

## Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System

Sergio Carrera, Elspeth Guild and Nicholas Hernanz

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### Abstract

This paper assesses the uses and misuses in the application of the European Arrest Warrant (EAW) system in the European Union. It examines the main quantitative results of this extradition system achieved between 2005 and 2011 on the basis of the existing statistical knowledge on its implementation at EU official levels. The EAW has been anchored in a high level of 'mutual trust' between the participating states' criminal justice regimes and authorities. This reciprocal confidence, however, has been subject to an increasing number of challenges resulting from its practical application, presenting a *dual conundrum*:

1. *Principle of proportionality*: Who are the competent judicial authorities cooperating with each other and ensuring that there are sufficient impartial controls over the necessity and proportionality of the decisions on the issuing and execution of EAWs?
2. *Principle of division of powers*: How can criminal justice authorities be expected to handle different criminal judicial traditions in what is supposed to constitute a 'serious' or 'minor' crime in their respective legal settings and 'who' is ultimately to determine (divorced from political considerations) when is it duly justified to make the EAW system operational?

It is argued that the next generation of the EU's criminal justice cooperation and the EAW need to recognise and acknowledge that the mutual trust premise upon which the European system has been built so far is no longer viable without devising new EU policy stakeholders' structures and evaluation mechanisms. These should allow for the recalibration of mutual trust and mistrust in EU justice systems in light of the experiences of the criminal justice actors and practitioners having a stake in putting the EAW into daily effect. Such a 'bottom-up approach' should be backed up with the best impartial and objective evaluation, an improved system of statistical collection and an independent qualitative assessment of its implementation. This should be placed as the central axis of a renewed EAW framework which should seek to better ensure the accountability, impartial (EU-led) scrutiny and transparency of member states' application of the EAW in light of the general principles and fundamental rights constituting the foundations of the European system of criminal justice cooperation.

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# Europe's most wanted?

## Recalibrating Trust in the European Arrest Warrant System

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### 1. Introduction

The European Arrest Warrant (EAW) was created by a Framework Decision taken in 2002 in the pre-Lisbon Treaty era under the so-called 'Third Pillar' of the European Union.<sup>1</sup> It constitutes the first concrete legislative measure in the field of criminal law cooperation in the EU based on the principle of mutual recognition,<sup>2</sup> and has been presented at EU official levels as 'the cornerstone' of judicial cooperation in criminal matters. The principle of mutual recognition, now formally enshrined in the treaties,<sup>3</sup> requires member states to accept decisions by judicial authorities in another member state as having the same legal value and effect as their own.

The aim of the EAW is to abolish the formalities associated with the old extradition procedures among the EU member states with respect to two categories of persons – those who are sought for criminal prosecution and those who have been finally sentenced in a criminal prosecution but are present in another member state. These may include nationals or residents of the requested member state. The simplified (yet not fully automatic) system of surrender of sentenced or suspected persons for the purpose of execution of criminal sentences or prosecution of criminal charges means that there should be much less delay in the process.

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<sup>1</sup> Council of the EU (2002), Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, 2002/584/JHA, Official Journal L 190, 18/07/2002, p. 1–20, hereinafter EAW FD. See the comprehensive webpage dedicated to the EAW in European Judicial Network's website <http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14> (all hyperlinks in this paper were last accessed on 1 March 2013).

<sup>2</sup> E. Guild and F. Geyer (2008), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate; G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds) (2009), *The Future of Mutual Recognition in Criminal Matters in the European Union*, Brussels: Editions de L'Université de Bruxelles; A. Souminen (2011), *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, : Cambridge: Intersentia; S. Alegre and M. Leaf (2004), "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – The European Arrest Warrant", *European Law Journal*, Vol. 10, No. 2, pp. 200-217.

<sup>3</sup> Art. 82.1 Treaty on the Functioning of the European Union (TFEU), which states: "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulation of the member states in the areas referred to in paragraph 2 and in Art.83."

Decisions on the execution of EAWs are subject, however, to a variety of exceptions and controls, most importantly that an independent judicial authority of a member state where the person is arrested has to determine whether s/he will be surrendered or not. Unlike the traditional system of extradition, where the final decision has largely been a political one (taken by relevant ministries or government), the EAW is initiated by judicial decision.

Extradition is a highly sensitive topic not least because criminal justice is widely conceived to be a matter of national sovereignty. Even among EU member states there are very substantial differences in criminal justice on issues of intense public interest. The way in which traditional extradition treaties have dealt with this dilemma has been through the (partial) application of the principle of double criminality (or dual incrimination) whereby the offence in question must be a criminal offence in both the requesting and requested states. The EAW has followed a different route: double criminality is excluded for a list of 32 offences if they are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years.<sup>4</sup>

Eleven years have passed since the formal adoption of the EAW and eight since the actual start of its practical operation. Its application has been anchored in a high level of 'mutual trust' between the participating states' criminal justice regimes and authorities. The EU also 'trusts' that all EU member states share and observe the same standards of integrity and guarantees in their judicial systems and practices.

Such a level of confidence, however, has been called into question as a consequence of several reactions by member states' constitutional courts,<sup>5</sup> the Court of Justice of the European Union in Luxembourg<sup>6</sup>, the Council of Europe Human Rights Commissioner<sup>7</sup> and evidence by civil society actors such as Fair Trials International<sup>8</sup> and JUSTICE,<sup>9</sup> all of which pointing out to the various shortcomings and gaps affecting the fundamentals and working arrangements of the EAW, as well as the deficiencies in some EU member states' judicial systems.

Among the most pressing challenges that the EAW has faced since its inception are the heterogeneous institutional settings and judicial traditions putting it into practice across the member states. Not only have there been as many EAWs as there are member states' laws

<sup>4</sup> Art. 1.2 of the EAW Framework Decision. For an analysis of the fate of the 'dual incrimination requirement', refer to N. Keijzer (2009), "The Fate of the Dual Incrimination Requirement", in E. Guild and L. Marin (eds) (2009), *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, pp. 61-75.

<sup>5</sup> E. Guild (2006), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers.

<sup>6</sup> C. Murphy (2011), "The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust?" in Eckes and Konstantinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press; B. De Witte (2011), "The use of the ECHR and Convention case law by the European Court of Justice", in P. Popelier, C. Van De Heyning and P. Van Nuffel (eds), *Law and Cosmopolitan Values*, Vol. 1, Cambridge: Intersentia, 2011, pp. 17-3; S. Braum and A. Weyembergh (2007), *Le Contrôle juridictionnel dans l'espace pénal européen*, Brussels: Editions de l'Université de Bruxelles,.

<sup>7</sup> Council of Europe (2011), *Overuse of the European Arrest Warrant – a threat to human rights*, Press Release, 15 March (<https://wcd.coe.int/ViewDoc.jsp?id=1760139&Site=COE>).

<sup>8</sup> See for instance Fair Trials International (2012), *The European Arrest Warrant Eight Years On – Time to Amend the Framework Decision?*, Outline Proposal for the European Parliament own initiative legislative report, 1 February. Refer also to Fair Trials International (2011), *The European Arrest Warrant Seven Years On – The Case for Reform* ([www.fairtrials.net/publications/policy-and-campaigns/the-european-arrest-warrant-seven-years-on-the-case-for-reform](http://www.fairtrials.net/publications/policy-and-campaigns/the-european-arrest-warrant-seven-years-on-the-case-for-reform)).

<sup>9</sup> JUSTICE (2012), *European Arrest Warrants – Ensuring an Effective Defence*, London, pp. 15-16 (<http://www.justice.org.uk/resources.php/328/european-arrest-warrants>).

implementing it,<sup>10</sup> the EAW has also revealed the limits and various domestic understandings of the general principle of the separation of powers, which lies at the heart of all the liberal democracies comprising the EU. While all EU member states comply formally with this principle depending on their respective constitutional and governance settings, the EAW has shown the high degree of divergences characterising the ways in which it functions and is put into practice depending on 'where' one is actually located in the Union. The exclusion by the EAW of the double criminality principle and the political involvement by governments in extradition decisions, has led, however, to the emergence of uncertainty and mistrust as regards 'who' is supposed to trust 'whom', and 'what' is precisely to be trusted in the various EU's justice areas.<sup>11</sup>

Confidence in the correct application of the EAW has been also undermined by criticisms alluding to the systematic issuing of EAWs for the surrender of persons sought in respect of often 'minor' offences which have been considered 'not serious enough' to duly justify the execution of such warrants. The issue of (lack of) proportionality was acknowledged by the latest European Commission Report from 2011 on the implementation of the EAW,<sup>12</sup> for instance, which recognised that "a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate." This question has become most pressing in light of the results of the mechanism of mutual member states' evaluations of the application of the EAW coordinated by the Council,<sup>13</sup> which have revealed a serious lack of uniformity regarding the nature of the competent judicial authority deciding on the EAW, with some member states allowing non-judicial authorities such as public prosecutors to issue 'Euro-warrants', and the consequent lack here of judicial scrutiny and political independence from national governments' interests.

This paper argues that the EAW poses a *dual conundrum*:

First, who are those competent judicial authorities cooperating with each other and ensuring that there are sufficient impartial controls over the necessity and proportionality of the decisions on the issuing and execution of EAWs?

Second, how can criminal justice authorities be expected to handle different criminal judicial traditions regarding what is supposed to constitute a 'serious' or 'minor' crime in their respective legal settings and who ultimately is to determine when is it duly justified to activate the EAW system for these same purposes?

These questions are examined by looking at the existing knowledge on the practical uses and misuses of EAWs. After this introductory section, Section 2 moves into an examination of EAW operations between 2005 and 2011. What do the EU and national official statistics tell us regarding the quantitative results and qualitative deficiencies of the EAW application? The cases of the UK and Germany are examined in particular as they have been considered

<sup>10</sup> E. Guild and L. Marin (2009), *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers.

<sup>11</sup> V. Mitsilegas (2012), "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law* 31.1, pp. 319-372.

<sup>12</sup> European Commission (2011), *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011)175 final, Brussels, 11 April, p. 8.

<sup>13</sup> Council of the EU (2011), *Follow up to the Evaluation Reports on the Fourth Round of Mutual Evaluations: practical application of the European Arrest Warrant and the relevant surrender procedures between Member States*, Presidency Report, 15815/1/11, Brussels, 18 November.

to be the EU member states working most actively (directly or indirectly) with the EAW system.

*Section 3* continues our analysis by focusing on the above mentioned ‘dual conundrum’ which criminal justice actors face in the delicate exercise of recalibrating trust in the application of the EAW system in fragmented European justice areas. Particular attention is paid to the proportionality and separation of powers dilemmas emerging from its implementation. The challenges posed to the separation of powers principle by cases such as that of Julian Assange, the founder of Wikileaks, are studied. Our examination reveals that effective cooperation in the scope of the EAW regime is jeopardised mainly by the mutual trust premise which takes (perhaps mistakenly) for granted an equal level of integrity and standards across all EU members states’ criminal justice regimes as well as uniformity in the nature of the competent judicial authority ensuring the independence of the regime’s implementation.

*Section 4* concludes and suggests that the next phase of the EAW will need to be anchored in a more methodologically sound statistics gathering and qualitative assessment model and an impartial evaluation of the uses of the EAW by member states’ authorities. For the legitimacy of the system to be upheld in the years to come, a ‘bottom-up approach’ will need to be developed, where the independent judicial actors within the national criminal justice systems will be those ultimately examining and determining the extent and scope of ‘mutual trust’ or ‘distrust’ to apply in practice. A correct recalibration of trust and mistrust will be the most effective way to ensure that the EU and its member states can place the necessary level of confidence in future EU criminal justice policy.

## 2. The practical uses and misuses of the EAW, 2005-11

The official statistics at EU and member state levels on the implementation of the EAW are scattered, incomplete and subject to a number of methodological shortcomings and inaccuracies.<sup>14</sup> One of the sources of statistical knowledge is the Council’s questionnaires on “quantitative information on the practical operation of the European arrest warrant” by member states which are regularly published in the Council’s public registry. The last update for 2011 was made available on 15 January 2013.<sup>15</sup> So far, there has been no qualitative comparative analysis of the results and responses provided by EU member states to the Council’s questionnaire since 2005.

This paper constitutes a first attempt in this direction. Annex 2 provides a complete statistical overview of the uses of the EAW system by EU member states between 2005 and 2011. Annex 1 offers a detailed overview of the existing official sources on EAW statistics, how they have been complemented with additional data, as well as a methodological note describing their weaknesses and ways in which these have been overcome for the purposes of the cross-member state analysis carried out in this paper. What do the statistics tell us about the practical application of the EAW since its launch?

<sup>14</sup> The above mentioned 2011 Commission report on the implementation of the EAW of 2011 acknowledged: “Not all Member States have provided data systematically and they do not share a common statistical tool. Moreover, different interpretations are to be found in the answers to the Council’s questionnaire” (p. 10). In fact, on the basis of a study entitled “Making better use of statistical data relating to the European Arrest Warrant” of March 2012, which contained proposals for revising the questionnaire, discussions are currently taking place at the Council’s Working Party on Cooperation in Criminal Matters (Experts on the European arrest warrant) on a revised/improved version of the questionnaire.

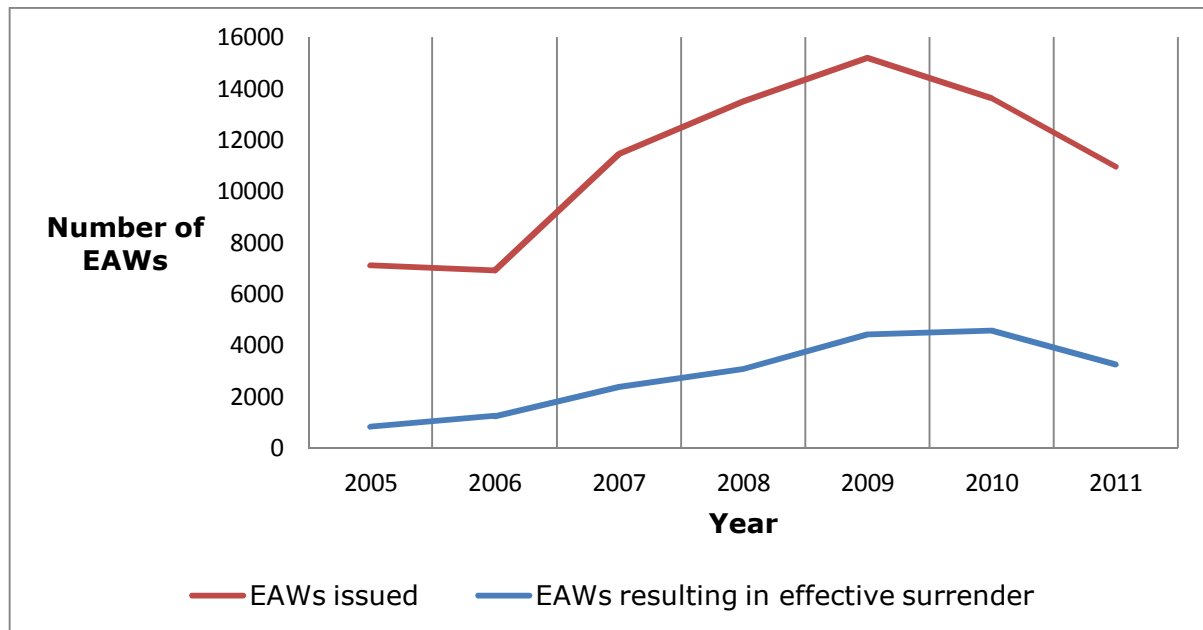
<sup>15</sup> Refer to Council of the EU (2013), Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2011, 9200/7/12, 15 January 2013, Brussels.

The following subsections tackle this question in a two-pronged approach. First, how many EAWs were issued and executed between 2005 and 2011, and which EU member states issued and executed more EAWs? Second, how many EAWs have been received by each member state, how many surrender procedures have been initiated by member states' judicial authorities pursuant to receipt of an EAW and how many warrants were refused during the reported period?

## 2.1 EAWs issued and executed

From 2005 until 2011, a total of 78,785 EAW requests for extradition were issued by EU member states. Of these, 19,841 EAWs resulted in the effective surrender of the person to the requesting member state.<sup>16</sup> Figure 1 gives a snapshot of the evolution in the numbers of EAWs issued and those resulting in effective surrender. From 2006 until 2009, there was a gradual increase in the number of EAWs issued, followed by a decrease in 2010 and 2011. The data on EAWs resulting in effective surrender have remained fairly consistent on average over the reported years, only showing a decrease from 2010 to 2011.

Figure 1. EAWs issued and resulting in effective surrender, 2005-11



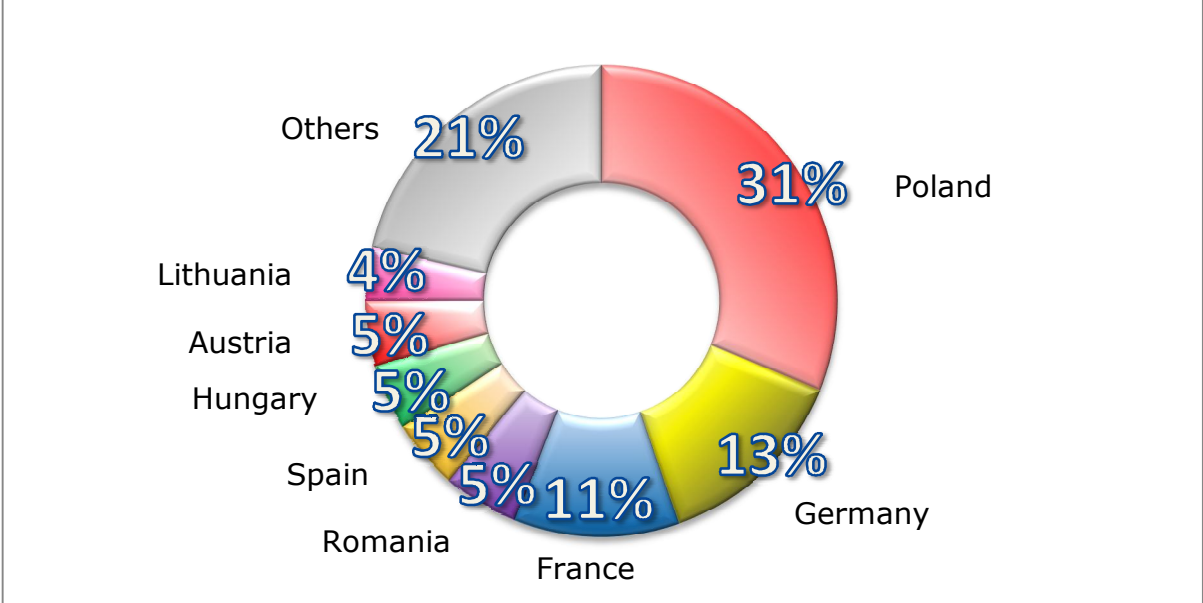
Source: Authors' own elaboration, based on statistics provided in the Council questionnaires.

Figure 2 below shows the proportion of EAWs issued by member states from 2005 to 2011. The EU member state that issued the largest number of EAWs was Poland, accounting for a total of 31% of EAWs, followed by Germany (14%), France (11%), Romania (5%), Spain (5%), Hungary (5%), Austria (5%) and Lithuania (4%). The relatively high number of EAWs issued by Poland during the reported period may be partly explained by looking at the issues of proportionality and division of powers that will be further examined in Section 3. The comparison between EAWs issued and those resulting in effective surrender of a person back to the issuing state (see Figure 3 below) shows that the member states that were more 'successful' in having suspects surrendered between 2005 and 2011 do not correspond with

<sup>16</sup> This picture based on the Council statistics is however not fully complete. There are some EU member states which have not systematically provided any statistical information to the Council (e.g. Italy for the years 2009 and 2010; The Netherlands for 2010), and there are other member states whose data are partially lacking in relation to specific reporting years. The information for 2011 is in fact still particularly scarce with data missing in the cases of Bulgaria, Romania, Greece, Hungary Italy and the Netherlands.

those actually issuing a higher number of EAWs. Among the top EAW issuers, Romania, the UK, Germany and France rank highest in the proportion of EAWs resulting in effective surrender, followed by Poland and Hungary.

Figure 2. EAWs issued, 2005-11

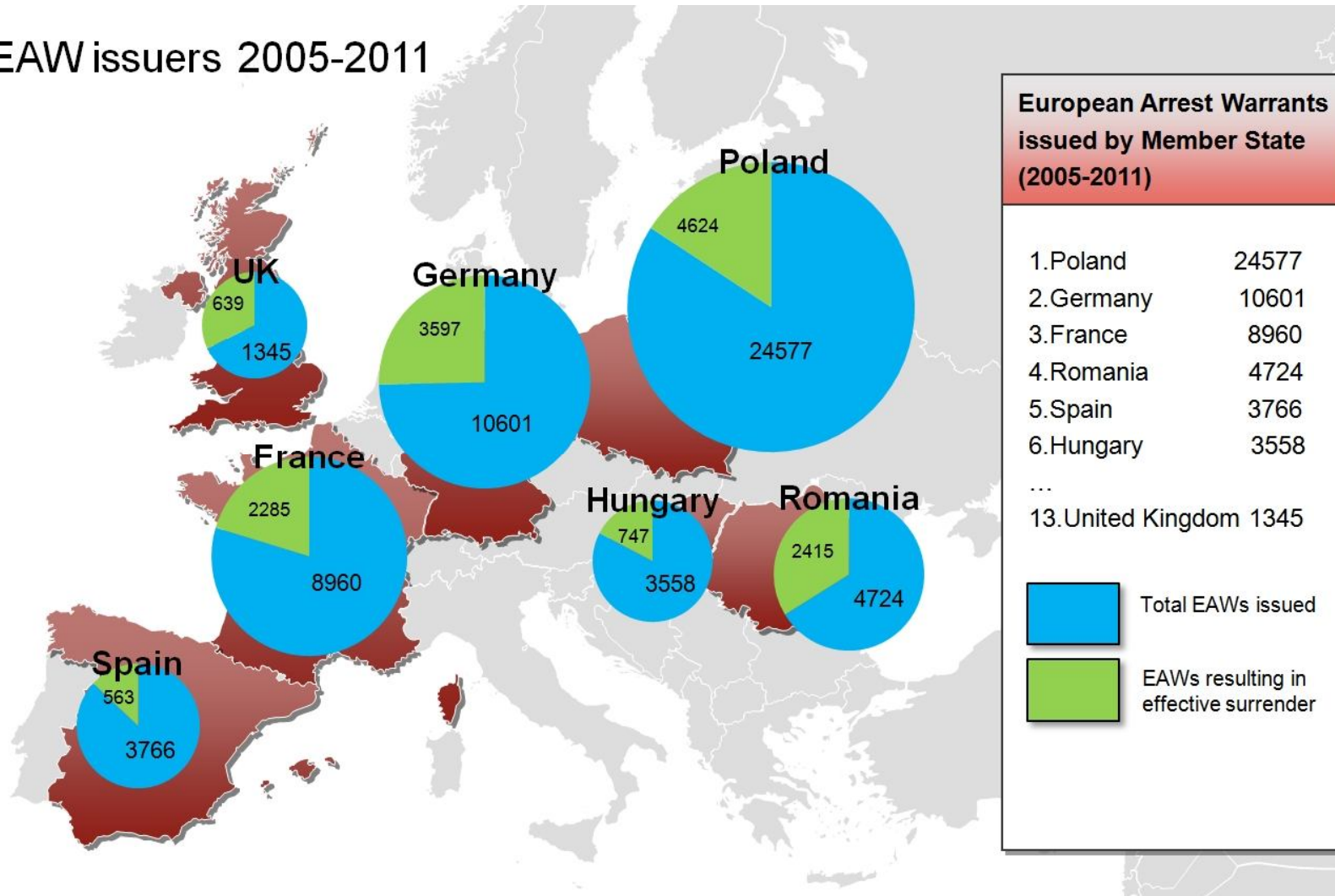


Source: Authors' own elaboration, based on statistics provided in the Council questionnaires.



Figure 3. EAWs issued and resulting in effective surrender, 2005-11

### Top EAW issuers 2005-2011



Source: Authors' elaboration, based on statistics provided in the Council questionnaires.

## 2.2 EAWs received, refused and persons surrendered

### 2.2.1 EAWs received

The four member states to have received the largest number of EAW requests in the EU between 2005 and 2011 were, according to the Council's statistics, Germany (50%), UK (25%), Spain (7%) and France (4%). Germany and the UK would have therefore received roughly 75% of the entire volume of EAW extradition requests issued by all EU member states (with 65,292 EAWs received by Germany and 32,079 EAWs received by the UK). That notwithstanding, these numbers need to be taken with caution, as they present several inaccuracies (refer to the Methodological Note in Annex 1 of this paper).

In short, the main methodological deficiency behind the total number of EAWs 'received' as reported by the Council statistics is that they do not always match the total number of surrender proceedings initiated following the receipt of an EAW. This is the situation in relation to the data provided by Germany and the UK, for instance, which include not only EAW-related extradition requests, but also all other extradition sources such as Interpol and, in the case of Germany, EAWs issued as 'alerts' by member states connected to the Schengen Information System (SIS).<sup>17</sup>

The SIS is one of the most important EU (justice and home affairs) large-scale databases used for migration and border controls in the EU.<sup>18</sup> Alerts on persons who are wanted for arrest for extradition (EAW) purposes are amongst the reasons for information to be included in the system. Since its official launch in 1995, the geographical coverage of the SIS has progressively expanded, reaching well beyond its original seven member states to apply in 22 EU member states (including the participation of the UK and Ireland) now,<sup>19</sup> as well as Switzerland, Norway and Iceland. The SIS (and its upcoming second generation SIS II) constitutes one of the main EU mechanisms through which member states are notified of an EAW in place for a requested (wanted) person. The special case of the UK's participation in the SIS is addressed in Section 2.3.1 below.

According to the information provided by the Council questionnaire, the member states connected to the SIS entered 14,229 alerts on the basis of an EAW in 2010, and 16,172 in 2011.<sup>20</sup> On 1 January 2013, the central SIS database contained 35,919 valid records (not

<sup>17</sup> The UK included a footnote in the 2005 Council statistics declaring that the 5,986 EAWs received included "all of the requests/alerts transmitted by EAW partners to the UK in 2005 by whatever channel; for example bilateral transmission, Interpol notice or diffusion. Similarly, statistical data on Germany for 2011 states that "a total of 14034 alerts on the basis of the EAW were issued by member states connected to the SIS". Refer to Council of the EU (2007), Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2005, 9005/5/06, 18 January 2007, Brussels, page 5 as well as Council of the EU (2013), *op. cit.*, page 7.

<sup>18</sup> J. Parkin (2011), *The Difficult Road to the Schengen Information System II: The Legacy of 'Laboratories' and the Cost for Fundamental Rights and the Rule of Law*, CEPS Liberty and Security Series, April 2011, CEPS, Brussels. One of the main differences which will be introduced in the second generation of the SIS (SIS II) is that the original copy of the EAW can be scanned into the system (plus a translation), so that all information contained in the EAW will be immediately available (Article 27 of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L 205/63, 07.08.2007). According to the latest discussions at Council levels, the SIS II is expected to be in operation by 9 April 2013 (see Council of the EU (2013), Press Release on the 3228th Council meeting on Justice and Home Affairs, 7-8 March 2013, p. 10).

<sup>19</sup> The UK and Ireland do not participate in the migration and border controls dimensions of Schengen, but they do take part in the 'law enforcement' (police and criminal justice) components of the Schengen system. Refer to S. Peers (2011), *EU Justice and Home Affairs Law*, Oxford EU Law Library, Third Edition.

<sup>20</sup> See Council of the EU (2011), Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2010, Council document 9120/2/11, Brussels, 9 September

expired) for persons wanted for arrest/extradition.<sup>21</sup> As highlighted by the 2011 report from the European Commission, “EAW statistical data indicate that in 2009 82.5% (10,012) of the 12,111 EAWs issued by Schengen participating states were transmitted via the Schengen Information System”.<sup>22</sup> That notwithstanding, data on persons wanted for EAW reasons are affected by a number of deficiencies. Most importantly, the system does not allow the executing national authority to remove an alert from the system when, for instance, it has decided not to accept the surrender request; nor does it permit the update, correction or deletion of entries (for those which have been refused).<sup>23</sup>

The accuracy and timeliness of the SIS data therefore remain under question. This can have a major impact on the degree of transparency and accountability related to the exact number of EAWs that member states actually receive. To this, we need to add that some member states provide cumulative data belonging not only to the Council reported year, but to all years since the adoption of the EAW. The Council statistics also do not offer a breakdown of the member states from which the requests for extradition originated, making it challenging to engage in a comparison of the number of EAWs reported by ‘the issuing member state’ with the EAWs reported by ‘the receiving member state’.

### 2.2.2 Persons surrendered

Acquiring a full understanding of the functioning of the EAW system would not be possible without, in addition, examining the EU member states’ performance with respect to the total number of persons surrendered. The total number of persons who were surrendered between 2005 and 2011 under the EAW system is 27,997. Figure 4 reveals the member states that have been more successful in sending people back to a requesting member state. At the top of the list is Spain with 5,279 surrenders, followed closely by Germany (4,280) and the UK (3,775).

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2011 (p. 7) as well as Council of the EU (2013), *op. cit.*, p. 7. The numbers provided here are the sum of the total EAW alerts (excluding Germany) and the SIS alerts issued by Germany in the same year.

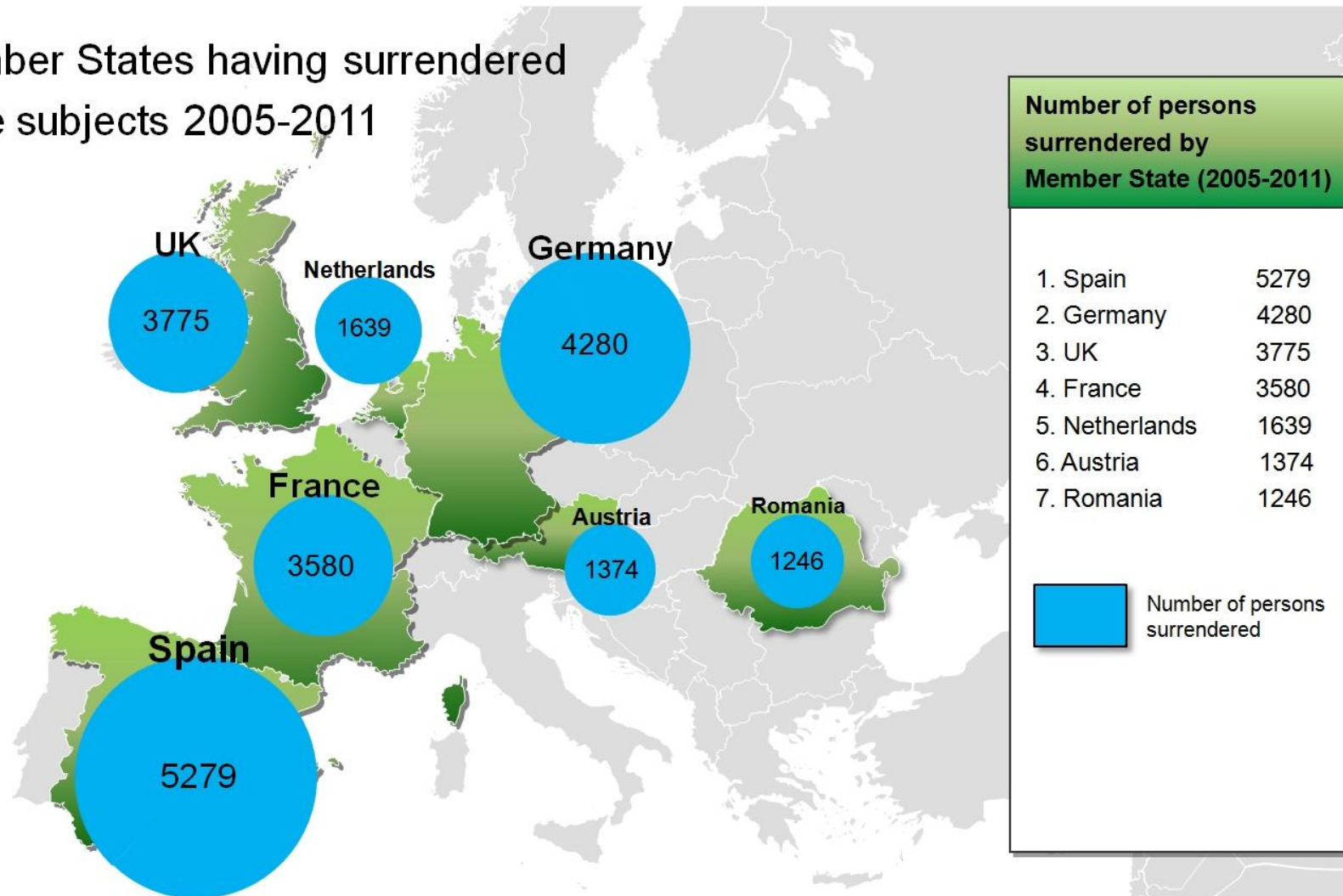
<sup>21</sup> Source: Council of the EU (2013), Schengen information system database statistics 01/01/2013, Document 7389/13, 13 March 2013.

<sup>22</sup> See European Commission (2011), Staff Working Document, Accompanying Document the third Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, SEC(2011) 430 final, Brussels, 11 April 2011, p. 14.

<sup>23</sup> Some reporting authorities in the Council’s questionnaire exercise appear to have been confused by the question on ‘EAW received’ in what concerns transmissions via SIS. See Annex 1 below. The confusion could stem from the difference between two actions: the “recording” of the notification of the existence of a EAW and the “recording” of the actual transmission of the EAW. The transmission, and hence the reception of an EAW, usually takes place when the subject of the EAW has been located by the issuing member state and after the person has been arrested. This may have led certain member states to provide unreliable data on ‘EAWs received’.

Figure 4. Number of persons surrendered by member state, 2005-11

## Member States having surrendered more subjects 2005-2011



Source: Authors' own elaboration, based on statistics provided in the Council questionnaires.

The relatively high number of surrenders from Spain compared to the rest of the member states could be explained by its traditional domestic interests and involvement in the so-called 'fight against illicit drug trafficking' and 'terrorism'. In the case of drug trafficking, this offence has been said to be statistically "behind the great majority of imprisonments in Spain".<sup>24</sup> Another ground for the high number of surrenders could be the implementing national legislation on the EAW which appears to provide a more facilitated procedure for extradition compared to other member states.<sup>25</sup> However, Spain's first place in this particular ranking needs to be considered in light of the fact that statistics are missing for other countries such as Germany (for the years 2005 and 2006) and Italy.

### 2.2.3 Refusals to execute

The 'simplified' extradition regime provided by the EAW does not, however, entail its full automaticity. The EAW Framework Decision does in fact offer member states a number of mandatory and other optional grounds for refusal of received extraditions requests.<sup>26</sup> A total of 3,455 refusals were reported by the Council questionnaires from 2005 to 2011. Member states that reported the most refusals in that period were Germany (760), Romania (350), the Netherlands (270), Poland (267) and the UK (251).

There are also a series of methodological caveats in the official statistics here: First, not all member states have provided data for all the reported years. Second, the concept of "*refusal to execute an EAW*" has been understood in a variety of ways across the EU. Some member states have reported EAWs that were withdrawn by the issuing authorities, while others have not. Member states have also failed to provide a consistent breakdown of the number of refusals by grounds, which makes it extremely complicated to gather a general quantitative picture for the period 2005-11.

Looking at the list of grounds for refusal provided in the annexes of the Council questionnaires by member states,<sup>27</sup> the most commonly used grounds for refusal included: the act upon which the EAW was based did not constitute an offence under the law of the executing member state; the criminal prosecution or punishment of the requested person is statute-barred; the EAW issued was incomplete and/or lacked evidence from the requesting member state; the EAW was withdrawn by the executive judicial authority; the executing member state undertook to execute the custodial sentence or detention order of the requested person who is staying in, or is a national of or a resident in that member state; and

<sup>24</sup> M. Jimeno-Bulnes (2006), "Spain and the European Arrest Warrant - the View of a 'Key User'", in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, p. 183. She explains that "most of them are related to terrorism (Islamic terrorism, following the attack in Madrid on 11 March 2003, as well as Basque separatist terrorism) and illicit drug trafficking, because Spain is geographically located on 'drug routes' between Latin America and Europe and Africa and Europe." *Ibid.*, p. 184.

<sup>25</sup> Two issues in the Spanish Law 3/2003 of 14 March 2003 have been largely commented in the literature: the exclusion of guarantees relating to *in absentia* judgments and the absence of any right of appeal against the final surrender decision - see M. Jimeno Bulnes (2009), "Spain and the EAW: Present Status and Future Perspectives", in E. Guild and L. Marin (Eds.) (2009), *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, pp. 261-296.

<sup>26</sup> Grounds for refusal may be based on Article 3 of the EAW Framework Decision listing the grounds for *mandatory* non-execution of the warrant, Article 4 listing the grounds for *optional* non-execution, as well as on certain provisions foreseen in the EAW FD such as those in Article 1, 5 and 20. For an analysis refer to S. Peers (2011), *EU Justice and Home Affairs Law, op. cit.*, p. 707.

<sup>27</sup> The grounds for refusal of a EAW reported by the Czech Republic, France, Germany, Hungary, the Netherlands, Spain and the United Kingdom were in particular examined.

the person who was the subject of the EAW was being prosecuted in the executing member state for the same act (*lis pendens*).<sup>28</sup>

## 2.3 The UK and Germany

The cases of the UK and Germany call for closer examination as they are the two member states that have been most active in using (directly or indirectly) the EAW system. While in the UK the number of EAWs received from countries like Poland and Romania has provoked extreme sensitivity to the point that the UK authorities are considering withdrawing from the whole field of EU criminal justice, in Germany the debate has been much more muted.<sup>29</sup> As observed above, Germany is amongst the member states having issued the highest number of EAW extradition requests since 2005. The next subsections focus on these two member states in an attempt to provide a more comprehensive set of statistical information on the uses of the EAW.

### 2.3.1 The UK

Debates over the UK's position on EU Justice and Home Affairs cooperation have been particularly heated during 2012 and the beginning of 2013. The option offered by Article 10.4 of Protocol 36 of the Treaty on the Functioning of the European Union (TFEU) for the UK to 'opt out' of Union legislative acts in the areas of police and judicial cooperation in criminal matters (old EU Third Pillar) have attracted some attention and critical concerns following the UK Government's stated intention to consider using it before 31 May 2014.<sup>30</sup> While the 'opt out' would not actually cover any new legislative measures which have been adopted or are under negotiation (and where the UK has 'opted in') in these domains after the Lisbon Treaty,<sup>31</sup> one of the most relevant instruments which would fall within the scope of the total of 133 measures from which the UK could withdraw participation happens to be the EAW!

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<sup>28</sup> Also, as mentioned above, the currently ongoing Council discussions on ways to improve the gathering of statistics in the questionnaire are also focusing on clarifying the potential reasons for non-execution under the EAW Framework Decision. According to the latest discussions at Council level, these grounds will be categorised in line with the relevant articles of the Decision and will include 20 different grounds that can be found in Annex 3 (question 7) which should allow for a more consistent and uniform gathering of statistical data on EAW refusals by executing member states.

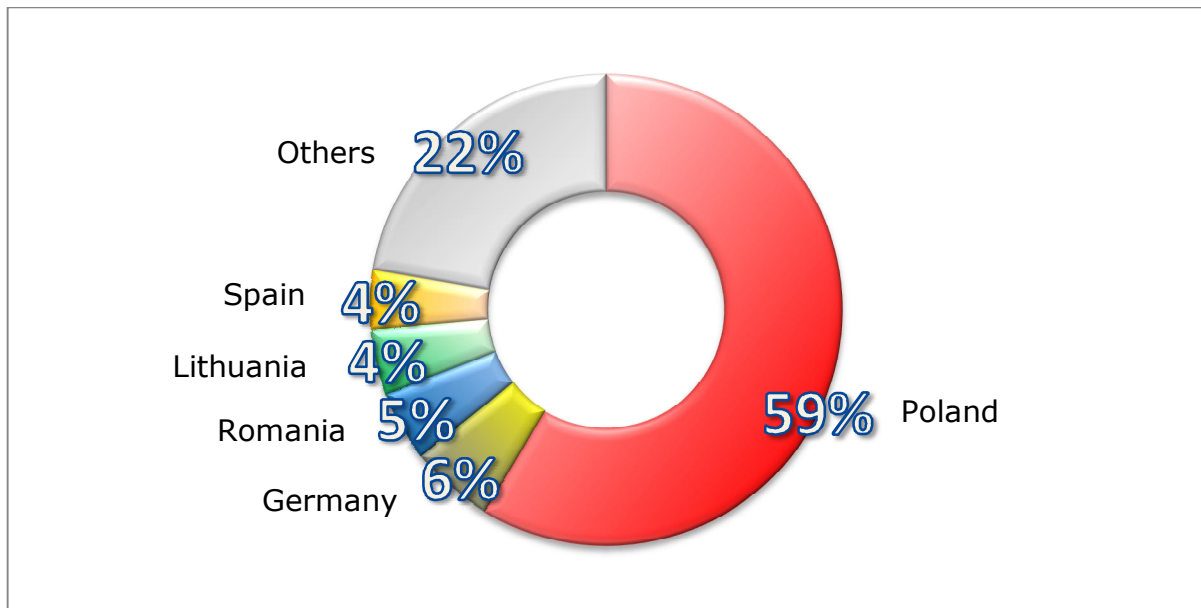
<sup>29</sup> This is of course apart from the controversies that were raised around the implementation of the EAW in the German legal system. For an analysis of the debate and the constitutional challenge against the EAW in 2005 refer to F. Geyer (2009), "A Second Chance for the EAW in Germany: The System of Surrender after the Constitutional Court's Judgement of July 2005", in E. Guild and L. Marin (2009), *Still not resolved?, op. cit.*, pp.195-208.

<sup>30</sup> The decision would take effect as from 1 December 2014. See the written speech delivered by David Cameron on the 23 January 2013 <http://www.number10.gov.uk/news/eu-speech-at-bloomberg> as well as M. Emerson (2013), *Seven Hazards in Cameron's Intended European Policy*, CEPS Commentary, Brussels, 15 January 2013.

<sup>31</sup> These include for instance a number of Directives (e.g. those related to rights of suspects in criminal proceedings, etc); important legislative proposals currently under negotiation and where the UK has already 'opted in' such as the European investigation Order and the Internal Security Fund; international agreements between the EU and the USA (and Australia) as regards the so-called 'Passenger Name Record'; and participation in EU Home Affairs Agencies such as Europol. For a detailed analysis refer to A. Hinarejos, J.R. Spencer and S. Peers (2012), *Opting our EU Criminal Law: What is actually involved?*, CELS Working Paper, No. 1, Centre for European Legal Studies, Cambridge: UK.

A common complaint from certain UK politicians and media has been the way in which the EAW has been (mis)used.<sup>32</sup> A January 2012 report by Open Europe,<sup>33</sup> quoted as a background source documenting 'the whys' behind the UK's critical stance on EU criminal law cooperation, stated that "almost 60% of the European Arrest Warrant extradition requests the UK receives come from Poland, where the legal system obliges the authorities to prosecute even very minor crimes." Is this accurate? The Report took this figure from a letter issued by the Minister for Immigration of the UK Home Office to the Joint Committee of Human Rights in May 2011. According to this letter, in 2009-10 the UK received a total of 4,100 EAW requests from other EU member states. Of these, 2,403 came from Poland.<sup>34</sup> Figure 5 below offers a complete picture of the EAW requests received by the UK in 2009-10 by EU member state of origin on the basis of these statistics.

Figure 5. Number of EAW requests received by the UK during the fiscal year 2009-10



Source: Authors' own elaboration, based on the data provided in UK House of Lords (2011) *The Human Rights Implications of UK Extradition Policy - Human Rights Joint Committee's Fifteenth Report*, June 2011.

Similarly to the methodological concerns raised above in relation to the Council's statistics, the extent to which this data relates exclusively to the total number of surrender proceedings initiated by the UK's judicial authorities pursuant to receipt of an EAW from Poland is not fully clear. The risk of duplication and inaccuracies is also likely here and should not be underestimated.

The actual relationship between UK authorities and the SIS and its consequences on the total number of EAWs received is shrouded in mystery. As already mentioned in section 2.2, the UK is officially part of the SIS but only for its police and criminal justice components. The

<sup>32</sup> P. Johnston, "We have European opt-outs, so why not use them", *Daily Telegraph*, 6 February 2012, available at: [www.telegraph.co.uk/comment/letters/9062615/Repatriate-powers-on-crime-and-policing-say-Conservative-MPs.html](http://www.telegraph.co.uk/comment/letters/9062615/Repatriate-powers-on-crime-and-policing-say-Conservative-MPs.html)

<sup>33</sup> S. Booth, C. Howarth and V. Scarpetta (2012), *An Unavoidable Choice: More or Less EU Control over UK Policing and Criminal Law*, Open Europe, London, January 2012, Page 11.

<sup>34</sup> UK House of Lords (2011) *The Human Rights Implications of UK Extradition Policy - Human Rights Joint Committee's Fifteenth Report*, June 2011, available here: [http://www.parliament.uk/documents/joint-committees/human-rights/JCHR\\_EXT\\_Written\\_Evidence\\_11.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf)

UK should have been linked to the SIS by late 2004, but until now it has failed to practically connect to the system.<sup>35</sup> In principle, British authorities should not have access to information related to EAWs alerts through the SIS network.<sup>36</sup> The UK has however access to EAW-related alerts issued via the SIS through other alternative routes, such as on the basis of 'bilateral informal contacts' and arrangements with other member states and law enforcement authorities. This confusing situation necessitates caveats with respect to the reported statistical data and makes it difficult to acquire a reliable picture of the total number of 'EAWs received' by the UK.<sup>37</sup>

True, Poland was at the top of the list of member states issuing the most EAWs between 2005 and 2011. Behind this may be questions relating to lack of independent judicial scrutiny and proportionality checks evidenced in the functioning of the Polish criminal justice system, developed in detail in Section 3.1 below. Another factor behind the concentration of Polish EAWs to the UK might have been the total number of Polish nationals who have exercised their right of free movement to reside legally in the UK since Poland's accession to the EU.<sup>38</sup> All in all, while the number of EAWs issued by Poland may have reached a peak during 2009, the data for 2010 and 2011 show now a somehow different scenario. In light of statistical data provided by the Polish Permanent Representation in Brussels to the authors of this paper, the total number of EAW extradition requests issued by Poland to the UK was 817 in 2010 and 833 in 2011. This constitutes a noticeable decrease in the total EAWs received by the UK authorities in comparison to those tracked for the period 2009-10.<sup>39</sup>

Moreover, as illustrated in Section 2, the UK has been one of the member states with a high success rate of persons effectively surrendered to the country following the issuing of extradition requests. Figure 6 below combines the data related to EAWs issued and resulting in surrender to the UK, and those received and resulting in surrender by the UK during 2011. The UK has been particularly successful in the proportion of total EAWs issued by the country ending in effective surrender of persons. This is in direct contrast with the data on EAWs received by the UK and the number of persons sent to the requesting member state. The UK surrendered less than 20% of total requests. Therefore, while the total EAWs received have been high, the actual number of people sent back to countries like Poland has

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<sup>35</sup> The Schengen provisions in which the UK was given permission to participate were put into effect for this country from 1 January 2005. It appears that one of the technical reasons for the delayed connection of the UK to the SIS was a fire which destroyed some equipment! Refer to UK House of Lords (2007), European Union Committee's Ninth Report, 20 February 2007 (point 18). See also Council of the EU (2004), Decision on the putting into effect parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, 2004/926/EC, OJ L 395/70, 31 December 2004.

<sup>36</sup> See UK House of Commons (2012), European Scrutiny Committee - Fourth Report, 14 June 2012 (point 13.2) as well as UK House of Lords (2007), *Ibid*.

<sup>37</sup> The future possible connection of the UK to the SIS II, currently scheduled for 2013-14 if no opt-out takes place, could facilitate a more reliable gathering of statistics.

<sup>38</sup> According to statistical data provided by the Polish government, the emigration of Polish citizens for temporary stay in the UK in the years 2002-2011 has increased: from 150,000 in 2004 to 580,000 in 2010 and 625,000 in 2011.

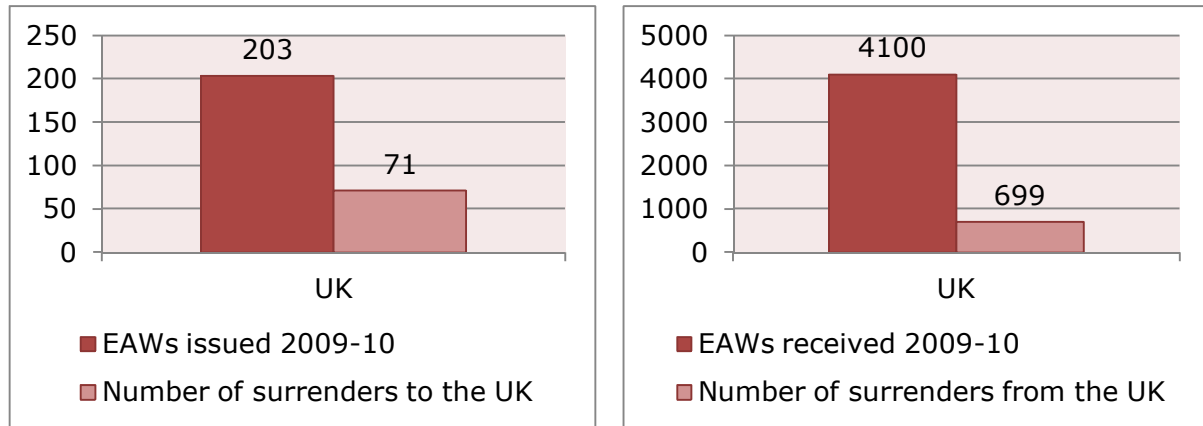
Source: [www.stat.gov.pl/cps/rde/xbcr/gus/LU\\_infor\\_o\\_rozm\\_i\\_kierunk\\_emigra\\_z\\_polski\\_w\\_latach\\_2004\\_2011.pdf](http://www.stat.gov.pl/cps/rde/xbcr/gus/LU_infor_o_rozm_i_kierunk_emigra_z_polski_w_latach_2004_2011.pdf). Those numbers are corroborated by the UK Office for National Statistics: [www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2011/polish-people-in-the-uk.html](http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2011/polish-people-in-the-uk.html)

<sup>39</sup> Assuming of course that in 2010 the figure of 817 issued EAW reported by Poland is correct and that the figure of 2,403 received EAW reported by the UK is not artificially inflated as discussed above.



been, by and large, low. Moreover, there is no publicly available information on the specific grounds for refusal by the UK authorities for 2009 and 2010.<sup>40</sup>

Figure 6. Total EAWs issued and received and persons surrendered to and by the UK during fiscal year 2009-10



Source: Authors' own elaboration, based on the data provided in UK House of Lords (2011) The Human Rights Implications of UK Extradition Policy - Human Rights Joint Committee's Fifteenth Report, June 2011.

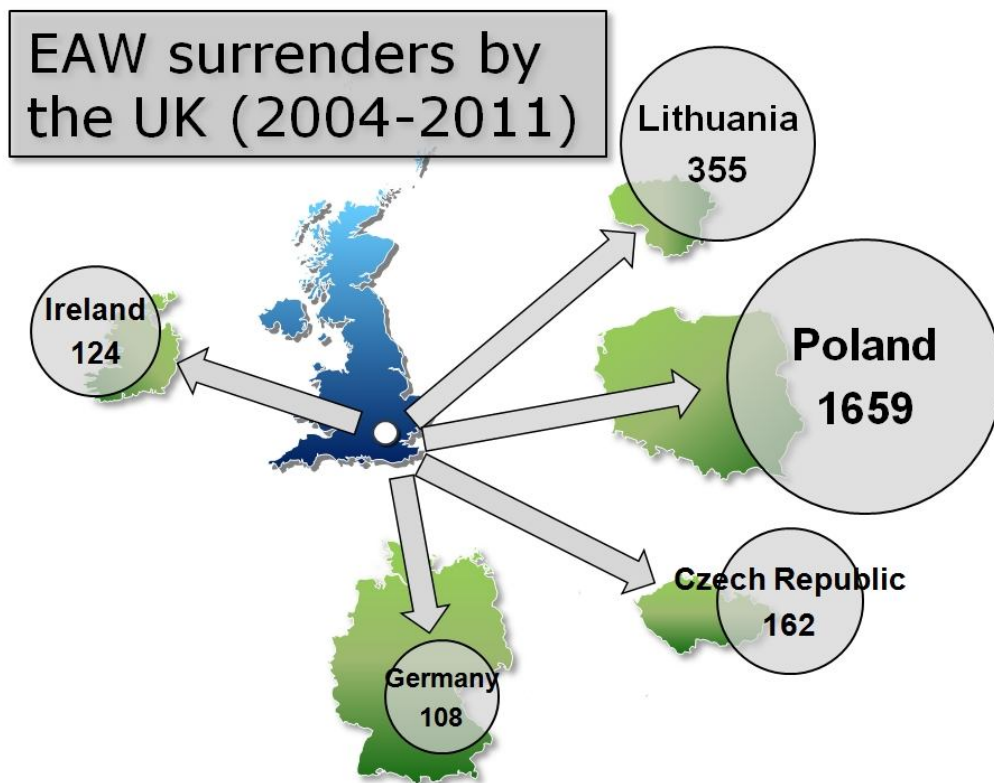
Figure 7, presenting the EU member states having received the most EAW-related surrenders by the UK between 2004 and end March 2011, further substantiates this assessment. Between 2004 and 2011, Poland received the most surrenders by the UK of any EU member state (1,659 in total). The main types of offences for which an extradition request was issued included fraud, theft, drugs trafficking and robbery.<sup>41</sup>

<sup>40</sup> In Council of the EU (2013), Replies to questionnaire (...) Year 2011, the UK reported the following grounds for refusal for the execution of EAWs coming from all EU member states: "Discrepancies with the EAW; - Lack of Evidence from Requesting State; - Identity of arrested person in question; - Not a Criminal Offence in the UK; - Not a framework offence", page 27.

<sup>41</sup> UK House of Commons Hansard (2011), Answer by Nick Herbert to a question by MP Richard Drax on 29 March 2011, available at this link:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110401/text/110401w0003.htm>

Figure 7. EAW surrenders by the UK to selected EU member states (2004 to end March 2011)



Source: Author's own elaboration on the basis of UK Home Office (2011).

### 2.3.2 Germany

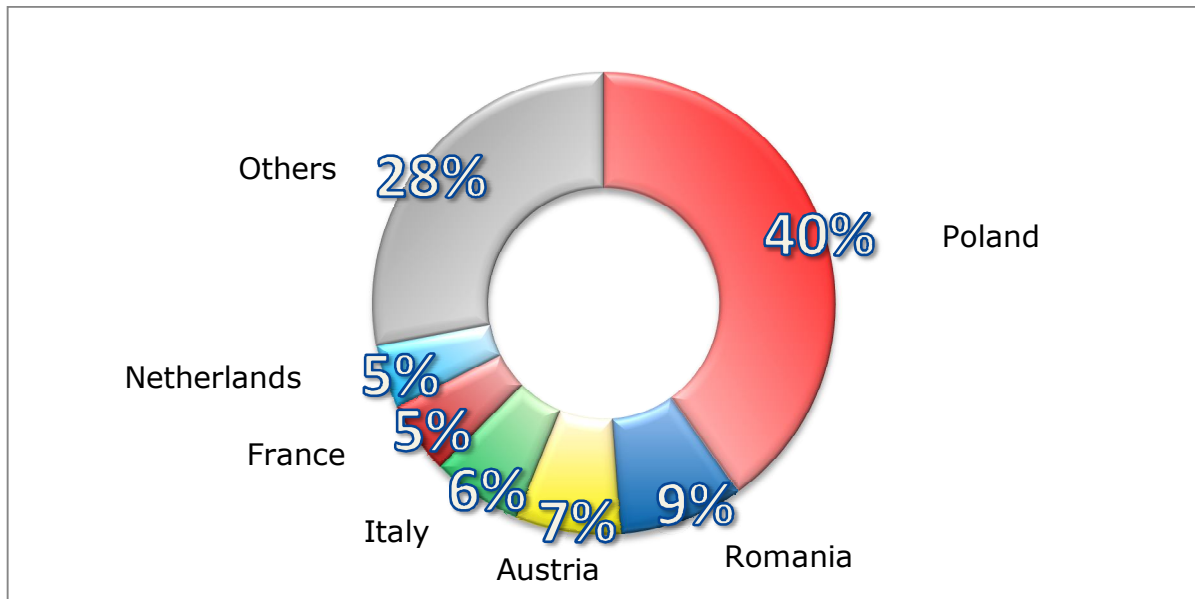
Germany issued the second highest number of EAWs in the EU between 2005 and 2011: a total of 10,601 which resulted in 3,597 surrenders. The Council statistics also tell us that Germany received the most EAWs (65,292). When looking at these numbers, however, one should take into account that they also include requests for searches for persons that have been issued as alerts in the SIS and that may not necessarily have a direct link with Germany, and duplications are therefore also likely here. Germany is also one of the member states that surrendered the most persons between 2005 and 2011 (4,280), of which 416 were reported to have been German nationals and/or legally residing in German territory.<sup>42</sup> In order to provide a more complete statistical picture of the uses of the EAW in Germany, the authors

<sup>42</sup> Interestingly, the most common ground for EAW refusals by Germany from 2007 to 2011 was that "a German national has not agreed to be extradited for the purpose of execution of sentence abroad". Those cases where the German authorities refuse to execute an EAW because the subject was a German national or a permanent resident in Germany and did not consent to surrender are emblematic of a general tendency among certain member states to refuse the execution of EAWs on the grounds that it would imply extraditing their own nationals. This issue has been most controversial in Poland, Germany and Cyprus during 2005, with their respective constitutional courts ruling that the national implementing laws of the EAW FD were invalid as regards the surrender of 'own nationals'. The Polish and German laws were subsequently amended, as was the Cypriot constitution in July 2006. The 2009 *Wolzenburg* judgment of the Court of Justice of the European Union (CJEU) poured some oil on these troubled waters by providing a detailed interpretation of how to apply Article 4(6) of the EAW FD in practice. Refer to Case C-123/08, *Dominic Wolzenburg*, Court of Justice of the European Union, 6 October 2009 [2009] ECR I-9621.

examined another set of publicly available data provided by the German Ministry of Justice on extraditions in 2010.<sup>43</sup>

The main 'extradition partners' for Germany were Poland, Austria, Romania and the Netherlands. Requests issued by Germany were distributed rather equally among other member states, mainly Poland, the Netherlands and Austria. Geographical proximity (shared territorial borders) may play a role here in the extradition patterns: more than 50% of extradition requests issued by Germany are directed at those member states sharing a land border with Germany.<sup>44</sup> As regards the requests received from other member states, as shown in Figure 8, they are dominated by Poland (40%). This establishes an apparent parallel with the UK as examined above.

Figure 8. Requests for extradition received by Germany in 2010 (by member state)



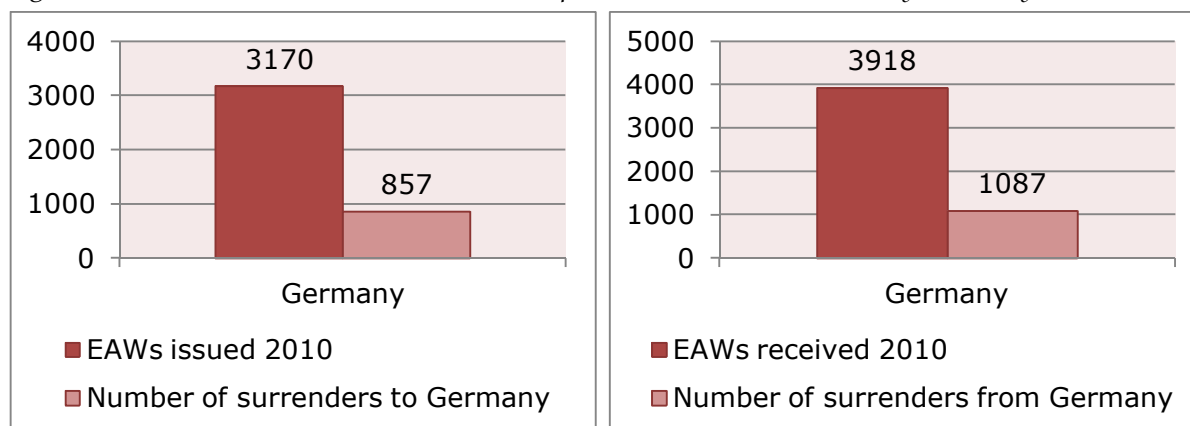
Source: Authors' own elaboration, based on the German Federal Gazette (2012) extradition statistics.

Another analytical parallel with the UK can be made regarding the ratio of EAWs issued to persons surrendered to Germany, and EAWs to persons surrendered by Germany. Figure 9 puts together the data related to EAWs issued and received and the number of surrenders to and from Germany in 2010. The number of subjects surrendered to Germany following an EAW issued by the German authorities is relatively low compared to the UK. Yet, Germany seems to be more 'efficient' at surrendering persons to requesting member states, with 28% of EAWs received resulting in surrender.

<sup>43</sup> The data which has been used to examine the German case study has included the statistics provided by the German Ministry of Justice for 2010 and published in the German Federal Gazette (*Bundesanzeiger*) on 22 February 2012. These statistics concern worldwide extradition requests from and to Germany, but only the relevant ones (from EU member states) have been extracted for the purposes of this analysis. Two elements need to be taken into account: First, the statistics concern 'extradition requests' and not EAWs, but an official in the German Ministry of Justice confirmed that all extradition requests in the EU from and to Germany in 2010 fell within the EAW scheme; Second, there is a difference between the time range for data collected in the Council questionnaires and in the German Federal Gazette (*Kalenderjahr*) which might create slight differences in the numbers examined.

<sup>44</sup> Denmark, Poland, Czech Republic, Austria, France, Luxembourg, Belgium and the Netherlands.

Figure 9. Total EAWs issued and received and persons surrendered to and by Germany in 2010



Source: Authors' own elaboration, based on the German Federal Gazette (2012) extradition statistics.

The difference between the number of EAWs received and the number of effective surrenders by Germany could be explained by duplication effects, statistical inaccuracies and also by the number of refusals to execute an EAW. Contrary to the UK, Germany counts with publicly available data on the number of refusals and the specific grounds for refusing to execute an EAW in the replies to the Council questionnaire for 2010.<sup>45</sup> German judicial authorities refused to execute an EAW in 153 cases in 2010. The most common grounds for refusal were situations where German nationals or (legally residing) foreigners in Germany did not consent to the extradition at stake.<sup>46</sup>

Another interesting aspect of the statistics provided by the German authorities is the breakdown of people surrendered by or to other member states according to nationality. The majority of suspects subject to extraditions in Germany are of Polish, German or Romanian nationality.<sup>47</sup> Finally, it is also interesting to look at the main types of offences for which extradition requests were sent to Germany. The statistics provided by the German authorities for 2010 give a complete and thorough overview of how many requests were received by Germany according to the issuing member state and classified in line with the criminal offences listed in the German Criminal Code (*Strafgesetzbuch*).<sup>48</sup> From the figures provided, the main types of offences for all requests received are theft, fraud and drug trafficking, which present similarities to the offences highlighted for the UK in the above section.

### 3. The EAW dual conundrum: A qualitative assessment

In light of the above, the application of the EAW raises a *dual conundrum*.

<sup>45</sup> See Council of the EU (2011), doc. 9120/2/11 *op. cit.*, p. 10 and pp. 22-23.

<sup>46</sup> The breakdown of grounds for refusal as reported by Germany is the following: A German national has not consented to extradition for the purpose of execution of a sentence (50 cases); A foreigner who is habitually resident in Germany has not consented to extradition for the purpose of execution of a sentence (32 cases); The investigation or execution is statute-barred according to German law (24 cases); and there is no double criminality in respect of an offence not listed in Article 2(2) of the EAW Framework Decision (16 cases).

<sup>47</sup> A vast majority of suspects extradited by Germany in 2010 are Polish (516 or 47%), followed by Romanians (136 or 13%) and Germans (118 or 11%). Individuals that were surrendered to Germany in 2010 include own German nationals (310 or 36%) followed by Romanians (135 or 16%) and Polish (125 or 15%). Source: German Federal Gazette (2012).

<sup>48</sup> Source: German Federal Gazette (2012), pp. 693 – 705.

- First, *proportionality*: how can the competent judicial authorities be expected to handle different criminal justice traditions in relation to 'what' is supposed to constitute a more or less 'serious' crime in their respective legal settings and 'who' ultimately is to determine when it is justified and necessary to activate the EAW system for these purposes? (Section 3.1).
- Second, *separation of powers*: 'who' are those competent national judicial authorities cooperating with each other and ensuring that there are sufficient controls over the independence of the judicial authorities and their decisions on the issuing and execution of EAWs? (Section 3.2).

### 3.1 Proportionality

The compatibility between the EAW and the proportionality test has attracted extensive debate and attention since the launch of the 'EU fast-track extradition scheme' in 2005. Proportionality has become a key tenet amongst the wider set of general principles of EU law. It involves an evaluation of a certain policy goal or legislative measure (e.g. the use of the EAW by national authorities) and the suitability and necessity of its implementation.<sup>49</sup> The suitability component of the proportionality test includes a cost-benefit examination or less restrictive option of the public policy at stake to achieve the same end through less onerous means (least onerous option test), which is particularly pertinent in the domain of criminal justice due to its profound implications for the fundamental human rights of suspects.

The main issue of contention has been the (over)use of EAWs by certain member states in 'less serious cases' placing a disproportionate burden on the courts of the receiving member states and costing too much in terms of time and resources. This was signalled in a report published by the UK Home Office in 2011<sup>50</sup> that argued that some member states do not count with a system filtering EAW cases, so they are often issued automatically without due consideration given to the less onerous test and the existence of a less coercive method for dealing with the requested person. This was signalled as being the case in Poland, where prosecutors are required to prosecute any crime, regardless of its gravity or consequences.<sup>51</sup>

An illustrative example of the issue at stake was the 2009 *Sandru v Government of Romania* case before the UK High Court of Justice.<sup>52</sup> The applicant of the case was subject to an EAW issued by a Romanian court because he was sentenced (*in absentia*) to three years' imprisonment for the theft of ten chickens from a neighbour's chicken coop. When addressing the proportionality of the case in light of the alleged lack of seriousness of the offence, the UK court was of the opinion that only in the most exceptional circumstances should the seriousness of the offence backing up an EAW issued by other member state be assessed from a proportionality angle by the receiving court, otherwise,

<sup>49</sup> T. Trimidas (2006), *The General Principles of EU Law*, Oxford University Press.

<sup>50</sup> UK Home Office (2011), A Review of the UK extradition agreements, available here: <http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review>

<sup>51</sup> When addressing the question of proportionality the UK Home Office report of 2011 stated that "In some member states, prosecutors are governed by the principle of legality. This means that they are required to prosecute any crime, regardless of its gravity, seriousness or consequences. For example, according to the European Commission meeting of experts on 5 November 2009, Poland's law enforcement authorities are obliged to take all measures to bring someone to justice and the European arrest warrant is a tool that makes that possible". See UK Home Office (2011), page 118.

<sup>52</sup> UK High Court of Justice, Queen's Bench Division (2009), *Sandru v Government of Romania*, case EWHC 2879 of 28 October 2009, available here: [http://www.judgmental.org.uk/judgments/EWHC-Admin/2009/%5B2009%5D\\_EWHC\\_2879\\_%28Admin%29.html](http://www.judgmental.org.uk/judgments/EWHC-Admin/2009/%5B2009%5D_EWHC_2879_%28Admin%29.html)

It would risk undermining the principle of mutual respect which underpins Part 1 of the Extradition Act. Insofar as it is requiring our courts to question or review the appropriateness of the sentence passed by a foreign court, it is asking these courts to exercise a function they are ill-equipped to carry out. The appropriate sentence is, in part, a function of culture, and in any event the courts here have limited information about the factors leading a foreign court to impose the sentence it did.<sup>53</sup>

The lack of proportionality and judicial scrutiny of EAW requests has been also signalled at various EU official levels as one of the fundamental flaws of the system.<sup>54</sup> The various political groups in the European Parliament have raised several oral questions and concerns regarding how the Council and the Commission could guarantee that disproportionate use of the EAW is put to an immediate end, both in law and practice.<sup>55</sup> The difficult relationship between the EAW and the proportionality principle was confirmed by the European Commission's 2011 Evaluation Report of the EAW, which highlighted as one of the unresolved problems with the EAW operation

... the non-uniform application of a proportionality check by issuing states, resulting in requests for surrender for *relatively minor offences* that, in the absence of a proportionality check in the executing state, must be executed. [...] Several aspects should be considered before issuing the EAW including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a *cost/benefit analysis* of the execution of the EAW [...] *an overload of such requests may be costly* for the executing member states. It might also lead to a situation in which the executing judicial authorities feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Framework Decision.<sup>56</sup> (Emphasis added).

The issue became so notoriously problematic that an amendment was included by the Council in 2010 to the non-legally binding *European Handbook on How to Issue a European Arrest Warrant*,<sup>57</sup> to provide guidance for improving the uniformity of the application of the EAW across the EU and to include the proportionality test amongst the factors to be examined by national authorities when issuing an EAW as well as alternatives to issuing the EAW. Nonetheless, the non-legally binding nature of this Handbook, and the fact that the EAW Framework Decision does not expressly include proportionality as one of the grounds for mandatory *or* optional non-execution of the EAW by member states, has led to continuing serious concerns over its application by criminal justice actors on the ground and the extent to which it will ensure consistency in the application of the proportionality check. The question was, for instance, still raised in the latest Council Evaluation Report on the practical application of the EAW published in November 2011.<sup>58</sup>

<sup>53</sup> Refer to paragraph 14 of the ruling.

<sup>54</sup> On the relationship between the proportionality principle, the non-verification of dual criminality principle and the territoriality exception refer to W. van Ballegooij (2009), "The EAW: Between the Free Movement of Judicial Decisions, Proportionality and the Rule of Law", in E. Guild and L. Marin (eds), *Still Not Resolved?*, *op. cit.*, pp. 77-96.

<sup>55</sup> Refer to Oral questions in Plenary Debate of 8 June 2011, [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20110608+ITEM-012+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20110608+ITEM-012+DOC+XML+V0//EN)

<sup>56</sup> European Commission (2011), *op. cit.*, pp. 6 and 8.

<sup>57</sup> Council of the EU (2010), Revised version of the European handbook on how to issue a European Arrest Warrant, 17195/1/10, Brussels, 17 December 2010. For an academic 'handbook' on the EAW refer to R. Blekxtoon and W. Van Ballegooij (2004), *Handbook on the European Arrest Warrant*, T.M.C Asser Press: The Netherlands.

<sup>58</sup> Council of the EU (2011), *Follow-up to the evaluation reports... op. cit.*

Concerns about the disproportionate application of EAWs by EU member states such as Poland and Romania have also surfaced in the mutual evaluation system coordinated by the Council - Evaluation Reports on the Fourth Round of Mutual Evaluations, *"The Practical Application of the European Arrest Warrant and corresponding Surrender Procedures between member states"*. In the Evaluation Report on Poland published by the Council in the beginning of 2008, the evaluation team raised questions about the lack of proportionality checks, which was discussed with prosecutors and judges in the country.<sup>59</sup> The Report pointed out the lack of clarity and common understanding between the prosecutors and the judges as to 'who' should ultimately have the responsibility to determine and filter the proportionality of EAW requests to other EU member states.<sup>60</sup> Similar issues were raised in relation to Romania.<sup>61</sup>

The relevance of the impartial judicial scrutiny of issuing and executing EAWs extends beyond the fundamentals of the proportionality and suitability test in the application of the EAW system. A second, and yet closely interrelated challenge characterising the use of the EAW is the ways in which the differences inherent in the various European judicial areas and who is a competent judicial authority in the EU affect the principle of the separation of powers, and consequently the requirement for the EAW system to be immune to politically driven (national government) interests.

### 3.2 Division of powers

The case of Julian Assange, the founder of Wikileaks, and the efforts of Swedish and UK authorities to execute an EAW issued by the former has highlighted a series of issues that have never been resolved in respect of the EAW. The facts of the case are fairly straightforward. An Australian national, resident in the UK is sought by the Swedish Prosecuting Authority for the purposes of an investigation into alleged offences of sexual molestation and rape. Mr Assange challenged the Swedish EAW, eventually before the UK's Supreme Court, on two grounds:

- The EAW had been issued by a public prosecutor who was not a 'judicial authority' as required by the Framework Decision.
- A judicial authority must be impartial and independent both of the executive and of the parties. Prosecutors were parties in the criminal process and could not therefore fall within the meaning of the term.

The UK Supreme Court decided against Mr Assange, which resulted in his current stay in the Ecuadorian Embassy in London, thus thwarting his extradition to Sweden. A steady stream of cases from national courts has been making their way to the Court of Justice of the European Union (CJEU) on various issues of the EAW and its application. While these have primarily concerned procedural issues rather than substance, behind so many of the procedural questions lays a deep concern about the justice of the transfer of the individual from one member state to another. Why is this?

<sup>59</sup> Council of the EU (2008), Evaluation Report on Fourth Round of Mutual Evaluations *"the Practical Application of the European Arrest Warrant"*, Report on Poland, 14240/2/07, 7 February 2008, Brussels.

<sup>60</sup> It is reported that Prosecutors said to the expert team that

...they have no possibility to decide not to file a motion for the issuing of an EAW on the basis of proportionality (if the threshold set by the Polish legislation and the Framework Decision is met). Prosecutors have an obligation to take all the measures available to bring the person to justice. If an EAW can be issued, it must be used (page 37).

<sup>61</sup> Council of the EU (2009), Evaluation Report on Fourth Round of Mutual Evaluations *"the Practical Application of the European Arrest Warrant"*, Report on Romania, 8267/2/09, 20 May 2009, Brussels.

If one takes the Assange case as a litmus test, it is clear that the problem rests with the principle of mutual recognition. While as a principle it sounds like a very good idea, when it comes down to practices one sees that there are a series of problems in its rather bulky form. Principally, these come down to the question which has been also addressed in Section 3.1 above: 'who' is supposed to have confidence and mutual trust in whom? Leaving aside whether confidence is well placed or not, the first issue which has never been satisfactorily resolved is the one which is fundamentally attached to the principle of division of powers, Montesquieu's greatest contribution to the theory of governance.

### 3.2.1 *Understanding the principle*

In liberal democracies, the principle of separation of powers is an inherent part of the furniture of governance. The idea that the same authority could be prosecutor, judge and jury is profoundly unacceptable. The democratically elected representatives of the people have a specific role in discussing and adopting laws. However, the administration is responsible for the application of those laws. In the EU, where all member states are signatories of the European Convention on Human Rights (and the EU itself is in the process of acceding to the ECHR), the greatest violence which state authorities can inflict on the individual is detention. The death penalty and corporal punishment have been outlawed. Thus, in states which are liberal democracies the bottom line is the conditions of possibility under which people can be imprisoned (or otherwise detained).

How does the principle of separation of powers work in this defining part of the state's activities? First, the democratically elected bodies and the executive branches of government in general are prohibited from direct involvement in criminal justice. While it is their job to pass laws and to arrange for their execution, they cannot identify an individual they would like to see jailed and require the criminal justice system to carry this out. Such behaviour by government leaders is associated with totalitarian dictatorships. Instead, the police are responsible for investigating whether crimes have been committed and, if so, pursuing suspects. Magistrates are responsible for determining whether evidence is admissible in a criminal court and whether charges should be laid against an individual. Judges and juries hear evidence and assess it. The suspect becomes a defendant and is entitled to be heard by the judges and juries. The latter are obliged to come to some conclusion on the guilt or innocence of the defendant. In this process, each institution is in charge of only one part of the procedure and generally has a very limited role in the next part of it. In most cases, the institution responsible for some part of the procedure is prohibited from interfering in the procedures before or after its engagement.

### 3.2.2 *The EAW and the separation of powers principle*

In light of the above broad brush categorisation of criminal justice systems in liberal democracies, how does the EAW upset the apple cart? The underlying problem is that while the principle of separation of powers within the criminal justice system is a defining feature in all the EU member states, it is implemented very differently depending on where one is. Thus in the Assange case, or as revealed when assessing the case of the UK in Section 2.3 above, the powers of the prosecutorial authority in Sweden, Poland or Romania are very different from those holders of office with a similar title in another member state. If the principle of mutual recognition is based on mutual trust, then those who are being asked to trust one another must have confidence that the authority in which they are being asked to place their trust holds the same position in the grand design of separation of powers as they do themselves. If this is not the case, then not only is proportionality under tension, but, most decisively, the underlying principle of separation of powers is violated.



The legitimacy of the state's claim to a monopoly over violence depends on the state's constitutional promise to the people that violence (understood here as imprisonment) will only be carried out in accordance with the very specific rules of the criminal justice system. Within that system, each institution is charged with jealously guarding its responsibilities against incursion by any other part of the system. Thus the investigating magistrate is very alive to his or her duty to ensure that the police are acting within their powers in respect of any criminal investigation. The defendant is particularly anxious that his or her right to equality of arms is complied with and the judge and jury are rightly sceptical of all the claims and evidence brought before them by both sides as their duty is to determine guilt or otherwise on the basis of the highest standard of proof.

In the member states, while the overall picture is one which reveals convergence, each individual part may be quite different and diverse. The powers and responsibilities of each institution and criminal justice actor may have overlaps which are incompatible with those of another member state as regards the overarching principle of separation of powers. That the EAW requires each part of the system to trust a part of another national system which shares the same title, but may have quite different powers, makes the actors nervous. Their duties of confidence and mistrust which are central to the operation of the system within the constitutional settlement of the state cannot be so easily translated into the system of even a neighbouring or partner state.

As we discussed in the introductory section of this paper, under the classic extradition system, this problem was taken off the shoulders of the actors of the criminal justice systems as the final decision on the extradition of an individual rested with the political authorities. However, with the exclusion of the political authorities from the EAW on the basis of the principle of mutual trust, the actors of the EU criminal justice systems find themselves faced with the conundrum. As the UK Supreme Court decided in the Assange case, the question of trust and of what judicial body to trust is determined by the UK Parliament's decision to adopt the EAW system. In its judgment, the Court ducked the question at least in part and instead of reaching a decision on whether the Swedish authority was a judicial body in which a UK court should have trust, it concluded that this question was one that the UK Parliament had determined through the adoption of national implementing legislation on the EAW. As a result, instead of looking behind the national legislators' decision to require trust, the Supreme Court relied on the decision of the UK national legislator.

The challenges of the EAW all stem from this problem of allocation of trust in criminal justice systems which are designed to operate on the basis of distrust among the actors. If judges and juries had mutual trust in the police then there would be no need for a trial, the defendant would obviously be guilty because the police say so and the judge and jury trust the police. The recent case which the Court of Justice of the European Union (CJEU) dealt with regarding Mr Radu again engaged this problem of trust when the national court asked the CJEU for some advice on how to apply the EU Charter of Fundamental Rights.<sup>62</sup> However, it would seem that the CJEU is not yet ready to tackle this issue as it expressed incomprehension as to why the national court would think that the Charter was engaged by the facts of the case and provided no interpretative guidance on the matter.

#### 4. Conclusions, key findings and policy suggestions

This paper has examined the quantitative uses and misuses of the EAW since its first year of practical operation in 2005. A number of policy steps have been taken at EU official levels at times to address the gaps and deficiencies affecting the application of the EAW in the various

<sup>62</sup> Case 396/11 *Radu* [2013], Court of Justice of the European Union, 29 January 2013.

European criminal justice areas of the EU. Yet, the political efforts to make the EAW 'work better' need to be further intensified in order to ensure and strengthen the added value and legitimacy of the whole system.

Questions of proportionality and division of powers have been identified as being amongst the main challenges facing the EAW system and the principle of mutual recognition. In view of the unease which is appearing in various criminal justice systems and sectors across the member states over the appropriateness of an obligation to place 'mutual trust' in the designated institutions in other member states, it may be wise to allow greater flexibility to the actors within the criminal justice systems to examine and determine within the systems themselves the extent and scope of the EU concept of mutual trust. A *bottom-up approach* to the objective should therefore be explored further. Meddling in the detail of how to achieve it might engage more fully the practitioners of the system themselves.

The analysis provided in this paper calls for improvements in the accountability and transparency in the application and evaluation of the EAW, as well as highlighting the dilemmas and obstacles facing its uses by member states' competent judicial authorities. More and better data is needed on the quantitative application of the EAW by EU member states and national justice authorities and actors. This should go hand-in-hand with an independent and high quality qualitative assessment of its practical daily operation across the EU. The EAW, and the principle of mutual recognition putting it into practice, have been developed so far under the presumption that there is a high level of reciprocal confidence between the participating states' criminal justice regimes and authorities and that all EU member states share and practice the same standards in their judicial systems. This presumption has faced several challenges and concerns, not least from the member states' criminal justice actors and national judges themselves. Also, there is an enormous diversity characterising the various criminal justice systems of the member states and a high degree of fragmentation in how the EAW is being implemented legally and in practice across the various justice areas comprising the EU.

While in many cases trust will still be well justified among certain authorities, specific kinds of issues and dilemmas, such as those examined in this paper in relation to the differences in member states' application of the proportionality and the division of powers principles, as well as their potential negative repercussions over the fundamental rights of suspects in criminal procedures, may actually require distrust among those very same authorities. The immunity of the mutual trust presumption is no longer sustainable and needs to be regarded as not conclusive both in nature and in ambition. Finding the right road through these byroads might better be left to the justice practitioners who have the very strong tool of the EU Charter of Fundamental Rights to guide them. As the EU Charter is the EU's Bill of Rights for everyone in the EU, it rather than the executive branches should constitute the basis for the development of a criminal justice system at EU level where mutual trust, and also mutual mistrust, are central elements. Only a correct recalibration of trust and mistrust will enable the EU and its member states to claim confidence in each other in holding the title of 'liberal democracies'.

## 4.1 Key findings

On the basis of this analysis, the following key findings can be highlighted:

First, the quantitative and qualitative knowledge on the practical operating of the EAW is largely insufficient. The current system/method of statistical (questionnaire-based) collection is affected by profound methodological caveats and gaps which inhibit comparability and analysis of results, and do not allow for a high degree of accountability and transparency of the EAW system.

Second, since the launch of the EAW system in 2005, there have been 78,785 EAWs issued by EU member states. Since the first steps of the system, and especially since 2006, there has been a gradual increase in the number of EAW extradition requests issued by EU member states. This trend started to change from 2009, coinciding with the first results of the Council mutual evaluation system, with a noticeable decrease in 2010 and 2011. The statistics on the number of EAWs resulting in effective surrender have remained fairly stable over the years, with a minor decrease between 2010 and 2011.

Third, the member states that have issued the most EAWs are (in decreasing order) Poland, Germany, France, Romania, Spain, Hungary, Austria and Lithuania. The requesting member states that have been most 'successful' in having sentenced or suspected persons surrendered have been Romania, the UK, Germany and France. The member state that has sent most people back to a requesting member state is Spain, followed closely by Germany and the UK.

Fourth, the UK and Germany have received the most EAWs from other member states. However, this data is subject to a number of deficiencies which lead to the risk of duplication and cumulative representation of the statistics. These shortcomings include the ways in which numbers of EAWs received are counted and the EAWs issued as alerts on the SIS are calculated according to national authorities.

In the case of Germany, for instance, these numbers are often mixed with the total of EAW alerts issued by member states connected to the SIS which are not necessarily related to a particular member state. A substantial number of EAWs are often transmitted via the SIS. The SIS represents a key tool through which member states receive notifications that an EAW has been placed for a requested person in the Schengen territory. The EAW component of the SIS is, however, subject to a number of methodological deficiencies concerning, for instance, the difficulties in guaranteeing the update, correction or deletion (for those which have been refused) of entries and alerts, and hence avoiding duplications and ensuring the accuracy and timeliness of the data.

Fifth, the majority of the reported EAW requests received by the UK during 2009-10 appear to come from Poland (59%), Germany (6%), Romania (5%), Lithuania (4%), and Spain (4%). These percentages have been used politically in the UK as one of the justifications for supporting the UK's potential opt-out from judicial cooperation in criminal matters. However, here also the risk of inaccuracies and duplication – the possibility that multiple EAWs are received in relation to the same person – exists and is unresolved. Also, the number of EAWs issued by Poland to the UK experienced a substantial drop during 2010 and 2011. Amongst the variables behind the high use of EAWs by Poland in relation to the UK are the specificities of the Polish criminal justice system (where prosecutors are required to prosecute any crime regardless of its nature and without an independent scrutiny by judges), and the total Polish population residing in the UK since the accession of the country to the EU. Finally, while the number of EAWs received by UK judicial authorities has been high, the total number of persons effectively surrendered to Poland and any other EU member states has been low in comparison. The main offences for which an extradition request has been issued are (in decreasing order) fraud, theft, drug trafficking and robbery.

Sixth, Germany issued the second highest number of EAWs in the EU. While the Council statistics tell us that Germany has received the most EAWs from other EU member states, these numbers also need to be taken with caution as they include not only EAW extradition requests but also SIS alerts and might as such be affected by duplication. The main extradition partners of Germany share territorial borders with it (e.g. Poland, Austria, the Netherlands, etc.), which may indicate the relevance of the geographical proximity variable in the use of the EAW. Regarding the types of offences, and similar to the UK situation, the main types have been theft, fraud and drug trafficking.

Seventh, the application of the EAW is affected by a dual conundrum, the first being the different ways in which the proportionality test is carried out (or not) across the EU, with different 'competent judicial authorities' involved (the 'who') and a widely diverse range of offences justifying requests for extradition (the 'what'). The main point of contention here is the burden and economic costs from a disproportionate use of the EAW by certain member states to others, as well as the lack of due consideration of less coercive or onerous means for attaining the same public goal in a field with profound implications for the liberty and security of the individual. The second conundrum is the ways in which the independence and impartial controls over the issue and execution of EAWs are ensured and their implications for the sustainability of the trust underlying the principle of mutual recognition upon which the EAW is based on. 'Who' is supposed to have confidence and trust in whom? The problem of allocation of trust between judicial authorities in cases such as that of Assange fundamentally puts the principle of separation of powers under tension.

## 4.2 Policy suggestions

Both the proportionality and division of powers challenges affect the overall sustainability of the EAW system and call for immediate policy debate and attention. For the legitimacy of a mechanism so firmly rooted in a high level of confidence amongst the participating states and authorities to subsist in the medium and long-term future, it is of utmost importance for the EU to allow and deploy a set of policy mechanisms primarily designed to recalibrate trust and mistrust in its practical operations and daily implementation. In particular, the following policy suggestions are put forward:

1. The presumption of mutual trust is no longer helpful in understanding and addressing the dual conundrum affecting the application of the EAW mechanism. Questions related to the effects of the EAW on the principles of proportionality and the separations of powers, as well as their implications on the EU Charter of Fundamental Rights, call for a rebuttable and non-conclusive presumption about the integrity of member states' criminal justice systems.
2. Consideration should be given to the re-introduction of a double criminality requirement to the EAW. This would allow the member states' criminal justice systems to resolve issues of (lack of) confidence regarding the similarity or otherwise of the offences and assist the process.
3. A key priority should be the development of a stronger and more methodologically sound evaluation, an improved system of statistical collection and an independent qualitative assessment of member states' implementation of the EAW. The current revision of the Council's questionnaire exercise is to be welcomed, but the comparability and objectivity of the statistical data gathered and presented should be further improved.

The discussions at Council level concerning a new questionnaire are a positive step in the right direction, but these should be accompanied by a higher degree of transparency and accountability on the uses of the EAW and a qualitative assessment of the results. The Council and member states' representatives should hold to a stronger commitment to provide all the necessary information related to the uses of the EAW. In addition to overcoming current data gaps and conceptual inconsistencies, a key priority should be to disentangle the quantitative information (statistics) provided by member states in relation to SIS-related and 'true' EAWs received. This should go hand-in-hand with a revision of the EAW component of the SIS and its second generation (SIS II) to better ensure the updating (corrections and deletions by independent judicial authorities) and non-duplication of EAW-

related alerts.<sup>63</sup> The European Commission, in close cooperation with the European Parliament, should become the main coordinating actor of the entire questionnaire exercise.

In addition, the current system of mutual (member states) peer evaluation should move decisively from its current intergovernmental nature towards a more EU-driven objective and independent method, ensuring a full and effective monitoring of the EAW implementation. This should go hand-in-hand with a permanent, impartial assessment of the EAW linkages and uses along with other mutual recognition legal instruments in judicial cooperation in criminal matters, such as the implementation of the Framework Decision on the cross-border execution of judgements in the EU involving deprivation of liberty (transfer of prisoners system).<sup>64</sup> A stronger role should be entrusted here to the Directorate General for Justice, Fundamental Rights and Citizenship of the European Commission and the European Parliament not just in the follow up and provision of information on the EAW evaluation results, but in the actual conduction and coordination of the evaluations as well as in the implementation of a solid follow-up system. Stronger democratic accountability should be one of the driving principles to inspire and nurture the current shape and future reviews of the EAW system. The contributions by EU agencies such as Eurojust and the European Union Agency for Fundamental Rights (FRA) could play an equally central role here towards gaining a better understanding of the current challenges and obstacles characterising the operation of the EAW system.

Moreover, the evaluation should be first and foremost a 'bottom-up' system, channelling the experiences and lessons learned by EU networks of national practitioners and criminal justice actors such as, for instance, the European Judicial Network (EJN) in criminal matters,<sup>65</sup> the European Network of Councils for the Judiciary (ENCJ),<sup>66</sup> the European Criminal Bar Association (ECBA)<sup>67</sup> and the Justice Forum,<sup>68</sup> as well as independent networks of interdisciplinary academics.<sup>69</sup>

4. The concept of a 'competent judicial authority' should be further discussed and defined in more detail. Public prosecutors (or national authorities of 'the like') should not be entitled to issue or execute an EAW and should not be considered for the purposes of the EAW because they are not independent from national governments. An impartial judicial authority should as a general principle be the only actor entrusted with that competence. The member states currently inform the Commission of the agency or body in their criminal justice system which is relevant for each part of the criminal proceedings (the competent judicial authority).

<sup>63</sup> This was a point also raised by JUSTICE report which argued for the need to provide "a mechanism whereby another member state which would refuse on the same grounds could take no action on the alert where a named person enters their territory; and agreeing circumstances where a refusal should lead to the withdrawal of the entry (and the EAW), such as misidentification". JUSTICE (2012), *European Arrest Warrants – Ensuring an Effective Defence*, Justice: London. Refer to pages 15 and 16.

<sup>64</sup> Council of the EU (2008), Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5 December 2008. Refer to G. Vermeulen et al. (2011), *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU member states*, IRCP-series, Maklu: Antwerpen, Volume 41.

<sup>65</sup> See the European Judicial Network's website: <http://www.ejn-crimjust.europa.eu/ejn>

<sup>66</sup> European Network of Councils for the Judiciary's website: <http://www.encj.eu>

<sup>67</sup> European Criminal Bar Association's website: <http://www.ecba.org/content>

<sup>68</sup> See the list of member organisations of the Justice Forum on the European e-Justice Portal: [https://e-justice.europa.eu/content\\_justice\\_forum\\_members-26-en.do](https://e-justice.europa.eu/content_justice_forum_members-26-en.do)

<sup>69</sup> For more information on existing EU networks and fora of justice networks refer to [https://e-justice.europa.eu/content\\_legal\\_professions\\_and\\_justice\\_networks-20-en.do](https://e-justice.europa.eu/content_legal_professions_and_justice_networks-20-en.do)

There is currently no check on this notification. There needs to be much greater control over the process of notification with the Commission given the power and duty to investigate the proposed agency or body and ensure that its powers and duties are compatible with the activity with which it has been designated.

5. The proportionality test, and its financial and fundamental rights implications, should be put at the forefront of any future discussion. In order to address the proportionality problem, minimum thresholds of sentence should be raised beyond those currently defined for a maximum period of at least three years; these should be legally binding for EU member states.

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## Annex 1. Methodological Note

This paper relies on publicly available statistical sources at EU levels on the use of European Arrest Warrants (EAWs) by member states. The Master Table provided in Annex 2 below includes a complete statistical overview of the quantitative uses of the EAW system by EU member states between 2005 and 2011, upon which we based our analysis and visualisations. This Methodological Note aims at providing the reader with a synthesised overview of the various sources which have been used in this paper regarding the quantitative information on the implementation of the EAW (Section 1) and the main methodological challenges which we have found in this exercise (Section 2).

### 1. Main sources for statistical data on the practical operation of the EAW

As highlighted in Section 2 of this paper, the set of official statistics at EU levels on the uses of the EAW are scattered and highly diversified. The following sources of information have been used at times of constructing the Master Table presented in Annex 2 below:

1. The main source of statistical data is the replies by member states' authorities to the Council questionnaires, in particular:
  - 1.1 Council of the EU (2007) Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - **Year 2005**, Council document 9005/5/06, Brussels, 18 January 2007.
  - 1.2 Council of the EU (2008) Replies to questionnaire (...) **Year 2006**, Council document 11371/5/07, Brussels, 3 March 2008.
  - 1.3 Council of the EU (2008) Replies to questionnaire (...) **Year 2007**, Council document 10330/2/08, Brussels, 16 September 2008.
  - 1.4 Council of the EU (2010) Replies to questionnaire (...) **Year 2008**, Council document 9734/6/09, Brussels, 16 November 2010.
  - 1.5 Council of the EU (2010) Replies to questionnaire (...) **Year 2009**, Council document 7551/7/10, Brussels, 24 November 2010.
  - 1.6 Council of the EU (2011) Replies to questionnaire (...) **Year 2010**, Council document 9120/2/11, Brussels, 9 September 2011.
  - 1.7 Council of the EU (2013) Replies to questionnaire (...) **Year 2011**, Council document 9200/7/12, Brussels, 15 January 2013.
2. A second source of statistical information are the Council evaluation reports on the fourth round of mutual evaluations on the practical application of the European Arrest Warrant and corresponding surrender procedures between member states (these evaluation reports provided relevant additional data on EAWs issued and received for certain member states where no data had been provided in the above-mentioned Council questionnaires):
  - 2.1 Council of the EU (2007) Evaluation report on the fourth round of mutual evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between member states" - Report on **Belgium**, Council document 16454/2/06, Brussels, 19 March 2007.
  - 2.2 Council of the EU (2007) Evaluation report on the fourth round of mutual evaluations (...) Report on the **United Kingdom**, Council doc. 9974/2/07, Brussels, 7 December 2007

- 2.3 Council of the EU (2008) Evaluation report on the fourth round of mutual evaluations (...) Report on **Poland**, Council document 14240/2/07, Brussels, 7 February 2008.
- 2.4 Council of the EU (2009) Evaluation report on the fourth round of mutual evaluations (...) Report on the **Netherlands**, Council doc. 15370/2/08, Brussels, 27 February 2009.
- 2.5 Council of the EU (2009) Evaluation report on the fourth round of mutual evaluations (...) Report on **Italy**, Council document 5832/2/09, Brussels, 18 March 2009.
- 2.6 Council of the EU (2009) Evaluation report on the fourth round of mutual evaluations (...) Report on **Germany**, Council document 7058/2/09, Brussels, 30 April 2009.
- 2.7 Council of the EU (2009) Evaluation report on the fourth round of mutual evaluations (...) Report on **Bulgaria**, Council document 8265/2/09, Brussels, 20 May 2009.
- 2.8 Council of the EU (2009) Evaluation report on the fourth round of mutual evaluations (...) Report on **Romania**, Council document 8267/2/09, Brussels, 20 May 2009.

### *Country-specific statistics*

3. **Germany**, provided by the German Ministry of Justice following a request for disclosure of information by the authors of this paper:
- 3.1 German Federal Gazette (2012) Bekanntmachung der Auslieferungsstatistik für das Jahr 2010, vom 17. Januar 2012, Bundesanzeiger – Amtlicher Teil Nummer 30 – p. 690, available here:  
[http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Auslieferungsstatistik2010.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Auslieferungsstatistik2010.pdf?__blob=publicationFile)
4. **Austria**:
- 4.1 Austrian Parliament (2012) Anfragebeantwortung – Europäischer Haftbefehl und Übergabeverfahren Österreich für 2010, 9974/AB XXIV. GP (Reply to a Parliamentary question providing EAW statistics for 2010), available here:  
[http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB\\_09974/fname\\_242787.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_09974/fname_242787.pdf)
- 4.2 Austrian Parliament (2012) Anfragebeantwortung – Europäischer Haftbefehl und Übergabeverfahren Österreich für 2011, 11282/AB XXIV. GP (Reply to a Parliamentary question providing EAW statistics for 2011), available here:  
[http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB\\_11282/fname\\_257055.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_11282/fname_257055.pdf)
5. **Ireland**:
- 5.1 Irish Ministry of Justice (2011) Report on the operation of the European Arrest Warrant Act 2003 in the year 2010 by the Irish Minister for Justice and Equality, November 2011, available here:  
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<http://www.justice.ie/en/JELR/2012UpdateToEuropeanArrestWarrantDocument.pdf/Files/2012UpdateToEuropeanArrestWarrantDocument.pdf>
6. **United Kingdom**:
- 6.1 UK House of Commons (2009) The European arrest warrant in practice, Standard Note: SN/HA/4979, available here: [www.parliament.uk/briefing-papers/SN04979.pdf](http://www.parliament.uk/briefing-papers/SN04979.pdf)

- 6.2 UK House of Lords (2011) The Human Rights Implications of UK Extradition Policy - Human Rights Joint Committee's Fifteenth Report, June 2011, available here: [http://www.parliament.uk/documents/joint-committees/human-rights/JCHR\\_EXT\\_Written\\_Evidence\\_11.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf)
- 6.3 UK Home Office (2011) A Review of the UK extradition agreements, available here: <http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review>
- 6.4 UK Serious Organised Crime Agency (2012) Annual Report and Accounts 2011/2012, London, June 2012, available here: [http://www.soca.gov.uk/about-soca/library/doc\\_download/392-soca-annual-report-and-accounts-201112.pdf](http://www.soca.gov.uk/about-soca/library/doc_download/392-soca-annual-report-and-accounts-201112.pdf)

Various requests for disclosure of information were sent for the purposes of this paper to a selected group of member states' permanent representations in Brussels asking specific questions for clarification and requesting access to more detailed information regarding the EAW quantitative uses by their authorities, in particular to the UK, Poland, Romania, Germany and Italy. We received statistical data and qualitative answers from Germany and Poland.

## 2. Methodological deficiencies

As underlined above, one of the main sources of information on the quantitative uses of EAWs by EU member states has been the replies to the Council questionnaires. These Council statistics, however, present a number of methodological challenges and deficiencies, in short:

The 2011 European Commission's report on the implementation of the EAW Framework Decision acknowledged that *"there are considerable shortcomings in the statistical data available for analysis. (...) Not all member states have provided data systematically and they do not share a common statistical tool. Moreover, different interpretations are to be found in the answers to the Council's questionnaire"*.<sup>70</sup>

This seriously affects the soundness and reliability of EAW data presented in the Council documents. A simple look at the sum of all EAWs issued and received by member states from 2005 to 2011, provided at the end of the Master Table in Annex 2, shows that there are discrepancies in the statistics: **78,785 EAWs** were reported as issued and **130,024 EAWs** were reported as received during that period, although from a logical point of view the number of EAWs issued should be equal to the number of EAWs received. This difference in the numbers points towards either an over-reporting of EAWs received or duplications in the data.

When looking more specifically at the statistics provided by the Council, the authors of this paper have identified two key methodological deficits. The first one relates to the way in which the Council itself provides the data (Section 2.1), and the second concerns the ways in which member states report their application and implementation on the EAW (Section 2.2).

### 2.1. Methodological deficiencies in the way the Council presents the data

Some important inconsistencies can be found in the presentation of the data derived from replies to the Council's questionnaires. In one instance, the Council document provided cumulative numbers for 2004-11 for persons effectively surrendered by a member state (Ireland) while the data for all other member states referred to the year 2011 only. The correct

<sup>70</sup> European Commission (2011), *op. cit.*, p. 10.

figure had to be found in an Irish official report. Small typos were also found in the case of the UK data (51 instead of 515 for effective surrenders in 2008, as well as 4 instead of 4,004 for EAWs received in 2009).

Another outstanding issue arising from the Council's questionnaire relates to the way in which the question on how many EAWs resulted in the effective surrender of persons sought (question 3) is being framed, which is asked jointly with the question on how many persons have been effectively surrendered (question 5.2). It is clear from the replies of member states that combining one question on arrest warrants and one question on persons can lead to confusion – as many footnotes in the replies to the Council's questionnaire indicate. The result is the risk of duplication: one person can be designated by several EAWs, which leads to inflated data on the number of EAWs.

In March 2012, the Council of the EU proposed certain revisions to the questionnaire on EAWs,<sup>71</sup> which have been discussed during meetings of the Working Party on Cooperation in Criminal Matters. Proposed revisions include new formulations of the questions relating to EAWs received by a judicial authority, in order to avoid duplications or cumulative data over the years. Some clarification of the questions on refusals of execution and refusals to surrender should also avoid confusion. In addition, a new question on the kind of offences for which an EAW is issued will be added. Also, there will be a common list of potential reasons for non-execution. The proposed new questionnaire can be found in Annex 3 of this paper.

## 2.2. Methodological deficiencies in the way member states report their data

Three main methodological weaknesses have been identified during the course of our research regarding the ways in which EU member states report their statistical data.

First, *incompleteness*: not all member states have provided their statistics on the use of EAWs. As an example, Italy fails to provide data since 2005. The authors managed to find additional statistics on Italy for 2006 and 2007 in the EAW Mutual Evaluation Report of 2008, but this lack of data affects the global statistics of the uses at EU level between 2005 and 2011, given that Italy is one of the largest member states. Other instances of information gaps include Germany (in 2005-6), Belgium (before 2009) and Bulgaria (no data at all except for the year 2010). The authors overcame some of these deficits by diversifying and complementing these sources of data with additional ones as outlined in Section 1 above. Another example of incompleteness relates to the number of refusals of execution of an EAW by member states, as well as the grounds for refusal. Given that only a minority of member states provide the statistics on how many EAWs were refused according to a specific ground, the authors chose to calculate the most commonly used grounds for refusing to execute a EAW by looking at certain key member states (Czech Republic, France, Germany, Hungary, the Netherlands, Spain and the UK) and highlighting their most used grounds of refusal.

Second, *inaccuracy*: some member states acknowledged certain methodological difficulties in reporting a comprehensive set of data. French authorities, for example, explain that the Ministry of Justice is not aware of all EAWs issued or received by France. A footnote for the 2008 figures explains that *“these statistics cover only EAWs brought to the knowledge of the Ministry of Justice. These statistics are incomplete as the French Ministry of Justice is not appraised of all EAWs issued by French judicial authorities and addressed to another member state, because of the rule of direct transmission of EAWs. Not all courts of appeal have been able to provide the*

<sup>71</sup> See Council of the EU (2012), Study "Making better use of statistical data relating to the European Arrest Warrant" - member states comments on the Final report, Council doc. 12951/1/12, Brussels, 26 September 2012.

*requested statistical data and therefore the French Ministry of Justice is unable to give more global statistical data.*"<sup>72</sup> Another example concerns Portugal, which provides approximate numbers and justifies it by stating that "once the local authorities are competent to directly send EAW certain flexibility on what concerns the numbers must be established".<sup>73</sup>

Third, *inconsistencies*: As we have underlined in Section 2 of this paper, a particularly serious deficiency relates to the reported statistics of EAWs received. Some member states include in their statistics all alerts received through the Schengen Information System (SIS) and/or Interpol, even those that have no connection whatsoever to the member state receiving them. This is the case for Germany and Hungary. German authorities indicate this in footnotes for all the reporting years. Hungary's figure for 2008 is 14,393, which is half the total of all received EAWs in the EU for that year – this figure strongly suggests a misinterpretation by the Hungarian reporting authority and the authors chose not to take it into account. On the other hand, in the case of Portugal in 2005, 'EAWs received' were only those received for execution – other EAWs introduced in the SIS are ignored.

In the British case, it is not clear whether the UK actually includes in its statistics on 'EAW received' the alerts issued via the SIS. A footnote in the 2005 questionnaire clearly specifies that "the response provided by the UK includes all of the requests/alerts transmitted by EAW partners to the UK in 2005 by whatever channel; for example bilateral transmission, Interpol notice or diffusion"<sup>74</sup> but no such caveat is given for the years 2006-11. It is, however, confirmed that data provided by UK authorities in 2009 and 2010 also include alerts through the SIS or via Interpol, which artificially inflate the statistics – the UK Minister of State for Police and Criminal Justice, Nick Herbert, answered in a parliamentary question on 29 March 2011: "it is worth noting that the majority of European arrest warrants issued by EU member states are circulated to other EU member states on the Schengen Information System. As the UK is not party to the SIS, we rely on the bilateral transmission of the EAWs. A significant proportion of the EAWs circulated will therefore prove to have no connection to the UK although they are registered as having been 'received' by SOCA."<sup>75</sup> As already mentioned in Section 2.2 of this paper, the UK participates in the SIS but only for its police and criminal justice components. The UK should have been connected to the SIS since 2004 but technical difficulties – such as a fire which destroyed some equipment – prevented this from occurring.<sup>76</sup> However, UK authorities manage to get access to information related to EAWs contained in the SIS through other alternatives such as 'bilateral informal contacts' and arrangements with other member states. This further exacerbates the emergence of inaccuracies in the available statistical information and does not allow an objective analysis of the number of EAW received by the UK.

Similarly, as regards the number of EAWs issued, one member state (Romania) differentiates between the EAWs it has issued as Interpol diffusions and those transmitted to other member states for execution. In 2008 for example, 2,000 EAWs were issued by Romania but only 733 of those were actually directed at specific member states for execution. The authors chose to take into account the EAWs issued for execution. In one case, the authors noticed

<sup>72</sup> Council of the EU (2010), Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2008, Council document 9734/6/09, Brussels, 16 November 2010, p. 2.

<sup>73</sup> Council of the EU (2007), Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2005, Council document 9005/5/06, Brussels, 18 January 2007, p. 2.

<sup>74</sup> *Ibid.*, p. 5.

<sup>75</sup> UK House of Commons Hansard (2011), Answer by Nick Herbert to a question by MP Richard Drax on 29 March 2011, available at this link: [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110401/text/110401w0003.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110401/text/110401w0003.htm)

<sup>76</sup> See <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/49/4905.htm> (point 18).



that a member state (Romania) reported different statistics in the Council questionnaire and in the mutual evaluation report of 2009. This difference was highlighted in a footnote of the mutual evaluation report but not explained.<sup>77</sup> The authors chose to take into account the statistics provided in the Council questionnaires.

Finally, a weakness regarding the different reporting periods being used by member states was also identified. While most national authorities use the calendar year (1 January – 31 December), a few, such as the UK, use a *financial year* reporting period (1 April – 31 March). In addition, some member states choose to report only the individual cases that were concluded in a given year while others choose to also include also the pending cases to be concluded in the following years.

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<sup>77</sup> The report simply mentions “*this information does not match the figures provided in the replies to the questionnaire on quantitative information regarding the practical operation of the EAW (10330/08)*” – see Council of the EU (2009), Evaluation report on the fourth round of mutual evaluations “The practical application of the European Arrest Warrant and corresponding surrender procedures between member states” - Report on Romania, Council document 8267/2/09, Brussels, 20 May 2009, p. 6.

## Annex 2. Master Table

### MASTER TABLE OF COMPILED STATISTICS ON THE OPERATION OF THE EUROPEAN ARREST WARRANT 2005 - 2011

	2005				2006			
	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:
Austria	975	198	73	134	391	250	67	157
Belgium <sup>78</sup>	212	185						
Bulgaria	NA	NA	NA	NA	NA	NA	NA	NA
Czech Republic	4	7	0	3	168	99	125	49
Denmark	64	33	19	19	52	45	19	27
Germany								
Estonia	38	25	10	17	42	30	15	30
Greece	38	68	12	47	53	79	4	45
Spain	519	632	54	400	450	721	62	423
France	1914	452	162	304	1552	490	237	339
Ireland	29	67	6	7	43	127	20	45
Italy <sup>79</sup>	121	69	57	18	33	91	25	
Cyprus	44	24	3	8	20	12	2	1
Latvia <sup>80</sup>	44	31	10	13	65	17	14	12
Lithuania	500	36	69	27	538	28	57	25
Luxembourg	42	25	24	7	35	24	22	8
Hungary	42	53	23	45	115	53	55	43
Malta	1	4	0	2	4	2	3	0
Netherlands	373	434	30	229	325	498	47	287
Poland	1448	218	112	80	2421	228	235	139
Portugal <sup>81</sup>	200	47	38	33	102	84	52	65
Romania	NA	NA	NA	NA	NA	NA	NA	NA
Slovenia	81	29	10	15	67	40	14	24
Slovakia	56	33	14	13	111	34	23	9
Finland	86	10	37	10	69	14	37	14
Sweden	144	34	10	28	137	36	27	30
UK <sup>82</sup>	131	5986	63	77	129	4910	86	160
<b>TOTAL</b>	<b>7106</b>	<b>8700</b>	<b>836</b>	<b>1536</b>	<b>6922</b>	<b>7912</b>	<b>1248</b>	<b>1932</b>

<sup>78</sup> Data for Belgium in 2005 are gathered from the Mutual Evaluation Report on the operation of the EAW for Belgium (Council document 16454/2/06).

<sup>79</sup> Data for Italy in 2006 are gathered from the Mutual Evaluation Report on the operation of the EAW for Italy (Council document 5832/2/09).

<sup>80</sup> The number of EAWs received in 2006 by Latvia includes all alerts sent through the Schengen Information System (SIS) or via Interpol.

<sup>81</sup> Portugal reports an approximate number of EAWs issued. Also, the number of EAWs received by Portugal in 2005 includes only the EAWs received for execution and ignores SIS or Interpol alerts.

<sup>82</sup> The number of EAWs received by the United Kingdom includes all alerts sent through the Schengen Information System (SIS) or via Interpol.

	2007				2008			
	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:
Austria	495	243	47	183	461	277	28	185
Belgium								
Bulgaria <sup>83</sup>	238	166	82	112		129		61
Czech Republic	435	176	66	108	494	245	141	129
Denmark					52	38	26	17
Germany <sup>84</sup>	1785	11147	506	571	2149	12637	624	742
Estonia	31	50	14	40	46	60	22	52
Greece	83	153	16	70	119	196	10	111
Spain	588	1207	59	715	623	1534	93	931
France <sup>85</sup>	1028	504	345	308	1184	709	400	574
Ireland	35	173	14	49	40	198	13	194
Italy <sup>86</sup>	349	453	100		347	201	64	
Cyprus	20	37	4	6	16	26	3	8
Latvia	97	20	16	14	140	11	22	7
Lithuania	316	42	60	18	348	43	68	37
Luxembourg	44	21	15	9	40	29	22	9
Hungary <sup>87</sup>	373	106	84	78	975		205	95
Malta	3	9	1	6	2	16	1	8
Netherlands <sup>88</sup>	403	482	17	355		456		360
Poland	3473	214	434	105	4829	241	617	118
Portugal	117	89	45	80		106		60
Romania <sup>89</sup>	856	274	235	237	733	351	448	266
Slovenia	54	43	8	25	39	65	11	50
Slovakia	208	97	71	53	342	102	81	36
Finland	84	12	43	9	107	23	44	20
Sweden	170	40	22	32	190	56	40	46
United Kingdom <sup>90</sup>	185	2534	99	328	218	3307	96	515
<b>TOTAL</b>	<b>11470</b>	<b>18292</b>	<b>2403</b>	<b>3511</b>	<b>13494</b>	<b>21056</b>	<b>3079</b>	<b>4631</b>

<sup>83</sup> Data for Bulgaria in 2007 and 2008 are gathered from the Mutual Evaluation Report (Council doc. 8265/2/09). Some data concern the period 1 January 2007 - 30 September 2008.

<sup>84</sup> The number of EAWs received by Germany includes all alerts sent through the Schengen Information System (SIS) or via Interpol.

<sup>85</sup> French authorities indicated that the French Ministry of Justice is not aware of all EAWs issued and received in 2008 as not all courts of appeal have been able to provide the requested statistical data.

<sup>86</sup> Data for Italy in 2007 and 2008 are gathered from the Mutual Evaluation Report (Council doc. 5832/2/09). Italian data in 2008 concern the period 1 January - 30 June 2008.

<sup>87</sup> In 2008, Hungary reported 14393 EAW received. The authors assume that this number represents the total EAWs issued through the SIS by all member states and choose not to take it into account.

<sup>88</sup> Dutch authorities indicated that the data provided for the effective surrenders in the Netherlands for 2007 was incomplete.

<sup>89</sup> In Romania in 2008, from approximately 2000 EAW issued for diffusion (via Interpol), 733 EAWs were transmitted for execution to the member states.

<sup>90</sup> The number of EAWs received by the UK includes all alerts sent through the SIS or via Interpol. Some data come from the UK Home Office's review of extradition agreements (2011).

	2009				2010			
	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:
Austria <sup>91</sup>	292		37	234	454		63	240
Belgium	508	565	73		553	543	57	68
Bulgaria					280	123	120	120
Czech Republic	439	310	67	220	552	330	97	179
Denmark	96	58	51	25	85	64	42	35
Germany <sup>92</sup>	2433	13452	777	982	2096	14022	835	1006
Estonia	46	38	21	31	74	36	29	31
Greece	116	216	19	127	132	213	33	139
Spain	489	1629	99	990	566	1544	97	931
France	1240	967	420	626	1130	1156	424	673
Ireland	33	326	16	263	51	373	161	161
Italy								
Cyprus	17	27	3	13	29	34	4	11
Latvia	171	27	40	11	159	40	48	18
Lithuania	354	52	84	37	402	75	79	60
Luxembourg	46	21	26	14	32	22	14	12
Hungary	1038	234	149	181	1015	204	231	165
Malta	7	8	2	4	16	16	1	6
Netherlands	530	683	0	408				
Poland	4844	286	1367	163	3753	297	929	162
Portugal	104	99	63	61	84		73	73
Romania <sup>93</sup>	1265	473	877	371	1235	547	855	372
Slovenia	27	56	6	39	30	99	4	73
Slovakia	485	97	79	43	361	111	164	42
Finland	129	26	47	25	116	30	49	28
Sweden	263	93	28	87	169	117	65	99
United Kingdom <sup>94</sup>	220	4004	80	628	257	4578	116	1068
<b>TOTAL</b>	<b>15192</b>	<b>23747</b>	<b>4431</b>	<b>5583</b>	<b>13177</b>	<b>24574</b>	<b>4527</b>	<b>5532</b>

<sup>91</sup> Data for Austria in 2010 are gathered from Austrian Parliament (2012) Anfragebeantwortung – Europäischer Haftbefehl und Übergabeverfahren Österreich für 2010.

<sup>92</sup> The number of EAWs received by Germany includes all alerts sent through the Schengen Information System (SIS) or via Interpol.

<sup>93</sup> In Romania in 2009, from approx. 1900 EAW issued for diffusion (via Interpol), 1265 were transmitted for execution. In 2010, from approx. 2000 EAWs issued, 1235 were transmitted for execution.

<sup>94</sup> The number of EAWs received by the UK includes all alerts sent through the SIS or via Interpol. Some data come from the UK Home Office's review of extradition agreements (2011).

	2011			
	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:
Austria <sup>95</sup>	466		101	241
Belgium	600	602	57	61
Bulgaria				
Czech Republic	518	302	238	238
Denmark	128	57	91	28
Germany <sup>96</sup>	2138	14034	855	979
Estonia	67	49	31	39
Greece				
Spain	531	1435	99	889
France	912	1102	297	756
Ireland	71	384	19	177
Italy				
Cyprus	26	51	8	20
Latvia	210	43	39	16
Lithuania	420	122	113	54
Luxembourg	60	22	29	11
Hungary				
Malta	15	9	4	6
Netherlands				
Poland	3809	296	930	186
Portugal	193	114	54	68
Romania				
Slovenia	53	110	16	79
Slovakia	350	88	105	48
Finland				
Sweden	198	163	69	137
United Kingdom <sup>97</sup>	205	6760	99	999
<b>TOTAL</b>	<b>10970</b>	<b>25743</b>	<b>3254</b>	<b>5032</b>

	Total EAWs 2005-2011			
	EAWs issued	EAWs received	EAWs resulting in effective surrender to:	Persons surrendered by:
AT	3534	968	416	1374
BE	1873	1895	187	129
BG	518	418	202	293
CZ	2610	1469	734	926
DK	477	295	248	151
DE	10601	65292	3597	4280
EE	344	288	142	240
EL	541	925	94	539
ES	3766	8702	563	5279
FR	8960	5380	2285	3580
IE	302	1648	249	896
IT	850	814	246	18
CY	172	211	27	67
LV	886	189	189	91
LT	2878	398	530	258
LU	299	164	152	70
HU	3558	650	747	607
MT	48	64	12	32
NL	1631	2553	94	1639
PL	24577	1780	4624	953
PT	800	539	325	440
RO	4089	1645	2415	1246
SI	351	442	69	305
SK	1913	562	537	244
FI	591	115	257	106
SE	1271	539	261	459
UK	1345	32079	639	3775
<b>Total</b>	<b>78785</b>	<b>130024</b>	<b>19841</b>	<b>27997</b>

<sup>95</sup> Data for Austria in 2011 are gathered from Austrian Parliament (2012).

<sup>96</sup> The number of EAWs received by Germany includes all alerts sent through the SIS or via Interpol.

<sup>97</sup> The number of EAWs received by the UK includes all alerts sent through the SIS or via Interpol. Some data come from the UK Home Office's review of extradition agreements (2011).

### Annex 3. Revised Council Questionnaire

#### Standard questionnaire on quantitative information relating to the practical operation of the European arrest warrant - Possible revision

This Annex presents the possible new questionnaire that could be used in the gathering of statistics related to the practical operation of the EAW framework in EU member states, as presented in the most recent Council document available to the authors at the time of completing this paper.<sup>98</sup> Discussions at Council level (Working Party on Cooperation in Criminal Matters) are currently ongoing on ways to improve the questionnaire from a methodological point of view.

**The information that is requested below refers to the year 20xx.**

#### QUESTIONS TO MEMBER STATES AS ISSUING STATES

No.	Questions	Explanatory annotations on the rationale/provenance of each question for the purpose of discussion
1	How many EAWs have been <b>issued</b> this year by the judicial authority of your country?	Essentially the same as previous question 1. This is an important indicator of EAW activity and will produce comparable data to that produced from 2005 to 2012. As several EAWs can be issued for the same person, this figure will produce the number of EAWs issued and not the exact number of persons sought. See explanatory note
2	How many of the EAWs <b>issued</b> this year were for the purpose of prosecution?	This data will show how many persons the subject of an EAW are suspects in respect of whom there are particular considerations - the presumption of innocence and the possibility of pre-trial detention when surrendered. Question 1 minus question 2 will give the figure of EAWs issued for the purpose of execution of a sentence.
3	How many of the EAWs <b>issued</b> this year led to the apprehension of the requested person and the initiation of a surrender procedure?	Compared to the answers to question 1, it will give an indication of the effectiveness of issuing an EAW in a particular year.
4	In respect of how many of the EAWs issued this year were the following methods of <b>alert</b> or <b>transmission</b> used?	Similar to previous questions 2.1-2.3. Provides data on which methods of alert/transmission are most commonly used by individual MS and EU wide.
4.1	SIS/Sirene	
4.2	Interpol	
4.3	Sent directly (or via Central Authority) to executing judicial authority	

<sup>98</sup> Council of the EU (2012) Standard questionnaire on quantitative information relating to the practical operation of the European arrest warrant - Possible revision, 12955/12, Brussels, 14 September 2012.

5	<p>How many EAWs <b>issued</b> this year were for the following categories of offence?</p> <ul style="list-style-type: none"> <li>- Terrorism</li> <li>- Drug offences</li> <li>- Sexual Offences</li> <li>- Firearms/explosives</li> <li>- Offences Against Property/Fraud</li> <li>- Counterfeiting the Euro</li> <li>- Homicide/Fatal Offences</li> <li>- Non fatal offences against the person</li> <li>- Trafficking in Human Beings</li> <li>- Other</li> </ul>	Provides very useful data on a breakdown of the offences for which the EAW is used
6	In respect of how many EAWs issued this year did your issuing judicial authority tick one or more of the offences listed in Article 2.2 in respect of which verification of dual criminality does not apply	Will provide useful data in context of mutual recognition in general - i.e. this figure against the EAWs issued per year will give an idea of how often dual criminality arises and therefore how comprehensive the 32-offence list is.
7	How many arrest warrants issued by your judicial authorities this year resulted in a positive decision concerning the <b>surrender</b> of the person sought?	Same as previous question 3 - will provide data on effectiveness of EAW

### QUESTIONS TO MEMBER STATES AS EXECUTING STATES

No.	Questions	Explanatory annotations on the rationale/provenance of each question for the purpose of discussion
1	How many persons have been <b>arrested</b> this year under a European Arrest Warrant in your country?	Same as previous question 5.1. This is now the first question as arrest is the first step in the process in the executing state. Data will give an indication of the total number persons arrested per year by country and EU wide.
2	How many surrender proceedings have been initiated by the judicial authorities of your MS this year pursuant to receipt of an EAW?	Replaces previous question 4 on how many EAWs "received" and phrased this way will avoid the previous problem of answer including receipt of info related to <u>existence</u> of an EAW via SIS/Interpol. The reference to "surrender proceedings" addresses the fact that multiple EAWs can be received in respect of the same person. Question 1 minus question 2 will give an indication of cases where post arrest on the basis of an alert, the actual EAW was not ultimately received and a person was released



3	How many persons have been effectively surrendered this year?	Same as previous question 5.2. Will provide vital information on the effectiveness of the EAW.
4	Of those persons surrendered this year how many consented to the surrender?	Same as previous question 5.3. This figure and the figure produced by subtracting this figure from the question 3 answers will give useful information on the extent to which EAWs are contested.
5	On average this year how many <u>days</u> did the surrender procedure take where the person consented to surrender (time between the arrest and the decision on surrender)?	Similar to previous question 7.1 and yields important data on length of time for EAW proceedings. Asking that the average be expressed in <u>days</u> addresses the fact that in previous replies different incomparable formats have been used to answer this question.
6	On average this year how many <u>days</u> did the surrender procedure take where the person did not consent to the surrender (time between the arrest and the decision on surrender)?	Similar to Question 7.2. See 5 above
7	In how many cases this year has a Judicial Authority in your MS <b>refused the execution</b> of an EAW?	Same as previous question 6.1. Will give a global yearly figure for refusals useful to assess the effectiveness of the EAW.
	In how many cases this year was the refusal for the following reasons	Essential information to assess why there are refusals per country and EU wide. For data it be comprehensive and comparable (in particular EU-wide) must be uniform and systematic and list all the possibilities in the FD. Ideally there should be no figure in the "other" category. Question on refusal to issuing state has been removed to have just one comprehensive question on refusals from the executing MS that makes the decision.
7.1	Amnesty (FD art. 3.1)	
7.2	Res iudicata (FD art. 3.2)	
7.3	Age (FD art. 3.3)	
7.4	Lack of double criminality (FD Art 4.1)	
7.5	Lis pendens (FD Art 4.2)	
7.6	No prosecution decided, prosecution halted or prevented (FD 4.3)	
7.7	Prosecution or punishment statute-barred (FD Art 4.4)	
7.8	Res iudicata in a third country (FD Art 4.5)	
7.9	Sentence executed in requested MS on account of requested persons nationality/residence (FD Art 4.6)	

7.10	Extension of executing MS jurisdiction or no extra-territorial jurisdiction of the executing MS (FD Art 4.7)	
7.11	Trial in absentia without meeting requirements (FD Art 4a as inserted by FD 2009/299/JHA)	
7.12	Lack of guarantee of review in respect of life sentence (FD Art 5.1)	
7.13	Lack of guarantee of return of national/resident to serve sentence (FD Art 5.2)	
7.14	EAW content is not in conformity with FD requirements (FD Art 8)	
7.15	Lack of requested additional information (FD Art 15.2)	
7.16	Privilege or immunity (FD Art 20)	
7.17	maximum penalty no more than 12 months (FD Art 2.1)	
7.18	sentence less than 4 months (FD Art 2.1)	
7.19	Priority of a conflicting request (FD Art 16.1, 3, 4)	
7.20	Fundamental rights (FD Art1.3)	
7.21	Other	
8.1	In how many cases this year were the judicial authorities of your member state not able to respect the 90-day time limit for the decision on the <b>execution</b> of the EAW according to Article 17.4 of the FD.?	Same as previous question 8.1 and will give useful data on the extent to which the EAW time limits (one of its most important innovations) are respected by MS and EU-wide.
8.2	In how many of the cases in 8.1 above was Eurojust informed (Article 17.7 FD)	Same as previous question 8.2. There is a legal obligation pursuant to Article 17.7 FD EAW to inform Eurojust and this question constitutes an important assessment tool of the level of compliance by MS
8.3	In how many cases this year did the <b>surrender</b> not take place because of non-compliance with the time limits imposed by Art. 23.2 of the FD?	Same as previous question 9.1 See 5.1 above
8.4	In how many of the cases in 8.3 above was the person released according to Art 23.5 FD?	Same as previous question 9.2 See 5.1 above and will give an indication of failed surrenders because of non-respect of time limits
9.1	In how many cases this year did your judicial authority <b>execute</b> an EAW with regard to a national or resident of your MS?	Same as previous question 10.1. Data will give an indication of how the innovations of the EAW in relation to own nationals work

9.2	In how many of the cases in 9.1 above did the judicial authorities of your member state request a guarantee under Article 5.2 (previously 5.3) of the FD?	Same as previous question 10.2. With the answer to 7.9 above (re Article 4.6), data will provide an indication of the extent to which MS avail of provisions to have own nationals serve sentences at home.
10	In how many cases this year did the judicial authorities of your member state request a guarantee under Article 5.1 (previously 5.2) of the FD?	Same as previous question 11. Data will give an indication of the extent to which life sentences arise in EAW cases.
11	In how many cases this year was the requested person temporarily surrendered to the issuing state pursuant to Article 24.2	Data will give an indication of the extent to which the useful possibility in Art 24.2 FD is availed of given the widely accepted maxim that delay defeats justice

Is there any other information regarding the operation of the European arrest warrant that you would like to give?

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