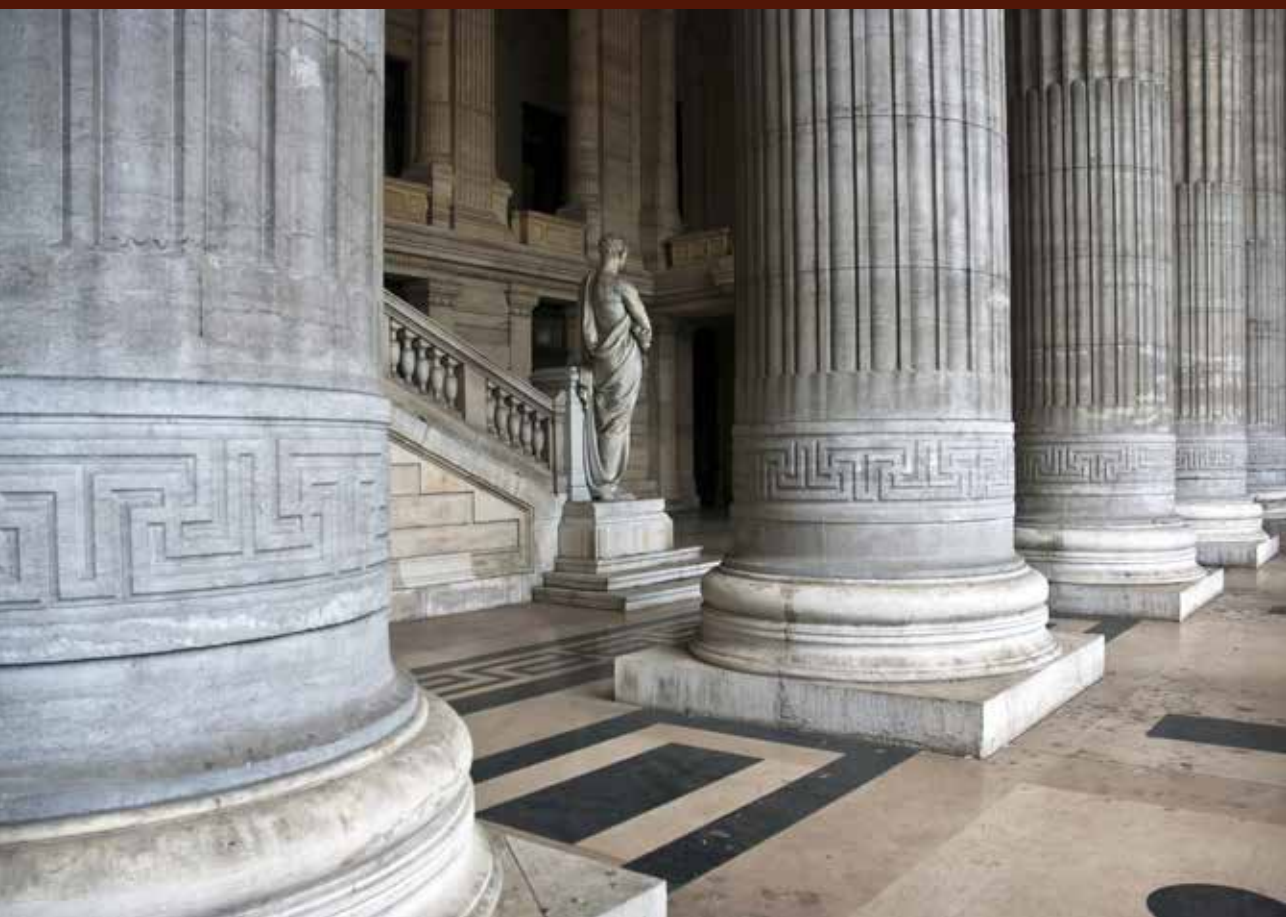
Short Version of the final report

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

(Summary, extracts of the main chapters of the final report and recommendations)



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

(Summary, extracts of the main chapters of the final report and recommendations)

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Part A

Part A
Introduction: approach, evaluation methodology and the pilot project

The present short version of the final report summarizes the main findings of the project "Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters". It contains extracts from the final report and includes its conclusions/recommendations. This short version is available in English, French and German. The final report in full length is available in English only.
The following introductory remarks give a brief overview of the background of the project, its aim and its approach (chapter 1), its starting point in methodological terms concerning the evaluation of mutual trust (chapter 2), and the specific subject matter evaluated ("the pilot project"), i.e. the European Arrest Warrant and the principle of proportionality (chapter 3). Chapter 4 guides the reader through this short version of the final report and informs which topics are contained in more detail in the final full length report.

1 Introduction to the project

In January 2009, the then Dutch Minister of Security and Justice intervened on the principle of mutual recognition and mutual trust at an informal JHA-Council in Prague. He stated that if doubts about the functioning of some parts of national criminal justice systems keep lingering (as it is the case in practice), the fundament of judicial cooperation in criminal matters in the EU is threatened. 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, exchange missions and procedural guarantees, an evaluation mechanism should be developed in order to strengthen mutual trust in the EU (which goes also beyond the current evaluation of judicial cooperation instruments on the EU level).

After a conference in Maastricht that discussed how such an additional evaluation mechanism should be developed.[1] the Ministries of (Security and) Justice of the Netherlands, France and Germany took further action. Upon their initiative the idea of an additional evaluation mechanism was anchored in the Stockholm Programme and its subsequent Action Plan[2] and they further developed an EU-funded project to examine the concept of an additional evaluation mechanism in more detail. This project is the subject matter of this publication.

Against the mentioned background, the project therefore aims 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. In order to test this methodology the instrument of the European Arrest Warrant was chosen as a pilot project and within this more specifically the conditions for issuing a European arrest warrant relating to the proportionality of the decision. A team of national experts from

[1] Cf. 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.

[2] 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 „ 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.

France, Germany and the Netherlands, supported by scientific experts (law professors from each of the three participating countries) evaluated in the period of 2011 to 2013 this specific topic. The findings of the evaluation of the specific study on the instrument of the European arrest warrant combined with comparative in-depth studies on methods applied to evaluate the justice sector and judicial cooperation inside and outside the EU, formed the basis of the project's final report.
It is important to mention that this dual approach entails the two lines of the final report: Namely the first line that is covering the subject matter of the European Arrest Warrant and the principle of proportionality and second – the methodological line – that is addressing the complex world of comparative evaluation methods and best-practice examples. The latter examines the main methodological approaches that should be included in a common evaluation framework to assess mutual trust and judicial cooperation between EU Member States in criminal matters. It is provided by non-governmental institutions, research institutes, universities, European and international organisations presenting quantitative and qualitative information of various aspects that are related to the structure and functioning of judicial systems from the viewpoint of the users of those systems (e.g. citizens, clients and legal professionals) and from the side of the institutions delivering justice (the justice institutions themselves). The team of experts has tried to bring the two mentioned lines together in the final report.

2 The starting point: the procedural and institutional aspects of mutual trust

In order to get a good overview of the mutual trust in judicial cooperation in criminal matters the project team found that two aspects must be taken into account: It is necessary to look at both procedural and institutional aspects that could be included in an evaluation at the European level. These two kinds of aspects can also be described as "building blocks" for mutual trust.

Procedural aspects

The application of mutual trust underpinning the principle of mutual recognition of judicial decisions in criminal matters is welcomed by every Member State of the European Union. However, mutual trust and mutual recognition are not automatically guaranteed, since in many Member States the sovereignty over national criminal law policies and practices is sometimes seen as of higher importance than developing a European criminal law culture with instruments to facilitate judicial cooperation in criminal matters. Under the influence of terrorism and a growing number of transnational crimes though, there is a need to introduce new procedural measures at a European level and to strengthen the existing ones. 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 harmonisation of substantive criminal law on the one hand, and on procedural measures enhancing cross-border cooperation on the other hand.

When the practice of the EU instruments in cooperation matters is being evaluated at a European level, it is necessary to pay attention to these procedural aspects enhancing mutual trust and cooperation between EU Member States. In practice, this means however that an evaluation should not be limited to the EU instrument to be evaluated as such (e.g. the evaluation of the European Arrest Warrant instrument), but

should take into consideration the interdependency between this instrument and other EU instruments in criminal matters as well.

Since the functioning of an individual EU instrument such as the European Arrest Warrant cannot be seen in isolation from other European instruments, policies and national criminal procedures these aspects must be included in developing a solid and well defined common evaluation framework at a European level. To illustrate this notion the relationship between the European Arrest Warrant, and new EU measures, in particular those that strengthen the procedural rights of suspects and victims shall be explained.

The European Arrest Warrant procedure was introduced in 2002 to abolish the complicated formal traditional extradition procedures with a simple procedure of surrender (surrender ofsentenced or suspected persons from one EU Member State to another EU Member State). Under the influence of the use of this instrument, grounds for refusal, formal requirements and the average duration for a surrender procedure were considerably reduced, which can also be defined as a great success of efficiency. But what about the legal protection of suspects or sentenced persons in Europe? Should these procedural aspects of mutual trust and judicial cooperation be included in a common evaluation framework, too? The answer is yes. Instruments such as the European Arrest Warrant procedure or the European Evidence Warrant are mainly focusing on the efficiency of law enforcement cooperation, i.e. the security issue within the area of freedom, justice and security of Europe. However, the European Commission has seen over the years that there is a lack of European instruments focusing on the rights of suspects and victims. Therefore, new instruments are being introduced to enhance the procedural rights of suspects or to improve the conditions of detention for suspects waiting for a trial or for persons whose sentence is executed. Good examples of these instruments are the introduction of letters of rights to the suspect, a right to interpretation and translation during pre-trial stages and the right to legal advice and legal assistance at the earliest stage as possible. Concerning the conditions of detention a Green paper has been published in 2011. In this paper, a clear relationship is provided between the use of instruments such as the European Arrest Warrant procedure and the conditions related to (custodial) detention. As a part of the European Arrest Warrant procedure, judges of the executing state who have to review a request to surrender a person, must be convinced that decisions taken by the issuing State are fair and fully respect human rights, such as decent conditions of detention during a pre-trial phase of the procedure.

This example clearly shows support of the idea that when a common evaluation framework for mutual trust and judicial cooperation is developed, a holistic approach must be applied, where the evaluation of an EU instrument is not limited to this instrument as such, but should pay attention to the influence and effects of other EU instruments and policies on the practice of this specific instrument, too.

Institutional aspects

Criminal procedures, supported by EU instruments, may become more or less effective and efficient under the influence of various institutional aspects related to mutual trust. For example a lack of personal ressources of judges in an executing Member State might have a negative influence on the average duration of a European Arrest Warrant procedure if judges are not able to review all the requests received from the issuing Member States to surrender a person in due time. The same holds true when surrendered persons who are being detained in other EU Member States, as a part of a pre-trial procedure, have to wait for their trial longer than expected due to capacity problems in the judiciary. This situation can have a negative

influence on the mutual trust between EU Member States and therefore also on the effectiveness, efficiency and quality of the application of EU instruments such as the European Arrest Warrant procedure. Therefore, there is a need for applying a holistic approach not only in procedural terms, but also in institutional terms.

That is why - in a common evaluation framework - there is a necessity to include (comparative) data/ information about various institutional aspects related to the judicial cooperation in criminal matters and the functioning of national legal and judicial systems. The project identified the following important elements of these institutional aspects : (1) (quality) standards for education, recruitment and nomination of police officers, customs, border police, prosecutors, judges and judicial staff, (2) the available capacity of legal systems, (3) performance of the police, law enforcement and judicial authorities, (4) the application of the right to a fair trial, (5) the level of perceived (and actual) corruption and trust in the police, law enforcement authorities (including customs and border police) and the judiciary, (6) the level of proportionality in the use of criminal law instruments, (7) the quality of legal representation, and (8) conditions of detention and the level of cooperation between EU Member States in criminal matters.[3] The functioning of this holistic approach in the area of a common evaluation framework for mutual trust and judicial cooperation in practice is tested, as mentioned, in the pilot project in which the principle of proportionality and the European Arrest Warrant is used as a "case study". The pilot project is not limited to an evaluation of the instrument itself by making use of various evaluation methods, but also presents comparative data on several institutional aspects related to mutual trust and judicial cooperation in criminal matters. The next paragraph explains, how the approach was applied.

3 The pilot project explained: the principle of proportionality and the European Arrest Warrant procedure

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 (the European Arrest Warrant) on the one hand and the intervention to be evaluated on the other hand (the principle of proportionality). Taking into consideration the general idea of including procedural and institutional aspects in an evaluation scheme, the case study on the application of the principle of proportionality and the European Arrest Warrant procedure used a combined approach in methodological terms: We combined legal analysis, quantitative and qualitative research methods because they best fit the hierarchical aspect of EU policy implementation in the field of judicial cooperation.

The European Arrest Warrant procedure has been chosen as the subject matter for a case study for various reasons. Firstly, the Framework Decision on the European Arrest Warrant was the first measure implementing the principle of mutual recognition in the criminal law area. As a consequence the measure has been implemented into national law not only for the participating countries, but for all EU Member

[3] Quantitative and qualitative data about these institutional aspects can be collected by making use of existing sources of data and evaluation reports (e.g. from the European Commission, Council of Europe, World Bank and NGO's (e.g. Transparency International and the World Justice Project).

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 pilot. Secondly, the European Arrest Warrant interferes with the right to personal freedom (Article 5 ECHR and Article 4 CFR), a fundamental right which is sensitive and, thus, a particularly suitable context to evaluate the impact of the principle of proportionality. The last reason for selecting this topic is that the European Arrest Warrant procedure has been already 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.

Topics for the evaluation

The emphasis on the impact of the principle of proportionality on the Member States' practice in issuing and executing European Arrest Warrants implies that 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 analysis of the intervention has several layers. Since the concept of proportionality and its role in legal practice may differ from Member State to Member State the first layer of the pilot project is about the general impact of the proportionality principle on the national criminal justice systems. The second layer is the impact of the implementation of the European Arrest Warrant where the issue of proportionality arises in both the Member State issuing a EAW and the Member State executing the EAW.

In the issuing Member State the evaluation focused on whether the competent authority applies a proportionality check before issuing a EAW and the criteria to be applied in that test. Given the fact that the seriousness of the crime is a crucial aspect when assessing the proportionality of arrest and surrender, special attention was given to the offences for which the 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 and procedural safeguards).

At first sight, the issue of the principle 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. When Member States, for instance, are examining optional grounds for refusing a request a proportionality test can be applied. Furthermore, the principle of proportionality may be considered to be part of the European ordre public (Article 1(3) FD EAW). 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 excessive punishment (Article 49(3) CFR), duration and conditions of detention (Article 3 and 5 ECHR,

Article 4 and 6 CFR) or the use of the EAW for trivial offences or for reasons that do not justify detention (e.g. interrogation).

Due to the fact that the execution of a EAW requires both arrest and detention on the one hand and surrender on the other hand, the analysis of differences between transnational law and national law enforcement have been taken into consideration in the pilot project on a third layer too.

In a subsequent part, the pilot project draws 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 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 collects the experiences with the current evaluation methodology and asks what lessons can be learned from the fourth round of mutual evaluation.

Evaluation methods applied

The core of the case study on the principle of proportionality and the European Arrest Warrant are the legal analysis and the peer review visits. The legal analysis provides an overview of the implementation of the EAW in the national law of each of the participating countries (France, the Netherlands, and Germany), possibly put in the context of documented policies. Document and text analysis, analysis of jurisprudence and literature review have been part of this legal analysis. The peer review is the second element designed to explore the implementation practice in the three participating countries. The peer review visits provided the framework for qualitative data assessment by interviews. Since the interviews delivered a comprehensive picture of 'what is going on' it was considered essential to address the whole range of practitioners dealing with EAWs (judges, prosecutors, officials of central authorities and the national Schengen Information System units as well as defence lawyers).

Due to the fact that the peer review visits were limited to France, Germany and the Netherlands and the results of those visits could not automatically be extended to the other EU Member States surveys supplemented the "peer review method" in order to evaluate the practice of the European Arrest Warrant and the principle of proportionality from the viewpoint of judicial authorities and defence lawyers of other EU countries. The surveys were addressed to the national contact points of the European Judicial Network in Criminal Matters and to defence lawyer correspondents of the European Criminal Bar Association respectively.

The last source of information that has been used in the project concerned statistical data on the European Arrest Warrant procedure and the national criminal justice systems of the three participating countries. This data was used to complement the results of the peer review visits and to prevent misinterpretations or erroneous conclusions. In order to assess the empirical basis for mutual trust, the collection of statistical data was not limited to the implementation of the EAW, but also related to the capacity and performance of the criminal justice systems of the participating countries.

4 Guide to the reader

As mentioned above, this short version of the final project report cannot but contain a summary, the main findings and our conclusions/recommendations on the elaborated two topics of the project, i.e. (1) the European Arrest Warrant and the application of the principle of proportionality, and (2) the development of a common evaluation framework on mutual trust and judicial cooperation in criminal matters. The issues that are mentioned here in this introductory part A (history and content of the project, procedural and institutional aspects related to mutual trust, the elaboration about methods that can be used to evaluate mutual trust and judicial cooperation, the explanation of the pilot project on the principle of proportionality and the European Arrest Warrant as well as the checklists/questionnaires that were used to implement the methodology) are elaborated much more extensively in the full length report (English only). Furthermore, this full length report contains the findings from the legal analysis and the peer reviews in the form of detailed country reports on France, the Netherlands, and Germany including the analysis of statistical data of each country, as well as the main results of the replies to the surveys to the judicial authorities of the European Judicial Network and the defence lawyers. These parts are not reproduced here. Therefore, reference is made to the full length report. The following parts B and C contain the unabridged final chapters of the final report.
In accordance with the dual approach of this project – and to meet the expectations of the possibly different target audience (justice practitioners interested in the European Arrest Warrant procedures vs. policy makers and academics interested in methodological aspects related to comparative evaluation studies in the criminal justice area) – the following two parts are designed to address each of the two approaches separately.

Part B addresses in its first section the comparative overview of the country reports and surveys in relation to the European Arrest Warrant and the principle of proportionality. In other words, this first section presents the main findings of the evaluation of the "case study". It is followed by a second section that draws the conclusions for the evaluated instruments, i.e. it contains the recommendations on making proportionate use of the European Arrest Warrant). Part C is designed as the methodological part. Here, the main findings of the pilot project are connected with a concrete proposal for a common framework for assessing mutual trust and judicial cooperation in criminal matters. In this proposal, several evaluation methods are recommended (peer review, government statistical data, legal analysis and the use of (rule of law) reports from European and international organisations, as well as from non- governmental organisations). The need for developing a criminal justice scoreboard method, in line with the EU (civil) justice scoreboard, is being discussed in this part of the report, too.

Part B

Part B The European Arrest Warrant and the principle of proportionality - findings and recommendations

1 Comparative overview of the country reports and surveys

Martin Böse

1.1 The Principle of Proportionality in European law and national criminal justice systems

1.1.1 European law

The principle of proportionality is integral part of the legal order of the European Union. Numerous Treaty provisions[4] explicitly refer to this principle or one of its elements ("necessary")[5], and in the case law of the Court of Justice[6], 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."[7]

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).[8]

The principle of proportionality is not necessarily related to individual rights but an objective principle.[9] 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.10 In this particular context

4 See e.g. Art. 5 (4) TEU, Art. 69 and 296 (1) TFEU, Art. 49 (3) CFR, Art. 52 (1) CFR.

5 See e.g. 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.

6 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.

7 ECJ, case 265/87, *Schräder v. Hauptzollamt Gronau*, [1989] ECR 2237 par. 21.

8 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).

9 E. Pache, „Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften", [1999] Neue Zeitschrift für Verwaltungsrecht 1033 (1036-1037).

10 See also Art. 296 (1) TFEU.

with the principle of subsidiarity[11], the proportionality test is "competence-related".[12] This objective concept of proportionality may also apply to the financial impact and costs of the measure to be taken.[13] 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.

1.1.1.1 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.[14] 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.[15] 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).[16] 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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[11] See opinion of Advocate General *Dámaso Ruíz-Jarabo Colomer* of 12 September 2006, case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3638 par. 61 et seq.

[12] G. Lienbacher, Artikel 5 EUV, in: J. Schwarze (ed.), EU Kommentar, 3rd edition, Baden-Baden 2012, par. 35-36 („Der kompetenzbezogene Grundsatz der Verhältnismäßigkeit").

[13] 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.

[14] 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.

[15] 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.

[16] 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.[17] 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.[18]

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.[19] 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.[20] 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.[21]

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)."[22]

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).

1.1.1.2 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

[17] 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.

[18] ECtHR, judgment of 18 March 2008, application no. 11036/03, *Ladent v. Poland*, § 56.

[19] ECtHR, judgment of 19 February 2009, application no. 3455/05, *A. and others v. United Kingdom*, par. 164.

[20] 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.).

[21] 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.

[22] Advocate General *Eleanor Sharpston*, opinion of 18 October 2012, case C-396/11, *Radu*, par. 62.

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 regard as a means of last resort (ultima ratio).[23] 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.[24]

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.[25] 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."[26]

Nevertheless, the national and the European legislator have a margin of discretion when adopting criminal law provisions.[27] 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.[28] 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.[29] 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

[23] See Advocate General Mazak, opinion of 28 June 2007, case C-440/05, *Commission v. Council*, [2007] ECR I-9100 par. 71, 102.

[24] ECJ, case 68/88, *Commission v. Greece*, [1989] ECR 2985 par. 24.

[25] See P. Asp et alii, "Manifesto on European Criminal Policy", [2009] Zeitschrift für Internationale Strafrechtsdogmatik 707 (709 et seq.), with various examples.

[26] O.J. C 115 of 4 May 2010, p. 1 (15).

[27] 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).

[28] 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).

[29] ECtHR judgment of 16 October 2010, application no. 25579/05, *A, B and C v. Ireland*, § 243.

certain conduct is in breach with EU law and, thus, an infringement of the national provision must not be punished by a criminal sentence.[30]

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.[31]

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.[32]

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.[33]

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. 1/2003[34], 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 fines[35], 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.
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.[36] 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.[37]

[30] 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.

[31] 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.

[32] A. von Hirsch, *Censure and Sanctions*, 1993, p. 18-19.

[33] ECJ, case 8/77, *Sagulo, Brenca and Bakhouche*, [1977] ECR 1495 par. 10-13; see also ECJ, case C-193/94, *Skanavi*, [1996] ECR I-929 par. 34 et seq.

[34] O.J. L 1 of 4 January 2003, p. 1.

[35] O.J. C 210 of 1 September 2006, p. 2 (4).

[36] A. von Hirsch, supra, p. 18-19.

[37] P. Asp, "Two notions of proportionality", in: K. Nuotio (ed.), *Festschrift in honour of Raimo Lahti*, Helsinki 2007, p. 207 (216).

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.[38] 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.[39] 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.[40]

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.[41] 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.[42]

1.1.1.3 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.[43] 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.[44] 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.[45] 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).[46]

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[38] ECtHR, judgment of 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.

[39] ECtHR, *James, Wells and Lee v. United Kingdom*, ibid., §§ 201 et seq., § 221.

[40] 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.

[41] ECtHR, judgment of 27 July 2010, application no. 28221/08, *Gatt v. Malta*, § 29.

[42] ECtHR, judgment of 17 January 2012, applications nos. 66069/09 and 130/10 and 3896/10, *Vinter and others v. United Kingdom*, § 89.

[43] Presidency conclusions of the Tampere European Council of 15 and 16 October 1999 no. 33.

[44] 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.

[45] 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.

[46] Recital (10) of the Framework Decision on the European Arrest Warrant.

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 ..."[47]

Furthermore, Art. 1 (3) of the Framework Decision recalls the Member States' obligation to respect fundamental rights and fundamental principles of the Union.[48] 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.[49] 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.[50] 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.[51] 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 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 ..."[52]

47 Recital (12) of the Framework Decision on the European Arrest Warrant.

48 See also recital (13) of the Framework Decision on the European Arrest Warrant.

49 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.

50 ECJ, ibid,. par. 80 et seq.

51 ECJ, ibid., par. 99 et seq.

52 ECJ, ibid., par. 106.

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 cases[53], 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. ..."[54]

Although the Advocate General referred to the Court's judgment in the asylum case[55], 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").[56]

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 penalties[57] 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."
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.[58] 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

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53 Advocate General *Eleanor Sharpston*, opinion of 18 October 2012, case C-396/11, Radu, par. 70 et seq., 74 et seq.

54 Ibid., par. 97.

55 Ibid., par. 76.

56 Ibid., par. 82 et seq.

57 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).

58 Ibid., par. 103.

state is considered to be "grossly disproportionate".[59] 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.[60]

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.[61] 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.

1.1.2 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 prosecution)[62], 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.

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59 ECtHR, judgment of 17 January 2012, applications nos. 66069/09 and 130/10 and 3896/10, *Vinter and others v. United Kingdom*, §§ 88, 89.

60 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 ..."

61 ECJ, judgment of 26 February 2013, case C-399/11, *Melloni*.

62 Sections 167 and 242 Dutch CCP.

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 suspicion[63];
- a minimum gravity of the crime of which the arrested person is charged[64];
- a ground for detention (e.g. the risk that the suspect will abscond, tamper with evidence or continue to commit crimes)[65];
- the requirement that less intrusive means (e.g. bail, house arrest, judicial supervision) are not available or not sufficient to achieve the objective pursued[66];
- 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).[67]

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.[68] 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.[69] 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.[70]

1.2 The principle of proportionality in the issuing state

1.2.1 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

[63] Section 67 (3) Dutch CCP; Section 112 (1) German CCP.

[64] 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).

[65] Section 67a Dutch CCP; section 144 French CCP; section 112 (2) and (3), section 112a German CCP.

[66] Section 80 Dutch CCP; Sections 144, 138 French CCP; sections 116, 116a German CCP.

[67] 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).

[68] Section 63 French CCP (24 hours, but extension to 48 hours possible); section 115 German CCP.

[69] Section 69, 71 Dutch CCP; sections 148, 186 French CCP; sections 117, 304 German CCP.

[70] Section 63-1 French CCP; section 114b German CCP.

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 EJN 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.[71] 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 remedies[72].

1.2.2 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

[71] 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.

[72] See e.g. section 304 German CCP („Beschwerde").

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).

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 EJN survey, a similar understanding has been reported from other Member States.

1.2.3 Alternative instruments

In all participating countries (and, according to the EJN 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).

1.2.4 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.

1.3 The Principle of Proportionality in the executing state

1.3.1 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.[73] 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 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

[73] 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).

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.

1.3.2 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. So, the criteria mentioned above are only rarely applied in the participating countries as an executing state. As has been mentioned above, the EAW is not issued – and executed – for serious crimes only; according to the EJN 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), 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.

1.3.3 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 EJN 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.[74] 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 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).[75]

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.

[74] Convention on the transfer of sentenced persons of 21 March 1983 (European Treaties Series No. 112).

[75] ECJ, Judgment of 5 September 2012, Case C-42/11, *Lopes da Silva Jorge*, par. 59.

1.3.4 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.
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).76 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).

[76] 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".

1.3.5 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.
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.77 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

77 Federal Constitutional Court, decision of 16 September 2010, case 2 BvR 1608/07, (2010) Strafverteidiger-Forum 495.

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,[78] 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). 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 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).

1.3.6 Practical problems

The practical problems related to the execution of a EAW are already reflected in the problems arising for the issuing authority. 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).

[78] 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.

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).

1.4 Factors relevant for mutual trust

1.4.1 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 EJN 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.[79]

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

[79] 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

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 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.

1.4.2 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.

1.4.2.1 Capacity of the criminal justice system

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).[80]

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 valuate the personal and financial resources that are

[80] European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems, CEPEJ Studies No. 18 – Efficiency and Quality of Justice, 2012, p. 26.

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.

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.

1.4.2.2 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).[81]

[81] 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).

1.4.2.3 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.
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.[82]

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).[83] Compared to the proportion of juveniles (under 18 years of age) in Germany and France (0.9 % respectively 1 % of all detained persons)[84], the rate in the Netherlands seems to be considerably high (11.5 %).[85] The rate of foreign detainees varies between 17.8 % (France), 21.4 % (the Netherlands) and 26,7 % (Germany).[86] 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 %).[87] 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.[88] 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.[89] 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).[90] 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

[82] Cf. Aebi/Delgrande, Council of Europe, Annual Penal Statistics – SPACE I (Survey 2010), p. 80.
[83] Ibid., p. 84, 52.
[84] Ibid., p. 61.
[85] 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.
[86] Ibid., p. 77.
[87] Ibid., p. 77, 80.
[88] See the German country report.
[89] Ibid., p. 117 (France: 4,1 months; the Netherlands: 3,7 months).
[90] Statistisches Bundesamt (ed.), Fachserie 10, Reihe 3., Rechtspflege – Strafverfolgung, Wiesbaden 2011, p. 361.

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'.91

1.4.3 Conclusion

Although the collected information only provides a rough EJN 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.

1.5 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

91 See, however, the German report on the duration of criminal proceedings and the lack of judicial remedies.

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).

2 Recommendations on making proportionate use of the European Arrest Warrant

Martin Bose[92]

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 Warrant93 and recent studies on the cooperation in criminal matters in the European Union[94] as well as on the impact of the EAW on defence rights[95]. As the pilot project, the recommendations differentiate between the role of the issuing authority and the role of the executing authority.

2.1 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

[92] 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.

[93] Council-Doc. 7361/10, p. 3-4 (language regime) and 4-7 (proportionality check by the issuing state, criteria for the proportionality test).

[94] 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).

[95] 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.[96] Furthermore, this remedy cannot prevent the issuing authoriry 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.

2.2 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),

[96] 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.

Part C

1 Recommendations concerning the development of a common evaluation framework for assessing mutua and judicial cooperation in criminal matters

Pim Albers[97]

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.

1.1 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.
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

[97] This text contains the recommendations that result from this pilot project. As such, this text reflects the experiences of the entire team.

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:[98] 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 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

[98] 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).

(perception) survey for contact points of the European Judicial Network in criminal matters and for defence lawyers of the ECBA.

1.2 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 EJN 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.

1.3 Legal analysis

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.

1.4 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.

1.5 (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. Examples of evaluation instruments can be found at various institutions, such as: 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.

1.6 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).99 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.

[99] 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).

1.7 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. 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

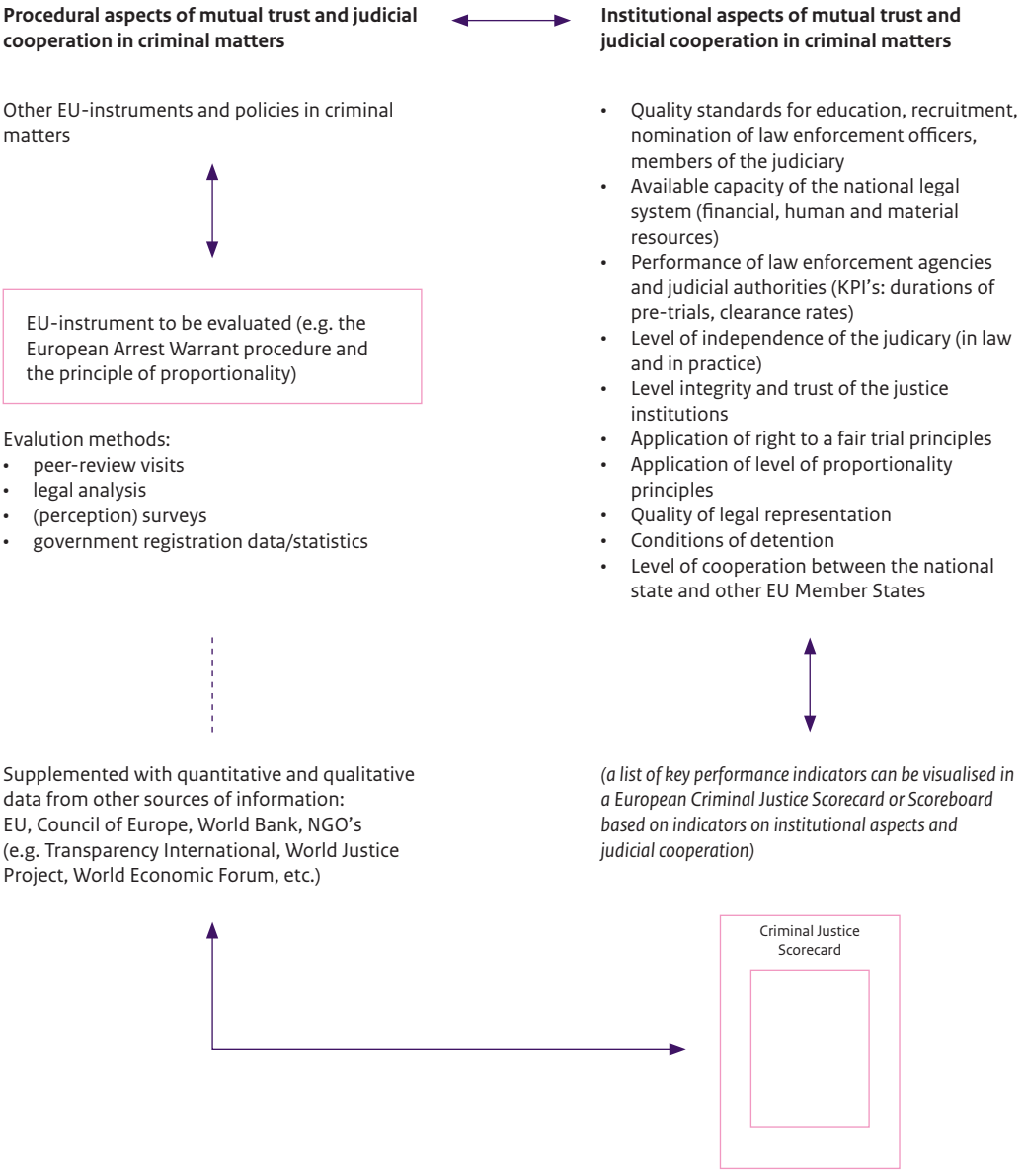
sanctioned with a penalty of imprisonment. Differences between accusatorial and inquisitorial systems is another good example of the large variety of national criminal policies in EU member states.

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. 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 case[100].

Figure 9: *An evaluation framework for mutual trust and judicial cooperation in criminal matters*



[100] An example how an EU Justice Scorecard in the criminal law area might look like is provided in the appendix of this report.

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 misedemeanor 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 dentention 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 accussed			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 absense 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)

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