



## **D4.3**

### **REPORT ON PERSPECTIVES ON IMPACT, LEGITIMACY & EFFECTIVENESS OF THE EUROPEAN ARREST WARRANT -- PROSECUTORS AND GOVERNMENT OFFICIALS PERSPECTIVES**

**CIAN C. MURPHY, ALDO ZAMMIT BORDA & LUCY HOYTE**  
**The Dickson Poon School of Law, King's College London**

#### **Work Package 4**

SECILE: Securing Europe through Counter-Terrorism – Impact, Legitimacy & Effectiveness  
This project has received funding from the European Union Seventh Framework Programme (FP7/2007-2013) under grant agreement n°313195

<b>PROJECT FULL TITLE</b>	Securing Europe through Counter-Terrorism - Impact; Legitimacy & Effectiveness
<b>PROJECT ACRONYM</b>	SECILE
	Collaborative Project funded under the 7 <sup>th</sup> Framework European Security Research Programme
<b>GRANT AGREEMENT</b>	313195
<b>STARTING DATE</b>	1 <sup>st</sup> May 2013
<b>DURATION</b>	18 months

## DOCUMENT MANAGEMENT

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Work Package 4

## HISTORY OF CHANGES

Vn	Status	Date	Organisation / Person responsible	Reason for Change
V1	Draft	19 May 2014	King's / Cian Murphy	First draft
V2	Draft	11 June 2014	King's/ Cian Murphy	Second draft
Vf	Final	2 July 2014	King's/ Cian Murphy	Final draft



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## EXECUTIVE SUMMARY

- The European Arrest Warrant (EAW) has led to speedier extradition, or surrender, of individuals between EU Member States on the basis of mutual recognition. This mechanism was made possible by a framework decision adopted after September 11 2001 but which was under consideration since the Tampere European Council in 1999. The EAW system was seen as a necessary corollary to the free movements of persons in the EU.
- This report sets out the results of a focus group with seven prosecutors and government officials, and one national expert, from seven member states that took place at King's College London on 10 December 2013 as part of the SECILE Research Consortium's Work Package 4. The focus group sought to explore the views of the research participants on the EAW's impact, legitimacy and effectiveness.
- The research participants were of the view that the EAW has had a positive impact on European security. They did not view it as having a negative impact on European security although they did note that criminal activity might be subject to displacement to jurisdictions outside of Europe as a result of the EU no longer being a safe haven.
- The participants set out that, despite being brought into force so as to combat terrorism, the EAW system has much broader use. They note that it is effective in counter-terrorism cases as it is in other cases and that there may be, in some jurisdictions, more deference given to requests for counter-terrorism cases. Some participants made the point that the absence of a definition of terrorism in the EAW may make its operation more difficult.
- The EAW system's improvements to extradition in Europe involve faster surrender because of mutual recognition, the ability to seek extradition of a Member State's own nationals, and the ability to seek direct communication with counterparts in other jurisdictions. The challenges that arise as a result of the EAW system include strain because of differences across common law and civil law systems of criminal justice.
- Despite its strengths the participants saw the EAW system as being a 'work in progress'. They were, in particular, conscious of the potential for the disproportionate use of the EAW – both in terms of there being too many requests and also in terms of the EAW being used for trivial offences. Furthermore, the EAW was, despite its strengths, seen as being part of a package of criminal justice

instruments.

- The relationship between the EAW as a tool of enforcement and the need for safeguards for those subject to the EAW system was the subject of much discussion. Some participants saw the EAW system as needing balancing through legislation to protect the rights of suspects whereas other participants put stress on the importance of not slowing down the process through onerous procedures. In this respect all participants were mindful of the supervisory roles of the Court of Justice of the European Union and the European Court of Human Rights. The participants were, in particular, skeptical as to the use of human rights as a ground to refuse surrender.
- The EAW may be leading to changes in national laws and legal culture in different Member States. There were suggestions from some participants that Member States such as Poland and Romania may be revising their criminal justice systems to address concerns as to the proportionality of the system.
- The question of the legitimacy of the EAW system raises points about its lawfulness as well as its broader social legitimacy. The participants were clear of the need to avoid misuse of the EAW system because of the resulting damage to social legitimacy. This discussion of legitimacy also engages the question of the need for transnational procedure to protect the rights of suspects – and the role of the European Courts' jurisdiction to review action.

## 1. Introduction: 'A Solution Ahead of its Time'?<sup>1</sup>

The European Arrest Warrant (EAW) is the flagship measure in the emerging EU criminal justice system.<sup>2</sup> Its central purpose is clear and simple: to make it possible to obtain the speedy surrender of a suspect, or a convict, from one EU Member State to another. Despite, or perhaps because of, its clarity and simplicity of purpose, the EAW is also one of the most contentious EU criminal justice measures in operation.

The idea for a more simple extradition system was first laid out in the Tampere European Council Conclusions in 1999.<sup>3</sup> Those Conclusions included the declaration that mutual recognition (ie the principle that Member State authorities should, on the basis of mutual trust, recognize the decisions of each others' legal systems) should be the cornerstone of criminal justice co-operation.<sup>4</sup> However, despite this declaration, it took the Al Qaeda attacks in New York City and Washington DC on 11 September 2001 to provide sufficient political will to legislate on the matter.

One result of the new political climate was the adoption of a Framework Decision on the European Arrest Warrant.<sup>5</sup> This legislation, adopted under the now-defunct 'third pillar' of the EU, required implementation by each national legal system for it to enter into operation. This process of implementation has been problematic with the operation of the EAW subject to different approaches across the EU legal system as a result. The prospect of co-operation between Member State criminal justice officials without corresponding safeguards for those subject to the system of co-operation gave rise to significant concerns in European civil society. A report from the UK non-governmental organisation, JUSTICE, refers to the EAW as 'a solution ahead of its time'.<sup>6</sup> The measure has been the subject of significant critique in the mass media as well as in the academic literature.

Despite being in the academic, and often-times public spotlight, the EAW system has not been the subject of significant empirical legal research. The SECILE consortium sought to remedy this gap in the literature, at least in part, through the carrying out of this case study. This report is the product of focus groups involving eight research participants including prosecutors, judicial officers and government officials. In light of the small number of research participants the report does not claim to offer a comprehensive treatment of the

<sup>1</sup> The subtitle of this section is borrowed from S. Alegre and M. Leaf, *European Arrest Warrant: A Solution Ahead of its Time?* (2003 JUSTICE).

<sup>2</sup> For a more complete overview of the European Arrest Warrant and its legislative history see chapter 6 of C.C. Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (2012 Hart Publishing).

<sup>3</sup> See European Council, 'Tampere European Council 15 and 16 October 1999: Presidency Conclusions' (1999 European Council).

<sup>4</sup> For a critique see S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?' (2004) *Common Market Law Review* 5.

<sup>5</sup> Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) – hereinafter 'EAW Framework Decision'.

<sup>6</sup> Alegre and Leaf, n 1 above.

subject. Rather, it offers a critical exposition and analysis of the views of the research participants on the measure's impact, legitimacy and effectiveness to inform both public policy and future research agendas.

## 2. Methodological Background

This section offers a brief overview of the fieldwork methodology – a full account of the methodological approach taken by the King’s College London (King’s) research team is available in Appendix A. The fieldwork for this case study consisted in a focus group involving prosecutors, judicial officers and governmental officials. The focus group was coordinated by King’s and took place in London on 10 December 2013. As provided by the Grant Agreement, in addition to the focus group on the EAW, King’s also conducted two further focus groups on Counter-Terrorism Finance Law and Policy and on EU Border Control Databases.

Focus groups were selected as the principal data collection method for this research because they enable programme implementation, utility and efficacy to be understood. Their utility has also been recognized in respect of qualitative research in criminal justice. Thus, focus groups may generate understanding as to the participants’ experiences and beliefs about a particular topic of inquiry, and are a useful method of data collection in a field that has been the subject of little empirical research. The limitations of this data collection method should also be understood. Focus groups rely on a small number of research participants and a small sample of the subject population is unlikely to be representative of the population as a whole. Moreover, focus groups in the field of criminal justice require access to, and successful recruitment of, data subjects that may be difficult to reach. This can further limit the degree to which the results are representative of perspectives in the subject population in general. It is necessary therefore to emphasize the limitations of generalizability of the data in this case study.

In recruiting participants to the focus group, the King’s team relied on a range of open-source materials to identify relevant national authorities with experience of the EAW in relation to counter-terrorism. In addition to approaching individuals in EU Member States authorities, the research team also had to rely on nomination of research participants through existing networks. Despite sending invitations to all EU Member States authorities, the total number of participants was eight. These research participants were from a variety of Member States, as follows: Participant A (Estonia); Participant B (Ireland), Participant C (Italy), Participant D (Romania); Participant E (United Kingdom (Scotland)); Participant F (Sweden); Participant G (Netherlands) and Participant H (Netherlands). During the focus group, the participants were asked a series of questions to ascertain their perspective on the impact, legitimacy and effectiveness of the EAW as a counter-terrorism measure. The questions are set out in Appendix A. The audio recordings of the focus groups were then subject to transcription, coding, analysis, and writing-up as section 3 of this report.



### 3. Focus Group Report

The research participants that took part in the focus group had first-hand experience of the EAW. The participants were knowledgeable and articulate discussants of a complex and dynamic field of law. Their engagement with national law and with the case law of the Court of Justice of the European Union was remarkable. Across the three case studies undertaken in this research it was in this, the EAW case study, that knowledge of the law was highest.

#### 3.1 Impact of the European Arrest Warrant

The perspectives of the research participants on the EAW's impact include four points: (i) the contribution of the EAW to EU security; (ii) the EAW as a 'work in progress'; (iii) impact on national laws and legal culture; (iv) the EAW as a counter-terrorism measure.

##### *(i) The Contribution of the EAW to EU Security*

In general, participants agreed that the impact of the EAW has been positive and it has contributed to improving EU security. In response to the question 'Do you think the European Arrest Warrant makes the EU more secure?', all participants replied in the affirmative. Moreover, in response to the converse question, 'Do you think the European Arrest Warrant makes the EU less secure?', participants generally agreed that they did not consider the EAW system as making the EU less secure. Indeed, while one participant made reference to a highly exceptional scenario, where an individual might avoid being brought to justice because they would be neither prosecuted nor surrendered, he could not see how it was possible, overall, for the EAW to make the EU less secure.<sup>7</sup>

One participant observed that, perhaps as an unintended consequence of the operation of the EAW, the 'bad guys' may move to third countries where they know extradition is more difficult. While this may eventually become a problem for the EU, the participant noted that, with respect to the operation of the EAW within the EU itself, there 'is no safe haven anymore.'<sup>8</sup> All participants considered that the EAW Framework Decision represents a significant improvement – in the words of one participant it is a 'vast improvement on the old extradition system'.<sup>9</sup> The following were set out as achievements of the EAW in improving the *effectiveness* of the European extradition system: the principle of mutual recognition; the

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<sup>7</sup> EAW – Q3 – E - United Kingdom (Scotland).

<sup>8</sup> EAW–Q2–D – Romania.

<sup>9</sup> EAW – Q2-B – Ireland.

surrender of Member States' own nationals; the speed of the process; and direct communication between judicial authorities.<sup>10</sup> These factors are considered in more detail in the section on effectiveness.

### *(ii) The EAW as a 'Work in Progress'*

While participants agreed that the EAW has had a positive impact, they also agreed that the EAW is a 'work in progress', as one participant put it.<sup>11</sup> For example, another participant noted that 'it's not without some issues and problems which may yet have to be resolved.'<sup>12</sup> Perhaps one of the most significant challenges that participants identified was the question of proportionality. Indeed, in response to the question 'Do you think that the European Arrest Warrant makes Europe less secure?', one participant said 'proportionality – I think that's the reason you ask this question'.<sup>13</sup>

The first, more general, observation about proportionality by participants was the disproportionate amount of EAW requests sent to, and received by, certain Member States. It was observed that most EAW requests originated from Poland although, participants also made mention of Germany in this regard. The Irish participant also made reference to this heavy load and said that his Member State 'would certainly welcome the fact that "these teething problems" are being addressed'.<sup>14</sup> However, both the Estonian and Romanian participants commented that their Member States receive far fewer EAW requests from Poland and reflected that this was possibly because they had fewer Polish migrants living in their countries.<sup>15</sup>

In recognition of this, other participants suggested that the reason that countries such as Poland were 'high on the list' of senders was not only due to their national laws but also because they had more people leave their countries, in order to live and work in other Member States, than others.<sup>16</sup> Therefore, although participants agreed that the disproportionate amount of EAW requests issuing from specific Member States requires attention, steps were already being taken to address this matter. In view of this, participants did not generally consider that this issue had a lasting negative impact on the operation of the EAW system itself. On the other hand, another aspect of proportionality gave rise to more intensely held views in the context of impact: the surrender of individuals for seemingly trivial offences. Two participants emphasised how this may damage the public's view of the EAW. For instance, participant B asserted that:

'[I]t probably has had some damage in undermining public confidence and public trust in the EAW. When people see families being sundered – people who've been living in that Member State for 10

<sup>10</sup> One participant also noted that the EAW system brings a more flexible approach and officials are getting better resources (EAW-Q2-D - Romania).

<sup>11</sup> EAW-Q2-G – Netherlands.

<sup>12</sup> EAW – Q2-B – Ireland.

<sup>13</sup> EAW-Q3-B – Ireland.

<sup>14</sup> EAW-Q3-B – Ireland.

<sup>15</sup> EAW-Q3-A - Estonia and EAW-Q3-D – Romania.

<sup>16</sup> EAW-Q3-H – Netherlands and EAW-Q3-G – Netherlands.

years, paying taxes, law abiding and being arrested and possibly extradited in relation to an offence, which in the host Member State would be regarded as trivial.<sup>17</sup>

Building on this point, participant E observed that EAW authorities' cooperation had improved on this but only with significant 'leg work' from affected individuals after being arrested, which in his opinion was not appropriate.<sup>18</sup> Another participant raised the possibility that some people could 'be surrendered for not very important acts or for...something that [they] did not do'.<sup>19</sup> He admitted that 'in national criminal law, things go wrong... sometimes you use force – maybe too much...there's no criminal law without pain'.<sup>20</sup> However, this participant underscored that this scenario was 'really the exception'.<sup>21</sup>

This view found support from another participant who said that 'we don't have to make too much fuss' because the Framework Decision incorporates limitations on the extradition of low-level crimes or small sentences.<sup>22</sup> Moreover, the same participant felt that accepting different proportionality thresholds of other Member States is part of mutual recognition and 'respecting each other's systems'.<sup>23</sup> Nonetheless, participants acknowledged that, in view of the considerations that proportionality gave rise to, some countries, such as Poland and Romania, had taken steps to change their laws.

### *(iii) Impact on National Laws and Legal Cultures*

The EAW system has had an impact on national laws and legal cultures. For instance, some participants made the suggestion that Poland may be in the process of changing its national laws.<sup>24</sup> In Romania, also, the national law implementing the EAW Framework Decision was in the process of being amended in order to introduce proportionality criteria and a new criminal code was being introduced which reduced the level of punishments.<sup>25</sup>

A consequence of the EAW system may therefore be a convergence in legal cultures in national criminal justice systems. Referring to the changes in the Polish legal system, one participant explained that, whenever they met Polish practitioners, they explained the problems with respect to the volume of requests and proportionality. This participant considered that as a result of this dialogue, Polish authorities have taken steps towards changing the law.<sup>26</sup> He held that 'cooperation or pressure between judicial

<sup>17</sup> EAW-Q3-B – Ireland.

<sup>18</sup> EAW-Q3-E - United Kingdom (Scotland).

<sup>19</sup> EAW-Q3-H – Netherlands.

<sup>20</sup> EAW-Q3-H – Netherlands.

<sup>21</sup> EAW-Q3-H – Netherlands.

<sup>22</sup> EAW-Q3-G – Netherlands.

<sup>23</sup> EAW-Q3-G – Netherlands.

<sup>24</sup> EAW-Q3-G – Netherlands and EAW-Q3-B – Ireland.

<sup>25</sup> EAW-Q3-D – Romania.

<sup>26</sup> EAW-Q3-H – Netherlands.

authorities' might therefore provide a better approach to balancing national systems than changing legal frameworks.<sup>27</sup>

#### *(iv) The EAW: A Counter-terrorism Instrument?*

Participants agreed that, even though the EAW Framework Decision had been adopted in the aftermath of the 11 September 2001 terrorist attacks, the EAW is an instrument that has a far wider application than counter-terrorism. One participant noted:

'[I] would not necessarily see the EAW as...an instrument which has a specific or unique value in terms of counter terrorism. Yes it has a value [in respect of counter-terrorism] but it obviously has a far wider application.'<sup>28</sup>

In general, participants observed that terrorism-related use of the EAW represents a very small percentage of overall EAW use. For instance, a participant from the Netherlands noted '[w]e receive about 850 EAWs a year and...I know of 2...European Arrest Warrants for terrorism, one from France and one from Belgium'.<sup>29</sup> Similarly, a participant from the United Kingdom (Scotland) asserted 'in Scotland we have about 160 to 280 Arrest Warrants a year...but of those that we have received, one has been in relation to terrorism'.<sup>30</sup> In the same vein, a participant from Ireland held that they receive 'between 300 and 400 [EAW] requests per year...We're looking at about 1% where people are being sought in relation to terrorism offense'.<sup>31</sup> The participant from Romania stated that she was not aware of any terrorism-related EAWs issued for the purpose of bringing suspects of terrorism before judges – although this may be because of decentralisation in her Member State. However, she considered that, even if there were any cases of terrorism-related EAWs, these would constitute a very small number.<sup>32</sup>

One participant reflected that these numbers may be influenced by the absence of a definition of terrorism in the EAW Framework Decision.<sup>33</sup> In this respect, another participant set out that, in respect of terrorism-related EAWs, although the numbers may be low, it was significant that the people involved would have been successfully surrendered – stressing 'the importance of the surrender'.<sup>34</sup> For instance, one participant from the Netherlands noted that the two terrorism-related cases mentioned in the previous paragraph had been dealt with in 60 days, just like any other EAW request, although perhaps with more attention to

<sup>27</sup> EAW-Q3-H – Netherlands.

<sup>28</sup> EAW-Q4-B – Ireland.

<sup>29</sup> EAW-Q4-H – Netherlands.

<sup>30</sup> EAW-Q4-E - United Kingdom (Scotland).

<sup>31</sup> EAW-Q4-B – Ireland.

<sup>32</sup> EAW-Q5/6-D – Romania.

<sup>33</sup> EAW-Q4-E - United Kingdom (Scotland).

<sup>34</sup> EAW-Q4-C – Italy.

detail. This constituted a significant difference from other, non-EAW cases of extradition, which would take 18 months or more to complete.<sup>35</sup>

### 3.2 Effectiveness of the European Arrest Warrant

The research participants did not draw a sharp distinction between the impact and effectiveness of the measure. The research participants made several points in respect of effectiveness. These include (i) achievements in respect of the surrender process; (ii) the EAW as part of a package of instruments; (iii) strain because of differences in legal systems; (iv) human rights as a ground for refusal.

#### *(i) The Surrender Process*

The research participants set out the following factors as achievements of the EAW which tended to improve the effectiveness of the surrender process: the principle of mutual recognition; the surrender of Member States' own nationals; the speed of the process; and direct communication between criminal justice and judicial authorities.

With respect to the principle of mutual recognition, participants generally held that this was an important achievement of the framework decision. As one participant observed, the high percentage of successful surrenders in his country is, in large part, 'because of mutual respect and mutual recognition'.<sup>36</sup> Another participant observed that, even though the events of 11 September 2001 may have increased the sense of urgency to adopt the EAW Framework Decision, the principle of mutual recognition was already set out in respect of criminal justice in the Tampere European Council Conclusions of 1999.<sup>37</sup> A further participant emphasized:

'It is absolutely central to this area of work for practitioners...It has reinforced not only the judicial culture, but also brought prosecutors closer together, I think, to work together, on the basis that they know...that the decision...will be recognised abroad.'<sup>38</sup>

Participants also generally agreed that another significant achievement of the EAW is that it has facilitated the surrender of own nationals. One participant noted that 'Member States really have worked hard to make sure that the extradition of own nationals can take place'<sup>39</sup> and emphasized that this was a major achievement. Participants agreed with the view that 'one of the major wins of the EAW is the possibility to get nationals of certain countries extradited [where extradition was previously not possible]'.<sup>40</sup>

<sup>35</sup> EAW-Q4-H – Netherlands.

<sup>36</sup> EAW-Q3-B – Ireland.

<sup>37</sup> EAW-Q4-H – Netherlands.

<sup>38</sup> EAW-Q2-E – United Kingdom (Scotland).

<sup>39</sup> EAW-Q2-E – United Kingdom (Scotland).

<sup>40</sup> EAW-Q11-A – Estonia.

Another significant achievement of the EAW is the speeding up of procedures from 18 months under the previous extradition system to 90 days under the EAW. For instance, one participant underscored that the EAW brought about 'speedier procedures'<sup>41</sup> while another participant noted 'it is certainly more expeditious'.<sup>42</sup> However, this increase in effectiveness may cause tension with the impetus to provide procedural safeguards for EAW subjects, an issue considered in the legitimacy section.

Participants also held that a further major achievement of the EAW is that it facilitates direct contact between judicial authorities. Some participants agreed that direct contact is one of the features of the EAW system that makes it better than the previous extradition system. One participant noted that 'it really makes it possible to speak with each other...maybe to look for an alternative or if we don't understand each other'.<sup>43</sup> The participant compared the EAW system with the previous extradition system, which fell within the remit of the Ministry of Justice in his Member State and that "takes more time."<sup>44</sup> On this point, another participant said that:

'One of the very valuable things that we find, which is a huge difference, is the fact that if we have a problem with a particular warrant which has been issued by a Member State, we simply contact the judge directly. Or we can go through the European Judicial Network. Very rarely, unless it's a particularly complex case, will we approach EuroJust.'<sup>45</sup>

However, the same participant indicated that there may be more scope to deepen direct contact. For instance, he held that the relevant authorities should seek to engage with each other earlier in the criminal justice process in order for prosecutors to agree on jurisdiction and then to deal with evidence, which is a difficult subject. He emphasised that the EAW should usually be issued after such direct contact would have taken place.<sup>46</sup>

### *(ii) The EAW as Part of a Package of Instruments*

In a similar vein to the previous point, participants agreed that authorities should be aware that there is a whole package of instruments available for use alongside, or instead of, the EAW and mutual legal assistance. Particularly in the case of terrorism-related offences, for instance, one participant referred to

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<sup>41</sup> EAW-Q2-D – Romania.

<sup>42</sup> EAW-Q2-B – Ireland.

<sup>43</sup> EAW-Q2-A – Estonia.

<sup>44</sup> EAW-Q2-A – Estonia.

<sup>45</sup> EAW-Q2-E - United Kingdom (Scotland).

<sup>46</sup> EAW-Q5/6-E - United Kingdom (Scotland).

Joint Investigation Teams that could be established to cut through difficulties of recovering evidence and to address the differences in Member States' rules of evidence.<sup>47</sup>

Another participant agreed that there are several other instruments that can be used, especially in the trial stage of the case, such as the use of conference calls. She noted that, in Romania, measures had been put in place to train the 'judiciary to use these alternative instruments'.<sup>48</sup> She emphasised that the EAW should be used 'really for those serious offences and...as a last resort'.<sup>49</sup> This view resonated with several other participants. For instance, the participant from Ireland noted that the EAW should come in 'really at the far end of the spectrum'<sup>50</sup> while the participant from the United Kingdom (Scotland) agreed that it is 'the end piece'.<sup>51</sup>

### *(iii) Strain from Differences in Legal Systems*

Many participants referred to the strain arising from differences between civil and common law systems that could hamper the effectiveness of the EAW system. One participant noted:

'Perhaps the EAW is coming under a little strain in relation to trying to marry the two systems [common law and civil law]. It is, in many ways, an instrument that is predicated on a civil law system.'<sup>52</sup>

For instance, he noted that, in Ireland, which has a common law system, authorities have no way of directly engaging with a judge responsible for an EAW and this may be a cause for frustration and complaint.<sup>53</sup> Another participant agreed that the different models of central authority could, in their own way, affect the operation of the system.<sup>54</sup> One participant made the claim that, perhaps as a result of these tensions, 'some persons that should serve their imprisonment in Estonia have found a perfect hide-out in the UK'.<sup>55</sup> However, another participant, while acknowledging that the different legal traditions can cause problems, observed that co-operation is evolving and is better than it was before the EAW system. She was 'positive that it will improve'.<sup>56</sup>

In addition to the differences between common and civil legal systems, participants identified other differences in national laws that could affect the effectiveness of the EAW. For instance, the participant

<sup>47</sup> EAW-Q5/6-E- United Kingdom (Scotland).

<sup>48</sup> EAW-Q9-D – Romania.

<sup>49</sup> EAW-Q9-D - Romania.

<sup>50</sup> EAW-Q5/6-B – Ireland.

<sup>51</sup> EAW-Q5/6-E – United Kingdom (Scotland).

<sup>52</sup> EAW-Q2-B – Ireland.

<sup>53</sup> EAW-Q2-B – Ireland.

<sup>54</sup> EAW-Q2-E – United Kingdom (Scotland).

<sup>55</sup> EAW-Q2-A – Estonia.

<sup>56</sup> EAW-Q2-D – Romania.

from Italy noted that, in some cases, the Italian authorities may request additional documents, which may not have been envisaged by the EAW Framework Decision.<sup>57</sup> Moreover, in Germany, with respect to the extradition of a German national, the prosecuting authorities must first of all consider whether or not the case can be, and will be, prosecuted in Germany. They can only move to surrender an individual if they decide that they will not prosecute the case in Germany.<sup>58</sup>

One participant from the Netherlands noted that, particularly with respect to less serious offences, it had become common practice for Dutch lawyers to contact Polish lawyers and, in some cases, this process may lead to a suspended sentence being awarded. It has therefore become the practice that where a Polish prosecutor makes a request before a Polish court, the Dutch authorities may wait for the resolution of the Polish litigation before taking action on the request.<sup>59</sup> Some other participants had similar experiences with dual representation. For instance, one participant from the United Kingdom (Scotland) explained that, where people were arrested in the UK pursuant to an EAW issued by Poland, it was becoming common for them to engage a Polish lawyer and seek to have the EAW withdrawn. In such instances, proceedings in the UK would wait on the resolution of the Polish proceedings.<sup>60</sup> In this context, one participant referred to dual representation as one way to address the challenge of (dis)proportionality, particularly with respect to less serious offences.<sup>61</sup>

There were some strongly divergent views expressed with regard to dual representation. On the one hand, one participant acknowledged that '[i]t could slow things down'.<sup>62</sup> Another participant emphasised that:

'If you have a right in some cases, not all of them, to a dual representation then you have the possibility to get swift information and to make these arguments within this time table. And I think that's important for the law enforcement agencies and also in the interest of fair procedures and getting the right person surrendered.'<sup>63</sup>

On the other hand, another participant expressed serious reservations with any 'extra procedures' that might slow down the process. She explained that:

'[The EAW] framework decision was meant to...do things in a short time. And we have to be careful not to get all these...extra procedures in other countries and we have to wait for [them]...I think that we have to be very strict...[about] this time frame because that's a very big plus for the EAW.'<sup>64</sup>

<sup>57</sup> EAW-Q2-C – Italy.

<sup>58</sup> EAW-Q3-E – United Kingdom (Scotland).

<sup>59</sup> EAW-Q3-H – Netherlands.

<sup>60</sup> EAW-Q3-E - United Kingdom (Scotland).

<sup>61</sup> In that, by engaging a lawyer in the requesting State, the person may be able 'to get some settlement,' particularly with respect to less serious crimes. EAW-Q3-E – Netherlands.

<sup>62</sup> EAW-Q3-H – Netherlands.

<sup>63</sup> EAW-Q4-F – Sweden.

<sup>64</sup> EAW-Q3-G – Netherlands.



#### *(iv) Human Rights: A Ground for Refusal?*

Participants considered that perhaps one of the greatest challenges to the effectiveness of the EAW were human rights arguments as a ground for refusal. Some participants emphasised that all EU Member States were signatories to the European Convention on Human Rights ('ECHR').<sup>65</sup> Nevertheless, one participant from the United Kingdom (Scotland) noted that human rights challenges in the UK had been raised on various grounds, such as on Article 3 (Prison Conditions); Article 5 (Length of Pre-trial Detention); and Article 8 (Separation of Parents from Children) of the ECHR.<sup>66</sup>

Although participants generally agreed that only a minority of EAW requests were unsuccessful on account of human rights challenges, one participant observed that 'it slightly goes against the principle of recognition and trust, that even within the Member States, they still take account of human rights arguments'.<sup>67</sup> Another participant considered that, in cases where people have successfully argued on human rights grounds, it appeared to be 'a contradiction of the underpinning of the [EAW Framework Decision] by mutual respect and mutual recognition which is obviously predicated on every Member State signing up to common human rights standards'.<sup>68</sup> One participant expressed the concern that 'mutual recognition [and] human rights are growing apart from one another'.<sup>69</sup> Another participant decried the fact that the helpful guidance in relation to the different weight balances, which had been provided by Advocate General Sharpson in the case of *Radu* had been 'simply swept away' by the Grand Chamber.<sup>70</sup>

However, it is also noteworthy that different countries may have differing approaches with respect to human rights as a ground for refusal. For instance, one participant noted that Sweden has mandatory refusal on human rights grounds. In this context, another participant noted that in Estonia, the Supreme Court has 'clipped the wings' of the executing judges with respect to human rights grounds, in that, even if a judge concludes there are human rights concerns, it does not mean that the judge can refuse to execute the warrant because of this concern.<sup>71</sup>

### **3.3 Legitimacy of the European Arrest Warrant**

All participants agreed that it was legitimate for law enforcement officials to use the EAW to combat crime. Thus, as one participant set out 'it's part of the deal, if you open your borders, people can travel, goods can

<sup>65</sup> EAW-Q2-E – United Kingdom (Scotland).

<sup>66</sup> EAW-Q2-E - United Kingdom (Scotland).

<sup>67</sup> EAW-Q2-E - United Kingdom (Scotland).

<sup>68</sup> EAW-Q2-B – Ireland.

<sup>69</sup> EAW-Q2-G – Netherlands.

<sup>70</sup> EAW-Q9-E - United Kingdom (Scotland).

<sup>71</sup> EAW-Q2-A – Estonia.

travel, criminality travels... it's in everyone's interest'.<sup>72</sup> Another participant gave a similar view stating that 'it might be legitimate because we are in a system in which... in which we have four fundamental freedoms'.<sup>73</sup> Thus, the participants see the use of the EAW (and the potential for EU citizens to be subject to surrender under an EAW) to be a legitimate corollary of the free movement made possible by the EU.

One participant, who would also go on to stress the need for safeguards for those subject to surrender, caught the general sense of the group when stating that 'I think it's legitimate to use it, I think it's necessary and there's absolutely no way back, of course, to the old extradition system...'.<sup>74</sup> However, participants also saw that the EAW faces challenges as to its legitimacy. Three particular points were the subject of discussion: (i) the relationship between legitimacy and legality; (ii) the role of accountability mechanisms; and (iii) the potential for misuse, or disproportionate use, to harm legitimacy.

### *(i) The Relationship Between Legitimacy and Legality*

A key exchange between two participants sets out clearly the assumption of legitimacy when there is a legal basis for action but also that the assumption is open to question:

**Participant H:** 'Maybe I don't understand the word "legitimate" but it's in law... this is why it's legitimate at least...'

**Participant A:** 'That only makes it legal!'

**Participant H:** 'Yep. Maybe I don't understand the word "legitimate"...'<sup>75</sup>

Another participant also took note of the difference between a bare legality and a broader idea of legitimacy. The United Kingdom (Scotland) participant set out his views: 'so is it legitimate? Yes because it's the law we've been given to work with. I would say that what lies behind your question is: is it fair?'.<sup>76</sup>

A related consideration is the extent to which, in the execution of an EAW, a Member State should examine whether the alleged crime matches the claims made by the issuing authority on the EAW form. Thus, the United Kingdom (Scotland) participant said:

'We have experienced where a framework list offence has been ticked but the description that has been given in the other part of the European Arrest Warrant doesn't quite match what's been ticked on the list.'<sup>77</sup>

<sup>72</sup> EAW-Q9-G – Netherlands.

<sup>73</sup> EAW-Q9-C – Italy.

<sup>74</sup> EAW-Q9-F – Sweden.

<sup>75</sup> EAW-Q9-H – Netherlands with interjection from A-Estonia.

<sup>76</sup> EAW-Q9-E – Scotland.

<sup>77</sup> EAW-Q9-E – Scotland.

Other participants set out that their Member States did not examine whether or not the alleged crimes were in concordance with their own understanding of criminal offences. This is particularly the case if the individual is being sought in connection with an offence of terrorism: ‘for us ... it’s enough that it *looks* like terrorism... we take a very big step back’.<sup>78</sup> There was corroboration on this point from the other participant from the Netherlands.<sup>79</sup> However, the participant from Ireland suggested that this deference might alter if there was a sense that it was being abused:

‘It’s a fair point that if we had dozens and hundreds of warrants being issued in relation to terrorism and people just ticking the box .... I’d say you’d be guaranteed to have people in court saying “well this isn’t terrorism – I was forging a document for whatever reason, it’s not part of a terrorist campaign...’.<sup>80</sup>

This suspicion as to the equivalence of offences in different Member States is, in part, due to different definitions of crimes in national law. Thus, in respect of terrorism, ‘there’s no definition!’<sup>81</sup> Ultimately, for the participant from the United Kingdom (Scotland),

‘So long as the Member State ticks the box for terrorism then that’s sufficient but again I suspect that since there is no standard – no common definition even amongst the international instruments, [I] suspect that if we were to drill down then we would find some difficulty if we had to apply double criminality.’

These questions about compliance with the law were, for some participants, tied to questions about the role of accountability mechanisms in the operation of the EAW system.

### *(ii) The Role of Accountability Mechanisms*

Several participants made reference to the role of accountability mechanisms, and in particular all Member States’ membership of the European Convention on Human Rights, as a safeguard for individuals. Thus, the participant from United Kingdom (Scotland) set out that ‘you’ve got the overall protection of the European Court of Human Rights’.<sup>82</sup> Reference was also made to the cases of *Hilali*<sup>83</sup> and *Radu*<sup>84</sup> concerning the operation of the system. The participant from Ireland thought that ‘perhaps when the European Court of Justice has jurisdiction from 1 December 2014, perhaps then we’ll see some settled EU jurisprudence’.<sup>85</sup> With reference to the *Hilali* case, which involved a dispute over the operation of a Spanish-issued, British-

<sup>78</sup> EAW-Q9-H – Netherlands.

<sup>79</sup> EAW-Q9-G – Netherlands.

<sup>80</sup> EAW-Q9-B – Ireland.

<sup>81</sup> EAW-Q9-E – Scotland.

<sup>82</sup> EAW-Q9-E – Scotland.

<sup>83</sup> See *Hilali v. Central Court of Criminal Proceedings Number 5 of the National Court of Madrid and other* [2006] EWHC 1239; *Hilali v. Governor of HMP Whitemoor et al.* [2007] EWHC 939 (Admin) and *R (on the application of Hilali) v City of Westminster Magistrates’ Court* [2008] EWHC 2892 (Admin).

<sup>84</sup> See *Proceedings relating to the execution of European Arrest Warrants issued against Ciprian Vasile Radu*, Judgment of the Court (Grand Chamber) of 29 January 2013 (reference for a preliminary ruling: Curtea de Apel Constanța – Romania).

<sup>85</sup> EAW-Q9-B – Ireland.

executed EAW, the Irish participant set out that ‘in the future, a case like that could go to the ECJ and the European Court of Justice would issue a binding judgment on Spain and the UK’. This extension of the Court’s jurisdiction was said to be ‘interesting. I’m not sure whether it will be “interesting good” or “interesting bad” but it will be interesting...’.<sup>86</sup>

For the participant from Sweden the existence of courts was not enough – it was also necessary to legislate for rights for those subject to surrender:

‘[The EAW] is a significant improvement of the law enforcement agencies powers and you have to create an instrument, a new directive, procedural rights that balance... those powers. And then it is not enough, like the European Union is doing at the moment, to create very slowly, very general directives on procedural rights that are very close to the European Convention.’<sup>87</sup>

The participant went on to call for ‘transnational procedure’ including through the development, in certain cases, of dual representation with access to the prosecution file. If such a balance could be struck then legitimacy would, in the participant’s view, be stronger. The participant from the United Kingdom (Scotland) also stated that it is “unfortunate that... it has taken so long within the EU and all of the democracies to eventually agree that you’re entitled to translation and interpretation or access to a lawyer”.<sup>88</sup> However, another participant, from the Netherlands, took a different view, placing emphasis on the speed of the EAW procedure and the need to avoid delays.<sup>89</sup> What is necessary, the participants agreed, is a ‘balance’ between these two objectives.<sup>90</sup>

### *(iii) Legitimacy and the Potential for Misuse*

A final point that participants sought to stress in respect of the legitimacy of the EAW system was that the misuse, or disproportionate use, of the EAW might harm the legitimacy of the system. Thus, the participant from Ireland said that:

‘One Member State would account for 60-70% of all EAWs issued in the European Union and clearly 60-70% of crime in the European Union isn’t emanating from that one Member State. And I think it probably has ad some damage in undermining public confidence and public trust in the EAW when people see families being sundered...’<sup>91</sup>

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<sup>86</sup> EAW-Q9-B – Ireland.

<sup>87</sup> EAW-Q9-F – Sweden.

<sup>88</sup> EAW-Q9-E- Scotland.

<sup>89</sup> EAW-Q9-G – Netherlands.

<sup>90</sup> EAW-Q9-E- Scotland.

<sup>91</sup> EAW-Q9-B – Ireland.

These observations about a ‘loss of confidence’ were ‘very legitimate’ in the eyes of another participant.<sup>92</sup> Despite the potential for damage to public confidence, the participant from Romania also sought to stress that anecdotes about comical cases (thefts of bicycles, chickens, and beer from a party) are not representative of the majority of EAW use and should not be given undue weight in the discussion. Trivial cases ‘are not so numerous you know... the European Arrest Warrant is applied for serious offences... not, most of the time, minor offences’.<sup>93</sup>

However, while the participant from Romania sought to stress that the instrument is legitimate, she went on to note that

‘We just need to make sure that we don’t abuse the instrument... it’s important to take into account how to make use of our tools...and use the European Arrest Warrant really for those serious offences and... as a last resort.’<sup>94</sup>

This point resonates with those made by other participants about the EAW being one measure amongst several available to law enforcement officials. As the participant from Ireland states:

‘It’s not necessarily what we would regard as an investigative measure – and I appreciate that that word has different meanings in common and civil law – but generally speaking, one is looking at mutual legal assistance in relation to what we would regard as a criminal investigation; gathering evidence and so on and freezing money and so on.’<sup>95</sup>

There was broad agreement among the participants that the EAW was best understood therefore as part of a toolkit of measures available to law enforcement officials seeking cross-border criminal justice co-operation in Europe.

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<sup>92</sup> EAW-Q9-E – Scotland.

<sup>93</sup> EAW-Q9-D- Romania.

<sup>94</sup> EAW-Q9-D – Romania.

<sup>95</sup> EAW-Q9-B – Ireland.

## 4. Conclusion: Towards Transnational Procedure?

It is appropriate to commence the conclusions by noting once more the limitations of this study. The results of one focus group with eight research participants from seven Member States cannot yield sufficient data to make generalizable claims about the operation of the EAW system. Thus, the first broad conclusion is that this research, although a significant step forward on the existing literature, also makes clear that there is a strong need for further empirical research with hard to reach groups such as prosecutors and law enforcement officials. In particular, the research team came to the conclusion that interviews with focus group participants and others with direct experience of the system would yield further valuable data. A further point here is that the absence of participants from some Member States, such as Poland in particular, represents a significant limitation on the data collection given how central Poland's practice in the EAW system was to the discussion. Efforts have been made to compensate for this limitation by checking the claims made as to the operation of the Polish system using open-source materials.

The eight research participants that took part in the focus group were, by and large, in agreement on a wide range of questions concerning the EAW. The overall consensus was that the EAW was a positive development in European criminal justice co-operation, that there have been problems with its operation, but that these problems can be solved, and that the system overall 'works'. The analysis that follows considers the data in respect of impact, legitimacy and effectiveness, and also the manner in which these three themes relate to each other.

### 4.1 Analysis of Perspectives on Impact of the European Arrest Warrant

There was a strong consensus amongst the prosecutors and governmental officials that the EAW system is an improvement on the previous system of extradition in Europe and that it has had a positive impact on criminal justice co-operation in general.

All participants' discussion confirms the view that even though the events of September 11 2001 made the measure palatable in political terms it has had a much broader effect. Thus, the European Arrest Warrant is not, primarily, a counter-terrorism measure. The research participants made this clear both by their statements and by the small numbers of counter-terrorism related EAWs they had seen. The research participants' view as to the principal justification for the measure as a necessary corollary of the free movement of individuals, one of the four fundamental freedoms in the EU, echoes the justifications that the Tampere Presidency Conclusions gave. It is not possible, of course, to offer anything except speculation as to whether this resonance with the initial ideal represents the inculcation of political language or is, on the other hand, a reflection born entirely of their own experiences.

The prosecutors and governmental officials also proved to be aware of the potential for a displacement of crime as a result of greater co-operation in Europe. There was agreement that this was a potential impact of the measure although no participant was willing to claim that such an impact was discernable from their own experience. The research participants drew upon both their own experiences and on certain statistics to substantiate their views as to the impact of the system.

## 4.2 Analysis of Perspectives on Legitimacy of the European Arrest Warrant

In the focus group the discussion of legitimacy was in many ways the most direct engagement with the themes of this study – likely because it was the concept set out explicitly in a question. A majority of participants saw the existence of a legal framework as the starting point for the discussion of legitimacy. This reference to legality may, in part, be a consequence of the participants' common background in law: most were prosecutors or justice ministry officials in Member State governments. One participant's interjection in the comments of another – that legality does not necessarily amount to legitimacy – was demonstrative of both the strong legitimisation that legality offers but also of an awareness that that is not solely determinative of what is legitimate.

The research participants also saw the need for social legitimacy, the legitimacy of the system in the eyes of those subject to it, as was clear from their concerns that misuse or disproportionate use of the EAW might have a negative effect on legitimacy. In this respect the use of an EAW for what might appear, to the public, to be petty thefts, was seen as disproportionate. The existence of a punishment threshold in the framework decision was not seen as sufficient to guard against the negative effect – perhaps because penalties in at least some Member States may be high due to the legacy of former Communist regimes. The use of emotive language – the sundering of families – in connection with this point demonstrates the challenges that criminal justice co-operation may face in terms of social legitimacy. Thus, although the rule of law requires that the law be enforced, for these participants it may be damaging to the law's overall legitimacy if it is enforced without a degree of proportionality.

There are reasonable inferences to be drawn on what legitimacy might mean in this context for these participants. Although one participant states explicitly that he is not clear on what is meant by "legitimacy" others were more certain in their views. Thus, for the participants in the focus group legitimacy may be legal (in accordance with law), rational (in accordance with a rational or reasonable policy goal), or social (having the support of the populace). The participants' views on the European Arrest Warrant suggests that they are supportive of law enforcement action seeking to meet a range of legitimacy requirements and that they do not see legality as sufficient for legitimacy.

### 4.3 Analysis of Perspectives on Effectiveness of the European Arrest Warrant

Perhaps the strongest point of disagreement in the focus group came between participants from the Netherlands and from Sweden on the necessity of further safeguards for those who are subject to EAW requests. For the latter participant such safeguards, including dual representation and the measures that make up the Stockholm Roadmap on Suspects Rights, are essential to ensure fairness and therefore to improve legitimacy. However, for the former participant there is a real risk that such safeguards could come at the cost of the speed of the procedure – widely seen by the participants as a key improvement on the pre-European Arrest Warrant system of extradition in Europe.

A challenge then will be to ensure fairness, including through the development of safeguards for requestees, without undermining the efficiency of the process. This tension, in effect between crime control and due process, has been understood as existing in criminal justice since at least the 1960s. In some respects the discussion between the participants makes it clear that the EAW itself represents a form of ‘transnational procedure’. It remains to be seen how much the creation of an enforcement-led form of co-operation such as the EAW will spawn further forms of ‘transnational procedure’ such as the dual representation that was the subject of much discussion in the focus group.

A further potential challenge to effectiveness was, in some research participants’ views, the prospect of refusal to execute an EAW on human rights grounds. Several participants made reference to the supervisory role of the European Court of Human Rights, and also to the role of the Court of Justice of the European Union. There was, in general, skepticism amongst participants about the necessity of human rights as a ground for refusal to execute an EAW when all Member States were subject to common human rights standards and to the supervision of these two courts. Some government officials did note that some Member State courts used human rights as a ground for refusal, even though this is contrary to the terms of the framework decision, and that they were likely to continue to do so.

In this respect the participants’ opinions on the importance of mutual recognition as a legal principle to facilitate co-operation, and the role of mutual trust in providing the foundation for mutual recognition, merits attention. For the research participants the European Arrest Warrant was seen as both requiring, and making a contribution to the improvement of, trust by law enforcement officials of each others’ criminal law and criminal procedure. The common view that one Member State, Poland, has had to adapt its legal culture in response to pressure over the operation of the European Arrest Warrant, may suggest that criminal justice co-operation will lead to further convergence in legal cultures, and harmonization or approximation of laws, in Europe. If this is the case then it will bear out a point that has been part of the



philosophy of mutual recognition ever since its introduction in the internal market: that mutual recognition can indeed serve as a substitute for the often-difficult process of reaching agreement on harmonization.

The views of the participants on 'effectiveness' suggest that they saw the effectiveness of the European Arrest Warrant as the extent to which it made it possible to obtain the speedy surrender of those sought by law enforcement officials. It was also clear that, in their view, the measure was largely effective. The contribution of such surrender to a broader effectiveness, which may be difficult to distinguish in conceptual terms from 'impact', was to a certain extent taken as understood by the participants. In their view, to bring suspects to trial and criminals to face their punishment is an effective contribution to security. It is worth stressing again here the point that effectiveness is, in the views of these participants, linked to legitimacy.

#### 4.4 Final Conclusions

Two final points of analysis are made by way of conclusion. First, the participants' views may lend support to the argument that enforcement-led co-operation in EU security and criminal justice co-operation is not sufficient.<sup>96</sup> Rather, to ensure both legitimacy and effectiveness, it is necessary for this co-operation to be in broad conformity with human rights standards. Second, it is necessary to ensure that there is sufficient information about the operation of the EAW system in the public sphere to ensure the social legitimacy of the system as well as EU criminal justice in general.

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<sup>96</sup> For a critique of this trend in EU criminal justice see V Mitsilegas, *EU Criminal Law* (2009, Hart Publishing) and in the specific context of EU counter-terrorism see C.C. Murphy, *EU Counter-terrorism Law: Pre-emption & the Rule of Law* (2012, Hart Publishing).

## Appendix A: Methodology

Under the terms of the Securing Europe through Counter-Terrorism-Impact, Legitimacy and Effectiveness (SECILE) Grant Agreement (Description of Work), King's was responsible for conducting an empirical study of the operation of the EAW, taking into account the perspectives of a dedicated end user group engaged with the European Arrest Warrant.<sup>1</sup> The Agreement further specified that a focus group methodology would be employed for this research.<sup>2</sup>

### 1. Ethics Approval

As a first step in the process, the King's team completed an ethics application and the research project was granted approval from the Law Research Ethics Panel, King's College London, on 2 October 2013.

### 2. Research Design

At the outset, the King's team reviewed available literature to assess the use of focus group methodology with respect to criminal justice and security studies. It emerged from the literature that focus groups, as a useful means of conducting qualitative research in these fields, has generally been recognised.<sup>3</sup> The literature review was conducted primarily using legal databases, namely SAGE publications, HeinOnline and Westlaw. These databases were searched using the following query: 'focus group' AND 'terrorism.' The literature review also drew on other sources, including the report of the DETECTER project, a European Union Framework Programme 7-funded project, which sought to survey applications of detection technologies in counter-terrorism across the EU and which included a focus group of retired or serving police officers and counter terrorism professionals.<sup>4</sup>

From the literature it was evident that, while some studies employed focus groups to assess the effectiveness of counter-terrorism measures within particular jurisdictions,<sup>5</sup> it was not possible to locate specific scholarship which adopted this methodology to undertake research from a distinctly European perspective.

#### 2.1 The Focus Groups Method

Focus groups may generate important insights into potential or existing strengths and weaknesses of existing or proposed programmes. They enable programme implementation, perceived utility and efficacy to be documented.<sup>6</sup> This method has been considered particularly useful in assessing

<sup>1</sup> Securing Europe through Counter-Terrorism-Impact, Legitimacy and Effectiveness (SECILE) Grant Agreement 313195, Annex I (Description of Work), 24.

<sup>2</sup> SECILE Grant Agreement, 13.

<sup>3</sup> See, for instance, Croft, 'Images and Imaginings of Security', 20 *International Relations* (2006) 387, p.389 and Borell, 'Terrorism and Everyday Life in Beirut 2005: Mental Reconstructions, Precautions and Normalization', 51 *Acta Sociologica* (2008) 55, p.59.

<sup>4</sup> Hadjimatheou, van der Hilst, Guelke, and Draper, 'A Double-edged Sword: Counter-Terrorism Professionals' Perceptions of the Practical and Ethical Factors Affecting the Use of Surveillance Technology in Their Work', in William Webster (ed.), *The State of Surveillance* (2012), p.74. See also <http://www.detecter.eu/>

<sup>5</sup> Mythen, Walklate and Khan, 'Why Should We Have to Prove We're Alright?': Counter-terrorism, Risk and Partial Secularities', 47 *Sociology* (2012) 383, p.387.

<sup>6</sup> Joshi, 'Focus Group interviews', in Ling and van Dijk (eds.) *Performance Audit Handbook* (RAND Europe, 2009), p.54.

perceptions to emerging areas of practice.<sup>7</sup> Specifically, focus groups can generate a wealth of understanding of the participant's experiences and beliefs about a particular topic of inquiry.<sup>8</sup> Solorzano et al. have summarized four strengths in which focus groups may enrich the research process. They consider that focus groups provide a methodology to:

- a. Explore and discover concepts and themes about a phenomena about which more knowledge is needed;
- b. Add context and depth to the understanding of the phenomena;
- c. Provide an interpretation of the phenomena from the point of view of the participants in the group; and
- d. Observe the collective interaction of the participants.<sup>9</sup>

In this context, the focus group methodology has been contrasted with, for instance, interview polls, in which the interviewer poses questions that require answers within seconds, usually entailing a simple choice among a small number of alternatives.<sup>10</sup> Unlike such polls, 'focus groups generate an environment in which respondents have the opportunity to reflect on the question posed, and can then discuss their reflections with other participants.'<sup>11</sup> It has also been noted that participants in focus groups tend to be more 'candid and forthcoming with their views than the questionnaire interviewees',<sup>12</sup> making focus groups a particularly useful tool for eliciting people's reasoning.<sup>13</sup> Indeed, focus groups have been recognised as a particularly useful means of exploring knowledge, perceptions and concerns.<sup>14</sup>

## 2.2 Challenges with the Focus Group Methodology

However, it has to be borne in mind that qualitative research methods, such as focus groups, may give rise to 'impressionistic and piecemeal findings that are not replicable or comparable,'<sup>15</sup> and it is therefore important that the specific limitations of this research method be recognised.<sup>16</sup>

Focus groups normally rest on a very small sample of participants and it has been emphasised that 'a small discussion group will rarely be a representative sample, no matter how carefully it is recruited.'<sup>17</sup> Moreover, focus groups may raise issues of access and/or recruitment of key participants or may otherwise not manage to attract participation from key subgroups. For instance, in his research on paramilitary groups in Northern Ireland, Knox underscored the difficulty of accessing those who have been subjected to paramilitary beatings.<sup>18</sup> In his research of

<sup>7</sup> See Borell, p.55, and Gebbie, Merrill, Hwang, Gupta, Btoush and Wagner, 'Identifying Individual Competency in Emerging Areas of Practice: An Applied Approach' 12 *Qual Health Res* (2002) 990, p.994. For a useful survey of the strengths and weaknesses of focus groups, see also Hollander, 'The Social Contexts Of Focus Groups', 33 *Journal of Contemporary Ethnography* (2004) 602, p.606 (Hollander a).

<sup>8</sup> Solorzano, Allen and Carroll, 'Keeping race in place: Racial microaggressions and campus racial climate at the University of California, Berkeley', 23 *Chicano-Latino L. Rev.* (2002) 15, p.32.

<sup>9</sup> Solorzano, p.32. In addition, other benefits of focus groups may be identified, such as that they are usefully 'relatively more cost-effective research than individual interviews': see Somer, Buchbinder, Peled-Avram and Ben-Yizhac, 'The Stress and Coping of Israeli Emergency Room Social Workers Following Terrorist Attacks', 14 *Qual Health Res* (2004) 1077, p.1080.

<sup>10</sup> Roberts, 'Public Opinion, Crime, and Criminal Justice', 16 *Crime & Just.* (1992) 99, p.106.

<sup>11</sup> Roberts, p.106.

<sup>12</sup> Wallace, 'Findings from a concurrent study on the level of community involvement in the policing process in Trinidad and Tobago', 85 *Police Journal* (2012) 61, p.71.

<sup>13</sup> Donnelly, 'The police officer as social scientist', *Police Journal* (2013) 53, p.53.

<sup>14</sup> Santos, Helmer, Fotiades, Copeland and Simon, 'Developing a Bioterrorism Preparedness Campaign for Veterans: Using Focus Groups to Inform Materials Development', 8 *Health Promot Pract* (2007) 31, p.38.

<sup>15</sup> Donnelly, p.59-60.

<sup>16</sup> Donnelly, p.59-60.

<sup>17</sup> Zikmund, *Business Research Methods* (Dryden Press, 1997), p.110.

<sup>18</sup> Knox, 'Establishing research legitimacy in the contested political ground of contemporary Northern Ireland', 1 *Qualitative Research* (2001) 205, p.209.

interfaith dialogue, Michael acknowledged that his focus groups had ‘failed to attract participation from some of the important parts of the community.’<sup>19</sup> In view of these limitations, it has been stressed that ‘in spite of the benefits of using focus group discussions, the results cannot be used to draw statistically based conclusions about the larger population.’<sup>20</sup> Indeed, in utilizing data generated by focus groups, one has to resist the temptation of making broad generalizations.<sup>21</sup> Focus group findings ‘are not necessarily generalizable to the target population relevant to the audit.’<sup>22</sup>

With respect to the focus group on the EAW conducted by King’s, invitations to participate were sent to *all* Member States authorities. Some responded noting that they were not aware of instances of the EAW having been used in the context of counter terrorism in their country. In the case of some other Member States, the King’s team, even after sending several reminders, simply did not receive any response.

Furthermore, it has been observed that, ‘the group pressures inherent in focus groups make them a problematic method for measuring individual thoughts or beliefs.’<sup>23</sup> Hollander argues that, given that focus group discussions are shaped by multiple social contexts or group pressures (including associational, status, conversational, and relational contexts), these contexts may foster both problematic silences (when participants do not share their relevant thoughts or experiences with the group) and problematic speech (when participants offer opinions or information that do not represent their underlying beliefs or experiences) in group discussion. Thus, these processes limit the usefulness of focus groups as a tool for understanding individual thoughts, feelings, or experiences.<sup>24</sup> These considerations may be particularly relevant in the context of criminal justice and security. In this respect, in the focus group conducted in the context of the DETECTER project, it was observed that:

‘[N]one of the participants were able to be completely open about their experiences, partly because they were bound by confidentiality agreements with their employers, partly because they recognized the ethical tension between protecting operations and participating in research, and possibly because they were aware that the researchers and/or readers of the research might be critical of their work.’<sup>25</sup>

## 2.3 Methods of Recruitment for Focus Group

A number of factors may have a bearing on the recruitment of participants. These include: (1) the research legitimacy; (2) the issue of ‘outsiders’; and (3) the confidentiality of discussions. With respect to research legitimacy, the literature suggests that if the research and/or researcher are not perceived to be legitimate by his/her research subjects, this may raise suspicions over the

<sup>19</sup> Michael, ‘Developing a Regional Interfaith and Intercultural Network in Melbourne’s Northern Suburbs’, 4 *Contemp. Readings L. & Soc. Just.* (2012) 15, p.34.

<sup>20</sup> Wallace, p.71.

<sup>21</sup> Roberts, ‘Public Opinion, Crime, and Criminal Justice’, 16 *Crime & Just.* (1992) 99, p.108. In this context, the literature indicates that different qualitative research methodologies may generate different data and, in general, a multi-method approach may furnish a fuller understanding of the phenomenon: see Hutton, ‘Beyond populist punitiveness?’, 7 *Punishment & Society* (2005) 243, p.245. Indeed, it has been noted that ‘focus groups are not as useful as a stand-alone method when the primary research objective is to measure outcomes across an entire setting or programme or to determine the cause of effects of an implemented programme: see Joshi, p.54.

<sup>22</sup> Joshi, p.55.

<sup>23</sup> Hollander, ‘Resisting Vulnerability: The Social Reconstruction of Gender in Interaction’, 49 *Soc. Probs.* (2002) 474, p.478 (fn 3) (Hollander b). See also Somer et al, p.1080.

<sup>24</sup> Hollander a, p.603.

<sup>25</sup> Hadjimatheou et al, p.80.

research objectives.<sup>26</sup> The first requirement for the researcher is, therefore to establish their good faith. A key component of this is the need to demonstrate objectivity in one's approach to the study.<sup>27</sup> There is also the need to be open and transparent on the objectives of the research.

With respect to the issue of 'outsiders,' the Duke University Guidelines for Conducting a Focus Group (the 'Guidelines') state that '[i]n an ideal focus group, all the participants are very comfortable with each other....'<sup>28</sup> The Guidelines place emphasis on the importance of a homogenous group of participants in focus groups in order to promote more open discussions. . This is of particular relevance to the context of law enforcement officers and counter-terrorism professionals, who may be considered 'difficult-to-reach population[s].'<sup>29</sup> This is because of the restricted and confidential nature of the information they may own or have access to, and the potential reluctance (or, indeed, legal constraints arising from confidentiality agreements) of several professionals to take part in focus group research.

It was important to bear in mind that the success of recruiting law enforcement officers and counter-terrorism professionals (and the extent to which they may be prepared to speak openly) would be, in part, reliant on who the other participants were, and whether they were perceived as 'outsiders'. It was for this reason that, while the importance of the perspectives of certain 'outsiders' was acknowledged, such as civil society, academics and defence lawyers, these were not invited to participate in the focus group conducted by the King's research team. However, a separate focus group, gathering the perspectives of civil society and academics, was organized for this purpose.

With this in mind, The Guidelines provide several different ways in which focus group participants can be recruited. Some of the most popular include:

1. Nomination – Key individuals nominate people they think would make good participants. Nominees are familiar with the topic, known for their ability to respectfully share their opinions, and able to volunteer their time. In the DETECTER project, this technique was used in conjunction with snowballing.<sup>30</sup>
2. Random Selection – If participants will come from a large but defined group, names can be randomly selected until the desired number of verified participants is achieved.
3. Membership of a Group – Sometimes an already existing group serves as an ideal pool from which to invite participants.
4. Role/Occupation – Depending on the topic, the pool might be defined by position, title or condition.
5. Volunteers – When selection criteria are broad, participants can be recruited with flyers and newspaper ads.<sup>31</sup>

The King's team used the following method to recruit focus group participants. Firstly, the King's team examined (1) three reports on the implementation of the EAW Framework Decision issued in

<sup>26</sup> Knox, p.206.

<sup>27</sup> Knox, p.211.

<sup>28</sup> Office of Assessment, Trinity College, 'Guidelines for Conducting a Focus Group', p.3. Available at: [http://assessment.aas.duke.edu/documents/How\\_to\\_Conduct\\_a\\_Focus\\_Group.pdf](http://assessment.aas.duke.edu/documents/How_to_Conduct_a_Focus_Group.pdf)

<sup>29</sup> Brown, 'Visa as Property, Visa as Collateral', 64 *Vanderbilt Law Review* (2011) 1047, p.1074.

<sup>30</sup> Hadjimatheou et al, p.1074

<sup>31</sup> Office of Assessment, Trinity College, p.3.

2005, 2006 and 2011,<sup>32</sup> (2) country-specific reports,<sup>33</sup> and (3) reported cases relating to EAW use, as well as media reports, in order to identify the relevant national authorities which had engaged with the EAW in relation to counter-terrorism. Open-source databases, such as the National Authorities Contact List<sup>34</sup> and the Asser Institute's European Arrest Warrant Project,<sup>35</sup> were used to identify relevant officials who were subsequently invited to participate in the focus group.<sup>36</sup> The recruitment process was supplemented by nomination and snowballing. As noted, while invitations to participate were sent to all Member States authorities, a total of eight participants were recruited as follows: Participant A (Estonia); Participant B (Ireland), Participant C (Italy), Participant D (Romania); Participant E (United Kingdom (Scotland)); Participant F (Sweden); Participant G (Netherlands) and Participant H (Netherlands). These participants included officials from the national courts, from the office of the prosecutor and relevant ministerial departments.

## 2.4 Method of Moderation

The EAW Focus Group was held at the King's Strand campus, in London, on 10 December 2013. The focus group was conducted by 'a team consisting of a moderator and assistant moderator. The moderator facilitates the discussion; the assistant takes notes and runs the tape recorder.'<sup>37</sup> Indeed, it is usual practice for focus group discussions, which generally last between one and two hours, to be audio-recorded and transcribed, and for an assistant moderator to be present to take notes and record dynamics such as nonverbal cues.<sup>38</sup>

At the start of the focus group session, the moderator used a prepared script to welcome participants, which reminded them of the purpose of the session, offered a basic framework and structure for the discussion and also set the ground rules. The ground rules for the focus group included an assurance to the participants that the information gathered would be confidential and that everyone's views were important. Participants were also reminded to speak clearly and to not talk over the top of one another.<sup>39</sup>

The King's team set a questioning route that moved from more general to more specific questions.<sup>40</sup> The King's questioning route is found below:

### Engagement Questions

<sup>32</sup> See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States (2002/584/JHA). See also the Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 1 March 2005, 6815/05; the Report From The Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 24 January 2006, COM(2006)8 final; and the 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, 11 April 2011, COM (2011) 175 final. While the EAW reports provided a useful overview of EAWs issued and executed for the period 2005 through 2009, the data was not disaggregated according to offence type and it was, therefore, not possible to determine how many of the EAWs issued or executed concerned terrorism-related offences.

<sup>33</sup> However, few publically-accessible, country-specific reports were available in relation to the operation of the EAW with respect to terrorism-related offences (see for instance, the UK data at: <https://www.gov.uk/government/publications/european-arrest-warrant-data-2009-2013> [last accessed: 20/05/2014]).

<sup>34</sup> See the contact list appended to the EUROJUST document on 'Worldwide child sex offender network dismantled', 5 November 2007, at <http://eurojust.europa.eu/press/PressReleases/Pages/2007/2007-11-05.aspx> [last accessed: 20/05/2014].

<sup>35</sup> See the European Arrest Warrant Project, Asser Institute, available at: [http://www.asser.nl/default.aspx?site\\_id=8](http://www.asser.nl/default.aspx?site_id=8) [last accessed: 20/05/2014].

<sup>36</sup> It should be noted that the King's team did not have access to closed sources, such as the password-protected contact point database on the European Justice Network: see [http://www.ejn-crimjust.europa.eu/ejn/EJN\\_Login.aspx](http://www.ejn-crimjust.europa.eu/ejn/EJN_Login.aspx) [last accessed: 20/05/2014].

<sup>37</sup> Office of Assessment, Trinity College, p.7.

<sup>38</sup> Santos et al, p.34. See also Gebbie et al, p.995, and Joshi, p.57.

<sup>39</sup> Joshi, p.55.

<sup>40</sup> Joshi, p.55; and Office of Assessment, Trinity College, p.3.

1. Perhaps you can tell us how long you've each been working with the European Arrest Warrant?

### Exploratory Questions

2. Do you think the European Arrest Warrant makes the EU more secure?
3. Do you think the European Arrest Warrant makes Europe less secure?
4. What is the first thing that comes to mind when you think of the role of the European Arrest Warrant in combatting terrorism in Europe?
5. Are there particular aspects of the European Arrest Warrant that are effective or that are not effective, either in general or specifically in relation to terrorism?
6. In your view, is it legitimate to use the European Arrest Warrant?

### Exit Question

7. [Summarise main points of the discussions] So my final question to you: is that a fair reflection of the points raised during the discussion? And is there anything else that anyone else would like to add?

An important challenge for the King's team was the reduction of bias. They were aware that the data generated can be 'influenced by the method of inquiry, the degree of information provided and the framing of the accounts.'<sup>41</sup> Therefore, the King's moderator was careful not to take the focus group in a particular direction and tried to encourage all participants to contribute to the session. The biggest challenge in this respect was presented when participants questioned the moderator on what 'legitimacy' meant. The moderator explained 'I think it would defeat the purpose of the exercise if I was to put words in your mouth about what you would understand as 'legitimate' so part of our... is how you understand 'legitimate'...in this context'.

## 2.5 Confidentiality & Anonymity with Focus Group Research

Without exception, in the literature reviewed, the identity (and other identifying information) of all focus group participants had been anonymized. Various techniques had been used to achieve this. For instance, in the DETECTER project, pseudonyms were assigned to all focus groups participants (eg. FGP1, FGP2, FGP3, etc).<sup>42</sup> Brown used initials to anonymize the identity of her focus group participants (eg. 'DR1, MK, DR2, AB, WM...').<sup>43</sup> And, in other cases, participants were identified by certain qualities/characteristics. For instance, Solorzano et al. identified their focus group participants by reference to their race/gender/position (eg. 'a Black male scholar'; 'an Asian American female student', etc).<sup>44</sup> Finally, some studies only made use of generic terms, such as 'a participant' or 'a man.'<sup>45</sup>

In the research conducted by the King's team, each participant was assigned a letter (e.g. Participant A, Participant B, Participant C, etc). During discussions, participants could then refer to each other using their assigned letters and, later, researchers could maintain the anonymity of participants during the coding process.

<sup>41</sup> Hutton, p.246.

<sup>42</sup> Hadjimatheou et al, p.75. See also Hardgrove, 'Liberian Refugee Families in Ghana: The Implications of Family Demands and Capabilities for Return to Liberia' 22 *J. Refugee Stud.* (2009) 483, p.485.

<sup>43</sup> Brown, p.1074 (fn. 75).

<sup>44</sup> Solorzano et al, p.36.

<sup>45</sup> For instance, Friedman and Immerwahr, 'Discussing Foreign Policy with the Post-Cold War Public', 3 *The Brown Journal of World Affairs* (1996) 259, p.262.



## 2.6 Data Analysis

In analysing the data, the King's team followed, broadly, the 'Long-Table Approach.'<sup>46</sup> Firstly, the principal investigator and the co-investigator independently analysed the transcript and coded it in accordance with the overall framework of (1) impact, (2) legitimacy and (3) effectiveness. Secondly, the data within each theme was analysed to distil and refine further sub-themes.

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<sup>46</sup> See Kreuger, Richard A. and Casey, Mary Anne, *Focus Groups: A Practical Guide For Applied Research* (3rd edn, SAGE Publications 2000) p.132.