



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 September 2011 (30.09)  
(OR. de)**

**14446/11**

**CRIMORG 157  
COPEN 229  
EJN 117  
EUROJUST 139**

**NOTE**

---

from:	German delegation
to:	Delegations
No. prev. doc.:	7058/2/09 REV 2 CRIMORG 32 COPEN 42 EJN 18 EUROJUST 12 8302/4/09 REV 4 CRIMORG 55 COPEN 68 EJN 24 EUROJUST 20 + COR 1 + COR 2
<u>Subject:</u>	Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States - Follow-up to the report on Germany

---

Germany's comments on the recommendations contained in the report on Germany and final report on the fourth round of mutual evaluations are as follows:

**1. Report on Germany**

**Recommendation 1**

*The experts note that, in implementing the legislation, Germany has not fully moved away from traditional forms of extradition. In the experts' view, legislative measures should be taken to draw a clear distinction between traditional extradition and the new European Arrest Warrant (EAW) procedure.*

The German legislator implemented Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States by adding a new Part VIII to the Law on International Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*, hereinafter referred to as the "IRG"). While it is true that the implementation of the Framework Decision is thus oriented towards existing extradition law arrangements, changes are made wherever required by the Framework Decision. This has the advantage that, where there are no elements peculiar to the Framework Decision, the practitioners can work with tried and tested procedural arrangements and rely on specific existing arrangements in areas not covered by the Framework Decision. By concentrating the new rules in one dedicated section of the Law, the specific characteristics of the new procedure are brought into clearer focus. The report supports this approach adopted by the German legislator in its assertions that the new legislation is being applied very well in Germany. This is due not least to the fact that in a wide range of cases the legal profession can work with familiar, tried and tested extradition law arrangements.

## **Recommendation 2**

*The experts note that the law is not being applied uniformly in the Länder in practice. The legislator should therefore take appropriate measures to promote a uniform approach to applying the provisions of the implementing law in all Länder.*

A not entirely uniform practice is the price to be paid for decisions being made at the lowest level – by the judicial authorities competent in each case – as stipulated by the arrangements laid down in the Framework Decision. At the time of the evaluation, the EAW was still very new. Since then, many court rulings, now published, have improved, and are continuing to improve, legal practice on the use of the EAW in Germany, with the final aim of making it uniform. Uniform practice is also promoted by the Guidelines on International Communications in Criminal Matters. The amended Guidelines came into force on 1 January 2009, just three months after the evaluation in Germany was completed. In addition, numerous training sessions have been provided which have been attended by a majority of the prosecutors and judges involved, contributing to harmonising practice.

### **Recommendation 3**

*The team of experts calls on Germany to update the Fiche Française (a summary of the legal situation in Germany available on the internet) on the website of the Council of the European Union.*

The experts' recommendation has been carried out. The Fiche Française was thoroughly revised and the updated version placed on the Council website on 18 September 2009.

### **Recommendation 4**

*Re recommendation 1, the evaluation experts complain that the two-stage nature of the procedure has been maintained in the implementation of the Framework Decision; under the IRG, the approving authority rules on the transfer following a ruling by the Higher Regional Court (Oberlandsgericht, hereinafter referred to as "OLG"). Under Section 74 of the IRG, responsibility for this decision continues to lie with the Federal Ministry of Justice and the Federal Foreign Office. It has been noted that referral to Land level results in the power to grant surrender lying mostly with the public prosecutor's office. Indeed, the experts note that in practice there are no problems with this (in fact three-stage) procedure. However, the experts feel that German law is not fully complying with the rules and the spirit of the Framework Decision, whereby transfers within the EU should occur on the basis of direct contact between judicial authorities. The Jurisdiction should therefore be vested in judicial authorities acting in their own right.*

We do not consider it urgently necessary to alter the rules in Germany in this manner. It is also in keeping with the proper implementation of the Framework Decision if, in any event, referral to Land level ensures that the decision on surrender is taken by a judicial authority. This was not the case in all Länder at the time of the evaluation. At the request of the Federal Ministry of Justice, however, uniformity has since been achieved in all 16 Länder. Since 1 April 2011, EAW decisions have been taken at federal level exclusively by judicial authorities, in compliance with the Framework Decision. Under the formal agreement between federal and Land authorities, the federal authorities' powers are thereby vested in the Land governments and thence in all 16 Länder to the chief public prosecutor's offices. The chief public prosecutor's office is an executing judicial authority within the meaning of Article 6(3) of the Framework Decision. Extradition is therefore in principle carried out directly by the chief public prosecutor's offices. The functioning of the German system is also explicitly praised by the experts (see page 40 of the national report on Germany).

### **Recommendations 5 and 6**

*The experts indicate that an oral hearing is never held before the OLG in practice, and that proceedings are principally conducted in written form. Secondly, the experts consider the legal protection enjoyed by requested persons during the procedure to be insufficient. The experts state that, although requested persons are entitled by law to be assisted by a lawyer at any time during the proceedings, they are generally not afforded any legal assistance. The court rarely appoints an ex officio lawyer. The experts feel that such insufficient assistance is of concern particularly as regards the procedure before the OLG, which as a rule is conducted only in writing. The team of experts therefore recommends that measures be taken to ensure that requested persons are heard by the OLG in cases where they do not consent to surrender. Furthermore, in the experts' view, measures should be taken as appropriate to ensure that legal assistance is provided to requested persons throughout the procedure.*

Improving requested persons' procedural rights is an important matter for Germany. The experts' recommendations on offering legal assistance to the persons concerned throughout the EAW procedure as well as on holding a hearing before the OLG are being carried out. At a specialist level, a review of legal practice in Germany has been launched, with the involvement of the Federal Office of Justice and the Länder. Moreover, the question of the need to enhance procedural rights accordingly is not restricted to the EAW procedure but applies to extradition law as a whole. The rules on providing an ex officio lawyer have since been strengthened by court rulings (see for example the decision of 16 January 2010 the Federal Constitutional Court in the Kaya case (2 BvR 2299/09)). Legislative measures are also being considered. In this way, a reversal of the relationship between general rules and exceptions could be implemented within the rules set out in Section 40(1) and (2) and in Section 30(3) of the IRG. As a consequence, in extradition cases, provision of an ex officio lawyer and an oral hearing before the OLG could be waived only in a justified exceptional case with simple facts and merits. There would also need to be checks on how proper practice can be reconciled with the peculiarities of the EAW procedure. In the EAW procedure, which relies on speed, a hearing before the panel of the OLG might lead to considerable delay in proceedings and a lengthening of the period of imprisonment, which would not be in the interests of the person concerned. There are plans to take legislative measures aimed at enhancing the legal position of the person concerned in the implementation of the EU's package of measures to enhance procedural rights. The negotiations the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings and the work on Measure C are priorities in this respect. Both legal instruments should also cover the EAW procedure. Department IIB6 is currently engaged in intensive work on this matter with regard to the EAW.

## **Recommendation 7**

*The experts take the view that Section 81(2) of the IRG is not in line with the Framework Decision in saying that "extradition for execution of a sentence shall be permissible only if, pursuant to the law of the requesting Member State, the custodial sentence to be executed amounts to at least four months". The experts state that, whereas the wording of Section 81(2) of the IRG may be interpreted as referring definitively to the duration of the time to be actually served, Article 2(1) of the Framework Decision refers clearly to the duration of the penalty imposed. The experts recommend that the relevant law be redrafted in order to ensure that the outstanding sentence to be served is not used as a ground for refusal of surrender.*

Under the arrangements of the EAW Framework Decision, an EAW may be issued if the penalty imposed is at least four months. Furthermore, the wording of the Framework Decision indicates that this does not refer to the remainder of the sentence to be executed. Criticism of the German point of view has, however, since diminished in the course of follow-up work by the Council and the Commission regarding the need to observe the proportionality principle when issuing EAWs. Most recently, in a letter to the justice ministers of the Member States, Commissioner Reding called for the proportionality principle to be observed and in this connection explicitly referred to the actual length of sentence (see also the remarks below regarding recommendation 10). Observance of the proportionality principle is also the reason why the German legislator took care when implementing the Framework Decision to ensure that, in decisions on issuing an EAW, not only the penalty imposed but also the remaining sentence is taken into account. In order for proportionality to be sufficiently observed and the execution of the (remaining) sentence to contribute to social rehabilitation, the remaining duration of detention should not exceed a certain level.

This approach is supported by the statistical data provided by the Commission: The period of time between arrest and a ruling on extradition in cases in which the requested person does not consent to extradition is approximately 40 days. The period between the decision and surrender of the requested person is a further 10 days. Custodial sentences to be completed in the issuing state where no more than 120 days remain to be served are therefore in fact mostly served in extradition detention. This is neither appropriate nor in line with the intention of the EAW.

### **Recommendation 8**

*The team of experts notes that Section 80(2) provides for grounds for refusal in cases where the offence has no relevant connection with the issuing Member State. The experts feel that this rule is incompatible with the Framework Decision and constitutes preferential treatment of German nationals or of foreigners habitually resident in Germany over other EU citizens. In the experts' view, this provision of the implementation act should be amended. The experts state that refusing to surrender German nationals and foreigners habitually resident in Germany in such cases cannot be justified either by the prevailing legitimacy of the expectation of the requested person that he or she would not be extradited or that there had been no double criminality.*

The wording of Section 80(2) of the IRG transposes the optional grounds for refusal referred to in Articles 4(6) and 5 of the EAW Framework Decision and is based primarily on the ruling of the Federal Constitutional Court of 18 July 2005 as a result of which the (first) law transposing the Framework Decision of 12 July 2004 was repealed. Now, under Section 80(1)(2) of the IRG, the law states that in principle the extradition of German nationals is permissible if the offence was committed in the requesting Member State and not if the place of the crime was in Germany (*a contrario* argument from Section 80(2)(2) of the IRG). If the crime is committed in a third country, the law provides for the assessment on a case-by-case basis criticised by the team of experts.

Another question addressed by the team of experts, which concerned inequalities in the treatment of domestic nationals and EU citizens, was – even though it had a different factual background – the subject of a referral by a Dutch court to the Court of Justice for a preliminary hearing (Case C-123/08 Wolzenburg). Since the Court's judgment in that case of 6 October 2009, the experts' criticism has in Germany's view become redundant. The decision makes it clear, first, that the Framework Decision's optional grounds for refusal are available to the national legislator and do not simply confer a measure of discretion on the judicial authorities. Second, the outcome was that the Court of Justice also raised no objections to legislative preferential treatment for domestic nationals. With the Court's decision, the IRG's grounds for refusal withstood a further test of their compatibility with the Framework Decision. The German legislator has made use of the discretion granted to it in a way that corresponds to European law. In so doing, the legislator has acted in a way that also takes account of the Framework Decision's objective of improving requested persons' chances of social rehabilitation. As regards the question of inequalities in the treatment of domestic nationals and EU citizens, the Court shares the view that a certain degree of integration into the society of the Member State is decisive.

### **Recommendation 9**

*The team of experts criticises the fact that in Germany a sentence cannot be executed on the basis of an EAW alone. In such cases, the German authorities require the foreign state to send an ad hoc request concerning the transfer of enforcement of the sentence.*

There is a lacuna in the Framework Decision on this point, as it fails to provide rules on the subsequent procedure for transfer of enforcement. Under Article 4(6) of the Framework Decision, the execution of an EAW issued for the purposes of enforcing a custodial sentence may be refused if the requested person is a national of the executing Member State and that state undertakes to take over enforcement of the sentence itself instead. Therefore, in common with a number of other Member States, Germany has sought to close this gap by means of domestic legal provisions governing the procedure for taking over the enforcement of sentences, supplementing the arrangements set out in the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 (Sections 48 et seq. of the IRG).



Against this background, the experts' criticism of Germany is unconvincing. Furthermore, the report on Germany rightly points out that the problem is in fact a temporary one and will be resolved with the implementation of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. That Framework Decision provides for rules in cases where enforcement of the sentence is transferred. To the extent that an application by Germany for a special request for the enforcement of a sentence to be transferred has entailed extra costs for the judicial authorities of certain Member States, representatives of those Member States have since been made aware of the legal requirements in Germany.

### **Recommendation 10**

*The team of expert criticises the fact that, when deciding on the recognition and execution of an EAW, the German judicial authorities review the issuing judicial authority's adherence to the principle of proportionality. In the experts' view, this check by the executing Member State is contrary to the principle of mutual recognition. The experts recommend that the practice of considering the lack of proportionality as a ground to refuse to enforce an EAW be reconsidered. However, the experts also express their explicit understanding of the fact that the German authorities occasionally refuse EAWs if proportionality had not been observed when they were issued. One of the recommendations made to the Council in the report is therefore to "discuss at the appropriate level the development of common standard criteria for a proportionality test when issuing an EAW".*

Avoiding disproportionate measures in the EAW procedure is a central concern in Germany. It is beyond question that proportionality checks should primarily be carried out when an EAW is issued. The experts share this view. Refusal to execute an EAW on grounds of the proportionality check by the requested judicial authorities can only be an exception. It is, however, justified and necessary in cases of clear non-proportionality. This is clear from Article 1(3) of the Framework Decision, which refers to the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. Indeed, Commissioner Reding also called for careful observance of the principle of proportionality in her letter of 12 April 2011. In particular, she asked the Member States to consider less burdensome alternative measures when issuing EAWs. Criticism of the German approach of checking observance of the proportionality principle by the issuing judicial authority when recognising and executing EAWs has diminished following the discussions in preparatory bodies and the follow-up work done by the Council and the Commission. Germany therefore warmly welcomes the fact that the overall report also calls on the Council's preparatory bodies to address the issue as a matter of priority (recommendation 9 of the overall report). Germany has worked intensively to help shape the follow-up work done in Brussels. It was considered sufficient at that time to add to the European handbook on how to issue an EAW. German practitioners have in the interim been asked to take note of the changes. Current figures show that observance of the principle of proportionality has since given rise to fewer problems. The reason for this cannot be established clearly in view of the shortness of the observation period. In Germany's view, the bilateral talks conducted with certain neighbouring countries in particular should bear fruit in the interim. In order to continue to be able to make valid statements on the issue of proportionality, and in particular to be able to continue to be involved in shaping subsequent follow-up work, the Federal Office of Justice asked the judicial authorities of the Länder to continue to place particular emphasis on the issue in practice and to provide regular reports on problems arising.

### **Recommendation 11**

*The provisions of Section 83b(1)(d) of the IRG provide for the possibility of making the execution of an EAW subject to reciprocity. The experts add that the condition of reciprocity does not apply under the EAW procedure. The implementing act should therefore be amended accordingly.*

In practice, the question of reciprocity has been of no significance to date. Indeed, under Section 82 of the IRG, reciprocity is no longer a condition for admissibility in German law, as this is guaranteed in principle by virtue of the obligations contained in the EAW Framework Decision. The provision in Section 83b(1)(d) of the IRG may be used as a basis for establishing an obstacle to granting extradition provided that, on the basis of an existing extradition requirement under the EAW Framework Decision, it cannot be expected that the requesting Member State would issue a comparable request. The rules are therefore intended to serve the interests of improving judicial cooperation in criminal matters and are therefore in line with the "spirit" of the Framework Decision. From Germany's point of view, it is particularly welcome that, in recent years, practice has shown that there is in fact simply no need to apply pressure in this way.

### **Recommendation 12**

*The experts criticised the fact that the 10-day time limit provided for under Article 23(2) of the Framework Decision was exceeded in numerous cases. One of the reasons cited is the transportation system. The experts recommend considering a rethink of the logistical procedures for the surrender of requested persons.*

Steps have been taken to deal with the experts' criticism. Particular significance has been attached to efforts to ensure that processes under the EAW procedure are conducted as quickly as possible and, where possible, in the interests of requested persons. However, the 10-day time limit is sometimes exceeded in Germany. There are many reasons for this. In some cases geographical distance and Germany's federal structure have a negative impact on the transportation time to the place of transfer at the border. In other cases, the termination of the surrender by the issuing state leads to time delays.

Possible ways of improving the situation are being discussed with practitioners. In recent months, technical problems regarding the transfer of requested persons to the border have been raised in bilateral consultations with neighbouring countries.

## **2. Final report on the fourth round of evaluations (general report)**

### **Recommendations 1 and 2**

*The Member States are advised to take into account the principle enshrined in the Framework Decision whereby extradition within the EU should occur on the basis of an EAW in direct contact between judicial authorities. Certain Member States, however, continue to provide for a role for "central authorities" such as ministries of justice.*

As mentioned above (see recommendation 4 of the report on Germany), extradition occurs on the basis of direct contact between judicial authorities. To the extent that there has been criticism of the fact that under Section 74 of the IRG power for the decisions lies with the Federal Ministry of Justice and the Federal Foreign Office, it has been stated that these powers are in fact vested in Land governments under a formal agreement between the federal and Land authorities and thence in the chief public prosecutor's offices.

### **Recommendations 3-5, 13, 17 and 18**

*Here, Member States are encouraged to offer appropriate training on the EAW and in foreign languages to practitioners involved in EAW procedures. It is also recommended that they take such measures as would lead to an improvement in cooperation in the course of EAW procedures as regards more technical aspects.*

Where the recommendations to the Member States concern the more technical aspects of improving cooperation (recommendations 4, 5, 6, 17 and 18), the points of criticism stem from individual evaluation reports not concerning Germany. Germany has provided comprehensive training programmes to its practitioners at both national – conducted by the Länder in cooperation with the Federal Ministry of Justice – and international level in cooperation with the Academy of European Law (ERA), the European Judicial Network (EDJ) and Eurojust. The programmes offered include appropriate foreign-language courses.

### **Recommendation 8**

*The report regrets the fact that certain Member States provide for grounds for refusal in their domestic law that are not compatible with the Framework Decision. Also, the rules in certain Member States distinguish between their own nationals and foreigners.*

As stated above (see recommendation 8 of the report on Germany), this criticism is in Germany's view essentially unjustified and has been made redundant by further developments in case-law and legal practice.

### **Recommendation 11**

*The experts note that the application of the speciality rule poses problems in practice, and request better cooperation between the Member States on this point.*

Particular attention is paid to observance of the speciality rule in Germany. It constitutes an important procedural guarantee for requested persons in that it prevents them from being prosecuted for offences other than that on which the EAW is based following their transfer to the issuing Member State. This allows the accusations on which the EAW is based to be presented accurately in individual cases. There have been no known cases in Germany where problems have arisen with regard to the application of the speciality rule.

During the EAW procedure, the German judicial authorities tend as a rule to cultivate such close contact and exchange of information that in cases of doubt additional information can be provided or requested.

### **Recommendation 16**

*Finally, the report complains that the judicial authorities of the receiving – executing – Member States often provide insufficient information to the requesting – issuing – Member States on the progress of the EAW procedure.*

Through the Land judicial authorities, German practitioners have since been asked to exchange relevant information using the standard form adopted with the Council conclusions of 4 June 2010. Information on the practical experiences of using the form will be made available in due course. In the course of the next amendment to the Guidelines on International Communications in Criminal Matters, the form should also be included as a template in those Guidelines and thereby also made available to German practitioners via the internet.

---