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3 List of Acronyms

AG: Amtsgericht

BGB: Bürgerliches Gesetzbuch

BGH: Bundesgerichthof

BverfG: Bundesverfassungsgericht

CJEU: Court of Justice of the European Union

ECHR: European Court of Human Rights

EIO: European Investigation Order

EAW: European Arrest Warrant

IRG: Gesetz über die internationale Rechtshilfe in Strafsachen

GG: Grundgesetz

GVG: Gerichtsverfassungsgesetz

LG: Landgericht

OLG: Oberlandesgericht

RiVASt: Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten

StGB: Strafgesetzbuch

StPO: Strafprozessordnung

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4 Executive Summary

This report aims to analyze the implementation of three cooperation instruments based on the principle of mutual recognition - the European Arrest Warrant (EAW), the European Investigation Order (EIO) and the freezing and confiscation order - in German domestic law. The transposition measures adopted by the legislature, their evolution over time and, most especially, any critical issues emerging from the comparison with European legislation will then be examined. From this perspective, it is necessary to examine how, especially in cases of divergence between (national and European) legislation, the effectiveness of judicial cooperation can equally be ensured and this will be addressed in the report by following up on the implementation and application of the three judicial cooperation instruments, including through an in-depth look at some case law.

5 The implementation of criminal mutual recognition instruments in Germany

5.1 Introduction

5.1.1 Overview of the criminal procedural system

German criminal procedure is largely regulated by the Code of Criminal Procedure (Strafprozessordnung - StPO), which in particular contains provisions on the course of criminal proceedings and the legal basis for investigative measures, and by the Court Constitution Act (Gerichtsverfassungsgesetz - GVG), which regulates the organisation and competences of the courts and the public prosecutor's office[876]. The fundamental rights of the individual, also in criminal proceedings, are laid down in the Basic Law (Grundgesetz - GG), the Federal German Constitution, and the ECHR.

The GG takes precedence over ordinary legislation such as the Code of Criminal Procedure. Provisions that violate the GG can be declared unconstitutional and void by the Federal Constitutional Court. The GG also influences the application of ordinary legislation by ensuring that its guarantees are taken into account in interpretation and by filling in any

[876] This subchapter is a slightly abridged copy of Anna Albrecht and Anne Schneider, 'German Report' in CROSS-JUSTICE project [2022] chapter 5, available at https://site.unibo.it/cross-justice/en/project-results/publications (22.02.2024).

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gaps in statutory law. For example, the StPO 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. 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 (Bundesverfassungsgericht – BverfG), however, they influence the interpretation of the fundamental rights and constitutional principles of the GG. 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[877].

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) StPO. According to section 150 GVG, the public prosecutor's offices are independent of the courts. Rather, as part of the executive, 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 GVG. According to the concept of the StPO, the public prosecutor's office is supported by the police in its investigations and is authorised to issue instructions to them, section 152 GVG. 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 StPO or file an application for a judicial decision in accordance with section 98 (2) 2 StPO against the way in which the measure is carried out.

[877] For further details, see the key decision of the German Federal Consitutional Court: BVerfGE 111, 307 – *Görgülü*.

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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) StPO, 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 GG guarantees the independence of the judiciary, while Art. 101 GG 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.

5.1.2 Overview of the implementation roadmap

Mutual assistance in criminal matters between Germany and foreign States is regulated in a special code, the Act on International Mutual Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen – IRG). The IRG covers outgoing and incoming requests and all types of mutual assistance within and without the EU. All EU criminal mutual recognition instruments discussed here were implemented in the IRG.

The IRG has 14 parts which differ in length and more than a hundred sections. Part 1 describes the scope of application and is very short. Parts 2-6 describe specific ways of mutual legal assistance such as extradition or the enforcement of foreign judgments. Part 7 (sections 73-77h IRG) deals with general provisions and data protection law. The following parts 8-13 contain rules on mutual assistance within the EU or with Schengen Associated States and Ireland and Norway and the last part has, again, some general and final provisions. This shows that, nowadays, approximately half the Act concerns mutual assistance in criminal matters between EU Member States and associated states. These rules take precedence over the more general provisions in the first parts (section 78(1) IRG)

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and international treaties (section 78(2) IRG). However, the latter still apply whenever there are gaps in EU law.

If there are no specific rules on a procedural matter in the IRG, the provisions of the StPO and the GVG apply analogously (section 77(1) IRG). This refers, for example, to the procedural rights of the defendant. Moreover, many details on how mutual legal assistance is supposed to work can be found in a body or rules laid out by the Ministry for Foreign Affairs, the Directives on Cooperation with foreign states in criminal matters (Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVASt). These directives are adopted by the executive and rank lower than ordinary statutes.

The implementation of FD EAW into German law has a checkered history. The German legislator first implemented the FD EAW – belatedly – by the Act implementing the Framework Decision on the European arrest warrant and the surrender arrest warrant and the surrender procedures between the Member States of the European Union of 21.07.2004 (EAW I).[878] However, the German Constitutional Court held that this law violated the constitutional rights of the person concerned, in particular Art. 16(2) and 19(4) GG.[879]

Art. 16(2) GG forbids the extradition of German citizens to foreign countries. In order to facilitate mutual legal assistance within the EU, sentence 2 had been added in 2000, which reads:[880] "*The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed*". Although the amended version of Art. 16 GG allowed the surrender of German citizens, the Constitutional Court held that the law was disproportionate in not making use of the exception provided in Art. 4(7) FD EAW[881]. Moreover, the Court found a violation of the guarantee of judicial protection (Art. 19(4) GG) because the decision authorizing the surrender was not subject to judicial review[882].

The German legislator then drafted a second law for implementing the FD EAW[883], taking account of the judgement of the Constitutional Court. This version restricted the

[878] Bundesgesetzblatt – BGBl. (Federal Law Gazette) 2004 I, 1748.
[879] BVerfGE 113, 273.
[880] Act amending the Basic Law (Article 16) of 29.11.2000, Bundesgesetzblatt – BGBl. (Federal Law Gazette) 2000 I, 1633.
[881] BVerfGE 113, 273, 304 ff.
[882] BVerfGE 113, 273, 309 ff.
[883] Act implementing the Framework Decision on the European arrest warrant and the surrender arrest warrant and the surrender procedures between the Member States of the European Union of 20.07.2006 (EAW II),

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surrender of German citizens, but kept the old rules for foreign citizens. The differentiation between German and foreign citizens is still found in the IRG (cf. section 80 and 83b IRG).

Directive 2014/41 was transposed into German law by the German legislator still in due time through the Fourth Act Amending the Act on International Mutual Assistance in Criminal Matters (here: Implementation of the Directive on the European Investigation Order 2014/41/EU) of 5 January 2017[884] into national law. The legislative amendments particularly concern the IRG, to which the legislator has added a separate section on the European Investigation Order (Sections 91a to 91j IRG). In many respects, however, the legislator already considered the existing law to be sufficient or announced amendments to the RiVASt.

Regulation 2018/1805/EU does not require implementation. Because it takes precedence over German law, the legislator often did not see a need to adapt national provisions. Where amendments to national law were necessary, these were made as a bundle in the Sixth Act amending the Act on International Mutual Assistance in Criminal Matters of 23.11.2020[885]. Considering that the Regulation entered into force on 19 December 2020, the changes were just in time.

5.2 The implementation of Framework decision 2002/584

5.2.1 Scope

The rules on the scope of the EAW are straightforward and are oriented on Art. 2 FD EAW. The main rules are set out in Art. 81 IRG, which refers under the setup explained above (7.1.2) to Art. 3 IRG. Art. 3 IRG generally requires double criminality, but the law makes exceptions for offences that are punishable by a sanction involving deprivation of liberty of a maximum of at least three years and belong to one of the categories listed in Art. 2(2) FD EAW (see Art. 81 No. 4 IRG). The scope is very wide in that most criminal offences provide for a higher maximum penalty than three years (e.g. theft, fraud, battery).

The German courts sometimes had to decide on whether the surrender was possible for a certain type of criminal offence. They have repeatedly held that their job in surrender proceedings is not to decide upon whether or not there are enough grounds for suspecting

Bundesgesetzblatt – BGBl. (Federal Law Gazette) 2006 I, 1721.
[884] Bundesgesetzblatt – BGBl. (Federal Law Gazette) 2017 I, 31.
[885] Bundesgesetzblatt – BGBl. (Federal Law Gazette) 2020 I, 2474.

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the person in regard of the evidence, but rather whether it is plausible that the facts laid down in the request could constitute a crime that falls within the categories in Art. 2(2) FD EAW[886]. The courts also seem to prefer an abstract approach to double criminality because the IRG only requires an "unlawful act". Accordingly, abandoning an attempted obstruction of prosecution – which makes the act not punishable under section 24 CC – did not prevent the surrender because obstruction of prosecution or punishment (section 258 CC) was an unlawful act in German law[887]. As long as an act falls within the scope of a criminal offence and is not justified, surrender is possible, even if the person acted without guilt or could not be punished for other reasons.

A prominent case having to do with the double criminality requirement was the *Puigdemont* case. Carles Puigdemont, the leader of the Catalan separatist movement, was arrested in Germany on the basis of an EAW by the Spanish authorities for "rebellion" and "corruption". The OLG Schleswig found that there was no German equivalent for "rebellion" because the relevant provisions in German law required violence[888]. Double criminality was required because "rebellion" was not listed in Art. 2(2) FD EAW. In contrast, "corruption" was one of the categories in which double criminality should not be assessed, and the reasoning that the act in question (wasting public money) qualified as "corruption" was plausible[889].

5.2.2 Grounds for non-recognition and non-execution

The German legislator has implemented most of the grounds for non-recognition and non-execution of the EAW. This is due to the fact that the German Constitutional Court required further protection of German nationals than was initially foreseen in the first implementation law[890]. Only the grounds in Art. 4(5) and Art. 4a(3) were not implemented into German law. The latter is not applicable in German law because German law does, in principle, not allow trials in absentia.

The ground for refusal in Art. 4(5) referring to a final judgment in a third State was not implemented on purpose. The German Constitution does not protect the ne bis in idem

[886] OLG Bamberg BeckRS 2018, 24515; OLG Köln BeckRS 2019, 50308; OLG Karlsruhe BeckRS 2019, 5221.
[887] OLG Hamm BeckRS 2011, 25292.
[888] OLG Schleswig BeckRS 2018, 19152.
[889] OLG Schleswig BeckRS 2018, 19152; OLG Schleswig BeckRS 2018, 4762.
[890] See BVerfGE 113, 273, referred to in 7.1.2.

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right in a transnational context, but forbids only a second criminal proceeding by German authorities (cf. Art. 103(3) GG). Foreign judgments are taken into account when sentencing (section 51 StGB). The argument that a final judgement in a third State should prevent surrender or extradition could be made under the public order clause in section 73 sentence 1 IRG, but so far, German courts have not accepted this argument.[891] The following subchapters will deal with only those grounds for refusal that have given rise to legal problems under German law recently.

5.2.2.1 Fundamental rights and proportionality issues

This leads directly to the question of whether or not recognition and execution of the EAW can be refused by referring to fundamental rights. The IRG has a so-called public order clause in section 73 which applies to all types of mutual legal assistance. Section 73 IRG reads as follows:

"*The rendering of mutual assistance and the transmission of data without a request is not permissible if it would contradict core principles of the German legal system. In the case of requests pursuant to Part 8, 9, 10 and 13, the rendering of assistance is not permissible if executing the request would go against basic principles as set out in Article 6 of the Treaty on European Union*".

The first sentence contains the rule on violations of the national public order. However, for cooperation within the EU, the second sentence applies (so-called "EU public order"). For a long time, it was unclear whether section 73 IRG was in breach of FD EAW because the FD EAW does not explicitly allow to refuse execution of an EAW in case of fundamental rights violations. However, the CJEU has in the meantime recognized that fundamental rights violations can provide a reasonable ground for refusal in *Aranyosi und Căldăraru*[892].

Since then, section 73 sentence 2 IRG has often been invoked. Most of the judgements that refer to Art. 73 sentence 2 IRG relate to the surrender to countries with bad imprisonment conditions. For example, surrender to Bulgaria has often been refused

[891] See OLG Hamm BeckRS 2016, 3320.
[892] CJEU, judgment of 5.04.2016, C-404/15 and C-659/15 PPU – *Aranyosi und Căldăraru.*

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due to the bad conditions in Bulgarian prisons[893]. The same happens for Greece[894]. Similar arguments have been made consistently for Romania, Latvia, Hungary and Lithuania, but also for Poland, France, Belgium and Spain[895]. A trustworthy guarantee by the State in question can, however, help the courts to allow surrender[896].

Other arguments in the context of section 73 IRG were a disproportionate penalty in the issuing State, e.g. a penalty of lifelong imprisonment that did not take into account imprisonment that had already taken place in another State[897], or excessive penalties[898]. Surrender has also been refused in case of a severe violation of defence rights, such as the right of access to a lawyer or of access to the file[899]. A point that is under debate is the question of whether surrender to Poland is still possible in the light of systemic deficiencies in the Polish justice system[900].

It should also be noted that the German Constitutional Court has developed a right to refuse surrender if surrender would violate fundamental rights guaranteed in the German Constitution and thus threaten the identity of the Constitution (so-called "Identitätskontrolle" = identity control)[901]. The identity control was a condition set by the Constitutional Court for Germany's agreement to the Lisbon Convention: If a measure taken by the EU or necessary under EU law violates the inviolable guarantees referred to in art. 79(3) GG and is thus irreconcilable with German Constitutional Law, the Constitutional Court reserves the right to defy the supremacy of EU law[902]. This exceptional measure was designed in order to safeguard fundamental principles of German Constitutional Law.

[893] See, e.g., OLG München BeckRS 2018, 17663; KG Berlin BeckRS 2015, 12531 margin no. 7 ff.; OLG Celle BeckRS 2015, 9794 margin no. 10 ff.
[894] See, e.g., OLG Brandenburg BeckRS 2022, 5759; OLG München BeckRS 2018, 263; OLG Hamm BeckRS 2017, 136404; OLG Stuttgart BeckRS 2016, 11835.
[895] See the overview of German jurisprudence in Neil Goerge, 'Menschenrechtswidrige Haftbedingungen als Ablehnungsgrund in der Praxis des Europäischen Haftbefehls aus Perspektive der deutschen Gerichtsbarkeit unter besonderer Berücksichtigung des Grundsatzes gegenseitigen Vertrauens' [2024] ZfIStW, 107, 111 ff.
[896] See OLG Bremen BeckRS 2023, 5079 (for Cyprus).
[897] OLG Hamm BeckRS 2016, 16677; KG Berlin BeckRS 2010, 453.
[898] OLG Zweibrücken BeckRS 2021, 8805.
[899] OLG Karlsruhe BeckRS 2020, 27088.
[900] See, on the one hand OLG Brandenburg BeckRS 2021, 5586; OLG Brandenburg BeckRS 2020, 20879; OLG Düsseldorf BeckRS 2019, 14733; in favor of surrender if there are no explicit concerns in the case in question, on the other hand OLG Karlsruhe BeckRS 2020, 1720; OLG Karlsruhe BeckRS 2019, 90; differentiating OLG Karlsruhe Beck RS 2018, 15344.
[901] First applied to the EAW in BVerfGE 140, 317.
[902] BVerfGE 123, 267, 340 ff. – *Lisbon Treaty*.

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Its first application was in a case on the surrender of a person who had been convicted *in absentia*[903]. The Higher District Court Düsseldorf felt obliged under the FD EAW to surrender the person, even though there were some doubts about whether Italian courts would grant a sufficient retrial[904]. In this decision, which was translated into English by the Court, the Constitutional Court recapitulates the reasoning of the identity control:

"However, the precedence of application of European Union Law only applies insofar as the Basic Law and the Act of Assent permit or provide for the transfer of sovereign powers […]. The national order giving effect to Union law at national level (Rechtsanwendungsbefehl), contained in the Act of Assent, may only be given within the framework of the applicable constitutional order (cf. BVerfGE 123, 267 <402>). Limits to opening German statehood – limits that apply beyond the specific design of the European integration agenda laid down in the Act of Assent – follow from the Basic Law's constitutional identity as stipulated in Art. 79 sec. 3 GG (a). This is compatible with the principle of sincere cooperation (Art. 4 sec. 3 TEU) (b) and is corroborated by the fact that the constitutional law of most Member States of the European Union contains similar limits (c).

a) The scope of precedence of application of European Union Law is mainly limited by the Basic Law's constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration (verfassungsänderungs- und integrationsfest) (aa). The constitutional identity is safeguarded by the identity review conducted bythe Federal Constitutional Court. (bb).

aa) To the extent that acts of an institution or an agency of the European Union have an effect that affects the constitutional identity protected by Art. 79 sec. 3 GG in conjunction with the principles laid down in Arts. 1 and 20 GG, they transgress the limits of open statehood set by the Basic Law. Such an act cannot be based on an authorisation under primary law, because the legislature deciding on European integration matters, despite acting with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG, cannot transfer sovereign powers to the European Union which, if exercised,

[903] BVerfGE 140, 317.
[904] See, in more detail, Frank Meyer, 'From Solange II to Forever I – the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' [2016] NJECL 277, 278 ff.

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would affect the constitutional identity protected by Art. 79 sec. 3 GG […]. Nor can it be based on initially constitutional conferrals that have supposedly evolved through a development of the law, because the institution or the agency of the European Union would thereby act ultra vires (cf. BVerfGE 134, 366 <384 para. 27>).

bb) Within the framework of the identity review, one has to review whether the principles laid down as inalienable by Art. 79 sec. 3 GG are affected by an act of the European Union […]. The result of such a review may be that in exceptional cases […] Union law must be declared inapplicable in Germany. However, to prevent German authorities and courts from simply disregarding the Union law's claim to validity, the application of Art. 79 sec. 3 GG in a manner that is open to European law in order to protect the effectiveness of the Union legal order and that takes into account the legal concept expressed in Art. 100 sec. 1 GG require that finding a violation of the constitutional identity is reserved for the Federal Constitutional Court (cf. BVerfGE 123, 267 <354>)."[905]

The Constitutional Court found that the decision to surrender the person violated their human dignity (art. 1 GG), which is one of the unchangeable and inviolable guarantees referred to in the so-called "eternity clause" in art. 79(3) GG:

"Art. 1 sec. 1 GG can be violated by executing the Framework Decision on the European arrest warrant, because, in extraditing a person with the purpose of executing a sentence rendered in the absence of the requested person, one enforces, through criminal law, a reaction to socio-ethical misconduct, a reaction that is incompatible with the guarantee of human dignity and the rule of law (Rechtstaatsprinzip) unless the individual blameworthiness (individuelle Vorwerfbarkeit) of the person concerned has been determined by the competent court (a). Therefore, one must also ensure compliance with the minimum procedural rights of the accused guaranteed under the rule of law and aimed at establishing the true facts of the case, rights that are necessary to ensure the effectiveness of the substantive component of the principle of individual guilt, in the extradition procedure determined by Union law that is triggered by a European arrest warrant (b)."[906]

[905] BVerfGE 140, 317 mn. 40 ff.
[906] BVerfGE 140, 317 mn. 52.

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Scholars have pointed out that EU law would have allowed to refuse surrender in the case in question and that the problem was, in fact, the misapplication of EU law by the German court and the lack of appeal in extradition and EAW cases[907]. Nonetheless, the case shows that the Constitutional Court is willing to subject surrender on the basis of an EAW to the scrutiny of the German Constitution. This reasoning also applies to other areas of mutual legal assistance (and other areas of EU supremacy).

From the point of view of EU law, this practice clearly defies the goals of mutual recognition. It is one thing to allow EU fundamental rights to prevent the surrender of a person, but another to grant this right to any constitutional provision in the Member States. Nonetheless, the struggle in creating human right based arguments in EAW cases show the consequences of the EU`s failure to give room to fundamental rights considerations. Later directives and regulations are clearer on the role of fundamental rights and prevent some of the confusion attached to the EAW.

5.2.2.2 In absentia trials

In absentia trials are covered by section 83(1) no. 3 IRG. Generally, surrender is forbidden if the person sentenced was absent from the trial which is the foundation for the sentence. This is in line with German procedural law that has always put huge emphasis on the presence of the defendant and does not allow for in absentia trials in principle. However, the law allows for exceptions from this rule in the following paragraphs. These exceptions are based on Art. 4a FD EAW and are to be interpreted similarly. It should also be noted that the doctrine of the "identity control" was developed in a case of an *in absentia* trial (supra 7.2.2.1).

However, it needs to be pointed out that Art.4a(1) gives the judicial authority the *right* to refuse the execution of the EAW, whereas section 83(1) IRG *forbids* the extradition under these circumstances. This raises the question of whether German law, in not granting the discretion foreseen in the FD EAW, is too narrow and thus in breach of EU law. This question was transferred to the CJEU by German courts[908]. Recently, the CJEU decided that

[907] See, e.g., Frank Meyer, 'From Solange II to Forever I – the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' [2016] NJECL 277, 279 ff.; Christoph Schönberger, 'Anmerkung zu BVerfG, Beschluss v. 15. 12. 2015 – 2 BvR 2735/14.' [2016] JZ 422f.; Helmut Satzger, 'Grund- und menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? – „Verfassungsgerichtliche Identitätskontrolle" durch das BVerfG vs. Vollstreckungsaufschub bei „außergewöhnlichen Umständen" nach dem EuGH' [2016] NStZ 514, 516 f.
[908] KG Berlin BeckRS 2022, 13807; OLG Brandenburg BeckRS 2022, 2923.

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such a set up was indeed contrary to EU law[909]. The consequences of this decision are unclear: generally, the precedence of EU law would require national law to provide the discretion foreseen. As this is not the case and cannot be assumed to the detriment of the person concerned, a change of law will be necessary. An interpretation of section 83 IRG that allows for discretion goes against the wording of the provision and is thus not an adequate ground for such discretion under German law.[910] E.g., if the surrender of a person was permitted although this person had not been present at the sentencing decision – this was the case which the CJEU had to decide –, constituting a breach of section 83(1) IRG, this would also be a violation of the principle of legality and thus constitutional law.

5.2.2.3 Ne bis in idem

The grounds for refusal that are based on the ne bis in idem principle have been implemented in three provisions of the IRG, section 9, section 83(1) no. 1 and section 83b(1) no. 1, 2 IRG. Section 83b IRG contains obstacles to the authorization of the surrender by the executive authorities and is thus subject to discretion. It allows the authorities to refuse surrender when there are criminal proceedings for the same facts by German authorities or German authorities have refused to open or continue with criminal proceedings (Art. 4 (2, 3) FD EAW). It does not apply to criminal proceedings in other EU countries.[911]

Section 83(1) IRG deals with final judgments in other Member States (including the issuing State)[912] on the same facts. If there was such a judgment, surrender must be refused, provided that the sanction was, in case of conviction, enforced, is currently being enforced or could not be enforced under the law of the sentencing state (cf. Art. 54 CISA). This provision differs in two respects from Art.4(3) FD EAW: First, Art. 4 contains optional grounds for refusal, but section 83 IRG does not give discretion to the authorities (see supra 7.2.2.2). Secondly, Art. 4 refers to "a final judgment […] which prevents further proceedings" and does not contain the so-called "enforcement clause".

Nonetheless, despite the changes, the German law does not violate the FD EAW in this respect. Since the CJEU has upheld the applicability of the enforcement clause of Art. 54 CISA to Art. 50 CFR,[913] a final judgment only prevents further proceedings within the EU if it

[909] CJEU, judgment of 21.12.2023, C-396/22 - *Generalstaatsanwaltschaft Berlin*.
[910] Dieter Inhofer, „§ 83 IRG mn. 3", in Graf (ed.), Beck'scher Online-Kommentar zur StPO, 50. ed. 2024.
[911] OLG Braunschweig BeckRS 2022, 25122.
[912] OLG Celle BeckRS 2018, 10787.
[913] CJEU, judgment of 27.05.2014, C-129/14 PPU – *Spasic*.

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has been enforced etc. Accordingly, the different wording in the German law is a valid interpretation of EU law. The second issue is the lack of discretion foreseen in the German law, which has proven to be a problem in the case of *in absentia* trials (supra 7.2.2.2). However, under EU primary law, the executing state does not have discretion in allowing surrender or not. If there is a final decision with ne bis in idem effect, the Member States are forbidden to initiate criminal proceedings. The CJEU has recently included extradition and surrender proceedings into the scope of the ne bis in idem principle, which means that extradition or surrender are contrary to EU primary law under these circumstances.[914] The wording of FD EAW is misleading. Because there is no discretion on EU primary law level, the German implementation law complies with EU law.

Section 9 IRG deals with criminal offences that are punishable under German law and have been the subject of certain judicial decisions with res judicata. Again, there is no discretion of the German authorities: surrender must be refused. In contrast to section 83 IRG, section 9 IRG does not contain an enforcement clause for final judgments, but obliges the authorities to refuse surrender even if a convicting judgment has not yet been enforced. From the point of EU law, this is not a problem because surrendering a person that has been finally convicted in the executing State is a situation in which not the transnational ne bis in idem principle (Art. 54 CISA) applies, but the national one which is laid down only in Art. 50 CFR. Art. 50 CFR forbids multiple proceedings within a state even if the first judgment was not (yet) enforced. Because Art. 50 CFR is also primary law, the lack of discretion is in compliance with EU law.

5.2.2.4 Surrender of citizens and residents

German law distinguishes between German citizens and foreigners:: the surrender of German citizens is regulated by section 80 IRG that contains rules implementing Art. 4(6, 7) FD EAW. Section 80 IRG forbids the surrender unless the criteria contained in there are met. Again, there is no discretion in the German transposition law. The reason for this is the influence of German Constitutional Law, in particular art. 16(2) GG. According to this provision, the extradition of German citizens is generally not allowed. An exception can be made for EU Member States, but this exception must be as narrow as possible. The lack of protection of German citizens was the reason why the first implementation law was considered to be in breach of the Constitution (supra 7.1.2). Now, the law forbids the

[914] CJEU, judgment of 28.10.2022, C-435/22 PPU – *HF*.

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surrender of German citizens unless the issuing state promises to transfer the person back for the enforcement of the sentence and there is a substantial link to the requesting Member State. The substantial link is defined as territorial by the law. The nationality of the victim does not suffice[915]. Again, German law leaves no discretion to the judge. However, section 80 IRG is very complex and requires, besides the substantial link, the balancing of the interests of the German national. Effectively, this gives the judge a huge leeway to decide in favour of or against the surrender. Accordingly, section 80 IRG is conform with the FD EAW.

In contrast, the surrender of foreign citizens is permitted in similar circumstances, but can be refused if they are habitually resident in Germany and their interests prevail on balance (section 83b IRG). The rule is an obstacle to authorization that is decided upon by the executive authorities. The reason for the distinction between German and foreign citizens is art. 16(2) GG which limits the right to extradite German citizens, but does not apply to foreign citizens. Foreign citizens are thus worse protected than German nationals. This is also apparent by the larger amount of court decisions on the surrender of foreign citizens[916]. It appears to be unclear under which circumstances the interests of the foreign citizen not to be surrendered prevail. The courts look at external factors such as language, work, family, in order to decide if someone is to be surrendered or if this person's interests of staying in Germany are dominant.

It has been argued that section 83b(2) no. 2 IRG constitutes a discrimination of other EU nationals because they cannot prevent the surrender in these cases as easily as Germans and are subject to a discretionary decision[917]. Although there might be reasons for distinguishing between German and foreign citizens, the threshold for justifying the difference is higher for EU citizens than other foreign nationals. Accordingly, after a certain

[915] OLG Dresden BeckRS 2022, 35753. In this case, Poland wanted to have a German citizen, a former Stasi officer, surrendered for a murder of a Polish national that had occurred at the border between Western and Eastern Berlin in 1974.
[916] See in the past couple of years OLG Saarbrücken BeckRS 2023, 10817; OLG Brandenburg BeckRS 2021, 32351; however, OLG Karlsruhe BeckRS 2014, 15796; OLG Brandenburg BeckRS 2021, 29137; OLG Brandenburg BeckRS 2021, 19029; OLG Brandenburg BeckRS 2022, 29232; OLG Brandenburg BeckRS 2020, 12235; OLG Bremen BeckRS 2017, 17627; KG Berlin BeckRS 2013, 1207; OLG Frankfurt a.M., BeckRS 2016, 13556; KG Berlin BeckRS 2016, 9285; OLG Karlsruhe BeckRS 2019, 12670.
[917] See Martin Böse, § 83b IRG. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 107th installment July 2012) margin note 34ff.

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period of time spent in Germany (CJEU in *Wolzenburg*:[918] five years), EU citizens must be treated equally to Germans in order to prevent a violation of Art. 18 TFEU. In these cases, the German authorities are obliged to refuse the authorization of the surrender.

5.2.3 Execution procedure

German law on judicial cooperation traditionally differentiates between two phases: the admissibility phase and the authorization phase[919]. In matters of extradition, the courts have to decide whether extradition is admissible or not. The Higher Regional Court (Oberlandesgericht) has jurisdiction in first instance for decisions about extradition (section 13 IRG). If extradition is admissible, the executive authorities can decide whether they wanted to extradite or not, often based on questions of policy.[920] This authorization decision (Bewilligungsentscheidung) was traditionally regarded to be a policy matter between the states and was thus not subject to judicial review.

5.2.3.1 Admissibility and authorization decision

The German legislator has kept the distinction between admissibility decision and authorization decision for EAW matters. While some of the grounds for refusal in the FD EAW have been implemented as grounds for the inadmissibility of surrender (e.g. section 80, 83 IRG), others are merely obstacles to authorization and thus subject to the discretion of the executing authorities (e.g. section 83b IRG). However, the rules have been modified as a result of the aforementioned decision of the German Constitutional Court on the implementation law[921]. In this judgment, the German Constitutional Court decided that some of the refusal grounds in the FD EAW concerned fundamental rights of the person concerned and required judicial review[922]. Therefore, the legislator had to change the system.

The German legislator chose to keep the traditional distinction also in EAW cases, but to enable prior judicial review of not only the admissibility of surrender but also of the

[918] CJEU, judgment of 6.10.2009, C-123/08 – *Wolzenburg*; see also OLG Frankfurt a.M. BeckRS 2016, 13556.
[919] A more detailed description of the execution procedure can be found in Martin Böse and Maria Bröcker, 'Country Report "Germany"' in Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer, 2021) 93, 95ff.
[920] Suzan Denise Hüttemann, § 13 'Grundlagen der Zusammenarbeit' in Martin Böse (ed), *Europäisches Strafrecht* (Nomos, 2020) margin note 36.
[921] BVerfGE 113, 273.
[922] BVerfGE 113, 273.

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obstacles for refusal (see section 79 IRG). Although the decision on admissibility of surrender usually comes first, the executing authority that is competent to authorize the surrender has to decide whether they see obstacles to authorization (section 79(2) IRG). They need to give reasons if they do not see obstacles and thus plan on granting authorization. These reasons can be assessed by the court deciding on the admissibility. It should also be noted that authorization can only be refused for one of the grounds laid down in section 80 ff. IRG, i.e. the provisions implementing the FD EAW. The actual authorization that still comes after the Higher Regional Court has found the surrender admissible has therefore lost its importance.

This traditional system of judicial cooperation does not fit with the system of the FD EAW, in which the grounds for refusal are limited and the surrender of a person is not subject to political considerations. Therefore, the German legislator has been criticized for keeping this distinction and trying to apply it to EU governed legal assistance.[923] Moreover, the existing law is very complicated.[924] The German legislator has initiated a working group on changing the Act on International Cooperation in Criminal Matters, so there might be changes of this set-up in the future.

5.2.3.2 Issues for the rights of the suspect, accused and other parties

The distinction between admissibility decision and authorization has an impact on the rights of the suspect. The first one is a judicial decision that follows the rules of the IRG and the Code of Criminal Procedure. The second one is regarded as an administrative matter and follows the procedural rules of administrative law. This means that legal standards such as the right to be heard can differ between both types of decisions. By including most obstacles to authorization of a surrender into the admissibility decision as a result of the Constitutional Court decision, this problem has largely been overcome in EAW proceedings.

In the past couple of years, another problem with the German implementation law has become obvious, an ambiguity on what is a "judicial authority". In 2019, the CJEU decided that the German public prosecution office was not a judicial authority because it

[923] Suzan Denise Hüttemann, § 13 'Grundlagen der Zusammenarbeit' in Martin Böse (ed), *Europäisches Strafrecht* (Nomos, 2020) margin note 36; Frank Zimmermann, § 83b IRG in Wolfgang Schomburg, Otto Lagodny, Sabine Gleß, Thomas Hackner and Sebastian Trautmann (eds), *Internationale Rechtshilfe in Strafsachen (*C.H.Beck, 2020) mn. 2 ff.; Martin Böse, Maria Bröcker and Anne Schneider, 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 84.
[924] Martin Böse and Maria Bröcker, 'Country Report "Germany"' in Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer, 2021) 93, 95ff.

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lacked independence from the executive authorities[925]. The reason for this was that the Ministry of Justice can give orders to the public prosecutors on how to use their discretion for dispensing with criminal proceedings in the cases foreseen by the law. It should be noted that German authorities are required under the principle of legality to initiate criminal proceedings, but can dispense with the proceedings under certain circumstances, e.g. in case of minor offences or compensation outside the framework of criminal law (sections 153 ff. StPO). Since then, all EAWs are issued by the judge, as are national arrest warrants under German law (section 112 StPO)[926]. Even before *OG and PI*, a European Arrest Warrant could only be issued when a national arrest warrant was in existence. However, the German legislator had not changed the law as a result of *OG and PI*, so that, on paper, the public prosecution office is still the competent judicial authority for issuing the EAW.

The public prosecution office at the Higher Regional Court or District Court is also competent for the authorization of surrender to other Member States of the EU, or, more precisely, matters of international cooperation[927]. Therefore, the question arises whether the public prosecution office is competent, under the FD EAW, to decide on authorizing the surrender after the courts have admitted it. The FD EAW does not distinguish between admissibility and authorization decision and provides no help in dealing with the aftermath of *OG and PI.* In 2021, the Higher Regional Court Frankfurt a.M. had to decide on a case in which Italy had issued an EAW for the surrender of person in order to enforce a sentence[928]. The Attorney General (*Generalstaatsanwalt*) was of the opinion that the obstacle to authorization of section 83b(2) no. 2 IRG applied, according to which foreign citizens who refuse to be extradited for the enforcement of a sanction cannot be surrendered if their legitimate interests to pass their sentence in Germany prevail. The Attorney General therefore asked the Court to hold that the surrender was inadmissible. The Court rejected the application by claiming that there was no legal foundation for deciding on the

[925] CJEU, judgement of 27.05.2019, C-508/18, C-82/19 - *OG and PI.*
[926] See Martin Böse, Maria Bröcker and Anne Schneider, 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 83ff.; Klaus Michael Böhm, 'Aktuelle Entwicklungen im Auslieferungsrecht' [2020] NStZ 204, 206.
[927] See e.g. the circular on the competences in international cooperation in criminal matters in the state of Northrhine-Westphalia of 16.12.2016 (*Ausübung der Befugnisse im Rechtshilfeverkehr mit dem Ausland in strafrechtlichen Angelegenheiten, Berichtspflichten und die Zusammenarbeit im Europäischen Justiziellen Netz sowie mit transnationalen Verbindungsstellen - Gemeinsamer Runderlass des Justizministeriums - 9350 - III. 19 -, des Ministeriums für Inneres und Kommunales - 424 - 57.01.48 - und des Finanzministeriums - S 1320 - 5 - V B 5/ S 770 - 4 - V A 1 - vom 16. Dezember 2016*), JMBI. NRW 2017, 74.
[928] OLG Frankfurt a.M. BeckRS 2021, 8518.

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admissibility of surrender if the competent executive authority, the Attorney General, had already decided not to authorize the surrender (cf. section 79(2) IRG, which applies to cases in which the AG sees no obstacles). The fact that the Attorney General was not a "judicial authority" according to the CJEU did not suffice to make the Court competent to decide instead of the Attorney General because this was contrary to German law. In another case, the person concerned had agreed to so-called simplified surrender proceedings (section 29, 41 IRG) and thus waived their right to an admissibility decision.[929] Again, the German court did not find that the surrender was inadmissible just because the public prosecution office (and not the court) had authorized it[930].

5.2.4 Cooperation issues between executing and issuing authorities

There are no recent court cases dealing with major cooperation issues. This is probably because German law in general is rather lax on formalities: minor irregularities in the papers do not make the surrender inadmissible[931].

5.2.5 Remedies

Judicial protection in transnational criminal proceedings in general and EAW proceedings in particular is complicated. Studies have shown that most States have deficits in this respect, and Germany is no exception.[932] With regard to legal remedies, it is again important to distinguish between the different types of decision that could be subject to judicial review, the admissibility decision and the authorization decision.

Extradition and surrender have to be admitted by the Higher Regional Court prior to the authorization decision (section 13 IRG). This is a normal court decision in which the person concerned has standard procedural rights such as the right to be heard. However, it should be noted that the substantive foundation for issuing an EAW are not assessed in the executing state due to the general rules of mutual legal assistance. This division of judicial review makes sense when considering that the executing State often does not have the relevant information on the case, but is also one of the reasons why legal assistance procedures are particular challenging for the person concerned.

[929] OLG Braunschweig BeckRS 2021, 31689.
[930] OLG Braunschweig BeckRS 2021, 31689.
[931] KG Berlin BeckRS 2017, 137828.
[932] Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer, 2021).

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The Higher Regional Courts are the highest courts of the *Länder* and judges there are more experienced than at the lower courts. While ordinary arrest warrants are signed by the local courts and most criminal proceedings are decided in first instance by the local and district courts, the German legislator wanted the higher ranking courts to decide on the complex matter of extradition and surrender.[933] At the same time, the legislator found that it was not necessary to provide for judicial review against this decision because it had already been taken by a higher court. This reasoning has been critized in literature because surrender has a massive effect on the individual concerned and a wrong application of the law in question could lead to a severe violation of fundamental rights[934]. The effects of wrongful surrender are often irreversible because FD EAW does not provide for an obligation to transfer the individual concerned back if the admissibility decision is shown to be wrong after the surrender. Moreover, the influence of EU law has made the decision on surrender much more complicated than the decision on extradition initially was. Indeed, there have been cases in which surrender could only be prevented by a constitutional complaint after the Higher Regional Court had wrongfully applied EU law.[935] It has therefore been suggested to change the law and allow judicial review of the authorization decision.[936] This is already the case when foreign judgments are to be enforced (section 50 IRG), so such a rule is not without precedent. It is likely that the upcoming reform of the IRG will take up these suggestions.[937]

The authorization decision was traditionally not subject to judicial review because it was considered a purely international matter. However, the German Constitutional Court held that the first implementation law was in breach of Art. 19(4) GG, which is the guarantee of judicial review, because there was no legal remedy against the authorization decision.[938] Taking into consideration that the obstacles to authorization based on the FD EAW had their foundation in individual rights of the person concerned, this person had to have the option to challenge the authorization decision before the courts. Now, the law clarifies that the

[933] BT-Drs. 9/1338, S. 47.
[934] Martin Böse, Maria Bröcker and Anne Schneider 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 84; Klaus Leipold and Moritz Lochmann, 'Mehr Rechtsschutz im Auslieferungsverfahren' [2018] Zeitschrift für Rechtspolitik, 43, 45.
[935]
[936] On different models, see Martin Böse, Maria Bröcker and Anne Schneider 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 84.
[937] This is because one of the most prominent critics of this aspect of German law, Martin Böse, was part of the expert committee making suggestions for a reform.
[938] BVerfGE 113, 273, 309 ff.

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obstacles to authorization need to be evaluated before the admissibility decision and are assessed by the courts (section 79(2) IRG). This makes for an awkward procedure because the execution authorities, i.e. the public prosecution office, needs to announce whether they intend to grant authorization or whether they see an obstacle, then the court decides whether the surrender is allowed and the executing authorities did assess the obstacles correctly, and then the public prosecution office authorizes the surrender or not depending on what the court held. This latter authorization decision is completely predetermined and does not allow for discretion any longer. This set-up has rightly been criticized for being overcomplicated and responsible for increasing the length of proceedings.[939]

Judicial review against the execution of the EAW is also possible under general criminal procedure law, i.e. the laws on arrest warrants (section 112 ff. StPO), but the local court responsible for assessing arrest warrants lacks the competence to decide on the specific rules of the IRG. There is no way to force the German authorities to issue an EAW, e.g. for someone who wants to have their foreign judgement enforced in Germany[940].

5.3 The implementation of Directive 2014/41

When transposing the Directive 2014/41/EU into the IRG, the legislator has restricted itself to the absolutely necessary changes due to differences between the Directive and the previous national legislative framework. This mainly concerns provisions on the scope of application, the grounds for refusal of the EIO, form, time limits and procedure in sections 91a – 91j IRG. In all other respects, section 91 and 91a(4) no. 1 IRG stipulate that the other provisions on general legal assistance apply on a subsidiary basis. The legislator has also again retained the traditional terminology of German legal assistance law[941] and the traditional division of the procedure for recognition into admissibility and authorization (see also supra 7.2.3. and 7.2.3.1.), although with regard to the EIO, the distinction between these two categories is essentially limited to the fact that objections to admissibility form a mandatory obstacle to mutual legal assistance while objections to authorization leave the

[939] Martin Böse, Maria Bröcker and Anne Schneider 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 84.
[940] Martin Böse, Maria Bröcker and Anne Schneider 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 83f.
[941] Sebastian Trautmann, IRG Vor § 91a. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 2; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 541.

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deciding authority with a discretionary power (see 7.3.2).[942] Nonetheless, the alignment of the implementation of the Directive with the traditional wording and categories of mutual legal assistance in German law is perceived as an indication of the legislator's reluctance to comprehensively implement the concept of mutual recognition and to understand mutual legal assistance as an extension of the issuing state's decision-making power.[943]

5.3.1 Scope

The scope of application is defined in section 91a IRG for both incoming and outgoing requests. The majority of the following regulations – sections 91b to 91i IRG – concern incoming requests. Sections 91b – 91e IRG regulate admissibility and authorization including requirements for the form of incoming requests. Sections 91f to 91h IRG relate to the execution of a request by regulating, among other things, the recourse to other investigative measures as well as time limits. Section 91i IRG contains provisions on appeals. With regard to outgoing requests, the only specific provision is contained in section 91j IRG and only specifies the form, the validation procedure for non-judicial authorities in accordance with Art. 2(c)(ii) and special provisions in relation to temporary transfers from abroad for German proceedings.

According to section 91a(1)[944] IRG, the provisions are only applicable if an EIO is used to obtain evidence, i.e. not in all cases of mutual legal assistance between EU Member

[942] Sebastian Trautmann, IRG Vor § 91a. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 4.
[943] Sebastian Trautmann, IRG Vor § 91a. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 3.
[944] Section 91a IRG – Principle
(1) Other types of mutual assistance rendered to another Member State of the European Union under Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1; OJ L 143, 9.6.2015, p. 16) (European Investigation Order Directive) are governed by the provisions of this Division.
(2) This Division does not apply to
1. the establishment of joint investigation teams and the gathering of evidence by such teams,
2. cross-border surveillance and
3. the hearing of an accused by telephone conference.
(3) The securing of evidence for or by another Member State of the European Union is governed by subsection (1). Sections 94 to 96 apply to the securing of property for the purpose of confiscation, unless the Freezing and Confiscation Regulation applies.
(4) The provisions of Part 1 and Parts 5 to 7, as well as the general and special provisions of this Part apply
1. in the absence of special provision made under this Part or
2. if a request was not made in accordance with the provisions of the European Investigation Order Directive.
(translation provided by the Federal Office of Justice, https://www.gesetze-im-

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States. Requests from non-participating EU Member States or from those that have not yet transposed the Directive or, finally, requests not made through an EIO are therefore subject to the general rules on mutual assistance[945]. Section 91a(2) and (3) IRG exclude the establishment of joint investigation teams and the gathering of evidence by such teams, cross-border surveillance and the hearing of an accused by telephone conference as well as a rule the securing of property for the purpose of confiscation from the scope of application. Section 91a(4) No. 1 IRG also stipulates that the general provisions on mutual legal assistance apply if the formal requirements for submitting an EIO are not met. This is understood by some to mean that this would also apply if there was a lack of mutual trust because states did not guarantee compliance with European minimum standards due to a lack of recognition of the directives protecting the accused in terms of legal assistance, the right to be present and the presumption of innocence. Accordingly, the Bundesrechtsanwaltskammer (BRAK, German Federal Bar) and voices in the academic literature advocate a clearer formulation by the legislator. It should be clarified, according to this perspective, whether or not the EIO provisions can apply when formal or substantive requirements are not fulfilled or if the requesting Member State does not guarantee compliance with the European minimum standards[946]. Others rather hold to the principle of mutual recognition in this respect but regard the deviation from the minimum standards as a potential obstacle to enforcement if it constitutes a violation of European ordre public in accordance with section 91b (3) IRG[947].

Overall, the material scope of application of the German transposition provisions, like that of the Directive, is very broad: in principle, all repressive investigative measures for conducting criminal and administrative offence proceedings in all their stages are covered, such as searches and seizures or methods of covert investigations. This does not, however, include measures of criminal procedure that do not serve to gather evidence, i.e. measures

internet.de/englisch_irg/englisch_irg.html#p1027, last access on 18/04/2024).

[945] Sebastian Trautmann, IRG Vor § 91a. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin notes 10 et seqq.

[946] BRAK Stellungnahme Nr. 11/2016, p. 4. (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf, last access on 05/03/2024); Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 541.

[947] Martin Böse, IRG § 91a. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 14.

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that are taken to determine the whereabouts or to apprehend the suspect as well as the arrest and surrender of the suspect for prosecution, as the provisions on the European arrest warrant apply in this respect. Also, preventive police measures are not encompassed[948].

With regard to personal scope, national law, like the Directive itself, contains no restriction, for example, to accused persons; this can only be inferred from Recital 27. It is therefore feared that measures will also be ordered or taken against third parties, insofar as national law provides for this possibility[949].

5.3.2 Grounds for non-recognition and non-execution

As with the EAW (cf supra 7.2.3.2.), the German legislator has decided to categorise the grounds for refusal of an EIO in Article 11(1) into two different categories: the grounds for refusal in letters (a), (c), (f), (g) and (h) are set out in sections 91b (general conditions) and 91c(2)(1) IRG (additional conditions for special types of mutual assistance) as mandatory conditions for admissibility, while the grounds for refusal in letters (b), (d) and (e) are set out in section 91e IRG as obstacles to authorisation that leave discretion to the competent German authorities. The legislator thus maintains a division of the procedure for recognition into admissibility and authorisation, which is traditionally established in German mutual assistance law, but not in the Directive, and which could be cause to misunderstandings in practice[950]. In the context of other so-called 'kleine Rechtspflege' (ancillary mutual legal assistance), i.e. the effecting of service, the examination of witnesses and the gathering of evidence, section 59 IRG gives the German authorities a wide margin of discretion as to whether they provide mutual legal assistance despite obstacles to authorisation. It would seem contradictory if legal assistance towards other States could be provided to a greater extent than in relation to EU Member States[951].

[948] Martin Böse, IRG § 91a. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin notes 3 et seq.; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 542.
[949] Anna Oehmichen, in Thomas Knierim, Anna Oehmichen, Susanne Beck, Claudius Geisler (eds.), Gesamtes Strafrecht aktuell (2018) chapter 23 margin note 10.
[950] Sebastian Trautmann, IRG Vor § 91a. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 4.
[951] Legislative materials, BT-Drs. 18/9757 p. 57; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 550.

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Implementation of Art. 11(1) was deemed unnecessary by the legislator, as the restriction of the double criminality test had no significance for German law. Traditional mutual legal assistance did not have a strict requirement of double criminality. The only exceptions to this rule were section 66(2)(1) (surrender of objects) and section 67(2) IRG (seizure and search), which provide for double criminality but are not included in the positive list. The surrender of evidence was covered by the wording of Article 10(2)(a) of the Directive. However, the legislator saw no risk of conflict with sections 67(2) and 66(2)(1) IRG, as objects that are already in the possession of the authorities, such as official files, did not fall under section 66 IRG and could be handed over under the general conditions of other mutual legal assistance. Furthermore, Article 10(2)(a) of the EIO Directive was only subject to the condition that the evidence in question could also have been obtained for domestic criminal proceedings or for the EIO. This meant that the relevant national requirements continued to apply[952].

Related to the question of refusal is the recourse to a different type of investigative measure according to Art. 10 EIO Directive[953], because the non-existence or non-availability of a measure in national law may result in a request being refused. The German legislator has realized the transposition of Art. 10 EIO Directive in section 91f IRG: paragraph 1 prescribes recourse to less intrusive measures ('is to be taken') and is therefore stricter than Art. 10(3) of the EIO Directive ('may also take recourse'). Paragraph 2 addresses the case referred to in Art. 10(1) EIO Directive where the requested measure could not be carried out in the national procedure either because the investigative measure does not exist in German criminal proceedings in the first place (No. 1), or because its requirements under national law are not met in the specific case (No. 2). In such cases, paragraph 5 stipulates in implementation of Art. 10(5) EIO Directive that if no other investigative measure is available which can achieve the same outcome as that stated in the request, the competent agency in the requesting Member State is to be notified, without delay, of the fact that it was not possible to render the requested assistance. An implementation of the exemption provision in Art. 10(2) of the EIO Directive, however, has been deemed unnecessary by the German legislator, as the investigative measures enumerated would be largely measures of

[953] Cf. Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020), Pt. 3 Div. 4 pp. 591 et seq.

relatively low intrusiveness, for which no special intervention thresholds were provided in general mutual legal assistance law[954].

5.3.2.1 Fundamental rights and proportionality issues

Regarding the transposition of Art. 11(1) of the EIO Directive, the aforementioned discretionary power granted in section 91e IRG is criticized by the BRAK and in academia insofar as the procedural rights of the person concerned might be affected[955]. It is pointed out that the Directive only partially guaranteed the rights of the accused person and also uninvolved third persons in the executing State and that the German law made insufficient use of the existing scope to ensure adequate protection through implementation. In particular, it is criticized that the grounds for refusal of *ne bis in idem* (section 91e (1) No. 2 IRG), the primacy of domestic law in domestic cases (section 91e (1) No. 3 IRG) and the lack of consent of the detained person to a temporary transfer (section 91e (1) No. 4 IRG) were only formulated as optional grounds for refusal, whereas the Directive generally permits a refusal of enforcement in these cases. The German legislator should at least have declared refusal as a general rule and only authorized enforcement in narrow exceptional cases instead of granting open discretion[956], or even should have excluded any discretion at all[957]. A stricter approach compared to mutual legal assistance to non-EU States was justified by the fact that the European Union is also committed to safeguarding the rights of the accused[958]. It can be said that the granting of such a discretion is provided for in the

[954] Legislative materials, ministerial draft for an Act amending the Act on International Mutual Legal Assistance in Criminal Matters, p. 26.

[955] BRAK Stellungnahme Nr. 11/2016, p. 7 (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf; last access on 05/03/2024); Martin Böse, IRG § 91e. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin notes 6 et seq., 9 et seq.; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 550.

[956] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 583; Marc Wortmann, Die Europäische Ermittlungsanordnung in Strafsachen (2020) p. 164 with regards to ne bis in idem.

[957] BRAK Stellungnahme Nr. 11/2016, p. 7 (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf; last access on 05/03/2024); Martin Böse, IRG § 91e. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 7.

[958] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 550.

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Directive, in fact Art. 11(2) specifies the grounds as optional ('may be refused'). In this respect, the criticism in the literature also relates to the Directive itself[959]. Against the background of the decision of the CJEU on the interpretation of Art. 4a(1) of the Directive EAW[960] (see supra 7.2.2.2), it can therefore be assumed that, at least in the view of the CJEU, the legislator was right to provide for a discretionary power where the Directive does so in order to avoid an insufficient transposition of the Directive.

Also, the non-implementation of Art. 10(2) of the EIO Directive is subject to criticism. The BRAK points out that German law did not contain a definition of "non-invasive" investigative measures. It was not sufficiently clear which measures did not require an examination of mutual legality. The examples of taking photographs and fingerprints cited by the legislator could certainly not considered to be "non-invasive". The legislator should therefore only waive the double legality tests for the measures explicitly mentioned in Article 10(2)(a), (b), (c) and (e)[961]. On the other hand, it has been pointed out in the literature that a rejection of the measures named in the positive list for the reasons stated in section 91f (2) IRG would be contrary to European law. It is therefore suggested to interpret national law in accordance with European law, insofar as the wording permits, to the effect that the authorities can nevertheless resort to the measure in the specific case[962].

The provision in section 91f (5) IRG on the procedure if an investigative measure is not available under national law in general or in a specific case is understood in the literature as a further reason for rejecting an EIO. With Article 10(5) of the EIO Directive, the EU legislator had implicitly recognised that the non-availability of the investigative measure or a substitute would lead to the request being rejected. For example, recital (10) suggests that existing requirements for the lawfulness of the investigative measure under the law of the executing State may result in its non-availability in the specific case and the relevant examples are not limited to the grounds for refusal expressly specified in the Directive. This would lead to a broad obstacle to enforcement, and not only in cases where

[959] Martin Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' [2014] ZIS, 152, 154; European Criminal Policy Initiative, 'Manifest zum Europäischen Strafverfahrensrecht', [2013] ZIS, 412,418; Andrea Leonhardt, Die Europäische Ermittlungsanordnung in Strafsachen (2017), pp. 286 et seq.
[960] CJEU, judgment of 21.12.2023, C-396/22 - *Generalstaatsanwaltschaft Berlin*.
[961] BRAK Stellungnahme Nr. 11/2016, p. 6 (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf; last access on 05/03/2024).
[962] Frank Zimmermann, IRG § 91f. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 14; see also Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 592.

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a measure is not provided for in national law at all, but also in cases where only its requirements are not met. Thus it was ensured that the interests of foreign criminal prosecution do not justify any more far-reaching interference with fundamental rights than the public interest in criminal prosecution in the context of German criminal proceedings. This also corresponded to constitutional requirements because the national provisions on the EIO in sections 91a et seq. do not extend the powers of the prosecution authorities and in cases in which the investigative measure is not available under national law, there would be no legal basis for carrying out the investigative measure[963]. Some even argue that because these preconditions for an investigative measure also included the respective suspicion of an offence, the requirement of double criminality would also be retained, contrary to its restrictions in Art. 11(1)(e) and (g) of the EIO Directive[964].

Others reject this interpretation of the Directive and of the corresponding provision in national law on the grounds that it was incompatible with the drafting history and the inner coherence of the EIO Directive. They point out that the Directive contains an exhaustive catalogue of grounds for refusal, which does not list the general unavailability of the measure. Either a refusal was only permitted on certain grounds or the general ground for refusal of the unavailability of the measure was provided only for certain investigative measures. These provisions would be redundant if Article 10 (1), (5) and therefore also section 91f IRG contained a general ground for refusal for all investigative measures[965].

[963] Legislative materials, BT-Drs. 18/9757 p. 73; Heiko Ahlbrecht, 'Europäische Ermittlungsanordnung – Durchsuchung à la Europäischer Haftbefehl' [2018] StV 601, 604; Bachmaier in: Brière/Weyembergh, The Needed Balances in EU Criminal Law: Past, Present and Future S. 313, 317; Martin Böse, IRG § 91f. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin notes 5 et seqq.; Katrin Brahms, Till Gut, 'Umsetzung der Richtlinie Europäische Ermittlungsanordnung in das deutsche Recht – Ermittlungsmaßnahmen auf Bestellschein?' [2017] NStZ 388, 390; Ulrich Eisenberg, Beweisrecht der StPO (10th ed. 2017), margin note 477; Dagna Knytel, Die Europäische Ermittlungsanordnung und ihre Umsetzung in die deutsche und französische Rechtsordnung (2020) p. 80; Andrea Leonhardt, Die Europäische Ermittlungsanordnung in Strafsachen (2017) pp. 55 et seq.; Peter Rackow, 'Überlegungen zu dem Gesetz zur Änderung des IRG vom 5.1.2017' [2017] KriPoZ 79, 80, 82; Marc Wortmann, Die Europäische Ermittlungsanordnung in Strafsachen (2020) p. 138.

[964] Martin Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln? ' [2014] ZIS 152, 156.

[965] Frank Zimmermann, 'Die Europäische Ermittlungsanordnung: Schreckgespenst oder Zukunftsmodell für grenzüberschreitende Strafverfahren?' [2015] ZStW 143, 164 et seqq.; Frank Zimmermann, IRG § 91f. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin notes 16 et seqq.; see also Dominik Brodowski, Verdeckte technische Überwachungsmaßnahmen im Polizei- und Strafverfahrensrecht (2016) p. 447; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 590 fn 297

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Especially the unrestricted retention of the double criminality requirement is countered by the argument that this would make the listing of individual measures unnecessary and would contradict the principle of mutual recognition[966].

5.3.3 Execution procedure

The execution of the EIO is largely governed by section 91h IRG. Paragraph 1 states in this respect that the request is to be treated in the same way as a measure under domestic law, while paragraph 2 no. 1 takes into account the requirements of the law of the requesting State [967].

The following procedure is provided for[968]: the authority of the requesting State issues an EIO using the required form. It is not required to attach any additional procedural documents, such as court orders, as can be deducted from section 66 (2) no. 2 IRG; however, pursuant to section 91b(3) IRG, the national authorities may request them for the purpose of assessing the proportionality of the requested measure. Sections 91h, 91g IRG stipulate the obligation to authorise the EIO and to decide and enforce as a rule without delay and at least within the following time limits: a decision on the authorising of mutual assistance is to be taken within 30 days, a decision on authorising requests for the securing of evidence, where possible, within 24 hours after receipt of the request; if there is no ground for delay or the authority is not already in possession of the evidence requested, the investigative measure is to be executed no later than 90 days after authorisation is given. Provisions that assign the decision on the ordering of a measure to a judge must be complied with. The evidence must be transmitted immediately unless an appeal pursuant to section 91i (2) is pending.

Under Article 33(1a) of the Directive, Germany has designated all judicial authorities as executing authorities, i.e. the Generalbundesanwalt beim Bundesgerichtshof (Federal Prosecutor General at the Federal Court of Justice, Germany), the public prosecutor's offices, the prosecutors general and the Zentrale Stelle in Ludwigsburg (Central Office of the Land Justice Administrations for the Investigation of National Socialist Crimes in

[966] Klaus Böhm, 'Die Umsetzung der Europäischen Ermittlungsanordnung' [2017] NJW 1512, 1513.
[967] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 607.
[968] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin notes 537 et seq.

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Ludwigsburg, Germany), or any court having jurisdiction in criminal matters. With regards to outgoing requests competence typically lies with the public prosecutor's offices.

5.3.3.1 Issues for the rights of the suspect or accused person

In this respect, it is criticised that the requirement of an (effective) judicial authorization was not sufficiently ensured.

With regard to incoming requests, section 91h(1) IRG ensures that a judicial authorisation must always be obtained if this is required by national law. However, it is not clear what precisely the judge is required to assess. In this respect, the legislator has 'left the clarification to legal practice'[969]. In the literature, it is assumed that the jurisdiction of the ordering judge to examine an incoming request is limited: Article 14(2) of the EIO Directive assigns the examination of the substantive grounds for an EIO, in particular the existence of a suspicion of an offence, to the courts of the issuing State in the event of a challenge to the measure and no further-reaching standard could apply to preventive legal protection by a judge when ordering the measure[970]. For this reason, there are fears of a deficit in legal protection compared to a corresponding measure in national proceedings alone, if the measure is not subject to a judicial reservation in the issuing State. The validation of the EIO did not offer sufficient compensation. Although it also takes into account the fundamental and procedural rights of the accused person, it can be carried out by the public prosecutor's office, which would not offer the same level of preventive legal protection as a judicial review. It is therefore proposed that the German judge should be given the power to conduct a summary review or plausibility check to determine whether the substantive requirements for the measure are met[971].

[969] Legislative materials, BT-Drs 18/9757, p. 31.
[970] Martin Böse, IRG § 91h. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin notes 4 et seq; Martin Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' [2014] ZIS 152, 158 et seq.; Frank Zimmermann, IRG § 91h. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 7.
[971] LG Köln, decision of 23/09/2020 – 111 Qs 32/20; AG Köln, decision of 4/06/2020 – 504 Gs 1117/20; Klaus Böhm, 'Die Umsetzung der Europäischen Ermittlungsanordnung' [2017] NJW 1512, 1513; Martin Böse, IRG § 91h. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 5; Martin Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' [2014] ZIS 152, 158, 159; Dagna Knytel, Die Europäische Ermittlungsanordnung und ihre Umsetzung in die deutsche und französische Rechtsordnung (2020), p. 77; Andrea Leonhardt, Die Europäische Ermittlungsanordnung in Strafsachen (2017), pp. 281 et seqq.; Peter Rackow, 'Überlegungen zu dem Gesetz zur Änderung des IRG vom

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With regard to outgoing requests while the Directive allows for the issuing or validation of an EIO by the public prosecutor's office to be sufficient (Art. 2 lit. c EIO Directive, section 91d (1) IRG), the BRAK demands that where German law requires a court order for a measure in a comparable case, such an order should also be required when an EIO is issued. Therefore, it was not adequate that, in such cases, in the event of outgoing requests from an administrative authority in misdemeanour proceedings pursuant to section 91j (4) IRG, validation by the public prosecutor's office was deemed sufficient. And even though it must be noted that in the decision "A et al." on the EIO, the CJEU had no reservations recognising the public prosecutor's office as an authority within the meaning of Art. 1 para. 1 and Art. 2 lit. c of Directive 2014/41[972] (see below 7.4.3.1.), it must be remembered in this context that the Court had taken a different view due to a lack of independence with regard to the EAW[973]. In this regard, however, it is not so much the formal dependence of the public prosecutor's office in the form of dependence on orders that is likely to worry critics as a suspected lack of neutrality on the part of a prosecuting authority. It is therefore suggested to amend section 91j (4) IRG to the effect that a judicial decision would always be required in transnational cases if required in a national case[974].

There are also objections raised against the fact that the suspect has not been afforded the right to request an EIO within the meaning of Art. 1 para. 3 of the EIO Directive. As a result, he/she only has the option of asking the prosecution to issue an EIO. The prosecution is only required to pursue such a request as part of its obligation to comprehensively investigate the facts of the case. The person concerned, however, has no right to force the prosecution to issue an EIO. This is considered insufficient - even though the public prosecutor's office must also investigate exculpatory circumstances under national law - particularly with regard to the principle of equality of arms. After all, the accused person has the right under national law to request for the taking of evidence during the main hearing ('Beweisantragsrecht'), even if the court is obliged to establish the facts

5.1.2017' [2017] KriPoZ 79, 85 et seq.; Frank Peter Schuster, 'Die Europäische Ermittlungsanordnung – Möglichkeiten einer gesetzlichen Realisierung' [2015] StV 393, 396; Frank Zimmermann, IRG § 91h. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 8; see also legislative materials, BT-Drs. 18/9757 p. 31.

[972] CJEU, judgment of 8.12.2020, C-584/19 – *A et al*.

[973] CJEU, judgment of 27.05.2019, C-508/18, C-82/19 - *OG and PI.*

[974] BRAK Stellungnahme Nr. 11/2016, p. 5 (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf; last access on 05/03/2024).

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of the case comprehensively and independently of requests; these requests for evidence can only be rejected by court order on the basis of grounds conclusively specified in the law. It is therefore suggested that at least a reduced discretion of the authority be assumed to follow up a request by the accused person for an EIO[975].

5.3.4 Cooperation issues between executing and issuing authorities

There are no apparent problems with cooperation between the authorities. This may firstly be due to the fact that the procedure provided for in the Directive already corresponded to a large extent to the already existing practice in mutual legal assistance and that the national legislator endeavoured to limit changes to this practice to what was absolutely necessary when transposing the Directive. Where problems exist, they may simply not be as visible because there is little case law on the EIO Directive and its transposition into national law. To a large extent, moreover, the decisions concern the EncroChat complex and, in this respect, the same questions are raised repeatedly.

One of these regarding cooperation is that the French authorities failed to fulfil their obligation to provide information in accordance with Art. 31 of the EIO Directive. The respective decisions discuss this issue with regard to the admissibility of the evidence and unanimously hold that any breach of the duty to provide information does not lead to an exclusion of evidence. On the basis that the exclusion of evidence is governed by national law, they offer various reasons: they refer to the idea of the hypothetical lawful intervention that the German authorities would have authorised the measure if they had been informed, because the measure would have been lawful under national law[976], they see a remedy in the fact that the national authorities have indicated that they have no objections or that they have used the data[977] or it is doubted that the provision is aimed at protecting individual rights[978].

5.3.5 Remedies

Article 14 is understood by the German legislator and the literature to mean that legal protection against the substantive grounds for issuing an EIO, such as suspicion of an offence, the legality of the measure in the issuing State and its proportionality, can only be

[975] Andrea Leonhardt, Die Europäische Ermittlungsanordnung in Strafsachen (2017), pp. 277 et seqq.
[976] OLG Karlsruhe, decision of 10/11/2021 – 2 Ws 261/21; HansOLG, decision of 29/01/2021 – 1 Ws 2/21.
[977] OLG Schleswig, decision of 29/04/2021 – 2 Ws 47/21.
[978] BGH, decision of 05/07/2022 – 4 StR 61/22.

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obtained in the issuing State[979]. The only provision on the subject of legal protection enacted in implementation of the Directive is section 91i IRG with regulations on legal protection against the execution of an incoming EIO, which supplements the general provisions on legal protection against the rendering of mutual legal assistance and the execution of the necessary investigative acts. Paragraph 1 extends the jurisdiction of the Higher Regional Court to decide on the admissibility of legal assistance (section 61) to decisions pursuant to sections 91e, 91f. Paragraph 2 allows suspension of the transmission of the evidence obtained through execution of the EIO if an appeal against the issuing of the investigation order has been lodged in the issuing state or an appeal against its execution has been lodged in Germany. Apart from that, the legislator saw no need for implementation, as section 77 IRG declares national procedural law and thus in particular the legal remedies of the Code of Criminal Procedure to be applicable[980].

This leads to the following system of legal remedies:

- section 61(1) sentence 2 IRG contains a specific legal remedy for the review of mutual legal assistance aimed at surrender (section 66 IRG). However, according to the prevailing view in practice, only third parties who are not directly affected by the mutual legal assistance are entitled to file such an application.
- Persons who are directly affected by legal assistance pursuant to section 66 IRG or who are affected by other forms of other legal assistance can therefore raise objections to the admissibility of legal assistance as part of an appeal against the execution proceedings (so-called 'Integrationslösung').
- According to the wording, the application for a court decision pursuant to section 98(2) sentence 2 CCP can only be directed against a seizure. However, it is generally recognised that the provision is also applied by analogy to other coercive measures, as otherwise there would be a significant shortfall in legal protection. Such an application is admissible if the coercive measure has been ordered by the public prosecutor's office or the police or if the person affected by the measure only

[979] Legislative materials, BT-Drs. 18/9757 p. 29; Frank Zimmermann, IRG § 91j. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) margin note 2
[980] legislative materials, government draft for an Act amending the Act on International Mutual Legal Assistance in Criminal Matters, pp. 29 et seqq.

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objects to the manner in which the coercive measure is carried out.

- In the case of a judicial order, a complaint ('Beschwerde') must be lodged in accordance with section 304 CCP.
- Section 101(7) CCP provides a specific legal remedy for undercover measures.
- An application for a court decision pursuant to section 77 (1) IRG in conjunction with sections 22 and 23 et seq. of the Einführungsgesetz zum Gerichtsverfassungsgesetz (Introductory Act to the Courts Constitution Act") is admissible if no preliminary measures are required for the provision of legal assistance, for example in the case of information from an official register.

Academia as well as the legal profession criticise the fact that no specific judicial reservation prior to the enforcement of an EIO has been created and that the diverse and confusing legal remedies under national law remain in place[981]. Judicial redress against the provision of legal assistance, i.e. an assessment of the admissibility of legal assistance, is to be obtained by contesting the execution[982]. To make matters worse, the scope of review by national courts is limited (7.3.3.1)[983]. Any discretion granted by law regarding the provision of legal assistance is also not subject to review.[984]. Also, decisions rejecting a request can only be reviewed to a limited extent, which means that there are deficiencies in legal protection in this respect as well[985]. Furthermore, there are concerns about a non-

[981] BRAK Stellungnahme Nr. 11/2016, p. 9 (https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2016/mai/stellungnahme-der-brak-2016-11.pdf; last access on 05/03/2024); Kai Ambos, Peter Rackow, Stefanie Schork, 'Die Europäische Ermittlungsanordnung aus Verteidigersicht' [2021] StV 126, 128 et seq.; Klaus Böhm, 'Die Umsetzung der Europäischen Ermittlungsanordnung' [2017] NJW 1512, 1513 et seq.; Anna Oehmichen, Björn Weißenberger, 'Die Europäische Ermittlungsanordnung – praxisrelevante Aspekte der deutschen Umsetzung im IRG' [2017] StraFo, 316,322 et seq; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 617.

[982] Martin Böse, IRG § 91i. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 5.

[983] Martin Böse, IRG § 91i. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 3.

[984] Martin Böse, IRG § 91i. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 6.

[985] Klaus Böhm, 'Die Umsetzung der Europäischen Ermittlungsanordnung' [2017] NJW 1512, 1513 et seq.;

transparent fragmentation of jurisdiction because beyond sections 61 and 91i (1) IRG, challenges to authorisation decisions would fall under the jurisdiction of the administrative courts; depending on the legal remedy, it would have to be submitted to the local court, the higher regional court or the administrative court[986].

In order to at least avoid a division of legal protection within the issuing State and the executing State, a procedure is therefore favoured in which the authorities of the requested State are obliged to forward objections to the grounds for issuing the EIO to the competent authorities of the requesting State, as provided for in recital 22 p. 3 of the Directive. This idea was actually put forward by Germany in the negotiations and the legislator had envisaged a corresponding amendment to the RiVASt when implementing the directive, but this never materialised.[987]

The challenges regarding legal remedies may also be a reason why there is very little national case law on the EIO Directive and its transposition into national law[988] as well as little discussion with regard to the scattered legal remedies and the question of an adequate protection of the rights of the accused person[989].

5.4 The coordination with Regulation 2018/1805

5.4.1 Legal basis in the national system and scope

The rules on issuing confiscation orders within the framework of criminal proceedings are laid down in sections 73 ff. StGB. These rules include third-party

Martin Böse, IRG § 91i. in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Müller, 135th installment December 2023) margin note 7; Anna Oehmichen, Björn Weißenberger, 'Die Europäische Ermittlungsanordnung – praxisrelevante Aspekte der deutschen Umsetzung im IRG' [2017] StraFo 316, 322 et seq.; Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020), Pt. 3 Div. 4 margin note 620.

[986] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 620; Frank Zimmermann, IRG § 91j. in Wolfgang Schomburg, Otto Lagodny (eds.), Internationale Rechtshilfe in Strafsachen (6th ed. 2020) para. 14.

[987] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 617; Frank Zimmermann, IRG § 91j. in Wolfgang Schomburg, Otto Lagodny (eds.) Internationale Rechtshilfe in Strafsachen (6th ed. 2020) para. 15.

[988] Cf Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 508.

[989] Liane Wörner, in Kai Ambos, Stefan König, Peter Rackow (eds.), Rechtshilferecht in Strafsachen (2nd ed. 2020) Pt. 3 Div. 4 margin note 616.

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confiscation and non-conviction based confiscation[990]. The rule on non-conviction based confiscation was changed considerably in 2017 and allows for confiscation in a huge number of cases. According to section 76a(1) StGB, the court can order confiscation *"[i]f it is impossible to prosecute or convict a specific person for a criminal offence, […] provided that, in all other respects, the conditions under which the measure is prescribed by law are met."* This provision requires a specific criminal offence with clear facts. In 2017, section 76a(4) was added, according to which *"[a]n object seized on suspicion that one of the offences referred to in sentence 3 has been committed, and any uses made thereof, are, as a rule, to be separately confiscated even in those cases in which the object derives from an unlawful act and it is impossible to prosecute or convict the person affected by the confiscation for the underlying offence."* The list in sentence 3 contains a large number of offences such as terrorist offences, tax evasion and money laundering. Section 76a(4) makes it possible to confiscate property without linking it to a specific offence when the court is convinced that it can be linked to a criminal offence.[991] Examples that were named by the legislator were large amounts of money or drugs found at the airport.

German law allows confiscation of all the types of property named in Art. 2(3), i.e. confiscation of the proceeds of crime, instrumentalities (or its value) and non-conviction based confiscation (section 76a Criminal Code). Before 2017, the law distinguished between the confiscation of objects (*Einziehung*) and the confiscation of the value of such proceeds (*Verfall*). In implementing Directive 2014/42/EU, the legislator deleted the term "Verfall" and used the word "Einziehung" (= confiscation) for both objects and value. Nonetheless, the former distinction is still obvious in the fact that both types of confiscation are contained in different provisions. Section 111b StPO allows the seizure of object that are likely to be confiscated, section 111e a freezing order of assets.

The legal framework for international cooperation can be found in the Act on International Mutual Assistance in Criminal Matters (IRG). There are rules on executing confiscation and freezing orders that were issued by other Member States in sections 88 ff., 94 IRG, but these only apply outside the scope of Regulation 2018/1805, e.g. for

[990] See also Suzan Denise Hüttemann, 'Grundlagen und Bedeutung der grenzüberschreitenden Vermögensabschöpfung unter besonderer Berücksichtigung der Verordnung (EU) 2018/1805 – Teil 2' [2019] NZWiSt 248, 253.

[991] See Folker Bittmann,Was wird nach welcher Vorschrift eingezogen und wie zuvor gesichert?', [2019] NZWiSt 445, 449 ff.; Felix Kraushaar,Die Einziehung nach § 76 a Abs. 4 StGB – Zivilprozess im Strafprozess?', [2019] NZWiSt 2019, 288, 288.

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cooperation with Ireland and Denmark. Outgoing requests to other Member States are covered by section 90.

Sections 96a ff. IRG include additional rules for cooperation that falls within the framework of the Regulation. These rules supplement the Regulation which applies directly and is the main source for international cooperation in the matter of confiscation.

5.4.2 Grounds for non-recognition and non-execution

5.4.2.1 Impossibility to execute the freezing or confiscation orders

The German legislator did not draft additional provisions on impossibility because they thought that these rules were self-explanatory and did not require any changes of the law. According to the legislator, the ground for refusal in Art. 19/1)(e), impossibility, is invoked when confiscation would not be possible in Germany in the light of third-party rights. This reasoning has been criticized in literature because it effectively makes the execution of a confiscation order dependent on the possibility to order confiscation under German law and thus works like a double criminality requirement[992].

5.4.2.2 Fundamental rights and proportionality issues

Germany fought hard to include Art. 8(1)(f) and 19(1)(h) in the Regulation[993]. The initial idea was to model a ground for non-recognition and non-execution on Art. 11(1)(f) of Directive 2014/41/EU (supra 7.3.2.1), but this found no consent. Art. 8(1)(f), 19(1)(h) is based on the CJEU jurisprudence on the EAW[994] and is a compromise between Germany's wish for a protection of fundamental rights and the other Member States' wish for expediency and effectiveness[995]. The provision has been severely criticized in literature: providing discretion for the authorities would be contrary to EU primary law, the provision was too narrow in focusing on the execution of confiscation orders only, property rights could - contrary to recital 34 - not be excluded and the provision should not only apply in

[992] Martin Böse, VO 2018/1805/EU in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 135th installment December 2023) margin note 28.
[993] See Martin Böse, VO 2018/1805/EU in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 135th installment December 2023) margin note 4.
[994] CJEU, judgment of 5.04.2016, C-404/15 und C-659/15 PPU – *Aranyosi und Căldăraru.*
[995] See, in more detail, BT-Drs. 19/19852, p. 22 f.

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exceptional situations, but always when its requirements are met (which should be the exception, not the rule)[996]. However, the criticism does not relate to the German laws implementing the Regulation, but to the text itself.

As for German law, Art. 8(1)(f), 19(1)(h) take precedence over section 73 sentence 2 IRG which covers violations of EU public order in other areas of mutual legal assistance[997]. It should also be noted that the German Constitutional Court does not allow the execution of a request for mutual assistance either if the execution would violate the core of German fundamental rights and thus threaten the identity of the German Constitution (see above 7.2.2.1)[998]. This exception was developed in an EAW case, but applies to all types of mutual legal assistance. Admittedly, it is less likely that a confiscation order will go against the core of German fundamental rights than a European Arrest Warrant, and Art. 8(1)(f), 19(1)(h) should suffice to prevent this type of conflict. It was the complete lack of provisions for fundamental rights issues in the FD EAW that led to this jurisprudence.

5.4.2.3 Territoriality issues

The provisions on territoriality, Art. 8(1)d, 19(1)(d), were the subject of the so far only decision by the German Federal Court of Justice on Regulation 2018/1805/EU[999]. In this decision, the Federal Court of Justice (Bundesgerichtshof) had to decide on a case in which a Dutch citizen had been surrendered for drug offences. In a search of the defendant's apartment, the Dutch authorities had found more drugs and more than 100.000 Euros in cash. The German district court ordered the confiscation of a large amount of this money on the basis of section 73a Criminal Code (extended confiscation), referring to unnamed other drug offences.

One argument raised by the defense was that the confiscation was contrary to art. 8(1)(d) of the Regulation. However, the court rejected the relevance of this argument. Because the executing authority was not obliged to refuse the execution on the basis of art.

[996] See Suzan Denise Hüttemann, 'Grundlagen und Bedeutung der grenzüberschreitenden Vermögensabschöpfung unter besonderer Berücksichtigung der Verordnung (EU) 2018/1805 – Teil 2' [2019] NZWiSt 248, 255; Frank Meyer, 'Recognizing the Unknown – the New Confiscation Regulation' [2020] EuCLR, 140, 167 ff.
[997] Martin Böse, § 96a IRG in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 135th installment December 2023) margin note 6; see also supra 7.2.2.2.
[998] BVerfGE 140, 317.
[999] BGH NJW 2023, 2956.

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8, the court ordering confiscation did not need to refrain from issuing the initial confiscation order. It would be up to the Dutch authorities to decide on whether to refuse the execution of the confiscation order due to the territoriality clause.

First, it should be noted that the Federal Court of Justice referred to the wrong article. The subject matter was the "*Einziehung*", a final measure imposed by the district court following proceedings in relation to a criminal offence and thus a confiscation order under Art. 2(2). Accordingly, the correct provision is art. 19(1)(b) of the Regulation (which, however, is identical to art. 8(1)(d)).

In the literature, it has been criticized that the executing State has discretion about whether or not to make use of art. 8(1)(d) or art. 19(1)(d)[1000]. This can lead to gaps in the protection of the defendant's rights[1001]. However, the Regulation is clear in giving discretion to the executing authorities. Bearing in mind that it was considered a violation of the FD EAW when the national legislator limited the discretion given to the judicial authorities in Art. 4 FD EAW,[1002] it seems to be an informed choice by the EU legislator and a general principle to give a lot of leeway to the executing authorities.

5.4.3 Execution procedure

Freezing orders are issued and transmitted by the public prosecution office, section 96e(1) IRG. There are other authorities who have the function of the public prosecution office in specific areas of law, such as public prosecutors in tax or customs matters (*Steuerfahndung, Zollfahndung*) and who are regarded as public prosecution office in the sense of Art. 2(8)(a)[1003]. When other authorities wish to freeze assets in a transnational context, the freezing order must be validated by the public prosecutor or the court in accordance with Art. 2(8)(b) of the Regulation.

Confiscation orders are issued by the court, often as an additional sanction in criminal proceedings, but sometimes as non-conviction based confiscation. The public prosecution office is responsible for executing a foreign confiscation order. Many details on

[1000] See Suzan Denise Hüttemann, 'Grundlagen und Bedeutung der grenzüberschreitenden Vermögensabschöpfung unter besonderer Berücksichtigung der Verordnung (EU) 2018/1805 – Teil 2' [2019] NZWiSt 248, 254; Martin Böse, VO 2018/1805/EU in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 135th installment December 2023) margin note 26.
[1001] Maximilian Lenk, 'Anmerkung zu BGH-Urteil vom 22.3.2023 – 1 StR 335/22' [2023] NJW 2959.
[1002] CJEU, judgment of 21.12.2023, C-396/22 - *Generalstaatsanwaltschaft Berlin.*
[1003] BT-Drs. 19/19852, p.16 f.

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the execution procedure can be found in the Directives on Cooperation with foreign States in criminal matters (RiVASt, particularly No. 181 ff.). No. 182 RiVASt describes the procedure for incoming confiscation orders: if the public prosecution office intends to refuse the execution of a confiscation order, e.g. because of impossibility, it needs to consult the competent authority of the issuing State or at least give them the opportunity to be heard. If the public prosecution office proceeds with the execution of the order, the convicted person and third parties will be heard (No. 183). Having assessed the admissibility of the execution and potential obstacles to execution, the public prosecution office applies to the court for a decision on the execution of the confiscation order and informs the issuing state of the decision.

5.4.3.1 Issues for the rights of the suspect, accused and other parties

In its legislative draft to the Sixth Act amending the Act on International Mutual Assistance in Criminal Matters, the German legislator pointed out that the use of the term "issuing authority" was ambiguous. In the context of the FD EAW, the CJEU had decided that German public prosecutors were not "judicial authorities" because they lacked formal independence[1004]. If this reasoning applied to freezing orders - which also have an impact on fundamental rights - it might not suffice that the public prosecutor issues the freezing order, although this authority was explicitly listed in Art. 2 (8)(i) of the Regulation[1005]. In the light of the (later) CJEU decision "A et al." on the EIO[1006], in which the court held that the German public prosecutor was competent to issue an EIO, these scruples seem unfounded. Bearing in mind that a freezing order is a temporary measure and directed against property and not personal freedom, it is likely that the CJEU would accept German public prosecutors as competent authorities in this context, too.

With regard to art. 14(2), it was argued in literature that German law should not only rely on the confiscation certificate, but ought to demand the original order because it is more difficult to assess potential grounds for refusal if the original confiscation order is not transmitted with the certificate[1007]. For example, the grounds for refusal of the order cannot

[1004] CJEU, judgment of 27.05.2019, C-508/18, C-82/19 - *OG and PI.*
[1005] BT-Drs. 19/19852, p. 50 f.
[1006] CJEU, judgment of 8.12.2020, C-584/19 – *A et al*.
[1007] Suzan Denise Hüttemann, 'Grundlagen und Bedeutung der grenzüberschreitenden Vermögensabschöpfung unter besonderer Berücksichtigung der Verordnung (EU) 2018/1805 – Teil 2' [2019] NZWiSt 248, 253.

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be evaluated properly if the order is not available. Nor can mistakes in the confiscation certificate be detected. The legislator refrained from including an obligation to ask for the original order because the original order was without much value if it was not translated and a translated order could not be asked for under the Regulation. It is true that a translated confiscation order would have more value and allow for a better assessment of the certificate. However, even with a limited knowledge of the language of the original order, obvious mistakes such as the wrong addressee would probably be noticed. Moreover, AI based translation programs make it easy to understand what the order is about and would enable the executing authority to translate the order in case of doubts. In any case, the protection of fundamental rights, ne bis in idem etc. that is foreseen in the Regulation is severely hampered if the executing state does not have access to the original order.

Germany's unwillingness to ask for the original order is even more surprising when considering that Germany sends a copy – whether asked for or not – of the order when issuing a certificate (No. 190(2) lit. c RiVASt). Although this is not translated into the foreign language (other than the certificate, see No. 190(2) lit. b RiVASt), it at least enables the executing authority to find out what the basis of the original order was.

It has also been criticized that there is no general rule about access to the file laid down in the Regulation[1008]. The rules in the Code of Criminal Procedure on access to the file in criminal proceedings, which apply mutatis mutandis, do not fit well in the context of transnational freezing and confiscation orders.

5.4.4 Cooperation issues between executing and issuing authorities

So far, there are no cooperation issues apparent.

5.4.5 Remedies

According to the German legislator, it was obvious that implementation of this article was required, which was done in section 96d IRG. Section 96d refers to the immediate complaint in Criminal Procedure Law (section 311 StPO). Other complaints are

[1008] Suzan Denise Hüttemann, 'Grundlagen und Bedeutung der grenzüberschreitenden Vermögensabschöpfung unter besonderer Berücksichtigung der Verordnung (EU) 2018/1805 – Teil 2' [2019] NZWiSt 248, 256f.; Sebastian Peters and Karl-Christoph Bode, 'Die grenzüberschreitende Abschöpfung von Vermögenswerten im Steuerstrafverfahren de lege lata und de lege ferenda (Teil 1) ' [2020] ZWH, 233, 245.

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not permitted[1009]. The immediate complaint has no suspensive effect under German law, nor was one intended. A slight difference to Criminal Procedure law is that only "affected persons" can file this complaint, not the public prosecution office.[1010]

There are also legal remedies against freezing and confiscation orders under national law, which apply against actual enforcement measures (sections 111j ff., 98(2) analogously and 304 StPO). Complaints against the issuing of the order must be directed at the issuing state.[1011] Damages for a violation of mutual legal assistance law can be claimed under art. 34 GG and section 839 of the German Civil Code (Bürgerliches Gesetzbuch – BGB). This is sometimes regarded as not helpful when it comes to an actual claim for damages because the burden of proof is rather high.[1012]

6 Conclusions

When implementing the FD EAW and the EIO Directive, the legislator endeavoured to integrate the regulations into the existing system of national legal assistance law and to limit the changes to what was strictly necessary. This has the advantage that the application of the transposing provisions did not result in any major disruption in the application of the law and that overall mutual legal assistance follows the same basic principles. However, this also means that the existing weaknesses in the law on mutual assistance law also extend to these particularly intensive and, especially with the EAW, particularly invasive forms of mutual assistance.

This concerns, firstly, the interaction and the legal nature of the relevant regulatory frameworks. The structure of the IRG itself is already complex due to its internal references; additionally, the Code of Criminal Procedure is to be referred to on a subsidiary basis. Added to this are the RiVASt and its supplements, which are difficult even for national practitioners to find. Moreover, foreign practitioners may not be familiar with their legal nature and it is questionable whether, as purely administrative regulations, the provisions in the RiVASt

[1009] OLG Saarbrücken, decision of 28.4.2023 - 1 Ws 73/23, ECLI:DE:OLGSL:2023:0428.1WS73.23.00.
[1010] Martin Böse, § 96d IRG in Heinrich Grützner, Paul-Günter Pötz, Claus Kreß, Nikolaos Gazeas, Dominik Brodowski (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller, 135th installment December 2023) margin note 2.
[1011] Ralf Riegel, VO 2018/1805/EU in Wolfgang Schomburg, Otto Lagodny, Sabine Gleß, Thomas Hackner and Sebastian Trautmann (eds), *Internationale Rechtshilfe in Strafsachen (*C.H.Beck, 2020) margin note 16.
[1012] Sebastian Peters and Karl-Christoph Bode, 'Die grenzüberschreitende Abschöpfung von Vermögenswerten im Steuerstrafverfahren de lege lata und de lege ferenda (Teil 1) ' [2020] ZWH, 233, 243.

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guarantee sufficiently clear, specific and permanent implementation. The cascade of interacting legal acts also does not properly take into account the transnational nature of mutual legal assistance. This is especially true for defence rights. Most defence rights can be found in the Code of Criminal Procedure. These apply "analoguously to mutual legal assistance proceedings which leaves room for interpretation on which rights actually apply to what extent in legal assistance proceedings[1013]. This is a problem that applies to all kinds of mutual legal assistance. The EAW is the only instrument for which some transnational defence rights are foreseen in EU law.[1014] By merely referring to the defence rights in national proceedings, the IRG does not take into account the specific hardships that are attached to the transnational dimension of mutual legal assistance such as the need to file a complaint against the substantive grounds of a measure in one country and its execution in another (see supra 7.3.3.1 with regard to the EIO).

It is also problematic that the existing system of legal remedies is being maintained. In case of the EAW, the traditional distinction between admissibility decision by the court and authorization decision by the Ministry (delegated to the public prosecution office) in extradition law was kept. It was obvious from the beginning that this was not a feasible approach for implementing the FD EAW, which is not based on this two-fold system. In consequence, the first implementation law was declared unconstitutional and void because there was no legal remedy against the authorization decision. Instead of changing the system, the legislator made the authorization dependent on the admissibility decision by the court, thus creating a complicated make-shift system of legal remedies. Objections to the EIO can only be raised in an integrated manner in legal remedies against its execution. These present themselves as patchworks: depending on the legal nature of the challenged measure and the focus of the appeal, different courts must be addressed with different legal remedies, some of which only result from an analogous application of provisions. This alone makes it a major challenge to obtain effective legal protection, especially for legal practitioners without extensive experience of German procedural law. The IRG itself does not contain any general procedural guarantees, but only either specific regulations for certain types of mutual legal assistance or references to the general regulations on national criminal proceedings; yet additional guarantees would be necessary that also take into

[1013] Martin Böse, Maria Bröcker and Anne Schneider, 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 86f.
[1014] See, e.g., Art. 3 Abs. 6 Dircetive 2010/64/EU; Art. 10 Directive 2013/48/EU.

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account the special features of national legal assistance.[1015] A new legal remedy was included in the IRG in order to complement Regulation 2018/1805/EU, but, again, it refers to a remedy preexisting in the Code of Criminal Procedure.

The German legislator's tendency of perseverance is also apparent in the discussion about the "judicial authorities" (supra 7.2.3.2). Since the CJEU found that German public prosecutors are not "judicial authorities" in the sense of Art. 6(1) FD EAW because they lack independence, it has become clear that EU law follows a different approach to mutual legal assistance than the German legislator: EU secondary law allows a large margin of discretion for refusal, while German law tends to limit the discretion as much as possible in order to protect fundamental rights. The more flexible approach in EU law requires a higher level of independence from the deciding authorities than the more rigid approach in German law where the legislator has predecided many issues. Although both approaches have risks and merits, the precedence of EU law decides the conflict in favour of the EU approach, at least in EAW cases. The German legislator should have adapted national law by either granting independence to the public prosecutors or delegating the decisions on the issuing and execution of an EAW to the courts. Their lack to take action leads to a situation in which the authorities are unclear about what they are allowed to decide (7.2.3.2).

On the contrary, Germany has been a staunch supporter of strengthening fundamental rights in mutual legal assistance cases. In this respect, there is a steep learning curve by the EU legislator. While the CJEU still had to clarify in relation to the EAW that fundamental rights violations can provide a reasonable ground for refusal because the FD EAW was silent on this issue, Art. 11(1) of Directive 2014/41/EU and section 91b(3) stipulate with regard to the EIO that the rendering of mutual assistance is not permissible if there is justified reason to believe that executing the request would not be compatible with the obligations of the Federal Republic of Germany pursuant to Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union. Art. 8(1)(f) and 19(1)(h) of Regulation 2018/1805 contain explicit grounds for the refusal of freezing and confiscation orders due to fundamental right violations. This development is at least in part due to the influence of Germany. The German Constitutional Court was adamant in granting fundamental rights protections in EAW cases even if this was contrary to EU law. The CJEU decision in *Aranyosi and Caldararu* is often regarded as an answer to the challenge by the German Constitutional

[1015] Martin Böse, Maria Bröcker and Anne Schneider, 'Rechtsschutz in der internationalen Rechtshilfe in Strafsachen – Defizite und Reformbedarf' [2021] JZ 81, 86 et seq.

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Court. Germany also lobbied for including grounds for refusal based on fundamental rights in other mutual legal assistance instruments such as Regulation 2018/1805/EU. Therefore, the history of cooperation in criminal matters in the EU is also the history of the relationship between EU and national fundamental rights.

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