

# The European Arrest Warrant and Its Implementation In Germany – Its Constitutionality, Laws and Current Developments

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The topic of the European Arrest Warrant appears as one of the most frequently discussed problems in today's European World. The European Arrest Warrant is an institute configured to harmonize, at last, our different cultures in those sensitive parts of criminal law, where together with our personal values our hearts are touched. With this in mind, one does not wonder that the new instalment caused several problems of constitutionality,<sup>1</sup> of whether<sup>2</sup> and of how<sup>3</sup> to imple-

ment the European Arrest Warrant into the national laws of each of the member states. National conservatives and statist still contend that national authority to punish belongs to the

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<sup>1</sup> Some examples are: implementation procedures in Germany (Cf. BVerfG 2 BvR 2236/04 v. 18.7.2005), in Poland (where the implemented extradition of Polish nationals violated Article 55 (1) Polish Constitution, see Judgement of April 27,

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2005; English Version online at: [www.trybunal.gov.pl/eng/summaries/summaries\\_assets/P\\_1\\_05.htm](http://www.trybunal.gov.pl/eng/summaries/summaries_assets/P_1_05.htm), visited March 4, 2007; see also *Makaruk*, ZStW 116 (2004), 372 and in the Czech Republic (for current statements on the meanwhile enacted European Arrest Warrant Act also surrendering Czech nationals <http://www.Radio.cz/en/article/58591>, visited March 4, 2007. See also *Satzger/Pohl*, Journal of International Criminal Justice 4 (2006), pg. 686, available at: <http://www.jicj.oxfordjournals.org/cgi/content/full/4/4/686>, on pg. 689-690.

<sup>2</sup> This was especially the case in Italy, which was the last member state to implement the European Arrest Warrant into its national law, Act No. 69 of April 22, 2005 (Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13.6.2002, relative al mandato d'arresto europeo e alle procedure di consegna tra Stati membri), Law Gazette (Gazzetta Ufficiale) No. 98 of April 29, 2005. Meanwhile Italy has also been criticized by the Commission because its implementation went beyond the tolerance given by the Framework Decision. According to Article 8 (1), Act No. 69 of April 22, 2005 (Italian European Arrest Warrant Act), Italy maintained de facto the double criminality requirement (see *Impala*, Utrecht Law Review, Volume 1, Issue 2 (December) 2005, <http://www.utrechtlaw-review.org>; see also *Satzger/Pohl* (note 1), pg. 686.

<sup>3</sup> For examples, one need only look at the implementation proceedings in Greece, Finland, Spain, Portugal and Austria. For information on these countries and on the other member states see the official European Arrest Warrant Website at: [www.eurowarrant.net](http://www.eurowarrant.net); updated through Summer 2006. For specific country information: Greece (Council of the European Union Document No. 11858/05 of September 9, 2005 by Greek Delegation, Summary of decisions of Greek Supreme and Constitutional Courts concerning the European Arrest Warrant); Finland (Council of the European Union Document No. 11824/05 of September 1, 2005 by Finnish Delegation, Summary of decisions? of the Supreme Court of Finland concerning the European Arrest Warrant), Spain (for an overview on legislation procedure and implementation see *Jimeno-Bulnes*, in: Guild [Edit.], Constitutional Challenges to the European Arrest Warrant – Chapter 9: Spain and the European Arrest Warrant – The View of a 'Key User', pg. 163), Portugal (Law No. 65/2003 of August 23, 2003; Portugal also uses a specific kind of a proceeding of approval, where the authority of approval decides beforehand the court's decision on admissibility: cf. *Lagodny*, StV 2005, 515 [518]), Austria (for it widely exhausted the grounds for non-execution of a European Arrest Warrant), see BGBI. I (2004) No. 36, pg. 1 et seq. online at [www.ris.bka.gv.at](http://www.ris.bka.gv.at) and *Satzger/Pohl* (note 1), pg. 686 (689).

indispensable core of national sovereignty.<sup>4</sup> Extraditing their own nationals, to their understanding, is not being questioned. On the other hand, liberals and attorneys of human rights criticize insufficient democratic legitimisation of the European Arrest Warrant Framework Decision and its insufficient protection of human rights. National parliaments in almost all member states proclaim to be derived of their rights to decide upon laws and to create and shape provisions. National constitutional courts also fear forfeiting competences.<sup>5</sup>

Nevertheless, since the Schengen *acquis*, the tension between a joined European market realizing the four basic European freedoms of persons, capitals, goods and services on the one hand, and national criminal prosecution stopping at national borders on the other, is a core matter for European Union political considerations. Conferences in Cardiff and Tampere achieved unity<sup>6</sup> to the extent that national decisions in criminal matters<sup>7</sup> shall be acknowledged in all member states and shall possibly be executed without severe procedural obstacles or intense examination of facts and law.<sup>8</sup> On September 19, 2001, the European Commission presented a draft for a Framework Decision on the European Arrest Warrant and Surrender Proceedings between the Member States of the EU.<sup>9</sup> As in many other parts of substantive criminal law and especially of criminal procedural law, the terror attacks on the United States of September 11, 2001 caused high political pressure in the direction of ensuring security to the people. Under this huge pressure, the Council of the European Union agreed on the European Arrest Warrant Framework Decision on December 6 and 7, 2001. The law was formally enacted on June 13, 2002 and entered into force on August 7, 2002.<sup>10</sup> According to Article 34 (1) FD the

<sup>4</sup> Cf. with the same statement *Vogler*, JZ 2005, 801 (802).

<sup>5</sup> Id.

<sup>6</sup> Conclusions of the chair (Cardiff) June 15 and 16, 1998, No. 39; conclusions of the chair (Tampere) October 15 and 16, 1999, No. 33 et seq.

<sup>7</sup> Meant are decisions of all kinds, such as judgements, sentencing decisions, orders, convictions, decisions to discontinue proceedings, or similar kinds of judicial decisions.

<sup>8</sup> For more detailed information in German, see *Böse*, in: Momsen/Bloy/Rackow (Edit.), *Fragmentarisches Strafrecht* 2003, pg. 233 et seq.; *Deiters*, ZRP 2003, 359; *Gleß*, ZStW 116 (2004), 353; *Hecker*, *Europäisches Strafrecht*, 2005, § 12 MN 39 et seq.; *Nestler*, ZStW 116 (2004), 333.

<sup>9</sup> Cf. Commission papers (2001), 522.

<sup>10</sup> See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures Between Member States, 2002/584 O.J. (L 190) 1; hereafter called FD; available at: [http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32002F0584](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32002F0584). Voluminous literature exists on the European Arrest Warrant Framework Decision, cf. *Alegre/Leaf*, *European Arrest Warrant – A solution ahead of its time?*, 2003; *Blekxtoon/van Ballegooij* (Edit.), *Handbook on the European Arrest Warrant*, 2005; v. *Bubnoff*, *Der Europäische Haftbefehl*,

European Arrest Warrant had to be implemented into national law until December 31, 2003.

The following article seeks to explore and examine the German National law implementing the European Arrest Warrant. After introducing the topic of German constitutional questions raised by the European Arrest Warrant Framework Decision, the *First German* European Arrest Warrant Act of July 2004 will be discussed.<sup>11</sup> Secondly, the paper will question *how* and *whether* the since enacted *Second German* European Arrest Warrant Act of August 2006<sup>12</sup> solved these problems constitutional and European-conform problems.<sup>13</sup> Finally, the paper will introduce European Arrest Warrant cases in Germany and how they are handled. The goal of this paper is to somehow make the complicated German enactment understandable, by explaining the reasons for these

2005; v. *Heintschel-Heinegg/Rohlff*, GA 2003, 44; *Hecker* (note 8), § 12 MN 19 et seq.; *Perdikis*, *The European Arrest Warrant*, 2004; *Plachta*, *The European Journal of Crime, Criminal Law and Criminal Justice*, 11 (2003), 178; *Rohlff*, *Der Europäische Haftbefehl*, 2003; *Schomburg*, NJW 2005, 3262; *Vennemann*, ZaöRV 63 (2003), 103.

Concentrating on German constitutional issues and implementation: *Lagodny*, StV 2005, 515; *Mölders*, *German Law Journal*, Vol. 07, No. 1, 45; *Pfützner*, 'The Decision of the Federal Constitutional Court (2 BvR 2236/04) concerning the European Arrest Warrant', *European Arrest Warrant Project of the T.M.C. Asser Instituut*, available online at <http://www.eurowarrant.net/index.htm> (visited March 4, 2007); *Satzger/Pohl* (note 1), pg. 686 with many more references esp. in footnote No. 3; *Schünemann*, ZRP 2003, 185; StV 2003, 531; StV 2005, 681; *Vogler*, JZ 2005, 801 (802); Concentrating on Spanish law: *Jimeno-Bulnes*, in: *Guild* (Edit.), *Constitutional Challenges to the European Arrest Warrant – Chapter 9: Spain and the European Arrest Warrant – The View of a 'Key User'*, pg. 163 et. seq. One of the First projects sponsored by the EU to examine political, legal and cultural problems with implementing the European Arrest Warrant within the member states is to be found online at [www.eurowarrant.com](http://www.eurowarrant.com). The project finished with a conference in June 2006 in Tampere, where all member states took part and discussed issues regarding implementation, issuing, and surrenders according to European Arrest Warrants. The website includes detailed information on the Framework Decision as on laws of all member states, including literature, official documents and even papers, published through the project. Unfortunately, since closing the project for monetary reasons, the website is rarely updated since June 2006.

<sup>11</sup> See the First European Arrest Warrant Act BGBl. I (2004), 1748. The paper will only give a precise short summary of this Act, since many papers have been written on this German constitutional topic; for examples see supra, note 10 and especially the most recent paper by *Satzger/Pohl* (note 1), pg. 686.

<sup>12</sup> European Arrest Warrant Act (EuHbG, *Europäisches Haftbefehlsgesetz*) v. 20.7.2006, BGBl. I (2006), 1721.

<sup>13</sup> German National laws will be translated into English as necessary to explain and examine the concern.

German legislative decisions and by building very simple examples to explain the ‘who’s who’ in German European Arrest Warrant cases.<sup>14</sup>

### I. Overview of the German laws on the European Arrest Warrant

Implementing the Framework Decision on the European Arrest Warrant and Surrender Proceedings between the Member States of the European Union<sup>15</sup> became quite a difficult undertaking for German legislators. This is especially true insofar as constitutional rights were concerned. As expected, as one of the “slower” member states,<sup>16</sup> German legislators solely complied with the obligations to implement the European Arrest Warrant Framework Decision in enacting the First European Arrest Warrant Act of July 2004.<sup>17</sup> Probable constitutional issues were somehow underestimated or just overseen. In the German system of law, the European Arrest Warrant Act amended the Law on International Judicial Assistance in Criminal Matters<sup>18</sup> in its eighth part (§§ 78 IRG et. seq.). Herewith, the German legislator installed the European Arrest Warrant into the existing system of International extradition proceedings in Germany. General rules for International extradition only had to be amended for the specific requirements of European Arrest Warrants. Thus, introducing the European Arrest Warrant in Germany was only meant to divide between International extradition and *European extradition*.

#### 1. How to Convert European Union Third Pillar Framework Decisions into German National Law

European Union Framework decisions do not directly bind or entitle individual German citizens, but rather have to be implemented into national law according to Article 34 (2) b TUE. As Germany’s Federal High Court of the Constitution affirmed in its decision on the enactment of the European Arrest Warrant, German legislators must remain within the scope of the single framework decision in implanting it into national law, but must always draft the law with the German constitutional rights foremost in their minds.<sup>19</sup>

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 correctly annotated in its decision conferring the European Arrest Warrant Framework Decision, a framework decision is secondary law, not primary law, which seeks to fulfil the goals of the Treaty of the European Union. As a result, a framework decision is binding, according to the aims of Article 34 (2) b TUE. But in contrast to the first pillar directive, the implementation of framework decisions into national laws is not enforceable. As a result, German national courts may not consider decisions with regard to framework decisions that have not been implemented yet.<sup>20</sup>

Still, Third-Pillar-Framework Decisions can be implemented into national provisions in many different ways, such as statutes, regulations, national directives, or theoretically by national legislators officially affirming them. According to Article 25 German Basic Law<sup>21</sup>, 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. However, Article 25 Basic Law refers only to the very general rules of International law.<sup>22</sup> Conversely, European Community law, European Union Framework Decisions, and European Union Conventions are International treaties, which have to be transformed into German national law according to Article 59 (2) GG. After implementation, those go into effect as German national federal law (*nationales Bundesrecht*) beside other German federal laws.<sup>23</sup> But implementation proceedings differ. European Union Conventions are first adopted by the German parliament (*Bundestag*) to become a federal law. Declaration of adoption and convention are published in the Federal Law Gazette<sup>24</sup> as such. According to Article 59 (2) GG, adoption by the parliament meets the require-

<sup>14</sup> The paper, however, does not seek to explain any questions raised by the European Arrest Warrant provisions. Time periods, for example, will not be discussed, for they were extracted from the framework decision, Article 17 FD and § 83e German IRG, which does not necessarily mean that there would be nothing to discuss.

<sup>15</sup> See *supra*, note 10.

<sup>16</sup> Germany can be seen as “slower” in part due to the very complicated legislation system and its proceedings in Germany.

<sup>17</sup> BGBl. I (2004), 1748; see *supra*, note 11.

<sup>18</sup> *Gesetz über die internationale Rechtshilfe in Strafsachen*, hereafter called the IRG.

<sup>19</sup> Cf. BVerfG 2 BvR 2236/04 v. 18.7.2005 MN. 80.

<sup>20</sup> Nevertheless, the German legislature, judiciary, and executive have to directly consider a European framework decision in relation to other member states, if the national implemented law was nullified before, as currently affirmed by the German Federal High Constitutional Court (BVerfG BvR 1667/05 v. 24.11.2005, MN. 15). Thus, German authorities must interpret national law in the spirit of European framework decisions, especially when dealing with other member states, since these cannot be burdened with old, non-European-conformed proceedings just because German authorities were not able to attend to their 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 principally to interpret all national laws conforming to European framework decisions, as they are part of the law of the European Union. For a detailed discussion see I. 3.

<sup>21</sup> German Basic Law is the generally used term for Germany’s Constitution [Grundgesetz], abbreviated GG.

<sup>22</sup> Cf. with a detailed argumentation *Schaffarzik*, DÖV 2005, 860.

<sup>23</sup> Admittedly, specific ruling is done for European community law (1. pillar), Article 24 GG.

<sup>24</sup> *Bundesgesetzblatt*.

ments of implementation. Since Third-Pillar-Framework Decisions leave some leeway for different national decisions (*Ermessensspielraum*), they are converted separately into national enactments.

If in the result leads to converted conventions, converted framework decision laws, or pre-existing national federal laws contradicting each other, rules of specialty or precedence are needed, because these are federal laws. As the example of the herein examined European Arrest Warrant shows, such contradiction is not unlikely. Accordingly, § 1 (3) IRG represents a rule of specialty, which states 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 would have partly contradicted those International treaties, § 1 (4) IRG<sup>25</sup> now provides a rule of precedence for all provisions in accordance to the European Arrest Warrant and the implementation of its framework decision. Thus, the European Arrest Warrant amending chapter 8 of the German IRG supersedes conventions on European cooperation in criminal matters. Only if chapter 8 IRG does not provide a solution to a specific question, then the other provisions of the IRG respective to International treaties are to be applied, §§ 78, 1 (3) IRG.<sup>26</sup>

### 2. A basic question to the system of laws: Do Germans Surrender or Extradite the Suspects wanted by a European Arrest Warrant?

The European Framework Decision carries the title: “The European Council Framework Decision on the European Arrest Warrant and Surrender Procedures between the Member States.” The term extradition is not used, neither within the title nor anywhere else in connection to the European Arrest Warrant. Originally the legal term “extradition”<sup>27</sup> was to be used describing the “official surrender” of an alleged criminal by one state or nation to another having jurisdiction over the crime charged.<sup>28</sup> Comparing this definition of “sur-

<sup>25</sup> According to the First and the Second German European Arrest Warrant Act.

<sup>26</sup> As a result, from a German point of view, European Union wide extradition procedure, first applies provisions of the European Convention of Extradition (EuAIÜbk, Europäisches Auslieferungsbereinkommen), added by its second supplementary protocol and bilateral supplementary contracts, and the provisions of the European Union Convention of Extradition (EU-AuslÜbk, EU-Auslieferungsbereinkommen). Second, Article 59-66 of the Schengen treaty (SDÜ, Schengener Durchführungsübereinkommen) is 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, give privilege to all aforementioned treaties and provisions.

<sup>27</sup> In German „Auslieferung”, cf. Köbler, Rechtsenglisch, 5. Edition 2001.

<sup>28</sup> Definition by *Garner*, Black’s Law Dictionary, a Handbook of Criminal Law Terms, 2000.

render” with that in *Garner*, *Garner* does not refer to a state or nation,<sup>29</sup> but simply to the act of deferring to another’s power or control, or in specific criminal matters, deferring to an officer’s delivery of a prisoner to the authorities in the appropriate jurisdiction.<sup>30</sup> As a result, “to surrender” carries less of a reference to a state or nation than “to extradite”. The European Union was seeking to simplify the transfer of criminals between its member states to the most possible extent, not only with the contents of the European Arrest Warrant Framework Decision, but also with the wording in its title, “and Surrender Procedures between the Member States,” where it made clear that complicated extradition proceedings are now outdated within the Union.

However, German legislators decided to rule European Arrest Warrant proceedings a special case of International extradition proceedings, rather than to formally install a new kind of European surrender. Thus, systematically correct describing the German procedure the European Arrest Warrant complies with an application for European extradition. This does not mean that one must use the term “surrender”. One can even raise arguments to legally justify this new term, saying that the European Arrest Warrant caused so many changes to the basic procedure of extradition that it actually is something new. As this is a very European-friendly interpretation, talk of “surrendering suspects” somehow is just as European-friendly. To clarify, nothing speaks against it being European-friendly.<sup>31</sup>

### 3. Historical Development up to a constitutional European Arrest Warrant law in Germany

The First German European Arrest Warrant Act came into effect on August 23, 2004<sup>32</sup> and was used on a regular basis until the day of the German Federal High Constitutional Court’s<sup>33</sup> ruling on July 18, 2005.<sup>34</sup> In its judgment, the Sec-

<sup>29</sup> In German „Auslieferung” but also „Herausgabe” [issuance] or „Kapitulation” [capitulation].

<sup>30</sup> Definition by *Garner* (note 28).

<sup>31</sup> Adding to this topic, the specific discussion on the legal terms “surrender” and/or “extradition” is in honour of one of the misunderstandings, which arose at the November conference in Krakow, Poland, in November 2006 and where a first draft of this paper was presented [see supra, note 1 for more details] and to one of the most gainful discussions we had at the conference. We want to especially thank Prof. Dr. *Dionysios D. Spinellis* for his question on this point, which was the catalyst for rethinking translations of the German European Arrest Warrant Act into English.

<sup>32</sup> See supra, note 11.

<sup>33</sup> Federal High Constitutional Court is the court of the Highest rank in Germany. It is, however, not a Supreme Court. Its function is to protect the constitution and the basic rights of the people. Federal High Constitutional Court means Bundesverfassungsgericht (abbreviation: BVerfG; decisions of the Bundesverfassungsgericht: BVerfGE).

<sup>34</sup> See the following court judgments on regular basis ruling: Oberlandsgericht Celle StV FORUM 2005, 163; Oberlandsgericht Düsseldorf StV FORUM 2005, 207; Oberlandsgericht

ond Senate of the Federal High Constitutional Court declared the First German European Arrest Warrant Act unconstitutional and void, because it contradicted the German Constitution.<sup>35</sup> Simultaneously, the court clearly stated that the European Arrest Warrant Framework Decision itself does not contradict the German Constitution.<sup>36</sup> The national laws implementing European framework decisions are interpreted in sight of German national and especially German constitutional law and not just solely the specific Framework Decision, its wording or content. Yet, the aims of those framework decisions are to be taken into account. The First German European Arrest Warrant Act did not meet these standards as set by the German Basic Law.<sup>37</sup>

As a consequence, one might have thought, as many scholars indeed did,<sup>38</sup> that the German national's extradition had to follow the rules of the European Convention on Extradition from 1957 until a new law was implemented.<sup>39</sup> On the contrary, the decision of the European Court of Justice in *Pupino*<sup>40</sup> and the German *Federal High Constitutional Court's* decision on the extradition of a Danish citizen from Spain to Germany<sup>41</sup> made clear that German national authorities *had and will have to* base their decisions on applicable European Framework Decisions. According to the *Pupino* decision, this is true if applying the Framework Decision concedes in a European-conform solution while national law lacks implementation.<sup>42</sup> The German Federal High Constitutional Court confirmed that decision, *as far as and as long as* the European Framework Decision does not contradict German constitutional law. A detailed look into the court's ruling reveals that the decision is totally underestimated especially concerning its consequences. In this decision, the Federal High Constitutional Court affirmed the earlier court statement on nullifying the First German European Arrest Warrant Act of July 18, 2005, and that the Framework Decision on the European Arrest Warrant was constitutional with regard to the German Basic Law. As a consequence of the finding of constitutionality and deferring to the *Pupino* decision, the court allowed the German authorities to directly refer to those provisions of the Framework Decision, which are in themselves constitutional. The German court reasoned, according

to the European Court *Pupino* decision, that the goal of the Framework Decision to simplify the "European transfer of criminals" could only be achieved in applying the Framework Decision directly, so that other member states do not bear the burden of unconstitutional German enactments.<sup>43</sup> Therefore, the German Federal High Constitutional Court allowed the German authorities to issue an European Arrest Warrant according to the European standard formulary as provided by Article 8 FD<sup>44</sup> and to use those ways of transmissions as they are provided in Article 9, 10 FD.<sup>45</sup>

While on the one hand the court did not allow a sole reference to provisions of European framework decisions for not meeting the German constitutional principle of proviso of legality,<sup>46</sup> at the same time it allowed issuing a European Arrest Warrant without an existing German law. According to the court's reasoning, the main issue was the sole European explanation that those goals of the framework decision to simplify European extradition, to harmonize surrender proceedings in Europe, and to build the European framework for an area of freedom, security and justice cannot be achieved otherwise, one has to admit that 'Europe-World' is getting closer and closer. Even the German Federal High Constitutional Court views legal questions from a European perspective.

The question of what we need national laws for if we are already able to issue arrest warrants to other member states directly by referring to a European Framework Decision remains criticisable. Just to rescue our cultures? One could ask what a culture is worth, if it only "copies" the odds of a European Framework Decision, because even its own "culture-protector", the Federal High Constitutional Court, already directly deferred to the Framework Decision. The chances for separate national cultures remain where European provisions will be found unconstitutional. But how possible is this, if the Court "thinks European"? Third pillar European framework decisions 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 decision itself contradicts national constitutional law. One has to be apprehensive that European framework decisions will be used as domestic laws. This is especially true for provisions of substantive and procedural criminal law, as this part of the law is mostly dealt within framework decisions, if at all questioned by European Union entities.<sup>47</sup>

Hamm NStZ 2005, 350; Oberlandsgericht Karlsruhe NStZ, 2005, 352; OLG Stuttgart NJW 2005, 1522.

<sup>35</sup> BVerfGE v. 18.7.2005 – 2 BvR 2236/04; critical *Schümann*, StV 2005, 681.

<sup>36</sup> Herein called Basic Law (Grundgesetz), since the German Constitution is not a constitution per definition but rather a Grundgesetz (GG); see supra, note 21.

<sup>37</sup> BVerfG v. 18.7.2005 – 2 BvR 2236/04.

<sup>38</sup> E.g. *Mölders*, German Law Journal Vol. 07 No. 1, 46; *Vogel*, JZ 2005, 802.

<sup>39</sup> Cf. European Convention on Extradition, Dec. 13, 1957, ETS 24 (entered into force on 18 April 1960).

<sup>40</sup> Cf. EuGH v. 16.6.05-Rs.C-105/03 (*Pupino*), JZ 2005, 838.

<sup>41</sup> Cf. BVerfG BvR 1667/05 v. 24.11.2005.

<sup>42</sup> Cf. clearly *Hackner*, in: Schomburg/Lagodny/Gleß/Hackner (Edit.), *Internationale Rechtshilfe in Strafsachen*, 4. Edition 2006, before § 78 MN. 16.

<sup>43</sup> Cf. decision of the German Federal High Court of the Constitution (BVerfG BvR 1667/05 v. 24.11.2005).

<sup>44</sup> FD (Framework Decision on the European Arrest Warrant and Surrender Proceedings between Member States of the European Union), see supra, note 10.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> For example, the framework decisions on money laundering, 20.6.2001 (Abl. L. 182 v. 5.7.2001, 1), on the European arrest warrant, 13.6.2002 (Abl. L. 190 v. 18.7.2002, 1), on joint investigation, 13.6.2002 (Abl. L. 162 v. 20.6.2002, 1), or on terrorism, 13.6.2002 (Abl. L. 164 v. 22.6.2002, 3) shall be mentioned.

As a consequence, new lawmaking proceedings were accelerated by these decisions and the Second European Arrest Warrant Act went into force on August 2, 2006.<sup>48</sup> Again, it did not enter into force as a separate law but rather provisions amended the German Act on International Assistance in Criminal Matters (IRG) in its eighth part, §§ 78 et. seq. IRG.<sup>49</sup>

### II. Reviewing Germany's First European Arrest Warrant Act's constitutional problems

In order to understand the German national legislation on the European Arrest Warrant, as well as practical and constitutional issues discussed in Germany, it is necessary to review the constitutional issues that the German Federal High Constitutional Court raised in his decision of July 18, 2005 nullifying the German First European Arrest Warrant Act. Specific provisions and proceedings will be explained together with the exposition of issuance and execution of European Arrest Warrants in Germany.

In concrete, the Federal High Constitutional Court found two main reasons:<sup>50</sup>

- *First*, the First European Arrest Warrant Act interfered with Article 16 (2) Sentence 1 GG<sup>51</sup> and *'the Right not to be Ex-*

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<sup>48</sup> Cf. supra, note 12. Affirming the acceleration of national ratification processes *Tinkl*, StV 2006, 36.

<sup>49</sup> IRG (Gesetz zur Internationalen Rechtshilfe in Strafsachen) is the Act on International Assistance in Criminal Matters) as enacted on June 27, 1994, BGBl. I (1994), 1537; lately amended with changes to the European Arrest Warrant through the First European Arrest Warrant Act of July 21, 2004, BGBl. I (2004), 1748 and of August 24, 2004, BGBl. I (2004), 2198, through the BVerfG decision of July 18, 2005, BGBl. I (2005), 2300 and law from July 22, 2005, BGBl. I (2005), 2189, and through the Second European Arrest Warrant Act of July 20, 2006, BGBl. I (2006), 1721.

<sup>50</sup> Cf. supra, note 35.

<sup>51</sup> The complete official translation of the German Basic Law is available at the German Law Archive Website at [www.iuscomp.org/gla/](http://www.iuscomp.org/gla/). Herein reproduced translations refer to this official translation.

Article 16 GG [Citizenship; extradition] reads:

(1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result.

(2) No German may be extradited to a foreign country.

This officially translated version of Article 16 was enforced until 1998. With amendments due to the introduction of the International Criminal Court Article 16 was changed and sentence 2 was introduced into Article 16 (2) Basic Law: „Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedsstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind.“ Translated this sentence means: „Only pursuant to a law a divergent provision may allow extradition to a member state of the European Union or to the International Criminal court, if

*tradited'*. German legislators had not complied with the prerequisites of the qualified proviso of legality (*qualifizierter Gesetzesvorbehalt*) when implementing the Framework Decision.

- *Second*, the statute interfered with Article 19 (4) GG<sup>52</sup> by *'excluding Recourse to Court'* against the decision to grant extradition to a European Member State.

#### 1. Article 16 (2) GG: The Right not to be Extradited

Concerning the interference with the 'Right not to be Extradited', one has to know that the German Constitution was already subject to change in 1998 concerning this basic right. At that time, the precedent of the International Criminal Court required the extradition of German citizens in an exemption to their German Civil Right to not be extradited.<sup>53</sup> With its decision concerning the First European Arrest Warrant Act, the Federal High Constitutional Court underlined that the extradition of German citizens overall does not contradict with the guarantee of perpetuity (*Ewigkeitsgarantie*) according to Article 79 (3) GG or with the limit of integration (*Integrationsschranke*) as set by Article 23 (1) GG.<sup>54</sup> While the court's statement can only be summarized herein, it needs to be emphasized that the extradition of Germans is only allowed to the extent that the principles of constitutionality

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fundamental principles of the democratic society and rule of law state are preserved.”

<sup>52</sup> Article 19 (4) GG (for record see supra, note 51) reads: “(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.”

<sup>53</sup> For the wording of Article 16 (1) GG see supra, note 51. Cf. Rome Statute Implementing Act (Gesetz zur Ausführung des Rom Statutes) of July 17, 1998 (current: BGBl. I [2002], 2144).

<sup>54</sup> BVerfG NJW 2005, 2290; BVerfGE 29, 183 (193) representing the opinion of the Senate's majority.

Article 79 (3) GG (for record see supra, note 51) reads: “(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

Article 23 (1) GG (for record see supra, note 51) reads: “(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.”

are not infringed upon.<sup>55</sup> Beyond this, the German Federal High Constitutional Court stressed the principle of proportionality (*Grundsatz der Verhältnismäßigkeit*), which must be respected, especially when fundamental rights are interfered with.<sup>56</sup>

While preparing a constitutional implementation of the European Arrest Warrant Framework Decision, the Court distinguished three categories:

(a) Cases which mainly concern domestic aspects, (“*maßgeblicher Inlandsbezug*”; showing genuine domestic link) and where the extradition is in principle disproportionate and illegitimate;

(b) Cases of a significant connection to a foreign country (*maßgeblicher Auslandsbezug*), where Germany has no concern about the extradition of a German citizen to a member state;<sup>57</sup> and

(c) Cases, where the criminal action takes place in Germany, whereas the site of the crime (*Tatort*) is abroad. These cases require a thorough assessment in each individual case. Here, it is obligatory to weigh the effectiveness of the prosecution on one hand, against the fundamental rights of the defendant on other. According to the Senate’s majority opinion, the First European Arrest Warrant Act did not meet this standard.<sup>58</sup>

## 2. Article 19 (4) GG:<sup>59</sup> Recourse to Court

Secondly, the First European Arrest Warrant Act was found unconstitutional concerning the interference with the Guarantee of Access to a Court. In this First Act, the State Attorney General’s<sup>60</sup> decision of granting a European Arrest Warrant was not open to recourse.<sup>61</sup> According to the hitherto existing legal situation, the defendant was refused to allege hindrances to the granting by virtue of § 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.<sup>62</sup>

In Germany, the general extradition procedure according to the IRG<sup>63</sup> is split into a procedure for admissibility of extradition by the High Regional Courts<sup>64</sup> (*Zulässigkeitsverfahren*) and a procedure for granting extradition by the Offices for Prosecution at the High Regional Court (*Bewilligungsverfahren*). Because of the historical, cultural, and traditional reasons for the division of competences in German proceedings of criminal investigation, this ‘two-stage-scheme’ was also adopted for proceedings on European Arrest Warrants. Installing another procedure just for cases of European Arrest Warrants would have meant to reconsider competences of courts and offices for prosecution for all cases of International extradition, as well as for all German preliminary proceedings. In Germany, the office for prosecution is the responsible leader of preliminary proceedings.<sup>65</sup> The court is involved if investigations interfere with constitutional rights of the person affected and a judicial review is

<sup>62</sup> Cf. OLG Braunschweig NStZ-RR 2005, 18; OLG Stuttgart NJW 2004, 3437; OLG means Oberlandesgericht (Regional Appeal Court).

<sup>63</sup> *Supra*, note 49.

<sup>64</sup> The German Court system consists of local courts (Amtsgerichte), installed at almost every town, of regional courts (Landgerichte), installed as first and second level courts, who also review local court decisions and are installed in all regions or districts (also called district courts), of high regional 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 or regional appeal courts), and Federal High Courts of Justice (Bundesgerichtshöfe) functioning solely as appeal courts on lower courts decisions of all German states. Herein the terms regional court for Landgericht and high regional 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, while the terming regional appeal court refers only to the court’s function to review appeals. Even this may be his major field, the court still also functions as a first level court for severe cases. The terms local, regional, and high regional court do not function perfectly but seem of better help in understanding the difficult terminology. Indeed, not translating the terms at all and thus not confronting them with their original English meaning would probably work best, but be of no help to the native English speaker.

<sup>65</sup> Cf. §§ 160, 161 StPO. § 160 (1) StPO (see *supra*, note 51, where an additional official translation of the German Code of Criminal Procedure is available) reads: “As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.”

<sup>55</sup> In German: “soweit rechtsstaatliche Grundsätze gewahrt sind”, BVerfG *id.* The Court interprets this as a requirement of ‘structural correspondence’ (“*Struktursprechung*”).

<sup>56</sup> BVerfG *id.* at pg. 2291.

<sup>57</sup> Whoever acts within another legal system must suppose him or her being held responsible within that system. BVerfG *id.* Also cf. *Mölders* (note 38), pg. 49.

<sup>58</sup> BVerfG *id.*

<sup>59</sup> Wording in *supra*, note 52.

<sup>60</sup> The State Attorney General is the prosecutor at the High Regional Court. In Germany, offices for prosecution are installed at the Regional Courts, at the High Regional Courts and at the Federal High Courts of Justice (for an explanation of the court system see below, note 64). He or she is the competent authority to grant extraditions according to a European Arrest Warrant also referring to the Second European Arrest Warrant Act. For details on competence and responsibility, see below in III. 3. a) Executing European Arrest Warrants.

<sup>61</sup> § 74b IRG *old version*; BVerfG *id.* at pg. 2294.

needed, for example if the person affected, the suspect, needs to be arrested.<sup>66</sup> Comparably, in International extradition proceedings, as well as in domestic proceedings, the prosecutor investigates, takes and reviews evidence, and grants the decision, while the judge decides upon the admissibility of the warrant of arrest, §§ 160, 161, 114 StPO.<sup>67</sup>

The proceedings for granting extradition are complemented by specified grounds for optional reasons to not execute an International Extradition request or a European Arrest Warrant in specific. As a result, the competent authority, the State Attorney General, has to enter into a process of balancing personal interests and subjective rights of the person affected. In particular, he or she has to decide if the subject is in particular criminal prosecution in the 'home state' of the person affected; thus, the European Arrest Warrant could be granted.<sup>68</sup> The prosecuted person's rights were not protected, according to the Basic Law, if such a decision was not open to a courts review.<sup>69</sup> Since the granting decision was thought of as a solely formal decision, which predominantly addressed the granting authority, German legislators underestimated its constitutional effects. Doubly mistaken, they passed over constitutional interferences and provided optional reasons, leaving discretion to the prosecutor for cases in which only one interpretation resulted in a constitutional solution, such as the provision on extradition in lifelong sentences.<sup>70</sup> However, the Federal High Constitutional Court did not query the German 'two-stage-scheme' for extraditions from admissibility (stage 1) to granting (stage 2).

### III. Germany's Second European Arrest Warrant Act of July 20, 2006 and its Constitutionality

Meanwhile, the Second European Arrest Warrant Act entered into force on August 2, 2006.<sup>71</sup> The new Act implemented what the Federal High Constitutional Court had criticized. Additionally the Second Act filled a gap left open by the First European Arrest Warrant Act concerning the goal of the Framework Decision to allow the extradition of nationals under simplified conditions (so called 'fast-track' proceedings).

In the following sections, this paper explores general changes in proceedings of European Arrest Warrants by the Second Act (I), considers the issuance of European Arrest Warrants (II) as well as their execution (III) in generally explaining the German provisions, also comparing them to

the requirements of the European Arrest Warrant Framework Decision, and finally speaking of a few practical issues (IV).

#### 1. The Implementation of the European Arrest Warrant into German National Law – Installing a new Proceeding of Approval?

In specific, the new European Arrest Warrant Act opens recourse to the court within the "first-stage-proceeding" for admissibility of EAW, §§ 79, 74b IRG. To back-draw this, the German proceedings for International extradition consist of two stages. Within Stage 1, the High Regional Court proves the admissibility of European Arrest Warrants. At Stage 2, the responsible prosecutor, the State Attorney General, questions whether a European Arrest Warrant has to be granted (*Bewilligung*).<sup>72</sup> These decisions of granting European Arrest Warrants are now reviewable. Herewith 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.<sup>73</sup> It consequently provides for a review of the State Attorney General's denial of hindrances by the High Regional Court; contained in § 79 IRG *new*. Thus, the High Regional Court is empowered to review hindrances to granting a European Arrest Warrant, considering the State Attorney General's wide discretionary powers.

At the same time, the provision stating that the Prosecutor's Granting Decision was irreversible (§ 83b IRG *old*) was erased from the law.<sup>74</sup> Thus, the decision granting an EAW is now per se open to legal recourse as demanded by the German Constitution. Legislators reasoned that according to the Federal High Constitutional Court's decision. Also Granting Decisions can interfere with the (subjective) rights of the people.<sup>75</sup> Conclusively, the High Regional Court now decides about the admissibility of European Arrest Warrants and about probable reasons not to grant European Arrest Warrants, as told by the prosecution. And in addition, the High Regional Court decides about new reasons, which hinder

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<sup>66</sup> For domestic proceedings according to § 114 (1) StPO, which reads: "(1) Remand detention shall be imposed by the judge in a written warrant of arrest."

<sup>67</sup> StPO means German Criminal Procedural Code, deutsche Strafprozessordnung; further abbreviated StPO; for further references see note 84.

<sup>68</sup> BVerfG id. at pg. 2295; with this clear sentence *Mölders* (note 38), pg. 51.

<sup>69</sup> BVerfG id. at pg. 2296.

<sup>70</sup> BVerfG id. at pg. 2295; cf. to the provision according to the First European Arrest Warrant Act *supra*, note 11.

<sup>71</sup> Cf. *supra*, note 12.

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<sup>72</sup> Cf. II. 2.

<sup>73</sup> For the constitutional decision cf. *supra*, note 19; explaining the former legal protection according to the First European Arrest Warrant Act, see II. 2.

<sup>74</sup> The first official draft to the Second European Arrest Warrant Act did not foresee erasing § 83b IRG *old*. Cf. *Zypries*, Annotations to the new draft of an European Arrest Warrant Act, Redaktion Beck Aktuell, becklink No. 161921: "Changes will only confer to §§ 79, 80 and 83a IRG as the Federal High Constitutional Court required". While legislators planned to have the court's beforehand approval to granting hindrances, it was not planned to open recourse to the granting decision itself. This was highly disputed. Cf. *Rosenthal*, ZRP 2006, 105 (107). However, shortly before enacting the law, the provision was deleted.

<sup>75</sup> Cf. official reasoning of the legislation in BT-Drs. No. 16/2015 (of July 28, 2006), 28.



admissibility and granting as they are caused by a change of circumstances after the first decision (§ 33 IRG).<sup>76</sup>

This is in order to guarantee the greatest possible extent of legal security and still allow a speedy procedure, without questioning the traditional division of an admitting judge and an approving prosecutor. The new procedure does a good job in serving the prosecuted person's interests. 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.<sup>77</sup>

## 2. Issuing European Arrest Warrants in Germany

First, it must be clarified that the European Arrest Warrant is not a warrant of arrest but rather a request of extradition to another member state of the European Union. Thus, the European Arrest Warrant also functions as the basis to search for the suspect within the Schengen Information System (SIS), per Article 95 of the Schengen Agreement (SDÜ, *Schengener Durchführungsübereinkommen*) and Article 9 FD.<sup>78</sup> To give an idea of practical German authorities' usage of that instrument, according to an official document of the Council of the European Union dated March 9, 2005, about 1300 European Arrest Warrants were granted in Germany in 2004.<sup>79</sup>

According to an agreement between the German Federation (*Bund*) and the constituent States of Germany (*Bundesländer*), the competent judicial bodies of the constituent states delegated the authority to issue European Arrest Warrants to the offices for prosecution, installed at the regional

<sup>76</sup> Cf. official reasoning of the legislation in BT-Drs. No. 16/2015 (of July 28, 2006), 29. § 33 IRG in translation reads: § 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.

<sup>77</sup> The new modification is similar to a proceeding used in Portugal. For a very detailed and critical view on this specific kind of proceeding, see *Lagodny*, StV 2005, 515 (519). Indeed, *Lagodny* suggested installing a separate law in Germany as well.

<sup>78</sup> Cf. especially to the difficulties *Hackner* (note 42), before § 78 IRG MN. 10; cf. arguing like this *Rosenthal*, ZRP 2006, 105.

<sup>79</sup> Document of the Council of Europe, March 9, 2005 No. 7155/05 COPEN 49 EJM 15 EUROJUST 15.

courts,<sup>80</sup> for they are responsible for criminal investigation.<sup>81</sup> The prosecutor has access to all domestic, European, and International information channels when issuing a European Arrest Warrant (SIS, EJM, Europol, Inpol,<sup>82</sup> etc.). The exact place of a suspect's residence does not have to be known in order to issue a European Arrest Warrant, according to Article 8 FD. The prosecutor issues European Arrest Warrants by completing the official European Arrest Warrant forms *ex officio*, based upon the existing domestic judicial arrest warrant (§ 114 StPO)<sup>83</sup>. If the request for extradition was issued as a European Arrest Warrant, it substitutes the national judicial arrest warrant according to Article 12 (2) (a) European Convention on Assistance in Criminal Matters. The presumptions are those required for domestic judicial arrest warrants. This means, the investigative magistrate (*Ermittlungsrichter*) at the local court<sup>84</sup> has jurisdiction, which is brought to him by motion of the office for prosecution. The exceptions are cases concerning state security, where 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) over domestic warrants of arrest. Also, the juvenile judge decides in juvenile cases (§ 34 (1) JGG)<sup>85</sup>. Nevertheless, in whichever court with jurisdiction over the matter, it is always one judge (and not a chamber) at this court who solely decides on the domestic judicial arrest warrant. The investigative magistrate considers all facts of the case and decides whether facts and presented evidence can show *strong suspicion* of the commission of the offence. However, the burden of proof is to show strong suspicion and not to prove whether the suspect actually committed the crime. For that, § 114 (2) No. 4 StPO requires that in all cases (unless national security is thereby endangered) all facts disclosing the strong suspicion of the

<sup>80</sup> *Landgerichte*, as explained in *supra*, note 64.

<sup>81</sup> 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.

<sup>82</sup> Inpol (Informationssystem der Polizei) is the Information system for the German Police.

<sup>83</sup> § 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 security is thereby endangered. (3) If it appears that Section 112 subsection 1, second sentence, is applicable, or if the accused invokes that provision, the grounds for not applying it shall be stated.

<sup>84</sup> 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.

<sup>85</sup> JGG = German Juvenile Courts Act.

commission of the offence and the ground for arrest have to be presented to court.

Since the imposed European Arrest Warrant is issued *ex officio* on basis of a domestic arrest warrant, on which there exists an investigative magistrate's reasoned decision, parties or other persons affected do not participate in issuing the European Arrest Warrant. However, persons affected may participate in domestic proceedings issuing and executing domestic judicial arrest warrants according to §§ 114 et. seq. StPO, as relatives must be informed (§ 114b StPO) and the suspect has to be brought to the investigative magistrate following arrest (§ 115 StPO).

At the same time following its legal definition as a request of extradition, the prosecutor's decision "to write out the suspect" is not subject to legal remedy.<sup>86</sup> However, the party has the right to appeal the investigative magistrate's decision upon which the issuance of the European Arrest Warrant was based. The German legal remedy within this case is a complaint<sup>87</sup> for relief from pre-trial detention (§ 117 StPO). If the prosecution's motion to issue or expand a 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.

Finally, German authorities will base their decisions to issue a European Arrest Warrant mainly on German law. Nevertheless, the impact of European Court of Justice Decisions and different European Union laws is not to be underestimated. Also, German authorities will have to lean on the contents of framework decisions to interpret German national laws. This is to follow *Pupino* and the goals of framework decisions to their best.<sup>88</sup> As our discussion on reaching constitutional solutions in Germany has already shown, the Federal High Constitutional Court has even allowed German authorities to issue a European Arrest Warrant directly, according to provisions of the European Union Framework Decision, since national law was lacking implementation at that time.<sup>89</sup>

### 3. Executing European Arrest Warrants in Germany – explaining the important provisions

The execution of the European Arrest Warrant focuses on incoming requests. In 2004, 71 European Arrest Warrants had been addressed to the Federal Republic of Germany. Until the nullification of the First European Arrest Warrant Act, 23 European Arrest Warrants had been executed.<sup>90</sup> The provisions concerning European Arrest Warrants apply with-

out any time restriction, as long as Germany is affected as an executing member state.<sup>91</sup>

#### a) Competence to execute European Arrest Warrants

The German Federation and the constituent states (*Bundesländer*) made an arrangement on April 28, 2004, regarding the competence to execute European Arrest Warrants and referring to Article 6 (3) FD. Therein, the performance of the granting authority is delegated to the *Bundesländer*. The ruling of the Federal High Constitutional Court on the First European Arrest Warrant Act did not influence that agreement. The constituent states themselves transferred the granting authority to their State Attorney Generals.<sup>92</sup> Independent from the nullification declared by the Federal High Constitutional Court, this transfer leaves § 12 IRG untouched. Thereafter, except in cases 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 a European Arrest Warrant, the State Attorney General files the motion to execute the European Arrest Warrant, and as long as the suspect does not agree on the "fast track" proceedings, the High Regional Court must decide upon its admissibility.

Germany, however, did not appoint a central authority competent for the entire German State as suggested by Article 7 FD, but rather appointed the High Regional Courts in each of the constituent states to be competent, according to its federal structure. 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, it would have been hard to realize, especially since the judiciary system is organized by the *Länder*. Additionally, the High Regional Courts are the

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<sup>86</sup> Cf. document of the Council of the European Union, 23.9.2004 Nr. 12510/04.

<sup>87</sup> *Beschwerde*.

<sup>88</sup> Cf. clearly *Hackner* (note 42), before § 78 MN. 16.

<sup>89</sup> BVerfG BvR 1667/05 v. 24.11.2005; [www.bundesverfassungsgericht.de/entscheidungen/](http://www.bundesverfassungsgericht.de/entscheidungen/). For a detailed discussion on this decision, see I. 3.

<sup>90</sup> Cf. *supra*, note 79.

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<sup>91</sup> Cf. document of the Council of Europe No. 12510/04, which does not include any official statement to restrict the application and execution of European Arrest Warrants. Regarding incoming extradition requests, Article 32 FD provides that any member state of the European Union was to declare to the Council of the European Union that the state 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 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.

<sup>92</sup> The State Attorney General (*Generalstaatsanwalt*) is the Prosecutor employed at the office for prosecution, which is installed at the High Regional 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.

highest courts in Germany with competence to negotiate cases by their facts (*Tatsacheninstanz*).<sup>93</sup>

To reiterate, the State Attorney General acts as the authority to execute the European Arrest Warrant. In doing so, he may only grant its execution and the respective extradition if the High Regional Court has declared it admissible (cf. § 12 IRG). By virtue of § 13 (2) IRG, the State Attorney General carries out the granted extradition.

The granting of the European Arrest Warrant, however, is dependent on the approval by the High Regional Court. The High Regional Court holds authority to review the domestic empowerment (the admissibility). In contrast, the question of whether there is a duty to extradite set by public International law is to be answered by the granting authority (the State Attorney General) on its own competence. The High Regional Court must examine the entire substantive legal situation of the defendant both extensively and conclusively. This means that no legal guarantee of the wanted person will be single-handedly examined by the granting authority.

In § 79 (2) IRG *new*, according to the Second European Arrest Warrant Act,<sup>94</sup> further ways of legal protection are provided. Accordingly, the State Attorney General must indicate whether he or she intends to claim hindrances to the granting of the European Arrest Warrant (§ 83b IRG *new*) in his or her reasons to extradite the defendant. This results in anticipation for the granting decision prior to the High Regional Court's decision on admissibility, because the motion on hindrances is examined judicially within the proceedings on admissibility.<sup>95</sup>

*b) The structure of the German Provisions in accordance to the European Arrest Warrant Framework Decision*

The Second German European Arrest Warrant Act<sup>96</sup> tries to comply with the provisions of the Framework Decision to the most possible extent. This especially applies to the compulsorily and optional negative premises of surrender, as now stated in §§ 80-83, 83 b German IRG. The compulsory reasons to deny a European arrest warrant (Article 3 FD) are to be found in §§ 80-83 German IRG. The optional reasons (Article 4 FD) are to be found in § 80 (1) No. 2, 3 IRG (for German citizens) and especially in § 83b IRG. It is concerned with the facultative ("can-do") reasons to deny approval within the proceeding for approval (*Bewilligungsverfahren*). § 83b (1) (a-c) IRG equals Article 4 No. 2, 3, 5 FD. The compulsory 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 (extradition of German nationals). 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 statutes thus differs between general compulsory reasons to deny European arrest warrants

(§§ 81, 82, 83, 83 IRG), specific reasons to deny only conferring to German citizens (§ 80 IRG),<sup>97</sup> and reasons to deny approval where the administrative body, the office for prosecution, has discretion (*Ermessen*) to decide whether to grant. Solely, the possibility to deny approval according to § 83b (1) (d) 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. Furthermore, approval can be denied if it is expected that the requesting member state will not allow an extradition according to the framework decision.<sup>98</sup>

*c) Provisions Extraditing German Nationals*

The extradition of German nationals was poorly 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 reprisals, in particular with the reprehension of a breach of the Basic Right not to be extradited,<sup>99</sup> § 80 IRG in its recent version has been remodelled significantly.

*aa) § 80 (1) and (2) IRG: Extradition for prosecution*

Secondly, the *new* EAW Act installed a *check routine* for extraditions of German nationals (§ 80 (1) and (2) IRG). It tries to comply with the requirements as stated by the Federal High Constitutional Court (to comply with qualified proviso

<sup>97</sup> This is especially due to the decision of the German Federal High Court of the Constitution nullifying the 1.EuHbG for reasons of contradicting the German civil rights of not being extradited as a German citizen (Article 16 German Constitution), cf. *supra*, note 19 for references to the BVerfG decision; very critical especially on the protection of the German Basic Right not to be extradited by the Second European Arrest Warrant Act from the European perspective of the prohibition of discrimination *Reinhardt/Düsterhaus*, NVwZ 2006, 432.

<sup>98</sup> § 83b. 1 d. IRG reads: „(1) Die Bewilligung der Auslieferung kann abgelehnt werden, wenn (d) nicht aufgrund einer Pflicht zur Auslieferung nach dem Rahmenbeschluss des Rates vom 13. Juni 2002 über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten (ABl. EG Nr. L 190, 1), aufgrund einer vom ersuchenden Staat gegebenen Zusicherung oder aus sonstigen Gründen erwartet werden kann, dass dieser einem vergleichbaren deutschen Ersuchen entsprechen würde.“

In translation: “The grant of extradition can be denied, if (d) not due to an obligation to extradite according to the Framework Decision on the European Arrest Warrant and Surrender Proceedings between Member States of the European Union of June 13, 2002 (Abl. EG Nr. L 190, 1), according to an assurance by the issuing member state or due to other reasons, it can not be expected that the issuing member state will respect and surrender according to a comparable issuance.”

<sup>99</sup> Article 16 Basic Law (wording *supra*, note 51).

<sup>93</sup> The Federal High Court, Criminal Section, is not given the function to take evidence but rather to decide solely legal appeals.

<sup>94</sup> Cf. *supra*, note 12.

<sup>95</sup> For a detailed explanation on the legal recourse see III. 1.

<sup>96</sup> Cf. *supra*, note 12.

of legality) and with those of the European Union as stated in Article 5 No. 3 and Article 4 No. 6 FD. At the same time, the new law takes the right to marriage and family of Article 6 German Basic Law into account. As the result, German nationals can be extradited for prosecution, if the issuing member state guarantees to offer the 'Return-Transfer' for execution of sentences to Germany and if the crime committed shows a decisive relation to the issuing member state (§ 80 (1) No. 1 and 2 IRG).<sup>100</sup> § 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.<sup>101</sup> As to offences with home territory in Germany, extradition is not admissible without interfering with the basic right not to be extradited. Following § 80 (1) No. 2 IRG, the reference to overseas territory is thoroughly explored.

As an exception, German nationals may be extradited for the purpose of prosecution by virtue of § 80 (2) IRG, as far as no proper reference to overseas territory can be determined. Prerequisites are that a back-committal arrangement according to § 80 (1) No. 1 IRG has been made, § 80 (2) No. 1 IRG, and that the committed crime does not show some proper reference to the Federal Republic of Germany, § 80 (2) No. 2 IRG. The proper reference to Germany is defined by the (not concluding) requirements set out in § 80 (2) IRG.<sup>102</sup> Additionally, § 80 (2) No. 3 IRG demands that the committed crime is punishable at least in a transfer of valuation in German law and the appreciation of opposing values of the defendant is not surrendered.

### *bb) § 80 (3) and (4) IRG: Extradition for execution of sentences*

Amendments to the *Extradition for Execution of Sentences* (§ 80 (3), (4) IRG) were due to compulsory requirements of the European Arrest Warrant Framework Decision. These

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<sup>100</sup> § 80 (1) IRG new reads in No. 1 and 2 that 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."

<sup>101</sup> Cf. supra, note 19.

<sup>102</sup> „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.)

changes can function as examples to show that German provisions can be both *constitutional* and *European conform*.<sup>103</sup> According to Germany's First and Second European Arrest Warrant Act, German nationals can be extradited for execution of sentences in principle, if they affirmed to the extradition (§ 80 (3) IRG). Due to a provision of the proceedings for extradition in International Assistance cases in general (§ 49 (1) No. 3 IRG), they could not be returned back to Germany for execution, if the sentenced crime was not punishable in Germany. As a result, a German national was able to hinder the execution of a sentence against him or her, if the crime was not punishable according to German law, by simply not consenting to his or her extradition. This conflicts with Article 4 No. 6 FD.

According to the *Second* European Arrest Warrant Act (§ 80 (4) IRG *new version*), whether the actual crime is punishable in Germany (according to § 49 (1) No. 3 IRG) is not considered.<sup>104</sup> Indeed, the general renunciation (*Aufgabe*) of ambilateral punishability (*beidseitiger Strafbarkeit*) as a crime is proportional and constitutional. Compared with the alternative, the national's extradition, the interference with the national's German constitutional rights is of minor importance.<sup>105</sup>

### *d) Provisions Extraditing Aliens: § 83b (2) IRG (former § 80 [4]) as an Optional Reason not to grant a Warrant.*

The emphasis shall be on another important change. The former compulsory inadmissibility reason that the affected person is an alien is no longer a solitary reason to not grant a European Arrest Warrant. The European Arrest Warrant Framework Decision only requires that certain non-nationals, especially in cases where they have their social hub (*gesellschaftlicher Mittelpunkt*) in the extraditing member state, must have rights comparable to national citizens (Art 5 No. 3

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<sup>103</sup> Indeed the conformity to the European Union standards can be questioned. The German provisions may interfere with the European prohibition of discrimination. Germany tried to give non-citizens rights comparable to German nationals. If the German enactment is found not conform to European Union standards, other member states will also have severe problems with their provisions.

<sup>104</sup> Cf. official reasoning of the legislation in BT-Drs. No. 16/2015 (of July 28, 2006), 30.

<sup>105</sup> With the same reasoning BT-Drs. No. 16/2015 (of July 28, 2006), 31. According to the First EAW Act, German nationals, who were extradited to another member state to execute sentencing, could only be transferred back (*rücküberstellt*) to Germany for execution or stay in Germany for those executions, if the crime the person committed was punishable in both, the issuing member state and Germany. The new provision allows extraditing German nationals if they both agree, or rejecting the extradition if Germany agrees to execute the sentence back in Germany. Article 4 No. 6 FD requires the possibility to either extradite nationals completely, or to extradite them for prosecution and sentencing, but to execute back in the extraditing member state (here: Germany).

and Article 4 No. 6 FD). This statement does not require a compulsory inadmissibility of extradition. Rather, it may provoke an option to not grant a European Arrest Warrant. Thus, aliens, who can show that their social hub is in Germany by their place of residence, can only be extradited for prosecution, if the requirements protecting German nationals are fulfilled (§ 80 (1) and (2) IRG); § 83b (2) (a) IRG. Extradition for execution of sentences can not be granted if the alien does not consent or if his subjective right to be executed in Germany prevails; § 83 (2) (b) IRG.

*e) § 83 No. 4 IRG: Extradition in lifelong sentencing cases.*

As part of another significant change, the Second European Arrest Warrant Act amended the former optional reason to dismiss a European Arrest Warrant in cases of lifelong sentences. The discussions in the law-making proceedings in Germany made clear that the extradition in these cases almost only interferes with the subjective rights of the affected person. There is almost no scope of discretion (*Ermessensspielraum*). In order to thoroughly protect the affected person's subjective rights, the *extradition in cases of lifelong sentences* is now configured as a compulsory requirement of inadmissibility proceedings (*Stage 1*).<sup>106</sup>

*f) § 81 No. 4 IRG: exemption from double-checking criminality.*

For crimes listed within Article 2 (2) FD, proof of dual criminality is exempted according to § 81 No. 4 IRG *new*. As provided in Article 2 (2) FD, § 81 No. 4 IRG exempts proving the punishability in both the requesting and the executing member state, if the request is based upon a European Arrest Warrant and refers to one of the catalogue crimes of Article 2 (2) FD. All these "crimes" are criminalized in Germany.<sup>107</sup>

<sup>106</sup> Cf. for a detailed reasoning BT-Drs. No. 16/2015 (of July 28, 2006), 32.

<sup>107</sup> With regard to 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 §§ 239a, b StGB; sexual exploitation of children and child pornography according to §§ 174 et seq. StGB; illicit trafficking in narcotic drugs and psychotropic substances according to §§ 29 et seq. 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 et seq., 331 et seq. StGB; fraud (including affecting the financial interest of the EU) according to §§ 152a, 152b, 242 et seq., 246, 267 et seq., 259 et seq., 263, 263a, 266b StGB; laundering the proceeds of crime according to § 261 StGB; counterfeiting currency according to §§ 146-148, 151 StGB; computer-related crime ("Cyberkriminalität") according to §§ 303a, 303b StGB, see also §§ 263, 263a, 266b, 242, 246, 202a, 269, 270, 271 (1) StGB; environmental crime according to §§ 324, 324a, 325, 330, 330a StGB; facilitation of unauthorised entry and resi-

Nevertheless, a few terms used by the framework decision are not to be found within the German substantive criminal law.<sup>108</sup> This is due to the German specific system and legal terminology in its criminal law. In other cases, such as 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, Germany made use of Article 4 No. 1 FD and the possibility within to provide a rule of examining dual criminality if the European Arrest Warrant refers to non-catalogue crimes.

*g) Extraditing despite an existing valid judgment and the German interpretation of Article 54 SDU*

Additionally, according to Article 54 Schengen Agreement, a suspect cannot be prosecuted, if already convicted or sentenced for the identical act by another party to that agreement. The official German translation of Article 54 SDÜ reads: "Wer durch eine Vertragspartei *rechtskräftig abgeurteilt* worden ist, darf durch eine andere Vertragspartei wegen

dence according to §§ 92, 92a, 92b Alien Law (AuslG, Ausländergesetz); murder according to § 211 StGB; grievous bodily injury according to §§ 224 et seq. StGB; illicit trade in human organs and tissue according to §§ 18, 19 Transplantation Act (TPG, Transplantationsgesetz); kidnapping, illegal restraint and hostage-taking according to §§ 239-239b StGB; racism and xenophobia according to §§ 130, 185 et seq., §§ 86 et seq. 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 et seq. StGB; racketeering and extortion according to §§ 253 et seq. StGB; counterfeiting and piracy of products according to §§ 106 et seq. Intellectual Property Act (UrhG, Urheberrechtsgesetz); forgery of administrative documents and trafficking therein according to §§ 267 et seq., 267 (3) No. 1-3 StGB; forgery of means of payment according to § 263a StGB; illicit trafficking in hormonal substances and other growth promoters according to §§ 95 et seq., 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 et seq. StGB; arson according to §§ 306, 306a et seq. 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 §§ 316c, 316b, 315a, 315b, 239a, 239b, 125a, 126, 129a, 211, 127, 310 StGB; and sabotage according to §§ 303, 303b, 304, 305 StGB. A lack of criminality cannot be perceived.

<sup>108</sup> For example, when 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; however, this does not mean that cyber crimes are not punishable. Computer-related crime ("Cyberkriminalität") according to §§ 303a, 303b StGB was basically introduced to fight white-collar crimes, 2. WiKG, May 15 1986 (BGBl. I [1986], 721).

*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 translation uses the legal 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, and the outcome is hard to predict. Using teleological and systematic interpretation, and taking into account the often unfamiliar wordings of the German language, legal scholarship and jurisprudence tend 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 Belgian/Netherlands “*transactie*” as well as the Austrian acknowledgement of guilt.<sup>109</sup>

§ 9 IRG provides a general obligatory rule of inadmissibility of an extradition, if already a valid judgement or conviction, for example, a decision of comparable validity, a decision of discontinuance of the procedure, either in rejecting the indictment (§ 174 StPO) or the opening of the main proceeding (§ 204 StPO), or if adjustment (§ 153a StPO) exists, or if rules of limitation apply.<sup>110</sup> It remains questionable whether the suspicion confers to the same crime, thus if the act is identical.

“Identity of an act” means the criminal action as a technical term according to § 264 StPO. The criminal action includes all punishable crimes committed and described by the substantive criminal law; in other words, all offences to which the elements were fulfilled. This is called criminal action within procedural sense.<sup>111</sup> According to its official definition, it means the deeds impeached by the prosecution, i.e. the consistent actions with all included committed offences.<sup>112</sup> § 83 No. 1 IRG provides in its German version the exact same wording of identity of an act.<sup>113</sup> To clarify, the wording does not mean just the criminal offence of the foreign criminal law. If identity of the act applies, the prose-

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

#### 4. Practical Issues

To the International community to whom this paper is mainly aimed, a few questions may remain. It might be excused, if this paper does not answer any questions to future developments and the practical work with issuing and executing European Arrest Warrants and actually surrendering or extraditing suspects according to it. Questions may concern (1) time periods for arrests in Germany, (2) oral hearings before Germany’s High Regional Courts and the standard of proof, (3) the right to counsel, (4) the surrender despite a concurrent European Arrest Warrant, and finally, (5) the German ‘Fast-Track’-Proceedings for International extradition. This paper will close by briefly addressing these questions and adding a few remarks on the practical work experience of the police.

##### a) Arresting the suspect in Germany and its custodial rules

Not surprisingly to the “knowing scholar” of the *civil system*, there is no legal regulation on the maximum period of arrest in extradition proceedings, although § 26 (1) IRG does require an examination of the detention (*Haftprüfung*) every two months by the Regional Appeal Court. However, Chapter 8 of the Law on International Judicial Assistance in Criminal Matters (IRG) provides specific rules in cases of European Arrest Warrants, due to the European Arrest Warrant Framework Decision. These specific rules do not specify the term of arrest, but require the authorities to react within certain time periods after the suspect is arrested, or else the suspect needs to be released.

§ 83c (1) IRG, which has already been inserted due to the First European Arrest Warrant Act<sup>114</sup>, only determines that the decision on extradition *ought to be reached* within 60 days after the suspect has been arrested. § 83c (3) IRG assigns for the transfer date within 10 days after the granting decision. Exceptions to those time limits are also laid down in § 83c (3) IRG. The decision on extradition has to be reached within 10 days according to § 83c (2) IRG, if the suspect affirmed to the fast-track-proceedings.<sup>115</sup> 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 (3) IRG. Finally, § 83d IRG provides that the suspect must be released from arrest if the transfer to the requesting member state has failed to be completed within 10 days after the assigned transfer date, and if authorities were unable to agree on a new date for the transfer. While it is

<sup>109</sup> Cf. *Radke/Busch*, NSTz 2003, 281 (282-283) with further references on the Belgian *transactie*; concerning the Austrian acknowledgement of guilt see Supreme Court Decision of Austria 12 Os 23/04 of June 17, 2004, in: NSTz 2005, 344.

<sup>110</sup> 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 not 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 a European Arrest Warrant.

<sup>111</sup> *Handlung im prozessualen Sinn*.

<sup>112</sup> Cf. *Lagodny* (note 42), § 3 MN. 6; BGHSt 27, 168, 172 [continuous jurisdiction].

<sup>113</sup> *derselben Tat*.

<sup>114</sup> Cf. *supra*, note. 11.

<sup>115</sup> § 41 IRG, see III. 4. e) for explanations to this specific kind of proceedings.

unlikely under these specific rules that an arrest based upon a European Arrest Warrant outlasts two months, it still is mathematically possible.

*b) Oral Hearing before the Regional Appeal Court and Taking Evidence*

There is no right to general presence in 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 office<sup>116</sup>, to the defendant, and to the defendant's counsel. In such hearing a representative of the State Attorney General's office must be present. The defendant has to be summoned when being imprisoned, unless he has waived his right to presence or there are other opposing obstacles. If he is not summoned for the hearing, his legal counsel (§ 40 IRG) must attend, in order to serve his interests. If the defendant is not 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 recorded, under § 31 (4) IRG. If the defendant is at large, the High Regional Court may order his or her personal attendance. If the defendant is called before the court properly and he or she does not attend without an excuse, the High Regional Court may order his or her summoning.

As granting of extradition is dependent on the decision on admissibility by the High Regional Court,<sup>117</sup> the High Regional Court even *takes and performs evidence* in the proceedings on the admissibility of extradition. The goal is to prove the admissibility of extradition. Only exceptionally, in cases of § 10 (2) IRG, does the court prove whether there is sufficient suspicion that the suspect committed the crime. This follows § 30 IRG.<sup>118</sup> According to these provisions

<sup>116</sup> The State Attorney General's office is the office for prosecution at the High Regional Court.

<sup>117</sup> Except in cases of § 41 IRG, as explained under III. 4. e).

<sup>118</sup> § 30 IRG: Preparing the Decision.

(1) If the extradition documents do not suffice for making a judgment on the granting of the extradition, the High Regional 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 High Regional 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 High Regional Court shall determine the manner and extent of the taking of evidence without being bound by prior applications, waivers or decisions.

(3) The High Regional Court may hold an oral hearing. § 10 (2) IRG reads: "(2) On occasion of certain circumstances within a specific case, whether the suspect is suffi-

evidence to the facts of the case has to be brought to court if certain circumstances of the specific case make approving the sufficient suspicion necessary.

*c) Right to Counsel*

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 German, this triggers the duty to call in an interpreter, §§ 77 IRG, 185 GVG<sup>119</sup>.

*d) Extraditing Despite a Concurrent European Arrest Warrant*

Neither the First nor the Second European Arrest Warrant Act provide for a regulation. § 83b lit. (c) 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, which of the European Arrest Warrants is to be executed.

*e) The 'Fast-Track'-Proceeding, 41 IRG*

Finally, attention shall be directed to amendments of the German simplified 'fast-track' proceedings (§ 41 IRG). Changes of this provision with the Second European Arrest Warrant Act were not due to the German Basic Law, but to requirements of the European Arrest Warrant Framework Decision. The main goal of the Framework Decision was to *simplify* International proceedings for extradition within the European Union. While, *Tuffner* (BKA-Wiesbaden) already officially stated that this aim has already been achieved,<sup>120</sup> the European Arrest Warrant Framework Decision also aims to simplify extraditions of member state nationals. Otherwise the European Conventions on Extradition and the European Union Convention on Extradition are not to be substituted. As a result, the 'Fast-Track' proceeding for extradition can now be applied for aliens *and* for German nationals, while according to the former version and according to the First European Arrest Warrant Act it was only applicable for aliens.

The 'Fast-Track' proceeding is a simplified proceeding, which allows extradition without participation of the High Regional Court if the affected person, now according to the wording, the "suspect" (*Verfolgter*), consents to it, after officially being cautioned by a judge at the local court. Amendment was only seen as clarification.<sup>121</sup> 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. The change, nevertheless, appears to be proportional and constitutional, since

ciently suspicious of the commission of a crime, the extradition is only admissible, if facts are shown, which prove sufficient suspicion."

<sup>119</sup> GVG (*Gerichtsverfassungsgesetz*, German Judicial Court's Act).

<sup>120</sup> Cf. *Tuffner*, MEPA-Zeitung 2/2005.

<sup>121</sup> Cf. BT-Drs. No. 16/2015 (of July 28, 2006), 27.

extradition depends on the suspect's decision and the suspect is advised by a judge.<sup>122</sup>

#### IV. Summary: Where are we going in the Future?

Summarizing the German situation, until August 2006 German authorities were not allowed to extradite (or surrender) German nationals to member states of the European Union according to a European Arrest Warrant. As we saw, this was due to the Federal High Constitutional Court's decision that the First European Arrest Warrant Act<sup>123</sup> had interfered with their Right not to be extradited according to Article 16 GG.<sup>124</sup> Thus, installing a new European Arrest Warrant Act was necessary to extradite (surrender) German nationals and comply with requirements of the Framework Decision on the European Arrest Warrant and Surrender Proceedings between Member States of the European Union.<sup>125</sup> However, other nationals were still searched, despite the non-existence of a German law according to the European Arrest Warrant. For example, the Federal High Constitutional Court allowed German authorities to issue a European Arrest Warrant for a Danish citizen to be extradited from Spain to Germany.<sup>126</sup>

As to the future, German legislators tried to comply with requests as set by the Federal High Constitutional Court. While there is no prediction, it is not that likely that the Second European Arrest Warrant Act will be exposed to another examination on its constitutionality. The paper also showed that it was not that easy to fulfil the requirements of the German Constitution and those of the European Arrest Warrant Framework Decision. But opening the 'Fast-Track' proceedings (§ 41 IRG) to German nationals and having the High Regional Court approve the granting decision together with deciding upon the admissibility of the European Arrest Warrant, sped up the proceedings as the Framework Decision requested.<sup>127</sup> It remains questionable whether the German law now violates the European non-discrimination principle, which to the drafters does not seem likely, since legislators also tried to give comparable rights to aliens.<sup>128</sup>

In praxis, in Germany, issued European Arrest Warrants are functioning as the basis for a search of the wanted person with help of the Schengen Information System (SIS). Most

European Union Member States are using the SIS.<sup>129</sup> Great Britain and Ireland, as well as the ten new European Union Member States, do issue and execute European Arrest Warrants, but are not connected to the SIS yet.<sup>130</sup> Searches with those countries base on INTERPOL (International Criminal Police Organization). Meanwhile also Italy ratified the European Arrest Warrant.<sup>131</sup>

Since the European Arrest Warrant issued in Germany in based upon a domestic warrant of arrest, German requirements to arrest a person are to be met. It is therefore unlikely from a German perspective that persons are searched through SIS for the commission of a crime, for which arrest is inadmissible. However, neither the Framework Decision on the European Arrest Warrant nor just one European Arrest Warrant Act in Germany may solve all problems of Constitutionality with all member state constitutions, conformity to European Union law, and the European Convention on Human Rights. To the last especially probable violations of Article 6 and 13 European Convention on Human Rights are always stressed. Discussing that needs to be suspended to another paper. To stick with a summarizing statement, Human Rights may always function as a counterbalance for extradition between member states of the European Union. Additionally, one should make him- or herself aware of the fact that the Framework Decision on the European Arrest Warrant and Surrender Proceedings between Member States of the European Union tries to answer questions as to whom needs to be prosecuted in which European Member State, which actually were to be answered on the first base by each member state's substantive criminal laws. Our problems to surrender suspects between our countries resolve from our complicated substantive criminal laws with expanding rules for prosecution of internationals or nationals committing crimes outside their national base. Germany is the very example of that.<sup>132</sup>

In the result, the German Second European Arrest Warrant Act insofar appears to be constitutional *and* conforming to requirements of the Framework Decision. Not-to-be-underestimated times of terror and mass surveillance, globalisation or Europeanisation, and rapid technical developments within all parts of our lives include new questions, new problems, but also introduce new risks. One risk among others is that of criminals crossing borders. As we plan to live within a "harmonized zone of law" we call the European Union, we want to make sure that the opportunity to go after these

<sup>122</sup> The change was also due to requirements judges of the BVerfG arrogated to protect German nationals due to Article 16 (2), but at the same time to protect those aliens with similar status.

<sup>123</sup> See *supra*, note 11.

<sup>124</sup> Cf. BVerfG (note 19). Wording of Article 16 GG in *supra*, note 51.

<sup>125</sup> See *supra*, note 10.

<sup>126</sup> See *supra*, note 41.

<sup>127</sup> Details in III. 1. ('two-stage' proceeding) and III. 4. e) ('fast-track' proceeding).

<sup>128</sup> Since this paper explicitly discusses the German point of view, it was not possible to discuss the non-discrimination principle in detail. Cf. for a detailed discussion *Reinhardt/Düsterhaus*, NVwZ 2006, 432.

<sup>129</sup> Belgium, Netherlands, Luxemburg, Germany, France, Spain, Portugal, Greece, Denmark, Sweden, Finland, Austria as according to an information by the German Federal Police. Switzerland, Norway and Island do not issue nor execute European Arrest Warrants, since they are not member states of the European Union.

<sup>130</sup> Both countries plan to install SIS II, expected for Summer 2008, according to information from the German Federal Police.

<sup>131</sup> Yet it cannot be stated whether the ratification especially is been European Union law conform. For critical arguments see *Impala* (note 2).

<sup>132</sup> Cf. §§ 3 et seq. German Substantive Criminal Code.



criminals is the same within all states of our “zone”. That is what the European Arrest Warrant Framework Decision aims at. No matter how far we are willing to go for this, if we change our constitutions, in either their wording or their interpretation, just to harmonize European investigation and live by European requirements and not by those of our own nations and cultures, we resign part of each system affected by this constitutional change. Not that this is wrong, but we have to be aware of changing it and us.