

Social Fieldwork Research (FRANET)

European Arrest Warrant proceedings – safeguards for requested persons

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Authors: Mirko Schwärzel, Dr. Roger Meyer

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EXECUTIVE SUMMARY

Right to information

Overall, findings show that the legal requirements for interpretation and translation are fulfilled within EAW proceedings in Germany. There have been no reports of severe violations. Beyond the formal recognition and fulfilment of legal standards, issues were raised concerning the implementation in practice. Regarding interpretation, those concerns include quality aspects and availability of interpreters (in few cases). The absence of a monitoring function or quality control of interpretation in practice – including standards for the assessment whether interpretation is needed or not – was raised. The provision of translation of documents seems to have even more challenges, ranging from quality, availability, timeliness, to regional differences. Findings show that very few are aware of legal reforms regarding and their impact in regulations and provisions. The use of standardised forms such as Letter of Rights (LR) in multiple languages for example have only been acknowledged by one of the five judges/prosecutors.

Right to interpretation and translation

Generally, findings show that the legal requirements concerning the right to information for requested persons in EAW proceedings in Germany are met by the authorities. All interviewees reported that requested persons are informed about their rights at any stage of the proceedings. Beyond this confirmation of formal compliance with legal provisions by German authorities, findings show that in practice a profound understanding of requested person might not always be achieved. The most prominent concern raised was whether the information provided alone can contribute to a profound understanding in such a complicated and existential matter as extradition. Judges and lawyers might at times not be experienced and knowledgeable enough to transmit the full meaning and implication to the requested person. The role and function of defense lawyers experienced in extradition proceedings was stressed to act as a mediator in this regard.

Right to access to a lawyer

Legal counsel and access to a lawyer are central rights of accused persons in Germany. This is reflected in the provision for requested persons in EAW proceedings. Findings underline that these provisions are generally respected. Issues arise however from the specific requirements in transnational extradition settings. The complexity of legal matters in EAW proceedings would make an experienced and knowledgeable legal representation desirable. The findings question whether the legal system supports requested persons to meet this demand. Authorities do not provide lists or contacts with specialised lawyers in extradition cases. Furthermore, the compensation system seems to hinder the development of a specialised group of lawyers for such proceedings: four out of five lawyers stated explicitly that the remuneration and compensation system would make effective representation difficult. Despite the legal requirement for dual legal representation, findings show that German provisions do not encompass support for cross-border communication. Also, German authorities do not actively provide requested persons with contacts in the issuing state.

Issuing and execution of the EAW – factors considered

Issuing and execution of an EAW encompasses several aspects and dimensions. Generally, findings show that both judges/prosecutors and lawyers consider a wide range of factors and criteria when issuing or executing an EAW in accordance with the legal provisions. When issuing an EAW, proportionality is widely mentioned as a main factor. From the findings there seems to be different criteria as to how this factor is weighted. However, very few of the interviewees are concerned with

this when issuing an EAW. Therefore, the current sample does not seem to give a representative and complete picture, which could be a limitation of this report. It has to be underlined that only few interviewees could respond to the perspective of an issuing authority – either because they are not concerned with it (lawyers) or these proceedings take place outside of their competencies (investigating courts, prosecutors). When executing an EAW, it is widely stated among interviewed judges/prosecutors and lawyers that proportionality is considered as a key factor. However, it happens rarely that an EAW is challenged for reasons of proportionality. Findings show that detention conditions in the issuing state are the most important and most actively challenged criterion in EAW proceedings in Germany. Both judges/prosecutors and lawyers state to use various sources including the FRA database on detention conditions. The main challenge would still be to get to reliable, current data from available sources in a language commonly used in German proceedings.

Use of digital tools

Germany does not have any legal provisions for the use of digital tools in formal procedures of judicial proceedings. According to German law, the proceeding cannot be closed in absence of the accused person, and the presence of the requested person may not be substituted by digital means. This has also not changed under the conditions of the COVID-19 pandemic significantly. The practice of other EU Member States to use digital tools for interrogations and hearings might have an impact on the development in Germany in future. The SIRENE network in the frame of the Schengen Information System (SIS) was named as an important driver in this regard. Nonetheless, digitalisation has influenced EAW proceedings by providing more reliable and faster forms of digital communication for both authorities and lawyers. Research on aspects like prison conditions, legal framework in issuing countries etc. provide a profound database for information. Digital translation options should help ensure that information is available for requested persons in multiple languages. Overall, the interviewees did not share the idea that digitalisation might lead to fewer EAWs being issued.

INTRODUCTION

This report contains the compilation of findings of a desk-research and a series of interviews conducted with 5 lawyers and 5 judges/prosecutors on the question of procedural rights in European Arrest Warrant proceedings in Germany.

Five interviews were conducted via electronic means and four interviews took place face-to face. One face-to-face interview was conducted with two participants, one judge and one prosecutor in Hamburg. One interview with a representative of the Federal Prosecutor's Office had to be held via telephone as the interviewee could not establish a solid and safe internet connection. This also was the only person who did not want the interview to be recorded.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The interviewer has participated in and lead different research projects involving interviews earlier, so no special training was delivered before the interviews. Preparation included a testing sample concerning timing and preciseness.

The identification and selection process varied significantly between the group of lawyers and judges/prosecutors. For the group of lawyers, experts could be relatively easily identified via online research. It was helpful to identify and refer to European Arrest Warrant (EAW) proceedings at the Federal Constitutional Court (*Bundesverfassungsgericht*) and contact the respective lawyers. For the group of judges/prosecutors, the recruitment appeared to become more difficult. Requests were often not answered by the administration of the respective courts, or it took a significant time to receive answers. Appointments for interviews were similarly harder to obtain than with lawyers. Some appointments were cancelled on short notice due to different reasons, and approaching summertime and the holiday period caused a further delay.

○ SAMPLE AND DESCRIPTION OF FIELDWORK

Defence lawyers:

Requested: 5, completed: 5

Judges/prosecutors:

Requested: 5, completed: 5

Table 1: Sample professionals

	Group	Expertise in EAW proceedings	Gender
1	Defence lawyer	Many years of practical experience with German and foreign law enforcement authorities in extradition proceedings. Specialised on EAW cases.	M
2	Defence lawyer	Founder of law firm with many years of experience in cross-border proceedings.	M
3	Defence lawyer	Employed at law firm specialised in cross-border criminal defence, white collar cases. Special expertise in mutual legal assistance and extradition law.	M
4	Defence lawyer	Lawyer, member of the interdisciplinary International Max Planck Research	M

		School for Comparative Criminal Law (IMPRS-CC). Employed as prosecutor in Hamburg.	
5	Defence lawyer	Founder of law firm in Hamburg, brought two EAW proceedings to German Constitutional Court.	F
6	Judge	Judge at Berlin Superior Court	M
7	Prosecutor	Chief Public Prosecutor, General Public Prosecutor's Office in Munich	M
8	Prosecutor	Prosecutor at Federal Prosecutor's Office Karlsruhe	F
9	Prosecutor	Prosecutor at Public Prosecutor Office Hamburg	M
10	Judge	Judge at Hamburg District Court	F

All interviews conducted were held in a supportive and cooperative atmosphere. Some interviewees appeared to be sceptical when first contacted and demanded extra explanation and information about the project. But they opened up noticeably during the meetings. The interviewer repeatedly received the feedback that such an interview with the opportunity to reflect procedures marked a welcomed change to daily routines.

The interviews consisted of an introduction, the set of questions and feedback. The core element, the set of questions, took in average 45 minutes to conduct. The interview with a prosecutor from the Federal Prosecutor's Office marks a significant deviation as it was held via phone, the interviewee would not consent to a recording and remarked that a large part of the questions raised were not in her mandate and responsibility.

- **DATA ANALYSIS**

The interviews were summarized with the scheme of an interview reporting template provided by FRA, also serving as a topic guide and questionnaire. Interview reporting templates contained two quotes per question/section. Dominant opinions or arguments, or otherwise distinct opinions and attitudes, were outlined here. All interviews except for one (s.a.) were audio-recorded. For each section and question a table was produced compiling the responses of the interviewees. In the frame of this country report, the responses were clustered along main recurring themes.

- **BRIEF OVERVIEW OF THE REPORT'S CONTENTS**

The findings of the desk-research - outlining the current policy context and legal provisions in Germany concerning procedural rights of persons requested in the EAW proceedings - opens each chapter and is subsequently contrasted with the implementation practice reported by lawyers and judges/prosecutors.

RESEARCH FINDINGS

1. Right to information

a. Legal overview

In general, the implementation of EU rules concerning the right to information of persons subject to an EAW (Directive 2012/13/EU), did not necessitate many changes as German law already knows many obligations to provide information. The arrest and surrender of requested persons based on an EAW is regulated by the Act on International Mutual Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen IRG*), namely §§ 78 et seq. IRG. The provisions of the IRG are completed by the Code of Criminal Procedure (*Strafprozessordnung StPO*) which contains more specific rules on the issuance and execution of arrest warrants (§ 77 IRG).

Information about rights and content of the EAW: The provisions state that an arrested person must be informed about the reasons for the arrest and the existence of the arrest warrant. This includes a written translation of the warrant if needed. A requested person arrested shall be instructed on his/her rights immediately in form of a written document¹ that is available in multiple languages². The form shall include an instruction on the following rights: to remain silent on the matter, to legal counsel at any stage of the proceedings, to be heard, the notification of a relative and the notification of the consular representation. These instructions must be given in a language that the arrested person understands, which will usually require involving a translator or interpreter free of charge³. Arrested persons must be brought before a judge at the district court immediately, where they will be informed once more of their rights pointed out above.

If at this first judicial hearing the arrested person challenges the surrender, the case will be referred to the Higher Regional Court (*Oberlandesgericht, OLG*) by the district court (*Amtsgericht*) for a ruling on the permissibility of the surrender. If the arrested person does not raise any objections, the judge may inquire whether he/she wishes to exercise his right to consent to simplified extradition (stipulated in § 41 para. 1 IRG) thus waiving his right to have an *OLG* certify the permissibility of the execution of the EAW according to § 21 para. 6 IRG (and § 22 para. 3 IRG). The court must ensure that the requested person fully understands the meaning and consequences of such consent which include an irrevocable loss of procedural safeguards. In this context, § 41 para. 2 IRG also allows for a renunciation of the speciality rule. The decision is left to the discretion of the requested persons. Informed consent presupposes prior documented instructions by the court explaining the consequences of a potential renunciation.

Speciality rule: The general rule on speciality, meaning that requested persons shall not be prosecuted or detained for previous offences not specified in the current warrant (§ 11 IRG), does not apply in EAW cases (§ 82 IRG)⁴. Yet, this does not mean the speciality rule no longer applies. It has been hard-wired into the special EAW provisions of the IRG in the process of implementing Art. 27 FD-EAW.

¹ Schmitt, B. in: Meyer-Goßner, L./ Schmitt, B. (2022), Code of Criminal Procedure (*Strafprozessordnung*), 65th edition, Munich, C.H.Beck, § 114b para. 1.

² Germany, Ministry of Justice (*Bundesministerium der Justiz*), https://www.bmj.de/SiteGlobals/Forms/Suche/Belehrungsformularesuche_Formular.html?templateQueryString=Suchbegriff (last visited: 13 June 2022).

³ Köbeler, W in: Ambos, K./ König, S./Rackow, P. (2020), Mutual assistance law in criminal matters (*Rechtshilferecht in Strafsachen*), 2nd edition, Baden-Baden, Nomos, § 41 IRG, para. 536.

⁴ Meyer, F. in: Ambos, K./ König, S./Rackow, P. (2020), Mutual Assistance Law in Criminal Matters (*Rechtshilferecht in Strafsachen*), 2nd edition, Baden-Baden, Nomos, § 83 IRG, para. 887.

Hence, no general renunciation or implicit waiver can be inferred from the reference in § 82 IRG. No notification pursuant to Art. 27 para. 1 FD-EAW was deposited by Germany either. The earlier declaration pursuant to Art. 11 para. 1 EU-Extradition Convention does not continue to apply (Art. 31 lit. d FD-EAW).

Safeguards: Individual rights to be informed appropriately can be enforced in court and ultimately culminate in a constitutional complaint to the German Constitutional Court followed by an individual complaint before the European Court of Human Rights ECtHR (Art. 34 of the European Convention on Human Rights ECHR). Requested persons may also move national courts for temporary legal protection or interim measures which might lead to a suspension of the surrender process until the protected rights have been fully granted. Such injunctions could be imposed by the competent *OLGs* or – upon appeal – the constitutional court.

Further procedural consequences are contingent in the *lex fori*. German rules of evidence and exclusionary rules do not govern incoming EAWs. The legal effects of any deficiencies on the part of the German authorities for a later trial in the issuing state is a matter of domestic law of the issuing state. Yet, according to European human rights law, the issuing state is under an obligation to ensure that the overall fairness of the criminal proceedings is not compromised by the way how the surrender or Mutual Legal Assistance processes are conducted (concerning the impact of a procedural violation in the requested state on the fairness of proceedings in the requesting state). In cases of outgoing EAWs (so called *Einlieferung*) that are inappropriately executed abroad, if at all, German courts might grant a mitigation of the sentence in compensation.

Remedies: Under German procedural law, violations of the state's obligation to instruct the defendant about his/her rights are generally dealt with comprehensively in the course of the criminal proceedings and a potential verdict. The consequences differ in relation to the type and effects of the omitted instruction.

In extradition cases this option is non-existent. As was explained before, requested persons enjoy various means to enforce their individual rights. Constitutional complaints to the German Constitutional Court and individual complaints before the ECtHR (Art. 34 ECHR) have already been mentioned - but represent the long end of a chain of legal remedies to be exhausted. Yet, to prevent a *fait accompli*, requested persons may need to involve the constitutional court earlier to obtain injunctive relief against pending surrender decisions at a very early stage.

If the requested person has not been informed correctly upon arrest, he may voice his protest at the initial hearing before the district court judge (§ 21, § 22 IRG) who will ensure correct instructions and oversee the effective implementation of relevant rights. Should the district court itself act in violation of the law and derelict its duties to inform or remedy earlier shortcomings by the police, the requested person could complain about these procedural violations at the next level of the proceedings before the Higher Regional Court (*Oberlandesgericht OLG*); unless he has agreed to a simplified extradition (§ 41 IRG).

Pursuant to § 29 IRG the *OLG* is tasked with reviewing the permissibility of the execution of an EAW including compliance with procedural requirements such as the right to information. In the event that the requested person has consented to simplified extradition (§ 41 IRG), but has not been informed of his or her rights previously or accurately, or has been denied legal counsel or an interpreter, the *OLG* may declare his consent invalid.

To seize the court of the matter, the requested person is supposed to approach the competent general prosecutor's office (*Generalstaatsanwaltschaft*), which is formally in charge of the executing process

under German law and apply for the initiation of proceedings pursuant to § 29 IRG. If the prosecutor general's office remains unconvinced by the arguments and evidence presented, the requested person is allowed to seek protection from *OLG* directly.

If the *OLG* does not recognize a claim of insufficient information, the only option left to the requested persons is a constitutional complaint (alleging a violation of constitutionally protected procedural rights) before the Federal Constitutional Court. Decisions taken by *OLG* in extradition matters are not open to any further statutory appeal.

If efforts seeking legal protection at the Federal Constitutional Court fail, the final remedy would be to present any shortcoming as an infringement of Art. 5 or Art. 6 ECHR and lodge an individual complaint by virtue of Art. 34 ECHR before the ECtHR.

b. Right to information in practice

- Provision of information (when, how by whom)

The legal provision that requested persons are informed about their rights upon arrest by the police officers seems not to be in question, since all 10 interviewees confirmed to this in general. Only few mentioned that there might be cases where the police would not have a Letter of Rights (LR) at hand in multiple languages at the moment of arrest, e.g. when a requested person is identified by chance in the frame of a routine control. Experience of police officers with EAW might vary greatly depending on the agency (e.g. border police might have more experience with such cases).

All interviewees agree however that at the latest on the next day, when the arrested person is brought before the investigative court, all requested information is provided, and a defence lawyer will be appointed. If the EAW is available in paper form, it is handed out and the content is disclosed. A defence lawyer points out:

"In fact, the law provides for instruction to take place. Normally, this should already be done by the police officers. Classically, in my experience, the proper instruction takes place at the district court, in the first judicial hearing. There is also taking place, according to my experience, a proper instruction on the rights." ("Gesetzlich ist das in der Tat vorgesehen, dass eine Belehrung stattfindet. Normalerweise soll dies auch bereits durch die Polizeibeamten stattfinden. Klassischerweise, so eher meine Erfahrung, findet die ordnungsgemäße Belehrung beim Amtsgericht statt, in der ersten richterlichen Vernehmung. Dort findet auch, nach meinem Erfahrungsschatz, eine ordnungsgemäße Belehrung über die Rechte statt.")

- Information about rights

All interviewees confirmed in consensus that persons arrested on an EAW are being informed about their rights within a maximum of 24 hours following to their arrest. Most interviewees states they are informed both orally and in writing. However, a chief public prosecutor points out that EAW cases are not very common, so there would sometimes be a lack of experience and routine among the judges. Hence, in order to still provide the requested information, the Munich Higher Regional Court has developed a check list form for judges that contains the pieces of information that need to be made known. One lawyer, one judge and one prosecutor from Hamburg add that their region provides for LR to be available in 35 different languages.

One lawyer remarks that for the sake of comprehensiveness the amount of information provided should not surpass a critical point:

“One has the feeling that in recent years - at least according to German law - the instructions have increased. One wonders whether this is always expedient when the information form is closely printed and two pages long. Even if it is provided in the appropriate language. But in any case, [the requested persons] are informed about their basic rights and understand that.” *“(Man hat das Gefühl, dass in den letzten Jahren – jedenfalls nach deutschem Recht – die Belehrungen eher zugenommen haben. Da fragt man sich schon, ob das immer im Sinne des Erfinders ist, wenn das Informationsblatt eng bedruckt zwei Seiten lang ist. Selbst wenn es in der entsprechenden Sprache zur Verfügung gestellt wird. Aber von den grundsätzlichen Rechten erhalten [die gesuchten Personen] in jedem Fall Kenntnis und verstehen das auch.”)*

Table 2: Are persons arrested on an EAW informed about their procedural rights?

	Lawyer 1	Judge 1	Total
YES	X	X	2
In writing (Letter of Rights)	-	-	0
Orally	-	-	0
In writing (Letter of Rights) and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 2	Judge 2	Total
YES	X	X	2
In writing (Letter of Rights)	-	-	0
Orally	-	-	0
In writing (Letter of Rights) and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 3	Judge 3	Total
YES	X	X	2
In writing (Letter of Rights)	-	-	0
Orally	-	-	0
In writing (Letter of Rights) and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 4	Judge 4	Total
YES	X	X	2
In writing (Letter of Rights)	-	-	0

Orally	-	-	0
In writing (Letter of Rights) and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 5	Judge 5	Total
YES	X	X	2
In writing (Letter of Rights)	-	-	0
Orally	-	-	0
In writing (Letter of Rights) and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0

- Information about the EAW – content and procedure

According to the unanimous opinion of the interviewees, requested persons arrested in Germany are informed about the contents of the EAW against them.

Divergences appear solely around the question on how requested persons are informed: Two judges/prosecutors and one lawyer state that in their experience the EAW would mainly be handed out to the requested persons and their lawyers. A lawyer from Berlin points out that a copy of the EAW will be openly handed over at the hearing before the investigating judge at the latest, but no oral explanations would be provided. This person also states that the underlying national arrest warrant is not always disclosed at the same time:

“It still seems to me that the underlying national arrest warrant is not in all cases and not at the same time disclosed, so that in my opinion this becomes a task for the defence counsel. The reason why I think this is so important is that the presentation in the corresponding form is often very rudimentary. And it sometimes even occurs that the information differs from one another in essential points, so that the juxtaposition of the European arrest warrant form and the national arrest warrant on which it is based is important.” (*“Meines Erachtens ist es immer noch so, dass der zugrundeliegende nationale Haftbefehl nicht immer und nicht immer gleich mitoffengelegt wird, sodass das eine Aufgabe ist, die dem Verteidiger meines Erachtens zukommt. Hintergrund, warum ich das für so wichtig halte, ist, dass die Darstellung im entsprechenden Formblatt häufig sehr rudimentär ist. Und es zum Teil auch vorkommt sogar, dass die Informationen voneinander abweichen in wesentlichen Punkten, sodass das Nebeneinander vom Europäischen Haftbefehlsformular und zugrundeliegendem nationalen Haftbefehl wichtig ist.”*)

Some of the interviewees question the quality of the translation of an EAW. One lawyer for example confirms that information is provided about the content of the EAW in the language spoken by the requested person. The interviewee questions however to what extent a proper translation can be offered or whether a translated document will already be handed out by the police or at latest by the investigating judge. Experience would have shown that there can be certain delays until a proper translation is available.

Table 3: Are persons arrested informed of the contents of the EAW against them?

	Lawyer 1	Judge 1	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 2	Judge 2	Total
YES	X	X	2
In writing	-	X	1
Orally	-	-	0
In writing and orally	X	-	1
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 3	Judge 3	Total
YES	X	X	2
In writing	-	X	1
Orally	-	-	0
In writing and orally	X	-	1
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 4	Judge 4	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 5	Judge 5	Total
YES	X		1
In writing			
Orally			
In writing and orally		X	1
NO			
Don't know/remember			1
Did not answer			

- Information on consenting to surrender

As pointed out in the legal overview, the first stage is the issue of simplified extradition according to § 41 IRG (referring to Art. 13 of the EAW framework decision). Simplified extradition encompasses the consent of the arrested person to surrender without a judicial review taking place in Germany. Instruction is provided in German legal terminology regarding a simplified extradition. So far, Germany has not adapted the semantics of its Law on International Legal Assistance in Criminal Matters IRG (*Gesetz über die internationale Rechtshilfe in Strafsachen*) to the terms of the EAW framework decision, so that “surrender” (*Übergabe*) in German terminology remains “extradition” (*Auslieferung*).

All interviewees approve that generally requested persons are informed about what consenting to their surrender would entail. Judges and prosecutors underline that the courts are instructed to ensure that the requested persons understand the information. To quote a chief public prosecutor :

“For example, at the Munich Higher Regional Court we have a form sheet for the judges, so that they have a kind of roadmap of everything that needs to be done and what needs to be announced to the requested persons, even if they [the judges] have never done it [EAW proceeding] before, which sometimes happens when the courts are on call at the weekend. And part of this roadmap is of course that the requested persons are instructed about the possibility of simplified extradition and the consequences of consenting [to surrender].” (*„Also wir haben zum Beispiel im Bereich des OLG München ein Formular für die Richter, damit die, selbst wenn die das noch nie gemacht haben, was mitunter vorkommt im Bereitschaftsdienst bei den Gerichten am Wochenende, quasi eine Art Ablaufplan haben, was alles gemacht werden muss und was alles bekanntgemacht werden muss. Und darin kommt eben auch vor, dass die die Personen natürlich über die Möglichkeit der vereinfachten Auslieferung belehren [und] über die Folgen der Zustimmung.“*)

Three of five lawyers however have raised substantial concerns. They state that extradition law and extradition proceedings mark a complex legal field. Therefore, specialisation and experience would be needed for an effective legal counsel. A lawyer also points out that in practice it could be seen that many investigating judges have little experience in extradition proceedings. Thus, although they would often pronounce or read instructions, they would sometimes not sufficiently understand the content themselves. This would make a profound and knowledgeable legal defence even more important:

“Investigating judges have their job, which is only on-call duty. And one often experiences that they themselves do not know exactly what they are informing about, but they do it or simply read it. And that's what I'm there for, too, to let them [the requested persons] know in advance what it all means.” (*“Die Ermittlungsrichter haben da ja ihren Dienst, der auch nur so vorübergehend ist. Und man erlebt es ganz häufig, dass die selber nicht so ganz genau wissen, was sie da belehren, aber sie tun es oder lesen es ab. Und dafür bin ja auch ich da, dass ich vorab sie dann auch informiere, was das alles bedeutet.“*)

A specific case in Germany is marked by the specialty rule. In light of the legal situation pointed out above, in Germany the specialty rule is renounced in rare cases. Simplified extradition, on the other hand, would be relatively common. The assessment of how requested persons are informed about the speciality rule marks a significant difference between judges and lawyers. While judges tend not to see an issue, lawyers point out that the rule itself would not be easy to understand - even for a lawyer. One lawyer explicitly states not to be able to estimate to what extent the consequences of surrendering would be fully illustrated. An experienced lawyer in extradition cases confirms that requested persons are informed about this rule, but it would be doubtful whether the detainees would understand all the implications, especially in a phase of great stress during the hearings. However, in the experience of almost all interviewees, this would not be particularly relevant in practice. No interviewee could recall a case where requested persons have renounced the specialty rule.

Judges and prosecutors also pointed out that the decision of the ECJ that the public prosecutor's offices in Germany are not judicial authorities in the meaning of the EAW framework decision because they would lack independence, creates a challenge.

Table 4: Are the requested persons informed about what consenting to their surrender entails?

	Lawyer 1	Judge 1	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 2	Judge 2	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 3	Judge 3	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 4	Judge 4	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 5	Judge 5	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0

- Understanding of information

The question whether requested persons understand the information provided was one of the most diverted questions in the survey.

The judges and prosecutors did not identify a great issue here. Correspondingly, no one mentioned specific approaches to examining whether requested persons understood the provided information correctly. One judge for example states that in his experience of more than 10 years in extradition law, he is aware of at most three cases in which the lawyers later complained that certain statements had not been correctly understood. This statement can be seen as exemplary for the assessment of all judges and prosecutors interviewed.

The lawyers on the other hand questioned whether requested persons would gain a full understanding about the meaning at any time especially since the irrevocability is also explicitly pointed out. A lawyer argued that for the legal layperson it is not immediately clear in such an extreme situation what the information provided would mean and what consequences it might entail:

“My spontaneous answer would be that it is asked formally: Did you understand that? And a client who is usually quite overwhelmed in that situation will say: Yes, yes. Daring to say to a judge in a foreign country, no, I don't understand what you're saying, requires a certain courage and a certain level of reflection that I don't think everyone in the situation has.” (*“Meine Antwort spontan wäre, es wird formal gefragt: Haben Sie das verstanden? Und ein in der Regel recht überfahrener Mandant wird sagen: Ja, ja. Sich zu trauen, in einem fremden Staat einem Richter gegenüber zu sagen, nein, ich verstehe nicht, was du da sagst, erfordert einen gewissen Mut und eine gewisse Reflektiertheit, die, glaube ich, nicht jeder in der Situation hat.”*)

On the same issue, another lawyer comments:

“Yes, they will be informed about [the speciality rule]. The problem is, of course, that it is not easy to understand, even for a lawyer. And people are nervous and stressed. And I always have my doubts as to whether they really understood it.” (*„Ja, sie werden darüber informiert. Das Problem ist natürlich: es ist schon für einen Juristen nicht ganz leicht zu verstehen. Und die Menschen sind in heller Aufregung. Und ob sie es dann wirklich verstanden haben, da habe ich immer meine Zweifel. Wobei man eben immer rät, dem nicht zuzustimmen.“*)

Lawyers highlighted that for the requested persons to gain a good understanding of the information provided, and consequences decisions would entail, would depend to a large degree on the qualification and experience of their lawyers.

A lawyer experienced in extradition law with mainly white-collar cases marks the only example among lawyers with a slightly different view:

“This is in fact something that is only really understood and internalised in a conversation with the lawyer. But I basically have the feeling that my clients always knew what it was about before they came into contact with me for the first time.” (*„Das ist in der Tat etwas, was erst in einem Gespräch mit dem Rechtsanwalt so richtig verstanden und verinnerlicht wird. Aber ich habe grundsätzlich das Gefühl, dass meine Mandanten immer wussten, worum es geht, bevor sie mit mir erstmalig Kontakt haben.“*)

c. Discussion of findings

Generally, findings show that the legal requirements concerning the right to information for requested persons in EAW proceedings in Germany are met by the authorities. All interviewees reported that requested persons are informed about their rights at any stage of the proceedings.

Beyond this confirmation of formal compliance with legal provisions by German authorities, findings show that in practice a profound information of requested person might not be achieved in all cases. The most prominent concern raised was whether the information provided alone can contribute to a profound understanding in such a complicated and existential matter as extradition. Judges and lawyers might at times not be experienced and knowledgeable enough to transmit the full meaning and implication to the requested person. The role and function of defense lawyers experienced in extradition proceedings was stressed to act as a mediator in this regard.

2. Right to interpretation and translation

a. Legal overview

Interpretation: In accordance with EU-legislation (Directive 2010/64/EU), requested persons who do not speak or understand the language of the proceedings have the right to state-funded interpretation and translation of essential documents (Articles 2(7) and 3(6)).

According to § 114a cl. 1 StPO, the requested person must be provided with a translation of the arrest warrant if he does not have a sufficient command of German. Instructions implementing the right to information must be translated by an interpreter if the arrested person does not understand German sufficiently. Furthermore, § 114b para. 1 cl. 2 StPO requires authorities to verify that wanted persons have a sufficient level of comprehension that will allow them to make effective use of their rights. On the occasion of the first hearing, similar instructions are to be imparted by the court. If the instructions have been issued in writing, a written translation is preferable.

Generally, the requested person is entitled to the free assistance of an interpreter for the entire duration of the extradition proceedings if he does not speak the language of the court according to § 77 IRG in connection with § 185 para. 1 GVG. § 185 para. 1a GVG adds that the court may allow an interpreter to perform his function remotely using communication technology. This exception would allow the court to accelerate proceedings and better safeguard the rights of the arrested person. The responsibility to guarantee compliance with these standards rests with the judicial authority in charge of the case (*Verfahrensherrschaft*); the district court or the *OLG*, that is.

At the time of writing, the standards of live interpretation are regulated independently at the state level by the German federal states. As of the first of January 2023, live interpretation will be governed by the Court Interpreters Act (*Gerichtsdolmetschergesetz/GDolmG*). This new federal statute will form a new regulatory framework. The interpreter must pass a state-recognized interpretation examination and take an oath to work faithfully and conscientiously (also pursuant to § 189 GVG). Furthermore, the competent court must ensure at every procedural stage that a requested person can communicate properly through the interpreter and follow the proceedings⁵. This entails a general obligation to keep a watchful eye on the performance of the interpreter and any noticeable difficulties on the part of the requested person.

Translation: Form sheets for arrested persons have been revised and complemented following the German Act on the Right of necessary Defence (Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung, Bundesgesetzblatt 2019 I/46). This act implemented Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. Translations of letters of rights have been standardised since then by the Federal Ministry for Justice.

b. Interpretation and translation in practice

- Provision of interpretation (decision and means)

The interviews overall confirmed that the provision for interpretation as laid out above are generally aligned. Most interviewees confirmed that if the requested person does not speak German

⁵ Frister, H in: Wolter, J (2016), Systematic Commentary on the Code of Criminal Procedure (*Systematischer Kommentar zur Strafprozessordnung: SK-StPO*) Vol. 9, 5th edition, Cologne, Carl Heymanns, § 185 GVG para. 8.

interpreters are called in - already during the first interrogations with the police. The findings validate that during the judicial hearing interpretation is provided. Two lawyers report that it is known to them that an interpreter was not available during an EAW hearing, however stressing that those were rather exceptions.

The motivation to consult an interpreter usually derives from the public prosecutor's office or from the judge. In the hearing, they determine whether the German language is understood or not. A lawyer among the interviewees acknowledges that the assessment is not necessarily easy for prosecutors and judges. Lawyers in general see a responsibility among themselves as well to demand interpretation as soon as it is evident that the accused cannot follow the hearing. Another lawyer states that in the context of every court hearing - be it at the district court or later at the higher regional court - an interpreter is assigned if the person does not speak German. In the lawyer's experience this would usually be provided for and would not cause any problems. A lawyer may argue for and demand an interpreter, but the final decision and assessment would be taken by the court.

A lawyer from Hamburg points out that in his experience, courts would attempt to appoint lawyers who speak the native language of the requested person if possible.

While neither lawyers nor judges report about structural problems in recruiting interpreters, at some points conflicts are described - as in the example of a lawyer from Hamburg:

"I haven't had any problems with it so far. I haven't heard any problems from colleagues either. The only questions arise rather in the area of interpreting when hearing witnesses in criminal proceedings. There are regular problems and regular disputes between the court and the lawyers as to whether this is then properly translated. These problems are of course somewhat different in mutual legal assistance proceedings or in extradition proceedings, because traditionally there is no questioning of witnesses."

"Ich hatte da bis jetzt noch keine Probleme. Auch von Kollegen habe ich keine Probleme gehört. Die einzigen Fragen stellen sich eher im Bereich des Dolmetschens bei Zeugenvernehmungen im Strafverfahren. Ob das dann ordnungsgemäß übersetzt wird, da gibt es regelmäßig Probleme und auch regelmäßig Disput zwischen Gericht und Verteidigung. Diese Probleme sind im Rechtshilfverfahren oder im Auslieferungsverfahren naturgemäß etwas anders, weil man klassischerweise keine Zeugenvernehmung hat."

In terms of quality of interpretation, lawyers tend to be more critical. A lawyer from Berlin remarks that the quality of translation and interpreting varies significantly. Therefore, the role of legal representation would not only be to accompany the case itself but would partly go beyond that in terms of monitoring the interpretation. The lawyer criticises the absence of a monitoring function or quality control regarding the interpreters, since their output is essential for the requested person to understand and follow the case:

"I clearly miss a monitoring function or quality control with regard to the interpreters. [...] what is translated is sometimes very important. We have addressed the specialty rule and consent. If that is translated incorrectly, there can be very serious procedural errors. And that's why I have to say that the translation quality is not sufficiently guaranteed." (*"Da fehlt mir ganz deutlich eine Überwachungsfunktion oder eine Qualitätskontrolle hinsichtlich der Dolmetscher. [...] das, was übersetzt wird, ist teilweise ganz wesentlich. Wir haben die 'speciality rule' und die Zustimmung angesprochen. Wenn das falsch übersetzt wird, dann kann es da zu ganz gravierenden Verfahrensfehlern kommen. Und deswegen muss ich sagen, die Übersetzungsqualität ist nicht hinreichend sichergestellt."*)

- Translation of documents

Regarding the translation of documents, the vast majority of interviewees did not refer to the German Act on the Right of Mandatory Defence (*Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung, Bundesgesetzblatt 2019 I/46*). Most were also not aware of the fact that translations of Letter of Rights have been standardised since then by the Federal Ministry for Justice. One lawyer from Hamburg was one of the few who could confirm that

“translations [of the Letter of Rights in EAW proceedings] have been standardised by the Federal Ministry of Justice BMJ in 2019 and were disseminated nationwide. They are also available on the BMJ homepage in – I don't know exactly – perhaps 30 languages.” (*„Übersetzungen [der Letter of Rights in EuHB-Verfahren] sind vom Bundesministerium der Justiz BMJ 2019 standardisiert und bundesweit angefertigt worden. Die sind auch auf der Homepage des BMJ abrufbar in – ich weiß nicht genau – 30 Sprachen vielleicht.“*)

In contrary, the majority of the interviewees was of the opinion that translations of documents would not be common in practice. Some were of the opinion that, according to German law, a translation is not required if a lawyer can communicate with the accused with the help of an interpreter and that only the EAW would be handed over in the language of the requested person. One judge from a Higher Regional Court states:

“Translations of documents tend not to take place, given that German law generally does not require a translation if someone has legal counsel and this legal counsel can then communicate with him with the help of an interpreter.” (*„Übersetzungen von Schriftstücken finden eher nicht statt, vor dem Hintergrund, dass nach deutschem Recht die Übersetzung in der Regel nicht erforderlich ist, wenn jemand einen Rechtsbeistand hat und dieser Rechtsbeistand dann mithilfe eines Dolmetschers sich da mit ihm verständigen kann.“*)

While this effects documents or file content in general, the EAW would still be presented in the language of the requested person. According to one judge, this would be the case because an EAW would already be available in the native language of the requested person:

“Because most requested persons come from the requesting state, i.e. from the state that issued the European arrest warrant, the European arrest warrant can usually be handed over to them in a language they understand, namely their native language.” (*„Weil die meisten gesuchten Personen jeweils aus dem ersuchenden Staat kommen, das heißt aus demjenigen, dass den Europäischen Haftbefehl erlassen hat, kann ihm in der Regel der Europäische Haftbefehl in einer ihm verständlichen Sprache übergeben werden, nämlich in ihrer Heimatsprache.“*)

Most interviewees however mentioned that the question of translation of documents would differ from state to state in Germany. While the judge quoted above reported about the practice in Berlin, a prosecutor from Munich points out that in the region of the Bavarian capital, documents and legal instructions are not usually translated, but are always made known at a hearing with the help of an interpreter. This would give the requested person and his lawyer an immediate opportunity to raise objections with the help of the interpreter:

“That is different in Germany [depending on the state]. In the Munich area, things usually are not translated, but are always made known with the help of an interpreter. So if, for example, a Higher Regional Court decision is made, the investigating judge will announce this and an interpreter will be called in.” (*„Das ist in Deutschland unterschiedlich. Im Bereich München ist es so, dass in der Regel die Dinge nicht übersetzt werden, aber immer mithilfe eines Dolmetschers bekanntgemacht. Also wenn*

zum Beispiel ein Oberlandesgerichtsbeschluss ergeht, wird dieser durch den Ermittlungsrichter bekanntgemacht und ein Dolmetscher hinzugezogen.“)

Another judge stresses for Hamburg that the authorities have improved the practice of translation in extradition cases considerably over the past years. In some Higher Regional Court districts, it would also be common for court decisions to be translated and delivered. However, no hearing would then take place.

This is also valid for the question of LR. According to a judge from Berlin, an LR that would contain references to legal remedies would not exist since “there are actually no legal remedies in German extradition law. There are legal remedies in the area of the appointment of legal counsel. An investigating judge would have to say whether instructions are also given in writing in the national language”. A prosecutor confirms that in Munich there would be an LR made available in different languages, but it would not specifically refer to the extradition process. It has to be stressed again, that only one person from the group of judges/prosecutors was aware of the standard LR in more than 30 languages provided by the German Federal Ministry of Justice.

Lawyers, from the findings of this research, tend to take a more critical position on this question. However, no interviewee was concerned that the legal provisions would not be respected. One lawyer for example confirms that translation and interpretation are provided for in general but also highlights the issue of proper quality translations. Furthermore, another lawyer noted that the time factor is relevant: sometimes it would take too long for the translation to be effectively used during the procedures. The LR would be provided in English at least in most districts in Germany:

“And it has to be said that the duration is different. So a positive example is certainly Frankfurt or Munich. They are actually always very quick with the translations, so it makes sense. If you get the arrest warrant, which has been outdated for weeks, at some point in time, that is of course of limited added value, because a completely different procedural stage may have been reached by then.” (“Und man muss dazu sagen, die Dauer ist unterschiedlich. Also ein Positivbeispiel ist sicherlich Frankfurt oder München. Die sind eigentlich immer sehr schnell mit den Übersetzungen, sodass es auch noch sinnhaft ist. Wenn man den schon wochenlang überholten Haftbefehl irgendwann übersetzt bekommt, ist das natürlich von begrenztem Mehrwert, weil bis dahin verfahrensrechtlich möglicherweise schon ein ganz anderes Stadium erreicht ist.”)

In summary the findings once more suggest that the practice in Germany regarding translation and interpretation formally is in line with the legal provisions. In practice, live interpretation seems to raise several issues from questions about quality to availability. Furthermore, practice differs from region to region. The provision of translation of documents seems to have even more challenges, ranging from quality, availability to timeliness. It must be said however that new regulations have recently been introduced (regarding translation) or will soon come into effect (interpretation) which will address those issues.

- Interpretation of consultations with lawyers

No interviewed lawyer has stated interpretation of consultations with lawyers would constitute a problem. A lawyer added that prisons would also be familiar with organising/providing for joint meetings with interpreters and defence attorneys. Judges and prosecutors stress that to their knowledge the appointment of interpreters for meetings with lawyers would be an established system and no complaints have been made so far.

A prosecutor adds that there are cases where lawyers visit the detainees in the detention centre and appoint an interpreter themselves. In such cases the cost would be reimbursed without a separate request upon invoicing:

“It is guaranteed that there is always the possibility that the lawyer can communicate with [the requested person] in such a way that both understand what is at stake. This is not only the case in court hearings, but also at consultations or prison visits and the like.” („Es ist gewährleistet, dass immer die Möglichkeit besteht, dass der Anwalt mit [der gesuchten Person] auch so kommunizieren kann, dass beide verstehen, um was es geht. Das ist nicht nur bei Gerichtsverhandlungen, sondern auch bei Haftbesuchen und Ähnlichem so.“)

c. Additional best practices or challenges

Interpretation: As of January 2023, live interpretation will be governed by the Court Interpreters Act (*Gerichtsdolmetschergesetz/GDoImG*). This new federal statute will form a new regulatory framework. The interpreter must pass a state-recognised interpretation examination and take an oath to work faithfully and conscientiously (also pursuant to § 189 GVG). Furthermore, the competent court must ensure at every procedural stage that a requested person can communicate properly through the interpreter and follow the proceedings. This entails a general obligation to keep a watchful eye on the performance of the interpreter and any noticeable difficulties on the part of the requested person.

Translation: Regarding translation of documents, the translations of letters of rights have been standardised with the Act on the Right of Mandatory Defence in 2019. The Federal Ministry for Justice has made those available for download from the Ministry’s website.⁶

d. Discussion of findings

Overall, findings show that the legal requirements for interpretation and translation are fulfilled within EAW proceedings in Germany. There have been no reports of severe violations.

Beyond the formal recognition and fulfilment of legal standards, issues were raised concerning the implementation in practice. Regarding interpretation, those concerns include quality aspects and availability of interpreters (in few cases). The absence of a monitoring function or quality control of interpretation in practice – including standards for the assessment whether interpretation is needed or not – was raised. The provision of translation of documents seems to have even more challenges, ranging from quality, availability, timeliness, to regional differences.

Findings show that very few of the interviewees are aware of legal reforms regarding and their impact in regulations and provisions. The use of standardised forms as LR in multiple languages for example have only been acknowledged by one of the five judges/prosecutors (Hamburg).

⁶ Germany, Ministry of Justice (*Bundesministerium der Justiz*), https://www.bmj.de/SiteGlobals/Forms/Suche/Belehrungsformularesuche_Formular.html?templateQueryString=Suchbegriff (last visited: 13 June 2022)

3. Right to access to a lawyer

a. Legal overview

As the executing state: According to IRG, a requested person may avail himself of legal assistance at any stage of the proceedings (§ 40 para. 1 IRG). This guarantee entails the right to consult a lawyer confidentially prior to any questioning by law enforcement agencies. In certain circumstances legal representation is mandatory and the competent judicial authority will proceed to appoint legal counsel if the requested person has not retained counsel already. The concept of mandatory legal representation (§ 140 StPO) ranks among the key tenets of German criminal procedure. It intends to protect the integrity of the proceedings and to guarantee the effective application of procedural rights of the individual.

The right of access to a lawyer is triggered unconditionally by the arrest of the wanted person. A qualified lawyer is hence supposed to be present during the initial district court hearings. The requested persons will therefore benefit from this presence and advice when considering the possibility of simplified extradition and waiving speciality. Mandatory representation also applies irrespective of detention whenever the requested person is a minor, incapacitated or the intricacies of the case require special legal expertise. § 40 para. 3 No. 1 IRG refers to several legally challenging grounds for refusing the execution of an EAW in this regard. If necessary, the court must adjourn or rest until counsel arrives to ensure effective assistance.

The German compensation system entails, in essence, that indigent suspects will not be offered legal counsel free of charge. But effective assistance of counsel is guaranteed in any situation required by the EU Directive without any immediate need to worry about securing financial resources to pay upfront fees or other expenses pending trial. One must not forget that the EU Directive is not about free legal assistance but effective legal assistance. So, the normal legal process in domestic criminal proceedings is that, in the event of a conviction, legal fees of appointed defenders must be repaid to the state. However, surrender proceedings differ from these rules for domestic cases. If legal representation is mandatory, legal counsel will be reimbursed by the state treasury. The requested person does not have to refund the fees incurred to the state in extradition cases. They are charged to the state treasury.

If legal counsel was hired privately at the requested person's own choosing (in cases of non-mandatory representation), the costs are only paid by the state treasury if the surrender request has been referred to the *OLG* for certification and been denied as impermissible due to an obstacle to extradition. If the case does not reach the court, because the prosecutor general's office refrained from filing an application by virtue of § 29 IRG, the prevailing opinion concludes that the expenses of the requested person cannot be reimbursed under § 77 IRG in connection with § 467, 467a StPO even though the foreign request for surrender was not successful.⁷

As the issuing state:

If Germany is the issuing state, the question of access to counsel arises in two dimensions.

Domestically, the requested person, necessarily, is the defendant in a national criminal case to which standard rules of criminal procedure apply. As such the requested person, like every defendant, has

⁷ crit. Hacker, T./Riegel, R. in: Schomburg, W./Lagodny, O. (2020), *International Mutual Assistance in Criminal Matters (Internationale Rechtshilfe in Strafsachen)*, 6th edition, Munich, C.H. Beck, § 40 para. 53.

the right to access to a counsel of one's own choosing at any point of the proceedings. Furthermore, the Code of Criminal Procedure (*Strafprozessordnung StPO*) spells out cases of mandatory representation in § 140 StPO. In these situations, a defense counsel will be appointed ex officio if the defendant has not yet hired a lawyer himself. Cases of mandatory representation pursuant to § 140 StPO include detention on remand under section 112 or 112a StPO, prosecutions involving serious criminal offences or cases in which assistance of defence counsel appears necessary due to the severity of the offence, due to the difficult factual or legal situation, or if it is evident that the accused cannot defend himself.

The second, transnational dimension concerns interrelations with the proceedings in the requested state following the issuance of a German EAW. § 83j para. 1 IRG implements certain aspects of the legal aid directive. It stipulates that legal assistance is mandatory in EAW cases where legal counsel is required in proceedings to enforce an EAW for the purpose of prosecution (not for the purpose of enforcement of a sanction). This is because the requested person nominates legal counsel in the area of application of this Act to assist his or her legal counsel in the requested Member State and the appointment of the additional legal counsel is necessary to guarantee the effective exercise of this person's rights in the executing state.

For both cases – Germany as executing and issuing state - **remedies** pointed out in the Legal Overview for "Right to Information" (1.a) apply in the context of the right of access to a lawyer as well.

Dual Representation

In German law there are no provisions or guidance for dual representation. The Ministries of Justice have issued binding directives for prosecutors and judges guiding cooperation with foreign authorities (*Richtlinien für den Verkehr mit dem Ausland in Strafsachen*).⁸ No comparable codes of conduct have been devised by the German Bar Associations. As cross-border cooperation among lawyers is at the heart of professional defense work and a matter of professional self-administration, it appears the national legislator would be precluded from formulating any rules in the province of the legal profession. Parliament is to provide a solid legal framework for effective national and transnational cooperation but is not empowered to regulate cooperation in the technical sense.

Table 5: Dual representation (in law)

Does the law of the executing MS foresee that the person arrested has a right to have the assistance of a lawyer in the issuing Member State and informed of this right?		
Germany	YES	

Table 6: Cost-free legal assistance (in law)

Free of cost lawyer provided in law	When your country is an executing state	When your country is an issuing state (e.g. to assist the lawyer in the executing state)
Germany	NO (s.a.)	NO (s.a.)

b. Right to access to a lawyer in practice

⁸ In the following: directives for prosecutors and judges guiding cooperation with foreign authorities (*Richtlinien für den Verkehr mit dem Ausland in Strafsachen*) = RiVAST.

- Information about legal assistance (including on dual representation)

All interviewees confirm that upon arrest requested persons are informed by the police about their rights to legal representation in Germany. The first hearing before the investigating judge following the arrest would always take place with the presence of a lawyer.

Regarding dual representation, most interviewees confirm that requested persons are informed about this option. As in German law there are no provisions or guidelines for dual representation, accordingly many interviewees state that they would not have experiences with this issue. All judges and prosecutors who have replied to this question remark that authorities would not be able to provide assistance to dual representation (providing contacts or even lists with lawyers in other Member States). A prosecutor from Munich for example points out that if a lawyer had been identified in the issuing state, it would have been initiated by the requested person or his/her lawyers in Germany.

Table 7: Are persons informed of their right to access a lawyer?

	Lawyer 1	Judge 1	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 2	Judge 2	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 3	Judge 3	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 4	Judge 4	Total
YES	X	X	2
In writing	-	-	0
Orally	-	-	0
In writing and orally	X	X	2
NO	-	-	0
Don't know/remember	-	-	0

Did not answer	-	-	0
	Lawyer 5	Judge 5	Total
YES	X	X	2
In writing			
Orally			
In writing and orally	X	X	2
NO			
Don't know/remember			
Did not answer			

Table 8: Information on dual representation, interview findings

Are persons arrested on an EAW informed by authorities on their right to have the assistance of a lawyer in the issuing Member State?			
	Lawyer 1	Judge 1	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 2	Judge 2	Total
YES	-	X	1
NO	-	-	0
Don't know/remember	X	-	1
Did not answer	-	-	0
	Lawyer 3	Judge 3	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 4	Judge 4	Total
YES	X	X	2
NO	-	-	0
Don't know/remember	-	-	0
Did not answer	-	-	0
	Lawyer 5	Judge 5	Total
YES	-	-	
NO			
Don't know/remember	X	X	2
Did not answer			

- Legal assistance in executing state (access, consultations, lawyer's tasks)

Regarding **access to lawyers** for requested persons and **consultations**, generally no indications have come up during the interviews that it would be restricted or challenging. The main issue, however, has been how requested persons practically can find a lawyer. Judges and prosecutors point out that lists would be provided by German authorities. Lawyers on the other hand criticise that such lists would not contain experts in the field of extradition law. Many interviewees remark that a deeper knowledge would be needed for effective legal representation in EAW proceedings.

Multiple **lawyer’s tasks** are named by the interviewees. All participants see the core task of lawyers to advise the requested person mainly on his options in the extradition case. Some also point out that the tasks also include developing a holistic defence strategy. One lawyer states that a lawyer should act as a mediator between the court, the public prosecutor's office and the requested person. It is not only important to explain the procedure according to the EAW, but also the German extradition law. Often there is also the task to communicate with the defendant's family in order to explain the situation to them, which often occurs very unexpectedly and surprisingly.

A prosecutor in Munich adds that in many proceedings it is helpful to contact foreign colleagues in order to have the EAW suspended. This may be the best way to avoid extradition, as appeals have very limited chances of success.

One recurring theme was the question of expertise of consulted lawyers. All of the interviewed lawyers pointed out that this constitutes a major challenge. A lawyer who brought two time-intensive cases to the Constitutional Court in Germany, states:

“When selecting legal representation in extradition proceedings, no consideration is given to professional expertise. As a result, colleagues who accept such a mandate first have to familiarize themselves with the legal matter. This is very time-consuming since international criminal law is not taught during the course or during the legal clerkship. In addition, there is time-consuming research into the respective prison conditions or procedural rights, and in foreign languages at that, which represents an additional time burden.” (*Bei der Auswahl der anwaltlichen Vertretung in Auslieferungsverfahren wird keine Rücksicht auf die fachliche Expertise genommen wird. Dies hat zur Folge, dass sich die Kollegen, wenn sie ein solches Mandat annehmen, zunächst in die Rechtsmaterie einarbeiten müssen. Dies ist sehr aufwendig, da internationales Strafrecht weder im Studium noch im Referendariat gelehrt wird. Hinzu kommen zeitintensive Recherchen der jeweiligen Haftbedingungen oder Verfahrensrechte, noch dazu in Fremdsprachen, was eine zusätzliche zeitliche Belastung darstellt.*)

Table 9: Facilitating dual legal representation, interview findings (executing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing? (When your country is an executing state)			
Interviewees	YES	NO	Didn't know/answer/remember
Lawyer 1		X	
Judge 1		X	
Lawyer 2			X
Judge 2		X	
Lawyer 3			X
Judge 3			X
Lawyer 4	X		
Judge 4		X	

Lawyer 5			X
Judge 5			X
Total	1	4	5

- Legal assistance in issuing state (access, consultations, lawyer’s tasks)

Table 10: Providing dual legal representation, interview findings (issuing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing in another MS? (When your country is an issuing state)			
Interviewees	YES	NO	Didn’t know/answer/remember
Lawyer 1		X	
Judge 1			X
Lawyer 2			X
Judge 2		X	
Lawyer 3	X		
Judge 3		X	X
Lawyer 4			X
Judge 4		X	
Lawyer 5			X
Judge 5		X	
Total	1	4	5

- Communication between the lawyers in both states

Legal provisions and accompanying guidance regulating cooperation (including use of digital tools) between lawyers dealing with a case in an executing and issuing Member State do not exist in German law. Respectively, transnational cooperation of lawyers is not a standard in Germany. No judge or prosecutor interviewed could practically provide information or experiences. A judge states:

“As far as I can tell, there are relatively few contacts between legal counsel appointed here and any defence counsel in the issuing state. This may be due to the fact that no defence counsel has been involved in the proceedings in the issuing state and that a conviction may also have taken place in proceedings without a defence attorney, so that there is no contact person as a lawyer at all.” („Soweit ich es mitbekomme, gibt es relativ selten Kontakte zwischen Rechtsbeiständen, die hier bestellt sind und etwaigen Verteidigern im Ausstellungsstaat. Das mag daran liegen, dass im Verfahren im Ausstellungsstaat bis dahin kein Verteidiger mitgewirkt hat und möglicherweise eine Verurteilung auch in einem Verfahren ohne Verteidiger erfolgt ist, sodass es erst mal gar keinen Ansprechpartner als Anwalt gibt.“)

Three lawyers interviewed declare that they regularly cooperate with colleagues in the issuing Member State. They point out that no support is provided by the authorities and that it would be mainly up to their personal efforts. A lawyer based in Berlin with a long expertise in extradition cases all over Germany highlights the importance of cooperation:

“Of course, with the increasing networking of the investigative authorities, the defence also has to be increasingly linked with each other. So I assume that many colleagues who are often active in this field have a corresponding network and can also recommend colleagues in different cities, different countries for the respective subject areas. Alternatively, of course, there are things like the association, such as the ECBA [European Criminal Bar Association], which also provides the network,

defenders, and recommends colleagues. And I have to say that it is now quite possible to find qualified colleagues quickly.” (*„Natürlich ist es so, dass mit zunehmender Vernetzung der Ermittlungsbehörden auch die Verteidigung zunehmend vernetzt sein muss. Sodass ich davon ausgehe, dass sehr viele Kollegen, die häufig in dem Bereich tätig sind, über ein entsprechendes Netzwerk verfügen und auch in verschiedenen Städten, verschiedenen Staaten Kollegen empfehlen können für die jeweiligen Themenbereiche. Alternativ gibt es natürlich Dinge wie die Vereinigung, wie zum Beispiel die ECBA, die einem ja auch da das Netzwerk liefert, Verteidiger, Kollegen empfiehlt. Und darüber, muss ich sagen, ist das durchaus mittlerweile gut möglich, auch qualifizierte Kollegen schnell ausfindig zu machen.“*)

A lawyer from Hamburg provides one example where the authority of a Member State has actively asked for contacts of lawyers in Germany. In this case, a court/prosecutor in the Netherlands had contacted the higher regional court in Hamburg asking for contacts of lawyers to defend a German citizen in an EAW proceeding.

- Free of cost access to a lawyer (or legal aid)

As pointed out in the legal overview, in Germany there is a system of necessity defence (§40 IRG), which also applies to the legal assistance procedure and extradition procedure under the EAW. A judge points out that the principle of the mandatory defence counsel is transferred to the extradition proceedings and a mandatory legal counsel is established, so that it does not depend on the economic conditions of the requested person whether a lawyer is assigned or not:

“[In Germany] the institution of the public defender, who is (remunerated) by the state, was also installed at extradition proceedings and a mandatory legal counsel was established, so that it does not depend on the economic circumstances (of the requested person) whether a lawyer is assigned or not. In rare cases, the requested persons have their own legal counsel, which they also pay themselves. But these are usually also cases from the area of white-collar crime and similar areas.” (*„[In Deutschland] wurde das strafrechtliche Institut des Pflichtverteidigers, der vom Staat (vergütet wird), auch auf das Auslieferungsverfahren übertragen und ein Pflichtrechtsbeistand begründet, sodass es nicht von den wirtschaftlichen Verhältnissen (der gesuchten Person) abhängt, ob ein Anwalt zugewiesen wird oder nicht. In seltenen Fällen haben die gesuchten Personen ihre eigenen Rechtsbeistände, die sie auch selber bezahlen. Das sind dann in der Regel aber auch Fälle aus dem Bereich der Wirtschaftskriminalität und ähnliche Bereiche.“*)

Some of the interviewed lawyers criticise that the fees foreseen in EAW proceedings are too low to conduct an effective representation. A lawyer states that while the system of mandatory legal counsel would work well regarding the timely appointment of a lawyer, it would have its downside regarding its compensation function. The law would provide for a compensation fee for the appointed lawyer of an estimated amount of up to 400 Euro for the whole proceeding, which in the view of the majority of the interviewed lawyers (4/5) would not be sufficient to guarantee a fairly compensated legal defence. As a consequence, for such a complex matter as extradition procedure not many specialised lawyers would be available in Germany. Many appointed lawyers would simply lack experience and specialisation. A lawyer states:

“So, if one were to be honest, effective representation of the person concerned in legal assistance proceedings in Germany is simply not possible under the legal conditions. [...] In view of this low remuneration for a highly complex procedure, there has also been no real specialization in the breadth of legal representation. That means that they are criminal defence lawyers who normally do pure criminal defence in the form of mandatory defence. And there is a regular lack of legal assistance

expertise. And in view of the fact that the mutual legal assistance procedure can extend for a few weeks or months, the remuneration structure in Germany in this area is no longer up-to-date and also no incentive.” (*“ Also, wenn man es ganz ehrlich sagen würde, ist eine effektive Vertretung des Betroffenen im Rechtshilfeverfahren in Deutschland nach den gesetzlichen Bedingungen schlichtweg nicht möglich. [...] Angesichts dieser doch geringen Vergütung für ein hochkomplexes Verfahren hat sich auch in der Breite der Rechtsvertretung keine wirkliche Spezialisierung ergeben. Das heißt, das sind Strafverteidiger, die normalerweise reine Strafverteidigung in Form der Pflichtverteidigung machen. Und angesichts der Tatsache, dass sich das Rechtshilfeverfahren einige Wochen und Monate erstrecken kann, ist die Vergütungsstruktur in Deutschland in dem Bereich nicht mehr zeitgemäß und eben auch kein Anreiz.”*)

Table 11: Cost-free legal assistance, interview findings

Free of cost lawyer provided	When your country is an executing state		When your country is an issuing state for the purposes of procedures in the executing MS (e.g. to assist the lawyer in the executing state)	
	YES			
LAWYER 1	YES			
JUDGE 1	YES			
LAWYER 2	YES			
JUDGE 2	YES			
LAWYER 3	YES			
JUDGE 3	YES			
LAWYER 4	YES			
JUDGE 4	YES			
LAWYER 5	YES			
JUDGE 5	YES			
TOTAL	10	0		

c. Discussion of findings

Legal counsel and access to a lawyer are central rights of accused persons in Germany. This is reflected in the provision for requested persons in EAW proceedings. Findings underline that these provisions are generally respected. Issues arise however from the specific requirements in transnational extradition settings.

The complexity of legal matters in EAW proceedings would make an experienced and knowledgeable legal representation desirable. The findings question that the legal system supports requested persons to meet this demand. Authorities do not provide lists or contacts with specialised lawyers in extradition cases. Furthermore, the compensation system seems to hinder the development of a specialised group of lawyers for such proceedings: Four out of five lawyers interviewed stated explicitly that the remuneration and compensation system would make effective representation difficult.

Despite the legal requirement to enable dual legal representation, findings show that German provisions do not encompass to support cross-border communication or to actively provide requested persons with contacts in the issuing state.

4. Issuing and execution of the EAW

a. Legal overview

Executing an EAW: Executing an EAW in Germany means to actively search for and arrest requested persons from another EU Member State on German soil. Public authorities in Germany first consider the underlying national arrest warrant from another EU Member State when implementing the execution of an EAW (as laid down in the German Code of Criminal Procedure StPO). Only in very rare circumstances, which do not apply in the context of an EAW, § 131 para. 2 StPO authorizes provisional arrests. That said, a ground for pre-trial detention must have materialized as a prerequisite. For that matter, § 112 StPO justifies pre-trial detention, only if the suspect is strongly suspected of having committed the offence in question. It may not be ordered if it is disproportionate to the significance of the case, or, to the penalty likely to be imposed. Flight, tampering with evidence, or improperly influencing witnesses constitute classic grounds for arrest (§ 112 para. 2 IRG).

Issuing an EAW: Should the defendant be residing abroad or be suspected of having taken refuge in another EU Member State, law enforcement agencies may consider resorting to mutual legal assistance and EAWs to secure the surrender of this person for the purpose of prosecution. The issuance of an EAW is not implicit in a national arrest warrant. EAWs have to be explicitly issued as distinct procedural measures. Such searches and alerts for arrest are regulated in § 77 IRG in connection with § 131 StPO. Their adoption is left to the discretion of the prosecutor under the condition that to the allegations were investigated effectively.

An EAW must be issued by a judicial authority. Notably, the CJEU held in the case of OG and PI that German prosecutors responsible for the investigating and issuing process do not enjoy a sufficient degree of judicial independence as they are, at least theoretically, subject to instructions by their ministries of justice in individual cases. Consequently, prosecutors running the investigation have to apply to the competent investigating judge (§ 162 para. 1 StPO) to issue EAWs on their behalf. No. 39 of the ministerial guidelines for criminal proceedings (*Richtlinien für Straf- und Bussgeldverfahren/RiStBV*) recalls that prosecutors seeking an EAW must petition a court. The investigating judge will accordingly determine whether substantive preconditions for issuing an EAW have been met; in particular

- whether the statutory requirements of § 131 StPO are satisfied (e.g., whether the petition rests on a valid national arrest warrant whose justification continues to hold),
- whether the EAW would satisfy other preconditions for mutual recognition by the executing authority (e.g. sufficient severity of the alleged crimes; punishable by more than one year, that is)
- if issuing an EAW would be proportional to the crime, the expected sentence, the presumption of innocence, and the personal impact of arrest and surrender on the rights to liberty and respect for privacy and family life.

As arrests abroad (pending extradition and a future surrender to Germany) carry additional weight from the perspective of individual rights and liberties, EAWs must pass an enhanced proportionality test.⁹ Finally, the investigating judge is called upon to secure all defence rights that are applicable in the issuing phase. Yet, in order not to imperil the success of the measure, the fugitive will usually not be heard or summoned. The right to be heard will be afforded upon arrest.

Recent legislative plans to overhaul the structure of the prosecution services fell victim to the end of the parliamentary cycle. The new government has announced that it intends to remove the ministerial

⁹ Court of Justice of the European Union (CJEU), C-489/19 PPU, *NJ & Office of the Attorney General Berlin*, 27 May 2019 para. 44; Meyer, F. in: Ambos, K./ König, S./Rackow, P. (2020), *Mutual Assistance Law in Criminal Matters (Rechtshilferecht in Strafsachen)*, 2nd edition, Baden-Baden, Nomos, § 78 IRG para. 790.

authority to give individual instructions to prosecutors. The introduction of this partial restriction of ministerial powers would allow prosecutors to resume issuing EAWs in the future. As regards the circulation of the EAW the ministerial guidelines for communication and cooperation with foreign authorities *RiVAST* (especially guidelines nos. 85 et seq.) regulate procedures and forms to be followed and used when contacting executing authorities in other Member States.

b. Issuing and execution of the EAW in practice

- Factors considered when issuing the EAW

Legal requirements

When issuing an EAW, a national arrest warrant must be existing. According to contributions by interviewed judges and prosecutors, the risk of absconding will be a reason to issuing an EAW in addition to the suspicion of a crime.

Proportionality

Proportionality is seen as a key factor, as with the underlying national arrest warrant in issuing the EAW. However, in the opinion and experience of two judges from Berlin and Hamburg, proportionality is being neglected because there would have already been a proportionality check when issuing the national arrest warrant.

From the responses of interviewees there seem to be different criteria in place regarding proportionality. A public prosecutor from Munich points out that in Bavaria the expectation of punishment in the event of criminal prosecution encompasses a prison sentence of at least six months. However, this might be handled differently in other German states. From the side of lawyers, one respondent adds that (as a factor) proportionality still remains undefined:

“In principle, proportionality is also an important factor in the national law of detention in Germany. In my view, however, it is one of the most unsuitable factors. I know that it is part of the framework decision [EAW] and is part of all mutual recognition instruments. In my opinion, however, it is far too soft a factor to be able to derive meaningful options for action.” (*„Verhältnismäßigkeit ist grundsätzlich auch im nationalen Haftrecht in Deutschland ein wichtiger Faktor. Er ist allerdings aus meiner Sicht einer der ungeeignetsten Faktoren. Ich weiß, das ist Teil des Rahmenbeschlusses und ist Teil aller Instrumente der gegenseitigen Anerkennung. Es ist aber ein aus meiner Sicht viel zu weicher Faktor, um daraus sinnvoll Handlungsmöglichkeiten ableiten zu können.“*)

Other possible factors

A recurring theme among some interviewees has been the impression that the amount of EAWs issued by German authorities has increased significantly over the past years. A lawyer based in Hamburg points out that some German authorities would use the standards of national prison law and effectively issue almost each national arrest warrant as EAW. German district courts would be more and more issuing EAWs, even though this formally would not be within their competencies. But formally, German authorities have to take into account all these specifications of the Framework Decision 2002/584 JI when issuing a warrant, as a lawyer states:

“Even if they are not actually responsible for this, German district courts are now also issuing the European Arrest Warrant. I sometimes have the feeling that the issuance of the European arrest warrant is in principle the same test programme. And the dimension, including the fundamental rights dimension, of a Europe-wide alert with all the implications that it can have for private life, for professional life, not necessarily is considered. In particular with the implications of any longer extradition detention. I don't think that has been fully internalised.” (*“Auch wenn sie dafür eigentlich*

richtigerweise nicht zuständig sind, erlassen mittlerweile auch deutsche Amtsgerichte den Europäischen Haftbefehl. Teilweise habe ich das Gefühl, dass eben der Erlass des Europäischen Haftbefehls im Prinzip das gleiche Prüfprogramm ist. Und die Dimension, auch die grundrechtliche Dimension, einer europaweiten Ausschreibung mit allen den Implikationen, die das haben kann für das Privatleben, für das Berufsleben, nicht unbedingt mitgedacht wird. Insbesondere eben auch mit den Implikationen von etwaiger längerer Auslieferungshaft. Ich glaube nicht, dass das vollständig verinnerlicht worden ist.“)

Other respondents however do not share this opinion. A prosecutor comes to a different impression: According to the new German guidelines (*Richtlinien für das Strafverfahren und das Bußgeldverfahren - RiStBV*), any arrest warrant must be advertised internationally. Those changes however have not yet led to the EAW being issued more often than before. To the interviewees' knowledge, an EAW would be issued far more often in other EU Member States.

Challenging the issue

The interviewees agree that a requested person can challenge the issuing of an EAW as any accused person can challenge any judicial decision. This would include proportionality concerns. A lawyer points out that in the past courts would have objected challenges based on proportionality concerns, but the case law would now refer to §131 StPO, which gives the district court the opportunity to issue the arrest warrant. Therefore, there is unanimous opinion that one can challenge such a decision both at the level of a district court as well as on the level of the higher regional courts.

- Factors considered when executing the EAW

Proportionality

Many interviewees agree that when executing the EAW, proportionality concerns constitute a difficult and debatable area because of the undefined and differentiating criteria. Whether an EAW is in fact disproportionate would depend on a wide array of issues - which are mostly not known to the executing authorities. This would for example concern the criminal record of the requested person. An EAW usually does not contain this information, sometimes only a reference to a recidivism. It is widely stated among interviewed judges and prosecutors that it happens rarely that an EAW is challenged for reasons of proportionality.

Judges and prosecutors confirm that there are contacts with the authorities of the issuing Member State. As a rule, proportionality concerns would derive from the content of the EAW itself. This would be able to be decided independently in Germany. The decision would then be communicated to the requesting Member State. In addition, it should be taken into account that different penalties apply in the Member States. A crime that is punishable with less than 6 months imprisonment in Germany, for example, can be punished in Romania with a prison sentence of over a year, according to a prosecutor:

“This is difficult because it is difficult to say whether a European Arrest Warrant is really disproportionate. On the one hand, because you don't know what his previous convictions are. So just because it's a minor offense doesn't say anything about the expected penalty. [...] You can't see that from the European arrest warrant. [...], one must also always take into account the usual penalties in certain jurisdictions. So with something that would be disproportionate in Germany, for example, [...] it may be [in Romania, for example] that he gets a year imprisonment for it. It's proportionate, of course, because the penalty is just so high. So that's a very difficult story.“ (*„Das ist schwierig, weil man schwer sagen kann, ob ein europäischer Haftbefehl wirklich unverhältnismäßig ist. Weil man zum*

einen nicht weiß, was hat der schon für Vorstrafen. Also nur weil es sich um eine kleine Straftat handelt, sagt das nichts über die Straferwartung. [...] Das ersieht man aus dem europäischen Haftbefehl nicht. Ansonsten muss man auch immer berücksichtigen, die üblichen Strafen in bestimmten Rechtsordnungen. Also bei etwas, was in Deutschland zum Beispiel unverhältnismäßig wäre, [...] kann es [zum Beispiel in Rumänien] sein, dass der ein Jahr Freiheitsstrafe kriegt dafür. Da ist das natürlich verhältnismäßig, weil die Strafe einfach so hoch ist. Also das ist eine ganz schwierige Geschichte.“)

In practice, lawyers and judges mainly agree that they experience very rarely cases of an EAW where the question of proportionality has been raised. A judge from Berlin points out:

“[Proportionality concerns] could lead to the Senate considering an extradition as inadmissible in individual cases. That would apply to trivial cases from my point of view. I had not had a case like this in almost seven years where an arrest warrant for this reason would have been disproportionate. I think that the chances of such a case are relatively low, due to the hurdles that are set both by the four-month limit for an enforceable European arrest warrant and by the foreseeable sentence itself. It would be conceivable in cases of enforcement of sentences in which only a few days are still to be enforced. I would then say that it is now becoming disproportionate.” („Das könnte dazu führen, dass im Einzelfall eine Auslieferung durch den Senat als unzulässig gewertet würde. Das beträfe Bagatellfälle aus meiner Sicht. Einen solchen Fall hatte ich in den fast sieben Jahren noch nicht gehabt, wo ein Haftbefehl aus diesem Grund unverhältnismäßig gewesen wäre. Ich denke, durch die Hürden, die sowohl bei der Vier-Monats-Grenze bei einem zu vollstreckbaren Europäischen Haftbefehl zum Zweck der Strafvollstreckung gesetzt sind, als auch [...] durch die Strafhöhen, die angedroht sein müssen, ist die Gefahr eines solchen Falles relativ gering. Es wäre denkbar in Strafvollstreckungsfällen, in denen nur noch ein geringeres von wenigen Tagen zu vollstrecken ist. Da würde ich dann auch sagen, da wird es jetzt unverhältnismäßig.“)

A lawyer states not to be able to recall one case in which challenging the EAW solemnly because of proportionality concerns would have been an option. In his opinion, challenging the national arrest warrant would be the more promising strategy - which would include a challenge to the EAW at the same time. The lawyer stresses:

“I would always attack the underlying national arrest warrant in that case. This way I would at the same time attack the European Arrest Warrant and find a coherent argumentation to also challenge proportionality. To only challenge the European arrest warrant solely based on proportionality concerns, I think I would be breaking new ground for the reasons just mentioned.” („Ich würde in dem Fall immer den zugrundeliegenden nationalen Haftbefehl angreifen. Deswegen würde ich wahrscheinlich an der Stelle gemeinsam auch den Europäischen Haftbefehl angreifen und das einheitlich verargumentieren und dabei auch die Verhältnismäßigkeit angreifen. Dass ich alleine aus Gründen der Verhältnismäßigkeit isoliert den Europäischen Haftbefehl angreifen kann, ich glaube, da würde ich aus den gerade genannten Gründen Neuland betreten.“)

Conditions of detention

The interviewees agree that detention conditions in issuing states are the most important and most actively challenged criterion in EAW proceedings. In some cases, statements are requested from issuing states on detention conditions. It would then depend on the constellation of the individual case whether these declarations are requested before the EAW is executed or after it has been executed – i.e. before the surrender.

Various sources are used for the general assessment of prison conditions. Several interviewees state to use the Council for the Prevention of Torture (CPT) country reports, occasionally also the FRA's Detention Database. Other sources are occasionally cited by the legal counsel, mainly in cases with

third countries rather than EU Member States. In principle, interviewees consider the sources to be sufficient to gain general insights into the conditions in the issuing states. In case of doubt, it would depend on what statements the issuing state provides when inquired about the conditions of detention it guarantees. The relevant reports to assess detention conditions include CPT reports and NGO reports such as those by Amnesty International. Also sources outside the EAW framework would be available, such as videos of convicts in Russia or other third countries.

According to the experience of one lawyer interviewed, the most important sources are reports from the Council of Europe, in particular the Anti-Torture Committee. ECtHR jurisprudence moreover often provides specific evidence for German courts. For example, the verdicts have proven repeated cases of prison overcrowding in Hungary, France, Romania and other EU Member States.

One lawyer elaborates that challenging detention conditions is a two-stage examination. First, evidence of systematic deficiencies is searched. In each specific individual case, it is checked which prison is involved, what the prison conditions are like, how the medical care situation is, etc. In the chronological sequence, the arrest would take place first on the basis of the order of the district court. The case then goes to the Higher Regional Court, who then contacts the foreign authorities to examine the prison conditions.

Regarding access to reliable information and data, another lawyer sees systematic shortcomings and deficits. Sometimes however defenders make statements or come up with other sources that need to be evaluated. Another problem lies in the language, as many reports are only available in the language of the country concerned and are not translated into English. Another problem is having relevant and up-to-date data. Changes in conditions, both positive and negative, should be available promptly and reliably.

Regarding the consideration of detention conditions in the frame of an EAW proceeding, a lawyer from Berlin would grant Germany a pioneering role. The Federal Constitutional Court has set standards with its decisions in the past. However, this appears to be a question that still needs to be brought up by the defence. The interviewee sees the practice of some courts, such as that of the Munich Higher Regional Court, positively and proactively by generally considering CPT reports. However, these are exceptions.

A lawyer from Hamburg specialised in EAW proceedings confirms that German authorities consider detention conditions in the issuing state of an EAW, adding that the entire ECJ case law in this regard was largely created on the basis of requests for submissions from German courts, in particular the Higher Regional Court in Hamburg. From a lawyer's perspective, the question of detention conditions is the main argument when extradition is to be challenged:

“There is a certain divergence between the higher regional courts in Germany: Some say we ask very specific questions and have the conditions of detention in the requesting state described in detail, so that we can then make a decision on the basis of these assurances, these specific facts. I think that's the only right thing to do in the light of ECJ case law. However, there are also courts in Germany that are more likely to accept ECHR-compliant or Charter of Fundamental Rights-compliant detention more generally, if guaranteed. But that's more of a continuum, so to speak, than a clear black and white demarcation.” (*“Man hat eine gewisse Divergenz zwischen den Oberlandesgerichten in Deutschland. Dass einige sagen, wir fragen sehr konkret nach und lassen uns die Haftbedingungen im ersuchenden Staat konkret schildern, um dann anhand dieser Zusicherungen, dieser konkreten Tatsachen dann eine Entscheidung vorzunehmen. Das halte ich für das einzig Rechtmäßige im Lichte der EuGH-Rechtsprechung. Es gibt aber durchaus auch Gerichte in Deutschland, die eher pauschaler eine EMRK-konforme oder eine Grundrechtecharta-konforme Inhaftierung, wenn die zugesichert würde, das auch*

eher akzeptieren. Aber das ist sozusagen eher ein Kontinuum als eine klare Schwarz-Weiß-Abgrenzung.“)

Rights to a fair trial (rule of law)

According to the interviewee's statements regarding the process, the court would assume first of all that the basic procedural rights are protected in a Member State. In the closer examination, the court would examine procedural rights of the requested person in the issuing state in case a concrete accusation is presented. This objection should also constitute an infringement from the point of view of the court, thus not only from the point of view of the person concerned.

An exception would be conviction in absentia - as most problems stem from those cases. A judge from a Higher Regional Court points out that Article 4a EAW specifies the test catalogue for a conviction in absentia. Frequent inquiries are necessary here because the understanding of the requirement of Article 4a is clearly different in the Member States. In part, it would not even be covered by the case law of the ECJ. Another main issue of interpretation concerns the justful delivery of arrest warrants and subpoena. The judge provides one example from his experience concerning a questionable practice in Romania:

“We noticed with some astonishment that Romania considers it personal when a summons is posted at the town hall door or at the court door where an unknown person is resident. We do not consider this to be a summons. In fact, it is the convictions in absentia from that most of the problems we deal with arise. [...] However, even Germany would hardly meet the requirements set by the case law of the ECJ for certain procedural rights. Two weeks ago we sent three orders for reference to the ECJ with various questions about Polish and Czech judgments in absentia. Because we have the feeling that the case law of individual chambers of the ECJ has created a system in urgent proceedings that could not actually have been intended. And then you have to see what the ECJ says about it.” (*„Wir haben mit einiger Verwunderung gemerkt, dass Rumänien es für eine persönliche Ladung hält, wenn bei einer unbekanntem aufenthaltsbefindlichen Person an der Rathaustür die Ladung ausgehängt wird oder an der Gerichtstür. Das halten wir nicht als persönliche Ladung verstanden. In der Tat, aus den Abwesenheitsurteilungen, erwachsen die meisten Probleme, mit denen wir zu tun haben. [...] Den Anforderungen, die die Rechtsprechung des EuGH bei bestimmten Verfahrensrechten stellt, würde allerdings auch Deutschland kaum genügen. Wir haben jetzt vor zwei Wochen drei Vorlagebeschlüsse an den EuGH geschickt mit verschiedenen Fragestellungen zu polnischen und tschechischen Abwesenheitsurteilen. Weil wir das Gefühl haben, dass die Rechtsprechung einzelner Kammern des EuGH im Eilverfahren ein System geschaffen hat, das so eigentlich nicht gedacht sein kann. Und da muss man mal gucken, was der EuGH dann dazu sagt.“)*

A prosecutor states that in any cases of judgments in absentia, procedural rights would be taken into account. In the case of EU Member States, however, this check would not be as extensive as towards third countries.

A lawyer based in Hamburg points out that specific regulations are provided for judgments in absentia, both in the EAW and in the IRG in Germany. INT however could not name a concrete example nor provide more detail.

A lawyer from Berlin stresses that national authorities in Germany would take into account the principles of Art 6 ECHR and the German Law on International Legal Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*) when considering the procedural rights in the issuing states. However, again, the responsibility for a fair consideration is mainly on the shoulder of the lawyers in both the issuing and executing state.

Another issue that lawyers Germany would consider when defending a requested person would be whether the defence in the requesting state has sufficient access to the files on the underlying national criminal proceedings. The right to consult a lawyer would rarely be checked, as this usually does not constitute a major problem within the European Union.

Individual situation

In case of executing an EAW, the individual situation can be assessed within the framework of the test catalogue of § 83b IRG. Accordingly, the requested person with a habitual residence in Germany can be equally treated to a German citizen. In this case, it is upon the discretion of the Attorney General's Office whether a surrender is approved or the prison sentence is to be served in Germany. In this respect, personal circumstances play a role. If exceptional humanitarian reasons constitute an obstacle to extradition, the procedure can be suspended. That would be constituted through an interaction of §73 IRG with the European Charter of Fundamental Rights and the ECHR. If this created a problem, it may result in the surrender not taking place.

Four interviewees could provide examples on how the individual situation has affected an EAW proceeding. One lawyer for example confirms that the individual situation of a requested person is principally assessed and considered. Family ties and contact possibilities of the imprisoned person with family members are taken into account. Health aspects that can prevent extradition are also considered. However, the other 6 respondents would not be able to recall a case where the individual situation was a factor in the proceeding.

Others

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c. Additional best practices or challenges

According to the new German guidelines (*Richtlinien für das Strafverfahren und das Bußgeldverfahren - RiStBV*), any arrest warrant must be circulated internationally. This includes issuing an EAW, except for cases raising proportionality concerns (§41.2 RiStBV). Those changes however have not yet led to the EAW being issued more often than before, according to interviewees.

d. Discussion of findings

Issuing and execution of an EAW encompass several aspects and dimensions. Generally, findings show that both judges/prosecutors and lawyers consider a wide range of factors and criteria when issuing or executing an EAW in accordance with the legal provisions.

When issuing an EAW, proportionality is widely mentioned as a main factor. From the findings there seem to be different criteria how this factor is weighted. However, very few of the interviewees are concerned with issuing an EAW. Therefore, the sample does not seem to give a representative picture among the interviewees.

When executing an EAW, it is widely stated among interviewed judges/prosecutors and lawyers that proportionality is considered as a key factor. However, it happens rarely that an EAW is challenged for reasons of proportionality. Findings show that detention conditions in the issuing state are the most important and most actively challenged criterion in EAW proceedings in Germany. Both judges/prosecutors and lawyers state to use various sources including the FRA database on detention conditions. The main challenge would still be to get to reliable, current data from available sources in a language commonly used in German proceedings.

5. Use of digital and technological tools in EAW proceedings

a. Legal overview

No specific rules for EAW proceedings could be identified in Germany's federal law regarding use of digital and technological tools. Via § 77 IRG the general provisions of the StPO are applicable (§§ 48 et seq., 58a, 168e, 247a, 239 et seq. StPO). It is noteworthy to add that on state level, North Rhine-Westphalia has been the first German state to introduce the option for digital interrogations by the police.

Table 12: Use of technological tools (in law)

National laws providing for:	Conducting EAW hearings (when an executing state)	Facilitating the provision of interpretation	Remote examination of witnesses or the person arrested (when an issuing state).	Communication with involved foreign authorities (both executing – issuing states).	Facilitating transmission of documents (issuing - executing)	Facilitating access to a lawyer in the issuing Member State (when an executing state)	Facilitating access to a lawyer in the executing Member State (when an issuing state)
Germany	NO	NO	NO	NO	NO	NO	NO
TOTAL							

b. Interview findings

Interview findings generally show that digital tools are used very rarely in formal processes of an EAW proceeding in Germany. German authorities would not use digital means in hearings or interrogations. In case Germany is issuing state, the requested person would need to surrender in order to appear before a court. Only one judge and one prosecutor from Hamburg could report that he experienced a case where Swedish authorities organised a digital interrogation with a requested person arrested in Germany (Germany as executing state).

Interviewees expressed to be sceptical that digital interrogations and court hearings would be implemented in Germany in the near future. According to German law, the proceeding cannot be closed in absence of the accused person, and the presence of the requested person may not be substituted by digital means. Adding to this from a lawyer's perspective, a defence counsel in an executing state cannot provide the legal assistance that a German lawyer can provide to the client in German criminal proceedings.

Only one of the interviewed prosecutors could imagine that one advantage of digitalisation in transnational criminal proceedings is that the requested person would not need to be present in the

country issuing the warrant. This could be associated with a reduction in extradition requests. However, this would create new problems and questions of organisational and procedural nature: Legal systems would have to be coordinated, e.g. concerning the compulsory presence of a judge. The presence of a lawyer might also have to be redefined. In addition, communication with the lawyer would be difficult at distance.

The majority of the interviewees shared the understanding that Germany in general was one of the most backward countries in Europe regarding digitalisation in criminal proceedings. Several interviewees experience an increase in digital interrogations and hearings taking place in other European countries such as Sweden, Austria, Finland or Switzerland. A lawyer points out that Germany was among the last countries to join the SIRENE network in the framework of the Schengen Information System (SIS), where communication works solely digital.

Another reason for Germany being slow in introducing digital means in judicial proceedings would be the fact that according to German law the proceeding cannot be closed in absence of the accused person, and the presence of the requested person may not be substituted with the use of digital tools.

Nonetheless, many interviewees have expressed high hopes regarding the improvement in extradition proceedings in the future with new digital opportunities. Many pointed out that a positive effect of digitalisation could be an improved and central access to data on prison conditions, procedural rights and similar aspects. This data should not only be limited to overviews but should include concrete representations of the legal situation and concrete court decisions. Research and communication have already improved through the opportunities digital instruments provides. Digital translation options should help ensure that this information is available at least in English and French. Generally, the question of digitalisation in transnational proceedings would be developing fast, and many new instruments would be introduced. In terms of data protection, one lawyer would find it helpful to have a secure portal or platform to have a common standard for secure communication with authorities in other countries.

An interesting aspect was mentioned by a lawyer from Berlin. Once a requested person has been transferred, it would be difficult to track whether any assurances were kept or not. And presenting and cataloguing the corresponding injuries by digital means would be very helpful.

Regarding the impact of the pandemic on EAW proceedings, no interviewee would see huge differences. Some state that electronic filing of documents has increased during the pandemic. The routine of electronic communication and standards in the exchange of electronically sent documents would have also improved. A lawyer stated when asked about the role digitalisation played during the pandemic:

“In my area of criminal law: nothing. This is very disappointing; I would have hoped so. But Berlin is, I think, a special case. During the pandemic, there was an active obligation to use the beA, the electronic mailbox for lawyers. This made it possible to send encrypted messages to courts and public prosecutors. But the joke is that the courts only have a passive obligation to use it. In other words, they have to be able to receive messages, but they don't have to use them. And in Berlin, for example, the criminal courts [...] refuse to use it. So they still send everything by letter and fax.” (*„In meinem Bereich Strafrecht: Nichts. Das ist sehr enttäuschend, ich hätte das gehofft. Aber Berlin ist da, glaube ich, auch noch mal ein Spezialfall. Es ist ja in der Pandemie die aktive Nutzungspflicht für das beA gekommen, das elektronische Postfach für den Anwalt. Damit ist ermöglicht worden, verschlüsselte Nachrichten an Gerichte und Staatsanwaltschaften zu versenden. Der Witz aber ist, dass die Gerichte nur eine passive Nutzungspflicht haben. Sprich, die müssen Nachrichten bekommen können, aber sie*

müssen sie nicht nutzen. Und in Berlin beispielsweise weigern sich die Strafgerichte [...], das zu nutzen. Also die schicken alles nach wie vor per Post und Fax.“)

Overall, the interviewees did not share the idea that digitalisation might lead to fewer EAWs being issued. A judge from a Higher Regional Court adds:

„What I think would make much more sense than [digital procedures] would be that more European Arrest Warrants were issued for criminal prosecution before convictions in absentia are issued. Because if I remember correctly, one of the purposes of the European Arrest Warrant was to reduce the number of sentencing in absentia [...]. If you don't make any effort at all, but first convict and then issue the arrest warrant for enforcement, then this effect will probably not be achieved.“ („Was ich auch für wesentlich sinnvoller halte als [digitale Verfahren] wäre, wenn mehr Europäische Haftbefehle zur Strafverfolgung ausgestellt werden bevor Abwesenheitsverurteilungen erlassen werden. Denn wenn ich mich recht entsinne, war einer der Zwecke des Europäischen Haftbefehls, die Zahl der Abwesenheitsverurteilungen zu reduzieren [...]. Wenn man sich gar keine Mühe macht, sondern erst mal verurteilt und dann den Haftbefehl zur Vollstreckung erlässt, dann ist dieser Effekt wohl nicht erreicht.“)

Table 13: Use of digital tools, interview findings.

Interviewees per Country	Conducting EAW hearings (when an executing state)	Facilitating the provision of interpretation	Remote examination of witnesses or the person arrested (when an issuing state).	Communication with involved foreign authorities (both executing – issuing states).	Facilitating transmission of documents (issuing – executing)	Facilitating access to a lawyer in the issuing Member State (when an executing state)	Facilitating access to a lawyer in the executing Member State (when an issuing state)
LAWYER 1	NO	NO	NO	YES	YES	YES	YES
JUDGE 1	NO	NO	NO	YES	NO	YES	YES
LAWYER 2	NO	NO	NO	YES	NO	YES	NO
JUDGE 2	NO	NO	NO	YES	YES	NO	NO
LAWYER 3	NO	NO	NO	YES	NO	YES	NO
JUDGE 3	NO	NO	NO	YES	YES	YES	NO
LAWYER 4	NO	NO	NO	YES	NO	YES	YES
JUDGE 4	YES	NO	NO	YES	YES	NO	NO
LAWYER 5	NO	NO	NO	YES	YES	YES	NO
JUDGE 5	YES	NO	NO	YES	YES	NO	YES
TOTAL							

c. Discussion of findings

Germany does not have any legal provisions for the use of digital tools in formal procedures of judicial proceedings. According to German law, the proceeding cannot be closed in absence of the accused person, and the presence of the requested person may not be substituted by digital means.

Respectively they have not entered EAW proceedings yet. This has also not changed under the conditions of the pandemic significantly.

The practice of other EU countries to use digital tools for interrogations and hearings might have an impact on the development in Germany in future. The SIRENE network in the frame of the Schengen Information System (SIS) was named as an important driver in this regard.

Nonetheless, digitalisation has influenced EAW proceedings by providing more reliant and faster forms of digital communication for both authorities and lawyers. Research on aspects such as prison conditions, legal framework in issuing countries etc. provide a profound database for information. Digital translation options should help ensure that information is available for requested persons in multiple languages.

Overall, the interviewees did not share the idea that digitalisation might lead to fewer EAWs being issued.

CONCLUSION

Drawing conclusions, it first needs to be pointed out that the data collected was limited to 10 interviewees and therefore only represents a very small sample size. Still, findings can show that on a positive note Germany has legally implemented the provisions of the EAW directive: Information of requested persons, translation and interpretation are provided, and legal representation is guaranteed.

Apart from the formal recognition of provisions, some major issues were raised by the interviewees concerning the implementation of such rights in practice:

- While all interviewees state that requested persons are generally informed about their rights and the impact of their decisions in extradition proceedings, many raise concerns over the quality of such information. From the replies of many lawyers, it can be concluded that the information provided upon arrest or at the first hearing include all relevant rights a requested person can benefit from but lack an in-depth education elucidation on the consequences and implications certain decisions might have. This finding raises questions as to whether an effective legal representation can compensate the lack of in-depth information provided by the authorities.
- Legal remedies constitute another challenge. They are not provided for in German extradition law as no statutory appeal against extradition decision exists. However, extraordinary remedies like individual and constitutional complaints could come into effect when certain rights are violated (such as information or access to a lawyer). To effectively apply such remedies however would require specialised knowledge of a lawyer experienced in extradition law. A challenge many lawyers stressed in the interviews are the relatively low compensation fees lawyers receive in EAW proceedings that would not justify the effort from a purely economic perspective. This may lead to a different treatment of requested persons: Those who can afford to pay for a lawyer themselves and those who are reliant on the state funded legal representation.
- Dual representation is provided for by law but does not seem to function well in practice. While the provision for legal defence in the issuing state is generally seen as a great improvement from the interests of a requested person, the implementation is hindered by a variety of factors and challenges. The absence of contact lists and communication channels

makes it difficult to identify lawyers in the issuing states. The bar associations do not seem to be organised well enough on a transnational level in Europe to provide for assistance in this regard. However, one might argue that the provision for dual representation should not be primarily the task of legal defence but rather of governmental authorities. It appears necessary to justify the harsh personal consequences of surrender, to guarantee essential procedural safeguards and to ensure effective legal assistance and curb arbitrariness.

- The access to reliable data and information is another issue that has been raised at multiple occasions. Interviewees reported mainly about individual cases and experiences but could not generalise their observations. Hardly any figures are available for the total number of EAW cases or specific questions like surrenders or rejections. Access to data and information was also the main theme when discussing issuing and execution of the EAW in practice, mainly regarding international databases on detention conditions or on the rule of law.

As a general observation it can be noted that most interviewees balanced their responses between the objective to achieve an effective criminal prosecution and the protection of the basic rights of the requested persons. According to the majority of the lawyers interviewed, more attention needs to be placed on the respect for the rights of the requested persons.