

Executive Summary: Germany

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Issuing Procedures

- A landmark ruling by the CJEU in 2019 stated that German public prosecutor's offices (*Staatsanwaltschaften*) lack the independence necessary to function as issuing authorities. Since then, Local Courts (*Amtsgerichte*) are considered to be **competent to issue EAWs**. However, this is only based on a generic legal basis in the German Code of Criminal Procedure and the German Act on International Mutual Assistance in Criminal Matters, and lacks legal clarity. Attempts to amend the law to transfer the power back to the public prosecutor's offices and to grant them full independence when issuing EAWs failed to gain track.
- Although Germany is one of the most active member states – if not the most active – in issuing EAWs, no published case law exists where the **issuance of an EAW** was **challenged in German courts** – instead, only case law on the non-issuance of EAWs exists, relating to cases where the non-issuance of EAWs was challenged by public prosecution authorities. Before the aforementioned CJEU ruling, requests for extradition as well as EAWs were considered to be not challengeable in court. Nowadays, with courts issuing EAWs, such decisions can be challenged by a complaint (*Beschwerde*) and brought to review by a superior court. It is striking that this opportunity for legal review seemingly is not used at all or only rarely and has not lead to published court decisions so far. While further research is needed on this matter, there might be a lack of awareness that an EAW sets out additional requirements on top of a national arrest warrant. Additionally, challenging an EAW after surrender might not provide for a sufficient 'benefit' for requested persons, as they are already present in the issuing state (*male captus bene detentus*). Both factors may be detriment to judicial review of EAWs in the issuing state, and instead highlight the need for strong judicial review in the executing state.
- Strikingly, a draft bill contained a provision introducing a (rebuttable) **presumption that an EAW is to be issued** if a national arrest warrant exists. Although this bill failed, it is indicative of a viewpoint that EAWs do not set out substantial additional requirements on top of national arrest warrants.

Executing Procedures

- German courts – from the local to the constitutional level – are considerably concerned on the **protection of human rights in the executing state**, in particular insofar it relates to prison conditions, the rule of law, and in absentia proceedings. In recent years, German courts have sought for **guidance by the CJEU** numerous times, and the German Federal Constitutional Court (*Bundesverfassungsgericht*) decided in late 2020 to base the constitutional review of the execution of EAWs **on the basis of the EU Charter of Fundamental Rights**. This points to an ever more Europe-focused standard of review, instead of the constitutional identity-focused standard of review applied by the German Federal Constitutional Court in 2015.
- Strikingly, a recent court decision highlights the problem that **assurances** given by other member states **may be broken**. In this particular case, the court held that the basis for mutual recognition – mutual trust – was broken by Hungarian authorities as they violated an assurance they had given earlier in relation to the same person (*ML*) now sought again by a new EAW relating a different crime. Therefore, it held that a new assurance given by Hungarian authorities on prison conditions cannot be relied upon.
- A number of court decisions relate to the question whether **access to the case file** in the issuing state must be granted to defense counsel already before surrender and/or before a decision on the execution of the EAW is taken in the executing state. Courts were concerned that this is a **requirement for an effective remedy to refute, in the issuing state, the suspicion** underlying the national arrest warrant as well as the EAW. These court decisions were taken before the CJEU downplayed the need for access to the case file and access to an effective remedy in the issuing state already before surrender. Nonetheless, they highlight that providing a legal remedy *after* surrender might be too ineffective, and that an effective remedy should not depend on the requested person's surrender to the issuing state.

Key interpretation and implementation challenges

- Both with Germany as the issuing and as the executing member state, case law (or the lack thereof) points to the importance of an effective – including: speedy – **legal review of EAWs**. With EAWs providing the basis for mid- to long-term deprivation of liberty, it is of utmost importance that EAWs can speedily be brought to review already *before* surrender. This requires an effective cross-border defense, access to the case file (in particular in the issuing state), and an awareness of the specific requirements for issuing an EAW (which go beyond the issuance of a national arrest warrant).
- In relation to the **protection of fundamental rights**, German courts up to the German Federal Constitutional Court (*Bundesverfassungsgericht*) highlight that Germany, as the executing state, must not become an accomplice in violations of human dignity and European human rights. It remains to be seen whether the two-step test set out by the CJEU both in relation to **prison conditions** and to **rule of law concerns** provides for a sufficient exception to mutual recognition and for a sufficient protection against violations of fundamental rights still attributable to Germany as the executing state.

- It is unclear whether the low rate of refusals to execute an EAW is an indication that the judicial 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 might better be interpreted as an **indicator or 'monitor' of potential fundamental rights concerns**. (Published) court decisions halting or rejecting the execution of EAWs should trigger a European discussion and analysis on whether such singular cases are outliers or whether they actually point to systemic deficiencies.