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German Report

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Disclaimer: The present deliverable has been drafted jointly by Prof. Dr. Anna H. Albrecht and Prof. Dr. Anne Schneider LL.M. Anna Albrecht has provided the text on Directives 2010/64/EU, 2012/13/EU and 2016/343/EU. Anne Schneider has provided the text on Directives 2013/48/EU, 2016/800/EU and 2016/1919/EU. **For the purposes of this report, national case-law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to**. The content of this report represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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4 Main findings/Executive summary

Most of the guarantees of Directive 2010/64 had previously already been laid down in German law. Thus, the legislator made only minor changes to transpose the Directive. However, the implementation fell short of the Directive's requirements as regards the documents to be translated. This concerns in particular an exception to the translation requirement where the accused has a defence counsel, the lack of rules for determining language skills and the implementation in the context of EAW.

Similarly, the transposition of Directive 2012/12 required only minor changes to existing legislation. The transposition of the Directive on information and access to material in the case shows only minor shortcomings, e.g. regarding the right to information on the accusation, regarding the comprehensibility of the information, the possibility of restricting the right to access the materials of the case in order to protect private interests. Occasionally, the legislator has provided for alternative approaches which do not fall short of the requirements of the Directive**, such as information on the accusation rather than on the right to be informed of the accusation.**

When implementing Directive 2013/48/EU, the German legislator took the view that German law already complied with most requirements of the Directive. Accordingly, there were only minor changes made to the law. Mostly, the transposition laws were convincing, albeit some details such as the effective participation of the lawyer or the length of the contact ban might have been made more convincing. More problematic are those areas of law which the legislator assumed did not need to be changed, especially the rules on confidentiality. Here, existing problems in German law make the implementation partly insufficient.

Many provisions of Directive 2016/800/EU on the rights of juvenile defendants were explicitly and correctly transposed, leading to substantive changes of the law. This is because the Directive gave detailed information about the rights of juvenile defendant, such as the right to be informed of their rights. The German legislator largely stuck to the wording of the Directive in order to avoid wrongful transposition. Other guarantees were already recognized in German law and, due to their broad wording in the Directive, did not require as many explicit changes. However, the transposition of the right of assistance by a lawyer (Art. 6), which is one of the crucial guarantees in the Directive, is not

completely convincing. In this respect, frictions between the traditional system of defence in German juvenile law and the EU law become apparent.

The implementation of Directive 2016/1919/EU leaves a lot to be desired. Although a merits test instead of a means test is allowed by the Directive, **the implementation of the Directive into the rules of mandatory defence has not been successful**. This is particularly true for the implementation of Art. 4, 6 and 7 of the Directive. The German legislator's wish to stick to the established system of mandatory defence has led to frictions with the new rules and is, therefore, widely criticized in literature.

The transposition of Directive 2016/343 has proven to be insufficient, above all because the requirements for the protection of the presumption of innocence have not been implemented in German law, although they had not been laid down previously either. They are based only on very general constitutional guarantees and presupposed by the CCP, but are generally and firmly recognised in their content. The right to be present, by contrast, had already largely been guaranteed before under German law, which therefore has undergone only minor adjustments in implementation of the Directive.

5 Introduction

German criminal procedure is largely regulated by the Code of Criminal Procedure (CCP), which in particular contains provisions on the course of criminal proceedings and the legal basis for investigative measures, and by the Court Constitution Act (CCA), which regulates the organisation and competences of the courts and the public prosecutor's office. The fundamental rights of the individual, also in criminal proceedings, are laid down in the Basic Law ("Grundgesetz", BL), the Federal German Constitution, and the ECHR. The Basic Law takes precedence over ordinary legislation such as the Code of Criminal Procedure. Provisions that violate the BL can be declared unconstitutional and void by the Federal Constitutional Court. The BL also influences the application of ordinary legislation by ensuring that its guarantees are taken into account in interpretation and by filling in any gaps in statutory law. For example, the CCP contains hardly any explicit provisions on the exclusion of the use of evidence; instead, the latter are determined by balancing constitutionally guaranteed interests and rights. More generally, all infringements of fundamental rights have to be proportionate, which is also to be determined by means of such a balancing test. Apart from the guarantee of human dignity and general fundamental rights such as personal freedom and physical integrity (Art. 2 BL), the Basic Law contains specific guarantees for judicial proceedings, such as the right of recourse to the court (Art. 19 (4) BL), the right to the lawful judge (Art. 101 (1) 2 BL) and the right of being heard (Art. 103 (1) BL). Other guarantees such as the right to a fair trial are enshrined in the rule of law ("Rechtsstaatsprinzip", Art. 20 (3) BL).

The fundamental rights are further safeguarded by the guarantees of the ECHR. As a result of its transformation into German law, these guarantees have the status of an ordinary statute. According to the settled case-law of the Federal Constitutional Court, however, they influence the interpretation of the fundamental rights and constitutional principles of the BL. The text of the ECHR and the case-law of the ECtHR serve as interpretative aids for determining their content and scope. Thus, within the framework of a methodology-based interpretation, German courts must give priority to an interpretation that is in line with the Convention. They must also take into account the relevant case-law of the ECtHR, i.e. they must take note of it, include it in the decision-making process and consider it appropriately.[1]

German criminal procedure is inquisitorially shaped: In preliminary proceedings, the prosecution is both authorised and obliged to initiate investigations into suspected criminal offences and to conduct these both for and against the accused, sections 152 (2), 160 (1), (2) CCP. According to section 150 CCA, the public prosecutor's offices are independent of the courts. Rather, as part of the executive,

[1] For further details, see the key decision *Görgülü* BVerfGE 111, 307 (German Federal Consitutional Court).

they are subordinate to the justice ministries of the Länder and of the Federal Government and are thus subject to instructions from the respective justice ministers, section 147 CCA. According to the concept of the CCP, the public prosecutor's office is supported by the police in its investigations and is authorised to issue instructions to them, section 152 CCA. In practice, in cases of minor crime, the police authorities conduct investigations largely independently. Independent judicial control in the investigation procedure is only exercised to the extent that particularly intrusive investigative measures require a judicial order at the request of the public prosecutor's office and that the accused may, under certain circumstances, lodge a complaint with a court against the ordering of an investigative measure in accordance with section 304 CCP or file an application for a judicial decision in accordance with section 98 (2) 2 CCP against the way in which the measure is carried out.

If, after the completion of the investigations, the public prosecutor's office considers a subsequent conviction of the accused to be probable, it may file an indictment pursuant to section 170 (1) CCP, thereby conferring competence on the court. The latter will decide on the opening of the main proceedings, also on the basis of a prognosis of conviction, before conducting the main trial. The court organisation lies largely in the hands of the Länder and, only for the supreme federal courts, in that of the Bund. The courts of first instance are the Local Court (Amtsgericht - AG) in cases of minor crime and the Regional Court or District Court (Landgericht - LG) in cases of more serious crime. In exceptional cases, especially offences relevant to state security, the Higher Regional Court (Oberlandesgericht - OLG) is the court of first instance. The Regional Court also decides on appeals (Berufung) against decisions of the Local Court, the Higher Regional Court and the Federal Court of Justice (Bundesgerichthof - BGH) on appeals on points of law (Revision). Art. 97 BL guarantees the independence of the judiciary, while Art. 101 BL prohibits withdrawing the case from the competent judicial body as laid down by law. If the accused deems a fundamental right to have been violated by a conviction, he may appeal to the Federal Constitutional Court after exhausting the legal remedies available to him.

6 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

6.1 Legislation

The Act on Strengthening the Procedural Rights of Defendants in Criminal Proceedings (Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren) was issued to implement the Directives 2010/64 and 2012/13 into the German CCP and CCA and entered into effect on 6th July 2013. The legislator has predominantly refrained from a literal implementation of the fundamental right to interpretation and translation as laid down in the Directive, since, in his opinion, the prevailing law already guaranteed most of the rights to be implemented. Instead, he has mainly opted for an addition to the wording of already existing provisions on the basis of their previous interpretation by case-law and introduced only few new provisions.

6.1.1 Persons without sufficient command of the language of the proceedings

6.1.1.1 Transposition of the Directive

Thus, the legislator has
- in explicit transposition of Art. 2, 3 of the Directive reformulated section 187 CCA (see below), which deals with the use of interpreters and translators outside of the main hearing,
- in explicit transposition of Art. 5 (3) of the Directive regulated the secrecy of the interpreter in section 189 (4) CCA,

> **Section 189 CCA**
> […]
> (4) The interpreter or translator shall observe secrecy concerning circumstances that become known to him in his professional capacity. The court shall advise him of this fact.[2]

- in explicit transposition of Art. 3 (1) of the Directive regulated the service of translations of the judgement in section 37 (3) CCP

> **Section 37 CCP - Procedure for service**
> (3) If a translation of the judgment is to be made available to a party to the proceedings pursuant to section 187 (1) and (2) of the Courts Constitution Act, the judgment shall be served together with the translation. In such cases, service on the other parties to the proceedings shall be effected at the same time as service pursuant to sentence 1.

and

[2] Unless otherwise indicated, all translations are official versions taken from the legislator's website „Gesetze im Internet", www.gesetze-im-internet.de (last access on 25 November, 2020).

- in explicit transposition of Art. 2 (1) of the Directive included a reference to sections 187 (1)-(3) and 189 (4) CCA in section 163a CCP concerning the interrogation of the accused by the public prosecutor and the police.

> **Section 163a CCP - Examination of accused**
> (5) Section 187 (1)-(3) and Section 189 (4) of the CCA shall apply mutatis mutandis.
> (translation by A.H. Albrecht)

With regards to the right to interpretation as guaranteed in Art. 2 of the Directive, the amendment of section 187 CCA is in substance little more than an addition of the obligation to provide information in subsection (1) 2. As to the right to translation of documents guaranteed in Art. 3 of the Directive, the amended provision in subsection (2) specifies the documents to be translated in writing and subsection (3) stipulates the possibility of dispensing with a written translation.
Section 187 CCA generally ensures the rights to translation and interpretation guaranteed in Art. 2 and Art. 3 of the Directive for the entire criminal proceedings until the conclusion of the ordinary appeal proceedings:

> **Section 187 CCA**
> (1) The court shall call in an interpreter or a translator for an accused or convicted person who does not have a command of the German language or is hearing impaired or speech impaired, insofar as this is necessary for the exercise of his rights under the law of criminal procedure. The court shall advise the accused in a language he understands that he may to this extent demand that an interpreter or a translator be called in for the entire criminal proceedings free of charge.
> (2) As a rule, a written translation of orders involving deprivation of liberty as well as of bills of indictment, penal orders and non-binding judgments shall be necessary for the exercise of the rights under the law of criminal procedure of an accused who does not have a command of the German language. An excerpted written translation shall be sufficient if the rights of the accused under the law of criminal procedure are thereby safeguarded. The written translation shall be made available to the accused without delay. An oral translation of the documents or an oral summary of the content of the documents may be substituted for a written translation if the rights of the accused under the law of criminal procedure are thereby safeguarded. As a rule, this can be assumed if the accused has defence counsel.
> (3) The accused may only effectively waive a written translation if he has been instructed beforehand concerning his right to a written translation pursuant to subsections (1) and (2) and concerning the consequences of a waiver of a written translation. The instruction pursuant to the sentence 1 and the waiver of the accused shall be documented. […]

For the main hearing, however, the provision of section 185 CCA takes precedence.

> **Section 185 CCA**
> (1) If persons are participating in the hearing who do not have a command of the German language, an interpreter shall be called in. No additional record shall be made in the foreign language; however, testimony and declarations given in the foreign language should also be included in the record or appended thereto in the foreign language if and to the extent that the judge deems this necessary in view of the importance of the case. Where appropriate, a translation to be certified by the interpreter should be annexed to the record.
> (1a) The court may permit the interpreter to be at a different location during the proceedings, hearing or examination. There shall be simultaneous audio-visual transmission of the proceeding, hearing or examination to such place and to the courtroom.
> (2) An interpreter may be dispensed with if all the persons involved have a command of the foreign language. […]

This provision guarantees the rights to interpretation and translation unconditionally, whereas section 187 CCA does so only 'insofar as this is necessary for the exercise of his procedural rights in criminal proceedings'.

6.1.1.2 Critical Assessment

6.1.1.2.1 with regards to the right to interpretation

This results in a discrepancy between the guarantees of the corresponding rights in German law and in the Directive, since the Directive fully guarantees the right during the whole criminal proceedings before investigative and judicial authorities and makes it subject to a reservation only in Art. 1 (2) with regards to the contact between accused and counsel. In respect of the right to interpretation guaranteed in Art. 3 of the Directive, this does not have any impact. In the literature it is assumed that interpretation is necessary in the aforementioned sense, especially so that the accused can communicate with counsel.[3] Whether this also corresponds to practice cannot be assessed.

6.1.1.2.2 with regards to the right to translation of essential documents

The assessment is different with regards to the right to written translation under Art. 3 of the Directive. This is not only due to the different wording ('which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings' from the directive compared to 'insofar as this is necessary for the exercise of his procedural rights in criminal proceedings' in German Law), which might lead to differing interpretations.[4] In the literature, the specification of the documents to be translated in section 187 (2) CCA is criticised in particular.

6.1.1.2.2.1 Ambiguous legal presumption

Among the criticisms are that the legal presumption in section 187 (2) CCA concerning the documents to be translated ('as a rule') was ambiguous.[5] On the one hand, it can be understood restrictively in the sense that the expressly named documents are only as a rule necessary for the exercise of procedural rights and therefore to be translated. Accordingly, a translation might be dispensed with in exceptional cases, for example if an extract in accordance with sentence 2 or an oral translation in accordance with sentence 4 is sufficient. On the other hand, a broader interpretation is possible in the

[3] Ulrich Eisenberg, 'Gesetz zur Stärkung der Verfahrensrechte Beschuldigter im Strafverfahren« – Bedeutung und Unzuträglichkeiten' [2015] (10) Juristische Rundschau 442, 445; Helmut Frister, § 187 GVG. in Jürgen Wolter (ed), Systematischer Kommentar zur Strafprozessordnung Vol 9 (2016) para.2; Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 13.

[4] See also the criticism by Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 7

[5] See also Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen' [2017] 35(5) Strafverteidiger 379 et seq., 383.

sense that the documents mentioned are to be translated in any event, but in exceptional cases others might be necessary for the exercise of the procedural rights and therefore to be translated as well. The legislative materials[6] are unclear in this respect. The restrictive understanding might be backed by the legal context with the exemptions from the rule. The broad interpretation, on the other hand, is supported by the fact that German law would otherwise fall short of the guarantees of the Directive which it is intended to implement. According to the obligation to interpret national law in accordance with the Directives, the broad interpretation should be followed.[7]

6.1.1.2.2.2 Restriction to judgments in the strict sense

It is also pointed out that the concept of judgment as used in the Directive is to be understood broadly, whereas German law limits the obligation to translate judgments in the strict sense. This obligation would therefore not cover decisions terminating proceedings apart from judgments in the narrow sense, especially 'Beschlüsse',[8] which e.g. are issued under section 206a Code of Criminal Procedure if a final obstacle to proceedings becomes apparent after the opening of the main proceedings but before the main hearing is held.

A corresponding obligation is indeed laid down in the Directives on criminal and administrative fine proceedings (Richtlinien für das Strafverfahren und das Bußgeldverfahren, RiStBV). Yet, the RiStBV are administrative regulations without legal force. They are issued by the Federal Ministry of Justice and Consumer Protection, are primarily aimed at the public prosecutor's office and the police and are intended to ensure a uniform approach in the relevant procedures.

Therefore, an interpretation in line with the Directive is suggested, which is based on the concept of essentiality and focuses on the meaning of the individual document.[9]

6.1.1.2.3 Restriction to non-appealable judgments

It is also objected that the right to translation is limited to non-appealable judgments. The German legislator considers this to be in conformity with the Directive, as the temporal scope of application of the Directive as set out in Art. 2 (1) only extends to the conclusion of the proceedings.[10] According to *Schneider*, this understanding was to narrow. She argues that in European law the right of appeal is not to be understood technically and can also cover extraordinary legal remedies.[11] The temporal

[6] Legislative materials, Bt-Drs. 17/12578, p. 11.
[7] See also Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen' [2017] 35(5) Strafverteidiger 379, 383 et seq.
[8] Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 18.
[9] Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 19; Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen' [2017] 35(5) Strafverteidiger 379, 383 et seq.
[10] Legislative materials, BT-Drucks. 17/12578, p. 11.
[11] Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen'

scope of application of the Directive thus extends beyond the force of law; the defendant must therefore also be able to demand a translation of final judgments, which is why the German law and case-law falls short of the protection guaranteed by the Directive.

6.1.1.2.3.1 Translation of only an excerpt

Pursuant to section 187 (2) 2 CCA, a translation of only an excerpt is required if the procedural rights of the accused in criminal proceedings are thereby safeguarded. In my opinion, this provision is compatible with the protection guaranteed by the Directive only if that possibility is not used to dispense with a full translation, which would otherwise be required under the first sentence. Such an approach should again be countered with the obligation to interpret national law in accordance with the Directive.

6.1.1.2.3.2 Oral translations

The presumption in section 187 (2) 5 CCA, that the procedural rights of the accused are also safeguarded in the case of a mere oral translation or oral summary of the contents of the documents if the accused has a defence counsel, has no equivalent in the Directive and considerably restricts the protection intended in it. The legislator assumed that, as a rule, consultation with the defence counsel already enabled an accused without sufficient command of the language to exercise his rights of defence and sufficiently ensured a fair trial; it would also avoid delaying the proceedings by providing a written translation of the judgment after the written grounds of the judgment have been drafted. An exception was to be made when the accused had a legitimate interest in a written translation which he could express by requesting it.[12]

This deviation from the Directive is rightly considerably criticised in the literature. Section 187 (2) 5 CCA reverses the relationship of rule and exception as laid down in Art. 3 (7) of the Directive. Also, the defence counsel usually does not have sufficient factual knowledge to compensate for the loss of information due to the limited translation. Furthermore, it is not compatible with the fact that the accused has a right to translation of even the communication with the defence counsel. Finally, the shift to the lawyer is also contrary to the principle that the translation should be free of charge regardless of the outcome of the proceedings.[13]

[2017] 35(5) Strafverteidiger, 379, 380 et seq.; approvingly Helmut Frister, § 187 GVG. in Jürgen Wolter (ed), Systematischer Kommentar zur Strafprozessordnung Vol 9 (2016) para. 11; Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para.18.

[12] Legislative materials, BT-Drs. 17/12578, p. 12.

[13] Ulrich Eisenberg, 'Gesetz zur Stärkung der Verfahrensrechte Beschuldigter im Strafverfahren« – Bedeutung und Unzuträglichkeiten' [2015] (10) Juristische Rundschau 442, 445; Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 19; Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen' [2017] 35(5) Strafverteidiger 379, 382.

6.1.1.2.3.3 Mechanisms to ensure sufficient quality of translation and interpretation

In order to ensure a sufficient quality of the translation as required by Art. 2 (8), 3 (9), 5 of the Directive, German law provides for the appointment of an interpreter by the court, in practice as a rule after selection from a court interpreter and translator database (http://www.justiz-dolmetscher.de/, as of 13th April 2020), as well as his or her swearing in in accordance with section 189 (1) CCA. At present, the general swearing-in of interpreters and translators leading to their entry into the database lays in the hands of the Länder (federal states), which as a rule make their entry dependent on an examination or a university degree.

The literature does not consider this a sufficient guarantee of the quality of the translation: The conditions for entry in the databases vary in the various federal states, are formal and do not give any indication of the competence of the interpreter, especially in criminal proceedings; the court cannot control the translation work; in practice, the use of a sworn interpreter is sometimes dispensed with and instead, for example, a person brought by the accused is employed.[14]

In the meantime, the Federal legislator has created a uniform federal scheme in the form of the Court Interpreters Act, which, among other things, lays down qualification requirements. It will enter into force on 1st July 2021 and at least establish uniform nationwide standards for the qualification of interpreters.

6.1.1.2.3.4 Mechanisms for determining the need for interpretation and translation

The provisions on the use of interpreters in (criminal) proceedings presuppose inadequate command of the language, but do not establish a mechanism for determining language skills. Only the RiStBV contain the requirement to record, when questioning a foreign accused, whether the accused has sufficient language skills so that no interpreter needs to be called in. However, since the use of an interpreter without establishing the lack of language command is hardly conceivable, it is recognised in case-law and literature that the Court has to assess language proficiency of its own motion, but how it does so is left to its discretion. According to the prevailing opinion, the use of interpreters in borderline cases and their scope is left to the discretion of the court as well. This is criticised in the literature, since either the command of the language was insufficient and the use of an interpreter therefore fully necessary and had to be unrestrictedly ordered or not.[15] A test of language skills is therefore carried out by the court in practice, but the recognition of discretion does not guarantee that this will be done reliably and that a required translator will be called in in every case.

[14] Ulrich Eisenberg, 'Gesetz zur Stärkung der Verfahrensrechte Beschuldigter im Strafverfahren« – Bedeutung und Unzuträglichkeiten' [2015] (10) Juristische Rundschau 442, 447 et seq.; Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 4 et seqq.).

[15] Mustafa Oğlakcıoğlu, § 187 GVG. in Christoph Knauer (ed), Münchener Kommentar zur StPO Vol 3 (2018) para 37.

6.1.2 Persons with speech impediments

Section 187 CCA was originally also applicable to persons with hearing or speech impediments, so that the legislator intended to implement the requirements of Art. 2 (3) of the Directive with the amendment in 2013. In 2017, however, the legislator introduced a separate provision in Section 186 of the CCA.

> **Section 186 CCA**
> (1) Communication with a hearing-impaired or speech-impaired person during the hearing shall, at his choice, take place orally, in writing or with the assistance of a communication facilitator to be called in by the court. The court shall furnish suitable technical aids for oral and written communication. The hearing-impaired or speech-impaired person shall be advised of his right to choose.
> (2) The court may require written communication or order a person to be called in as an interpreter if the hearing-impaired or speech-impaired person has not availed himself of his right to choose pursuant to subsection (1) or if adequate communication is not possible in the form chosen pursuant to subsection (1) or would require disproportionate effort. […]

According to its systematic context, the provision is directly applicable only to court proceedings.[16] It is generally acknowledged that the corresponding rights also apply in the investigative stage as well as in enforcement proceedings;[17] this also corresponds to the will of the legislature when drafting the provision.[18] However, a corresponding statutory provision is missing.

6.1.3 Remedies required by Art. 2 (5), 3 (6) of the Directive

Since the interpreter, like an expert, is considered an assistant of the court, he or she can be excluded or refused on the grounds of partiality, section 191 CCA in conjunction with section 74 CCP. In cases of violation of the rules on interpretation and translation, the usual legal remedies (complaint, appeal and appeal on grounds of law) are open to the suspect (for further details see the commentary on Art. 2 (5) of the Directive).

6.1.4 Applicability other than in criminal proceedings

Per general reference in section 46 (1) Administrative Offences Act, the respective provisions of the CCP are declared to be applicable mutatis mutandis in proceedings on the imposition of administrative fines. It is questionable whether this is a sufficiently clear and precise implementation of Art. 1 (3) of the directive. Corresponding concerns are expressed about the implementation of Art. 2 (7), 3 (6) of the Directive in section 77 of the Act on International Mutual Cooperation in Criminal Matters. The legislator of the Act on Strengthening the Procedural Rights of Defendants in Criminal Proceedings assumed that through this provision a level of protection beyond that of the Directive would be achieved. The reference to section 187 CCA not only required a translation of the EAW, as

[16] Legislative materials, BT-Drs. 18/10144, p. 30.
[17] Instead of many Herbert Diemer, § 186 GVG. in Rolf Hannich (ed), Karlsruher Kommentar zur Strafprozessordnung (2019) para 1.
[18] Legislative materials, BT-Drs. 14/9266, p. 41.

the directive stipulates, but also other written procedural documents in the extradition proceedings. However, Schneider[19] considers this general reference to the rules on criminal procedure insufficient for three reasons. The provision of section 187 CCA applicable to the EAW only addresses courts, but not the Ministry of Justice, which is responsible for receiving EAW; moreover, until recently, EAW were approved by the Prosecutor General's Office. Furthermore, it is considered doubtful whether the mutatis mutandis reference to section 187 CCA, which refers to the law on criminal procedure, meets the requirements of certainty for the implementation of the Directive. Finally, the European Arrest Warrant is not covered by the presumption of section 187 (1) 1 CCA; its translation is therefore subject to the court's scope of assessment under paragraph 1.

6.1.5 Costs of interpretation and translation, Art. 4 of the Directive

The cost of an interpreter or a translator engaged by the court on behalf of the defendant are in principle borne by the treasury (section 464c CCP in conjunction with No. 9005 para. 4 List of costs of the CCA; for further details see the commentary on Art. 4 of the Directive in the transposition table).

6.2 Case-law

6.2.1 Key decisions

BGH, Beschluss vom 10. Juli 2014 – 3 StR 262/14 –

The accused, who had no command of the German language, was not provided with a written translation of either the indictment or the judgment.

The BGH referred to the provisions of section 187 (2) 4, 5 CCA, according to which a written translation can be replaced by an oral translation or an oral summary if this safeguards the rights of the accused in criminal proceedings. This was to be assumed as a rule if the accused has a defence counsel. The Court doubts, however, that the latter presumption also applies to the translation of the bill of indictment, 'because the communication of the bill of indictment is precisely intended to inform the accused 'in detail' about the charge, as guaranteed by Article 6 (3)(a) of the Convention on Human Rights' and the accused's rights to respond to the charge may be curtailed.

BGH, Beschluss vom 09. Februar 2017 – StB 2/17 –

The accused, who had the assistance of defence counsel, had filed an appeal in Turkish against a decision by which the KG Berlin (i.e. OLG Berlin) had rejected his application to revoke the arrest warrant against him and ordered the continuation of his pre-trial detention. The defendant again expressed his opinion on the Federal Public Prosecutor General's motion to dismiss the complaint as unsubstantiated in a letter written in Turkish.

[19] Anne Schneider, 'Der Anspruch des Beschuldigten auf schriftliche Übersetzung wesentlicher Unterlagen' [2017] 35(5) Strafverteidiger, 379, 381.

The BGH confirmed its previous case-law that foreign-language letters are generally irrelevant, even if the author does not have a sufficient command of the German language. The decision of the ECJ in its judgment of 15 October 2015 - C 216/14 did not preclude this, because any obligation to translate which might be derived from it existed only in the case of defendants without the assistance of defence counsel.

BGH, Beschluss vom 30. November 2017 – 5 StR 455/17 –
The LG ordered that the suspect be placed in a psychiatric hospital. The suspect, who was assisted by a public defender, filed a complaint against this order, but initially only in Russian. The court-ordered translation of the complaint was only received after the deadline for appeal had expired.
The BGH dismissed the complaint as inadmissible because the deadline for complaint had not been observed. The defendant's letter only became relevant upon receipt of the translation, and restitutio in integrum was not to be granted. This was not precluded by the decision of the ECJ in Case C-216/14, Judgment of 15 October 2015, since a resulting obligation to translate written submissions under Article 3 (3) of Directive 2010/64/EU only applied to suspected persons without the assistance of a defence counsel.

BGH, Beschluss vom 22. Januar 2018 – 4 StR 506/17 –
The BGH refers to the rule in section 187 (2) 5 CCA, according to which a written translation of a judgment is in principle not required if the defendant, who is not fluent in German, has the assistance of a defence counsel. Since the defence counsel knows the written judgment and the defendant can consult it with him - if necessary, with the participation of an interpreter - an effective defence was sufficiently guaranteed.

BGH, Beschluss vom 13. September 2018 – 1 StR 320/17 –
After the BGH had dismissed the appeal of the convicted person - a Lithuanian citizen - by order, the Chairman of the Senate rejected the translation of the order into Lithuanian as well as the service of such a translation requested by the defence.
The Court derives from Art. 2 (5) of Directive 2010/64/EU the possibility to challenge the decision of the chairmen to bring about a decision by the entire body of judges in analogous application of section 238 (2) CCP. Furthermore, the Court states that there was no right to a translation of the final and absolute judgment of the BGH. Section 187 (2) 1 CCA only provided for a right to the translation of decisions that are not final and absolute. Neither was there any need to interpret the provision in conformity with the Directive. The translation should enable the defendant to exercise his procedural rights. This would no longer be possible after the judgement had become final. The fact that the sentenced person considered an application for retrial or a constitutional complaint was not sufficient, since these were not legal remedies, also in the sense of EU law. For the same reasons, it was not possible to base the claim directly on the Directive.

BGH, Beschluss vom 18. Februar 2020 – 3 StR 430/19 –

The BGH refers to the provision of section 187 (2) 5 CCA, according to which a written translation of a judgment is generally not required if the accused, who is unfamiliar with the language, has a defence counsel. However, an exception was to be made if the accused has a legitimate interest in a written translation. As an example of a legitimate interest the court mentions the accused's own expertise, 'if the defence counsel cannot meet his task of exercising the rights of the sentenced person, if the sentenced person is not put in a position to offer help on his own initiative on the basis of his own knowledge of the reasons for the judgment'. In the case to be decided, it was not sufficient that the accused had had no contact with his defence counsel since the pronouncement of the judgment. It was decisive that a client-lawyer relationship existed.

The BGH also considers an exception for extraordinary situations, such as appeal judgments handed down in the absence of the accused or - with reference to the European Court of Justice's judgment of 12 October 2017 - C-278/16 - penalty orders, because in these cases the service of the judgment grants the accused a right to be heard.

6.2.2 Critical analysis of the case-law

The case-law essentially follows the specifications of the legislation, for example with regards to restrictions on the right to translate essential documents. Insofar, the corresponding criticism of the legislation applies accordingly. This concerns in particular the exception to the requirement of a translation when the defendant has a defence counsel.

7 Directive 2012/13/EU: Right to information in criminal proceedings

7.1 Legislation

Regarding the implementation of the Directive through the Act on Strengthening the Procedural Rights of Defendants in Criminal Proceedings see above, 6.1.

7.1.1 Transposition of the Directive

The legislator added obligations to instruct the suspect
- on the right to the assistance of an interpreter or translator in section 187 (1) 2 CCA, section 114b (2) 3 CCP and section 163a (5) CCP
- on the right to the appointment of a mandatory defence counsel in section 114b (2) 1 no. 4a CCP and section 136 (1) 3 CCP
- on the right of the accused person without a defence counsel to receive information and copies of the files under section 114b (2) 1, no. 7 CCP
- on the right of legal remedies against pre-trial detention in section 114b (2) 1, no. 8 CCP
- on the right of the defence counsel to inspect the files in section 114b (2) 2 CCP
- as well as the obligation to document instructions in case of judicial, public prosecutor's and police interrogations in section 168b (3) CCP.

For the rest, it is fair to assume that the obligations to provide information laid down by the Directive had already largely been laid down in German law.
In administrative offences proceedings the provisions apply mutatis mutandis by a general reference in Art. 46 (1) of the Administrative Offences Act, which does not appear to be a sufficiently clear and precise implementation in accordance with Art. 2 (2) of the Directive (for details see the commentary on Art. 2 (3) of the Directive in the transposition table and above, 6.1.4.).

7.1.2 Overview of the relevant legislation

7.1.2.1 Instructions in accordance with Art. 3 and 4 of the Directive

The Code of Criminal Procedure stipulates that the suspected person must be informed of his rights for two different situations separately, the first interrogation and the arrest of the suspected person. Section 136 CCP regulates the case of the first judicial interrogation (‘Vernehmung’) of a suspected person (‘Beschuldigter’). ‘Beschuldigter’ is in German criminal procedure a person initially suspected of a crime, against whom the law enforcement authorities are conducting an investigation. A ‘Vernehmung’ is given if the interrogator confronts the accused in official capacity and requests information from him in this capacity.

Section 136 CCP - First examination
(1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges or not to make any statement on the charges and the right, at any stage, even prior to his examination, to consult defence counsel of his choice. If the accused wishes to consult defence counsel prior to his examination, he shall be provided with information which makes it easier for him to be able to contact such defence counsel. Reference is thereby to be made to any emergency legal services which are available. He shall further be advised that he may request evidence to be taken in his defence and, under the conditions of section 140, apply for the appointment of defence counsel in accordance with section 141 (1) and section 142 (1); in the latter case, reference shall be made to the resulting costs referred to in section 465. In appropriate cases, the accused shall also be informed that he may make a written statement and of the possibility of victim–offender mediation.
(2) The examination is to give the accused the opportunity to dispel the grounds for suspecting him and to assert the facts which speak in his favour. […]

Section 163a (3) CCP refers to the provision of section 136 CCP for questioning by the public prosecutor's office and Section 163a (4) CCP for questioning by the police.

Section 163a CCP - Examination of accused
(1) The accused shall be examined prior to conclusion of the investigations at the latest, unless the proceedings are terminated. […]
(3) The accused shall be obliged to appear before the public prosecution office if summoned. Sections 133 to 136a and section 168c (1) and (5) shall apply accordingly. […]
(4) The accused shall be informed of the offence with which he is charged when he is first examined by police officers. In all other respects, section 136 (1) sentences 2 to 6 and (2) and (3) and section 136a shall apply to the examination of the accused by police officers. […]

With regard to the time of the interrogation and thus the instruction according to sections 136, 163a CCP, the law only stipulates in section 163a (1) sentence 1 CCP that it must take place prior to conclusion of the investigations at the latest and only if investigations are not terminated without formal indictment. Since according to recitals 19 and 28, it is still sufficient if the information is provided at the latest before the first official interview, section 136 (1) CCP safeguards that information is to be given at the latest date which is compatible with the Directive. For further details see the commentary on Art. 3 (1) of the Directive in the transposition table.
Section 114b CCP regulates the instruction of the arrested suspect.

Section 114b CCP - Instruction of arrested accused
(1) The arrested accused shall be instructed as to his rights without delay and in writing in a language he understands. If written instruction is clearly insufficient, oral instruction shall also be given. The same procedure shall apply accordingly if it is not possible to give instruction in writing; written instruction shall, however, be given subsequently insofar as this can reasonably be done. The accused shall confirm in writing that he was given instruction; if he refuses, this shall be documented.
(2) In the instruction pursuant to subsection (1) the accused shall be advised that he
1. shall, without delay, at the latest on the day after his apprehension, be brought before the court which is to examine him and decide on his further detention,
2. has the right to reply to the accusation or to remain silent,
3. may request that evidence be taken in his defence,

4. may at any time, including before his examination, consult with defence counsel of his choice,
4a. may, in the cases under section 140, request the appointment of defence counsel in accordance with the provisions of section 141 (1) and section 142 (1),
5. has the right to demand an examination by a female or male physician of his choice,
6. may notify a relative or a person trusted by him, provided the purpose of the investigation is not significantly endangered thereby,
7. may, in accordance with the provisions of section 147 (4), apply to inspect the files and, under supervision, to view items of evidence in official custody if he has no defence counsel and
8. may, if remand detention is continued after he is brought before the competent judge,
   a) lodge a complaint against the warrant of arrest or apply for a review of detention (section 117 (1) and (2)) and an oral hearing (section 118 (1) and (2)),
   b) in the event of inadmissibility of the complaint, make an application for a court decision pursuant to section 119 (5) and
   c) make an application for a court decision pursuant to section 119a (1) against official decisions and measures in the enforcement of remand detention.

The accused is to be advised of defence counsel's right to inspect the files under section 147. An accused who does not have a sufficient command of the German language or who is hearing or speech impaired shall be advised in a language he understands that he may, in accordance with the provisions of section 187 (1) to (3) of the Courts Constitution Act, demand that an interpreter or a translator be called in free of charge for the entire criminal proceedings. A foreign national shall be advised that he may demand notification of the consular representation of his home state and have messages communicated to the same.

According to section 127b (4) CCP, the provision is already applicable to provisional arrests by police and public prosecutors. The prerequisites of such a detention or arrest according to section 112 CCP, especially the strong suspicion of a crime, will often only be established in the course of the investigations.
The aforementioned provisions oblige the authorities to inform the accused of the rights in accordance with Art. 3 (1), 4 (2), (3) of the Directive
- of the right of access to a lawyer, Art. 3 (1) (a), in sections 114b (2) 1 No. 4, 136 (1) 2-4 CCP
- of his entitlement to free legal advice and the conditions for obtaining such advice, Art. 3 (1) (b), in sections 114b (2) 1 No. 4a, 136 (1) 5 CCP
- of the right to interpretation and translation, Art. 3 (1) (d), in sections 114 b (1), (2) 3 CCP, 187 (1) 2 CCA
- of the right to remain silent, Art. 3 (1) (e), in sections 114b (2) 1 No. 2, 136 (1) 2 CCP
- of the right of access to the materials of the case, Art. 4 (1) (a), in section 114b (2) 1 No. 7, 2
- of the right to have consular authorities and one person informed, Art. 4 (1) (b), in section 114b (2) 1 No. 6, 4
- of the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority, Art. 4 (1) (d), in section 114b (1) 1 No. 1.
- of any possibility, under national law, of challenging the lawfulness of the arrest, Art. 4 (3), in section 114b (2) 1 No 8.

Instead of informing the accused of his right to be informed of the accusation, as laid down in Art. 3 (1) (c), sections 114, 114a, 136 (1) 1 CCP provide for the information of the accusation itself. Section

114b (2) CCP obliges the authorities to inform the arrested person of his right to demand an examination by a female or male physician of his choice, which will lead to urgent medical assistance if indicated, so this can be assumed to correspond to the right to be informed of the right of access to urgent medical assistance as guaranteed in Art. 4 (2) (c).
Failures to instruct accordingly may lead to an exclusion of a following statement as evidence (for details see the commentary on the respective Articles of the Directive in the transposition table).
What is lacking, however, are provisions on the comprehensibility as required per Art. 3 (2), 4 (4) of the Directive. No reference to the model Letter of Rights has been made. The special concerns of persons with disabilities are expressly addressed only in Art. 21 of the RiStBV. Section 136 CCP only regulates the content of the instruction; section 114b (1) 1, 2 CCP prescribes that difficulties in understanding the written instruction are to be addressed by additional oral instructions as laid down in Art. 4 (5) of the Directive.

7.1.2.2 Letter of Rights in European Arrest Warrant proceedings in accordance with Art. 5 of the Directive

Section 21 of the Act on International Mutual Assistance in Criminal Matters provides for the person pursued to be informed of his/her right to remain silent and for defence counsel to be consulted after his/her arrest. The service of the EAW in accordance with sections 83a, 83c 2 of the Act also inform the person concerned of the allegation in both factual and legal terms. The further obligations to instruct the suspected person in accordance with sections 3, 4 of the Directive result from the general reference in section 77 Act on International Cooperation in Criminal Matters to inter alia the provisions of the CCP and the CCA. As mentioned sub 6.1.4., it appears doubtful whether this provides a sufficient certainty of the implementation of the Directive.

7.1.2.3 Right to information about the accusation in accordance with Art. 6 of the Directive

German law also ensures that the defendant is informed of the accusations in accordance with Article 6 of the Directive, although in the above situations by different means.

At his arrest, the accused is pursuant to section 114a CCP to be issued with a copy of a warrant of arrest and – if necessary, a translation -, containing the information prescribed by section 114 CCP (see below), thus inter alia the factual details of the offence he is suspected of as well as the grounds for his detention.

Section 114 CCP - Warrant of arrest
(1) Remand detention shall be imposed by the judge in a written warrant of arrest.
(2) The warrant of arrest shall indicate
1. the accused,

2. the offence of which he is strongly suspected, the time and place of its commission, the statutory elements of the offence and the penal provisions to be applied,
3. the ground for arrest as well as
4. the facts disclosing the strong suspicion of the offence and the ground for arrest, unless disclosure would endanger national security.
(3) If it appears that section 112 (1) sentence 2 is applicable or if the accused invokes that provision, the grounds for not applying it shall be stated.

Section 114a CCP - Issuance of warrant of arrest; translations
A copy of the warrant of arrest shall be handed over to the accused at the time of his arrest; if he does not have a sufficient command of the German language, he shall additionally be provided with a translation in a language he understands. If it is not possible for a copy and, where necessary, a translation to be handed over to him, he must be informed without delay, in a language he understands, of the grounds for his arrest and the accusations levied against him. In that case, the copy of the warrant of arrest and, where necessary, a translation shall subsequently be handed over to him without delay.

Thus, for the situation of pre-trial detention, Art. 6 (1), (2) CCP is complied with.

In the more frequent situation of the first interrogation, by contrast, the law only provides for an oral disclosure of the accusation whose content is only roughly described: Section 136 (1) 1 CCP requires the communication of the alleged "Tat" - understood as the actual facts that may constitute an offence - and the relevant penal provisions; practice considers a broad outline of the facts to be sufficient (for further details see the commentary on Art. 6 (1) of the Directive in the transposition table). Moreover, only the judge and the public prosecutor's office, but not the police must inform the accused about the legal assessment of the 'Tat' at the beginning of their interrogation (for further details see the commentary on Art. 6 (1) of the Directive. Thus, in the majority of cases the information on the legal qualification of the criminal offence is withheld from the suspect in contradiction to Recital 28. Neither is laid down in the CCP nor recognised in case-law that the accused is to be informed about new factual findings or a change in the legal assessment during further investigations (see the commentary on Art. 7 (4) of the Directive). However, this information will be provided when the court submits the bill of indictment to the accused in accordance with section 201 CCP before deciding on opening the main proceedings. This appears to be only a slight delay compared to the requirement of the Directive, which does not affect the defence interests.

A clear incompatibility is apparent from the national legislation on penalty order proceedings, which have therefore already been the subject of several referrals to the ECJ. The penalty order may be the first opportunity for the accused to be informed of the accusation against him. Section 410 CCP grants him a two-week period to lodge an objection to the penalty order in order to defend himself against the accusation, to prevent it from becoming legally binding, and to bring about a regular hearing. Section 132 CCP obliges an accused person not residing in Germany to appoint a person authorised to accept service of a penalty order concerning him, with the period for lodging an objection against

that order running from the service of that order on that authorised person. Thus, the period to file an objection would be reduced by the time needed by the appointed representative to transmit the penalty order to its addressee. If the order is received by the addressee after the expiration of the period for lodging am objection, it would become final and enforceable even without the knowledge of the addressee.

As the ECJ has held in its judgments of 15/10/2015 in C-216/14 (Covaci) and of 22/03/2017 in C-124/16, C-188/16, C-213/16, 22/03/2017 (Tranca et al.), the relevant German law must therefore be interpreted in such a way that the addressee of the penalty order is entitled to the full period for lodging an objection from the date on which he receives the penalty order and, if necessary, is to be granted restitutio in integrum. In contrast to the otherwise higher requirements for a restitutio, the mere knowledge of the penalty order should suffice as a sufficient reason.[20] However, it follows from this approach that the penalty order would after expiry of the regular objection period initially become final and enforceable. In its judgment of 14/05/2020 - C-615/18 -, the Court therefore held that the Art. 6 precluded a legislation under which a person residing in another Member State, if he does not comply with an order imposing a driving ban on him from the date on which that order became final, is subject to a criminal penalty, even though that person had no knowledge of the existence of the order.

7.1.2.4 Right of access to the materials of the case in accordance with Art. 7 of the Directive

7.1.2.4.1 Guarantee of the aforementioned right

As typical for an inquisitorial shaped proceeding, all the materials of the case gathered by the public prosecutor during investigations are contained in an investigative file. The right of access to this file and to view items of evidence, as laid down in Art. 7 (1), (2) of the Directive, is regulated in section 147 CCP.

Article 147 CCP - Right to inspect files, right of inspection; accused's right to information
(1) Defence counsel shall be authorised to inspect those files which are available to the court or which would have to be submitted to the court if charges were preferred as well as to view items of evidence in official custody.
(2) If the fact that the investigations have been concluded has not yet been recorded in the file, defence counsel may be refused inspection of the files or of individual parts of the files as well as the viewing of items of evidence in official custody insofar as this may jeopardise the purpose of the investigation. If the conditions of sentence 1 are met and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.

[20] Cf. T Wahl, 'Die EU-Strafverfahrensrechtsrichtlinien vor deutschen Gerichten ' [2017] 7(1) Eucrim 50.

(3) At no stage of the proceedings may defence counsel be refused inspection of records drawn up of the examination of the accused or of such judicial investigatory acts to which defence counsel was or should have been admitted, nor may he be refused inspection of expert opinions.
(4) An accused who has no defence counsel shall be authorised, applying subsections (1) to (3) accordingly, to inspect the files and to view, under supervision, items of evidence in official custody insofar as the purpose of the investigation even in other criminal proceedings cannot be endangered thereby and the overriding interests of third parties meriting protection do not constitute an obstacle thereto.[...]
(5) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in all other cases, the presiding judge of the court seized of the case shall be competent to decide. If the public prosecution office refuses inspection of the files after noting the termination of the investigations in the file, if it refuses inspection pursuant to subsection (3) or if the accused is not at liberty, a decision by the court competent pursuant to section 162 may be applied for. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply accordingly. These decisions shall be given without reasons if their disclosure might jeopardise the purpose of the investigation.
(6) If the reason for refusing inspection of the files has not already ceased to exist, the public prosecution office shall revoke the order no later than upon conclusion of the investigations. Defence counsel or an accused who has no defence counsel shall be notified as soon as he once again has the unrestricted right to inspect the files.

Subsections 1 to 3 concern the right of access to documents for the defence counsel, Subsection 4 stipulates the right of the undefended suspect to inspect the files and refers substantially to the provisions of subsection 1 to 3. The general right of access to the file is laid down in subsection 1 for the defence counsel and in subsection 3 for the suspect. Subsection 2 sentence 1 and subsection 4 sentence 1 contain significant restrictions of the aforementioned right as long as the public prosecutor's office has not yet noted the conclusion of its investigations in the files (for further details see below). From that moment on and thus before the charge is brought and the merits of the accusation are submitted to the judgment of court according to Art. 7 (3) of the Directive, the accused or his defence lawyer must be granted unrestricted access to the file. The other requirement in Art. 7 (3) with regard to safeguarding an effective exercise of the rights of the defence has no equivalent in German law. This seems innocuous in principle since access to the file is to be granted, unless reasons for its restriction, which are to a large extent also laid down in the Directive (see below), are given (for further details see the commentary on Art. 7 (1) of the Directive).

The obligation laid down in Article 7 (3) 2 of the Directive to grant the defendant and/or his counsel access to evidence obtained after access to the file has already been granted is not explicitly laid down by law. However, the right of access to the file may be exercised repeatedly without giving reasons. In addition, the BGH derives from the right to a fair trial guaranteed in Art. 6 (1) ECHR in conjunction with section 147 CCP an obligation of the court of first instance to inform the accused and his defence counsel when new investigation results are available in the main proceedings, thereby giving them the opportunity to take note of them.[21]

[21] BGH 5 StR 200/05, decision of 11/08/2005, NStZ 2006, 115, 116; 1 StR 145/17, decision of 10/05/2017, NStZ 2017, 549.

7.1.2.4.2 Restrictions of the aforementioned right

German law makes differentiated use of the possibilities for restricting the right of access to the file which Article 7 (4) of the Directive allows.

The risk of a prejudice to an ongoing investigation is recognised as a reason to limit the right of access to the files of both the defence counsel and the undefended suspect, section 147 (2) 1, (4) 1 CCP (for further details see the commentary on Art. 7 (4) of the Directive in the transposition table). For the benefit of private interests, only the right of the accused to inspect files can be confined. But the respective grounds for restriction under German law are broader than the reason given in the directive: According to the legislator, 'the overriding interests of third parties meriting protection' also include the protection of privacy of third parties, the protection of at-risk witnesses as well as of company and business secrets[22] and go far beyond a serious threat to the life or the fundamental rights of another person.

In order to protect other interests approved by Art. 7 (4) of the Directive, information can be excluded from the investigation file. This concerns information on witness protection measures pursuant to section 2 (3) 2 of the Act on Harmonization of the Protection of Witnesses at Risk and in accordance with Recital 33 of the Directive. The same applies to material that has been blocked pursuant to section 96 CCP because the risk of a serious harm to the national security and the interest in the continued use of an undercover investigator or pursuant to section 110b (3) 1, 3 CCP because of a risk for the life, limb or liberty of the undercover investigator or of another person and the public interest in the continued use of the undercover investigator (for further details see the commentary on Art. 7 (4) of the Directive and section 96 CCP in the transposition table).

What German law is missing, however, is the proviso that the retention of the materials must not curtail the right to a fair trial**.** Such explicit reservations with regard to procedural fairness are generally not found in German law. In view of the fact that comprehensive inspection of files is to be granted at the latest when the charges are brought and that completely blocked evidence pursuant to section 96 CCP may not be used in the proceedings, it seems rather rare that a refusal to grant inspection of files in accordance with the provisions impairs the fairness of the proceedings. Nevertheless, especially with regard to the use on the identity of undercover investigators, this is a reason to assume only partial implementation.

7.1.2.4.3 Exceptions to the restrictions explained above

Section 147 (2) 2 and (3) contain two exceptions to the aforementioned restriction of access to the file. Where the suspect is in pre-trial detention or his provisional arrest has been applied for, information essential for the assessment of the legality of his detention shall be provided, normally by way of access to the file, subsection 2 sentence 2. The requirements of Art. 7 (1) of the Directive

[22] Legislative materials, BT-Drs. 14/1484, p. 22

on the right of the arrested and detained person to access the materials of the case are therefore satisfied. In addition, access may not be denied to minutes of the accused's questioning and of such judicial acts of investigation in which the defence counsel has been or should have been allowed to be present, nor to the opinions of experts, subsection 3.

7.1.2.5 Verifications and remedies in accordance with Art. 8 of the Directive

According to sections 168, 16a, 168b CCP, the essential formalities of interrogations, which include instructions prescribed by law, are to be recorded. Section 114b (1) 4 CCP generally requires the accused's written confirmation of his instructions. The failure to provide information and the refusal of access to the file by the prosecuting authorities themselves can be challenged only to a limited extent, cf. section 147 (5) 2 CCP. In contrast, the exception to the right to inspect files, due to a risk to the purpose of the investigation, which is particularly important in practice, is not subject to review. There is also the possibility of an appeal, which in principle is only successful if the judgment is based on the violation of the law, section 337 CCP (for further details see the commentary on Art. 7 (2) of the Directive). The possibilities for challenge correspond to those in the case of other comparable errors, as indicated in Recital 36.

7.2 Case-law

7.2.1 Key decisions

BGH, Urteil vom 26. April 2017 – 2 StR 247/16 –

During his first interrogation, the suspect was not informed that he had already been under investigation for some time in the course of another investigative procedure for further offences, so that the secret investigations against other suspects could be continued. When addressing the question of whether the instruction was therefore insufficient, the BGH argued that the accusation did not have to be fully disclosed to the suspect, but only 'in broad outlines to such an extent that the suspect can defend himself properly, but not so far as to impair the establishment of the facts and thus the effectiveness of the prosecution'. Nor would it be necessary to disclose all the results of the investigation. In this respect, the person questioning was granted a certain scope of assessment.

BGH, Beschluss vom 06. Februar 2018 – 2 StR 163/17 –

In violation of section 136 (1) 3 half-sentence 2 CCP old version (now: section 136 (1) 5 half-sentence 2 CCP), the accused was not informed during his police questioning that a public defender can be appointed to him under the conditions of section 140 (1), (2) CCP. The BGH found that this did not result in an exclusion of the following statement of the accused as evidence. The corresponding duty to instruct was not of the same importance as the one under section 136 (1) 2 CCP on the general possibility of consulting with defence counsel.

BGH, Beschluss vom 03. April 2019 – StB 5/19 –
The BGH had to decide on a complaint against an arrest warrant which the investigating judge at the BGH had issued against the suspect but which had not yet been executed. The suspect's defence counsel was denied access to the files pursuant to section 147 (2) 1 CCP, on the grounds that the purpose of the investigation was endangered. The BGH considered the refusal to allow inspection of the files to be lawful. Until a suspected person is arrested, the purpose of the investigation would be jeopardised and thus the interest of the prosecuting authorities in withholding investigative knowledge from the suspect would be particularly high.

BGH, Beschluss vom 06. Juni 2019 – StB 14/19 –
The suspect was questioned as a witness, stating facts that made his participation in the acts on which he was questioned appear possible. However, the interrogators then did not inform him of his rights as a suspect pursuant to section 136 (1) 2 in conjunction with section 163a (4) 2 CCP, but only his right to refuse to give information as a witness pursuant to section 55 CCP.
The BGH regarded this as an inadmissible withholding of the status of a suspected person and thus as a breach of the duties to provide corresponding instructions, leading to an exclusion of the following statements as evidence. The court refers to its consistent case-law that the criminal prosecution authorities are in principle entitled to a scope of assessment as to whether the suspicion of a crime reaches such a degree that questioning the person as a suspect is required. However, this scope for assessment was arbitrarily exceeded if it proves to be unjustifiable to deny a strong suspicion of a crime that induces the obligation to provide information under section 136 (1) sentence 2 CCP.

BGH, Beschluss vom 17. Juli 2019 – 5 StR 195/19 –
The accused was initially heard as a witness. Since the suspicion against him was corroborated during the interrogation, the interrogation was interrupted for the purpose of a telephone call with the public prosecutor's office. During the break, the accused stated to the interrogator who remained with him that he may have inadvertently caused the fire which was the subject of the proceedings. After a brief continuation of the interrogation as a witness, the accused was then informed of his rights as a suspect and arrested.
The BGH stated that the use of the statement as evidence would be legally unobjectionable if the police officer had not questioned him specifically, but had only passively received a spontaneous statement, even if the interrogators had failed to inform the accused of his rights as a suspect in the course of the interrogation.

7.2.2 Critical analysis of the case-law

Referrals to the ECJ show that national courts are selectively aware of possible discrepancies between the requirements of the Directive and national law. Otherwise, it is once again apparent that the courts are guided only by national law and the legislative will, without recourse to the Directive. This

appears to be less of a concern in the case of this Directive, as the rights it lays down had to a large extent already been laid down in German law and, for the rest, were widely implemented.

8 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

8.1 Legislation

Directive 2013/48/EU has been implemented into German law by the Second Act on Strengthening the Procedural Rights of Defendants in Criminal Proceedings (Zweites Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren)[23] on 27 August 2017. The German legislator was of the opinion that German Law already met most requirements laid down in the Directive.[24] Accordingly, only minor changes were made to German law, whereas most of Directive was considered to be de facto implemented. The following analysis will give a brief overview on the German implementation of the Directive on an article-by-article basis.

Art. 1 and Art. 2 of the Directive were not explicitly transposed, because their content on when protection of this right begins and ends and who should have this right are already well-respected in German Law. It should be noted, however, that there is no definition of "suspect" in the Code of Criminal Procedure. Nor is there an explicit rule on under which circumstances witnesses become suspects. Nonetheless, the applicable principles are established by case law and comply with the requirements of the Directive. Explicit transposition was therefore not necessary.

8.1.1 Art. 3 – Right of access to a lawyer

Art. 3 of the Directive is the central guarantee on the right of access to a lawyer. Even before the Directive came into force, German law allowed access to a lawyer for suspects at any stage of the criminal proceedings, including those indicated in Art. 3 (2) Directive 2013/48/EU. This principle is laid down in section 137 (1) CCP:

> **Section 137 Accused's right to assistance of defence counsel**
> (1) The accused may avail himself of the assistance of defence counsel at any stage of the proceedings. No more than three defence counsel may be chosen.

Art. 3 (3) of the Directive gives a more detailed description of the lawyer's rights to participate. Art. 3 (3) lit. a refers to the right to communicate with the lawyer. This right was also already accepted in section 148 (1) CCP and thus not directly implemented.

> **Section 148 Accused's communications with defence counsel**

[23] Bundesgesetzblatt – BGBl. (Federal Law Gazette), 2017 I, 3295.
[24] BT-Drs. 18/9534, p. 1.

(1) The accused shall be entitled to communicate with defence counsel in writing as well as orally even when he is not at liberty.

This provision is understood to be an all-encompassing guarantee of confidentiality. If confidentiality is guaranteed even in case of imprisonment, this means, a fortiori, that it is also guaranteed for persons who are at liberty.

Art. 3 (3) lit. b establishes an obligation to allow for the presence and participation of the lawyer during an interrogation. While the right of the defence lawyer to be present in interrogations by the judge and the public prosecutor was established in German law before the Directive, the right to be present in interrogations by police officers was not guaranteed by German law. Accordingly, in implementing the Directive, section 163a (4) CCP was changed and refers, now, to section 168c (1) CCP which allows the presence and participation of a lawyer in judicial interrogations. A new provision on the record was added in section 168b (2) CCP.

Section 163a Examination of accused
(4) The accused shall be informed of the offence with which he is charged when he is first examined by police officers. In all other respects, section 136 (1) sentences 2 to 6 and (2) and (3) and section 136a shall apply to the examination of the accused by police officers. Section 168c (1) and (5) shall apply accordingly to defence counsel.
Section 168b Record of investigating authorities' investigatory acts
(1) The result of investigatory acts of the investigating authorities shall be included in the record.
(2) The examination of the accused, witnesses and experts shall be recorded pursuant to sections 168 and 168a insofar as this can be done without considerably delaying the investigations. If no record is made of the accused's examination, the fact that his defence counsel participated in the examination shall be documented.
Section 168c Right to be present during judicial examination
(1) The public prosecutor and defence counsel shall be permitted to be present during the judicial examination of the accused. Following the examination, they shall be given the opportunity to comment or to ask the accused questions. Questions or statements which are inappropriate or of no relevance to the matter may be rejected.

It has been argued in literature that the possibility to ask questions "following the examination", which means after the interrogation, does not constitute effective participation.[25] However, so far, there have been no complaints to the courts, which probably means that lawyers can ask questions during longer interrogations in practice, although the law is not entirely clear in this respect.

Art. 3 (3) lit. c deals with specific investigative measures: identity parades, confrontations and reconstructions of the scene of crime. Both identity parades and confrontations are covered by section 58 (2) CCP, which was introduced in order to implement the Directive.

Section 58 Examination; confrontation

[25] Anne Schneider, 'Richtlinie 2013/38/EU – III D 18' in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß and Nikolaos Gazeas (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (40th installment December 2016, C.F.Müller), margin note 97.

(2) A confrontation with other witnesses or with the accused in the preliminary investigation shall be admissible if this appears necessary for the further proceedings. Defence counsel shall be permitted to be present during a confrontation with the accused. He is to be given prior notice of the date set down for the confrontation. He shall not be entitled to have the date postponed on account of his being prevented from attending.

Although section 58 CCP applies to the confrontation of several witnesses, too, the right to have access to a lawyer is only granted for confrontations in which the accused takes part. This is, however, not in breach of the Directive. There are no special provisions on reconstructions of the crime scene in German law. Accordingly, this investigative measure falls within the scope of sections 161, 163 CCP which allows the police authorities to take every measure necessary for investigating a crime. Presence of the lawyer is neither specifically provided, nor forbidden. However, if the reconstruction is used to ask questions of the defendant, the rules on examination apply, i.e. section 168c (1) CCP. Therefore, a special rule was rightly not deemed necessary by the legislator.
Art. 3 (4) deals with finding a lawyer. The German legislator has included provisions on supporting the suspect in finding a lawyer in section 136 CCP, which is the general rule on the examination of the suspect. The authorities have to facilitate contacting a lawyer by providing relevant information and pointing out emergency legal services. Sentences 4 and 5 were introduced in order to transpose the Directive.

Section 136 First examination
(1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges or not to make any statement on the charges and the right, at any stage, even prior to his examination, to consult defence counsel of his choice. If the accused wishes to consult defence counsel prior to his examination, he shall be provided with information which makes it easier for him to be able to contact such defence counsel. Reference is thereby to be made to any emergency legal services which are available. He shall, further, be advised that he may request evidence to be taken in his defence and, under the conditions of section 140, apply for the appointment of defence counsel in accordance with section 141 (1) and section 142 (1); in the latter case, reference shall be made to the resulting costs referred to in section 465. In appropriate cases, the accused shall also be informed that he may make a written statement and of the possibility of victim–offender mediation.

The rights on access to a lawyer apply regardless of whether the suspect or accused person is imprisoned or at liberty. E.g., section 148 CCP explicitly guarantees confidentiality of the lawyer-client conversation in case of imprisonment.
Art. 3 (5, 6) of the Directive limit possible derogations from the right of access to a lawyer. There are no derogations in German law that fall within the scope of Art. 3 (5). However, in some cases it is possible to restrict access to a lawyer by means of sections 31 ff. EGGVG (Introductory Law on the Court Constitution Act), which is a derogation in the sense of Art. 3 (6). This so-called "Kontaktsperre" (contact ban) applies to suspects of terrorism and was, indeed, introduced after lawyers had been found to smuggle notes between persons imprisoned on suspicion of terrorism.

Before the Directive was implemented, it was possible to introduce such a contact ban for communication with a lawyer in the trial phase. As Art. 3 (6) restricts exceptions to the pre-trial phase, the law had to be changed. Section 31 (1) sentence 5 EGGVG now makes clear that confidential communication with a lawyer is still possible (section 148 CCP). Section 31 (2) EGGVG specifies that people who have not been criminally charged and those who have been finally convicted can be subject to a contact ban, including communication with a lawyer. The first are in the pre-trial phase where the Directive allows for exceptions. The latter are not covered by the scope of the Directive.

> **Section 31 EGVGV**[26]
> (1) […] Section 148 CCP remains untouched.
> (2) The declaration of a contact ban in the sense of para. 1 can include the oral and written communication with a lawyer for prisoners who have not yet been indicted or who have been finally convicted.

Generally, the threshold for declaring a contact ban is high. There must be immediate danger for life, body and freedom of a person, caused by a terrorist organisation, and the contact ban must be necessary to prevent the danger from manifesting (section 31 (1) EGGVG). Moreover, the declaration becomes invalid after 30 days (section 36 EGGVG). If contact to a lawyer is banned, the person receives another lawyer as contact person (section 34a EGGVG). The requirements of Art. 3 (6), 8 (1) of the Directive are in principle met by the new rules. However, one might wonder whether 30 days are not a rather long time for such a contact ban to be valid.[27]

8.1.2 Art. 4 – Confidentiality

Section 148 CCP is, as has already been stated, the general rule guaranteeing confidentiality between the defendant and his or her lawyer. The scope of the right laid down in section 148 (1) CCP is identical to Art. 4 of the Directive and can, therefore, be regarded as indirect implementation. This is because this right was in existence long before the Directive. The German legislator saw no need to implement Art. 4 further.
However, this assessment is not completely correct. Section 148 (2) CCP provides an exception in terrorist cases: communication is only allowed if the person agrees to having the communication checked by the court.

> **Section 148 Accused's communications with defence counsel**
> (1) The accused shall be entitled to communicate with defence counsel in writing as well as orally even when he is not at liberty.

[26] Translation by Anne Schneider.
[27] Anne Schneider, 'Richtlinie 2013/38/EU – III D 18' in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß and Nikolaos Gazeas (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (40th installment December 2016, C.F.Müller), margin note 98.

> (2) If an accused who is not at liberty is strongly suspected of having committed an offence under section 129a, also in conjunction with section 129b (1), of the Criminal Code, the court shall order that in communications with defence counsel any papers or other items shall be rejected if the sender does not agree to their being first submitted to the court competent pursuant to section 148a. If no warrant of arrest has been issued for an offence under section 129a, also in conjunction with section 129b (1), of the Criminal Code, the decision shall be given by the court which would be competent to issue a warrant of arrest. If the written correspondence referred to in sentence 1 is subject to surveillance, devices which rule out the possibility of handing over papers and other items shall be put in place in respect of conversations with defence counsel.

Such an exception to confidentiality was hinted at in Recital 33 of the Directive, but it was removed from the text of Art. 4. This means that Art. 4 does not allow for exceptions. Accordingly, section 148 (2) CCP is in breach of Art. 4 and therefore not applicable.[28]
Another problematic constellation is the case that the lawyer is suspected to be involved in the crime. Again, Recital 33 claims that this might be a reason for an exception to the confidentiality rights, but Art. 4 does not allow for one. Here, the solution must be to exclude the lawyer as such, which ends confidentiality rights.
Art. 4 makes clear that confidentiality must be guaranteed no matter how communication takes place. Section 148 CCP is interpreted in the same way. However, German Law knows several specific investigative measures, e.g. for search and seizure, telecommunication surveillance, IT surveillance etc. Some of these have special rules on the protection of privileged witnesses, which includes defence lawyers. Sometimes, these special rules offer less protection than section 148 CCP. This is especially true for section 97 CCP, the privilege from seizure. According to the wording of section 97 CCP, written communication between the defendant and his or her lawyer is excluded from seizure, but only if the lawyer is in possession of the communication. It is generally accepted that communication must also be protected if it is possessed by the defendant by means of applying section 148 CCP, but this is not written down in the law and might be difficult to figure out for people who are not familiar with German Criminal Procedure Law. In this respect, the implementation is not transparent.[29]

8.1.3 Art. 5, 6 and 7 – Information and communication in case of detention

Art. 5 (1) contains the right to have a third person informed of detention. This right was already recognized for custody in section 114c CCP. This provision is referred to in other provisions on detention such as section 127 (4) CCP (provisional arrest), section 127b (1) sentence 2 CCP

[28] Anne Schneider, 'Richtlinie 2013/38/EU – III D 18' in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß and Nikolaos Gazeas (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (40th installment December 2016, C.F.Müller), margin note 67.

[29] Anne Schneider, 'Richtlinie 2013/38/EU – III D 18' in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß and Nikolaos Gazeas (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (40th installment December 2016, C.F.Müller), margin note 99; Anne Schneider, *Strafprozessuale Ermittlungsmaßnahmen und Zeugnisverweigerungsrechte* (Mohr Siebeck, 2020 – not yet published) 398 f.

(provisional arrest and accelerated proceedings) and section 163c (1) sentence 3 CCP (deprivation of liberty to establish identity). Explicit transposition was therefore not necessary.

Section 114c Notification of relatives
(1) An arrested accused shall be given the opportunity without delay to notify a relative or a person trusted by him, provided the purpose of the investigation is not significantly endangered thereby.
(2) If detention is enforced against the arrested accused after he is brought before the court, the court shall order that one of his relatives or a person trusted by him be notified without delay. The same duty shall exist in respect of every further decision on the continuation of detention.

Art. 5 (2) deals with the information rights of juvenile offenders. This provision was explicitly transposed in section 67a Youth Courts Act, the law on juvenile offenders. Art. 5 (3, 4) are implemented in section 67a (3, 4). The implementation meets the requirements of the Directive.

Section 67a Youth Courts Act Notification in case of deprivation of liberty
(1) If notification of the suspected or accused person is necessary, the juvenile's parent of guardian and the legal representative shall be informed.
(2) The information that the juvenile is to receive under section 70a must also be addressed to the parent or guardian and the legal representative. In the case of the juvenile being deprived of his liberty, the parent or guardian and the legal representative shall be informed of the deprivation of liberty and of the reasons therefor as soon as possible.
(3) The notification or information of the parent or guardian and of the legal representative foreseen in para. 1 and 2 may be omitted
1. subject to the provisos of section 67, subsection 4, first and second sentences insofar as such notification would cause concern with regard to a considerable endangerment of the child's best interests,
2. insofar as the purpose of the examination would be considerably endangered thereby or
3. if neither the parent or guardian nor the legal representative can be reached.
(4) If neither the parent or guardian nor the legal representative is notified, another adult individual who is suited to protect the interests of the juvenile shall be notified. The opportunity is to be afforded to the juvenile prior to this to name an adult individual enjoying his trust. Such an adult can also be the member of the youth courts assistance service responsible for the juvenile.

German law has provisions on communication of the defendant while he or she is under arrest. According to section 114c CCP, the relatives must be notified (see above). There is also a general provision on custody in section 119 CCP. Although this provision deals with exceptions from the right to confidential communication, it implies that such a right exists. Section 119 CCP also contains several exceptions under which surveillance of communication is possible. These are based on the reasons why the person was taken into custody (e.g. risk of flight). Because the purpose is clear in the law and conversation about the case is excluded from surveillance in section 119 (4) CCP, the exceptions comply with Art. 6 (2) of the Directive.

Section 119 CCP Restrictions during remand detention relating to grounds for arrest[30]

[30] Abbreviated version. For the full version of section 119 CCP, see transposition table to Directive

(1) Insofar as necessary to avert the risk of flight, suppression of evidence or repetition (sections 112 and 112a), restrictions may be imposed upon a detained accused. In particular, an order may be made that
1. visitation and telecommunications shall be subject to permission,
2. visitation, telecommunications, correspondence and parcels shall be monitored,
[…]
(2) Implementation of the order shall be incumbent upon the authority making the order. The court may revocably transfer the implementation of orders to the public prosecution office, which may avail itself of the services of its investigators and the penal institution in effecting such implementation. The transfer shall not be contestable.
(3) Where the surveillance of telecommunications has been ordered pursuant to subsection (1) sentence 2 no. 2, the persons with whom the accused is communicating shall be informed of the intended surveillance immediately after the connection has been established. The information may be given by the accused himself. The accused shall be advised in good time prior to the commencement of telecommunications of the duty to so inform.
(4) Sections 148 and 148a shall remain unaffected. […]

The rights in Art. 7 (1, 2) are contained in Art. Art. 7 (3) lit. c, 36 (1) lit. a and b of the Vienna Convention on Consular relations. The Vienna Convention on Consular Relations was ratified by the German legislator in 1969.[31] Since then, it has been the basis for regulating the rights of the consulate. Art. 7 of the Directive is based on Art. 6 VCCR. It has long been recognized by the German Constitutional Court that Art. 36 VCCR must be taken into account in German criminal proceedings.[32] An obligation to inform the defendant was contained in section 114b (2) sentence 4 CCP: "A foreign national shall be advised that he may demand notification of the consular representation of his home state and have messages communicated to the same." Accordingly, the German legislator did not consider it necessary to include a national obligation in the law.

8.1.4 Art. 8 and 9 – Derogations and Waiver

Art. 8 of the Directive states general requirements for exceptions under Art. 3 (5, 6) and Art. 5 (3). According to the legislator, these requirements are met by the few specific exceptions contained in German law. As has been explained above, one might wonder whether a contact ban of 30 days is always proportionate. Nonetheless, the CCA allows for a shorter ban and, therefore, could comply with the law. Apart from that, there is no indication that Art. 8 has been violated by German law.
Art. 9 of the Directive contains rules on a waiver of rights. German law does not provide a formal waiver of rights. The defendant can freely decide whether he or she wants to have access to a lawyer and change his or her mind at any time (notwithstanding the law on mandatory assistance by a lawyer). This complies with the Directive.

20^3/48/EU.

[31] Gesetz zu dem Wiener Übereinkommen vom 24. April 1963 über konsularische Beziehungen vom 26. August 1969, BGBl. 1969 II S. 1585.

[32] See, e.g. BVerfG (Federal Constitutional Court), order of 5.11.2013 – 2 BvR 1579/11, NJW 2014, 532.

8.1.5 Art. 10 – European Arrest Warrant

The general right of access to a lawyer in extradition proceedings is contained in section 40 of the Act on International Cooperation in Criminal Matters (IRG). This right is referred to by section 78 (1) IRG, which deals with the European Arrest Warrant.

> **Section 40 IRG - Legal Counsel**
> (1) The person sought may at any time during the proceedings have the assistance of counsel.

A person that is deprived of liberty following the execution of a European Arrest Warrant must be brought before a court without delay. The judge is obliged to inform the person of his or her right to have access to a lawyer at any time during the surrender proceedings. The Act on International Cooperation in Criminal Matters does not elaborate on the relationship between the lawyer and the person sought. However, section 77 (1) IRG refers to the rules in the Code of Criminal Procedure that have been explained above, in particular section 148 (1) CCP.
In order to implement the requirement in Art. 10 (4) of the Directive, a new provision was introduced in section 83c (2) IRG for cases in which Germany is the executing state. If Germany is the issuing state, there must be a criminal investigation, which means that section 137 CCP applies. Therefore, there would be a right to have access to a lawyer under the CCP. The legislator also introduced an obligation to inform the foreign authorities of the request for a lawyer in the issuing state in Art. 156a RiVASt. All in all, the transposition is sufficient.

> **Section 83c Procedure and time limits**
> (2) The person sought must be informed without delay about his right to have a lawyer appointed in the issuing Member State.

8.1.6 Art. 12 – Remedies

A violation of the right of access to a lawyer can be challenged before German courts in different ways, depending on the context in which the violation occurred. Most common is the approach to have evidence gathered in breach of this right not admitted in trial. If a violation of criminal procedure law has occurred during the gathering of the evidence, the courts must assess whether this violation leads to a prohibition to use this evidence in trial ("Beweisverwertungsverbot"). This means that not all violations lead to an exclusion of evidence. The same approach can be used in case of an appeal on points of law (section 337 (1) CCP). In some cases, e.g., surveillance of communications of persons deprived of liberty or European Arrest Warrant, there are special complaints possible (section 119 (5) CCP, section 23 IRG). Considering that the standard for legal remedies required by the Directive is low, the German legislator rightly assumed that no further transposition was necessary.

8.2 Case-law

There have only been few cases dealing with the right of access to a lawyer after Directive 2013/48/EU has been transposed. In several cases, courts pointed out that the status of "suspect" does not require formal notification.[33] In another case, the Federal Financial Court emphasized that Directive 2013/48/EU did not apply to witnesses in tax proceedings.[34] The OLG Bremen decided that there was no special appointment fee for a lawyer who appeared in the first judicial hearing at the Local Court after the person sought had been arrested.[35] This reasoning was based on the fact that the German legislator did not make changes to section 40 IRG in transposing Directive 2013/48/EU, meaning that the status quo ante in the matter of lawyer's fees should still be valid.

Two cases merit further discussion: In a case that was decided by the BGH[36], the defendant was interrogated by police officers. After having been informed of his right to contact a lawyer, the defendant asked for a specific lawyer to be contacted. After contacting the lawyer had failed, the interrogation was continued. The Court had to decide whether the defendant's statement could be admitted as evidence. The first question was whether the police officers breached the law by failing to point at the emergency legal service (section 136 (1) sentence 4 CCP). This argument was rejected by the Court because the defendant had named a specific lawyer whom he wanted to contact, while the advice about the emergency legal service was aimed at defendants who did not know whom to contact. However, the Court held that it was wrong of the police officers to go on interrogating the defendant without asking his consent for continuing the interrogation without the defendant having consulted a lawyer.[37] This behaviour could give the wrong impression to the defendant that the right to consult a lawyer had been forfeited after the failure to contact the lawyer. Evidence gathered that way is, in principle, not admitted in court.

Another decision by the Higher Regional Court Bremen deals with the role of lawyers in the issuing state in surrender proceedings.[38] The Court stressed that the procedural role of the lawyer in the issuing state was exclusively governed by that state's law.[39] The fact that, according to the Directive, the role of this lawyer was to merely assist the lawyer in the executing state by providing information and advice showed that the EU legislator saw no need to introduce special rights for the lawyer in the issuing state. Accordingly, access to the file was denied to this lawyer. Nor was he granted an

[33] LG Detmold, order of 06.03.2020 –23 Qs 22 Js 258/20 - 31/20, juris; LG Detmold BeckRS 2020, 10898; LG Magdeburg BeckRS 2020, 21147.
[34] BFH (Federal Financial Court) BeckRS 2019, 17633.
[35] OLG Bremen BeckRS 2018, 24597.
[36] BGH BeckRS 2019, 14505.
[37] BGH BeckRS 2019, 14505 margin no. 10.
[38] OLG Bremen NStZ 2018, 383.
[39] OLG Bremen NStZ 2018, 383 (384).

extension of the deadline for the submission of comments on the case. However, the lawyer in the executing (German) state could get an extension of the deadline in order to assure that there was enough time to get advice and information from the lawyer in the issuing state. This decision clearly shows the flaws of the Directive: By not providing clear guarantees for transnational proceedings, the rights might easily be undermined in cases of international cooperation.[40]

[40] Martin Böse, Maria Bröcker and Anne Schneider, 'Recommendations' in Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer 2020) 438 f.

9 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

9.1 Legislation

This Directive was transposed by the Law on Improving procedural guarantees of the defendant in criminal proceedings of juveniles ("Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren") on 9 December 2019.[41] German law already had a special law on juvenile defendants in criminal proceedings, the Youth Courts Act ("Jugendgerichtsgesetz"), which was changed by the transposition law.

Art. 1 and 2 of the Directive did not require explicit transposition because the Youth Courts Act already applied to criminal proceedings that fell within the scope of the Directive.[42] German law even goes beyond what is required: While the Directive focuses on the defendant's age at the time of the beginning of criminal proceedings (Art. 2 (3)), the German Youth Courts Act applies according to section 1(1) YCA when a person was a juvenile or young adult at the time of the criminal act. This means that later majority during criminal proceedings does not deprive the juvenile of the special guarantees for child offenders. This means that even the reaching of the age of majority before criminal proceedings are initiated does not change the applicability of the Youth Courts Act.

9.1.1 Art. 3 – Definitions

In German law, a juvenile is a person that has reached 14, but not yet 18 years (see section 1 (2) YCA). This fits with the definition of "child" in Art. 3 (1) of the Directive. Pursuant to Art. 2 (5), there is no need to grant rights to all children, i.e. even those younger than 14, because these children are not criminally responsible and, therefore, have no need for procedural guarantees.

> **Section 1 YCA - Scope as to persons and substantive scope**
> (1) This Act shall apply if a juvenile or young adult engages in misconduct punishable under the provisions of general law.
> (2) "Juvenile" shall mean anyone who, at the time of the act, has reached the age of fourteen but not yet eighteen years; "young adult" shall mean anyone who, at the time of the act, has reached the age of eighteen but not yet twenty-one years.
> (3) Where it is uncertain whether a person has reached the age of 18, the procedural rules for juveniles will be applied.

Prior to the Directive, it had been debated in German law whether the in dubio pro reo principle applied to procedural law in cases in which it is unclear if a person is a juvenile or young adult or

[41] BGBl. 2019 I, 2146.
[42] For details, see the transposition table on Directive 2016/800/EU on the website.

not.[43] Implementing Art. 3 (1) of the Directive, the legislator has added a provision in section 1 (3) YCA that explicitly states that the procedural rules for juveniles apply if it is unclear whether the person was 18 or younger. Section 1 (3) YCA only applies to procedural guarantees, not to substantive law. The reason given was that the Directive does not cover substantive criminal law. Although it is true that the Directive does not intend to harmonize substantive criminal law, the distinction between criminal law and criminal procedure law can be difficult to make. This might become problematic in the future. However, the consequences of uncertainty in substantive criminal law are clear - the in dubio pro reo principle applies. This does not necessarily mean that juvenile law applies. It has been pointed out in literature that the sanctions under juvenile law might be harsher than under adult law.[44] There is no equivalent provision for young adults, which are persons between 18 and 21 of age who can, under certain circumstances, be treated like juvenile offenders. If it is uncertain whether the defendant was 20 or 21, the dispute therefore remains. However, the Directive focuses only on the age of 18, not on 21. Accordingly, the German law is not in breach of the Directive.

9.1.2 Art. 4 – Right to information

Although German criminal procedure law, which is applicable in juvenile criminal proceedings according to section 2 (2) YCA, provides several rights to information, changes were necessary in order to implement the catalogue in Art. 4 of the Directive. Accordingly, the legislator has introduced section 70a YCA. Section 70a YCA is a long and complicated provision that aims at implementing the equally complex regulation in Art. 4 of the Directive. It also refers to other instruction rights in section 70b YCA, sections 114b, 168b (3) CCP.[45] It has been criticized in literature that there is a high risk of juveniles being overwhelmed by the amount of information that has to be given practically at first contact with the police.[46] However, this criticism must be directed at the European legislator and Art. 4 (1) of the Directive. The German transposition is adequate.

Section 70a YCA – Information of the juvenile[47]

(1) If the juvenile is informed that he is accused, he must be informed immediately of the main features of a juvenile justice process. He will also be informed immediately of the next steps in the proceedings against him, provided that the purpose of the investigation is not jeopardized. The juvenile must also be informed immediately that:

1. in accordance with Section 67a, the legal guardians and the legal representatives or another suitable adult must be informed,

[43] See the references in BT-Drs. 19/13837 (proposal for the law implementing the Directive), p. 20.
[44] Ulrich Eisenberg and Ralf Kölbel, *Jugendgerichtsgesetz* (21st ed. 2020), § 1 margin no. 32.
[45] For details on these provisions, see the transposition table.
[46] Stefanie Bock, 'Schutz von Kindern und Jugendlichen im europäisierten Strafverfahren: Zur Kinderrechtsrichtlinie der EU und ihrer Umsetzung ins deutsche Recht' [2019} StV 508, 511; Ulrich Eisenberg and Ralf Kölbel, *Jugendgerichtsgesetz* (21st ed. 2020), § 70a margin no. 4.
[47] Translation by Anne Schneider.

2. in the case of mandatory defence (Section 68), in accordance with Section 141 of the Code of Criminal Procedure and Section 68a, he can request the participation of a defence lawyer and in accordance with Section 70c (4) the postponement or interruption of his interrogation for a reasonable time,
3. in accordance with Section 48, the trial before the trial court is principally not public and that he can request the exclusion of the public or of individual persons under certain conditions in an exceptionally public main hearing,
4. he can, pursuant to Section 70c Paragraph 2 Sentence 4 of this Act in conjunction with Section 58a Paragraph 2 Sentence 6 and Paragraph 3 Sentence 1 of the Code of Criminal Procedure, object to the provision of a copy of the recording of his interrogation in pictures and sound to the persons authorized to inspect the files and that the provision of the Recording or the release of copies to other places requires his consent,
5. he can be accompanied by his legal guardians and his legal representatives or another suitable adult in accordance with Section 67 (3) in investigative acts,
6. he can request a review of the measures and decisions concerned because of a suspected violation of his rights by one of the authorities involved or by the court.

(2) Insofar as this is important in the procedure or as soon as this becomes important in the procedure, the juvenile must also be informed as early as possible about the following:

1. the consideration of his personal circumstances and needs in the process in accordance with sections 38, 43 and 46a,
2. the right to a medical examination which he is entitled to in accordance with the state law or the law of the federal police in the event of the temporary deprivation of liberty and the right to medical assistance, if it turns out that such assistance is required during this deprivation of liberty,
3. the application of the principle of proportionality in the event of the temporary deprivation of freedom, in particular
4. the primacy of other measures that may serve the purpose of deprivation of liberty,
5. limitation of deprivation of liberty to the shortest reasonable period of time and
6. taking into account the special burdens of deprivation of liberty with regard to its age and level of development as well as taking into account another special protection value,
7. the other measures that are generally considered to prevent detention in suitable cases,
8. the mandatory ex officio checks in detention matters,
9. the right to the presence of legal guardians and legal representatives or another suitable adult in the main hearing,
10. his right to and his duty to be present at the main hearing in accordance with section 50 paragraph 1 and section 51 paragraph 1.

(3) If pre-trial detention is carried out against the juvenile, he must also be informed that

1. in accordance with Section 89c, it must be accommodated separately from adults,
2. in accordance with the enforcement laws of the federal states
3. care for his health, physical and mental development,
4. to guarantee his right to education,

5. his right to family life and the possibility of meeting his legal guardians and legal representatives must be guaranteed,
6. ensuring access to programs and measures to promote its development and reintegration, and
7. freedom of religion and belief is to be guaranteed.

(4) In the event of a temporary deprivation of liberty other than pre-trial detention, the juvenile must be informed of his or her rights under paragraph 3 number 2, and in the case of police detention also of his right to separate accommodation from adults in accordance with the relevant provisions.
(5) Section 70b of this Act and Section 168b paragraph 3 of the Code of Criminal Procedure apply accordingly.
(6) If an arrested juvenile is given written instructions in accordance with Section 114b of the Code of Criminal Procedure, this must also include the additional information specified in this paragraph.
(7) Other information and instruction obligations remain unaffected by the provisions of this paragraph.

9.1.3 Art. 5 – Parental responsibility

The concept of parental responsibility is well-known in German law. Nonetheless, the Directive required explicit transposition. The information of the holder of parental responsibility (Art. 5 (1) of the Directive has been included in section 67a (1, 2) YCA, the rules on exceptions (Art. 5 (2)) in section 67a (3, 4) YCA, Art. 5 (3) of the Directive in section 67a (5) YCA. The German law complies with the Directive and can be considered sufficient transposition.

Section 67a YCA – Notification of legal guardians and legal representatives[48]
(1) If notification to the accused is required, the corresponding notification should be sent to the legal guardian and the legal representative.
(2) The information that the juvenile has to receive in accordance with § 70a must also be given to the legal guardians and the legal representatives as soon as possible. If the juvenile is temporarily deprived of his liberty, the legal guardians and the legal representatives must be informed as soon as possible about the deprivation of liberty and the reasons for this.
(3) Notifications and information according to paragraphs 1 and 2 to legal guardians and legal representatives are omitted, insofar

1. on the basis of the information, a considerable impairment of the well-being of the young person would have to be taken care of, in particular if the life, body or freedom of the young person is endangered or if the requirements of section 67 (4) sentence 1 or 2 are met,
2. based on the information the purpose of the investigation would be significantly jeopardized or
3. Legal guardians or legal representatives cannot be reached within a reasonable period of time.

(4) If, according to paragraph 3, neither legal guardians nor legal representatives are informed, another adult who is suitable for the protection of the interests of the juvenile must be informed. The juvenile should be given the opportunity to designate an adult of his or her trust. Another suitable adult can also be the representative of the juvenile justice service responsible for the care of the juvenile in the juvenile justice system.
(5) If there are no longer any reasons for which notifications and information pursuant to subsection 3 are no longer required, the notifications and information required in the further procedure must also be sent to the legal guardians and

[48] Translation by Anne Schneider.

legal representatives concerned. In this case, they will also subsequently receive notifications and information that the juvenile has already received in accordance with Section 70a, insofar as these remain important in the course of the procedure or as soon as they become important.
(6) For the permanent withdrawal of the rights according to paragraphs 1 and 2, the procedure according to § 67 paragraph 4 applies accordingly.

9.1.4 Art. 6 – Assistance by a lawyer

The YCA refers to the rules of the CCP, so the right of access to a lawyer as provided for criminal defendants in general applies to juvenile defendants, too (see supra chapter 8). However, Art. 6 (2) of the Directive requires the Member States to make sure that children are assisted by a lawyer. This is understood to mean that mandatory defence is required.[49] The same is true for Art. 6 (3), which provides assistance by a lawyer at certain points in time. In German literature, it has indeed been argued that this is the general principle that the Directive follows and that German law (i.e. section 140 (2) CCP) must be interpreted that way.[50]
Nonetheless, there is no provision in German law claiming that children must always be assisted by a lawyer. Section 68 YCA does prescribe mandatory defence in more cases than for adults, but there is no general rule on mandatory defence for children. In this respect, the implementation seems to be insufficient.

Section 68 – Mandatory Defence[51]

A case of necessary defence exists if

1. there would be a case of necessary defence in the trial against an adult,
2. the legal guardians and legal representatives are deprived of their rights under this Act,
3. the legal guardians and legal representatives have been excluded from the negotiation in accordance with Section 51 (2) and the impairment in exercising their rights is not sufficiently compensated for by subsequent information (Section 51 (4) sentence 2) or the presence of another suitable adult can be,
4. for the preparation of an opinion on the level of development of the accused (§ 73) his placement in an institution comes into question or
5. the imposition of a youth sentence, the suspension of a youth sentence or the ordering of placement in a psychiatric hospital or in a detention center are expected.

[49] BT-Drs. 19/13837, p. 24; Stefanie Bock, 'Schutz von Kindern und Jugendlichen im europäisierten Strafverfahren: Zur Kinderrechtsrichtlinie der EU und ihrer Umsetzung ins deutsche Recht' [2019] StV 508, 513.
[50] Stefanie Bock, 'Schutz von Kindern und Jugendlichen im europäisierten Strafverfahren: Zur Kinderrechtsrichtlinie der EU und ihrer Umsetzung ins deutsche Recht' [2019] StV 508, 513.
[51] Translation by Anne Schneider.

Art. 6 (3) of the Directive is similar to Art. 3 (3) of Directive 2013/48/EU (supra 8.1.1). However, the rights in this Directive go beyond the other Directives by demanding the assistance of a lawyer for children at these points in time.[52] Therefore, the legislator created section 68a YCA. Section 68a (1) sentence 1 YCA explicitly states that the juvenile must be assisted by a lawyer before an examination or confrontation, which includes crime scene reconstruction. This right is also important for Art. 6 (4) of the Directive. Again, the right under German law is dependent on their being a need for mandatory defence under section 68 YCA.

> **Section 68a – Point in time for mandating the lawyer[53]**
> (1) In the case of necessary defence, the juvenile who does not yet have a defence lawyer is appointed a mandatory defence lawyer at the latest before an interrogation of the youth or a comparison with him is carried out. This does not apply if there is a case of mandatory defence solely because the juvenile is charged with a felony, a dispensing of criminal prosecution according to section 45 paragraph 2 or 3 is to be expected and the appointment of a public defence attorney at the point of time mentioned in sentence 1 would also be disproportionate, taking into account the well-being of the young person and the circumstances of the individual case.

Art. 6 (4, 5) are also similar to Art. 3 and 4 of Directive 2013/48/EU. This means that the same problems can be found here (supra 8.1.1, 8.1.2). Considering that Art. 6 (3) basically requires legal assistance for all child suspects, it is understandable that Art. 6 (6) of the Directive allows for derogation. In German law, there are two possible derogations to consider: a derogation from the need to have legal assistance and the derogation from the point in time at which legal assistance is necessary.

It has already been pointed out that the Directive assumes, as a rule, that juveniles will have a defender. Only in cases that are not complex, concern rather minor criminal offences and less severe sanctions is a derogation possible if it is in the child's best interest. German law follows the contrary approach. According to section 140 (2) CCP, mandatory defence is reserved for complex cases with severe consequences and rather serious criminal offences (felonies always require mandatory defence). This difference in approach does not render German law incompatible with the Directive. However, it will require section 140 (2) CCP to be interpreted more broadly when juveniles are concerned.
Section 68a (1) sentence 2 YCA also contains a specific clause on derogation from the requirement to appoint a lawyer before examination or confrontation. The threshold for derogation is rather high: the only reason for mandatory defence must be the nature of the crime (felony, minimum sanction one-year imprisonment), dispensing with criminal prosecution is expected and the appointment of a lawyer would be disproportionate. Although it might sound odd to dispense with prosecution of a

[52] For details, see the transposition table on Art. 6 on the crossjustice website.
[53] Translation by Anne Schneider.

felony, these cases are common in juvenile law because robbery, a felony, is a typical juvenile crime due to the broad definition of robbery in German law. Another derogation can be found in section 2 (2) YCA, section 141 (2) sentence 3 CCP which applies to mandatory defence because of being placed in an institution and expected non-prosecution.

Art. 6 subparagraph 2 of the Directive also requires the child's assistance by a lawyer if deprivation of liberty might be imposed as a sanction. This requirement has been transposed in section 68 No. 5 YCA: Mandatory defence is necessary if "the imposition of a youth sentence, the suspension of a youth sentence or the ordering of placement in a psychiatric hospital or in a detention center are expected." However, the transposition is not complete. Juvenile law knows - beside the youth sentence, which is a prison sentence - another sanction that deprives the juvenile of liberty, so-called "youth detention" ("Jugendarrest", see section 16 YCA). Because youth detention is a deprivation of liberty, it should have been included in the catalogue of section 68 No. 5 YCA.[54]

The German legislator also decided to make use of the possibility to provide an exception to mandatory defence in section 68b YCA. This provision copies Art. 6 (8) of the Directive. Still, it has been criticized in German literature as being too vague.[55] Moreover, the rule only applies to mandatory defence attorneys, not chosen defence attorneys, which is in breach of the Directive (see the commentary of Art. 4 Directive 2016/1919/EU, infra 10.1.2). Altogether, Art. 6 has only partially been implemented into German law.

Section 68b - Interrogation and confrontation before appointment of legal counsel[56]

In deviation from Section 68a (1), the juvenile may be interviewed or confronted with other defendants or witnesses before the appointment of a legal counsel in the preliminary proceedings, provided that this also takes into account the well-being of the juvenile

1. to urgently avert serious adverse effects on life or limb or the freedom of a person or
2. immediate action by law enforcement agencies is imperative to avert a significant threat to criminal proceedings related to a serious crime.

The juvenile's right to ask a defence lawyer to be elected at any time, even before the questioning, remains unaffected.

9.1.5 Art. 7 and 8 – Individual asssessment and medical examination

Art. 7 deals with the individual assessment of the child. German law already had similar rules, according to which the individual assessment is undertaken by the youth court assistance service (section 38 YCA). There were only minor changes necessary in order to clarify the service's tasks.[57]

[54] Stefanie Bock, 'Schutz von Kindern und Jugendlichen im europäisierten Strafverfahren: Zur Kinderrechtsrichtlinie der EU und ihrer Umsetzung ins deutsche Recht' [2019] StV 508, 513 fn. 68.

[55] Stefanie Bock, 'Schutz von Kindern und Jugendlichen im europäisierten Strafverfahren: Zur Kinderrechtsrichtlinie der EU und ihrer Umsetzung ins deutsche Recht' [2019] StV 508, 513.

[56] Translation by Anne Schneider.

[57] For details, see the transposition table for Art. 7 on the crossjustice website.

Derogation (see Art. 7 (9)) is possible in the pre-trial phase if a dispensing of proceedings is likely. It is also possible for the youth court assistance service not to attend the trial. However, complete derogation in case of an indictment would be contrary to the interests of the juvenile and is not allowed.[58]

Art. 8, which is about medical examination, did not require many changes of the law, either. Medical examinations were possible before the Directive came into force. However, it should be noted that medical examination of prisoners is the competence of the Länder. Although it was already the rule in German law to take medical examinations into account when assessing the capacity to stand trial, section 70 (3) YCA was added to stress this point and make the law more transparent.

> **Section 70 - Notifications**
> (3) In the event of the temporary deprivation of liberty of the juvenile, the depriving authorities shall inform the juvenile public prosecutor's office and the juvenile court ex officio of information they have obtained on the basis of a medical examination, insofar as this gives rise to doubts as to whether the juvenile is fit to stand trial or is able to cope with certain investigative acts or measures. Otherwise, Section 114e of the Code of Criminal Procedure remains unaffected.

9.1.6 Art. 9 – Audiovisual recording

Before the Directive, German law allowed for audio-visual recording of interrogations of children under the circumstances laid down in sections 136 (4), 58a (1) CCP. However, the rules were considered to be not flexible enough, which is why section 70c (2) YCA was created. The legislator decided to oblige the enforcement authorities to record a non-judicial interrogation audio-visually, if the presence of a lawyer is required and the lawyer is not present. This means that audio-visual recording is only obligatory in case of mandatory defence, i.e. when the lawyer who should attend the interrogation is not there. According to section 136 (4) CCP, there is also an obligation to audio-visually record the interrogation in homicide cases and in cases when the defendant is handicapped. A record should also be made if this serves the interests of juveniles better (section 58a (1) CCP). The legislator argues that the need for audio-visual recording is less if a lawyer is present, and that a lawyer should be present whenever the child is deprived of liberty.[59] Both statements are true. However, it seems too narrow to make audio-visual record obligatory in the case of mandatory defence only. Undefended juveniles might even need more support because they will not have a lawyer ask for the written record. Accordingly, audio-visual recording should be in the interest of juveniles without a lawyer (see section 58a (1) No. 2 CCP). With that caveat, German law complies with the requirements of Art. 9 of the Directive.

> **Section 70c YCA – Interrogation of the accused**

[58] BT-Drs. 19/13837, p. 31.
[59] BT-Drs. 19/13837, p. 34.

(1) The accused must be interrogated in a manner that takes into account his age and level of development and education.
(2) Outside of trial, the interrogation can be recorded in audio and video. Interrogations by other authorities than judges must be recorded in video and sound if, at the time of the interrogation, the involvement of a defence lawyer is necessary, but a defence lawyer is not present. Otherwise, Section 136 paragraph 4 sentence 2 of the Code of Criminal Procedure, also in conjunction with Section 163a paragraph 3 sentence 2 or Section 4 sentence 2 of the Code of Criminal Procedure, remains unaffected. If the interrogation is recorded in image and sound, Section 58a paragraphs 2 and 3 of the Code of Criminal Procedure apply accordingly.
(3) A recording in image and sound according to paragraph 2 does not affect the provisions of the Code of Criminal Procedure regarding the record of investigative acts. If an interrogation of the accused outside of trial is not recorded in video and sound, it must always be recorded in writing.
Section 58b CCP - Video and audio recording of examination
(1) A video and audio recording may be made of the examination of a witness. The examination shall, after evaluation of the relevant circumstances, be recorded and conducted as a judicial examination

1. if the interests meriting protection of persons under 18 years of age as well as of persons who as children or juveniles have been aggrieved by one of the offences under section 255a (2) can thus be better safeguarded or
2. if there is a concern that it will not be possible to examine the witness during the main hearing and the recording is required in order to establish the truth.

9.1.7 Art. 10-20 – Fundamental rights, European Arrest Warrant, Remedies and Training

The requirements laid down in Art. 10 to 20 of the Directive were mainly already respected in German law.[60] Most of the guarantees contained in Art. 10 ff. of the Directive can be found in the German Constitution. Only few rules required explicit transposition. For example, section 89c YCA was introduced to transpose some guarantees of Art. 12 into the YCA, although it must be noted that the organisation of prisons is the competence of the Länder, not of the Federal State. Art. 15 was in part transposed by section 51 (2, 6, 7) YCA. The rules on the European Arrest Warrant (Art. 17) are transposed by the general reference of the Act on International Cooperation in Criminal Matters to the Code of Criminal Procedure. The same is true for legal aid and remedies, which are governed by the CCP due to the YCA's general reference to this law.
One point might be of interest: Art. 20 (2) of the Directive obliges the Member States to ensure specific training of judges and prosecutors. This is also the standard in German law. However, there are also lay youth assessors ("Jugendschöffen") that are part of some of the youth courts. These are laypersons, i.e. persons without a qualification in law, that form part of the panel of judges and have full voting rights. Although these laypersons should also have appropriate training and experience for dealing with juvenile offenders, one might wonder whether these layjudges are qualified enough for the purpose of the Directive. Nonetheless, it is obvious that laypersons lack judicial qualification. That is the whole point of involving laypersons. Considering that the Directive explicitly respects the different organisation of the judiciary, the use of laypersons should not constitute a breach of the Directive.

[60] For details, see the transposition table of these articles on the crossjustice website.

Section 51 - Temporary exclusion of participants

(2) The chairman may also exclude legal guardians and legal representatives of the accused from the trial, provided

1. there are significant educational disadvantages, because there are fears that the discussion of the personal circumstances of the accused in their presence will make it considerably more difficult for the persons mentioned above and the juvenile justice service to cooperate in the implementation of expected juvenile court sanctions,
2. they are suspected of being involved in the defendant's misconduct, or if they are convicted of involvement,
3. there is a risk to the life, limb or freedom of the accused, a witness or another person or any other significant impairment to the well-being of the accused,
4. it is to be feared that their presence affects the ascertainment of the truth, or
5. circumstances from the personal life of a party to the proceedings, witnesses or injuries caused by an unlawful act, the discussion of which in their presence would violate interests worthy of protection, unless the interests of the legal guardians and legal representatives in the discussion of these circumstances prevail in their presence.

(6) If the legal guardians and the legal representatives are excluded for a not inconsiderable part of the main hearing, the chairperson must allow another person of legal age who is suitable for the protection of the interests of the juvenile to attend for the duration of their exclusion. The juvenile should be given the opportunity to designate an adult of his or her trust. The other suitable person present will be given the floor at the main hearing on request. If no other person is permitted to attend according to sentence 1, a representative of the youth welfare service responsible for the care of the juvenile in the juvenile justice procedure must be present.

(7) If no legal guardians or legal representatives are present at the main hearing because they could not be reached within a reasonable period of time, paragraph 6 shall apply accordingly.

Section 89c YCA - Enforcement of pre-trial detention

(1) As long as juveniles have not yet reached the age of 21 at the time of the crime, pre-trial detention is carried out in accordance with the provisions for the execution of pre-trial detention on young prisoners and, if possible, in the facilities provided for young prisoners. If the person concerned is 21, but not yet 24 when the arrest warrant is enforced, pre-trial detention can be carried out in accordance with these regulations and in these facilities.

(2) If the juvenile has not yet reached the age of 18, he may only be accommodated with young adult prisoners who have reached the age of 18 if accommodation together does not contradict his welfare. He may only be accommodated with prisoners who have reached the age of 24 if this serves their welfare.

(3) The decision according to paragraph 1 sentence 2 is made by the court. The institution intended for admission and the youth court assistance must be heard before the decision is made.

9.2 Case-law

There have only been few cases so far on the implementation of Directive 2016/800/EU. All of them concerned the question of mandatory defence for juveniles. After the deadline for transposing the Directive had expired on 11 June 2019, two courts pointed out that the Directive had become directly applicable and interpreted the right to mandatory defence accordingly. Therefore, a lawyer was appointed in the pre-trial phase[61] and in a case in which the defendant could be sentenced to a

[61] AG Freiburg BeckRS 2019, 19711.

probationary prison sentence[62], although German law originally would not have considered the cases to be ones of mandatory defence.

After the Directive had been implemented into German law, the LG Saarbrücken had to decide about mandatory defence in a case in which one defendant faced a prison sentence, the other not (see section 68 no. 5 YCA).[63] The possibility of a prison sentence led to jurisdiction of the juvenile lay assessor court. While the first defendant was granted mandatory defence, the second one was not. The reason was that, according to the court, section 68 YCA took precedence over the general rules on mandatory defence in the CCP (here section 140 (1) no. 1 CCP, see infra 10). Although section 68 no. 1 YCA refers to the CCP, this reference did not encompass the rule in section 140 (1) no. 1 CCP because section 68 no. 5 YCA was more special. The result was that the co-defendant could not have a mandatory lawyer appointed, although the trial took place before the juvenile lay assessor court (see section 68 no. 1 YCA, section 140 (1) no. 1 CCP).

After the co-defendant had immediately complained, this decision was overturned:[64] The reference to the rules on mandatory defence for adults in section 68 no. 1 YCA was clear. All potential proceedings before lay assessor courts were cases of mandatory defence. Section 68 no. 5 YCA did not take precedence over no. 1, but was an alternative option for cases of mandatory defence. Accordingly, the fact that the proceedings, actually, take place before the lay assessor court make the case one of mandatory defence. This decision shows that courts are struggling with the increase in mandatory defence cases, particularly in juvenile law, that is the result of Directive 2016/800/EU.

[62] LG Chemnitz StV 2019, 601.
[63] AG Saarbrücken BeckRS 2020, 2275.
[64] LG. Saarbrücken BeckRS 2020, 2274.

10Directive (EU) 2016/1919: Legal aid

10.1 Legislation

The Directive has been implemented by the Law on a new regulation of the rules on mandatory defence ("Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung") of 10 December 2019.[65] The main focus of the law were changes to the CCP.

Art. 1 and 2, dealing with the subject matter and the scope of the Directive, did not require many changes to German law. Only Art. 2 (1) lit. a of the Directive led to a broadening of the rules on mandatory defence for persons deprived of liberty in section 140 (1) No. 5, 6 CCP. Both Art. 1 and 2 have, therefore, been successfully transposed.

> **Section 140 – Mandatory defence**
> (1) The participation of defence counsel shall be mandatory if
> [...]
> 4.the defendant is brought before the court pursuant to sections 115, 115a, 128 (1) or 129 for a decision about remand detention or provisional placement
> 5.the defendant is in an institution based on judicial order or with the approval of the judge
> […]

10.1.1 Art. 3 – Definition

Art. 3 contains a definition of “legal aid” and, as such, does not require transposition. However, the definition gives rise to the question of whether "funding" means that the Member State has to pay all the costs of defence, regardless of the outcome of the criminal proceedings.

If that were the case, German law on mandatory defence would not comply with the Directive because the convicted person usually has to pay the costs (section 465 CCP). Although Recital 8 allows for the suspect to bear part of the costs, it has been argued in literature that the general rule in German law obliging the convicted person to pay all the costs is too severe and in breach of the Directive.[66] Others point out that the duty to pay the costs will not be enforced against people who lack the financial means to pay.[67]

[65] BGBl. 2019 I, 2128.

[66] Hans Meyer-Mews, ‘Umsetzung der EU-Richtlinie über Prozesskostenhilfe im Strafverfahren’ [2019] ZRP 5, 8.

[67] E.g. Reinhold Schlothauer and Ralf Neuhaus and Holger Matt and Dominik Brodowski, ‘Vorschlag für ein Gesetz zur Umsetzung der Richtlinie (EU) 2016/1919 betreffend Prozesskostenhilfe für Verdächtige und Beschuldigte in Strafverfahren’ [2018] HRRS 55, 62.

It should also be noted that the defendant is advised during the first examination that he or she will have to pay the costs of a lawyer in case of a conviction (section 136 (1) sentence 5 CCP). This instruction has been severely criticized in literature as having a derogatory effect, particularly, because it does not include the explanation that this obligation cannot be enforced if the convicted person is destitute.[68]. It has also been pointed out that the information that "right to mandatory defence might exist pursuant to section 140 CCP" is not helpful for someone who has not studied criminal law.[69]

Accordingly, it is doubtful whether the German concept of legal aid is conform to what is meant by the Directive. It remains to be seen whether this question will be brought before the ECJ any time soon.

10.1.2 Art. 4 – Legal aid in criminal proceedings

Art. 4 contains the crucial guarantee on legal aid in criminal proceedings. According to Art. 4 (2) of the Directive, the Member States are free to apply either a means test or a merits test. German law has always based the rules on mandatory defence purely on a merits test, and the legislator saw no need to change the existing system completely.

German law contains a list of cases in which mandatory defence is called for in section 140 (1) CCP. The requirements of No. 1 and 2 mean that all crimes that might lead to imprisonment of more than two years in the concrete case require mandatory defence. The same is true for cases in which provisional detention applies (No. 4, 5). The rules for juvenile defendants are even stricter (see section 68 YCA, supra 9.1.4). Apart from this, there is also an open clause for mandatory defence in section 140 (2) CCP that is modeled on Art. 4 (4) of the Directive. This clause can serve as a catch-all element to cover situations that are missing from the list of section 140 (1) CCP.

The initial proposal prepared by the Ministry intended to include cases in which more than one year of imprisonment was at stake. This number was not mentioned in the final version of the law. Considering that the idea was to implement jurisprudence by the ECtHR, it is a pity that the law is not more precise.[70] Nonetheless, section 140 (2) CCP is conform with Art. 4 (4) sentence 1 of the

[68] E.g. Hans Meyer-Mews, 'Umsetzung der EU-Richtlinie über Prozesskostenhilfe im Strafverfahren' [2019] ZRP 5, 8; Reinhold Schlothauer and Ralf Neuhaus and Holger Matt and Dominik Brodowski, 'Vorschlag für ein Gesetz zur Umsetzung der Richtlinie (EU) 2016/1919 betreffend Prozesskostenhilfe für Verdächtige und Beschuldigte in Strafverfahren' [2018] HRRS 55, 62; Reinhold Schlothauer, 'Europäische Prozesskostenhilfe und notwendige Verteidigung' [2018] StV 169, 171.

[69] Sven Schoeller, 'Das neue Recht der Pflichtverteidigung – richtlinienkonformer und praktikabler Prozesskostenhilfeersatz?' [2019] StV 190, 193.

[70] Sven Schoeller, 'Das neue Recht der Pflichtverteidigung – richtlinienkonformer und praktikabler Prozesskostenhilfeersatz?' [2019] StV 190, 193.

Directive. Moreover, it is recognized by case-law that mandatory defence is necessary if the actual sanction could be imprisonment of more than a year.

> **Section 140 CCP - Mandatory defence**[71]
> (1) The participation of defence counsel shall be mandatory if
> 1. the main hearing at first instance is held at the higher regional court, at the regional court or at the magistrate's court (professional judge and lay assessors);
> 2. the accused is charged with a serious criminal offence;
> 3. the proceedings may result in an order prohibiting the exercise of a profession;
> 4. the defendant is brought before the court pursuant to sections 115, 115a, 128 (1) or 129 for a decision about remand detention or provisional placement;
> 5.the defendant is in an institution based on judicial order or with the approval of the judge;
> 6. placement of the accused pursuant to section 81 is being considered for the purpose of preparing an opinion on his mental condition;
> 7. preventive detention is expected;
> 8. the previous defence counsel is excluded from participating in the proceedings by a decision;
> 9. a lawyer has been assigned to the aggrieved person pursuant to section 397a and section 406h (3) and (4).
> 10. in case of judicial examination, on account of the importance of the examination, it appears necessary for defence counsel to be involved in order to safeguard the rights of the accused.
> 11.the accused has a visual, speech or hearing impairment.
> (2) The participation of defence counsel shall be mandatory if the assistance of defence counsel appears necessary due to the severity of the offence, due to the severity of the sanction or due to the difficult factual or legal situation, or if it is evident that the accused cannot defend himself.

The German legislator has changed section 141 CCP in order to make it compatible with the requirements of Art. 4 (5) of the Directive. Nonetheless, in doing so, the system of mandatory defence was changed distinctly. Section 141 (1) CCP makes the appointment of a lawyer dependent on an application by the defendant. This is at odds with the paternalistic approach of the CCP to provide mandatory defence and also a useless formality because the authorities are obliged to grant the application.[72] In effect, the need for an application (which can be oral) might even prevent the effective use of a right. It has been pointed out in literature that the German implementation blends the right of access to a lawyer and the right to legal aid, thus rendering the former less effective than prescribed.[73]

Section 141 (2) CCP states a number of cases in which the lawyer must be appointed ex officio. These include the situations referred to by Art. 4 (4) lit. a, lit. b, in which the merits test must lead to legal aid according to the Directive. However, the German provision knows some exceptions to this rule: in case of an arrest warrant, an application by the defendant is required (section 141 (2) sentence 2

[71] Official translation with additional translations of changed paragraphs by Anne Schneider.
[72] Anke Müller-Jacobsen, 'Das neue Recht der notwendigen Verteidigung' [2020] NJW 575, 579.
[73] Albert Spitzer, 'Das Gesetz zur Neuregelung der notwendigen Verteidigung aus europarechtlicher Sicht' [2020] StV 418, 421.

CCP). It is also allowed to refrain from appointing a lawyer in case of placement in an institution (No. 2), if the proceedings will be dispensed with soon and no intrusive investigative measures were adopted. Moreover, No. 3 makes the appointment dependent on the ability to defend oneself, although the Directive uses the term "interests of justice" (Art. 4 (4)). These exceptions are commonly regarded to be contrary to the Directive in literature.[74]

Section 141 – Point in time for appointing a lawyer[75]
(1) In case of mandatory defence, a defence counsel shall be appointed by the court without delay for an indicted accused who has no defence counsel, if the accused applies for mandatory defence after he or she has been advised of this right. The application must be decided on before the examination of the accused or a confrontation takes place.
(2) Independent of an application, a defence counsel shall be appointed by the court for the accused who has no defence counsel in case of mandatory defence if

1. he or she has to appear before the court for the purpose of remand detention or provisional placement;
2. it becomes known that the indicted accused is in an institution based on judicial order or with the approval of a judge;
3. it is obvious in the pre-trial phase that the defendant will not be able to defend himself/herself, particularly in case of an examination or confrontation;
4. the defendant has been asked to give a declaration on the indictment order pursuant to section 201. If the need for mandatory defence arises later, the lawyer is appointed immediately.

If the appearance takes place in the cases of sentence 1 number 1 for the decision on the issuing of an arrest warrant according to § 127b paragraph 2 or on the enforcement of an arrest warrant according to § 230 paragraph 2 or § 329 paragraph 3, a mandatory defence lawyer is only appointed if the accused expressly applied for this after instruction. In the cases of sentence 1 numbers 2 and 3, the appointment may not be made if the intention is to terminate the proceedings as soon as possible and no further investigative acts other than obtaining register information or consulting judgments or files are to be carried out.

German law has introduced another exception to section 141 (2) CCP in a new section 141a CCP. This exception is based on Art. 3 (6) of Directive 2013/48/EU (supra 8.1.1). However, it has been rightly pointed out that exceptions under Art. 3 (6) must apply to both mandatory and elected defence, whereas section 141a only applies to mandatory defence.[76] Accordingly, this provision does not comply with the Directive.

Art. 141a CCP - Examinations and confrontations before appointing a lawyer[77]

[74] Hans Meyer-Mews, 'Umsetzung der EU-Richtlinie über Prozesskostenhilfe im Strafverfahren' [2019] ZRP 5, 6 f.; Anke Müller-Jacobsen, 'Das neue Recht der notwendigen Verteidigung' [2020] NJW 575, 576.
[75] Translation by Anne Schneider.
[76] Anke Müller-Jacobsen, 'Das neue Recht der notwendigen Verteidigung' [2020] NJW 575, 577; Sven Schoeller, 'Das neue Recht der Pflichtverteidigung – richtlinienkonformer und praktikabler Prozesskostenhilfeersatz?' [2019] StV 190, 195; Albert Spitzer, 'Das Gesetz zur Neuregelung der notwendigen Verteidigung aus europarechtlicher Sicht' [2020] StV 418, 422.
[77] Translation by Anne Schneider.

In the pre-trial phase, examinations of the accused or confrontations with the accused may be carried out prior to the appointment of a public defender, in deviation from section 141 paragraph 2 and, if the accused expressly agrees to this, also in deviation from section 141 paragraph 1, insofar as this is the case

1. is urgently required to ward off a present danger to life or body or for the freedom of a person, or
2. is imperative to avert a significant threat to criminal proceedings.

The accused's right to ask a defence lawyer to be elected at any time, even before the questioning, remains unaffected.

10.1.3 Art. 5 – European Arrest Warrant

For European Arrest Warrant proceedings, section 78 (1) IRG refers to the general rules on extradition, including section 40 IRG. Section 40 IRG has been changed in order to implement Art. 5 (1). If the person sought has been arrested, mandatory legal assistance is necessary (section 40 (2) IRG). If not, it can be necessary pursuant to section 40 (3) IRG. The defendant can apply for legal assistance, but in case of detention, a counsel must be appointed ex officio. Section 40 (8) IRG refers to the rules in the CCP, but not to the exceptions that might violate the Directive. Accordingly, the transposition has been more successful in the case of international cooperation. A similar provision has been added in section 53 IRG for the execution of foreign judgments, although this was not required by the Directive.

Section 40 IRG -Legal counsel

(1) Persons pursued may avail themselves of the services of legal counsel at any stage of the proceedings.

(2) Where persons pursued are arrested, they require the mandatory assistance of legal counsel in the extradition proceedings.

(3) Where persons pursued are not arrested, they require the mandatory assistance of legal counsel in the extradition proceedings if

1. the involvement of legal counsel appears necessary on account of the complexity of the factual or legal situation, in the case of proceedings pursuant to Part 8 Division 2 especially in the case of doubt as to whether the conditions of sections 80 and 81 no. 4 are met,
2. it is clear that they are not in a position to adequately exercise their rights themselves or
3. they are under the age of 18.

(4) If the mandatory assistance of legal counsel is required and the person pursued has not yet mandated legal counsel, then legal counsel is to be appointed for the person pursued upon application or ex officio. If the person pursued has no legal counsel, then, in the cases referred to in subsection (3) no. 1 and no. 2, upon disclosure of the request, the person pursued is to be instructed about the right to apply for legal counsel to be appointed.

(5) Legal counsel is appointed ex officio

1. in the case under subsection (2): without delay following arrest,
2. in the case under subsection (3) no. 3: without delay following disclosure of the request for extradition,
3. in the cases under subsection (3) no. 1 and no. 2: following disclosure of the request for extradition as soon as the conditions set out therein are met.

(6) It is for that court before which the person pursued is to be brought or would have to be brought to give a decision on the appointment. After an application is made pursuant to section 29 (1), it is for the competent higher regional court to give such a decision.

(7) The appointment ends once the person pursued is surrendered or once a final decision is given not to surrender the person pursued. The appointment encompasses procedures pursuant to section 33. If no decision declaring the extradition not to be permissible is given and the person in question is not surrendered, the appointment ends once the

public prosecution office at the higher regional court gives a decision not to surrender the person pursued. In the cases under subsection (3) no. 1 and no. 2, the appointment may be revoked if there is no longer a requirement for the mandatory assistance of legal counsel.
(8) The provisions of Book 1 Division 11 of the Code of Criminal Procedure, with the exception of sections 139, 140, 141 and 141a, section 142 (2) and (3), section 143 (1) and (2) sentences 2 to 4 and section 143a (3) apply accordingly. Sections 142 (7), 143 (3) and 143a (4) of the Code of Criminal Procedure apply accordingly, with the proviso that the decision on an immediate appeal (sofortige Beschwerde) is given by that court which is competent to give a decision on whether extradition is permissible. There is no right to contest decisions given by the higher regional court as per subsection (6) sentence 2 and subsection (7) sentence 4.

In implementing Art. 5 (2) of the Directive, the German legislator has added a provision for the situation that Germany has issued a European Arrest Warrant and a legal counsel in the issuing state is necessary (section 83j IRG). Although the requirements in section 83j (1) IRG comply with the rules of the Directive, it is hard to imagine a case in which a lawyer in the issuing state might not be necessary for effective access to justice. This is because the foundation of the European Arrest Warrant usually has to be challenged in the issuing state alone.[78] Be that as it may, in sum the German implementation of Art. 5 complies with the Directive.

Section 83j IRG – Legal counsel
(1) The mandatory assistance of legal counsel is required in proceedings to enforce a European Arrest Warrant for the purpose of prosecution if
1. the person pursued nominates legal counsel in the area of application of this Act to assist his or her legal counsel in the requested Member State and
2. the appointment of the additional legal counsel is necessary to guarantee the effective exercise of the person pursued's rights in the requested state.
(2) Where the mandatory assistance of legal counsel is required pursuant to subsection (1) and the person pursued does not yet have legal counsel in the area of application of this Act to assist his or her legal counsel in the requested Member State, legal counsel is to be appointed upon application or ex officio.
(3) It is for the court which issued the domestic arrest warrant giving rise to the European Arrest Warrant to make the appointment. After preferment of public charges, the decision lies with the president of the court before which the proceedings are pending.
(4) The appointment is, as a general rule, to be revoked if the conditions of subsection (1) are no longer met or the person pursued has been transferred.
(5) The provisions of Book 1 Division 11 of the Code of Criminal Procedure, with the exception of sections 139, 140, 141, 141a, 142 (2) and (3), 143 (1) and (2) sentences 2 to 4, 143a (3) and 144 apply accordingly.

10.1.4 Art. 6 – Granting decisions

The decision about mandatory defence is usually taken by the court, which is an independent authority (section 142 (1) CCP). Section 142 CCP was changed substantively when the Directive was

[78] Martin Böse, Maria Bröcker and Anne Schneider, 'Comparative Analysis' in Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer 2020) 368 ff.

implemented. In cases when time is of essence, the prosecution service can decide (section 142 (4) CCP) but needs to get judicial authorization within a week.
Art. 6 (2) is the reason why the German legislator decided to introduce a request for legal aid. Before, the decision to appoint a lawyer as mandatory defence lawyer had to be taken by the court ex officio. The defendant did not have a written right to ask for mandatory defence. The necessity of a written decision is laid down in section 34 CCP.
However, it has been pointed out in literature that the German legislator has wrongfully mixed the right of access to a lawyer and the right to legal aid because, under German law, a request is necessary for appointing a mandatory lawyer.[79] On the other hand, the right to be represented by a chosen lawyer is not affected; the defendant can have both chosen and mandatory lawyer. In this respect, it is hard to determine whether the required application is in breach of the Directive.

Section 142 CCP - Jurisdiction and appointment procedure[80]
(1) The accused's application pursuant to Section 141 (1), first sentence, must be submitted to the authorities or officers of the police service or to the public prosecutor's office before the indictment is brought. The public prosecutor shall submit it to the court for a decision without delay, provided that it does not proceed in accordance with paragraph 4. After the indictment has been brought, the accused's application must be submitted to the court responsible under paragraph 3 number 3.
(2) If a public defender is to be appointed to the accused in the preliminary proceedings pursuant to Section 141 (2) sentence 1 numbers 1 to 3, the public prosecutor's office will immediately submit an application to appoint a public defender to the accused, provided it does not proceed in accordance with paragraph 4.
(3) Decisions about the appointment are taken by
1. the district court in whose district the public prosecutor's office or its competent branch has its seat, or the competent court in accordance with section 162 (1) sentence 3;
2. in the cases under Section 140 (1) number 4, the court to which the accused is to be brought before;
3. after the indictment has been brought, the presiding judge of the court in which the proceedings are pending.

(4) In the case of particular urgency, the public prosecutor's office can also decide on the appointment. It immediately requests, at the latest within one week after her decision, the judicial confirmation of the appointment or the rejection of the accused's application. The accused can apply for a court decision at any time.
(5) Before the appointment of a public lawyer, the accused must be given the opportunity to designate a lawyer within a period to be determined. Section 136 paragraph 1 sentences 3 and 4 apply accordingly. A defence counsel appointed by the accused within the time limit must be appointed if there is no good reason against doing so; there is also an important reason if the defender is not available or is not available in time.
(6) If the accused is appointed a mandatory defence lawyer, whom he has not designated, he must be selected from the full list of the Federal Chamber of Lawyers (Section 31 of the Federal Lawyers' Act). From the lawyers registered there, either a specialist lawyer for criminal law or another lawyer who has indicated to the bar association that he is interested in taking over compulsory defence and is suitable for taking over the defence should be selected.

[79] Albert Spitzer, 'Das Gesetz zur Neuregelung der notwendigen Verteidigung aus europarechtlicher Sicht' [2020] StV 418, 421.
[80] Translation by Anne Schneider.

10.1.5 Art. 7 – Quality of legal aid

The legislator has insured the quality of the appointed lawyer in section 142 (5, 6) CCP. All German lawyers have studied criminal law as part of their first and second state exam and should therefore have at least basic knowledge of criminal defence. They also have to keep updated on legal developments. Priority is given to the lawyer chosen by the defendant, regardless of whether this person specializes in criminal law or not. This is in line with Art. 3 (1) of Directive 2013/48/EU and the ECtHR jurisprudence, both giving precedence to the chosen lawyer.

If the defendant does not suggest a specific lawyer, a lawyer is chosen who is either a specialist in criminal law ("Fachanwalt") or has indicated the will to take over mandatory defence and is suitable to do so. In practice, often the lawyers indicating that they like to take over mandatory defence want to specialize in criminal law but need to get more practical experience before they can apply. Nonetheless, this rule has been criticized for two reasons: First, the mere wish to undertake mandatory defence does not necessarily amount to the knowledge to do so in a qualified way.[81] Secondly, the court choosing the lawyer to appoint has to assess his or her suitability for defence, thus rendering the lawyer dependent from the judge.[82] It is unclear how the court is going to assess the suitability. Considering that the ECJ has recently refused to accept the independence of the German Prosecutor's Service in European Arrest Warrant proceedings, it could well be that a selection procedure that is dependent on the whim of the judge does not comply with Art. 7 (1) lit. b of the Directive. Insofar, the German law leaves something to be desired.

Section 143a CCP was introduced in order to establish a right by law to have the appointed lawyer changed in special circumstances. This is an improvement to the former law that only allowed for a change in limited cases, although there had been extensive jurisprudence. The courts have held that the principles that were developed by jurisprudence under the old law still apply.[83] However, it has been pointed out that the timeline of three weeks for changing the lawyer (section 143a (2) No. 1 CCP) is rather short. Often, three weeks do not even suffice for getting access to the file, which means that the public defender chosen cannot prove his or her qualities.[84] Therefore, a more flexible rule would have been better. Nonetheless, the German law has been fully transposed.

[81] Reinhold Schlothauer, 'Europäische Prozesskostenhilfe und notwendige Verteidigung' [2018] StV 169, 173; Sven Schoeller, 'Das neue Recht der Pflichtverteidigung – richtlinienkonformer und praktikabler Prozesskostenhilfeersatz?' [2019] StV 190, 198).

[82] Hans Meyer-Mews, 'Umsetzung der EU-Richtlinie über Prozesskostenhilfe im Strafverfahren' [2019] ZRP 5, 7] Reinhold Schlothauer, 'Europäische Prozesskostenhilfe und notwendige Verteidigung' [2018] StV 169, 174).

[83] BGH BeckRS 2020, 15343; BGH BeckRS 3030, 3631; LG Hamburg BeckRS 2020, 3149.

[84] Hans Meyer-Mews, 'Umsetzung der EU-Richtlinie über Prozesskostenhilfe im Strafverfahren' [2019] ZRP 5, 7; Müller-Jacobsen, NJW 2020, 575 [578]; Sven Schoeller, 'Das neue Recht der Pflichtverteidigung – richtlinienkonformer und praktikabler Prozesskostenhilfeersatz?' [2019] StV 190, 199).

Section 143a CCP - Revocation of lawyer appointment[85]

(1) The appointment of the mandatory defence lawyer shall be revoked if the accused has chosen another defence lawyer and the latter has accepted the election. This does not apply if there is concern that the new defence lawyer will soon resign and request his assignment as a mandatory defence lawyer, or if it is necessary to maintain the appointment for the reasons of § 144.

(2) The appointment of the public defender is to be canceled and a new public defender is to be appointed if

1. the accused, to whom a counsel other than the counsel designated by him within the period specified in Section 142 Paragraph 5 Clause 1 or to whom the counsel was selected was given only a short period of time, within three weeks of the announcement of the judicial decision on the appointment requests to appoint another defence lawyer whom he has designated and against whom there is no important reason;
2. the public defence lawyer appointed at a demonstration before the next judge in accordance with Section 115a requests that his assignment be canceled for good cause, in particular because of the unreasonable distance to the accused's future location; the application must be submitted immediately after the procedure pursuant to Section 115a has ended; or
3. the relationship of trust between the defence lawyer and the accused has been finally destroyed or for any other reason an adequate defence of the accused is not guaranteed.

In the cases of numbers 2 and 3, § 142 paragraphs 5 and 6 apply accordingly.

(3) For the appeal by law proceedings, the appointment of the previous legal counsel must be revoked and the accused must be appointed a new legal counsel designated by him if he requests this within one week after the start of the justification period for the revision and there is no important reason to oppose the appointment of the legal counsel. The application must be submitted to the court whose judgment is being challenged.

(4) Resolutions according to paragraphs 1 to 3 can be contested with the immediate appeal.

10.1.6 Art. 8 and 9 – Remedies and vulnerable persons

All decisions about mandatory defence are taken by the court and can be contested by immediate complaint ("sofortige Beschwerde", section 304 CCP, see, e.g. section 142 (7)). In urgent cases, the Public Prosecutor can take the decision instead of the court, but it must be validated by the court a couple of days later.

What is lacking is a rule on the admissibility of evidence that has been gathered in violation of this Directive. For example, it could happen that the accused is interrogated without having a lawyer present although it is a case of mandatory defence. In this case, the court would have to assess whether the violation of the law leads to the inadmissibility of this particular piece of evidence - a result which is by no means certain in German law.

Art. 9 has been transposed in section 140 (1) No. 11 CCP (supra 10.1.2): if a person with a visual, speech or hearing impairment applies for mandatory defence, the application will always be granted, regardless of the seriousness of the offence or other criteria.

[85] Translation by Anne Schneider.

10.2 Case-law

Although the expiration date was only in June 2019 and the German transposition law entered into force less than a year ago, there have already been numerous cases dealing with the interpretation of the Directive.

10.2.1 Decisions after expiration of the deadline and before transposition

Directly after the expiration of the deadline, the question arose whether the Directive could be applied directly. In the case in question, the Prosecution Service wanted to have a mandatory lawyer appointed for the defendant before his/her first examination based on Art. 4 (5) of the Directive. The BGH rejected this approach because the Directive was not clear and precise enough to be immediately applicable, particularly, because the Member States could choose whether they wanted to apply a means or a merits test.[86] This assessment was shared by another court.[87] However, the LG Chemnitz based the appointment of a lawyer on Art. 4 (4) Directive 2016/1919/EU, which amounts to direct application of the Directive, although the court did not explain the dogmatic background.[88] The Chamber Court ("Kammergericht Berlin") also considered the Directive to be directly applicable.[89]
The BGH also gave a statement on whether national law should be interpreted in light of the Directive ("richtlinienkonforme Auslegung"). This was – rather surprisingly – also rejected. The Court's reasoning is interesting: The Court points out that legal aid, meaning financial funding of legal representation, and mandatory defence as it was understood in German law are fundamentally different. While the former is granted in the interest of the defendant, the latter serves the interests of justice and is based on the principle of the rule of law. This is illustrated by the fact that mandatory defence is independent from financial need. According to the Court, the two approaches differ so much that an interpretation of German law by having recourse to the Directive was not possible. Only one court accepted this reasoning for the interpretation of national law.[90] The majority of courts did interpret national law referring to the Directive, e.g. in extradition cases[91] or when deciding on appointing a mandatory lawyer[92].

[86] BGH, order of 04.06.2019 - 1 BGs 170/19, available at Entscheidungen: Andere Gerichte: RiLI 2016/1919, Umsetzung, Anwendung im nationalen Recht / BGH, Beschl. v. 04.06.2019 - 1 BGs 170/19 - Burhoff online (last access on 30 November 2020). The court had jurisdiction in first instance because it was a case of espionage.
[87] LG Frankfurt BeckRS 2020, 7595.
[88] LG Chemnitz BeckRS 2019, 19698.
[89] KG BeckRS 2019, 18928.
[90] LG Frankfurt BeckRS 2020, 7595.
[91] OLG München BeckRS 2019, 12699; OLG München BeckRS 2019, 10914.
[92] AG Freiburg BeckRS 2019, 19711. See also LG Chemnitz BeckRS 2019, 19698.

The decision by the BGH is not convincing. Although it is correct that the Directive gives a lot of leeway to the legislator, some provisions are precise enough to be directly applicable. This is true for Art. 4 (5) of the Directive, which applies regardless of whether the Member State has chosen a means or a merits test and which is unambiguous. Even if the direct application of the Directive is rejected, the Court should have taken the Directive into consideration when interpreting national law. The Court makes a valid point in explaining that the German system of mandatory defence is far removed from classical legal aid. Indeed, most criticism in literature points out that the mixture of both systems leads to frictions and makes the law unnecessary complex (see supra 10.1.2). However, even under these circumstances, it would have been possible to take the Directive and its rules for merits tests into account when deciding on the appointment of a mandatory lawyer. This would not only have been desirable, but necessary under EU law.

10.2.2 Retroactive appointment of lawyers

Another problem is the question of whether a mandatory lawyer can be appointed retroactively, i.e. after the (investigative) proceedings have ended. Even before the transposition of the Directive, this question has been discussed controversially by the jurisprudence and is still under dispute in recent case-law.[93] While those in favour of retroactive appointment point out that it would be unfair to refuse the appointment if the decision about the defendant's application was delayed due to circumstances outside the defendant's responsibility, others stress that the purpose of mandatory defence is not to reduce costs but to provide adequate defence. If criminal proceedings have been ended, a defence is no longer necessary and, therefore, there is no reason to appoint a lawyer retroactively.

The debate is still ongoing. However, several courts have pointed out that a retroactive appointment in cases in which the defendant was not responsible for the delay would fit better with the purpose of the Directive and the German transposition law.[94] Another court rejected this argument by pointing out that the Directive required legal aid only in the "interest of justice" (Art. 4 (4)) and that justice

[93] See, e.g., in favour of retroactive appointment (under certain conditions) AG Duisburg BeckRS 2020, 14122; AG Berlin-Tiergarten BeckRS 2020, 14118; AG Berlin-Tiergarten BeckRS 2020, 18953; AG Ambeg, BeckRS 2020, 7655; AG Frankfurt a.M., order of 30.3.2020 - 3610 Js 242150/19 - 931 Gs, juris; LG Magdeburg BeckRS 2020, 2477; LG Mannheim BeckRS 2020, 4792; LG Passau BeckRS 2020, 7551; LG Bonn BeckRS 2020, 7166; LG Nürnberg-Fürth BeckRS 2020, 10878; LG Aurich BeckRS 2020, 10940; LG Hechingen BeckRS 2020, 14359; LG Frankenthal BeckRS 2020, 14117; LG Freiburg BeckRS 2020, 21745; against retroactive appointment LG Münster BeckRS 2019, 35906; LG Essen BeckRS 2020, 7596; OLG Hamburg BeckRS 2020, 27077.

[94] LG Mannheim BeckRS 2020, 4792; LG Passau BeckRS 2020, 7551; LG Bonn BeckRS 2020, 7166; LG Nürnberg-Fürth BeckRS 2020, 10878; LG Aurich BeckRS 2020, 10940; LG Hechingen BeckRS 2020, 14359.

could not be served after the criminal proceedings had been finally adjudicated.[95] However, the latter decision is not convincing. According to the Directive, the lawyer must be appointed without "undue delay" (Art. 4 (5)). National law must also provide an effective remedy against any breach of the rights in the Directive (Art. 8). If delaying a decision could render a remedy ineffective, as would be the result of the decision of the OLG Hamm, national law would be in breach of a Directive. In the case of the OLG Hamm, the court did not delay the decision; the application was rejected four days after it had been filed. However, the final decision on the defendant's appeal came during the seven day timeline for filing a legal remedy against the refusal to appoint a mandatory lawyer. The court's argument made this remedy less effective, thereby breaching the Directive.

10.2.3 Remedies

In one decision, the defendant had applied to have the appointment of the mandatory lawyer revoked because the relationship of trust between the defendant and the lawyer had been finally destroyed (section 143a (2) No. 3 CCP).[96] The court had granted the application and revoked the lawyer's mandate. The lawyer then filed a remedy against this decision (immediate complaint). The BGH held that the lawyer's immediate complaint was inadmissible because the decision to revoke the appointment did not concern the lawyer's rights. It also pointed out that Art. 8 of the Directive did not require the Member States to provide a legal remedy for the lawyer. This assessment is obviously correct and does not require further explanation.

[95] OLG Hamburg BeckRS 2020, 27077.
[96] BGH BeckRS 2020, 21490.

11 Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial

11.1 Legislation

11.1.1 Presumption of innocence

The only explicit formulation of the presumption of innocence in German law can be found in Art. 6 (2) of the ECHR. However, it is generally recognised that the presumption of innocence is also enshrined in the BL, especially in principle of the rule of law in Article 20 (3) BL[97] and presupposed in several provisions, particularly in the CCP. The national legislator therefore saw no need for implementation.[98] As a result, the details of these warranties are not explicitly specified. This has several disadvantages: Beyond the obvious essence of the guarantee, it might make the individual specifications appear less susceptible to change. Moreover, it could give rise to the risk that the addressees of the guarantees are not sufficiently aware of the requirements to be observed in their particular situation. Therefore, it is to be doubted that the respective guarantees as laid down in Chapter 2 of the Directive are implemented sufficiently clear and precise.[99] However, the warranties in the Directive are also the core area of the respective warranties in national law and also recognised in practice.

11.1.1.1 Implementation of Art. 3 – 5 of the Directive

As the Federal Constitutional Court ("Bundesverfassungsgericht") states, the presumption of innocence prohibits, in actual criminal proceedings, the imposition of measures on the accused which have the effect of imposing a punishment and treating the accused as guilty in procedural terms, without proof of guilt being established according to the rules of procedure; it also requires proof of guilt to be established in a final judgment before it can be generally invoked against the accused in legal proceedings.[100] The essence of the guarantee therefore concerns the treatment of the accused in criminal proceedings. But it must also be taken into account by other public authorities. The presumption of innocence therefore in accordance with Art. 4 (1) 1 alt. 1 of the Directive forbids

[97] BVerfGE 19, 342, 347 f.; 35, 311, 320; 74, 358, 369 ff.; 74, 358, 370; 82, 106, 118 ff.; 110, 1, 22 f.; 111, 307, 323 f; legislative materials, BR-Drucks. 384/18, p. 9.
[98] Legislative materials to the Act to Strengthen the Right of the Accused to Be Present at the Trial, BR-Drucks. 384/18, p. 9, BT-Drucks. 19/446, p. 9.
[99] See also Momme Buchholz, 'Die Selbstbelastungsfreiheit im Lichte der EU-Richtlinie 2016/343 vom 932016' [2018] 19(11) Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht 457.
[100] BVerfGE 35, 311, 320; 74, 358, 369 f.

statements by a public official concerning a person accused of a crime, that reflect the view that he or she is guilty before legal proof of guilt has been established.[101] The same results from Art. 6 (2) ECHR, as is apparent inter alia from the judgment of the ECtHR in El Kaada v. Germany. It is therefore fair to assume that Art. 4 (1) of the Directive is complied with. In accordance with Art. 4 (2) of the Directive, in cases of a violation of the presumption of innocence in criminal proceedings, the accused may challenge court decisions with the usual legal remedies, challenge the judge for fear of bias and file a constitutional complaint once all legal remedies have been exhausted (for further details see the respective commentary in the transposition table). If public communications by courts and authorities violate the presumption of innocence, the person concerned can take action before the administrative courts;[102] in addition, he may claim damages from official liability.[103] With regard to the implementation of Art. 4 (3) of the Directive and investigative measures explicitly addressed to the public, the publicity of the main trial and the media's right to information see the respective commentary in the transposition table.

No. 4a RiStBV instruct the public prosecutor not to unnecessarily expose the accused.

> **No. 4a Directives on criminal and administrative fine proceedings (RiStBV)**
> The public prosecutor avoids anything that could lead to an exposure of the accused that is not required by the purpose of the investigation. This applies in particular to correspondence with other authorities and persons. If the name of the accused or the crime he is accused of is not dispensable, it must be made clear that the accused is merely suspected of a crime.
> (translation by A.H. Albrecht)

This can be understood to also prohibit the presentation of a suspect as being guilty as laid down in Art. 5 (1) of the Directive. This should as well follow from the principle of proportionality that is constitutionally anchored in the principle of the rule of law and/or in the fundamental rights laid down in the BL. Certainly, German Law permits pre-trial detention as allowed for in Art. 5 (2) (for further details see the respective commentary in the transposition table).

11.1.1.2 Implementation of Art. 6 of the Directive

In accordance with Art. 6 (1) of the Directive, under German law the burden of proof lies with the state**:** During the investigative stage, the prosecution has to collect incriminating and exonerating evidence and in the main hearing, the court is obliged to establish the truth; the prerequisites of criminal liability and concrete punishment under section 261 CCP must be established to the persuasion of the court as required by Art. (6) 1, and doubts must always benefit the accused as laid down in Art. 6 (2) of the directive. Thus, according to the in dubio pro reo principle as enshrined in

[101] BGH, 1 StR 154/16, judgement of 7/09/2016, NJW 2016, 3670.
[102] BGH, 2 ArS 188/15, decision of 27/7/2017, StV 2018, 208.
[103] Legislative materials, BR-Drucks. 384/18.

the rule of law, Art. 20 (3) BL, doubts as to facts which cannot be resolved despite the exhaustion of all evidence, must in the application of substantive law be assessed only in favour of the accused (for further details see the commentary on Art. 6 (2) of the Directive in the transposition table).

11.1.1.3 Implementation of Art. 7 of the Directive

The principle of nemo tenetur se ipsum accusare, i.e. the right not to incriminate oneself as safeguarded by Art. 7 (2) of the Directive, is enshrined in the constitution, and is mostly referred to human dignity, the protection of which is guaranteed by Art. 1 (1) BL, or the right to informational self-determination (Recht auf informationelle Selbstbestimmung") under Art. 2 (1) in conjunction with Art. 1 (1) BL. It prohibits any compulsion on the suspect to actively incriminate himself. Compulsion to passively endure the taking of evidence, as allowed for in Art. 7 (3) of the Directive, remains permissible as well as – according to case-law – minor forms of deception which is not intended to circumvent the right against self-incrimination.
Its manifestation in the right to remain silent as laid down in Art. 7 (1) of the Directive is explicitly regulated in the CCP only for the situation of the examination of witnesses, section 55 CCP.

> **Section 55 CCP - Right to refuse to give information**
> (1) Any witness may refuse to answer any questions the reply to which would subject him or one of the relatives indicated in section 52 (1) to the risk of being prosecuted for an offence or a regulatory offence.
> (2) The witness shall be instructed as to his right to refuse to answer.

With regard to the questioning of the suspect, it is only presupposed, for example, by the fact that inter alia sections 136 (1) 2, 114b (2) Nr. 2 CCP (see above) require instructions on the right. Embodied in the right to remain silent is a ban to construe the accused complete silence to his disadvantage as stipulated by Art. 7 (5) of the directive, irrespective of whether he remains silent for the whole proceedings or only initially to later make a statement (for further details, especially the admissibility of unfavourable conclusions from a partial silence see the respective commentary in the transposition table).
German law takes into account cooperative behaviour by the accused when sentencing as permitted in Art. 7 (4) of the Directive via a crown witness leniency scheme in section 46b CC. Moreover, in practice, a confession is considered a mitigating circumstance and can be the subject of a negotiated agreement according to section 257c CCP which is roughly comparable to a plea bargain.
In accordance with Art. 7 (6), section 407 et seqq. CCP allow for written penalty order proceedings.

11.1.2 Right to be present at trial in criminal proceedings

11.1.2.1 Implementation of Art. 8 of the Directive

In order to adapt German law to the requirements of Article 8 of the Directive regarding the right to be present in criminal proceedings, the Act to Strengthen the Right of the Accused to Be Present at the Trial ("Gesetz zur Stärkung des Rechts des Angeklagten auf Anwesenheit in der Verhandlung",

BGBl I 2018, p. 2571, in force since 21 December 2018) was adopted. The changes to the previously applicable law were minor and therefore de facto/implicit transposition was assumed.

The right to be present as laid down in Art. 8 (1) is in German national law derived from the right to be heard as guaranteed in Art. 103 (1) BL and an element of a fair trial in accordance with Art. 6 (1), (3) ECHR. It is in principle established for hearings in all the instances of criminal proceedings as well as in administrative fine proceedings (section 73 (1) of the Act on Regulatory Offences).

At first instance, the principle of the presence of the accused is laid down in section 230 (1) CCP.

> **Section 230 (1) CCP - Defendant's failure to appear**
> No main hearing shall be held against a defendant who fails to appear.

The broadest and therefore most relevant exception is formulated in section 231 (2) CCP.

> **Section 231 CCP - Defendant's duty to be present**
> (1) A defendant who has appeared may not absent himself from the hearing. The presiding judge may take appropriate measures to prevent the defendant from absenting himself; he may also have the defendant kept in custody during any interruption of the hearing.
> (2) If the defendant nevertheless absents himself or fails to appear when an interrupted main hearing is resumed, the main hearing may be concluded in his absence if he has already been examined on the charges, the court does not consider his further presence to be necessary and he was informed in the summons that the main hearing may, in such cases, be concluded in his absence.

Since its amendment through the aforementioned Act in transposition of Article 8 (2)(a) of the Directive, it requires in addition to the absence of the defendant without sufficient excuse that the accused was informed in the summons that the main hearing may be concluded in his absence.

Article 8 (2)(a) also covers the exception to the right to be present in section 232 CCP.

> **Section 232 CCP - Conduct of hearing despite defendant's failure to appear**
> (1) The main hearing may be held in the defendant's absence if he was properly summoned and the summons referred to the fact that the hearing may take place in his absence and if only a fine of up to 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is to be expected. […]

An exception to the right of presence, which is based exclusively on representation by a defence lawyer, as is allowed for by Article 8 (2)(b), is not provided for regarding the hearing at first instance. However, representation by a lawyer, in particular pursuant to section 234 CCP, can lead to the fact that the accused's presence is no longer indispensable and a hearing in absentia therefore permissible under the prerequisites of the exceptions to the right of presence laid down in sections 231 (2) et seqq. CCP. It also establishes the compatibility of section 231a CCP, allowing for a hearing in absence, when the accused seeks to sabotage the proceedings by inducing himself into a state of inability to stand trial, with Article 8 of the Directive.

Section 231a CCP - Bringing about of unfitness to stand trial with intent
(1) If the defendant has intentionally and culpably placed himself in a condition which precludes his fitness to stand trial and if, as a result, he knowingly prevents the proper conduct or continuation of the main hearing in his presence, the main hearing shall, if he has not yet been heard on the charges, be conducted or continued in his absence, unless the court considers his presence to be indispensable. […]
(3) […] An immediate complaint against the decision shall be admissible; it shall have suspensive effect.
(4) Defence counsel shall be appointed for any defendant who is not represented by defence counsel as soon as a hearing in the absence of the defendant is being considered in accordance with subsection (1).

The exception to the right of presence because of disorderly conduct in section 231b CCP corresponds to Art. 8 (5) and one of the examples mentioned in Recital 40.

Section 231b CCP - Continuation after defendant's removal to maintain public order
(1) If the defendant is removed from the courtroom for disorderly conduct or arrested for disobedience to court orders (section 177 of the Courts Constitution Act), the hearing may be conducted in his absence if the court does not consider his further presence to be indispensable and as long as it is to be feared that the defendant's presence would be seriously detrimental to the progress of the main hearing. In any event, the defendant shall be given the opportunity to make a statement on the charges.

The same applies to the possibility to exclude the accused from the examination of witnesses according to section 247 sentence 1 CCP, whereas it is doubtful as to the possibility of exclusion under sentence 2 and 3 in the interest of the witness or of the accused himself (for further details on the exceptions to the right to be present see the commentary on Art. 8 (2), (5) of the Directive in the transposition table).

Section 247 CCP - Defendant's removal from courtroom during examination of co-defendants and witnesses
The court may order that the defendant leave the courtroom during an examination if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the defendant's presence. The same shall apply if, on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects if serious detriment to his health is to be

feared. As soon as the defendant is brought back into the courtroom, the presiding judge shall inform him of the essential content of the proceedings, including the testimony given, during his absence.

The aforementioned provisions apply accordingly to hearings at the appellate instance of review on the merits ("Berufungsinstanz"), section 332 CCP. Additionally, section 329 (2) CCP allows for a hearing in absence if the personal presence of the accused is dispensable. Since the accused must be informed of the consequences of his absence in the summons, the exception under Art. 8 (2)(a) of the Directive is fulfilled. As far as it requires representation by defence counsel with a documented power of attorney, the hearing in absentia is also permissible in accordance with Art. 8 (2)(b) of the Directive.
According to Section 350 (2) 1 CCP, the defendant is also entitled to appear in the main hearing of the appellate court after an appeal on points of law ("Revision").

Section 350 (2) CCP - Main hearing on appeal on points of law
(2) The defendant may appear at the main hearing or may be represented by defence counsel with a documented power of attorney. Where it is not necessary that defence counsel participate, the main hearing may also be conducted if neither the defendant nor defence counsel is present. It is within the discretion of the court to decide whether a defendant who is not at liberty is to be ordered to appear at the main hearing.

However, if he is indisposed, he has no right to a postponement of the date. If the accused is not at liberty, the court has a discretion whether or not to order him to appear to the main hearing according to sentence 3. This provision was amended by the Act to Strengthen the Right of the Accused to Be Present at the Trial as an explicit transposition of Art. 8 of the Directive. However, because of this discretion a sufficient implementation of Article 8 of the Directive, which provides for the unconditional guarantee of the right of presence, appears questionable. The legislator, nevertheless, considers that the provision is in conformity with the Directive and justifies this on the basis of a narrow interpretation of the concept of trial in Article 8 (1) of the Directive as hearings which may lead to a decision on the guilt or innocence of the accused, and thus only those before courts of fact; since the procedure on appeals on points of law is in principle limited to a legal review, this would not be covered.[104] This conclusion is to be doubted, since under section 354 CCP, the appellate court may, in exceptional cases, decide on the question of guilt and its decision may be of decisive importance for the accused, which is why he could have an interest worthy of protection in attending the hearing itself, even if it is only to decide on points of law (for further details see the commentary on Art. 8 (1) of the Directive, section 350 CCP in the transposition table.)

11.1.2.2 Implementation of Art. 9 of the Directive

Art. 9 of the Directive is to be considered to be fully implemented, since German law grants the right to a new trial if the preconditions of a hearing in absentia according the prerequisites of the Directive are not met. If the trial was held in the absence of the accused and his defence counsel

[104] Legislative materials, BT-Drs. 19/4667, p. 23 et seq.

pursuant to section 232 CCP, he may apply for a restoration of status quo ante pursuant to section 235 CCP. Apart from that, the right to a new trial is realised through appellate proceedings. If the first instance proceedings are held at the Local Court, the accused can appeal to the LG in accordance with section 312 CCP as a second factual instance ('Berufung'), where a new main hearing including the taking of evidence takes place. It is to be noted that, according to section 313 CCP, an appeal for petty offenses requires leave to appeal.
He may also appeal on points of law against first-instance judgements of the Local Court and judgements on appeal of the LG as well as first-instance judgments of the LG or the OLG, sections 333, 335 CCP. The deciding court will not conduct a fresh determination of the merits of the case, including examination of new evidence, but only examine whether the judgment is based on an infringement of rights according to sections 337, 338 CCP. If this is the case, the court will quash the judgement pursuant to section 353 CCP and as a rule refer the case back to a court of first instance according to section 353 (2) CCP, where a new hearing will be held. When the provisions on the presence of the accused are infringed, it is assumed that the judgment is based on the error, section 338 No. 5 CCP. (For further details see the commentary on Art. 9 of the Directive).

11.1.3 as to remedies

The remedies for violations of the right to be present in the main hearing have already been described under 11.2.2. Against all other judicial measures issued by a court at first instance or in appeal proceedings, the accused can file a complaint according to section 304 CCP. For a review of the legality of an investigative measure ordered by the public prosecutor's office or of the manner in which a judicial or non-judicial investigatory measure is carried out, the accused may submit an application for a court decision in accordance with section 98 (2) 2 CCP. (For further details see the commentary on Art. 10 (1) of the Directive.) Art. 10 (1) of the Directive is therefore considered to be fully implemented.
In cases of breaches of the right to remain silent or not to incriminate oneself, the rights of the defence and the fairness of proceedings are, as required by Art. 10 (2), respected via the exclusion of the use of the evidence concerned (see the commentary on Art. 7 (1) of the Directive)

11.2 Case-law

11.2.1 Key decisions

11.2.1.1 Presumption of innocence

BVerfG, Stattgebender Kammerbeschluss vom 11. April 2018 – 2 BvR 2601/17 –
The Federal Constitutional Court infers from the presumption of innocence that the deprivation of liberty before a final and absolute conviction (in this case: detention to secure presence during the pending trial) was only permissible in exceptional cases. The rights to personal freedom were to be

weighed against the interests of the prosecution in restricting freedom; the principle of proportionality was of decisive importance.
(settled case-law, cf. inter alia BVerfG, Stattgebender Kammerbeschluss vom 11. Juni 2018 – 2 BvR 819/18 –, BVerfG, Stattgebender Kammerbeschluss vom 25. Juni 2018 – 2 BvR 631/18 – etc.)

BGH, Beschluss vom 22. Mai 2018 – 4 StR 598/17 –
If it is not clear whether the accused has committed the offence for which he is convicted within or outside his probation period, the in dubio pro reo principle requires to assume, in favour of the accused, that the offence was committed outside the probation period.

BGH, Beschluss vom 05. Juli 2018 – 1 StR 42/18 –
The LG had assessed to the detriment of the accused that they had not provided any information on the reason for their stay in the area of the arrest. The BGH regarded this as a violation of privilege against self-incrimination, which leaves it to the accused to make a statement in criminal proceedings directed against him or not to testify on the merits. If the accused decides to remain silent, this may not be interpreted to his disadvantage.

BGH, Beschluss vom 28. August 2018 – 4 StR 320/18 –
The BGH states that the in dubio pro reo principle fully applies to the sentencing process. It must not have an adverse effect on the accused if the court is unable to establish with certainty the effects of the crime.

BGH, Beschluss vom 05. Oktober 2018 – StB 45/18 –
The BGH infers inter alia from the presumption of innocence that with the growing duration of pre-trial detention, the requirements for the expeditious conduct of proceedings as well as for the reason justifying the continuation of detention increase. It followed from the presumption of innocence that the detention of a suspect was only permissible in exceptional circumstances. His rights to freedom had to be weighed against the interests of the prosecution in restricting his freedom. The duration of the pre-trial detention shall not be disproportionate to the expected sentence.
(settled case-law, cf. inter alia BGH, Beschluss vom 03. Mai 2019 – AK 15/19 -; BGH, Beschluss vom 13. Juni 2019 – StB 13/19 –)

BGH, Urteil vom 27. Februar 2019 – RiZ (R) 2/18 –
The BGH had to decide on a dismissal from probationary civil service. It stated that the presumption of innocence did not extend to proceedings which, according to their objective, are not aimed at establishing and punishing criminal guilt, but which are concerned with a decision on other legal consequences outside the actual criminal justice system such as the assessment of the health and character aptitude of a probationary civil servant, which had no such punitive character, but served to ensure the efficiency of public administration.

BVerwG, Beschluss vom 25. März 2019 – 6 B 163/18, 6 PKH 10/18 –
The complainant had been suspected of several crimes, but the investigations were discontinued. However, he was subjected to identification measures for preventive reasons. The complainant considered the order to be a violation of the presumption of innocence and therefore applied to the Federal Administrative Court for leave to appeal. The Court stated that the storage and the use of data for the preventive suppression of criminal offences was compatible with the presumption of innocence, since these measures were not linked to a finding of guilt, were not comparable to a criminal punishment and served other purposes, namely the maintenance of public security

BGH, Beschluss vom 04. April 2019 – 3 StR 64/19 –
According to section 56 (1) 1 CC, the court suspends the execution of a prison sentence of not more than one year on probation if it is to be expected that the convicted person will take the conviction as a warning and will not commit any further offences in future even without the influence of the execution of the sentence. According to the BGH, the in dubio pro reo principle is not to be applied in assessing the probability that the accused will reoffend; the court must reach a positive persuasion of the probability.

BGH, Urteil vom 04. Juni 2019 – 1 StR 585/17 –
The BGH refers to its settled case-law that the principle of in dubio pro reo does not require that assumptions be made in the accused's favour for the existence of which the result of the evidence has not produced any concrete factual indications. It must not be taken into account already in the assessment of evidence, but rather in the decision if the court after having completed the assessment of evidence cannot obtain full conviction of the perpetratorship of the accused.

BGH, Beschluss vom 06. Juni 2019 – StB 14/19 –
The suspect was wrongly questioned as a witness and therefore instructed pursuant to section 55 instead of section 136 (1) CCP. The BGH stated that the strong suspicion of a crime - being a prerequisite for an arrest warrant - could not be based on the information following the deficient instruction, since the statement was excluded as evidence.

BGH, Urteil vom 19. September 2019 – 3 StR 166/19 –
The in dubio pro reo principle does not require to assume a merely theoretical possibility in favour of the accused. Neither is it to be applied when assessing the individual circumstantial evidence, but only after the overall assessment of all evidence.

BGH, Beschluss vom 12. November 2019 – 5 StR 451/19 –

A court inadmissibly draws adverse conclusions from the accused's initial silence, if it assesses his statement as not credible because, among other things, he made it 'for the first time in the trial' despite months in pre-trial detention.

BGH, Beschluss vom 28. Januar 2020 – 4 StR 608/19 –
The accused had filed an appeal on points of law against the regional court's decision, which acquitted him in dubio pro reo 'despite strong evidence against him'. The BGH ruled that he was not aggrieved by the ruling. The required immediate impairment of his rights must in principle result from the operative part, not only from the reasoning of the decision. An exception to this principle was not established in the case to be decided.

BVerfG, Beschluss vom 27. Juli 2020 – 2 BvR 2132/19 –
The accused had previously been the subject of preliminary proceedings for a similar offence, which were discontinued in accordance with section 153 CCP. This provision allows the public prosecutor's office to refrain from further investigations if the accusation, should it be confirmed, would be minor. In the new procedure, the investigating authorities based the search of the flat, among other things, on the accusation from the previous investigation.
The Federal Constitutional Court regarded this as a violation of the presumption of innocence. The presumption of innocence did not prohibit the inclusion in an assessment of a suspicion which had not been conclusively clarified. However, it must be borne in mind that this is only a suspicion and not a judicial determination of guilt.

11.2.1.2 Right to be present

BGH, Beschluss vom 27. Juni 2018 – 1 StR 616/17 –
The accused did not appear at a scheduled date for the main trial because he had been taken into police custody in Turkey. He had originally left Turkey for political reasons and was granted political asylum in Germany. Furthermore, the Foreign Office had issued a travel warning regarding the province to which the accused had travelled. However, he had travelled to Turkey at least 48 times in the previous years and made this particular journey to visit his seriously ill mother.
The LG assumed that the accused was absent arbitrarily, as he could have foreseen his imprisonment, and continued the hearing in his absence in accordance with section 231 (2) CCP. The BGH considered this to be a breach of section 230 CCP and thus an absolute ground for an appeal on points of law according to section 338 No. 5 CCP. The continuation of a main hearing in the absence of the accused presupposes that the accused has absent himself arbitrarily, i.e. that he knowingly has failed to comply with his obligation to be present without any justification or excuse. This was not the case, because the accused did not have to reckon with imprisonment because of his numerous unhindered journeys to Turkey and had a substantial reason for the journey.

11.2.2 Critical analysis of the case-law

Again, the courts only rely on national law and the legislative will and not the Directives. Due to the comprehensive compliance of the national law with the stipulations of the Directive, this does appear to be unproblematic.

12 Concluding remarks

Comparing the implementation of the six Directives, two trends can be seen. With most Directives, the legislator has widely assumed that there was no need for transposition since the current law already largely met the requirements of the Directives. These are the Directives that provide broad guarantees that are also found in the ECHR (right to interpretation, right to information, right of access to a lawyer, presumption of innocence). And, indeed, this assessment appears to be accurate. It can therefore be assumed that the legislator wanted to avoid what it considered to be unnecessary substantial revisions which could cause friction in the concerted regulatory framework and would render the previous case-law and maybe even discussion in the scientific legal community void. This caution in changing the existing legal framework also explains why the courts are mostly guided by national law, former case-law and the legislative will and rarely explicitly refer to the Directive. They also very rarely refer cases to the ECJ, even if this would be appropriate.
However, this assessment is not true for all Directives. Some Directives (juvenile defendants, legal aid) that contain more detailed rules initiated major changes of law. For example, in implementing Directive 2016/800/EU, the legislator made extensive changes to the Youth Courts Act, introducing several new provisions. Directive 2016/1919/EU led to a comprehensive revision of the rules on mandatory defence, which can be considered one of the major legislative projects in German criminal procedure law in recent years. When the legislator implements the Directive, it selectively amends already existing provisions. This is true for both minor and major changes. In doing so, it usually refers to the previous wording of the existing national law rather than the wording of the Directive. Considering that the new law on mandatory defence was meant to implement Directive 2016/1919/EU, there have been several court decisions in which it was argued that the Directive should be taken into account when interpreting national law. This kind of argument is facilitated by the fact that several of the guarantees in the Directive are unambiguous. It is easier to convince a court that the legislator failed to implement a specific provision than that a broad guarantee such as the presumption of innocence has been wrongfully implemented.

Both implementation trends identified here are problematic. If the guarantees - whether as with the presumption of innocence in their entirety or in the details guaranteed by the Directives - are not explicitly laid down in the legislation because they have already been recognized by long-standing case-law, it is considerably more difficult not only for foreign defendants but probably also for foreign defence lawyers to obtain information on how and to what extent the individual rights are guaranteed under national law. The same is true where, in proceedings other than purely criminal proceedings, the legislator implements the guarantees of the Directives by means of a general referral, as it has done in section 46 of the Administrative Offences Act and section 77 of the Act on International

Cooperation in Criminal Matters. In these cases, the person concerned has to find out to what extent the respective procedural guarantees apply *mutatis mutandis*.

Finally, the same applies to the implementation of the provisions on remedies, which is similar for all Directives. The legislator refers the persons concerned to the ordinary legal remedies in criminal procedure law, which, apart from appeals against judgements, are far from being regulated clearly. This concerns, for example, the question of which court decisions can be challenged with an (immediate) complaint. Nor is it apparent from the legislation in the CCP that, by analogous application of section 98 (2) sentence 2 CCP, a court decision can be sought with regard to the manner in which certain investigative measures are carried out. Furthermore, German case law requires the accused or his defence counsel to raise objections to the admission of evidence immediately at the first (or second) instance trial in order not to be precluded from raising them in an appeal on points of law. For instance, if the accused or his defence counsel consider a decision of the presiding judge during the hearing to be erroneous in law, they must, in principle, bring about a decision by the entire panel against this decision by analogous application of section 238 (2) 2 CCP; otherwise the objection is foreclosed in the appellate proceedings. Similar to that is the so-called 'Widerspruchslösung': As indicated above, violations of the duty to inform the accused inter alia about his right to remain silent generally establish a ban on the use of his following statement as evidence. However, the defendant can only invoke this in the appeal instance (Revisionsinstanz) if he or his defence counsel have objected to the use of the statement in the hearing at first instance. Moreover, it is unclear under which circumstances evidence that was obtained in breach of the rights contained in the Directive is not admitted in court. As there are only few rules on the admissibility of wrongfully obtained evidence, the courts have to balance defendant's rights with the public interest in prosecution. The outcome of this balancing test is hard to predict for the procedural guarantees contained in the Directives.

Again, it can be assumed that the legislator wanted to avoid creating inconsistencies in the law on legal remedies by introducing specific remedies for the infringement of particular rights. This would not have been be consistent with the rest of the regulatory framework of the CCP. It should also be pointed out that the Directives themselves do not contain any specifications regarding remedies, thus leaving the legislator the greatest possible freedom. A detailed regulation of the presumption of innocence, including the in dubio pro reo principle, may have seemed to be too complex, since there was no explicit legislation at all and amendments to several federal and state laws would have been necessary.

However, a more detailed transposition has its own risks. This can be illustrated by the example of the new legislation on "legal aid" that was introduced in order to transpose Directive 2016/1919/EU. Although the Directive focusses on the funding of legal defence when the defendant exercises his/her right of access to a lawyer, the German legislator wanted to keep its system of mandatory defence, which provides a lawyer in more severe cases regardless of financial need. Accordingly, the

legislation is an odd mixture of rules that has already been criticized severely. This example shows that the intention to stick to a well-proven system in national law is not the best way to approach the implementation of EU law. Similar problems can be found for the Youth Courts Act that implements Directive 2016/800/EU. Courts have been unwilling to accept the huge extension of mandatory defence required by the Directive. These examples show that the German legislator's approach to implement the Directives in the existing law by using well-known terminology might not be the best option to ensure full compliance with EU law.

In summary, it can be stated that the guarantees of the Directives were already largely part of the essence of the rights of the accused as laid down in German legislation and recognised in practice, although the Directives were to some extent more detailed. Along with the amendments introduced in implementation of the Directives, the stipulations of the Directives have been implemented to a very large extent. It seems quite possible that minor transposition deficits will be eliminated by amendments to the legislation or its interpretation in conformity with the Directives. But it remains doubtful if the legislator will undertake larger schemes to explicitly implement, for example, the provisions on the presumption of innocence or in the legislation on legal remedies. If the German legislator does so, it would be better to adopt a tabula rasa approach instead of making piecemeal changes to existing provisions.