Stream

Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant

POLICY BRIEF

Towards a coherent and merited trust system for the European Arrest Warrant in the EU

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Executive Summary

This Policy Brief is part of the STREAM Project – *'Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant'*. The Project aims to promote judicial cooperation between Member States surrendering persons suspected of having committed a criminal offence. It does so by identifying legal gaps, interpretative doubts, and practical challenges that exist in the application of the law establishing the European Arrest Warrant (EAW) system. It then proposes policy solutions to those issues, including to facilitate the achievement of the objectives of EU criminal justice law as well as uphold EU fundamental rights law, and values including the rule of law with respect to individuals in criminal justice cases.

The key findings show the consequential lack of coherence in the application and implementation of the EAW system across Member States due to a lack of legal definition of key terms and explanation of the content of legal concepts, such as 'mutual trust', 'issuing judicial authority', 'effective judicial protection' and 'proportionality'; and the role of fundamental rights in EAW procedures. Interpretations sometimes differ in diametrically opposing ways with respect to these core EU legal concepts.

Further to requests from national courts which raise doubts about such terms and concepts, the Court of Justice of the European Union (CJEU) has provided interpretative rulings and established certain common legal tests on a case-by-case basis. However, the CJEU's input has only further fragmented an increasingly complex legal framework governing the relevant issues characterising the application of the EAW system. It has established thresholds that are either still vague or that are very close to the automaticity of 'mutual trust' at the expense of fundamental rights and the rule of law. This means that there must be a lower level of review of compliance with EU values in criminal justice proceedings.

The resulting picture is that the EAW system is not as simple, swift, and trusty as the original designers intended it to be. There is, and the above reinforces, a suboptimal construct of trust between Member States; incoherence and a lack of legal certainty and accessibility as to the EU standard; incomplete protection of the requisite fundamental rights of persons in EAW proceedings; growing tension between European human rights protection mechanisms; and a further erosion of EU Treaty values which lay at the heart of the European Criminal Justice Area.

Introduction

There is an obstacle to the criminal justice process if the person who is suspected of having committed a criminal offence is not physically in the country – particularly in cases where the person has fled. In parallel, **the criminal justice process should be designed so that the person has due process and fair trial guarantees** – considering the importance of being treated as 'innocent until proven guilty', and being able to defend oneself. Every person's fundamental rights should be respected in the criminal justice context, under **a system in which Article 2 TEU values, including the rule of law, are upheld**.

Extradition proceedings based on bilateral or multilateral treaties are the standard international mechanism used for seeking the arrest and transfer of suspects and accused persons who were physically located in another country, negotiated at the State-level. But the European Union did away with that method and significantly transformed the way its Member States transferred such persons. It **moved the power from governmental authorities to the arena of *judicial* authorities**, who would surrender such persons based on a **European Arrest Warrant (EAW) system**. The EAW was designed to be ***simple*** (in contrast to the complexity of extradition proceedings), ***swift*** (cutting tape and reducing delays), and to ***prevent impunity*** (i.e. suspects and accused persons 'getting away with it').

Through Framework Decision 2002/584/JHA, the EAW tool opted for to achieve those goals was encapsulated in the principle of mutual recognition of judicial decisions. This meant there was agreement that judicial decisions in criminal matters in one Member State would be recognised in other Member States. An EAW can be sent by what is called an issuing judicial authority of a Member State to the executing judicial authority in the Member State in which the person in question is physically located. And the latter will surrender the person (almost) without questioning the request. It is pointed out in the Framework Decision that this can occur because it is **based on a 'high level of confidence between Member States'**, and that the surrender procedure can only be suspended in exceptional cases.

Simultaneously the EAW requires that decisions to surrender the person in question are **subject to sufficient controls, and EU fundamental rights obligations still apply** (Article 1(3) EAW). Express mention is made in recitals 10 and 12 of the Framework Decision 2002/584/JHA concerning protection against non-discrimination, and a serious risk of the death penalty, torture or other inhuman or degrading treatment. The Framework Decision also aims **not to contradict national constitutional rules** relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

There are however **profound structural tensions and contradictions embedded into the system**: that 'high level of confidence' or 'mutual trust' is referred to without pointing to the evidence that would show there was indeed such confidence, and what ought to occur should there be evidence there is no trust or suboptimal levels of trust. **Fundamental rights protection and respect for the rule of law (Article 2 TEU values) cannot be guaranteed at EU level, if a fictionally or 'blindly' high level of trust is presumed for legal purposes without an actual basis for it in reality.**

Methodology

The key findings in this Policy Brief are based on the STREAM Comparative Report and STREAM State of the Art Report. The Comparative Report brings together evidence on the implementation and application challenges of the EAW regime in 14 selected Member States, as presented in 13 Periodic Country Reports and 11 Research Briefs submitted between 2022 and 2023. The State of the Art Report provides a critical update as of June 2023 of the EU's legal criminal justice standards and safeguards, which constantly undergo clarification and refinement by the Luxembourg Court.

Key Findings

Finding #1: Despite crucial contextual evolutions, the European Arrest Warrant system has not adapted

At the time of the drafting and adoption of the EAW Framework Decision in 2002, **the interests and priorities of 15 EU Member States and the nature of their criminal justice systems were taken into account**. This means that the different constitutional histories and criminal justice systems of Member States acceding to the EU from 2004 onwards were not necessarily represented or accounted for in the legal text.

Next, the entry into force of the Treaty of Lisbon in 2009 brought in **a new era in European cooperation**, where the fundamental rights of the individual were emphasised more strongly than at the time of the adoption of the Framework Decision. The Treaty significantly altered the EU legislative and decision-making processes, transforming Justice and Home Affairs (JHA) cooperation into the so-called **Area of Freedom, Security and Justice (AFSJ) policies**. It also **elevated and constitutionalised EU fundamental rights law** into a legally binding EU Charter of Fundamental Rights.

It meant a shift away from intergovernmentalism, with **greater EU supervisory and monitoring powers** being given to the European Commission and Court of Justice of the EU as of 1 December 2014 on EU criminal justice law; the European Parliament also gained more legislative powers. This made the EU legislative process more democratic and meant that any amendments had to be subject to the co-decision (ordinary) legislative procedure. The perspective of individuals' rights came into sharper focus too. With the Lisbon Treaty, a number of **EU criminal justice procedural safeguards – of suspects and the accused** - were developed through a package of Directives, so that the subject of individuals' rights could benefit from greater protection.

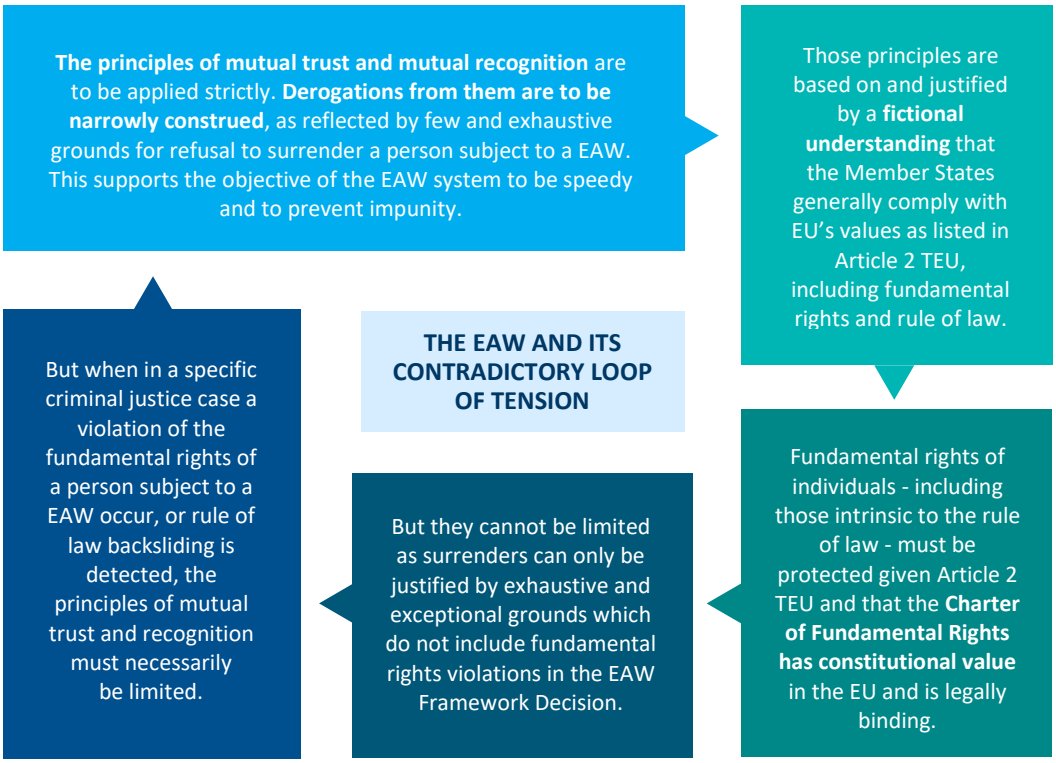
The challenges faced by Member States in the criminal justice field were rather different to what they are now. *Back then,* the adoption of the EAW Framework Decision was pushed forward as emergency legislation in a legislative proposal only eight days after the 9/11 terrorist events. The document expressly mentioned those events, reflecting a very strong emphasis on a security and law enforcement rationale as the overriding priority, with a weaker emphasis on their actual impacts and compatibility with the protection of fundamental rights and EU Treaty values. This is evident through its emphasis on speed, cutting red tape, and a high degree of automaticity.

But the landscape has also changed. The challenges the EU is *now* facing include tangible threats to individual rights and liberties, as well as to EU integration as a result of **rule of law backsliding in certain EU Member States and the existence of systematic fundamental rights challenges**. These issues also lead to the questioning of **the primacy of EU law** by some Member States, and (sometimes structural) fundamental rights violations by Member States as established by the European Court of Human Rights in Strasbourg. More specifically, the consequences of controversial judicial reforms in Hungary and Poland (since 2010 and 2015 respectively) show a disregard for Article 2 TEU values (and Article 19(1) TEU, and the Charter of Fundamental Rights).

All this shows from the outset that contextually the EAW system is anachronistic and out of date.

Finding #2: Inherent flaws in the EAW system: a contradictory loop of tension between mutual trust with respect to fundamental rights, which impacts the principle of mutual recognition

Graph 1: The EAW and its contradictory loop of tension



Source: Authors' own elaboration

As *Graph 1* shows, the pattern is circular: the EU general principles of mutual trust and recognition must be applied strictly for the system to operate as designed; they can only be limited exceptionally including if there is a fundamental rights/rule of law breach; but **the failure to fully protect fundamental rights erodes the very justification for the mutual trust principle existence** – the *presumption* that there is a common and high standard of respect for fundamental rights generally in all EU Member States.

This is problematic because with the entry into force of the Lisbon Treaty, **the correct functioning of mutual recognition in criminal matters intrinsically depends upon Member States compliance with the rule of law and fundamental rights** standards set out in Charter. Despite the development of the EAW Framework Decision through the Court of Justice's case law, this contradictory loop has not really been broken.

Finding #3: No unified and consistent definition of 'mutual trust'; and opposite ways of approaching trust

The application of the principle of mutual recognition under the EAW Framework Decision is anchored in – or depending on the perspective connected to, dependent on, or justified by, and at the very least intertwined with – **the presumption of a high level of 'mutual trust'**. But there is no actual reference to the latter term: **it is legally undefined**. The only mention of this aspect

can be traced back to the legally non-binding recital 10 of the Framework Decision which states that the mechanism is 'based' on a 'high level of confidence between Member States'.

In *Opinion 2/13* the Court of Justice elevated mutual trust to the status of a general principle of EU law – but without further elaborating its legal definition and content. It stated only that this (newly coined) principle includes accepting that the fundamental rights of persons requested under an EAW would be subjected in other Member States to the same standards, and that it could only be considered otherwise in exceptional circumstances.

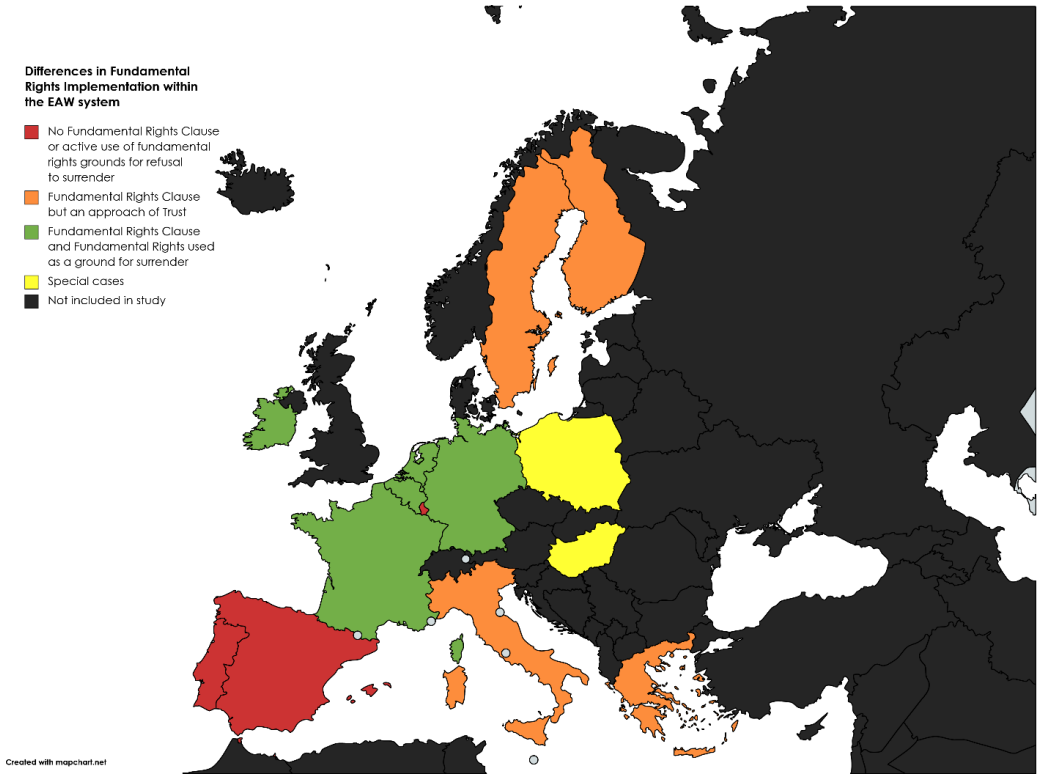
Questions such as *who* that mutual trust is between, who or what is to be trusted, what the trust is based on, what level of trust is required, and who monitors and ensures that 'trust' remains in place were not defined. Is it trust between individual judges? Or an agreed standard of trust between judicial systems? Trust between Member States' governments? Trust of an individual with the judiciary of a Member State? Does the individual have any role in the trust relationship?

The current EU policy on mutual trust does not take into account that it likely has a dynamic and 'fluctuating' nature. **Trust is in fact a daily practice and cannot be taken for granted.** Divergences between the way (the then 15) Member States' criminal justice systems were structured and the precise manner in which the EAW Framework Decision was implemented were inherently permissible in the Framework Decision at the time of its adoption, due to an assumption that the protections they provided were equivalent and that defence rights were protected adequately all over the EU in a comparable way.

A comparison of national assessments in the STREAM Comparative Report shows however that in practice **the Member States do not have a shared or unified view of 'mutual trust'**. There is a **lack of coherence** in the use of the European Arrest Warrant. Discrepancies may in fact be so severe that there are almost **opposite approaches**. Some EU Member States treat the system as basically automatic; others question it deeply.

At least **two main general tendencies** can be identified: on the one hand, some Member States are proactive in taking actions to uphold fundamental rights when deciding on surrender of a person in EAW proceedings in a way that seems to show 'limited mutual trust' or 'mistrust'. They have gone as far as legislating a specific fundamental rights provision in national law which can serve as a ground for refusing surrender (in green in the *Graph 2* below), and which is actually in use in practice in a subgroup of Member States. On the other hand, some Member States intentionally do not review fundamental rights, treating them as *subordinate* when considering whether to surrender persons in order to adhere to the idea of a 'high level of mutual trust' as prescribed by EU law, including CJEU case-law (in orange – having transposed the fundamental rights component but not applying it in practice - and red – not having included it in their national legislation - in Graph 2).

Graph 2: Selected EU Member States Approaches to Fundamental Rights under Article 1(3) EAW FD



Source: STREAM Comparative Report

Taking this key finding into consideration, as well as the current context of rule of law backsliding and evidence that the state of affairs in several EU states are not compatible with EU fundamental rights, **the trust-based presumption can no longer always be realistically maintained.**

Finding #4: The Court of Justice's rulings result in continuity of the problem and further complexity instead of clarity

The lack of understanding as to what mutual trust and the fundamental rights obligations constitute precisely is further shown by the **large number of wide-ranging and far-reaching questions from national courts and judges seeking guidance from the Court of Justice through the preliminary ruling procedure on what it means in legal terms, and how to apply it in specific cases** before them.

Despite accepting that the principles of mutual trust and recognition can be limited under the Framework Decision in order to respect fundamental rights ('earned' trust), the Court of Justice's case law has not really solved key legal questions and failed to make it easier to identify the EU legal standards. Instead it increased complexity. The judicial tests set very high thresholds and are highly complex. The result is not a higher level of protection of fundamental rights than before, but **a reinforcement of a fictional idea of trust rather than 'piercing the veil' as to whether there is really trust on the ground.**

First, the two-step test the Court established in the case *Aranyosi* on general deficiencies and individuals' impact sets a threshold that is very difficult, almost impossible, to overcome in

practice. The Court's adaptation of the test in *Aranyosi* to rule of law related issues in the case *LM* leads to a **fragmented legal structure and maintains the very high thresholds**. Insisting on the same logic and essentially the same judicial test, the Court of Justice has not taken into account two issues. First, this places national judges in very difficult position when expected to ask colleagues in other EU Member States whether they are indeed and truly independent. Second, **courts may be captured where there is rule of law backsliding.** Therefore **they are incapable of assessing their own independence**. It is only logical that Member States considered to be facing rule of law backsliding are not considered to be reliable assessors of compliance with fundamental rights and the rule of law, if it is challenged that they are themselves not considered compliant with fundamental rights and the rule of law.

Second, the *OG and PI* line of cases reveals **limitations and inconsistencies with respect to the concept of judicial independence, and interpretative doubts remain**. There is a possibility for public prosecutors' offices to qualify as an 'issuing judicial authority', but only if the authority acts *independently* while issuing an EAW. When checking the independence of the 'issuing judicial authority' one needs to consider whether there are statutory rules and an institutional framework which guarantee that the respective authority is independent and the executive cannot give instructions to the prosecutors. Public prosecutors do not meet the criteria of independence under the EU law; even if this power is very theoretical and surrounded by safeguards. It is paradoxical that a theoretical and never before used possibility of executive interference can disqualify a whole entity from being considered a 'judicial authority', while under the *LM* jurisprudence even strong evidence of systemic deficiencies concerning judicial independence cannot deny all judges or courts of the issuing Member State the status of 'issuing judicial authority'.

The lack of uniformity regarding the nature of the authorities competent to issue and execute EAW shows 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.

Furthermore, the Court of Justice's strong emphasis in its case law on the importance of dialogue between national judicial authorities and the obtaining of assurances essentially brings the system closer to traditional extradition proceedings, which is perhaps justified and shows that the Framework Decision now overly and inappropriately claims that the surrender system is simple and swift. However, here again **there is much room for interpretative doubt given that the Court of Justice's rulings are not specific on the dialogue process** – should it be between individual judges? Or representatives of a court? Or representatives of the judiciary as a whole? And what should a court do in the case of a captured court or one that is suspected of not being independent? What if there is a relationship breakdown between those actors? How should a judicial authority decide whether an assurance should not be accepted?

Taking that into account, the national reports refer to cases where refusal to surrender a person on fundamental rights grounds was considered. The STREAM Comparative Report shows that in most cases the practice changed after applying the CJEU's judicial tests, so that surrenders were not refused because there were 'Herculian hurdles'[1] or suspects and convicts to show that they were specifically affected by systemic and generalised breaches of EU fundamental rights or values. In these circumstances, there have been **very few cases where the use of mutual recognition-based instruments has been halted by national courts.**

[1] State of the Art report.

Finding #5: Lack of coherence between the Member States with respect to several core legal concepts and terms

Some EU Member States question the independence of the issuing judicial authority more than others, and some don't question it at all as a matter of practice – **this is an *opposite* application of the EAW system that results in opposite outcomes**: in some cases surrender is postponed, while in others there is incomplete monitoring and supervision of respect for the independence of the judiciary which impacts specific persons subject to EAWs.

That lack of coherence can also be seen in other aspects of the EAW system. **Certain violations of EU values are more in focus than others.** Whereas almost all of the 14 Member States studied in the STREAM Project focused on in absentia-procedures, fair trial rights, procedural rights and detention conditions, **only a few took action concerning perceived rule of law violations** (the majority of Member States did not mention it at all), and only a few mentioned the fundamental right to family and private life. These are further examples of Member States' authorities treating surrenders in very different ways that also leads to very different results.

As shown in the STREAM national reports, **effective judicial protection was also interpreted differently**, which is fundamentally problematic given courts' central role in guaranteeing the right to a fair trial.

Crucially, there was also a lack of coherence concerning **how and whether proportionality assessments are conducted in EAW proceedings**, given the lack of regulation of it in the Framework Decision, and the lack of guidance from the CJEU's rulings. There is a range of quite different approaches to it. In the Netherlands proportionality is applied at both pre- and post-surrender stages. In other Member States, it is hardly paid attention to.

It can be recalled here also that the European Commission, back in 2011, had already identified this policy issue in a report and was of 'of the view that against the background of general agreement in Council on the merits of a proportionality test and the undermining of confidence in the EAW system where a proportionality test is not applied, it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory.'

Finally, there are further remaining legal gaps: concerning **the lawfulness of deprivation of liberty during pre-trial detention** – despite the grave consequences for fundamental rights in case of potential breaches –, the Court of Justice has ruled that the EAW procedure is exhausted once the person is surrendered and no further protection can be extended beyond that moment; there is also **lack of clarity about minimum EU procedural safeguards** such as the right to access to a lawyer, to have a third party informed, and legal aid; and there are controversies on the 'sufficient controls' necessary for decisions to surrender.

Finding #6: The wider context is equally unclear

Whereas relevant laws on the rights of suspects and accused persons complement the EAW system, they do not contribute much to identifying the limits of mutual trust.

First, relevant provisions are found in **many different legislative texts**, and it can be hard to piece them together. Those texts are of a **different legal nature**, including (i) Directives, which leave a *margin of discretion* to Member States as to how they choose to implement them; (ii) the Charter of Fundamental Rights which has a constitutional status in EU law and is legally binding, but *only applies within the scope of EU law* according to Article 50; and (iii) the

European Convention of Human Rights and related case law – the standards of which are to be **applied *through the prism* of the corresponding Charter rights**, and where such standards might either be higher or lower on what the Court of Justice has decided in its own case law.[2]

Second, **they add a layer of complexity in how they are applied to the EAW context**. For example, the EU legal framework on the rights of suspects and the accused in criminal proceedings – regulating the right to information, the right to interpretation and translation, the right to have a lawyer, strengthening certain aspects of the presumption of innocence and the right to be present at the trial, the procedural safeguards for children and legal aid – ***do not all automatically or fully apply* to surrender proceedings**. The wording of provisions in Directive 2012/13 which guarantees the right to information in criminal proceedings to the suspects or accused persons does not clearly indicate whether it also applies to the persons who are arrested for the purposes of surrender. As for the right to information in criminal proceedings, the Court of Justice has concluded that several rights enshrined in Directive 2012/13 do not apply to persons who are arrested for the purposes of the execution of a EAW.

In a context where it is increasingly necessary to monitor, protect, and enforce individuals' fundamental rights, procedural safeguards, and check how these are impacted by rule of law backsliding, **the current letter of the EAW Framework Decision is not sufficiently precise** in this respect either. Nor does it define the concept of an 'issuing judicial authority'. The wording of Article 1(3) of the Framework Decision and recitals 12 and 13 are vague on when (if at all) execution of a European Arrest Warrant can be refused. Finally, there is no indication of what the EU minimum procedural safeguards and suspects rights are either.

[2] Consider for example *IS*, where the CJEU set the threshold in determining the breach of fair trial rights very high equating the real risk of a breach of the essence of the applicant's right to a fair trial with the ECtHR's 'flagrant denial of justice' test).

Policy Recommendations

Recommendation 1:

The Council of the EU, the European Parliament, and the European Commission should play a greater role in effectively addressing the policy issues identified in this Policy Brief. The Luxembourg Court is not the correct actor to provide solutions to legislative gaps and cannot do so alone given its limited interpretative competence. The Court of Justice has not been able to resolve long-standing policy issues relating to the EAW application, adding to the complexity and reaching a result similar to what is provided for strictly by the letter of the anachronistic EAW Framework Decision.

Recommendation 2:

An EU definition of mutual trust ought to be expressly provided in EU law, considering its crucial role in the functioning of the EAW and other criminal justice instruments, to reverse the fact that it has been elevated to the status of a principle (because it has a dynamic and fluctuating nature which cannot be properly encapsulated by a principle), and evidence of a lack of coherence and legal uncertainty in how Member States interpret it in practice. The EU legal concept should move away from the direction of quasi-automaticity ('blind trust') **towards an 'earned or merited trust' model of European cooperation**, where fundamental rights and rule of law derogations are compatible with the functioning of the general principle of mutual recognition.

Recommendation 3:

The EAW is not adapted to the Lisbon Treaty constitutional framework. A merited trust-building approach should be built into a legislative reform aimed at **'Lisbonising' the EAW system**. Enforcement of the rule of law and other Article 2 TEU values would serve as a trust-building exercise to eliminate doubts and uncertainties between Member States authorities. At the very minimum, there should be greater internal-EU monitoring of fundamental rights protection and a greater scrutiny over judicial independence. The EU's existing monitoring tools – such as the Justice Scoreboards and Commission's Annual Rule of Law Reports – could be integrated in the legislation as evidence to Member States justifying that there should or should not be trust.

Recommendation 4:

Mutual trust in general – and not on a case-by-case basis – should be suspended when a Member State violates an Article 2 TEU value, where this concerns the rule of law or fundamental rights, until it has been restored. Fundamental rights exceptions could be inserted into a new EAW Directive as a basis for grounds to refuse surrender, which does not impose an excessively high threshold. This would also build and reinforce trust among the Member States, and provide for much needed clarity as to what the EU legal standards are. It would also bring legal certainty. Setting up a procedure for the mandatory dialogue and for assurances would ensure coherence and legal certainty. In case of a suspicion that a court is captured, a neutral third party assessor could be invited to check judicial independence.

Recommendation 5:

The EAW system should be redesigned to give way to the swiftness that it currently insists on, as this impedes the equally important EU law objectives to protect fundamental rights and the rule of law. This is further supported by the fact that the system has become increasingly complex. Providing for **a *principled approach* harmonising the various tests** related to judicial independence and the legal consequences foreseen for judicial capture and rule of law decline would prevent further fragmentation and inconsistencies in EU criminal law, including in surrender cases. With special regard to the fact that it is a general principle of EU law, proportionality in the EAW procedure should be regulated by black letter law, so as to overcome the lack of coherence in how it is approached currently. In order to avoid impunity, alternatives to the EAW Framework Decision could be emphasised: for example, conducting a trial is possible via mutual legal assistance, transfer of criminal proceedings or countries could make use of transfer of sentences. It should be expressly stated that **EU standards on suspects rights and procedural guarantees fully apply to the EAW Framework Decision**.