European criminal procedural law in Germany: 
Between tradition and innovation

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I. Introduction

A. Basic axioms of the German criminal legal order

It may sound like a truism to say that EU law increasingly influences German law in terms of criminal procedure. From the turn of the millennium, debate in Germany has focused, however, on the impact of EU harmonisation measures on substantive criminal law¹ and the implementation of the EU cooperation instruments (in particular the European Arrest Warrant) into the rather specific field of international judicial cooperation in criminal matters.² Only a few authors have considered the existing influence of European Community law on the national criminal procedure.³ Several ‘contact points’ between European Community (EC)/European Union (EU) law and German criminal procedure law, such as detention, due process requirements, admissibility of evidence and the position of the defence counsel, have not been discussed for a long time.⁴ This changed after the ‘Lisbonisation’ of European criminal law and the increasing effect of EU acts specifically designed to harmonise national procedure law, namely the procedural rights’ directives.

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⁴ JOKISCH, Ibid., 253.
This development was not only welcome but also led to criticism; European criminal procedure law remains a sensitive topic that touches on the fundamentals of sovereignty and legal culture, in particular if one recalls a solid German viewpoint that criminal procedure law is the ‘citizen’s magna carta’ and the ‘ventricle of the rule of law’. In order to understand the extent of influence of EU law on German procedural law, the main features and sources of criminal procedure as well as the status of the defendant and ‘victim’ are explained in the following analysis.

The Federal Republic of Germany is constitutionally considered a democratic, social and federal state. These ‘leading rules’ – enshrined in Art. 20 para. 1 of Germany’s constitution, i.e. the Basic Law (Grundgesetz – GG) – also have an impact on criminal law (see also below). The federation is made up of 16 semi-autonomous Länder (federal states). The federal structure (inter alia) aims at preventing the accumulation of state power at the central level after the negative experience of the Third Reich. The most important aspect is the division of competences and tasks between the Federation (Bund) and the Länder. This triggers three important notes:

1. The legislative competence of the Federation is limited to areas defined in the Basic Law. Criminal law and criminal procedure law belong to the so-called ‘concurrent legislation’; the Länder have the competence to legislate as long as the Federation has not done so (Art. 72, 74 para. 1, No. 1 GG). The Federation regulates criminal law and criminal procedure law. This means that the rules defined in these areas are applicable in all the German Länder and, unlike in the United States, Länder are barred from legislating in these ambits. The Länder retain legislative competence for regulating the system of enforcing penalties (Strafvollzug), including the law enforcement of pre-trial detention, and for policing, including the prevention of crime.

2. To be distinguished from the legislative competence is the competence to execute statues. The Länder exercise most of the state powers (see Art. 83 GG). The Federation is only allowed to create a few federal authorities. Federal laws, are, in general, executed by the administrative and judicial authorities of the Länder. This includes the administration of criminal justice, which represents the procedure from the start of criminal investigations to the execution of the penal authority of the state. Prosecution services are assigned to the court structure at the level of the Länder. The Federation’s possibilities of supervision in this area vary.

3. In principle, all courts are courts of the Länder. There are only a few federal courts. Federal courts are regularly involved as appeal courts within the criminal procedure. They are, in principle, designed to maintain consistency and uniform interpretation in legal decision-making at the national level.

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7 I.e. not pre-trial detention itself as part of the criminal procedure.

8 The Federal Prosecutor General at the Federal Court of Justice conducts prosecution only for a number of offences against the State or national security. Criminal proceedings are then carried out at the Higher Regional Court as first instance court, i.e. at supreme level of the Länder.
The Federal Constitutional Court (hereinafter FCC) is not an integral part of the judicial or appeal process. However, unlike supreme/constitutional courts in other countries, it has a very powerful and highly influential position, especially in criminal law-related matters. It exercises judicial review on constitutional issues and the compliance of all governmental institutions with the constitution. Procedures, including the constitutional complaint procedure that can be brought by an individual who alleges that his/her constitutional rights have been violated, enable the FCC to declare a legislative act, an act/a measure of the executive branch or a court decision unconstitutional.

An important feature of the constitution is the ‘Rechtsstaatsprinzip’ (enshrined in Art. 20, para. 3 GG). It is also a source from which further principles and rights are derived. One of these principles is the principle of proportionality (Verhältnismäßigkeitssgrundsatz or Übermaßverbot). It is anchored deeply in the German legal order. It is one of the most important principles of constitutional law, the terms of which override ordinary legislation. The principle of proportionality can also be found in many statutory provisions that shape more concretely the principle as enshrined in the constitution. It is an own concept of German law. It is closely (but not exclusively) connected with fundamental rights where the principle of proportionality serves as a limit to state action. Accordingly, any measure interfering with the fundamental rights of the individual must comply with the principle of proportionality. To this extent, the measure must be based upon a legitimate purpose, suitable, necessary and adequate to that end (proportionality strictu sensu).

The proportionality principle applies at all stages of the criminal procedure. It is also applicable to citizens’ rights other than fundamental rights or rights of state

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9 The “Rechtsstaat” is often translated as ‘rule of law’. Although the core idea of the Rechtsstaatsprinzip is very similar to the British – in fact Western – tradition, this translation may be misleading since the German ‘rule of law-concept’ is considered wider than the British or other ones. It has not only a formal character, i.e. the idea of formal guarantee of supremacy of law and checks on state powers, such as the formal act of Parliament (so far similar to the British rule of law), but also substantial elements. The latter is mainly reflected in Art. 20 para. 3 of the Basic Law according to which state authorities, such as the judiciary and the executive are not only bound by acts of parliament, but also ‘the law’ meaning ‘substantial rightness and justice’ as expressed by fundamental constitutional values, namely the basic rights (Art. 1(3) Basic Law). Hence, Parliament (as constituted by the Bundestag and Bundesrat) itself is bound by the constitution (Art. 20(3) Basic Law). The ‘Rechtsstaatsprinzip’ itself is not explained in one single provision in the constitution, but must be derived from several fundamental provisions aiming at limiting state power in order to protect the citizen from arbitrary decisions. See further N. Foster, S. Sule, German Legal System and Laws, 4th edition, New York, OUP, 2010, 178.

10 Hillgruber, in J. Isensee, P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band IX, Allgemeine Grundrechtslehren, 3rd ed., Heidelberg, CF Müller, 2011, § 201 (Grundrechtschranken), mm. 51 et seq. The landmark-case is the judgment of the Federal Constitutional Court of 11 June 1958, official court reports (BVerfGE), vol. 7, p. 377 (404 et seq.).

11 See e.g. Section 74b Criminal Code (confiscation) and Section 111m (1) Code of Criminal Procedure (seizure of printing devices).
institutions. Sometimes, the proportionality principle is explicitly mentioned in the provisions of the criminal procedure or the criminal code. At first glance, the conditions of the proportionality principle mirror those construed in European Union law. However, a closer look reveals that legal requirements, applicability and results of the principle of proportionality may differ from its European counterpart. The principle of proportionality is a recurring theme through the following analysis and therefore most important to understand the German way of legal thinking.

The aims of the criminal process are considered complex, sometimes indeed incompatible in a particular case, so that they must be weighed up against each other. As main aims, the following are put forward:

- Correct application of the substantive criminal law and enforcement of the State’s claim for punishment;
- Granting a correct judicial process, including the maxim that justice cannot be reached at any price;
- Restoring social harmony;
- Rehabilitation of the victim and of the innocent defendant are ancillary purposes.

The main sources of German criminal procedure are the (German) Code of Criminal Procedure (Strafprozessordnung – StPO; hereafter: GCCP) and the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG; hereafter: CCA). As mentioned above, the German Constitution (Basic Law; Grundgesetz – GG) plays an important role since criminal procedure law is considered “the seismograph of the State’s constitution”.

The European Convention of Human Rights (ECHR) contains fundamental procedural guarantees directly applicable by German courts. It forms, hierarchically, a statutory federal law, below the Constitution. However, the case law of the FCC strengthened the legal position of the ECHR by arguing that the Convention should

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12 For details on the concept of proportionality in the German legal order, see M. Böse, T. Wahl, ‘Country Report Germany’, in P. Albers et al., Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters (2013), 213 et seq. (the report is also available at: www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/seinrichtungen/Lehrstuehle/Boese/Aushaengde/J-18664_WEB_Rapport_Rechtsstaatmonitor__EN_.pdf).

13 W. Beulke, S. Swoboda, Strafprozessrecht, 14th ed., Heidelberg, C.F. Müller, 2018, nn. 3 et seq.; Roxin, Schünemann, Strafverfahrensrecht, § 1, nn. 3 et seq.

14 Federal Court of Justice (Bundesgerichtshof – BGH), official case reports (St) 38, 215, 219 et seq.


16 Ibid.

17 Ibid.

18 Roxin, Schünemann, Strafverfahrensrecht, § 2, nn. 1.
The substantive criminal law is enshrined in the (German) Criminal Code (Strafgesetzbuch – StGB; hereafter GCC). A separate set of provisions relate to ‘infractions’ (also called ‘regulatory offences’), which are dealt with in the Act on Regulatory Offences (Ordnungswidrigkeitengesetz – OWiG). This Act governs substantive rules and procedure relating to an area of the law, which decriminalised formerly criminal behaviours and created a separate category of less serious wrongdoings.

Rules on international cooperation in criminal matters are provided for in the Act on International Cooperation in Criminal Matters (Gesetz über die Internationale Rechtshilfe in Strafsachen (IRG), hereafter AICCM). It also contains the national provisions implementing the instruments on the mutual recognition of judicial decisions (EU cooperation), such as the European Arrest Warrant or the European Investigation Order. The law is linked to other provisions of domestic criminal procedure since Sec. 77 AICCM refers to the GCCP, the CCA, etc., to the extent that this Act does not contain any special procedural rules. As a result, for instance, some procedural safeguards in international cooperation can be inferred from the GCCP and other acts.

B. The hybrid nature of the German criminal procedure

Modern German criminal procedure is not a purely inquisitorial system for it contains several features of an adversarial process. It can best be described as a mixed or ‘hybrid’ system. Inquisitorial elements consist in, for instance, the leading role of the presiding trial judge who actively conducts the trial, e.g. by questioning witnesses or hearing experts. Furthermore, there is the duty of the court to establish the relevant facts and the defendant’s guilt. It is required that the trial court itself must establish the facts and not simply rely on the motions or statements of the other parties of the proceedings (Sec. 155(2), 244(2) GCCP). If it believes that evidence adduced is insufficient, it must call evidence ex oื่นคือ (e.g. witnesses or experts). The criminal court ‘is the master of trial’, thus keeping control of the presentation of evidence. It is also the only one that has the power to discontinue the proceedings.

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19 BVerfGE 74, 358.
22 An English translation of the 2012 version of the act (i.e. recent reforms not considered) is available at: www.gesetze-im-internet.de/englisch_irg/english_irg.html#p0461. A new translation is currently under elaboration.
A decisive element that counteracts a purely inquisitorial process is the principle of accusation (Anklagegrundsatz, Sec. 151 GCCP). Accordingly, the opening of a court investigation shall be conditional upon preferment of charges. The institution responsible for conducting investigations and bringing a case to court is the public prosecution office (Sec. 152(1) GCCP). Therefore, there is no longer a personal union between investigator, prosecutor and judge – features that were hallmarks of the German criminal procedure for a long time in the past. The investigatory or pre-trial procedure (Ermittlungsverfahren) is now formally in the hands of the state prosecution (‘master of the investigative phase’). The public prosecution office shall ascertain not only incriminating but also exonerating circumstances (Sec. 160(2) GCCP). The pre-trial judge is involved if certain coercive measures are to be carried out: the necessary applications must be filed by the state prosecutor and the pre-trial judge must approve the coercive measure in question. However, the state prosecutor (neither the police nor the pre-trial judge) decides on the collection of evidence and whether the case is to be dropped or proceeded to trial by indictment.

As the German criminal procedure was undergoing a reform process, adversarial elements have been introduced and further developed. The court is, for instance, actively supported in its functions by both the state prosecution and the defence (although the court is neither limited to evidence presented by the participants nor is it bound by a confession, see above). The prosecutor as well as the defendant can influence the hearing of evidence by suggestions, formal motions on evidence taking or direct presentation of witnesses to the court. The defendant can influence the procedure by exercising his/her rights. German criminal procedure law assumes that the defendant takes an active role during the proceedings. He/she has the right (or even the duty) to participate in the process. He/she can, for instance, put forward questions (Sec. 240 GCCP); file applications to take evidence (Sec. 244(3)-(6), 245(2), 246(I) GCCP); make statements after evidence has been taken in each individual case (Sec. 257 GCCP); and present arguments or file applications after the closure of the taking of evidence (Sec. 258 GCCP).

A rather new, recent element that is characteristic of the adversarial dimension of German procedure is the legislation on ‘plea bargaining’. The court can negotiate

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24 Beulke, Swoboda, Strafprozessrecht, nn. 18.
25 The institution of the ‘investigating judge’ was abolished in 1975.
26 In practice, however, it is the police that undertakes investigations, for the most part acting on their own authority.
27 Huber, ‘Criminal Procedure in Germany’, 283. R. Schlothauer, ‘Europäische Prozesskostenhilfe und notwendige Verteidigung’, 2018, Strafverteidiger (StV), 169, 174 submits that adversarial elements will characterise the pre-trial proceedings in future after implementation of the EU’s legal aid Directive 2016/1919 (see also below I. 3a).
agreements with the participants on the further course and outcome of the proceedings (Sec. 257c GCCP).  

C. The status of the defendant and the victim as an outcome of democracy, liberty and the welfare State

German criminal procedure takes account of the three main demands of the Age of Enlightenment: democracy, liberty and a welfare State. Democratic requirements are fulfilled, for instance, by the participation of lay judges in court (Sec. 28 et seq., 76 et seq. CCA) or by the rule that the facts and the defendant’s guilt are established in an oral and public hearing, i.e. under the condition that the judicial process can be verified by the people (Sec. 250, 261 GCCP, Sec. 169 et seq. CCA).

Defendants

The liberal idea of criminal procedure is mainly reflected in the rights of the individual because his/her sphere of freedom must be protected from arbitrary and excessive intrusion by the State. The search for a balance between an effective judicial system and the protection of the State’s citizen on the one hand, and the safeguarding of individual rights of the defendant on the other, characterises the German criminal procedure. Only a few individual rights are explicitly mentioned in the German Constitution (see below). Others are referred to in the criminal procedure code, such as the right not to be the subject of compulsory measures that affect the independent will of the suspected or accused person (Sec. 136a, 163(3) and (4) GCCP) or the right to have a mandatory defence counsel paid for by the State (Sec. 140 GCCP). Other rights are derived from general principles of the German Constitution (in particular the ‘Rechtsstaatsprinzip’ according to Art. 20 of the Basic Law) and/or the ECHR, e.g. the presumption of innocence or the right to a speedy trial. The fair trial principle is considered as an overriding procedural right, against which all norms of criminal procedure must be measured.

Regarding the rights of an accused or suspected person in the criminal proceedings that are enshrined in the German constitution, the following are of particular importance:

– The right to be heard is enshrined in Art. 103(1) of the Basic Law and is an essential part of the ‘Rechtsstaatsprinzip’. All participants in a criminal case must have the opportunity to speak, to make statements regarding the facts and the law, and to introduce motions. It requires the court to take account of the participants’ statements and consider them. The right to be heard is further expressed in various provisions of the GCCP.

30 Roxin, Schünemann, Strafverfahrensrecht, § 2, mn. 2 et seq.
31 Roxin, Schünemann, Strafverfahrensrecht, § 2, mn. 9.
32 Ibid.
33 Beulke, Swoboda, Strafprozessrecht, mn. 30 with further references.
The ban on double jeopardy (or autrefois convict or autrefois acquit [Strafklageverbrauch]) is a fundamental right enshrined in Art. 103(3) of the Basic Law. The ban on double jeopardy is considered a guarantee to individual liberty, which is also founded on human dignity. The German legal order does not provide for a particular rule that would trigger the ne bis in idem in a transnational dimension. It is settled case law that the fundamental right of Art. 103 para. 3 of the Basic Law only applies to decisions of internal tribunals. As a result, German authorities are not prevented from prosecuting a person anew in Germany or extraditing a person, although (s)he may have been sentenced or acquitted for the same criminal offence in a foreign country.

The right to one’s lawful judge is guaranteed in Art. 101(1) of the Basic Law. The Article further clarifies that extraordinary courts shall not be allowed. The right of Art. 101 also requires that objective and general rules are established to determine the jurisdiction of the criminal court. As a consequence, the GCCP and the CCA provide for rules on the substantive jurisdiction of criminal courts, the venue of the trial and the allocation of cases.

Art. 97 of the Basic Law sets out the independence of judges, who shall be subject only to the law.

Art. 104 of the Basic Law provides for the important legal framework as to the deprivation of liberty. Intrusions into the personal freedom are regulated more precisely in the GCCP, in particular regarding pre-trial detention (Sec. 112 et seq.).

In sum, Germany has developed a mixed system of the defendant’s fundamental rights. An explicit and a general reference to defence rights for persons against whom criminal proceedings have been brought, did not make it to the Constitution. The Constitution expressly mentions only a few defence rights, in particular the entitlement to a hearing, Art. 103(1) of the Basic Law. Other defence rights, such as the nemo tenetur guarantee, or the right to be present, are considered as having a constitutional status by the Federal Constitutional Court’s case law (derived either from the Rechtsstaats-guarantee as enshrined in the constitution or from basic rights as enshrined in the first part of the Basic Law or even by the ECHR). Other defence rights – regulated in the criminal procedure code, i.e. simple federal law – are considered fundamental only.

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34 ‘No person may be punished for the same act more than once under the general criminal laws.’


37 BVerfGE, Ibid. (16).

38 See further Beulke, SWOBODA, Strafprozessrecht, mn. 29 with further reference.

39 Drafts of the German Basic Law after the Second World War foresaw also an article on the right to a lawyer of any accused person beside the right to be heard. The right to a lawyer was not taken up in the final version of the Constitution for various reasons (Rüping in Bonner Kommentar zum Grundgesetz, Heidelberg, C.F. Müller, 2005, Art. 103, Abs. 1, mn. 3).

40 T. Wahl, ‘Fair trial and defence rights’, 134 et seq.
German criminal procedure also takes into account social considerations. Law enforcement authorities are obliged, for instance, to take account of the personal situation of a suspect (Sec. 136(3), 160(3) GCCP). Other elements of the ‘welfare State’ are the appointment of a mandatory defence counsel already in the pre-trial stage of the proceedings (Sec. 140, 141 GCCP) or the appointment of a defence counsel for the purpose of preparing proceedings to be reopened (Sec. 364b GCCP). The provisions on mandatory defence mirror a very paternalistic approach of the German legislator towards the defendant.\footnote{K. Lüderssen, M. Jahn, in Löwe-Rosenberg, \textit{Die Strafprozessordnung und das Gerichtsverfassungsgesetz – Großkommentar}, 26th ed., Berlin, De Gruyter, 2007, § 140, nn. 12; M. Bohlander, \textit{Principles of German Criminal Procedure}, Oxford, Hart, 2012, 60.} The appointment of mandatory defence is independent of the financial means of the defendant, but rather orientated towards – partly broadly formulated – case groups defined by law.

\textit{Victims}

An important component with regard to the social responsibility of the State is the strengthening of victims’ rights, which have considerably increased in the last three decades. This notwithstanding, there is no general provision in the Constitution that ensures the protection of victims of criminal offences or a ‘right to prosecution’\footnote{BVerfGE 51, 187.}. It is nonetheless acknowledged that the legal status of victims derives from constitutional norms, such as human dignity (Art. 1 para. 1 GG); the guarantee of access to justice (Art. 19 para. 1 GG); the principle of fair trial (which applies to all parties involved and thus also to the victim); the State’s obligation to ensure that criminal justice functions properly (deduced from the \textit{Rechtsstaats}-principle and meaning that the interests of the victim must also be taken into account); or the right to be heard (Art. 103 GG, as this right is intended to benefit all parties involved in legal proceedings).

The German legal order distinguishes between the ‘victim’ as described in substantive criminal law and victims’ rights enshrined in the German criminal procedure.\footnote{P. Velten, \textit{in Rudolphi et al. (eds.), Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz (SK-StPO)}, München, Luchterhand, 2007, Vor §§ 374-406h, mn. 1.} The GCCP does not use the term ‘victim’, but instead refers to ‘aggrieved person’. The law does not define this term, which may also be due to the fact that the German criminal procedure assigns different functions, or roles, to the aggrieved person. He/she may be, for instance, an ‘applicant to compel public charges’, a ‘private prosecutor’ (\textit{Privatkläger}), a ‘private accessory prosecutor’ (\textit{Nebenkläger}), or an applicant for civil compensation (within the criminal proceedings)\footnote{Commonly referred to as \textit{Adhäsionsverfahren} – a distant cousin of the French \textit{action civile}.}.

The legal position of victims of crime has considerably and continuously improved since the mid-1980s. Today, the GCCP and other laws confer several rights to victims (apart from the said functions). These rights can be grouped by typology, i.e. rights that pursue the interest of the aggrieved person for punishment and/or compensation, and
those that ensure the protection of the person, for example if the victim is a witness.\textsuperscript{45} Although the number of victims’ rights has considerably increased in recent years, the position of victims is always subject to a degree of tension between the interests of the injured and those of the accused, which must be balanced by the legislator.\textsuperscript{46}

\section*{D. ‘United in diversity’ – legal traditions and their impact on cooperation}

In general, Germany favours a rather ‘cooperation-friendly’ approach. It was particularly shaped by the case law of the FCC, first and foremost developed in extradition law. It is, however, also applicable to other forms of international cooperation in criminal matters.\textsuperscript{47} The FCC acknowledges that the level of protection of the German Constitution cannot be applied if it comes to cooperation in criminal matters. Its view can be summarised as follows:\textsuperscript{48}

The German Constitution (the Basic Law) assumes that the state of which it is the Constitution is integrated into the system of international law of the international community of States. This approach is due to the ‘openness’ of the German Constitution to international cooperation and its ‘friendliness’ towards international law.

The Basic Law therefore also orders foreign legal systems and legal views to be respected in principle even if they are not identical to German domestic views in every detail.

In mutual assistance concerning extradition, especially if it is rendered on the basis of treaties under international law, the requesting State is, in principle, to be shown trust as concerns its compliance with the principles of due process and the protection of human rights.

The only insurmountable obstacle to extradition on which the courts may base their decision is the violation of (a) the minimum standards of international law that are binding on Germany and (b) the inalienable principles of the German constitutional order.

Interviewees confirmed that the existing diversity of legal traditions regarding criminal procedure law across the EU is, in principle, not considered an obstacle by the German authorities. In particular, they pointed out that requirements of each other’s criminal procedure are widely accepted and mutually recognised. In this context, interviewees pointed out the forum regit actum principle, which governs daily practice in MLA in Europe. Information requirements regarding the rights of suspects or witnesses or information sheets for victims are widely accepted by all jurisdictions.

\textsuperscript{45} See also details below IV.


Only a few issues have been mentioned where the different legal traditions have an impact on cooperation. One main aspect is pre-trial detention, where the authorities in common law countries (in particular the UK) consider it problematic that a person can already be remanded in custody at an early stage of the investigative proceedings (as is usual in most continental European countries, including Germany). As a result, UK authorities are reluctant, in general, to surrender persons if they have to expect a longer stay in pre-trial detention in the requesting Member State.\(^49\)

Another example is the different approach of countries to adapt the level of punishment of foreign sentences. Problems mainly occur in relation to the Netherlands, where the courts seemingly make extensive use of adapting German sanctions to the punishment or measure prescribed by the Dutch law for a similar offence. Since the level of punishment for drug-related offences is much lower in the Netherlands than in Germany, German authorities fear that offenders are favoured by the Dutch law if a German sentence is enforced in the Netherlands. In the end, this is an issue of discrimination/non-discrimination, which can be looked at from both sides. The Dutch approach has seemingly not changed after the entry into force of the Framework Decision on mutual recognition of foreign sentences. As a result, German authorities are distrustful and smooth cooperation in the enforcement of sentences is hindered.

Finally, interviewees raised the point that problems occur in the execution of sanctions against juveniles. Certain sanctioning measures imposed under German law do not exist in other countries, such as France. Consequently, these measures cannot be executed at the place of residence of the juvenile. In practice, the problem is solved by executing the measure against the juvenile in Germany. The offender receives assistance from social workers, probation officers, etc. who speak French.

II. Transposition and implementation of procedural rights’ directives for defendants

A. State of transposition

Germany has transposed four out of the six procedural rights’ directives (as of December 2018), i.e. Directives 2010/64 (interpretation and translation), 2012/13 (right to information), 2013/48 (access to a lawyer), and Directive 2016/343 (presumption of innocence and right to be present). As regards Directive 2016/800 (safeguards for children) and Directive 2016/1919 (legal aid), ministerial drafts (Referentenentwürfe) were presented in October 2018.\(^50\)

\(^{49}\) See in this context also CCBE, EAW-Rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners, 2016, 34. The CCBE report is available in the Internet at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf.

\(^{50}\) Note: This article reflects legislation and case law through March 2019. Later developments could not be considered. This also applies for the following sections.
1. Transposed Directives

In essence, the German legal system was already in line with the obligations of the aforementioned directives.\(^{51}\) It was only necessary to bring a few refinements to German laws during the transposition of directives (as carried out so far). Even a change of the national legislation upon the requirements of the directives was only necessary in some parts of the legislation; substantial differences in the European obligations have not emerged.

An example of this is the implementation of Directive 2016/343. The bill argued that the Directive only requires selective adjustments of German procedural law as regards certain aspects of the right to be present at a trial. The law contains obligations to inform the defendant about the consequences of his/her absence at the trial and a clarification that German law already complies with the Directive and the ICCPR as far as the presence of the defendant who was deprived of liberty at the hearing stage of an appeal on law (Revision) is concerned.\(^{52}\) Some of the provisions of Directive 2016/343 were not deemed necessary for transposition.\(^{53}\) In particular, exceptions from the principal defendant’s duty to be present throughout the trial\(^{54}\) were held to be in line with Art. 8 of the Directive.

There was criticism that the legislator did not make full use of the Directive and particularly did not positively regulate the presumption of innocence which is still deduced from the ‘Rechtsstaats-garantie’ of the Basic Law.\(^{55}\) Furthermore, there was criticism that the legislator seized the opportunity to dilute mandatory defence at the stage of the proceedings of the appeal on law.\(^{56}\) Others conceded that the Directive only provides for legislative content at the lowest level by reviewing ECtHR case law, i.e. the minimum standards in Europe, so that the leeway of the legislator was indeed limited.\(^{57}\)

From a legal point of view, the implementation of Directive 2013/48 brought about rather considerable changes, by improving the suspect’s right to access a lawyer: the suspect who wants to consult a defence lawyer before his/her examination


\(^{52}\) BT Drucks. 19/6138.

\(^{53}\) See BT Drucks. 19/4467, 10 et seq.

\(^{54}\) See Wahl, ‘Fair trial and defence rights’, 138. Exceptions which justify holding or continuing criminal proceedings without the accused concern, for instance, voluntary absence, unfitness to stand trial or disorderly conduct.


\(^{56}\) Deutsche Strafverteidiger e.V., ‘Stellungnahme Nr. 01/2018’, 6.

must be provided with information that facilitates contact with a lawyer, including information on emergency legal services. The defence lawyer of the accused has a right to be present and actively participate in the very early stages of investigations, i.e. at the stage of examinations of the accused by the police. Equally, the defence counsel has a right to be present at confrontations (Gegenüberstellung). However, it must be noted that these rights and duties of the authorities were already exercised in practice beforehand, meaning that the actual effects of the new law are limited.

In the context of changes in the AICCM, which establishes the right of the person sought by means of an EAW to be informed of his/her right to legal assistance in the issuing state, the legal literature remarked that Directive 2013/48 has raised the standards and quality of German criminal procedure for domestic cases. However, the legislator remains vague when it comes to the standards of the defence counsel in cases of international cooperation. It is argued that the idea of Directive 2013/48 was to establish equal standards for both domestic procedures as well as EAW cases. However, assistance in cases of extradition is (still) lagging behind.

The assignment of a lawyer to a person sought under an arrest warrant (extraditee) is, for instance, made dependent upon requirements that are applied rather strictly in practice. An early involvement of lawyer’s assistance in cases of international cooperation is (still) rather rare.

Other authors noted that the implementation of Art. 10(4) of Directive 2013/48 into the German law is a bit misleading because the information given to the requested person may confuse him/her that a real right of dual representation both in the executing and issuing state exists.

2. Directives in the process of transposition

More far-reaching changes to German legislation can be expected in view of the two remaining pieces of EU law, Directive 2016/1919 and Directive 2016/800.

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58 See Sec. 136(1) sentence 2 GCCP new version.
59 Sec. 163a(4) GCCP new version.
60 Sec. 58(2) GCCP new version.
64 Or is at least not handled uniformly among the Higher Regional Courts, as one interview partner confirmed.
Legal aid

The Directive on legal aid is closely connected to the rules on access to a lawyer in criminal proceedings. German law does not yet fully comply with the requirements of the Directive on legal aid. The main difficulty is to integrate the obligations set out by Directive 2016/1919 into a rather special (in Europe perhaps unique) system of ‘mandatory defence’ provided for by German law. Before we look at the envisaged amendments for the implementation of the Directive, it is worth briefly explaining this system of ‘mandatory defence’:

As indicated in the introduction, Germany has no legal aid system stricto sensu, as far as defendants are concerned. Although it is well established that the accused may enjoy the assistance of a defence counsel at any stage of the proceedings (Sec. 137 para. 1 GCCP), the German system distinguishes between mandatory and discretionary representation. The law defines certain scenarios where representation by a defence counsel is ‘mandatory’ (better said: ‘necessary’), which is called notwendige Verteidigung. A ‘necessary defence counsel’ may be a lawyer of the defendant’s own choice, or – if he/she does not have one – a lawyer appointed by court either upon application or ex officio (appointed defence counsel – Plichtverteidiger). The lawyer is then appointed irrespective of the financial means of the defendant and irrespective of his/her will. Therefore, a ‘necessary defence counsel’ (notwendiger Verteidiger) is not necessarily a ‘mandatory defence lawyer’ (Plichtverteidiger), but a mandatory (better said: appointed) defence counsel is always a ‘necessary’ one.

There are different provisions in the GCCP that set out situations where defence is ‘necessary’. The most important provision, however, is Sec. 140 GCCP para. 1 defines certain scenarios of defence being mandatory, such as:

- The main hearing at first instance is held at the Higher Regional Court or at the Regional Court;
- The accused is charged with a felony;
- The proceedings may result in an order prohibiting the pursuit of an occupation;
- Remand detention is executed against an accused;
- An attorney has been assigned to the aggrieved person pursuant to Sections 397a and 406g GCCP.

Para. 2 of Sec. 140 GCCP provides for a general clause, i.e. a defence counsel shall be appointed if the assistance of defence counsel appears necessary because of

1. the seriousness of the offence, or
2. the difficult factual or legal situation, or

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66 This is different to the situation of aggrieved persons acting in their functions as private prosecutor (Privatkläger) or ‘private accessory prosecutor’ (Nebenkläger, see above) where certain legal aid aspects apply, see Sec. 379 and 397a para. 2 GCCP.

67 Bohlander, Principles of German Criminal Procedure, 60.

68 The idea is mainly based on the public interest. in a properly functioning system of administration of justice and emanates from the Rechtsstaatsprinzip (see Bohlander, Ibid.).

69 Beulke, Swoboda, Strafprozessrecht, mn. 165.

70 I.e. the offense at issue carries a minimum sentence of one year (Sec. 12 GCC).
(2) if it is evident that the accused cannot defend himself/herself.

Applications filed by accused persons with a speech or hearing impairment shall be granted.

Another feature of the German system of ‘necessary defence’ is that – as a rule – a lawyer must be appointed ‘as soon as’ the accused is indicted (Sec. 141 para. 1 GCCP), i.e. at a rather late stage of the criminal proceedings. During preliminary proceedings, a defence counsel ‘may’ be appointed upon request of the public prosecution office, i.e. leaving a certain discretion to the appointment of a necessary defence counsel to the prosecutors. At a first stage, the appointed defence counsel is paid by the State. Depending on the outcome of the criminal proceedings, the defendant may bear the costs of the appointed defence counsel, in particular if he/she is convicted.\(^7\)

According to the ministerial draft, ‘introducing new provisions into the law of mandatory defence’ of October 2018,\(^2\) the current system of ‘necessary defence’ will be maintained. As a consequence, no general shift towards a proper legal aid system, as it exists in other EU countries, can be expected. The regime of ‘necessary defence’ can be seen as a ‘functional equivalent’ to a means and merits test.\(^3\) The Directive, however, triggered several amendments, such as extending the scenarios for which participation of a defence counsel is mandatory; abolishing time constraints, in particular by ensuring an early appointment of the defence counsel (e.g. if the accused is interviewed or is to appear before the court which is deciding on his/her detention);\(^4\) and opening the possibility for the defendant to file his/her own motion to appoint a defence lawyer at the pre-trial stage. Other amendments include new rules on the quality of ‘appointed defence lawyers’, on the replacement of lawyers and on legal remedies.\(^5\)

Several issues regarding the implementation of the Directive into German law are currently being discussed. In particular, stakeholders disagree, \textit{inter alia}, on the following issues: \textit{What forms of deprivation of liberty trigger mandatory defence? Which procedural measures must be included in the catalogue of mandatory

\(^{71}\) Another question is, however, whether the costs can actually be enforced against indigent perpetrators. Thus, there is a certain ‘means test’ at the level of execution of costs. See in this context: M. Jahn and S. Zink, ‘Verteidiger der ersten Stunde \textit{ante portas}: Legal Aid und das Pflichtenheft des deutschen Strafprozessgesetzgebers’, in B. Czerwenka, M. Korte, B.M. Kübler (eds.), Festschrift zu Ehren von Marie Luise Graf-Schlicker, Cologne, RWS, 2018, 475, 487.


\(^{73}\) Referentenentwurf ‘notwendige Verteidigung’, 2.

\(^{74}\) See also R. Schlothauer, ‘Europäische Prozesskostenhilfe und notwendige Verteidigung’, 2018, \textit{StV}, 169, who considers decisive adaptations of German law to the Directive’s scope in terms of points of time when a defence lawyer must be appointed.

\(^{75}\) Referentenentwurf ‘notwendige Verteidigung’, 2-3.

participation of the defence counsel? Above which threshold of criminal sanction is participation necessary? To what extent are exceptions from the participation of the defence counsel acceptable? Which should be the conditions for replacing an appointed defence lawyer? Which criteria must be met to ensure the quality of mandatory defence lawyers? 

Major changes will also be brought to the system of mandatory defence in cases of international cooperation in criminal matters. The ministerial draft intends to generate a major paradigm shift when it declares each extradition as a scenario of necessary assistance (notwendiger Rechtsbeistand). Limitations that the law currently stipulates would be fully abolished. Hence, the draft goes beyond the obligations from the Directive that limit legal aid to EAW cases. To that extent, the Directive may have an indirect effect since ‘legal aid’ (in the German sense of the term) would be extended to all extradition cases. Regarding the EAW, the draft provides for additional specific rules as to ensure the necessary participation of a lawyer’s assistance when the person sought exercises his/her right of dual defence (see Art. 5 para. 2 Directive 2016/1919). Further adaptations are made as regards assistance of counsel in cases of enforcement of foreign orders for confiscation or deprivation (enforcement cooperation). Although the Directive does not regulate this field, amendments are deemed necessary in order to ensure consistency with the extradition rules.

Children’s rights

Rather complex issues must also be solved in the course of the implementation of Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. In essence, the implementation of the Directive will change the roles of the different parties to the German youth criminal procedure. It is laid down in the Youth Courts Law (Jugendgerichtsgesetz – JGG, hereafter: YCL) with several references to the GCCP.

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77 Quality is a very sensitive issue in the discussion. Lawyers observed that Germany lags behind as regards ensuring a high quality of appointed defence lawyers (see SCHLOTHAUER, NEUHAUS, MATT, BRODOWSKI, 2018, HRRS, 55-56; M. JAHN, Zur Rechtswirklichkeit der Pflichtverteidigerbestellung. Eine Untersuchung zur Praxis der Beordnung durch den Strafrichter nach § 140 Abs. 1 Nr. 4 der Strafprozessordnung in der Bundesrepublik Deutschland Berlin, De Gruyter, 2014. SCHLOTHAUER, ‘Europäische Prozesskostenhilfe’, 2018, StV, 173 points out that Germany is to introduce a certified quality assurance. For the discussion on the quality of mandatory defence lawyers, see the EU funded QUAL-AID project: www.qualaid.vgtpt.lt/en.

78 Referententwurf ‘notwendige Verteidigung’, 11, 51.

79 See Sec. 40 AICCM and below III A 2.

80 See Referententwurf ‘notwendige Verteidigung’, 55.

81 However, in this case the existing restrictions for the appointment of the assistance of counsels are upheld (Sec. 53 para. 2 AICCM). See, in detail, Referententwurf ‘notwendige Verteidigung’, 12, 54-55.
The focus of implementation lies on the right to assistance by a lawyer (Art. 6 of Directive 2016/800). By comparison with the existing law, further scenarios of ‘necessary’ assistance by a lawyer will be introduced. Considerable further changes will be necessary as to the points in time when the appointment must be enforced. The implementation must, in particular, ensure that deprivation of liberty as a sanction can only be imposed if the accused ‘child’ has received effective assistance by a lawyer during the criminal proceedings. In line with Directive 2013/48, Directive 2016/800 introduces the assistance by a lawyer from the outset of criminal proceedings (‘lawyer of the first moment’), which entails the need for adaptations. The role of defence lawyers will considerably increase with implementation. Actually, participation of a defence counsel in criminal proceedings involving ‘children’ is not very frequent.

Similarly, the roles of other parties to the German criminal procedure involving juveniles and young adults are expected to evolve after the Directive has been transposed. This concerns first the situations allowing for removal of the rights of the ‘holder of parental responsibility’ under Art. 5 (2) Directive 2016/800. A far-reaching right of – possibly final – removal of the rights is not known in the YCL yet. In particular, the implementation of the Art. 7 Directive 2016/800 is going to change the way in which the youth courts’ assistance service is involved in the criminal proceedings. It is expected that – due to the right to an individual assessment that shall be carried out at the earliest appropriate stage of the proceedings according to the Directive – the youth courts’ assistance service must be involved much earlier in the preliminary proceedings than it is to date. Furthermore, it must be implemented under which conditions indictment can be filed without a prior report of the youth courts’ assistance service and under which conditions participation of a representative of the youth courts’ assistance service at trial is dispensable.

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82 For the use of the term ‘necessary assistance/defence counsel’ (notwendiger Rechtsbeistand/notwendige Verteidigung), see above, a).
84 German law does not use the term ‘child’ as in the Directive, but distinguishes, see Sec 1 YCL: ‘Juvenile’ shall mean anyone who, at the time of the act, has reached the age of fourteen but not yet eighteen years; ‘young adult’ shall mean anyone who, at the time of the act, has reached the age of eighteen but not yet twenty-one years.
86 German law distinguishes in this regard between the legal notions of ‘parent or guardian’ and of ‘legal representative’ (see Sec. 67 YCL).
89 Referentenentwurf ‘Verfahrensrechte von Beschuligten im Jugendstrafverfahren’, 31 et seq.
B. Implementation of procedural rights’ directives in practice

EU directives on strengthening procedural safeguards have become more and more subject to the case law of German courts. As far as purely national cases are concerned, an important issue is whether the defendant can claim the translation of the entire judgment if he/she does not have sufficient command of the German language, but is present, represented by a lawyer and supported by an interpreter during the main proceedings. The German courts denied such a claim and argued that the interpretation of the German law in the light of Directive 2010/64 does not change the already previously followed concept (backed by the FCC) according to which the interpretation of passages of the judgment is regularly sufficient to maintain an effective defence of the accused.  

Another area of concern is the application of Directive 2010/64 and Directive 2012/13 to special types of criminal procedure which are not brought to an end by a judgment. It can be observed that the implementing law is mainly tailored to the regular situation of judgments and it became questionable how the relevant provisions must be adapted to other forms terminating criminal proceedings. This problem mainly occurred in relation to the penal order procedure (Strafbefehlsverfahren). This procedure is a common tool to effectively deal with trivial and medium offences. In these situations, a case can be unilaterally disposed of by the prosecutor and criminal court without oral hearing and formal judgment, but with the possibility to impose criminal sanctions including a fine or suspended sentence of up to one year. Most importantly, the defendant can avoid the enforcement of the sanction (e.g. fine, issued in the first stage in a written procedure) and force a trial only by lodging a formal objection (Einspruch) against a penal order within two weeks following service of the order. In case of admissible objections, the court sets down a main hearing on the case where the defendant can fully exercise his/her right to be heard.

German courts brought cases to the CJEU seeking guidance on the interpretation of Directive 2010/64 and Directive 2012/13 in relation to this German penal order procedure because problems arose on how to handle this procedure if the defendant had no domicile in Germany, but went abroad after having committed the offence. In the Gavril Covaci case, the CJEU that Directive 2010/64 on interpretation/translation

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91 See also Case C-278/16, Frank Sleutjes, 12 October 2017, ECLI:EU:C:2017:757.

92 For details see Huber, ‘Criminal Procedure in Germany’, 350-351.

93 Case C-216/14, 15 October 2015, ECLI:EU:C:2015:686.
does not preclude national legislation which requires the legal remedy to be drafted in the national language of the criminal proceedings (here: written objection against the penal order penalty in German) even if the accused person does not speak it. The CJEU, however, left it to the German court to decide whether such an objection constitutes an ‘essential document’ in accordance with Art. 3(3) Directive 2010/64, so that it must be translated into German.

The consequences of the latter finding largely differ in German practice, in particular whether the ‘objection’ must be considered an essential document and whether the entry of the objection in the foreign language meets the two-week deadline and can therefore be considered admissible. The Federal Court of Justice has now ruled that, if the defendant is represented by a lawyer, the time limits for legal remedies are only met when the document was translated. Thus, the FCJ limits the CJEU’s Covaci judgment only to accused persons who are not represented by a lawyer.

Furthermore, the CJEU ruled that Arts. 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU on the right to information in criminal proceedings (i) do not preclude German legislation which, in criminal proceedings, makes it mandatory for an accused person not residing in Germany to appoint a person authorised to accept service of a penal order concerning him, but (ii) require that the defendant has the benefit of the whole of the prescribed period for lodging an objection against the penal order.

In the aftermath of the Covaci judgment, the local court and regional court in Munich asked the CJEU how to handle situations if the addressees of penal orders had neither a fixed place of domicile nor residence in Germany nor in their country of origin. In these cases, the CJEU followed the proposal by the referring courts that Germany may maintain its system of mandatory representatives to officially receive notification of the penal order, but the German provisions on restoring to the status quo ante (Wiedereinsetzung in den vorigen Stand) must be interpreted in the light of Directive 2012/13. As a consequence, the accused person must be conferred a two-week period instead of one week (as stipulated by law) for his/her objections from the moment when he/she actually became aware of the order.

However, it is doubtful whether the approach via the provisions on re-storing the status quo ante is the right one, since it seemingly puts persons who are not defended by a German lawyer at a disadvantage. They might ignore the German penal order procedure or react too late, meaning that they would then be confronted with a res

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96 See also BGH, Beschl. v. 9.2.2017 – StB 2/17.
97 C-124/16, C-188/16 and C-213/16, Ianos Tranca and Others, 22 March 2017, ECLI:EU:C:2017:228.
iudicata decision which might be enforced under the terms of Framework Decision 2005/214/JHA.\textsuperscript{98}

Together with the difficulties in reaching people in the context of trials \textit{in absentia}, issues relating to penal orders raise the question of how the law can be applied effectively when people exercise their European Union right of free movement. The existence of national legal regimes which end at the borders of their own territory does not correspond to the single area of free movement which was created by the treaties.

\textbf{C. Perceived added value of the procedural rights’ directives}

Interviewees expressly raised the point that, due to the exception clauses stipulated in the directives and taken over by the German legislator, the legal result remains the same as in the past. An example is the German case law on the requirement for translations of judgments, which today follows the same lines of argument that were already set out by the Federal Constitutional Court in 1983: if a lawyer represents the defendant, oral translations by an interpreter are held, in principal, to be sufficient. Therefore, some interviewees noted that ‘all remains the same’ and it remained unclear where the added value of EU law lied. They added that it is understandable that compromises must be found at EU level with the Council and its 28 EU Member States as the dominant force in putting out EU legislation. However, it must be observed that cost-benefit considerations were (implicitly) introduced by the EU legislation that have normally not played a role in German law, but are now picked up by German courts when interpreting German law. Future EU legislation should duly take into account the impacts of exception clauses. An assessment of the real added value of the EU harmonisation process should be conducted before the adoption of new instruments.

According to the defence lawyers interviewed, Directive 2016/1919 raised high expectations for favourable changes. Interviewees argued that a reform of the German rules on ‘legal aid’ should be aligned with the defendant’s ‘material right’ to have access to a lawyer from the outset of the investigative proceedings. Furthermore, the compensation of appointed defence counsels should increase. In this context, defence lawyers request a considerable improvement when it comes to the assistance of clients in extradition/surrender proceedings. In addition, it is hoped that a quality control for mandatory defence counsels is introduced by the German implementing law. It was advocated that Directive 2016/1919 should be the occasion to introduce a new system of assigning defence lawyers \textit{ex officio}, which limits the discretion of judges.

On the other hand, interviewees fear that the German legislator will use the broad margin of discretion granted by Directive 2016/1919 in order to maintain the current system. Here, again interviewees referred to the Directive’s too far-reaching ‘exception clauses’, which means that the impact of the harmonisation process of EU law remains low.

\textsuperscript{98} Instead, German authorities should, as a first step, resort to the facilitated possibilities to serve official documents under the EU’s mutual legal assistance scheme. Unknown residences could be investigated via the Schengen Information System. T. Wahl, ‘Die EU-Strafverfahrensrichtlinien vor deutschen Gerichten’, 2017, \textit{Eucrim}, 50, 52.
As regards the expected changes from the implementation of the children’s rights’ Directive, interview partners voiced criticism that the regulations on the assistance of the defence counsel laid down in the Directive may even lead to a distortion of the German criminal procedure against children. To date, the majority of cases are dealt with bilaterally, during the preliminary proceedings, between the prosecutor/police on the one side and the juvenile and his/her parents on the other side. Under German law, prosecutors and judges specialised in proceedings involving juveniles have far-reaching possibilities to dispense cases without bringing them to charge (so-called ‘diversion’). The entire procedure is oriented primarily towards the educational concept (see also Sec. 2 YCL). This concept is ‘on top’ of the criminal proceedings involving juveniles, but may be done away with if defence counsels participate at an early stage of the proceedings. Instead of finding tenable solutions between the law enforcement authorities and the juvenile offender in the pre-phase of a trial, it is feared that court procedures will increase. The involvement of defence lawyers may even undermine the ‘socio-educational work’ towards the juvenile offender. These concerns are also raised because defence lawyers may pursue different interests than the ‘education of the client’ and most defence lawyers lack training in criminal proceedings involving juveniles or young adults. Whether this caveat can be remedied by increasing training measures in the future is very much doubted. Regarding the peculiarities of the German criminal procedure involving juveniles on dispensing cases, it was noted that implementation by the legislator must be awaited who might trigger the exceptional clause of Art. 6(6) Directive 2016/800 in order to maintain the current state of play, i.e. a dispensation without participation of the defence counsel and without (formal) court proceedings.

Regarding other issues of judicial practice, the EU Directives on procedural safeguards have had a very low impact. Special training sessions to ensure a high level of competence among interpreters/translators, judicial staff (prosecutors, judges, etc.) and lawyers so as to match the requirements of Directives have not been provided in Germany. Most interviewees confirmed what was already explored in former studies: German practitioners hardly take into consideration EU law. Instead, they apply the national law (after it enters into force). Only a few specialists deal with questions as to what extent general principles of EU law, e.g. the requirement to interpret national law in conformity with the Directives, may serve as lines of argument in favour of a person concerned in a given case. Similarly, CJEU case law does not have a major impact on daily judicial practice. An exception – as remarked by a prosecutor who was interviewed – is the CJEU’s case law on the service of penal orders to non-resident accused persons (living abroad).

III. Evidence law
A. Evidence-gathering
1. Principles of evidence collection and actors involved in the German law of criminal procedure

As indicated in the introductory remarks, there are basically two layers during criminal proceedings in Germany. Whereas the court exercises the leading role for the trial, the pre-trial phase is under the control of the State prosecution service. The prosecution service is also called the ‘master of the criminal pre-trial procedure’ (Herrin des Ermittlungsverfahrens). The investigations carried out by the prosecutor are primarily intended to decide whether a case should proceed to the court for trial, i.e. whether public charges should be preferred (Sec. 160 para. 1 GCCP). Once a case is admitted to trial, control is taken out of the hands of the prosecution and given to the court. It is then up to the presiding judge to take the evidence. The procedure to establish the truth during the trial is regulated formally and strictly (Strengbeweis), with the law acknowledging only four types of evidence: witnesses, experts, documentary evidence and inspection.

In the pre-trial or investigative phase, the prosecutor has the duty to “ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken” (Sec. 160 para. 2 GCCP). For this purpose, the public prosecutor’s office shall be entitled to request information from all authorities and to make investigations of any kind. It shall hear witnesses and experts; and the accused must be examined prior to conclusion of the investigations (unless the proceedings result in termination). Sec. 136 and 136a of the GCCP stipulates rules for the first examination of the accused and prohibited measures of examination.

In practice, however, it is the police that undertakes the investigations. The police is called ‘state prosecution auxiliary officers’ (Hilfsbeamte der Staatsanwaltschaft). In theory, this means that they are legally obliged to support the prosecutor and follow the instructions of the State prosecution service. In the vast majority of cases, the police – after having informed the prosecutor of an offence – leads the investigations independently, drafts a police report and submits its findings to the prosecutor. The State prosecutor then prepares the indictment, so, in practice, his/her role is rather prosecutorial than investigative.\(^\text{100}\) The de facto role of the police is, however, without prejudice to the reliability of evidence that remains with the prosecution service.

Since the bulk of the investigative measures infringe the fundamental rights of the suspect or third parties, most measures are subject to statutory control. The GCCP contains specific rules for coercive measures, such as search and seizure, surveillance, interception of telecommunications, online search, long-term observation, use of technical means, use of undercover agents, bodily examinations, taking of blood samples, photographs, fingerprints, DNA analysis, etc.

The individual measures are often regulated in a very detailed manner. This also emanates from the specific case law of the FCC that gave guidance to the legislator on how measures (in particular covert investigative measures with technical means) must be construed in order to comply with the requirements of the constitution. In addition,

\(^{100}\) Huber, ‘Criminal Procedure in Germany’, 298.
the FCC remarked, that – as an overarching principle – the powers under the GCCP are only valid if carried out in a manner that is proportionate to the object in view.\textsuperscript{101}

As a rule, violations of this principle of proportionality render evidence inadmissible for trial.\textsuperscript{102}

Against this background, courts (in most cases a single pre-trial judge at the local court – \textit{Ermittlungsrichter}) are involved in order to legitimate measures that intrude on the suspect’s or third party’s rights. For this purpose, the prosecutor must apply to the judge for authorisation. Which conditions are to be observed and how a judge must be addressed is regulated in the provisions on the specific investigative measure. Under certain circumstances and for some measures (e.g. search and seizure, bodily examination of persons, interception of telecommunications, surveillance by technical means), an order can be directly made by the prosecution service.

This applies above all in exigent circumstances, in which there is a danger that the evidence may otherwise be lost or interfered with and a court order cannot be obtained in time. In cases of urgency, when no judicial orders can be obtained, the police may also be entitled to execute an investigative measure immediately. The police then enjoys similar powers to the State prosecution service (see Sec. 163 GCCP).

Such actions are, however, subject to subsequent judicial oversight, i.e. the pre-trial judge must affirm the measure (see e.g. Sec. 100b para. 1 of the GCCP with respect to the interception of telecommunications). In addition, the person affected may seek court rulings on the lawfulness of a measure. In the pre-trial phase, this can also be done if the measure was finished and the person affected became aware of it. As a consequence, a court may decide on the admissibility of evidence before the trial.

Furthermore, the pre-trial judge may be involved for reasons relating to ensuring a higher quality and reliability of evidence, e.g. for a judicial examination of the suspect or witness.\textsuperscript{103}

Notwithstanding, German criminal procedure today cannot be compared with systems like France or Spain where a strong role is devolved to the investigative judge. This is because the pre-trial judge cannot influence the process of evidence collection and his/her role is limited to judicial oversight.

2. \textit{Evidence-gathering in the transnational context}

For evidence gathering abroad, the AICCM does not contain specific rules. In the pre-trial stage, it is for the prosecution service to decide whether evidence located in another country must be collected in order to underpin his decision for prosecution. Ministerial guidelines (\textit{Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (RiVAS)}\textit{t})) provide for advice in case of outgoing requests for mutual legal assistance. General guidelines for outgoing requests are provided for in No. 25 et seq. RiVAS). According to No. 26 RiVAS, German authorities must consider that foreign authorities execute a request for mutual legal assistance in accordance with the procedural and formal rules of their own law. It is said in these guidelines that

\begin{itemize}
  \item \textsuperscript{101} BVerfG, 44, 353, 383. For the significance of the proportionality principle in the German legal order, see the introduction.
  \item \textsuperscript{102} BVerfG, \textit{Ibid}.
  \item \textsuperscript{103} BOHLANDER, \textit{Principles of German Criminal Procedure}, 67.
\end{itemize}
compliance with this law is, as a rule, sufficient for the German criminal procedure. Foreign authorities may be requested to consider certain rules of German criminal procedure, in particular if treaties or conventions provide for that.

In addition, the RiVASt provides for specific rules on how to file a request for search and seizure, conditions for the service of documents abroad (including summoning), examination of suspects, witnesses and experts, requests for information on the foreign law and for getting files, the temporary transfer from and to a foreign country for German proceedings and the direct communication with persons abroad.\textsuperscript{104}

In the context of international cooperation in the trial phase, the most fiercely discussed topic is to what extent applications to summon witnesses abroad can be rejected. The underlying provision is Sec. 244 para. 5 sentence 2 of the GCCP, which stipulates that an application to take evidence by examining a witness may be rejected if the witness has to be summoned from abroad and if the court, in the exercise of its duty-bound discretion, deems the witness not to be necessary for establishing the truth. The provision is an exception from the rule that the trial court must, \textit{proprio motu}, extend the taking of evidence to all facts and means of proof relevant to the decision (Sec. 244 para. 2 of the GCCP) and opens the path to an anticipatory assessment of the facts and guilt of the defendant.\textsuperscript{105} The ratio of this exception related to witnesses abroad goes back to the idea that the trial court should not be obliged to take evidence that is beyond the limits of its jurisdiction.\textsuperscript{106} Notwithstanding, modern developments of faster mutual legal assistance and modern techniques, such as the cross-border video examination of witnesses, cannot be set aside when interpreting Sec. 244 para. 5 GCCP.\textsuperscript{107}

As regards incoming requests for mutual legal assistance, Germany takes the view that assistance for foreign countries should be rendered as far as possible. This concept is followed, e.g. by the fundamental provision in the AICCM, Sec. 59 para. 2, according to which

‘[l]egal assistance [in criminal matters] shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.’

The limits are laid down in Sec. 59 para. 3 AICCM:

‘Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.’

This means that the measure to be taken must comply with the German (regularly criminal procedure) law and potentially existing limits to the use of evidence or to the exchange of information must be observed by the executing authorities.\textsuperscript{108} Hence, here again the principle of proportionality takes effect, so

\textsuperscript{104} See No. 115 et seq. RiVASl.

\textsuperscript{105} MEYER-GOSSNER, SCHMITT, \textit{Strafprozessordnung}, § 244, mn. 78a.

\textsuperscript{106} MEYER-GOSSNER, SCHMITT, ibid., with further references.

\textsuperscript{107} GLESS and SCHOMBURG, \textit{Internationale Rechtshilfe in Strafsachen}, III B 1, EU-RhÜbk, Art. 10, mn. 28.

\textsuperscript{108} LAGODNY, \textit{in SCHOMBURG et al., Internationale Rechtshilfe in Strafsachen}, I, § 59 mn. 31.
that a requested measure cannot be executed if it is deemed disproportional under the German yardsticks.\textsuperscript{109}

B. Evidence admissibility

1. National rules on evidence admissibility

German criminal procedure as regards evidence features two fundamental principles: First, the inquisitorial principle (also known as ‘instruction’ or ‘investigation’ principle – \textit{Ermittlungsgrundsatz}) requires that the aim of any investigation and trial is to find out the material truth (\textit{materielle Wahrheit}). It is up to the trial court to establish the facts and evidence. The trial court is not in a position to rely solely upon the motions or statements as adduced by the parties taking part in the proceedings, in particular the prosecution and the defence. The second important principle is the principle of free evaluation of evidence (\textit{freie Beweiswürdigung}). According to Sec. 261 of the GCCP, the court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole. It essentially means that the judge is free from strict rules on evidence or guidelines. As a rule, no specific conditions are laid down which have to be satisfied before a judge can find a fact proven. However, the principle of free evaluation of evidence reaches its limits because the material truth cannot be established ‘at any price’.\textsuperscript{110} As a consequence, by means of exclusion of evidence, higher legal interests break through both the ‘inquisition’ principle and the principle of free evaluation of evidence. They stem from the idea that each State action is limited by the fundamental rights as enshrined by the Basic Law, in particular the fair trial principle (deriving from the \textit{Rechtsstaatsgarantie}). Therefore, exclusionary rules are an instrument to ensure that individual rights are respected.\textsuperscript{111}

If a piece of evidence is taken into account in the conviction although it was not allowed to be used, the principle of free evaluation of evidence is violated. This may relate to evidence obtained in violation of the rules governing its collection in the pre-trial phase if evidence supports the findings of the court in its judgement. An example of this is when a policeman does not properly instruct the suspect about his/her rights at his/her examination and the court takes into account the suspect’s statement during the police interview in the conviction. If evidence must be excluded, the exclusion is comprehensive, i.e. it cannot be circumvented by recurring to another means of evidence.\textsuperscript{112}

German law distinguishes between exclusionary rules explicitly stipulated in the law and those that must be deduced implicitly. Explicit exclusionary rules are regulated, for example, for certain surveillance measures (such as the interception of telecommunications) when statements are recorded that concern the ‘core area

\textsuperscript{109} \textsc{Lagodny}, \textit{Ibid.}, mn. 33.

\textsuperscript{110} BGHSt 14, 358, 365; St 52, 11, 17.

\textsuperscript{111} \textsc{Beulke, Swoboda, Strafprozessrecht}, mn. 454.

\textsuperscript{112} \textsc{Beulke, Swoboda, Strafprozessrecht}, mn. 455. For example, if the statement of the suspect during his examination by the police is inadmissible, the judge cannot hear the police officer as a witness on the suspect’s statements.
of private life'. The law also regulates that evidence cannot be used if statements are collected from persons who have the rights to refuse testimony (i.e. persons who enjoy privileges). Another important exclusionary rule is included in Sec. 136a of the GCCP, which stipulates prohibited methods of examination. Exclusionary rules may also be included in other laws outside the GCCP.

It is acknowledged that evidence can also be excluded although a rule is not explicitly mentioned in legal provisions. Often – but not always – evidence is excluded when evidence was obtained in violation of the rules of its collection. Hence, it is hard to predict whether an illegal collection of evidence will result in an exclusion of evidence. Doctrine further distinguishes whether an exclusion of evidence must be accepted if the evidence was wrongly collected (unselbständiges Beweisverwertungsverbot) or whether a piece of evidence was legally collected but cannot be used for the conviction (selbständiges Beweisverwertungsverbot).

In sum, it must be stressed that neither the doctrine nor the case law developed general rules on when violations of evidence gathering may lead to an exclusion of evidence. The approach is very casuistic and decisions are made on a case-by-case basis. There is, above all, considerable disagreement on the criteria which determine the admissibility and non-admissibility of evidence.

Some lines of jurisprudence and scholars focus on the protective purpose of the norm that governed the collection of the evidence. Other areas of the case law weigh up the State interest for prosecution against the fundamental rights of the person affected, in particular by taking into account the gravity of the offence and the importance of the violation. Others combine both approaches depending on the type of the exclusionary rule, i.e. whether it is a ‘unselbständiges’ or ‘selbständiges’ Beweisverwertungsverbot.

In recent time, the case law resorts more and more to an older theory that made the question on admissibility dependent on whether the violation touched upon the ‘legal sphere’ (Rechtskreis) of the defendant in its essence or whether the violation was of minor importance in view of the person’s ‘legal sphere’. Hence, statements of an accused were held admissible evidence in proceedings against co-defendants although the accused had no proper access to his/her defence counsel in pre-trial investigation. Similarly, the statement of an accused before the pre-trial judge can be used for the conviction of a co-defendant although the defence lawyer of the accused was not notified about the examination before the pre-trial judge.

In practice, the following cases play an important role if it comes to a question as to whether a piece of evidence is admissible or not: i) refusal of testimony by

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113 See Sec. 100d para. 2 GCCP.
114 BEULKE, SWOBODA, Strafprozessrecht, mn. 456.
115 Overview of the different theories at BEULKE, SWOBODA, Strafprozessrecht, mn. 458 et seq.
116 Advocated by BEULKE, SWOBODA, Strafprozessrecht, mn. 458.
117 BGH NSSt-Z RR 2016, 377.
witnesses in the trial; ii) false or omitted advice on the defendant’s rights (in particular *nemo tenetur* and consultation with a lawyer) at the examination of the suspect/accused;\(^{119}\) iii) unlawful interception of telecommunication or unlawful interception of the private speech on private premises; iv) interferences into privacy, such as diary entries or tape-recordings by private persons; v) non-respect of the requirement that an investigative measure must be ordered by a judge, in particular as regards physical examination/blood tests or searches.

In general, one can state that the Federal Court of Justice (Bundesgerichtshof, hereafter FCJ) follows a rather restrictive line to accept an exclusion of evidence.\(^{120}\) Another important feature in this context of exclusion of evidence is the so-called ‘*Widerspruchslösung*’ developed by case law of the FCJ.\(^{121}\) In several cases of possible exclusion, the FCJ requires that the defendant (or better said his/her defence counsel) must object to the use of evidence in time in the proceedings before the first instance court. ‘In time’ means after evidence has been taken in each individual case where the law allows the defendant to add anything.\(^{122}\) Jurisprudence also applies this rule to defendants who have no defence counsel if the defendant was sufficiently informed by the judge as regards the need of objection and its consequences. If the defendant does not object in time, his/her argument on the exclusion of an individual piece of evidence is not heard on appeal. Areas where the requirement to object apply are as follows:

- Failure of advice on the defendant’s rights (in particular *nemo tenetur* and consultation with a lawyer) at the first examination of the suspect/accused;
- Non-observance of the duty to notify persons who are permitted to be present at judicial examinations;
- Violation of the requirements to order the interception of telecommunications or undercover investigators;
- Non-respect of the judicial authority to order physical examination or blood tests;
- Violation of the right to confrontation under Art. 6 para. 3 lit. d) ECHR.

2. **Evidence admissibility in a transnational context**

Specific approaches are followed if it comes to the admissibility of evidence gathered abroad. As explained above, German criminal procedure law contains several restrictions and prohibitions when it comes to the gathering of evidence and therefore the question arises as to whether (and if yes, to what extent) these

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\(^{119}\) The Federal Court of Justice ruled that the failure of the police officer to inform the suspect of his/her right to get mandatory defence (a new provision that was introduced in the course of implementation of Directive 2012/13) does not lead to the exclusion of the suspect’s statement as evidence in trial (BGH, Beschluss vom 6.2.2018 – 2 StR 163/17). This is criticised in legal literature since the FCJ devalues and undermines rights designed to strengthen suspects’ position in the criminal proceedings and so marginalises the spirit of EU law (see C. Jäger, ‘Praxiskommentar’, 2018, *NSStZ*, 672; A. Lilie-Hutz, *FD-StrafR* 2018-406438).


\(^{121}\) Germany’s highest court of civil and criminal jurisdiction.

\(^{122}\) Sec. 257 GCCP.
restrictions/prohibitions must be observed in transnational cases. This question must be treated on the two sides of the coin, i.e. (1) how ‘German restrictions’ may have an impact on the admissibility of evidence in the foreign country (outgoing evidence with incoming MLA requests) and (2) how evidence that is gathered abroad for a German criminal procedure can be held admissible although German standards were not maintained (incoming evidence upon a German MLA request).\textsuperscript{123} In the first scenario, the main question is as to what extent conditions can be set by the requested country that must be observed in the requesting country under international public law and to which extent the individual can rely on these conditions in the foreign criminal proceedings.\textsuperscript{124}

We will focus here on the second scenario. The topic under which conditions evidence gathered abroad is admissible in German criminal procedure is much discussed in legal literature.\textsuperscript{125} The main problem is whether evidence abroad can be used if the foreign standards of evidence gathering do not comply with German criminal procedure law. Although there are different approaches and solutions, practice is considerably marked by an important decision of the Federal Court of Justice taken in 2012.\textsuperscript{126} In this decision, the court set far-reaching guidelines as far as cooperation within the EU is concerned.

In the case at issue, upon a request by the Hamburg prosecutor, the prosecution service of Prague submitted records from telephone interceptions and audio CDs with more than 45,000 intercepted telephone calls. This material was used against the defendants in the German criminal proceedings. In its appeal on points of law before the FCJ, the defendants argued that the material could not be used lawfully for the following reasons:

First, the applicable bilateral mutual legal assistance treaty between Germany and the Czech Republic had required an interception order or warrant by the competent German court declaring that the requirements of the interception would be met if


\textsuperscript{124} See details: Wahl, \textit{Ibid.}


\textsuperscript{126} BGH \textit{1 StR} 310/12 – Beschluss vom 21. November 2012 (LG Hamburg) = BGHSt 58, 32 = \textit{HRRS} 2013, Nr. 314.
such measure were carried out on the territory of the requesting party;\textsuperscript{127} this order or warrant was lacking in the present case;  

Second, German criminal procedure has more stringent rules on the interception of telecommunications since these can only be ordered if the defendant is suspected of a certain offence listed in the relevant provision of the German Criminal Code of Procedure (Sec. 100a). Such a listed offence was not given at the time when the interceptions were carried out in the Czech Republic;  

Third, the evidence was gathered unlawfully on Czech territory since the interception order of the Prague court was ill-founded.  

The FCJ reiterated its standpoint that the question of the use of evidence obtained abroad must follow the rules of the requesting state, i.e. in the case at issue: German law. In other words, the FCJ applies the \textit{forum regit actum} principle when it comes to the use of evidence, instead of the \textit{locus regit actum} principle, which applies to the enforcement of a requested MLA measure.  

The FCJ further emphasised that – as far as judicial co-operation within the EU is concerned (and there are no indications of abusive actions of the public authorities) – the use of the evidence obtained abroad is independent of the lawfulness of the measure in the requested EU state (here: the law of the Czech Republic). The FCJ mainly argues that, in an area like the EU, which is based on the principle of mutual recognition of judicial decisions, Germany is not entitled to examine the compliance of the measure at issue with the law of the enforcing State. As a consequence, it is not relevant when the requested State does not comply with the protection of privileged information in accordance with its law or other substantive or formal requirements of its law. By contrast, the received information cannot be used as evidence in the German criminal procedure if the content of information is affected by an exclusionary rule of German (criminal procedure) law. This would be the case if, for example, the received information involved the ‘core area of the private conduct of life’ or conversation with privileged persons pursuant to Sec. 160a of the GCCP.  

By applying these rather restricting standards (\textit{eingesschränkter Prüfungsmaßstab}),\textsuperscript{128} the FCJ could not detect a ground for the evidence handed over being inadmissible. The FCJ, \textit{inter alia}, argued that the possible fact that orders of the Czech court were not sufficiently justified, is no issue infringing German \textit{ordre public}. Furthermore, the FCJ rejected the first argument of the defendants and ruled that the relevant provision of the bilateral treaty must be interpreted as having a meaning relating to whether the conditions are fulfilled under which German criminal courts may use information that was gathered and transferred in other – not necessarily criminal – proceedings (Sec. 477 GCCP). In other words, it does not have to be assessed whether the German rules on interception of telecommunications must hypothetically be met, but the rules on the use of information found by chance. These conditions were fulfilled in the given case.

\textsuperscript{127} Art. 17 para. 5 in conjunction with para. 2 No. 1 of the bilateral treaty on mutual legal assistance that supplement the 1959 European Convention on Mutual Assistance in Criminal Matters between the Federal Republic of Germany and the Czech Republic.  

\textsuperscript{128} Confirmed by a decision of the FCJ of 9 April 2014 concerning the transfer of wiretap protocols by Hungarian authorities (BGH 1 StR 39/14 = \textit{HRRS} 2014 Nr. 679).
In conclusion, the ruling of the FCJ opens up the admissibility of evidence gathered in another EU Member State. The standards for equivalent purely national criminal proceedings are not applied. Instead, only the national *ordre public* or the fair trial principle of Art. 6 of the ECHR are considered the only limitation for declaring evidence inadmissible. It can be assumed that such grounds are only successful in exceptional cases.

C. Perceived impact on cross-border cooperation and negotiations of new instruments

Many interviewees replied that the different procedural orders of the EU Member States do not lead to problems in practice when it comes to the problem of evidence gathering abroad. The main reason is that the *forum regit actum* principle, as enshrined in Art. 9(2) Directive EIO and Art. 4 EU MLA Convention 2000, is being applied in practice. As a consequence, formalities and procedures requested by the foreign State are respected and implemented. The exception to the *forum regit actum* principle, i.e. that the formalities or procedures of the foreign State would be contrary to the fundamental principles of the law of the executing State, have not played a role in practice so far. They argued that the discussed matter of admissibility of foreign evidence is above all of a theoretical nature.

One interviewee pointed out, however, that the strict German rules of criminal procedure, according to which a judge must authorise most of the coercive measures, may hinder cross-border cooperation. Others disagreed and argued that the aim of MLA is not to let a specific measure be carried out as required, but to achieve the evidentiary result. The way this result is achieved should be left open to the executing authorities and the Directive EIO explicitly provides for the necessary leeway to the executing State.

Another interviewee pointed out that he faces problems in investigating assets or property, which is assumed to be in foreign countries. He conceded, however, that it is not the rules on cooperation in matters of freezing and confiscation, but the investigation of the assets that is the problem. The reason is seen in the different content and management of relevant databases in the various EU Member States.

Against this background, most interviewees advocated that the option of Art. 82 (2)(a) TFEU should not be triggered. It is first argued that the added value of an EU action is expected to remain low. Should EU standards of admissibility be envisaged, experiences with the implementation and use of the EIO should be gathered and a thorough impact assessment should be carried out in order to define the need for European rules in this matter.

A further reason for the limited added value of an EU action is also seen in the rather broad possibilities to accept foreign evidence although it may not have kept up the standards of German criminal procedure. This is considered to give the necessary leeway to decide on the relevant cases. This approach was criticised by one interviewed defence lawyer, who argued that German courts can justify ‘all

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129 See the jurisprudence explained above, and the approach of the courts to weigh up the interests at stake (*Abwägungslösung*).
or nothing’ by this concept. This being said, it is was considered doubtful that EU legislation would entail improvements, since regulations much in favour of the defendant (preferably followed the Swiss model relating to the exclusion of evidence in MLA procedures) cannot be expected.

Interviewees also pointed out that the existence of different rules in evidence gathering and admissibility have not hindered and/or slowed down negotiations on the European Investigation Order (EIO). The EIO is considered a cooperation instrument without claiming to be a harmonising measure as regards admissibility of evidence. It was further remarked that the question of the grounds for refusal was widely discussed in the debates in the Council. Given the different procedural systems of the EU countries, discussions boiled down to the question as to what extent mutual trust should be accepted in the EU. As decided in the EIO (in particular after the intervention of the European Parliament) the EU is moving in the direction of shared responsibility, i.e. to concede rights of examination by the executing State. In addition, the question on the use of evidence is not covered by the EIO either. This corresponds to the understanding of the EIO as an instrument of cooperation, respecting the legal traditions of the EU Member States.

IV. Detention law

A. Pre-trial detention and alternatives to detention

1. National rules of pre-trial detention and existing alternatives

The starting point of the national law on detention is Art. 104 of the Basic Law. It sets out the framework for detention and ensures, as a procedural safeguard, the material fundamental right to liberty and freedom of the person (Art. 2 para. 2, sentence 2 of the Basic Law). Art. 104 para. 1 contains a parliamentary reservation of restriction of a person’s liberty (Freiheitsbeschränkung), i.e. this is only possible pursuant to a formal law and only in compliance with the procedures prescribed therein. Art. 104 paras. 2-4 sets the framework for the most intensive form of restriction of liberty, i.e. the deprivation of liberty (Freiheitsentziehung), in particular by requiring the involvement of a judge. The norm expresses that the freedom of individuals is a very high-ranking value of the German constitutional order. This refers back to the experiences of injustice during the Third Reich. 130

The effective application of this constitutional safeguard is very much dependent on the detailed level of legislation and the implementation by the courts in practice. Although the non-compliance with statutory law triggers a violation of the Constitution, the FCC only examines whether the interpretation of statutory law by the courts is within the limits of the Constitution or not. The FCC also supervises the guarantee of the proportionality of measures depriving the person of their liberty. 131


131 For this restricted control of the FCC, see MÜLLER-FRANKEN, Ibid.
Further requirements for the deprivation of liberty are detailed in the GCCP.\(^{132}\) It should be distinguished between detention of non-convicted persons (i.e. remand detention) and detention of convicted persons after judgment. The following focuses on the first scenario, i.e. pre-trial or remand detention.\(^{131}\) Remand detention concerns the period before a final judgment. Because of the presumption of innocence, German law balances the interests of the as-yet-officially innocent suspect against the public interests in an effective and proper administration of justice and prosecution of criminal offences.\(^{134}\) In other words, remand detention is a security measure and not a first taste of prison.\(^{135}\) Therefore, as a rule, the suspect has to remain at liberty; remanding someone in custody should be the exception.

Admissibility of remand detention and the accused’s rights

Remand detention can only be ordered by a judge who must issue a written arrest warrant (Sec. 114, 128(2) GCCP). Remand detention is admissible only under a number of conditions (Sec. 112 GCCP): i) strong (i.e. high degree of) suspicion of the offence; ii) there is a ground for arrest; iii) the order is not disproportionate to the significance of the case and to the penalty\(^{136}\) likely to be imposed\(^{137}\). The following grounds for arrest exist: i) flight or risk of flight,\(^{138}\) and risk of tampering with evidence\(^{139}\); ii) strong suspicion of having committed certain serious offences exhaustively listed in the law, such as murder or homicide, or forming terrorist organisations;\(^{140}\) iii) risk

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\(^{132}\) The following deals with the ‘ordinary detention conditions’ most common in German criminal proceedings. Particular forms of detention, such as custody for establishing the identity of an accused person (Sec. 163b and 163c GCCP), detention for failure to answer summons (Sec. 133(2), 134, 230(2) GCCP), arrest of persons found actually committing an offence or fleeing from the scene of crime (Sec. 127, 128), or provisional arrest to secure accelerated proceedings (Sec. 127b GCCP) are not analysed in the following section.

\(^{133}\) For further information on detention of convicted persons after judgment, see the internet publication of the study at: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf, 43 et seq.

\(^{134}\) BOHLANDER, *Principles of German Criminal Procedure*, 75 with further references to the jurisprudence of the Federal Constitutional Court.

\(^{135}\) HUBER, ‘Criminal Procedure in Europe’, 305.

\(^{136}\) Or measure of reform and prevention.

\(^{137}\) This requirement expresses in a concrete way the general principle of proportionality (see introductory remarks). Another provision in this context is Sec. 113 GCCP which further restricts remand detention in case of less serious offences (if the offence is punishable only by imprisonment of up to six months, or by a fine up to one hundred and eighty daily units).

\(^{138}\) Sec. 112(2) nos 1 and 2 GCCP.

\(^{139}\) Defined as: the accused's conduct gives rise to the strong suspicion that he will a) destroy, alter, remove, suppress, or falsify evidence; b) improperly influence the co-accused, witnesses, or experts, or c) cause others to do so, and if, therefore, the danger exists that establishment of the truth will be made more difficult. See Sec. 112(2) No. 3 GCCP.

\(^{140}\) According to the wording of Sec. 112(3) GCCP this applies without the need for a risk of flight or tampering of evidence. However, the FCC found that constitutionality can only be considered, if these grounds for arrest are given in this alternative too. Only, the burden of judicial justification of the grounds for arrest (risk of flight and tampering) are
of further committing certain serious offences or risk of continuing such offences as listed in the law, e.g. sexual abuse, child abuse, or serious offences against the person, or property, arson or public order offences, etc.; \(^{141}\) iv) risk of non-appearance at the main hearing in accelerated proceedings\(^{142}\).

Detailed and rather complicated rules lay down the rights of the accused and the mechanisms of judicial oversight of remand detention. The rights of the accused include:

- Handing over of a copy of the warrant of arrest at the time of the accused’s arrest;
- Translation of the warrant of arrest, if the accused does not have a sufficient command of the German language;
- Instruction as to the accused’s rights without delay and in writing in a language that the accused understands.

Sec. 114b(2) GCCP summarises the rights: the accused is to be advised in the instruction:

1. shall, without delay, at the latest on the day after his apprehension, be brought before the court that is to examine him and decide on his further detention;
2. has the right to reply to the accusation or to remain silent;
3. may request that evidence be taken in his defence;
4. may at any time, also before his examination, consult with defence counsel of his choice;
4a. may, in the cases referred to in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3) [note: German provisions on mandatory defence and legal aid];
5. has the right to demand an examination by a female or male physician of his choice;
6. may notify a relative or a person trusted by him, provided the purpose of the investigation is not endangered thereby.
7. may, in accordance with Section 147 subsection (7), apply to be given information and copies from the files, insofar as he has no defence counsel; and
8. may, if remand detention is continued after he is brought before the competent judge,
   a) lodge a complaint against the warrant of arrest or apply for a review of detention (Section 117 subsections (1) and (2)) and an oral hearing (Section 118 subsections (1) and (2)),
   b) in the event of inadmissibility of the complaint, make an application for a court decision pursuant to Section 119 subsection (5), and
   c) make an application for a court decision pursuant to Sec. 119a subsection (1) against official decisions and measures in the execution of remand detention.

lowered (see Bohlander, *Principles of German Criminal Procedure*, 76; Beulke, Swoboda, *Strafprozessrecht*, mn. 214).

\(^{141}\) See further Sec. 112a GCCP. This provision clearly pursues preventive purposes which is why its proportionality is criticized (see Bohlander, *Principles of German Criminal Procedure*, 77).

\(^{142}\) See Sec. 127b GCCP.
The accused is also to be advised of the defence counsel’s right to inspect the files pursuant to Section 147 GCCP. An accused who does not have a sufficient command of the German language or who is hearing impaired or speech impaired shall be advised in a language that he/she understands that he/she may, in accordance with Section 187 subsections (1) to (3) of the Courts Constitution Act, demand that an interpreter or a translator be called in for the entire criminal proceedings free of charge. A foreign national shall be advised that he/she may demand notification of the consular representation of his/her native country and have messages communicated to the same.

Judicial remedies

The accused can invoke certain judicial remedies. The law distinguishes between judicial remedies against the warrant of arrest and against decisions and measures in execution of detention.

Starting with the former, if the accused is apprehended on the basis of the warrant of arrest, he/she shall be brought before the competent court without delay. The court shall examine the accused concerning the subject of the accusation without delay following the arrest and not later than on the following day. During the examination, the accused has the right to reply to the accusation (or to remain silent). He/she shall be given an opportunity to remove grounds for suspicion and arrest and to present those facts which speak in his/her favour (see Sec. 115 GCCP).

If remand detention is continued, the accused can lodge a complaint (Beschwerde)143 aiming at revoking the warrant of arrest.

As long as the accused is in remand detention, he/she may at any time apply for a court hearing as to whether the warrant of arrest is to be revoked or its execution suspended in accordance with Section 116 GCCP.144 This remedy is called review of detention (Antrag auf Haftprüfung). By contrast with the complaint, the review of detention has no suspensive effect, i.e. the accused remains in custody until a decision revoking the warrant of arrest or releasing the accused on bail is taken.145

Upon application by the accused, or at the court’s discretion proprio motu, a decision on maintaining remand detention is to be given after an oral hearing (Sec. 118 GCCP).146

Regarding measures in execution of detention, during the execution of the warrant by detention on remand, the suspect may be subjected by judicial order to a number of restrictions relating to visits, telecommunications, letters and parcels, placement of

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143 Regulated in Sec. 304 et seq. GCCP.
144 Sec. 117(1) GCCP.
145 A complaint shall be inadmissible where an application has been made for a review of detention. The right of complaint against the decision following the application shall remain unaffected (Sec. 117(2) GCCP). According to Sec. 117(3), the judge may order specific investigations which may be important for the subsequent decision concerning continuation of remand detention and he may conduct a further review after completion of such investigations.
146 The accused may also be located in another place than the court and the hearing is simultaneously transmitted audiovisually to his place, e.g. because of great distance or sickness of the accused (Sec. 118a(2), sentence 2 GCCP).
the accused, etc. The accused in remand detention can lodge a complaint against these restrictions pursuant to Sec. 304 GCCP.147

Judicial oversight ex officio

After a detention period of six months, the Higher Regional Court Oberlandesgericht (the highest courts at the level of the Länder)148 examines ex officio whether remand detention can be continued (Sec. 121 GCCP). Furthermore, examinations ex officio take place at the opening of the trial (Sec. 207 GCCP) and at the time of judgment (Sec. 268b GCCP).

Sec. 121 et seq. GCCP make clear that remand detention exceeding a period of six months can only be maintained exceptionally and continuation must be duly justified. According to Sec. 121(1) GCCP, remand detention for one and the same offence exceeding a period of six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention. Each extension can be ordered only for three months.

Sec. 121(1) must be interpreted restrictively because it expresses the citizen’s fundamental right to liberty. This right gains more and more importance towards the State’s interest in a proper administration of justice and prosecution of criminal offences the more the time in detention increases.149 According to the FCC, the State’s intrusion into the individual’s right to liberty requires a higher degree of scrutiny (more profoundness and intensity of examination) if remand detention lasts longer than six months.150 This concept includes more concretely the following issues:

- The seriousness of the alleged offence cannot in itself be taken into account in the framework of Sec. 121;151
- Remand detention cannot be maintained in order to investigate other offences not subject to the current warrant of arrest;152
- Delay of investigations attributable to matters falling within the sphere of the State do not legitimise an extension of the time period of retention detention;153
- An overload of work is, in principle, not a serious reason, because the prosecution services and the courts are required to address such problems as soon as possible at the organisational level.154 The same holds true for situations of absences or vacation periods of judges or prosecutors.155

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147 Beulke, Swoboda, Strafprozessrecht, mn. 229a. This must also be considered as a rule. For exceptions see Sec. 119(5) GCCP and Meyer-Gossner, Schmitt, Strafprozessordnung, § 119 mn. 36, 37.
148 If the Higher Regional Court is in charge of the detention decisions, the competent court to decide on the extension of the remand detention is the Federal Court of Justice.
149 Beulke, Swoboda, Strafprozessrecht, mn. 227.
150 BVerfGE, 103, 21, 35.
151 Thüringisches OLG, StraFo 2004, 318.
152 BVerfG, NSzZ 2002, 100.
154 BVerfG, StV 1999, 328.
155 Bohlander, Principles of German Criminal Procedure, 80.
As a consequence of these approaches, remand detention periods exceeding one year are rare in practice. If the detention is based on grounds of serious offences, it must by law be terminated after one year (Sec. 122a GCCP). Hence, whether there is a maximum length of remand detention depends on the ground for arrest.

2. Detention in the transnational context: extradition detention

Procedure and judicial oversight

Particular rules apply if a person is apprehended for the purposes of extradition. These rules also apply for the surrender of a person to another EU Member State upon an incoming EAW. The rules are detailed in the AICCM.

As a rule, the detention of a person sought is only possible after an extradition arrest order (Auslieferungshaftbefehl)\(^{156}\) has been issued. The extradition arrest order can only be issued by the Higher Regional Court (Oberlandesgericht) which decides this after the procedure has been initiated by the State Attorney at the Higher Regional Court. The Higher Regional Court is the court that holds the extradition procedure in its hands. His/her decisions are final and not subject to an ordinary remedy.\(^{157}\) An extradition arrest order can be issued either upon receipt of an extradition request (Sec. 15 AICCM) or even prior to the receipt of an extradition request. In the latter case, the order is called a ’provisional extradition arrest order’ (vorläufiger Auslieferungshaftbefehl) according to Sec. 16 AICCM. Since the European Arrest Warrant is considered to be an extradition request, an extradition arrest order can be directly issued pursuant to Sec. 15 AICCM. This is not only the case when an EAW has already been transmitted but also if the accused has been entered in the Schengen Information System (SIS). However, the information must contain the minimum content as described in Sec. 83a AICCM, which transposes Art. 8 of the FD EAW. Often, the requirements of Sec. 83a are not fulfilled since only insufficient information about the facts of the case were provided.

According to Sec. 15(1) AICCM, the Higher Regional Court may issue an extradition arrest order if i) there is danger that the person may attempt to avoid the extradition proceedings or the extradition (risk of flight); or ii) if, on the basis of known facts, there is reason for strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or extradition proceedings (danger of collusion/prejudicing). If it appears that, from the outset, extradition is inadmissible, no order will be issued (Sec. 15(2) AICCM).

The accused, who is apprehended on the basis of an extradition request or provisionally arrested, must be brought before the magistrate of the closest local court (Amtsgericht) without delay, at the latest on the day following his apprehension/arrest.\(^{158}\) Since the extradition procedure is in the hands of the Higher Regional Court, the powers of the magistrate are limited: the magistrate is entitled to examine the

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\(^{156}\) Also translated as ‘extradition arrest warrant’. In order to avoid confusion with the term ’European arrest warrant’, the term ’order’ is used.

\(^{157}\) As an extraordinary remedy, constitutional complaint is possible.

\(^{158}\) See Sec. 21 and 22 of the AICCM. Sec. 21 of the AICCM provides the procedure after arrest to an extradition arrest order. Sec. 22 considers the particularities of the procedure after a
identity and citizenship of the accused. The magistrate also advises the accused that he/she may at any time during the proceedings be represented by counsel (Sec. 40 AICCM) and that he/she is free to make or not make any statements regarding the charges against him/her. The magistrate also asks whether and, if so, on what grounds the accused wishes to object to the extradition. At this stage of the first hearing, the accused may already consent to the simplified extradition procedure (Sec. 41 AICCM) after having been advised by the magistrate (Sec. 22(3), Sec. 21(6) AICCM).

The magistrate may only release the accused if (1) he/she is not the person the request refers to, (2) the extradition order has been cancelled, or (3) the execution of the extradition arrest order has been suspended. Otherwise, the magistrate transmits the file to the State Attorney at the Higher Regional Court. In cases of a provisional request, the State Attorney must promptly request a ruling by the Higher Regional Court about the emission of an extradition arrest order. The decision of the magistrate may not be appealed.

The accused may raise objections to the extradition arrest order or against its execution. However, these objections are not taken into account by the magistrate at the local court, but are a matter of the Higher Regional Court (Sec. 23 AICCM). The court may suspend the extradition order or request a stay of execution of the extradition order. The extradition order is to be suspended as soon as the requirements for the provisional extradition detention or extradition detention no longer exist or a ruling not admitting extradition has been made (Sec. 24 AICCM). The execution of the extradition order may be suspended if less drastic measures will ensure that the purpose of the provisional extradition detention or extradition detention is achieved (Sec. 25 AICCM). In this case, the Higher Regional Court will impose conditions on the accused (e.g. instructions to regularly report to the office of the judge or prosecutor, deposit of passports or bail).

If the accused is kept in detention, a review of remand in custody/a writ of habeas corpus is preliminarily undertaken at least twice a month. The Higher Regional Court may order that the review takes place within shorter periods of time (Sec. 26 AICCM). The review procedure especially examines if the ordered temporal validity of the arrest warrant is still proportional.\(^\text{159}\) In contrast to Sec. 121 GCCP for purely national cases, the AICCM does not provide for a regular maximum duration of extradition detention. An oral hearing is not carried out in the review procedure.\(^\text{160}\)

The procedure relating to the extradition arrest order must be distinguished from the following formal extradition procedure, which is characterised by the decision on admissibility and the decision on approval of the extradition request. This procedure also applies to EAWs. The decision on the admissibility of the extradition request is taken by the Higher Regional Court, which also examines – to a certain extent – the decision of approval by the State Attorney. The decisions of the Higher Regional Court are prepared by the State Attorney (Sec. 13(2) AICCM).

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\(^{160}\) OLG Düsseldorf, *MDR*, 1990, 466; Schomburg and Hackner, 1 § 26, in Schomburg, Lagodny, Gless, Hackner (eds.), *Internationale Rechtshilfe in Strafsachen*, nn. 7.
Before the Higher Regional Court decides on the admissibility of the extradition request/EAW, the accused is heard. The hearing takes place at the local court belonging to the district in which the accused was apprehended or provisionally arrested. It is initiated by the State Attorney at the Higher Regional Court. The examination of the magistrate at the local court essentially corresponds to examination under Sec. 21 and 22 AICCM. He/she checks the identity and citizenship of the accused and advises him that he may at any time during the proceedings request assistance of counsel (Sec. 40 AICCM) and that he/she is free to make or not make any statements regarding the charges against him/her. The magistrate will also ask the accused whether, and if so on what grounds, he/she wishes to object to the extradition. The accused is free to make statements on the subject matter of the charges. However, explicit interrogation in this regard is only made by the magistrate provided that the State Attorney has applied for it. After advice by the magistrate, the accused can also consent to the simplified extradition procedure.

In accordance with Sec. 28 AICCM, this hearing is necessary, even if the accused had been examined after his/her arrest pursuant to Sec. 21 or 22 AICCM. The hearing will not be carried out only if the accused has consented to the simplified extradition procedure in his/her first examination. The examinations can, according to Sec. 28 and Sec. 21/22 of the AICCM, be carried out simultaneously if the same local court has jurisdiction. In this case, the magistrate is obliged to clarify to the accused that two examinations are being combined.\(^\text{161}\)

If the accused has not consented to the simplified extradition procedure, the State Attorney will apply to the Higher Regional Court for a decision on whether the extradition will be admitted. He will also tell the Higher Regional Court whether he does not intend to claim obstacles to approval in the procedure approving/granting a European Arrest Warrant (Sec. 79(2) AICCM). The decision not to claim obstacles to approval must be reasoned and the accused must have the opportunity to make statements. The Higher Regional Court then decides on the admissibility of the extradition and possible abuses of discretion of the State Attorney as regards hindrances in relation to approval of the European Arrest Warrant.

The Higher Regional Court may hold an oral hearing (Sec. 30(3) AICCM). According to the law, the Higher Regional Court is not obliged to hold an oral hearing but has discretion to do so. An oral hearing is considered necessary if grounds for refusal play a role, for which the personal impression of the judges of the Higher Regional Court of the accused is relevant, or doubts about admissibility arise that go beyond purely formal requirements.\(^\text{162}\) If no oral hearing is carried out, the Higher Regional Court decides in a written procedure.

The decision of the Higher Regional Court regarding the admissibility of the extradition must be reasoned. The State Attorney at the Higher Regional Court, the accused and his/her legal counsel must be advised of the decision. The accused must

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receive a copy. The decision of the Higher Regional Court is final and not subject to review (Sec. 13 AICCM). Therefore, the State Attorney is bound to any decision that declares extradition inadmissible. The only possibility for the accused is to file a constitutional complaint (Verfassungsbeschwerde) before the Federal Constitutional Court if the Higher Regional Court has no objections against extradition. The Federal Constitutional Court can only examine whether one of the fundamental rights of the accused contained in the Basic Law (including judicial rights) has been infringed. A constitutional complaint hinders the continuation of the extradition procedure only if the Federal Constitutional Court issues a temporary injunction (einstweilige Anordnung). Otherwise, the granting authority has the discretion to postpone extradition until the final decision of the Federal Constitutional Court has been taken, which it normally does.

However, the Higher Regional Court may render a new decision if, subsequent to the decision regarding the admissibility of the extradition, circumstances arise that furnish a basis for a different decision. It must reconsider its decision ex officio (Sec. 33 LIACM). The procedure of Sec. 33 also refers to circumstances which furnish a new basis for hindrances of approval (Sec. 79(3) AICCM).

If the extradition is granted, the State Attorney at the Higher Regional Court arranges the surrender of the person concerned to the authorities of the issuing state. The surrender is supported by the State Office of Criminal Investigation (Landeskriminalamt) and the Federal Police (Bundespolizei).

Rights of the accused during the extradition procedure

The main rights of the accused during the procedure of the execution of an EAW follow from the procedure described. The rights are summarised in the following section:

– Review of the admissibility of the extradition by the Higher Regional Court;
– Higher Regional Court’s review of the abuse of discretion exercised by the State Attorney on the grounds for approving the extradition;
– Right to assistance of counsel at any time during the procedure (Sec. 40 AICCM).

In certain cases, the right to assistance of counsel must be provided by the State Attorney or the court mandatorily if:

(1) factual or legal situation is complex; here the law explicitly mentions cases where doubts arise about whether the conditions of an extradition of own nationals upon an EAW are met (Art. 80) or whether the penal provisions of the request fall under the groups of offences where double criminality is no longer examined (Art. 2 para. 2 of the Framework Decision, Art. 81 No. 4 of the LIACM),

See Art. 32 of the AICCM.

Hackner, Schierholt, Internationale Rechtshilfe in Strafsachen, mn. 67, fn. 90.

For further details on the surrender phase, see Hackner, Schierholt, Internationale Rechtshilfe in Strafsachen, mn. 78.

Sec. 12 AICCM.

Sec. 79 AICCM.
(2) it is apparent that the accused cannot himself adequately protect his/her rights, or
(3) the accused is under 18 years of age.

- Right to be informed of the right to nominate an assistance of counsel in the
  issuing state (in case of EAWs, Sec. 83c para. 2 AICCM);
- The legal counsel essentially has the rights according to the German Criminal
  Procedure Code, the most important of which are access to files (Sec. 147 GCCP)
  and communications with the accused (Sec. 148 GCCP);  
- Right to an interpreter/translator corresponding to the rights in national criminal
  procedures, including the right to translation of the European Arrest Warrant and
  further “essential documents” in the extradition procedure;  
- Right to be informed, right to notification of decisions/orders;  
- Right to advice;  
- Right to remain silent;  
- Right to be heard;  
- Right to make statements and objections;  
- Right to suspension or stay of execution of an extradition arrest order;  
- Right to review remand in custody at least twice a month;  
- Right to examine probable causes of suspicion if special circumstances justify a
  review;  
- Right to reconsider the decision of the Higher Regional Court after new
  circumstances become known;  
- Right to file a constitutional complaint against the Higher Regional Court’s
decision before the Federal Constitutional Court.  

Particularities exist if it comes to the simplified extradition procedure in accordance
with Sec. 41 AICCM. This procedure is based on the consent of the person concerned.

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168 In case of applicability of Sec. 83c para. 2 AICCM, the defence counsel in the issuing
state has no right to access the files (so OLG Bremen, Beschluss vom 5.9.2018, 1 Ausl. A 13/18).
169 Art. 6 ECHR, Sec. 77 AICCM in conjunction with Sec. 187 CCA. According to BT
Drucks. 17/12578 (10), other documents to be translated in the extradition procedure may
include the decision on approval of surrender by the State Attorney.
170 Sec. 20, 32 AICCM, Sec. 77 in conjunction with Sec. 114b, c GCCP (e.g. notification
of relatives before detention).
171 Sec. 21, 22, 28, 79 para. 2 AICCM.
172 See Sec. 21, 22, 28 AICCM.
173 Sec. 28, 30 para. 2, 31 para. 4, 79 para. 2 AICCM.
174 Sec. 21, 22, 23, 28 AICCM.
175 Sec. 24, 25 AICCM.
176 Sec. 26 AICCM.
177 Sec. 10 para. 2 AICCM.
178 Sec. 33, 79 para. 3 AICCM.
179 Art. 93 para. 1 No. 4 of the Basic Law. As a further exceptional remedy, an individual
complaint before the European Court of Human Rights is, of course, possible.
3. Perceived impact on cross-border cooperation instruments

In the interviews, defence lawyers criticised the extensive use of pre-trial detention in most European countries. They observed that clients remain in pre-trial detention after surrender until the beginning of the trial. They argued that, in a European Union with the idea of a single legal space, it is untenable that suspects cannot stay in the residing country until the investigations are finalised. In this context, it is pointed out that the instruments that should flank the European Arrest Warrant, in particular the Framework Decision 2009/829/JHA on the European Supervision Order and MLA procedures, are hardly used in practice. In view of the proportionality test, the EAW should ideally be the ultima ratio, but in practice the system is reversed, i.e. the EAW remains the first and nearly exclusive tool for bringing people to other jurisdictions.\(^{180}\)

B. Interpretation and application of the Aranyosi and Căldăraru judgment

1. Peculiar German context of the Aranyosi and Căldăraru judgment

As a preliminary remark, it should first be highlighted that the CJEU’s judgment in the Aranyosi and Căldăraru case (C-404/15) was – at least indirectly – triggered by the FCC’s landmark decision of 15 December 2015, also known as the ‘identity control/review decision’.\(^{181}\)

The FCC’s decision set the limits of mutual recognition by the German legal order if it comes to a conflict between obligations in favour of EU cooperation and fundamental rights. The FCC expressed its dissatisfaction with previous approaches of the CJEU. It seized the opportunity to establish an opposing concept to the CJEU’s lines of argument, especially developed in Radu (C-396/11) and Melloni (C-399/11) to deny considerations of the national constitution’s fundamental rights in the context of executions of EAWs. The relationship between the FCC and the CJEU has always been a ‘special’ one, in particular with the FCC’s doctrine not to absolutely recognise the supremacy of EU law and to develop certain ‘German-like’ limits of this supremacy with its Solange case law. Hence, as a rule, the FCC will not examine acts or legal measures of EU law as long as they are not considered ultra vires\(^{182}\) or touch upon the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law.\(^{183}\)

With its decision of 15 December 2015, the FCC sent a clear warning shot towards the CJEU, since German courts have been critical from the outset towards tendencies

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\(^{180}\) Problems in the context of the proportionality control with regard to extradition arrest and detention were presented in previous studies. See M. Böse, T. Wahl, ‘Country Report Germany’, in Albers et al., Evaluation framework, 245 et seq.


\(^{182}\) See BVerfG, Beschl. vom 6 Juli 2010, 2 BVR 2661/06 (Honeywell), paras. 55 et seq.

\(^{183}\) This identity control was mainly developed in the FCC’s decision on the constitutionality of the Lisbon Treaty, BVerfG, Urteil vom 30. Juni 2009, 2 BvE 2/08 et al., paras. 240 et seq.
of the court in Luxembourg to prefer effectiveness of mutual assistance and to deny any refusal ground because human rights might be violated in the issuing EU Member State. The FCC clearly states that there are limits to the mutual recognition principle enshrined in the EAW and that German courts reserve the right, as an executing authority, to verify fundamental rights’ infringements if there are sufficient grounds to believe that mutual trust has been shaken.

In the case at issue, the Oberlandesgericht (Higher Regional Court – hereafter: HRC) of Düsseldorf allowed the surrender of an American citizen to Italy, where he was sentenced in absentia to a custodial sentence of 30 years for participating in a criminal organisation and importing cocaine. It was questionable whether the complainant would have the opportunity of a new evidentiary hearing in Italy against the judgment in absentia at the appeal stage. Despite these doubts, the HRC held the EAW admissible and favoured surrender. The FCC quashed this decision by arguing that the principles enshrined in Art. 1 and Art. 20 of the Basic Law should be subject to constitutional review even when applying European sovereign acts such as the EAW. Art. 1 para. 1 of the Basic Law states that human dignity shall be inviolable and to respect and protect it shall be the duty of all State authority. It is the most fundamental of all human rights. Art. 20 sets out the ‘Rechtsstaatsprinzip’, i.e. the ‘rule of law’ principle as established by the German legal order. Both principles protect the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law which the FCC is entitled to review even if sovereign acts determined by EU law are the subject of the procedure.

The FCC stressed that it is not the German implementation law on the EAW that is unconstitutional, but rather the decision of the HRC, since it did not fully take account of the safeguards of Art. 1 of the Basic Law. Under the principle of guilt, the offence and the offender’s guilt have to be proven in a procedure that complies with applicable procedural rules, in particular the right to be present and to actively challenge the evidence brought forward by the prosecution service. In the court’s view, an extradition for the purpose of executing a sentence passed in absentia is not compatible with these guarantees of human dignity and the rule of law if it is not absolutely clear that the defendant receives – without any discretion on the part of the courts in the requesting State – a new procedure after surrender allowing for a fresh determination of law and evidence, which may at the end also lead to the original decision being reversed.

The decision triggered more questions and uncertainties than it solved problems. One may wonder, for instance, which concrete principles and rights can trigger the identity review, to which types of cooperation the identity review is applicable, what consequences the identity control has and to what extent it forms a (possibly new) ground for refusal in EU cooperation. Nevertheless, the decision must be seen in the wider context of the ‘ordre public’ discussion that entails every cooperation instrument, be it mutual recognition, international treaty or non-treaty based. It is all about the question as to what extent a state can refuse extradition or surrender of

184 See introduction above, I.
185 Also sometimes referred to under the heading public policy reservation.
a person because certain standards that exist in the requested state are not upheld in the requesting state. This could be different substantive criminal law, other standards of criminal procedure or diverging fundamental rights standards in the ‘enforcement phase’, such as detention conditions.

Germany, including the German legislator, opposed, from the outset, the view that surrender cannot be denied even if another EU Member State does not maintain certain standards. Therefore, the human rights clause in Art. 1 para. 3 of the Framework Decision on the European Arrest Warrant was considered a ground for refusal of *ordre public* to be implemented. The implementing norm, Sec. 73 Sentence 2 AICCM, applies to all mutual recognition instruments given that the human rights clause was basically reiterated in all of them. It also serves as implementation of the EIO Directive, which explicitly foresees this ground for refusal in its Art. 11, para. 1, lit. f). Sec. 73 Sentence 2 AICCM reads as follows: ‘Requests under Parts VIII, 186 IX 187 and X 188 shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.’ The FCC’s approach is therefore different from the one followed by the CJEU in its *Aranyosi* judgment in several respects; the FCC established its own ‘constitutional’ refusal ground when it invokes the identity control test. 189 This approach seemingly differs diametrically from the approach of the CJEU, which concluded in the *Melloni, Radu and Aranyosi and Căldăraru* cases that there is no additional refusal ground next to Art. 3, 4, and 4a of the Framework Decision on the EAW. Besides, European fundamental rights are no longer the yardstick of examination while the German Constitution is the yardstick for examination. The FCC shifts away from the European *ordre public* which should also according to the CJEU – exclusively govern cooperation within the EU. The FCC invokes a national constitutional brake to mutual recognition and mutual trust and therefore falls back to a national *ordre public* – referring to the principles of the German national legal order. 190 In contrast to the CJEU in *Aranyosi*, the FCC does not restrict a possible suspension of surrender to ‘exceptional circumstances’ or a ‘systematic lack of human rights standards’ but calls on the German courts to carry out an assessment of a possible fundamental rights’ infringement in each individual

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186 Part VIII = Extradition and Transit between Member States of the European Union.
187 Part IX = Assistance by Enforcement to Member States of the European Union.
188 Part X = Other Legal Assistance with the Member States of the European Union.
190 The FCC expressly states that ‘safeguarding the principle of individual guilt, which is not open to European integration, justifies and requires review according to the standards of the Basic Law of the Higher Regional Court’s decision, …’. This can be considered a not very European-minded part of the decision.
Lastly, the FCC does not prescribe a certain procedure to be followed by a German court before deciding on the admissibility of a surrender/MLA request.  

2. The issue of detention conditions and evolving uncertainties

The Bremen court’s reference for a preliminary ruling

In parallel to the new case law of the FCC, the Higher Regional Court (HRC) of Bremen referred some questions to the CJEU that specifically touch on the issue of detention conditions. Cases brought by defendants that claim inhuman and degrading treatment because of detention conditions in certain EU countries have increased in the last three to four years. They are currently the most serious issue that poses a possible obstacle to cooperation between Germany and other EU Member States. Whereas, in 2014, surrender because of detention conditions was refused in one case, the number of refusals increased to 40 in 2016. The HRC of Bremen was, however, the first court in Germany that dared to seek guidance from the CJEU when it filed its request for preliminary rulings on 23 July and 8 December 2015 (received at the CJEU on 24 July and 9 December 2015 respectively) in the Aranyosi and Căldăraru proceedings.

As confirmed in interviews, the HRCs, which are the competent courts in Germany to rule on the admissibility of an extradition/a surrender request, are caught in between the (as has been seen, not uniform) requirements posed by Germany’s constitutional court on the one hand and the case law of the Court of Justice of the European Union on the other. The HRCs are increasingly struggling with constitutional obligations of better reasoning and investigation of facts. Nonetheless, German courts have tried to implement the Aranyosi and Căldăraru judgment. From recent case law of the Higher Regional Courts, it can be observed that the reaction is far from uniform. This demonstrates that there are legal uncertainties that could not be sufficiently dispelled by the CJEU’s decision in Aranyosi and Căldăraru. By contrast, the decision seems to have resulted in more problems, when the court states that surrender is possible in ‘exceptional circumstances’.

Consequently, in order to ensure respect for Article 4 of the Charter of Fundamental Rights of the EU in the individual circumstances of the person who is the subject of the European Arrest Warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing

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192 Nevertheless, the FCC set certain thresholds for admissibility of future constitutional complaints. The complainant must succeed in corroborating his/her claim that an identity review is indispensable to protect the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law. This corroboration must be done in a detailed and substantiated manner.
Member State, he/she will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

Follow-up of the identity review by the constitutional court’s decisions

Further uncertainties have arisen in follow-up decisions of the FCC where hopes that the FCC would clarify its ‘identity review’ approach have not been fulfilled.

In a decision of 6 September 2016, the FCC had to deal with the defendant’s argument that, if he was extradited to the UK, the UK criminal court and the jury would be allowed to draw inferences from his silence to his guilt which, in his opinion, would conflict with the status of the accused’s right to remain silent in the German legal order and therefore affects constitutional identity. Although the FCC reiterated the viewpoints in its order of December 2015, it surprisingly came to the conclusion that extradition is only not permissible if the ‘core content’ of the right in question (i.e. the right not to incriminate oneself as an inherent part of human dignity) is affected. In the view of the FCC, the core content is not affected when the silence can be used as evidence under certain circumstances and can be used to the defendant’s detriment, as is the case with Sec. 35 of UK’s Criminal Justice and Public Order Act 1994.

A second follow-up case specifically concerned detention conditions in the context of an ordered surrender of a Romanian national to Romania for the purpose of prosecution. The defendant reprimanded the Higher Regional Court of Hamburg for having insufficiently taken into account that the detention conditions that he has to face in Romania do not comply with the standards of the ECHR and that the refusal ground of an infringement of human dignity in accordance with the identity control decision of the FCC must be applied.

After having sought additional information from the Romanian judicial authorities and obtained assurances from the Romanian Ministry of Justice, the HRC mainly argued that the size of the cells will meet the necessary conditions, such that Art. 3 of the ECHR is not violated. Although the HRC observed that the prisons in Romania are severely overcrowded, it argued that improvements have been made since 2014 (in particular by establishing an ombudsman with oversight and intervention rights as well as extending legal protection of prisoners) which leads to the fact that no real risk of inhuman or degrading treatment can be acknowledged. In this context, the HRC referred to Aranyosi and Căldăraru and argued that national judicial authorities are, in principle, obliged to enforce EAWs. ‘Exceptional circumstances’ that may limit mutual recognition cannot be discerned in the present case. Furthermore, the HRC put forward the argument of the proper functioning of criminal justice. A refusal of surrender would lead to the defendant not being punished for his wrongdoing and ultimately to Germany becoming a ‘safe haven’ for criminals.

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197 At least 3m² in a more severe enforcement regime, 2m² in case of a regime of daily release.
By contrast, the defendant argued that the HRC put too much emphasis on the size of prison cells, but did not recognise other circumstances, including furniture in cells (that cannot be taken into account when assessing the size of detention rooms), the different enforcement regimes in Romania, locking times, etc. In sum, the minimum limits for cell space, as set out by the ECtHR, are not respected in Romanian prisons.

In a preliminary injunction (einstweilige Anordnung) of 18 August 2017 that stopped the surrender for the time being, the FCC indicated that it may follow the argumentation of the complainant. In particular, it pointed out that the principle of mutual trust is infringed if there are factual indications that the requirements – that are absolutely essential for the protection of human dignity – will not be met if the requested person is extradited. It also raised doubts as to whether the prison conditions on the basis of the information gathered so far are beyond the fundamental rights standards and hinted that the instance court had not fully assessed all circumstances that may lead to an infringement of human dignity.

In its final decision of 19 December 2017, the FCC did not, however, rule on the substantial issues of the case but instead blamed the HRC of Hamburg for not having made a reference for a preliminary ruling to the CJEU. This failure is considered a violation of the right to one’s lawful judge (Art. 101 para. 1 sentence 2 of the Basic Law). The FCC mainly argued that it cannot be discerned from the case law of the CJEU in Aranyosi/Căldăraru which specific minimum standards derive from Art. 4 of the Charter of Fundamental Rights (CFR) in relation to detention conditions and what determines the applicable review of detention conditions under European Union law. Hence, the case law of the CJEU is incomplete and it is up to the judges in Luxembourg to further develop the law.

The consequences of this decision remain unclear. On the one hand, the FCC clearly maintains its identity review approach. On the other hand, it refers the instance court to take the path towards addressing the CJEU when it comes to detention conditions. It remains vague whether – and despite differences in concepts (see above) – the FCC acknowledges the CJEU’s case law in Aranyosi in the specific case of detention conditions that is an undoubted threat to human dignity. The FCC is avoiding confrontation with the CJEU and is calling for a constructive dialogue with the judges in Luxembourg. This does not mean, however, that the FCC maintains its reservation to intervene if the reply from the CJEU may not comply with the – at least core spheres of – national fundamental rights standards.


200 A. Edenhardt, Anmerkung, 2018, Juristenzeitung (JZ), 313.
In a decision of 16 August 2018, the FCC reprimanded the HRC of Munich for not having sufficiently cleared up the law and practice of detention conditions in Hungary.\textsuperscript{201} In the case at issue, the HRC of Munich declared surrender of a Serbian national to Hungary for the purpose of criminal prosecutions of fraud admissible. The argument of the defendant that he may be detained under inhuman and degrading conditions was not followed up by the court in Munich. Instead the court briefly argued that detention conditions in Hungary have improved.

The FCC found that the Munich court was obliged to clear up the legal situation and practice of detention conditions in Hungary. Since the HRC failed to do so, it violated the defendant’s right to an effective legal remedy pursuant to Art. 19 para. 4 sentence 1 of the Basic Law. The FCC reiterated its viewpoint that, in principle, the HRCs do not need to reason compliance with fundamental rights standards in the issuing State because the EAW system is governed by mutual trust. However, the principle of mutual trust is shaken if there are factual indications that the requirements of Art. 4 of the CFR are not maintained after the surrender of the defendant. In this case, the competent court that decides on the admissibility of an EAW is obliged to ascertain the legal situation and practice in the issuing State under the condition that the defendant and its defence counsel provided enough information.\textsuperscript{202} These requirements were met in the case at issue because the defendant provided sufficient arguments to believe that there are continuing systemic deficiencies in Hungarian prisons. The FCC particularly rejected the HRC’s argument that there are no longer deficiencies in Hungary. The FCC stated that the judgment of the ECtHR in \textit{Domján}\textsuperscript{203} did not change the ECtHR’s viewpoint of 2015 in its pilot judgment \textit{Varga & Others} that there are still systemic deficiencies in Hungary.\textsuperscript{204}

As a result, the FCC referred the case back to the HRC of Munich, which now has to seek additional information from the issuing authorities and other sources on detention conditions in Hungary. Although in \textit{Aranyosi}, the CJEU established a concrete procedure to follow, interestingly the FCC did not take up this point in its decision. This can be interpreted as a signal that the FCC has not finally decided whether it accepts the CJEU’s approach in \textit{Aranyosi} or not. It rather seems that the FCC is keeping an ‘open door’ that allows the FCC to intervene if it finds incompatibility between the interpretation of fundamental rights at the EU level and the core standards of fundamental rights’ protection as guaranteed by the German Constitution. The FCC only agrees with the CJEU that the possibilities of subsequent judicial review of detention conditions in the issuing State are not sufficient to avert a real risk of inhuman treatment. The executing authority is still bound to undertake an individual assessment.\textsuperscript{205}

\textsuperscript{202} In this context, the FCC pointed out that the defendant has no ‘burden of proof’ in extradition cases, so it is to the court to clear up the facts and law \textit{ex officio}.
\textsuperscript{203} ECtHR, 14 November 2017, application No. 5433/17, \textit{Domján v. Hungary}.
\textsuperscript{204} ECtHR, 10 March 2015, application nos. 14097/12, 45135/12, 73712/12 et al., \textit{Varga and Others v. Hungary}.
\textsuperscript{205} See case C-220/18 PPU, \textit{ML}, 25 July 2018, ECLI:EU:C:2018:589.}
Reactions of instance courts

Meanwhile, the HRC of Hamburg raised the requested reference to the CJEU.\textsuperscript{206} The HRC posed numerous questions related to the minimum standards of detention conditions pursuant to Art. 4 of the CFR and the effects of these standards on the presumption of a ‘real risk’ of a violation of fundamental rights.

The HRC’s first decision was particularly criticised for its argument that the functioning of justice should prevail over the protection of fundamental rights.\textsuperscript{207} Furthermore, it must be doubted whether references to ECtHR case law should be relativised since the HRC of Hamburg stated that the lines of argument of the ECtHR are partly detrimental to the EU principles of mutual trust and mutual recognition.\textsuperscript{208} Other Higher Regional Courts followed different approaches in this regard. One decision of the HRC of Bremen and two decisions of the HRC of Celle may illustrate this.

In the subsequent decision after the preliminary ruling of the CJEU in the Căldăraru case, the HRC of Bremen ordered the repeal of the warrant against Căldăraru.\textsuperscript{209} The HRC argued that – in accordance with the requested examination by the CJEU – it asked for additional information from the Romanian authorities. The Romanian authorities stated that the defendant was likely to be placed in a correctional facility located near to his domicile and that this facility was initially designed for 330 prisoners, but is currently occupied by 659 prisoners. The HRC stated that, as a consequence, each prisoner has a personal space available of approximately 2m\textsuperscript{2}, so that an infringement of Art. 4 of the CFR does exist.\textsuperscript{210}

The HRC of Celle refused surrender of individuals to Romania in two soundly reasoned decisions of 2 and 31 March 2017. The first case concerned an EAW for the purpose of execution of a sentence of one year of imprisonment for driving without a licence,\textsuperscript{211} and the second an EAW for the purpose of execution of a sentence of three years and nine months of imprisonment for robbery.\textsuperscript{212} In both cases, the HRC found that detention conditions in Romania in the concrete cases do not meet the requirements in line with the European ordre public.\textsuperscript{213} The HRC referred first to the case law of the CJEU in Aranyosi and Căldăraru and stated that an assessment of a possible inhuman or degrading treatment necessitates two steps: (1) a general and abstract risk of inhuman/degrading prison conditions; (2) a real risk in the individual case. The HRC considered both requirements fulfilled in the two cases. It mainly concludes that the conditions for the form of semi-open detention that the defendant

\textsuperscript{206} The case is referred to as C-128/18, Dorobantu. The CJEU passed judgment on 15 October 2019.
\textsuperscript{207} See the preliminary injunction of the FCC of 18 August 2017, op. cit.
\textsuperscript{208} OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16. This is the underlying decision that led to the constitutional complaint before the FCC.
\textsuperscript{210} In the case Pál Aranyosi, the EAW was withdrawn by the Hungarian authorities – see also Case C-496/17, Pál Aranyosi, 15 November 2017, ECLI:EU:C:2017:866.
\textsuperscript{211} OLG Celle, Beschl. v. 2.3.2017 – 1 AR (Ausl) 99/16.
\textsuperscript{212} OLG Celle, Beschl. v. 31.3.2017 – 2 AR (Ausl) 15/17.
\textsuperscript{213} Sec. 73 sentence 2 AICCM, Art. 6 para. 3 TEU, Art. 3 ECHR.
presumably must expect do not meet the standards set by the ECtHR in the Muršić and Lazar cases. Hence, the assessment of the HRC is first and foremost based on the ECtHR case law. In this context, the HRC of Celle stresses, in its decision of 31 March 2017, that the relevant ECtHR case law is the guiding yardstick for the required examination of the criteria of human and non-degrading prison conditions. It reasons that this approach is the most modest way of not interfering too much in national systems since each national system has its peculiarities and finds its own way of balancing the various interests at stake.

In sum, the Celle court particularly stresses that:

- The assessment necessitates two steps;
- The decision cannot be based only on the explanations of the official authorities;
- The whole likely process of the execution of the concrete sentence must be considered and not only one enforcement regime;
- Greater importance cannot be attributed to the functioning of criminal justice than to human treatment of convicted persons (in contrast to the HRC of Hamburg).

Nevertheless, the HRCs’ case law on detention conditions is very diverse. The courts seem unsure regarding the extent to which clarification of facts is necessary, to which detention facilities enquiries must be extended, and/or whether (diplomatic) assurances can (still) be the basis for their judicial decisions. Furthermore, the case law of the HRCs differs as to the consequences of the order, i.e. whether the surrender can be declared admissible in a concrete case or whether the surrender must be declared “inadmissible at the moment”. The case law has developed in a very casuistic way where the HRCs take into account the individual circumstances in each case.

In some cases, execution of EAWs was refused on the basis of inhuman prison conditions in the issuing EU Member State. These concerned: Bulgaria; Greece; Hungary; Latvia; Lithuania; Romania.

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214 See also L. MüHLENFELD, jurisPR-StrafR 12/2017 Anm. 3.
219 OLG Bremen, Beschl. v. 3.8.2016 -1 Ausl A 14/15.
221 See also the mentioned decisions of the HRCs of Bremen and Celle above; furthermore: OLG Köln, Beschluss vom 27.06.2017 – 6 AuslA 27/17; OLG München, Beschl. v. 13.4.2017 – 1 AR 126/17; OLG Nürnberg, Beschl. v. 5.7.2017 – 2 Ausl AR 14/17; OLG Hamm, Beschl.
Despite general deficiencies in the issuing State, a concrete risk for the requested person was denied (second stage) in the following countries; Bulgaria;\(^{222}\) Hungary;\(^{223}\) Latvia;\(^{224}\) Romania\(^{225}\). The execution of requests has been invoked i) on the basis of recent information showing improvements in the issuing State;\(^{226}\) ii) on the basis of assurances of the issuing State concerning prison conditions of the requested person;\(^{227}\) iii) on the basis that execution is made subject to conditions by the executing State concerning conditions of imprisonment\(^{228}\).

In general, one can see increasing uncertainties at the level of the HRCs as instance courts in relation to extradition on how to follow up with the decisions of the ‘supreme courts’ (i.e. both CJEU and FCC) when it comes to alleged human rights’ violations in the surrender scheme of the EAW. As confirmed in interviews, most judges are of the


\(^{225}\) OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16. This is the underlying decision that was quashed by the FCC (see further above). In favour of admissibility despite voiced concerns of detention conditions in Romania, see OLG Schleswig, Beschl. v. 20.12.201 – 1 Ausl (A) 53/17 (54/17). The FCC blocked surrender until its decision on the Hamburg case (see BVerfG, Beschl. v. 12.1.2018 – 2 BvR 37/18). But see now: KG, Beschl. v. 24.8.2018 – (4) 151 AuslA 185/17 (228/17).

\(^{226}\) OLG Celle, Beschl. v. 16.6.2017 – 2 AR (Ausl) 31/17 (Latvia); OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16; OLG Dresden, Beschl. v. 27.8.2018 – OLGAusl 107/18; KG, Beschl. v. 24.8.2018 – (4) 151 AuslA 185/17 (228/17) (all three Romania); OLG Rostock, Beschl. v. 04.12.2017 [not published] (Hungary). Different: OLG Bamberg, Beschl. v. 22.12.2017 – 1 Ws 508/17 which stated that due to the lack of improvements in Bulgarian prisons (based on a 2015 CPT report) detention in Bulgaria cannot be credited 1:1 but 1:2 in Germany.

\(^{227}\) OLG München, Beschl. v. 8.3.2016 – 1 AR 2/16 (Bulgaria) – but see OLG München, Beschl. v. 04.04.2017 – 1 AR 68/17 which considered that assurances are no longer necessary after having interpreted the Aranyosi/Căldăraru judgment of the ECJ; it is sufficient when the issuing State provided “additional information”). Further decisions that based their findings on assurances: OLG Hamm, Beschl. v. 1.12.2015 – III-2 Ausl 131/15, 2 Ausl 131/15; OLG Dresden, Beschl. v. 13.7.2015 – OLGAusl 98/1 (all Hungary).

\(^{228}\) OLG Karlsruhe, Beschl. v. 15.02.2018 – Ausl 301 AR 135/17 and OLG Karlsruhe Beschl. v. 31.1.2018 – Ausl 301 AR 54/17: in both decision the HRC of Karlsruhe set several conditions as to the correctional facilities and detention conditions which the Hungarian authorities must fulfil. Conditions (less comprehensive) were also set by: OLG München, Beschl. v. 04.04.2017 – 1 AR 68/17.
opinion that the CJEU’s guidance in the Aranyosi and Căldăraru ruling needs further clarification and substantiation. This also led the HRC of Bremen, which brought up the Aranyosi and Căldăraru case, to subsequent references to the CJEU. The Bremen court reacted to this judgment by asking a list of questions to the issuing authorities in subsequent surrender cases. This resulted ultimately in a kind of game of ‘ping pong’ between the German judicial authorities and the issuing authorities in the other EU Member States. Nevertheless, in its reference for a preliminary ruling before the CJEU in case C-220/18 PPU (‘ML’), the judges in Bremen were essentially concerned with the following four issues:

– Does the existence of a legal remedy – in the issuing state – enabling the person sought under an arrest warrant to challenge the detention conditions rule out the existence of a real risk of inhuman and degrading treatment?

– If the answer is negative, to what extent can the executing authority assess the conditions in the prisons, i.e. all prisons in which the person sought could potentially be detained in or only the prison in which he is likely to be detained in for most of the time?

– Which information must the executing authority take into account for assessment of the prison conditions?

– What is the value of assurances given by an institution in the issuing State other than the issuing judicial authority?

By judgment of 25 July 2018, the CJEU held, inter alia, that the executing judicial authority is solely required to assess the detention conditions in the prison in which the person concerned is specifically intended to be detained, including on a temporary or transitional basis. Requests for additional information must concentrate on the determining factors of the ECtHR case law. The list of 78 questions submitted by the Bremen court to the issuing authorities, which included questions on opportunities for religious worship or laundry arrangements, went too far, according to the CJEU. As regards assurances, the CJEU held that the Framework Decision on the EAW allows the request for assurances on the actual and precise detention conditions. Since the EAW system is based on mutual trust, the executing authority must, however, rely on the assurance given, at least if – as in the present case – there are no specific indications that the detention conditions in a particular prison centre are in breach of Art. 4 of the CFR.

3. Perceived impact on cross-border cooperation instruments

In the interviews, the practitioners mentioned that the approach chosen by the CJEU is simply not practicable. Even today, one of the most practical problems in
relation to cooperation within the EU is the lack of communication. Although the CJEU requests, in \textit{Aranyosi and Căldăraru}, increased obligations for the executing authorities to start a dialogue with the issuing authorities and seek sufficient information, they often either do not receive replies or do not receive adequate replies from the issuing authority. Consequently, extradition detention cannot be upheld and the person sought must be released from custody. Otherwise, extradition detention will be disproportionate.

In addition, Higher Regional Courts are confronted with increasing obligations from the FCC to investigate more deeply into the foreign legal order in order to substantiate possible \textit{ordre public} infringements. The implementation of these obligations has also posed problems in practice. In this context, interviewees confirmed that the approaches of the CJEU and the FCC differ and the Higher Regional Courts must find a way to cope with both approaches in practice.

However, all interviewees found that a solution regarding insufficient detention conditions in certain EU countries or certain prison centres in Europe cannot be remedied by legislation. They found, instead, that the issue of detention conditions is a factual remedy. In this context, an objective and impartial EU evaluation procedure was also recommended as a pre-condition for tackling the problem. These insufficient detention conditions can only be solved by the governments of the countries concerned. It is widely seen as a problem of financing and interviewees suggested that the EU could establish the competence to allocate money to the countries concerned. A further obstacle is seen in the willingness of the governments of the countries concerned to initiate improvements. Another aspect in this regard is the recommendation that, as a first step, the standard of individual prison centres in which extradited persons could be imprisoned is raised. This may lead, however, to a ‘first/second-class’ enforcement of sentences in the domestic systems and may therefore be denied by the countries concerned.

Ultimately, solutions must be found for the situation when a requested person expresses concerns about his surrender where he might face fundamental rights’ infringements in the issuing State. Often, people prefer family ties in their home country to fundamental rights’ protection in the executing State. This poses the question as to whether a person can waive protection of their fundamental rights.

\textbf{C. Compensation for unjustified detention}

1. \textit{National rules on compensation for unjustified detention}

German law provides for compensation of loss and damages both for unlawful and lawful law enforcement measures. If a measure was unlawful, e.g. remand detention was ordered in violation of the principle of proportionality according to

\begin{footnotesize}
\begin{enumerate}
\item This is another issue that raises, in the end, distrust. Higher Regional Courts and defence lawyers increasingly doubt whether assurances and information given by official authorities can be trusted.
\item In 2011, Germany introduced specific rules on the compensation for excessive length of criminal proceedings (Sec. 198-201 of the Court’s Constitution Act (\textit{Gerichtsverfassungsgesetz – GVG}). These are not dealt with in the following.
\end{enumerate}
\end{footnotesize}
Sec. 112 para. 1 sentence 2 GCCP (see above), the person concerned may claim State liability under the conditions of Sec. 839 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) and Art. 34 of the Basic Law. Both provisions establish liability if a person, in the exercise of a public office entrusted to him, violates his official duty to a third party. However, the breach of this duty must be intentional or negligent. If there is no intention or negligence (so-called objective unlawfulness), the person concerned may claim compensation directly on the basis of Art. 5 para. 5 of the ECHR. 234

Although a law enforcement measure was per se lawfully ordered, a defendant may claim financial compensation on the basis of the Gesetz über die Entschädigung von Strafverfolgungsmaßnahmen (StrEG – Act on the compensation of prosecutions). 235 The Act does not only regulate compensation in case of wrong final judgments, but also in case of measures during the investigative and prosecution phase of the criminal proceedings. 236 The law further distinguishes as to whether the defendant was finally convicted or not. In the first case (final conviction), he/she may claim financial compensation if he/she was acquitted or the penalty was lowered after the reopening of the case (Wiederaufnahme). 237 Compensation is excluded here if the person concerned caused the prosecution by intention or negligence or by providing wrong or untruthful information. The initially convicted person can obtain compensation for pecuniary loss as well as for non-material damage. The law confers a rather low rate for the non-material damage, i.e. €25 per day of deprivation of liberty. 238

If the defendant was not convicted, he may claim compensation under the conditions of Sec. 2 StrEG, which regulates financial compensation for damages suffered because of unlawful or disproportionate measures during the prosecution of a criminal offence. The law lists (exhaustively) only a few measures for which compensation is eligible, including remand detention, measures in the context of the suspension of execution of remand detention, provisional placement in a psychiatric hospital, arrest, search and seizure, provisional withdrawal of permission to drive and provisional prohibition of the pursuit of an occupation. Compensation can only be conferred if the defendant were acquitted, or criminal proceedings were dispensed/dismissed, or the opening of the main proceedings were refused by the court. Furthermore, the law provides for clauses that exclude compensation or give the State authority the possibility to deny compensation (Sec. 5, 6 StrEG).

In case of dispensation/dismissal of a case against a defendant, the law further distinguishes: If the prosecution must be dismissed, the defendant must be compensated. If the prosecution can be dismissed, compensation for the mentioned

234 ROXIN, SCHÜNEMANN, Strafverfahrensrecht, § 60, mn. 2.
235 There is no official English translation of this Act. The German version of the Act is available at: www.gesetze-im-internet.de/strreg/index.html.
236 D. MEYER, StrEG, commentary, 10th ed., Cologne, Carl Heymanns Verlag, 2017, § 2 StrEG, mn. 1.
237 Sec. 1 StrEG.
238 See Sec. 7 StrEG.
239 For the distinction between arrest and pre-trial detention under German law, see HUBER, ‘Criminal Procedure in Europe – Germany’, 304.
240 E.g. cases of discretionary prosecution in accordance with Sec. 153, 153a GCCP.
prosecution measures can be conferred if this complies with considerations of equity (*Billigkeit*).\footnote{Sec. 3 StrEG.} The same applies if the defendant was discharged\footnote{Applies for minor offences, see, for instance, Sec. 60 GCC.} or the defendant was convicted for consequences of the offence which were below the ones for which the prosecution measure was ordered.\footnote{Sec. 4 StrEG.} Practice often connects the discretionary dispensation of a case with the waiver to compensation – a practice that is held inadmissible in legal literature.\footnote{Roxin, Schünemann, *Strafverfahrensrecht*, § 60, nn. 5.}

As regards the procedure of the claim to compensation, German law distinguishes between the decision on the merits of the claim and the amount of compensation. The decision on the merits of the claim is regularly taken by the court in the final judgment or decision on the case. If the case was dismissed by the prosecution service, the local court at the seat of the prosecution decides on the claim. The claimant can immediately appeal against the court decision. If the court affirmed the claim for compensation, the indemnification (amount of compensation) must be claimed from the prosecution service (which conducted the prosecution in the first instance) within six months. The defendant must be advised about this right. His/her application is taken forward by the judicial administration of the *Land* concerned. The defendant may appeal against the decision setting the amount of compensation of the judicial administration before the civil chambers of the regional court within three months.

The StrEG is only applicable to defendants, i.e. persons who suffered criminal prosecution against them. It is not applicable to other persons who may be affected by law enforcement measures, such as persons with property rights in the cases of seizures. However, there may be other provisions that allow compensation of these ‘third persons’, such as Sec. 74f GCC, Sec. 28 of the Regulatory Act (OWiG) or the above-mentioned state liability provisions of Sec. 839 BGB and Art. 34 of the Basic Law.

### 2. Compensation in the transnational context

German law also takes into account compensation for time spent in detention in cross-border cases. It is appropriate to distinguish between situations where a person spent time in detention abroad because of a German extradition request/EAW (outgoing requests – Germany as an issuing country – placement to Germany) and situations where Germany is executing a foreign extradition request/EAW (incoming requests – Germany as an executing country).

**Compensation for detention abroad (Germany as an issuing country)**

If a person convicted in Germany spent time in custody abroad, German law first provides for the possibility of crediting the detention abroad. The law distinguishes between whether a person was sought by German authorities for extradition for the purpose of conducting a criminal prosecution or for the purpose of executing a custodial sentence or detention order.
In the first case, i.e. extradition for the purpose of conducting a criminal prosecution, Sec. 51(3), 2nd sentence GCC sets out that any detention suffered abroad shall be credited to the German sentence. The notion of ‘detention’ includes extradition detention, police custody/garde à vue or remand in detention. The court may order for such time not to be credited in whole or in part depending on the conduct of the convicted person after the offence was committed.

If time in detention abroad is to be credited, the court shall determine the rate as it sees fit (Sec. 51(4), 2nd sentence GCC). In determining the rate, the court has to take into account the specific prison centre and not the detention conditions in a country in general. Often, a statement of the Foreign Office is requested. The rate must also be determined if a life-long sentence is delivered.

In the second case, i.e. extradition for the purpose of executing a custodial sentence or detention order, Sec. 450a GCCP applies the principles of Sec. 51(3) GCC mutatis mutandis. Accordingly, the deprivation of liberty undergone by the convicted person abroad in extradition proceedings for the purpose of execution of a sentence shall also be credited against the enforceable prison sentence. Also in this case, the court may exclude a credit: the court may, upon application by the public prosecutor’s office, order that no, or only partial, credit shall be given, where such credit is not justified in view of the convicted person’s conduct after pronouncement of the judgment. If the court gives such an order, credit shall not be given in any other proceedings, for deprivation of liberty undergone abroad, insofar as its duration does not exceed the sentence (Sec. 450a(3) GCCP). Although not expressly stated by law, it is settled case law that the court must also determine the rate in accordance with Sec. 51(4) 2nd sentence GCC.

Interviewees confirmed that the rate for time spent in custody in other EU Member States is one-to-one, i.e. there is no additional credit because of ‘bad’ detention conditions in other EU Member States. Some interviewees remarked that this approach is inconsistent with the case law of the extradition courts denying the surrender to certain EU countries because of inhuman or degrading detention conditions. As a result, German criminal courts deciding on the credit of time spent in detention abroad should reconsider the rate following the ongoing developments.

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245 Sec. 51(1) 1st sentence provides for credits if convicted person has already been sentenced abroad for the same offence. This provision is widely replaced by Art. 54 CISA within the European Union. Sec. 51(1) 1st sentence allocates a compensation mechanism because German law does not foresee a transnational dimension of ne bis in idem. It is settled case law that the fundamental right of Art. 103 para. 3 of the Basic Law does only apply to decisions of internal tribunals (basic decision: Federal Constitutional Court, order of 31 March 1987 – 2 BvM 2/86, published in the court’s case reports BVerfGE, 75, 1 (15)).

246 Sec. 51(1), 2nd sentence GCC which also applies for detentions abroad.

247 German name for Ministry for Foreign Affairs.


249 See the references at: Meyer-Gossner, Schmitt, Strafprozessordnung, § 450a, mn. 3.

250 See also the overview at: Fischer, Strafgesetzbuch, § 51, mn. 19.
as regards detention conditions in other EU countries.\footnote{See now OLG Bamberg, Beschl. v. 22.12.2017 – 1 Ws 508/17 which stated that due to the lack of improvements in Bulgarian prisons (based on a 2015 CPT report) detention in Bulgaria cannot be credited 1:1 but 1:2 in Germany.} It was also noted, however, that defendants rarely put forward this argument. A reason is seen in the fact that, in case of EAWs, the time spent in extradition detention abroad has been considerably reduced or is rather short.

The aforementioned ‘Act on the compensation of prosecutions’, which contains rules on the financial compensation of damage that occurred as a result of unlawful or disproportionate measures during the prosecution of a criminal offence, also applies in certain situations of international cooperation in criminal matters. Sec. 2(3) StrEG clarifies that the compensation scheme for damage suffered as a result of prosecution measures before the final conviction extends to the extradition detention, the provisional extradition detention, the freezing, the seizure and the search which have been ordered abroad at the request of a German authority. As a consequence, prosecution measures carried out abroad on the request of German authorities are treated equally as for measures for purely domestic cases since it is felt unjust that the order is carried out towards a person being/residing abroad.\footnote{Meyer, \textit{StrEG}, §2, StrEG, mn. 75.} However, the list of measures stipulated in Sec. 2(3) StrEG is exhaustive and cannot be applied in an analogous way. If, for instance, a foreign country suspends provisional extradition detention on bail, the damage cannot be compensated on the basis of the StrEG.\footnote{Meyer, \textit{StrEG}, §2, StrEG, mn. 79.} By contrast to Sec. 51(3) GCC, Sec. 2 StrEG requires a formal MLA/extradition request. Otherwise, compensation cannot be taken into account.\footnote{Meyer, \textit{StrEG}, §2, StrEG, mn. 77.}

Compensation for detentions spent in Germany (Germany as an executing authority)

Sec. 2(3) StrEG only applies for outgoing requests of German authorities. German courts deny an application \textit{mutatis mutandis} if foreign MLA/extradition requests are executed by German authorities unless the authorities of the Federal Republic of Germany are responsible for the unjustified persecution.\footnote{Basic decision: BGH, Beschl. v. 17.1.1984 – 4 ARs 19/83, published in the official case reports, BGHSt 32, 221. See also OLG Dresden Beschl. v. 10.7.2014 – OLGAusl 53/14 (=NStZ-RR 2015, 26) with further references.} In the vast majority of cases, the responsibility of German authorities is denied by the German courts.\footnote{Responsibility is only affirmed if – after having taken into account all circumstances of the case, in particular the proper functioning of justice – the measure of the German authorities is bluntly unreasonable (BGH, Urteil vom 29.04.1993, Az.: III ZR 3/92 = BGHZ 122, 268).} If, for instance, a country issues an EAW against a person and the person is apprehended and put into extradition detention, but during the extradition proceedings it turns out that the person is innocent (and the EAW is eventually withdrawn), he/she cannot claim for compensation for the damage suffered. The same holds true if the Higher Regional Court concludes inadmissibility of extradition/surrender after a
longer examination of the request, e.g. because replies by the issuing authorities (after having sought information from the German authorities) reveal that a proper re-trial of an initial in absentia trial is not guaranteed.\textsuperscript{257} Compensation was also denied when the person had to be released because it was found out that prosecution is time-barred and extradition is therefore not possible.\textsuperscript{258}

The legal literature is debating whether an exception must be affirmed if there is a case of mistaken identity of the person sought by the German authorities.\textsuperscript{259}

Independently of the responsibility of the German authorities, the Federal Court of Justice decided, however, that according to Sec. 77 AICCM in connection with Sec. 467 and 467a GCCP, the necessary expenses incurred by a person who has been wrongly prosecuted, and against whom a decision on the admissibility of the extradition has been requested, must be reimbursed by the German State Treasury.\textsuperscript{260} This reimbursement mainly concerns the costs for a (Germany-based) lawyer.

Notwithstanding the regular non-applicability of the StrEG, the accused may found its claim for damages due to unjustified extradition detention on other bases, in particular Art. 5(5) in connection with Art. 50 ECHR.\textsuperscript{261} The German courts stress, however, that it is the order of extradition detention that must be examined and not the question of admissibility of the extradition request.\textsuperscript{262} Therefore, the claim based on the ECHR is denied if the extradition order is seen as justified in order to secure a foreign request for criminal prosecution or execution of a sentence and the principle of proportionality is upheld.\textsuperscript{263}

\begin{footnotes}
\item[257] OLG Frankfurt Beschluss vom 4.5.2009 – 1 W 10/09, BeckRS 2009, 13811 (case with Egypt).
\item[258] OLG Karlsruhe, Beschluss vom 25. März 2013 – 1 AK 102/11 (case with Austria).
\item[259] H\textsc{ackner}, vor § 15 IRG, \textit{in Schomburg, Lagodny, Gless, H\textsc{ackner}, Internationale Rechtshilfe in Strafsachen}, nn. 12 argues that in this case Sec. 2 StrEG applies. He refers to an older decision of the Federal Court of Justice of 1981 (BGHSt 30, 152) which affirmed compensation in this case and he argues that the Federal Court of Justice in the subsequent decision of 1984 (BGHSt 32, 221) left this case open. Others (e.g. M\textsc{eyer}, \textit{StrEG}, § 2 nn. 81) argue that applicability of the StrEG must be denied in all cases of extradition procedures carried out on the basis of the AICCM and the decision of the Federal Court of Justice of 1981 became meanwhile obsolete. H\textsc{ackner} (Ibid.) is also arguing that compensation must be granted if extradition detention is manifestly ill-founded because a 'German' ground for refusal applies, e.g. the ban not to extradite German nationals according to Art. 16 para. 2 of the Basic Law. However, he concludes that in 'regular cases', compensation for damages suffered in the event of execution of foreign extradition request on the basis of the StrEG must be denied.
\item[260] BGHSt 32, 221, 227.
\item[261] H\textsc{ackner}, vor § 15 IRG, \textit{in Schomburg, Lagodny, Gless, H\textsc{ackner}, Internationale Rechtshilfe in Strafsachen}, mm.14.
\item[262] Unless inadmissibility is manifestly given at the time of the decision on extradition detention. For example, the court overlooks that the person sought is a German national and cannot be extradited.
\item[263] OLG Frankfurt Beschluss vom 4.5.2009 – 1 W 10/09, BeckRS 2009, 13811. The principle of proportionality is considered not to be infringed if the person sought remained one year in extradition detention for an offence that may be sentenced up to three years of imprisonment.
\end{footnotes}
The Higher Regional Court of Frankfurt considered, however, an additional possibility for compensation, e.g. for losses of business due to *ex post* unjustified extradition detention.\(^{264}\) The court indicated that claims can be based on a general claim to compensation which initially followed infringements of property rights suffered in the course of legal State measures. The claim is rooted in former Prussian law and its requirements are not regulated by positive law in force. It is based on the idea of equity and can be conferred if a person suffered a special sacrifice that distinguishes that person from others in similar situations.

V. Victims’ law

German law provides for a large number of protective measures and compensation mechanisms in the area of victim protection. A distinction is made between the authority to dispose of certain aspects of criminal procedure, monitoring rights, offensive and defensive rights, information rights, rights to be protected as well as rights of reparation or compensation.\(^{265}\) These victims’ rights have been continuously strengthened since the 1970s/1980s.\(^{266}\) The following is limited to an analysis of the victims’ rights in the context of the relevant pieces of EU law, namely Directive 2012/29/EU, Directive 2004/80/EC and Directive 2011/99/EU. Nonetheless, it should be mentioned that German law provides for victim protection mechanisms that go beyond the scope of the legal framework established at EU level.\(^{267}\)

A. Transposition and application of Directive 2012/29/EU on victims’ rights

1. Transposition of the victims’ rights’ Directive 2012/29/EU

Implementation at the federal level

Directive 2012/29/EU was implemented in Germany by the Law on Strengthening Victim Rights in Criminal Proceedings (3\(^{rd}\) Victim Rights Reform Act) of 21 December 2015, which came into force on 31 December 2015, and at the same time implemented Art. 31 a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (‘Lanzarote Convention’, ETS No. 201).\(^{268}\)


\(^{267}\) See details in the Internet publication of this study: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf, 68 et seq.

\(^{268}\) BT-Drucks. 18/4621, 2.
In addition, the so-called psychosocial procedural support has been established by law, which, as such, goes beyond the requirements of the Directive and is now standardised in Sec. 406g GCCP and the new law on psychosocial procedural support (PsychPbG).  

Many of the legal instruments were known in German law prior to the Directive and, in particular, the regulations introduced successively by the victim rights’ reform acts go beyond the European minimum standard. In addition, key areas of the Directive are within the legislative competence of the federal states (Länder). Accordingly, only a limited need for implementation was envisaged by the German federal legislature.

This concerns, in particular, the information rights of Art. 4, 5, 6 (1) b), (5), 7 (4), (5), 22 of Directive 2012/29/EU. The implementation process mainly focused on the restructuring of the duty to provide information to the victim, which was implemented in §§ 406i to 406k GCCP. Besides, the provision of information in connection with the filing of a criminal charge, § 158 (1) GCCP, was also revised, as was the need for translation of written information, §§ 158 (4), 406d (1) GCCP. Attention was additionally paid to the need for translation services in all hearings and proceedings, §§ 161a (5), 163 (3) GCCP, § 185 CCA.

A general standard of protection within the meaning of Art. 18 of Directive 2012/29/EU is unknown to German law as well as a general regulation for the assessment of a special need for protection according to Art. 22 of the Directive. However, the rights deriving therefrom under Art. 20, 21, 23 and 24 of the Directive had already been applicable law in Germany. In order to take account of Art. 22 of the Directive, Sec. 48(3) GCCP was nevertheless constructed as a new entry standard for victim protection in order to standardise an assessment of the vulnerability of victims as early as possible, to guarantee the awareness of public authorities and to

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269 SCHÖCH, ‘Opferrechte im Strafprozess in Deutschland’, in SAUTNER, JESIONEK (eds.), Opferrechte, 121.


271 BT-Drucks. 18/4621, 13 et seq.

272 Ibid.

273 BT-Drucks. 18/4621, 14-15, 25; see also SCHÖCH, ‘Opferrechte im Strafprozess in Deutschland’, in SAUTNER, JESIONEK (eds.), Opferrechte, 121.

274 BT-Drucks. 18/4621, 18.
initiate any protective measures that may be appropriate. This standard also applies via Sec. 161(1) sentence 2 GCCP for the public prosecution service as well as for the police according to Sec. 163(3) sentence 1 GCCP. In this respect, it should be noted that early assessment has already been practised in this way, yet now it is a legally standardised, binding rule. This means that a mandatory examination is now necessary as to whether there is a need for protection and this already needs to be done when potentially injured persons make their first official appearance at the prosecution authorities. The relevance of this provision is seen in the fact that it is not so much a victim protection right in the narrow sense, but rather has a declaratory effect which is intended to underline the importance of victim protection in criminal proceedings.

Federal State (Länder) level

As mentioned in the introduction, federal states (Länder) retain legislative competences in many areas, so that – in the federal system of Germany – different regulations may exist in the 16 federal states. Major areas of the Directive lie within the responsibility of the federal States. This applies in particular to Art. 8, 9, 12, 19, 23, 25, which deal mainly with the practical realisation of victim protection. However, the report on the implementation of Directive 2012/29/EU issued by the German Ministry of Justice and Consumer Protection (BMJV) concludes that there is a nationwide and extensive range of institutions and programmes for effective victim protection in all federal States and that further implementation of the Directive was therefore not necessary. More precisely, the report sets out the following:

Art. 8 of the Directive requires free access to victim support measures. In this respect, the report of the BMJV refers to VIKTIM, a database of the North Rhine-Westphalia State Criminal Police Office, to which each federal State has access and in which extensive, also regionally specific information on support measures and institutions, can be found. The same applies to the online database OBDAS of the Kriminologische Zentralstelle e.V. on behalf of the Federal Ministry of Labour and Social Affairs (BMAS). This website is also aimed at victims directly and is based on the Opferatlas, which gives an overview of the victim support landscape in Germany. In addition, the BMJV offers links to many victim support sites on its

275 Ibid., 18-19.


278 BT-Drucks. 18/4621, 23; Kilchling, Opferschutz innerhalb und außerhalb des Strafrechts, 32.

279 BMJV, Bericht zur Umsetzung der Richtlinie 2012/29/EU, 1.

280 Ibid.

281 See www.bmjv.de/DE/Themen/OpferschutzUndGewaltpraevention/OpferhilfeundOpferschutz/Bericht_BundLaender_AG.pdf;jsessionid=7C061D850583703861CF75BA8F15EDEF.2_cid324?__blob=publicationFile&v=2.

282 www.odabs.org.

283 www.krimz.de/forschung/opferhilfe-atlas/.
own homepage. Particularly noteworthy is the WEISSER RING e.V., an association which operates nationwide as the largest institution for victims in Germany. Finally, all federal States also offer information material and links to the above-mentioned pages on their homepages.

Measures for assistance by victim support services within the meaning of Art. 9 of the Directive are carried out by the federal States under their own responsibility. For example, there are special foundations with regional offices that are financed by the States’ budget. In total, there are well over 1,000 non-governmental victim support organisations, some of which are specifically designed to help victims of certain crimes and to protect women and children.

With regard to the restitution measures required by Art. 12 of the Directive, the report of the BMJV refers to the offenders-victim mediation/perpetrator-victim-agreement (Täter-Opfer-Ausgleich, hereafter TOA), which has long been anchored in Sec. 46 (2), 46a No. 1 GCC, Sec 10 (1) No. 7, 45 (2) sentence 2, 47 (1) YCL, and Sec. 136 (1) sentence 4, 153a (1) sentence 2 No 5, 155a, 155b GCCP as an out-of-court compensation mechanism. Quality standards are established by the Federal Working Group TOA e.V. in cooperation with the TOA Service Office Cologne and enforced by specialised social workers in the judiciary. These standards include that participation for the victim must be voluntary and, as required by the case law, the implication that the offender has essentially acknowledged his crime and is willing to take responsibility for it so that the TOA is effective.

Art. 19 and 23 (2) a) of the Directive require the establishment of spatial protection measures for victims. In this context, the report of the BMJV refers to the comprehensive guarantee of witness protection rooms or other separate premises in the judiciary and police. In addition, a large number of courts have special technical equipment such as video conferencing systems. Special emphasis is placed on the interrogation of children and adolescents. In general, guidelines and internal instructions ensure that victims and perpetrators do not meet where possible.

Concerning the required qualifications of interrogators, Art. 23 of the Directive, the BMJV speaks of nationwide training of police officers with regard to respectful treatment of victims and with special attention to specific protection needs in the sense of the Directive. The same applies to judges.

With regard to the educational requirements of Art. 25 of the Directive, the BMJV even states that many Länder have set up special continuing education programmes and conferences that go far beyond the requirements of the Directive. The protection of victims was an essential element in police education and training, which was continuously evaluated and further developed. There are also detailed instructions for dealing with affected women and children.

Victim protection is also taken into account in the education of judges and prosecutors. There are special training courses, advanced training, seminars and

285 BMJV, Bericht zur Umsetzung der Richtlinie 2012/29/EU, 3.
conferences, some of which are offered by the German Judicial Academy (*Deutsche Richterakademie*). In addition, the topic was an integral part of the training of young lawyers in general and of judicial officers as well as of civil servants of the middle judicial service and the judicial guards’ service.

Finally, with respect to the provision of data and statistics (Art. 28 of the Directive), the report of the BMJV refers to the police crime statistics\(^{287}\) as well as the criminal prosecution statistics\(^ {288}\).

### Implementation gaps

Whether implementation gaps have occurred in the implementation of Directive 2012/29/EU has been much discussed by stakeholders and the legal literature. Already the term ‘victim’ provokes discussion. The definition of the term, which has intentionally\(^ {289}\) not been implemented (see also introduction), is a point that is repeatedly taken up – especially in the statements of various associations and victim institutions on the draft of the 3rd Victim Law Reform Act.\(^ {290}\) Even though the legal term is, in essence, clear in German law and case law, it has been criticised that relatives are not subsumed under the term ‘victim’.\(^ {291}\) In addition, concerns are occasionally raised that the law does not make clear that – according to the presumption of innocence – the victim can only be regarded a ‘potential victim’.\(^ {292}\) Here, for example, reference is made to the Austrian provision in § 65 No 1a of the Austrian Criminal Procedure Code.

Another line of criticism relates to the implementation of Art. 8 of the Directive. The article requires that victim support services have to be confidential. However, the German legislator did not take this as an opportunity to grant the psychosocial victim service workers the right to refuse testimony, even though this is essential for proper victim support based on trust.\(^ {293}\) Reference is made to the provisions of Austrian and Swiss law, both of which provide for the right to refuse testimony.\(^ {294}\)

A shortfall in the implementation of the Directive also exists in the context of Arts. 11, 6 (1) a) and (3), which call for review possibilities insofar as public authorities refrain from criminal prosecution. In German law, a procedure to compel

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\(^{287}\) PKS: www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/pks_node.html.

\(^{288}\) www.destatis.de/DE/Startseite.html.

\(^{289}\) BT-Drucks. 18/4621, 13.

\(^{290}\) Statement of ANUAS regarding implementation of Directive 2012/29/EU, p1; Statement of bff, 3; Statement of kok, 20 et seq.; Statement of WEISSER RING e.V., 3; Statement of Opferhilfe Sachsen e.V., 2, 11; Statement of dbh, 2; Statement of dbh, p.4; All statements are available at: www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Staerkung_Opferrechte_Strafverfahren.html.

\(^{291}\) Statement of ANUAS, 1, 2.


\(^{293}\) Statement of ado, 9 et seq.; statement of bff, 3, 10; statement of Opferhilfe Sachsen e.V., 9, 15 et seq.; statement of TDF, 5; statement of kok, 3.

\(^{294}\) See Statement of ado, 10.
public charges is only possible if the prosecution dismisses the proceedings for lack of sufficient suspicion in accordance with Sec. 170 (2) GCCP. However, the victim may not initiate a further examination if the public prosecutor dismisses the case for opportunistic reasons (e.g. Sec. 153 et seq. GCCP). Even a person entitled to an accessory private prosecution (Nebenklage, see above), is not involved in the dismissal proceedings.\[295\]

As mentioned above, a noteworthy German instrument of restorative justice is the TOA, to which the victim must agree for it to apply. In this respect, a contradiction is seen in relation to Art. 12 of the Directive, which requires that restorative justice services are based on the victim’s free and informed consent. Under German law, however, it is possible to encourage a TOA if the victim does ‘simply not disagree’. This is seen as a limitation of the victim’s authority.\[296\] In this context, it has been pointed out that the requirement for confession by the offender is not stipulated in law.\[297\]

Furthermore, it is stated that training in accordance with Art. 25 of the Directive is not provided for under German legislation\[298\] and is not carried out in a systematic, mandatory manner\[299\].

Ultimately, the newly introduced standards on interpreting services are considered to be inadequate.\[300\] In particular, the German legislature points out that sufficient communication in the case of filing a complaint (see Sec. 158 (4) sentence 1 GCCP) in a common foreign language or the support of an attendant of the injured person with sufficient language skills would suffice.\[301\] However, a complete translation is requested.\[302\]

2. Practical implementation of Directive 2012/29/EU

Aside from the described legislative implementation deficits, practical problems with the application of the victim protection mechanisms are often raised in Germany. In general, some victim protection institutions are missing a needs-oriented and comprehensive support system.\[303\] It should be noted, however, that these institutions argue from their own particular point of view. By contrast, legal experts have found an

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297 Statement of ado, 17 et seq.
298 Statement of ANUAS, 3; statement of bff, 11 et seq.; statement of Opferhilfe Sachsen e.V., 16 et seq.; statement of TDF, 6; statement of kok, 29 et seq.
299 Statement of ado, 17 et seq.
300 Statement of ANUAS, 4.
301 BT-Drucks. 18/4621, 24, 25.
302 See also statement of kok, 5 et seq.
303 See Statement of bff, 9 et seq.
excessive level of victim protection for some time, which is held no longer compatible with the rights of the defendant and his/her legal status.\textsuperscript{304}

One of the main problems with regard to the rebalancing of the various interests within the criminal procedure lies in the fact that there are only very few scientific studies that assess how effective the far-reaching victim protection laws are in reality. This means that possible differences between the ‘law in the books’ and ‘law in action’ cannot be analysed in a reliable manner.

\textit{Müller-Piepenkötter} analysed, in a journal article, the impacts of Art. 8 of the Directive and the situation of victim support services in Germany. She refers to various studies commissioned by the Federal Ministry for Labour and Social Affairs in the run up to the victim rights’ reform of 2015 (see above, 1), in particular a survey of the stock of victim support services of 2014. She acknowledged a rather dense network of victim support services in the Federal Republic of Germany but pointed out that this network is unevenly distributed. She also sees a lack of equal access to services, especially in cities with fewer than 20,000 inhabitants.\textsuperscript{305} She concludes, however, that the studies seem to suggest that there is some catching up to be done, but that the survey does not allow a definitive assessment of actual victim support provision within the meaning of the Directive.\textsuperscript{306}

Case law on the interpretation of the EU victims’ rights Directive is even more scarce in Germany, because court decisions tend not to address possible conflicts between EU law and national law. As far as can be seen, the issue of a possible interpretation of German law in conformity with the EU obligations has not been raised so far. Problems occurred in court practice about the scope of the term ‘aggrieved person’, to which the GCCP confers certain rights (see introduction above).

The Higher Regional Court of Stuttgart ruled that capital investors damaged by market manipulation cannot be considered as an ‘aggrieved party’ in the sense of German criminal procedure law and therefore their attorneys have no right to inspect the procedural files of the criminal proceedings (Sec. 406e GCCP).\textsuperscript{307} The court argued that the then Council Framework Decision on the standing of victims in criminal proceedings from 2001 does not change the view of German courts and practitioners and that the term ‘aggrieved person’ must be interpreted in a narrow sense. This means that an aggrieved person can only be someone whose legal interest is protected by the criminal law provision, i.e. it must fall under the scope of protection of the criminal law. Legal interests only protected by civil law rules for damage claims cannot turn a person into an aggrieved party in criminal proceedings. In the case at issue, the underlying criminal law provision, Sec. 20a of the German Securities Trading Act (\textit{Gesetz über den Wertpapierhandel, WphG}), is not designed to deliver protection for individual capital investors but its purpose is to protect the general public interest in reliability and truthfulness of price determination at money markets or stock exchanges.

\textsuperscript{304} \textsc{Kett-Straub}, ‘Opferschutz’, 2017, \textit{ZIS}, 343 et seq.; statement of DAV, 1 et seq.
\textsuperscript{305} \textsc{Müller-Piepenkötter}, ‘Die EU-Opferschutz-Richtlinie’ 2016, \textit{NK}, 11-12.
\textsuperscript{306} \textsc{Müller-Piepenkötter}, ‘Die EU-Opferschutz-Richtlinie’, 2016, \textit{NK}, 12 et seq.
\textsuperscript{307} OLG Stuttgart, Beschluss vom 28.06.2013 – 1 WS 121/13.
3. **Perceived added value of Directive 2012/29/EU**

The effects of the implementation of Directive 2012/29/EU have been assessed positively during the interviews. As mentioned above, one should, however, take into account that most of the requirements were already known to German law beforehand. Nevertheless, sensitivity to the issue of victim protection seems to have increased in German criminal proceedings. This tendency is not always seen positively because critics note an excess of victim protection. However, when talking about a transnational scope of application, the interview partners concluded that there have been nearly no cross-border cases of victim protection in Germany. It should be noted that the Directive has significantly increased attention to the protection of victims, yet this has ultimately had no effect on EPO cases.  

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B. **Compensation for victims**

1. **Compensation mechanism for victims of crime**

The victim compensation demanded by Directive 2004/80/EG has existed in Germany since the introduction of the Crime Victims Compensation Act (OEG) of 7 January 1985. In accordance with the Directive, Sec. 6a (2) OEG was introduced, which designates the Federal Ministry of Labour and Social Affairs as ‘assisting authority’ and ‘central contact point’ in the sense of the Directive. In addition to the standard required by the Directive, Sec. 3a OEG provides for the provision of compensation in the event of offences abroad to which, however, compensatory payments to be made by other Member States must be credited.

2. **Compensation vis-à-vis the offender**

In the context of compensation for victims, the so called *Adhäsionsverfahren* (a distant cousin of the French *action civile*) according to Sec. 403 et seq. StPO as well as the TOA (offender-victim-mediation) referred to above should be mentioned.  

The *Adhäsionsverfahren* is a procedure in which the ‘aggrieved person’ or his/her heir can assert civil claims against the offender in criminal proceedings in order to avoid another proceeding before the civil courts.  

As already mentioned, the TOA is an out-of-court attempt to resolve a conflict, which can either lead to the termination of the criminal proceeding (Sec. 153a, 153b GCC in conjunction with Sec 46a GCC or Sec. 45, 47 YCL) or at least be taken into account in sentencing (Sec. 46a, 46 (2) GCC). The preconditions for this are clear facts or a confession of the offender. In addition, the accused and the victim must agree to such a procedure.  

The seizure of confiscated assets to which the victim is entitled should also be mentioned as a form of right of compensation. This recovery aid ensures that the

308 See below, point C.

309 Velten, *SK-StPO*, Vor §§ 374-406h, mn. 54.


312 See further: Schroth, Schroth, *Die Rechte des Verletzten im Strafprozess*, mn. 187 et seq.
victim’s claims for damages are secured by means of coercive measures in criminal proceedings during the investigations.\footnote{Schöch, ‘Opferrechte im Strafprozess in Deutschland’, in Sautner, Jesionek (eds.), *Opferrechte*, 133.}

Eventually, if the perpetrator of particularly serious criminal offences is not in a position to make up for the damage caused or cannot be traced in the first place, the victim is entitled to state compensation under the Crime Victims Compensation Act (Gesetz über die Entschädigung für Opfer von Gewalttaten, OEG).

3. Implementation gaps

Implementation gaps in Directive 2004/80/EC are not evident. As mentioned, victim compensation in Germany has been regulated in the OEG since 1985 and not only complies with European standards but goes beyond them to some extent. Only the establishment of an ‘assisting authority’ and a ‘central contact point’ were included in the OEG in the course of the implementation of the Directive. This is without prejudice to the fact that compensation mechanisms may pose practical problems.\footnote{See below, point D.}

4. Compensation in practice

When it comes to the question as to whether compensation schemes work well in practice, there are only a few studies that have dealt with the topic in recent times. As noted elsewhere, research on state compensation in favour of victims of crime was mainly done in the 1980s and 1990s but decreased afterwards.\footnote{T. Bartsch, H. Brettel, K. Blauert, D. Hellmann, ‘Staatliche Opferentschädigung auf dem Prüfstand – Entschädigungsanspruch und Entschädigungspraxis’, 2014, *ZIS*, 353.} Nonetheless, criticism as to the legal arrangements and managing of the OEG has increased in recent years.\footnote{The authors, *inter alia*, refer to an article in the newspaper ‘Frankfurter Allgemeine Zeitung’ (published in September 2012) entitled ‘Du Opfer, du’ in which a victim when faced with legal and practical problems raised the question of whether the OEG should be abolished. In addition, statements of victims of sexual abuse voiced their dissatisfaction with the rules and concrete implementation of the OEG. The big ‘victim organisation’, Weisser Ring e.V., elaborated several socio-political demands and called for a reform of the law.} Thus, there is a need for legal and/or empirical-criminological studies in this respect. The authors take up the criticism and scrutinise the evaluation of the OEG. They conclude, however, that – due to a lack of scientific research – it is unclear to what extent victims, who are potentially entitled to benefits, may file an application under the OEG.\footnote{Bartsch, Brettel, Blauert, Hellmann, 2014, *ZIS*, 360.} Accordingly, it is not possible to give a definite answer as to whether the OEG works in practice or not.\footnote{Ibid., 361.} They also conclude that a comprehensive evaluation is needed to identify problems with the practical implementation, although there might be some indications thereof.\footnote{Ibid., 362.} On the other hand, however, the authors emphasise that there is no gap in legislative implementation of the EU Directives, since European standards do not go beyond what German law allows in principle.\footnote{Ibid., 357.}
Kett-Straub considers the financial compensation of victims to be highly unsatisfactory. In particular, she asserts financial compensation at the low level of applied ‘actions civiles’ (Adhäsionsverfahren, see above), which have not risen significantly despite further legislative expansion.\(^{321}\) She also sees problems in the practical application of the OEG and pointed out a number of issues. \textit{Inter alia}, these include that only a few victims of violent crime lodge claims despite an entitlement to do so, many victims do not fall within the scope of application of existing frameworks and there are considerable regional differences with regard to the granting of compensation.\(^{322}\)

The INASC (Improving Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings) study also sees problems in the application of the OEG and the Adhäsionsverfahren. In particular, judges at criminal courts consider the latter less favourable, since the criminal proceedings would be delayed and civil law competences were sometimes lacking.\(^{323}\) So, even if the procedure is enshrined in law and judges are called upon to carry it out, there is a certain unwillingness to do so, which is also related to the fact that it is a different kind of legal matter.

Equally, the case law does not contribute to a thorough assessment of the compensation schemes in Germany, in particular when it comes to the compensation of victims in the transnational context as envisaged by EU law. Nonetheless, the following two decisions are worth mentioning.

(1) In a case in 2011, the Federal Court of Justice (Bundesgerichtshof – BGH) dealt with the question of whether the first instance court correctly dismissed the application of aggrieved persons from Austria and Switzerland that became victims of a fraud scheme involving diamonds. In the light of the then Council Framework Decision on the standing of victims in criminal proceedings from 2001, the German legislator changed the criminal procedure code and stipulated that applications of victims claiming, in criminal proceedings, the loss of property against the accused arising out of the criminal offence, if the claim actually falls under the jurisdiction of the ordinary courts, should, in principle, be approved by the criminal courts. As a consequence, the criminal court must decide on the civil claim in the judgment in which the accused is pronounced guilty of a criminal offence (Adhäsionsverfahren). Exceptions for dismissing this application for compensation were restricted by this reform legislation. According to Sec. 406 CCP, the criminal court may dispense with the application if it is inadmissible (e.g. the applicant is not an aggrieved person or the application is delayed), unfounded (e.g. the defendant is not held guilty of a criminal offence) or not suitable. The latter ground – not suitable – poses problems in practice as in the case at issue.\(^{324}\)

\(^{321}\) \textsc{Kett-Straub}, ‘Opferschutz’, 2017, ZIS, 346.

\(^{322}\) \textit{Ibid.}, 347. Reference is made in this context, \textit{inter alia}, to statistics of the Weisser Ring e.V. (www.weisser-ring.de/media-news/publikationen/statistiken-zur-staatlichen-opferentschaedigung).

\(^{323}\) \textsc{Kotlenga, Nägele, Nowak}, \textit{Bedarfe und Rechte von Opfern im Strafverfahren}, 19 et seq.

\(^{324}\) It should be noted that, pursuant to Sec. 406 para. 1 last sentence GCCP, the ground of lack of suitability cannot be invoked, where the applicant has asserted a claim in respect of
However, the FCJ left open whether his previous case law must still be considered unequivocally valid after the reform and in the light of EU law. In this previous case law the FCJ ruled that the application can be dispensed with if the criminal court has to decide on difficult points of civil law. In the case at issue, the FCJ indeed found that the first instance court had to assess difficult questions of international private law, which justified the denial of the Austrian and Swiss applications for compensation. Therefore, the refusal ground of Sec. 406 para. 1 sentence 5 (risk of protracting criminal proceedings) was applicable. Compensation claims had therefore to be brought by the aggrieved persons before civil litigation courts.

(2) The Higher Regional Court of Hamburg ruled in 2005 that, also in the light of the FD on the standing of victims and the intentions of the German legislator implementing the EU instrument, German courts have discretion if they decide on whether an application for compensation is “not suitable”. Next to the aspect of considerable protraction of the criminal proceedings by the civil claim, the criminal court can also consider whether the purposes of the criminal procedure are affected by the application. These include the risk for effective defence of the defendant or exceptional difficulties that lead to a risk to the operation of the criminal court in view of the proper investigation of the facts of the criminal offence. In the case at issue, the HRC of Hamburg justified the dismissal of the application due to the high amount and scope of the claim, the liability risks for the assigned counsel, arising difficult legal issues and the impacts of civil procedure law on the criminal proceedings.

C. Protection measures for victims

1. National rules on protection measures

Protection against violence within the meaning of the European protection order is designed as a civil and not a criminal procedure in Germany. Within the limits of the German territory, it is regulated in the Act on Protection against Violence (Gewaltschutzgesetz, GewSchG). In order to implement Directive 2011/99/EU, the Act on European Violence Protection Procedures (EU-GewSchVG) of 5 December 2014 was created, which also contains the implementing provisions of Regulation (EU) No. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. Even before the law came into force, a very efficient domestic system of protection against violence in Germany already existed, which could also be used by citizens of other EU Member States residing in Germany.

There was just a need for transposition of Directive 2011/99/EU with regard to the request for recognition of a European protection order in criminal matters by other Member States to Germany as executing state. No such request can be made by Germany itself since the scope of the Directive is limited to criminal matters (Art. 2

 damages for pain and suffering (Sec. 253 subsection (2) of the Civil Code).

325 BGH, Beschluss vom 14.04.2011 – 1 StR 458/10 = wistra 2011, 335.
326 Expressly indicated as an example in the CCP.
328 BT-Drucks. 18/2955, 23.
329 BT-Drucks. 18/2955, 3.
330 Ibid., 24.
Regulation (EU) No. 606/2013 applies accordingly, so there was a need for implementation in so far as the competence and the procedure for issuing a certificate for the EU-wide applicability of a German protection order against violence had to be regulated.\(^{332}\) It was also necessary to regulate the recognition and enforcement of civil protection measures in other Member States. This was completely done by the EUGewSchVG. Section 2 of this Act refers to recognition and enforcement under Directive 2011/99/EU and Section 3 covers recognition and enforcement under Regulation (EU) No. 606/2013. Lastly, it should be mentioned that, beyond the EPO, other important protective victims’ rights are granted during the criminal procedure.\(^{333}\)

2. Practical implementation of victim protection measures

As far as the question is concerned as to how victim protection measures are applied in practice, the INASC project (Improving Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings) should be highlighted. The project was funded by the Criminal Justice Programme of the European Union. Researchers conducted interviews with ten women affected by partner violence and 27 experts from the fields of police, justice, victim protection and protection against violence and analysed 70 procedural files on cases of intimate violence. The findings of the study are available on the project’s website, where summary brochures can also be found.\(^{334}\) The study focuses on the obligations of the victims’ rights Directive 2012/29//EU in the context of domestic violence, but also makes general conclusions as to protective measures for victims.

The study provides double-edged results.\(^{335}\) Germany is, for instance, certified by a nationwide network of decentralised confidential and legal support institutions. But INASC also came to the conclusion that some services are not available in rural areas. The study points out that the transfer of information by police authorities is well established and that, in all federal States, the referral to victim protection institutions is firmly anchored in police laws. Nevertheless, the corresponding procedural steps are not always being complied with.

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\(^{331}\) Ibid., 24-25.

\(^{332}\) Ibid.

\(^{333}\) These include secrecy of place of residence and identity (Sec. 68 GCCP); restriction of the right to ask questions on personal matters (Sec. 68a (1) GCCP) transfer of jurisdiction from the local court (Amtsgericht) to the regional court (Landgericht) (Sec. 24 (1) No. 3 CCA), so that vulnerable victims in particular do not have to be heard in two instances; exclusion of the public in trial (Sec. 171b (1) to (3), 172 No. 1a, 3 and 4 CCA); and limitations as to the presence of the accused (Sec. 247 sentence 2 GCCP), if this has damaging effects on the victim. See details at Kilchling, *Opferschutz innerhalb und außerhalb des Strafrechts*, 35 et seq.


\(^{335}\) For the following see Kotlenga, Nägele, Nowak, *Bedarfe und Rechte von Opfern im Strafverfahren*, 13-20.
In principle, there are also suitable instruments available in the judiciary for collecting special victims’ needs according to Art. 22 of the Directive 2012/29/EU, yet there is sometimes a lack of effective cooperation between police and victim protection institutions in this respect. There seems to be a strong need for improvement in the field of translation since court documents are often written exclusively in German and, in the case of police hearings, no professional translation is offered. Similar difficulties are seen in protective orders under the GewSchG, which are in principle assessed very positively, but there is a lack of information on this possibility by the police.

3. Perceived impact on cross-border cooperation instruments

Application and effectiveness

The main problem when talking about cross-border recognition and implementation of a protection measure is that, according to interview information, this procedure has not been applied in Germany so far. Cases are not known, in which the Directive on the European Protection Order (EPO) or the Regulation on protection measures in civil matters have been applied. Accordingly, it is not possible at this point to set out clearly what issues arise with regard to the regulations of other Member States. One interviewee argued that it is simply easier to make use of domestic procedures instead of initiating the cross-border procedure of mutual recognition. Due to the low thresholds for the production of an order under the German GewSchG, which can be made directly and even without a lawyer, this ‘national way’ is preferred to an inter-European procedure in which the authorities of the Member States must first communicate with each other. The national protective procedure is considered the more direct and thus easier way to claim an order in the Member State in which the person concerned is currently staying.

Another reason seems to be that many judges and lawyers are simply not aware of the EPO instruments. There seems to be a lack of knowledge and competence to adequately draw the attention of victims to the possibility of an EPO and then strive for it accordingly. As a result, the EPO, alongside the Regulation on protection measures in civil matters, has proven to be a paper tiger, of which, although it is – in principle – a suitable instrument available, no practical effects can be discerned – at least in Germany. It was also stated in the interview that the fact that the proceedings in the Member States are partly governed by civil and partly by criminal law leads to frictions. The coexistence of the Regulation and the Directive complicates matters.

Possible improvements

Against this background, it is difficult to make suggestions on how to make the EPO more effective. On the one hand, practitioners, especially lawyers, need better and more explicit training or further education in order to acquire the skills to carry out the European procedure in an orderly manner and in the interests of victim protection. However, it is problematic that judges in Germany are subject to judicial independence and cannot be forced to undergo further training. Similarly, lawyers are not always willing to participate in training sessions. This comes as little surprise as not only has the use of the EPO been very rare so far at EU level, but it is also non-existent in Germany. Training is considered inappropriate because the national
procedures appear quite simple and easy to use, so that there is no wider scope of the European procedure. Finally, it may also be problematic that most lawyers in Germany who deal with criminal law are primarily criminal defence lawyers and that they therefore rarely deal with victim protection proceedings. Specialised victim lawyers are quite rare.

As far as the frictions generated by the coexistence of the Directive and the Regulation are concerned, a full harmonisation would, of course, be the easiest way out. This harmonisation should conceive of protection orders throughout Europe either uniformly under private or criminal law. It is questionable whether such EU legislation is possible in the light of Art. 4 (2) TEU, in particular since national procedures offer sufficient protection from the outset.

VI. Horizontal issues of implementation, coordination and cooperation

A. Conflicts of jurisdiction

Interviewees affirmed that (positive) conflicts of jurisdiction do not play any role in horizontal cooperation practice. It is argued that, in nearly all cases of daily practice, the jurisdiction is clear (mostly based on the principle of territoriality). The topic of jurisdiction may only play a role in ‘bigger’ cross-border cases of organised crime or drug smuggling.336

It was remarked that the allocation of jurisdiction might play a more important role in European Public Prosecutor’s Office (EPPO) proceedings in the future. Nevertheless, German lawyers argue that it must be seen whether the rules in the EPPO Regulation will turn out to be practicable.

Against this background, any further legislation at the EU level is widely considered unnecessary. One interview partner remarked that the fact that the EU has currently only rather vague and unclear rules about the conflict of jurisdiction stems from sovereignty reservations from the EU Member States. Therefore, the precondition for any EU action would be to overcome these reservations. In other words: the willingness of the Member States is more important than legislation.

Despite the low level of significance of conflicts of jurisdiction in practice, German legal literature fiercely debates this topic. Many studies have been carried out in recent years. They included various proposals for models (including potential Regulations or Directives at the EU level).337 The debate mainly focuses on the question of whether

336 Drug smuggling is perhaps the most major offence where questions of jurisdiction are posed, in particular in the relationship between Germany and the Netherlands. Interviewees pointed out, however, that such cases are solved bilaterally between the German and the Dutch authorities. The Dutch authorities regularly renounce prosecution.

the national rules on jurisdiction *rationae loci* should be harmonised or whether more harmonisation of substantial criminal law is needed. In addition, the studies question which authority should decide on the allocation of jurisdiction, which parties should be involved in this process and which legal remedies should be provided for.

### B. In absentia trials

Trials held *in absentia* remain an ongoing issue, which leads to problems of recognising the enforcement of other EU Member States’ judicial decisions. Quite tellingly, it was an Italian trial held *in absentia* that triggered the aforementioned landmark decision of the FCC on the ‘identity review’ (see III B 1). Problems continue despite the stricter, pro-recognition rules introduced by Framework Decision 2009/299. If requests are denied, the foreign criminal proceedings do not fulfil one of the alternatives of Art. 4a FD EAW as implemented in Sec. 83 para. 1 No. 3, paras. 2 and 3 AICCM.  

Increasingly problematic are cases where the defendant was only partly present at the trial. In this context, the HRC of Cologne, for instance, had to deal with the constellation where a defendant attended a part of the trial in the Netherlands but was expelled to Belgium as an “unwanted foreigner”, although the trial in Rotterdam/the Netherlands continued. He did not attend the rest of the trial but was continuously represented by a defence lawyer. The Rotterdam court finally sentenced him to five years of imprisonment because of attempted homicide, bodily injury and hostage-taking. The HRC of Cologne declared the Dutch request for surrender inadmissible since the sentence was imposed by a trial *in absentia*. The HRC argued that the defendant was neither summoned in person for the remaining meeting dates nor did he frustrate his presence through flight in the knowledge of the proceedings. It further cannot be to the detriment of the defendant that he did not apply for a suspension...
of his status as ‘unwanted foreigner’ in order to secure the opportunity to attend the remaining trial meetings. The HRC finally released the defendant from extradition detention. However, the HRC clarified that it would not consider a ground for refusal if the defendant was only absent in a meeting pronouncing a judgment without any substantial assessment of evidence.

It is therefore not so much that German views on the right to be present at trial (which is in fact stipulated in the GCCP as a duty to be present)340 differ with other legal orders that are more lenient to proceed without the attendance of the defendant, but rather an issue for foreign criminal legal orders to bring their national law into line with the European standards as defined in FD 2009/299 and the case law of the ECtHR.341

It often happens in practice that the accused was not summoned in person since he/she has already moved to a place in the European Union other than his home country. Moving within the European Union is also not recognised by German courts as “frustrating the trial through flight” since this exception provided for by Sec. 83 para. 2 No. 2 AICCM requires a wilful conduct to escape justice.342

Lately, cases involving procedures in the issuing state that implement suspended sentences on probation have increasingly occurred. The question is whether the provisions implementing FD 2009/299 apply and whether the right to a fair hearing (Art. 6 ECHR) is infringed if the person does not attend the proceedings revoking the suspension of a sentence. The case law of the HRCs distinguishes between a revocation made in a judgment and a revocation made by a separate order. If the revocation is made in a judgment, the provision of Art. 83 AICCM implementing the FD 2009/299 applies. If the revocation is made by separate order (as is regularly the case), the HRCs assess whether the proceedings infringe the ordre public clause of Sec. 73 sentence 2 AICCM. Although German procedural law requires that, if the court has to decide on a revocation of suspension of sentence because of a violation of conditions or instructions, it shall give the convicted person an opportunity to be heard orally (Sec. 453 para 1 sentence 3 CCP), German courts accept the revocation of the suspension of the sentence on probation without the person concerned being heard when he/she is not available because he/she moved away without notifying of the new address.343 However, a violation of Art. 6 ECHR is considered if the authorities in

340 See introduction.
341 See further Wahl, ‘Fair Trial and Defence Rights’, in Sicurella, Mitsilegas, Parizot, Lucifora (eds.), General Principles for a Common Criminal Law Framework in the EU, Chapter 4, Section I, 2.2.2 and Section II, 2.2 with further references to the national laws of seven EU Member States.
the issuing state knew that the person concerned moved to Germany and summoning could have been served there under his/her new address.\textsuperscript{344}

C. Other obstacles to cooperation

\textit{Differing competences as an obstacle}

The different articulation of competences between law enforcement and judicial bodies in the investigation and prosecution of crimes can also pose a problem in some cases. Germany considers MLA as a judicial procedure and gathering evidence via police cooperation is eyed critically. Sometimes Germany is faced with MLA requests by seemingly non-judicial authorities, such as the police forces. This does not mean that such requests are unsuccessful in the end, but it comes to further inquiries from the part of the German authorities, as a consequence of which the foreign state must involve a prosecution service or other judicial authorities to formally issue an MLA request.

In this context, it was also submitted that many European countries do not maintain a strict separation between police and intelligence services. This separation is deeply anchored in the German legal order and may pose problems if intelligence services become involved in criminal proceedings. This is not only the case in the UK where, for instance, intelligence services are competent for telephone interceptions, but also in the neighbouring country of Austria. There, intelligence is part of the police and supports covert investigations, including criminal cases. Such ‘evidence’ is held admissible in Austrian law in the investigation phase and could be used in trial if the undercover agent testifies, whereas under German law the use and admissibility of submitted intelligence information is not legally defined and is unclear.\textsuperscript{345}

Regarding competences, problems occur due to the different roles of judges in the investigation phase. Some European countries do not provide for the interrogation of witnesses, e.g. spouses, by a judge in their national law. By contrast with German law, these legal orders sanction false testimonies before prosecutors or police officers. Under German law, the corresponding criminal law provision requires false testimony before a court, i.e. judge. Moreover, German criminal procedural law attaches a higher evidential value to testimonies before a judge, as a consequence of which the statements in judicial records can be read out under certain conditions (see e.g. Sec. 251(1 and 2), Sec. 254 GCCP). If a foreign legal order does not accept to take a witness or accused evidence before a judge, this may lead to frictions in the German criminal proceedings.

Another issue related to competences concerns the fact that, in some countries, e.g. the UK, advocates (such as barristers) perform certain functions of the judiciary. German authorities sometimes consider letters from barristers to be of ‘non-judicial nature’ (stemming from ‘a lawyer’) and do not react.

\textsuperscript{344} OLG Karlsruhe, Beschl. v. 4.8.2017, Ausl 301 AR 64/17.

Practical problems

Interviewees also mentioned several factual problems that currently hinder cooperation within the EU. Prosecutors responded that the execution of issued requests are still not executed in a timely manner in foreign EU countries. A reason may be the lack of human resources or the concept of prioritising cases pursued in other EU countries. This situation leads to questions pertaining to the state of affairs. In some cases, the German procedure may be brought to an end if no answer to the required assistance is provided. This concerns especially minor offences. Waiting too long for replies would contradict the principle of proportionality.

Sometimes, German MLA requests are not completely executed, i.e. evidence is submitted to the German authorities only in a selective way by the foreign authorities. This may first lead to delays in the domestic procedure since the foreign authorities must be queried to complete the request, and second, the success of domestic criminal procedure may be endangered if the foreign authorities in the end refuse to submit important, perhaps exonerating evidence.

A big problem is still the language. Interviewees argued that cooperation can only work if one can communicate with each other. Language barriers still hinder effective cooperation. Another problem in relation to language are the partly (still) bad translations of European Arrest Warrants / MLA requests into German received from other EU Member States.

Defence lawyers replied that there are considerable differences regarding the quality of the lawyers' advice, especially in cross-border cases. In particular, the level of knowledge of lawyers assigned as mandatory defence lawyers to an MLA/extradition case differs considerably among the EU Member States. Most defence lawyers lack expertise in MLA and extradition. International cooperation in criminal matters remains a specific field of law, which is only dealt with by few people.

VII. Conclusion and policy recommendations

Interview partners generally submitted that no further action should be initiated at the EU level at the moment. Instead, the time is considered ripe for entering into a consolidation phase and for a thorough evaluation of the existing instruments.

The example of the European Protection Order shows that existing instruments are not being used, but that in the majority of cases there is no need for them, since national procedures and measures already offer sufficient protection. As things stand at present, the EU legislator should therefore be cautious about creating further instruments since the effects on the rights of the accused and thus the impacts on the rule of law procedure in general must always be taken into account as well.

346 But see the proposal of German defence lawyer and former president of the ECBA H. Matt for a new roadmap on minimum standards of certain procedural rights – an Agenda 2020 in 2017, Eucrim, 1.

347 This also holds true for the area of victim protection where many lawyers are of the opinion that a thorough evaluation is needed first. Furthermore, many lawyers are concerned that further regulation may further distort the balanced criminal procedure system.
The majority of interviewees stressed that more training measures are needed in order to adequately prepare all those involved in international cooperation in criminal matters, such as judges, prosecutors, and defence lawyers. Those involved should learn more about the existing instruments of cooperation, e.g. the European Supervision Order or the Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

Experts on the part of defence lawyers conceded that lack of knowledge on the part of defence lawyers should be remedied. Most defence lawyers are neither trained nor specialised in the EU instruments of international cooperation and, if one is assigned as mandatory defence lawyer, the client may not be adequately advised. Therefore, the objective should be that all defence lawyers who may be assigned to the client should have the same level of knowledge.

A similar picture emerged in the area of protection of victims. Victims’ rights and protection mechanisms are designed effectively from a legal point of view, but more problematic is the practical application. This can hardly be achieved by ever increasing harmonisation or EU standardisation, which could sometimes make the victim protection system appear overloaded and opaque. It seems more important to emphasise existing European standards at the national level to increase the awareness of them of lawyers, prosecution authorities and victim protection agencies working in this field. It would certainly make sense, for example, for victim protection to play a greater role in the training of young lawyers, which is practically difficult in view of the general training scheme as it is designed in Germany. Beyond appropriate training measures, the general availability of victim support and victim protection institutions should be strengthened. These improvements on a low-threshold basis are preferred to an expanding system of standards driven by political activism.348

The majority of interview partners are of the view that attempts to harmonise procedural criminal law across the EU are not feasible and not reasonable. It was also stressed that, in the case of legal orders that share a common legal culture, differences remain that cannot be overcome by EU harmonisation. Austria and Germany were mentioned as a good example. Although both countries share a long common legal history and the criminal procedure of both countries seems rather similar (at first glance), there are vast differences between them. These concern, for instance, the role of the public prosecutor and investigating judge during the criminal procedure; the rights of the defence (e.g. access to the files); the confidentiality of lawyer-client communication;349 the rights to refuse testimony on professional grounds,350 and exclusionary rules for evidence.

348 See also Kotlenga, Nägele, Nowak, Bedarfe und Rechte von Opfern im Strafverfahren, 5: the implementation of the victims’ rights Directive depends above all on the willingness of the law enforcement authorities and courts to apply the spirit of the directive in their daily work.
350 See in this regard, J. Taferner, ‘Die Legitimation von Vernehmungsverboten nach § 155 StPO’, in O. Lagodny (ed.), Strafrechtsfreie Räume in Österreich und Deutschland,
Against this background, one interview partner advocated that the EU should not be called to answer the question of further harmonisation but instead to develop a ‘negative catalogue’ of issues under which mutual recognition of judicial decisions is considered inadmissible. As a starting point, one could raise the question: what are the ‘fundamental principles’ of law that may hinder the applicability of the forum principle in MLA (Art. 9(2) Directive EIO; Art. 4(1) 2000 EU MLA Convention)? Possible issues of this negative catalogue could be: detention conditions; privileges to refuse testimony; rights and position of the defence lawyer in criminal proceedings; and proportionality of coercive measures.

In order to improve cooperation in criminal matters within the EU, other interview partners were in favour of EU action in specific fields. They concern both legislative and practical measures.

**Legislative measures:**

- EU-wide, central and easily accessible registers, such as a register for criminal records (beyond the current European Criminal Records Information System (ECRIS) system) or a register on DNA (beyond the current Prüm solution);
- EU-wide rules on the service/notification of documents in criminal matters;
- Witnesses’ duties in criminal proceedings led in an EU Member State other than the EU Member State of residence;
- Ensuring the same level both as regards quality and financing of defence lawyers if it comes to mandatory/ex officio defence.

**Practical measures:**

- Better and continued language training of practitioners involved in MLA;
- Establishment of certified interpreters/translators particularly competent for MLA/extradition procedures;
- Establishment of fora where practitioners of all EU Member States meet to discuss current problems in cooperation in criminal matters and/or exchange their views on their national legal system;
- Guide for practitioners on the relationship of the various existing EU instruments on cooperation in criminal matters (key words: European Arrest Warrant as the ultima ratio; use of other EU instruments as less intrusive means).

Vienna, facultas, 2015, 185 et seq.