person does not consent to his surrender, the Investigating Chamber delivers a judgement, within 20 days after the appearance of the requested person, if no further information has been ordered. This judgement can be challenged only before the Court of cassation by the public prosecutor of the Court of appeal or by the requested person according to Art. 568-1 and 574-1 CCP (Art. 695-31 CCP). The appeal must be lodged within 3 days after the deliverance of the decision of the Investigating Chamber and the Court of cassation must pronounce its judgement within 40 days of the date of the appeal. If no final decision has been delivered within 60 days following the arrest of the requested person, the time limits may be extended by a further 30 days. In this case, the public prosecutor of the Court of appeal informs immediately the issuing judicial authority thereof, giving the reasons for the delay (Art. 695-43 CCP).

If the requested person is not surrendered to the judicial authorities of the issuing Member State at the latest within 10 days after the final decision of the Investigating Chamber, s/he is statutory released, unless the French judicial authorities decide to proceed to a temporary surrender (Art. 695-37 and 695-39).

6.3.4 Procedural rights in EAW proceedings

6.3.4.1 Interpretation and translation

The right to interpretation and translation is guaranteed throughout the procedure regarding the execution of a EAW. During the hearing before the Investigating Chamber regarding surrender or revocation of control measures, the requested person can be assisted, if necessary by an interpreter (Art. 695-30 and 695-36 CCP). The same applies to the hearing before the Investigating Chamber regarding the release of the requested person, although Art. 695-34 CCP does not mention it explicitly. Despite this omission, the right to an interpreter during this hearing can be based on Art. 6 ECHR as well as on Art. 11 FD EAW²²⁸.

The Court of cassation has accepted that the requested person who has been granted legal aid has the right to an interpreter whose services are also free of charge in order to communicate with his legal counsel also before the hearing, even if no relating provisions exist in the code of criminal procedure²²⁹.

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²²⁸ C. Mauro, « Mandat d'arrêt européen », *Rép. Internat. Dalloz*, p. 14.

²²⁹ Court of cassation (Ch. crim.), 8 December 2010, n° 10-87818.

6.3.4.2 *Information of the requested person on his/hers rights*

In French law, there is no specific information provision for persons arrested in a EAW procedure. General rules regarding rights under police detention are applicable within the framework of the execution of a EAW.

According to Art. 695-27 CCP, any person arrested pursuant to a EAW must be brought before the territorially competent public prosecutor of the Court of appeal within 48 hours. At this stage of the procedure, the requested person enjoys the rights enounced from Art. 63-1 to 63-5 of the CCP regarding police detention (information on his/her rights, on the nature of the offence, right to contact a relative, a legal counsel, a doctor). During this stage of the procedure, the public prosecutor of the Court of appeal is responsible for the due course of this measure. Following his/her identification, the public prosecutor will inform him/her, in a language which s/he understands, of the existence and contents of the EAW against him/her, as well as of his/her right to a legal counsel. The requested person can be assisted by a legal counsel of his/her own choice or by a legal counsel appointed by the chairman of the bar association who will be informed without delay and by any appropriate means. General rules regarding legal aid apply in this case. The legal counsel can immediately consult the case file and communicate freely with the requested person. The public prosecutor also informs the requested person of his/her right to consent or oppose to his/her surrender and to renounce entitlement to the speciality rule and of the relevant consequences. This information is mentioned in the minutes of the proceedings; failing to do so would render the procedure invalid.

6.3.4.3 *Right of communication of the requested person*

According to ordinary law applicable in the context of police detention, when the requested person is under arrest he/she has the right to inform a relative or next of kin of his/her arrest and detention. Art. 63-2 CCP states that any person placed in police custody can, at his/her request, inform by telephone a person with whom s/he resides habitually, one of his relatives in direct line, one of his brothers or sisters or his employer or his/hers legal guardian of the measure to which he is subjected. However, if the judicial police officer considers that he should not grant this request because of the needs of the inquiry, he reports the request forthwith to the public prosecutor, who grants it if he considers it appropriate to do so. The necessary arrangements that have to be accomplished by the investigators in order to ensure the exercise of the right to inform, must be carried out, at the latest, within 3 hours from the moment when the arrested person has formulated the request, except in the case of “insurmountable” circumstances which have to be mentioned in the minutes of the proceedings.

6.3.4.4 *Specific rules regarding vulnerable persons*

According to Art. 8 of the CCP, a person is considered vulnerable because of his/her age, illness, infirmity, physical or psychic deficiency or pregnancy. The framework relating to the execution of the EAW provides explicitly for special rules applicable to minors or mute and deaf persons.

Art. 695-22 CCP provides for a ground of mandatory refusal in case that the requested person was less than 13 years old when the offence on which the EAW is based was committed. Therefore, a EAW can be executed against a minor who is over 13 years old. In that case, specific guarantees regarding police and pre-trial detention are applied according to the rules relating to juvenile offenders²³⁰.

.....
²³⁰ Ordinance n° 45-174, 2 February 1945, regarding juvenile offenders.

Specific rules are also applicable to mute and deaf persons who are in police detention. Pursuant to Art. 63-1 CCP, if the person is deaf and cannot read nor write, s/he must be assisted by a sign language interpreter or by some other person qualified in a language or method of communicating with the deaf. Use may also be made of any other technical means making it possible to communicate with persons who are deaf.

Specific rules regarding protected adults assisted by a legal guardian can also be applied within the framework of a EAW execution. The legal guardian has the right to visit the protected adult in any case of pre-trial detention, the right to be informed of the prosecution and of the most important stages of the procedure and of their outcome, such as the hearing date, or even access to the documents relating to the procedure (Art. 706-113 CCP). However, no right of visit is recognized in case of police detention. In this case, the protected person can only inform his legal guardian of his arrest and detention (Art. 63-1 CCP).

6.3.5 Statistics

In 2010, 1156 EAWs have been executed in France (832 persons arrested, 673 surrendered). In 2011, 1102 EAWs have been executed in France (906 persons arrested, 756 surrendered)²³¹. Belgium, Spain, Poland, Germany, and Romania are the states that address the most EAW in France²³². From 2004 to 2010, Germany addressed 791 EAW in France, The Netherlands addressed 502 EAW²³³.

In 2010, the average duration of proceedings on the execution of a EAW is around 20 days.

It is not possible to specifically identify the exact number of professional judges responsible for the EAW procedure - it is even not possible to specifically identify the exact number of judges who devoted to criminal matters. In November 2012, are recorded:

- 3157 non-specialized judges (1138 at the Courts of Appeal and 2019 at the District Courts);
- 569 investigating judges;
- 432 juvenile court judges;
- 372 judges for the application of penalties.

As a consequence, the average workload of the judges (and also prosecutors) involved in proceedings on the execution of a EAW is not evaluated by the Ministry of Justice. It would be very difficult to obtain accurate data on that point to the extent that EAW only accounts for a small proportion of the cases and of the workload.

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²³¹ Information given by the *Bureau de l'entraide pénale internationale* (BEPI), Ministry of Justice.

²³² Information given by the *Bureau de l'entraide pénale internationale* (BEPI), Ministry of Justice.

²³³ Information given by the *Bureau de l'entraide pénale internationale* (BEPI), Ministry of Justice.

6.4 Factors relevant for the degree of mutual trust

6.4.1 Problems in terms of mutual trust regarding the participating countries

The peer review has proved very useful in identifying problems in terms of mutual trust regarding the participating Member States.

Both judges and prosecutors believe that the number of EAWs received from the Netherlands and from Germany is not sufficient enough in order to identify any problems regarding mutual trust. In general, they consider that bilateral cooperation with the two participating Member States is very good and no major problems have been encountered so far in the framework of the EAW.

The majority of the judges interviewed seem particularly concerned with the nature of the decision on which the EAW is based (for example, final decision or not authority of *res judicata*) even though it is not a condition for the execution of the EAW. Yet, they appear more confident to proceed with the execution of the EAW when it is based on a final decision which has the authority of *res judicata*.

The other major concern of the judges interviewed was the reply of the issuing judicial authorities to the requests for additional information, since information especially on procedural aspects (such as for ex. the notion of the decision on which the EAW is based) is considered to be very difficult to obtain. Nonetheless, the judges interviewed agree that they have always proceeded to the surrender of the requested person and that the right to a fair trial has always been respected by these Member States. Even, if sometimes, they would like to better know the aftermath of the procedure in the issuing Member State.

Finally, the magistrates participating in the peer review have been asked to indicate which aspects of the cooperation were or still are problematic in terms of trust for the three participating (France, Germany and the Netherlands) countries. Regarding the quality of the judiciary (nomination of judges, training and education) and the available capacity (number of judges, prosecutors, etc.), some magistrates interviewed considered this question as not problematic while others have found this aspect very difficult to be evaluated, since they do not have any information on this aspect.

The duration of the proceedings (even pre-trial detention), the right to a fair trial and the level of independence of the judiciary have been also considered as not problematic in the participating Member States. The level of corruption in the judiciary and law enforcement organisations is not, either, a problem. The magistrates interviewed had the same good appreciation regarding the condition of detention, the level of proportionality (relation between the crime/offence committed and the expected level of sanctions) and the level of cooperation between the member States.

Concerning the quality of the legal representation, whereas for the majority of the magistrates interviewed it is considered as not problematic, some judges consider that the quality of the defence can be problematic, especially when lawyers are not specially trained in the EAW proceedings, or in case they are, they lack experience in this field.

6.4.2 Problems in terms of mutual trust regarding other Member States

The peer review has also proved very useful in identifying problems in terms of mutual trust regarding other Member States.

An aspect of mutual trust that has been addressed with respect to all Member States is the quality of the legal representation. The majority of the magistrates interviewed, influenced by their own experiences regarding legal representation within their jurisdictions, consider that access to a qualified lawyer, which is a part of the most general issue of access to justice, is difficult to be provided for in all Member States. For instance, the CA of Douai has raised serious concerns about the quality of the defence in its jurisdiction because lawyers are neither specialized nor specifically trained in the EAW procedures. Defence lawyers of the Paris Bar Association have underlined the fact that the quality of the defence depends also on the budget allocated for justice matters. Legal aid fees at approximately 114€ per case are considered by the defence lawyers as insufficient to ensure access to a qualified lawyer.

Some magistrates said that they are sometimes worried about the level of corruption in the judiciary and law enforcement organisations in few Member States. One magistrate dealt with a case in which there was a problem of corruption (Bulgaria). Of course, such a situation creates a durable lack of confidence in the other judicial system.

The overall level of cooperation with the British and Irish judicial authorities is considered not satisfying by the majority of prosecutors and judges. In particular, bordering jurisdictions such as the CA of Douai attribute their overloading with EAW requests to the British authorities which who do not arrest persons travelling through the Channel Tunnel against whom a EAW has been issued but, instead, inform the French authorities on their arrival in the French territory. Therefore, these persons are arrested by the French law enforcement authorities and the burden to execute the EAWs in question falls to the French judicial authorities.

According to one prosecutor, one aspect of fair trial appears to be problematic when dealing with the Italian judicial authorities : it seems that convictions on definitive sentences are passed in absentia and that no means of remedy is available to the convicted person.

Regarding the level of proportionality (relation between the crime/offence committed and the expected level of sanctions), Polish and Romanian judicial authorities issue a great number of EAWs for petty crimes with heavy penalties which are considered completely disproportionate by all of the magistrates interviewed.

6.4.3 Problems in the execution of EAWs issued by other Member States

The peer review has brought to light problems regarding the execution of EAW's issued by other Member States.

The majority of the magistrates interviewed have observed that in some cases there is a serious lapse of time between the act and the issuing of the EAW. In many cases, they would like to better know the aftermath and the results of the procedure in the issuing Member State. Such information would be a factor of confidence. But this remark concerns EAWs issued by all Member States.

With the other Member States, they noted problems regarding communication between the judicial authorities. For instance, Judges of the Investigative chamber have encountered communication problems with the Portuguese judicial authorities regarding additional information requests. Additional information may take a long time to be communicated or may never be provided. Prosecutors have experienced long delays regarding requests for additional information to the Italian judicial authorities because of translation problems. They also underlined that the replies they receive are sometimes insufficient since the relevant information are not given.

There are also problems regarding the quality of the EAW : for instance, prosecutors acknowledge that while, in general, there are no particular problems regarding Spanish EAWs issued by the "Audencia Nacional"²³⁴, this is not the case regarding EAWs issued by local judicial authorities because the EAW single form is often filled out by clerks. When such EAWs are received requests for additional information are very frequent on behalf of the French judicial authorities. Translation of Italian EAWs is quite problematic according to both prosecutors and judges.

As regard the double criminality test, the majority of the magistrates interviewed have observed that quite often Polish, Romanian and Bulgarian EAWs have been issued for acts that do not qualify as criminal offences under French criminal law. However, they are not in favour of the re-introduction of the double criminality control for the 32 categories of offences of Art. 2 (2) of the Framework decision, which is a factor of efficiency, but are mostly complaining about the abusive, to their opinion, use of some of the broad and vague categories found in that list, such as the category of "fraud" and about the higher sentence thresholds for petty offences.

Finally, some prosecutors have stressed that they encounter difficulties with the execution of EAWs issued for offences regarding aliens and irregular immigrants as well as environmental related offences.

.....
²³⁴ A special and exceptional high court in the Spanish judiciary.

6.4.4 Statistical data

The following statistical data have been identified as possibly influencing mutual trust between the Member States.

In France, in 2011, 15 871 pre-trial detentions have been ordered in the framework of an investigative procedure (“procédure d’instruction”), and 14 860 pre-trial detention have been ordered in the framework of procedure before the District Court (“tribunal correctionnel”)²³⁵. 48.2% of people indicted are held under pre-trial detention. Regarding minors, 1019 pre-trial detention were imposed in 2010.

In criminal cases, the average length of detention is estimated at 25.3 months in 2010. For misdemeanours, the average length of detention is estimated at 0.4 months for immediate appearance procedures (“comparution immédiate”) and 6.5 months for investigative procedures.

The length of criminal proceedings in the issuing state is an important element of mutual trust²³⁶. In criminal cases, the average time between the commission of the crime and the judgment of the Court of Assizes is about 60 months in 2010. For misdemeanours, the average time between the commission of the offence and the judgment of the district court is about 11.1 months in 2010. In juvenile Courts, the average time between the commission of the offense and the judgment was about 16.4 months in 2010. For petty offences, the average time between the commission of the offence and the judgment of the police court is about 9.9 months in 2010.

The budget allocated to criminal Justice could be another element of mutual trust²³⁷. In 2011, the annual budget of the French Ministry of Justice is about 7 138 millions euros. The annual budget allocated to Judicial Justice (“programme justice judiciaire”) is about 2 960 millions euros. The annual budget allocated to legal aid is 351,10 million euros. The annual budget allocated to prison (“administration pénitentiaire”) is about 2 821 million euros. In 2012, the annual budget allocated to “security” in the annual budget of Ministry of internal affairs (“ministère de l’intérieur”) is about 17,17 milliards euros²³⁸. Annual budget allocated to the customs and border police is about 1 585 millions euros.

6.4.5 International review of national detention conditions

The last report of the Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), published in April 2012, on its visit to France at the end of 2010, noted a number of positive developments like legal reforms adopted concerning conditions of detention in prison. The CPT raised the issue of the prison overcrowding in France. If the CPT’s delegation received no allegations of deliberate ill-treatment of inmates by prison staff, in the prison of Le Havre, some cases of excessive use of force by the prison staff when dealing with incidents were reported to the delegation. The delegation also noted that there was an appreciable risk of inter-prisoner violence in that establishment. Further, the conditions under which prisoners are transferred to local health-care establishments and receive medical treatment continue to be of concern to the Committee. Concerning the special conditions of detention, for example for “high-risk

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²³⁵ Annuaire statistique du ministère de la justice, 2011-2012, Documentation française.

²³⁶ Annuaire statistique du ministère de la justice, 2011-2012, Documentation française.

²³⁷ Annuaire statistique du ministère de la justice, 2011-2012, Documentation française.

²³⁸ « Chiffres clés » du budget du ministère de l’intérieur, de l’outre-mer, des collectivités territoriales et de l’immigration

prisoner”, the CPT considers that illumination of the cells should not be lit all the night. The courtyards of isolation cells should be large enough and equipped to allow prisoners to have physical exercise.

From 2007 till now, the European Court on Human Rights has condemned France in several cases concerning the conditions of detention in the French prisons. The legal basis of the condemnation was essentially Art. 2, “right to life”, Art. 3, “prohibition of inhuman or degrading treatment”, Art. 8, “right to respect for private and family life”, Art. 13, “right to an effective remedy”, and Art. 6 (1), “right to a fair hearing”. The noteworthy cases for which France was condemned by the European Court are the following:

- full body search of a prisoner with systematic inspection every time he received a visit for two years²³⁹ ;
- suicide, during pre-trial detention of a prisoner who had serious mental problems and posing a suicide risk²⁴⁰ ;
- detention conditions and security measures imposed on a prisoner²⁴¹ ;
- failure to provide adequate medical care for anorexic prisoner²⁴² ;
- conditions of detention of a “high-risk prisoner” were inhuman but his repeated transfers were justified²⁴³ ;
- repeated full body searches, recorded on video and conducted by law-enforcement officers wearing balaclavas²⁴⁴;
- placement of a prisoner with mental disorders in a punishment block and his continued detention²⁴⁵;
- prisoner held in foul smelling cell in disciplinary wing, 23 hours a day for 28 days²⁴⁶.

6.4.6 Conclusions

In spite of the aforementioned problems with respect to mutual trust, the French judicial authorities emerged in the peer review as being confident that mutual trust among magistrates in the EU is already underway. They consider the EAW to be very useful in building this mutual trust on an everyday basis, but they regard the links between magistrates to be more important than any institutionalised mechanism of judicial cooperation.

On the contrary, the defence lawyers interviewed do not share the magistrate’s optimism regarding the building of mutual trust among Member States. In their point of view, the principle of mutual trust and the presumptions on which is based not only hamper any possibility for a successful defence but also hide discrepancies in terms of human rights standards or even clear violations of fundamental rights. Because of mutual trust defence lawyers have difficulty to plead violations of the ECHR since they are almost never accepted by the French courts. However, it was noted that such pleas are very seldom accompanied by hard evidence which in fact are very difficult to establish.

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²³⁹ ECtHR (section II), Judgment of 6 June 2007, Case no. 70204/01, *Frérot v. France*.

²⁴⁰ ECtHR, (Chamber Judgment), Judgment of 16 October 2008, Case no. 5608/05, *Renolde v. France*.

²⁴¹ ECtHR (Section V), Judgment of 9 July 2009, Case no. 39364/05, *Khider v. France*.

²⁴² ECtHR (Section V), Judgment of 21 December 2010, Case no. 36435/07, *Raffray Taddei v. France*.

²⁴³ ECtHR (Section V), Judgment of 20 January 2011, Case no. 19606/08, *Payet v. France*.

²⁴⁴ ECtHR (Section V), Judgment of 20 January, Case no. 51246/08, *El Shennawy v. France*.

²⁴⁵ ECtHR (Section V), Judgment of 3 November 2011, Case no. 32010/07, *Cocaign v. France*.

²⁴⁶ ECtHR (Section V), Judgment of 10 November 2011, Case no. 48337/09, *Plathey v. France*.



LIBERTE

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6.5 Experiences with the current evaluation methodology of the peer-reviews EAW

No particular observation regarding the methodology of the research or the quality of the experts has been made during the peer-reviews. The persons interviewed have never took part in such reviews before.

Concerning the methodology, the combining of three approaches - legal analysis, statistics and peer review – has produced many results that give a relatively accurate picture of the operational difficulties of EAW concerning proportionality.

However, taken separately, the three approaches showed weaknesses and limitations:

Concerning the legal analysis: this method is instructive if the analysis is not too punctual and resituated in the entire legal system. The legal analysis must be contextualized in order to permit comparison between the systems. The techniques of comparative law should be used.

Concerning the statistics: statistics from the French Ministry of Justice are not sufficient for a precise and adequate evaluation of the European cooperation instruments. Regarding data on judicial international activities, the statistical system on criminal Justice is not fine enough.

Regarding peer-reviews, they have led to open and interesting discussions, with a good general output. The interviews highlighted practical problems in the functioning of the EAW. Some concrete solutions have been proposed by practitioners. The questionnaires should be prepared very precisely. The appropriateness of the questionnaire largely determines the quality of the results of the peer-reviews. The accuracy of the questionnaire is essential in order to conduct the interviews seriously and to obtain comparable results between different Member States. However, the interview should allow the possibility of spontaneous discussion beyond the questionnaire: this would permit to identify practical problems that evaluators could have not imagine. But interviewees spoke more freely about the malfunctions of other Member States than their own. Sometimes they tended to search the answer expected by the evaluators. As a consequence, considerations should be given to ensure a better anonymity of answers. Evaluators should not have any influence on the careers of the professional interviewed.

Annex to the Country Report France – Statistics

Pascal Beauvais

1. Type of offences for which the European Arrest Warrant is most often issued

For this question, there are no statistics from the statistical services of the Ministry of Justice. The information obtained come from the *Bureau de l'entraide pénale internationale* ("BEPI"), Ministry of Justice.

The figures do not reflect accurately the activities of the courts related to the EAW : indeed, the data of the BEPI are incomplete due to the direct transmission of many EAWs from judicial authorities : a number of jurisdictions do not provide complete and exhaustive information relating to EAWs in their jurisdiction to the Ministry, even if it is compulsory.

According to the BEPI, the most commonly issued extradition requests are :

- "robbery" (with organized gang);
- "offences of drugs trafficking";
- "fraud";
- "bodily injury by intent" (with organized gang);
- "murder".

The vast majority of EAW issued by French authorities refer to the most serious offences crimes against the person and property.

2/3. Member States issuing the highest number of requests for executing a European Arrest Warrant (in particular of the participating countries)

According to the BEPI, Belgium, Spain, Poland, Germany, and Romania are the states that address the most EAW in France.²⁴⁷

From 2004 to 2010, Germany addressed 791 EAW in France, The Netherlands addressed 502 EAW.²⁴⁸

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²⁴⁷ Information given by the *Bureau de l'entraide pénale internationale* (BEPI), Ministry of Justice.

²⁴⁸ Information given by the *Bureau de l'entraide pénale internationale* (BEPI), Ministry of Justice.

4. General country information

a. Number of inhabitants

65 800 000 the 1st January 2013²⁴⁹

b. Annual State budget

The total net expenditure of France in 2011 was € 1 262 300 million, including social insurance and extra budgets.²⁵⁰

According to the Ministry of Economics and Finance, in 2011, the overall budget of the central state was € 446 700 million (36,83%), the budget of the territorial entities (Region, departments, cities...) was € 234 4000 million (19,33%). The amount of expenditure for social insurance was € 531 800 million (43,85%).

The budget of the Ministry of Justice was € 7 138 million.

c./d. Annual budget allocated to courts, public prosecution and legal aid / to the police, customs, border police, prisons

In 2011, the annual budget of the French Ministry of Justice is about 7 138 million euros.²⁵¹

The annual budget allocated to Judicial Justice (“Programme justice judiciaire”) is about 2 960 million euros.²⁵²

The annual budget allocated to Prison (“Administration pénitentiaire”) is about 2 821 million euros.²⁵³

In 2012, the annual budget allocated to “security” in the annual budget of Ministry of Internal affairs (“Ministère de l’Intérieur”) is about 17 170 million euros.²⁵⁴ Annual budget allocated to the customs and border police is about 1 585 million euros

The annual budget allocated to legal aid is 351,10 million euros.²⁵⁵

According to the “Chiffres-clefs de la Justice 2012” (Document of the Ministry of Justice, 2012):

Numbers of persons admitted to legal aid.	Numbers of persons admitted to legal aid in criminal cases	Numbers of persons admitted to legal aid in civil cases.
882 607	373 166	509 167

.....
²⁴⁹ Reported by Institut National de la Statistique et des Etudes Economiques (INSEE) – (www.insee.fr/)

²⁵⁰ Web site of the Ministry of Economics and Finance <http://www.performance-publique.budget.gouv.fr/le-budget-et-les-comptes-de-letat/le-budget-de-letat/approfondir/le-tableau-de-bord-des-finances-publiques/toutes-administrations-publiques.html> (accessed 16 March 2013).

²⁵¹ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁵² Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁵³ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁵⁴ « Chiffres clés » du budget du Ministère de l’intérieur, de l’outre-mer, des collectivités territoriales et de l’immigration.

²⁵⁵ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

e. Number of public prosecutors and number of public prosecutors responsible for issuing a European Arrest Warrant?

In 2012, the Magistrates members of the Public Prosecutor (“Ministère public”) are 1717, including 315 magistrates near the Courts of Appeal (“Cour d’appel”), and 1402 near the District Court (“Tribunal de Grande instance”). In these data are also included 36 General Prosecutors (“Procureurs généraux”) and 162 District Prosecutors of the Republic (“Procureurs de la République”).²⁵⁶

In principle, the District Prosecutors are responsible for issuing a EAW, but practically many others magistrates, members of the Public Prosecutor can deal with the EAW. And, as the interviews revealed, some public prosecutor offices are much more active in issuing EAWs than others, mostly depending on the location of the prosecution office and the type of daily cases. In any case, EAW counts for a small proportion of the activities of the prosecutors. So, on the basis of the data available, it is not possible to assess the average workload of a prosecutor responsible for issuing a EAW.

f. Number of police officers, custom officers, border police (in general and more specific the no. of officers responsible for the EAW procedure (for example arrest, transit, etc.)

No data available.

g. Total number of (professional) judges and the number of judges responsible for the judicial part of the EAW procedure (to make the surrender decision)

Jurisdiction for the execution of a EAW is, principally, exercised by the Investigative Chamber (Court of appeal) in France. But, other judges can intervene (JLD, Court of cassation). In reality, it is not possible to specifically identify the exact number of professional judges responsible for the EAW procedure - it is even not possible to specifically identify the exact number of judges who devoted to criminal matters.

In November 2012, are recorded:²⁵⁷

- 3157 non-specialized judges (1138 in the Courts of Appeal, 2019 in the District Courts)
- 569 investigating judges
- 432 juvenile court judges
- 372 judges for the application of penalties

As a consequence, the average workload of the judges (and also prosecutors) involved in proceedings on the execution of a EAW is not evaluated by the Ministry of Justice. It would be very difficult to obtain accurate data on that point to the extent that EAW only accounts for a small proportion of the cases and of the workload.

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²⁵⁶ Information obtained from the Ministry of Justice : « Direction des services judiciaires / Sous-direction des ressources humaines de la magistrature / RHM1 »

²⁵⁷ Information obtained from the Ministry of Justice : « Direction des services judiciaires / Sous-direction des ressources humaines de la magistrature / RHM1 »

5. Performance

a. Number of European Arrest Warrants issued in a given year (including information about the category of crimes committed)
In 2010, French prosecutors have issued 1240 EAWs.²⁵⁸ In 2011, they have issued 1156 EAWs.²⁵⁹

There are no statistics available on the categories of crimes committed for which the EAW requests were issued.

b. Number of EAWs executed in a given year (including information about the category of crimes committed)
In 2010, 1156 EAWs have been executed in France (832 persons arrested, 673 surrendered). In 2011, 1102 EAWs have been executed in France (906 persons arrested, 756 surrendered).²⁶⁰

c. Average duration of a EAW procedure from the formal transmission of the request until the surrender and transit of the requested person (including information about the duration of the sub-steps) in days
In 2010, the average duration of proceedings on the execution of a EAW is around 20 days.²⁶¹

Valid data on further sub-steps are not available.

d. Average duration of judicial proceedings (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court), if possible related to certain categories of crime, instead of the average total duration of a EAW procedure from the formal transmission of a EAW request until the final judgment in a judicial proceeding (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court)

In 2011, in criminal cases, the average time between the commission of the crime and the judgment of the Court of Assizes (first instance) is about 34 months. The average time between the first judgment and the appeal is about 17,7 months.²⁶²

For misdemeanours, the average time between the commission of the offence and the judgment of the district court is about 11.4 months in 2011. The average time between the first judgment and the appeal is about 16 months.²⁶³

For petty offences (“contraventions de 5e classe”), the average time between the commission of the offence and the judgment of the police court is about 13,5 months in 2011. The average time between the first judgment and the appeal is about 13,5 months.²⁶⁴

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²⁵⁸ Information given by the Bureau de l'entraide pénale internationale (BEPI), Ministry of Justice.

²⁵⁹ Information given by the Bureau de l'entraide pénale internationale (BEPI), Ministry of Justice.

²⁶⁰ Information given by the Bureau de l'entraide pénale internationale (BEPI), Ministry of Justice.

²⁶¹ Information given by the Bureau de l'entraide pénale internationale (BEPI), Ministry of Justice.

²⁶² Chiffres-clefs de la Justice 2012, Document of the Ministry of Justice, 2012.

²⁶³ Chiffres-clefs de la Justice 2012, Document of the Ministry of Justice, 2012.

²⁶⁴ Chiffres-clefs de la Justice 2012, Document of the Ministry of Justice, 2012.

In juvenile Courts, the average time between the commission of the offense and the judgment was about 16.4 months in 2010.²⁶⁵

e. Total number of incoming criminal cases in the courts of first instance compared to the total number of EAW cases to be reviewed by a judicial authority responsible for granting or refusing a request to surrender a person

According to the “Chiffres-clefs de la Justice 2012” (Document of the Ministry of Justice, 2012):

Activité des parquets en 2011			
	2011	%	Evolution 2010/09 (%)
Procès-verbaux reçus	5.243.334	100,0	+ 5,6
dont auteur inconnu	3.191.209	60,9	+ 11,2
Affaires traitées	4.751.586		+ 5,5
Classement d'affaires non poursuivables	333.020	100,0	+ 7,5
Infractions mal caractérisées, charges insuffisantes	490.298	14,7	+ 1,8
Défaut d'élucidation	2.842.722	85,3	+ 8,6
Orientation des affaires poursuivables	1.418.566	100,0	+ 1,1
Poursuites	628.368	44,3 a	-1,7
devant le tribunal correctionnel	513.911		-0,2
dont: selon une procédure de CRPC	77.569		-0,9
selon une procédure d'ordonnance pénale	151.029		+ 10,8
devant le juge d'instruction	17.548		-10,7
devant le juge des enfants	48.539		-10,1
devant le tribunal de police	48.539		-5,2
Compositions pénales	72.519	5,1 b	-0,4
Procédure alternatives aux poursuites	558.003	39,3 c	+ 5,8
Classements sans suite	159.676	11,3 d	-2,1
Taux de réponse pénale (a+b+c)	88,7%		(88,4% en 2010)

g. Average workload of a public prosecutor responsible for issuing a EAW and/or the pre-trial procedure of a EAW-related case
As a consequence, the average workload of the prosecutors involved in proceedings on the execution of a EAW is not evaluated by the Ministry of Justice. It would be very difficult to obtain accurate data on that point to the extent that EAW only accounts for a small proportion of the cases and of the workload.

²⁶⁵ Information given by the Bureau de l'entraide pénale internationale (BEPI), Ministry of Justice.

6. Arrest and detention

a. *Remand detention rate (detainees / population; detention on remand / detention for other reasons), maybe also immigrant detention rates and juvenile detention rates*

In France, in 2011, 15 871 pre-trial detentions have been ordered in the framework of an investigative procedure (“procédure d’instruction”), and 14 860 pre-trial detention have been ordered in the framework of procedure before the District Court (“tribunal correctionnel”).²⁶⁶ 48.2% of people indicted are held under pre-trial detention. Regarding minors, 1019 pre-trial detention were imposed in 2010.²⁶⁷

b. *Average duration of detention on remand / average duration of criminal proceedings*

In criminal cases, the average length of detention is estimated at 25.3 months in 2010.²⁶⁸

For misdemeanours, the average length of detention is estimated at 0.4 months for immediate appearance procedures (“comparution immédiate”) and 6.5 months for investigative procedures.²⁶⁹

According to the “Chiffres-clefs de la Justice 2012” (Document of the Ministry of Justice, 2012):

Condamnations après détention provisoire	30.531	durée de détention provisoire [en mois]
dont: crimes	1.787	24,2
délits	28.732	3,8
dans le cadre d’une instruction	15.556	6,6
dans le cadre d’une comparution immédiate	13.176	0,5

²⁶⁶ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁶⁷ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁶⁸ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

²⁶⁹ Annuaire statistique de la Justice, éd. 2011-2012, La Documentation française.

7. Information of international organisations

The last report of the Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), published in April 2012, on its visit to France at the end of 2010, noted a number of positive developments like legal reforms adopted concerning conditions of detention in prison. The CPT raised the issue of the prison overcrowding in France. If the CPT's delegation received no allegations of deliberate ill-treatment of inmates by prison staff, in the prison of Le Havre, some cases of excessive use of force by staff when dealing with incidents were reported to the delegation. The delegation also noted that there was an appreciable risk of inter-prisoner violence in that establishment. Further, the conditions under which prisoners are transferred to local health-care establishments and receive medical treatment continue to be of concern to the Committee. Concerning the special conditions of detention, for example for "high-risk prisoner", the CPT considers that illumination of the cells should not be lit all the night. The courtyards of isolation cells should be large enough and equipped to allow prisoners to have physical exercise.

From 2007 till now, the European Court on Human Rights has condemned France in several cases concerning the conditions of detention in the French prisons. The legal basis of the condemnation was essentially article 2, "right to life", article 3, "prohibition of inhuman or degrading treatment", article 8, "right to respect for private and family life", article 13, "right to an effective remedy", and article 6 § 1, "right to a fair hearing". The noteworthy cases for which France was condemned by the European Court are the followings:

- full body search of a prisoner with systematic inspection every time he received a visit for two years²⁷⁰;
- suicide, during pre-trial detention of a prisoner who had serious mental problems and posing a suicide risk²⁷¹;
- detention conditions and security measures imposed on a prisoner²⁷²;
- failure to provide adequate medical care for anorexic prisoner²⁷³;
- conditions of detention of a "high-risk prisoner" were inhuman but his repeated transfers were justified²⁷⁴;
- repeated full body searches, recorded on video and conducted by law-enforcement officers wearing balaclavas²⁷⁵;
- placement of a prisoner with mental disorders in a punishment block and his continued detention²⁷⁶;
- prisoner held in foul smelling cell in disciplinary wing, 23 hours a day for 28 days²⁷⁷.

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²⁷⁰ ECtHR (section II), Judgement of 6 June 2007, *Frérot v. France*, n°70204/01.

²⁷¹ ECtHR, (Chamber Judgement), Judgement of 16 October 2008, *Renolde v. France*, n°5608/05.

²⁷² ECtHR (Section V), Judgement of 9 July 2009, *Khider v. France*, n° 39364/05.

²⁷³ ECtHR (Section V), Judgement of 21 December 2010, *Raffray Taddei v. France*, n°36435/07.

²⁷⁴ ECtHR (Section V), Judgement of 20 January 2011, *Payet v. France*, no 19606/08.

²⁷⁵ ECtHR (Section V), Judgement of 20 January, *El Shennawy v. France*, n° 51246/08.

²⁷⁶ ECtHR (Section V), Judgement of 3 November 2011, *Cocaign v. France*, no 32010/07.

²⁷⁷ ECtHR (Section V), Judgement of 10 November 2011, *Plathey v. France* n° 48337/09.

7 Country Report The Netherlands

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This report is based on a legal analysis of the Dutch criminal justice system, interviews with practitioners (most notably: judges, prosecutors and defence lawyers) dealing with European Arrest Warrant (EAW) cases, and on a collection of statistical data and other information relating to criminal proceedings in the Netherlands. The report is divided in five parts. The first part will explain the legal status and elaboration of the principle of proportionality in the Dutch criminal justice system (7.1.). The second part will precise the Dutch legal rules and experiences with issuing EAWs (7.2). The third part will deal with the execution of EAWs in the Netherlands (7.3.). The fourth part will analyse the relevant factors for the degree of mutual trust (7.4). We will conclude with some observations on the evaluation methods applied (7.5).²⁷⁸

7.1 The principle of proportionality in the Dutch criminal justice system

7.1.1 The Status and Content of the Proportionality Principle

The principle of proportionality is not explicitly enshrined in Dutch constitutional law or in the relevant statutory law, at least not as a principle with general application. It must primarily be considered a general – non-codified - principle of law, which applies as such to criminal procedure law as well.²⁷⁹ Within this domain, legal doctrine distinguishes a category of ‘general principles of criminal procedure law’. The normative value of the general principles of criminal procedural law is acknowledged in case law of the Dutch Supreme Court.²⁸⁰ The proportionality principle is in this context, however, not considered as a separate legal principle but it rather forms part of the principle of the *redelijke en billijke belangenafweging* (‘fair balance between the relevant interests’). This latter principle entails that every decision/action should be the result of a proper balancing of interests. This balance contains two elements. First, the least intrusive means of action should be chosen. The legal doctrine applies the concept of subsidiarity to refer to this element, which mirrors thus a different understanding of subsidiarity than the principle with the same name enshrined in the constitutional system of the EU. The second element is that the negative consequences of a measure may not be disproportionate to the objectives achieved by the order. This element is referred to as the proportionality test.

It is important to note that the principle of a ‘fair balance between the relevant interests’ carries both an abstract and a concrete dimension. The abstract dimension concerns the requirement that law and policy should be the result of a fair balance of interests. The concrete dimension concerns the individual decision based on law. The application of law in the individual case must be proportionate as well. In light of the margin of discretion awarded to the prosecution authorities, review by courts is limited to *manifest* breaches of the proportionality principle.

The principle of proportionality has not been laid down as a general principle in statutory law governing criminal procedure, *e.g.* in the Criminal Procedure Code (CPP). The principle does appear, however, with

.....
²⁷⁸ Utrecht University, School of Law, The Netherlands.

²⁷⁹ G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2011, p. 50.

²⁸⁰ See *e.g.* case ‘Braak bij binnentreden’, Supreme Court 12 December 1978, NJ 1979; case ‘niet-ontvankelijkheid openbaar ministerie’, Supreme Court 22 December 1981, NJ 1982, 233.

regard to specific issues, for example in relation to the use of specific investigative powers (see below). The principle of proportionality can furthermore be found in administrative guidelines. This may in part be explained by the opportunity principle on which the Dutch Criminal Justice system is based. Administrative guidelines serve to ensure consistency in the application of the public prosecutor's discretion.

In the administrative guidelines concerning the prosecution of fiscal, customs and surcharge crimes (financial crimes),²⁸¹ the proportionality principle is reflected in the choice for either administrative or criminal enforcement. Criminal enforcement is appropriate according to the guidelines in case of a severe damage to the interests of the citizen or state.

Other guidelines relate to sentences the public prosecutor should demand in criminal proceedings. These so-called Polaris guidelines are extremely precise.²⁸² Sentences are prescribed in relation to specific crimes and specific circumstances. Since 1999, computer software programs (BOS) provide automatic guidelines, which now cover almost eighty percent of the prosecuted common criminality.²⁸³ Obviously, this has a substantial unifying effect on national sentence policies.²⁸⁴ The proportionality principle is, nevertheless, largely left intact, as many proportionality arguments, which affect the severity of the sentence, are included in the guidelines.

Separate mention should be made of the proportionality principle in relation to the development of EU criminal law. In 2011,²⁸⁵ the Dutch government communicated to the Dutch Parliament its general views on the development of EU criminal law. In its letter to Parliament, the government formulated a set of criteria to evaluate new European proposals. One of the 8 criteria that was put forward, concerns the proportionality principle defined as: "what is expected from the Member States, citizens and business to comply with the measure in question, must be proportionate to the problem the measure aims to address". As such, it may influence not only the Dutch position taking in the EU decision making process, but also emerge as an important parameter for the implementation of EU law in the field of criminal matters.

7.1.2 Application of the proportionality principle

Dutch courts are bound by the proportionality principle when imposing a criminal sentence. This is *inter alia* implied by Art. 6 of the European Convention of Human Rights (ECHR). The European Court of Human Rights (ECtHR) has decided in the *Albert and Le Compte* case that a judge should be competent when imposing a criminal sanction 'to assess the proportionality of the sanction'.²⁸⁶ Art. 94 of the Dutch Constitution establishes the precedence of directly effective binding provisions of international treaties over national law. The ECHR is therefore directly applicable in the Dutch legal order which binds Dutch courts to the proportionality principle.

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²⁸¹ Amendments to the 'Aanmeldings- transactie en vervolgingsrichtlijnen van fiscale delicten, douane- en toeslagendelicten', Strc 5 July 2011, nr. 11782.

²⁸² The so-called Polaris guidelines are publicly available at the website of the Dutch public prosecutor office: www.om.nl. However, they only apply to the most common crimes for which rapid handling is necessary.

²⁸³ T. P. Marguery, *Unity and Diversity of the Public Prosecution Services in Europe: a study of the Czech, Dutch, French and Polish Systems*, Dissertation University of Groningen, 2008, p. 126.

²⁸⁴ Marguery, 2008, p. 126.

²⁸⁵ Letter of the Minister of Security and Justice of 8 November 2011, *Kamerstukken II*, 32 317, nr. 80.

²⁸⁶ ECtHR, ECtHR, judgment of 24 October, application nos. 7299/75 and 7496/76, *Albert and Le Compte v. Belgium*, § 36.

The Dutch public prosecution is also bound by the proportionality principle. The application of the opportunity principle entails substantive policy discretion for public prosecution to assess whether criminal prosecution is desirable in individual cases. Such policy discretion includes the assessment whether alternatives for criminal enforcement must be preferred (criminal enforcement as *ultimum remedium*). The Polaris guidelines mentioned in the previous section indicate that the public prosecution takes account of the principle of proportionality when demanding a sentence.

7.1.3 Investigative Measures and Proportionality

Investigative measures that affect fundamental rights and freedoms of citizens laid down in the Dutch constitution, such as taping of telephone conversations, are fully subject to what was labelled earlier as subsidiarity (but what is actually an element of the proportionality principle).²⁸⁷ The least intrusive means to conduct the investigation must be chosen. Furthermore, the principle of proportionality requires the authorities to balance the interest of prosecution and the violation of the constitutional rights of the suspects before taking investigative measures.

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²⁸⁷ G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2008, p. 442.



7.1.3.1 Role of the investigative judge

The police are required to request the investigative judge leave to impose investigative measures. The latter decides whether the conditions which are set out in the relevant statutory provision (providing the police with the competence to take the investigative measure) are fulfilled and that the principle a fair balance between the relevant interests is complied with. An example of such a provision is Art. 126m (1) CCP which entails the power to tap telephones. The judge leading the investigation in the final trial has to decide whether the investigative judge could reasonably have come to his decision and whether the public prosecutor has acted in accordance with the authorization issued by the investigative judge.²⁸⁸ The judge in the final trial, who reviews whether the discretionary powers have been exercised reasonably, can only conduct a limited review, meaning that a level of discretion is granted to the investigative judge. The court only reviews whether the limits of this discretion have been respected.²⁸⁹

However, on the basis of an evaluation of the Special Investigative Powers Act (*Wet Bijzondere Opsporingsbevoegdheden*) it has become clear that investigative judges are not able to consider properly whether or not an investigative measure is proportionate in the case at hand. Assessing proportionality by the investigative judge comes therefore often down to a merely rubber-stamping exercise in which the investigative judge without further investigation approves requests of the law enforcement authorities.²⁹⁰

7.1.3.2 Arrest and pre-trial detention

The competence of the police to arrest individuals is regulated in Art. 53 and 54 CCP. Art. 53 provides for the competence to arrest a suspect *in flagrante delicto* whereas Art. 54 covers other arrests. The proportionality principle applies to arrests as well, for instance with regard to the use of violence.²⁹¹ Non-compliance with proportionality may have as a consequence that the public prosecution loses its right to initiate proceedings, as disproportionate violence constitutes a “serious form default” (and thereby an obstacle to prosecution) in the sense of Art. 359a(3) CCP.²⁹²

Art. 133 CCP regulates pre-trial detention. This type of detention must be requested by a senior police officer (*hulpofficier van Justitie*) or a public prosecutor and be approved by a judge.²⁹³ The judge determines whether the following conditions as set out in Art. 67 CCP are met:

There should be a ‘serious presumption’ that the offender has committed an offence:

- that carries a maximum statutory prison sentence of four years or more; or
- that is specifically designated by law, or
- that carries the penalty of imprisonment while the suspect does not have a fixed domicile or residence in the Netherlands.

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²⁸⁸ Supreme Court, 11 October 2005, NJ 2006,625; Supreme Court, 21 November 2006, NJ 2007, 233.

²⁸⁹ G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2011, p. 33.

²⁹⁰ P.A.M. Mevis, *Rechterlijke controle impliceert onderzoeken door de zittingsrechter*, DD 1997, p. 913.

²⁹¹ G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2008 p. 379.

²⁹² See e.g. case of Amsterdam District Court of 2 June 2008, LJN:BD2980, in which the suspect pleaded that the police had used a disproportionate amount of violence when arresting him. The prosecutor should therefore lose his right to prosecute the suspect. The court however did not follow this reasoning.

²⁹³ Article 63 Dutch CCP.

The term ‘serious presumption’ (*ernstige bezwaren*) implies a qualified suspicion that the suspect has indeed committed the crime of which he is suspected. Art. 67a CCP specifies that pre-trial detention may be applied only if there is a serious risk that the suspect might flee or if public safety requires the immediate detention of the suspect.

The proportionality principle, in the sense of subsidiarity as explained above, is relevant in this context as well. Courts must consider whether the objectives of pre-trial detention can only be met by fully depriving the person of his freedom or whether less intrusive means are possible, for example house arrest.²⁹⁴ In the Dutch criminal legal system as it is now, these less intrusive measures (see Art. 80 CCP) are possible only as alternative for pre-trial detention, i.e. they may only be applied if pre-trial detention is a legal possibility. Currently, however, legislation is in preparation to widen the scope of application of these measures.²⁹⁵

With regard to such less intrusive means of control over the suspect, mention needs to be made of the Dutch implementation of the Framework Decision on Mutual Recognition of Decisions on Supervision Measures as an Alternative to Provisional Detention.²⁹⁶ The proportionality principle plays an important role here as well. The Dutch government has indicated that it will make a declaration conform Art. 21 of the said Framework stating that the threshold of Art. 2 (1) of the EAW Framework Decision will be applied in the context of the application of decisions on Supervision measures as well. This will exclude the use of the Supervision Measures Framework Decision in cases in which the maximum sentence does not exceed 12 months of imprisonment for offences for which a control of dual criminality is allowed.

7.1.4 Overview of provisions regarding procedural safeguards relating to proportionality

7.1.4.1 Maximum periods of detention

In statutory law, three types of pre-trial detention are distinguished:

- Remand in Custody (*‘Bewaring’*): is that phase in the pre-trial detention during which a suspect is deprived of his freedom for a maximum of 14 days (Art. 64(1) CCP);
- Remand in Detention (*‘Gevangenhouding’*): this phase follows the remand in custody. A suspect may be deprived of his freedom for a period of maximum 90 days until the proceedings start (Art. 66(3) CCP). This form of detention may not only be applied in the pre-trial stage but also after the investigation for the trial has commenced (Art. 65(2))
- Detention Pending Trial (*‘Gevangenneming’*): a judge if the suspect is still free or when the investigation at trial has commenced can order this.²⁹⁷ The maximum period of detention is also 90 days.

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²⁹⁴ Raad voor Strafrechtstoepassing en Jeugdbescherming, ‘Voorlopige hechtenis- maar dan anders’, July 2011, p. 13. Available at: www.rsj.nl.

²⁹⁵ Kamerstukken II 2012-2013, 29 279, 132.

²⁹⁶ Framework Decision 2009/829/JHA of 23 October 2009, OJ 2009, L 294/20.

²⁹⁷ G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2008 p. 403.

The total period of pre-trial detention may not exceed 104 days. However, after the initiation of the hearing, Dutch statutory law provides no maximum period for pre-trial detention. On the basis of the abovementioned conditions, pre-trial detention may subsequently be extended for sixty days following the final judgment (Art. 66(2) CCP). If pre-trial detention has not been terminated in the meantime, it does so as soon as the judgment becomes irrevocable. In practice this means, especially in complicated cases, that pre-trial detention may sometimes last for several years.

7.1.4.2 *Right to contract a lawyer*

Art. 63(4) CCP grants the suspect a right to a lawyer in pre-trial detention. The lawyer can be present while the suspect is being interrogated, and is allowed to speak. (Art. 63(4) CCP).

A more general provision of the CCP provides that a person is entitled to contract a lawyer (Art. 28). The second paragraph of this article provides that the suspect should be able to contact his lawyer whenever he wishes to do so.

7.1.4.3 *Legal remedies during pre-trial detention*

During the pre-trial detention, the suspect has the right to be heard and assisted by a lawyer in decisions on imposing or extending detention. The following remedies are at his disposal:

- He may appeal to the Court of Appeal (*'Gerechtshof'*) against the remand detention order, or the order to prolong it. This appeal can only be lodged once (Art. 71, par. 1 and 2 CCP);
- He may repeatedly request the court that issued the remand in custody order or the remand order, to terminate this (Art. 69 CCP). He may appeal to the Court of Appeal against a negative decision of the court (Art. 87(2) CCP).
- He may repeatedly request the judge who issued the order, to suspend his detention (Art. 80-87 CCP); he may appeal to the Court of Appeal against a negative decision of the court (Art. 87(2) CCP).

The possibility of appeal to the Court of Appeal can only be used once. So if a suspect has already filed an appeal against the decision of a court not to suspend its pre-trial detention, no appeal may subsequently be lodged against the decision of the court not to terminate his detention.

If the existing possibilities for disputing pre-trial detention do not give any prospects for a swift decision, the suspect may submit a request for termination or suspension to a civil judge by initiating summary civil proceedings.²⁹⁸

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²⁹⁸ Report of the Netherlands responding to Public Open Tender JLS/D3/2007/01 published in the Official Journal of the European Union no. S93 of 16-05-2007. Study: an analysis of minimum standards in pre-trial detention and the ground for regular review in the Member States of the EU Contracting Authority: European Commission. Available at: http://www.ecba.org/extdocserv/projects/JusticeForum/Netherlands_2_180309.pdf.

7.1.4.4 Legal remedies against a ruling of conviction

When a suspect has been convicted, several legal remedies remain available. The Dutch legal system makes a distinction between ‘regular’ legal remedies and ‘special’ legal remedies. Regular legal remedies are available to the convicted person as long as the decision has not become final. The special legal remedies become available after the judgment has become final. Regular legal remedies furthermore have a suspending effect whereas special legal remedies do not.

Regular legal remedies

- Appeal (Art. 404 CCP): the Court of Appeal (*‘Gerechtshof’*) has the power to review the judgment of lower district courts. It conducts a full review of both the legal aspects and the facts.
- Appeal to the Dutch Supreme Court (Art. 427 CCP): This will not entail a factual review of the entire case, but concerns a review of the application of the legal aspects only.

Special legal remedies

- Cassation in the interest of the law (*‘cassatie in het belang der wet’*) (Art. 456 CCP): This can only be instituted by the procurator-general (*Procureur-generaal*) of the Dutch Supreme Court in cases relevant for the general ‘development of the law’.
- Revision (*‘Herziening’*) (Art. 457 CCP): even after the judgment has become final, in very exceptional circumstances a revision of the judgment is possible. Such circumstances may be found when final judgments of a later date contradict the judgment in **casu** or when new facts contradict the judgment.

Also when the ECtHR has given a different ruling in a case where the same facts were at hand and the person is convicted based on the same evidence, revision is possible.

7.1.5 The Principle of Opportunity

The Dutch criminal justice system provides for discretion of the competent authority whether to prosecute or not (‘principle of opportunity’). The opportunity principle may be defined as the freedom for the public prosecution to select which criminal cases to prosecute and when to opt for other settlements (most notably transactions or dismissals).

Art. 167 and 242 CCP provide that the public prosecution may decide not to prosecute or to prosecute further. This mirrors the opportunity principle *‘in optima forma’*. In reality, the freedom for the public prosecution is restricted to a greater extent than may be implied on the basis of these provisions. First, the notion of the ‘general interest’ as a reason not to prosecute is linked to the responsibility of the Minister of Justice.²⁹⁹ The decision not to prosecute is therefore taken with a view on the political responsibility of the Minister of Justice.³⁰⁰ Furthermore, the meaning of the notion of ‘general interest’ has been defined in policy instructions (*‘Vervolgingsrichtlijnen’*) provided by the Board of General Prosecutors (*‘College van Procureurs-generaal’*), which prescribe in which circumstances prosecution is warranted. Examples of such circumstances are:³⁰¹

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²⁹⁹ D.H. de Jong and G. Knigge, *Teksten Strafvordering*, Deventer: Kluwer, 2005, p. 14.

³⁰⁰ D.H. de Jong and G. Knigge, *Teksten Strafvordering*, Deventer: Kluwer, 2005, p. 138.

³⁰¹ Examples of grounds are listed in the guidelines of the Board, such as ‘Aanwijzing gebruik sepotgronden van het College van Procureurs-Generaal, 2009A016, 1 September 2009.

- Another type of procedure/ sanctioning other than criminal prevails (e.g. administrative or tort law).
- There is insufficient national interest, for example, the suspect will be extradited.
- The impact of the criminal act on the legal order is minimal.
- The criminal act itself is minor.
- Although the time limit to prosecute has not elapsed, the facts are old.
- There are circumstances particular to the accused such advanced age or poor health.

Lastly, the earlier mentioned Polaris guidelines curtail the public prosecution's discretion with regard to the type and severity of the sanction. All in all, although the opportunity principle applies to Dutch criminal procedure law, important limits and conditions curtail the discretion of the public prosecution.

7.2 The principle of proportionality and its relevance for the authority issuing a European Arrest Warrant

7.2.1 The role of the judicial authorities

Art. 44 of the Dutch Surrender Act ('*Overleveringswet*' hereafter DSA) provides that any public prosecutor may issue a EAW.³⁰² No distinction is made between prosecution and conviction cases. There is no special procedure in order to take the decision to issue a EAW.

A EAW can only be issued for acts punishable by a custodial sentence of a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (Art. 2 DSA). Provided these conditions are met, "the competent public prosecutor makes an independent decision on whether or not to issue a EAW based on the case details."³⁰³ There is no judicial control of these decisions.

The *Internationale Rechtshulp Centra* (IRC) play an important role in the issuing and executing phases of EAWs. There are seven IRC in the Netherlands. Each service consists of several public prosecutors and legal advisors. The service is specialized in extradition and EAW cases. The service provides advices to local public prosecutors who want to issue a EAW. In particular the IRC gives advice on how to implement the handbook. The IRC does not give any specific guidelines for deciding on issuing a EAW. It is a case-by-case assessment. In particular, IRCs receive and execute EAWs.

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³⁰² *Overleveringswet*, Stb. 2004, 195.

³⁰³ Evaluation Report on the fourth round of mutual evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between member states" Report on the Netherlands, Council of the European Union, 27 February 2009, 15370/2/08, REV 2, 7.

7.2.2 Proportionality review

7.2.2.1 *The legal basis for review*

The DSA does not provide for a specific proportionality review. The legal basis for this control can be found in national law and in the general principles of EU law (see above).³⁰⁴

A temporary proportionality check is, however, provided for in the DSA. Art. 35(3) of the DSA provides that a public prosecutor may postpone the surrender of a person on humanitarian grounds. Nevertheless, this article cannot provide a ground to refuse the surrender of the requested person.³⁰⁵

7.2.2.2 *The criteria of review*

Prosecutors give consideration to proportionality when they issue EAWs. Until the publication of the European handbook on how to issue a EAW, no guidelines or agreed standards concerning a proportionality check *specific* to the issuance of EAWs were applied.³⁰⁶ Now prosecutors use the handbook when they decide on the issuance of a EAW. However, the principle of opportunity applies in the Netherlands, therefore the decision to issue is made on a case by case basis and it is hard to pinpoint the exact extent of the review. Nevertheless, prosecutors carry out a proportionality check according to national and European criteria. In particular, the seriousness of the offence is taken into account.

It stands out of the peer review, that all practitioners agree on the fact that the judicial authorities of the issuing country should perform a proportionality check. At least, all assume (on the basis of mutual trust) that it is arranged this way. They assume that the check is not a significant delaying factor in the procedure of the execution of EAWs.

Peer reviews confirm the importance of the criteria mentioned in the handbook.

However, it is difficult to determine which criteria of the guideline exactly the issuing prosecutors are using, because it depends on the case. The issuing prosecutors balance the criteria and some others include the precise circumstances of the case such as the likeliness of the person to be convicted. There are no specific examples given. The gravity of the facts of the case and their consequences for victims are important criteria for the issuance of a EAW.

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³⁰⁴ The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 280.

³⁰⁵ Dutch Supreme Court, 28 November 2006, LJN:AY6631 and Dutch Supreme Court, 28 November 2006, LJN:AY6633.

³⁰⁶ Evaluation Report on the fourth round of mutual evaluations “The practical application of the European Arrest Warrant and corresponding surrender procedures between member states” Report on the Netherlands, Council of the European Union, 27 February 2009, 15370/2/08, REV 2, 7.

7.2.2.3 *The seriousness of the offence*

Art. 2 DSA provides that a EAW can only be issued for acts punishable by a custodial sentence (or a detention order) of a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. This is a transposition of Art. 2(1) of the Framework Decision on the EAW. Recent research conducted in the Netherlands indicates that in general “Dutch prosecutors ask for surrender of persons for heavier crimes only.”³⁰⁷

The peer review showed that prosecutors use the Handbook as a guideline for deciding whether to issue a EAW or not. In fact, all the circumstances of the facts are taken into account when deciding to issue a EAW. Public prosecutors do not issue EAWs for ‘minor offences’. Nevertheless, it remains unclear what a minor offence is since prosecutors enjoy discretion in the application of the opportunity principle. If an offence falls within the scope of Art. 2 of the Framework Decision, prosecutors may simply issue a EAW.

Whether the public prosecutors consider the reasonable chance of conviction, the effective exercise of defence rights, the privacy rights of the suspect, the cost and effort of a formal extradition proceeding, the age of the sought person and other factors, cannot be concluded on the basis of the peer review interviews.

If a decision not to issue a EAW is taken, proceedings are not necessarily terminated. A court can give a verdict *in absentia* for example.

7.2.2.4 *Problems regarding the execution of EAWs issued in the Netherlands*

According to the peer review only few problems have been made explicit. Nevertheless, one can mention the following problem, which relates to defence lawyers with a mandate to represent their client. A statement from the lawyer that he has a mandate to represent a client is valid in the Netherlands whereas it is not considered as sufficient evidence in other Member States.

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³⁰⁷ The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 253.

7.2.2.5 *Alternative means and suggestions*

Peer review evidence revealed that prosecutors always try alternative measures first before issuing a EAW. Public prosecutors issue a EAW only when no alternative means are possible or when they have no idea of the whereabouts of the wanted person. For example, they often take recourse to the SIS, the EJN or Eurojust. However, it has not been always made clear how prosecutors proceed when deciding on alternative means and which alternatives are used.

Most EAW-cases are considered to be proportionate by practitioners in the field of the EAWs (including defence lawyers).

The defence lawyers and the national coordinating public prosecutor both point out the need of fine-tuning the system of alternative means and developing more alternative means to the EAW system.

Suggestions of the defence lawyers for alternative means and for improving of the system are, inter alia: creating a European wide legal-aid system, raising the thresholds for issuing a EAW, call in the help of networks of public prosecutors (EJN) and lawyers.

7.3 The principle of proportionality and its relevance for the authority executing a European Arrest Warrant

7.3.1 General framework

Some discretion to refuse the execution of a EAW is left to the competent executing authorities. Firstly, the Netherlands has transposed certain optional grounds for refusal. Secondly, the Netherlands provides for a ground to refuse a EAW in case of humanitarian problems or of violation of fundamental rights of the person sought (see below 7.3).

7.3.1.1 *Judicial authorities having jurisdiction to execute EAWs*

Three authorities have a power of decision with regard to the surrender of a person subject to a EAW. First of all, public prosecutors, in particular the public prosecutors at the Amsterdam District Court where requested persons shall be transferred have a large margin of discretion when executing a EAW and applying refusal grounds. Secondly, the Amsterdam District Court has exclusive jurisdiction to decide upon the surrender of the requested person (Art. 22 DSA). It is therefore also the only authority competent to conduct a proportionality test. Finally, the Minister of Justice has certain discretion to decide on the suspension of a decision to surrender (Art. 9(2) DSA).

Because of the short period of time for a court to decide upon the surrender (60 days according to Art. 22(1) DSA) appeal and cassation have been abolished. The Minister of Justice has justified this by arguing that an appeal only aims at guaranteeing the uniformity of the law. Since the Amsterdam District Court decides on all cases of incoming EAWs, uniformity is guaranteed.

The peer reviews confirms that the absence of appeal against decision on EAWs is not seen as problematic. Moreover, there is always a possibility for the Attorney General to lodge a complaint 'in the interest of the law' before the Supreme Court. The Court may stay proceedings until the Supreme Court has decided on the case. Nevertheless, the decision of the Supreme Court cannot have any influence on the outcome of proceedings. No appeal is available. However, a person subject to a EAW may request a court hearing. The Court consists of three judges.

7.3.1.2 *Transposition of optional grounds for non execution of EAWs*

Art. 4(2) FD EAW³⁰⁸ constitutes a mandatory ground for refusal transposed in Art. 9(1)(a) DSA. This does not cover the situation when investigative measures have been executed with regard to a person or someone who has been arrested and put in detention, but the authorities never planned on prosecuting the person in question.³⁰⁹ For example, if someone was subject to a house search in the Netherlands upon a request from another Member State, this person is not considered to have been subject to 'criminal proceedings in the Netherlands.'

However, the Minister of Justice may order the public prosecutor to surrender the person when he is of the opinion that the person can be better prosecuted in the issuing country.³¹⁰ For example, when the requested person has its place of habitual residence in the issuing state or is already prosecuted for other crimes in that State.³¹¹

.....
³⁰⁸ "Where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based."

³⁰⁹ See e.g. Amsterdam District Court, 24 April 2009, LJN:BJo779 and Amsterdam District Court, 11 September 2009, LJN:BK9181; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 203.

³¹⁰ Article 9(2) DSA. This is a special competence of the Minister of Justice with regard to extradition. The more general competence of the Minister to give orders/guidance to the Public Prosecutor is laid down in Article 128(6) Act on Judicial Organisation (*Wet RO*) see H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 204.

³¹¹ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 205, footnotes 907-909.

Art. 4 (4) FD EAW³¹² has been implemented in Art. 9(1)(f) DSA as a mandatory ground for refusal. If prosecution becomes statute-barred according to Dutch law, the Dutch authorities have to refuse extradition, but only if a Dutch court had jurisdiction with regard to the original prosecution.³¹³ This also implies that the double criminality requirement must be fulfilled, even if the issuing state has defined the crime as a crime for which the requirement of double criminality does not have to be fulfilled. The Amsterdam District Court decides *in abstracto* whether a prosecution is statute-barred. This means that the court will judge in a hypothetical manner whether a similar case would be statute-barred in the Netherlands.³¹⁴

Art. 5(3) FD EAW³¹⁵ is implemented in Art. 6(1) DSA. The Dutch authorities can surrender a Dutch national or an alien with a residence permit for an indefinite time to the issuing state, as long as that State gives the Dutch authorities a so-called ‘return guarantee’. This return guarantee applies to both a fine and a custodial sentence.³¹⁶

Art. 4 (7) (a)³¹⁷ and **Art. 4 (7) (b)**³¹⁸ **FD EAW** are implemented in Art. 13(1) DSA. According to Art. 13(2) DSA, a public prosecutor can surrender a person, despite the fact that a crime occurred on Dutch territory. Prosecutors have a wide discretion to use this power. The Amsterdam District Court can however review their decision. Yet, the Court conducts only a marginal review and cannot impose on public prosecutors an obligation to motivate their decision extensively.³¹⁹

This Court however held that the personal circumstances of the requested person should be taken into account when judging upon Art. 13(2). A decision made by a public prosecutor omitting to take these circumstances into account would be unreasonable and surrender would have to be refused.³²⁰ In contrast, the Dutch Supreme Court always refuses a similar reasoning and decides that such a decision must be made on application of Art. 35(3) DSA, which provides for humanitarian grounds.³²¹

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³¹² “Where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law.”

³¹³ Amsterdam District Court, 28 December 2012, LJN:BZ0414.

³¹⁴ Amsterdam District Court, 13 February 2008, LJN:BF8822, Amsterdam District Court, 1 March 2013, LJN:BZ2240; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 216.

³¹⁵ “Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.”

³¹⁶ Amsterdam District Court, 6 February 2007, LJN: AZ8784.

³¹⁷ “Where the European arrest warrant relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such.”

³¹⁸ “Where the European arrest warrant relates to offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”

³¹⁹ Dutch Supreme Court, 28 November 2008, NJ 2007, 488; Amsterdam District Court, 20 January 2012, LJN:BV1745 and BV1743; Amsterdam District Court, 16 March 2012, LJN:BW0644; Amsterdam District Court, 25 January 2013, LJN:BZ3594; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 237.

³²⁰ Amsterdam District Court, 2 July 2004, LJN:AQ6068.

³²¹ Supreme Court, 28 September 2006, NJ 2007, 486 and 487.

In later cases, the Amsterdam District Court found that the ‘return guarantee’ as provided for in Art. 6(1) DSA was enough to meet the interests of the requested person.³²² In conformity with a judgment of the Supreme Court of 28 September 2008 the Amsterdam District Court decided in later cases that it could not take the personal interests of the requested person into account (e.g. the possibility to lose one’s job, house or affect one’s pregnancy).³²³

Art. 4bis FD EAW³²⁴ is implemented in Art. 12 and 12a DSA. In conformity with the principle of mutual trust, the Amsterdam District Court does only carry out a formal review of the guarantees provided by the issuing state that the rights of defence of a person subject to a EAW will be respected.³²⁵ The Dutch rules on the rights of defence are not applicable.³²⁶

7.3.1.3 Refusal to execute a EAW on humanitarian and human rights grounds

Art. 35(3) DSA provides that

*“As an exception, the actual surrender may be omitted where there are serious humanitarian reasons against actual surrender, especially where it is irresponsible for the requested person to travel, given his state of health. The issuing judicial authority shall immediately be informed of this. The public prosecutor, in consultation with the issuing judicial authority, shall decide the time and place at which actual surrender can yet take place. Actual surrender shall then take place no later than ten days after the set date.”*³²⁷

This ground can only lead to postponement of the surrender, and not to a refusal. However, the humanitarian grounds may be permanent, for example when the state of health of the person involved does not seem to improve.³²⁸ Nevertheless, in such a case, the Amsterdam District Court refuses to carry out the EAW because it would not be proportionate. The Court does not apply Art. 35 DSA.³²⁹ This is remarkable, because Art. 35 paragraph 3 explicitly formulates the exception to the duty to surrender the requested person if “.. especially when considering the health condition of the requested person it is not safe to travel”. Strictly speaking this provision was not applicable, because the requested person in the case had a severe brain tumor and was expected to pass away in the foreseeable future (as medical experts advised). That explains the reference to the proportionality principle in this judgment as a ground for refusal of surrender.

³²² Amsterdam District Court, 12 January 2007, LJN:AZ7048; Amsterdam District Court, 5 January 2010 LJN:BK9107 and BK9117.

³²³ Amsterdam District Court, 25 March 2009, LJN:Bl0772 and Amsterdam District Court, 10 December 2010 (LJN:BO8099).

³²⁴ Decisions rendered following a trial at which the person did not appear in person as amended by Framework Decision 2009/299/JHA of 26 February 2009, OJ 2009, L 81/24.

³²⁵ See for example, Amsterdam District Court, 25 January 2013, LJN:BZ3593.

³²⁶ Amsterdam District Court, 24 February 2012, LJN: BV7998.

³²⁷ Translation available at http://www.asser.nl/default.aspx?site_id=8&level1=10789&level2=10836&level3=11077&text_id=29576 (last visited December, 2012).

³²⁸ N. Rozemond, ‘Bevat het overleveringsrecht een humanitaire weigeringsgrond?’, Nederlands Juristenblad, 2007, issue 11.

³²⁹ Amsterdam District Court, 1 March 2013, LJN:BZ3203.

It is possible to institute interlocutory proceedings against a public prosecutor's decision to refuse the application of Art. 35(3). In some circumstances the humanitarian grounds fall within the scope of the protection of Art. 3 ECHR, which renders the surrender inhumane, for example when the person involved is seriously ill or dying. In that case surrender would lead to flagrant breach of the fundamental rights of the person concerned and should be refused according to Art. 11 DSA.³³⁰

Art. 11 DSA provides that

“Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950.”

This refusal ground cannot be traced back to the text of the Framework Decision on the EAW. Human rights defences have to be based on a ‘justified suspicion’ that is based on ‘facts and circumstances’.³³¹ It has to concern an imminent or flagrant threat of a violation of human rights, not just the general situation the issuing country.³³² The court's starting point is the trust that the issuing country respects the rights enshrined in the ECHR.³³³ The concept ‘flagrant’ means that if the breach concerns a reasonable time as set out in Art. 6 of the ECHR, a violation occurs when this cannot be compensated by lowering the sentence and this can have no other consequence than the dissolution of the right to prosecute.³³⁴ The Amsterdam District Court will only refuse surrender if the suspect cannot dispose of an effective remedy in the issuing Member State.³³⁵ In application of the Strasbourg case *MSS v. Belgium*, the Court may refuse surrender if there is a strong motivated suspicion that the surrender will lead to the violation of an absolute right of the requested person such as Art. 3 ECHR.³³⁶ Even so, the court chooses to refer to the proportionality principle and not to refer to Art. 11 DSA in this case. One wonders if this is the beginning of a new line of jurisprudence or just an exceptional case.

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³³⁰ N. Rozemond, ‘Bevat het overleveringsrecht een humanitaire weigeringsgrond?’, *Nederlands Juristenblad*, 2007, issue 11; this seems confirmed by the Amsterdam District Court in its judgment of 1 March 2013 mentioned in footnote 51 although the Court did not refer expressly to Article 11 DSA.

³³¹ Amsterdam District Court, 21 June 2012, LJN:BX4049.

³³² Amsterdam District Court, 24 December 2004, LJN:AR8435, Amsterdam District Court, 21 January 2005, LJN:AS7084, Amsterdam District Court, 10 October 2010, LJN:AZ1408, Amsterdam District Court, 29 May 2012, LJN:BX3744, Amsterdam District Court, 16 October 2012, LJN:BZ0835.

³³³ Amsterdam District Court, 17 August 2012, LJN:BY1996.

³³⁴ Amsterdam District Court defined this concept in a case of 1 July 2005 (LJN:AT8580)

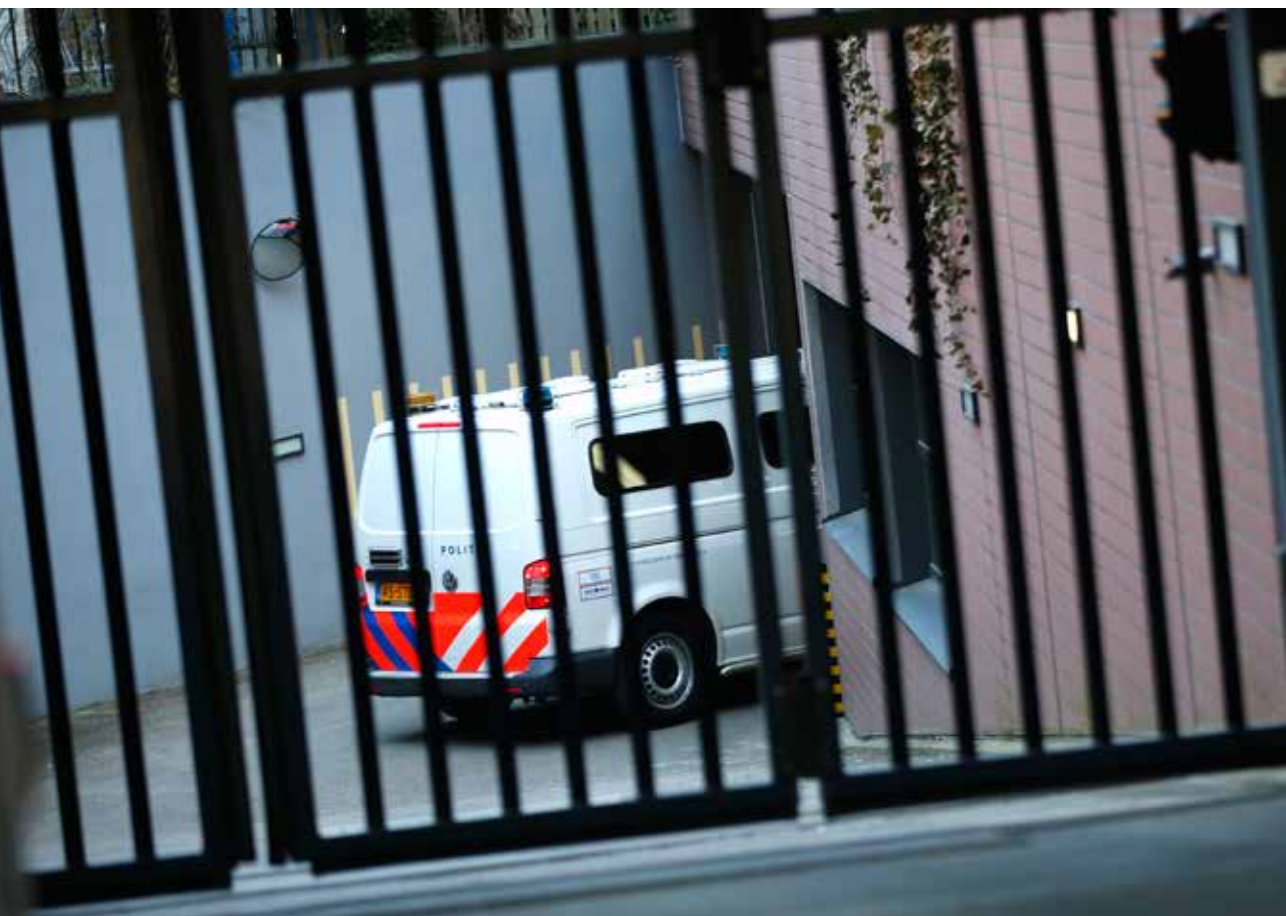
³³⁵ Amsterdam District Court, 1 July 2005 (LJN:AT8580.)

³³⁶ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011.

7.3.1.4 *Judicial review of proportionality*

Once a suspect is arrested, he may choose between

- The 'short procedure' where the suspect waives the principle of specialty, then the prosecution service decides on the EAW within 10 days out of court. The prosecution service can reject the EAW if there is a ground of refusal for example. It is only when no doubt arise that the prosecution service refuses the execution.
- The 'normal procedure', where the suspect challenges the EAW before the court. The Court has exclusive jurisdiction in the Netherlands to decide on matters concerning the EAWs and traditional extraditions. In the case of a EAW received by the Netherlands, proceedings are brought to this Court if the person subject to the EAW refuses his surrender. The prosecution service has otherwise jurisdiction to execute EAWs received in the Netherlands.



7.3.1.5 Criteria concerning the proportionality test

So far only one case is known in which the Amsterdam District Court has refused the surrender of a requested person on the grounds of proportionality.³³⁷ This Court distinguishes two types of proportionality:³³⁸

- The proportionality of the DSA (*stelsevenredigheid*): that Act is based on the assumption that in conformity with the proportionality principle enshrined in Art. 5(4) TEU, the competence to surrender does not exceed what is necessary to achieve the goal of the Framework Decision on the EAW. The Court refers to recital 7 of the Framework Decision on the EAW and to the ECJ case *Advocaten voor de Wereld* and the Opinion of the Advocate General in that case (at 18-26).³³⁹ This proportionality test is general and abstract. It only concerns the proportionality of the act adopted by the Netherlands in order to implement the Framework Decision on the EAW. Therefore, it must be distinguished from the proportionality test that a court performs concretely on the facts of a specific case.
- The proportionality of the execution of a EAW in a specific case: a court must interpret national law in the light of EU law.³⁴⁰ Dutch courts also consider EU Recommendations when deciding on a case. Therefore, they take the “Handbook on how to issue a European Arrest Warrant” into account even if the latter is not binding when deciding on the execution of a EAW. The Court refers in particular to the following grounds provided in the Handbook: “Considering the severe consequences of the execution of a EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences.” However, only in very exceptional circumstances the execution of a EAW can be refused in application of the proportionality principle.³⁴¹

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³³⁷ Amsterdam District Court, 1 March 2013, LJN:BZ3203.

³³⁸ Amsterdam District Court, 30 December 2008, LJN:BG9037, 11 December 2012, LJN BZ0832.

³³⁹ Case C-303/05 *Advocaten voor de Wereld* (2007) I-03633.

³⁴⁰ Case C-105/03 *Pupino* (2005) I-05285.

³⁴¹ In a case decided on 26 June 2012, (LJN:BY8250) the counsel for the requested person argued that surrender would be disproportionate given the highly exceptional circumstances of her client. The person concerned suffered from serious mental health problems, he was receiving treatment but it was feared that a transfer to France would deteriorate his status, also because he would not receive the same, intensive care in prison in France. In the light of the principle of proportionality the Court did not exclude to possibility that if the French authorities had been informed they would have chosen for a less intrusive solution instead of issuing a EAW. The Amsterdam District Court therefore stayed the proceedings for an indefinite amount of time, and requested the French authorities if it would be possible – given the circumstances at hand – to take over the prosecution of the person concerned. By contrast, in the case decided on 1 March 2013 (mentioned in footnote 53) the Court – relying on medical expertise – refused the execution of the EAW because the person concerned suffered from a heavy form of brain cancer for which the estimated life expectancy is 15 months. The Court decided that the combination of the heavy treatment supported by the person and the short life expectancy would in fact render in this “very exceptional circumstance the surrender illusory”.

Practitioners feel in general that it is not the task of the executing country to control the proportionality of a EAW even if this may be possible in exceptional circumstances. The issuing Member State should be in charge with a control of the proportionality of the EAW.

Prosecutors and judges rely on the principle of mutual trust.

The seriousness of the offence

Until today, the Amsterdam District Court has always rejected pleas on the *disproportionality* of a EAW issued for minor offences regarding the consequences that its execution would have on Treaty freedoms.³⁴² Even for obvious ‘petty crimes’ such as bribing a prison guard with 100 zloty (21€) the Court authorized surrender.³⁴³ According to the Court, the importance of a crime cannot be determined by the amount of money concerned, but by the interests violated.

If a minor offence fulfils the minimum standards as set out in Art. 2(1) of the FD EAW, the proportionality will be presumed as mentioned earlier.³⁴⁴ In such a case, the proportionality argument with regard to the seriousness of the offence will not succeed.³⁴⁵ Commentators refer to the legality principle in force in certain Member States as being one reason for such decisions.³⁴⁶ One might say that prosecutors of an executing state where the principle of opportunity applies are bound to execute a EAW issued by a prosecutor in a Member State where the legality principle is in force.³⁴⁷

The likely penalty imposed if the person sought is found guilty of the alleged offence

In a case of the Amsterdam District Court, the Court refused the plea of the defence counsel who argued that if the suspect would be punished in the Netherlands, he would probably be sentenced to imprisonment for a very short period or to paying a fine.³⁴⁸ Another case concerned the execution of a EAW concerning a man charged with the offence of misappropriation of goods of little value.³⁴⁹ In Poland and according to the defence, the sentence for such an offence would be limited to a suspended sentence or a small fine. However, the Court decided that the execution of the EAW was not disproportionate. It relied on the

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³⁴² Amsterdam District Court, 30 December 2008 LJN: BG9037, 17 September 2009 LJN:BN8264.

³⁴³ Amsterdam District Court, 22 July 2009, LJN:BJ4810.

³⁴⁴ A.H. Klip, *Overleveringsperikelen*, Delikt en Delinkwent 2010, 32.

³⁴⁵ Amsterdam District Court, 4 March 2009, LJN:BH6183 (smuggling of 1000 kg. hash), Amsterdam District Court, 25 March 2009, LJN:BI0772 (illegal trade in narcotics), Amsterdam District Court, 11 September 2009, LJN:BK9181 (trade in narcotics), Amsterdam District Court, 12 January 2010 LJN:BL3019 (possession of 425gr. of narcotics), Amsterdam District Court, 21 May 2010, LJN:BM6497 (misappropriation of goods: will probably just get a suspended sentence or a fine in Poland), Amsterdam District Court, 15 June 2010, LJN:BM8538 (serious violence and property crimes), Amsterdam District Court, 10 December 2010, LJN:BO8099 (smuggling committed by an organized group), Amsterdam District Court, 21 June 2012, LJN:BX4049 (acquired a knowingly counterfeit passport, personal identity card and driver’s licence), Amsterdam District Court, 25 September 2012, LJN:BY2657 (theft of a mobile phone).

³⁴⁶ A.H. Klip, *Overleveringsperikelen*, Delikt en Delinkwent 2010, 32.

³⁴⁷ The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 276.

³⁴⁸ Amsterdam District Court, 10 December 2010, LJN:BO8099.

³⁴⁹ Amsterdam District Court, 21 May 2010, LJN:BM6497.

information provided in the EAW and on the principle of mutual trust. The crime of misappropriation is sentenced in both the Netherlands and Poland with a maximum imprisonment of 12 months. It therefore fulfils the minimum requirements as set out in the DSA.

Use of less intrusive means to ensure protection/ alternative measures of legal assistance

The possibility of taking over a sentence in the future in application of Framework Decision 2008/909/JHA³⁵⁰ cannot be a reason to set aside the jurisdiction requirement and refuse extradition.³⁵¹

Effective exercise of defence rights (information of defence rights, providing translation and interpretation)

The Court rejects pleas concerning a possible violation of the principle of a fair trial as set out in Art. 6 ECHR, because of the length of the proceedings. The Court motivates its decision by a reference to the principle of mutual trust and to the fact that Member States are party to the ECHR.³⁵²

Privacy rights of the suspect (e.g. possibility to have contact with family members)

If the conditions of detention in the issuing State raise doubt on the respect of Art. 3 ECHR, the Court may stay proceedings and ask the issuing State for information. However, the Court has never refused the execution of a EAW on this ground.³⁵³

Human rights grounds

It follows from the peer review that EAWs are hardly ever refused because of a violation of human rights of the person subject to the EAW. Only in very exceptional cases (e.g. flagrant breaches of human rights) execution is refused.

On their side, defence lawyers observe that more than 80 % of the EAWs are proportionate (all included issuing and executing). Problems occur very rarely.

However, it almost never happens that lawyers obtain from the Court or the public prosecution service the refusal to execute a EAW on human rights grounds. They have to be very specific in their argumentation if they want to prove the existence of an actual flagrant breach of right (for example, with regard to degrading treatment, the Court requires to know in which prison the person will be sent, what is the actual situation in this prison that is problematic in the light of fundamental rights protection...). Lawyers always try to find an alternative to the execution of a EAW, but rely on the will of the public prosecution service in the issuing country.

.....
³⁵⁰ Framework Decision 2008/909/JHA of the European Council of 27 November 2008 on the application of principle of mutual recognition to judgments in criminal matters imposing custodial measures or measures involving the deprivation of liberty for the purpose of their enforcement within the EU, OJ (2008) L 327/27.

³⁵¹ Amsterdam District Court, 5 January 2010, LJN:BK9060, Amsterdam District Court, 6 March 2012, LJN:BV8667.

³⁵² Amsterdam District Court, 3 January 2012, LJN:BV1112.

³⁵³ Amsterdam District Court, 22 February 2011, LJN:BP5390.

7.3.1.6 *Problems with regard to the proportionality of EAWs issued in another Member State*

If a EAW complies with the offence requirements as set out in Art. 2 of the FD EAW as implemented in Art. 2 DSA, it is presumed proportionate. It makes no difference whether or not the issuing Member State applies a proportionality test. An example of this is a case concerning a request for surrender from Poland. Poland's criminal law recognizes the principle of legality and the authorities/the public prosecutors are therefore obliged to issue a EAW for all crimes which comply with the offence requirements.

The peer review showed that the Dutch practitioners, in particular judges and public prosecutors, have the impression that the participating countries use a standard proportionality check before issuing a EAW. However, this is only an assumption, it is not built on factual knowledge. There is no habit of sharing procedural rules and standards concerning the proportionality check between the Member States. All participants stressed the fact that the EAW is, in general, a very good instrument and that there are very few problems relating to its application.

However, the executing authorities carry out a formal check of incoming EAWs and will refuse the execution when a EAW does not meet all the formal requirements laid down in the Framework Decision. There is hardly any mention of petty cases issued by one of the Member States participating in the present research.

Nevertheless, there is an increasing tendency for the IRCs to ask more evidence from French prosecutors (e.g. act of indictment.) than the Framework Decision of the EAW allows. Sometimes the complete file is requested. However, it is not clear whether the request comes from the IRC or the Court of Amsterdam actually or from lawyers that act through the IRC. Nevertheless, in December 2007 six EAW issued by France were refused by the Amsterdam Court because of a lack of evidence.

It seems that it takes a longer time to obtain a return guarantee from France and Germany. This is especially true for drug offences where the Netherlands is felt to be less harsh in the level of penalty applied to these offences.

With regard to other Member States:

- Poland is mentioned several times by different practitioners (judges, public prosecutors, national coordinating of prosecutors and IRC South), in relation to disproportionate cases. It is not clear whether a proportionality check is performed in Poland. It is believed that Poland issues a lot of EAWs because of the duty to prosecute every offence, which contrasts with the principle of opportunity. Some of these Polish EAWs are considered to concern 'petty' cases (in comparison, the Czech Republic is also a Member State where the principle of legality is in force; however there is no problem with this Member State since it issues only few EAWs.) It also occurs that Poland sends old case for offences that would be considered 'petty' offences in the Netherlands. These cases are an exception and it has been observed that the country shows progress. Mutual trust is the leading principle. It ought to be noted that the Netherlands has a very large Polish community.

- It happens quite often that Belgium issues a EAW in order to just hear a person.
- Another problem concerns the cooperation with the United Kingdom that has complained about the long duration of the surrendering procedure from the Netherlands to the United Kingdom. This long duration is often caused by medical issues, which can lead to delay of extradition in the Netherlands.

From the **lawyers' side**, the peer review showed that the assistance of a lawyer (legal aid) in the requesting country is essential. If the lawyers' cooperation in Europe is improving, access to legal aid remains problematic.

- When a person subject to a EAW is granted legal aid in the Netherlands he will not receive legal aid in the issuing Member State for example.
- Poland often violates the speciality principle and prosecutes persons who have been subject to a EAW for other offences than the offence for which he has been surrendered. Therefore, lawyers are in favour of a stronger mechanism for monitoring EAWs.

7.3.1.7 *Monitoring system*

The EAW has not laid down any monitoring system. Once a person is surrendered, the executing state does not undertake the follow up of the case even in cases where surrender was subject to conditions.

The peer review showed two different opinions with regard to a monitoring system.

The first is a rather positive view with regard to a follow-up system. The second is, however, they do not experience a pressing need for such a monitoring-system. It does not seem to be a need or wish of the practitioners (an additional issue being a concern for possible follow up tasks to be carried out), except for the defence lawyers. They would welcome a follow-up system.

With Dutch nationals public prosecutors always follow up because of the return guarantee in these cases. It is the responsibility of the minister of justice to keep track of the lengthiness of the return guarantee procedure.

7.3.2 *Nationals (and return guarantees)*

There is no additional proportionality test carried out when a EAW requests the surrender of a Dutch national. However, a double criminality check is required, also for facts for which double criminality is abolished according to the Framework Decision on the EAW, if a EAW concerns a Dutch national (or a resident with a residence permit for an indefinite time). It furthermore requires more procedural safeguards.

Art. 6(1) DSA provides that extradition of a Dutch citizen is allowed for the purpose of prosecuting the suspect. However, extradition of a national is only allowed when the issuing Member State provides the Dutch authorities with a 'return guarantee'. Extradition for executing a sentence is not allowed.

The Amsterdam District Court assesses return guarantees. Art. 6(1) does not clarify which authority should issue the 'return guarantee'. It is assumed that the issuing judicial authority should issue the return guarantee. A guarantee given by another judicial authority (such as the Minister of Justice) also suffices in practice,³⁵⁴ if this authority is competent to do so under the applicable national law.³⁵⁵ As a consequence of the principle of mutual trust, the executing judicial authority presumes that a competent authority issues the return guarantee.

7.3.2.1 Requirements for a valid return guarantee

A return guarantee does not only have to contain a guarantee that the detention order will be executed in the Netherlands, but also that the sentence will be transposed to Dutch standards according to Art. 11 of the Convention on the transfer of sentenced persons or any other applicable convention concerning the transfer of sentenced persons.³⁵⁶ If this double guarantee is lacking, the Amsterdam District Court will refuse surrender.³⁵⁷ The guarantee has to be clear and unambiguous, in the sense that if a sentence is imposed upon the suspect, an actual possibility of returning to the Netherlands exists. The DSA does not provide for a fixed term within which a surrendered national must be returned in case she is convicted. The court does not decide on this term.³⁵⁸

It is still possible that the extradition of a Dutch national will be refused, even if all the above-mentioned conditions are fulfilled. Taking over of foreign convictions is regulated in the Law on transfer of executing convictions (*Wet overdracht tenuitvoerlegging strafvonnissen*).³⁵⁹ This law requires that both the executing and the issuing state should be party to a bilateral or multilateral treaty.³⁶⁰ Such treaties require double criminality.³⁶¹ This means in practice that the Amsterdam District Court has to assess whether or not the fact also constitutes a crime under the Dutch legal system. The same goes for crimes for which in the Framework Decision on the EAW the requirement of double criminality has been abolished. It should be noted that return of a national is subject to the consent of the suspect concerned.³⁶²

Public prosecutors inform the Minister of Justice of every extradition where return guarantee has been given. This way the Minister can monitor if the return guarantee is complied with.³⁶³

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³⁵⁴ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 187

³⁵⁵ Amsterdam District Court, 1 August 2008, LJN:BF1897.

³⁵⁶ E.g. Amsterdam District Court, 6 July 2007, LJN: BB2690; Amsterdam District Court, 1 October 2008, LJN:BF1897.

³⁵⁷ Amsterdam District Court, 6 July 2007, LJN:BB2690 and Amsterdam District Court, 1 October 2008, LJN:BF1897.

³⁵⁸ Amsterdam District Court, 20 January 2012, LJN:BV

³⁵⁹ *Wet overdracht tenuitvoerlegging strafvonnissen*, Stb. 1986, 464.

³⁶⁰ Article 2 *Wet overdracht tenuitvoerlegging strafvonnissen*.

³⁶¹ See e.g. Article 3(1)(e) Convention on the transfer of sentenced persons and 3(1)(c) *Wet overdracht tenuitvoerlegging strafvonnissen*.

³⁶² Article 3(1)(d) Convention on the transfer of sentenced persons.

³⁶³ Kamerstukken (Acts of Parliament) II 2002/03, 29042, nr. 3, p. 13 (MvT).

7.3.2.2 Union citizens

A Union citizen is treated as a Dutch national if he has been legally residing in the Netherlands for at least 5 years³⁶⁴ at the moment when the court decides upon the application of a EAW.³⁶⁵ In order to enjoy this treatment, the Netherlands should furthermore have jurisdiction to execute the sentence and the Union citizen should not be expected to forfeit his right to residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.

7.3.2.3 Third country nationals (TCN)

The provisions regarding the surrender of nationals for the purpose of prosecution or execution of a sentence apply also to a TCN with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts mentioned in the EAW, and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender. The requirements are cumulative. TCNs who do not meet all the requirements, are not equated with nationals.

However, the Court decided that the requirement of a residence permit for an indefinite time was not decisive. The TCN in question had to have ‘reasonable prospects of a future in the Dutch society.’³⁶⁶

The peer review confirmed the application of the aforementioned principles.

Prosecutors only perform extra checks on EAWs concerning Dutch nationals and persons equated to nationals, because of the return guarantee. In these cases public prosecutors apply a double criminality check. Besides that no additional proportionality check is performed. Public prosecutors arrange return guarantees.

7.3.3 Proportionality of arrest in EAW proceedings

7.3.3.1 Legal provisions

The DSA stipulates that a requested person can only be deprived of his liberty in case of a reasonable risk of absconding (Art. 64(1) DSA). The risk of absconding of a Dutch national or an alien who fulfils the requirements mentioned in the former section is considered much smaller than that of other foreigners, since the former group has the possibility of a return guarantee to lose. If the authorities may not reasonably assume a risk of absconding, the deprivation of liberty is not allowed.³⁶⁷ There should, furthermore, be a reasonable chance that the Amsterdam District Court will permit the surrender.³⁶⁸

³⁶⁴ See e.g. Amsterdam District Court, 2 December 2009, LJN: BK5504, Amsterdam District Court, 5 January 2010, LJN: BK 9107, BK9114, BK9117, BK9119, BK9120; Amsterdam District Court, 21 February 2012, LJN:BV7120.

³⁶⁵ Amsterdam District Court, 5 January 2010, LJN: BK9114 and BK9117.

³⁶⁶ Amsterdam District Court, 17 March 2006, LJN: BD2943.

³⁶⁷ V. Glerum en V. Koppe, *De Overleveringswet, Overlevering door Nederland*, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 103.

³⁶⁸ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 90

Another requirement concerns the expectation on the part of the authorities that the EAW will be issued within a short period of time.³⁶⁹ Lastly, it could be argued that the principle of proportionality as a general principle of EU law requires that if the EAW has the purpose of executing a sentence the detention period before surrender cannot extend beyond the length of the sentence imposed on the requested person in the issuing Member State.³⁷⁰

Article 5 ECHR

Art. 5(1)(f) ECHR allows for the deprivation of liberty of a person subject to a surrender procedure. If one interprets this provision strictly, deprivation of liberty is only allowed if a EAW has already been issued. However, a broader interpretation includes the deprivation of liberty prior to the issuing of a EAW.³⁷¹ Such an interpretation is applied to the surrender proceedings.³⁷² The ECHR furthermore requires that the deprivation of liberty be in accordance with a procedure prescribed by law.

Art. 5(2) ECHR requires that the requested person should be informed promptly, in a language he understands, of the reasons of his arrest. Art. 59 DSA provides therefore that a copy of the order for the deprivation of liberty (which includes the reasons for the issuing of the order) will be delivered to the person concerned.

Art. 5(4) ECHR provides that anyone who is deprived of his liberty shall be entitled to have a court speedily review the legality of the detention. The DSA provides for this right in the Art. 19(a), 21(g) and 33(a) DSA. The investigative judge and the Amsterdam District Court have to decide speedily upon the legality of the detention and will have to order release if detention is unlawful. If the court or the investigative judge does not decide upon the legality of the detention within a reasonably short period, the requested person can turn to the provisional judge (*voorzieningenrechter*) of the Hague District Court.³⁷³

Finally it should be noted that if the detention of a person should be in violation of Art. 5 ECHR, he can demand compensation according to Art. 5(5) ECHR. Compensation should be granted if the detention was unlawful or has exceeded the maximum period as prescribed by law.³⁷⁴ If the District Court of Amsterdam has permitted surrender, the requested person has to turn to the civil court in order to claim compensation. If surrender is refused, Art. 67 DSA applies, which states that the court may award the requested person compensation if surrender is refused.³⁷⁵

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³⁶⁹ V. Glerum en V. Koppe, *De Overleveringswet, Overlevering door Nederland*, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 103.

³⁷⁰ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 90.

³⁷¹ A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeen Willink, 1986, p. 532-533.

³⁷² Amsterdam District Court, 3 September 2004, LJN: AS 3861.

³⁷³ V. Glerum en V. Koppe, *De Overleveringswet, Overlevering door Nederland*, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 105.

³⁷⁴ *Ibid.*

³⁷⁵ See e.g. Amsterdam District Court, 17 June 2009, LJN:BJ4764. The requested person was granted compensation in accordance with article 67 DSA. However, not on grounds of the refusal of the surrender, but on the basis of the issuing state that had withdrawn its arrest warrant. See also, Amsterdam District Court, 10 February 2012, LJN:BW6578.

7.3.3.2 Procedural safeguards

Detention for the purpose of surrender

Two phases can be distinguished with regard to detention with the purpose of surrender: detention prior to receiving a EAW from the issuing state (provisional arrest) and detention after having received a EAW (arrest).

The provisions regarding 'provisional arrest' (*voorlopige aanhouding*) are laid down in Art. 17-19 DSA. If a person has been arrested by a foreign police officer after a pursuit involving the crossing of country borders (hot pursuit), a public prosecutor or deputy public prosecutor may order for a person to be held in detention if there is *good cause* to expect that a Schengen/Interpol alert will be issued concerning the person without delay or that a EAW will be received (Art. 16 DSA). A person may be held in detention for 6 hours (this does not include the hours between midnight and 9 o'clock in the morning) (Art. 61 (1) and (3) of the Dutch CCP).

On the basis of an Interpol/SIS alert, a person may be arrested provisionally (Art. 15 DSA). Since the law refers to a requested person in general, it may concern both a national and an alien. Art. 17(1) provides that every (deputy) public prosecutor is competent to order a provisional arrest. If it is not possible to await the order of a (deputy) public prosecutor, every police officer may provisionally arrest the requested person. The police officer is competent to enter any place (Art. 565 (1) CCP and 60(3) DSA).

The (deputy) public prosecutor is required to hear the requested person before an order for the requested person to be held in custody for three days may be issued (Art. 17(3) DSA). The person being heard needs to be informed of the EAW and he has the right to react. The requested person needs furthermore to be informed about the possibility to consent to immediate surrender (Art. 39-40 DSA).

The period of being held in custody may be prolonged once with another 3 days. The maximum period of being held in custody is therefore 6 days (parallel to Art. 58(2) of the Dutch Code on Criminal Procedure). Extension may only be granted by the public prosecutor in Amsterdam and only in case of a serious risk of absconding.

Termination of the detention for the purpose of surrender may be decided *ex officio* or on the explicit request of the requested person by the public prosecutor, the investigative judge or the Amsterdam District Court (Art. 19a DSA). Art. 19b DSA furthermore determines that a person shall be released if the detention has lasted twenty days and no EAW has been received yet. It is however possible to detain a person once again after the termination of the detention for the purpose of surrender if the Dutch authorities do ultimately receive a EAW. The principle of *ne bis in idem* is irrelevant for the surrender procedure.³⁷⁶

With regard to the detention for the purpose of surrender after receiving a EAW, if the requested person has been provisionally arrested, a conversion into a formal arrest is necessary after the Dutch authorities have received the EAW. The decisive date is the date on which the public prosecutor has dealt with the arrest warrant as laid down in Art. 20(2) DSA. The conversion from a provisional arrest into a formal arrest is necessary, because the period in which a person should be surrendered starts when the requested person is

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³⁷⁶ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p 81.

arrested.³⁷⁷ The conversion is merely an administrative act, but the requested person should be notified of the conversion and be informed that the arrest will continue until the court has decided on imprisonment (Art. 21(3) DSA). The requested person can request the court at any time to lift the imprisonment. Since Art. 21(9) does not apply to a requested person who has been arrested provisionally, Art. 19(a) applies.³⁷⁸ In case the court refuses the first request for termination of custody, the requested person may appeal to the court or the court of appeal (Art. 64(2) DSA in conjunction with Art. 87(2) CCP).

If the requested person has not been arrested provisionally, he has to be arrested on the basis of the EAW if it meets the requirements laid down in Art. 2 DSA. No further formalities are needed (Art. 21(1) DSA). Since Art. 21(1) refers to 'requested persons', these may be either Dutch nationals or aliens.³⁷⁹ The requested person shall within 24 hours be brought before the public prosecutor or, in his absence, before the deputy public prosecutor (Art. 21(4) DSA). The public prosecutor may order for the requested person to remain in custody for three days counting from the day of his arrest (21(5) DSA). If the requested person has been arrested outside of the district of Amsterdam, he will be transferred to the public prosecutor of Amsterdam within three days (21(6) DSA). The public prosecutor of the district of Amsterdam may order for the requested person to remain in custody until the court has decided upon his imprisonment after having heard the person concerned (Art. 21(8) DSA). The DSA does not set a maximum time limit within which the court should decide on custody. However, arbitrary results are not acceptable since Art. 23(2) DSA obliges the public prosecutor to request (in written form) for the court to deal with the arrest warrant within no more than three days after its reception by the public prosecutor. Art. 24(1) DSA furthermore urges the court to decide on the case in a speedy manner.³⁸⁰

Art. 21(9) DSA provides that the public prosecutor or court may at any time lift the custody, *ex officio* or at the request of the requested person or his counsel. In case of a refusal of a first request to terminate custody, the requested person may appeal to the court or the court of appeal (Art. 64(2) DSA in conjunction with Art. 87(2) CCP).

Continuation of custody

If the requested person is no longer in custody when the court decides upon surrender, the court may order custody of the requested person. This is only possible if the public prosecutor has ordered the court to do so (Art. 21(7)) DSA. The public prosecutor has to bring forward reasons in order to justify the request. Such reasons may include the fact that the requested person has escaped after his arrest, the fact that he is being held in custody with regard to a Dutch criminal case or the expiration of a former reason for the deprivation of liberty.³⁸¹ The decision of the court on the continuation of custody will depend *inter alia* on the reasonable chance that the court will allow the surrender of the requested person.³⁸²

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³⁷⁷ Kamerstukken II 2002/03, 29042, nr. 3, p. 21 (Explanatory Memorandum).

³⁷⁸ V. Glerum and V. Koppe, *De Overleveringswet, Overlevering door Nederland*, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 98-99.

³⁷⁹ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 82.

³⁸⁰ A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeenk Willink 1986, p. 521.

³⁸¹ A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeenk Willink, 1986, p. 522.

³⁸² H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 84.

Before the examination is concluded the court will rule on the custody of the requested person (Art. 27(2) DSA). The court should take into account the time limits as set out in Art. 22 DSA. Art. 22 DSA decides that the court should decide upon the EAW within sixty days of the requested person's arrest. This period can be extended with a maximum of 30 days (Art. 22(3) DSA). If the court still has not decided upon the EAW after 90 days, the court may extend the term indefinitely. The detention may only serve the purpose of preventing the risk of absconding (Art. 64(1) DSA).

Custody after the decision of the court on the EAW

Art. 35(1) DSA determines that the requested person should be surrendered as soon as possible after the verdict, but in any case no later than 10 days after the verdict. The detention will end after 10 days if the person has not been surrendered. An exception may occur when the court has extended the detention (33(b) DSA) at the public prosecutor's request. This order for extension has to be granted within 10 days.

The detention can be extended for a maximum period of 10 days (Art. 34(1)). If the actual surrender is not possible within 20 days, the detention may be extended by a maximum of 30 days if the International Criminal Court or another international tribunal has requested surrender of the requested person and the Minister of Justice has not yet decided upon the request (Art. 34(2)(a) DSA).

The detention may also be extended with a maximum of 30 days if the surrender has been allowed, but the actual detention has proved impossible (Art. 34(2)(b) DSA). This concerns situations of 'force majeure' (Art. 35(2) DSA) or extension on grounds of serious humanitarian reasons, such as the health condition of the requested person (Art. 35(3) DSA). In the abovementioned cases, the public prosecutor will set a new deadline and the requested person should be surrendered 10 days after the expiry of this deadline.

Art. 35(4) DSA prescribes that the detention of the requested person shall be terminated after the terms as described in Art. 35(1)-(3) have expired.

If the requested person is not in custody at the moment of the court verdict on the EAW, the public prosecutor may order his arrest for a maximum of three days in order to facilitate the surrender. If the surrender cannot take place within the three-day period, the public prosecutor may extend the order for arrest with a maximum of three days (Art. 37(1) DSA). After the public prosecutor has extended the arrest with six days, only the court may extend it further. In case special circumstances prevent the factual surrender, the court may (upon the request of the public prosecution) extend the arrest with a maximum of ten days (Art. 37(2)-(3) DSA). If after 16 days surrender still has not taken place, the detention shall be terminated.

7.3.3.3 Arrest and detention in EAW cases compared to domestic criminal proceedings in general

Several similarities and differences may be pointed out. An important similarity regards the provision of the CCP according to which a person may only be arrested if serious presumptions exist that he has committed the crime of which he is suspected (Art. 67 CCP). This is similar to the requirement in the DSA that a person may only be detained in case of a reasonable chance that the court will allow the surrender.³⁸³ Furthermore, both the CCP and the DSA only allow detention in case of strong indication of a reasonable risk of absconding (Art. 67a CCP and Art. 64(1) DSA).

Custody under the CCP is only allowed in case of a suspicion of a crime that carries a statutory prison sentence of four years or more (Art. 67 Dutch Criminal Code). This is different from the provisions on surrender which allow custody awaiting surrender for persons requested in relation to acts punishable with a statutory prison sentence of 12 months or more (Art. 2(1) DSA). The DSA therefore allows for custody with regard to less serious crimes.

7.3.4 Procedural rights in EAW proceedings

7.3.4.1 Procedural rights relating to interpretation and translation

Art. 2(3) DSA provides that the EAW should be translated into the official language or one of the official languages of the executing Member State. The Netherlands, as the executing state, accepts EAWs issued in Dutch or English.³⁸⁴ The Minister of Justice did not consider it a violation of Art. 6 ECHR to act on a EAW issued in English. If the requested person is not able to understand English, an official translator may translate the EAW during proceedings before the court.³⁸⁵

Art. 30(1) provides that Art. 275, 276 and Art. 325 CCP shall apply. Art. 275 CCP provides that an investigation will be suspended until a translator can assist a suspect if it becomes apparent during the investigation that he is not able to speak or understand Dutch properly. Art. 276 CCP provides that if it appears during the proceedings that assistance of a translator is needed, the court will call upon a translator. Art. 325 CCP provides furthermore that there should be an interpreter present at the time of the verdict in such cases.

Very recently, a new law has been adopted with regard to the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.³⁸⁶ This act includes a change of the DSA, more in particular Art. 23. A new paragraph is added providing for the right of the requested person for a written translation in a language he understands of at least the “relevant parts” of the EAW if he is not able to understand the languages in which the EAW has been received and the translation thereof. The following elements of the EAW will be considered as “relevant parts” of the EAW: the Member State that has issued the EAW; the decision underlying the EAW, the length of the sentence to be executed or a brief description of the criminal act that underlies the EAW.

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³⁸³ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p 90.

³⁸⁴ H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 67.

³⁸⁵ *Kamerstukken I* 2003/04, 29042, C, p.10-11 (Explanatory Memorandum)

³⁸⁶ Law of 28 Februari 2013 regarding the Implementation of Directive 2010/64/EU, *Staatsblad* 2013, 85.

7.3.4.2 *Providing information on legal rights, legal aid and legal representation*

The police are required to point the requested person at his right to remain silent before being heard by the police and/or the public prosecutor (Art. 29(2) CCP). The suspect furthermore has a right to consult a lawyer before being heard. If the suspect is a minor, the lawyer will also be allowed to be present during the interrogation by the police.³⁸⁷ Art. 275 CCP furthermore requires that a translator will assist the requested person during the investigation.

Art. 61(2) DSA provides that the right to an attorney as laid down in Art. 40 CCP is also applicable to the requested person put in detention on the basis of the DSA. Consequently, the requested person lacking an attorney will be assigned a picket lawyer (Art. 40(1) CCP). Assignment of an attorney is restricted to the period when the requested person remains in custody (Art. 40(2) CCP).

Art. 62(2) DSA provides that the detained requested person will be assigned a lawyer. The assignment of this lawyer is not restricted to the period of detention, but also encompasses the actual surrender and the proceedings before the district court of Amsterdam. It should furthermore be noted that according to Art. 30(1) DSA, Art. 45-49 CCP regarding the assignment of a lawyer and the payment of his services shall apply.

Legal aid can also be necessary after the verdict of the Amsterdam District Court with regard to court proceedings on the extension of detention or serious humanitarian reasons that prevent the factual surrender of the requested person. The DSA does not provide for legal aid after the verdict of a court, but the Legal Aid Board (*'Raad voor Rechtsbijstand'*) may assign a lawyer in such cases based on Art. 24 of the Act on Legal Aid (*Wet op de Rechtsbijstand*).

7.3.4.3 *Additional rights and vulnerable persons*

The requested person does not possess formal rights to inform a person that he is deprived of its liberty after the arrest. However, practice shows that he will be allowed to contact his embassy. When he is put into custody, the requested person is in principle allowed to contact his family or friends. However the public prosecutor may prohibit this, when special circumstances require so. None of this is, however, laid down in statutory law.

Art. 10 DSA provides that surrender will be refused if the requested person had not yet reached the age of 12 at the time when the crime was committed. Art. 287 CCP inspires this age limit.

If the requested person has a hearing deficiency, interrogation during the trial will be carried out in writing. Should the requested person on top of that be unable to properly write or read, an interpreter will be assigned (Art. 274 CCP which applies in light of Art. 30(1) DSA).

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³⁸⁷ Supreme Court cases of 30 June 2009, LJN: BH3079, LJN: BH3081 and LJN: BH3084.



7.4 Factors relevant for the degree of mutual trust

7.4.1 Factors relating to mutual trust, general observations

A high level of ‘internalization’ of the principle of mutual trust may be deduced from the interviews of the judges involved in executing EAWs issued by other Member States. The centralization of executing EAWs may be an important factor in this regard: only the District Court of Amsterdam (and within the district court a specialized chamber in international matters – the IRK) is competent to execute EAWs. This internationalization of the principle of mutual trust leads to a rather minimal review of the request and is limited to checking whether the formal conditions of the EAW have been fulfilled.

The interview with the judges of the Court highlighted their perspective on mutual recognition and mutual trust as legal principles. As the default principle in dealing with incoming EAWs, trust in other Member States’ legal systems is assumed. Some room for assessment remains available, however: the respondents put forward that the legal principles do not fully replace actual trust. The public prosecutors that have been interviewed shared this view. They claimed that no differences are made between the Member States. “Only in exceptional circumstances when specific information concerning extreme situations would be received concerning this would be taken into account in the process.” In general and without counter-indicative information the principle of mutual trust should be respected. The defence lawyers confirmed this attitude and stated that it is very difficult to claim anything that would stand in the way of the application of mutual trust.

General arguments relating for instance to human rights conditions in other Member States are not taken into consideration, and it proves even quite difficult to have the court to take specific circumstances of a suspect into consideration. The interviewee of the EJN confirmed that on the operational level the level of trust is quite high, even higher than at the political level. Nevertheless, a general issue that has been put forward is the lack of adequate information regarding specific circumstances (e.g. prison conditions, ground for suspicion) and the fact that mutual trust may be an obstacle in demanding such information from other Member States.

It has been observed that the Framework Decision has marked a distinction between EU Member States and third countries, although some level of mutual trust may be assumed in case of Council of Europe Member States which are subject to the European Convention of Human rights (ECHR). A consequence of the high level of ‘internalization’ of the principle of mutual trust is that none of the factors mentioned in the questionnaire seem to substantially influence the actual level of mutual trust.

7.4.2 Specific problems with regard to mutual trust

One of main issues in the early years of the Framework decision concerned the Polish issuing of EAWs for what were considered petty crimes. This has been seen as unwarranted claims on scarce resources. According to the judges, this problem has greatly diminished and is no longer seen as a major obstacle to the proper functioning of the Framework decision. An issue that was raised in relation to Poland relates to the application of the specialty principle, for instance, it has occurred that people extradited to Poland are prosecuted for offenses which have not been included in the EAW.

With regard to Germany, the differences in treating *in absentia* convictions have been mentioned. This has caused problems with the German execution of Dutch EAWs based on *in absentia* convictions.³⁸⁸

7.4.3 Statistical data and international review

The following statistical data regards factors that have been identified as possibly influencing mutual trust between the Member States.

7.4.3.1 International review of national detention conditions

In August 2012, a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visit to the Netherlands in October 2011 was published. With regard to prison conditions, the CPT found that most detainees were detained in single cells, which were described as well equipped and of high standard.

The following comment was made regarding the food supply in detention “However, the delegation was inundated with complaints concerning the food provided to prisoners. They received three meals a day, including a main meal. However, the latter was systematically delivered in a frozen box, and needed to be heated in the microwave before consumption. The delegation observed for itself that a large quantity of the frozen meals remained untouched and was ultimately wasted. The CPT would like to be informed of any measures taken to address the above-mentioned issue.”³⁸⁹

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³⁸⁸ Nevertheless, the harmonization of the procedural safeguards in case of trial in absentia pursuant to the Framework Decision 2009/299 should streamline the problems.

³⁸⁹ CPT Report 2012, p. 23 available at <http://www.cpt.coe.int/documents/nld/2012-21-inf-eng.htm> (last visited 14 March 2013).

With regard to the regime, the following conclusion was drawn “This difference in treatment was confirmed by different sources, including monitoring bodies, NGOs, the prison staff and the prisoners themselves. The CPT recommends the Dutch authorities to review the programme of activities available to foreign prisoners with “VRIS” status, in particular in respect of education, vocational training, and re-socialization activities, with a view to ensuring that they are not disadvantaged in comparison with the general prison population in the Netherlands.”³⁹⁰

Although special attention was paid to “foreign nationals held under aliens legislation”, the issue of detainees detained for the purpose of extradition was not addressed in the report of the CPT.

7.4.3.2 ECtHR review

In case *Nelissen v. the Netherlands*³⁹¹ the ECtHR held that a schizophrenic patient’s continued detention in remand prison upon completion of the sentence was not justified and constituted a violation of Art. 5(1) (right to liberty and security) ECHR. Similarly, in case *S.T.S. v. the Netherlands*³⁹² the ECtHR ruled that the Netherlands had violated Art. 5(4) of the Convention because of a failure to rule on the legality of the detention of the applicant, a minor, on the ground that the order authorizing his detention had expired – a decision which denied him access to compensation.

.....
³⁹⁰ CPT Report 2012, p. 24

³⁹¹ *Nelissen v. The Netherlands*, Application no. 6051/07, European Court of Human Rights, Judgment, 5 April 2011.

³⁹² *S.T.S. v. the Netherlands*, Application no. 277/05, European Court of Human Rights, Judgment, 7 June 2011.

7.5 Experiences with the current evaluation methodology of the peer-reviews EAW

The authors of the Dutch report cannot build on extensive experience in carrying out peer review visits as an element of academic research. The following remarks regarding our observations must, therefore, be seen in that light. First, the combination of legal analysis, statistics and peer review visits seems to allow for the most comprehensive approach to assess the functioning of the EAW. The similarities between the systems of the countries included in the project are substantial. Moreover the Netherlands' authorities seem to experience little problems in the cooperation with these countries.

The inclusion of more countries – such as Poland, Bulgaria, Romania but also the UK – might have born a greater potential for the comparative analysis. Another methodological observation regards the approach of the country visits. It was the observation of the Dutch research team that the yields of especially the visits with a high number of participants were sub-optimal. Interviews conducted by a small number of persons might induce interviewees to speak without any reservations.

Moreover, the status of the team might also play a role here since it consisted of independent researchers, Ministry of Justice representatives and foreign researchers and peers. The public prosecution has a special responsibility towards the national Ministry of Justice apart from the evaluation project. Also court judges' answers tend to primarily fit legal and formal parameters. To underline scientific independence and objectivity it might help to compose a research team that consists only of independent researchers.

Another recommendation would regard the possibility to carry out follow-up visits if preliminary findings would give rise thereto. Such visits could include interviewees that have not been identified at an earlier stage as possibly interesting for the project.

With regard to statistics, the Dutch team has noted that much of the required information has been unavailable or too general in nature, at least for the Dutch situation. This even relates to data that can be considered quite crucial for understanding the functioning of the EAW. More systematic collection of data in this regard would enhance the understanding of the actual functioning of the EAW. Given the various evaluations of the EAW up until now, and the quintessential importance of the adequate functioning and development of the Area of Freedom, Security and Justice, both from the individual's perspective and the perspective of the EU's interest, it is necessary to dispose of such data.

The last observation regards the relation between the questionnaire for the interviews and the interviews themselves. The questionnaire is a comprehensive and detailed document. This made it quite difficult to address all elements of the questionnaire during the interviews. It might be useful to explore possibilities for the interviewees to deal with the questionnaire before the interview, serving as a basis to address more general issues during the interview itself.

Annex to the Country Report The Netherlands - Statistics

Marlies Blesgraaf and Philip Langbroek

1. For which type of criminal acts the European Arrest Warrant is most often issued?

We did not receive any recent information on this from the Dutch Public Prosecutions office. Therefore we draw on a previous research for the years 2006-2008.³⁹³ We received information from the international legal aid centre of the PPO in the Hague on 105 cases during 2006 – 2008, which definitely does NOT constitute a random sample for the Netherlands.³⁹⁴

Table 1 Offences and issued EAW's

Offences in issued EAW's ³⁹⁵	N	Percent	Percent of Cases
illicit trafficking in narcotic drugs and other substances	25	17,0%	26,9%
murder, grievous bodily injury	22	15,0%	23,7%
organised or armed robbery	21	14,3%	22,6%
participation in a criminal organisation	17	11,6%	18,3%
kidnapping, illegal restraint and hostage-taking	17	11,6%	18,3%
fraud, etc.	14	9,5%	15,1%
Swindling	8	5,4%	8,6%
Rape	5	3,4%	5,4%
trafficking in human beings	4	2,7%	4,3%
forgery of means of payment	4	2,7%	4,3%
forgery of administrative documents and trafficking therein	3	2,0%	3,2%
laundering of the proceeds of crime	2	1,4%	2,2%
racketeering and extortion	2	1,4%	2,2%
sexual exploitation of children and child pornography	1	,7%	1,1%
counterfeiting of currency, including the euro	1	,7%	1,1%
arson	1	,7%	1,1%
Total	147	100,0%	158,1%

This table shows that most of the cases issued are related to drugs offences, next to the most serious crimes. It should also be noted that in a EAW more than one crime can be mentioned.

³⁹³ Ph.M. Langbroek and Elina Kurtovic, The EAW in the Netherlands, in: Boaventura de Sousa Santos, Conceição Gomes The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area, p. 316-329

³⁹⁴ Langbroek and Kurtovic 2010, p. 323.

³⁹⁵ One arrest warrant can have more offences listed.

2. From which of the European Member States do you receive the highest number of requests for executing a European Arrest Warrant?

We received a limited amount of information from the Office of Prosecutor's General. So, we also refer to the findings of an earlier research.

The data for the EAW's issued to the Netherlands were gathered by drawing a random sample of 250 out of approximately 1600 files of concluded cases (2006-july 2008), of the international legal aid centre in Amsterdam. Frequently we were confronted with incomplete files. We could not always fill out all the data we wanted.³⁹⁶

Table 2 Issuing Country 2006-2008

Issuing Country	Frequency	Percent	Valid Percent	Cumulative Percent
Germany	71	28,4	28,7	28,7
Belgium	54	21,6	21,9	50,6
Poland	31	12,4	12,6	63,2
Italy	27	10,8	10,9	74,1
France	18	7,2	7,3	81,4
Spain	10	4,0	4,0	85,4
Austria	6	2,4	2,4	87,9
United Kingdom	6	2,4	2,4	90,3
Hungary	5	2,0	2,0	92,3
Czech Republic	4	1,6	1,6	93,9
Lithuania	3	1,2	1,2	95,1
Portugal	3	1,2	1,2	96,4
Latvia	2	,8	,8	97,2
Luxembourg	2	,8	,8	98,0
Sweden	2	,8	,8	98,8
Bulgaria	1	,4	,4	99,2
Finland	1	,4	,4	99,6
Slovakia	1	,4	,4	100,0
Total	247	98,8	100,0	
Missing/ND	3	1,2		
Total	250	100		

³⁹⁶ Langbroek and Kurtovic, 2010. p. 290

In 2006-2008 most of the EAW's were issued by Germany and Belgium, followed by Poland. Together they issued almost two thirds of the EAW's received by the Netherlands.

Since 2008 the number of EAW's received has gradually increased up to 804 in 2011.

Table 3 Number of EAW's received by The Netherlands

Year	Number of EAW's issued
2009	683
2010	737
2011	804

For 2011, the frequencies per issuing country are displayed in the next table:

Table 4 Number of EAW's per issuing country³⁹⁷

Issuing Country	Number	Issuing Country	Number
Belgium	171	Latvia	9
Bulgaria	3	Lithuania	26
Cyprus	0	Luxemburg	3
Denmark	6	Malta	1
Germany	141	Austria	4
Estonia	1	Poland	242
Finland	4	Portugal	3
France	30	Romania	18
Greece	0	Slovenia	0
Great Britain	37	Slovakia	3
Hungary	52	Spain	9
Ireland	4	Tsjech Republic	9
Italy	18	Sweden	10

³⁹⁷ Data acquired by the kind cooperation of the Office of Procurators General in The Hague.

3. Looking at the participating States in the pilot project (Germany, France and the Netherlands), which of those three countries are issuing the most EAW's?

Based on the table above, most of the EAW's are issued by Poland, Belgium and Germany. France issued 30 EAW's to Dutch authorities in 2011.

4. General country information

a. Number of inhabitants³⁹⁸

Table 5 Number of inhabitants of The Netherlands 2009-2011	
Year	Number of Inhabitants
1 January 2009	16 485 787
1 January 2010	16 574 989
1 January 2011	16 655 799

b. Annual State budget

Table 6 Annual state budgets ³⁹⁹				
year	2008	2009	2010	2011
total revenues (in million euros)	277.684	262.788	271.669	273.318
total expenses (in million euros)	274.781	294.782	301.213	299.928

c. Annual budget allocated to courts, public prosecution and legal aid⁴⁰⁰

³⁹⁸ <http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=7109oned&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0,12,24,36,48,60&HDR=T,G3,G1&STB=G2,G4,G5&P=T&VW=T>

³⁹⁹ <http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81191NED&D1=0,28&D2=0&D3=55,60,65,70&HDR=G1,G2&STB=T&VW=T>

⁴⁰⁰ http://www.rijksbegroting.nl/2012/voorbereiding/begroting,kst160360_8.html (last accessed 15 March 2013)

d. Annual budget allocated to the police, customs, border police, prisons⁴⁰¹

Table 7 Annual budgets for justice administration police and prisons				
year →	2009 ⁴⁰²	2010	2011	2012
x € 1.000				
budget allocated courts⁴⁰³ to	x	904 692	944 786	993 131
budget allocated public prosecution⁴⁰⁴ to	611 165 ⁵	589 216 ⁵	594 0175	568 603
budget allocated legal aid⁴⁰⁵ to	455 200	458 368	496 695	494 816
budget allocated police⁴⁰⁶ to	115 972 ⁵	129.084	121 093	116 276
budget allocated customs⁴⁰⁷ to				
budget allocated border police⁴⁰⁸ to				
budget allocated prisons⁴⁰⁹ to	1 164 888	1 035 610	1 043 413	991 2

e. Number of public prosecutors and number of public prosecutors responsible for issuing a EAW

Since all Dutch Public Prosecutors are in principle competent to issue a EAW, the total number of Public Prosecutors should be found.⁴¹⁰ According to the table below, the number of Public Prosecutors in fte's has grown from 674 in 2006 to 780 in 2011.

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⁴⁰¹ http://www.rijksbegroting.nl/2012/voorbereiding/begroting,kst160360_8.html

⁴⁰² http://www.rijksbegroting.nl/2011/voorbereiding/begroting,kst148608_7.html (last accessed 15 March 2013)

⁴⁰³ categorie 12.3.1.: Council for the Judiciary – Courts.

⁴⁰⁴ categorie 13.3.2: Prosecutor's offices.

⁴⁰⁵ categorie 12.2.1: Raden voor rechtsbijstand.

⁴⁰⁶ categorie 13.3.1: Law enforcement.

⁴⁰⁷ Not traceable.

⁴⁰⁸ Not traceable.

⁴⁰⁹ categorie: 13.4.1: DJI prisonorganisation-regular.

⁴¹⁰ Art. 44 Overleveringswet (http://wetten.overheid.nl/BWBR0016664/geldigheidsdatum_29-10-2012#HoofdstukIII)

Justice ppo/judiciary	31/12/2007	31/12/2008	31/12/2009	31/12/2010	31/12/2011
PPO prosecutors	714	756	787	796	780
PPO support staff	3542	3776	3897	3863	4039
Judges	2127	2176	2203	2275	2230
Court support staff	7095	7214	7467	7409	7167
Support suprem Courts	113	135	147	135	127
Total fte	13591	14058	14501	14478	14343

f. Number of police officers, custom officers, border police (in general and more specific the no. of officers responsible for the EAW procedure (for example arrest, transit, etc).

Police	31/12/2007	31/12/2008	31/12/2009	31/12/2010	31/12/2011
KLPD	4865	4900	4975	4933	4939
Politie academie	1775	1800	1706	1619	1583
Politieregios;	47139	47400	48340	48756	49365
Total – fte’s	53779	54100	55021	55311	55887

In this table, the total number of police officers at the national level is depicted in fte’s. It was not possible to find accurate information on the categories requested.

g. Total number of (professional) judges and the number of judges responsible for the judicial part of the EAW procedure (to make the surrender decision)

In this table, the total number of fte’s dedicated to the judiciary (“rechtspraak”) is displayed. This number refers to judges only.

The surrender decision is made in particular by the judges of the Amsterdam District Court, since the Netherlands has assigned this court the task of being the Dutch executing authority. However, it has not been possible to deduce the number of judges in the International legal aid chamber at Amsterdam District Court.

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⁴¹¹ <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/jaarverslagen/2012/05/10/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers-140512.pdf> (accessed 16 March 2013).

⁴¹² <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/jaarverslagen/2012/05/10/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers-140512.pdf> (accessed 16 March 2013).

5. Performance

a. Number of EAWs issued in a given year (including information about the category of crimes committed)

Year	Number of EAW's issued
2009	683
2010	737
2011	804

b. Number of EAWs executed in a given year (including information about the category of crimes committed)

ND

c. Average duration of a EAW procedure from the formal transmission of the request until the surrender and transit of the requested person (including information about the duration of the sub-steps) in days

ND

d. Average duration of judicial proceedings (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court), if possible related to certain categories of crime, instead of the average total duration of a EAW procedure from the formal transmission of a EAW request until the final judgment in a judicial proceeding (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court)

The average term from the moment of conversion of the provisional arrest into arrest to a decision by the ADC was in 2004: 41 days, in 2005: 56 days, in 2006: 74 days, and in the first half of 2007: 85 days. The average term from the moment of arrest under Section 21 OLW until the decision by the ADC was in 2004: 48 days, in 2005: 59 days, in 2006: 70 days, and in the first half of 2007: 76 days.⁴¹³

e. Total number of incoming criminal cases in the courts of first instance compared to the total number of EAW cases to be reviewed by a judicial authority responsible for granting or refusing a request to surrender a person

There is only one court dealing with incoming EAW's, the District Court of Amsterdam.

In 2011 there were 804 incoming EAWs.

72 were dealt with in a short procedure (consent of suspect with surrender).

16 Cases were rejected by the PPO (no double criminality, Dutch citizen and irrevocable judgement)

64 Cases there has been no arrest of the requested person and therefore no court proceedings

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⁴¹³ Evaluation Report on the fourth round of mutual evaluations "The practical application of the European arrest warrant and corresponding surrender procedures between Member States", report on the Netherlands, published February 2009, Council-Document 15370/2/08 REV 2 –EJN 777, p. 25

25 EAW's were revoked by the issuing state.

The actual number of cases submitted to the court was $804 - 177 = 627$.

f. Average workload of a judge responsible for the handling of EAW cases

ND

g. Average workload of a public prosecutor responsible for issuing a EAW and/or the pre-trial procedure of a EAW-related case

We did not receive adequate information from the Office of Procurators' General and from Amsterdam District Court at this point. There are no separate registries and statistics on this point.

6. Arrest and detention

a. Remand detention rate (detainees / population; detention on remand / detention for other reasons), maybe also immigrant detention rates and juvenile detention rates

Information on these ratios has been found in a publication by WODC and CBS.⁴¹⁴ Information was given on the capacity of the prisons designated to detention of immigrants. However, the number of people actually detained there was not included in the information.⁴¹⁵

Interestingly, one of the tables mentioned "bewing, uitlevering" which can be interpreted as detention prior to extradition. These numbers have been added to the table.

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⁴¹⁴ "Justitie in Statistiek, Criminaliteit en Rechtshandhaving 2011." Eindredactie: M.M. van Rosmalen (CBS), S.N. Kalidien (WODC) N.E. de Heer-de Lange (CBS), available at <http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/publicaties/archief/2012/2012-criminaliteit-en-rechtshandhaving-2011.htm> (accessed 16 March 2013).

⁴¹⁵ Table 7.3, attached to the report of footnote 383.

Table 11 Arrest and detention⁴¹⁶

Year	2006	2007	2008	2009	2010	2011
detainees ^a	20.642	20.871	20.114	19.532	19.588	20.160
population ^b	16.334.210	16.357.992	16.405.399	16.485.787	16.574.989	16.655.799
detainees / population	0,001263728	0,00127589	0,00122606	0,001184778	0,001181781	0,001210389
detention on remand ^c	5.924	5.823	5.488	5.571	5.703	5.723
detention for other reasons ^d	7794	6946	6446	6111	6033	5822
detention on remand / detention for other reasons	0,76007185	0,838324215	0,851380701	0,911634757	0,945300845	0,982995534
bewaring uitlevering	41	45	31	57	62	67
juveniles ^e	1398634	1400438	1399638	1397361	1389915	1388579
detained juveniles ^f	3.003	2.790	2.441	2.292	2.255	1.844
juvenile detention rate	0,002147095	0,001992234	0,001744022	0,001640235	0,001622401	0,001327976

b. average duration of detention on remand / average duration of criminal proceedings

The average duration of detention on remand has not been published in one of the reports used here.

The average duration of criminal proceedings has been discussed in the “Jaarverslag Rechtspraak”.

The following table shows the duration (in Dutch: doorlooptijd) of criminal cases.⁴¹⁷

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⁴¹⁶ Notes with table on question 6a

- the number of detainees has been taken for table 7.2 from the beforementioned report. In this number, all types of detainees were included.
- the population has been displayed earlier in question 4
- Detention on remand has been translated as “voorarrest”. In the tables of the report, no such category existed. However, the categories ‘voorlopige hechtenis’ en ‘bewaring’ have been added up.
- All types of detention, without ‘detention on remand’
- As indicated by the CBS, the focus is on people between 12-18 years old, since they are considered a juvenile in criminal law.
- Total number of juveniles detained (exclusively because of a criminal conviction)

⁴¹⁷ Jaarverslag Rechtspraak 2011, table 9a: average duration of the proceedings

Table 12 Average duration of criminal cases in weeks

Year	2008	2009	2010	2011
Duration in weeks				
Criminal case, first instance adult	15	15	17	18
Criminal case, first instance juvenile	5	5	5	6
Criminal case, Appeal	33	38	42	44

7. Information of international organisations

a. Detention conditions (reports of the CPT)

In August 2012, a report of the CPT's visit to the Netherlands in October 2011 was published. With regard to the material prison conditions, the CPT found that most detainees had a cell for themselves. The cells were described as well equipped and of a high standard. A comment was made regarding the food supply in detention:

"However, the delegation was inundated with complaints concerning the food provided to prisoners. They received three meals a day, including a main meal. However, the latter was systematically delivered in a frozen box, and needed to be heated in the micro-wave before consumption. The delegation observed for itself that a large quantity of the frozen meals remained untouched and were ultimately wasted. The CPT would like to be informed of any measures taken to address the above-mentioned issue."⁴¹⁸

With regard to the regime, the following conclusion was drawn:

"This difference in treatment was confirmed by different sources, including monitoring bodies, NGOs, the prison staff and the prisoners themselves.

The CPT recommends that the Dutch authorities review the programme of activities available to foreign prisoners with "VRIS" status, in particular in respect of education, vocational training, and re-socialization activities, with a view to ensuring that they are not disadvantaged in comparison with the general prison population in the Netherlands."⁴¹⁹

Although special attention was paid to "foreign nationals held under aliens legislation", no special attention was paid to detainees detained for the purpose of extradition.

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⁴¹⁸ CPT Report 2012, p. 23

⁴¹⁹ CPT Report 2012, p. 24

*b. Number of convictions by the ECtHR for violations of Art. 5 ECHR and Art. 6 ECHR (length of criminal proceedings)*⁴²⁰

- *Nelissen v. the Netherlands* (5 April 2011): Schizophrenic patient's continued detention in remand prison upon completion of sentence unjustified: Violation of Article 5 § 1 (right to liberty and security)
- *S.T.S. v. the Netherlands* (7 June 2011): Failure to rule on the legality of the detention of the applicant, a minor, on the ground that the order authorising his detention had already expired – a decision which denied him access to compensation: Two violations of Article 5 § 4 (right to liberty and security)

In Conclusion

Statistical information about the EAW practice in the Netherlands is not systematically generated or assembled in the Netherlands. This makes it a very time consuming work for the public prosecutions offices and for Amsterdam district court to gather this information.

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⁴²⁰ Press Country Profile of the Netherlands, August 2011, p. 4, available at:http://www.echr.coe.int/NR/rdonlyres/067903DB-68CE-424E-A6EF-C95C2449A980/0/PCP_Netherlands_en.pdf (accessed 16 March 2013).

8 Country Report Germany

Martin Böse and Thomas Wahl

The national report gives a survey on the role of the proportionality principle in the practice of the European Arrest Warrant (EAW) and its impact on the mutual trust between the Member States of the European Union. The report is based on a legal analysis of the German criminal justice system, interviews with practitioners (judges, prosecutors and defence lawyers) dealing with EAW cases, and a collection of statistical data and other information on criminal proceedings in Germany that are considered to be relevant for mutual trust.

The report is structured in five main parts. The first part will explain the legal status and concept of the principle of proportionality in the German criminal justice system (8.1). The second part will deal with the German provisions on issuing a EAW and its practical implementation, in particular the impact of the proportionality principle (8.2). In the third part, the rules on and experiences in the execution of EAWs will be examined, with a special focus on the proportionality principle as a potential ground for refusal (8.3). The fourth part will give additional information on potential “building blocks” for mutual trust (8.4), and the report will conclude with a summary of experiences with current evaluation methods (8.5).

8.1 The principle of proportionality in the national criminal justice system

8.1.1 The sources of proportionality in the German criminal justice system

The principle of proportionality is anchored deeply in the German legal order. It is one of the most important principles of constitutional law,⁴²¹ the terms of which override ordinary legislation. The principle of proportionality can also be found in many statutory provisions that shape more concretely the principle as enshrined in the constitution.⁴²² The concept and contents of the principle of proportionality has widely been developed by the Federal Constitutional Court (*Bundesverfassungsgericht*). The principle of proportionality as part of the European legal order is recognised as well. Since, however, all measures of the state authority must abide by constitutional law the “European” principle of proportionality can be considered less important.

8.1.1.1 National sources

The principle of proportionality can be derived from several provisions or principles in the German constitution (Basic Law - *Grundgesetz*). Courts and literature refer to Art. 1 of the Basic Law (human dignity), the guarantee of the essence of a fundamental right (*Wesensgehaltsgarantie* - Art. 19 para. 2 of the Basic Law), Art. 3 para. 1 of the Basic Law (equality before the law), the intrinsic nature of the fundamental rights enshrined in the Basic Law, and the rule of law principle (*Rechtsstaatsprinzip*).⁴²³ The main idea of the principle of proportionality is closely (but not exclusively) connected to fundamental rights that – as a concept of the general personal liberty rights – can only be limited by state authority if the protection of other or of the

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⁴²¹ Hillgruber in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band IX, Allgemeine Grundrechtslehren, 3rd edition (2011), § 201 (Grundrechtsschranken), mn. 51 et seq. The landmark-case is the judgment of the Federal Constitutional Court of 11 June 1958, official court reports (BVerfGE), vol. 7, p. 377 (404 et seq.).

⁴²² See e.g. Section 74b Criminal Code (confiscation) and Section 111m (1) Code of Criminal Procedure (seizure of printing devices).

⁴²³ Cf. Grzeszick, in: Maunz/Dürig (eds.), *Grundgesetz, Kommentar*, Art. 20, mn. 108 with further references.

public interests is indispensable.⁴²⁴ As a consequence, the principle of proportionality defends the individual rights and freedoms and has therefore an eminent importance when state authorities interfere with the individual's fundamental rights.⁴²⁵

According to the German legal order any measure interfering with fundamental rights of the individual complies with the principle of proportionality under four conditions:

- (1) It has to be based upon a legitimate purpose, and
- (2) it must be suitable,
- (3) necessary, and
- (4) adequate (proportionate in the strict or narrower sense) to that end.⁴²⁶

This concept can also be applied when rights of citizens other than fundamental rights or rights of state institutions are at stake.⁴²⁷

The legitimate purpose is identified and set by the democratic legislature. The only limit for the legislature is that the purpose may not be unconstitutional. The executive powers and the judiciary are bound to the set purposes.

A statute or measure is suitable when with its help the desired result can be promoted. It is necessary if the legislator could not have chosen a different means which would have been equally effective but which would have infringed on fundamental rights to a lesser extent or not at all (concept of the less intrusive measure).⁴²⁸

The proportionality test *strictu sensu* (adequacy) implies that a measure is disproportionate if it, although suitable and necessary, nevertheless imposes an excessive burden on the individual. This leads to a balancing of the seriousness of the infringement against the importance and urgency of the factors which justify it. Hereby, the decision-maker must take into account the limits of what can be demanded from the individuals to whom the measure is addressed.⁴²⁹

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⁴²⁴ Federal Constitutional Court, official court reports (BVerfGE) vol. 19, p. 342 (348 et seq.), vol. 76, 1 (50 et seq.); Grzeszick, *ibid.*

⁴²⁵ Federal Constitutional Court, official court reports (BVerfGE) vol. 81, p. 310 (338).

⁴²⁶ Federal Constitutional Court, official court reports (BVerfGE) vol. 118, p. 168 (193, with further references).

⁴²⁷ Grzeszick, *ibid.*

⁴²⁸ Federal Constitutional Court, official court reports (BVerfGE) vol. 63, 88 (115); vol. 67, 157 (176), vol. 90, 145 (172). In forming a judgement as to whether the chosen means is suitable and necessary for achieving the desired goals the legislator has a certain degree of discretion. The same applies to the estimation and prediction of the dangers which threaten other individuals or the public good which must be undertaken in this context. Thus, the Federal Constitutional Court can only review the exercise of this discretion to a limited extent, (see Federal Constitutional Court, official court reports, (BVerfGE) vol. 77, 170 (215); vol. 88, 203 (262)).

⁴²⁹ Federal Constitutional Court, official court reports (BVerfGE) vol. 90, p. 145 (173), vol. 92, p. 277 (327); vol. 118, p. 168 (195). See for details also Hillgruber, *op. cit.*, mn. 72.

This general constitutional theory of the proportionality principle specifically applies in the criminal law sphere. Since a penal provision is the most severe sanction to the state and imprisonment is the harshest measure for the state to deprive the individual from his/her liberty, the basic principle of proportionality gains even greater significance. The Federal Constitutional Court developed specified yardsticks in relation to the proportionality principle in criminal law. They are designed to limit the State's claim for punishment and, as a result, criminal-law specific characteristics have shaped the principle of proportionality. These peculiarities can be found both in the sphere of substantive criminal law and procedural criminal law. In order to underpin the interference between the rights and basic principles enshrined in the constitution and criminal law/criminal procedure law is also called "applied constitutional law" or being the "seismograph of the constitution".⁴³⁰ In the following, the main features of the principle of proportionality in the German criminal justice system as contoured by the constitutional and supreme courts are reflected⁴³¹ before the concrete application of proportionality is further explained under 8.1.2 below.

In substantive criminal law, the principle of proportionality was mainly put in relation to the *Schuldprinzip*, the requirement of personal guilt and blameworthiness as the determining parameters for liability and punishment.⁴³² The Federal Constitutional Court stated that the legislature must balance the elements of crime and the legal consequences in an appropriate way; the individual must be able to assess in advance, whether his/her conduct is punishable or not. The principle of proportionality may also lead to a necessary restrictive interpretation of the elements of the crime. These findings can also be transferred to administrative sanctions and disciplinary measures. Regarding the relation between punishing behaviour with criminal sanctions or sanctions under the *Ordnungswidrigkeitenrecht* (regulatory offences sanctioned by pecuniary fines and regulated in a special code), the legislator has a wide discretion, but type and level of the sanction must be proportionate to the personal guilt of the offender and the gravity of the offence.

In case of applying measures in procedural criminal law, the principle of proportionality limits, above all, the ordering, enforcement and duration of intrusive measures, such as remand detention, bodily intrusions, search and seizures and observations (see also *infra*). It also determines the legality of a procedural measure at any given time depending on the seriousness of the charge and the strength of evidence underlying the suspicion. Holding a trial may be disproportionate if the continuation of the trial would lead to serious health risks for the accused. Eventually, the "informalisation" of the criminal procedure through plea agreements must not undermine the defendant's subject status disproportionately.

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⁴³⁰ Roxin/Schünemann, *Strafverfahrensrecht*, 26th edition (2009), § 2, mn. 1.

⁴³¹ Cf. Grzeszick, in: Maunz/Dürig (Eds.), *Grundgesetz, Kommentar*, Art. 20, mn. 124 with references to the jurisprudence of the Federal Constitutional Court and the Federal Supreme Court.

⁴³² For the *Schuldprinzip* cf. Bohlender, *Principles of German Criminal Law*, (2009), p. 20.

8.1.1.2 European sources

The principle of proportionality is recognised as a general principle in the ECHR and in the legal order of the European Union. The ECHR forms part of federal law, i.e. it formally ranks below the provisions of the Basic Law; its fundamental rights and procedural guarantees are directly applicable by German courts. In case of conflict between the guarantees enshrined in the Basic Law and those in the ECHR, the fundamental rights in the German constitution must be interpreted in conformity with the ECHR and the decisions of the ECtHR, as a consequence of which the ECHR in fact precedes German law.⁴³³

The European Union Law widely affects German national (criminal) law by its general principles, such as the direct effect of Union Law and its supremacy over national law, the assimilation principle or the interpretation of national law provisions in conformity with Union law. In combination with these principles the principle of proportionality as a principle of European Union Law may influence German criminal law. It mainly plays a role when the five freedoms are limited by criminal law provisions or sanctions.⁴³⁴

Section 73 sentence 2 of the Act on international cooperation in criminal matters (*AICCM – Gesetz über die internationale Rechtshilfe in Strafsachen*) explicitly refers to the principles laid down in Art. 6 TEU (European ordre public), as a consequence of which also the principle of proportionality as a general principle of EU law and common to all EU Member State must be taken into account when a EAW is executed. The Higher Regional Court of Stuttgart has recently further used Art. 49 (3) of Charter of the Fundamental Rights of the European Union to read a proportionality requirement into this national legislation on the EAW (*infra* 8.3.1.1.3).

However, interviewees confirmed that, in daily practice, practitioners feel more bound by the principle of proportionality as enshrined in the German constitution instead of making “considerations” on European law. The reason behind is that they would act in breach of the German constitution if they would enforce an act that is not proportionate.

8.1.2 The application of proportionality in the German criminal justice system

Since, as mentioned above, each action of the state authority must be in conformity with the constitutional principle of proportionality, the proportionality principle applies at all stages of the criminal procedure. Sometimes, the proportionality principle is explicitly mentioned in provisions of the criminal procedure or criminal code.

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⁴³³ Beulke, *Strafprozessrecht*, 11th edition (2010), mn. 9. See also Federal Constitutional Court, official court reports (BVerfGE) vol. 111, p. 307 where the court states: “[O]n the level of constitutional law, the text of the Convention and the case-law of the ECHR serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of the individual’s fundamental rights under the Basic Law.” However, the Court did leave a backdoor open: “If a violation of fundamental principles of the constitution cannot otherwise be averted, there is no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law established by international treaties.”

⁴³⁴ Satzger, *Internationales und Europäisches Strafrecht*, 5th edition (2011), § 9, mn. 18, 21, 81.

8.1.2.1 Prosecution

As a rule, the German criminal justice system is based on the principle of mandatory prosecution (“*Legalitätsprinzip*”, Section 152 (2) CCP). There are, however, a lot of exceptions to this rule offering the prosecutor to exercise discretion (“*Opportunitätsprinzip*”, Sections 153 et seq. CCP). In particular, the prosecutor has discretion to drop minor cases (Sections 153, 153a CCP). Notwithstanding, the general obligation to investigate and prosecute a case German law enforcement authorities are still bound by the obligation to comply with the principle of proportionality. So, the principle of mandatory prosecution cannot be relied upon in order to justify a measure which is in breach with this principle.

8.1.2.2 Investigation/Deprivation of liberty before judgment

The principle of proportionality applies to investigative measures in criminal proceedings as well. Some provisions explicitly refer to the principle (see for the seizure of objects in the custody of a journalist or at media institutions Section 97 (5) 2 CCP, for pre-trial detention Section 112 (1) 2 CCP; for the protection of persons who have the right to refuse testimony against investigative measures Section 160 (2) 1 CCP; for establishing identity of non-suspected persons Section 163b (2) CCP or for computer-assisted search Section 163d (1) 1 CCP). Some provisions require the competent authority to assess whether less intrusive means are available (e.g. for surveillance of telecommunication: Section 100a (1) No. 3 CCP). Irrespective of such an



explicit reference, courts and law enforcement authorities have to apply a proportionality check when taking any intrusive measure.⁴³⁵ According to the jurisprudence of the Federal Constitutional Court, as a rule, a contravention of the principle of proportionality can render the evidence inadmissible for trial.⁴³⁶

8.1.2.2.1 Proportionality control

As regards pre-trial detention, the principle of proportionality plays a very important role. As a direct consequence of the principle, the rule is that a suspect remains at liberty, remand in custody is the exception.⁴³⁷ Furthermore, the principle of proportionality is one of the three pre-conditions for a detention order/arrest warrant beside suspicion and urgency. Accordingly, a detention order may be issued if

- (1) there is a strong suspicion (*dringender Tatverdacht*) that the suspect committed the offence;
- (2) on the basis of certain facts, one of the following grounds for arrest exists:
 - flight or risk of flight
 - risk of tampering with the evidence
 - suspicion that the accused has committed a serious offence (e.g. membership of a terrorist organisation, murder/manslaughter)⁴³⁸
 - danger of re-offending⁴³⁹
- (3) detaining of the suspect is not disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.

Section 113 CCP legally clarifies the proportionality principle for minor offences. If the offence is punishable only by imprisonment up to six months or by a fine up to 180 daily units a warrant cannot be based on the ground of a risk of evidence being tampered with. The ground of risk of flight may be evoked only if the accused (1) has previously evaded the proceedings against him or has made preparations for flight; (2) has no permanent domicile or place of residence in Germany; or (3) cannot establish his identity.

Another clarification of the proportionality principle represents the suspension of the execution of a warrant of arrest, if less severe measures could fulfil the purpose of remand detention (Section 116 CCP). In practice, the requirements to report on certain days at a certain police station or bail are common

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⁴³⁵ See e.g. for the physical examination of the suspect: Federal Constitutional Court, official court reports (BVerfGE) vol. 16, p. 194 (202).

⁴³⁶ Federal Constitutional Court, official court reports (BVerfGE) vol. 44, p. 353 (383); Huber, "Criminal Procedure in Germany" in: Vogler/Huber (Eds.), *Criminal Procedure in Europe*, (2008), p. 298.

⁴³⁷ Bohlander, *Principles of German Criminal Procedure*, (2012), p. 75.

⁴³⁸ Section 112 (3) CCP. The Federal Constitutional Court interpreted this provision in conformity with the constitutional law: Taken literally, it would contradict the principle of proportionality that prohibits the detention of a person merely because of the seriousness of the offence. Yet, the risk of flight or tampering with the evidence is also required for this alternative; however the judicial justification is reduced (official court reports (BVerfGE) vol.19, p. 342). See also Beulke, *Strafprozessrecht*, 11th ed. (2010), mn. 214, Bohlander, *Principles of German Criminal Procedure*, (2012), p. 76.

⁴³⁹ The danger of re-offending in Section 112a CCP refers to certain serious offences that in the light of past experience are repeatedly committed, such as sexual offences, offences against the person or property, arson or public order offences. Also this provision is seen critical from the point of view of proportionality since it is a purely preventive measure to prevent the public from further serious offences (cf. Bohlander, *ibid*, p.77). However, the provision was held constitutional by the Federal Constitutional Court (official court reports (BVerfGE) vol.19, p. 342 (349 et seq.)).

alternatives.⁴⁴⁰ In criminal investigations against juveniles the level of scrutiny in view of the proportionality is increased: Section 72 (1) of the Act on criminal proceedings against juveniles (*Jugendgerichtsgesetz*) requires that account shall be taken of the special strain which executing custody has on youths when assessing proportionality; furthermore, other measures than remand detention must be evaluated and an enhanced justification for the need of detention is demanded.

Also the provision on the revocation of the warrant of arrest explicitly mentions proportionality. Pursuant to Section 120 CCP the warrant of arrest shall be revoked as soon as the conditions for remand detention no longer exist, or if the continued remand detention is disproportionate to the importance of the case or to the anticipated penalty or measure of reform and prevention.

8.1.2.2.2 *Procedural safeguards*

German law provides for various safeguards for pre-trial detention, *inter alia*:

- Remand detention is imposed by a judge in a written form.⁴⁴¹
- In the arrest warrant, the judge/court has to state the reasons for the proportionality of pre-trial detention (Section 114 (3) CCP).
- If the suspect is arrested on the basis of an arrest warrant he / she has a right to be examined by a court not later than the day after arrest (Section 115 (1) and (2) CCP).
- The court has to suspend the execution of the arrest warrant if less intrusive means (e.g. bail) are available in order to ensure that the person will not escape from justice or seek to obstruct justice (Sections 116 and 116a CCP).
- The suspect has the right to appeal against the decision to be detained and to have the proportionality of detention reviewed (Section 117 CCP).
- The arrested person has to be informed of his/her rights (*inter alia*) to consult with a lawyer, to demand an examination by a physician, to notify a relative or a person trusted by him/her (Section 114b CCP).
- German law does not provide for a maximum period of detention, but after six months a higher threshold applies (particular difficulty / unusual extent of the investigation or another important reason) that has to be assessed by the higher regional court (*Oberlandesgericht*, see Section 121 CCP).
- If remand detention is ordered against juveniles an enhanced level of justification for the need of detention is required (Section 72 of the Act on criminal proceedings against juveniles (*Jugendgerichtsgesetz*), see also *supra* 8.1.2.2.1).

Similar safeguards apply to extradition detention, arrest and detention in order to execute a EAW in particular (see *infra* 8.3.3.2.).

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⁴⁴⁰ Huber, "Criminal Procedure in Germany" in: Vogler/Huber (Eds.), *Criminal Procedure in Europe*, (2008), p. 306.

⁴⁴¹ The prosecution service is authorized to issue a warrant of arrest for execution of a prison sentence, if the convicted person has not appeared or is suspected of having absconded – Section 457 CCP.

8.1.2.3 Sentencing

German courts (and other law enforcement authorities) have to abide by the principle of proportionality when imposing a criminal (or non-criminal) sentence. In particular, the sentence has to be adequate with regard to the personal guilt of the offender (Section 46 (1) 1 Criminal Code).⁴⁴² In the case-law of the Federal Constitutional Court, the principle of personal guilt and the principle of proportionality provide for parallel guarantees against excessive penalties.⁴⁴³

8.2 The principle of proportionality and its relevance for the authority issuing a European Arrest Warrant

8.2.1 The proportionality check in the issuance of an European Arrest Warrant

As has been mentioned above (8.1), the principle of proportionality is a general principle of constitutional law and, thus, applies in extradition law as well. As a consequence, the requesting authority has to assess whether a request for extradition complies with this principle.⁴⁴⁴ According to the guidelines on international cooperation in criminal matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVAsT*) any request for mutual legal assistance is subject to the principle of proportionality (No. 25 (1) 2). A similar reference to the proportionality principle is foreseen in the guidelines on international searches of persons wanted for arrest.⁴⁴⁵ In Berlin, the internal guidelines of the general prosecutor provide for a minimum threshold: If the expected sentence amounts to 12 months imprisonment or more the issuing of a EAW is considered to be proportionate even if the execution of the sentence is likely to be suspended on probation.⁴⁴⁶ With regard to a foreign suspect who is supposed to be abroad and not to have a residence permit, the prosecutor may refrain from issuing a EAW for a minor offence.⁴⁴⁷

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⁴⁴² Federal Constitutional Court, official court reports (BVerfGE) vol. 92, p. 277 (326); vol. 105, p. 135 (154).

⁴⁴³ See e.g. Federal Constitutional Court, official court reports (BVerfGE) vol. 80, p. 244 (255-256); for a critical analysis of the different concepts: H.A. Wolff, "Der Grundsatz "nulla poena sine culpa" als Verfassungsrechtssatz", *Archiv des öffentlichen Rechts*, vol. 124 (1999), p. 55 (67 et seq.). See also supra 8.1.1.1.

⁴⁴⁴ Schomburg/Hackner in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), Vor § 68 mn. 18.

⁴⁴⁵ Richtlinien über die internationale Fahndung nach Personen, insbesondere der Fahndung nach Personen im Schengener Informationssystem (SIS) und aufgrund eines Europäischen Haftbefehls, Anlage F zu den Richtlinien für das Strafverfahren und das Bußgeldverfahren (RiStBV), No. 4. These guidelines have not yet entered into force in all Länder, see Hackner, in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), p. 3008.

⁴⁴⁶ Generalienheft der Generalstaatsanwaltschaft Berlin (Auszug): „Die internationale Fahndung ist in der Regel schon dann verhältnismäßig, wenn eine Freiheitsstrafe von 12 bis 18 Monaten zu erwarten ist. Dies gilt auch dann, wenn mit einer Aussetzung dieser Strafe zur Bewährung zu rechnen ist.“

⁴⁴⁷ No 41 (3) of the guidelines for criminal proceedings, Richtlinien für das Strafverfahren und das Bußgeldverfahren (RiStBV): "Ist der Beschuldigte Ausländer und liegen Anhaltspunkte dafür vor, dass er sich im Ausland befindet, so setzt sich der Staatsanwalt, bevor er um Ausschreibung zur Festnahme ersucht, in der Regel mit der Ausländerbehörde in Verbindung. Besteht ein Aufenthaltsverbot oder sind bei einer späteren Abschiebung Schwierigkeiten zu erwarten, so prüft der Staatsanwalt bei Straftaten von geringerer Bedeutung, ob die Ausschreibung unterbleiben kann."

8.2.1.1 National arrest warrant and European Arrest Warrant

Since under German understanding a request for extradition for the purpose of prosecution usually requires a (national) arrest warrant⁴⁴⁸, proportionality of arrest and detention has to be established before issuing a EAW. For the requirements to issue a warrant of arrest in accordance with Sections 112 et seq. CCP cf. supra 8.1.2.2. Requests for extradition for the purposes of executing a custodial sentence are based on an enforceable judgment.

8.2.1.2 The role of the judicial authorities

According to the Act on international cooperation in criminal matters (AICCM), the Federal Ministry of Justice (*Bundesministerium der Justiz*) in consent with the Ministry of Foreign Affairs (*Auswärtiges Amt*) shall decide on requests to foreign states for legal assistance (Section 74 (1) AICCM).

This principle has been given up in EAW-related matters since the federal government has delegated its competence to exercise its power to decide on outgoing requests to the governments of the federal states (*Länder*)⁴⁴⁹ which themselves have further delegated this competence by own decrees. Therefore, competences and powers may differ in detail from federal state to federal state. It is also dependent on which proceedings and at which stage of the proceedings a EAW is to be issued. As a rule, the public prosecutors' offices, installed at the regional courts (*Staatsanwaltschaften beim Landgericht*), are competent to issue EAWs.⁴⁵⁰ They are generally responsible for criminal investigations unless a special competence is conferred to the federal attorney general (*Generalbundesanwalt*).⁴⁵¹ Each prosecutor can draft a EAW by completing the EAW form *ex officio*. However, at least within bigger prosecutors' offices, special units exist to deal with international legal assistance (e.g. Cologne, Stuttgart, Frankfurt a.M., Munich, Berlin). Either these experienced prosecutors are regularly responsible for drawing up EAWs or they provide assistance to the other prosecutors in the office who prepare the EAWs. In its decision the prosecutor has to examine the legality of such a request and, thereby, to assess its proportionality.

Courts are in practice not involved in the process leading to the issue of EAWs, but they are competent for issuing the underlying national arrest warrant (in the majority of cases it is the judge at the local court (*Amtsgericht*) who decides on the national arrest warrant). Justice ministries are no longer involved in the decision-making process for issuing EAWs although they can have a supportive function or are a central point for reporting difficult or sensitive cases.

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⁴⁴⁸ Schomburg/Hackner, in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), mn. 19.

⁴⁴⁹ Section 74 (2) AICCM and the agreement between the federal government and the governments of the states of 28 April 2004 (*Bundesanzeiger* p. 11494), No. 3 lit. a.

⁴⁵⁰ See e.g. Section 5 No. 2 of the Bavarian regulation on competence in cooperation in criminal matters (*Zuständigkeitsverordnung Rechtshilfe*) of 29 April 2004 (*Bayerisches Gesetz- und Verordnungsblatt* 2004, p. 260). In Berlin, this competence has not been delegated to the prosecutor, but is exercised by the general prosecutor acting on behalf of the state ministry of justice (*Senatsverwaltung für Justiz*). Decrees of the *Länder* differ on whether only the Chief Public Prosecutor (*Leitender Oberstaatsanwalt*) can sign the EAW or also other prosecutors of the prosecutor's offices.

⁴⁵¹ This is the case if a crime is given for which the higher regional courts (*Oberlandesgerichte*) decide in the first instance. In these cases, which mainly concern state security, terrorism, and international crimes, it is the federal attorney general (*Generalbundesanwalt*) who leads the investigations. He can transfer the prosecution to the prosecutor's office at the higher regional court (*Generalstaatsanwaltschaft beim Oberlandesgericht*). Either the federal attorney general or the prosecutor at the higher regional court is then competent to exercise the necessary procedural acts, including the issuing of European Arrest Warrants. See Art. 120, 142a of the German Judicial Court's Act (*Gerichtsverfassungsgesetz – VG*).

The decision to issue a EAW for the purpose of prosecution is not subject to judicial review because it does not directly affect individual rights since arrest, detention and surrender will be executed by the requested Member State.⁴⁵² However, a European Arrest Warrant is usually⁴⁵³ based on a domestic arrest warrant (infra 8.2.2.1) that has to be issued by a judge and can be challenged before the court (Section 304 CCP).⁴⁵⁴ An arrest warrant for the purpose of enforcement (execution of a sentence) can be issued by the public prosecutor (Section 457 (2) CCP)⁴⁵⁵; the warrant is subject to judicial review, too (Section 457 (3) 3 CCP). So, the person sought can challenge the domestic arrest warrant arguing that it does not comply with the principle of proportionality.⁴⁵⁶ Furthermore, the notice for arrest (being reported to the N-SIS and the SIS) can be appealed before the local court (*Amtsgericht*) because it will automatically result in a (provisional) arrest.⁴⁵⁷

8.2.1.3 The role of the central authorities

The Federal Ministry of Justice is responsible for the negotiation and legal scrutiny of proposed legal instruments under public international law or the law of the European Union. It also takes a drafting role and carries out scrutiny in respect of legislation to incorporate such instruments into domestic law.

All operational matters in the international judicial cooperation in criminal matters are performed since 2007 by the newly established Federal Office of Justice (*Bundesamt für Justiz*). It is a subordinate authority of the Federal Ministry of Justice and serves as a central point of call when it comes to extradition, international mutual assistance in criminal matters and transfer of prisoners.⁴⁵⁸ In EAW-related matters its main function lies in advising the judicial authorities, transmitting and spreading relevant information, reporting selected cases and matters of principle to the Federal Ministry of Justice and compiling nationwide statistics on extradition.

The Federal Criminal Police Office (*Bundeskriminalamt* – “*BKA*”) is the central point that is responsible for the transmission of EAWs via the international search systems. Since in the vast majority of the cases the whereabouts of the suspect are unknown, the regular way is the transmission of the EAW via the Schengen Information System (SIS) or Interpol channels which is done by the BKA. The division within the BKA that is assigned for international cooperation in criminal matters provides 24/7 and language service.

All central authorities do not intervene into the process of issuing a EAW.

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⁴⁵² Higher Regional Court Celle, decision of 16 April 2009 – 2 VAs 3/09, *Neue Zeitschrift für Strafrecht* (NSTZ) 2010, p. 534; Schomburg/Hackner in: Schomburg/Lagodny/Gleiß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), Vor § 68 mn. 25.

⁴⁵³ In urgent cases an arrest warrant is not necessary, but has to be submitted as soon as possible, see for the national level: Section 131 (2) CCP.

⁴⁵⁴ See in this regard Federal Constitutional Court, decision of 25 March 1981 – 2 BvR 1258/79, *Neue Juristische Wochenschrift* (NJW) 1981, p. 1154 (1155).

⁴⁵⁵ An arrest warrant against juveniles must be issued by a judge (Section 82 (1) 1 Jugendgerichtsgesetz).

⁴⁵⁶ See the explicit reference to the proportionality principle in Section 457 (3) 2 CCP.

⁴⁵⁷ Higher Regional Court Celle, decision of 16 April 2009 – 2 VAs 3/09, *Neue Zeitschrift für Strafrecht* (NSTZ) 2010, p. 534, with reference to Section 98 (2) 2 CCP; Schomburg/Hackner, *ibid.*, mn. 18, 25.

⁴⁵⁸ See the act on the establishment of the Federal Office of Justice (*Gesetz über die Errichtung des Bundesamts für Justiz*) of 17 December 2006, Federal Law Gazette (Bundesgesetzblatt), part I, no. 62, p. 3171.

8.2.2 The Criteria for the proportionality control

8.2.2.1 *European handbook criteria*

According to the European handbook on how to issue a European Arrest Warrant,⁴⁵⁹ the competent judicial authority should, before deciding to issue a EAW, consider proportionality by assessing a number of factors. In particular, it should assess the seriousness of the offence, the possibility of the suspect being detained, the likely penalty to be imposed if the person sought is found guilty of the alleged offence, the effective protection of the public, and the interest of the victims of the offence.

As has been mentioned above (8.1.2.2.1), the EAW is usually based upon a domestic arrest warrant that requires a strong suspicion against the detainee and a ground for detention (such as risk of flight or tampering with evidence,). Furthermore, remand detention is subject to the principle of proportionality, i.e. it may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed (Section 112 (1) 2 CCP). So, when assessing the proportionality of the (domestic) arrest warrant the court takes into consideration *inter alia*:

- the gravity of the offence and the public interest in prosecuting it;⁴⁶⁰
- the expected penalty; the duration of detention has to be adequate with regard to the sentence to be served.⁴⁶¹

Regarding the gravity of the offence, a higher threshold applies in case of minor offences (Section 113 CCP).⁴⁶²

When issuing a EAW, the prosecutor has to consider both the aspects mentioned above (proportionality of arrest) and the aspects related to cross-border cooperation (proportionality of surrender and arrest in a foreign country).⁴⁶³ The latter can have an additional impact on the fundamental rights of the person sought (e.g. with regard to the detention conditions in the executing Member States or the duration of detention in extradition proceedings). In most cases, however, proportionality of surrender will depend upon proportionality of arrest and detention, and the prosecutor can rely on the proportionality of the domestic arrest warrant.

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⁴⁵⁹ Council doc. 17195/1/10, Copen 275, p. 14.

⁴⁶⁰ Hilger, in: Löwe-Rosenberg, *Strafprozessordnung und Gerichtsverfassungsgesetz*, vol. 4, 26th edition (2007), § 112 mn. 58; Meyer-Goßner, *Strafprozessordnung mit GVG und Nebengesetzen*, 54th edition (2011), § 112 mn. 11.

⁴⁶¹ Federal Constitutional Court, decision of 11 June 2008- 2 BvR 806/08, *Strafverteidiger* 2008, p. 421 (422-423); Hilger, *ibid.*, mn. 59; Meyer-Goßner, *ibid.*, mn. 11 (duration of remand detention may not exceed the duration of imprisonment for default of payment of a criminal fine).

⁴⁶² Cf. 8.1.2.2.1.

⁴⁶³ For this „double proportionality test“ see also Burchard in: Böse (Ed.), *Enzyklopädie zum Europarecht*, vol. 9: *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, § 14 mn. 29 who points out that beside the proportionality of the domestic arrest warrant the prosecutor should also examine the proportionality of the issuance of the EAW taking into consideration the burdens for the person sought transnationally and for the executing countries (!).

The interviews with prosecutors have confirmed that most of the criteria mentioned in the European handbook on the EAW are already taken into consideration when a court issues a domestic arrest warrant (which is considered an indispensable requirement for issuing a EAW). Most important are the seriousness of the offence and the likely penalty to be imposed. A EAW is not issued if the facts let (obviously) expect only a fine or a suspended sentence.⁴⁶⁴ The effective protection of the public and the interests of the victim were considered differently. On the one hand they are assessed in connection with the likely penalty and, thus, have a limited relevance (Berlin, Frankfurt), on the other hand the criteria can have an own relevance depending on the offender or the type of the offence (Cologne).⁴⁶⁵

If a national arrest warrant has been issued, there is no uniform practice on whether to issue a EAW automatically (Frankfurt) or to apply an additional proportionality test (Cologne, Berlin). In the latter regions, a EAW will only be issued if the expected penalty will be one year imprisonment or more in case of surrender for prosecution and trial or a sentence to be executed of at least seven (Cologne) respectively ten (Berlin) months in case of surrender for execution of a custodial sentence; with regard to the latter, the minimum threshold of four months (Art. 2 (1) FD EAW) is considered to be far too low. In Berlin, only 30 % of the domestic arrest warrants result in the issuing of a EAW. This corresponds to the considerably small number of EAWs (about 2.000), compared to the total number of domestic arrest warrants (almost 27.000, see infra 8.4.2.2).

8.2.2.2 Other criteria

Obviously, the criteria listed in the European handbook are not exhaustive. When issuing the domestic arrest warrant, the court must assess its proportionality taking into consideration (*inter alia*):

- less intrusive means enabling the judicial authorities to carry out the investigation (e.g. bail, Section 116a CCP);⁴⁶⁶
- reasonable chance of conviction⁴⁶⁷ (for the requirement of a strong suspicion) and previous convictions (as a relevant factor for the expected penalty);
- the fundamental rights of the person to be arrested and the consequences of arrest for his/her health⁴⁶⁸, private life and professional activities⁴⁶⁹;
- the special need for the protection of juveniles (Section 72 (1) 1 of the Act on criminal proceedings against juveniles – *Jugendgerichtsgesetz*).

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⁴⁶⁴ Explicitly mentioned by Berlin and Cologne. Cologne also pointed out that the case law on sentencing criminal offences by the courts of the region should be taken into account.

⁴⁶⁵ Cologne reminded on cases of child abduction where the interests of the victim are important. The effective protection of the public can play a major role if the offender is held dangerous or a repeat offender.

⁴⁶⁶ Hilger, *ibid.*, mn. 55; Meyer-Goßner, *ibid.*, mn. 9, 10.

⁴⁶⁷ Hilger, *ibid.*, mn. 17.

⁴⁶⁸ Constitutional Court of the state Berlin, *Neue Juristische Wochenschrift* (NJW) 1993, p. 515; Meyer-Goßner, *ibid.*, mn. 11a.

⁴⁶⁹ Hilger, *ibid.*, mn. 57; see for detention of a mother breastfeeding her child: Constitutional Court of the state Berlin, *Neue Juristische Wochenschrift* (NJW) 2001, p. 3183.

When issuing the EAW, the prosecutor has to consider these factors as well, in particular if an additional proportionality test is applied (Berlin, Cologne).

The interviews have revealed that most of the factors mentioned above are taken into consideration. In particular, the prosecutor may summon the defendant, thereby having recourse to a less intrusive means (Cologne). For obvious reasons, this will only be a realistic option if the prosecutor can establish the address of the suspect (and there is no risk of flight). To that end, the SIS allows for a request to communicate the defendant's place of residence or domicile (Art. 98 CISA).⁴⁷⁰ Nevertheless, several criteria that refer to the personal circumstances or conditions of the location of arrest (e.g. detention conditions, effective exercise of defence rights) cannot be applied because the issuing authority usually does not know the place where the suspect will be arrested (Berlin, Cologne). To some extent, there is a general assumption that detention conditions are (more or less) equivalent all over the Union (Frankfurt) whereas in exceptional cases the detention conditions in the executing Member State may give reason not to issue a EAW (Cologne). By contrast, the age of the person wanted for arrest is considered as a relevant factor, but does not hinder the prosecutor from issuing a EAW if a serious crime is at stake (Berlin, Cologne, Frankfurt).⁴⁷¹ Similarly, the suspect's right to family life (Art. 8 ECHR) does not hinder detention (and a EAW) right from the outset, but calls for detention conditions (in Germany) that comply with this guarantee (Frankfurt). With regard to a foreign suspect who is supposed to be abroad and not to have a residence permit, the prosecutor may refrain from issuing a EAW for a minor case (see supra 8.2.1).

Defence lawyers have confirmed that the requirement of a domestic arrest warrant can be considered a sufficient safeguard to ensure compliance with the proportionality principle.

Cost and efforts are not considered to be part of the proportionality check because they are not related to individual rights, but to public interests.⁴⁷² Nevertheless, the interviews have revealed that these interests are taken into account in the decision whether to issue a EAW (Cologne).⁴⁷³

On balance, the interviewees confirmed that the various criteria for assessing the proportionality largely depend on the individual case. They are permanently examined during the search for the suspect (Cologne).

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⁴⁷⁰ According to the Federal Criminal Police Office, the judicial authorities of Slovakia always seek to establish the place of residence (Art. 98 CISA) before issuing a European Arrest Warrant.

⁴⁷¹ In case of juveniles (persons under the age of 21) it must be born in mind that detention is the absolute exception under German law so the same must apply for EAWs (Frankfurt). In case of elder people it must be assessed whether they are fit for arrest (Cologne, Frankfurt, Berlin).

⁴⁷² Vogel in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2001), Vor § 1 IRG par. 77.

⁴⁷³ See also with regard to the decision not to file a request for assistance if this request is expected to be refused: Administrative Court of Cologne, judgment of 7 December 2010 – 5 K 7/61/08 (extradition of CIA-officials); see also for the proportionality check with regard to European Arrest Warrant issued by another Member State: Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift (NJW)* 2010, p. 1617 (1618) – English translation: *Criminal Law Review* 2010, p. 474 (479).

8.2.3 Problems encountered by the issuing authority

8.2.3.1 *Problems regarding the execution of the issued EAW*

The cooperation with France and the Netherlands is considered to run smoothly. As regards France, prosecutors reported only occasional problems (Berlin: finding the competent authority; Cologne: request for additional information combined with tight time limits, e.g. on the evidence, and documents, e.g. the national arrest warrant). In the cooperation with the Dutch authorities, problems arise from the different approach to combatting drug-related offences (Berlin), in particular with the decision on whether to arrest and detain a person and the conversion of sentences to a rather low sanction (Frankfurt, Federal Office of Justice).

As far as the cooperation with other Member States is concerned, various problems are reported.

One of the major problems results from the different views on the basis to enforce a sentence in the executing Member State (cases of Art. 4 No. 6 and 5 (3) FD EAW). Several Member States (e.g. Poland, Italy, Spain) interpret the German EAW as request to execute the sentence or to be the only basis for a prompt return of the person to the executing Member State whereas the German authorities share the position to make the return of a national of the executing Member State subject to the convention on the transfer of sentenced persons of 1983 that requires the consent of the person to be transferred. In this context, problems were identified when the enforcement of a sentence is carried out without the control/involvement of the issuing state, e.g. if a German EAW against a national of the executing state is executed quasi automatically and the German authorities are not or lately informed (especially in relation to Italy); furthermore, concerns were expressed in cases where the prompt return of a person is demanded by the executing state without recognising his/her consent that provokes to the feeling that the person concerned is transferred through Europe like a chess piece not having any procedural right (Cologne).

Another type of problem refers to the existing differences in domestic law. The execution of EAWs in the United Kingdom, for example, has turned out not to function properly because the transmission of the EAW is required within 48 hours which is due to the fact that the legal order of the UK does seemingly not have the possibility of a provisional extradition detention (Cologne). Furthermore, the executing UK authority usually asks for detailed additional information on evidence (due to the maintenance of the "probable cause element" in the national extradition law), so too excessive requirements make the procedure very cumbersome (Frankfurt, Cologne). In Belgium, the executing authority may not take investigative measures (e.g. surveillance) in order to execute a sentence; as a consequence, a EAW for the purpose of enforcement cannot be executed because the whereabouts of the convicted person cannot be established (Federal Criminal Police Office).

Eventually, some communication problems occur. Seemingly depending on the authority, often additional information is required which is deemed unnecessary in the given case (Cologne: some Italian and Greek authorities as well as Cour d'Appel of Paris – see above). In several cases, the issuing authority was not informed of the duration of detention in the executing state; this information is crucial because the time spent in custody shall be deducted from the sentence. In order to avoid additional requests for information, the French liaison magistrate suggested to submit the relevant information automatically when surrendering the person sought.

8.2.3.2 *Problems regarding the use of alternative measures*

The European Handbook on how to issue a European Arrest Warrant describes examples of alternatives to a EAW (using less coercive instruments of mutual legal assistance where possible; using videoconferencing for suspects; summons; using the Schengen Information System to establish the place of residence of a suspect; use of the Framework Decision on the mutual recognition of financial penalties).

In general, German prosecutors do not have recourse to the alternative (and less intrusive) means mentioned in the handbook. In most cases, the prosecutor does not know the whereabouts of the person sought and, thus, cannot request the corresponding Member State to take an alternative measure. Accordingly, there are no internal guidelines on whether and how to use these alternative instruments (Cologne).

This applies in particular to a summons or an interrogation via videoconferencing; in any case, the seriousness of the offence or a risk of flight can call for an arrest warrant (Cologne).

In minor cases, the prosecutor can apply for a final court decision to be taken on the basis of the file with a right of the convicted person to challenge this decision; here, the court can issue a so-called penal order (“*Strafbefehl*”) in a written procedure upon application of the prosecutor and without trial and formal judgment, i.e. without the need of an oral hearing (Section 407 et seq. CCP).⁴⁷⁴ The penal order will be served to the person if the place of residence is known (Berlin, Cologne). Nevertheless, it was clarified that the EAW is not an instrument to make the person appear before court (Frankfurt).⁴⁷⁵

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⁴⁷⁴ Cf. Huber, “Criminal Procedure in Germany” in: Vogler/Huber (Eds.), *Criminal Procedure in Europe*, (2008), p. 350; the penal order can only impose certain penalties, in particular a fine and - where the indicted accused has defence counsel – suspended sentence not exceeding one year.

⁴⁷⁵ See also Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift* (NJW) 2010, p. 1617 (1619). Opinions differ whether a EAW can be issued if the defendant fails to appear before court (Section 230 para. 2 CCP – denying: Burchard in: Böse (Ed.), *Enzyklopädie zum Europarecht*, Bd. 9: *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, § 14 mn. 33; in favour: Heintschel-Heinegg in: Sieber/Brüner/Satzger/Heintschel-Heinegg, *Europäisches Strafrecht* (2011), § 37, mn. 7.

Measures such as pre-trial supervision orders are considered to interfere with the executing state's competence to assess whether the person sought has to be detained or he/she can be released on bail (Berlin, Frankfurt). On the other hand, recourse to a less intrusive means (e.g. house detention) implies the risk that the person sought will seek to escape from justice (Cologne, with regard to surrender from Italy and Poland).

An enhanced use of enforcement cooperation (request for the execution of a sentence) is not considered a real alternative to a EAW since the procedure is still too formalized (Cologne). Nevertheless, when a sentence (a fine) has been imposed in written proceedings through penal order (cf. supra) and the convicted person did not appeal that decision, the prosecutor usually initiates a request for the execution of this sentence.

The transfer of criminal proceedings does not seem to be a feasible alternative either. The proceedings are considered to be too complicated (Berlin); furthermore, transfer of proceedings usually requires a translation of the file and thereby produces disproportionate costs (Cologne).

If a EAW is considered to be disproportionate, the prosecutor will seek to establish the residence of the suspect (Art. 98 CISA, supra 8.2.2.2) in order to summon him/her (Cologne) or to proceed without a hearing (final court decision to be taken on the basis of the file, see supra). According to the Federal Criminal Police Office (*Bundeskriminalamt*), this instrument (Art. 98 CISA) should be used more frequently. Furthermore, the person can be searched for arrest on the national level (Berlin, Cologne). If the person cannot be arrested (or summoned) the prosecutor provisionally terminates the proceedings (Section 154f CCP; Berlin, Cologne).

8.2.3.3 *Problems regarding the scope of the EAW*

In principle, a EAW can be issued for any category of offence. Apart from the conditions set out in Art. 2 (1) FD (maximum penalty of one year imprisonment or more), German law does not provide for exemptions in that regard.

In view of proportionality of EAWs, German authorities that wanted to execute imprisonments for default of payments encountered problems (Federal Office of Justice). Under German law, a monetary fine that was imposed can be commuted to a term of imprisonment if it is not recoverable (Section 43 CC). Thus, the term of imprisonment was made subject to a EAW by some German prosecution services, mostly affecting Poland as executing Member State. However, Polish courts refused execution mainly arguing that the scope of Art. 2 FD EAW does not apply and that the financial penalty could be enforced, e.g. through the FD on the application of the principle of mutual recognition to financial penalties.

Although prosecutors expressed the view that a EAW shall not be issued for petty offences (supra 8.2.2.1 and 8.2.2.2) the annual statistics illustrate that the German authorities use this instrument with regard to minor offences (breach of domestic peace, insult, damaging property, theft of objects with a minor value) as well.⁴⁷⁶ If a EAW is issued for both the major offence and the petty offence (i.e. in cases of accessory extradition respectively surrender), this will not necessarily result in a breach with the proportionality principle. However, in the interview with police officers at the Federal Criminal Police Office (*Bundeskriminalamt*), it has been reported that a Member State refused to execute a EAW issued by Germany for theft of an object of minor value (4 Euro).

8.2.4 Solutions and propositions

The interviews revealed that, since in most cases the whereabouts of the person sought are not known, the EAW is regularly the only means to search the person after having affirmed the requirements of the national arrest warrant (Frankfurt).⁴⁷⁷ The alternatives mentioned in the European handbook on the EAW can only be considered if the whereabouts of the person sought are known which is frequently not the case. In these cases interrogations in the country of residence may be a good practice. The interviews also brought to light that the alternatives to the EAW can only properly function if they can be applied as easily as the EAW, which is still hindered by not having implemented other framework decisions (e.g. pre-trial supervision order) or not having on track a consistent system of judicial cooperation in criminal matters within the EU. As a consequence, the EAW is applied "*in dubio*" instead of alternatives such as the transfer of proceedings although the latter may be more appropriate in a given case.

Despite the practical problems, prosecutors and judges expressed the view that the proportionality check should be exercised by both the issuing and the executing authority (Berlin, Frankfurt). Nevertheless, the assessment of the executing authority should be limited to flagrant breaches of this principle and to proportionality of arrest and detention in the executing state (Cologne).

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⁴⁷⁶ Statistics on extradition, *Bundesanzeiger* No 30 of 22 February 2012, p. 690, (712 et seq. - Section 123 CC: breach of domestic peace; Section 185 CC: insult; Section 248a CC: theft of object of minor value; Section 303 CC: damaging of property).

⁴⁷⁷ The Federal Criminal Police Office pointed out in this respect that the EAW changed the practice of SIS alerts: Whereas originally Art. 98 alerts prevailed Art. 95 ones, today Art. 95 entries are nearly automatically made if the whereabouts of the suspect seem not to be known (for the other practice of Slovakia, see footnote 283).

8.2.5 Statistics

In 2011, German prosecutors have issued 2138 EAWs⁴⁷⁸, in 2010, 2096 EAWs.⁴⁷⁹ The highest amount of issued EAWs was registered in 2009 with 2433 EAWs.⁴⁸⁰

An analysis on the frequency of the type of offences upon which a German extradition request was based⁴⁸¹ shows that the vast majority of EAW requests issued by German authorities refer to crimes against property or unlawful gaining of financial profits (theft, robbery, fraud, tax evasion and smuggling). Crimes against the person like bodily injury or offences affecting the sexual self-determination (rape, etc.) can be found but play a minor role considering the overall size. It can further be concluded that the complex of “theft” is by far the most often underlying offence of a German EAW request within the crimes against property (in 2010, 433 EAWs for theft). Furthermore, fraud and robbery occur very often (in 2010: 291 EAWs for fraud and 261 for robbery). A major role further plays crime involving narcotic drugs (in 2010: 174) and crime in relation to tax law. Bodily injury ranks on the sixth position of the German requests executed between 2007 and 2010 (in 2010: 162). The distribution of the frequency of the offences is similar year by year. It can also be concluded from the statistics that the majority of EAWs deal with crime “at the lower or medium level” and not with the serious forms of crime.

In addition, it can be observed that some types of offences play a more prominent role in relation to individual EU Member States than to the others. Offences involving narcotic drugs, for example, are by far the most often category of EAWs issued by German authorities in relation to the Netherlands. In relation to Poland, EAWs are very often issued for tax offences (e.g. tax evasion, smuggling, VAT fraud or black marketing with tobacco). In relation to Spain, fraud occurs more often than theft or robbery. In 2009 and 2010, a high number of EAWs requests to Romania and Bulgaria referred to counterfeiting of money/credit cards. In relation to Germany’s neighbouring countries France and Austria, the general trend is more or less reflected, i.e. most EAWs refer to theft and fraud.

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⁴⁷⁸ Information provided by the Federal Office of Justice.

⁴⁷⁹ Council-Doc. No. 9120/2/11 REV 2, p. 2.

⁴⁸⁰ Council Doc. No 7551/5/10 REV 5, p. 2.

⁴⁸¹ For this question the German statistics on extradition (*Auslieferungsstatistik*) were analysed (published at: <http://www.bmj.de/DE/Service/StatistikenFachinformationenPublikationen/Statistiken/Auslieferungsstatistik/artikel.html> (accessed on 8 March 2013)). The reference period was 2007 - 2010. For the analysis the criminal offences were analyzed EU Member State by EU Member State and the category of offence was taken that has been accounted most often in the given year in reference to the EU Member State. It should also be stressed that the criminal offences in the statistics refer to the German Criminal Code and other domestic statutes that foresee criminal offences, such as the Narcotic Drugs Act (*Betäubungsmittelgesetz*), the Fiscal Code (*Abgabenordnung*) and other taxation law; thus the offences in the nation-wide extradition statistics do not correspond exactly to the list of offences in Art. 2 (2) FD EAW Sections 223-227 CC: bodily injury/assault; 242-244a: theft; 263, 263a: fraud; 249- 252, 255: robbery; BTMG: drug-related offences).

A relation between the total number of issued EAWs and the total number of prosecutors that may give further findings on the performance of issuing EAWs in Germany can hardly be drawn. Although the statistics indicate 5246 as the total number of public prosecutors on 31 December 2010⁴⁸², it must be noticed that the information relates to the number of job shares for public prosecutors. There are no absolute figures for the number of persons. The information on the job shares count a public prosecutor working full-time as 1. A prosecutor working part-time is counted as the fraction of 1 which corresponds to the proportion of his/her working hours to full-time (e.g. 0.5 for a person working half the usual number of hours). Thus, there are at minimum 5246 prosecutors, but in fact there are even more.

The EAW is a measure available to each prosecutor conducting a criminal investigation. Theoretically, every public prosecutor can issue a EAW in Germany. However, as the interviews revealed, some public prosecutor offices are much more active in issuing EAWs than others, mostly depending on the location of the prosecution office and the type of daily cases. Furthermore, bigger public prosecutor offices, such as Cologne, Stuttgart, Munich, Frankfurt a.M., Berlin, etc. have special units dealing with international legal assistance in criminal matters. Here, one or more public prosecutors advise their colleagues on the issuing of mutual legal assistance requests, take care of the quality of the requests and provide for a consistent practice of the respective prosecution service. However, these tasks are allocated not in full-time job shares. International legal assistance only forms a part of the overall working time of these prosecutors (e.g. 30 or 50%).

Moreover, the issuing of EAWs only accounts for a small proportion of a prosecutor's activities. So, on the basis of the data available it is also impossible to assess the average workload of a prosecutor responsible for issuing a EAW as another factor of performance.

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⁴⁸² Statistics of the Bundesamt für Justiz (11 August 2011 – 3110/6 – B7 268/2011), available at: http://www.bundesjustizamt.de/nm_2103256/DE/Themen/Buergerdienste/Justizstatistik/Personal/Gesamtstatistik,templateId=raw,property=publicationFile.pdf/Gesamtstatistik.pdf (accessed 13 March 2013).

8.3 The principle of proportionality and its relevance for the authority executing a European Arrest Warrant

8.3.1 General framework

8.3.1.1 Proportionality test by the executing judicial authorities

8.3.1.1.1 Legal basis

As mentioned above, German judicial authorities take the view that – as a last resort – also the executing Member State can examine a EAW under the aspects of proportionality. In legal theory, the proportionality test can be approached by two ways: First, an extradition may not be granted because extradition would infringe fundamental rights and fundamental principles as enshrined in Art. 6 TEU (Section 73 sentence 2 AICCM). Second, the German warrant ordering extradition request (*Auslieferungshaftbefehl* – see also infra 8.3.3.) must be in conformity with the principle of proportionality in the sense of the German constitutional law principle (cf. supra 8.1.1.1.) since the German arrest order is a sovereign act by a German state authority and remains such an act even if it is issued in execution of an extradition request/ a EAW.⁴⁸³

Although the court decisions refer to the proportionality of arrest the courts' assessment results in a proportionality check on whether to execute the EAW or not because the reasoning is based upon the fact that the issuing state (rather than the executing authority) could have recourse to a less intrusive means to ensure effective prosecution of the offence for which the EAW had been issued. The case-law suggests that there is no clear cut distinction between proportionality of arrest and detention on the one hand and proportionality of execution of the EAW and surrender on the other.

As far as the proportionality test of the extradition is concerned, Section 73 sentence 2 AICCM stipulates that a EAW may not be executed if surrender to another Member State would violate the principles in Art. 6 TEU. Through Section 73 sentence 2 the German legislator implemented the "European ordre public" as laid down in Art. 1 para. 3 FD EAW.⁴⁸⁴ It was considered necessary by the legislator that the executing authorities of Germany should keep the possibility to deny the execution of a request in evident cases of a breach of fundamental rights and principles. The clause is applicable to all areas of legal assistance in relation to EU Member States. In detail, Section 73 sentence 2 refers to the following principles: principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, in particular principles which are common to the Member States.⁴⁸⁵

Since the principle of proportionality is a general principle of EU law and, thus, part of the fundamental rights and principles as enshrined in Art. 6 TEU, the executing authority has to assess whether its decision complies with the principle of proportionality. For the proportionality of extradition detention see infra 8.3.3.1.

⁴⁸³ For these two approaches of examining proportionality, cf. Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift* (NJW) 2010, p. 1617 – English translation: *Criminal Law Review* 2010, p. 474 (476 and 479).

⁴⁸⁴ Vogel in: Grütznert/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2007), §73 IRG, mn. 132.

⁴⁸⁵ Vogel, *ibid.*, mn. 152.

8.3.1.1.2 Competent authorities

As it is the case for outgoing extradition requests (cf. supra 8.2.1.2), the Act on international cooperation in criminal matters provides that, in principle, the Federal Ministry of Justice (*Bundesministerium der Justiz*) in consent with the Ministry of foreign affairs (*Auswärtiges Amt*) shall decide on the execution of a EAW (Section 74 (1) 1– AICCM). The federal government, however, has delegated the competence to exercise this power to the governments of the federal states (*Länder*)⁴⁸⁶ which have further delegated this competence to the general prosecutor's office attached to the Higher Regional Court (*Generalstaatsanwalt beim Oberlandesgericht*).⁴⁸⁷

The general prosecutor may not execute a EAW before the competent Higher Regional Court (*Oberlandesgericht*) has ruled the execution admissible in case the person sought did not consent to his/her extradition (Sections 12, 13 AICCM). To that end, the court must establish that the formal and substantive requirements for the execution are met and no mandatory grounds for refusal apply. As regards optional grounds for refusal, the general prosecutor has to decide whether to raise objections or not; in the latter case, it has to give reasons for its decision which is subject to judicial review by the Higher Regional Court in its ruling on the admissibility of surrender (Section 79 (2) AICCM). Due to the general prosecutor's margin of discretion, only in exceptional cases the decision not to have recourse to one of the grounds of refusal will be considered to be a breach of the principle of proportionality.⁴⁸⁸

In case of consent to the simplified extradition the Higher Regional Court does not decide on the admissibility of surrender but keeps jurisdiction only for ordering extradition detention. Extradition detention is, however, not possible, if it appears ab initio that extradition is clearly inadmissible (Section 15 (2) AICCM).

The central authorities mentioned above (8.2.1.3.) are not involved in the decision-making process on the execution of a EAW. As regards the execution of EAWs the Federal Office of Justice (*Bundesamt für Justiz*) has an advisory and supportive function; it can, for example, be addressed by the judicial authorities of the *Länder* in a given case in order to gain advice or to submit statements on problems; here, the Office can facilitate judicial cooperation, in particular since it keeps an overview of the practice of other *Länder* and other Higher Regional Courts. Problems with a particular political, factual or legal significance are reported to the Federal Ministry of Justice that may use the information for consultations with individual EU Member States or in discussions at the EU level.

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⁴⁸⁶ Section 74 (2) AICCM and the agreement between the federal government and the governments of the states of 28 April 2004 (Bundesanzeiger p. 11494), No. 3 lit. a.

⁴⁸⁷ See e.g. Section 5 No. 2 of the Bavarian regulation on competence in cooperation in criminal matters (Zuständigkeitsverordnung Rechtshilfe) of 29 April 2004 (Bayerisches Gesetz- und Verordnungsblatt 2004, p. 260). In Berlin, this competence has not been delegated to the prosecutor, but is exercised by the general prosecutor acting on behalf of the state ministry of justice (Senatverwaltung für Justiz).

⁴⁸⁸ See the explanatory memorandum to the draft of the government, Bundestags-Drucks. No. 16/1024, p. 13; Böhm/Rosenthal in: Ahlbrecht/Böhm/Esser/Hugger/Kirsch/Rosenthal, *Internationales Strafrecht in der Praxis*, (2008), mn. 851.

The Federal Criminal Police Office (*Bundeskriminalamt*) helps in the transmission of information via the SIRENE. The Office processes all EAWs entered into the SIS and/or distributed by Interpol channels. If a EAW can ab initio obviously not be executed in Germany (e.g. EAW for execution of a judgment against a German national, double criminality not given, concurring jurisdiction), the Federal Criminal Police Office takes care of “flagging” the EAW in the SIS and to transform it into an alert for the purposes of communicating the place of residence or domicile (Art. 98 CISA-alert). Otherwise, the entry of the EAW in the SIS is the basis to start search for the person sought.

8.3.1.1.3 Criteria

As mentioned above (8.3.1.1.1.) respect to the principle of proportionality is considered one of the main elements of a European standard for fundamental rights and the rule of law. The most important role in practice plays Section 73 sentence 2 AICCM in relation to the principle of proportionality.⁴⁸⁹ Accordingly, the executing authority has to refuse to surrender a person for minor cases if this would be disproportionate.⁴⁹⁰ However, although Art. 73 sentence 2 has been evoked several times in the case law relating to the execution of EAWs, there are not much court decisions that would determine single criteria for the proportionality test as a matter of principle.⁴⁹¹

In case of possible draconic sanctions compared to the charge, the Higher Regional Court of Stuttgart referred to Art. 49 (3) of the Charter of Fundamental Rights of the European Union which guarantees the proportionality of criminal offences and penalties and which, according to the Court, must be respected with any execution of a EAW. Accordingly, a person may not be surrendered if the sentence sought by the issuing state is “intolerably severe” or “by all means incommensurate” or even “in no way justifiable”.⁴⁹² This proportionality test, however, is not the same as under German constitutional law, i.e. surrender is permitted even if the sentence is “according to German understanding too severe” as long it is not “intolerably severe”.⁴⁹³

For the same reasons, inhuman detention conditions in the issuing state will render extradition impossible. The existing case-law refers to extradition to non-member states⁴⁹⁴ but having regard to Art. 3 ECHR this will apply to the execution of a EAW as well.⁴⁹⁵

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⁴⁸⁹ Cf. Wahl, “The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany”, in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (135).

⁴⁹⁰ Schomburg/Lagodny, “Verteidigung im international-arbeitsteiligen Strafverfahren“, *Neue Juristische Wochenschrift (NJW)* 2012, p. 348 (351); Burchard in: Böse (Ed.), *Enzyklopädie zum Europarecht, Bd. 9: Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, § 14 mn. 47

⁴⁹¹ See also Wahl, “The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany”, in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (135).

⁴⁹² Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift (NJW)* 2010, p. 1617 – English translation: *Criminal Law Review* 2010, p. 474 (477); see also Böhm/Rosenthal in: Ahlbrecht et al., *Internationales Strafrecht in der Praxis* (2008), mn. 723 and 730.

⁴⁹³ Higher Regional Court Stuttgart, *ibid.* So, four years imprisonment for selling 0,2 gram cocaine was not considered a violation of Art. 49 (3) of the Charter.

⁴⁹⁴ See e.g. Higher Regional Court Cologne, decision of 21 June 2010 – 6 AuslA 106/08, *Neue Zeitschrift für Strafrecht (NSZ)* 2010, p. 706 (707); see also Lagodny in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), § 73 IRG mn. 99 with further references.

⁴⁹⁵ See for detention conditions in Greece: ECtHR, judgment of 21 January 2011, case no. 30696/09, *M.S.S. v. Belgium and Greece*.

Furthermore, it is established that – following from the general scope of the principle of proportionality that the executing authority has to abide by this principle – the availability of less intrusive alternatives to surrender must be considered.⁴⁹⁶ When assessing the proportionality of arrest, the Higher Regional Court of Stuttgart has stated that reasonable alternatives to a trial in the issuing state such as summons, questioning and/or in absentia proceedings have to be taken into consideration.⁴⁹⁷ For similar reasons, the Higher Regional Court of Karlsruhe refused to order extradition arrest arguing that the issuing Member State did not undertake any efforts to establish the address of the person sought and to summon him, and that there was no reason to believe that he/she would not appear in court.⁴⁹⁸ In another decision, the Court argued that the person sought might be given the opportunity to surrender to the police of the issuing state by himself.⁴⁹⁹

As far as cases are concerned, where the EAW may be disproportionate with the right to family life (Art. 6 of the Basic Law, Art. 8 ECHR) the execution of a EAW could be considered – in exceptional cases – a disproportionate encroachment upon the right to family life. However, as a rule, German courts are of the opinion that the right to family life, such as in the case of a foreigner sought who is married with a German citizen and is taking care of children in Germany, does not per se prevent the foreigner from being extradited; the reasoning behind this case law is the fact that an extradition would equally affect the person's right to family life as a purely domestic criminal proceeding would do, as a consequence of which the fundamental right of the person to family life does not necessarily prevail the interest of the public for prosecution.⁵⁰⁰ Case law allows for exceptions from this rule by weighing both interests in the individual case. Thus, the Higher Regional Court of Hamm declared inadmissible an execution of two EAWs, one for the purpose of executing a sentence based on theft of a handbag and a mobile phone (total worth 200€) and the second for the purpose of prosecution of a loan fraud (worth 500 €), if the surrender will separate the mother from her one year old child.⁵⁰¹

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⁴⁹⁶ Schomburg/Lagodny, *Neue Juristische Wochenschrift* 2012, p. 348 (351); see also Böhm/Rosenthal in: Ahlbrecht et al., *Internationales Strafrecht in der Praxis* (2008), mn. 779; Böhm in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (2008), § 15 IRG mn. 11.

⁴⁹⁷ Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift* 2010, p. 1617 (1618) – English translation: *Criminal Law Review* 2010, p. 474 (479-480).

⁴⁹⁸ Higher Regional Court Karlsruhe, decision of 15 March 2007 – 1 AK 15/07, and decision of 5 April 2007 – 1 AK 17/07.

⁴⁹⁹ Higher Regional Court Karlsruhe, decision of 26 June 2007 – 1 AK 16/06, *Strafverteidiger-Forum* 2007, p. 477.

⁵⁰⁰ Higher Regional Court of Hamm: decision of 13. April 2010 – III-2 Ausl 45/10, 2 Ausl 45/10 with further references.

⁵⁰¹ Higher Regional Court of Hamm, decision of 25 February 2010 – case (2) 4 Ausl A 163/08 (89/09), *Strafverteidiger (StV)* 2011, 152. By contrast, the same court declared an extradition admissible where the person sought was in a similar familial situation (three year old child, married with a German), but the EAW concerned the execution of a sentence of 2 years based on credit fraud worth 1200 € (Higher Regional Court of Hamm: decision of 24. June 2010 – III-2 Ausl 47/10, 2 Ausl 47/10. See also Higher Regional Court of Stuttgart, decision of 14. 5. 2004 – 3 Ausl. 76/03, *NSStZ-RR* 2004, 345, which denied protection under Art. 8 ECHR in view of extradition of a 20-year old juvenile to the Republic of Hungary for the purpose of the execution of a custodial sentence of 1 year and 8 months imposed for robbery .

By way of a preliminary remark, it should first be noticed that Germany experienced the following types of EAW cases which caused concerns in view of proportionality (Federal Office of Justice):

- (1) EAWs for petty offences (e.g. theft of a mobile phone worth 85 €), sometimes allegedly committed a long time ago (e.g. theft committed in 1998, EAW issued in 2006) and/or offence is related more or less to civil law matters instead of criminal ones (e.g. not paying the bill of a mobile phone company declared in the EAW as fraud; not paying child support);
- (2) EAWs for petty offences, but the offender lives in Germany and is socially integrated there, thus the EAW obviously clashes with the right to family life (e.g. theft of handbag/mobile phone – total worth 200€, loan fraud – worth 500 € against a person who is married with a German and mother of a one year old child).
- (3) EAWs for petty offences in spite of known residence; the major purpose of such EAWs seems to be to enforce the wanted person's presence before the issuing Member State's courts or prosecutors (e.g. EAW for theft of mobile phones against long-time resident in Germany but immediately release of the suspect being back to Germany 2 days after surrender – no prior attempt to contact)
- (4) EAWs containing a discrepancy between the charges (relating to petty offences) and the expected sanctions that may cause a disproportion to arrest and extradition (e.g. possession of 1,435 g of metamphetamine – expected sentence in the issuing state: up to two years imprisonment)
- (5) EAWs for the purpose of executing a custodial sentence where the remaining sentence to be served is less than 4 months although the original sentence passed (for a trivial offence) was more than 4 months and thus, formally, fulfilled the criteria of Art. 2 (1) FD EAW.

In the interviews judges and prosecutors stressed that the executing authority has to abide by the proportionality principle (Berlin, Cologne, Frankfurt). Applying the proportionality test, the gravity of the offence is the main criterion. Thus, a EAW would not be executed for absolutely minor cases (e.g. theft of an object amounting to less than five Euro) or if the sentence to be executed is considered to be intolerably severe (Cologne, Frankfurt). Nevertheless, prosecutors and judges emphasized that the criminal justice system of the issuing state has to be recognized even if it provides for higher sentences than German criminal law. One reference point is the range of punishment which is foreseen by the German Criminal Code for similar offences (Cologne, Frankfurt). Taking this into account, judges/general prosecutors viewed that there are not so many differences throughout the EU (Frankfurt), whereby also sentencing issues must be considered which the executing authority does regularly not know (Cologne). Concerns would be raised if the sentence is twice as much as the maximum penalty under German law (e.g. two years imprisonment for driving whilst disqualified by court order). However, judicial authorities confirmed that in practice, a EAW has not been denied because the penalty was “intolerably severe”.

Defence lawyers argued that it is a matter of definition what is understood by “trivial or petty offence” (*Bagatelldelikt*); however, although the principle of mutual recognition leads to the acceptance of an expected high punishment of a theft of an object of minor value in the issuing state this discrepancy can hardly be conveyed neither to the person concerned nor to the average citizen.

Regarding EAWs for the purpose of executing a custodial sentence, interviewees of the judicial authorities unanimously shared the view that the legislator has already set the threshold for proportionality, i.e. the minimum sentence is four months (Cologne, Frankfurt, Berlin). Although this might be regarded a too low threshold compared to the German legal order EAWs that fulfil this requirement are recognised and executed.

Furthermore, it was clarified that the right to family life is not a successful factor when assessing the proportionality; the EAW gives not rise to treat foreigners in another way than Germans whose family life is equally affected in case of criminal proceedings against them or detention (Cologne). In extreme cases (e.g. surrender of a person being mother of a baby), reference can be made to the established case law (see above). Furthermore, it was argued that if the person sought is a resident he/she will be protected within the limits of Section 83b AICCM (see *infra*).

8.3.1.2 Proportionality test in applying the grounds for optional refusal

In Germany, most of the grounds for refusal foreseen in Art. 4 and 5 FD do not provide for a margin of discretion. So, a EAW may not be executed *per se* if one of these grounds applies (Art. 4 No. 1 and 4; Art. 4bis and Art. 5 No. 1 and 2 FD).⁵⁰² As regards surrender of nationals, this applies as well to Art. 4 No. 6 and Art. 5 No. 3 FD.

By contrast, Art. 4 No. 2 and 3 FD EAW (prosecution of the same act in the executing Member State; decision not to prosecute or to halt proceedings or final judgment in the executing state) are implemented in a manner that provides for a margin of discretion. So, the executing authority (the general prosecutor) has to decide on whether execution of the EAW shall be granted or refused on the basis of the grounds mentioned above (Section 83b (1) lit. a and b AICCM). In its decision, the executing authority has to consider (*inter alia*):

- the general obligation to execute a EAW (Art. 1 FD);
- the place where the crime has been committed;
- the availability of evidence in Germany;
- the stage of proceedings in the issuing state and in Germany;
- the interests of the victim.⁵⁰³

Beyond the interest of the issuing state (and the victim), the interests of the person sought have also to be taken into consideration⁵⁰⁴, i.e. the consequences of surrender for his private life (Art. 8 ECHR) and the effective exercise of his procedural rights.⁵⁰⁵ In weighing these interests, however, the executing authority, has a margin of discretion which is subject to limited judicial review only (*supra* 8.3.1.1.2).

8.3.1.3 Appeal to the decision on surrender

The decision of the Higher Regional Court is not subject to appeal (Section 13 (1) 2 AICCM). Nevertheless, it can be challenged before the Federal Constitutional Court (Art. 93 (1) No. 4a of the Basic Law – *Grundgesetz* - and Section 90 et seq. Act on the Federal Constitutional Court – *Bundesverfassungsgerichtsgesetz*). However, judges, prosecutors and defence lawyers have reported that the success rate of this remedy is fairly poor.

As a consequence, the individual must rely on the assessment of the general prosecutor (executing authority) whether the conditions for execution and surrender are met; this will include the proportionality test as well. If the person sought does not give his/her consent to surrender, the Higher Regional Court will control the legality of the decision (including proportionality of execution and surrender) *ex officio* (Sections 12 and 79 (2) AICCM). As far as the executing authority is given a margin of discretion (Section 83b AICCM) judicial control is limited to the assessment whether this margin of discretion has been abused.

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⁵⁰² Art. 4 No. 5 and No. 7 lit. b FD have not been transposed into national law.

⁵⁰³ See the explanatory memorandum to the draft of the government, Bundestags-Drucks. No. 16/1024, p. 13.

⁵⁰⁴ Böhm/Rosenthal in: Ahlbrecht et al, *Internationales Strafrecht in der Praxis* (2008), mn. 852.

⁵⁰⁵ Higher Regional Court Karlsruhe, *Neue Juristische Wochenschrift* (NJW) 2007, p. 2567 (2568); Higher Regional Court Stuttgart, *Strafverteidiger* (StV) 2007, p. 258 (259); Böse in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2012), § 83b IRG mn. 4.

If a legal issue of fundamental significance is to be clarified, the Higher Regional Court or the general prosecutor may request a preliminary ruling by the Federal Court of Justice (Section 42 AICCM).⁵⁰⁶

8.3.1.4 Actions/solutions in case of disproportionate EAWs

An analysis of the case law and the replies during the peer-review revealed that the different types of cases, as described above, entail different reactions.

If it comes to a possible discrepancy between the charge and the expected punishment, the legal order of the issuing EU Member State is accepted by the German authorities. In one case, the Higher Regional Court of Celle denied extradition to Greece for the purpose of execution of a sentence, if the sentence foresaw life-long imprisonment for possession of small quantities of (soft) drugs.⁵⁰⁷ In other cases Higher Regional Courts ruled out a disproportionality of punishment.⁵⁰⁸ Even in the quoted decision of the Higher Regional Court of Stuttgart of 25 February 2010, the Court did not conclude an “intolerably severe” penalty in case of attempt to sell 0,199 g of cocaine entailing an expected prison sentence of four years in Spain.⁵⁰⁹

In case of EAWs for the purpose of executing a custodial sentence the request is executed as long as the threshold of Art. 2 FD (sentence passed of at least four months) is formally maintained.

In case of EAWs for trivial offences several strategies are applied, often informal ways are first sought in order to solve the matter:

- If the EAW raises doubts on its conformity with the proportionality principle, the executing authority will ask the issuing authority for additional information (Berlin).
- In minor cases, the person sought has been given the opportunity to contact the issuing authority; in some cases the issuing authority terminated proceedings and recalled the EAW (Berlin, Cologne).
- A solution could also be found when German judicial authorities asked for alternative measures; in this context one case having raised doubts on proportionality was reported (Cologne) where after having contacted the issuing authority the issuing authority withdrew the request for surrender but filed a penal order imposing a monetary fine instead that was then paid by the person concerned.
- In other cases, the prosecutor refused to execute the EAW because the person sought had a permanent address in Germany and thus could be summoned (Cologne).

.....

⁵⁰⁶ This is neither a legal remedy for the person sought nor a possibility to revise a decision of the Higher Regional Court in an extradition case. The person sought may only stimulate a request for preliminary ruling (Lagodny in: Schomburg/Lagodny/Gleiß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th ed. (2012), § 42 IRG, mn. 1, 26).

⁵⁰⁷ Higher Regional Court Celle, decision of 20 May 2008 – 1 ARs 21/08), *Strafverteidiger (StV)* 2008, 43.

⁵⁰⁸ E.g., Higher Regional Court Stuttgart, *Neue Zeitschrift für Strafrecht (NSTZ)* 2005, 47; Extradition admissible although serious drug offences can be punished with life imprisonment; OLG Hamburg, decision of 22 January 2007, *Ausl 70/06*: No breach of Art. 73 if attempted homicide can be punished by life imprisonment in the issuing state.

⁵⁰⁹ Higher Regional Court Stuttgart, decision of 25 February 2010, *Criminal Law Review* 2010, p. 474.

Judicial authorities also clarified that if proportionality is a subject matter of the case the surrender is frequently not denied at the end, but extradition detention can be suspended (Frankfurt, Berlin, see also *infra* 8.3.3). In these cases there is no need for prior contact of the issuing authority.

As a possible good practice it was proposed to have more background information about the practice and law of the issuing state in the given case, in particular as regards sentencing (Cologne). This might often facilitate the EAW procedure and would make requests for additional information in many cases obsolete. In this context, it should be pointed out that prosecutors and judges – although they do not know the law – assume that the Dutch and French authorities apply a proportionality test before issuing a EAW (Berlin, Cologne) so that the issue of proportionality is not raised in EAWs from these countries.

Defence lawyers pointed out that the person sought is hardly be assisted/represented by a defence counsel in the petty offence cases, regularly and simply because of a lack of financial means.⁵¹⁰ Defence lawyers suggested getting involved also in these cases because they can consult to seek for alternative measures together with the participating judicial authorities and, if necessary, with colleagues in the issuing state.⁵¹¹ The financial problem could be solved by having legal aid both in the executing and issuing state (double legal aid) or by unified European legal aid rules.⁵¹²

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⁵¹⁰ Also considering that it is first nearly not possible to finance a defence lawyer in the executing and issuing state (dual representation) and second most persons concerned are people with low income. See also empirical study conducted at the Max Planck Institute for foreign and international law on defence in transnational criminal cases, summary of results published by Arnold, "Auf dem Weg zu einem Europäischen Strafverteidiger", *Strafverteidiger-Forum* 2013, p. 54 (55/56) pointing out that only „financially strong“ defendants may today afford appropriate defence in EAW cases and that – independent of petty offence cases - in most transnational cases the person concerned is not represented by a defence counsel (!).

⁵¹¹ See also Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany", in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (132).

⁵¹² For the demand of defence lawyers for harmonized rules on legal aid see also Arnold, "Auf dem Weg zu einem Europäischen Strafverteidiger", *Strafverteidiger-Forum* 2013, p. 54 (60)

8.3.1.5 Overall situation of the proportionality problem in Germany

All in all, it was stated that the issue of proportionality had been a problem especially at the beginning of the full application of the EAW (years 2004-2009).⁵¹³ Here, proportionality concerns were raised mostly in relation to EAWs for petty offences issued by Polish authorities. In recent years, German judicial authorities encounter the problem by far less; it was told that the situation has changed significantly, i.e. the problem of proportionality has become indeed marginal today (Frankfurt, Federal Office of Justice). Therefore, a legally binding modification of the FD EAW was not held necessary (Cologne). Although EAWs for trivial offences may have decreased, the vast majority of EAWs, however, continue to deal with less serious offences (crime at the lower or medium level – Federal Criminal Police Office), mostly originating from Eastern European countries (defence lawyer).

One can only speculate about the reasons for improvement of the overall situation of EAWs for trivial offences, but the following factors may have played a role:

- Bilateral consultations: Germany conducts regular bilateral meetings, both at the federal level (e.g. Federal Ministry of Justice / Federal Office of Justice with Ministry of Justice in Poland) and *Länder* level (e.g. meeting between judicial authorities of Berlin with Polish counterparts). In these meetings, the issue of proportionality and possible solutions have been discussed several times.
- Working groups at EU level. Germany also reiterated its positions in the working groups at the Council or in meetings organised by the Commission what might have caused a rethinking of the practice in Poland.
- European handbook: Possibly the guidelines on proportionality as described in the European handbook on how to issue a EAW are applied in the practice of the issuing authorities.
- Change of general attitude towards the instrument: Last but not least, the change of attitude that the EAW is not only a sledgehammer but also rights of liberty and procedural rights of the persons sought must be a point of concern may have led to a rethinking how to apply the EAW in the individual case.

⁵¹³ The issue of disproportionate EAWs has often been put forward by judges and general prosecutors in a study conducted in 2008 (summarized at: Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany", in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (135).

8.3.2 Surrender of nationals and residents

As regards the surrender of German nationals, Art. 4 No. 7 lit. a FD has been implemented in Section 80 AICCM, thereby taking into account the constitutional right of German citizens not to be extradited (Art. 16 (2) of the Basic Law – *Grundgesetz*). Since extradition of a German national as such interferes with this fundamental right, it has to be established that surrender to another Member State complies with the principle of proportionality.

Section 80 AICCM differentiates between surrender for prosecution and surrender for the execution of a sentence. According to Section 80 (3) AICCM, a German national may only be surrendered for the purpose of enforcement (execution of a sentence) if the person sought has given his/her consent. If consent is not given, the enforcement in Germany has to be considered as less intrusive means.⁵¹⁴ So, Section 80 (3) and the refusal to execute the EAW are an emanation of the principle of proportionality.⁵¹⁵

Practice: Since a German national must not be surrendered for the execution of a sentence without his/her consent, arrest and detention would be disproportionate. In this case, the police will establish the residence of the person in order to ask for his/her consent to surrender (Frankfurt; see Art. 95 (5) CISA). If the consent is not given, the German authorities will enforce the sentence on request of the issuing authority. The requirement of such a request has been severely criticized by other Member States arguing that the EAW implies such a request whereas the German authorities refer to the general rules (the German provisions) on the transnational enforcement of criminal sanctions (Berlin; see also supra 8.2.3.1). In order to solve these problems, prosecutors have suggested to combine the EAW with a formal request for enforcement.

The rules on surrender of a German national for the purpose of prosecution are more complex: Section 80 (1) AICCM deals with the situation that the relevant offences have a substantial link to the issuing state (Section 80 (1) No. 2).⁵¹⁶ In this case, the German national could have foreseen that his conduct will be subject to foreign criminal law, and extradition will not raise constitutional concerns based upon the principles of legal certainty and proportionality. Nevertheless, the proportionality of surrender has to be assessed in each single case.

⁵¹⁴ Cf. Lagodny, "Auslieferung und Überstellung deutscher Staatsangehöriger", *Zeitschrift für Rechtspolitik* (ZRP) 2000, p. 175 (176).

⁵¹⁵ Böse in: Grütznher/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2012), § 80 IRG mn. 46 and 62.

⁵¹⁶ According to Section 80 (1) 2 AICCM, a substantial link to the requesting Member State typically exists if the conduct underlying the offence occurred wholly or in its essential parts on its territory and the result occurred there at least to an essential degree, or if it relates to a serious offence with a typically transborder quality which was committed at least in part on its territory.

If there is no such link to the issuing Member State, Section 80 (2) will apply. The person may not be surrendered if the offence has a substantial link to the German territory (Section 80 (2) 1 No. 2 AICCM). Otherwise (so-called “mixed cases”), the national may be surrendered if the double criminality requirement⁵¹⁷ is met and the interests of the national in his non-extradition do not outweigh the interests of the issuing state (Section 80 (2) 1 No. 3 AICCM). When balancing these interests, special regard shall be had to the nature of the offence, the practical requirements and possibilities of an effective prosecution, the interests of the person sought as protected under civil liberties, taking into account the goals related to the creation of a European Judicial Space and weighing them against each other (Section 80 (2) 2 AICCM). The wording of the provision is based on the judgment of the Federal Constitutional Court on the EAW.⁵¹⁸ The vague terms and criteria notwithstanding, the law does not provide for a margin of discretion. The decision to execute a EAW must pass a proportionality check which is subject to unlimited judicial review.

As regards residents, Art. 4 No. 7 lit. a FD has been implemented in Section 83b (2) lit. a AICCM that refers to Section 80 (1) and (2) AICCM. Contrary to Section 80, Section 83b does not provide for a mandatory, but only an optional ground for refusal. So, it is up to the executing authority to decide within its margin of discretion whether a resident should be granted the same level of protection as a German national. In its decision, the executing authority has to consider the degree of integration in the society and the consequences of surrender for the private and social life of the person sought.⁵¹⁹ In particular, a resident who has applied for naturalization and is entitled to obtain German citizenship shall not be surrendered for the purpose of the execution of a sentence without his/her consent.⁵²⁰

The criteria for the proportionality test for German nationals can be derived from the rationale of the correspondent fundamental right (Art. 16 (2) Basic Law): Its purpose is to ensure that citizens are not removed against their will from the legal system with which they are familiar. To the extent that they reside in the state territory, all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal system that is unknown to them under circumstances that are inscrutable to them.⁵²¹

Accordingly, a criminal trial before German courts has to be considered as a less intrusive means to ensure that the offence committed will be investigated and prosecuted. As a consequence, a decision on the case that has been taken by a domestic court or prosecutor has to be considered when assessing the proportionality of surrender to another EU Member State (Section 80 (2) 3 and 4 AICCM).

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⁵¹⁷ This general reference to the principle of double criminality is considered not to be in line with Art. 2 (2) of the Framework Decision on the European Arrest Warrant, see Böse, *ibid.*, § 80 mn. 15, with further references.

⁵¹⁸ Federal Constitutional Court, official court reports (BVerfGE) vol. 113, p. 273 (303).

⁵¹⁹ See the report of the legal committee of the Parliament, Documents of the Parliament (Bundestags-Drucksache) No. 16/2015, p. 14.

⁵²⁰ Higher Regional Court Berlin (Kammergericht), decision of 18 January 2012 – (4) 151 AusI 1443/11 (14/12).

⁵²¹ Federal Constitutional Court, official court reports (BVerfGE) vol 113, p. 273 (293).

If a German national has been convicted by the court of another Member State, it will be less intrusive to execute the sentence in Germany than to surrender him to the forum state. This is why the German law provides for a return guarantee (Section 80 (1) No 1, (2) No 1 AICCM).

Furthermore, the court has to consider in its proportionality check:

- the gravity of the offence⁵²²;
- the chances to investigate the case in the issuing state and Germany (e.g. availability of evidence, see supra 8.3.1.2)⁵²³;
- the interests of the victim⁵²⁴;
- the age of the person sought and the corresponding need for special protection (e.g. for juvenile offenders)⁵²⁵.

Surprisingly, the interviews have revealed that the judicial authorities do not apply a specific proportionality test for German nationals. In most cases, however, proportionality is not an issue because the person sought is surrendered for offences committed in the issuing state (Cologne).⁵²⁶ Correspondingly, defence lawyers have reported that a motion to conduct the investigation and the trial in Germany is usually rejected if the offence has been committed in the issuing state. When the person has been surrendered and convicted in the issuing state and shall be returned to Germany in order to serve his/her sentence, German authorities require a formal request for the execution of the sentence (Berlin, Frankfurt). This understanding of the return guarantee has been subject to severe criticism by other Member States (e.g. Greece, Poland), claiming that the execution of the sentence should immediately follow the return of the German national (see also supra 8.2.3.1).

Despite its optional character, Section 83b (2) AICCM is based upon a similar reasoning. Due to their integration in German society, residents will prefer proceedings (or sentencing) in Germany to a trial and enforcement in another Member State. Whether a EAW is executed or not will depend on the degree of integration and the interest of the person sought to be reintegrated in society in Germany.⁵²⁷ According to No. 159 (2) of the guidelines on international cooperation in criminal matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RIVASt*) the following aspects have to be taken into consideration:

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⁵²² Federal Constitutional Court, *ibid.*, p. 303.

⁵²³ A reasonable chance of conviction is not required because the executing authority shall not assess whether there is a reasonable suspicion against the person sought; in extraordinary cases, however, this assessment is permitted, see Higher Regional Court Karlsruhe, decision of 18 June 2007 – 1 AK 72/06.

⁵²⁴ See the explanatory memorandum to the draft of the government, Bundestags-Drucks. No. 16/1024, p. 13.

⁵²⁵ Higher Regional Court Karlsruhe, decision of 18 June 2007 – 1 AK 72/06 (with regard to Section 83b (1) lit. b AICCM).

⁵²⁶ This view is confirmed by statistical data: in 2010, 33 nationals and residents have been surrendered whereas the execution of a European Arrest Warrant for the purpose of prosecution of a national has been refused only in two cases, see Council-doc. No. 9120/2/11 REV 2, p. 18, 22.

⁵²⁷ See also ECJ, Case C-123/08, *Wolzenburg*, [2009] ECR I-9660 par. 46-47.

- legal status (legal / illegal) and duration of residence in Germany;
- family relations to other residents, German nationals in particular (Art. 8 ECHR) and other social (e.g. professional) relations.⁵²⁸

Furthermore, the knowledge of the German language has to be considered as a relevant aspect when assessing the person's chances of reintegrating in society.⁵²⁹ The chances of reintegrating in society in the issuing state have to be considered as well, in particular if the issuing state is the home country of the person to be surrendered.⁵³⁰

There is no uniform practice on the surrender of residents. In Cologne, residents integrated in German society (permanent residence, sufficient knowledge of the German language) are treated like nationals (return guarantee and/or enforcement of the sentence in Germany); in Berlin and Frankfurt, equal treatment is granted on the basis of a case-by-case-analysis. As a rule, a resident is surrendered to his home country (e.g. Poland) without a return guarantee. According to defence lawyers, residents are usually surrendered to the issuing state. Nevertheless, in 2010, 32 residents have not been surrendered for the purpose of execution of a sentence; compared to the corresponding number of refusals for German nationals (50), this is quite remarkable.⁵³¹

8.3.3 Proportionality of arrest in EAW proceedings

8.3.3.1 Proportionality control with regard to extradition arrest and detention

As mentioned above (8.3.1.1), the second layer is a proportionality check of extradition detention understood as a subject of the constitutional principle of proportionality.⁵³² The duration has to be limited to the extent necessary; thus, extradition proceedings have to be conducted speedily.⁵³³ Since detention is only permitted in order to ensure that the person sought will not escape from justice or obstruct the course of justice, e.g. by tampering with evidence (Section 15 (2) No. 1 and 2 AICCM), the Higher Regional Court "may"⁵³⁴ stay the execution of the arrest warrant if less intrusive measures (e.g. bail) will ensure that the purpose of detention is served (Section 25 (1) AICCM).

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⁵²⁸ For instance, the executing authority has to take into account that the former wife of the person sought and their minor son are living in Germany, see Higher Regional Court Karlsruhe, *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* (NSTZ-RR) 2008, p. 376 (378).

⁵²⁹ Higher Regional Court Berlin (Kammergericht), *Neue Juristische Wochenschrift* 2011, p. 3177 (3178).

⁵³⁰ Higher Regional Court Berlin (Kammergericht), decision of 24 May 2011- (4) Ausl A 1069/10 (68/11) par. 12.

⁵³¹ See for the statistical data Council-doc. No. 9120/2/11 REV 2, p. 22, 23.

⁵³² Federal Constitutional Court, official court reports (BVerfGE) vol. 61, p. 28 (34-35); Schomburg/Hackner in: Schomburg/Lagodny/Gleiß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), § 15 IRG mn. 4; § 24 mn. 10 et seq.

⁵³³ Federal Constitutional Court, *Neue Juristische Wochenschrift* (NJW) 2000, p. 1252 ("Gebot größtmöglicher Verfahrensbeschleunigung").

⁵³⁴ Contrary to the wording, this is not a matter of discretion ("may") but a "must", see Schomburg/Hackner, *ibid.*, § 25 IRG mn. 1.

In its assessment on proportionality of arrest, the court will have to examine the proportionality of the EAW, i.e. whether the issuing state could have recourse to less intrusive means in order to ensure the presence of the person sought in trial (supra 8.3.1.1.3).

With regard to the proportionality of extradition arrest, the said decision of the Higher Regional Court of Stuttgart stated that the following aspects have to be taken into consideration:

- the wanted person's right to liberty and safety;
- the cost and effort of a formal extradition proceeding including extradition arrest;
- the significance of the charge;
- the severity of the possible penalty.⁵³⁵

In principle, the duration of detention may not exceed the expected sentence in the issuing state significantly.⁵³⁶ Furthermore, detention for surrender can be considered disproportionate if the issuing state fails to provide additional information in due time.⁵³⁷

8.3.3.2 Procedural safeguards

In principle, arrest and detention in the framework of extradition proceedings is subject to the procedural safeguards applicable in domestic proceedings:

The arrest warrant is issued by the Higher Regional Court that has to state the reasons for detention (Section 17 AICCM).

If the suspect is arrested on the basis of an arrest warrant he / she has a right to be examined by a judge at the local court (*Amtsgericht*) not later than the day after arrest (Section 21 (1) and (2) AICCM).⁵³⁸ However, the examining judge is not competent to revoke the arrest warrant or stay its execution; this decision has to be taken by the Higher Regional Court that has issued the arrest warrant (Section 21 (5) AICCM). The magistrate may only release the accused if (1) he/she is not the person the request refers to, (2) the extradition order has been cancelled, or (3) the execution of the extradition arrest order has been suspended. Otherwise, the magistrate transmits the file to the general prosecutor at the higher regional court. In cases of a provisional request, the general prosecutor must promptly request a ruling by the Higher Regional Court about the

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⁵³⁵ Higher Regional Court Stuttgart, decision of 25 February 2010 – 1 Ausl (24) 1246/09, *Neue Juristische Wochenschrift* 2010, p. 1617 (1618) – English translation: *Criminal Law Review* 2010, p. 474 (479); see also Higher Regional Court Karlsruhe, decision of 15 March 2007 - 1 AK 15/07 (no extradition arrest of a person suspect of criminal damage of a car (amount of damage: 730 Euro); Higher Regional Court Stuttgart, decision of 18 November 2009 – 1 Ausl. 1302/09 (possession of 1,435 gram metamphetamin).

⁵³⁶ Higher Regional Court Munich, decision of 22 October 1985 – OLG Ausl 73/85.

⁵³⁷ Higher Regional Court Düsseldorf, *Neue Juristische Wochenschrift* (NJW) 1991, p. 3105 (3106).

⁵³⁸ Since the extradition procedure is in the hands of the higher regional court, the powers of the magistrate are limited: the magistrate is entitled to examine the identity and citizenship of the accused. The magistrate also advises the accused that he may at any time during the proceedings be represented by counsel (Section. 40 AICCM) and that he is free to make or not make any statements regarding the charges against him. The magistrate also asks whether and, if so, on what grounds the accused wishes to object to the extradition. At this stage of the first hearing, the accused may already consent to the simplified extradition procedure (Section. 41 AICCM) after having been advised by the magistrate (Sections 22 (3) 2, 21 (6) AICCM).

emission of an extradition arrest order. The decision of the magistrate may not be appealed (Art. 22 para 3 (2), 21 para. 7 AICCM). Taken the law literally, the magistrate is only competent to protect the person concerned from mistaken identity. The Federal Constitutional Court, however, stated that according to the constitutional guarantees (freedom of the person), the magistrate has to establish – by way of a summary examination – whether the requirements for detention are not met or the extradition request is ab initio obviously inadmissible and – in the affirmative – to release the arrested person (if contact to the general prosecutor fails, who may order release or put forward reasons for further arrest).⁵³⁹

The Higher Regional Court has to suspend the execution of the arrest warrant if less intrusive means (e.g. bail) are available in order to ensure that the person will not escape from justice or seek to obstruct justice (Section 25 AICCM).

The suspect has the right to raise objections against the decision to be detained and to have the proportionality of detention reviewed by the Higher Regional Court (Section 23 AICCM).

The arrested person has to be informed of his right to consult with a lawyer (Section 21 (2) 2 AICCM).

There is no maximum period of detention, but the Higher Regional Court has to review the continuation of extradition detention *ex officio* every two months (Section 26 (1) AICCM).

In principle, the applicable rules and the level of protection between a domestic arrest warrant for pre-trial detention and an extradition arrest warrant are quite similar. However, there are differences in the requirements for detention:

- Pre-trial detention requires a strong suspicion against the detainee (Section 112 (1) CCP) whereas extradition detention does not because the EAW of the issuing state is supposed to be based on a (strong) suspicion against the person sought (principle of mutual recognition).⁵⁴⁰
- As regards the grounds for detention, it has been argued that in extradition proceedings a lower threshold applies with regard to the risk of flight, in particular that the assessment of the issuing state has to be taken into consideration (principle of mutual recognition).⁵⁴¹ This difference, however, is not considered to be relevant in court practice because the court has to be convinced that such a risk exists.⁵⁴² In any case, the principle of proportionality will apply to extradition detention and pre-trial detention to the same extent.⁵⁴³

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⁵³⁹ Federal Constitutional Court, decision of 16 September 2010, case 2 BvR 1608/07, *Strafverteidiger-Forum* 2010, p. 495.

⁵⁴⁰ See *supra* for exceptions in extraordinary cases.

⁵⁴¹ Higher Regional Court Stuttgart, *Neue Juristische Wochenschrift* 2007, p. 613 (614-615).

⁵⁴² Böhmer in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (2008), § 15 IRG mn. 33.

⁵⁴³ See the reference to constitutional requirements in the decision of the Higher Regional Court Stuttgart, *Neue Juristische Wochenschrift* 2007, p. 613 (615).

According to the judges and prosecutors, the court abides by the principle of proportionality when deciding upon arrest and detention for surrender. In several cases, the execution of an extradition arrest warrant has been suspended; in that regard, it has been considered useful if the issuing authority could inform the executing authority on whether it deems arrest and detention indispensable or not (Frankfurt). Defence lawyers criticized that most of the persons sought are arrested and detained; only in very exceptional cases (in particular if the person sought is a German national or the EAW shows fundamental insufficiencies such as a lack of plausibility), the court does not order an extradition arrest warrant or suspends its execution. According to the defence lawyers, one of the main reasons for this situation is that the person sought is usually not assisted by a counsel (infra 8.3.4.2). Another reason that was put forward by defence lawyers is the lack of a European-wide bail system (one judge pledged for having this at least in cases more related to civil law matters, such as the non-payment of child support).

Furthermore, defence lawyers have pointed out that the arrested person is examined by the magistrate at the local court (*Amtsrichter*) whereas the decision on arrest and detention is taken by the Higher Regional Court (*Oberlandesgericht*). In addition, the Higher Regional Court usually decides on the admissibility of the execution of the EAW without an oral hearing.⁵⁴⁴ As a consequence, the decision on arrest, detention and surrender is taken without the arrested person being heard before the competent court. Objections against extradition or extradition detention are only noticed by the magistrate, but – due to his lack of competence – not decided upon. All in all, defence lawyers stated that this situation is not understood by the individual. Furthermore, the judges reported that the arrested person’s consent to simplified surrender is void because the local courts do not properly notify him/her of his/her rights (Frankfurt) often due to a lack of experience.⁵⁴⁵

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⁵⁴⁴ According to Section 30 (3) AICCM, the Higher Regional Court may hold an oral hearing, but the hearing is not mandatory.

⁵⁴⁵ See also Lagodny in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), § 28 IRG mn. 1.

8.3.4 Procedural rights in EAW proceedings

In general, the procedural safeguards in proceedings on the execution of a EAW are equivalent to the procedural safeguards in domestic criminal proceedings. Safe as otherwise provided, the rights of arrested persons apply accordingly to persons arrested for surrender to another Member State.

8.3.4.1 Interpretation and translation

In the oral hearings of the arrested person, the magistrate has to call in an interpreter if the person does not have a command of the German language (Section 77 AICCM and Section 185 (1) of the Courts Constitution Act – *Gerichtsverfassungsgesetz*).⁵⁴⁶ Furthermore, the court shall call in an interpreter or a translator for the person sought insofar as this is necessary for the exercise of his/her rights in extradition proceedings (Section 77 AICCM and Section 187 (1) CCA).⁵⁴⁷

It is up to the court to decide to what extent interpretation and translation is “necessary”. According to No. 181 (2) of the Guidelines for Criminal Procedure and Procedure for Fines” (*Richtlinien für das Strafverfahren und das Bußgeldverfahren - RiStBV*), summons, arrest warrants, written summary sanctioning orders, writs of indictment, and all decisions on the merits of the case have to be translated literally.⁵⁴⁸

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⁵⁴⁶ Schomburg/Hackner in: Schomburg/Lagodny/Gleiß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), § 21 IRG mn. 7; Lagodny, *ibid.*, § 28 IRG mn. 4.

⁵⁴⁷ Draft legislation that will implement Directives 2010/64/EU and 2012/13/EU foresee that the person concerned is informed on his/her right to interpretation and translation free of charge during the (EAW) proceedings (Draft-Section 187 para. 1 sentence 2 CCA, draft 114b para. 2 sentence 3 CCP) The new provisions would mean that beside a translation of the EAW also other documents in the extradition proceeding, such as the decision of the general prosecutor whether he intends to raise objections under Sect. 83b AICCM, and the decision of the Higher Regional Court reviewing that discretion (cf. reasoning of the draft legislation, p. 12, available at: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RegE_Gesetzes_zur_Starkung_der_Verfahrensrechte_von_Beschuldigten_im_Strafverfahren.pdf;jsessionid=BC563396F19DFB489D01DD255E52D757.1_cid334?__blob=publicationFile (accessed on 8 March 2013).

⁵⁴⁸ By implementing Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings draft legislation (fn. 129) now provides for a legal provision that is going to make, as a rule, translation of certain documents necessary (Section 187 para. 2 draft CCA), inter alia all orders depriving a person from his liberty. For the EAW procedure that means that the extradition detention order must be translated. However, the draft law accepts several exemptions from translation in accordance with Art. 3 of the Directive.

8.3.4.2 Information of the requested person on his/her rights

The arrested person has to be informed of his/her basic rights. German law does not provide explicitly for a letter of rights in extradition proceedings but before questioning the arrested person, the magistrate at the local court has to inform him/her of the right

- to reply to the accusation or to remain silent (Section 21 (2) 2, Section 22 (2) 2 AICCM);
- to consult with a lawyer of his choice (Section 21 (2) 2, Section 22 (2) 2 AICCM);
- to give his/her consent to simplified surrender and to a waiver of the speciality principle (Section 41 (1) and (2) AICCM; see also for German nationals Section 80 (3) AICCM).

Furthermore, according to Section 77 (1) AICCM, the arrested person shall also be informed of his/her rights after arrest in the framework of domestic criminal proceedings such as

- to demand an examination of a physician of his choice;
- to notify a relative or a person trusted by him;
- (if necessary) to demand an interpreter to be called in to the proceedings free of charge;
- to demand notification of the consular representation of his native country.⁵⁴⁹

8.3.4.3 Right to counsel

As has been mentioned above, the arrested person has the right to consult with a counsel. Section 40 (1) AICCM stipulates this right for the extradition proceedings: “The person sought may at any time during the proceedings have the assistance of counsel.” One of the main consequences of being represented by a defence counsel is the counsel’s right to have access to the file (Section 40 (3) AICCM and Section 147 CCP).

However, there is no explicit obligation of the court to give further information on defence counsel but some case law with regard to (domestic) criminal proceedings: The police has to provide the suspect with the information necessary to contact a lawyer; to hand out a telephone book is not sufficient if the suspect is a foreigner and will not manage to get in touch with a defence lawyer.⁵⁵⁰ If the suspect wishes to consult with a lawyer but does not have the financial means to pay for legal advice he shall be informed of the possibility to get legal advice free of charge by a lawyer’s emergency unit.⁵⁵¹

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⁵⁴⁹ Section 114b CCP. This provision provides that “the arrested accused shall be instructed as to his rights without delay and in writing in a language he understands”. For the effects on extradition proceedings cf. Böhm in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2012), § 20 mn. 11, § 22 mn. 37-38; Schomburg/Hackner in: Schomburg/Lagodny/Gleß/Hackner (Eds.), *Internationale Rechtshilfe in Strafsachen*, 5th edition (2012), § 20 IRG par. 4. Section 114b CCP is going to be amended in view of the implementation of Directive 2012/13/EU. In particular, it is planned to provide the accused promptly with information concerning his entitlement to free legal advice and his right to inspect the files (see draft legislation, available at: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RegE_Gesetzes_zur_Starkung_der_Verfahrensrechte_von_Beschuldigten_im_Strafverfahren.pdf;jsessionid=BC563396F19DFB489D01DD255E52D757.1_cid334?__blob=publicationFile (accessed on 8 March 2013). Implications on the extradition proceedings are subject to further examination at the current stage of the legislative process (cf. cited document, p. 20, 21).

⁵⁵⁰ Federal Court of Justice (Bundesgerichtshof), official court reports vol. 42, p. 15 (20).

⁵⁵¹ Federal Court of Justice (Bundesgerichtshof), official court reports vol. 47, p. 233 (234-235); *Neue Zeitschrift für Strafrecht (NStZ)* 2006, p. 236 (237); Gleß in: Löwe-Rosenberg, *Strafprozessordnung und Gerichtsverfassungsgesetz*, vol. 4, 26th edition (2007), § 136 StPO mn. 41.

The right to counsel notwithstanding, the assistance of a counsel is not mandatory in proceedings on the execution of a EAW. According to Section 40 (2) No. 1 – 3 AICCM, the right to assistance of counsel must be provided by the general prosecutor or the Court mandatorily if:

- (1) the factual or legal situation is complex; here the law explicitly mentions cases where doubts arise about whether the conditions of an extradition of own nationals upon a EAW are met (Section 80 AICCM) or whether the penal provisions of the request fall under the groups of offences where double criminality is no longer examined (Art. 2(2) FD, Section 81 No. 4 AICCM),
- (2) it is apparent that the accused cannot himself adequately protect his rights, or
- (3) the accused is under 18 years of age.

The case-law suggests that this provision is applied in a strict manner; so, if assistance by counsel is not absolutely necessary, the court will reject the application.⁵⁵² By contrast, if the defendant is detained in the framework of domestic criminal proceedings, assistance of counsel is mandatory (Section 140 (1) No. 4 CCP). The reasoning behind this rule (protection of detainees)⁵⁵³ should apply as well to persons arrested for surrender to another Member State.

The interviews of judges and prosecutors have revealed that assistance of counsel is limited to rather exceptional cases (Berlin, Frankfurt; Cologne: 10-20 % of the cases). The situation has been subject to severe criticism by defence lawyers arguing that legal advice can also speed up proceedings (e.g. the advice to consent to simplified surrender), help to avoid extradition detention and to prepare the defence in the issuing state.⁵⁵⁴ Correspondingly, defence lawyers advocate a mandatory defence counsel in both the issuing and the executing state.

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⁵⁵² See e.g. Higher Regional Court Berlin (Kammergericht), *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport (NSfZ-RR)* 2011, p. 339.

⁵⁵³ See the report of the legal committee of the Parliament, *Bundestags-Drucks.* 16/13097, p. 18-19.

⁵⁵⁴ See also 8.3.1.4. and particularly footnote 323. See also Schomburg/Lagodny, "Verteidigung im international-arbeitsteiligen Strafverfahren", *Neue Juristische Wochenschrift* 2012, p. 348 (351) criticizing that provisions of criminal procedure on mandatory representation by the defence counsel are not applied in EAW cases.

8.3.4.4 *Right to communication*

When arrested, the accused person shall be given the opportunity without delay to notify a relative or a person trusted by him, provided the purpose of the investigation is not endangered thereby (Section 114c (1) CCP). If detention is executed against the accused after he has been brought before the court, the court shall order that one of his relatives or a person trusted by him shall be notified without delay (Section 114c (2) 1 CCP). The same applies with regard to any further court decision on the continuation of detention (Section 114c (2) 2 CCP). These rules apply accordingly in extradition proceedings (Section 77 (1) AICCM).

8.3.4.5 *Specific rules regarding vulnerable persons*

In German criminal procedure, there are only few specific provisions for the protection of the procedural rights of impaired persons that apply accordingly to extradition proceedings (Section 77 (1) AICCM):

According to Section 191a (1) 1 Courts Constitution Act (CCA - *Gerichtsverfassungsgesetz*), a blind or visually impaired person may demand that the court documents intended for him also be made available to him in a form accessible to him to the extent that this is necessary in order to safeguard his rights in the proceedings; there shall be no charge for this. This applies accordingly to hearing or speech impaired persons (Section 187 (1) CCA).

Furthermore, juvenile offenders enjoy a special protection: Assistance by counsel is mandatory (Section 40 (2) No. 3 AICCM). Since pre-trial detention may have especially harmful effects on young people, detention of juvenile offenders is subject to a particular strict proportionality check (Section 72 (1) Act on criminal proceedings against juveniles (JCP), Section 77 (1) AICCM); as regards suspects below the age of sixteen, detention due to the risk of flight is permitted in exigent circumstances only (Section 72 (2) JCP). When taking its decision on pre-trial detention, the court has to cooperate with the Youth Court Assistance Service (*Jugendgerichtshilfe*) that will highlight the social and care-related aspects of the matter and help the court to explore alternatives to pre-trial detention (Sections 72a and 38 JCP).

8.3.5 Monitoring and communication

In Germany, the judicial authorities (courts and prosecutors) do not monitor the case after the person sought has been surrendered to the issuing state. If surrender has been made subject to a condition or a guarantee, German authorities rely on the issuing state and its willingness and capacity to comply with these conditions and guarantees, and thereby refer to the principle of mutual trust (Berlin, Cologne, Frankfurt). The judicial authorities consider it as a matter of the suspect to enforce the conditions and guarantees given by the issuing state; as regards the return guarantee for nationals, the surrendered person can contact the diplomatic or consular representation of Germany to that end. According to defence lawyers, the guarantees given by the issuing state are not always respected (e.g. with regard to the guarantee of a new trial in Romania). A defence lawyer argued that a monitoring of the case would be an essential element in order to develop uniform standards of criminal procedure in Europe (e.g. in relation to the length of proceedings, not one-sided gathering of evidence, non-corruption in the police and justice sector).

In general, major communication problems with the issuing authority have not been reported. In some cases, the English translation of the relevant offence in the SIS report is misleading, but these problems can be solved by contacting the issuing authority (Cologne). If a EAW has been issued for a petty offence, the issuing authority is rarely willing to recall the EAW; in some states (Poland, Slovakia) a hearing of the defendant seems to be mandatory before proceedings can be terminated (Frankfurt). Thus, even if the executing state refuses to surrender the person sought, the EAW will still be effective in the other Member States. Defence lawyers have criticized that the decision not to execute the EAW is neither recognized nor even considered in other Member States.

Furthermore, defence lawyers pointed out that it is rather difficult to get contact to defence lawyers in the issuing state in order to prepare the arrested person's defence. Despite the great efforts that have been spent in recent years, there is no comprehensive network of defence lawyers in Europe.⁵⁵⁵ Apart from that, information on the criminal justice system of the issuing state is hardly available. To overcome these deficiencies, defence lawyers suggested to publish country information on the national criminal justice systems in the framework of the EJM (similar to the information available in the EJM for civil and commercial matters) and to provide for public funding of a defence lawyer's network.

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⁵⁵⁵ See already Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany", in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (132).

8.3.6 Statistics

8.3.6.1 New incoming EAW requests

After the implementation of the EAW⁵⁵⁶ the number of extradition requests/EAWs from other EU Member States to Germany has increased steadily from 2005 to 2009 when the climax to date was reached with 1086 new incoming EAWs (2005: 540 extradition requests; 2006: 725; 2007: 871; 2008: 926).⁵⁵⁷ In 2010, German judicial authorities received 921 EAWs according to the national statistics on extradition (*Auslieferungsstatistik*). It can be concluded that Germany receives by far most EAWs from Poland (in 2008 and 2009 over 400 requests, in 2006, 2007 and 2010 more than 300 requests). The difference to EU countries in relation to which Germany has also intense extradition relations is very high: Extradition requests in relation to Romania are about 90, Austrian requests move, in general, between 70 and 90, and Italian ones between 50 and 60. Interestingly, a very high number of requests between 2003 and 2006 came from Lithuania (between 50 and 60); in recent years, requests from Lithuania diminished by half and seem now to stabilize on the average of about 20 to 30 requests. As to France and the Netherlands, Germany generally receives more extradition requests/EAWs from the Netherlands, but the difference to France in numbers is not very high (on average both states between 40 and 50 requests per year).

8.3.6.2 Cleared EAW requests

The following table shows – on the basis of the statistics on extradition - the number of executed extradition requests by German judicial authorities from 2003 to 2010 (cases cleared).⁵⁵⁸

Year	2003	2004	2005	2006	2007	2008	2009	2010
Total EU	354	440	520	590	907	1007	1290	1179
Total (EU and third states)	472	552	654	701	1082	1183	1452	1350

In 2010, 1179 EAW procedures were cleared, in 2009 even 1290. Compared to the traditional extradition scheme that applied in 2003, Germany had to cope with 936 cases more in 2009. If one compares these two years, this is around 3,6 times higher. In relation to the total number of received extradition requests the extradition relations within the EU have always dominated. Whereas, however, the figures for the execution of incoming extradition requests from non-EU Member States remain rather stable between 2007 and 2010 (around 200), the performance in view of EAWs had to be increased much more.

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⁵⁵⁶ The first implementation law entered into force in August 2004 in Germany and made the EAW applicable to Germany.

⁵⁵⁷ Statistics on extradition (*Auslieferungsstatistik*), available at: <<http://www.bmj.de/DE/Service/StatistikenFachinformationenPublikationen/Statistiken/Auslieferungsstatistik/artikel.html>>, (accessed on 8 March 2013). Years 2005 and 2006 include requests from Bulgaria and Romania, that were at that time non-EU Member States.

⁵⁵⁸ The first German implementing law on the European Arrest Warrant entered into force on 23 August 2004, before the traditional extradition scheme applied. EU countries that joined the EU in a later stage (e.g. Bulgaria and Romania in 2007) were also considered in order to show the difference between the situation before and after the application of the EAW. The statistics distinguishes between figures on “cleared extradition requests” (*erledigte Auslieferungsersuchen*) and “extradition requests where the extradition procedures was terminated” (*Ersuchen, bei denen das Auslieferungsverfahren zum Abschluss gekommen ist*). Differences in numbers may result because of multiple counting since a request may be granted for one offence but not granted for the other. Thus, for the following, the “cleared requests” are taken into account because they should reflect more precisely the amount of the EAW requests themselves.

As regards the figures on the individual EU Member States almost 50 % of the cases nowadays deal with EAWs from Poland (in 2010: 528 cleared EAWs from Poland, in 2009: 621; in 2008: 464). These cases are by far outweighing the number of cases from other EU countries, such as Romania (in 2010: 97 cleared cases, in 2009: 105), Austria (in 2010: 80 cleared cases, in 2009: 89 cleared cases), and Italy (in 2010: 59 cleared cases, in 2009: 51). In relation to the Netherlands, German authorities clear around 50-60 cases per year (in 2010: 61 cases cleared, in 2009: 48; in 2008: 51), in relation to France around 50 cases per year (in 2010: 42 cases cleared, in 2009: 55; in 2008: 53).

Beside the figures of the statistics on extradition, statistical data is also available on the EAWs that are submitted via the SIS and – for non-SIS-connected countries – via Interpol. These entries are processed at police level by the Federal Criminal Police Office (*Bundeskriminalamt*).

According to the replies to the Council's EAW questionnaire, Germany received 14022 alerts in 2010 based upon a EAW of which 12133 were entered into the SIS by SIS-connected EU Member States, 1899 were entered in Interpol by EU Member States that do not participate in the SIS. 1221 persons were arrested in 2010. In 2009, Germany received 13452 EAWs (11310 through SIS, 2142 through Interpol). 1208 persons were arrested.

8.3.6.3 *Types of offences*

An analysis of the statistics on extraditions in Germany for the years 2007 – 2010 with regard to the frequency of offences in EAWs which were executed by German authorities⁵⁵⁹ shows a similar picture as for EAWs issued by Germany (cf. supra 8.2.5). The vast majority of executed EAW requests refer to crimes against property or unlawful gaining of financial profits (theft, fraud, robbery). Within this area, theft is by far the most frequent category of offence the execution has to deal with. It is followed by fraud.

Important in relation to all EU Member States are also offences involving narcotic drugs. A rather high number of requests refer to offences against life and bodily integrity (murder, manslaughter, bodily injuries). In this context, also offences against the sexual self-determination may be counted that occur sometimes rather frequently. In the area of offences against life and limb, there is a remarkable high number of murder and manslaughter crimes (esp. Sections 211, 212, 222 CC) in comparison with the frequency of homicide crime in relation to the overall crime rate. In general, incoming requests referring to offences against life and limb play a more significant role than for outgoing German requests.

This is also the case for offences in the context of forgery. Whereas this category of offence plays a minor role for outgoing requests a high number of EAWs for forgery are received. In contrast, the situation concerning tax offences is vice versa. Whereas this category of offences plays an important role for EAWs issued by the German authorities it is very rare in view of the executed EAWs.

Remarkably, offences in the context of forming criminal or terrorist organisations or the membership therein (Sections 129-129b CC) play a very important role for incoming EAW requests. This crime complex

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⁵⁵⁹ Offences refer to the German Criminal Code and other statute law that criminalizes certain acts (e.g. offences involving narcotic drugs, tax offences) instead of list of offences described in Art. 2 FD EAW. The named category of offence (e.g. theft, fraud) may combine several elements of the crime (i.e. including aggravating or mitigating elements or alterations).

seems often be “ticked” in the box of the EAW form. However, one must state that it seems to have a certain significance in relation to specific EU Member States only - in particular Italy, but also the Netherlands and France as well as Belgium, Austria and Poland - whereas in relation to other EU Member States, this type of crime appears not or hardly.

In this context, it can generally be observed that some types of offences play a more prominent role in relation to individual EU Member States or a group of EU Member States than to others. Beside the aforementioned example on forming criminal or terrorist organisations, offences in the context of road traffic can be mentioned as another example. This category of offence can be found quite often in relation to EAWs from Poland and Romania. The type of offence on forgery can be found rather often in relation to Eastern EU Member States, in particular, Bulgaria, Poland, Romania, and Hungary.

In relation to Spain, offences involving drug offences are most important. In relation to Poland only, there is a very significant high number of offences concerning the non-payment of child support (Section 170 CC); offences of using threats or force to cause a person to do, suffer or omit an act and threatening (Sections 240 and 241 CC) also occur rather often in relation to Poland. In contrast, the mentioned criminal offences can be considered negligible in relation to all other EU Member States.

In relation to the Netherlands and France the overall trend is mirrored, i.e. theft offences are the most frequent ones for which EAWs have to be executed by Germany. But also offences involving narcotic drugs occur rather often in relation to both countries.

8.3.6.4 Duration of EAW proceedings

The average time between the time of arrest and the decision of surrender of the requested person (where the person did not consent to his/her surrender) was 36.8 days in 2010 and 37,8 days in 2009.⁵⁶⁰ In case of consent to the surrender, the average time was 15,4 days in 2010 and 15,7 days in 2009.⁵⁶¹

In 32 cases, the German authorities did not manage to abide by the 90-day-limit (Art. 17 (4) FD EAW).⁵⁶² The ten-day-limit for surrender (Art. 23 (2) FD EAW) was not met in 521 cases.⁵⁶³ In most cases, however, the 10-day-limit is only slightly exceeded.⁵⁶⁴

In the interviews, judicial authorities stated, that surrender usually takes 12 to 14 days (Cologne, Federal Office of Justice). These problems are due to the federal structure of Germany and the German system of the transport of prisoners which is also used for surrender.⁵⁶⁵ To overcome these problems, police officers suggested organising surrender by air, in particular to the Member States issuing the most EAWs (Federal Criminal Police Office).

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⁵⁶⁰ Council-doc. No. 9120/2/11 REV 2, p. 13.

⁵⁶¹ Council-doc. No. 9120/2/11 REV 2, p. 12.

⁵⁶² Council-doc. No. 9120/2/11 REV 2, p. 14.

⁵⁶³ Council-doc. No. 9120/2/11 REV 2, p. 16.

⁵⁶⁴ Council-doc. No. 9200/5/12 REV 5, p. 16 (with regard to 2011).

⁵⁶⁵ Council-doc. No. 9120/2/11 REV 2, p. 16; see also the evaluation report of the fourth round of mutual evaluation “Practical application of the European Arrest Warrant and corresponding surrender procedures between Member States” – report on Germany, Council Doc. 7058/2/09 REV 2, p. 31.

8.3.6.5 Workload

The average workload of the judges, general prosecutors and police officers involved in proceedings on the execution of a EAW can hardly be assessed. Detailed data specifically on the workload or spent working time in extradition cases are not available.⁵⁶⁶ Although the number of judges competent to decide upon the admissibility of surrender can be considered to be 72⁵⁶⁷, it has to be taken into consideration that the execution of EAWs only accounts for a small proportion of their cases.⁵⁶⁸ Furthermore, it must be born in mind that some Higher Regional Courts are more affected by extradition proceedings than others (see infra explanation for general prosecution services attached to the Higher Regional Courts) due to their location, size of their jurisdictional territory, composition of residents living in the region etc. Thus, the workload of judges in certain Higher Regional Courts is different. It is therefore also difficult to conclude the workload of the judges by drawing a relation between the number of EAW requests to be dealt with and domestic criminal cases to be reviewed. In order to give only an approximate idea, however: If one compares the total number of EAW requests that were terminated by Court decision⁵⁶⁹ and the criminal cases to be reviewed by the Higher Regional Courts⁵⁷⁰, EAW cases were in 2010 approximately a sixth (in 2009: approximately one seventh) of the domestic criminal cases to be reviewed.⁵⁷¹ In this context, it is also interesting to see that more than half EAWs from Poland were subject to the decisions on admissibility of EAWs by the Higher Regional Courts (total court decisions in 2010: 974 – court decisions in 2010 referring to Poland: 541; total court decisions in 2009: 828 – court decisions in 2009 referring to Poland: 480).⁵⁷²

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⁵⁶⁶ A system analyzing workforce and manpower in justice, including records of working time for single operations by judges exists (*Personalbedarfsberechnungssystem in den Gerichtsbarkeiten und Staatsanwaltschaften* – abbr.: PEBB5Y), but it not lists work on extradition cases separately.

⁵⁶⁷ In Germany there are 24 Higher Regional Courts (<https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/GerichtePersonal/Tabellen/GerichteZahl.html#Zahl%20oder%20Gerichte> (accessed on 8 March 2013)). In each Higher Regional Court one chamber (Senat) is competent for all extradition cases and all cases where it has competence in matters of international cooperation in criminal matters. The decision in extradition cases is made by three judges including the presiding judge (Section 77 AI CCM and Section 122 Courts Constitution Act).

⁵⁶⁸ For instance, the second division of the Higher Regional Court Cologne has a general competence for international cooperation in criminal matters, legal remedies against pre-trial detention, proceedings concerning the the counsel's remuneration, and the determination of the forum in criminal cases, see *Geschäftsverteilungsplan 2012*, p. 61, available at: http://www.olg-koeln.nrw.de/001_wir_ueber_uns/002_geschaeftsverteilung/gvp_senate_2012.pdf. See also Schedule of responsibilities of the Higher Regional Court Munich: http://www.justiz.bayern.de/imperia/md/content/stmj_internet/gerichte/oberlandesgerichte/muenchen/gvp_2013.pdf; Higher Regional Court Frankfurt a.M.: http://www.olg-frankfurt.justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?uid=e8b60407-62e3-8411-aeb6-df144e9169fc; internet references accessed 8 March 2013.

⁵⁶⁹ Cf. Statistics on extradition 2010, *Bundesanzeiger* No 30 of 22 February 2012, p. 690 (691-692), A.1. (row 12); Statistics on extradition 2009, *Bundesanzeiger* No 18 of 2 February 2011, p. 418 (419-420), A.1. (row 12):.

⁵⁷⁰ The main area of activity of Higher Regional Courts in criminal matters concern legal remedies. The Higher Regional Court has jurisdiction for appeals on points of law (Revision) from the local court judgments either directly (*Sprungrevision*) or after the case has been adjudicated on first appeal by the regional court. Furthermore, the Higher Regional Court may decide on complaints in the course of criminal proceedings (*Beschwerde* – kind of interlocutory remedy) The Higher Regional Courts have also limited jurisdiction at first instance (above all serious political crimes), but the amount of incoming first instance cases is very low (in 2010: 17 cases, in 2009: 12 cases). Statistical data on the volume of work of, and the work completed by, criminal courts are contained in: *Statistisches Bundesamt, Fachserie 10, Reihe 2.3, Rechtspflege, Strafgerichte* (available at: <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Strafgerichte.html> (accessed on 8 March 2013)).

⁵⁷¹ In 2010, the Higher Regional Courts cleared 6070 Revisionen, whereas 974 admissibility decisions of EAWs were taken. In 2009, the Higher Regional Courts cleared 6077 „Revisionen“, whereas 828 admissibility decisions of EAWs were taken.

⁵⁷² Statistics on extradition, fn. 383.

Similar problems occur with regard to assess workload of the general prosecutors and their staff. A picture on the workload in extradition cases may be drawn by the statistics on the development of extradition cases at the general public prosecution office which is, in fact, responsible for handling the execution of extraditions (see explanation supra 8.3.1.1.2.). The following table indicates the number of extradition cases (including transit cases, including third countries) at the general public prosecution offices from 2004 till 2010.⁵⁷³

Year	2004	2005	2006	2007	2008	2009	2010
Extradition Cases	2240	2309	2559	3162	3351	3465	3068

It should be added that there are regional differences. The general public prosecution offices with most extradition cases in 2010 are: Berlin (546), Hamm in North-Rhine Westphalia (488), Munich (335), and Frankfurt a.M. (315). The fewest cases had the general prosecution offices in Jena/Thuringia (8), followed by Naumburg/Saxony-Anhalt (12), Saarbrücken (16), and Bremen (21). In 2009, the figures of the general public prosecution offices with most cases were: Hamm (585), Berlin (537), Munich (357), and Frankfurt a.M. (290). The ones with the fewest in 2009 were: Jena (4), Naumburg (13), Saarbrücken (21), and Rostock/Mecklenburg-Western Pomerania (31).

Eventually, it should also be recalled that also the magistrate at the local court by whom the person sought will be examined after arrest as well as the police are involved in EAW proceedings. The competent judge is determined by the place (court district) and time of arrest (on call duty). In principle, this can be any judge at a local court. The same holds true for police officers arresting the person sought. Therefore, also approximate figures on their workload cannot be delivered.

8.4 Factors relevant for the degree of mutual trust

8.4.1 Mutual trust towards foreign legal orders

8.4.1.1 General observations

The decision making process by the competent authority to execute a mutual legal assistance request may be influenced by several factors of mutual trust, such as the duration of pre-trial and trial procedure, the right to a fair trial, the level of independence of the judiciary, the level of corruption in the judiciary and law enforcement organisations, the quality of the legal representation, detention conditions, and the level of cooperation between the Member States.

⁵⁷³ Statistisches Bundesamt, Rechtspflege, Fachserie 10, Reihe 2.6, Staatsanwaltschaften, 2010 and 2009, no. 5.1.

In the interviews judges and prosecutors expressed their view that the system of the EAW is based upon mutual trust, and it is not up to them to question the principle of mutual recognition. In particular, they do not have the expertise and capacity to assess the quality of other Member States' criminal justice system. In the recent decade, cooperation within the Union has increased the level of mutual trust. So, generally speaking, the Member States' criminal justice systems are considered more trustworthy than the systems of third states. Factors mentioned on mutual trust may play a role in individual extradition cases with third countries, but not in relation to EU Member States. For the recognition of the level of punishment cf. supra 8.3.1.1.3. In sum, judicial authorities draw a clear-cut between the extradition procedure and the follow-up procedure after surrender in the state of trial.

Defence lawyers, by contrast, argue that mutual trust cannot be taken for granted but needs a solid factual and normative basis which does not exist yet. Membership in the European Union does not per se guarantee compliance with minimum human rights standards and the rule of law. Extradition proceedings and the following criminal proceedings in the issuing state cannot be separated (in a genuine European area of justice). The defence lawyers' experiences with the EAWs raise serious doubts on whether a general trust in the issuing state's criminal justice system is justified. In several cases minimum human rights standards have not been met (detention conditions, length of proceedings); in various areas, common standards are not defined in a sufficiently precise manner or do not exist at all (standards on evidence, judicial review of court orders, access to the file, confidentiality of the communication between defendant and his/her counsel). A defence lawyer reported a case where the person sought claimed to be victim of a corrupt judge who has issued the EAW to make him pay the bribe. Although the defence lawyer referred to publicly available information on corruption in the justice sector of the issuing state, the judicial authorities executed the EAW, thereby relying on the principle of mutual trust. Similar problems arise in the context of guarantees given by the issuing state (supra 8.3.5).

Defence lawyers pledged for having harmonized standards in reality as regards several aspects of criminal procedure (e.g. access to a lawyer, mandatory representation by defence counsel, access to files)⁵⁷⁴, but – since the EAW is the instrument that massively relates to detention – at least detention conditions must follow the same standards in all EU countries which is to date not the case in reality. They further pointed out that judicial authorities may adhere to mutual trust, but persons concerned lose trust into foreign legal orders if they must notice that they are powerless against their surrender and confronted with a very different level of punishment in the other EU Member States. According to defence lawyers, one aspect may increase mutual trust if one would think about the mutual recognition of judgments; thus, if a court in one EU country denies extradition this decision should be recognised by other courts in the EU as well (or at least made available).

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⁵⁷⁴ For difficulties of lawyers due to the different understanding of also basic principles of criminal procedure (e.g. access to files in France) see also Arnold, "Auf dem Weg zu einem Europäischen Strafverteidiger", in: *Strafverteidiger-Forum* 2013, p. 54 (55).

However, instead today, the EAW is upheld in the SIS and the person concerned is in fact not allowed to travel, thereby risking that another court in another EU Member State may execute the EAW; the mutual recognition of judgments should correlate to the principle of the free movement of persons as enshrined in the EU treaties.

Since trust deserves to be gained also by the citizens, all defendants should have the right “of first advice by a defence counsel” as a rule in all extradition proceedings, i.e. it should become standard that assistance by counsel is assigned mandatorily in EAW cases (see also supra 8.3.4.3).

Another parameter for having mutual trust is the application of “eurosceptic” provisions in the implementation law of the EAW. Provisions of that kind are in particular the regulation on reciprocity (Art. 83b lit. d) AICCM)⁵⁷⁵ and also the above-mentioned “European ordre public clause” in Section 73 sentence 2 AICCM.⁵⁷⁶ However, German practice shows that mutual trust seems to overtop both provisions. The provision on reciprocity has not played any role in practice so far and seemed to have never been applied yet. An analysis of the published case law on Section 73 AICCM to date shows that objections on the basis of fundamental rights or other issues that could justify refusing a EAW because European values, as defined in Art. 6 TEU, were not guaranteed, are rarely successful. Courts either deny objections since they are not founded sufficiently or they grant extradition by setting conditions. Moreover, legal restrictions were introduced when courts required that “the core sphere” of a fundamental right must be breached by another EU Member State, as a consequence of which only very exceptional cases, in which the criminal proceedings were unfair or unacceptable, can lead to a successful intervention by German courts. In respect of the fundamental rights clause, courts show trust and confidence in the other EU Member States’ legal systems. Although Art. 73 sentence 2 of the AICCM may, at first glance, be suggestive of being a “eurosceptic” norm, practice proved that courts interpret the norm in quite an “extradition-friendly” way.⁵⁷⁷

In the interviews defence lawyers confirmed that the thresholds for arguing a fundamental breach are very high; in most cases sufficient material as required by the courts cannot be provided or evidence is lacking although often remains the impression that not only rule of law elements prevail the conduct of criminal proceedings in the requesting EU Member State.

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⁵⁷⁵ According to Section 83b para. 1 lit. d) AICCM approval of extradition may be denied if the requesting Member State cannot guarantee that it will itself act in accordance with the framework decision and the provisions on the European Arrest Warrant. Thus, this provision keeps up a residuum of the traditional reciprocity principle.

⁵⁷⁶ Vogel in: Grützner/Pötz/Kreß (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd edition (2007), § 73 IRG mn. 134.

⁵⁷⁷ Wahl, “The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany”, in: Vernimmen-Van Tiggelen/Surano/Weyembergh (Eds.), *The future of mutual recognition in criminal matters in the European Union*, (2009), p. 115 (133).

If the issue of *ordre public* plays a role in a case, the practice of the higher regional courts is to regularly ask the issuing EU Member State to maintain certain standards instead of denying the surrender. Example: If the accused claims degrading conditions of detention in the issuing Member State, German courts let it be guaranteed in former decisions that the accused is placed into certain jails of that country or is medically supervised.⁵⁷⁸

8.4.1.2 *Mutual trust and specific EAW problems*

Mutual trust can also be disturbed if difficulties with other EU Member States arise when they issue EAWs. Judges and prosecutors confirmed that the EAW runs smoothly in the vast majority of cases; only in few individual cases problems occur. This can disturb mutual trust between EU member states. One of the main problems in this context are EAWs where the facts are described very insufficiently, even though the case deals with serious crime, as a consequence of which the degree of suspicion is in no way justified and/or the request becomes incomprehensible for the executing authority. Judges and prosecutors argued that the EAW request must be at least plausible.⁵⁷⁹

The Higher Regional Court of Cologne, for example, held that a person must not be detained if the EAW to be executed does not specify the illegal conduct in a comprehensible manner.⁵⁸⁰ Similar problems arise in civil law-related cases in which the EAW is based upon the mere fact that the person sought has not paid his/her debts (Berlin). If it is obvious that the conduct is not a criminal offence under German law (and the waiver of the double criminality requirement do not apply), the national SIRENE (the Federal Criminal Police Office) will set a flag, thereby prohibiting the arrest of the person sought (Art. 94 (4), Art. 95 (3) CISA).⁵⁸¹ Otherwise the case is referred to the judicial authorities that will decide on whether to request the issuing authority for more information or to set a flag in the SIS.

As regards the level of information, in particular, EAWs for the execution of sentences are sometimes hardly understandable since there are inconsistencies between the judgment and the information given in the EAW form. Some judges were in favour of having more background information about the concrete case, in particular on the sentencing practice in the issuing country.

⁵⁷⁸ Wahl, with further references *ibid.*, p. 135.

⁵⁷⁹ A lack of the provision of sufficient information that allows a judge to base its decision and a defendant to put forward substantiated objections against the request was identified one of the main problems due to the strong formalization of the EAW also in a study carried out in 2008 on the EAW (Wahl, *ibid.*, p. 115 (121 and 133)).

⁵⁸⁰ Higher Regional Court Cologne, decision of 13 July 2012 – case 6 AusLA 54/12 – 45, *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport (NStZ-RR)* 2012, p. 345: The European Arrest Warrant for participation in a terrorist group was based on the information that the girl wanted for arrest has left her parents, took up her Kurdish name, participated in demonstrations of the PKK and told her friends that she wanted to leave Europe for the Kurdish mountains.

⁵⁸¹ The interviewees referred to European Arrest Warrants issued in Bulgaria and Romania for illegal entry of the national territory from another Member State of the Union.

Other problems⁵⁸² in practice relate to the tight time limits in some EU Member States that require the delivery of all information in case of provisional arrest (e.g. 48 hours).⁵⁸³ Especially during the weekend, when translation services are not available, it is very difficult to meet the time limits, so that in some cases persons sought had to be discharged and absconded.

One of the main obstacles remain language problems. From the point of view of judicial authorities they concern above all the – sometimes poor – translations of the EAW (which leads again to – avoidable – requests for additional information and delay of proceedings). From the point of view of defence lawyers, language barriers hinder the establishment of an effective “double defence”.⁵⁸⁴ One prosecutor proposed recognising all EAWs in English and having unified time limits (“EAW one-for-all”).

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⁵⁸² See also 8.2.3.

⁵⁸³ See also Council doc. 12736/1/04 of 12 October 2004.

⁵⁸⁴ For the latter see also Arnold, “Auf dem Weg zu einem Europäischen Strafverteidiger”, *Strafverteidiger-Forum* 2013, p. 54 (55).



8.4.2 Mutual trust in the German legal order

Also the own legal order must provide for factors that can establish mutual trust by other countries. Here, several aspects can be considered. In the following, the main factors that may determine mutual trust - the length of proceedings and detention conditions in Germany - are explored in more details.

8.4.2.1 Mutual trust and the length of proceedings

As the interviews of defence lawyers have revealed, the length of criminal proceedings in the issuing state is an important element of mutual trust. When assessing the length of judicial proceedings in Germany, the criminal investigation, the trial phase and the appeal have to be taken into consideration.

The criminal investigation is conducted by the prosecutor; in most cases, this is the prosecutor attached to the regional court (*Staatsanwaltschaft beim Landgericht*).⁵⁸⁵ In 2010, nearly 5 million criminal investigations have been closed, 67 % of them within three months. The average duration of the investigation was 3,2 months (4 months for the cases brought to trial).⁵⁸⁶

As regards the trial phase, statistical data on the length of court proceedings is not related to the gravity of the crime as it is reflected in the maximum punishment provided by law, but to the court dealing with the case. In rough terms, the local court (*Amtsgericht*) is competent for offences if the expected criminal sentence does not go beyond four years of imprisonment. The regional courts (*Landgericht*) have jurisdiction in cases in which the sentence is expected to exceed four years, cases where the prosecutor decided to be not tried by the local court and minor political crimes as well as for felonies resulting in death and economic crimes. The jurisdiction of the Higher Regional Courts (*Oberlandesgericht*) at first instance is limited. Its jurisdiction is determined by a list of criminal offences that deal with terrorism and crimes against the state and other grave offences when committed in the course of offences such as murder, bank robberies etc.⁵⁸⁷ Since this category of crimes only plays a minor role in the proceedings on the execution of a EAW, the overview is limited to the local and regional courts.

In 2010, the local courts concluded 790.000 proceedings, 59 % of them within three months; the average duration of the criminal proceedings was 3,8 months (concluded by judgment: 4,1 months).⁵⁸⁸ The regional courts conducted approximately 14.000 proceedings, almost 75 % of them were concluded within six months (39 % within three months); the average duration of criminal proceedings was 6,3 months (concluded by judgment: 6,6 months).⁵⁸⁹ The duration of a criminal case between opening of the criminal procedure by the public prosecutor and court decision was 7,2 months when the case came up to the local court at first instance, and 17,3 months when the case was treated by the regional court at first instance.

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⁵⁸⁵ The general prosecutor at the higher regional court and the federal prosecutor only deal with exceptional cases (such as terrorism) and will therefore not be taken into consideration; in that regard, statistical data on the length of criminal investigations is not available.

⁵⁸⁶ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.6., Rechtspflege – Staatsanwaltschaft, Wiesbaden 2011, p. 43.

⁵⁸⁷ For further information on the German court system in criminal matters cf. Huber, in: Vogler/Huber (Eds.), Criminal procedure in Europe, (2008), p. 269 (284).

⁵⁸⁸ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.3., Rechtspflege – Strafgerichte, Wiesbaden 2011, p. 40.

⁵⁸⁹ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.3., Rechtspflege – Strafgerichte, Wiesbaden 2011, p. 78.

The statistical data on appeal proceedings is structured accordingly: The judgment of a local court can be challenged before the regional courts (Section 312 CCP). In 2010, the regional courts had to decide upon 54.000 appeals on points of facts and law (*Berufung*). 53,1 % of the decisions have been taken within six months, the average duration of appeal proceedings was 6,8 months.⁵⁹⁰ The decision of the regional court is subject to appeal on points of law only (*Revision*). In 2010, the higher regional courts took 6000 decisions on appeal, 72 % of them within six months. The average duration of appeal proceedings was 5,6 months.⁵⁹¹ The average duration of a criminal case between opening of the criminal procedure by the public prosecutor and appellate court decision was, in 2010, 15,3 months if the appellate decision was taken by the regional courts, and 21,7 months if the Higher Regional Court decided.

The judgment of a regional court is subject to appeal in points of law only (Section 333 CCP). In 2010, the Federal Court of Justice - division for criminal matters (*Bundesgerichtshof - Strafsachen*) had to decide upon 3061 appeals. Most of them (2376) were rejected as manifestly ill-founded; 78 % of the decisions were taken within six months. In 647 cases, the court decided on the merits of the case; about 63 % of the decisions were issued within nine months.⁵⁹² Statistical data on the average duration of appeal proceedings before the Federal Court of Justice is not available.

In summary, most criminal proceedings are concluded within one or two years. Apart from the statistical data, information on the length of proceedings can be taken from the annual reports of the European Court of Human Rights. In 2011, the European Court of Human Rights stated in 19 cases that Germany has violated its obligations under Art. 6 (1) ECHR because German courts failed to conclude proceedings within reasonable time.⁵⁹³ The violations, however, are not related to criminal proceedings in the majority of cases, but rather to court proceedings in civil, administrative and social matters.⁵⁹⁴

In 2010, the Court severely criticized that German law did not provide for an effective remedy against an excessive length of court proceedings and came to the conclusion that the repetitive violations of Art. 6 (1) ECHR were consequences of systemic problems and the failure of Germany to take adequate legislative action.⁵⁹⁵ In response to this pilot judgment, Germany adopted the Act against Protracted Court Proceedings and Criminal Investigations⁵⁹⁶ that entered into force on 3 December 2011. In its recent case law, the European Court of Human Rights considered the new remedy to meet the requirements set out in Art. 6 and Art. 13 ECHR.⁵⁹⁷

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⁵⁹⁰ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.3., Rechtspflege – Strafgerichte, Wiesbaden 2011, p. 98.

⁵⁹¹ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.3., Rechtspflege – Strafgerichte, Wiesbaden 2011, p. 134.

⁵⁹² Statistisches Bundesamt (ed.), Fachserie 10, Reihe 2.3., Rechtspflege – Strafgerichte, Wiesbaden 2011, p. 153.

⁵⁹³ European Court of Human Rights, Annual Report 2011, Strasbourg March 2012, p. 156. See also the annual "Reports of the German Federal Government on the Case-Law of the European Court of Human Rights and on the Execution of its Judgments in cases against the Federal Republic of Germany", available at: <http://www.egmr.org/link.html> (accessed on 8 March 2013).

⁵⁹⁴ Most of the violations occur in civil proceedings, see the list of 39 judgments and 28 settlements in: ECtHR, judgment of 2 September 2010, Case no. 46344/06, *Rumpf v. Germany*, §§ 65-67.

⁵⁹⁵ ECtHR, *ibid.*, §§ 68-70.

⁵⁹⁶ Gesetz über den Rechtsschutz gegen überlange Gerichtsverfahren und strafrechtliche Ermittlungsverfahren of 24 November 2011, Bundesgesetzblatt (Federal Law Gazette), part I, p. 2302.

⁵⁹⁷ ECtHR, decision of 29 May 2012, case no. 53126/07, *Taron v. Germany*, par. 38 et seq., 48.

8.4.2.2 Mutual trust and detention

Another aspect considered to be key factor for mutual trust is the situation of detained persons in the issuing state.⁵⁹⁸ After surrender, the person sought will probably be detained either for the purpose of enforcement of a sentence or for the purpose of prosecution in the issuing state. As regards the latter, the person will be held in detention on remand. A disproportionate use of this measure is likely to undermine mutual trust and, thus, have a negative impact on the functioning of cooperation instruments such as the EAW.

Like the majority of European criminal justice systems, the German concept of remand detention is not limited to pre-trial detention (i.e. detention of untried defendants), but also covers persons who are detained during the trial and convicted persons who have appealed or who are within the statutory limits for doing so.⁵⁹⁹

In 2010, 26.967 persons (out of 1.034.868 persons charged) were subject to detention on remand.⁶⁰⁰ In most cases, the detention did not last longer than one (7.174 cases), three (6.222) or six months (7.152). In 4.961 cases, the duration of remand detention was between six and twelve months, in 1.458 cases more than one year.⁶⁰¹

By the end of November 2010, 10.941 remand detainees were held in prison; 468 of them (4,3 %) were juveniles (14 to 17 years of age), 1026 of them (9,4 %) were young adults (18 to 21 years of age).⁶⁰² 5042 of the detainees were foreigners (46,1 %). Given the fact that only 26,7 % of all prisoners are foreigners, this rate is considered fairly high and deemed to result from a reluctance of German courts and prosecutors to use less intrusive alternatives to detention.⁶⁰³

15,3 % of all prisoners are held in detention on remand.⁶⁰⁴ The rate of detainees per 100.000 inhabitants is 13,4.⁶⁰⁵ In comparison to other European states, the rate is considerably low.⁶⁰⁶ This gives rise to the assumption that, in general, there is no excessive use of remand detention in Germany.

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⁵⁹⁸ See the Commission's Green Paper "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention", COM (2011) 327 final, p. 3-4.

⁵⁹⁹ Aebi/Delgrande, *Council of Europe, Annual Penal Statistics – SPACE I* (Survey 2010), p. 80 (available at: http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/SPACE-1_2010_English.pdf (accessed on 8 March 2013); Morgenstern, "Untersuchungshaft in Europa", *Monatsschrift für Kriminologie* vol. 94 (2011), p. 452 (453-454).

⁶⁰⁰ Statistisches Bundesamt (ed.), *Fachserie 10, Reihe 3., Rechtspflege – Strafverfolgung*, Wiesbaden 2011, p. 360.

⁶⁰¹ Statistisches Bundesamt (ed.), *Fachserie 10, Reihe 3., Rechtspflege – Strafverfolgung*, Wiesbaden 2011, p. 361.

⁶⁰² Statistisches Bundesamt (ed.), *Rechtspflege – Bestand der Gefangenen und Verurteilten in den deutschen Justizvollzugsanstalten* (Stichtag 31. August 2012), Wiesbaden 2012, p. 42; see also Aebi/Delgrande, fn. 413., p. 80.

⁶⁰³ Cf. Morgenstern, *Monatsschrift für Kriminologie* vol. 94 (2011), 452 (463-464, with further references); see also Morgenstern in: van Kalmthout/Knapen/Morgenstern (Eds.), *Pre-Trial Detention in the European Union*, (2009), p. 389 (426).

⁶⁰⁴ Aebi/Delgrande, fn. 413, p. 84; see also Statistisches Bundesamt (ed.), *Rechtspflege – Bestand der Gefangenen und Verurteilten in den deutschen Justizvollzugsanstalten* (Stichtag 31. August 2012), Wiesbaden 2012, p. 30.

⁶⁰⁵ Aebi/Delgrande, *ibid.*

⁶⁰⁶ Cf. Morgenstern, *Monatsschrift für Kriminologie*, vol. 94 (2011), 452 (460-462).

As to the detention conditions in Germany, information can be derived from the annual report of the European Court of Human Rights and the report of the European Committee on the prevention of torture.

In 2011, Germany was held responsible for a violation of Art. 3 ECHR in one case.⁶⁰⁷ In this case, a prisoner had been placed in a security cell, and after having been strip-searched, he had remained there without clothes for seven days.⁶⁰⁸ The European Committee on the prevention of torture, however, came to the conclusion that persons detained in Germany run relatively little risk of being physically ill-treated.⁶⁰⁹ Almost no allegations of ill-treatment were reported, but the delegation received several complaints on inter-prisoner-violence.⁶¹⁰ The material conditions of detention conditions were considered to comply with high or at least adequate standards⁶¹¹; nevertheless, the Committee adopted several recommendations (i.a. clean mattresses for persons held in police custody, full partition of sanitary facilities in the cells for juveniles, opportunity to out-of-cell activities, strict limitation of measures under a special regime for non-cooperative and violent prisoners).⁶¹²

8.5 Experiences with the current evaluation methodology of the peer-reviews

The experiences with the current evaluation methodology are limited because the majority of the interviewees have not been involved into the mutual evaluation on the practical application of the EAW. Overall, the comprehensiveness of the evaluation and the assistance provided by the Commission and General Secretariat of the Council have been considered quite positive. As regards the expertise of the experts involved in the evaluation and the reliability of the information, the interviewees were more hesitant in their comments and raised doubts whether they have enough information to assess the quality of the information and the experts' capacities and experiences in the field of research and evaluation. Prosecutors criticized that the evaluation has focused on formal aspects and compliance with terminology (e.g. extradition vs. surrender) instead of taking a closer look at the practical implementation (Berlin). Nevertheless, the report on Germany has been considered to provide comprehensive and correct information on the practical implementation of the EAW in Germany.

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⁶⁰⁷ European Court of Human Rights, Annual Report 2011, Strasbourg March 2012, p. 156.

⁶⁰⁸ ECtHR, judgment of 7 July 2011, case no. 20999/05, *Hellig v. Germany*, §§ 52-58.

⁶⁰⁹ Report to the German government on the visit to Germany carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010, CPT/Inf (2012) 6, p. 14, 22, 28.

⁶¹⁰ CPT-Report, *ibid.*, p. 14, 22, 28.

⁶¹¹ CPT-Report, *ibid.*, p. 28, 31.

⁶¹² CPT-Report, *ibid.*, p. 61 et seq.

Accordingly, no suggestions on the improvement of specific elements of the current methodology have been made. However, it has been pointed out that the peer review visits in the Member States were not carried out by one and the same evaluation team and that this might result in different evaluation results and recommendations.

The questionnaire for the interviews conducted in the framework of the pilot project has triggered suggestions on the collection of data on the issuing state and the grounds for detention (in particular risk of flight) and alternatives to pre-trial detention. Although this is – at least in part – covered by the legal analysis and the collection of statistical data, more specific information on court practice might provide a more comprehensive picture on the role of the proportionality principle.

Annex to the Country Report Germany - Statistics

Thomas Wahl

1. Type of offences for which the European Arrest Warrant is most often issued

Preliminary remark: For this question the German statistics on extradition (*Auslieferungsstatistik*) were analysed. The reference period was 2007 - 2010.⁶¹³ Detailed figures about the distribution of the most commonly issued extradition requests are shown in the following table.

The statistics on extradition list the executed German requests by foreign states and indicates the criminal offence upon which the German extradition request was based. For the reply to question 1) the criminal offences were analysed EU Member State by EU Member State and the category of offence was taken that has been accounted most often in the given year in reference to the EU Member State. As a result, the sums do not indicate the totals of all requests of German authorities in relation to a certain category of offences (e.g. all EAWs concerning theft in a given year), but only the most often occurred (categories of) offences.

Example: If “heft” only occurs 5 times, and “robbery” 10 and “fraud” 12 times in relation to a specific EU Member State, robbery and fraud was listed, theft was not considered.

The criminal offences in the statistics refer to the German Criminal Code (*Strafgesetzbuch* - in the following: CC) and other national statutes that foresee criminal offences, such as the Narcotic Drugs Act (*Betäubungsmittelgesetz*), the Fiscal Code (*Abgabenordnung*) and other taxation law. It was looked at the type of offences. In this context, not only the basic elements of the crime were considered but also modifications (e.g. aggravations or mitigations). Examples: The type of “theft” includes aggravating circumstances of the theft, such as the carrying of weapons, acting as a member of a gang and burglary of private homes as well as theft of objects of minor value (Sections 242-244a, and 247, 248a CC). The type of “robbery” comprises beside the criminal offence of “robbery” (Section 249 CC) aggravated robbery, robbery causing death, theft and use of force to retain stolen goods as well as blackmail and use of force or threats against life or limb (Sections 249-252, 255 CC). “Fraud” includes the criminal offence of computer fraud, that punishes the gain of unlawful material benefits by influencing the result of a data processing operation, as well as subsidy fraud (Sections 263, 263a, 264 CC). “Bodily injury” comprises bodily injuries both by intent and by negligence.

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⁶¹³ If not otherwise stated, 2010 was taken as reference year for statistical data since not all official data were published for 2011.

Frequency of offences for which EAWs were issued by German judicial authorities - part I																
	Fraud			Theft			Robbery			Offences Narcotic Drugs						
	2010	2009	2008	2007	2010	2009	2008	2007	2010	2009	2008	2007	2008	2007		
Belgium	7	15			8	24			21	13	20	18	9	8	12	
Bulgaria	20	8	7						5	9	8	5				
Denmark													2		3	
Estonia	10										6	4				
Finland	4													3		
France	18	15	22	17	43	50	41	40	20	16	16	14	9	14		
Greece	9				6					16			7		4	
Ireland																
Italy	20	32	32	19	22	23	15	19	14	14	16	16	8		13	
Latvia	4	4						6				6		3		
Lithuania	3				18	24	18	4	10	10	12					
Luxembourg	5			2												
The Netherlands	21	16		17	21		19	30	22			22	60	57	51	
Austria	36	32	30	44	52	93	57	54	25	29	29	22	13	17		
Poland					93	92	62	67	48	59	37					
Portugal				4					4					3	5	
Romania	45				65	33	50	9	25	34	35	11				
Sweden	5	5				8			7	7	7					
Slovakia					10		15									
Slovenia	6				9	10					9	6	10			
Spain	30	36	45	55	23	30	39	33	33	24	24	22	25		26	
Czech Republic		7		8	41	26	22	18						7		
Hungary	10	14	8	5	23	30	14	11	10				7			
United Kingdom	8				15			9	9	21	14	16				
Cyprus																
Sum	261	184	144	175	449	443	361	326	228	225	102	203	140	112	95	106
			764		1579					758				453		

Frequency of offences for which EAWs were issued by German judicial authorities - part II																			
	Tax Offences / Smuggling					Bodily Injury					Handling of stolen goods			Counterfeiting of Money / Debit and Credit Cards					
	2010	2009	2008	2007		2010	2009	2008	2007		2010	2009	2008	2007	2010	2009	2008	2007	
Belgium								17											
Bulgaria					9										27				
Denmark																			
Estonia																			
Finland																			
France					23														
Greece			23	6			10												
Ireland																			
Italy					11		16												
Latvia																			
Lithuania											9								
Luxembourg																			
The Netherlands																			
Austria					21			22											
Poland	61	74	79	15	28						24								
Portugal																			
Romania															26	20			
Sweden																			
Slovakia																			
Slovenia																			
Spain					21		24		22										
Czech Republic																			
Hungary		13	15	10	8														
United Kingdom	6								9										
Cyprus																			
Sum	67	87	117	31	121	50	39	31	31	241	33	53	20	73					

Results: The analysis shows that the vast majority of EAW requests issued by German authorities refer to crimes against property or unlawful gaining of financial profits (theft, robbery, fraud, tax evasion, and smuggling). Crimes against the person like bodily injury or offences affecting the sexual self-determination (rape, etc.) can be found but play a minor role considering the overall size. It can further be concluded that the complex of “theft” is by far the most often underlying offence of a German EAW request within the crimes against property. Furthermore, robbery and fraud occur very often. A major role further plays crime involving narcotic drugs and crime in relation to tax law. Bodily injury ranks on the sixth position of the German requests executed between 2007 and 2010. The distribution of the frequency of the offences is similar year by year.

In addition, it can be observed that some types of offences play a more prominent role in relation to individual EU Member States than to the others. Offences involving narcotic drugs, for example, are by far the most often category of EAWs issued by German authorities in relation to the Netherlands. In relation to Poland, EAWs are very often issued for tax offences (e.g. tax evasion, smuggling, VAT fraud or black marketing with tobacco). In relation to Spain fraud occurs more often than theft or robbery. In 2009 and 2010 a high number of EAWs requests to Romania and Bulgaria referred to counterfeiting of money/credit cards. In relation to Germany’s neighbouring countries France and Austria the general trend is more or less reflected, i.e. most EAWs refer to theft and fraud.

2./3. Member States issuing the highest number of requests for executing a European Arrest Warrant (in particular of the participating countries)

The following table shows the number of incoming extradition requests to Germany from 2003 till 2010. Figures for European states that joined the EU in a later stage (e.g. Bulgaria and Romania in 2007) were included so that the data also reflect periods in which the traditional extradition system applied. It can be concluded that after the application of the EAW⁶¹⁴ Germany receives by far most EAWs from Poland (in 2008 and 2009 over 400 requests, in 2006, 2007 and 2010 more than 300 requests). The difference to EU countries in relation to which Germany has also intense extradition relations is very high: Extradition requests in relation to Romania are about 90, Austrian requests move, in general, between 70 and 90, and Italian and Dutch ones between 50 and 60. Interestingly, a very high number of requests between 2003 and 2006 came from Lithuania (between 50 and 60); in recent years, requests from Lithuania diminished by half and seem now to stabilize on the average of about 20 to 30 requests.

As to the participating countries France and Netherlands, Germany generally receives more extradition requests/EAWs from the Netherlands, but the difference to France in numbers is not very high (on average both states between 40 and 50 requests per year).

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⁶¹⁴ The first implementation law entered into force in August 2004 in Germany and made the EAW applicable to Germany.

Number of New Incoming Extradition Requests								
	2003	2004	2005	2006	2007	2008	2009	2010
Belgium	29	40	35	33	50	38	40	39
Bulgaria	3	4	2	4	15	21	28	21
Denmark	6	8	7	12	6	9	33	31
Estonia	2	3	0	1	1	2	4	3
Finland	1	5	4	3	2	1	2	8
France	23	48	44	45	33	46	46	39
Greece	4	3	8	3	5	5	6	5
Ireland	0	0	0	0	0	1	0	0
Italy	46	54	34	45	55	44	47	60
Latvia	2	5	6	7	9	7	11	10
Lithuania	50	59	66	45	19	28	28	19
Luxemburg	3	4	2	4	10	4	5	4
The Netherlands	34	56	48	33	56	42	55	50
Austria	58	89	58	55	68	41	86	77
Poland	27	60	123	327	349	453	473	318
Portugal	9	4	6	6	1	5	3	5
Romania	27	20	28	21	88	62	89	92
Sweden	5	12	9	15	4	8	8	13
Slovakia	2	2	8	6	10	19	15	21
Slovenia	2	4	2	6	8	5	4	7
Spain	6	19	14	12	10	19	22	13
Czech Republic	11	11	11	12	32	36	33	38
Hungary	13	12	16	25	33	25	42	40
United Kingdom	2	4	9	4	7	5	5	7
Cyprus	0	0	0	1	0	0	1	1
Total:	365	526	540	725	871	926	1086	921

4. General country information

a. Number of inhabitants

81,8 million (2011)⁶¹⁵

b. Annual State budget

Preliminary note: The overall public budget in Germany comprises the core and extra budgets of the Federation, Länder, municipalities, /associations of municipalities, statutory social insurance and the financial shares in the European Union (EU shares).

The figures of the state budget are different depending on the time and methods of accounting: First, there is the annual draft budget that gives estimation about the expected expenditure and revenue for the public finances. The drafts are done on the level of the federation (Bund) for the budget of the federation (e.g. Federal Ministries, federal institutions like federal offices or courts), the Länder for the “Länder budget” and the municipalities for “local” budgets. Responsible for the drafts are the governments/governmental units. These drafts are then deliberated in the parliamentary organs. The outcome is the budget plan for a given year.

Second, a more up-to-date and detailed picture of the situation of the overall public budget is delivered by cash statistics (*Kassenstatistik des öffentlichen Gesamthaushalts*). On a quarterly basis, the cash statistics record for the quarter that has just expired, and for the core and extra budgets of the overall public budget, data on the actual expenditure and actual revenue. The cash statistics are set up by the Federal Statistics Office (published in the *Fachserie 14, Reihe 2*).

Furthermore, the Federal Statistics Office report annually about the accounting of the revenue and expenditure of the overall public budget in a breakdown by selected functional areas, corporate entities, Länder, net lending/net borrowing, and particular monetary transfers (*Rechnungsergebnisse des öffentlichen Gesamthaushalts*, published in the *Fachserie 14, Reihe 4*). Also these statistics are precise and up-to-date. However, due to methodical differences figures differ from the cash statistics. Since the annual statistics on the overall public budget represent a more concrete breakdown regarding the different functional areas of the public sector, this statistics is taken for the answers b-d. The latest statistics refer to the budgetary year 2010.⁶¹⁶

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⁶¹⁵ Reported by the Federal Statistical Office (www.destatis.de (accessed on 8 March 2013)).

⁶¹⁶ https://www.destatis.de/DE/Publikationen/Thematisch/FinanzenSteuern/OeffentlicheHaushalte/AusgabenEinnahmen/RechnungsergebnisOeffentlicherHaushalt2140310107004.pdf?__blob=publicationFile (accessed on 8 March 2013).

According to the above mentioned annual accounting of the overall public budget (*Rechnungsergebnisse des öffentlichen Gesamthaushalts*) the total net expenditure of Germany in 2010 was € 1 105 876 million, including social insurance and extra budgets.⁶¹⁷ The overall budget of the Federation was € 333 062 million, the one of all the Länder was € 287 269 million. The amount of expenditure for the whole regional/federal entity level (Leander, municipalities, municipal associations) was € 474 599 million.

c./d. Annual budget allocated to courts, public prosecution and legal aid / to the police, customs, border police, prisons

Figures of the official national statistics on the annual state budget (provided by the Federal Statistical Office – *Statistisches Bundesamt*) do neither distinguish between courts, public prosecutors and legal aid nor between civil and criminal matters. Furthermore, there is no distinction between the different law enforcement areas/authorities (police, customs, border police). The national statistics account for (1) public security, law and order that include as individual post “police” (including the federal police, formerly federal German border police) as well as justice (2) and judicial activities that separately also account for courts (in civil and criminal matters) and public prosecution services on the one hand and prisons on the other hand.

As a consequence of the federal structure, data on specific questions must be collected from and provided by the individual federal state. So, some data may be available through international statistics (e.g. in CEPEJ reports) whereas they are not available at the national level. However, figures indicated in international questionnaires for specific questions should be read cautiously since not all Länder may make data available or they have a different accounting as to the budget item.⁶¹⁸ So sometimes, the picture remains incomplete. Therefore, the national statistics are referred to in the following and international statistics are taken only if they delivered additional values.

The national statistics on the annual budget further distinguish between direct expenditure (*unmittelbare Ausgaben*), gross expenditure (*Bruttoausgaben*), and adjusted expenditure (*bereinigte Ausgaben*). **Direct expenditure** is defined as expenses for fulfilling the (public) tasks whereas payments to the public sector are not considered. Figures of direct expenditure are regularly the basis for notifications of data in the international sphere. Official statistics of budgets list nearly identically the type of expenditure. These are:

- Personnel costs (e.g. civil servants’ salaries, social insurance contributions (part of the state as employer), contributions to old age pension schemes, other allocations to the staff, such as reimbursements);
- Material costs (ongoing expenses for equipment and minor acquisitions, costs for maintaining own, hired or leased buildings, estate or sites, insurances, taxes, costs for guarding, and other costs such as rents, fees, training costs, legal costs):
- Costs for building measures (new constructions, modifications, extensions) include all costs in the context of the building measure, such as civil and underground engineering, heating, drainage as well as all permanent equipment of buildings such as electrical installations, supply circuits and costs for architects, engineers and other building authorities.

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⁶¹⁷ Expenditure for social insurance is by far the highest budget item: In 2010: €512 635 million.

⁶¹⁸ Cf. for example the comments in the CEPEJ evaluation for Germany in 2011 re. 7 and 13. The report is available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Germany_en.pdf, (accessed on 8 March 2013).

- Costs for the acquisition of tangible assets
- Costs for the acquisition of shareholding and capital assets.
- Payments to other sectors, such as pensions, aids, grants to private entities, extra payments, etc.

Gross expenditure is defined as the sum of the direct expenditure plus payments to the public sector (ongoing allocations and refunds, such as refunds of administrative costs, allocations to the debt service for the purpose of getting cheaper credits).

Adjusted expenditure is the gross expenditure corrected by payments that were made within the same level. They indicate how many financial means a given public body (e.g. federation, Land, and municipality) spent in order to fulfil its tasks independent of contributions of other public sectors.

Statistical statements can be made by the following figures on the different State's functional areas:

Figures for 2010 in million Euros

Functional area	Direct Expenditure Total Federation Länder ⁶¹⁹	Gross Expenditure Total Federation Länder	Adjusted Expenditure Total Federation Länder
Public security, law and order	25 155 3 157 21 998	26 118 3 223 22 849	25 287 3 223 22 235
Police (including federal police [Bundespolizei])	15 824 2 887 12 937	16 271 2 952 13 283	16 117 2 952 13 250
Justice and judicial activities	11 692 360 11 332	11 885 373 11 505	11 842 373 11 479
(Civil and criminal) courts and public prosecution services	7 976 61 7 915	8 090 67 8 0915	8 070 67 8 009
Prisons	2 431 -- 2 431	2 482 -- 2 482	2 470 -- 2 473
All areas	1 108 296 162 184 392 989	1 424 497 333 062 518 981	1 105 876 333 062 401 641

⁶¹⁹ Including local level (municipalities and municipal associations).

Functional area	Personnel costs Total Federation Länder	Material costs Total Federation Länder	Costs building measures Total Federation Länder
Public security, law and order	17 040	5 525	745
	1 779	916	67
	15 261	4 609	678
Police (including federal police [Bundespolizei])	12 087	2 626	251
	1 743	705	66
	10 343	1 922	184
Justice and judicial activities	6 815	4 258	211
	253	82	10
	6 562	4 176	201
(Civil and criminal) courts and public prosecution services	4 522	3 193	57
	51	9	0
	4 471	3 184	56
Prisons	1 439	678	138
	--	--	--
	1 439	678	138
All areas	207 860	276 003 ⁶²⁰	31 506
	28 196	21 408	6 241
	148 913	66 455	24 580

Source: Statistisches Bundesamt, *Finanzen und Steuern, Rechnungsergebnisse des öffentlichen Gesamthaushalts 2010, Fachserie 14, Reihe 3.1.*

⁶²⁰ Most part of material costs refer to social insurance: 187 745 million Euro

Figures for 2009 in million Euros

Functional area	Direct Expenditure Total Federation Länder	Gross Expenditure Total Federation Länder	Adjusted Expenditure Total Federation Länder
Public security, law and order	24 590	25 489	24 730
	3 107	3 170	3 170
	21 483	22 274	21 696
Police (including federal police [Bundespolizei])	15 513	15 933	15 776
	2 856	2 920	2 920
	12 657	12 976	12 932
Justice and judicial activities	11 572	11 746	11 682
	378	386	386
	11 194	11 356	11 332
(Civil and criminal) courts and public prosecution services	7 913	8 012	7 972
	61	65	65
	7 852	7 944	7 940
Prisons	2 359	2 406	2 396
	--	--	--
	2 359	2 406	2 399
All areas	1 115 564	1 407 053	1 113 124
	166 773	317 076	317 076
	389 980	514 414	398 972

Functional area	Personnel costs Total Federation Länder	Material costs Total Federation Länder	Costs building measures Total Federation Länder
Public security, law and order	16 803	5 348	672
	1 756	895	51
	15 047	4 453	622
Police (including federal police [Bundespolizei])	11 861	2 562	222
	1 721	701	50
	10 141	1 862	172
Justice and judicial activities	6 728	4 235	219
	244	96	20
	6 485	4 140	199
(Civil and criminal) courts and public prosecution services	4 466	3 202	49
	51	9	0
	4 416	3 193	49
Prisons	1 414	634	146
	--	--	--
	1 414	634	146
All areas	203 463	269 261	29 694
	27 939	21 372	6 836
	145 503	63 538	22 392

Source: Statistisches Bundesamt, Finanzen und Steuern, Rechnungsergebnisse des öffentlichen Gesamthaushalts 2009, Fachserie 14, Reihe 3.1.

As far as legal aid is concerned, the CEPEJ report for Germany, 2011, indicates separate figures, based on special notifications of the Länder:

	Total annual approved public budget allocated to legal aid	Annual public budget allocated to legal aid in criminal law cases	Annual public budget allocated to legal aid in non-criminal law cases
Amount in €	382 382 576	85 822 785	296 559 791

Source: *European Commission for the Efficiency of Justice (CEPEJ), Scheme for Evaluating Judicial Systems 2011, Country: Germany*⁶²¹

In comparison with the total amount of the public budget, expenditure for public security, law and order, and justice and judicial activities is 3.4 % in 2010 (3.3 % in 2009). This is the third biggest sector after social security (56.6 %) - that includes inter alia benefits for families, youth welfare service, welfare aid and social insurance - and the field of education (8.5 %).

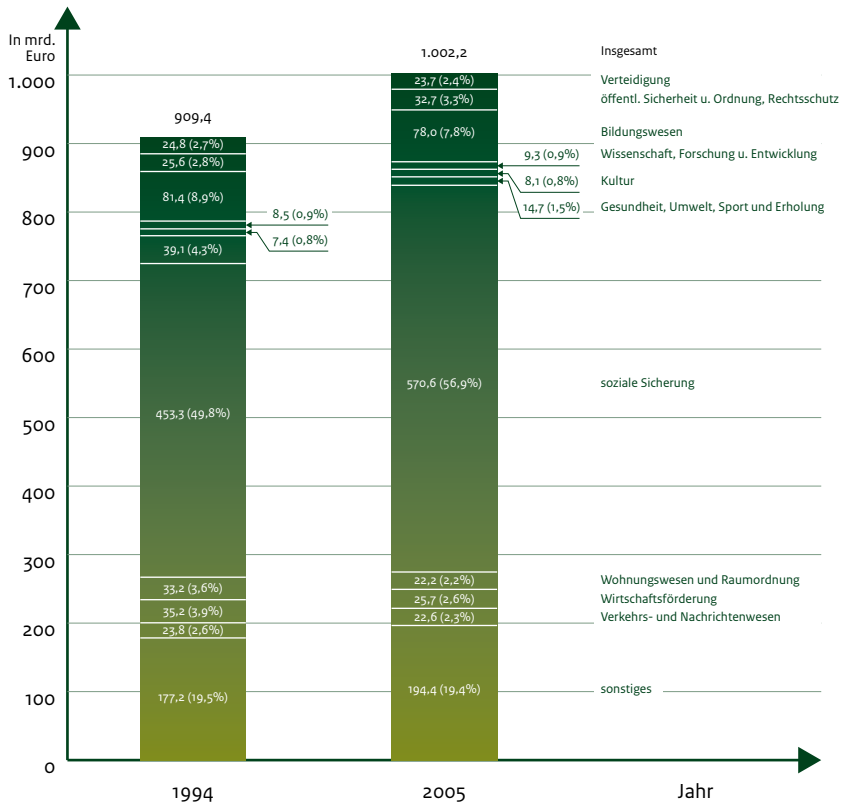
If one compares the data for the years after 2000 and those of the 1990s a shift in the composition of the budget can be noticed: Expenditure in the functional area of public security, law and order and justice and judicial activities increased most comparing the figures of 1994 and 2005 (plus 27.4 %); it is followed by the area of social security (plus 25.9 %). In other areas expenditure decreased, in particular in the field of health, environment, sports and recreation (minus 62.4 %), housing, urban development and regional policy (minus 32.9 %), and promotion of economic development (minus 26.9 %). Expenditure also declined in other areas such as education (minus 4.1 %), and transport and communications (minus 5.0 %). In total, the expenditure of the public budget increased of 10.2 % between 1994 and 2005.⁶²² The overall shift is shown in the following table:

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⁶²¹ http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Germany_en.pdf, (accessed on 8 March 2013).

⁶²² <http://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/61871/oeffentliche-ausgaben>, (accessed on 8 March 2013).

Öffentliche Ausgaben nach Aufgabenbereichen

In absoluten Zahlen und Anteile in Prozent, 1994 und 2005



Source: Statistisches Bundesamt: Statistisches Jahrbuch 2007, Statistisches Jahrbuch 2008

Lizenz: Creative Commons by-nc-nd/2.0/de

Bundeszentrale für politische Bildung, 2008

e. Number of public prosecutors and number of public prosecutors responsible for issuing a EAW?

The statistics indicate 5246 as the total number of public prosecutors on 31 December 2010. However, the information relates to the number of job shares for public prosecutors. There are no absolute figures for the number of persons. The information on the job shares count a public prosecutor working full-time as 1. A prosecutor working part-time is counted as the fraction of 1 which corresponds to the proportion of his/her working hours to full-time (e.g. 0.5 for a person working half the usual number of hours).

Theoretically, every public prosecutor can issue a EAW in Germany.

However, as the interviews revealed, some public prosecutor offices are much more active in issuing EAWs than others, mostly depending on the location of the prosecution office and the type of daily cases. Furthermore, bigger public prosecutor offices, such as Cologne, Stuttgart, Frankfurt a.M., Berlin, etc. have special units dealing with international legal assistance in criminal matters. Here, one or more public prosecutors advice their colleagues on the issuing of mutual legal assistance requests and take care of the quality of the requests. However, these tasks are allocated not in full-time job shares. International legal assistance only forms a part of the overall working time of these prosecutors (e.g. 30 or 50%).

f. Number of police officers, custom officers, border police (in general and more specific the no. of officers responsible for the EAW procedure (for example arrest, transit, etc.)

No data available.

g. Total number of (professional) judges and the number of judges responsible for the judicial part of the EAW procedure (to make the surrender decision)

Jurisdiction for the execution of a EAW is exercised by the Higher Regional Courts (*Oberlandesgerichte*) in Germany. The judges decide on the admissibility of the extradition. No decision on the admissibility is made in case the person sought consents to the simplified extradition, but the Higher Regional court keeps its competence to decide on the extradition detention also in these cases.

In Germany there are 24 Higher Regional Courts.⁶²³ In each Higher Regional Court one chamber (*Senat*) is competent for all extradition cases and all cases where it has competence in matters of international cooperation in criminal matters. However, the work in this area is only one part (not full-time), the chamber also deals with other criminal cases.⁶²⁴ The decision in extradition cases is made by three judges including the presiding judge (Section 77 AICCM and Section 122 Courts Constitution Act).

In conclusion, altogether 72 judges at the Higher Regional Court make decisions on extraditions in Germany. Data in relation to job shares are not available.

5. Performance

a. Number of EAWs issued in a given year (including information about the category of crimes committed)

According to the replies to the questionnaire on quantitative information on the practical operation of the EAW Germany issued 2096 EAW requests in 2010. In 2009, Germany issued 2433 EAWs.

There are no statistics available on the categories of crimes committed for which the EAW requests were issued. However, the categories of offences are mirrored in the statistics on the *executed* German EAW requests. In this context, reference is made to question 1.

b. Number of EAWs executed in a given year (including information about the category of crimes committed)

The following table shows – on the basis of the statistics on extradition - the number of executed extradition requests by German judicial authorities from 2003 to 2010 (cases cleared). The first German implementing law on the EAW entered into force on 23 August 2004, before the traditional extradition scheme applied. EU countries that joined the EU in a later stage (e.g. Bulgaria and Romania in 2007) were also considered in order to show the difference between the situation before and after the application of the EAW.

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⁶²³ <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/GerichtePersonal/Tabellen/Gerichtezahl.html#Zahl%20oder%20Gerichte>, (accessed on 8 March 2013).

⁶²⁴ Cf. schedule of responsibilities of the Higher Regional Court of Munich: http://www.justiz.bayern.de/imperia/md/content/stmj_internet/gerichte/oberlandesgerichte/muenchen/gvp_2013.pdf; Higher Regional Court of Frankfurt a.M.: http://www.olg-frankfurt.justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?uid=e8b60407-62e3-8411-aeb6-df144e9169fc; Higher Regional Court of Cologne: http://www.olg-koeln.nrw.de/001_wir_ueber_uns/002_geschaeftsverteilung/gvp_senate_2013.pdf. Internet references accessed (accessed on 8 March 2013).

Number of Executed Extradition Requests by German Judicial Authorities (cleared requests)

	2003	2004	2005	2006	2007	2008	2009	2010
Belgium	29	36	34	31	56	35	53	43
Bulgaria	2	2	6	3	6	22	27	26
Denmark	2	12	8	12	4	12	26	36
Estonia	2	2	1	1	1	1	4	4
Finland	3	5	5	5	1	2	1	7
France	16	40	44	31	47	53	55	42
Greece	6	1	4	5	5	5	7	6
Ireland	0	0	0	0	0	1	0	0
Italy	45	44	51	40	54	59	51	59
Latvia	2	5	2	8	11	11	11	6
Lithuania	43	47	60	59	35	32	32	31
Luxemburg	1	3	4	4	6	5	7	4
The Netherlands	34	52	52	36	48	51	48	61
Austria	63	81	44	68	67	54	89	80
Poland	22	33	108	194	382	464	621	528
Portugal	10	4	4	8	3	4	7	3
Romania	25	21	19	22	72	79	105	97
Sweden	9	10	8	14	8	9	8	13
Slovakia	3	3	6	5	10	15	15	17
Slovenia	3	2	3	6	7	7	5	1
Spain	7	12	21	9	14	15	28	22
Czech Republic	11	12	15	9	27	37	36	38
Hungary	12	11	13	14	37	29	46	49
United Kingdom	4	2	8	5	6	5	6	6
Cyprus	0	0	0	1	0	0	2	0
Total EU	354	440	520	590	907	1007	1290	1179
Total (EU + third states)	472	552	654	701	1082	1183	1452	1350

In 2010, 1179 EAW procedures were cleared, in 2009 even 1290. Compared to the traditional extradition scheme that applied in 2003, Germany had to cope with 936 cases more in 2009. If one compares these two years, this is around 3,6 times higher. In relation to the total number of received extradition requests the extradition relations within the EU have always dominated. Whereas, however, the figures for the execution of incoming extradition requests from non-EU Member States remain rather stable between 2007 and 2010, the performance in view of EAWs had to be increased tremendously.

Beside the figures of the statistics on extradition, further interesting are the EAWs that are submitted via the SIS and – for non-SIS-connected countries – via Interpol. These entries are processed at police level by the Federal Criminal Office (*Bundeskriminalamt*).

According to the replies to the Council's EAW questionnaire, Germany received 14,022 alerts in 2010 based upon a EAW of which 12,133 were entered into the SIS by SIS-connected EU Member States, 1,899 were entered in Interpol by EU Member States that do not participate in the SIS. 1,221 persons were arrested in 2010.

In 2009, Germany received 13,452 EAWs (11,310 through SIS, 2,142 through Interpol). 1,208 persons were arrested.

The following table shows the frequency of offences which were executed by German authorities in a given year. The table represents the most common categories of offences EU Member State by EU Member State. As to the counting, the same method was applied as for question 1, i.e. the figures in the table result from an analysis of the statistics on extraditions in Germany for the years 2007 – 2010. As in question 1, the sums do not indicate the total execution rate of the given (category of) offences for all EU Member States (e.g. all EAWs in connection with fraud in a given year), but only that of the most frequent offences for which EAWs were executed in relation to the individual EU Member States. Therefore, the figures only indicate the categories of offences that most frequently appeared in relation to the individual EU Member State and not absolute figures.

As explained in question 1 the offences refer to the German Criminal Code and other national statute law that criminalizes certain acts (e.g. offences involving narcotic drugs). The named category of offence (e.g. theft, fraud) may combine several elements of the crime (i.e. including aggravating or mitigating elements or alterations). For further explanation please refer to question 1.

Frequency of offences for which EAWs were executed in Germany - part II																					
	Bodily Injury				Murder/Manslaughter				Forming criminal or terrorist organisations				Offences against sexual self-determination				Using threats or force to cause a person to do, suffer or omit an act; Threatening				
	2010	2009	2008	2007	2010	2009	2008	2007	2010	2009	2008	2007	2010	2009	2008	2007	2010	2009	2008	2007	
Belgium	9	10		5	6	12	5	9													
Bulgaria																					
Denmark	6																				
Estonia																					
Finland																					
France				5		9	5	4	7				7			9					
Greece																					
Ireland																					
Italy				10	8	10	13	14	22	5											
Latvia			5																		
Lithuania		12	7	10												4					
Luxembourg																					
The Netherlands	16	9			10	8		10	6	4	10										
Austria	9				5				6	5	3	7									
Poland	142	133	96	94	36	11	15	13	18	15	9	9	23	12		70	48	33		32	
Portugal																					
Romania	20	10		10					6												
Sweden																					
Slovakia			5																		
Slovenia							3														
Spain		5									3										
Czech Republic						3															
Hungary	9			8																	
United Kingdom						3									5						
Cyprus																					
Sum	211	179	113	122	36	42	39	28	49	63	33	53	29	28	24	13	70	48	33	32	183
											198				94						

Frequency of offences for which EAWs were executed in Germany – part III														
	Offences in the context with road traffic					Non payment of child support					Tax Offences / Smuggling			
	2010	2009	2008	2007		2010	2009	2008	2007		2010	2009	2008	2007
Belgium														
Bulgaria														
Denmark														
Estonia														
Finland														
France														
Greece														
Ireland														
Italy														
Latvia														
Lithuania														
Luxembourg														
The Netherlands														
Austria														
Poland	128	63	38	29	43	58	50	36						
Portugal														
Romania	16	22	8	7										
Sweden														
Slovakia														
Slovenia														
Spain														
Czech Republic	4				3									6
Hungary														
United Kingdom										3				
Cyprus														
Sum	148	85	46	36		190					9			

Results: The analysis of the incoming EAW requests shows a similar picture as for the outgoing ones. The vast majority of executed EAW requests refer to crimes against property or unlawful gaining of financial profits (theft, fraud, robbery). Within this area, theft is by vast the most frequent category of offence the execution has to deal with. It is followed by fraud.

Important in relation to all EU Member States are also offences involving narcotic drugs. A rather high number of requests refer to offences against life and bodily integrity (murder, manslaughter, bodily injuries). In this context, also offences against the sexual self-determination may be counted that occur sometimes rather frequently. In the area of offences against life and limb, there is a remarkable high number of murder and manslaughter crimes (esp. Sections 211, 212, 222 CC) in comparison with the frequency of homicide crime in relation to the overall crime rate. In general, incoming requests referring to offences against life and limb play a more significant role than for outgoing German requests.

This is also the case for offences in the context of forgery. Whereas this category of offence plays a minor role for outgoing requests a high number of EAWs for forgery are received. Vice versa is the situation concerning tax offences. Whereas this category of offences plays an important role for EAWs issued by the German authorities it is very rare in view of the executed EAWs.

Interesting is further that offences in the context of forming criminal or terrorist organisations or the membership therein (Sections 129-129b CC) play a very important role for incoming EAW requests. This crime complex seems often be “ticked” in the box of EAW offences pursuant to Art. 2 (2) FD EAW. However, one must state that it seems to have a certain significance in relation to specific EU Member States only - in particular Italy, but also the Netherlands and France as well as Belgium, Austria and Poland - whereas in relation to other EU Member States this type of crime appears not or hardly.

In this context, it can generally be observed - as for question 1 - that some types of offences play a more prominent role in relation to individual EU Member States or a group of EU Member States than to the others. Beside the aforementioned example on forming criminal or terrorist organisations, offences in the context of road traffic can be mentioned as another example. This category of offence can be found quite often in relation to EAWs from Poland and Romania. The type of offence on forgery can be found rather often in relation to Eastern EU Member States, in particular, Bulgaria, Poland, Romania, and Hungary.

Most important in relation to Spain are offences involving narcotic drugs. In relation to Poland only, there is a significant high number of offences concerning the non-payment of child support (Section 170 CC), and also offences of using threats or force to cause a person to do, suffer or omit an act and threatening (Sections 240 and 241 CC) occur rather often in relation to Poland. In contrast, the mentioned criminal offences can be considered negligible in relation to all other EU Member States.

In relation to the Netherlands and France the overall trend is mirrored, i.e. theft offences are the most frequent ones for which EAWs have to be executed by Germany. But also offences involving narcotic drugs occur rather often in relation to both countries.

c. Average duration of a EAW procedure from the formal transmission of the request until the surrender and transit of the requested person (including information about the duration of the sub-steps) in days

The average time between the time of arrest and the decision of surrender of the requested person (where the person did not consent to his/her surrender) was 36.8 days in 2010, and 37,8 days in 2009. In case of consent to the surrender, the average time was 15,4 days in 2010 and 15,7 days in 2009.

The average time between the final decision on the execution of the EAW and the effective surrender is between 12 and 14 days according to the information of the judicial authorities.

Valid data on further sub-steps are not available.

d. Average duration of judicial proceedings (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court), if possible related to certain categories of crime, instead of the average total duration of a EAW procedure from the formal transmission of a EAW request until the final judgment in a judicial proceeding (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court)

The following figures inform about the average duration of judicial proceedings of first instance in criminal matters before the German criminal courts.

	Cleared cases in 2010	Cleared cases in 2009
Local Courts (Amtsgerichte)		
All procedures	3,8 months	3,9 months
Cleared by judgment	4,1 months	4,2 months
Duration of a criminal case between opening of the criminal procedure by the public prosecutor and court decision	7,2 months	7,3 months
Number of trial days per procedure with trial	1,2 days	1,2 days
Regional Courts (Landgerichte) – First Instance		
All procedures	6,3 months	6,2 months
Cleared by judgment	6,6 months	6,4 months
Cleared by judgment after indictment	6,6 months	6,5 months
Duration of a criminal case between opening of the criminal procedure by the public prosecutor and court decision	17,3 months	17,5 months
Number of trial days per procedure with trial	3,6 days	3,5 days
Higher Regional Courts (Oberlandesgerichte) – First Instance		
All procedures	12 months	11,6 months
Cleared by judgment	11,2 months	13 months
Cleared by judgment after indictment	11,8 months	13 months
Duration of a criminal case between opening of the criminal procedure by the public prosecutor and court decision	28 months	47 months
Number of trial days per procedure with trial	26,8 days	19,3 days

The following figures inform about the average duration of **appeals** in criminal matters before the German criminal courts.

	Cleared cases in 2010	Cleared cases in 2009
Regional Courts (Landgerichte)		
All appellate procedures (as of registration at appellate court)	4,3 months	4,4 months
Duration between pronouncement of the judgment at first instance and appellate decision	6,8 months	7,0 months
Duration of appellate procedures terminated with judgments	4,7 months	4,8 months
Duration of a criminal case between opening of the criminal procedure by the public prosecutor and appellate court decision	15,3 months	15,5 months
Number of trial days per procedure with trial	1,2 days	1,2 days
Higher Regional Courts (Oberlandgerichte)		
All appellate procedures (as of registration at court)	1,4 months	1,3 months
Duration between pronouncement of the judgment at first instance and appellate decision	5,6 months	5,6 months
Duration of appellate procedures terminated with judgments	3,2 months	2,5 months
Duration of a criminal case between opening of the criminal procedure by the public prosecutor and appellate court decision	21,7 months	22,1 months
Federal Court of Justice - division for criminal matters (Bundesgerichtshof - Strafsachen)		
<p>Average figures are not indicated in the statistics for the Federal Court of Justice. However, one can state that in 44 % of the cases in 2010 it took between 6 and 9 months between the pronouncement of the contested judgment and the appellate judgment of the Federal Court of Justice. In 22% of the cases the procedure took between 9 and 12 months, in 19,1 % between 3 and 6 months and in 14,2% it took more than 12 months. In 0,7% of the cases the appellate judgment was within 3 months after the pronouncement of the contested judgment. It should be added that appellate judgments are handed down following a trial. The Federal Court of Justice can also decide by way of a court order without a trial, i.e. if the appeal is (1) inadmissible, (2) manifestly unfounded, or (3) an appeal for the benefit of the defendant is unanimously held well-founded (Section 349 CPC). In these simplified procedures the clearance rate is much faster. In more than half of the cases, the court order is handed down between 6 and 9 months after the pronouncement of the contested judgment (case (1): 55,3%; (2) 67,6%; (3): 50,9%).</p> <p>Considering the time between registration at the Federal Court of Justice and its appellate judgment, 75,9 % of the cases are decided within 3 months. In case of a decision by way of court order, more than 97 % of the cases where the appeal is inadmissible or manifestly unfounded are decided within three months. In case of well-founded appeals decided by court order 91,5 % of the cases are cleared within 3 months.</p> <p>A nearly equivalent picture can be assessed for 2009.</p>		

Source: Statistisches Bundesamt, Fachserie 10, Reihe 2.3, Rechtspflege, Strafgerichte, 2010 and 2009

Statistical data on the length of proceedings before the court are not available in relation to the gravity or type of the crime. As regards proceedings conducted by the public prosecutor (pre-trial phase) statistics indicate inter alia the length of proceedings in relation to selected categories of crime such as offences against sexual self-determination, theft, fraud, economic/fiscal crime and money laundering, road traffic offences and offences involving narcotic drugs. The data are listed in the following table:

	2010	2009
Average duration between registration at public prosecution office and clearance by public prosecutor (all criminal cases)		
All procedures	1,6 months	1,6 months
Procedures with indictment	2,4 months	2,4 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor (all criminal cases)		
All procedures	3,2 months	3,3 months
Procedures with indictment	4,0 months	4,0 months

Average duration between registration at public prosecution office and clearance by public prosecutor in case of offences against sexual self-determination		
All procedures	3,5 months	3,0 months
Procedures with indictment	5,6 months	5,6 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of offences against sexual self-determination		
All procedures	5,1 months	4,4 months
Procedures with indictment	7,2 months	7,3 months

Average duration between registration at public prosecution office and clearance by public prosecutor in case of causing bodily harm by intent		
All procedures	1,4 months	1,4 months
Procedures with indictment	2,0 months	1,9 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of causing bodily harm by intent		
All procedures	3,1 months	3,2 months
Procedures with indictment	4,0 months	3,9 months

	2010	2009
Average duration between registration at public prosecution office and clearance by public prosecutor in case of theft and unlawful appropriation		
All procedures	1,1 months	1,1 months
Procedures with indictment	1,4 months	1,4 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of theft and unlawful appropriation		
All procedures	3,0 months	2,9 months
Procedures with indictment	3,0 months	3,0 months

Average duration between registration at public prosecution office and clearance by public prosecutor in case of fraud and embezzlement		
All procedures	1,8 months	2,0 months
Procedures with indictment	2,6 months	2,6 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of fraud and embezzlement		
All procedures	3,3 months	3,6 months
Procedures with indictment	4,0 months	4,0 months

Average duration between registration at public prosecution office and clearance by public prosecutor in cases involving economic and fiscal offences and money laundering		
All procedures	4,4 months	4,0 months
Procedures with indictment	11,8 months	12,4 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in cases involving economic and fiscal offences and money laundering		
All procedures	6,4 months	6,3 months
Procedures with indictment	14,4 months	15,1 months

Average duration between registration at public prosecution office and clearance by public prosecutor in case of offences against the Narcotic Drugs Act		
All procedures	1,5 months	1,5 months
Procedures with indictment	2,8 months	2,9 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of offences against the Narcotic Drugs Act		
All procedures	3,1 months	3,1 months
Procedures with indictment	4,3 months	4,3 months

	2010	2009
Average duration between registration at public prosecution office and clearance by public prosecutor in case of road traffic offences		
All procedures	1,2 months	1,2 months
Procedures with indictment	1,6 months	1,6 months
Average duration between opening of investigations at investigative authority (including e.g. police, tax, customs or administrative authorities) and clearance by public prosecutor in case of road traffic offences		
All procedures	2,4 months	2,4 months
Procedures with indictment	2,8 months	2,8 months

SoSoSource: Statistisches Bundesamt, Rechtspflege, Fachserie 10, Reihe 2.6, Staatsanwaltschaften, 2010 and 2009

e. Total number of incoming criminal cases in the courts of first instance compared to the total number of EAW cases to be reviewed by a judicial authority responsible for granting or refusing a request to surrender a person

Incoming criminal cases in the courts of first instance:

	2010	2009
Local Courts (Amtsgerichte)	776,447	803,465
Regional Courts (Landgerichte)	14,071	14,204
Higher Regional Courts (Oberlandesgerichte)	17	12

Note: In simple terms, the jurisdiction in criminal matters **at first instance** is as follows:

The local courts have jurisdiction for criminal offences in which the sentence is expected to be less than four years. The regional courts have jurisdiction in cases in which the sentence is expected to exceed four years, cases where the prosecutor decided to be not tried by the local court and minor political crimes as well as for felonies resulting in death and economic crimes.

The jurisdiction of the Higher Regional Courts at first instance is limited. Its jurisdiction is determined by a list of criminal offences that deal with crimes against the state and other grave offences when committed in the course of offences such as murder, bank robberies etc.

The main area of activity of Higher Regional Courts concern **legal remedies**.

Here, the system is as follows: The regional court (small criminal chamber) exercises jurisdiction on the legal remedy of appeal on points of fact and law (*Berufung*) against decisions of the local court.

The Higher Regional Court has jurisdiction for appeals on points of law (*Revision*) from the local court judgments either directly (*Sprungrevision*) or after the case has been adjudicated on first appeal by the regional court.

The highest Court in criminal matters in Germany, the Federal Court of Justice (*Bundesgerichtshof*), rules on appeals on points of law (*Revision*) from judgments passed by the regional courts and the higher regional courts of first instance.⁶²⁵

In the context of legal remedies, the figures for new incoming cases in a given year are as follows:

	2010	2009
Regional Court	51979	52344
Higher Regional Court	6009	6151
Federal Court of Justice	3093	3014

Source: Statistisches Bundesamt, *Fachserie 10, Reihe 2.3, Rechtspflege, Strafgerichte, 2010 and 2009*

f. Average workload of a judge responsible for the handling of EAW cases

Data on the workload of a judge in view of EAW or extradition cases do not exist.

Some conclusions may be drawn from the statistics on extradition indicating the extradition cases that were terminated by court decision, i.e. the higher regional court has ruled on the admissibility of the extradition request, and the person sought did not consent to the simplified extradition procedure. The following table shows the development of court decisions between 2003 and 2010:

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⁶²⁵ For further information on the German court system in criminal matters cf. Huber, "Criminal Procedure in Germany" in: Vogler/Huber (Eds.), *Criminal Procedure in Europe*, (2008), p. 269 (284).

Number of Extradition Requests terminated by Court decision

	2003	2004	2005	2006	2007	2008	2009	2010
Belgium	18	35	12	16	29	14	24	18
Bulgaria	2	3	2	2	1	10	8	10
Denmark	0	3	8	1	0	4	17	8
Estonia	1	0	1	0	1	0	1	3
Finland	0	3	0	1	0	0	0	6
France	4	17	16	25	25	29	38	27
Greece	1	2	4	0	3	3	10	0
Ireland	0	0	0	0	0	0	0	0
Italy	29	45	46	27	24	28	46	55
Latvia	2	4	1	2	15	14	15	7
Lithuania	28	29	33	31	28	30	22	42
Luxemburg	2	1	6	5	1	0	1	4
The Netherlands	16	24	28	4	9	19	2	23
Austria	24	66	25	43	34	37	49	73
Poland	12	20	58	134	342	306	480	541
Portugal	0	1	0	5	0	6	6	1
Romania	14	21	7	17	25	43	46	56
Sweden	1	2	5	9	3	3		3
Slovakia	1	2	2	2	5	7	3	11
Slovenia	2	0	1	0	4	2	1	0
Spain	6	5	4	6	5	8	14	16
Czech Republic	4	8	11	9	21	19	19	36
Hungary	5	2	8	6	17	14	21	31
United Kingdom	3	2	4	6	3	5	4	3
Cyprus	0	0	0	2	0	0	1	0
Total EU	175	295	282	353	595	601	828	974
Total (EU and third states)	256	342	366	427	683	686	920	1064

In sum, extradition cases on which the higher regional courts decided have increased steadily. In 2010, nearly 1000 EAWs had to be handled by the judges at the higher regional courts, in 2007 (when also Bulgaria and Romania applied the EAW after their accession) and in 2008 there were around 600 EAWs. In relation to third states EAW cases clearly dominate the work of judges today, since the extradition cases in relation to non-EU countries have remained rather stable (around 80 to 90 cases per year with the exception of 2004 when there were even only 47 cases in relation to third states). Compared to 2003 when the traditional extradition scheme still applied the higher regional courts had to cope with around 800 extradition requests more in relation to current EU countries. In 2009 and 2010 more than the half of the courts' decisions related to EAWs from Poland (in 2009: 480 requests, in 2010: 541 requests). This is around 10 times higher than decisions in relation to Romania and Italy, ranking also on the top of the statistics in 2009 and 2010. In relation to France, the figures remain rather stable since 2006 (around 30 court decisions), in relation to the Netherlands the figures alternate from year to year (in 2008 and 2010 around 20 court decisions, in 2009 only 2 and in 2007 only 9). Of course, it should be born in mind that some higher regional courts are affected much more by extradition cases than others (see in this regards in particular the following question).

g. Average workload of a public prosecutor responsible for issuing a EAW and/or the pre-trial procedure of a EAW-related case.

Data on the workload of a public prosecutor in view of EAW or extradition cases do not exist.

A picture on the workload in extradition cases may be drawn by the statistics on the development of extradition cases at the general public prosecution office which is, in fact, responsible for handling the execution of extraditions (see explanation on the competences in extradition cases in the national report). The following table indicates the number of extradition cases (including transit cases) at the general public prosecution offices from 2004 till 2010.

2004	2005	2006	2007	2008	2009	2010
2240	2309	2559	3162	3351	3465	3068

Source: Statistisches Bundesamt, Rechtspflege, Fachserie 10, Reihe 2.6, Staatsanwaltschaften, 2010 and 2009

It should be added that there are regional differences. The general public prosecution offices with most extradition cases in 2010 are: Berlin (546), Hamm in North-Rhine Westphalia (488), Munich (335), and Frankfurt a.M. (315). The fewest cases had the general prosecution offices in Jena/Thuringia (8), followed by Naumburg/Saxony-Anhalt (12), Saarbrücken (16), and Bremen (21). In 2009, the figures of the general public prosecution offices with most cases were: Hamm (585), Berlin (537), Munich (357), and Frankfurt a.M. (290). The ones with the fewest in 2009 were: Jena (4), Naumburg (13), Saarbrücken (21), and Rostock/Mecklenburg-Western Pomerania (31).

6. Arrest and detention

Preliminary remark: As far as data on detention on remand are concerned a complete picture for Germany cannot be drawn. The reason is first that national data do not completely encompass the detention on remand. The second reason is that valid data on remand are contained in two different national statistics that differ in terms of reference dates and contents. In general, data on pre-trial detention in the national statistics feature various shortcomings. Most reliable data can be drawn from the “statistics on criminal prosecution” (“*Strafverfolgungsstatistik*”), but it only covers remand prisoners that were officially charged at the further stage of the criminal proceedings. It covers the period during one year (calendar year). The “statistics on the execution of a prison sentence” (“*Strafvollzugsstatistik*”) only indicates data on the number of remand prisoners at a certain cut-off date (31 March, 31 August and 30 November), but does not refer to the duration of the remand, its reasons, and the type of crime as well as the total number of remand prisoners within one year.⁶²⁶ All in all, national statistics lack data on the duration of the pre-trial detention and additionally data on the number of persons who were arrested, but not charged because of a lack of evidence, or because the reasons of remand detention could not be maintained or the person was deported as well as data on persons against whom a detention order was issued but not executed (even if these groups probably form only a small number).⁶²⁷

Data for answering this question are drawn from different statistics both at the national and international level. The aforementioned observations on the national statistics should also be kept in mind if one looks at statistics at the international level that -it can be assumed – mostly rely on the above-mentioned national statistics but do not clearly indicate the different origins of the national data. As regards international statistics attention is, at first, paid to data of the Council of Europe’s survey of annual penal statistics (SPACE I). The last updated version of SPACE I relate to 31 March 2008 as far as the data for Germany have been introduced into the report. Data from the International Centre for Prison Studies (ICPS) are another source at the international level. Its world prison brief gives an overview related to 31 August 2012 (if not stated otherwise).

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⁶²⁶ Heinz, „Das strafrechtliche Sanktionierungssystem und die Sanktionierungspraxis in Deutschland 1882-2010“ (<http://www.uni-konstanz.de/rtf/kis/Sanktionierungspraxis-in-Deutschland-Stand-2010.pdf>, (accessed on 8 March 2013).

⁶²⁷ Cf. Zweiter Periodischer Sicherheitsbericht, 6.2.1 (http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/2_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile, (accessed on 8 March 2013).

a. Remand detention rate (detainees / population; detention on remand / detention for other reasons), maybe also immigrant detention rates and juvenile detention rates

Total number of prisoners (including pre-trial detainees)	Number of pre-trial detainees	Percentage of pre-trial detainees (in relation to the total prison population)	Foreigners in prison		Age Structure of pre-trial detainees
			Total number (incl. pre-trial)	pre-trial detainees	
74706	12358	16,54%	19627 (=26,3%) ⁶²⁸	5297 (=42.68%) ⁶²⁹	14-less than 18 years: 558 18-less than 21 years: 1291 21 years and over: 10509 ⁶³⁰

Source: Aebi/Delgrande, SPACE I, Survey 2008⁶³¹

Total number of prisoners (including pre-trial detainees)	Number of pre-trial detainees	Percentage of pre-trial detainees (in relation to the total prison population)	Prison population rate per 100,000 of national population	Foreigners in prison		Minors (under the age of 18) in pre-trial Detention
				Total number (incl. pre-trial)	pre-trial detainees	
65722	10715 ⁶³²	16,30%	80 ⁶³³	26,7 % ⁶³⁴	Not indicated	2,8 %

Source: ICPS – World Prison Brief – Germany (reference date: 31.08.2012)⁶³⁵

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⁶²⁸ In relation to the total number of prisoners.

⁶²⁹ In relation to the number of pre-trial detainees.

⁶³⁰ Prisoners in juvenile prisons are usually below 21 but can be up to 25 years of age. The data indicated concern all prisons.

⁶³¹ Figures for Germany in the survey are on 31 March 2008.

⁶³² The national statistics (Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten) further indicates the age of the 10.715 remand prisoners on 31 August 2012: Accordingly, 296 were from 14 to less than 18 years, 962 were from 18 to less than 21 years, and 9457 persons were 21 years or older. Prisoners in juvenile prisons are usually below 21 but can be up to 25 years of age. The data indicated concern all prisons.

⁶³³ Based on an estimated national population of 81.91 million at end of August 2012 (from Federal Statistical Office figures).

⁶³⁴ In relation to the total number of prisoners – reference date: 31 March 2010.

⁶³⁵ Available at: http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=139, (accessed on 8 March 2013).

		Grounds for Arrest (reference to several grounds possible)					
Covered Persons						Danger of re-offending	
Year	All persons charged (Abgeurteilte)	Remand detainees (out of column 1)	Absconding or flight risk (§ 112 Abs. 2 Nr.1,2 StPO)	Risk of tampering with the evidence (§ 112 Abs. 2 Nr.3 StPO)	Felonies against life (§ 112 Abs.3 StPO) (§ 112a Abs.1 Nr.1 StPO)	Against sexual self-determination.	Other serious offences pursuant to § 112a Abs.1 Nr.2 StPO
2011	1 019 467	26 513	24 471	1 892	339	298	1 409

Source: Statistisches Bundesamt, Fachserie 10, Reihe 3, Rechtspflege, Strafverfolgung, 2011.⁶³⁶

Year	Persons convicted (total)	German citizenship	Foreigners			
			Altogether	Percentage of convicted foreigners (in relation to all convicted persons)	Juveniles Adolescents Adults ⁶³⁷	Citizenship a) EU b) Other European countries c) Non-European countries d) Non-nationals
2011	807 815	630 240	177 575	22 %	9 543 13 565 154 467	a) 61 141 b) 69 306 c) 38 104 d) 9 024

Source: Statistisches Bundesamt, Fachserie 10, Reihe 3, Rechtspflege, Strafverfolgung, 2011.⁶³⁸

b. Average duration of detention on remand / average duration of criminal proceedings

The following figures of the “Strafverfolgungsstatistik 2011” indicate the duration of the detention on remand. Figures on the average duration are not available. As to the average duration of criminal proceedings see question 5 d).

Year	Duration of detention on remand				
	Up to 1 month	More than 1 until 3 months	More than 3 until 6 months	More than 6 months until 1 year	More than 1 year
2011	4 877	5 188	5 334	3 278	980

⁶³⁶ The statistics refer to the period of the whole year (calendar year).

⁶³⁷ Juveniles: from 14 to less than 18 years of age; adolescents: 18 to less than 21 years of age; adults: 21 years of age and over.

⁶³⁸ The statistics concerning foreigners only refer to the convicted persons; data on remand detainees are not given.

7. Information of international organisations

a. Detention conditions (reports of the Committee for the Prevention of Torture)

On 22 February 2012, the CPT published a report on the visit to Germany, carried out by the Committee for the Prevention of Torture – CPT), from 25 November to 7 December 2010. The committee visited various places of detention in 6 Länder.

The material conditions in the prisons visited (juvenile prisons, adult female prisons and adult male prisons) were assessed as good or, on the whole, adequate.

The CPT also observed the detention of foreigners under aliens legislation. Remarks on extradition detention were not made.

b. Number of convictions by the ECtHR for violations of Art. 5 ECHR and Art. 6 ECHR (length of criminal proceedings).

Violations of Germany of Art. 5 (Right to liberty and security)

1959-2011	2011	2010	2009
23	8	0	2

Violations of Germany of Art. 6 (length of proceedings)

1959-2011	2011	2010	2009
102	19	29	14

Source: European Court of Human Rights, *Table of Violations*.

Note: Violations of Germany in relation to the length of proceedings concern in the vast majority of cases non-criminal proceedings, in particular proceedings before the civil, administrative or social courts. In 2010, only 1 judgment establishing a violation on the length of proceedings pursuant to Art. 6 ECHR referred to criminal proceedings.⁶³⁹

.....
⁶³⁹ Cf. CEPEJ, Evaluation of Germany, 2011, re. 86. See also the annual "Reports of the German Federal Government on the Case-Law of the European Court of Human Rights and on the Execution of its Judgments in cases against the Federal Republic of Germany", available at: <http://www.egmr.org/link.html>, (accessed on 8 March 2013).

9 Results survey contact points of the European Judicial Network in Criminal Matters

Pim Albers

9.1 Introduction

In addition to the peer-review visits to Germany, France and the Netherlands, a survey has been prepared for the contact points of the European Judicial Network in criminal matters. The main objective of the questionnaire is to complement the findings of the three country visits and the verification of the conclusions of those visits. In this survey standard questions have been included on the use of the principle of proportionality in the national criminal justice systems, the application of the EAW as an issuing member state, the execution of the EAW and the mutual trust between the EU member states. Comparing the content of the survey with the checklist which have been applied for the peer review visits it is evident that the survey tries to cover the same aspects as the topics that have been listed for the interviews with the justice practitioners of the three participating countries in the pilot project.

The distribution of the survey was carried out with the assistance of the secretariat of the European Judicial Network in criminal matters. Through this active cooperation we were able to receive in a relative short time period (beginning of October – 30 November 2012) 30 replies from the contact points. The filled questionnaires provides a fair overview of the current state of affairs in Europe with regards the practice of the EAW, since contact points of 23 EU member states from the total of 27 have submitted their response to the secretariat of EJN in criminal matters.

During the 39th plenary meeting of the European Judicial Network in criminal matters (Nicosia, 28 – 30 November 2012) the preliminary results have been discussed with the contact points of the network. The results of the meeting have been used as an important feedback instrument for receiving the first comments on the outcomes of the survey.

It must be noted that the results of the survey does not reflect the official point of view of the 27 EU member states, but contains the opinion of a selective group of justice practitioners – EJN contact point/public prosecutors – and must be seen as a raw ‘snapshot’ of the findings concerning the practice on the application of the principle of proportionality and the EAW, as well as their subjective opinion regarding the mutual trust in Europe.

After this brief introduction about the survey in the next paragraphs the results of the findings will be presented. The presentation of the findings will follow the same structure of the questionnaire, where the first group of questions is addressing the principle of proportionality in national criminal systems, to be followed by the results on the questions focusing on the issuing and execution of EAWs, as well as the mutual trust aspect.

9.2 The use of a standard proportionality check in a *national arrest warrant*

A large majority of the replied contact points (21 contact points) indicated that in their national criminal system a standard proportionality check is applied to review *national arrest warrants*. Only for 8 contact points this is not the case.⁶⁴⁰

When it concerns a judicial review of national arrest warrants in relation to the application of a proportionality check most of the contact points indicated that this review is conducted by a court (22 contact points) or another law enforcement authority (i.e. the public prosecutor). On the basis of this we can conclude that often in national procedures a proportionality check is used and that the cases concerned are reviewed on a regular basis by a judge or another member of the judiciary.

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⁶⁴⁰ To some extent, the answers provided by contact points of one and the same Member State differed from one another.

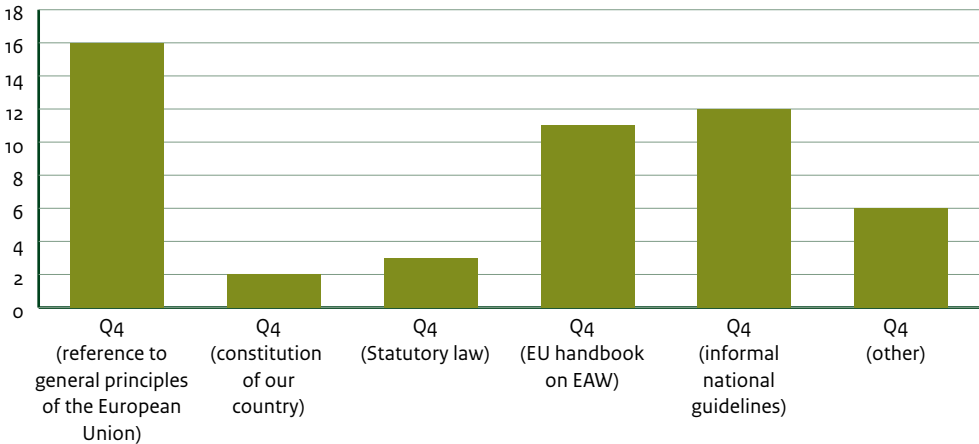


9.3 The use of the European Arrest Warrant by the EU Member States as an *issuing country*

With regards to the application of a proportionality check for issuing a EAW there seems to be a common practice to use a standard proportionality check, since 24 contact points (from the total of 29 replied to this question) indicated that their country always apply a proportionality check before a EAW is issued. Only 5 contact points indicated that this is not (always) the situation.⁶⁴¹

The legal basis for the proportionality check is in most of the countries a reference to general principles of the European Union law, to be followed by informal national guidelines and the EU handbook on the EAW. To a lesser extend statutory laws and the constitution was mentioned as one of the legal basis for a proportionality check (see figure 1).

Figure 1 What is the legal basis for the proportionality check in your country? (number of replies)



⁶⁴¹ See the previous note.

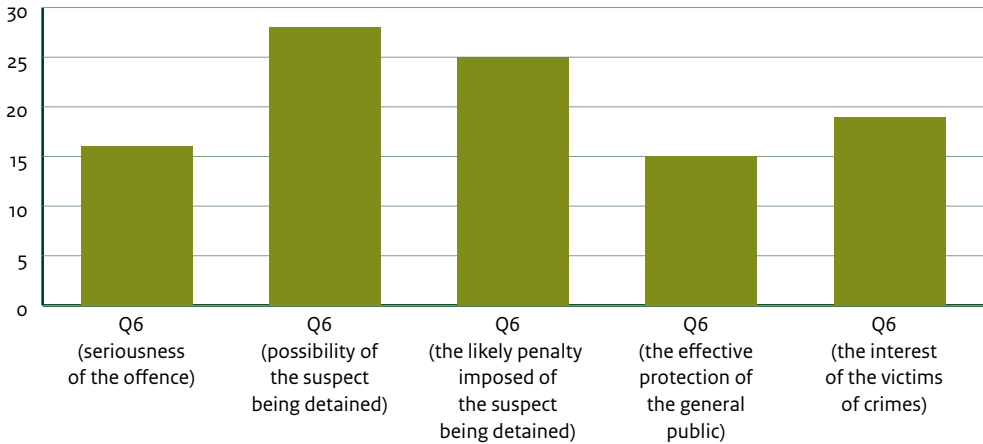
9.4 Proportionality criteria for issuing or not issuing a European Arrest Warrant

12 Contact points have indicated that specific procedural rules are used for the EAW (for 13 contact points this is not the case). Examples of procedural rules that are applied are the following:

- A detention order by the court is a condition for the issuing of a EAW for prosecution. When ordering detention the court is obliged to assess the proportionality. In addition, the prosecutor who issues the EAW has the obligation to assess the proportionality of the EAW beforehand (so, proportionality is already in line with Art. 2 (1) FD EAW).
- As a matter of principle, there must be an underlying national arrest warrant. A national arrest warrant may be issued under the conditions that the suspect has no permanent residence, and the offence is punishable by a prison sentence. Further, a EAW may only be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.
- A request for the extradition of a person may not be submitted if the seriousness or nature of a criminal offence does match the expenses of the extradition.
- The court will not issue an arrest warrant if
 - a) it expects an imposition of a punishment other than an unconditional prison sentence, or an unconditional prison sentence shorter than four months,
 - b) the prison sentence that is to be executed or its remaining term is less than four months,
 - c) upon the extradition the government would incur costs or consequences manifestly disproportionate to the public interest in the criminal prosecution or the execution of the prison sentence of the person whose extradition is requested,
 - d) upon the request from a foreign State, the person who is subject to extradition would suffer a detriment clearly disproportionate to the importance of the criminal proceedings or the consequences of the criminal offence, with particular regard to his/her age, social status, or family situation.

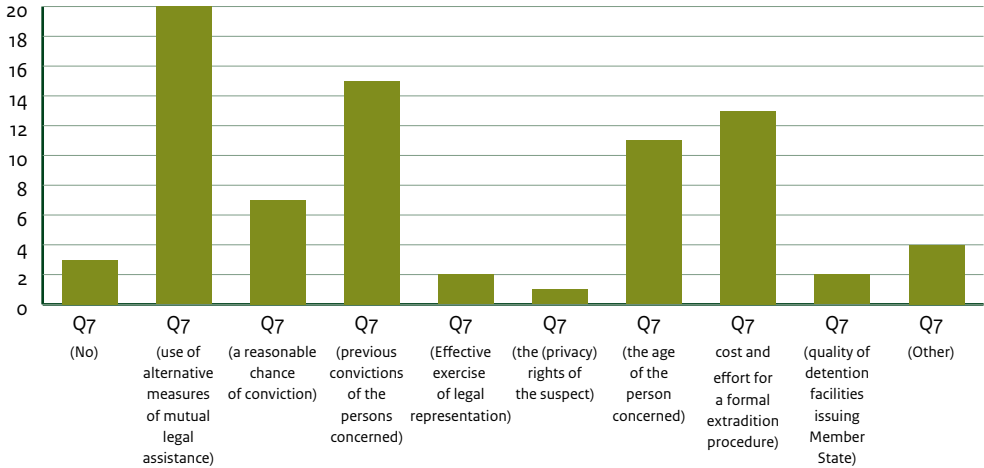
Besides (national) specific procedural rules for (not) issuing a EAW in the EU handbook on how to issue a EAW several factors are listed to determine if a EAW should be issued or not. This varies from the seriousness of the offence to the interest of the victims of the criminal offence. The national contact points of the EJM in criminal matters were asked to give information about the use of these factors listed in the Handbook. According to the replies of the survey the possibility of the suspect being detained (28 replies) and the likely penalty imposed to the subject being detained (25 contact points) are in general key criteria to issue or not to issue a EAW. Also, the interest of the victims of crime (19 contact points) and the seriousness of the offence (16 contact points) is a determining factor. The least mentioned factor in this case concerns the effective protection of the general public (see figure 2).

Figure 2 In the European handbook on how to issue a European Arrest Warrant a number of factors are listed to determine if in a certain situation a EAW should be issued or not. Which of these factors are used in your country to determine if a EAW should be issued? (number of contact points replied)



On the question if a country is applying additional proportionality criteria, most of the countries have indicated that they do so. Often this is related to the use of alternative measures of mutual legal assistance (20 contact points), previous convictions of the person concerned (15 contact points), a reasonable chance of conviction (7 contact points) and the costs and effort for a formal extradition procedure (11 contact points). An effective exercise of legal rights (2 contact points), the quality of detention facilities (2 contact points) and privacy rights of the suspects (1 contact point) are much lesser mentioned by the contact points (see figure 3).

Figure 3 Are there other proportionality factors that your country takes into account in the decision to issue or not to issue a EAW? (number of contact points)

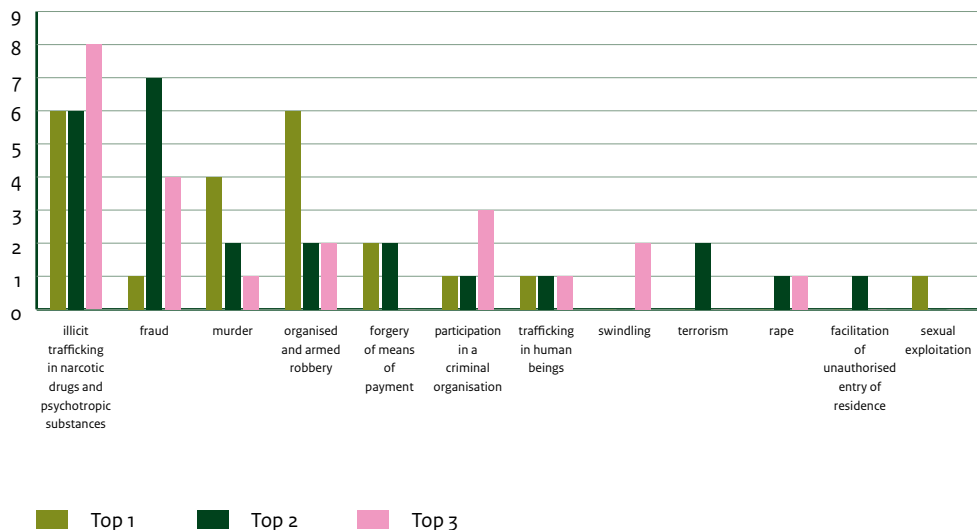


9.5 Top three list offences for issuing a European Arrest Warrant

When it comes to the most often mentioned *list offences*⁶⁴² for issuing a EAW it is evident that in the majority of the EU Member States this is for illicit trafficking in narcotic drugs and psychotropic substances, followed by organized and armed robbery and fraud. Also murder cases, forgery of means of payment and trafficking in human beings are listed in the highest ranking of the top three offences. Swindling, terrorism, rape, facilitation of unauthorised entry of residence or sexual exploitation is lesser indicated as a list fact for issuing a EAW. See figure 4.

⁶⁴² In the survey, we have only focused on the offences that are listed in Art. 2 (2) FD EAW and for which a double criminality check is excluded. The "non-list offences" are not included in the survey.

Figure 4 Top 3 list offences for issuing a EAW (number of contact points)



9.6 Problems in the issuing Member State

The correspondents have been asked about problems or obstacles they encounter when issuing a EAW. To detect and identify these problems we have asked the contact point to provide specific examples (11 contact points have indicated that they are facing problems in the issuing of a EAW). Below a number of problems/obstacles are listed:

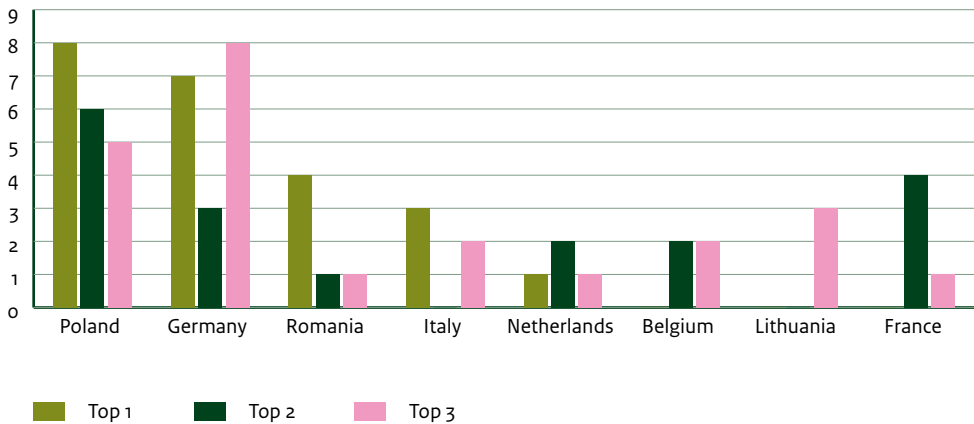
- Some countries request additional information not required by Art. 8 FD EAW or request additional information in a rather vague manner;
- some Member States have very short deadlines for the reception of EAW and its translation (e.g. Romania and Bulgaria want to receive the EAW in 48 hours);
- some countries are refusing the execution of the EAW for grounds not foreseen in the FD EAW;
- lack of the information on the decision of the executing State, including the information on the specialty rule after the person has been surrendered;
- the executing state often releases the wanted person from detention during the surrender procedure which often results in impossibility of surrender;
- it is difficult to receive from the foreign authorities – on a short notice – information about the duration of the time that a person has already been detained in another country (this information is necessary for the decision on whether to reduce the total length of imprisonment in the issuing country).
- difficulties concerning the return guarantee of a national.

9.7 The execution of the European Arrest Warrant

The success of the use of the EAW procedure is not only determined by the number of cases for which a country is issuing a EAW, but also by the success in terms of having executed a EAW in the EU member states. To provide an insight of the type of “list offences” that are subject of EAWs to be executed the contact points were asked to indicate from which country they receive the most requests for execution and for which (top three) list offences.

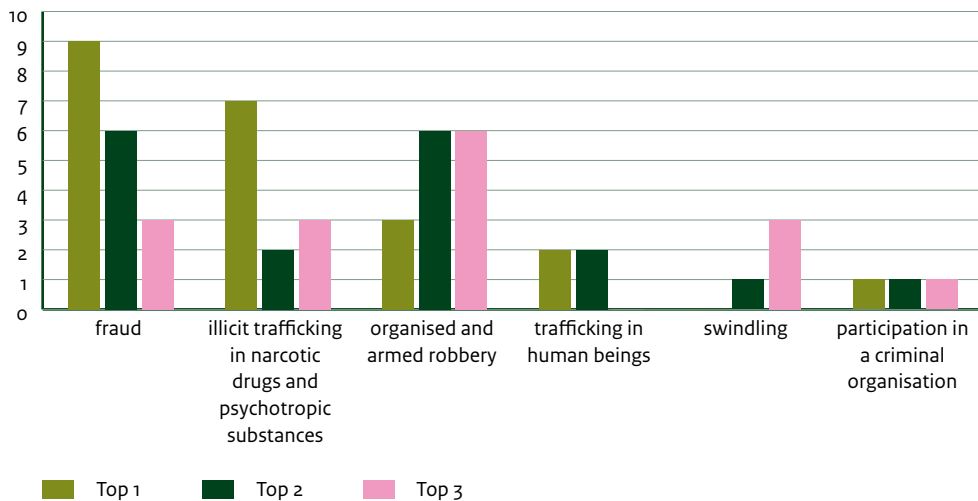
According to the answers provided by the contact points, the majority of the requests for execution of a EAW is received from Poland and Germany. Romania, France, Italy, the Netherlands, Belgium and Lithuania were listed in the replies, too, but in a much lesser frequency (figure 5).

Figure 5 What are the top three EU member states where you receive requests from for the execution of a EAW (number of contact points replied)



Similar to the question on the top three list offences for which EAWs are issued the contact points were asked to make a top three of *list offences* for which EAWs are executed. In contrast with the replies to the question on the issuing of EAWs where illicit trafficking in narcotic drugs and psychotropic substances was clearly indicated the number one “list offence”, for execution this is fraud, followed by organised and armed robbery and illicit trafficking in narcotic drugs and psychotropic substances (see figure 6).

Figure 6 Top 3 list offences for receiving a request to execute a EAW (number of contact points replied)

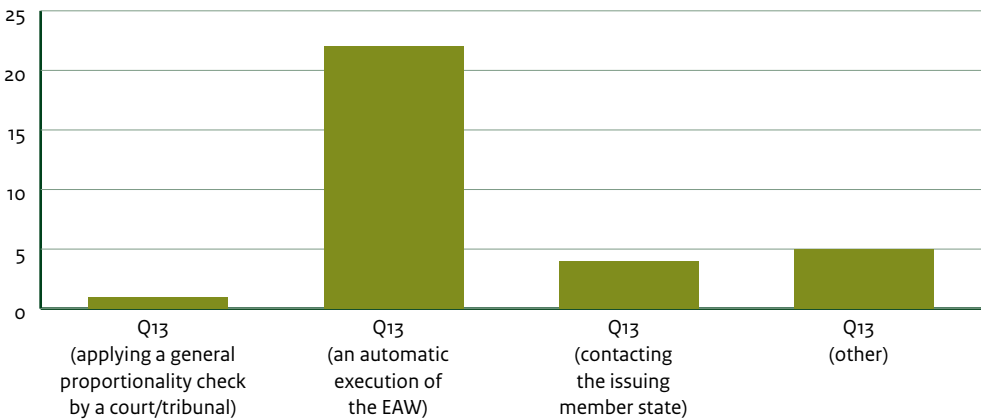


9.8 Non application of a proportionality check by the issuing Member States and (procedural) actions

19 contact points have replied that they do receive requests from issuing Member States to execute a EAW, before a proportionality check has been carried out by the requesting country (question 12). Only six contact points have a different experience. List offences that are often mentioned as cases where no proportionality check has been conducted, concerns: fraud, organized and armed robbery, illicit trafficking in narcotic drugs, and swindling. Other list offences that were mentioned are: trafficking in human beings, murder, forgery of administrative documents, facilitation of unauthorised entry of residence and participation in a criminal organisation.

In situations where there is no proportionality check done by the issuing Member State the answers provided by 22 contact points lead to the conclusion that this usually has no or only limited impact on the procedure itself, since most of these requests are “automatically” executed (if all the formal requirements of the issuing country have been fulfilled). Alternatives that have been indicated vary from applying a general proportionality check by a court/tribunal before accepting the request for execution (1 contact point), contacting the issuing Member States (4 contact points) and other solutions (5 contact points). See figure 7.

Figure 7 Question 13 procedural steps to be taken when an issuing EU Member State is not applying a proportionality check (number of contact points replied).



9.9 Proportionality check in relation to nationals and monitoring

In almost all of the replying Member States a proportionality check is applied if the EAW shall be executed against nationals (27 contact points). Often this is combined with a demand of a return guarantee of those nationals when the execution of a EAW for the purpose of prosecution results in a prison sentence. 21 contact points replied that in their country a return guarantee is required. Seven contact points replied that there is no automatic return guarantee.

As a part of the EAW procedure member states may decide to monitor the situation of the surrendered person when the country has executed the EAW and the person concerned has to stand for trial. Especially for nationals (with a return guarantee) this can be of relevance. However, the practice shows that only a small group of contact points (4) said that they do monitor the situation of a surrendered person. 24 contact persons indicated that there is no monitoring system in place. The main arguments for not monitoring are:

- It is not possible to receive information from the EAW issuing states about the surrendered person;
- It is a principle of mutual trust and it is assumed that ECHR minimum standards are applied in all EU member states;
- There is no legal ground for this and there is no need to monitor.

However, in situations that surrendered persons are monitored, this is related to cases regarding serious offences (and where a person might be excluded from returning to the country where the EAW was executed), where there are concerns about the persons fundamental rights and freedoms, where there is a return guarantee of a national or where the court or defence is seeking for additional case information (when a request for executing a EAW is pending).

9.10 Problems in the execution of a European Arrest Warrant

Dealing with EAW cases does not only give rise to problems in the issuing state, but also in the executing state. In line with question 9 of the survey we have asked the contact points to explain if they face difficulties in the processing of the execution of a EAW. The majority of the contact points (19 contact points) have replied that they do encounter problems in the execution of a EAW; 10 contact persons replied that they do not have problems in the execution process. To get a better picture of the causes of the problems we have also asked to provide examples of the difficulties that appear in the process of execution. The following examples were reported:

- The absence of the exercise of discretion by issuing judicial authorities; the lack of willingness to withdraw the EAW post-arrest.
- Quality of translation and description of the offence in the EAW form are sometimes problematic.
- Insufficient information about judgments rendered in absentia.
- Short time for surrender, difficulties in organizing the transit.
- Disproportionate use of the EAW under certain circumstances;

- In some cases - very strict time limits for supplying additional information;
- Problems with obtaining the guarantee provided for in the Art. 5 (3) FD EAW from some Member States as they return the sentenced persons only under provisions of the Convention on the Transfer of Sentenced Persons and therefore are of the opinion that the return to the executing State is possible only after obtaining the consent of the sentenced person.

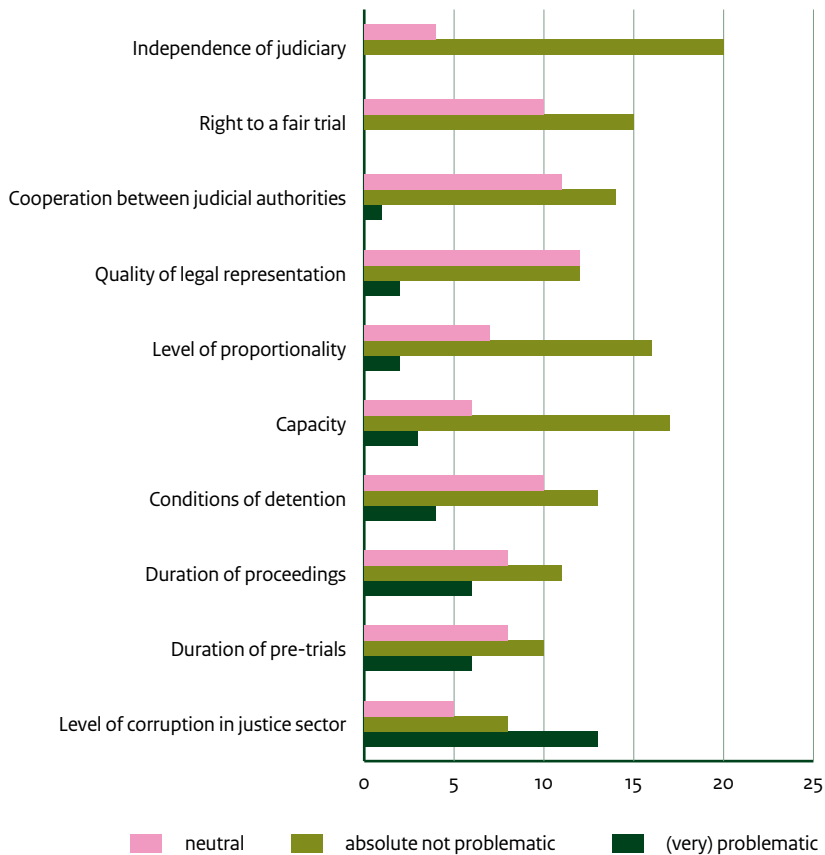
9.11 Mutual Trust between the EU Member States

One of the key principles for a successful application of European instruments in the criminal law area is the assumption that there is a high level of mutual trust between the EU Member States in judicial cooperation in criminal matters. In the survey the contact points were asked to rate (on a 5 points scale from (very) problematic to (absolute) not problematic at all) several mutual trust aspects in the judicial cooperation in criminal matters. These aspects are:

- The available capacity of the justice systems (judges, prosecutors, staff)
- The duration of the pre-trial procedures
- The duration of the court procedures
- The right to a fair trial
- Level of independence of the judiciary
- Level of corruption within the justice sector
- Level of proportionality (relation between crime committed and the expected level of sanctions)
- Quality of legal representation
- Conditions of detention
- Cooperation between the judicial authorities of other countries

Generally speaking, when looking at the results of the survey, there are no significant problems in the area of mutual trust, according to the viewpoint of the EJM contact points. The level of proportionality, the capacity of the justice systems, the right to a fair trial, the level of independence of the judiciary, the quality of legal representation, the conditions of detention and the cooperation between the judicial authorities of other countries seems not to be problematic. In that sense there is a high level of mutual trust between the judicial authorities of the EU Member States. However, certain contact points indicated that there are problematic mutual trust areas when it concerns the duration of (court) proceedings (including pre-trial procedures) and the level of corruption in the justice sector. To these aspects it must be noted that *only* for the matter of corruption in the justice system there seems to be a real mutual trust problem. For the other two categories (duration of the pre-trials and procedures) some contact points suggested that these issues are (very) problematic, whilst on the other side there are also several contact points who do not have (absolute) no problems with the duration of the procedures and pre-trials (see figure 8).

Figure 8 Can you indicate for the following aspects of mutual trust between the EU member states how problematic these aspects are for the cooperation between the member states in criminal matters? (number of contact points)



When the contact points are asked about which countries they are facing difficulties with and for which specific mutual trust problem, then the following observations can be made: The first observation is that only a very limited number of contact persons have provided information about the countries concerned and the mutual trust aspects considered to be particularly problematic with regard to these countries. Secondly, the contact persons who do have replied to this question, indicated that in the majority of EAW cases the problems are related to the level of proportionality of EAW requests from Poland (7 contact points) and Romania (5 contact points). Also the duration of pre-trials were seen as a problematic factor for UK related EAW's (4 contact points) and a case from Ireland (1 contact point).

9.12 Suggestions for improvement of the European Arrest Warrant procedure

A number of contact points of the EJM have proposed concrete suggestions for improving the EAW procedure. The necessity of a mandatory proportionality check in the issuing Member States was very often mentioned. One of the contact points suggested relating this proportionality check to the seriousness of the offence rather than to the (abstract) maximum sentence which can be applied. Another contact point indicated that in the procedure there should be an obligation to consider other less coercive measures prior to issuing a EAW, or possibly an additional ground for refusal. It was also suggested to include some form of dual criminality clause to the list offences in the EAW in order to bring some consistency with other, less invasive mutual recognition instruments (i.e. the Framework Decision on prisoner transfer). Other proposals are summarized as follows:

- More openness to consider the use of alternative measures instead of applying the EAW procedure.
- The principle of mutual recognition should be enforced in all Member States without exception.
- The rule in Art. 4 (7) FD EAW could be clarified. According to this provision, the executing Member State can reject the EAW if the crime has been committed in whole or in part in its territory.
- Additional safeguards for pre-trial detention conditions.
- An extension of time in which to submit the full application following a provisional arrest. Forty eight hours can be too short especially if the request came from the domestic police on a Friday afternoon – the lack of translation services over the weekend means that it is probably never going to be possible to meet the deadline for full submission. A revised time limit of 96 hours or even a full week is suggested.
- Building up more mutual trust between the EU judicial authorities by providing systematic training programs on EAW matters for judicial authorities involved in issuing and executing EAWs and by promoting learning of other EU languages with a view to enhancing and facilitating direct contacts.

10 Summary of the defence lawyers' views on the European Arrest Warrant and mutual trust

Thomas Wahl

10.1 Introductory Remarks

Beside the view of the judicial authorities expressed during the peer review visits and in the framework of the survey of prosecutors of the European Judicial Network the project also took due account of closely elaborating on the problems of the defence of the person sought in extradition cases within the European Union. This chapter is designed to give an overview of the position of the defence lawyers in this regard.

The findings take into account of the survey that has been prepared for the defence lawyers in the other EU Member States (cf. chapter 5.3.). The standard questionnaire of this survey was distributed with the assistance of the European Criminal Bar Association (ECBA) to defence lawyers of its network in the EU Member States. The questionnaire did not reiterate all the questions that were addressed during the peer review visits to all interviewees but takes more account of the specific situation of the defendant and his/her defence counsel during the execution of a European Arrest Warrant. So the questionnaire was streamlined accordingly. The survey first took up the issue of proportionality in the defence situation and asked for the experiences of defence lawyers in cases where the EAW from the issuing state seemed to be disproportional. In this context it was further asked for the possibilities and successes of appeals. Furthermore, the survey addressed questions on the specific problems for the defence in the country concerning the requests from other countries for the execution of a European Arrest Warrant, in particular in view of mandatory legal representation, effective legal representation and the organisation of legal representation. In a second part, defence lawyers were asked for mutual trust aspects and suggestions for improving the EAW procedure.

Regrettably, the return of replies to the survey questionnaire was quite low. Up to the date of finalising this report only three defence lawyers (one each from Belgium, the Czech Republic and the United Kingdom) have responded. Their contributions formed nonetheless a very valuable basis and complemented the findings of the three country visits. However, in order to have a better basis for the verification and validation of the conclusions it was decided to design this chapter as a qualitative description on the defence aspects in surrender cases. Beside the findings of the interviews with defence lawyers that were conducted during the peer-review visits to Germany, France and the Netherlands (see chapters 6-8) and the responses to the survey additional sources that reflect the position of the defence lawyers, especially recent research studies on the subject matter,⁶⁴³ were consulted. This qualitative method allowed us, on the one

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⁶⁴³ In particular, studies were taken into account that were based on an empirical, problem-orientated approach, so that the practical needs could be identified by the research. A very helpful source was the project on “European Arrest Warrants: ensuring an effective defence” conducted by JUSTICE, the European Criminal Bar Association and the International Commission of Jurists (hereinafter: “JUSTICE project/report”). The project encompassed 10 countries and results are based on case reports from lawyers to reviewers, the dissemination of questionnaires and in-country interviews. The final report can be downloaded via the following website: <http://www.justice.org.uk/resources.php/328/european-arrest-warrants>, (accessed on 8 March 2013). Another study to which reference is made has been conducted at the Max Planck Institute for Foreign and International Criminal Law; the study *inter alia* aimed at finding out problems in the defence of trans-border criminal law cases. The study used also the method of interviews (though it was limited to interviews with German lawyers). A summary of the findings is published at: Arnold, “Auf dem Weg zu einem Europäischen Strafverteidiger?”, (2013) *Strafverteidiger-Forum*, p. 54. A longer publication is in preparation. Other interesting studies to mention are: Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), available at: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf (accessed 15 March 2013); Vernimmen-Van Tiggelen/Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union* (Brussels November 2008), available at: http://ec.europa.eu/justice/criminal/files/mutual_recognition_en.pdf (accessed 15 March 2013).

hand to draw up a more complete picture of the problems the persons arrested on the basis of a EAW are facing with in practice. On the other hand the following analysis does not claim to treat all problems/ aspects of the defence in a EAW case or to be exhaustive. The analysis clearly follows the two main questions of this project, i.e. the issue of proportionality of European Arrest Warrant and the factors that determine mutual trust. The structure follows the topics that were addressed in the survey (cf. 5.4.3.2.).

10.2 The issue of proportionality in the defence of European Arrest Warrants

10.2.1 *Kind of cases*

Most defence lawyers have already had experience with disproportionate European Arrest Warrants and take the view that proportionality of issued EAWs remains an issue of concern. Both defence lawyers and practitioners from the judiciary (esp. France) recalled that the EAW was originally conceived of combating serious crime but is nowadays very often used for arresting people who allegedly committed offences of lower gravity.⁶⁴⁴

Concerns of proportionality are raised in various kinds of cases: As far as EAWs for the purpose of the execution of sentences are concerned cases were reported where only a short sentence is left to serve. As regards EAWs for the purpose of prosecution experience on cases was reported where the person sought was seemingly only surrendered for the purpose to appear before a judge or a prosecutor who then quickly terminated the criminal proceedings against the person and released him/her. In these cases a resolution could often have been found by paying a fine. Given the impact of arrest and surrender on the family and professional live of the person concerned this was not considered proportionate. In a similar way the issue of disproportionality of the case is raised by many defence lawyers if a surrender is sought against a person with stable family ties in the executing state (although a sentence of imprisonment in the issuing state may not be expected).⁶⁴⁵

Another kind of problematic EAW cases was identified where the issuing authority did not thoroughly examine the whereabouts of the person sought (reported esp. in relation to insufficiently conducted proper enquiries by the police in Greece and Portugal).⁶⁴⁶

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⁶⁴⁴ Confirmed by statistical analysis in this project, but also by the empirical in-depth analysis at: Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010).

⁶⁴⁵ A defence lawyer in the Czech Republic presented the example of separation of a mother from her child.

⁶⁴⁶ See also JUSTICE report „*European Arrest Warrants: ensuring an effective defence*”, fn. 1, of this chapter p. 37.

Poland was often named the country where EAWs for minor offences were issued. But the problem of disproportionate EAWs has also occurred, according to the findings, in relation to other countries, such as other Eastern European countries or Greece and Portugal (the latter in the above mentioned cases on enquiries on the residence of the offender). Furthermore, matters of proportionality were interestingly also raised in relation to the participating countries France and the Netherlands.⁶⁴⁷

10.2.2 *Alternative measures*

Defence lawyers found that alternative, less intrusive measures may often be appropriate in cases but are not used by the judicial authorities. Especially, in cases where the whereabouts of the person are known or could be found out with little efforts (see above) the EAW is “over hastily” preferred although a first summoning (probably in combination with video-conferencing) could have solved the case. This confirms the findings during the peer-review visits where it was stated that possibilities of Art. 98 SIS alerts are hardly or not used by the vast majority of EU Member States and that the European Arrest Warrant “is a victim of its own success”.

10.3 Appeals against the decision on surrender

Possibilities of appeal against the decision on surrender are provided for very differently in the various EU Member States. The Netherlands, for example, have even abolished the opportunity of appeal for the individual in the EAW procedure, in Germany only extraordinary remedy to the Federal Constitutional Court is possible (but in practice with a fairly poor success rate), and Spain allows no appeals against the surrender decision but against detention decision. Other countries provide for the possibilities to appeal the surrender decision, however sometimes legal restrictions were introduced (e.g. Ireland).⁶⁴⁸ Nevertheless, defence lawyers deem important the opportunity to appeal against the decision to surrender, in particular if the defendant is not or poorly represented in the first stages of the procedure.⁶⁴⁹

Nevertheless, defence lawyers admitted during the peer review visits and in the survey that the courts are very reluctant to accept the issue of disproportionality of a EAW. From the UK it was reported that the UK courts have yet to develop the law to fully take account of the principle of proportionality since it is not a UK legal concept. Therefore, it was found that it is usually better to take proportionality issues up in the issuing state to prevent the issuance of the domestic arrest warrant in the first place. In France, the peer review revealed that the notion of “proportionality” is understood by lawyers (only) to assess the “proportionality” of the severity of the penalty to the criminal offence but not for the “proportionality” of the offence to the request or arrest warrant for example (proportionality of the EAW for petty offences). Also a reply from the Czech Republic let conclude that there is different understanding of the proportionality principle.

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⁶⁴⁷ A Belgian lawyer reported of disproportionate cases in relation to the Netherlands, but did not specify the kind of cases.

A Czech lawyer referred to the case described in fn. 3 of this chapter where surrender was sought by France.

⁶⁴⁸ See also Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 43 et seq.

⁶⁴⁹ JUSTICE report „European Arrest Warrants: ensuring an effective defence”, fn. 1, p. 39.

Notwithstanding, due to the scheme of the European Arrest Warrant the possibilities of the defence to achieve a refusal of surrender are very much diminished, so, as was reported to the project team, in the vast majority of cases, defending the client in the executing state is not (very) helpful. The peer review visits as well as the survey revealed that, for a possible successful appeal, in most Member States the defence counsel in the executing state often tries to prevent surrender by putting forward arguments that could justify a violation of the fundamental right to family life (Art. 8 ECHR). Other approaches for possibly successful appeals are in absentia judgments when insufficient guarantees of a fair retrial are at stake as well as cases where the underlying facts for the offence in the EAW are poorly advanced or not specified enough (which makes the request incomprehensible or not plausible at the end). Especially in France, defence lawyers may produce arguments of torture of witnesses with regard to information used in a EAW, mostly in the case of EAWs from Spain containing allegations of terrorist offences by ETA members.

Defence lawyers confirmed, however, that even in the case where the fundamental rights issues are at stake and relevant arguments can (really) be put forward in the particular case, surrender can sometimes be protracted⁶⁵⁰ but not prevented at all. First, the courts are very reluctant to refuse a European Arrest Warrant on the general ground of a breach of fundamental rights / “ordre public”. Second, courts set/developed high thresholds in view of the factual basis or evidence that may justify the arguments but the defence counsel and his/her client cannot substantiate enough their arguments since knowledge or evidence is lacking in the executing state. All in all, defence lawyers pointed out the eminent importance of making representations in the issuing state in order to avoid proceedings in the executing state or getting enough material that would justify a denial of the extradition (see also *infra* 10.4.4.).

As to the question whether defence possibilities to prevent surrender are better if the person sought is a national sometimes the impression was mentioned that the courts tend to be more attentive before extraditing a national (Belgium, partly France). However, it was also confirmed that in most cases the demand for extradition to the issuing state is granted and usually the facts are clear.⁶⁵¹ Protection is then ensured by the legal possibilities in accordance with the framework decision, i.e. possibility of return guarantee.

As regards the treatment of residents there is no uniform implementation of the respective provisions of the Framework Decision on the European Arrest Warrant in the European Union, either in law or in practice.⁶⁵² The implementation ranges from not granting residents an equal status to nationals by law, such as in France, Hungary or the UK, to a full equal treatment of permanent residents, for example in the Czech Republic or Lithuania.⁶⁵³ In other countries, such as Germany and Finland, the executing authority is

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⁶⁵⁰ Mostly leading to a demand for additional information by the executing court.

⁶⁵¹ The latter aspect plays a particular role in Germany where there is no discretion to grant extradition if the offence was committed in the territory of the issuing state; this is usually the case.

⁶⁵² Vernimmen-Van Tiggelen/Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union* (Brussels November 2008), p.14.

⁶⁵³ Šlosarčík, “Criminal Law and Mutual Recognition in the Czech Republic” in: Vernimmen-Van Tiggelen/Surano/Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, (Brussels 2009), p. 99 (112). For Lithuania see same publication, Švedas/Mickevicius, “Future of mutual recognition in criminal matters in the European Union: Lithuania”, p. 339 (346) For Hungary see same publication, Ligeti, “The principle of mutual recognition in criminal matters in Hungary”, p. 259 (263).

granted discretion by law to evoke the similar ground for refusal for nationals in relation to people with habitual/permanent residence whereas such discretion is not given in case of a national.⁶⁵⁴ Other states inserted certain restrictions into national law to accept an equal treatment with nationals (e.g. the Netherlands). However, what could generally be observed in practice is that – also in case residents have not been granted the same status than nationals - the chances for a possible protection of residents via the fundamental right of family life (Art. 8 ECHR) are raised under the condition that the person has lived in the executing country a considerably period of time; so arguments in the context of family life can be put forward more easily and may be more convincing.⁶⁵⁵

10.4 Problems for the defence in cases of the European Arrest Warrant

10.4.1 *Specific Problems*

When asked for specific problems for the defence in the executing country many problems were reported that do not relate to the issue of proportionality alone but are of general nature concerning all EAW cases. Defence lawyers nearly unanimously answered that they have the feeling that courts grant any request almost automatically or judges rush the cases through without listening to the arguments or they show little criticalness towards the materials provided by the issuing state. This is even a problem of major dimension if – as it is often the case in many countries – the person concerned is not represented by a defence lawyer during the EAW procedure. As a result, the surrender procedure in general terms cannot be put (adequately) across to the citizens (again: with an impact on mutual trust, see *infra* 10.6). As a further implication in this context, defence lawyers across the countries confirmed that in their legal order or due to case law it is of utmost difficulty to get the judicial authorities/courts listen to human rights grounds (see also *supra* 10.3.).

Another finding during the peer-review interviews confirmed both by the survey and the JUSTICE project was that, in the view of defence lawyers, judges and prosecutors in the executing State often argue with a clear cut between the extradition procedure and the eventual criminal case/outcome of the trial in the issuing state. By contrast, defence lawyers argue that in fact a consideration of the offence usually is an important matter and cannot be left out of consideration (also) in the executing state. The defence lawyers therefore claim that it is impossible to consider the EAW independently from the proceedings in the issuing state; in other words: not every argument can be put aside by hinting that the item is preserved for the trial. Thus, defence lawyers take the view that also the executing state should further explore evidence relating to, for example, innocence, misidentification, persecution, passage of time, lack of knowledge, lack of

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⁶⁵⁴ For German law cf. chapter 8.3.2., for Finland cf. Suominen, “The Finnish approach to mutual recognition in criminal matters and its implementation”, in: Vernimmen-Van Tiggelen/Surano/Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, (Brussels 2009), p. 219 (228).

⁶⁵⁵ In view of the success rate to recognise the ground for refusal of fundamental right violations see however above.

evidence, impact upon established life or poor prison conditions.⁶⁵⁶ One defence lawyer exemplified that there is often the impression of an “over-qualification” of the 32 categories of offences where the double criminality requirement cannot be checked,⁶⁵⁷ but this is usually fully tolerated by the court of his jurisdiction.

In the context of the necessity of considering also the following criminal proceedings in the issuing state, an interesting point is further made in the JUSTICE project insofar that in many case studies a long length between further pre-trial investigations (where the surrendered person remain in pre-trial detention) and the beginning of the trial could be observed.⁶⁵⁸ Thus, the question arises whether alternatives could be found so that the person concerned has not to be in a long period of extradition detention and subsequent pre-trial detention that was triggered by the EAW. This question, however, leads to the conclusion that there is a need of further flanking measures for the EAW instrument to function properly or even a consistent system of judicial cooperation in criminal matters. This point was very often made by practitioners during the peer review visits and many suggested that the European Supervision Order may be a relief in the near future.⁶⁵⁹

Another point of concern from the part of defence lawyers is the obtaining of consent to surrender/simplified extradition. The number of executed EAWs with the consent to surrender has increased, today in average around the half of the surrenders take place upon prior consent of the person concerned.⁶⁶⁰ One reason of the increase in number is certainly the fact that due to the model of mutual recognition with very limited grounds for refusal and the impression that only the formality of the request is examined by the executing authority citizens and defence counsels feel powerless to tackle the surrender in the executing state but instead would like to concentrate on the trial in the issuing state. In some cases the consent to surrender may be an appropriate way of solution, nevertheless defence lawyers pointed out that “the question of consent can involve complex issues in the same way as whether someone agrees to plead guilty or not to a charge”.⁶⁶¹ The JUSTICE project therefore recommends that the decision of consent requires effective access to legal advice before it is taken not afterwards, furthermore it must be assured that the person concerned is not influenced on his decision by police or prosecutors.⁶⁶²

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⁶⁵⁶ See also JUSTICE report „*European Arrest Warrants: ensuring an effective defence*”, fn. 1, p. 34; Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 108; Response by the European Criminal Bar Association to the Home Office Extradition Review, p. 1 (available at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf [accessed 15 March 2013]).

⁶⁵⁷ Meaning also that the provided description of the facts and the legal qualification do not fully match and at the same time only the title of the criminal offences is provided, not the whole wording. In terms of proportionality this leads of course to the possibility for the issuing authority to build up an impression for a more serious case than it is in reality.

⁶⁵⁸ *ibid*, p. 38.

⁶⁵⁹ However, this view has not remained uncontested.

⁶⁶⁰ COM(2011) 175 final, p. 12.

⁶⁶¹ JUSTICE report „*European Arrest Warrants: ensuring an effective defence*”, fn. 1, p. 38.

⁶⁶² *ibid*.

The reflection on the different sources dealing with defence problems also brought to light that there is no uniform practice between the Member States as regards the ordering and suspension of extradition detention. There is court practice in some countries, such as Germany and the Czech Republic, where defence lawyers felt the courts make a too excessive use of custody in EAW cases being very reserved to resort to the legal possibilities to suspend detention (e.g. even if there are strong ties to the executing country). This was confirmed by the JUSTICE report stating that there is one group of countries where remand in custody and ordering extradition detention is considered more usual whereas in other Member States legal traditions stimulate a more increased use to award release pending surrender (e.g. Ireland, the UK, Portugal).⁶⁶³

Worth mentioning of problems in relation to the defence in the executing country are language issues. The JUSTICE project found out that in almost the half of the 10 studied Member States the quality of interpretation and translation is an issue of concern (Greece, Italy, Poland, Portugal). During the peer review visits to Germany, the Netherlands and France language problems were sometimes put forward by judicial authorities in view of a poor translation of the EAW request, however it could not be confirmed that poor interpretation/translation towards the person sought during the extradition proceedings (and so affecting his defence rights) was identified as a major problem in the participating countries.

On the other hand, language barriers prevent lawyers from the access to the criminal procedure law in the foreign countries (due to the lack of translation of the laws) which is felt necessary to provide good advice, especially when organisation of dual representation fails.⁶⁶⁴ Therefore, interviewees requested access to information on the foreign laws, that is provided to judicial authorities (e.g. through the EJN), is also made available to defence lawyers.⁶⁶⁵

10.4.2 *Mandatory legal representation*

During the peer review visits often the question arose how mandatory representation is applied in EAW cases. In this context, mandatory legal representation is inextricably linked with legal aid. Regarding the item on the rules, conditions and practical application of mandatory representation, including legal aid questions, again a big variety in terms of law and practice among the EU Member States could be concluded. This is already the case if one only compares the laws of the Member States for purely domestic cases.⁶⁶⁶ When it comes to extradition cases some Member States apply the rules pertained to criminal cases,⁶⁶⁷ others regulate mandatory representation in special rules.⁶⁶⁸

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⁶⁶³ *ibid.*

⁶⁶⁴ Arnold, "Auf dem Weg zu einem Europäischen Strafverteidiger?", (2013) *Strafverteidiger-Forum*, p. 54 (55); Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 102 and 111; Lagodny, in: Górski/Hofmański (ed.), *The European Arrest Warrant and its implementation in the Member States of the European Union*, p. 45

⁶⁶⁵ Another request is to establish databases with essential information and explanations on the criminal procedure law in the other states, in particular for Eastern European countries where a real information deficit was identified, cf. Arnold, *ibid.*

⁶⁶⁶ Cf. Plekksepp, *Die gleichmäßige Gewährleistung des Rechts auf Verteidigerbeistand* (Berlin, 2012), p. 454 et seq. This study compares the concepts on the access to a defence counsel in England/Wales, Germany, Finland and Estonia.

⁶⁶⁷ e.g. Denmark, Czech Republic.

⁶⁶⁸ e.g. Germany.

Also practice of granting mandatory legal representation and legal aid differs considerably among the EU Member States. In Germany, the respective provision (that is subject to the condition of complexity) is interpreted restrictively by the courts so legal aid is usually denied in practice whereas in Denmark, for example, granting legal aid is the rule since the deprivation of liberty by the EAW is always considered as a seriousness of the case.⁶⁶⁹ Problems occur in systems that request a means test, as in the UK and Italy. The means test can take a long time during which the person concerned remains unrepresented. This leads to the major concern that the surrender proceeding is progressed by the prosecutor, but usually the person concerned is not aware what is going on.

Another problem in current legal aid schemes in many EU countries is the fact that legal aid is poorly paid and administered; so many lawyers of any experience and skill do not undertake legal aid work. Regularly, the work does not cover the expenses and efforts of the lawyer in a EAW case which could be quite bluntly observed during the peer review visit in France⁶⁷⁰ whereas the situation seems to be more satisfying in the Netherlands for example. The JUSTICE report concludes that in jurisdictions with a poor legal aid scheme often young and inexperienced lawyers, who take every case they can, grasp the representation in the extradition case whereas experienced and skilled lawyers are not interested in. As a result, this can reduce quality of the defence.⁶⁷¹

A mechanism which provides for legal aid by the executing state for the assistance of lawyers in the issuing state seems not to be established in the EU Member States.⁶⁷²

One lawyer in the interviews pointed out a further interesting aspect of discrepancy, specifically in relation to the proportionality principle. The lawyer argued that often cases of EAWs for petty offences “hit” socially disadvantaged people that do not have any financial means to afford a defence lawyer and remain unrepresented during the proceedings (frequently both in the executing and issuing state). On the other hand EAWs issued for serious criminal offences frequently relate to “white collar crime” where the defendants have regularly also the financial background to establish an effective defence both in the executing and issuing country. As a result, in the cases of serious crime for which the EAW was originally designed the suspect may with the help of his/her defence counsels hinder his/her extradition or settle the case in the issuing state (defence lawyers may reveal more details, raise grounds for refusal, communicate with the issuing state lawyers or experts, take action against national arrest warrant in the issuing state, file appeals through the domestic courts). By contrast, the person in the petty offence case does not know what is going on, is channelled through the procedure and has to face ordinary trial in the state requesting his/her surrender. It was argued that this disproportionateness is surely not in the spirit of the EU surrender scheme.

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⁶⁶⁹ JUSTICE report „European Arrest Warrants: ensuring an effective defence”, fn. 1, p. 48.

⁶⁷⁰ Cf. Chapter 6.4.2. The JUSTICE report (fn. 1), p. 40 also identified Greece, Italy, Poland and Portugal as other countries having a poor legal aid system.

⁶⁷¹ JUSTICE report „European Arrest Warrants: ensuring an effective defence”, fn. 1, p. 40. Another point that could not be deepened in this project is the question in how far the person has also access to a interpreter/translator free of charge, in other words whether the allocation of a mandatory legal representation does also cover the costs for a relevant allocation of an interpreter/translator. See on this issue Arnold, “Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum*, p. 54 (60).

⁶⁷² *ibid.* Exceptions are provided in the UK and Denmark (and partly Ireland) by the following way: legal aid may be granted if the lawyer of the issuing state is accepted as expert advice in the case.

10.4.3 *Effective legal representation*

Access to the files was the major issue that was raised in the survey on the question whether problems of an effective legal representation in a EAW case were encountered by the defence lawyers. Frequently defence lawyers must struggle against many restrictions and obstacles so that a timely and adequate access to the necessary pieces of information is not guaranteed. Concerning the restrictions replies mentioned: the file is accessible for a limited amount of time only, disclosure of only a minimum of information (e.g. EAW and some formal documents only) what makes a thorough assessment impossible, too strict procedure, and time constraints (e.g. disclosure of information only short before the start of the case).

Another point, that was made, were problems to access the files in the issuing state whilst the extradition procedure is ongoing what can also hinder defence in the executing state. It was argued that in some issuing states there is no access to the case file before the surrender of the requested person from the executing state, the defence lawyer of this person in the issuing state may become active only once the requested person is surrendered to this state. Such lack of information hinders also defence in the executing state.

However, also good practices were reported. So one reply indicated that Czech judicial authorities are particularly diligent in the regard of ensuring an effective legal representation.

10.4.4 *Organisation of legal representation*

The findings of the peer review visits in view of the organisation of (dual) legal representation were confirmed by the answers from the survey and recent studies. Getting in contact with the issuing authority by a defence lawyer in the executing state requires a lot of efforts and is often frustrating; these pro-active actions are done only by (very) few advocates.⁶⁷³ Defence lawyers in the interviews further stressed that a defence lawyer in the issuing state is in the best position to find, if necessary, solutions with the issuing authority or to provide for necessary information (be it on legal issues or facts relevant for the case). In the context of the various reasons on the need for a dual representation in EAW cases that are reiterated by defence lawyers, reference can be made to the JUSTICE project in which the reasons were thoroughly elaborated.⁶⁷⁴ To sum up: Advice and assistance is needed in order to

- verify the validity of the EAW (e.g. does described offence fit into the envisaged list offence of the framework decision, is relevant offence equivalent to an offence in the executing state, may statutes of limitations be invoked, how is the stage of proceedings in the issuing state, has the matter already dealt with or may defendant enjoy the ne bis in idem principle?, etc.);
- acquire evidence in the issuing state if a possible ground for refusal is at stake or postponement of surrender is wished (e.g. appropriateness to contact defence lawyer in the issuing state when it comes to questions about the person's family or life in the issuing state, client wishes to dispute the information provided by the issuing state);

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⁶⁷³ See also Langbroek / Kurtovic, "The EAW in the Netherlands" in: Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 245 (289).

⁶⁷⁴ For the following cf. JUSTICE report „European Arrest Warrants: ensuring an effective defence”, fn. 1, p. 42.

- promote or further the administration of the case (defence lawyer in the issuing state may bring forward arguments in favour of the person sought and may therefore explore solutions of the case, e.g. demonstrate lack of proportionality due to length of proceedings or substantial impact on person's family and life, get in contact with the issuing authorities, sort out possibilities to activate suspension of sentence, assist to pay a fine in order to avoid commuting the breach into custodial term of imprisonment).

Some defence lawyers argued that it would be the best way to have a written provision on the European level enacting the right to dual representation as a consequence of which the deciding court can make its decision in a way having been fully informed.⁶⁷⁵ It should be added that it is currently discussed to have a stricter norm on the right to have dual representation in EAW cases or to follow a more pragmatic, flexible approach, i.e. whether there should be a necessity test to extend the right to access to a lawyer to the advice and/or assistance of a lawyer in the issuing state.⁶⁷⁶

As regards the organisation of the dual defence, the vast majority of defence lawyers reiterated that it is currently completely up to the client and his/her defence lawyer in the executing state to organise. Usually defence lawyers refer to personal contacts after having built up an own informal network.⁶⁷⁷ In the interviews defence lawyers stated that – though they established a personnel network - it is difficult to address and/or cooperate with colleagues in individual EU Member States, be it because they had not experienced to cooperate in this country before (hardly had EAWs from the issuing country) or be it because of the very different concepts of law (and sometimes also exercise of profession) that collide.⁶⁷⁸

Some defence lawyers, especially from the side of Dutch advocates, believed that a better quality of defence lawyers must be promoted throughout the EU to ensure that cooperation among defence lawyers of other EU Member States follow the same standard.⁶⁷⁹ They advocated the idea of setting up a European bar of excellent advocates. This may also improve the chances that a Member State (here: the Netherlands) then can pay for legal counsel of its national who are surrendered to other states.⁶⁸⁰ The latter argument shows that the issue of dual representation is of course also much linked to the issue of legal aid (see supra 10.4.2. and below the suggestions for legal aid schemes 10.6.).

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⁶⁷⁵ A proposal for a written provision of dual defence in EAW proceedings was made in the Commission's Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2001) 326 final.

⁶⁷⁶ JUSTICE report „European Arrest Warrants: ensuring an effective defence“, fn. 1, p. 14.

⁶⁷⁷ On the practiced solutions to build up an effective European defence see also Arnold, „Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum*, p. 54 (57).

⁶⁷⁸ For the latter aspect cf. also Arnold, „Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum*, p. 54 (55).

⁶⁷⁹ See in this context also the – quite unique - domestic Dutch approach where lawyers on an extradition duty list must undertake specific training (JUSTICE report „European Arrest Warrants: ensuring an effective defence“, fn. 1, p. 40, 104).

⁶⁸⁰ Langbroek / Kurtovic, „The EAW in the Netherlands“ in: Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 245 (289).

Vice versa, lesser problems were naturally encountered when two EU Member States have intensive judicial cooperation in criminal matters and so also cooperation between defence lawyers became a kind of routine; thus, the defence lawyer in the executing state is often contacted by the defence counsel in the issuing state (e.g. in relation between the Netherlands and Belgium).

Admittedly, this project only addressed defence lawyers who are specialised and experienced in the defence of trans-border/extradition cases. As a result, no conclusions can be made how the organisation of dual defence is managed by inexperienced lawyers. In this regard, recent studies concluded that inexperienced colleagues who undertake EAW cases have often no contacts and no means of obtaining adequate support at all, and – as a consequence – the lack of personnel networks leads to considerable deficits in the defence.⁶⁸¹

The major problem in practice to establish dual representation in the issuing state that was reported is time pressure. The major reason for this is seen in the reluctance of judges to allow adjournments because they fear mutual recognition will be in peril, and the time limits foreseen in the FD EAW will be missed.⁶⁸²

As to an effective organisation of dual representation some defence lawyers, especially in the Netherlands, suggested having a European Bar that also ensures a coordination mechanism in order to coordinate defence in the executing state and in the case where the suspect is tried. A European Bar organisation was also held necessary to guarantee minimum defence standards. For example, sometimes it occurs that an appointed lawyer informally charges money and threatens not to be committed in a serious defence of the suspects. So the European Bar organisation should also provide for disciplinary measures of malfunction. In sum, the idea goes beyond what is currently provided for by the European Criminal Bar Association and the Council of Bars and Law Societies in Europe (CCBE).⁶⁸³

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⁶⁸¹ JUSTICE report „*European Arrest Warrants: ensuring an effective defence*“, fn. 1, p. 43; Arnold, „Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum*, p. 54 (58).

⁶⁸² Mainly put forward by UK defence lawyer.

⁶⁸³ Cf. Chapter 3.8. However, the idea of a European Bar organisation with a mandate as suggested seem not be fully thought through yet, so e.g. whether such an organisation should be financed by (public) EU means or not. Furthermore, German lawyers seem more critical to a supranational network but advocate for extending (own) personnel networks (see Arnold, „Auf dem Weg zu einem Europäischen Strafverteidiger?“, (2013) *Strafverteidiger-Forum*, p. 54 (58)). For the discussion see also Vernimmen-Van Tiggelen/Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union* (Brussels November 2008), p.16..

10.5 Mutual Trust between the EU Member States

In the same way as the project team did it in the interviews during the peer review visits and also in the survey submitted via the EJM to its contact points (mainly prosecutors) the survey designed for the defence lawyers asked to rate (on a 5 points scale from (very) problematic to (absolute) not problematic at all) several mutual trust aspects in the judicial cooperation in criminal matters.

The answers of defence lawyers, both in the interviews and upon the survey, highly confirmed that mutual trust aspects are seen much more critical than by judges and prosecutors. In general, judges and prosecutors did not identify significant problems in the various areas of mutual trust (see also chapter 9). Defence lawyers by contrast did not regard the factors listed in our questionnaire being not problematic or absolute not problematic (at all). About the aspects that are considered problematic or very problematic defence lawyers indicated in particular the quality of the judiciary/judges, the available capacity of the justice systems (judges, prosecutors), the right to a fair trial, the quality of the legal representation and the conditions of detention. Mentioned as problematic were also the length of proceedings, corruption within the justice sector, and the level of proportionality (regarding the relation between the crime committed and the expected level of sanctions).

On balance, defence lawyers opined that mutual trust within the European Union cannot be taken for granted. They criticized the approach of the judiciary of having a nearly “blind” adherence to “mutual recognition”, although many concepts of criminal procedure are not shared between Member States or (still) differ considerably. They felt that the EU may be seen as a single area of justice, but it still does not work as one from the legal perspective (which could be compared to the functioning of a legal system within one Member State). According to the defence lawyers mutual trust is particularly disturbed in the field of extradition/surrender, because extraditions are done automatically, without regarding the arguments that were elaborated by the defence.⁶⁸⁴

The question to indicate the three countries in relation to which most problems are faced with in view of mutual trust and which of the mutual trust aspects of the country concerned are the most problematic ones remained widely unanswered. One defence lawyer pointed out the following considerations: 1. In relation to Poland: Problems in view of proportionality since it is the country that uses the EAW as an upheaval for trivial offences and/or too often short sentences are concerned; 2. Germany for not having a proper system of legal aid (in extradition cases); 3. Italy: legal order does not deem necessary to re-hear the evidence to afford a retrial (instead a quick/rough review is exercised in the way of flipping through the evidence to see if anything went wrong at the trial).

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⁶⁸⁴ See also Boaventura de Sousa Santos, Conceição Gomes, *The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area*, (Coimbra October 2010), p. 99: “As a generalized perception, we find the apprehension of a hypertrophy of securitarian interests at the cost of citizenship. This appears to be common to defence lawyers in general, as expected, but is also present in judges, public prosecutors and police officers. All in all, there is some uneasiness in actors of all four countries that blind mutual trust/ mutual recognition overshadow fundamental rights.”

10.6 Suggestions for improvements of the European Arrest Warrant procedure

Defence lawyers were asked for providing specific suggestions for improving the European Arrest Warrant procedure. The suggestions made were usually a result of the problems as described in this chapter. Thus, the major concerns of the defence lawyers focus on the very formalistic approach of the judicial authorities in the executing state, severe limits for the defence in terms of time, the very rare possibilities to successfully present arguments against the surrender (in particular when it comes to infringements into the private and family life of the person), the overuse of the EAW for petty offences, and the poor or sporadic provision of legal aid.

Therefore, suggestions were particularly made in view of a better respect of the rights of the person in the executing state. Here, two approaches were proposed: One would be better and more cooperation between the competent authorities across the EU because such cooperation would, as a consequence, enable respecting the rights of persons to be prosecuted in the country of residence instead of issuing the EAWs which fundamentally affect lives of people. Another way would be to introduce a mechanism in the executing state that ensures human rights issues are properly taken into account by the courts; in other words to provide the executing authorities with more options to deny a request. It was admitted that even though this would conflict with the idea of mutual trust, the EU should need a mechanism that enables Member States to tackle the problem of poorly motivated EAWs or EAWs that do not justify an encroachment of the person's liberty and family life.

In the context of the problems around the proportionality principle, also two similar ways were proposed for solution. It was suggested that the police and judicial authorities across the EU should cooperate more via the mutual legal assistance channels (e.g. to question someone) instead of often immediately issuing the EAWs. It was also argued to think about introducing a bar that limits the EAW to serious offences, preventing its use for the thousands of petty offences.

As regards the guarantee of a meaningful defence in surrender cases, the usually tabled suggestion was to have an EU legal aid scheme available in order to overcome the problem that life and livelihoods of defendants are getting wrecked by the introduced fast-track procedure. However, the replies did not make clear whether a harmonisation of the legal aid law in the EU Member States is strived for (so access to legal aid can be made both in the issuing and executing state before surrender is effected) or a genuine legal aid system on the EU level. Nonetheless, most defence lawyers are at one with the statement that the improvement of the situation of the defence in a transnational, even to say "European" criminal procedure decisively depends on the possibilities of financing through the European Union.

Another important item in the context to ensure a meaningful defence obviously related to dual representation. For the demand to have clear, written provisions on dual representation and to establish a "European defence coordination mechanism" see *supra* 10.4.4.

Other suggestions for improvements concerned an increased harmonisation in the field of criminal procedure in order to create the European single area of justice also in reality. From a common law perspective it was proposed to change the system whereby to succeed in obtaining a surrender the issuing authority has to show there is a *prima facie* case to answer on the evidence (according to the model of the USA).

11 Comparative overview of the country reports and surveys

Martin Böse

11.1 The Principle of Proportionality in European law and national criminal justice systems

11.1.1 European law

The principle of proportionality is integral part of the legal order of the European Union. Numerous Treaty provisions⁶⁸⁵ explicitly refer to this principle or one of its elements (“necessary”)⁶⁸⁶, and in the case law of the Court of Justice⁶⁸⁷, the proportionality principle is established as one of the general principles of EU law. The Court has defined the concept of the proportionality principle as follows:

“By virtue of that principle, measures .. are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.”⁶⁸⁸

Thus, a measure is in conformity with the proportionality principle if

- the measure pursues a legitimate objective,
- it is suitable for attaining this objective,
- the measure is necessary to achieve the objective, i.e. less intrusive and equally efficient means are not available,
- and the means employed are not disproportionate to the objectives pursued (balancing of interests, proportionality in the narrow sense).⁶⁸⁹

The principle of proportionality is not necessarily related to individual rights but an objective principle.⁶⁹⁰ In particular, reference to the principle of proportionality can be made in order to protect the sovereign powers and competences of the Member States: According to Art. 5 (4) TEU, any legislative action of the Union shall not exceed what is necessary to achieve the objectives of the Treaty.⁶⁹¹ In this particular context

⁶⁸⁵ See e.g. Art. 5 (4) TEU, Art. 69 and 296 (1) TFEU, Art. 49 (3) CFR, Art. 52 (1) CFR.

⁶⁸⁶ See e.g. Art. 21 (2), Art. 43 (2), Art. 48 (1), Art. 66, Art. 67 (3), Art. 75, Art. 77 (3), Art. 80 (2), Art. 81 (2), Art. 82 (2), Art. 113, Art. 114 (4) TFEU.

⁶⁸⁷ ECJ, case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster und Berodt & Co*, [1970] ECR 1161 par. 20 et seq.; case 122/78, *SA Buitoni v. Fonds d'orientation et de régularisation des marchés agricoles*, [1979] ECR 677 par. 16/18 et seq.; case 265/87, *Schräder v. Hauptzollamt Gronau*, [1989] ECR 2237 par. 20 et seq.

⁶⁸⁸ ECJ, case 265/87, *Schräder v. Hauptzollamt Gronau*, [1989] ECR 2237 par. 21.

⁶⁸⁹ ECJ, judgment of 15 November 2012, joined cases C-539/10 and C-550/10, *Stichting Al-Aqsa v. Council*, par. 122 et seq.; J. Kühling, *Fundamental Rights*, in: A. von Bogdandy/J. Bast (ed.), *Principles of European Constitutional Law*, 2nd edition, Oxford 2010, p. 479 (505-506).

⁶⁹⁰ E. Pache, „Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften“, [1999] *Neue Zeitschrift für Verwaltungsrecht* 1033 (1036-1037).

⁶⁹¹ See also Art. 296 (1) TFEU.

with the principle of subsidiarity⁶⁹², the proportionality test is “competence-related”.⁶⁹³ This objective concept of proportionality may also apply to the financial impact and costs of the measure to be taken.⁶⁹⁴ Nevertheless, the main function of the proportionality principle lies in providing a safeguard against violations of individual rights. Accordingly, Art. 52 (1) 2 of the EU-Charter of Fundamental Rights (CFR) states:

“Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

The Charter’s (limited) field of application (Art. 51 CFR) notwithstanding, this applies to any limitation of a Fundamental Right guaranteed by the Charter, and to any measure taken in the framework of criminal proceedings in particular. As regards criminal sentencing, Art. 49 (3) CFR explicitly states that the penalty must not be disproportionate to the criminal offence.

11.1.1.1 *Proportionality of arrest and detention*

For the evaluation of the EAW, the proportionality of arrest and detention is a crucial issue. The freedom of the person is guaranteed by Art. 6 of the Charter which according to Art. 52 (3) CFR has the same meaning and scope as Art. 5 ECHR.⁶⁹⁵ Art. 5 (1) ECHR provides a list of legitimate grounds for arrest and detention, in particular detention of persons serving a criminal sentence (Art. 5 (1) lit. a ECHR), arrest and detention of a suspect for the purpose of prosecution (pre-trial detention, Art. 5 (1) lit. c ECHR), and arrest and detention for the purpose of extradition (Art. 5 (1) lit. f ECHR). Art. 5 (3) and (4) ECHR provides for procedural safeguards, the right to judicial review in particular.

In its case law on Art. 5 (1) lit. c ECHR, the European Court of Human Rights has consistently held that pre-trial detention has to meet the requirements set out by the proportionality principle.⁶⁹⁶ If the defendant is detained in order to ensure his presence at the trial, it must be established that the person’s detention is strictly necessary to that end and that other, less stringent measures, are not available (or not equally efficient).⁶⁹⁷ The Convention itself refers to alternative measures by stating that release of the defendant may be conditioned by guarantees to appear for trial (Art. 5 (3) 2 ECHR). Accordingly, the Court has held that a violation of Art. 5 (1) lit. c ECHR occurred if the national court failed to consider whether less intrusive

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⁶⁹² See opinion of Advocate General *Dámaso Ruiz-Jarabo Colomer* of 12 September 2006, case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3638 par. 61 et seq.

⁶⁹³ G. Lienbacher, Artikel 5 EUV, in: J. Schwarze (ed.), *EU Kommentar*, 3rd edition, Baden-Baden 2012, par. 35-36 („Der kompetenzbezogene Grundsatz der Verhältnismäßigkeit“).

⁶⁹⁴ See the Protocol on the application of the principles of subsidiarity and proportionality, O.J. C 306 of 17 December 2007, p. 150 (Art. 5), see also Art. 192 (5) TFEU (“costs deemed disproportionate”); see further ECJ, judgment of 11 May 2011, case C-176/09, *Luxemburg v. Parliament and Council*, par. 61 et seq., 68 et seq.

⁶⁹⁵ See also the official explanations to the Charter, O.J. C 303 of 14 December 2007, p. 17 (19); opinion of Advocate General *Eleanor Sharpston* of 18 October 2012, case C-396/11, *Radu*, par. 58.

⁶⁹⁶ ECtHR, judgment of 4 May 2006, case no. 38797/03, *Armbruszkiewicz v. Poland*, § 31; judgment of 18 March 2008, case no. 11036/03, *Ladent v. Poland*, § 55; judgment of 14 October 2010, application no. 38717/04, *Khayredinov v. Ukraine*, § 28.

⁶⁹⁷ ECtHR, judgment of 18 March 2008, application no. 11036/03, *Ladent v. Poland*, §§ 55-56.

means (e.g. bail) were available and sufficient to ensure the defendant's presence at trial.⁶⁹⁸ Furthermore, when assessing the proportionality of pre-trial detention, the court has to consider the gravity of the offence and the penalty which is likely to be imposed; in case of petty offences which are likely to be punished by a fine or any other less severe penalty, pre-trial detention is considered disproportionate.⁶⁹⁹

The recent case law of the European Court of Human Rights on extradition detention (Art. 5 (1) lit. f ECHR) follows the same reasoning. According to the Court, detention must be closely connected to the relevant ground (deportation or extradition); the place and conditions of detention should be appropriate; and the length of the detention should not exceed what can be reasonably required for the purpose pursued.⁷⁰⁰ Thus, it appears from the case law that arrest and detention based on any of the grounds listed in Art. 5 (1) ECHR is subject to the limitations set out by the proportionality principle; nevertheless, the scope of the proportionality test to be applied varies depending on the type of detention involved.⁷⁰¹ Correspondingly, the entry of an alert in the SIS-II (which will immediately result in an arrest of the person sought) is subject to a proportionality test.⁷⁰²

On the basis of this case-law, Advocate General *Sharpston* recently stated that the judicial authority executing a EAW has to abide by the principle of proportionality:

“The deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Art. 5 of the Convention and Art. 6 of the Charter. That interference will normally be justified as ‘necessary in a democratic society’ by virtue of Art. 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (thus satisfying the proportionality test).”⁷⁰³

Thus, if the person sought has been arrested in the executing state, the national authorities of that state are held to examine whether detention of the arrested person is strictly necessary or whether less intrusive means are available to prevent the person from absconding (Art. 12 FD EAW).

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⁶⁹⁸ ECtHR, judgment of 4 May 2006, application no. 38797/03, *Armbruszkiewicz v. Poland*, § 32; judgment of 18 March 2008, application no. 11036/03, *Ladent v. Poland*, § 56.

⁶⁹⁹ ECtHR, judgment of 18 March 2008, application no. 11036/03, *Ladent v. Poland*, § 56.

⁷⁰⁰ ECtHR, judgment of 19 February 2009, application no. 3455/05, *A. and others v. United Kingdom*, par. 164.

⁷⁰¹ ECtHR, judgment of 12 September 2012, applications nos. 25119/09, 57715/09 and 57877/09, *James, Wells and Lee v. United Kingdom*, par. 195. As regards detention of convicted persons (Art. 5 (1) lit. a ECHR), the Court has considered the length of the imposed sentence as a matter for the national authorities rather than for the Court (*ibid.*), see however the Court's assessment in that case (par. 201 et seq.).

⁷⁰² Art. 21 Council Decision 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (2007/533/JHA), O.J. L 205 of 7 August 2007, p. 63.

⁷⁰³ Advocate General *Eleanor Sharpston*, opinion of 18 October 2012, case C-396/11, *Radu*, par. 62.

11.1.1.2 Proportionality of criminal sanctions

The principle of proportionality does not only apply in the framework of criminal proceedings and transnational law enforcement but to criminal sentencing as well (Art. 49 (3) CFR). This is also reflected in Art. 83 (2) TFEU that makes the exercise of the Union's criminal law competence subject to the condition that an approximation of criminal laws of the Member States proves "essential" (necessary) to ensure the effective implementation of a Union policy. The Treaty thereby refers to a sub-principle of the proportionality principle, i.e. the rule that criminal law should be regarded as a means of last resort (*ultima ratio*).⁷⁰⁴ More generally, the Court has stated in the Greek Maize case that the Member States have to ensure that infringements of Community law are penalised and that the sanctions to be imposed are effective, dissuasive and proportionate.⁷⁰⁵

The proportionality of a criminal sanction can arise under two aspects. First, it can be related to the question whether a criminal sentence is legitimate or not. Second, the severity of the penalty has to correspond to the gravity of the offence.

As to the first aspect, the proportionality principle calls upon the legislator to define a legitimate objective (protection of a legal interest) and to assess whether criminal law is a suitable, necessary (*ultima ratio*) and adequate (proportionate) instrument to achieve this objective.⁷⁰⁶ A corresponding political commitment has been stated in the Stockholm Programme of the Council stating:

"Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort."⁷⁰⁷

Nevertheless, the national and the European legislator have a margin of discretion when adopting criminal law provisions.⁷⁰⁸ So, there are only a few cases in which a criminal sanction has been considered to be disproportionate as such. For instance, the European Court of Human Rights held that a criminalization of homosexual conduct is in breach with the right to private life (Art. 8 ECHR) because the breadth and the absolute character of the criminal offence goes far beyond of what can be considered necessary in a democratic society.⁷⁰⁹ In another case, a criminal law provision on abortion was held incompatible with Art. 8 ECHR because it did not provide for a procedure under which a pregnant woman could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy.⁷¹⁰

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⁷⁰⁴ See Advocate General Mazak, opinion of 28 June 2007, case C-440/05, *Commission v. Council*, [2007] ECR I-9100 par. 71, 102.

⁷⁰⁵ ECJ, case 68/88, *Commission v. Greece*, [1989] ECR 2985 par. 24.

⁷⁰⁶ See P. Asp et alii, "Manifesto on European Criminal Policy", [2009] *Zeitschrift für Internationale Strafrechtsdogmatik* 707 (709 et seq.), with various examples.

⁷⁰⁷ O.J. C 115 of 4 May 2010, p. 1 (15).

⁷⁰⁸ M. Böse, "The Principle of Proportionality and the Protection of Legal Interests (Verhältnismäßigkeit und Rechtsgüterschutz)", [2011] *European Criminal Law Review* 35 (37-38 and passim).

⁷⁰⁹ ECtHR, judgment of 22 October 1981, application no. 7525/76, *Dudgeon v. United Kingdom*, Series A no. 45, §§ 61-62; see by contrast ECtHR, judgment of 12 April 2012, application no. 43547/08, *Stübing v. Germany*, §§ 55-67 (no violation of Art. 8 ECHR with regard to the criminal offence of incest).

⁷¹⁰ ECtHR judgment of 16 October 2010, application no. 25579/05, *A, B and C v. Ireland*, § 243.

In the case law of the European Court of Justice, the proportionality of criminal sanctions has been touched upon if national criminal law interfered with the economic freedoms of the Treaty (free movement of goods, persons, services and capital). In several cases the Court has held that a national law prohibiting a certain conduct is in breach with EU law and, thus, an infringement of the national provision must not be punished by a criminal sentence.⁷¹¹

On the other hand, the proportionality test can be related to the nature and the level of the criminal sentence. In this particular context, proportionality is not (only) established with regard to the objective pursued, but with regard to the nature and gravity of the conduct that shall be punished (Art. 49 (3) CFR). Accordingly, the European Court of Human Rights has stated that a criminal court imposing a sentence shall be competent to assess the proportionality between the fault and the sanction.⁷¹²

Proportionate sanctioning requires a consistent sanctioning regime with a ranking of different categories of crimes and penalties. Thus, the proportionality of the criminal penalty has to be adjusted in relation to sanctions prescribed for other (similar, more or less serious) offences. This comparative concept of proportionality is called *ordinal proportionality*.⁷¹³

Once again, this can be illustrated by referring to the case law of the Court of Justice on the economic freedoms of EU law: Since a national of a Member State has the right to move freely within the Union, the failure to obtain necessary documents (identity card, passport) cannot be considered equivalent to corresponding infringements of a third-state national who is not *per se* entitled to enter the territory of the Member State concerned, but requires a residence permit. Applying the same sanctioning regime to a third-state national and a citizen of another Member State would result in a disproportionate penalty with regard to the latter if a national not complying with similar formal requirements is liable only to considerably lighter penalties.⁷¹⁴

The concept of *ordinal proportionality* can be applied in the framework of a national criminal justice system, but also in a European sanctioning system such as the penalty regime in EU competition law. According to Art. 23 (3) Regulation No. 1/2003⁷¹⁵, in fixing the amount of the penalty the Commission shall have regard to both the gravity and the duration of the infringement. In its guidelines on the setting of fines⁷¹⁶, the Commission has published the method for the setting of fines and, in particular, the aggravating (e.g. continuous or repeated illegal conduct, leading role of the undertaking concerned, sufficiently deterrent effects of the fine) and mitigating (e.g. cooperation with the Commission) factors.

.....
⁷¹¹ See e.g. ECJ, case 8/74, *Dassonville*, [1974] ECR 837; joined cases C-338/04, C-359/04 and C-360/04, *Placanica and others*, [2007] ECR I-1891 par. 68 et seq.

⁷¹² ECtHR, judgment of 10 February 1983, application nos. 7299/75 and 7496/76, *Albert and Le Compte v. Belgium*, Series A no. 58, §§ 36, 37.

⁷¹³ A. von Hirsch, *Censure and Sanctions*, 1993, p. 18-19.

⁷¹⁴ ECJ, case 8/77, *Sagulo, Brenca and Bakhouché*, [1977] ECR 1495 par. 10-13; see also ECJ, case C-193/94, *Skanavi*, [1996] ECR I-929 par. 34 et seq.

⁷¹⁵ O.J. L 1 of 4 January 2003, p. 1.

⁷¹⁶ O.J. C 210 of 1 September 2006, p. 2 (4).

The proportionality of a sanction, however, can also be assessed in absolute terms, i.e. without reference to a given sanctioning system. This notion of proportionality is called *cardinal proportionality*.⁷¹⁷ An absolute proportionality test, however, can only indicate the outer limits for proportionate punishment, e.g. by stating that life imprisonment is disproportionate to petty theft.⁷¹⁸

Thus, in its case law on Art. 5 (1) lit. a ECHR and the proportionality of imprisonment, the European Court of Human Rights has considered the length of the imposed sentence as a matter for the national authorities rather than for the Court.⁷¹⁹ Nevertheless, the Court stated that a convicted person having served his sentence may not be subject to preventive detention without having access to appropriate rehabilitative courses.⁷²⁰ In another case, the Court held that a detention of more than five years as a result of a one-time breach of a bail condition is disproportionate and, thus, in breach with Art. 5 (1) ECHR.⁷²¹

Furthermore, a disproportionate criminal sanction (in absolute terms) might come close to a violation of Art. 3 ECHR and Art. 4 CFR both prohibiting inhuman or degrading punishment. Although the European Court of Human Rights has not excluded that a disproportionate sentence might result in a degrading or inhuman punishment, it stated that a sentence five years imprisonment does not reach the minimum level of severity required by Art. 3 ECHR.⁷²² In a recent judgment, the Court stated that a “grossly disproportionate” sanction could amount to ill-treatment contrary to Art. 3 ECHR; nevertheless, the Court emphasized that the criteria of “gross disproportionality” will only be met on rare and unique occasions.⁷²³

11.1.1.3 Proportionality and mutual trust

Since the European Council in Tampere, the principle of mutual recognition is considered to form the cornerstone of judicial cooperation in criminal matters.⁷²⁴ Under the Treaty of Lisbon, it has become part of primary EU law (Art. 67 (3), Art. 82 (1) TFEU). The EAW is the first measure implementing the principle of mutual recognition, and it is based on the high level of confidence between the Member States.⁷²⁵ Right from the outset, it has been considered essential for mutual trust that Member States abide by common minimum standards, in particular with regard to fundamental legal principles enshrined in Art. 6 TEU.⁷²⁶

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⁷¹⁷ A. von Hirsch, *supra*, p. 18-19.

⁷¹⁸ P. Asp, “Two notions of proportionality”, in: K. Nuotio (ed.), *Festschrift in honour of Raimo Lahti*, Helsinki 2007, p. 207 (216).

⁷¹⁹ ECtHR, judgment of 2 March 1987, application no. 9787/82, *Weeks v. United Kingdom*, Series A no. 114, § 50; ECtHR, judgment of 12 September 2012, applications nos. 25119/09, 57715/09 and 57877/09, *James, Wells and Lee v. United Kingdom*, § 195.

⁷²⁰ ECtHR, *James, Wells and Lee v. United Kingdom*, *ibid.*, § 201 et seq., § 221.

⁷²¹ ECtHR, judgment of 27 July 2010, application no. 28221/08, *Gatt v. Malta*, §§ 43-44 and §§ 51-52, with regard to Art. 5 (1) lit. b ECHR (“detention ... in order to secure the fulfillment of any obligation prescribed by law”); see also with regard to a detention based upon an arbitrary conviction: ECtHR, judgment of 29 May 1997, application no. 19233/91, *Tsirlis and Kouloumpas v. Greece*, Reports of Judgments and Decisions, 1997-III, § 62.

⁷²² ECtHR, judgment of 27 July 2010, application no. 28221/08, *Gatt v. Malta*, § 29.

⁷²³ ECtHR, judgment of 17 January 2012, applications nos. 66069/09 and 130/10 and 3896/10, *Vinter and others v. United Kingdom*, § 89.

⁷²⁴ Presidency conclusions of the Tampere European Council of 15 and 16 October 1999 no. 33.

⁷²⁵ Consideration (10) of the Framework Decision of 13 June 2002 on the European Arrest Warrant, O.J. L 190 of 18 July 2002, p. 1; see also with regard to Art. 54 CISA: ECJ, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR 1345 par. 33.

⁷²⁶ Presidency conclusions of the Tampere European Council of 15 and 16 October 1999 no. 33; recitals (12) and (13) of the Framework Decision on the European Arrest Warrant.

Since all Member States share common values such as democracy, rule of law and respect for human rights (Art. 2 and Art. 6 TEU), the principle of mutual recognition is based upon the presumption that each Member State lives up to these standards and complies with its obligations under the ECHR. Correspondingly, the implementation of the principle of mutual recognition may be suspended only in the event of a serious and persistent breach of the principles set out in Art. 6 (1) TEU (see Art. 7 (1) and (2) TEU).⁷²⁷

This high threshold notwithstanding, there are reasons to assume that human rights concern may suspend a Member State's obligation to recognize and execute a EAW in individual cases as well. The Framework Decision explicitly states:

“Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation ...”⁷²⁸

Furthermore, Art. 1 (3) of the Framework Decision recalls the Member States' obligation to respect fundamental rights and fundamental principles of the Union.⁷²⁹ With regard to the surrender of the arrested person, this obligation might come into conflict with the principle of mutual recognition.

The tension between the obligation to respect for human rights and mutual recognition has recently been addressed by the Court of Justice in the area of common asylum policy. Like the EAW, the Common European Asylum System is based upon the principle of mutual recognition and the assumption that each Member State abides by fundamental rights as enshrined in Art. 6 TEU.⁷³⁰ Therefore, the Court held that it can be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the CFR and the ECHR (“presumption of compliance”) and that even a violation of these rights by the Member State responsible will not as such affect the obligations of the other Member States under the Common European Asylum System because otherwise these obligations were deprived of their substance.⁷³¹ Nevertheless, the presumption that Member States comply with their obligations under the CFR and the ECHR is not conclusive, but allows for evidence to the contrary.⁷³² The Court concluded that

“Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that

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⁷²⁷ Recital (10) of the Framework Decision on the European Arrest Warrant.

⁷²⁸ Recital (12) of the Framework Decision on the European Arrest Warrant.

⁷²⁹ See also recital (13) of the Framework Decision on the European Arrest Warrant.

⁷³⁰ ECJ (Grand Chamber), judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. and others*, par. 14-15, with further references.

⁷³¹ ECJ, *ibid.*, par. 80 et seq.

⁷³² ECJ, *ibid.*, par. 99 et seq.

Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision ...”⁷³³

As to the EAW, the issue of mutual trust has been raised in the *Radu* case. In her opinion, Advocate General *Sharpston* has drawn conclusions quite similar to the Court’s reasoning in the asylum case. Referring to Art. 1 (3) of the Framework Decision and to the case-law of the European Court of Human Rights in extradition cases⁷³⁴, she stated that

“the competent judicial authority ... can refuse the request for surrender ... where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. ...”⁷³⁵

Although the Advocate General referred to the Court’s judgment in the asylum case⁷³⁶, she did not subject the exception to mutual trust subject to “systemic deficiencies” in the issuing Member State. Moreover, she explicitly rejected the minimum (evidential) standards of the European Court of Human Rights (“flagrant” violation of human rights “beyond reasonable doubt”) but emphasized that the criteria must be defined in a manner that it is not practically impossible for the arrested person to challenge the legality of surrender (“fundamental” violation, “substantially well founded objections”).⁷³⁷

In the regime on mutual recognition of decisions imposing financial penalties, the corresponding Framework Decision explicitly provides for a refusal ground based upon the “European *ordre public*”. Art. 20 (3) of the Framework Decision on the application of the principle of mutual recognition to financial penalties⁷³⁸ states:

“Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions.”

.....
⁷³³ ECJ, *ibid.*, par. 106.

⁷³⁴ Advocate General *Eleanor Sharpston*, opinion of 18 October 2012, case C-396/11, *Radu*, par. 70 et seq., 74 et seq.

⁷³⁵ *Ibid.*, par. 97.

⁷³⁶ *Ibid.*, par. 76.

⁷³⁷ *Ibid.*, par. 82 et seq.

⁷³⁸ Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (O.J. L 76 of 22 March 2005, p. 16).

This line of reasoning is valid for any fundamental right enshrined in Art. 6 TEU and to the proportionality principle in particular. In her opinion, the Advocate General explicitly refers to the proportionality of criminal sanctions (Art. 49 (3) CFR), but did not examine whether a disproportionate sanction could give rise to a refusal of surrender.⁷³⁹ Nevertheless, according to the case-law of the European Court of Human Rights, extradition could amount to a breach of Art. 3 ECHR if the expected punishment in the requesting state is considered to be “grossly disproportionate”.⁷⁴⁰ In that regard, a violation of Art. 3 ECHR will rely upon the above-mentioned concept of absolute or cardinal proportionality.

Nevertheless, it seems doubtful whether under the principle of mutual recognition a Member State can still refuse to execute a EAW, referring to constitutional principles. In recital (12) of the preamble, the Framework Decision on the European Arrest Warrant stresses that it “does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media”. In judicial cooperation in civil matters, a corresponding refusal ground based upon the national *ordre public* is well-established.⁷⁴¹

On the other hand, a reservation based upon national constitutional law would seriously undermine the primacy of EU law. In recent judgment, the Court of Justice has rejected an interpretation of EU law (Art. 53 CFR) that allows a Member State to refuse the execution of a EAW by referring to fundamental rights enshrined in its national constitution.⁷⁴² In any case, such an exception to the obligation to recognize and execute a EAW should be limited to the fundamental rights mentioned in recital (12) of the Framework Decision and not apply to the principle of proportionality as such.

11.1.2 National law

In the participating countries, the principle of proportionality is considered a general principle of law. In France and Germany, it can be derived from constitutional law, and in the Netherlands it forms part of the general principle of fair balancing of interests. In Germany, the principle of proportionality is one of the most important constitutional principles. Its status as a general (constitutional) principle notwithstanding, the proportionality principle is expressly referred to in many statutory provisions and administrative guidelines as well. Furthermore, the applicability of this principle in the national criminal justice system can be derived from the ECHR and the case law of the European Court of Human Rights.

In particular, the principle of proportionality applies to criminal sentencing. In France and Germany, the proportionality of the criminal offence (*in abstracto*) is subject to review by the constitutional court. In all three countries, the judge has to comply with the proportionality principle when imposing the sanction (*in concreto*), in particular the sanction has to correspond to the personal guilt of the offender. Since the criminal justice system of the Netherlands adheres to the principle of opportunity (non-mandatory

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⁷³⁹ *Ibid.*, par. 103.

⁷⁴⁰ ECtHR, judgment of 17 January 2012, applications nos. 66069/09 and 130/10 and 3896/10, *Vinter and others v. United Kingdom*, §§ 88, 89.

⁷⁴¹ Art. 34 (1) Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. L 12 of 16 January 2001, p. 1): “A judgment shall not be recognized 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought ...”

⁷⁴² ECJ, judgment of 26 February 2013, case C-399/11, *Melloni*.

prosecution)⁷⁴³, special attention is paid to whether less intrusive alternatives to criminal punishment are available and sufficient; in that regard, administrative guidelines provide criteria for the prosecutor in exercising his discretion. In the French criminal justice system which is also based upon the opportunity principle, the prosecutor has to apply a proportionality check when exercising its prosecutorial discretion.

In the national laws of criminal procedure, several provisions explicitly refer to the proportionality principle. Irrespective such explicit reference, any measure interfering with individual rights must be in conformity with the proportionality principle. This applies in particular to coercive measures such as surveillance of telecommunication, arrest and pre-trial detention. The proportionality principle in the context of arrest and detention is reflected in the following requirements:

- a qualified suspicion⁷⁴⁴;
- a minimum gravity of the crime of which the arrested person is charged⁷⁴⁵;
- a ground for detention (e.g. the risk that the suspect will abscond, tamper with evidence or continue to commit crimes)⁷⁴⁶;
- the requirement that less intrusive means (e.g. bail, house arrest, judicial supervision) are not available or not sufficient to achieve the objective pursued⁷⁴⁷;
- time limits for the duration of pre-trial detention; however, these time-limits are not absolute, but can be extended under certain circumstances (e.g. in particularly complex and serious cases).⁷⁴⁸

Furthermore, the national laws provide for procedural safeguards to ensure the legality (and proportionality) of arrest. The arrested person has a right to be examined by a court within 48 hours.⁷⁴⁹ If the court issues a detention order, the defendant has the right to apply for repealing or suspending that order and to appeal against the decision rejecting his/her application.⁷⁵⁰ Furthermore, the arrested person has to be informed of his rights (*inter alia*) to consult with a lawyer, to demand an examination by a physician, to notify a relative or a person trusted by him.⁷⁵¹

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⁷⁴³ Sections 167 and 242 Dutch CCP.

⁷⁴⁴ Section 67 (3) Dutch CCP; Section 112 (1) German CCP.

⁷⁴⁵ Section 67 (1) Dutch CCP (maximum penalty of four years imprisonment or a catalogue offence); section 143-1 French CCP (felony or misdemeanor of at least three years imprisonment); see also section 113 German CCP (detention is limited to exceptional cases if the expected sentence is not more than six months imprisonment or a fine of 180 daily units).

⁷⁴⁶ Section 67a Dutch CCP; section 144 French CCP; section 112 (2) and (3), section 112a German CCP.

⁷⁴⁷ Section 80 Dutch CCP; Sections 144, 138 French CCP; sections 116, 116a German CCP.

⁷⁴⁸ Section 66 Dutch CCP (90 days); sections 145-1 (4 months for misdemeanours) and 145-2 (1 year for felonies) French CCP; section 121 German CCP (six months).

⁷⁴⁹ Section 63 French CCP (24 hours, but extension to 48 hours possible); section 115 German CCP.

⁷⁵⁰ Section 69, 71 Dutch CCP; sections 148, 186 French CCP; sections 117, 304 German CCP.

⁷⁵¹ Section 63-1 French CCP; section 114b German CCP.

11.2 The principle of proportionality in the issuing state

11.2.1 Legal and institutional framework

According to the national laws of all participating countries, a EAW can be issued for offences punishable with a maximum sentence of at least one year imprisonment or for the execution of a sentence of at least four months imprisonment; this corresponds to the threshold set out in Art. 2 (1) FD EAW.

Nevertheless, the interviews in the participating countries have revealed that a EAW is not issued whenever these criteria are met. Internal guidelines in Germany even provide for a higher threshold (expected sentence of at least one year). Similarly, French and German prosecutors reported not to issue a EAW for the execution of a sentence of six months (France) or seven / ten months (Germany – Cologne / Berlin) imprisonment or less. In the Netherlands, the proportionality of a EAW is assessed case by case.

In all three participating countries, it is the prosecutor that decides on whether to issue a EAW or not. Although central authorities are not involved in the decision-making to issue a EAW prosecutors may seek, if appropriate, the assistance of a central authority; in France and the Netherlands, central authorities have a more important role in the formal validation of the EAW, thus ensuring quality of the EAW whereas in Germany this task is often taken over by internal MLA units within the (bigger) prosecution services. All in all, it is up to the prosecutor to apply the proportionality test when issuing a EAW for the purpose of prosecution or of the execution of a sentence imposed by a domestic court.

Nevertheless, the prosecutor's assessment on proportionality is determined by the decision of the competent court. If a court has imposed a custodial sentence that shall be executed by means of issuing a EAW, the court has implicitly established that the penalty (and its execution via detention) is proportionate. Thus, the prosecutor usually follows to the court's assessment and will abstain from issuing a EAW only if the transnational dimension of the case gives rise to discuss the issue of proportionality (i.e. cases that do not meet the minimum threshold, see *supra*).

Similarly, in France and Germany the prosecutor's assessment of issuing a EAW for the purpose of prosecution is based upon a national arrest warrant issued by an investigative judge or a court. Since the national arrest warrant is subject to the proportionality principle, French prosecutors rely on the court's assessment of the proportionality of the national arrest warrant when issuing a EAW. In Germany, the prosecutors' practice differs: In some districts, a EAW is issued "automatically" if a court has issued a national arrest warrant (Frankfurt); in others, the prosecutor assesses the proportionality of the EAW on its own (Berlin, Cologne). According to the EJM survey, the picture is quite similar in most other Member States where the issuing of a EAW also requires a national arrest warrant issued by a judge conducting a proportionality test.

Thus, the prosecutor's decision is mainly based upon the decision of the court; the ex-ante judicial review thereby provides for judicial protection of the personal freedom of the person wanted.⁷⁵² Nevertheless, the prosecutor's decision to issue a EAW cannot be challenged before court. As a consequence, judicial review will not be available before arrest respectively available only insofar as the national arrest warrant is subject to legal remedies⁷⁵³.

11.2.2 Criteria of proportionality

In all participating countries, the minimum threshold for a EAW (maximum penalty of at least one year imprisonment, penalty of at least four months imprisonment, Art. 2 (1) FD EAW) is properly implemented into national law. This threshold, however, only defines a minimum standard of proportionality. Even if this minimum standard is met, the issuing authority applies a proportionality test involving various aspects of the individual case. In the participating countries, national prosecutors mainly apply the criteria mentioned in the European Handbook on how to issue a EAW, even if they are not aware of this handbook (France).

In all participating countries, the seriousness of the crime seems to be the most important criterion. In the Netherlands, a EAW is reported to be used "for heavier crimes only" whereas statistical data on EAWs issued by German prosecutors reveals that this instrument is applied to minor offences, too (e.g. theft of objects of minor value, insult, damaging property). The surveys also suggests that the EAW is not issued for serious crimes only; in particular, fraud is among the top three list offences for which EAWs are issued in the Member States (EJN survey), and the defence lawyers reported that EAWs are very often issued for less serious crimes (defence counsel survey).

In Germany and France, the gravity of the crime and the expected penalty (including the aspects of previous convictions, the reasonable chance of conviction, and the public interest in an effective prosecution) are already considered by the judge issuing the national arrest warrant. According to the EJN survey, the criteria considered to be most important are the possibility of detention, the seriousness of the offence and the expected penalty. In minor cases, the prosecutor may refrain from issuing a EAW against a foreign suspect who is supposed to be abroad and not to have a residence permit (Germany).

Some criteria (detention conditions, effective exercise of defence rights, right to privacy and family life) cannot be applied because the issuing authority usually does not know the place where the suspect will be arrested (Germany). If the circumstances of the case give rise to an interference with fundamental rights (Art. 3 and Art. 8 ECHR), this will usually not render a EAW disproportionate (Germany), a fact that has been severely criticized by defence lawyers (defence counsel survey). By contrast, the age of the person is considered an important criterion; in particular, EAWs against minors are issued in exceptional cases only (Germany).

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⁷⁵² Cf. also Response by the European Criminal Bar Association to the Home Office Extradition Review, p. 4 (available at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf), pointing out that it seems that EAWs are often issued by prosecutors without the involvement of judges or an authority "sufficient to offer the guarantees of independence required" in the sense of Art. 5 (3) ECHR.

⁷⁵³ See e.g. section 304 German CCP („Beschwerde“).

Although not considered an issue of proportionality in the strict sense (Germany), the financial resources spent for issuing a EAW are taken into account as well (France, Germany). In the EJM survey, a similar understanding has been reported from other Member States.

11.2.3 Alternative instruments

In all participating countries (and, according to the EJM survey, in other Member States, too), prosecutors reported to consider less intrusive alternatives, but recourse to these alternatives often encounters practical problems. In particular, there are no guidelines on how to make use of the alternative instruments mentioned in the Handbook.

Under certain circumstances, the person sought can be brought to judgment without being present at trial: In France and in the Netherlands, the prosecutor can apply for a judgment in absentia. In Germany, the prosecutor can apply for a penal order (a court decision to be taken on the basis of the file with a right of the convicted person to challenge this decision), usually imposing a fine; the court decision can then be served to the person if the place of residence is known. If the person wanted for arrest can be summoned (and there is no risk of flight), a EAW is not considered an appropriate instrument to make the person appear before court (France, Germany). Prosecutors have pointed out that recourse to these alternatives requires information on the whereabouts of the suspect and that, in most cases, this information is not available. So, in practice, the alternative instruments mentioned in the Handbook do not play an important role. Accordingly, defence lawyers complained of “overhastily” recourse to the EAW (defence counsel survey). Nevertheless, practitioners also have referred to the Schengen Information System providing an instrument to establish the residence of the suspect (Art. 98 CISA); nevertheless, this possibility is used less frequently since the application of the EAW (mostly, Art. 95 CISA-entries are preferred to preparatory Art. 98 CISA-entries; see also the defence counsel survey).

Since several alternative instruments are not implemented yet (European supervision order, European enforcement order) and, thus, they are still part of the traditional regime of mutual legal assistance, that is considered to be inefficient, cumbersome and time consuming. Therefore, prosecutors tend to prefer the EAW which is “a victim of its own success” (France). The same applies to the transfer of proceedings; in particular, it usually requires a translation of the file and thereby produces disproportionate costs (Germany). Furthermore, the transfer of proceedings or a request for the execution of the sentence might lead to a punishment considered to be inadequate (France and Germany, with regard to the handling of drug offences in the Netherlands).

11.2.4 Practical problems

In the interviews and the EJN survey, various practical problems have been addressed. Most of these problems are general in nature and not related to the issue of proportionality (e.g. non-compliance with the time-limits for surrender, extremely short time-limits for transmission –and translation – of the EAW after arrest in the executing state, application of amnesty statutes in the executing state, the requirement of the surrendered person’s consent to his/her return to the executing state for the purpose of the execution of the sentence, refusal on grounds not foreseen in the FD EAW). Nevertheless, some aspects are particularly relevant for the application of a proportionality test:

The participating countries complained of requests for additional information; if the executing state is expected to apply a proportionality test this might trigger such requests. This is why a proportionality check by the executing state should be limited to exceptional cases (“flagrant breaches” of the proportionality principle). On the other hand, when surrendering the person sought to the issuing state, the executing state should transmit standard information (e.g. on the duration of extradition detention) in order to avoid further requests for information by the issuing state.

In general, practitioners emphasized that respect for the proportionality principle crucially depends upon the availability of practical guidelines and an effective exchange of relevant information. In that regard, liaison magistrates have reported to be quite helpful. Defence lawyers pointed out that the defence in cross-border cases still has to fight structural weaknesses, and they made several proposals on how to overcome these shortcomings (e.g. establishment of a EU legal aid system, providing for mandatory assistance by counsel in the issuing and the executing state – “dual representation”; availability of the country information in the EJN system to defence lawyers, see the corresponding proposals in chapter 10.5).

11.3 The Principle of Proportionality in the executing state

11.3.1 Legal and institutional framework

The national laws of the participating countries do not explicitly provide for a proportionality test in the framework of surrender proceedings. That does not mean, however, that the issue of proportionality does not arise in the executing state.

First, the Framework Decision provides for several grounds for refusal. Referring to one of the optional grounds for refusal (Art. 4 (2), (3) and (7) FD EAW), the executing authority may have recourse to the principle of proportionality when exercising its discretion on whether or not to execute the EAW. However, implementation practice in the participating countries reveals that the impact of the proportionality principle is rather limited in this regard because the prosecutor has a wide margin of discretion.⁷⁵⁴ In Germany, the prosecutor has to consider various circumstances (inter alia the rights of the arrested person, the availability of evidence, the stage of proceedings in the issuing state and the rights of the victim). In weighing these interests, however, the executing authority, has a margin of discretion which is subject to

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⁷⁵⁴ For obvious reasons, this does not apply to refusal grounds that have been implemented as a mandatory obstacle to surrender (Art. 4 (1) and (4) FD EAW; see also Art. 3 FD EAW).

limited judicial review only. In the Netherlands, the Supreme Court and the Amsterdam District Court explicitly rejected to take the rights of the arrested person into account when deciding upon whether to have recourse to the ground for refusal under Art. 4 (7) FD EAW, and the case-law of the French Court of Cassation is based on a similarly strict understanding on what aspects may be considered by the court when applying an optional ground of refusal.

Secondly, the proportionality principle comes into play when the executing authority has to decide upon whether the execution of a EAW is in breach with fundamental rights of the person to be surrendered:

According to the case-law of the French Court of Cassation, the execution of a EAW can be refused if it is considered to violate the right to private and family life (Art. 8 ECHR). In many cases, the court's reasoning has been based upon the principle of proportionality because the execution of the EAW was held to be disproportionate to the gravity of the crime. Similarly, the Court of Cassation has provided for an indirect proportionality test, stating that the waiver of the double criminality requirement (Art. 2 (2) FD EAW) is subject to judicial control by French courts if the legal qualification by the issuing state (e.g. "fraud") does clearly not match the acts described in the form and, thus, is "obviously inadequate". In the majority of cases, the relevant acts did not qualify for a criminal offence under French law so that the execution of a European Arrest Warrant was considered to be "manifestly disproportionate".

Dutch law explicitly states that a EAW must not be executed if surrender would result in a "flagrant breach" of fundamental rights (e.g. inhuman detention conditions, Art. 3 ECHR). Furthermore, the execution may be postponed for humanitarian reasons.

Under German law, a EAW may not be executed if surrender to another Member State would violate the principles in Art. 6 TEU ("European ordre public"). Since the principle of proportionality is a general principle of EU law, the executing authority has to assess whether its decision complies with the principle of proportionality, in particular the proportionality of criminal penalties (Art. 49 (3) CFR). This proportionality test, however, is not as strict as the test under German constitutional law, i.e. surrender is permitted even if the sentence is "according to German understanding too severe" as long it is not "intolerably severe".

Although a proportionality test is applied under the national law of all participating countries, it is limited to exceptional circumstances. According to the defence counsel survey, courts are reluctant to refuse surrender for proportionality of human rights issues. The legal analysis and the interviews have revealed that the EAW is not subject to a general proportionality test by the executing state, but that it follows from the principle of mutual recognition and mutual trust that it is primarily a matter of the issuing state to assess whether recourse to this instrument is necessary and proportionate. On the other hand, the majority of contact points have reported that they receive EAWs that have not been subject to a proportionality check in the issuing state (EJN survey), and defence lawyers have taken the view that EAWs usually are executed almost "automatically" (defence counsel survey). In these cases, there is an obvious need for a (subsidiary) proportionality check in the executing state. Nevertheless, the lack of a clear legal guideline on how to deal with (manifestly) disproportionate EAWs has triggered informal solutions (bilateral negotiations, stay of proceedings) in order to avoid surrender.

In all participating countries, the decision on surrender is taken by a court if the person sought does not consent to his/her surrender. So, it is the competent court that assesses whether the execution of the EAW complies with the general principle of proportionality (and the fundamental rights of the person sought). In the Netherlands, the decision of the Amsterdam District Court is final and cannot be challenged by the person to be surrendered. In the other countries, the decision is subject to appeal to the Court of Cassation (France) or subject to extraordinary appeal to the Federal Constitutional Court, but the success rate is fairly poor (Germany; see also the defence counsel survey). If the arrested person consents to surrender, the prosecutor decides on the execution of the EAW.

As far as the national laws provide for optional grounds for refusal, it is the prosecutor (or the Minister of Justice) that decides on whether or not to invoke a ground for refusal. Thereby, the prosecutor enjoys a wide margin of discretion that is subject to limited judicial review only.

11.3.2 Criteria of proportionality

In general, the criteria for the proportionality test correspond to those applied in the issuing state (seriousness of the offence and the expected/imposed penalty, fundamental rights of the person sought, availability of less intrusive alternatives). Nevertheless, the proportionality test is not a standard procedure in the executing state, but limited to exceptional circumstances (see supra 11.3.1). So, the criteria mentioned above are only rarely applied in the participating countries as an executing state. As has been mentioned above (11.2.2), the EAW is not issued – and executed – for serious crimes only; according to the EJM survey, “fraud” is the list offence for which most EAWs are received.

In the Netherlands, there are no cases reported in which the Amsterdam District Court considered the seriousness of the offence, the gravity of the penalty, or the availability of less intrusive means as a ground for not executing a EAW. The same holds true for human rights violations (Art. 3, Art. 6, Art. 8 ECHR) because, due to the high evidential standards, the defence usually fails to provide sufficient evidence for a “flagrant breach” of the fundamental right concerned. Nevertheless, the interviews provided several examples for disproportionate EAWs (lack of evidence, petty offences, EAWs issued only for the purpose of a hearing of the person sought).

In France, the seriousness of the offence is the most important factor; in particular, EAWs issued for minor offences (e.g. traffic offences) committed long time before have been deemed disproportionate. When applying the proportionality test, French courts also consider the penalty, the family status of the person sought (Art. 8 ECHR; see also infra 11.3.3. for residents), and his/her age and health status.

In Germany, the proportionality test is related to the gravity of the crime and the penalty; thus, a EAW is not executed for absolutely minor cases (e.g. theft of an object amounting to less than five Euro) or for the execution of a sentence that is deemed to be intolerably severe. The degree of suspicion is also a relevant factor: The statement that the person sought did not pay his/her debts is not sufficient basis for surrender, but the illegal conduct has to be specified in a comprehensive manner. Furthermore, the court examines whether a less intrusive alternative to surrender (e.g. summons) is available; if the issuing authority did not undertake any efforts to use reasonable alternatives, the execution of the EAW is refused. Nevertheless, defence lawyers complained of an excessive use of this instrument in prosecutorial and court practice (defence counsel survey). Finally, the fundamental rights (Art. 5 and 8 ECHR) of the person sought are taken

into consideration; for instance, the execution has been considered a disproportionate encroachment upon the right to family life if surrender will separate the mother from her one year old ill child.

However, as confirmed in the interviews by defence lawyers, the thresholds by the courts in all three countries to accept a successful breach of fundamental rights and the proportionality principle were set very high, complaints are rarely successful (defence counsel survey). In Germany, for example, the higher regional courts have widely denied to accept an “intolerably severe” penalty, and only the separation of the accused from his child/partner without exceptional circumstances does not justify a refusal of surrender because the right to family life was at stake. Similarly, French case-law on refusals based upon Art. 8 ECHR suggests a very restrictive understanding; accordingly, only few cases are reported in which surrender has been held to be in breach with Art. 8 ECHR.

11.3.3 Surrender of nationals and residents

In the laws of all participating countries, the surrender of nationals and residents is subject to special requirements, the return guarantee in particular (Art. 5 (3) FD EAW). Due to the integration of nationals and permanent residents into the society of the executing state, the execution of the sentence in the home country is considered less intrusive than its execution in the issuing state. So, the return guarantee is an emanation of the proportionality principle (Germany). According to the EJM survey, the law of most Member States calls for an additional proportionality test; a similar conclusion can be drawn from the defence counsel survey. The interviews, however, have revealed that the legal situation differs significantly from one country to another.

In the Netherlands, the regular proportionality test is applied to nationals and residents as well. However, surrender for the execution of a sentence must not be granted and surrender for prosecution is subject to the double condition that the person is returned to the Netherlands *and* that the sentence imposed in the issuing state can be converted according to Art. 11 of the Convention on the transfer of sentenced persons.⁷⁵⁵ Since a conversion of the sentence is based upon Dutch criminal law the court has to ensure that the conduct is also punishable under Dutch law even if the EAW has been issued for a “list offence” exempted from the double criminality requirement (Art. 2 (2) FD EAW). So, although the executing authority does not apply an additional proportionality test, the conversion of the sentence provides equivalent protection against disproportionate punishment. The same guarantees apply to non-nationals legally residing within the Netherlands for at least five years.

French law does not provide for an additional proportionality test for nationals and residents, and there is no uniform court practice in that regard. Nevertheless, some criteria of the regular proportionality test are particularly relevant for nationals and residents because invoking their right to private and family life (Art. 8 ECHR), they can often refer to their family living in France, a regular employment and other aspects of integration into French society (see also the general observations in the defence counsel survey). A return guarantee is not a mandatory requirement, but subject to prosecutorial discretion. In general, a return guarantee is required at the request of the person to be surrendered, but there is no uniform practice yet. According to French law, the return guarantee can be required for nationals only, but the Court of Justice

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⁷⁵⁵ Convention on the transfer of sentenced persons of 21 March 1983 (European Treaties Series No. 112).

has recently stated that the non-application to nationals of other Member States violates the principle of non-discrimination on ground of nationality (Art. 18 TFEU).⁷⁵⁶

In Germany, the ban on extradition of nationals is a fundamental right guaranteed by the constitution. Accordingly, the court has to apply an additional proportionality test, thereby having due regard to this constitutional right of German nationals. As a consequence, a German national may be surrendered for the execution of a sentence with his/her consent only. A surrender for prosecution is subject to a return guarantee (see supra) and may only be granted either if the offence has a substantial link to the issuing state or if the offence does not have a substantial link to the German territory, the double criminality requirement is met and the interests of the national do not outweigh the interests of the issuing state. The prosecutor's decision to execute the EAW must pass a proportionality check which is subject to unlimited judicial review. Nevertheless, according to the interviews, proportionality is not an issue in the vast majority of surrender proceedings in practice because in most cases surrender is requested for an offence committed in the issuing state.

Since the constitutional right applies to nationals only, the protection of permanent residents is not mandatory, but optional in Germany and, thus, subject to prosecutorial discretion. According to administrative guidelines, the prosecutor has to consider in particular the legal status and the duration of the residence and the private (family) and social relations to other residents. Although there is no uniform practice, the interviews and statistical data suggest that residents integrated into German society are granted equal treatment to German nationals in quite a number of cases.

11.3.4 Proportionality of arrest and detention

In all participating countries, arrest and detention in the course of surrender proceedings have to comply with the principle of proportionality; extradition detention has to meet the minimum standard set out in Art. 5 ECHR.

In principle, the rules on pre-trial detention apply to extradition detention accordingly. However, a strong suspicion is not required (in Germany, the court can rely on the assessment of the issuing authority), but replaced by the reasonable chance of surrender (the Netherlands). Furthermore, a lower threshold applies (in the Netherlands and in France, a maximum penalty of at least one year instead of four respectively three years imprisonment is required, in accordance with Art. 2 (1) FD EAW).

The detention of the arrested person must be strictly necessary to achieve the objective, i.e. to prevent the person from absconding (or, in Germany, from tampering with evidence). To that end, the court has to establish a risk of flight and, thereby consider the nationality of the arrested person (the Netherlands) and other circumstances (family ties, employment in the executing state) making it less probable that the arrested person will abscond (France). In Germany, a court has argued that they can rely on the assessment of the issuing authority (mutual recognition), but this view is not uncontested.

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⁷⁵⁶ ECJ, Judgment of 5 September 2012, Case C-42/11, *Lopes da Silva Jorge*, par. 59.

On the other hand, detention is not a necessary means to surrender if the execution of the EAW is likely to be refused (the Netherlands, France). Accordingly, detention does not comply with the proportionality principle if surrender is considered disproportionate; this even applies to mere arrest if the surrender of a national cannot be granted but with his/her consent (Germany). Furthermore, like in domestic criminal proceedings, detention is not permitted if less intrusive means are available to ensure that the person will not escape from justice (e.g. bail, judicial supervision, house arrest, electronic surveillance). In any case, the assessment of the issuing authority might provide useful information for the executing authority.

Finally, detention must be proportionate in the strict sense. So, the duration may not last longer than the sentence imposed and to be executed in the issuing state (the Netherlands) nor significantly exceed the expected penalty in the issuing state (Germany). If the issuing authority fails to transmit the EAW or additional information requested by the executing authority in due time, continued detention is likely to become disproportionate (the Netherlands, Germany).

However, in practice, defence lawyers reported that ordering extradition detention is the rule, suspension is conceded rather rarely (Germany; defence counsel survey).⁷⁵⁷ Bail is not used as a less intrusive means very often. Furthermore, defence lawyers reported cases where the surrendered person has been held in pre-trial detention for a considerable period of time before the opening of the trial and criticized that the issuing state often does not consider less intrusive means in order to avoid a disproportionate duration of (extradition and pre-trial) detention (defence counsel survey).

11.3.5 Procedural safeguards and monitoring

According to the national law of all participating countries, the person arrested on the basis of a EAW shall be heard as soon as possible (France and Germany: within 48 hours; the Netherlands: 24 hours). In the hearing, the arrested person has to be informed of the EAW, his/her procedural rights (see *infra*) and the possibility to consent to surrender.

In France and the Netherlands, the hearing is held by the executing authority (i.e. the competent prosecutor). On the basis of the hearing, the prosecutor decides whether detention is necessary to prevent the arrested person from absconding. The detained person must be heard before the court competent for surrender proceedings within five working days (France), or the prosecutor has to request for such a hearing within three days (the Netherlands), and the court shall decide in due time whether the detainee shall remain in custody or whether he/she shall be released. The court may, at any time, repeal the detention order, at the request of the detainee or *ex officio*, and the court decision rejecting such a request is subject to appeal.

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⁷⁵⁷ Confirmed for other countries by the European Criminal Bar Association in its response to the Home Office Extradition Review, p. 5 (available at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf): “[...] custody [...] is often the mindset at present”.

In Germany, the first hearing is held before the judge at the local court. Unlike the French and Dutch prosecutor, the German judge is not competent to release the arrested person, but only to protect him/her from mistaken identity (the judge is obliged to order – provisional – detention unless the arrested person is not the person sought). According to German law, it is a matter for the court competent for the decision on surrender (higher regional court) to decide upon detention or release. The Federal Constitutional Court, however, stated that according to the constitutional guarantees (freedom of the person), the judge at the local court has to establish – by way of a summary examination – whether the requirements for detention are not met or the extradition request is ab initio obviously inadmissible and – in the affirmative – to release the arrested person if necessary.⁷⁵⁸ Nevertheless, the interviews suggest that the written law still reflects common court practice. Furthermore, a hearing before the court dealing with surrender and detention is not prescribed by law, and according to the interviews, the court usually takes its decisions without an oral hearing, but on the basis of the file, so – by contrast to France and the Netherlands – the arrested person is not heard by the court that decides on his/her surrender.

In all participating countries, the arrested/detained person has the following basic rights:

- the right to information (on the EAW and on his/her rights, including consent to surrender and the waiver of speciality);
- the right to remain silent;
- the right to consult a defence counsel of his choice;
- the right to translation and interpretation to the extent necessary (in the Netherlands, an English version of the EAW is sufficient for the first hearing);
- the right to have another person informed of arrest/detention (in the Netherlands, this right is not regulated, but recognized in court practice);
- the right to demand a medical examination (France, Germany).

The right to assistance by counsel notwithstanding, the effectiveness of this right depends on whether legal assistance is practically available to the arrested person. In that regard the situation in the participating countries differ significantly: Whereas in the Netherlands and France, assistance of detained persons is mandatory, in Germany, mandatory assistance in surrender proceedings is limited to exceptional circumstances and courts are reserved to assign mandatory assistance in practice; in particular in minor cases, defendants are not represented by defence counsel due to a lack of financial means and a poorly funded legal aid scheme (defence counsel survey). In the interviews and the defence counsel survey, defence lawyers pointed out the necessity of early and dual representation,⁷⁵⁹ in particular they explained that assistance by counsel in the executing state can also support and/or speed up (extradition) proceedings (e.g. legal advice to consent to surrender and to focus on preparing the defence in the issuing state, suggest solutions and alternative measures; see chapter 10.4.4.). On the other hand, interviews and the defence counsel survey revealed that the added value of legal assistance depends on the expertise of the defence lawyer; and judges, prosecutors and defence lawyers complained of considerable shortcomings in that respect. Furthermore, the defence lawyers emphasized that in the majority of cases, the preparation of the

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⁷⁵⁸ Federal Constitutional Court, decision of 16 September 2010, case 2 BvR 1608/07, (2010) Strafvverteidiger-Forum 495.

⁷⁵⁹ For the need of dual representation and legal aid see also Response by the European Criminal Bar Association to the Home Office Extradition Review, available at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf.

defence in the issuing state is more important than assistance in surrender proceedings, but that transnational cooperation between defence lawyers encounters numerous practical problems (inter alia deficiencies in legal aid schemes, lack of an EU wide defence network, different understanding of the role of the defence counsel during the criminal proceedings, language problems, time pressure in surrender proceedings, limited access to the file). Finally, defence lawyers criticized that the principle of mutual recognition is not applied to (court) decisions by which the execution of a EAW is refused.

The national laws also provide for special protection of vulnerable persons. The detention of juveniles is subject to a particularly strict proportionality check, and the surrender of children (minors below 12 – the Netherlands, 13 – France, 14 – Germany, years of age when the crime was committed) is not permitted (Art. 3 (3) FD EAW). As to deaf and mute persons, the provisions on interpretation apply accordingly. In case of elder persons the question in practice is often whether they are fit for arrest (Germany).

The participating countries do not provide for a general monitoring mechanism if surrender has been made subject to a condition or guarantee; only the return guarantee for Dutch nationals is subject to monitoring by the Dutch Minister of Justice. Prosecutors and courts rely on the principle of mutual trust and consider it as a matter of the surrendered person to enforce the guarantees given by the issuing state (Germany, the Netherlands). In the EJN survey, contact points have shared this view, maintaining that there is neither a need nor a legal basis for monitoring the case after surrender. By contrast, defence lawyers have reported cases in which the issuing state did not respect the guarantees given to the executing state (Germany), and to some extent, judges and prosecutors were in favour of a follow-up or monitoring of the cases after surrender (France).

11.3.6 Practical problems

The practical problems related to the execution of a EAW are already reflected in the problems arising for the issuing authority (supra 11.2.4). According to the EJN survey, problems may arise from the quality of the translation and the description of the offence (see also the defence counsel survey), the information about judgments rendered in absentia, strict time limits for supplying additional information, the return guarantee (Art. 5 (3) FD EAW). In Germany, the short time-limit for surrender is hard to comply with (see also the EJN survey). Furthermore, the contact points have reported cases where the use of the EAW was considered disproportionate, and where the executing authority complained of a lack of discretion or flexibility of the issuing authority (EJN survey). On the other hand, defence lawyers criticized that courts were reluctant to assess human rights violations in the issuing state or the “overqualification” of list offences, and called for an obligation of the executing authority to assess whether there is a *prima facie* case as foreseen by the extradition law of common law countries (defence counsel survey).



11.4 Factors relevant for mutual trust

11.4.1 General observations

In the view of judges and prosecutors, the system of the EAW is based upon mutual trust, and it is not up to them to question the principle of mutual recognition. So, the reasoning is based upon a legal principle rather than upon actual trust. In particular, judges and prosecutors stated that they did not have the expertise and capacity to assess the quality of other Member States' criminal justice system. Thus, none of the factors mentioned in the questionnaire seems to have a substantial impact on the level of mutual trust. Nevertheless, cooperation within the Union has increased the level of trust in the recent decade. So, generally speaking, the Member States' criminal justice systems are considered more trustworthy than the systems of third states.

Nevertheless, the peer review visits also illustrated that some of the aspects mentioned in the questionnaire were considered to be problematic in relation to specific member states, e.g. the level of corruption (Bulgaria), the level of judicial cooperation (United Kingdom), trials in absentia and length of proceedings (Italy), breaches of the speciality principle (Poland), disproportionate sentencing (Poland, Romania), quality of requests (Spain, Poland, Belgium). In the EJM survey, the issue of corruption has been identified as the major mutual trust problem; several contact points also considered the duration of proceedings and the duration of pre-trials to be problematic or very problematic.

In France, practitioners pointed out that a lack of trust often roots in insufficient knowledge of other Member States' criminal justice systems and pleaded for a more frequent use of the existing instruments to overcome this situation (Eurojust, liaison magistrates, European Judicial Network), in Germany, judges pleaded for having more background information if the request is complicated or offences mentioned are not evident (e.g. sentencing rules if several judgments are included in the request, facts supporting the crime of "membership in a criminal organisation"). Often requests are simply not plausible, so the issuing authority should exercise due care in providing the necessary information in the EAW and make its request comprehensible.⁷⁶⁰

Defence lawyers argue that mutual trust cannot be taken for granted but needs a solid factual and normative basis which does not exist yet. Membership in the European Union does not per se guarantee compliance with minimum human rights standards and the rule of law. Accordingly, almost all mutual trust aspects mentioned in the questionnaire were considered to be problematic or very problematic. Defence lawyers also argued that extradition proceedings and the following criminal proceedings in the issuing state cannot be separated (in a genuine European area of justice) which seems, however, to be the approach of the judicial authorities in the executing state. The defence lawyers' experiences with the EAWs raise serious doubts on whether a general trust in the issuing state's criminal justice system is justified. In several cases minimum human rights standards have not been met (detention conditions, length of proceedings); in various areas, common standards are not defined in a sufficiently precise manner or do not exist at all (standards on evidence, judicial review of court orders, access to the file, confidentiality of the

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⁷⁶⁰ Often, EAWs lead to the necessity to demand additional information (especially put forward during peer review in France).

For the impact of "bad EAW cases" on costs, cf. Response by the European Criminal Bar Association to the Home Office Extradition Review, available at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf

communication between defendant and his/her counsel). A defence lawyer reported a case where the person sought claimed to be victim of a corrupt judge who has issued the EAW to make him pay the bribe. Although the defence lawyer referred to publicly available information on corruption in the justice sector of the issuing state, the judicial authorities executed the EAW, thereby relying on the principle of mutual trust. So, the evidential standards applied in the executing state make it practically impossible for the defence to challenge the legality of surrender (see also supra 11.3.2 on the thresholds of the higher courts in the participating countries for establishing fundamental breaches).

11.4.2 Evaluating institutional aspects of mutual trust

Some of the factors which were considered crucial for mutual trust (in particular by defence lawyers) have been subject to closer examination in the pilot project. These factors are the capacity of the criminal justice system, the length of criminal proceedings and the detention practice in the participating countries. The analysis has been based upon statistical data of the Member States and the Council of Europe (Annual Penal Statistics) on the one hand and international monitoring reports (reports of the European Committee on the Prevention of Torture, annual reports of the European Court of Human Rights) on the other.

11.4.2.1 Capacity of the criminal justice system

As has been elaborated in chapter 3, one of the institutional building blocks for mutual trust is the capacity of criminal justice systems. The performance of justice institutions crucially depends upon the financial and personal resources spent for criminal justice and law enforcement. Although adequate resources do not automatically guarantee a good performance, they are indispensable for an effective criminal justice system. Therefore, the analysis started from the national budget and the budget spent for criminal justice.

In all participating countries, statistical data on public expenditure and the budget for criminal justice are available, but not in a uniform manner. For instance, in Germany, the expenditure for courts and prosecutions services covers not only criminal, but also civil courts, and in the Netherlands, data for border police and customs authorities are not available. As a consequence, the data collected in the national reports cannot be compared properly. Nevertheless, the latest report of the CEPEJ suggests that, generally speaking, the participating countries provide their justice systems with adequate resources (France: 1,1 %, Germany: 1,6 %, and the Netherlands 2,0 % proportion of the total public expenditure).⁷⁶¹

As a building block for mutual trust, capacity can also refer more specifically to the EAW. The pilot project, however, could not realize the idea to measure and value the personal and financial resources that are necessary to issue (or execute) a EAW. The EAW has become a standard instrument of transnational law enforcement, and, thus, there are a lot of judicial and police authorities that, according to their competences, can be involved in the issuing or execution of a EAW. Nevertheless, most judges, prosecutors and police officers are not involved at all, or proceedings related to EAWs only account for a small proportion of their activities. As a consequence, the average workload of the judges, prosecutors and police officers involved in proceedings on the issuing or the execution of a EAW can hardly be assessed.

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⁷⁶¹ European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems, CEPEJ Studies No. 18 – Efficiency and Quality of Justice, 2012, p. 26.

The methodological and practical problems (availability of statistical data / need for uniform data collection standards) illustrate that an evaluation of the capacity of a criminal justice system requires substantial efforts that have already spent by the CEPEJ. Therefore, the added value of an additional assessment of justice capacity could be doubted, and it seems rather preferable to refer to the reports of CEPEJ.

11.4.2.2 *Duration of criminal proceedings*

Adequate capacities and resources are pre-conditions for effective criminal justice systems; whether and to what extent they influence the performance of a given criminal justice system is often difficult to assess. By contrast, focusing on the “output” of a criminal justice system (number of cases cleared in a given period of time) will avoid the uncertainty about the impact of a given factor. For that reason, the pilot project draws upon statistics on the duration of criminal proceedings in the participating countries.

Once again, the statistical data refer to different stages of criminal proceedings:

In France, the trial at first instance is completed in the average time of 60 months (court of assizes) or 11 months (district court) after the crime has been committed (2010); statistical data on appeal are not available. In the Netherlands, the average duration of the trial at first instance is 18 weeks, the average duration of appeal proceedings is 44 weeks (2011); there are no data on the duration of pre-trial investigations.

In Germany, the average duration of a pre-trial investigation is 3,2 months respectively 4 months for the cases brought to trial (2010). The average duration of the trial phase is 3,8 months (local courts) or 6,3 months (regional courts). Judgments of the local courts are subject to appeal to the regional court (average duration of 6,8 months) or to the higher regional court (appeal on points of law only, average duration of 5,6 months). The first instance judgments of the regional courts are subject to appeal to the federal criminal court; the vast majority of appeal decisions are rendered within 6 months.

Despite the different formats of statistical data available at the national level, the collection of the data available at the national level offers an added value to the reports of the CEPEJ that do not present general data on the duration of criminal proceedings, but only selected data on certain case categories (robbery and intentional homicide).⁷⁶²

11.4.2.3 *Detention*

By its nature and effects, the EAW is closely linked to the issue of detention. In particular, the surrendered person will probably be detained either for the purpose of enforcement of a sentence or for the purpose of prosecution in the issuing state. Therefore, compliance with human rights standards on detention conditions will be particularly relevant for mutual trust. Furthermore, a disproportionate use of remand detention is likely to undermine mutual trust and, thus, have a negative impact on the functioning of cooperation instruments such as the EAW.

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⁷⁶² European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems, CEPEJ Studies No. 18 – Efficiency and Quality of Justice*, 2012, p. 208 (222, 226).

As regards detention on remand, the statistical data is provided by the Council of Europe (Annual Penal Statistics – SPACE I). According to this report – and the national law of the participating countries – the concept of remand detention is not limited to pre-trial detention (i.e. detention of untried defendants), but also covers persons who are detained during the trial and convicted persons who have appealed the judgment.⁷⁶³

The rate of detainees (remand detention) per 100,000 inhabitants in 2010 varies between 13.4 (Germany), 24.5 (France) and 34.4 (the Netherlands), the rate of all detainees per 100,000 inhabitants ranges from 69.0 (the Netherlands) and 78.2 (Germany) to 94.5 (France).⁷⁶⁴ Compared to the proportion of juveniles (under 18 years of age) in Germany and France (0.9 % respectively 1 % of all detained persons)⁷⁶⁵, the rate in the Netherlands seems to be considerably high (11.5 %).⁷⁶⁶ The rate of foreign detainees varies between 17.8 % (France), 21.4 % (the Netherlands) and 26.7 % (Germany).⁷⁶⁷ Whereas the rate of foreign prisoners in remand detention in the Netherlands is on the same level (23.5 %), the rate in Germany is considerably higher (46.1 %).⁷⁶⁸ This might reflect a reluctance of German courts and prosecutors to have recourse to less intrusive alternatives to detention as far as foreigners are concerned.⁷⁶⁹ Nevertheless, the data does not give rise to the assumption that there is an excessive use of remand detention in one of the participating countries.

The statistical data collected by the Council of Europe provides basic information on the situation in the participating countries. Nevertheless, the statistics of the Council of Europe only allow for a rough estimate of the average duration of pre-trial detention.⁷⁷⁰ In that regard, national statistics can provide for an added value. For instance, in almost 50 % of the cases in Germany, the duration of remand detention is less than three months, and only in 5,4 % of the cases it will exceed 12 months (2010).⁷⁷¹ Unfortunately, this kind of data is not available in France and in the Netherlands.

The detention conditions in the participating countries have been assessed on the basis of the reports of the Committee for the Prevention of Torture (CPT) and the annual reports of the European Court of Human Rights (ECtHR). According to these reports, human rights violations only occurred in single cases that did not give rise to the assumption of resulting from ‘systemic deficiencies’.⁷⁷²

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⁷⁶³ Cf. Aebi/Delgrande, Council of Europe, Annual Penal Statistics – SPACE I (Survey 2010), p. 80.

⁷⁶⁴ Ibid., p. 84, 52.

⁷⁶⁵ Ibid., p. 61.

⁷⁶⁶ See the statistical data provided by the country report. In the Annual Penal Statistics of the Council of Europe, juveniles have not been taken into account in the Netherlands, *ibid.*, p. 62, 67.

⁷⁶⁷ Ibid., p. 77.

⁷⁶⁸ Ibid., p. 77, 80.

⁷⁶⁹ See the German country report.

⁷⁷⁰ Ibid., p. 117 (France: 4,1 months; the Netherlands: 3,7 months).

⁷⁷¹ Statistisches Bundesamt (ed.), Fachserie 10, Reihe 3., Rechtspflege – Strafverfolgung, Wiesbaden 2011, p. 361.

⁷⁷² See, however, the German report on the duration of criminal proceedings and the lack of judicial remedies.

11.4.3 Conclusion

Although the collected information only provides a rough EJM survey on the situation in each participating country, the assessment allows for the overall conclusion that there are no “systemic deficiencies” and that, therefore, mutual trust in the ability and willingness of these countries to comply with European human rights standards (Art. 3, 5 and 6 ECHR) has a sufficient factual basis. This conclusion corresponds to the assessment of practitioners in the interviews.

11.5 Experiences with current evaluation methodology and peer reviews

The experiences with the current evaluation methodology are limited because the majority of the interviewees have not been involved into the mutual evaluation on the practical application of the EAW. Overall, the mutual evaluation mechanism has been considered to provide comprehensive and correct information on the practical implementation in the Member State concerned. However, it has been pointed out that the evaluation focused too much on formal aspects and compliance with terminology (e.g. extradition vs. surrender) and that the peer review visits in the Member States were not carried out by one and the same evaluation team and that this approach might result in different evaluation results and recommendations (Germany).

As regards the evaluation methodology applied in the pilot project, the combination of legal analysis, peer review visits and collection of (statistical) data has been considered a comprehensive approach to assess the practical implementation of the EAW and the role of mutual trust (France, the Netherlands). Nevertheless, the experiences with the pilot project have revealed that there is room for improvement:

The legal analysis should consider the legal context in the national judicial system (criminal proceedings, mutual legal assistance) and in the EU legislation, e.g. other instruments based upon the principle of mutual recognition (France).

Given the comprehensive and extensive nature of the questionnaire for the interviews, the interviewees should be given the opportunity to deal with the questionnaire before the interview (and to answer the questions in writing); this would allow for addressing more general issues in the interview itself (the Netherlands); if necessary, the country visits could be supplemented by follow-up-visits to clear open questions and confirm or falsify preliminary results (the Netherlands). Furthermore, conducting the interviews in a large group of participants has been considered to be sub-optimal to induce interviewees to speak without any reservations. As an alternative, interviews conducted by a small group of persons (the Netherlands) or anonymous answers (France) might be considered. In order to underline objectivity and independence, it might be helpful to compose the evaluation team of independent researchers (the Netherlands). Peer review visits should be conducted in English (if the interviewers do not have sufficient knowledge of the country to be evaluated). The alternative (assistance by an interpreter) is considered to consume too much time and money.

Finally, the collection of statistical data has been seriously hampered by different standards and definitions applied in the Member States. To a considerable extent, relevant data on the EAW (e.g. on the offences EAWs are issued for) is not available at all (France, the Netherlands).

Part C

12 Recommendations on making proportionate use of the European Arrest Warrant

Martin Böse⁷⁷³

The EAW is a well-established instrument of transnational cooperation in criminal matters in the Union and the “flagship” of mutual recognition. It significantly facilitates and speeds up surrender procedures between the Member States. Nevertheless, the efficiency of the new instrument also harbours the risk of human rights violations, due to a lack of judicial control and an excessive reliance on mutual trust. Mutual trust cannot be achieved by mere decision, but needs a reliable basis, i.e. general information on the criminal justice system of the other EU Member State or practical experiences in transnational cooperation. These experiences are the “core” of mutual trust; “good” experiences can strengthen, “bad” experiences can undermine mutual trust. Evaluation seeks to strengthen the impact of positive experiences (e.g. by establishing “best practices”) and to learn the lessons from negative experiences. In the pilot project, a variety of positive and negative experiences has been collected. These experiences have been summarized in the following recommendations on a proportionate use of the EAW. Several recommendations are also supported by the results of other projects, such as the Council’s evaluation round on the European Arrest Warrant⁷⁷⁴ and recent studies on the cooperation in criminal matters in the European Union⁷⁷⁵ as well as on the impact of the EAW on defence rights⁷⁷⁶. As the pilot project, the recommendations differentiate between the role of the issuing authority and the role of the executing authority.

12.1 The issuing of a European Arrest Warrant

1. The requirement of a national arrest warrant, for which the interests are outweighed whether detention of a person is necessary or not, is an important procedural safeguard to ensure proportionality of a EAW. However, the national arrest warrant must not be only a rubber-stamp as a prerequisite for the EAW form, but must exclude that the EAW is an instrument to make the person appear before court only. Since the judge issuing a national arrest warrant does not examine the transnational dimension of the case, the prosecutor’s decision to issue a EAW shall be subject to a judicial control *ex ante* (authorization by a judge), too. Thereby, the judge shall assess and lay down the proportionality of the EAW as means of transnational law enforcement, in particular with regard to those aspects the judicial authority of the executing state is not competent to examine (e.g. the probative value of evidence).
2. The decision to issue a EAW should be subject to judicial review *ex post*. If the person sought has been arrested, but surrender has been refused, the EAW is still active. Art. 111 CISA guarantees a right to judicial review of SIS-alerts (Art. 95 CISA), but there are doubts whether this provision has been properly

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⁷⁷³ This text contains the recommendations on the implementation of the EAW that result from the pilot project. As such, this text reflects the experiences of the entire team.

⁷⁷⁴ Council-Doc. 7361/10, p. 3-4 (language regime) and 4-7 (proportionality check by the issuing state, criteria for the proportionality test).

⁷⁷⁵ G. Vermeulen/W. de Bondt/C. Ryckman (ed.), *Rethinking international cooperation in criminal matters in the EU* (Antwerp, 2012), p. 533-547, in particular 536-537 (explicit und precise proportionality clauses), 539-540 (strengthening of the individual in transfer proceedings after surrender) ; Vernimmen-Van Tiggelen/Surano/Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union* (Brussels, 2009), p. 549-581, The results are published in English also under: http://ec.europa.eu/justice/criminal/files/mutual_recognition_en.pdf (accessed 13 March 2013), in particular II.3 (more use of alternative measures in cases of petty offences), II.4. (fundamental rights clauses), II.10 and III. 11 (contacts to the issuing state, better organization of defence lawyers), IV.17 (more MLA instruments at disposal).

⁷⁷⁶ JUSTICE report, *European Arrest Warrants – Ensuring an effective defence* (London, 2012), p. 10-17, in particular 12-15 (legal training of defence lawyers, dual representation, establishment of an IT-based counsel network), 15-16 (review of the SIS-alerts and consequences of decisions to refuse to execute a European Arrest Warrant).

implemented yet.⁷⁷⁷ Furthermore, this remedy cannot prevent the issuing authority from transmitting of the EAW via Interpol, the European Judicial Network etc. Therefore, the person sought must be provided with a legal remedy against the EAW in the issuing state because otherwise he/she runs the risk to be arrested all over the Union.

3. The implementation practice in the participating countries has revealed, that the threshold set out in Art. 2 (1) FD EAW does not reflect the common understanding of the proportionality principle. Thus, for issuing a EAW, a higher threshold should apply. A best practice that can be derived from the pilot project suggests a minimum threshold of one year imprisonment to be *expected* or to be executed. Accordingly, judicial authorities should explore more carefully whether the offence is likely to be punished by a fine (that can be executed by another EU Member State, see also *infra* 5.).
4. Several “list offences” (Art. 2 (2) FD EAW) are described in rather vague terms (“fraud”, “sabotage”) which has given rise to a variety of interpretations, each of them rooted in the national criminal justice system of the issuing state. An “excessive labeling” of list offences would undermine the rationale of the catalogue to define standard categories of serious transnational crime. Therefore, a definition of the problematic offences should be adopted to have a common understanding on the scope of the waiver of the double criminality requirement.
5. The proportionality principle calls upon the issuing authority to use less intrusive alternative instruments. If there is no risk of flight (in particular in minor cases), it will be sufficient to first establish and communicate the place of residence of the defendant (cf. Art. 98 CISA) for a summons; the issuing authority shall take this instrument in due consideration.
6. For the time being, the alternative instruments are not regulated / implemented in a way that enhances a frequent use. As a consequence, law enforcement authorities tend to the more efficient instrument, i.e. the request for arrest and detention via the EAW, instead of having recourse to cumbersome or more time-consuming procedures of traditional legal assistance. Therefore, it is of crucial importance to make the alternatives (execution of sentences, transfer of proceedings, transnational video conferences etc.) work as efficiently as the EAW.
7. The Member States should adopt administrative guidelines on when and how to use the alternative instruments mentioned above (6.). In appropriate cases it should be explored how the concerned judicial authorities can work together without the need of a EAW, such as through first interrogations at the place of residence of the suspect (this could especially be appropriate in cross border regions).
8. In order to speed up proceedings, the language regime should be modified, allowing for EAWs to be issued in English (and to be accepted in English in each Member State); in that case, the executing state shall provide translation into its official language for the arrested person.

12.2 The execution of a European Arrest Warrant

9. As can be derived from recent developments in EU law and the national implementation of the EAW, the principle of mutual recognition does not relieve the executing state from its obligation to respect fundamental rights (Art. 1 (3) FD EAW). Thus, the executing authority has to comply with the proportionality principle, in particular when exercising its discretion whether to have recourse to optional grounds for refusal. In the framework of the “European *ordre public*” (Art. 1 (3) FD EAW),

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⁷⁷⁷ See Council-Doc. 7361/10, p. 10; JUSTICE report, *ibid.*, p. 15.

however, the executing state shall be competent to refuse the execution of a EAW (only) if it reveals to be manifestly disproportionate. The same should apply to “obvious inadequate” references to a list offence (Art. 2 (2) FD EAW). The Framework Decision should define a corresponding refusal ground in a clear and precise manner.

10. According to the recent case law of the Court of Justice, permanent residents should be treated equally to nationals. A return guarantee should also be required if the resident is surrendered to his/her home country because reintegration into society calls for the sentence to be executed in the social environment of the convicted person. A surrendered and convicted person, however, shall not be returned to the executing state against his/ her will.
11. In principle, it is for the court of the executing state to decide whether extradition detention is necessary or recourse to less intrusive means is possible; the court in the executing Member State is normally in the best position to consider all the circumstances of the arrested person. Nevertheless, the court shall take the assessment of the issuing authority into due consideration. To that end, the issuing authority shall provide the executing authority with information relevant for establishing the risk of flight (to the extent necessary, in addition to the national arrest warrant).
12. The court before which the first hearing is held should have full competence to examine whether the legal conditions for extradition detention are met and to decide whether detention shall be continued or the arrested person shall be released. If the decision on surrender is taken by another court, the person shall also be heard by this court.
13. Compliance with the principle of proportionality requires adequate procedural safeguards. Since the personal freedom of the person is at stake, the arrested person must be assisted by counsel immediately after arrest (mandatory assistance; right “of first advice by a defence counsel”). The arrested person has to be informed of his/her right to counsel free of charge.
14. To ensure an effective transnational defence, it is necessary to take measures in order to foster cooperation between defence lawyers and to establish dual representation (e.g. a legal aid system financing dual representation in EAW cases), networking and legal training for handling cross-border cases. Defence lawyers shall be granted access to the basic information on the Member States’ criminal justice systems in the European Judicial Network. If a EAW is not executed and the decision is based on human rights concerns (manifest breach of the proportionality principle, inhuman prison conditions etc.), this decision shall be accessible to the network of judicial authorities and defence lawyers so that this information can be considered in other proceedings on the execution of EAWs of this particular Member State.
15. If surrender has been made subject to guarantees (e.g. a return guarantee, minimum standard on prison conditions or a trial within reasonable time) the executing state shall monitor the case in order to ensure that the issuing state complies with these guarantees. A guarantee always reflects a degree of uncertainty whether the issuing state lives up to the common standards that form the basis of mutual trust; if compliance with these standards cannot be doubted, there is no need for a guarantee. Monitoring individual cases could help to reduce this uncertainty and to regain confidence in the criminal justice system of the issuing state. The monitoring shall be conducted on the basis of a standardized electronic form in which the issuing state enters a basic set of information which makes it possible to follow the surrendered persons.

13 Combining results of the pilot with the need for the development of a common framework for evaluating mutual trust and judicial cooperation in criminal matters

Pim Albers⁷⁷⁸

On the basis of the results of the pilot project on the European Arrest Warrant and the application of the principle of proportionality several lessons can be learned. Moreover, the analysis of existing methods of comparative evaluation studies can contribute to a number of observations concerning the need for the development of a framework for evaluating mutual trust and judicial cooperation in criminal matters. The lessons and observations may be used for a future debate at a European level about options and directions concerning the creation of a common framework for evaluation of judicial cooperation in criminal matters, in the light of (strengthening) the mutual trust between the EU Member States.

In this chapter, a short overview will be given on the different evaluation methods that can be applied for evaluating the judicial cooperation in criminal matters in the context of developing a common evaluation framework. We will recommend several evaluation methods (peer-reviews, legal analysis, surveys, government data and a careful selection of other (rule of law) evaluation data sources). As a part of this recommendation specific attention will be provided for the pros and cons of the development of a European Criminal Justice Scorecard/Scoreboard method.

13.1 The peer-review method

In general the peer-evaluation approach applied in several evaluations of EU instruments is often based on a horizontal learning approach where a team of justice-practitioners (e.g. judges, prosecutors, representatives of ministries of justice) of one country is assessing the situation in another country, based on a standard questionnaire. Often these teams of experts are supported with the assistance of the European Commission or the secretariat of the Council of the European Union. In this sense, the pilot project on the European Arrest Warrant and the application of the principle of proportionality does not differentiate much from this common approach, since the team of national experts was composed of governmental representatives of the three participating EU Member States, supplemented with a team of scientific experts.

The scientific experts played an important role in several stages of the evaluation process. First at the starting point of the evaluation, when the checklist for the interviews was developed. In this part the scientific experts have contributed to the drafting process by adding relevant topics to the list of the checklist, based on the latest scientific developments in the (European) criminal law area related to the European Arrest Warrant. During the peer-visits they also had an important role to play in the interviews with relevant key actors by stimulating debates on the subject concerned based on their scientific knowledge and with the provision of technical support for the recording of the interviews. During the last part of the peer-evaluation another important task for the scientific experts was related to the drafting of this report.

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⁷⁷⁸ This text contains the recommendations that result from this pilot project. As such, this text reflects the experiences of the entire team.

On the basis of the lessons learned from the current pilot project we can conclude that the use of a peer-review is a proper method for evaluating the current practice of the functioning of an EU instrument at a national level. By interviewing key actors in the three participating EU Member States good insight can be provided about the European Arrest Warrant practice in relation to the principle of proportionality. Since at least two members of the national experts had experience with the conduct of evaluations, the peer-evaluation could be carried out in a solid and consistent manner with the help of (the assistants of) the scientific experts. Despite this positive experience, there are also points for improvement that need to be mentioned.

During the visits in the Netherlands, France and Germany the interviews were held in the Dutch, French and German language. This was only possible, due to the fact that the experts were able to follow the discussions in the three different languages without the help of an interpreter. However, for future peer-evaluation visits it is recommended to make a choice between two options. The first is the use of a common language during the interviews (e.g. the English language) and the second option is the application of an interpreter. The advantage of the first option is that costs for conducting a peer-review visit will be lower, since there is no need to hire an interpreter. However, this may have the disadvantage that in not all instances the interviewed actors are able to express themselves in the common language. Especially to understand the nuances in the different (legal) procedures and practices better it must be recommended that in future peer-review visits interpreters will support the team of experts.

As to the evaluation team responsible for conducting the interviews, there are basically two options:⁷⁷⁹ The first option will rely on peer review, i.e. interviews conducted by national experts of other Member States (judges, prosecutors, civil servants; maybe also defence lawyers); peer review visits provide a platform for sharing experiences and best practices and an informal and open exchange of information. The second option will rely on “expertocratic” monitoring by independent scientific experts; this approach is supposed to meet concerns about the uniformity and objectivity of mutual peer evaluation. The pilot project has been based upon a combination of both methods, thereby drawing upon the advantages of both models. When referring to any of these models (or their combination), it should be borne in mind that the composition of the team should meet the need to ensure practicability (negative – “intimidating” - effects of large evaluation teams) and uniformity of the interviews in all Member States. Thus, the same evaluation team (or at least the “core” of the team) shall be responsible for all country visits and interviews in the framework of the evaluation process and not have more than three or four members.

Irrespective of the difficulties in the language regime it is also important to take notice of the limitations of a peer-review method. Peer-reviews are labour-intensive and costly, since a team of high level experts is responsible for the conduct of the evaluation. Moreover, the results of the peer-review visits are limited to the countries that have been assessed. In that sense it has a narrow generalizability. Conclusions made during the peer-visits can only be applied to the countries evaluated and only to a very limited manner to a larger geographical area. To increase the level of generalizability it is necessary to replicate the peer-visits to other EU member states and/or to make use of other methods of data collection. From the point of view of contributing to horizontal learning the replication of peer-review visits must be recommended, but – as has

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⁷⁷⁹ Klip/Versluis/Polak, in: Dane/Klip (eds.), *an additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust* (2009), S. 99 (228-229).

been indicated earlier in this paragraph – it is labour-intensive and costly. Alternatively other methods of data collection must be used to verify the observations made during the peer-review visits with a view of generalizing the findings to a larger extend. The pilot-project tried to achieve this by developing a standard (perception) survey for contact points of the European Judicial Network in criminal matters and for defence lawyers of the ECBA.

13.2 Perception surveys among institutional key players

During the pilot project, two standard surveys were used for two types of institutional actors. One survey was addressed to the contact points of the European Judicial Network in criminal matters and the other was submitted to the defence lawyers with the help of the European Criminal Bar Association. The experience with the two surveys showed different results. In contrast with the relative good cooperation of the contact points of the European Judicial Network in Criminal Matters resulting in a good response rate, the number of replied surveys of the defence lawyers was very low. Due to the low response rate of the defence lawyers the possibilities for generalizing the results and adding more information to the report concerning the viewpoints of the lawyers regarding the European Arrest Warrant and the principle of proportionality was relatively limited, especially when you compare this with the survey results of the contact points of the European Judicial Network in Criminal Matters. The results of the survey of the EJM contact points clearly supplemented our findings of the three peer-review visits. Observations made during these visits can – with the help of the results of the survey – be generalized for a number of topics related to the European Arrest Warrant practice to the other EU Member States as well.

Looking back at the pilot project, we can conclude that an additional perception survey among key actors is a useful supplementary tool for data collection, besides the conduct of peer-visits (and peer-based interviews) in the three participating countries. Based on this experience, it is recommended that – when a peer-visit method is applied – to make use of a survey method to increase the level of generalization of the findings of the evaluation. However, it is also important to bear in mind that the use of a questionnaire will be less relevant if the interviewees will be asked to reply in writing and the evaluation will cover all Member States. So, it should not form a standard, but an optional element of the evaluation process.

13.3 Legal analysis

As has been described in chapter 5, the legal analysis is – next to the peer-review visits – the core of the pilot project. It describes for each of the three participating Member States how the European Arrest Warrant was implemented in the national law and which national policies have influenced the current practice of the European Arrest Warrant. This part of the work was conducted by the scientific experts where relevant (policy) documents, jurisprudence and other literature was used to provide a picture of the current practice of the application of the European Arrest Warrant in the national (legal) context. Since for a proper evaluation of EU instruments there will be always a need to assess the transposition of the European instruments into national practice it is recommended that - in addition to peer-review visits and the use of a perception survey – this legal analysis will form a standard element of the evaluation method applied.

13.4 Government registration data

As a part of a solid evaluation approach it is important that observations made in peer-review visits, the results of a legal analysis and surveys, can be supplemented with statistical data. Especially to assess the performance of justice institutions, the use of resources (finance, human resources, material resources) in relation to the EU instrument that is being evaluated it is necessary that quantitative figures are available at a national level and at a European level. Many different international comparative evaluation studies show that there is a large variety between countries concerning the level and quality of the data that is collected in the justice sector. Compared with financial and economic data, much work in this area is necessary.

Countries are not collecting data in a uniform manner, the level of reliability of the data may vary and also the level of detail of the statistical information that is being collected can be different from country to country. The pilot project results indicated that there are already major differences between the Netherlands, Germany and France concerning the level of detail and available data on the European Arrest Warrant. Also figures on the European Arrest Warrant available at a European level, show that only for a very limited number of indicators information can be provided (e.g. the number of issued European Arrest Warrants or executed EAWs) and that there is a need for improving the national government registration data for the purpose of comparing the figures at a European level.

13.5 (Rule of law) evaluations from other European, international organisations and Non-Governmental Organisations

In the area of (criminal) justice there are several other information resources available that can be used to complete the picture on the level of effectiveness and efficiency of an EU instrument in the context of other rule of law aspects. In Chapter 4 of this report, examples were provided from the European Union (CVM mechanism, Schengen evaluation, Euro barometer), the Council of Europe (CPT, CEPEJ, GRECO), the World Bank and a number of NGO's (Transparency International, World Economic Forum, World Justice Project). This shows that there is already a wealth of information available concerning the functioning of the legal systems that can be used in the light of developing a common evaluation framework at an EU level. Despite the availability it must be noted that these resources have also limitations, because often these evaluations have been developed for a purpose different from that of evaluating EU instruments in the European criminal justice area. Furthermore, the level of reliability and quality of the data may vary from instrument to instrument. A simple duplication of a selective number of datasets from external sources must be handled with care and it is important to decide which external data sources will be used and for which data there is a need to collect the information separately.

Another complication that must be mentioned in relation to the external rule of law evaluations concerns the cycles of evaluation and the reference years of the data presented. For example for the CEPEJ reports on European judicial systems data is collected in a two years cycle, where the year of reference is often two years before the data of publication. In situations where major reforms in the justice sector have been

implemented over the last year, this will not be mentioned in the report resulting in figures that are not real up to date. Other organisations may use a one year cycle, but also the year of reference for presenting the data can be different from the data that is necessary for other evaluation purposes.

Despite the fact that double work should be avoided in the process of data collection, it is important to bear in mind that a careful decision must be made between the use of external data sources and the collection of new data.

13.6 Reporting and follow up on the recommendations provided by the evaluators

On the basis of the evaluation results (legal analysis, statistics, questionnaire, interviews, information derived from international monitoring) a report will be filed which will identify weaknesses and shortcomings of the legal and factual situation in the Member States concerned and which will also give recommendations on how these problems can be addressed; in particular, the report can make reference to best practices established in other Member States.

The evaluation mechanism shall provide for a follow-up and an obligation of the Member State to report on the measures that had been taken in the aftermath of the evaluation and the recommendations in particular. An autonomous sanctioning mechanism does not seem appropriate because the Commission can already have recourse to the infringement proceedings (Art. 258 TFEU) and it must be doubted whether Art. 70 TFEU provides a legal basis for an additional sanctioning mechanism. The evaluation report should also address the question whether amendments to the EU legislation are considered appropriate.

Nevertheless, the evaluation mechanism should provide for consequences of a “bad” evaluation. Since mutual trust and mutual recognition are closely linked to each other, an erosion of trust will affect the basis of mutual recognition and call for more legal scrutiny and judicial control when cooperating with a Member State considered less trustworthy. A possible option that has been proposed by the Meijers Committee is to shift the burden of proof: If the evaluation report establishes serious shortcomings in a Member State’s criminal justice system that are not occasional, but of a general or structural nature, it is up to this Member State to demonstrate that it will comply with the common standard in the individual case (see also the comparative overview).⁷⁸⁰ The evaluation regime might also provide for a framework of monitoring individual cases in which the Member State has guaranteed to comply with the relevant standard. Monitoring individual cases could help to regain confidence in the criminal justice system of the evaluated Member State.

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⁷⁸⁰ Meijers Committee, The Principle of Mutual Trust in European Asylum, Migration, and Criminal Law, December 2011, p. 54, available at http://www.commissie-meijers.nl/assets/commissiemeijers/Co_opmaakOmslag06.pdf (accessed 17 March 2013).

13.7 Towards a common evaluation framework for judicial cooperation in criminal matters

In the previous paragraphs it is outlined that for a proper evaluation of the application of a European instrument in national contexts it is recommended to make use of a *combined approach* and *several methods of evaluation*. A peer-review visit, based on structured interviews, is an important starting point for an evaluation, however due to its limitations in terms of generalization it is necessary that additional means of data collection is used as well, such as perception surveys, a legal analysis, government registration data and – if available - information from other European/international organisations and NGO's. By making use of several evaluation methods and sources of data the reliability of the findings of the evaluation will increase, which will also lead to better information that can be used for decision makers to continue with a (European) policy or to adjust the policy directions in the area of judicial cooperation in criminal matters.

The above mentioned recommendations of making use of various evaluation methods is valid when the practice of an EU instrument is evaluated, without taking note of the influence of other EU instruments in the criminal law area and the current state of affairs of the national criminal law systems/national judicial systems. However, the practice shows that other European policies and other EU instruments in the criminal law area can have an impact on the functioning of the EU instrument that is being evaluated. In general, one can expect that other EU instruments will have a (positive) influence on the functioning of the evaluated EU instrument. For example, a European supervision order in pre-trial procedures can influence the functioning of the European Arrest Warrant procedure, since alternative supervision measures may reduce the number of citizens (as a part of the European Arrest Warrant procedure) being detained during a pre-trial procedure. Moreover, the stimulation of alternative sanctions and financial penalties at a European level, will influence the application of the European Arrest Warrant, too. Especially for small criminal offences this may result in a reduction of requests for the execution of a European Arrest Warrant when more and more countries are making use of financial penalties for those small criminal offences.

The interdependency between the various EU instruments and policies in the criminal law area results in the need for developing a common evaluation framework for judicial cooperation in criminal matters. In this common framework it is necessary that each EU instrument that is being evaluated, must be put in the context of the influence of other EU instruments and policies that can have an impact on the outcomes of the evaluation. In our report we have described this as the *procedural aspects and (legal) instruments* for enhancing mutual trust between the EU Member States (see Chapter 2). In practice, this implies that a solid evaluation of an EU instrument requires that the influence of other EU instruments and policies must be included in this evaluation.

In addition to the recommendations for developing a common framework related to the need of the use of various evaluation methods and to include the influence of other EU instruments and policies in the evaluation scheme, there is another notion that must be considered as well and that is the influence of national criminal policies and the functioning of national legal systems on the application (and results) of the EU instrument being evaluated. In the EU member states different national criminal law policies are being applied, where for example in one EU member state the theft of chickens is seen as a small criminal offence, whilst in another EU member state this is seen as a severe criminal offence which must be sanctioned with a penalty of imprisonment. Differences between accusatorial and inquisitorial systems is another good example of the large variety of national criminal policies in EU member states.

The use of European instruments in the criminal law area may have a harmonizing effect on those differences, by setting minimum standards. However, this may not always be the case. On the other side it is important to note that the level of capacity, performance and trust of the national legal systems varies, too, and can have a positive or negative impact on the level of effectiveness of an EU instrument. Especially under the influence of the economic crisis national legal systems may be put under pressure, where budget cuts in the public sector might result in a reduction of the available capacity (and performance) of the justice sector responsible for the fight against crime and the handling of criminal (court) procedures. Reductions in court budget, police capacity, judicial capacity, etc. can lead to an erosion of an effective application of a European instrument in the criminal law area, for example because it will result in longer (pre-trial) court procedures. Not only the capacity and performance of the justice sector might be influenced by the economic crisis, but it may have a negative societal impact too. Especially where the performance is put under pressure, the public trust and confidence in the justice sector might erode and problems in the sphere of integrity issues (i.e. corruption) may increase.

That is why we also recommend to include in a common evaluation framework a comparative description of the state of affairs (in terms of performance, capacity, integrity, etc.) of the national legal systems in qualitative and quantitative terms. This we have defined in our report as the *institutional aspects* related to mutual trust and judicial cooperation in the criminal law area (see Chapter 3 of the report). In Chapter 3 of the report, we have outlined that the functioning of an EU instruments (in terms of level of effectiveness and efficiency) is influenced by several aspects of the national legal/criminal law systems, namely: quality standards for education, recruitment and nomination of law enforcement officers and members of the judiciary, the available capacity of the legal systems, the performance of the justice and judicial institutions, the application of the right to a fair trial, the level of independence of the judiciary, the level of integrity of the justice sector representatives, the level or proportionality, the quality of the legal representation, the conditions of detention and the level of cooperation between the national legal system and the other EU member states. To our opinion it is recommended that for each of these aspects a number of key-indicators is developed, supplemented with qualitative information based on several information resources.

In the context of the ideas of a common framework for evaluation of the judicial cooperation in criminal matters in the light of mutual trust between the EU member states it is important to take notion of the ideas for developing an *EU justice scoreboard* or *criminal scorecard* method. A scoreboard or scorecard must be seen as a graphical representation of the progress over time, toward specified goals or objectives. Often these goals or objectives are related to key-performance indicators (KPI's). Key performance indicators are metrics to evaluate relevant factors that are crucial for the success of organisations (or countries). Bringing the notion of the scoreboard or scorecard to the (national) justice systems this implies that at a European level (performance) objectives or targets can be defined, as well as key performance indicators. In the previous paragraph we have already identified the main areas that are of importance for evaluating national legal systems in the criminal area, by looking at: quality, performance, capacity, fair trial, independence, integrity, proportionality, legal representation, conditions of detention and level of cooperation. For some of those areas already performance indicators are defined and is data available, whilst for other this is not the case⁷⁸¹.

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⁷⁸¹ An example how an EU Justice Scorecard in the criminal law area might look like is provided in the appendix of this report.

Figure 9: An evaluation framework for mutual trust and judicial cooperation in criminal matters

Procedural aspects of mutual trust and judicial cooperation in criminal matters

Other EU-instruments and policies in criminal matters



EU-instrument to be evaluated (e.g. the European Arrest Warrant procedure and the principle of proportionality)

Evaluation methods:

- peer-review visits
- legal analysis
- (perception) surveys
- government registration data/statistics



Supplemented with quantitative and qualitative data from other sources of information: EU, Council of Europe, World Bank, NGO's (e.g. Transparency International, World Justice Project, World Economic Forum, etc.)

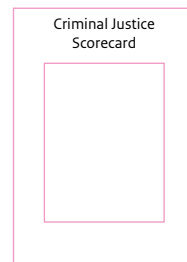


Institutional aspects of mutual trust and judicial cooperation in criminal matters

- Quality standards for education, recruitment, nomination of law enforcement officers, members of the judiciary
- Available capacity of the national legal system (financial, human and material resources)
- Performance of law enforcement agencies and judicial authorities (KPI's: durations of pre-trials, clearance rates)
- Level of independence of the judiciary (in law and in practice)
- Level integrity and trust of the justice institutions
- Application of right to a fair trial principles
- Application of level of proportionality principles
- Quality of legal representation
- Conditions of detention
- Level of cooperation between the national state and other EU Member States



(a list of key performance indicators can be visualised in a European Criminal Justice Scorecard or Scoreboard based on indicators on institutional aspects and judicial cooperation)



A justice scoreboard or criminal scorecard implies that the state of affairs of a national judicial system can be represented in a limited set of quantitative figures. Experience with the work of institutions such as the Council of Europe/CEPEJ and the World Bank shows however, that there are limitations to this approach. One of the major difficulties in the developing a scoreboard or scorecard concerns the use of uniform definitions for the key-performance indicators, the availability of reliable (and verifiable) data and a uniform data collection process. The pilot project showed already that for the three participating Member States there exist a large variety on the data available of the practice of the European Arrest Warrant. In Germany, detailed statistical information is available, whilst in the Netherlands and France only to a limited extend statistical data on the European Arrest Warrant is collected. Results of several evaluation rounds of the CEPEJ indicated that the level of reliability of the data received from the member states of the Council of Europe (through the self-reporting method) is still problematic and that there can exist major differences between the statistical figures provided for the CEPEJ reports and other available statistical reports. This implies that – when it is decided to develop an EU justice criminal scoreboard or scorecard method – it will be necessary to invest in the process of data collection and reliability of the data provided by the Member States and to make a careful choice between which data will be collected by the EU (or through the EU institutions at the EU Member States) and which other sources (e.g. CEPEJ data) will be used to fill the scoreboard/scorecard.

One of the essential points for a successful development and implementation of an EU justice scorecard or scoreboard method is the level of cooperation of the individual EU Member States (and the political willingness to contribute to this idea) and the use of the information that is being collected by the European Union. In contrast with the Council of Europe's CEPEJ report on European judicial systems, the European Criminal Justice Scorecard or Scoreboard method is not a non-binding evaluation tool, since the results of an evaluation round may result in an intervention of the European Union in national criminal justice systems. Especially, in situations where for a specific key performance indicator (e.g. the quality of the detention facilities) figures are shown which fall under certain pre-defined European norms. To prevent a 'naming and shaming' approach it is essential that a (if it is decided to opt for a European scorecard) a scorecard is used as a positive tool by the European Union. 'Underperforming' national legal systems must receive additional support (e.g. through technical assistance projects) from the European Union to raise their level of performance, capacity, etc. towards acceptable European minimum norms and standards.

To our opinion the development of an EU Justice Scoreboard or Scorecard might be considered as one of the options to develop a better understanding of the functioning of national legal systems in the context of the application of European policies and instruments. However, as has been indicated earlier, a description of national legal systems cannot be summarized only in quantitative figures, but must be supplemented with qualitative data based on several evaluation methods. This is absolutely necessary for the development of a real common evaluation framework for judicial cooperation in criminal matters, where a balanced picture can be provided of the level of effectiveness and efficiency of EU instruments in the light of the current practices and challenges that the current EU Member States are facing.

Annex

EU Criminal Justice Scorecard		COUNTRY		YEAR
Indicator		Country score	EU-average score	Data source
Caseload criminal law cases (incl. EAW's)				
1	Total number of incoming national criminal court cases (100.000 inh)			country/EU
2	Total number EAW's issued illicit drug trafficking			country/EU
3	Total number EAW's issued for fraud cases			country/EU
4	Total number EAW's issued for armed and organized robbery			country/EU
5	Total number EAW's issued for participation criminal org.			country/EU
6	Total number EAW's issued for other list-fact cases			country/EU
7	Total number EAW's issued for non-list facts (e.g. theft)			country/EU
8	Total number EAW's executed illicit drug trafficking			country/EU
9	Total number EAW's executed for fraud cases			country/EU
10	Total number EAW's executed armed and organized robbery			country/EU
11	Total number EAW's executed for participation criminal org.			country/EU
12	Total number EAW's executed for other list-fact cases			country/EU
13	Total number EAW's executed for non-list facts (e.g. theft)			country/EU
14	Total number of refused requests EAW's for execution			country/EU
Access to justice				
15	Number of 1st instance courts per 100.000 inhabitants			CEPEJ
16	Average annual budget allocated to legal aid			CEPEJ
17	Number of cases granted with legal aid per 100.000 inhabitants			CEPEJ
18	Number of lawyers per 100.000 inhabitants			CEPEJ
Performance justice systems				
19	General clearance rates courts 1st instance misdemeanor cases (%)			CEPEJ
20	General clearance rates courts 1st instance severe offences (%)			CEPEJ
21	Average duration misdemeanor cases 1st instance court (days)			country/EU
22	Average duration pre-trial severe criminal cases 1st instance level (days)			
23	Average duration severe crim. Case 1st instance court (days)			country/EU
24	Average duration execution EAW (consent surrendered pers) (days)			country/EU
25	Average duration execution EAW (non-consent surrender) (days)			country/EU
26	Average cost per EAW case (execution)			country/EU
27	Average cost per EAW case (issuing)			country/EU

Resources justice systems			
28	Number of professional judges per 100.000 inhabitants		CEPEJ
29	Number of public prosecutors per 100.000 inhabitants		CEPEJ
30	Number of non-judge staff per 100.000 inhabitants		CEPEJ
31	Number of non-prosecutor staff per 100.000 inhabitants		CEPEJ
32	Total annual approved budget allocated to the whole justice system		CEPEJ
33	Justice expenditure % per capita		CEPEJ
34	Justice expenditure % total government expenditure		CEPEJ
35	annual budget allocated to detention facilities (*)		country/EU

Quality of justice			
36	The perceived level of independence judiciary		WEF
37	the efficiency of the legal framework in settling disputes		WEF
38	Due process of law and rights of the accused		WJP
39	perceived effectiveness criminal investigation		WJP
40	timeliness and effectiveness criminal adjudication		WJP
41	Impartiality criminal system		WJP
42	Number of judges participated exchange program EJTN		EJTN
43	Number of public prosecutors participated in exchange program EJTN		EJTN

Integrity			
44	Euro barometer - trust in the judiciary		EU
45	Courts treat all citizens equally (%)		WB/LITS
46	Level of perceived corruption judiciary		TI/GCB
47	Level of absence corruption criminal system		WJP
48	Level of absence influence government of the criminal system		WJP
49	Irregular payments and bribes public officials		WEF

Data sources:

EU = European union

Country = EU member state

CEPEJ = European Commission for the Efficiency of Justice

WB = World Bank (LITS = life in transition survey)

WJP = World Justice Project

TI/GCB = Transparency International - global corruption barometer

EJTN = European judicial training network data

WEF = World Economic Forum - Executive Opinion Survey

(note a similar EU civil justice scorecard can be developed for civil law (indicators to be added):

Caseload:

Total number of civil litigious incoming cases per 100.000 inh

Total number of civil non-litigious cases per 100.000 inh

Total number of mediations

total number of cross-border mediation cases

total number of European Order for Payment cases

total number of European Small Claims procedures

Capacity:

Total number of registered mediators

Total number of judicial officers/baillifs

Quality of justice

satisfaction with service delivery civil courts (WB/LITS)

Integrity

Prevalence of unofficial payments to civil courts (WB/LITS)

List of abbreviations

AICCM	(German) Act on Cooperation in Criminal Matters
CC	Criminal Code
CCA	(German) Courts Constitution Act
CCBE	Council of Bars and Law Societies of Europe
CCJE	Council of European Judges
CCP	Code of Criminal Procedure
CEPEJ	European Commission for the Efficiency of Justice
CFR	Charter of Fundamental Rights
CISA	Convention Implementing the Schengen Agreement
CPT	European Committee for the Prevention of Torture
DSA	Dutch Surrender Act
FD	Framework Decision
FD EAW	Framework Decision on the European Arrest Warrant and the surrender procedures between Member States
EAW	European Arrest Warrant
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EIO	European Investigation Order
EJN	European Judicial Network
EJTN	European Judicial Training Network
EU	European Union
IRC	Internationaal Rechtshulp Centrum
JCP	(German) Act on Criminal Proceedings against Juveniles
OJ	Official Journal of the European Union
SIRENE	Supplementary Information Request at National Entry
SIS	Schengen Information System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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