



Stream

Strengthening Trust in the
European Criminal Justice Area
through Mutual Recognition
and the Streamlined Application
of the European Arrest Warrant

Research Brief

Germany

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Introduction

Owing to the principle of mutual recognition, a number of questions which were traditionally at the forefront of the extradition system have become less relevant in the context of EAW surrender proceedings, for instance double criminality and sufficient level of suspicion. Instead, the focus of EAW proceedings often turns to whether (European) fundamental rights, the rule of law, and procedural safeguards are guaranteed in the issuing state. When courts in the executing state notice severe shortcomings in the state issuing a European Arrest Warrant, any refusal of cooperation – and even requests for additional information – puts such situations into a European spotlight. Such a case-based ‘monitoring’ of criminal justice systems creates incentives – and sometimes pressure – to reflect upon the state of each criminal justice system, and to modify laws and practice where needed.

This STREAM Research Brief provides an overview of how German judicial authorities consider rule of law guarantees, fundamental rights, and procedural safeguards in the context of EAW proceedings, building upon ‘leading cases’ identified and analysed in the Periodic Country Report for Germany,² starting with the landmark order of the Second Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 15 December 2015. That order called for the non-execution of EAWs if executing them would violate Germany's constitutional identity.³ Additionally, around 100 more recent decisions taken by German courts in relation to EAWs and published by the courts in the leading German database on court decisions, *juris*,⁴ were checked for their relevance, as well as one additional decision brought to the attention of the author. Those decisions, relating to the protection of the rule of law, fundamental rights, and procedural safeguards, were considered for the subsequent analysis. Notably, all newly published decisions related to German authorities as the executing but not as the issuing authorities.

2 Brodowski (2021).

3 German Federal Constitutional Court (*Bundesverfassungsgericht*), 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 (2016).

4 Juris GmbH (1985–2022).

Section I – Fundamental rights: primarily a matter for the issuing state?

It is embedded in the concept of mutual recognition,⁵ and was also highlighted by the Court of Justice of the European Union (Court of Justice),⁶ that any European Arrest Warrant (EAW) issued under the EAW Framework Decision (EAW FD)⁷ requires a valid national (judicial) arrest warrant as its basis. Based on this notion, before the issuing of an EAW may be considered, the competent German authorities must first request and courts must first issue a (national) arrest warrant, on the basis of §§ 112 ff. German Code of Criminal Procedure (StPO). This national arrest warrant is open to effective judicial review in (German) courts,⁸ (at least) once it is enforced (including enforcement by the execution of an EAW), and (at least) until its legal effects are resolved.

Moreover, a (new and second) decision on the national arrest warrant must be taken promptly – within one day (§§ 115, 115a StPO) – once a suspect is arrested inland or transferred to Germany in the execution of an EAW.

As the invalidation of a national arrest warrant means that the persons sought have to be released, defence representatives often focus on how to challenge such arrest warrants – or to have them suspended on bail. In this context, alternatives to pre-trial detention may be considered, and the substantive grounds for the arrest warrant may be challenged. Therefore, there is effective judicial protection, pre- and post-surrender, insofar as it relates to the national arrest warrant(s) underlying the EAW. Notably, the standard of this judicial protection is the same as in purely national situations, and no *additional* factors of transnational enforcement are taken into account.

A decisive shift in the German implementation of EAW occurred when the Court of Justice ruled in 2019, to the surprise of many, that German public prosecutor's offices (*Staatsanwaltschaften*) lack the independence necessary to be issuing authorities, and therefore may not issue EAWs themselves.⁹

5 Just see Burchard (2019), pp. 91 ff.

6 Judgment of the Court of Justice of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385.

7 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190*, 18.7.2002, p. 1.

8 Just see Vogel/Burchard (2021), mn. 295; Rackow (2020), part 1 mn. 118.

9 Judgment of the Court of Justice 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).

That raised the question of who is competent to issue EAWs instead. After some early dispute,¹⁰ it is now commonly accepted practice that those courts that issue national arrest warrants – that is, generally the Local Courts (*Amtsgerichte*) – are also competent to issue EAWs.¹¹

One notable consequence of this shift is that nowadays, at least in theory, the issuing of an EAW can be challenged in the same court and may also be brought before an appellate court before and/or after surrender.¹² It is an outdated view therefore that EAWs and 'alerts' in the Schengen Information System lack immediate legal effects, are not open to judicial review, and therefore lack effective judicial protection.¹³

However, it is striking that no single judicial decision has yet been published where the court, when issuing an EAW, discusses its specific proportionality requirements, which may be stricter than in purely national situations.¹⁴ That may be indicative that German courts consider EAWs do *not* require substantially more – in terms of proportionality and the protection of human and fundamental rights – than a national arrest warrant, or that they lack awareness of the relevant jurisprudence of the Court of Justice.

Moreover, some German courts still state that Germany does not bear responsibility for inhumane prison conditions that a person arrested on Germany's behalf has to suffer abroad.¹⁵

Notably, there is also no (published) case law yet where an EAW issued by German authorities was challenged before German courts. A reason for that may be that challenging the underlying national arrest warrant seems to be advantageous to the suspect, but challenging only the EAW (in particular after surrender) does not lead to any substantial benefits, as an illegal surrender does not invalidate the legality of pre-trial detention (*male captus bene detentus*).

10 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.

11 German Federal Constitutional Court (Bundesverfassungsgericht), Chamber Order of 28 September 2020, 2 BvR 1435/20, ECLI:DE:BVerfG:2020:rk20200928.2bvr143520; 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.

12 See, in particular, Oehmichen/Schmid (2019); Brodowski (2022), mn. 61.

13 Higher Regional Court of Appeals Celle (Oberlandesgericht Celle), Order of 16 April 2009, 2 VAs 3/09, ECLI:DE:OLGCE:2009:0416.2VAS3.09.0A.

14 See, for instance, Judgment of the Court of Justice of 13 January 2021, MM, C-414/20 PPU, ECLI:EU:C:2021:4, para. 64. While the 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, notes the need for such a proportionality review, this decision merely relates to the question of competence to issue EAWs.

15 See, for instance, the Constitutional Court for the State Brandenburg (Verfassungsgericht des Landes Brandenburg), Order of 11 March 2022, 1/22 eA, ECLI:DE:VERFGBB:2022:0311.1.22EA.00 (relating prison conditions in Tanzania); for an analysis of this question, see Brodowski (2022), mn. 12 ff.

In conclusion, the lack of discussion – in published court decisions – of specific (proportionality) requirements to issue an EAW on top of a national arrest warrant is a shortcoming insofar as it points to a *lack of awareness* that such additional requirements exist. While German courts do focus on guaranteeing the proportionality of national arrest warrants, the transnational enforcement of arrest warrants may be more intrusive than in a purely national situation. Therefore, it is of even higher importance in transnational cases to consider alternative measures to secure the presence of the person sought for trial. Moreover, the lack of published court decisions on that matter may also point to a deficit in *judicial protection* relating to the issuing of EAWs in Germany. While there is strong judicial protection relating to underlying national arrest warrants, it is doubtful whether that suffices, as the standard of judicial review of national arrest warrants does not take the specific requirements of EAWs into account.

Section II - Protecting fundamental rights in the executing state?

Part 8 of the German Act on International Mutual Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen – IRG*) implements the EAW FD. A general provision of this Act, § 73, contains a fundamental rights limitation to the provision of mutual assistance – which is understood to include extradition and surrender –, and includes an important modification with regard to Part 8:

Limits to mutual assistance. The rendering of mutual assistance and the transmission of data without a request is not permissible if it would contradict core principles of the German legal system. In the case of requests pursuant to Part[s] 8, 9, 10 and 11, the rendering of assistance is not permissible if executing the request would go against basic principles as set out in Article 6 of the Treaty on European Union.¹⁶

In Germany the extent to which § 73 sentence 2 IRG is compatible with the EAW FD and its interpretation by the Court of Justice has been a focal point for discussion on EAW execution, as well as what is covered by ‘basic principles as set out in Article 6 [TEU]’ (European *ordre public*), and how this provision is to be applied in practice, for at least the last decade. It is also the legal basis that the Higher Regional Courts of Appeals (*Oberlandesgerichte*) apply when considering whether to defer or halt the execution of EAWs on grounds of fundamental rights in the issuing state.

As § 73 sentence 2 IRG is a statute of ‘ordinary’ but not constitutional law, its correct application is outside of the scope of what can, as such, be reviewed by the German Federal Constitutional Court. Instead, the German Federal Constitutional Court at first focused on Germany’s constitutional identity (and therefore core parts of its constitutional protection of fundamental rights) as a limit to EU law in general and on EAWs in particular. On this basis, it blocked the execution of an Italian EAW relating to the execution of a sentence handed out *in absentia*.¹⁷

¹⁶ See https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html – an unofficial translation of the IRG published on the Internet by the German government.

¹⁷ German Federal Constitutional Court (*Bundesverfassungsgericht*), Order of 15 December 2015, 2 BvR 2735/14,

Subsequently, the German Federal Constitutional Court focused on the procedural involvement of the Court of Justice in deciding on what protection of fundamental rights and the rule of law applies in the execution of EAWs.¹⁸ Building upon the constitutional requirement on preserving the jurisdiction of courts, the German Federal Constitutional Court repeatedly held that 'unreasonable and evidently wrong decisions to not request a preliminary ruling from the CJEU violate (also) Germany's constitution'.¹⁹ On this basis, it recently decided that a German court violated the constitution when allowing for the execution of an EAW relating to a person who, owing to a psychiatric illness, is at a concrete risk of further physical harm in case of surrender, before asking the Court of Justice to express its views on fundamental rights limitations to the execution of EAWs in such situations.²⁰ Where there is already sufficient jurisprudence of the Court of Justice – such as relating to prison conditions and the preservation of the rule of law – , the German Federal Constitutional Court has recently started to review German court decisions on the basis of their compatibility with the Charter of Fundamental Rights of the European Union.²¹ This highlights a shift to a more European – and Court of Justice-friendly – understanding of fundamental rights as a limitation to the execution of EAWs. Yet, the German Federal Constitutional Court still upholds its viewpoint that Germany's constitutional identity may serve as a (reserve) backstop in case it considers the European standard – or its interpretation by the Court of Justice – to be wanting.

On this evolving basis, there have been a number of successful challenges to the execution of EAWs. Most published court decisions halting or refusing the execution of EAWs relate to prison conditions in the issuing state (and to what extent assurances given by authorities in the issuing state may be trusted), and to the rights of suspects and accused persons, especially in proceedings *in absentia*. There exists conflicting case law whether the issuing state must grant access to the case file already before surrender.²² Far fewer decisions address – and base the non-execution of EAWs – on matters of proportionality and concerns on the rule of law including the independence of the judiciary.²³

ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. On this decision, see, inter alia, Brodowski (2016), Kühne (2016), Meyer (2016).

18 German Federal Constitutional Court (*Bundesverfassungsgericht*), Order of 19 December 2017, 2 BvR 424/17, ECLI:DE:BVerfG:2017:rs20171219.2bvr042417; German Federal Constitutional Court (*Bundesverfassungsgericht*), Chamber Order of 9 May 2018, 2 BvR 37/18, ECLI:DE:BVerfG:2018:rk20180112.2bvr003718.

19 Brodowski (2021), p. 7.

20 German Federal Constitutional Court (*Bundesverfassungsgericht*), Chamber Order of 20 April 2022, 2 BvR 1713/21, ECLI:DE:BVerfG:2022:rk20220420.2bvr171321.

21 German Federal Constitutional Court (*Bundesverfassungsgericht*), 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 (2021a); Swoboda (2021).

22 See, on the one hand, 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, and on the other hand, Judgment of the Court of Justice of 28 January 2021, C-649/19, *IR*, ECLI:EU:C:2021:75, in particular para. 79; Higher Regional Court of Appeals Celle (*Oberlandesgericht Celle*), Order of 23 June 2021, 2 AR (Ausl) 12/21, ECLI:DE:OLGCE:2021:0623.2AR.AUSL12.21.00.

23 For an overview, see Brodowski (2021), pp. 8–12.

When questions regarding the independence of the judiciary are raised in EAW proceedings, German Higher Regional Courts of Appeals²⁴ extensively refer to and apply the ‘two-step test’ developed by the Court of Justice. Owing to the high bar of the second step – that there is a real risk of a violation of the fundamental rights of the person subject to the EAW specifically due to a lack of judicial independence –, German courts have been very reluctant to halt or refuse the execution of EAWs.²⁵ Two of the most recent published decisions on EAWs addressing lack of judicial independence in the issuing state (in both instances in Poland) exemplify the German courts’ approach:

- On 2 March 2021, the Higher Regional Court of Appeal Brandenburg ordered that an EAW may be executed which relates to both a two-year prison sentence for burglary and prosecution for manipulating a passport. Referring to the Court of Justice’s judgments *LM*²⁶ and *L and P*,²⁷ the Higher Regional Court of Appeal held that the EAW system with the issuing state is not suspended generally (on the basis of Article 7 TEU). Then, the Higher Regional Court of Appeal focused directly on the second step and pointed out that there is no evidence of a real risk – specifically for the person sought – that their fundamental rights would be violated by a lack of judicial independence; and that the person sought also did not make any such specific claims themselves. The Higher Regional Court of Appeal also mentioned that the person sought apparently was not active in politics, and was sought for ordinary property and forgery offences.²⁸
- On 21 March 2022, the Higher Regional Court of Appeal Braunschweig decided on an EAW issued for the prosecution of conspiracy and incitement of theft offences. While it held that there are indeed indications for systemic and general deficiencies regarding the independence of the judiciary in the issuing state (first step), it referred to the *X and Y* judgment of the Court of Justice²⁹ and supporting jurisprudence that there needs to be real risk, for the person sought specifically, that their fundamental rights are to be violated by a lack of judicial independence (second step). Owing to the property offences the prosecution is based on, and as the person sought merely referred to the general situation in the issuing State, the Higher Regional Court of Appeal did not consider the second step of the test to be met. As it also held the prison conditions to be adequate, it ordered that the EAW may be executed, and the person be surrendered to the issuing state.

24 The German Federal Constitutional Court has not yet ruled on that matter, but refers to the similar ‘two-step test’ in relation to prison conditions.

25 See already Brodowski (2021), pp. 9–10.

26 Judgment of the Court of Justice of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586.

27 Judgment of the Court of Justice of 17 December 2020, Joined Cases *L and P*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.

28 Higher Regional Court of Appeals Brandenburg (*Brandenburgisches Oberlandesgericht*), Order of 2 March 2021, 1 AR 26/20 (S), ECLI:DE:OLGGB:2021:0302.1AR26.20.00.

29 Judgment of the Court of Justice of 22 February 2022, Joined Cases *X and Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

While German courts can and do focus on the protection of fundamental rights of the person sought in principle, a lack of independence of the judiciary in the issuing state has not (yet) turned out to be an issue leading to the non-execution of EAWs. While it may be true that the persons are sought for ‘ordinary crimes’ which do not give rise to specific concerns of political persecution, it is noteworthy that the second step of the test set out by the Court of Justice seems to be very hard to prove evidentially.

Section III Protecting fundamental rights through horizontal and vertical cooperation?

In the reasoning of a number of court decisions on EAW matters, courts refer extensively to German authorities, as executing authorities, requesting additional information – and, to the extent they consider it to be necessary, assurances – from authorities in the issuing state. In contrast, also due to the lack of published court decisions, there is no publicly available information on other Member States requesting additional information from *German* authorities when they are *issuing* authorities. Roughly speaking, three types of situations regarding additional information are reflected in (published) jurisprudence:

- In several instances, German authorities ask issuing authorities in other Member States for additional information, which they then share with German executing authorities. This strengthened information-basis is then considered by the courts on whether it is sufficient to order the execution of the respective EAW and the surrender of the requested person.³⁰
- In a number of instances, the additional information received from the issuing authorities is considered by German courts to be insufficient to resolve legal or factual boundaries to the execution of EAWs;³¹ rarely, the issuing authorities in another Member State fail to respond altogether.³²
- In two instances, a German court had received, upon request, additional information including an assurance by the issuing authority which at face value would have been sufficient to overcome doubts concerning prison standards in the issuing state. However, the German courts determined that a previous assurance – relating to the same or another person – had been violated by the issuing state, and that this violation was insufficiently explained – and therefore held that the new information and the new assurance could not be trusted.³³

30 See, for instance, Higher Regional Court of Appeals Hamm (*Oberlandesgericht Hamm*), Order of 5 May 2022, 2 Ausl 202 and 203/21, ECLI:DE:OLGHAM:2022:0505.2AUSL202UND203.21.00.

31 See, for instance, Higher Regional Court of Appeals Dresden (*Oberlandesgericht Dresden*), Order of 26 April 2022, OLG Ausl 51/22, ECLI:DE:OLGDRES:2022:0426.OLG.AUSL51.22.00.

32 See, for instance, 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.

33 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; Higher Regional Court of Appeals Hamburg (*Hanseatisches Oberlandesgericht Hamburg*), Order of 26 January 2022, (1) Ausl 99/20, ECLI:DE:OLGHH:2022:0126.AUSL99.20.0A.

Generally speaking, German courts are well-prepared to issue requests to the Court of Justice for preliminary rulings. In particular, a number of German Higher Regional Courts of Appeals (*Oberlandesgerichte*), which decide on the execution of EAWs as first and final instance, have initiated preliminary ruling proceedings. These have shaped the Court of Justice's jurisprudence, such as on prison conditions, and more recent requests for preliminary rulings refer, for instance, to EAWs issued in relation to *in absentia* proceedings. Yet, there seems to be some discrepancy between different German courts. Some seem to be more willing to issue requests for preliminary rulings, also with the aim to stir a European debate. Others seem to consider questions of interpreting the EAW FD to be so clear or resolved that no (additional) request to the Court of Justice is warranted. However, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has overturned a number of lower court decisions in EAW matters for their failure to issue requests to the Court of Justice for preliminary rulings.³⁴ As 'unreasonable and evidently wrong decisions to not request a preliminary ruling from the CJEU violate (also) Germany's constitution'³⁵ – specifically the right to be judged by a specific, pre-determined court – this matter can be reviewed by the German Federal Constitutional Court. Decisions by the German Federal Constitutional Court on this basis also have a harmonising effect, ensuring that the duty to issue requests for preliminary rulings in accordance with Article 267 TFEU is complied with by German courts. Notably, the German Federal Constitutional Court itself has not yet requested a preliminary ruling from the Court of Justice in EAW matters, but has done so in other contexts.

34 Most recently in German Federal Constitutional Court (*Bundesverfassungsgericht*), Chamber Order of 20 April 2022, 2 BvR 1713/21, ECLI:DE:BVerfG:2022:rk20220420.2bvr171321.

35 Brodowski (2021), p. 7.

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Availability of EAW-related jurisprudence

In Germany, court decisions relating to the issuance and execution EAWs may be taken at different levels:

At the highest level, the German Federal Constitutional Court (*Bundesverfassungsgericht*). All decisions by this court which state reasons are publicly available online. Decisions which are taken without stating any reasons – and therefore not published – are of no relevance to the development of constitutional interpretation, but point to procedural errors in lodging a complaint or that such complaints are manifestly without basis.

The Federal Court of Appeals (*Bundesgerichtshof*) only has to take decisions on EAWs in highly exceptional cases – such as in preliminary rulings upon request by a Higher Regional Courts of Appeal. Generally speaking, all decisions by this court which state reasons are publicly available online. A notable exception relates to decisions taken by investigating judges at this court, who may take decisions on the issuance of EAWs in high-profile terrorism cases. Such decisions are only published exceptionally, if the respective judge issuing the decision considers their decision of particular importance and fit for publication (also in light of a potentially ongoing investigation). So far, no decision of an investigating judge at the Federal Court of Appeals which relates to an EAW has been published.

The 26 Higher Regional Courts of Appeals (*Oberlandesgerichte*) decide on the execution of EAWs as first and final instance; the numerous Local Courts (*Amtsgerichte*) generally decide on the issuance of EAWs. So far, only a ‘fraction of all decisions taken in EAW cases’ is published, as each judge, chamber or senate ‘decide[s] 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’.³⁶ However, the lack of published jurisprudence on the issuing of EAWs is noteworthy, and may imply that courts issuing EAWs do not consider the issuing of EAWs to raise additional questions of law.

It should be noted that the coalition agreement leading to the current German government has stated their plan that all court decisions are to be made available online. However, any such change of law and practice will likely have to contain exceptions relevant in EAW cases – such as when court decisions have to remain unpublished because there is an ongoing investigation.

³⁶ Brodowski (2021), p. 2.