The European Arrest Warrant (EAW) and its Implementation in the Member States of the European Union

International Research Questionnaire

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1. Constitutional issues

a. Please specify views of doctrine and judicature in your country concerning the legal character of the third pillar framework decisions (FD) issued on the basis of art. 34.2 TUE

Framework decisions do not directly bind or entitle German citizens, but rather have to be implemented into national laws, as already according to Article 34.2 b. TUE. According to a decision of Germany’s Federal High Court of the Constitution, German legislators have to circle within the whole leeway given by the single framework decision implanting it into national law, but always in drafting the law to the extent, which is looking after the German constitutional rights to its best. At the same time, the fact that the third pillar framework decision is a legal action similar to the first pillar European directive provokes a specific responsibility for legislators to implement the new law constitutionally. As the Federal High Court of the Constitution in its decision conferring to the European Arrest Warrant Framework Decision correctly annotated, a framework decision is secondary not primary law that seeks to fulfill the goals of the Treaty of the European Union. As a result, a framework decision is according to Article 34.2 b. TUE binding regarding to the aim stated in the TUE.

However, framework decisions do not directly affect the German people. In contrast to the first pillar directive, the implementation of framework decisions into national laws is not enforceable. German national courts as a result may not consider their decisions to framework decisions, which have not been implemented yet. Nevertheless and according to a decision of the European Court of Justice, currently affirmed by the German Federal High Constitutional Court, German legislature, judiciary and executive has to directly consider a European framework decision in relation to other member states, if the national implemented law was declared as nullified before. Thus, German authorities are held to interpret national law in the spirit of European framework decisions, especially when dealing with other member states, since these cannot be burdened with old and non-European-conformed proceedings just because Germans authorities were not able to enact a law and to attend to its European duty completely. While this does not result in a direct applicability of framework decisions within member states, it still means that Article 34.2 b. TUE has to be read as a principle to interpret all national laws conforming to European framework decisions as they are part of the law of the European Union.

1 Cf. BVerfG 2 BvR 2236/04 v. 18.7.2005 MN. 80.
2 Cf. answer to question 1d. for more information. Also cf. BVerfG BvR 1667/05 v. 24.11.2005, Anm. 15 for the statement of the German Federal High Court of the Constitution.
b. Please indicate the position of the doctrine and courts in your country concerning the relation between the domestic norms being a result of implementation of framework decisions – and conventions on European cooperation in criminal matters, accepted within the EU/Council of Europe?

According to Article 25 German Basic Law (GG), the general rules of International law are part of the German federal law and overrule national statutory law. These general rules directly bind and entitle the inhabitants of the German territory. Article 25 Basic Law refers only to the very general rules of International law. European Community law, Framework decisions, but also Conventions about the European cooperation in criminal matters are, on the other side, International treaties, which have to be transformed into German national law according to Article 59.2. Basic Law. All these specific International treaties basically have to be implemented into German national law and go into effect as German federal law beside other German federal laws.4

Thus, in national law implemented European framework decisions (FD, 3. pillar) take effect as German federal law besides other German federal laws. Conventions on European cooperation in criminal matters are as other European conventions first adopted by the German parliament (Bundestag) and herewith become a federal law, as well. Declaration of adoption and convention are published in the Federal Law Gazette as such. The adoption by the parliament meets the requirements of the need for implementation according to Article 59.2. Basic Law. If now both federal laws contradict each other, rules of speciality or precedency are needed. Referring to matters, which are of interest herein, § 1.3. IRG represents a rule of speciality saying that conventions and International treaties contain specific rules of assistance and that IRG provisions are only to be applied, if no specific rule exists. Since the implementation of the framework decision on the European Arrest Warrant (EAW) would have partly contradicted to International treaties, now § 1.4. IRG provides a rule of precedency for all provisions in accordance to the EAW and the implementation of its framework decision. Thus, the European Arrest Warrant implementing chapter 8 of the German IRG supersedes conventions on European cooperation in criminal matters according to § 1.4. IRG. Only if chapter 8 IRG does not provide a solution to a specific question, the other provisions of the IRG resp. of International treaties are to be applied, §§ 78, 1.3. IRG.

As a result from a German point of view, the European Union wide extradition procedure applies first the provisions of the European Convention of Extradition (EuAlÜbk, Europäisches Auslieferungsübereinkommen), added by its second supplementary protocol and bilateral supplementary contracts, and the provisions of the European Union Convention of Extradition (EU-AuslÜbk, EU-Auslieferungsübereinkommen). Second, Article 59-66 of the Schengen treaty (SDÜ, Schengener Durchführungsübereinkommen) are applied. Additionally, the provisions of the IRG are to be applied. While the new provisions on the European Arrest Warrant, implemented in Chapter 8 of the IRG, privilege to all aforementioned treaties and provisions.

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3 German Basic Law is the generally used term for Germany’s Constitution [Grundgesetz], abbreviated GG.
4 Specific ruling admittedly is done for European community law (1. pillar), Article 24 GG.
5 Bundesgesetzblatt.
c. Is the doctrine and judicature in your country opting for “pro-european” (“European – friendly”), interpretation of domestic law, including constitutional law? Is it also applied as regards third pillar instruments?

German jurisdiction is generally held to argue and decide "pro- European". European Union laws are precedence to national laws as also the German Federal High Court of the Constitution stated in its landmarking so called “As Long As” decisions (‘So lange’ I-III). This is true as long as and as far as necessary. The majority of German’s legal scholars agree to this opinion of the Federal High Court of the Constitution.

However, especially concerning questions of substantive and procedural criminal law great reservation towards European Union Law prevailed for a long time. In deed, this view has decreased within the last few years. Hecker even describes the principle of the union-conform interpretation (gemeinschaftsrechtskonforme Auslegung) of national statutes as one of the one and most important Europeanisation factor. Solely union-conform interpretation of European Community legislation advantages to domestic notice. However, union-conform interpretation is often only defined as and in connection to “directive-conform” interpretation. Thus, considering the principle of union-conform interpretation, one only considers a union-conform interpretation of European Community (EC) or European Union (EU) directives. The principle was not yet applied to the “third pillar” of the European Union.

However, the comparability of EU-directives and EU-framework decisions and the similar wordings of Article 249.3. TEC and Article 34.2. lit. b) TUE did not remain undetected. The ECJ (16.6.05 - Rs.C-105/03) recently approved to that in its Pupino decision stating that member states are obligated to interpret union-conform also when framework decisions are concerned. Exceptions can only be made, if the requested union-conform interpretation results in contradiction of the national law (contra legem statement). Second, exceptions can be done, if it results in penal law, not yet provided by the member state. This ECJ decision has been overly criticised in Germany. The legal majority does not yet favour its consequences. The significant difference between Article 249.2. TEC and Article 34.2. lit. b) TUE lies in the addition of the wording "not directly entitling or binding" in Article 34.2. lit. b) TUE. Nevertheless, the duty to also interpret union conform to third pillar European Union enactments, as set by the ECJ, leads to just this. Herewith, the ECJ indirectly creates “through its back door partial harmonization impermissibly stretching the law.”

d. What is the influence of ECJ judicial decisions on the implementation of domestic law (e.g. Pupino case)?

ECJ decisions influence national jurisdiction especially in ‘crossing-border cases’. In stating its general procedural guaranties, the ECJ regularly affirms to the already existing standard of guaranties in Germany.

Looking at Pupino shows, that indeed the impact of ECJ statements is controversy discussed throughout German’s legal scholarship and literature. Nevertheless, also in Germany one will lean on the contents of framework decisions to

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6 BVerfGE 73, 339 ff.
7 Hecker, Bernd, Europäisches Strafrecht, 1.A., 2005, § 10 Rn 1 (S. 327) m.w.N.
8 Hecker (suprnote 7) § 10 Rn 2 (S. 327).
9 Vgl. EuGH v. 16.6.05-Rs.C-105/03 (Pupino) in JZ 2005, S. 838 ff.
10 Cf. Hillgruber criticizing EuGH v. 16.6.05-Rs.C-105/03 (Pupino) in Anmerkung, JZ 2005, S. 838 ff.
11 e.g. Brügge EuZW 2003, 214.
interpret German national law. This is on bases of Pupino and to fulfill the goals of framework decisions as to its best.\textsuperscript{12} The German Federal High Court of the Constitution\textsuperscript{13} confirmed to these conclusions already in a case concerning a German request for an European Arrest Warrant extraditing a Danish citizen from Spain to Germany.\textsuperscript{14} The Federal High Constitutional Court explicitly stated herein that German authorities were acting correctly based upon the European Arrest Warrant Framework Decision and as a result of European-conform interpretation, even though the German European Arrest Warrant law was nullified at that time. The court reasoned that other European member states cannot have to bear the burden of German’s difficulties enacting a constitutional law.

Fulfilling herewith outspoken obligations to interpret framework decisions European-conform or even apply them directly will result in remarkable "Europeanization" on the one hand and speed up national ratification processes on the other hand.\textsuperscript{15} This is especially true for substantive and procedural criminal law, as this part of the law is, if at all questioned by European Union entities, mostly dealt within framework decisions.\textsuperscript{16} To ensure their own legal systems national legislators and authorities will always tend to rather apply their own national statutes and laws than to interpret or apply European Union laws.

\textbf{e. Is interpretation of domestic law implementing framework decisions in your country possible solely by referring to the wording or inhalt of the framework decisions? Is it possible also when a framework decision is not yet implemented into the domestic legal order?}

National law, which implements European framework decisions, is been interpreted in sight of German national and especially German constitutional law, not just solely referring to the certain framework decision and its wording or content. Yet, the aims of those framework decisions are taken into account.

As an example, the herein questioned matter of the German national statute on the European Arrest Warrant was declared nullified by the German Federal High Court of the Constitution (\textit{BVerfG}), because it contradicted German constitutional law and thus did not meet the standards as set by the German Basic Law.\textsuperscript{17} However, the ECJ decision \textit{Pupino} and the German \textit{BVerfG} decision on the extradition of a Danish citizen from Spain to Germany\textsuperscript{18} make clear that German national authorities will have to base their decisions and their acting on applicable European framework decisions. This is especially of effect, if the framework decision allows an European conform solution while national laws lack implementation. According to the German \textit{BVerfG} decision, this is true as far as and as long as the European framework decision concerned does not contradict German constitutional law.\textsuperscript{19} However, these decisions

\textsuperscript{13} BVerfG, Bundesverfassungsgericht.
\textsuperscript{14} BVerfG BvR 1667/05 v. 24.11.2005; www.bundesverfassungsgericht.de/entscheidungen/.
\textsuperscript{15} Cf. affirming Tinkl, criticism to EuGH v. 16.6.05 C-105/03 (Pupino) in StV 2006, S. 36 etseq.
\textsuperscript{17} BVerGE v. 18.7.2005 – 2 BvR 2236/04.
\textsuperscript{18} Cf. supranote 14.
\textsuperscript{19} Cf. decision of the German Federal High Court of the Constitution, as in supranote 14. The court stated explicitly on the matter of the nullified implemented European arrest warrant law, that the court in
and developments do not allow to simply and solely referring to provisions of framework decisions when deciding on punishability or criminal prosecution. A sole reference does not meet the German constitutional principle requiring a “law” when interfering with civil rights of the people.\textsuperscript{20}

As a result, German national statutes, which implement European law, have to be interpreted European-conform and according to the standards provided by the German constitution. Third pillar European framework decisions, however, will have to be questioned directly, if national law lacks implementation and if this lack is only due to national reasons and not to the fact that the framework decisions itself contradicts national constitutional law. One has to be apprehensive that European framework decisions will be used as domestic laws.

f. To what scope, if at all, is it possible to ask ECJ preliminary questions as refers to the interpretation of framework decisions (art. 35 TUE). Can such question be asked by constitutional court (or equivalent)?

For Germany, Article 35 TUE and those provisions concerning proceedings for preliminary ECJ-rulings were implemented into the German European Court of Justice Statute (EuGHG, Gesetz zum europäischen Gerichtshof).\textsuperscript{21}

Every national court is entitled to issue questions to the ECJ concerning validity and interpretation of framework decisions and EU-decisions, concerning interpretation of conventions established under TUE and concerning validity and interpretation of the measures implementing them.\textsuperscript{22} National courts or tribunals may request ECJ’s preliminary ruling in those matters, if the national court considers that a ECJ decision on the case pending before it is necessary to enable the national court to give judgement, § 1.1. EuGHG.\textsuperscript{23} National courts have to request such ECJ preliminary ruling, if there is no judicial remedy under national law, § 1.2. EuGHG.

g. What is the technical form of implementation of the framework decision on EAW in your country (e.g. separate law, a part of the CCP, separate from extradition provisions, other ways?)? When exactly did the law implementing the framework decision enter into force?

Germany implemented the Framework Decision on the European Arrest Warrant in form of a statute. This European Arrest Warrant Statute (EuHbG, Europäisches Haftbefehlgesetz)\textsuperscript{24} entered into force on August 2, 2006. It is the second statute to ratify the Framework Decision in Germany. The first EuHbG\textsuperscript{25} had been declared nullified by the German BVerfG for reasons of its unconstitutionality in particular.\textsuperscript{26}

nullifying the law had questioned the constitutionality of the European arrest warrant framework decision. Thus, German authorities had to interpret European-conform and had to base their extraditing decision directly on standard forms as provided in Article 8 of the European arrest warrant framework decision and to use those ways of transmissions as there are provided in Article 9 and 10 of the framework decision. This is in order to simplify the work of the member states.

\textsuperscript{20} So called ‘Gesetzesvorbehalt’ (proviso of legality). The BVerfG decision (supranote 14) underlines that.
\textsuperscript{21} EuGHG, Act conferring the presentation to the European Court of Justice for preliminary ruling in the field of police and judicial co-operation in criminal matters according to Article 35 TUE August 6, 1998 (BGBl. I 1998, 2035), enforced since May 1, 1999.
\textsuperscript{22} § 1.1 EuGHG, Article 35 TUE. For a more detailed explanation of proceedings in German national law, cf. Streinz, Europarecht, 6. A. RN 561 etseu.
\textsuperscript{23} According to Article 35.3a and Article 35.3b TUE.
\textsuperscript{24} EuHbG v. 20.7.2006, BGBl. I 1721.
\textsuperscript{25} EuHbG v. 21.7.04, BGBl. I 1748.
\textsuperscript{26} Cf. BVerfG v. 18.7.2005 – 2 BvR 2236/04.
However, the statute did not enter into force as a separate law but rather provisions amended the Act on International Assistance in Criminal Matters (IRG, *Gesetz zur Internationalen Rechtshilfe in Strafsachen*).\(^{27}\) This is due to the German system of laws, which tries to include new forms of legal action into already existing forms, types or measures. Thus, the extradition on basis of European Arrest Warrants is seen as a specific form of International extradition between member states of the EU.

**h. Was the law implementing the framework decision and the framework decision itself subject of proceedings of the constitutional court in your country?**

The first German statute to implement the EU framework decision, the *EuHbG* from July 21, 2004, indeed was subject of proceedings questioning its constitutionality. On July 18, 2005, the German Federal High Court of the Constitution declared that the law was null and void.\(^{28}\) As part of the decision on the implemented law, the *BVerfG* stated that, as far as it is authorized and competent, the framework decision itself does not contradict German constitutional rights and law. The Federal High Court of the Constitution even confirmed this statement within a later decision.\(^{29}\)

**i. Is the surrender procedure according to the EAW understood as a form of extradition or is it treated as a separate legal instrument?**

The surrender procedure according to the European Arrest Warrant is understood as a specific form of International extradition. This becomes evident because of the implementation of the German *EuHbG*\(^{30}\) into the German *IRG*\(^{31}\) as a specific procedural form of International extradition, Chapter 8 of the *IRG*. The basic rules of extradition proceedings, especially the German “Bewilligungsverfahren” (proceeding for approval) were not changed.

### 2. The implementation of the FD on the EAW in the domestic legal order

**a. Are there differences between the way of implementation of the EAW in your country and the “pattern” provided by the framework decision? If so, do the differences concern:**

- the negative premises (compulsorily and optional) of surrender?
- the catalogue of “crimes” listed in art. 2.2. FD. Are all those “crimes” criminalised in your country. Please specify which are not criminalized?
- the period of time for execution of the EAW?
- other issues. Please specify.

- (i) The German *EuHbG*\(^{32}\) tries to comply with the provisions of the framework decision to the most possible extend. This especially applies to the compulsorily and optional negative premises of surrender, as stated in § 80-83, 83 b German *IRG*. Basically, compulsory reasons to deny an European Arrest Warrant (Article 3 FD) are to be found in §§ 80-83 German *IRG*, optional reasons (Article 4 FD) are to be found in § 83 b German *IRG*. The compulsorily reasons to deny an European Arrest Warrant according to Article 3 No. 2 and 3 FD are to be found in § 83 No. 1 and 2 *IRG*.

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\(^{27}\) IRG (Act on International Assistance in Criminal Matters), BGBl. I (2005), 1537.

\(^{28}\) Cf. BVerfG (Decision 7.18.2005) - 2 BvR 2236/04.

\(^{29}\) Cf. supranote 14.


\(^{31}\) Act on International Assistance in Criminal Matters, cf. supranote 27.

\(^{32}\) Cf. supranote 24.
(extradition of Germans). At the same time, the guarantees that have to be granted according to Article 5 FD were implemented in § 83 No. 3 and 4 IRG.

The system of the German statute thus differs between general compulsorily reasons to deny European Arrest Warrants (§§ 81-83 IRG), specific reasons to deny only conferring to German citizens (§ 80 IRG)\(^{33}\), and reasons to deny approval, where the administrative body, the office for prosecution, has discretion (Ermessen) to decide whether to grant. The optional reasons to deny an extradition according to Article 4 FD are subject of § 80.1 No.2, 3 IRG (for German citizens) and especially subject of § 83 b IRG. § 83 b IRG is concerned with the facultative ("can-do") reasons to deny approval within the proceeding for approval (Bewilligungsverfahren). § 83 b.1a-c. IRG equals Article 4 No. 2, 3, 5 FD.

 Solely, the possibility to deny approval according to § 83 b IRG is not provided by Article 4 FD. Herein approval can be denied if the requesting member state can not guarantee that it will itself act in accordance to the Framework Decision and to the provisions on the European Arrest Warrant. Further, approval can be denied, if expectations are that the requesting member state will not allow an extradition according to the Framework Decision itself in a case similar to the request. The administrative body, which has authority to deny approval, arrives at a reasoned decision exercising its dutiful discretion even taking regards to foreign affairs into account.

- (ii) The new § 81 No. 4 IRG (according to the 2. EuHbfG\(^{34}\)) refers directly to the catalogue of crimes as provided by Article 2.2 FD. As provided in Article 2.2 FD, § 81 No. 4 IRG exempts from proving the punishability in both the requesting and the executing member state, if the request is based upon an European Arrest Warrant and refers to one of the catalogue crimes of Article 2.2. FD. All these “crimes” are criminalized in Germany. Nevertheless, a few terms used by the framework decision are not to be found within the German substantive criminal law. This is due to the German specific system in its criminal law. For example, searching the substantive criminal law one will not find the wording “Cyberkriminalität” (cyber crimes) as it is used by the official translation of the European Arrest Warrant Framework Decision, which does not mean that cyber crimes are not punishable.

Staying with the wordings of the framework decision:
- participation in a criminal organisation is punishable according to § 129 German Substantive Criminal Code (StGB, Strafgesetzbuch),
- terrorism according to § 129a StGB,
- trafficking in human beings according to § 239 a, b StGB,
- sexual exploitation of children and child pornography according to § 174 etsequ. StGB,
- illicit trafficking in narcotic drugs and psychotropic substances according to § 29 etsequ. German Narcotic and Drug Law (BtMG, Betäubungsmittelgesetz),
- illicit trafficking in weapons, munitions and explosives according to § 51, 52 firearms law (WaffG, Waffengesetz),
- corruption according to §§ 297 etsequ., 331 etsequ. StGB,

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\(^{33}\) This is especially due to the decision of the German Federal High Court of the Constitution nullifying the 1.EuHbG for reasons of contracting with German civil rights of not being extradited as a German citizen (Article 16 German Constitution), cf. supranote Błąd! Nie zdefiniowano zakładki. for references to the BVerfG decision.

\(^{34}\) Cf. supranote 24.
- fraud (including affecting the financial interest of the EU) according to §§ 152 a, 152 b, 242 etseq., 246, 267 etseq., 259 etseq., 263, 263a, 266 b StGB,
- laundering the proceeds of crime according to § 261 StGB,
- counterfeiting currency according to §§ 146-148, 151 StGB,
- computer-related crime ("Cyberkriminalität") according to § 303 a, 303 b StGB, see also §§ 263, 263 a, 266 b, 242, 246, 202 a, 269, 270, 271.1 StGB,
- environmental crime according to §§ 324, 324 a, 325, 330, 330 a StGB,
- facilitation of unauthorised entry and residence according to §§ 92, 92 a, 92 b Alien Law (AuslG, Ausländergesetz),
- murder according to § 211 StGB, grievous bodily injury according to §§ 224 etseq. StGB,
- illicit trade in human organs and tissue according to §§ 18, 19 Transplantation Act (TPG, Transplantationsgesetz),
- kidnapping, illegal restraint and hostage-taking according to §§ 239-239 b StGB,
- racism and xenophobia according to §§ 130, 185 etseq., 86 etseq. StGB,
- organised or armed robbery according to §§ 249, 250 StGB,
- illicit trafficking in cultural goods, including antiques and works of art, according to §§ 242, 243.1. No. 3-5 and 259 StGB,
- swindling according to §§ 263 etseq. StGB,
- racketeering and extortion according to §§ 253 etseq. StGB,
- counterfeiting and piracy of products according to §§ 106 etseq. Intellectual Property Act (UrhG, Urheberrechtsgesetz),
- forgery of administrative documents and trafficking therein according to §§ 267 etseq., 267.3 No. 1-3 StGB,
- forgery of means of payment according to § 263 a StGB,
- illicit trafficking in hormonal substances and other growth promoters according to §§ 95 etseq., 6, 6 a Law on the Trade in Drugs (AMG, Arzneimittelgesetz),
- illicit trafficking in nuclear or radioactive materials according to § 326 StGB,
- trafficking in stolen vehicles according to § 259 StGB,
- rape according to §§ 177 etseq. StGB,
- arson according to §§ 306, 306 a etseq. StGB,
- crimes within the jurisdiction of the International Criminal Court according to the German Code of Crimes against International Law (VStGB, Völkerstrafgesetzbuch),
- unlawful seizure of aircraft/ships according to §§ 316 c, 316 b, 315 a, 315 b, 239 a, 239 b, 125 a, 126, 129 a, 211, 127, 310 StGB, and
- sabotage according to §§ 303, 303 b, 304, 305 StGB.

Thus, a lack of criminality can not be perceived.

- (iii) The time periods were exactly extracted from the framework decision, conferring Article 17 FD and § 83 e IRG.

- (iv) A special characteristic of German law is the so called "two step procedure" of legal admissibility and proceeding for approval ("Bewilligungsverfahren"). The regional appeal court is competent to decide whether an European Arrest Warrant is legally admissible. The office for prosecution is competent to approve European Arrest Warrants. For that proceeding the prosecutor is given discretion to be dealt with as in duty bound. The ‘proceeding for approval’ was historically developed as for

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custody and extradition cases according to §§ 12, 13, 32 etsequ. *IRG*. It now also applies to the specific form of extradition based upon European Arrest Warrants, § 78 *IRG*. It has its difficulties especially from an International aspect. However, it is traditionally based on the historical division of competence between the office for prosecution and the judges and courts in Germany. According to the Federal High Constitutional Court’s decision on the First European Arrest Warrant Act\(^\text{36}\), the prosecutor’s decision on approving an European Arrest Warrant needs to be revisable. This is due to Article 19.4. German Basic Law, which requires to open recourse to law, if decisions possibly interfere with constitutional rights.

As a result and according to Germany’s Second European Arrest Warrant Act, the approving authorities (prosecutors) decide beforehand, § 79.2 *IRG*. This is in order to guarantee the greatest possible extend of legal security and alongside still allow a speedy procedure without questioning the traditional division of admitting judge and approving prosecutor itself. Thus, now prosecutors inform judges about possible reasons to deny approval of an European Arrest Warrant together with their motion to decide upon admissibility of the warrant before the court decides.\(^\text{37}\) This procedure very well serves the prosecuted person’s interest. It guarantees greater legal protection, a speedy proceeding and may even avoid extradition custody. At the same time it serves the strict timetable set by the European Arrest Warrant Framework Decision.

b. *Can lack of dual criminality in cases other than mentioned in art. 2.2. FD constitute optional reason to refuse the execution of the EAW (to surrender)?*

For crimes listed within Article 2.2. FD proving of dual criminality is exempted according to § 81 No. 4 *IRG*. § 80.2. No. 3 *IRG* applies, if a member state’s request to extradite confers to other crimes than listed in Article 2.2. FD. It states that in cases of requesting the extradition conferring to a non-catalogue crime the dual criminality has to be examined. Herewith Germany made use of Article 4 No. 1 FD and the possibility herein to provide a rule of examining dual criminality in cases referring to non-catalogue crimes. This applies in cases extraditing German citizens according to § 80.2. No. 3 *IRG* and in cases extraditing aliens according to §§ 83b.2.a., 80.2. No. 3 *IRG*.

c. *Did your country make a proper notification to the Secretary of the CUE, concerning the waiver of the specialty rule (according to the art. 27.1 FD)?*

Germany did not respond to Article 27.1. FD as according to the documents of the Council of Europe No. 12510/04, Sept. 23, 2004 (COPEN 108 EJN 60 EUROJUST 77, including explanations to notifications) and No. 12180/04, Sept. 8, 2004 (COPEN 103 EJN 57 EUROJUST 74), which do not include any notification to that matter.

d. *Did your country appoint a central authority (art. 7 FD). If so, which one? What is the scope and tasks it is supposed to perform and its practical meaning?*

Germany, however, did not appoint a central authority body competent for the entire German State as suggested by Article 7 FD.

\(^\text{36}\) See supranote *Błąd! Nie zdefiniowano zakładki.*

\(^\text{37}\) According to the traditional ‘proceeding of approval’ (*Bewilligungsverfahren*), prosecutors first asked for admission, while reasons to deny were proven within a second step after the court had decided on admissibility already. The new modification is similar to a proceeding used in Portugal. For a very detailed and critical view on this specific kind of proceeding, already at that early point suggesting what German legislation later in deed decided for, see Lagodny (supranote 14), StV 2005, 515-519.
According to its federal structure, Germany appointed the regional appeal courts (OLG, Oberlandesgerichte) in each of the German states (Länder) to be competent. From the viewpoint of the German Länder the “Oberlandesgerichte” are the highest judicial authorities in each of the states. They are traditionally responsible for questions of International assistance in criminal matters (Internationale Rechtshilfe). Thus, a certain amount of centralisation may be perceived herewith. While indeed it would have been possible to appoint one central authority for the German State on its federal level, still it would have been hard to realize that. Especially since the judiciary system is organized by the Länder. Additionally, the Oberlandesgerichte in each of the Länder are the highest courts in Germany with competence to negotiate cases by their facts (Tatsacheninstanz). The Federal High Court, Criminal Section, is not given the function to take evidence but rather to decide solely legal matter appeals.

According to the official information from September 23, 2004, performed by the German delegation assigned for dealing with the European Arrest Warrant in Germany and referring to Article 6.3. FD, the competent authorities in Germany are the judicial bodies of the States and of the Federation. The judicial bodies of the Länder delegate the competence to issue European arrest warrants to the offices for prosecution, installed at the regional courts (Landgerichte) for those are responsible for investigation. They delegate the competence to approve European arrest warrants to the offices for prosecution, installed at the regional appeal courts (Oberlandesgerichte). This makes especially sense since the Oberlandesgerichte itself are competent for the decision on admissibility of European Arrest Warrants.

3. The principle ne bis in idem and EAW

a. What is the meaning of the identity of an act in the context of the art. 3 FD (ground for refusal of the execution of EAW) – is it its description or legal qualification as made by the domestic court?

“Identity of an act” means the criminal action as a technical term according to § 264 German Criminal Procedural Code (StPO, Strafprozeßordnung). The criminal action includes all herewith committed crimes; with other words all offences to which the elements were fulfilled. This is called criminal action within procedural sense. According to its official definition, it means the deeds impeached by the prosecution, i.e. the consistent actions with all herein included offences committed. § 83 No. 1 IRG provides in its German version the exactly same wording of identity of an act.

To clarify, the wording does not mean just the criminal offence of the foreign criminal law.

b. Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non – execution of the EAW?

§ 9 IRG provides a general obligatory rule of inadmissibility of an extradition, if already a valid judgement or conviction, respectively a decision of comparable validity or a decision of discontinuance of the procedure, either in rejecting the indictment.
§ 174 StPO or the opening of the main proceeding (§ 204 StPO), or adjustment (§ 153 a StPO) exists or if rules of limitation apply.

According to §§ 1.4., 78 IRG provisions of Chapter 8 of the IRG supersede its general rules. Additionally, Chapter 8-§ 82 IRG declares that some of the Chapter 1-7 provisions are non-applicable in cases of European Arrest Warrants. However, § 82 IRG does not exclude § 9 IRG. At the same time § 78 IRG opens the provisions of Chapter 8 to the general rules of the IRG for additional application, if Chapter 8 does not provide an own specific rule. Thus, § 9 IRG can be applied herein and functions as a mandatory ground for non-executing an European Arrest Warrant.

c. Is the valid judgement/conviction/discontinuance of the procedure in other UE Member State the same ground for refusal as in “b”?

If identity of the act applies, the prosecuted person cannot be extradited, if a valid judgement of another member state exists and this judgement was already or is being executed or if this judgement cannot be executed at all (§ 83 No. 1 IRG). Therefore, solely the existence of a valid judgement does not hinder the extradition of European arrest warrants. Extradition may take place in order to execute a judgement.

d. What is the meaning and/or interpretation of “the finally disposal of the trial” in art. 54 SDU in your country?

- Is such a disposal the valid decision on discontinuance of the criminal process because its legal inadmissibility?
- Is such a disposal the valid decision on discontinuance of the criminal process because lack of advisability of prosecution?

The official German translation of Article 54 SDÜ reads: „Wer durch eine Vertragspartei rechtskräftig abgeurteilt worden ist, darf durch eine andere Vertragspartei wegen derselben Tat nicht verfolgt werden, vorausgesetzt, dass im Fall einer Verurteilung die Sanktion bereits vollstreckt worden ist, gerade vollstreckt wird oder nach dem Recht des Urteilsstaats nicht mehr vollstreckt werden kann.“

This official translation uses the term “Aburteilung” (conviction), which indeed caused discussion whether and how to interpret it. Meanwhile, the term is been read as “Verurteilung” (sentence). Still, the interpretation of its content is subject to a heated debate which outcome is hard to predict. Using teleological and systematical interpretation and taking into account the often unfamiliar wordings of the German language, legal scholarship and jurisprudence tends to interpret the wording “rechtskräftige Aburteilung” as all decisions, which adjust or otherwise close the proceeding and produce validity, which results to a consumption of the indictment in the state of original prosecution. This includes the Belgic/Netherlands “transactie” as well as the Austrian acknowledgement of guilt.

e. Was the problem of the European application of the principle ne bis in idem a subject of judicial interpretation in your country (e.g. by the Supreme Court, Constitutional Court)?

Two important decisions took place: The “Brügge” decision of the Federal High Court, Criminal Division (BGH St)42 and the decision of the Federal High

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42 Decided before the case went to the ECJ. Cf. ECJ decision 2-11-2003 - C-187/01 and C-385/01 Gözütok and Brügge, JZ 6/2003, 303.
Constitutional Court (BVerfG) declaring the First European Arrest Warrant Act (EuHbG) for unconstitutional and nullified.\(^\text{43}\)

4. The issuing of the EAW

a. Which judicial authority in your country decides on the issuing of the EAW?

According to the Second European Arrest Warrant Act (EuHbfG)\(^\text{44}\), the offices for prosecution installed at the regional courts issue European Arrest Warrants based upon national judicial arrest warrants according to § 114 StPO. If the request for extradition was issued as an European Arrest Warrant, it substitutes the national judicial arrest warrant according to Article 12.2a. European Convention on Assistance in Criminal Matters. Additionally, the European Arrest Warrant is the bases on which tracing is conducted according to the Schengen Information System (SIS).

b. Is, according to the domestic law, the decision on issuing of the EAW made on a motion (on request) of a national organ or ex officio. If the former, on which organ's motion/request?

In Germany prosecutors at the offices for prosecution have competence to issue European Arrest Warrants. According to an agreement between the German Federation and the constituent States of Germany (Bundesländer) the basically competent judicial bodies of the Bundesländer delegated the competence to issue European Arrest Warrants to the offices for prosecution, installed at the regional courts (Landgerichte)\(^\text{45}\), for those are responsible for investigation.\(^\text{46}\) The prosecutor issues European Arrest Warrants in completing the official European Arrest Warrant forms ex officio, but based upon the existing domestic judicial arrest warrant.

c. If a court is entitled to issue the EAW – of what rank and panel?

Since the European Arrest Warrant is issued ex officio, but based upon the domestic judicial arrest warrant in Germany (§ 114 StPO\(^\text{47}\)), the presumptions to issue are those

\(^{43}\) Cf. supranote Błąd! Nie zdefiniowano zakładki. To this subject see as well ECJ NJW 2003, 1173 regarding the applicability of § 153a dStPO and BayOLG StV 2001, 263 regarding Austria.

\(^{44}\) Supranote 24.

\(^{45}\) The German Court system consists of local courts (Amtsgerichte), installed at almost each town, of regional courts (Landgerichte), installed as first and second level courts, who also review local court decisions and which are installed in all regions or districts (also called district courts), regional appeal courts (Oberlandesgerichte) functioning as the highest courts of the German states, reviewing decisions by lower courts but also deciding on a first level in severe cases (also called High[er] District Courts), and Federal High Courts of Justice (Bundesgerichtshöfe) functioning as appeal courts on lower courts decisions of all German states. Herein the terms regional court for Landgericht and regional appeal court for Oberlandesgericht are preferred mainly because the terms district and high district courts can be very misleading. In many areas in Germany only one local court is installed for a whole district. Also, the term high district court does not necessarily include the imagination of being the highest court within the court system of a German state. The terms local, regional, and regional appeal court do not function perfectly but seem of better help in understanding the difficult terming. In deed not translating the terms at all and thus not confronting them with their original English meaning would be best.

\(^{46}\) As assigned by the German delegation dealing with the EAW in Germany in referring to Article 6.3. FD, document of the Council of Europe No. 12510/04.

\(^{47}\) § 114 StPO (German Criminal Procedural Code): [Warrant of Arrest]: (1) Remand detention shall be imposed by the judge in a written warrant of arrest. (2) The warrant of arrest shall indicate: 1. the accused; 2. the offence of which he is strongly suspected, the time and place of its commission, the statutory elements of the criminal offence and the penal provisions to be applied; 3. the ground for arrest, as well as 4. the facts disclosing the strong suspicion of the offence and the ground for arrest, unless national
required for domestic judicial arrest warrants. This means, the investigative magistrate (Eröffnungsrichter) at the local court has jurisdiction over the subject, which is brought to him by motion of the office for prosecution. Exceptionally, in cases concerning the state security, the investigative magistrate at the regional appeal court (Oberlandesgericht) or at the Federal High Court, Criminal Division, (BGHSt, Bundesgerichtshof in Strafsachen) has jurisdiction (§ 169 StPO). The juvenile judge decides in juvenile cases (§ 34.1. JGG). Nevertheless, which court in specific has jurisdiction over the matter, always one judge (and not a chamber) at this court solely decides on the domestic judicial arrest warrant.

As a result, the European Arrest Warrant itself issued by the prosecutor is an outgoing request for extradition.

As a result the EAW itself issued by the prosecutor is an outgoing request for extradition.

d. Do the parties or other participants to the process have the right or duty to take part in the session?

Since the EAW is issued by the prosecution ex officio based upon the investigative magistrate reasoned decision to issue a domestic judicial arrest warrant, the parties or other persons involved do not participate issuing the EAW. They may participate according to the proceedings issuing and executing domestic judicial arrest warrants according to §§ 114 etseq. StPO, as relatives have to be informed (§ 114 b StPO) and the suspect has to be brought to the magistrate after arrested (§ 115 StPO).

e. Is evidence procedure made in the proceedings on the issuing of the EAW?

To issue an arrest warrant the requirements of § 114 StPO have to be met. § 114.2. No. 4 StPO requires that in all cases (unless national security is thereby endangered) all facts disclosing the strong suspicion of the commission of the offence and the ground for arrest have to be presented to court. The investigative magistrate has to consider these facts and to decide whether fact and presented evidence can show strong suspicion of the commission of the offence. However, the investigative magistrate is not taking the evidence (like hearing witnesses) or considering the evidence itself before issuing an arrest warrant. This is because, the investigative magistrate does not have to prove whether the suspect actually committed the crime, but rather whether there is strong suspicion at the same time as formal requirements are fulfilled to arrest the suspect.

f. Who (party, other participant), if anyone, is entitled to appeal against the decision on the issuing (accordingly: rejecting issuing) of the EAW? Which judicial authority reviews these decisions?

The decisions of the competent judicial authority itself cannot be made subject of any legal remedy. However, the party has the right to appeal against the investigative magistrate’s decision upon which the issuance of the European Arrest Warrant was

security is thereby endangered. (3) If it appears that Section 112 subsec. 1, second sentence, is applicable, or if the accused invokes that provision, the grounds for not applying it shall be stated.

Also translated as summary judge or committing magistrate is a judge, who is appointed by the allocation of duties, to have jurisdiction in judicial questions of preliminary criminal investigation.

JGG = German Juvenile Courts Act.

based on. The German legal remedy within this case is a complaint for relief from pre-trial detention (§ 117 StPO).

If the prosecutions motion to issue or expand an European Arrest Warrant was denied by the investigative magistrate, the prosecutor can file a complaint according to § 304 StPO and a further complaint according to § 310.1 StPO.

g. Can the EAW be issued retroactively? (as regards to crimes allegedly committed before the implementation of the EAW)?

Regarding incoming extradition requests Article 32 FD provides that any member state of the European Union may give declaration to the Council of the European Union that he will execute extradition requests of other member states before a certain determined effective date according to the rules, which were applied before the FD had been gone into effect (such before Jan 1, 2004).

This wording implies that Article 32 FD only forbids to retroactively applying the provisions on the European Arrest Warrants, if the executing member state gave a compliant declaration. Germany did not submit such a declaration. Therefore the provisions concerning European Arrest Warrants do apply without any time restriction as long as Germany is affected as an executing member state.\(^{51}\)

h. How many EAWs were issued in your country until the day mentioned above in point 1g of the questionnaire?

In 2004 about 1300 European Arrest Warrants were granted in Germany according to an official document of the Council of the European Union of March 9, 2005.\(^{52}\)

i. Which “crimes” mentioned in art. 2.2. of the FD on EAW were subject to issuing the EAW in your country? If possible, please specify exact numbers?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

j. Were the EAW’s issued in your country subject to crimes other than “crimes” mentioned in art. 2.2. FD. If so, in how many cases?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

k. How many such request were rejected by the deciding judicial authority? (applies only if EAW’s are issued on request)

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

l. Which information channels are used before/along with the issuing of the EAW in your country (SIS, EJN, Europol, other means)? Is EAW issued only if the exact place of residence of the requested person is known? If not, what is the procedure if the place of residence of the requested person is not known?

\(^{51}\) Cf. supranote 50.

\(^{52}\) Document of the Council of Europe, March 9, 2005 No. 7155/05 COPEN 49 EJN 15 EUROJUST 15.
The prosecutor has access to all domestic, European and International information channels when issuing an European Arrest Warrant (SIS, EJN, Europol, Inpol\textsuperscript{53}, etc.). The exact place of suspect’s residence does not have to be known in order to issue an European Arrest Warrant, already according to Article 8 FD. The European Arrest Warrant is basis for searching the suspect within the Schengen Information System (SIS), according to Article 95 Schengen Agreement (SDÜ, Schengener Durchführungsübereinkommen) and Article 9 FD.\textsuperscript{54}

m. How many EAW’s issued by the judicial authority in your country were executed in other Member States? In how many cases was the requested person effectively surrendered?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

n. In how many cases did the executing of the EAW issued by judicial authority in your country refuse? What were the grounds for refusal?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

5. Executing of the European Arrest Warrant

a. Which judicial authority in your country decides on executing of the EAW?

The execution of the EAW focuses on incoming requests:
Only the State Attorney General\textsuperscript{55} is empowered to grant an EAW. His competence is to be traced back to the respective federal states and furthermore and by virtue of consent to the Federal Republic of Germany. Germany has declared that the powers to decide on incoming requests shall be brought forward to the State Attorney General as a general rule.

The execution of the European Arrest Warrant focuses on incoming requests:
Only the State Attorney General\textsuperscript{56} is empowered to grant an European Arrest Warrant. His competence is to be traced back to the respective constituent state (Bundesland) and furthermore and by virtue of consent to the Federal Republic of Germany. Germany has declared that the powers to decide on incoming requests shall be brought forward to the State Attorney General as a general rule.

The Federation and the constituent states (Bundesländer) have made an arrangement on that competence on April 28, 2004. Therein, the performance of the granting authority is stipulated as being delegated to the Bundesländer. The ruling of

\textsuperscript{53} Inpol (Informationssystem der Polizei) is the Information system for the German Police.
\textsuperscript{54} Cf. especially to the difficulties Schomburg/Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 4. Aufl. 2006, before § 78 IRG MN. 10.
\textsuperscript{55} State Attorney General (Generalstaatsanwalt) is the Prosecutor employed at the office for prosecution, which is installed at the regional appeal courts (Oberlandesgerichte). Since Oberlandesgerichte represent the highest jurisdictional body in each of the German Länder, the prosecutor at this court is translated as State Attorney General.
\textsuperscript{56} State Attorney General (Generalstaatsanwalt) is the Prosecutor employed at the office for prosecution, which is installed at the regional appeal courts (Oberlandesgerichte). Since Oberlandesgerichte represent the highest jurisdictional body in each of the German Länder, the prosecutor at this court is translated as State Attorney General.
the Federal High Constitutional Court on the First European Arrest Warrant Act did not touch that competence agreement. The constituent states themselves transferred the granting authority to their State Attorney Generals. Independent from the nullification declared by the Federal High Constitutional Court, this transfer is leaving § 12 IRG untouched. Thereafter, - except in case of § 41 IRG (the so-called consented “fast track” proceedings) an extradition may only be granted if the court has held it being admissible. Therewith, it is certain that even in case of an European Arrest Warrant the State Attorney General files the motion to execute the European Arrest Warrant and, as far as the suspect does not agree on the “fast track” proceedings, the Regional Appeal Court (Oberlandesgericht) has to decide on its admissibility.

Recapitulatory, the State Attorney General acts as the authority which is executing the European Arrest Warrant. In doing so, he may only grant its execution and the extradition respectively, if the Regional Appeal Court has declared it being admissible (cf. § 12 IRG). Since the Second German European Arrest Warrant Act is enforced, the waiver of the Regional Appeal Court’s decision on admissibility according to § 41 IRG applies to both foreign nationals (aliens) and Germans. By virtue of § 13.2. IRG the State Attorney General carries out the granted extradition.

b. Is the decision on execution of the EAW performed ex officio or on request of other domestic judicial authority. If yes – what is that judicial authority?

The decision to execute an European Arrest Warrant is made by the State Attorney General, who at the same time is the granting authority. The granting, however, is dependent on the approval by the Regional Appeal Court except in the cases of § 41 IRG. The Regional Appeal Court holds authority to review the domestic empowerment (the admissibility). In contrast the question, whether there is a duty to extradite being set by public International law, is to be answered by the granting authority (the State Attorney General) on its own competence. The Regional Appeal Court must examine the entire substantive legal situation of the defendant both extensively and concludingly. This means that no legal guarantee of the wanted person might be examined by the granting authority single-handedly.

In § 79.2. IRG new, according to the Second European Arrest Warrant Act, further ways of legal protection are provided. Accordingly, the State Attorney General has to point out, whether he or she intends to claim hindrances to the granting (§ 83b IRG new) in his or her reasons to extradite the defendant. This results in an anticipation of the granting decision prior to the Regional Appeal Court’s decision on admissibility. Because the motion of the granting authority not to claim hindrances to the granting in his or her later decision is being examined judicially within the proceedings on admissibility. The change in provision is justified in the law-making sources and material, for that way the courts do not have to deal with the same process repeatedly or even in several judicial cognizances. Additionally, a prolongation of the length of the extradition proceedings is avoided by the intended regulation. Ultimately, this

57 Cf. supranote 24.
58 This change of § 41 IRG was not demanded by the Federal High Constitutional Court but was due to requirements of the European Arrest Warrant Framework Decision to speed up proceedings of extradition between the member states of the EU. According to the former version of § 41 IRG the Higher Regional Court’s decision on admissibility was indispensable for German nationals even if they agreed on the extradition.
59 See answer to question 5a for explanation.
60 Cf. supranote 24.
means that the decision of the granting authority, presumably not to claim hindrances to the granting, will be submitted to and decided by the Regional Appeal Court in a body with the application to decide on admissibility of extradition. Thus, the decision is open to legal recourse as the Federal High Constitutional Court demanded.

c. Does your domestic law envisage a period in which the decision on the execution of the EAW should be made? If so, what is that period of time?

Both the void First German European Arrest Warrant Act (in its § 83 c)\(^\text{61}\) as well as the Second European Arrest Warrant Act (also in § 83 c \(\text{IRG new}\)\(^\text{62}\)) determine that it has to be decided on the extradition at the latest within 60 days after the defendant had been arrested.

d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

As granting of extradition is dependent on the decision on admissibility by the Regional Appeal Court\(^\text{63}\) the Regional Appeal Court even in the proceedings on the admissibility of extradition takes and performs evidence. This follows § 30 \(\text{IRG}\) which reads as follows:

\textbf{§ 30 \(\text{IRG}\): Preparing the Decision.}

(1) If the extradition documents do not suffice for making a judgment on the granting of the extradition, the Regional Appeal Court shall render a decision only after the requesting state has been given an opportunity to submit additional documents. A deadline for the submission of these documents may be set.

(2) The Regional Appeal Court may examine the accused. It may take other evidence regarding the admissibility of extradition. In the case of § 10.2., the taking of evidence regarding the admissibility of extradition shall also extend as to whether the accused appears to be under sufficient suspicion of the offence with which he is charged. The Regional Appeal Court shall determine the manner and extent of the taking of evidence without being bound by prior applications, waivers or decisions.

(3) The Regional Appeal Court may hold an oral hearing.

e. How, if at all, does your domestic law regulate the solution of the concurrent EAWs?

Neither the First nor the Second European Arrest Warrant Act provide for a regulation. § 83b lit. c \(\text{IRG new}\) solely assigns for a hindrance to the granting, when a third state’s request for extradition shall be prioritised. Thus, it remains with the European-conform and framework decision-compliant interpretation and application of Article 16 FD..

f. Does the domestic law in your country envisage the collision of an EAW and extradition procedure? If so, please clarify.

Both the obsolete void regulation as well as the Second European Arrest Warrant Act provide for an overriding character of the specific regulations on the European Arrest Warrant at the expense of the general rules of the \(\text{IRG}\). The specific rules on European Arrest Warrants had been laid down in the eighth part of the law on International Assistance in Criminal Matters, §§ 78-86 \(\text{IRG}\). The Second European Arrest Warrant Act stuck to that arrangement and the according sections.

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\(^{61}\) Cf. supranote 25.

\(^{62}\) Cf. supranote 24.

\(^{63}\) except to the cases of § 41 \(\text{IRG}\) as explained above within the answer to question 5a.
g. Is the EAW issued in other Member State of the EU a sole legal basis for the deprivation of liberty for the sake of procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

In the German legal system, the European Arrest Warrant complies with the request for extradition. But with both, a request for extradition or an European Arrest Warrant, the basis for arresting the suspect prior to extradition is not yet given. Accordingly, the arrest prior to extradition is ordered by the Regional Appeal Court (§ 15 IRG). This decision is prepared by the State Attorney General (§ 13.2 IRG). As a consequence, the State Attorney General has to file an accordant application.

h. What is the maximum period for the arrest of the requested person before his or her effective surrender?

There is no legal regulation on the maximum period of arrest in extradition proceedings. Though, § 26.1. IRG requires an examination of the detention (Haftprüfung) every two month by the Regional Appeal Court. However, Chapter 8 of the IRG provides specific rules in cases of European Arrest Warrants due to the European Arrest Warrant Framework Decision. These specific rules do not terminate the term of arrest but require the authorities to react within certain time periods after the suspect is being arrested.

§ 83c.1. IRG, which has already been inserted due to the First European Arrest Warrant Act64, only determines that the decision on extradition ought to be reached at the latest within 60 days after the suspect has been arrested. § 83c.3. IRG assigns for the transfer date being at the latest within 10 days after the granting decision. Exceptions to those time limits are also laid down in § 83c.3. IRG. If the suspect affirmed to the fast-track-proceedings65, the decision on extradition has to be reached within 10 days, § 83c.2. IRG. If, however, the decision cannot be reached within the time limits as set by § 83c.1-3. IRG, the German Government has to inform Eurojust of that circumstance and of reasons for the non-decision, § 83c.4. IRG. Finally § 83d IRG provides that the suspect has to be released from arrest, if the transfer to the requesting member state has failed within 10 days after the assigned transfer date and if authorities were not able to agree on a new transfer date.

i. What rank – and panel – of the court decides on surrender (the execution of the EAW)?

The German system of extradition adopts a two-stage scheme. Granting of extraditions is incumbent on the State Attorney General. This decision, however, is dependent on the approval of the Regional Appeal Court.66

j. Do parties or other participants of the proceedings have the right or duty to take part in the session?

There is no right to presence in the granting proceedings on extradition by the State Attorney General.

The Regional Appeal Court, however, may order an oral hearing according to § 30.3. IRG. The court has to give notice of time and place of such hearing to the State Attorney General’s office67, to the defendant, and to the defendant’s counsel. In the hearing a representative of the State Attorney General’s office must be present.

64 Cf. supranote 25.
65 § 41 IRG, see answer to question 5a for a detailed explanation of this certain kind of proceeding.
66 The suspect’s agreement to the so-called fast-track proceedings (§ 41 IRG) is the only way to abandon the approval of the Regional Appeal Court (see answer to question 5a for details on this proceeding).
67 The State Attorney General’s office is the office for prosecution at the Regional Appeal Court.
defendant has to be summoned when being imprisoned, unless he has waived his right to presence or there are other opposing obstacles. As far as he is not summoned for the hearing, his legal counsel (§ 40 IRG) has to attend to serve his interests in the hearing. As far as the defendant is not yet legally represented, a defence attorney must be appointed in the oral hearing to serve as legal counsel for him. In the oral hearing, the present parties must be heard and their statements must be minuted, § 31.4 IRG. If being at large, the Regional Appeal Court may order the defendant’s personal attendance. As far as the defendant is called before the court properly and he or she does not attend without an excuse, the Regional Appeal Court may order his or her summoning.

k. Can the decision on surrender be complained. Who has the right to complain? Which judicial authority reviews this decision?

According to the First European Arrest Warrant Act, the State Attorney General’s granting decision on executing an European Arrest Warrant had been declared final, § 74b IRG. Also, the German Federal Government’s draft to the Second Act stuck to that. However, in the recently adopted version68 this provision is deleted, for it cannot be made sure that the granting decision does not interfere with the defendant’s basic rights. Thus, the granting decision now ultimately is subject to judicial control69 as the Federal High Constitutional Court had required.70

The State Attorney General’s decision not to claim hindrances to granting an European Arrest Warrant in a certain case is revised before the Regional Appeal Court, § 29 IRG. According to § 13.1. Sentence 2 IRG the Regional Appeal Court’s approval is final. Nevertheless, § 33 IRG allows for a new decision on the admissibility in certain cases:

§ 33 IRG: Reconsideration of Decisions Granting Extradition.
(1) If, after the Regional Appeal Court’s decision regarding the admissibility of the extradition, circumstances arise which furnish a basis for a different decision, the Regional Appeal Court shall ex officio, on motion by the public prosecutor at the Regional Appeal Court or on application by the accused, reconsider its decision.
(2) If, after the Regional Appeal Court’s decision, circumstances become known which furnish a basis for a different decision, the Regional Appeal Court may render a new decision.
(3) § 30 (2), (3) and §§ 31, 32 shall apply correspondingly.
(4) The Regional Appeal Court may order that extradition be deferred.

It may be appealed against the approval only by means of the constitutional complaint as an extraordinary appeal. Thus, the defendant is given at least the possibility to reprove violation of constitutional law.

The currently passed Second European Arrest Warrant Act is responsive to the former problem lacking legal protection against the State Attorney General’s granting decision as revealed by the Federal High Constitutional Court.71 It consequently provides for a review of the State Attorney General’s denial of hindrances by the Regional Appeal Court. The innovation is contained in § 79 IRG new. Thus, the Regional Appeal Court is empowered to revise the hindrances to the granting considering the State Attorney General’s wide discretionary powers. According to the hitherto existing legal situation, the defendant was refused to allege hindrances to the granting by virtue of

68 Second European Arrest Warrant Act (supranote 24).
69 Cf. BTDr. 16/2015 from 28.6.2006, pg. 28.
70 Cf. supranote Błąd! Nie zdefiniowano zakładki.
71 For the constitutional decision cf. supranote Błąd! Nie zdefiniowano zakładki.
§ 83b IRG old (of the void European Arrest Warrant Act), for those hindrances were thought to predominantly address the granting authority (State Attorney General) and not the person affected.  

1. Does the person in question have the right to:

   - the assistance by the defense lawyer?
   - the right to interpreter?

   The person affected has the right to legal counsel at any time of the proceedings, § 40 IRG. If he or she is unable to speak the German language, this triggers-off the duty to call in an interpreter, §§ 77 IRG, 185 GVG.

m. Does the domestic law in your country envisage any barriers as refers to the surrender of own nationals?

   The extradition of German nationals had been regulated in the outdated First European Arrest Warrant Act in § 80 IRG. It was regarded as one of the most controversial rules of the entire statute. Due to the Federal High Constitutional Court’s reprovals with the reprehension of a breach of the Basic Right of not to be extradited in particular, § 80 IRG in its recent version has been remodelled significantly.

   According to § 80.1. IRG new, extradition of German nationals for the purpose of prosecution is admissible, if “[No. 1] it is assured that after the imposition of a prison-sentence or another sanction the requesting member state will offer the defendant to be committed back for the purpose of execution on his demand to the jurisdiction of that code, and [No. 2] the offence shows some proper reference to the requesting state.” § 80.1. No. 1 IRG stands for the so-called ‘back-committal rule’. The requirement of back-committal is aiming at rehabilitation. § 80.1. No. 2 IRG addresses the reference of the offence to both home and overseas territory. In its ruling on the First German European Arrest Warrant Act the Federal High Constitutional Court has referred to that explicitly. As to offences referring to home territory being in Germany, extradition is not admissible without interfering with the basic right not to be extradited. Following § 80.1. No. 2 IRG, it is dwelled upon the reference to overseas territory.

   As far as no proper reference to overseas territory can be determined, still German nationals may be extradited for the purpose of prosecution by virtue of § 80.2. IRG, if a back-committal arrangement according to § 80.1. No. 1 IRG has been made, § 80.2. No. 1 IRG, and if the offence does not show some proper reference to the Federal Republic of Germany, § 80.2. No. 2 IRG. The proper reference to the inland is defined by the (not concluding) requirements as set out in § 80.2. IRG. Additionally, § 80.2. No. 3 IRG demands amongst others the appreciation of opposing values of the defendant not to be surrendered.

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72 Cf. OLG Braunschweig NSz-ZRR 2005, S. 18; OLG Stuttgart NJW 2004, S. 3437; OLG means Oberlandesgericht (Regional Appeal Court).
73 GVG (Gerichtsverfassungsgesetz, German Judicial Court’s Act).
74 Article 16 Basic Law.
75 „Ein maßgeblicher Bezug der Tat zum Inland liegt in der Regel vor, wenn die Tathandlung vollständig oder in wesentlichen Teilen im Geltungsbereich dieses Gesetzes begangen wurde und der Erfolg zumindest in wesentlichen Teilen dort eingetreten ist.“ (A proper reference to the inland exists, if the criminal action completely or at least in its substantial parts was committed within the area of application of the inland law and if the effect of that action at least in its substantial parts is been realized there.).
A German national’s extradition solely for the purpose of executing a sentence is admissible by virtue of § 80.3. IRG only, if he agrees after being cautioned and after this consent is taken to the minutes judicially.

n. How many EAWs issued by other MS was executed by your country from the date mentioned in 1g of the questionnaire. In how many cases was the person effectively surrendered?

In 2004, 71 European Arrest Warrants had been addressed to the Federal Republic of Germany. Until nullification of the dated First European Arrest Warrant Act, 23 European Arrest Warrants had been executed.

o. In how many cases did judicial authority in your country refuse to execute the EAW. What were the grounds for non – execution?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

p. For what “crimes” listed in art. 2.2 of the FD were EAWs executed in your country. If possible, please specify by providing exact numbers.

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

q. Was the EAW executed for crimes other than listed in the above mentioned art. 2.2. FD? If so, in how many cases?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

r. Were there cases in your country, in which courts rejected the executing of the EAW because of possible violation of guarantees of the requested person in the country of issuing of the EAW (esp. human rights)?

Not specified.

s. How often does the requested person consent to the “fast track” surrender procedure?

Thereeto, no data is known.

t. In how many cases was the decision on the execution of the EAW subject of the judicial control? What were the results of such control? In how many cases was the decision on the execution of the EAW revoked?

Beyond the problem of constitutional law no specific difficulties that could be owing to the different national systems of criminal justice have been observable so far.

u. What is the average period of time between the execution of the EAW and the effective surrender of the requested person?

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.
6. Others

a. Are there any special difficulties in putting the EAW into practice, resulting from particularities of legal system in your country (esp. common law countries)?

Beyond the problem of constitutional law no specific difficulties that could be owing to the different national systems of criminal justice have been observable so far.