

## First Periodic Country Report: Germany

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### Introduction

According to the most recent data available from the European Commission (2020, p. 9, 14), Germany issues the most European Arrest Warrants (EAWs) per year (3.783 EAWs in 2018), but also effectively surrenders the most persons pursuant to a receipt of an EAW (1.240 persons in 2018). However, it is also Germany where the highest number of EAWs was refused to be executed by Judicial Authority (226 instances in 2018), 76 of those explicitly based on the reference to fundamental rights in Art. 1(3) EAW FD<sup>1</sup> (cf. European Commission, 2020, p. 16, 21). This underlines the importance of German judicial decisions, both by issuing and executing authorities, for the functioning of the EAW system in particular, and for the European Criminal Justice Area and the functioning of the system of mutual recognition in general. However, this quantitative extent also underlines the need to select (only) those decisions for further analysis in this report which are “leading cases” for the implementation of the EAW in Germany and provide insights into the system of mutual recognition, into mutual (dis-)trust, and into the protection of fundamental rights and the rule of law.

A decisive turning point for the implementation of the EAW in Germany was an order by the Second Senate of the **German Federal Constitutional Court** (*Bundesverfassungsgericht*) of 15 December 2015, calling for the non-execution of EAWs if their execution violates Germany's constitutional identity.<sup>2</sup> Shortly thereafter and on request by a German court, the CJEU, in the landmark judgment of 5 April 2016 (*Aranyosi and Căldăraru*), re-interpreted the EAW FD with regard to situations where the execution of EAWs may be postponed or ended altogether.<sup>3</sup> Therefore, this analysis focuses on German jurisprudence since these turning points, and excludes

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<sup>1</sup> European Council (2002), as amended by European Council (2009).

<sup>2</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. On this decision, see, inter alia, Brodowski (2016), Kühne (2016), Meyer (2016a).

<sup>3</sup> CJEU, Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198. On this decision, from a German perspective, see, inter alia, Brodowski (2016); Meyer (2016b); Oehmichen (2017); Reinbacher/Wendel (2016); Satzger (2016).

decisions issued before 15 December 2015. Another landmark order by the Second Senate of the German Federal Constitutional Court was taken recently on 1 December 2020:<sup>4</sup> the execution of EAWs is nowadays subject to judicial review by the constitutional court, on the basis of the EU Charter of Fundamental Rights. This is a decisive shift, as the Court now primarily takes the European fundamental rights standard into account, and only falls back to Germany's constitutional identity as an (largely hypothetical) option of last resort.

Besides such landmark decisions by the Second Senate of the German Federal Constitutional Court, the handful of (final) chamber decisions of the German Federal Constitutional Court, issued upon constitutional complaints regarding EAWs, are selected for further analysis in this report. Such questions of constitutional review are highly relevant in judicial practice, influence the academic discourse and also the political sphere – oftentimes also beyond Germany – and therefore warrant closer analysis.

Decisions on the **execution of EAWs** are taken by the 26 **Higher Regional Courts of Appeals** (*Oberlandesgerichte*) as first and final instance; a review by the German Federal Constitutional Court is considered to be an exceptional appeal and is of limited scope, as it solely relates to the compatibility of the execution with German Basic Law and, since the aforementioned order of 1 December 2020, also the EU Charter of Fundamental Rights. As there is no appeal to the Federal Court of Appeals (*Bundesgerichtshof*) in EAW matters,<sup>5</sup> the practical application of the law may deviate extensively in different German regions. Within the temporal scope of this report, about 230 decisions taken by Higher Regional Courts of Appeals in cases involving EAWs are reported in the leading German database on court decisions, *juris*.<sup>6</sup> These 230 decisions were skimmed to determine their relevance for this report, in particular whether they focused on the protection of fundamental rights and/or the rule of law. It should be noted, however, that these 230 decisions by Higher Regional Courts of Appeals recorded in this database are only a fraction of all decisions taken in EAW cases: Higher Regional Courts of Appeals decide on a case-by-case basis on which cases to publish; sometimes lawyers involved in a case will publish decisions as well.

Yet, this selection by the courts regularly points to decisions of particular importance, such as when new standards are developed, when such standards are applied with regard to a new or changed situation, or when a different interpretation is reached. Therefore, this pre-selection – and the additional filtering of most interesting decisions regarding the scope of this report – should provide for qualitative input in the European discourse on mutual trust and mutual recognition. It must not, however, be confused with a representative quantitative evaluation of German case law on EAW matters. To further focus the report, decisions by German courts which request the CJEU to issue a preliminary ruling under Article 267 TFEU are excluded, as these court decisions – and in particular the binding interpretation of European law by the CJEU – have already reached the level of pan-European discourse. Strikingly, not all national court decisions following a preliminary ruling by the CJEU have been published by the courts, presumably as they followed the guidance provided by the

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<sup>4</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18, ECLI:DE:BVerfG:2020:rs20201201.2bvr184518. On this decision and preceding decisions by the Bundesverfassungsgericht clearing the path to this decision, see Brodowski (2021); Swoboda (2021).

<sup>5</sup> Only rarely, the Federal Court of Appeals is involved to unify the application of the laws between the Higher Regional Courts of Appeals. Within the temporal scope of this report (15 December 2015 to June 2021), no such decision was taken.

<sup>6</sup> *Juris GmbH* (1985–2021).

CJEU. The only notable exceptions<sup>7</sup> are when a German court subsequently requested more guidance by the CJEU (the EAW was then withdrawn and the case closed)<sup>8</sup> and when another German court closely implemented the *ML* judgment.<sup>9</sup>

With regard to **Germany as an issuing state**, decisions were regularly taken by the public prosecutor's offices (*Staatsanwaltschaften*) until the CJEU ruled in May 2019 that they lack the independence necessary to function as issuing authority.<sup>10</sup> As decisions by public prosecutor's offices are usually not published in Germany and were hardly ever challenged independently in German courts, they are not available for academic review. Since the aforementioned landmark judgment of the CJEU, decisions to issue EAWs are generally taken by the Local Courts (*Amtsgerichte*), but also not published and therefore also not available for academic review, with the exception of a handful of decisions where the legal basis to issue EAWs was challenged.

For additional verification, **regular case-law summaries** published in a leading German law journal (Böhm, 2021; Böhm, 2020; Böhm, 2019; Böhm, 2018; Böhm, 2017) and commentaries on the German Act on International Mutual Assistance in Criminal Matters (Grützner et al., 2007–2021; Schomburg and Lagodny, 2020; Ambos, König and Rackow, 2020) – which is the main implementing legislation on the EAW FD – were cross-checked for further relevant court decisions.

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<sup>7</sup> Outside the scope of this report is Bundesgerichtshof (Federal Court of *Appeals*), Order of 4 December 2020, 6 StR 41/20, ECLI:DE:BGH:2020:041120B6STR41.20.0, closely following the guidance of CJEU, Judgment of 24 September 2020, C-195/20 PPU, XC, ECLI:EU:C:2020:749, relating to the specialty rule.

<sup>8</sup> Leading to CJEU, Decision of 15 November 2017, *Aranyosi II*, C-496/16, ECLI:EU:C:2017:866.

<sup>9</sup> Higher Regional Court of Appeals Bremen (*Oberlandesgericht Bremen*), Order of 21 September 2018, 1 Ausl A 21/17, ECLI:DE:OLGHB:2018:0921.1AuslA21.17.01.

<sup>10</sup> CJEU, Judgment of 25 May 2019, *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456. On this decision, from a German perspective, see, inter alia, Ambos (2019), Eisele/Trentmann (2019), Oehmichen/Schmid (2019), Trüg/Ulrich (2019).

## Section I – Issuing of EAWs: rule of law and fundamental rights considerations

It sent out a huge shockwave in Germany when the **CJEU ruled in May 2019 that German public prosecutor's offices** (*Staatsanwaltschaften*) lack the independence necessary to function as issuing authorities in the context of EAWs.<sup>11</sup> In light of this turning point, it is necessary to distinguish the situation pre-May 2019 and the present situation (including recent legislative developments in this field).

**Before the landmark judgment by the CJEU**, German public prosecutor's offices regularly issued EAWs. These public prosecutor's offices are fully bound by law, are staffed with highly trained judicial officers (all of whom have the training and capacity to become judges), and oftentimes consider themselves to be part of the judiciary and not of the executive branch. Most importantly, specific instructions by the executive branch to the public prosecutor's offices, though provided for by law, are the exception. Therefore, hardly anyone doubted that public prosecutor's offices can be considered "issuing authorities" in the meaning of the EAW FD. Furthermore, it was and is commonly accepted that any EAW issued by Germany, same as any request for extradition, requires a national (judicial) arrest warrant as its basis,<sup>12</sup> and that this national arrest warrant can be challenged in court, same as in a purely national situation.<sup>13</sup> The same holds true for an "alert" entered into the Schengen Information System (SIS) by German authorities.<sup>14</sup> In contrast thereto, jurisprudence considered that requests for extradition as well as EAWs are **not challengeable in court**, not even after surrender, as they lack immediate legal effects on the person sought.<sup>15</sup> Therefore, the issuance of EAWs by public prosecutor's offices as issuing authority, and the *specific* proportionality of EAWs issued in Germany had not been challenged successfully in court, even though (albeit more recent) jurisprudence of the CJEU states that this proportionality test may be stricter than what is required in a purely national situation.<sup>16</sup> Instead, it depended on the awareness of judges, prosecutors and in particular lawyers involved in specific cases to make recourse to alternatives to EAWs and to avoid pre-trial detention if alternative measures sufficed to secure the presence of the suspect or accused person in court, and whether the national arrest warrant can be lifted.<sup>17</sup>

Based on this prevailing view in German legal practice, it caused much surprise when the **Irish Supreme Court** and the **Irish High Court** challenged the capacity of German public prosecutor's offices to issue EAWs and requested the CJEU to rule on this matter; it caused even more surprise when the CJEU followed Advocate General M. Campos Sánchez-Bordona's opinion and judged that German public prosecutor's offices are not sufficiently independent to serve as "issuing authorities" in the context of EAWs.<sup>18</sup> This ruling has been

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<sup>11</sup> CJEU, Judgment of 25 May 2019, *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456. On this decision, from a German perspective, see, inter alia, Ambos (2019), Eisele/Trentmann (2019), Oehmichen/Schmid (2019), Trüg/Ulrich (2019).

<sup>12</sup> Just see Burchard (2019), pp. 91 ff.

<sup>13</sup> Just see Vogel/Burchard (2021), mn. 295; Rackow (2020), part 1 mn. 118.

<sup>14</sup> Vogel/Burchard (2020), mn. 260; Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 16 April 2009, 2 VAs 3/09, ECLI:DE:OLGCE:2009:0416.2VAS3.09.OA.

<sup>15</sup> Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 16 April 2009, 2 VAs 3/09, ECLI:DE:OLGCE:2009:0416.2VAS3.09.OA.

<sup>16</sup> See, for instance, CJEU, Judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 64.

<sup>17</sup> As an example, see Higher Regional Court of Appeals Berlin (*Kammergericht Berlin*), Order of 24 March 2010, 4 Ws 37/10, ECLI:DE:KG:2010:0324.4WS37.10.OA. Such decisions on arrest warrants are hardly ever published, and therefore generally not available for academic review.

<sup>18</sup> See supra note 11.

accepted in German legal practice (though not all accept its reasoning), but it caused a **dispute of who instead may issue EAWs**. With very few and early court decisions (but more scholars and defense counsel) pointing to the contrary,<sup>19</sup> **Local Courts** (*Amtsgerichte*) and other courts of first instance are now generally considered to be competent to issue EAWs based on generic legal basis in the German Code of Criminal Procedure and the German Act on International Mutual Assistance in Criminal Matters.<sup>20</sup> While this interpretation was upheld by the German Federal Constitutional Court,<sup>21</sup> it lacks legal clarity, also on the consequences for judicial review. Notably, the ability to challenge the issuing of an EAW, before and/or after surrender, in court, is argued for in literature,<sup>22</sup> but no (published) case law exists so far (but only for the contrary case where the local court held itself incompetent to issue an EAW<sup>23</sup>). At least one of the landmark decisions by the Higher Regional Courts of Appeals which ruled on the competence of Local Courts to issue EAWs also points out the **specific proportionality requirement** when issuing an EAW, taking into account any alternatives to pre-trial detention.<sup>24</sup> Although the German Federal Ministry of Justice and for Consumer Protection published an early **draft bill** to strengthen the independence of public prosecutors when issuing EAWs – and thereby transferring the power to issue EAWs back to the public prosecutor's offices –,<sup>25</sup> that bill has not yet been introduced into the German legislature; therefore, a reform is only likely after the national election scheduled for September 2021. In a similar vein, a suggestion to include a (rebuttable) presumption that an EAW is to be issued if a national arrest warrant exists and the formal requirements for an EAW are met,<sup>26</sup> did not gain track in the legislature such a presumption would likely undermine the specific proportionality requirement as set out in the jurisprudence of the CJEU.

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<sup>19</sup> See, for instance, Local Court Dortmund (*Amtsgericht Dortmund*), Order of 9 July 2019, 730 AR 11/19, ECLI:DE:AGDO:2019:0709.730AR11.19.00.

<sup>20</sup> Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 1 August 2019, III-2 Ws 96/19, ECLI:DE:OLGHAM:2019:0801.2WS96.19.00; Higher Regional Court of Appeals Frankfurt (*Oberlandesgericht Frankfurt*), Order of 12 September 2019, 2 Ws 60/19, ECLI:DE:OLGHE:2019:0912.2WS60.19.00; Higher Regional Court of Appeals Frankfurt (*Oberlandesgericht Frankfurt*), Order of 8 November 2019, 2 Ws 78/19, ECLI:DE:OLGHE:2019:1108.2WS78.19.00;

Higher Regional Court of Appeals Frankfurt (*Oberlandesgericht Frankfurt*), Order of 31 January 2020, 2 Ws 96/19, ECLI:DE:OLGHE:2020:0131.2WS96.19.00; Higher Regional Court of Appeals Schleswig-Holstein (*Schleswig-Holsteinisches Oberlandesgericht*), Order of 6 February 2020, 2 Ws 13/20, ECLI:DE:OLGSH:2020:0206.2WS13.20.00.

<sup>21</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 28 September 2020, 2 BvR 1435/20, ECLI:DE:BVerfG:2020:rk20200928.2bvr143520.

<sup>22</sup> See, in particular, Oehmichen (2019).

<sup>23</sup> See, for instance, Regional Court Dortmund (*Landgericht Dortmund*), Order of 12 June 2019, 34 Qs 28/19, ECLI:DE:LGDO:2019:0612.34QS28.19.00.

<sup>24</sup> Higher Regional Court of Appeals Schleswig-Holstein (*Schleswig-Holsteinisches Oberlandesgericht*), Order of 6 February 2020, 2 Ws 13/20, ECLI:DE:OLGSH:2020:0206.2WS13.20.00.

<sup>25</sup> Bundesministerium der Justiz und für Verbraucherschutz (2021).

<sup>26</sup> Cf. Deutscher Anwaltverein (2021).

## Section II – The execution of EAWs: national judicial authorities as monitors of trust

### II.1. Constitutional control

**Judicial review by the German Federal Constitutional Court** on the basis of Germany's constitution, the Basic Law, is the most prominent form of asserting the constitutionality and adherence to human and fundamental rights:

#### *II.1.1. Constitutional identity as a backstop*

As already set out in the Introduction, the German Federal Constitutional Court highlighted in 2015 that Germany's **constitutional identity** must not be violated when executing an EAW. Therefore, it deducted a requirement, stemming from the protection of human dignity in general and the principle of individual guilt in particular, that the “requested person who has been sentenced in his or her absence and who has not been informed about the trial and its conclusion will at least be provided with the real opportunity to defend him- or herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate him or her and by having them reviewed”.<sup>27</sup> Although the standard of the EAW FD for **in absentia proceedings** had actually not been met in the case at stake (issuing state: Italy), this landmark decision led to significant focus in EAW proceedings on potential violations of the German constitutional identity as a ground for non-execution of EAWs. Strikingly, the CJEU was not involved to rule on this or in one of the subsequent cases: In a chamber decision issued some months later, the German Federal Constitutional Court distinguished a stronger protection of the **right to remain silence** under German constitutional law, and the core of the right to remain silence which is part of the protection of the human dignity and therefore part of Germany's constitutional identity. As UK criminal procedure does not violate that core, as remaining silent may be detrimental to the suspect, but cannot be the sole ground for a conviction. Therefore, the execution of an EAW was not stopped on grounds of Germany's constitutional identity.<sup>28</sup> In yet another case relating to prison conditions, the German Federal Constitutional Court did not rule on the merits whether the prison conditions awaiting the requested person in the issuing state (here: Hungary) and the assistance Germany would provide by surrendering them would violate Germany's constitutional identity, but ruled that the court of first instance had failed to properly assess the risk of inhumane prison conditions, therefore thwarting their constitutional **right to an effective legal remedy**.<sup>29</sup>

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<sup>27</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. On this decision, see, inter alia, Brodowski (2016), Kühne (2016), Meyer (2016a).

<sup>28</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 6 September 2016, 2 BvR 890/16, ECLI:DE:BVerfG:2016:rk20160906.2bvr089016. On this decision, see, inter alia, Esser (2017); Gärditz (2016).

<sup>29</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 16 August 2018, 2 BvR 237/18, ECLI:DE:BVerfG:2018:rk20180816.2bvr023718.

### *II.1.2. Safeguarding the involvement of the CJEU*

Almost exactly two years later, the German Federal Constitutional Court strengthened the **role of the CJEU** in EAW proceedings: German constitutional law puts high relevance that the **jurisdiction of lawful courts** is upheld. Therefore, unreasonable and evidently wrong decisions to *not* request a preliminary ruling from the CJEU violate (also) Germany's constitution, and are open to review by the German Federal Constitutional Court. In the specific case at hand, a court had failed to request a preliminary ruling from the CJEU to decide on the **specific standard of prison conditions** to be guaranteed by the issuing state (here: Romania), but had ordered to execute the EAW.<sup>30</sup> Subsequently, the court whose decision was overturned issued such a request, resulting in the *Dorobantu* judgment of the CJEU.<sup>31</sup> Based on the same standard that a preliminary ruling proceeding should have been initiated, another EAW-related court decision was overturned by the German Federal Constitutional Court.<sup>32</sup>

### *II.1.3. Application of the Charter of Fundamental Rights*

In December 2020, the Second Senate of the German Federal Constitutional Court – competent in constitutional review of EAW matters – decided that it will **apply EU fundamental rights**, and in particular the EU Charter of Fundamental Rights, when conducting a constitutional review of lower court decisions in EAW matters. It further held that only in case the EU fundamental rights standard is deficient (which the court considers to be unlikely, at least in relation to the standard of minimum prison conditions), the execution of an EAW may (still) be tested against Germany's constitutional identity. In the interpretation of EU fundamental rights, the Second Senate generally **defers to judgments by the CJEU**, but also points out the relevance of the **jurisprudence by the ECtHR and the constitutional and supreme courts of the Member States**. In the case at stake, it applied the standards set out by CJEU and ECtHR case-law on prison conditions in EAW matters and the requirements to assess the concrete risk of inhumane prison conditions in the issuing state (here: in Romania) and held that the lower courts had failed to properly assess that risk (the determination of such factual issues is a task vested in lower courts, not in the German Federal Constitutional Court).<sup>33</sup> Subsequently, a chamber decision applied this standard in relation to another EAW by Romania.<sup>34</sup> Another, more recent decision relates to an EAW from Latvia: the lower court's decision to execute the EAW was overturned as it had failed to take the **prison conditions in all detention facilities** into account where the requested person is likely to be imprisoned (following the CJEU's standard in *Dorobantu*<sup>35</sup>), and not properly assessed the reliability of an assurance given by Lithuanian authorities.<sup>36</sup>

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<sup>30</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 19 December 2017, 2 BvR 424/17, ECLI:DE:BVerfG:2017:rs20171219.2bvr042417.

<sup>31</sup> CJEU, Judgment of 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019:857.

<sup>32</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 9 May 2018, 2 BvR 37/18, ECLI:DE:BVerfG:2018:rk20180112.2bvr003718.

<sup>33</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18, ECLI:DE:BVerfG:2020:rs20201201.2bvr184518. On this decision and preceding decisions by the Bundesverfassungsgericht clearing the path to this decision, see Brodowski (2021); Swoboda (2021).

<sup>34</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 14 January 2021, 2 BvR 1285/20, ECLI:DE:BVerfG:2021:rk20210114.2bvr128520.

<sup>35</sup> CJEU, Judgment of 15 October 2019, C-128/18, *Dorobantu*, ECLI:EU:C:2019:857.

<sup>36</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 27 April 2021, 2 BvR 156/21, ECLI:DE:BVerfG:2021:rk20210427.2bvr015621.

## II.2. Control by Higher Regional Courts of Appeals

In relation to “regular” **decisions on the execution of EAWs**, taken by Higher Regional Courts of Appeals as first and final instance, a number of themes in relation to safeguarding the fundamental rights of the requested person can be discerned:

### II.2.1. Reliability of assurances

Most closely focusing on the theme of “**mutual trust**” is a decision questioning the **reliability of assurances** given by Hungarian authorities that the requested person, *ML*, will be kept imprisoned in accordance with European minimum prison condition standards. *ML* had already been surrendered previously to Hungary, following a CJEU judgement,<sup>37</sup> and based on an assurance by Hungarian authorities on the detention facilities he was to be imprisoned in and the prison conditions that were to be upheld in his case. In the present case, the court determined that the previous assurance had been violated, the person had been kept in a different, sub-standard detention facility than the one assured by Hungarian authorities, and Hungarian authorities, though asked by German authorities, have failed to explain why that assurance seemingly was violated. Therefore, it held that the basis for mutual recognition – mutual trust – was broken by Hungarian authorities, in particular in relation to *ML*, who was requested by Hungarian authorities by means of a new EAW. Therefore, the court held that a new assurance by Hungarian authorities that *ML* will be kept in acceptable prison conditions cannot be relied upon. Furthermore, it held, applying the CJEU jurisprudence,<sup>38</sup> that a real risk of inhumane prison conditions continues to exist in relation to *ML*, and concluded that the EAW cannot be executed in this situation.<sup>39</sup>

### II.2.2. Prison conditions

The leading topic in published court decisions in EAW matters are the **prison conditions** requested persons have to expect when being surrendered to the issuing country. Since the landmark CJEU decisions on this topic, German courts tend to apply the required two-step test which is, at least nowadays, also subject to review by the German Federal Constitutional Court (see supra **1.3.**). In particular, German courts did not see a need for further analysis of prison conditions in Poland (referring to a lack of any indications of insufficient prison conditions),<sup>40</sup> but held that additional information may be required from Belgium,<sup>41</sup> that prison conditions had improved sufficiently in Lithuania,<sup>42</sup> and that assurances given by Bulgaria are sufficient to mitigate any real

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<sup>37</sup> CJEU, Judgment of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589.

<sup>38</sup> CJEU, Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198; CJEU, Judgment of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589; CJEU, Judgment of 15 October 2019, C-128/18, *Dorobantu*, ECLI:EU:C:2019:857.

<sup>39</sup> Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 16 March 2020, 1 Ausl A 78/19, ECLI:DE:OLGHB:2020:0316.1AUSLA78.19.00.

<sup>40</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 3 April 2020, (4) 151 AuslA 201/19 (234/19), ECLI:DE:KG:2020:0403.4AUSLA234.19.00; Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 22 January 2020, 1 AR 29/19, ECLI:DE:OLGGB:2020:0122.1AR29.19.00.

<sup>41</sup> Higher Regional Court of Appeals Cologne (*Oberlandesgericht Köln*), Order of 20 March 2018, 6 AuslA 203/17, ECLI:DE:OLGK:2018:0320.6AUSLA203.17.14.00.

<sup>42</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 22 August 2017, (4) 151 AuslA 78/17 (95/17), ECLI:DE:KG:2017:0822.4.151AUSLA78.17.9.0A, but see also Higher Regional Court of Appeals Saarbrücken (*Saarländisches Oberlandesgericht Saarbrücken*), Order of 5 October 2016, OLG Ausl 9/2016 (47/16) beforehand.

risk.<sup>43</sup> However, the further execution of EAWs issued by Greek<sup>44</sup> and in particular Romanian<sup>45</sup> authorities has been stopped in a number of EAW cases. In the latter case, diverting viewpoints emerged on whether the prison conditions in facilities the requested person may be transferred to subsequently must be taken into account as well;<sup>46</sup> a too restrictive view by lower courts was recently overturned by the German Federal Constitutional Court (see supra 1.3.). Concerning Hungary, the trust vested in assurances by some courts<sup>47</sup> was breached (see supra 2.1.).

### II.2.3. Rule of law and independence of the judiciary

In relation to concerns regarding the **rule of law** and the **independence of the judiciary** in the issuing state, a number of published court decisions discuss the situation with regard to EAWs issued by Polish authorities, generally citing the CJEU jurisprudence in *LM*<sup>48</sup> as the standard to apply. In cases concerning menial or ordinary crimes, or where the EAW related to the execution of a custodial sentence, courts did not find an indication of a specific risk of political interference in the case at stake.<sup>49</sup> Only in one published case, the concern of disciplinary proceedings, conducted by a panel lacking independence and concerning the evaluation of

<sup>43</sup> Higher Regional Court of Appeals Nuremberg (*Oberlandesgericht Nürnberg*), Order of 14 March 2018, 1 Ausl AR 44/17, ECLI:DE:OLGNUER:2018:0314.1AuslAR44.17.00; Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 14 July 2016, 2 Ausl 93/16, ECLI:DE:OLGHAM:2016:0714.2AUSL93.16.00; Higher Regional Court of Appeals Stuttgart (*Oberlandesgericht Stuttgart*), Order of 8 March 2016, 1 Ausl 8/16, ECLI:DE:OLGSTUT:2016:0308.1AUSL8.16.0A; Higher Regional Court of Appeals Munich (*Oberlandesgericht München*), Order of 8 March 2016, 1 AR 2/16, ECLI:DE:OLGMUEN:2016:0308.1AR2.16.0A.

<sup>44</sup> Higher Regional Court of Appeals Munich (*Oberlandesgericht München*), Order of 9 January 2018, 1 AR 319/17; Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 30 November 2017, III-2 Ausl 81/17, ECLI:DE:OLGHAM:2017:1130.2AUSL81.17.00; Higher Regional Court of Appeals Stuttgart (*Oberlandesgericht Stuttgart*), Order of 8 June 2016, 1 Ausl 321/15, ECLI:DE:OLGSTUT:2016:0608.1AUSL321.15.0A.

<sup>45</sup> Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 21 May 2019, 2 AR 8/19, ECLI:DE:OLGGBB:2019:0521.2AR8.19.00; Higher Regional Court of Appeals Nuremberg (*Oberlandesgericht Nürnberg*), Order of 5 July 2017, 2 Ausl AR 14/17, ECLI:DE:OLGNUER:2017:0705.2AUSLAR14.17.0A; Higher Regional Court of Appeals Cologne (*Oberlandesgericht Köln*), Order of 27 June 2017, 6 AuslA 27/17 - 45, ECLI:DE:OLGK:2017:0627.AUSLA27.17.00; Higher Regional Court of Appeals Munich (*Oberlandesgericht München*), Order of 13 April 2017, 1 AR 126/17; Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 31 March 2017, 2 AR (Ausl) 15/17, ECLI:DE:OLGCE:2017:0331.2AR.AUSL15.17.0A; Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 2 March 2017, 1 AR (Ausl) 99/16, ECLI:DE:OLGCE:2017:0302.1AR.AUSL99.16.0A; Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 23 August 2017, III-2 Ausl 125/16, ECLI:DE:OLGHAM:2016:0823.2AUSL125.16.00; Higher Regional Court of Appeals Thuringia (*Thüringer Oberlandesgericht*), Order of 14 July 2016, Ausl AR 36/16; Higher Regional Court of Appeals Stuttgart (*Oberlandesgericht Stuttgart*), Order of 17 June 2016, 1 Ausl 6/16, ECLI:DE:OLGSTUT:2016:0617.1AUSL6.16.0A; Higher Regional Court of Appeals Stuttgart (*Oberlandesgericht Stuttgart*), Order of 29 April 2016, 1 Ausl 326/15, ECLI:DE:OLGSTUT:2016:0429.1AUSL326.15.0A.

<sup>46</sup> Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 21 September 2018, 1 Ausl A 21/17, ECLI:DE:OLGHB:2018:0921.1AuslA21.17.01; but see also Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 31 January 2018, Ausl 301 AR 54/17, ECLI:DE:OLGKARL:2018:0131.AUSL301AR54.17.00.

<sup>47</sup> Higher Regional Court of Appeals Munich (*Oberlandesgericht München*), Order of 16 January 2019, 1 AR 442/18; Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 5 September 2018, 2 AR (Ausl) 39/18, ECLI:DE:OLGCE:2018:0905.2AR.AUSL39.18.00; Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 24 August 2018, (4) 151 AuslA 185/17 (95/17), ECLI:DE:KG:2018:0824.4AUSLA228.17.00.

<sup>48</sup> CJEU, Judgment of 25 July 2018, C-216/18 PPU, *LM*, ECLI:EU:C:2018:586.

<sup>49</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 3 April 2020, (4) 151 AuslA 201/19 (234/19), ECLI:DE:KG:2020:0403.4AUSLA234.19.00; Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 15 November 2019, (4) 151 AuslA 167/19 (185/19), ECLI:DE:KG:2019:1115.4AUSLA185.19.00; Higher Regional Court of Appeals Düsseldorf (*Oberlandesgericht Düsseldorf*), Order of 14 June 2019, 4 AR 38/19, ECLI:DE:OLGD:2019:0614.4AR38.19.00; Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 7 January 2019, Ausl 301 AR 95/18, ECLI:DE:OLGKARL:2019:0107.AUSL301AR95.18.00; Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 7 September 2018, 1 Ausl A 31/18, ECLI:DE:OLGHB:2018:0907.1AuslA31.18.00.

evidence (and thus a task at the core of judicial independence) lead to the court asking for further information from Polish authorities; the outcome of that EAW is unknown.<sup>50</sup> No real risk of political persecution, political interference or a lack of judicial independence was seen – before the CJEU set the standard in *LM* – in the famous Puigdemont case<sup>51</sup> and in another case relating to a suspected member of the ETA.<sup>52</sup>

#### *II.2.4. Independence of the issuing authority*

The shockwaves of the CJEU judgments on issuing authorities led German Higher Regional Courts of Appeals to consider the question whether EAWs from **Belgium**,<sup>53</sup> **Lithuania**<sup>54</sup> and **Italy**<sup>55</sup> were issued by a sufficiently independent “issuing authority”. In all these decisions, the courts considered it to be very clear that the requirements stemming from the EAW FD, as interpreted by the CJEU, were met. On this basis, they did not initiate a preliminary ruling proceeding in accordance with Art. 267 TFEU. However, only in the case of Lithuania, the court was able to point to a specific CJEU judgement on the matter.<sup>56</sup>

#### *II.2.5. Proportionality of issuing an EAW*

In relation to the **proportionality of issuing an EAW** and the “case-readiness”, two orders by the Higher Regional Court of Appeals in Karlsruhe stand out: In 2016 – that is, before the EIO Directive (European Parliament and European Council, 2014) had to be implemented –, it considered that it may suffice that an EAW is “only” issued to secure the **presence of a suspect for questioning**. However, it also held that the proportionality requirement to issue an EAW is not met if the residence of the suspect is known and if there are no indications that the suspect will not appear for questioning upon being summoned. As the suspect in question had actually expressed his willingness to be questioned, he was released from detention and, de facto, the execution of the EAW was halted.<sup>57</sup> In another case decided in 2017, the EAW in question related to the execution of a **remaining custodial sentence of 123 days** in Spain. Owing to the timespan required for the execution of the EAW – the person sought had already spent around two months in extradition detention in Germany –, the court considered it likely that the person sought would only spend around a month in Spanish prisons, and that further detention and thus the further execution of the EAW would be disproportionate.<sup>58</sup> In a similar vein, a

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<sup>50</sup> Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 17 February 2020, Ausl 301 AR 156/19, ECLI:DE:OLGKARL:2020:0217.AUSL301AR156.19.00.

<sup>51</sup> Higher Regional Court of Appeals Schleswig-Holstein (*Schleswig-Holsteinisches Oberlandesgericht*), Order of 12 July 2018 - 1 Ausl (A) 18/18 (20/18), ECLI:DE:OLGSH:2018:0712.1AUSL.A18.18.20.1.00; Higher Regional Court of Appeals Schleswig-Holstein (*Schleswig-Holsteinisches Oberlandesgericht*), Order of 5 April 2018 - 1 Ausl (A) 18/18 (20/18), ECLI:DE:OLGSH:2018:0405.1AUSL.A18.18.20.1.00.

<sup>52</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 16 November 2017, (4) 151 AuslA 136/17 (167/17), ECLI:DE:KG:2017:1116.4.167.17.00.

<sup>53</sup> Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 6 June 2019, 2 AR (Ausl) 43/19, ECLI:DE:OLGCE:2019:0606.2AR.AUSL43.19.00.

<sup>54</sup> Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 5 February 2020, 1 AR 3/20, ECLI:DE:OLGBB:2020:0205.1AR3.20.00.

<sup>55</sup> Higher Regional Court of Appeals Nuremberg (*Oberlandesgericht Nürnberg*), Order of 27 February 2020, Ausl AR 16-17/20, ECLI:DE:OLGNUER:2020:0227.AuslAR16.17.20.00.

<sup>56</sup> CJEU, Judgment of 25 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457.

<sup>57</sup> Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 21 December 2016, 1 AK 119/16, ECLI:DE:OLGKARL:2016:1221.1AK119.16.0A.

<sup>58</sup> Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 4 August 2017, Ausl 301 AR 94/17, ECLI:DE:OLGKARL:2017:0804.AUSL301AR94.17.0A.

chamber of the German Federal Constitutional Court held that the mere ground that a requested person does not consent with their surrender does not suffice to put them into extradition detention, also pointing to the proportionality aspect to EAWs.<sup>59</sup>

### *II.2.6. Rights of suspects and accused persons*

Concerning **specific rights of suspects and accused persons** in the issuing state, three aspects have been highlighted by German courts, although not backed by CJEU jurisprudence:

#### *II.2.6.1.*

The procedural **right of access to the case file** has been discussed in relation to Poland in cases decided before the CJEU downplayed the need for access to the case file and access to an effective remedy in the issuing state already before the surrender (although only referring to the EAW, not to the underlying national arrest warrant).<sup>60</sup> In both cases, any access to the case file in the issuing state had been refused to the suspect's lawyers without any comprehensible reasoning. The Higher Regional Court of Appeals Karlsruhe, referring also to Directive 2012/13/EU (European Parliament and European Council, 2012) and jurisprudence by the ECtHR<sup>61</sup>, is concerned regarding the lack of effective remedy to refute the suspicion in the issuing state, and also regarding the fairness of any subsequent trial.<sup>62</sup> That decision highlights that there is, at least from a German perspective, a need for an effective remedy to challenge the detention and deprivation of liberty already in the days and weeks when the requested person is kept in detention in the executing state, also insofar the person seeks to challenge the substantive grounds for their detention.

#### *II.2.6.2.*

Following the decision by the German Federal Constitutional Court on identity control against EAWs issued after **in absentia proceedings** (see supra 1.1.), one lower court refused extradition to Italy;<sup>63</sup> soon afterwards, however, another court considered an assurance given by Italian authorities relating to a re-trial sufficient.<sup>64</sup> While a Dutch in-absentia proceeding did not raise concerns,<sup>65</sup> courts halted the execution of EAWs if there were insufficient assurances that a re-trial can occur on the requested person's request (in relation to

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<sup>59</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Chamber Order of 14 December 2017, 2 BvR 2655/17, ECLI:DE:BVerfG:2018:rk20180816.2bvr023718.

<sup>60</sup> CJEU, Judgment of 28 January 2021, C-649/19, *IR*, ECLI:EU:C:2021:75, in particular para. 79.

<sup>61</sup> European Court of Human Rights, Decision of 10 December 2013, 53792/09 and 11320/13, *Junior*.

<sup>62</sup> Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 27 November 2020, Ausl 301 AR 104/19, ECLI:DE:OLGKARL:2020:1127.AUSL301AR104.19.00; Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 6 October 2020, Ausl 301 AR 34/20, ECLI:DE:OLGKARL:2020:1006.AUSL301AR34.20.00.

<sup>63</sup> Higher Regional Court of Appeals Düsseldorf (*Oberlandesgericht Düsseldorf*), Order of 2 September 2016, 3 Ausl 108/14, ECLI:DE:OLGD:2016:0902.3AUSL108.14.00.

<sup>64</sup> Higher Regional Court of Appeals Frankfurt (*Oberlandesgericht Frankfurt*), Order of 14 November 2017, 2 Ausl A 17/17, ECLI:DE:OLGHE:2017:1114.2AUSL.A17.17.00.

<sup>65</sup> Higher Regional Court of Appeals Munich (*Oberlandesgericht München*), Order of 3 March 2016, 1 AR 5/16, ECLI:DE:OLGMUEN:2016:0303.1AR5.16.0A.

Bulgaria,<sup>66</sup> Romania<sup>67</sup> and Poland<sup>68</sup>) or otherwise the requirements set out in the EAW FD concerning surrender in spite of a conviction *in absentia* were not met (in relation to Croatia<sup>69</sup>).

### II.2.6.3.

A number of decisions, by German courts acting as executing authorities, discuss whether the **severity of the sentence** in the issuing state is disproportionate to the offence (cf. Article 49(3) Charter of Fundamental Rights). A Greek sentence for migrant smuggling of (almost) 25 years imprisonment –subject to shortening to 20 years according to Article 5(1) EAW FD – and 2.300.000 Euro was considered to be disproportionate and unbearably harsh, leading to the non-execution of an EAW.<sup>70</sup> In other instances, courts refrained from interfering with sentencing levels in other EU member states, even if such sentences are harsher than they would be in Germany, and pointed out that the limit to surrender are unbearably harsh sanctions.<sup>71</sup> However, in cases of lifetime imprisonment, courts paid attention that the requested persons have a reasonable expectation to have their **continuing detention after 20 years imprisonment reviewed**, as required by Article 5(1) EAW FD. Courts considered that requirement to be met in Latvia<sup>72</sup> but not in Italy<sup>73</sup>.

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<sup>66</sup> Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 14 July 2016, 2 Ausl 93/16, ECLI:DE:OLGHAM:2016:0714.2AUSL93.16.00.

<sup>67</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 10 July 2019, (4) 151 AuslA 167/18 (178/18), ECLI:DE:KG:2019:0710.4AUSLA178.18.00; Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 8 July 2019, 2 AR 6/19, ECLI:DE:OLGGBB:2019:0708.2AR6.29.00; Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 21 April 2017, Ausl 301 AR 35/17, ECLI:DE:OLGKARL:2017:0421.AUSL301AR35.17.0A.

<sup>68</sup> Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 7 April 2021, 1 AR 7/21 (S), ECLI:DE:OLGGBB:2021:0407.1AR7.21S.00; Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 25 November 2020, 2 AR 22/20, ECLI:DE:OLGGBB:2020:1125.1AR22.20.00; Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 18 June 2020, 1 Ausl A 5/20, ECLI:DE:OLGHB:2020:0618.1AUSLA5.20.00; Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 5 February 2020, 1 AR 29/19, ECLI:DE:OLGGBB:2020:0205.1AR29.19.00; Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 7 September 2018, 1 Ausl A 31/18, ECLI:DE:OLGHB:2018:0907.1AuslA31.18.00; but see also Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 14 November 2017, (4) 151 AuslA 140/17 (200/17), ECLI:DE:KG:2017:1114.4.200.17.00 concerning the question whether a proceeding according to § 355 of the Polish Code of Criminal Procedure has to be taken into account.

<sup>69</sup> Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 9 November 2018, Ausl 301 AR 101/18, ECLI:DE:OLGKARL:2018:1109.AUSL301AR101.18.00.

<sup>70</sup> Higher Regional Court of Appeals Zweibrücken (*Oberlandesgericht Zweibrücken*), Order of 22 April 2021, 1 AR 12/20 A, ECLI:DE:POLGZWE:2021:0422.1AR12.20A.00.

<sup>71</sup> Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 20 December 2019, 1 AR 26/19, ECLI:DE:OLGGBB:2019:1220.1AR26.19.00; Higher Regional Court of Appeals Karlsruhe (*Oberlandesgericht Karlsruhe*), Order of 31 October 2019, Ausl 301 AR 81/19, ECLI:DE:OLGKARL:2019:1031.AUSL301AR81.19.00.

<sup>72</sup> Higher Regional Court of Appeals Berlin (*Kammergericht*), Order of 6 July 2016, (4) 151 AuslA 198/15 (54/16), ECLI:DE:KG:2016:0706.4.151AUSLA198.15.0A.

<sup>73</sup> Higher Regional Court of Appeals Koblenz (*Oberlandesgericht Koblenz*), Order of 15 July 2019, 1 AR 95/16 A.

## Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Germany

In the recent five years, there has been a significant shift in how cooperation through the EAW is facilitated in Germany, and more importantly, on how human and fundamental rights are protected in EAW proceedings:

Back in 2015, the **German Federal Constitutional Court** highlighted Germany's constitutional identity as a backstop to extradition and surrender, and that human dignity and the core of procedural rights in criminal procedure may form a ground to refuse cooperation with other EU member states.<sup>74</sup> Then, in an interlude in 2017, the same court highlighted the importance that the CJEU is involved in preliminary ruling proceedings whenever clearly warranted by Art. 267 TFEU.<sup>75</sup> Since December 2020, the German Federal Constitutional Court takes a far more European approach and applies, when conducting its constitutional review of lower court's decision, EU fundamental rights, as interpreted by the CJEU, the ECtHR, but also by the constitutional and supreme courts of all the Member States. With this approach, the German Federal Constitutional Court highlighted human and fundamental rights issues with regard to in absentia proceedings and in particular prison conditions that requested persons may face upon being surrendered to other EU member states. While this new jurisprudence by the German Federal Constitutional Court is on its face friendly towards the CJEU, it still considers Germany's constitutional identity as a backstop. Moreover, the German Federal Constitutional Court clearly wishes to be involved in developing and shaping the European human and fundamental rights standards, in EAW proceedings and beyond.<sup>76</sup> And despite a number of high-profile decisions by the German Federal Constitutional Court pointing out limitations to EAW proceedings, it should not be overlooked that the Court only intervened in a handful of cases.

The **jurisprudence of the Higher Regional Courts of Appeal** deciding, in first and final instance, on EAW matters paints a more differentiated picture, which additionally is blurred by the aspect that far from all decisions are published and therefore easily accessible to academic review.

According to these published decisions, courts pay much attention to **prison conditions**, in particular in Romania, Bulgaria and Hungary, but also a handful of other Member States, and whether assurances given by these Member States suffice to mitigate any real risk. However, in at least a handful of cases the standards applied seems to have been too lenient, causing the German Federal Constitutional Court to step in. Most strikingly is perhaps a recent decision by the Higher Regional Court of Appeals Bremen which states that

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<sup>74</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. On this decision, see, inter alia, Brodowski (2016), Kühne (2016), Meyer (2016a).

<sup>75</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 19 December 2017, 2 BvR 424/17, ECLI:DE:BVerfG:2017:rs20171219.2bvr042417.

<sup>76</sup> Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18, ECLI:DE:BVerfG:2020:rs20201201.2bvr184518. On this decision and preceding decisions by the Bundesverfassungsgericht clearing the path to this decision, see Brodowski (2021); Swoboda (2021).

assurances given by Hungarian authorities were broken and have invalidated the trust in Hungarian authorities and the assurances they have expressed in relation to a new EAW against the same person.<sup>77</sup>

German courts have been far more hesitant to refuse surrender owing to **generic rule of law concerns**, in particular relating to the independence of the judiciary. In particular, the second step that also the requested persons themselves, in their specific case, must face a real risk of a violation of their human and fundamental rights (such as the right to a fair trial), turns out to be very difficult to overcome. The distinct but related issue whether the issuing authority is sufficiently independent did not lead to significant jurisprudence in Germany as the executing state (see **supra Section II, 2.4.**).

A number of court decisions point to the **proportionality of issuing an EAW**, in particular relating to an EAW issued for questioning a suspect, and an EAW issued for the execution of a custodial sentence where the person requested would only spend around a month in detention in the issuing state (see **supra Section II, 2.5.**).

Far more EAWs were refused to be executed for concerns relating to **specific rights of suspects and accused persons**, in particular in relation to proceedings *in absentia*, and whether the limitations and, if applicable, the guarantee to a re-trial are met (see **supra Section II, 2.6.2.**). It is likely that this focus was influenced by the German Federal Constitutional Court decision on EAWs relating to *in absentia*-convictions, same as the focus on prison conditions was influenced by CJEU jurisprudence highlighting that issue upon preliminary ruling requests stemming from Germany. That, however, may point to a (too) specific focus where *other* problematic instances of misapplication of EU fundamental rights and rule of law violations may be overlooked. Yet, a handful of court decisions questioning complete lack of access to the case file in the issuing state – a necessity to effectively challenge the arrest warrant in the issuing state – (**supra Section II, 2.6.1.**) and on the severity of the sentence and protections in case of life-long or long-term imprisonment (**supra Section II, 2.6.3.**) show that at least in *some* problematic cases, courts are willing to intervene to protect human rights in cases of evident violations of rights of suspects, accused and convicted persons.

Concerning **outgoing EAWs**, the CJEU judgment that German public prosecutor's offices lack independence to issue EAWs came to much surprise (**supra Section I**). In its aftermath, a debate was stirred – and ultimately resolved by a chamber decision by the German Federal Constitutional Court – on whether there is a sufficient legal basis for courts to issue EAWs. Even though European standards call for a specific proportionality test when issuing EAWs, this question has not led to distinct case-law, leading to the assumption that suspects and accused persons are more focused on challenging the national arrest warrant underlying the EAW than only the EAW itself.

Overall, German courts seem to apply the mutual recognition principle stringently. Compared to the overall number of EAWs executed by Germany, non-execution based on fundamental rights concerns seems to be, at least according to the published cases, the rare exception. Generally speaking, courts follow CJEU jurisprudence – such as on prison standards – or (at least) apply EU fundamental rights standards (but not national human rights standards) in these rare cases; ever more rarely, they halt the execution of an EAW solely or predominantly on grounds of German (constitutional) law. It seems unclear whether the low rate of refusals,

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<sup>77</sup> Higher Regional Court of Appeals Bremen (*Hanseatisches Oberlandesgericht in Bremen*), Order of 16 March 2020, 1 Ausl A 78/19, ECLI:DE:OLGHB:2020:0316.1AUSLA78.19.00.

such as in situations where concerns regarding the rule of law were raised, is an indication that the procedures in the executing state serve as an effective safeguard with regard to the protection of EU fundamental rights and rule of law standards. Instead, the few published cases where serious concerns are raised – such as on access to the case file, on overly harsh sentences, and on assurances being breached – might **serve as an indicator** or “monitor”: Once triggered, discussions on a European level should be initiated whether such singular cases actually point to systemic deficiencies, or whether they are outliers not affecting mutual trust between the Member States.

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