MutualRecognition2.0
RESEARCH PROJECT

COUNTRY REPORT

GERMANY

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INDEX FOR THE COUNTRY REPORTS

Introduction

Content

This document contains the annotated index that will be used to draft the Country Reports. For reasons of accessibility, the annotated index will be preceded by the non-annotated index.
The index consists of five Chapters:

1. The instruments and national law;
2. The application of the instruments: investigation/prosecution;
3. The application of the instruments: enforcement;
4. Anticipating the application of instruments: sentencing;
5. Miscellaneous: whereabouts unknown and *in absentia*.

MR2.0 Methodology

The research to be conducted by the NARs consists of three elements:

I. European/national law and national case-law (essentially concerning issues of transposition, competent national authorities, and the scope of European/national instruments);

II. Considerations that (can) play a role when the competent national authority decides whether or not to request a specific form of judicial cooperation;

III. Whether the competent national authorities apply the instruments in an 'effective and coherent' manner (within the meaning of *MR2.0: some preliminary explorations*).[1]

[1] To be effective and coherent in the application of mutual recognition instruments in an individual case, available instruments should not be overlooked (**comprehensiveness**), decisions to apply an instrument should not be contradictory (**consistency**), as long as there remains an option this option should be used (**completeness**) and, finally, this has all to be done with the lowest costs (in the broad sense of the word, i.e. in terms of money, time and impact on the requested person) (**proportionality**). See *MR2.0: some preliminary explorations*.

Ad I

This element of the research is partly descriptive, and partly analytical (the latter with regard to the scope of European/national instruments).
The NARs will draw upon their own knowledge as national experts[2] and supplement it, if need be, by case-law and legal literature research.

Ad II

This element of the research is descriptive.
Case-file research does not seem to be the most adequate means of research to get those considerations out into the open. The most direct source of information on such considerations are the competent national authorities themselves. Therefore, qualitative interviews with representative members of the competent national authorities are the best method of getting a clear picture of what these considerations are. For pragmatic reasons, it is only possible to interview a relatively small number of representative practitioners. In order to ensure that the findings – and any conclusions based on them (see Ad III) – are sufficiently valid, the selection of practitioners is of particular importance. Moreover, the NARs are encouraged to include not only practitioners who are members of the competent national authorities but also other practitioners (such as defence lawyers), and academics. The NARs are furthermore encouraged to refer to any cases they are aware of, to national case-law (e.g. judicial decisions on appeal against decisions of the competent authority whether or not to request judicial cooperation) or to literature, wherever possible, in order to corroborate or refute, as the case may be, the considerations mentioned by the interviewees. In addition, in the stage of drawing up the research report the findings from the other Member States could also be used as corroboration/refutation.

[2] And, where necessary, the knowledge of other experts.

Ad III

This element is of an analytical and a more normative nature.

The NARs will analyse the considerations that play a role when their MS' authorities decide whether or not to request judicial cooperation (see Ad II) and will determine whether those authorities apply the instruments in an 'effective and coherent' manner.

In doing so, they will also identify:

- any defects that stand in the way of 'effective and coherent' application, *e.g.* defects in:
    - EU/CoE legislation;
    - National legislation;
    - National practice;
- any best practices that facilitate 'effective and coherent' application.

Output

The research will result in:

- a country report in which the outcome of the first two elements of the research as described above will be laid down and which will be part of the final research report;
- a separate memorandum which contains the outcome of the third element and which will be used for drafting the overall analysis based on all country reports.

In the country reports, The NARs will follow the general rules on citation and the specific points of style of the Common Market Law Review.[3] However, by way of derogation from these points of style, paragraphs should be numbered.

[3] https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/europees-recht/houserul2020.pdf.

MR2.0 INDEX OF COUNTRY REPORT (NON ANNOTATED)[4]

[4] *Legenda*: black is unannotated index; red is annotation.

MR2.0: Annotated index of Country Report

1. The instruments and national law

General introduction

This chapter deals with two general matters:

1. the transposition/ratification of the instruments by the MS of the NAR;
2. the (judicial) authorities/central authorities designated by that MS under the instruments/convention.

In the proposal, we stated that the 'perspective adopted by this project is that of a criminal prosecution or enforcement proceedings with a transnational aspect. That transnational aspect is linked to the accused or the convicted person. The accused or convicted person is present in another Member State [than the issuing Member State] or is a national or a resident of another Member State'.[5] The latter circumstance presupposes that the person concerned is present in the issuing MS. Situations in which the whereabouts of the person concerned are unknown are addressed in Chapter 5.

Only those proceedings in which a subject has been identified fall within the scope of the project. That is to say, situations in which the competent authorities have reasons to believe that an offence was committed but do not yet know who the probable author of that offence was do not fall within the scope. At the same time, an enforcement proceeding is not conceivable without a convicted person whose identity is known.

The proposal also states that the project will focus on instruments that are capable of prejudicing the liberty (in a broad sense) of the suspect/accused/convicted person.[6]
This means that the perspective of a criminal prosecution or enforcement proceedings with a transnational aspect inherently concerns investigation/prosecution/enforcement proceedings with regard to an offence for which detention on remand[7] is (ultimately) possible.[8]

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[5] *Proposal (amended)*, p. 8.
[6] *Proposal (amended)*, p. 8. With regard to investigation/prosecution we use 'suspect', 'accused person' or 'suspect/accused person'.
[7] We use the term 'detention on remand' and not 'pre-trial detention' because the latter term seems to exclude detention during the trial stage.
[8] The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*) for that offence. After all,

Against this background, the project will examine two categories of instruments:

- instruments that involve deprivation of liberty of a suspect, accused or convicted person, and
- instruments that offer a (less intrusive) alternative to measures involving deprivation of liberty of a suspect, accused or convicted person.

In order to establish whether the effectiveness and coherence of the application of instruments involving deprivation of liberty can be improved, it is absolutely essential to include some instruments that do not impinge on the liberty of the person concerned. Some of these instruments could serve as a less intrusive but sufficiently effective – and therefore proportionate – alternative to instruments that do impinge on liberty. Since proportionality is an essential part of our definition of the concept of 'effective and coherent application'[9] these less intrusive instruments are therefore in scope even though they do not impinge on liberty. This is in line with the European Commission's Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.[10]

With regard to the concept of 'intrusiveness' the following scale could give guidance.
Using an instrument without detention is less intrusive than using an instrument with detention. Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

Included in the research are the following instruments:

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD[11] 2002/584/JHA);[12]
- 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

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detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence.
Consequently, proceedings concerning an offence, which only carries a non-custodial sanction, are out of scope.

[9] See *MR2.0: some preliminary explorations*, p. 2.

[10] *OJ* 2023, L 86/44. See recital (10): 'Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred (…)'.

[11] 'FD' is a commonly used abbreviation of the words 'Framework Decision'.

[12] *OJ* 2002, L 190/1, as amended by *OJ* 2009, L 81/24.

custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 2008/909/JHA);[13]

- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (FD 2008/947/JHA);[14]
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (FD 2009/829/JHA);[15]
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/41/EU);[16,17]
- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU Convention on Mutual Assistance in Criminal Matters);[18,19]
- (CoE) European Convention on the Transfer of Proceedings in Criminal Matters;[20,21]
- (CoE) European Convention on Mutual Assistance in Criminal Matters.[22,23]

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[13] *OJ* 2008, L 327/27, as amended by *OJ* 2009, L 81/24.
[14] *OJ* 2008, L 337/102, as amended by *OJ* 2009, L 81/24.
[15] *OJ* 2009, L 294/20.
[16] *OJ* 2014, L 130/1.
[17] These first five instruments were mentioned in the call document: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/just/wp-call/2021-2022/call-fiche_just-2022-jcoo_en.pdf.
Regulation 2018/1805/EU is mentioned in the call document but not included in the proposal. That regulation only touches upon deprivation of liberty in an indirect way: once a freezing order or confiscation order is recognised by the executing MS, *subsequent* decisions by the competent authorities of the executing MS may include the imposition of a custodial sentence. However, the focus of the project is on the decisions taken by the issuing MS. Moreover, a freezing order or confiscation order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.
Not mentioned in the call document and equally not included in the proposal for more or less the same reasons: Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.
Regulation 2023/1543/EU on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings is not included in the research (this regulation will apply from 18 August 2026). The regulation is not directly related to measures concerning deprivation of liberty and a European Production Order /European Preservation Order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.
[18] *OJ* 2000, C 197/3.
[19] Not included in the call document, but included in the *Proposal (amended)*.
[20] Strasbourg 15 May 1972, ETS No. 73.
[21] Not included in the call document, but included in the *Proposal (amended)*.
[22] Strasbourg 20 April 1959, ETS No. 30.
[23] Added during the first Research Team meeting.

(The NARs are invited to identify and include other instruments insofar as they can contribute to effective and coherent judicial cooperation.)[24]

A number of these instruments concern decisions concerning deprivation of liberty *stricto sensu* (FD 2002/584/JHA and FD 2008/909/JHA) or *lato sensu* (restriction of liberty: FD 2008/947/JHA and 2009/829/JHA).

Directive 2014/41/EU does not interfere with the right to liberty of the person concerned, except for the temporary transfer of a person already held in custody for the purpose of investigating measures.[25] However, this instrument offers (less intrusive) alternatives to surrender on the basis of a prosecution-EAW: temporary transfer to the issuing MS[26] to be interrogated as a suspect/accused person[27] and interrogating a suspect/accused person by videoconference.[28] Other investigative measures that can be requested by an EIO, such as search and seizure of evidence or hearing a witness, cannot function as an alternative and are, therefore, out of scope.

The three conventions do not as such impinge on the right to liberty of a suspect, accused or convicted person.[29] Like Directive 2014/41, they are included insofar as they offer *alternatives* to measures that do involve deprivation of liberty.

The EU Convention on Mutual Assistance in Criminal Matters is only included insofar as it contains provisions concerning sending to and serving documents on a suspect, accused person or convicted person who resides abroad.[30] Summoning a suspect to an interrogation, an accused person to his trial or a convicted person to report to prison to undergo a sentence may already

[24] With the exception of the European Convention on the Transfer of Proceedings in Criminal Matters, the instruments/conventions listed are instruments/conventions that are binding on all MS participating in the project. Bilateral agreements are not included. Including such agreements would hamper making a comparison between the four participating MS ('comparing apples with oranges'). However, if in the opinion of a NAR a bilateral agreement facilitates 'effective and coherent' application of the instruments and, therefore, constitutes a 'best practice', he or she is encouraged to mention this as such.
[25] Case 584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, ECLI:EU:C:2020:1002, para. 73.
[26] We will use the words 'issuing Member State' in a broad sense: the Member State that requests judicial cooperation or initiates judicial cooperation based on mutual recognition.
[27] Art. 22(1).
[28] Art. 24(1).
[29] The EU Convention on Mutual Assistance in Criminal Matters includes provisions on the temporary transfer of a person already held in custody for the purpose of investigative measures (Art. 9) and on hearing by videoconference (Art. 10), but these provisions are replaced by the corresponding provisions in Directive 2014/41/EU (Art. 34(1).
[30] Art. 5.

suffice to attain the goal pursued, thus obviating the need for employing forms of judicial cooperation that involve deprivation of liberty.

The CoE European Convention on the Transfer of Proceedings in Criminal Matters is included, because transfer of proceedings can serve as an alternative to surrender on the basis of an EAW or to recognition and enforcement of a sentence.[31]

The CoE European Convention on Mutual Assistance in Criminal Matters is only included insofar as it offers a mechanism to achieve the result of a transfer of proceedings, without complying with the formalities of the CoE European Convention on the Transfer of Proceedings in Criminal Matters.[32] Moreover, not all Member States have ratified the CoE European Convention on the Transfer of Proceedings in Criminal Matters.[33]

The Protocol to the EU Convention on Mutual Assistance in Criminal Matters nor the Additional Protocols to the CoE Convention on Mutual Assistance in Criminal Matters are included. They do not contain forms of judicial cooperation that can serve as alternatives to measures involving deprivation of liberty.

It should be recalled that the provisions of the EU Convention on Mutual Assistance in Criminal Matters and the CoE European Convention on Mutual Assistance in Criminal Matters that are relevant to this project, were not replaced by the directive on the EIO (Directive 2014/41/EU).[34]

1.1. Transposition of EU instruments

(a) FD 2002/584/JHA;

(b) FD 2008/909/JHA;

(c) FD 2008/947/JHA;

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[31] In certain circumstances, the CoE European Convention on the Transfer of Proceedings in Criminal Matters also applies when the person concerned has already been finally convicted. See *MR2.0: some preliminary explorations*.

[32] Art. 21(1) of the European Convention on Mutual Assistance in Criminal Matters : the 'laying of information' by one MS 'with a view to proceedings in the courts of another' MS.

[33] Germany and Poland are not bound by this convention.

[34] See Art. 34(1): '(…) this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions (…)'. The directive does not contain any provisions on sending to and serving documents on a suspect, accused person or convicted person who resides abroad, nor on the 'laying of information' by one MS 'with a view to proceedings in the courts of another' MS. That is so, because the directive is only concerned with obtaining evidence.

(d) FD 2009/829/JHA;

(e) Directive 2014/41/EU.[35]

Explain for each of these instruments whether your MS transposed them and, if so, whether in separate laws or as a part of the Code of Criminal Procedure.[36]

On 5 April 2023, the European Commission submitted a proposal for a regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, which was adopted by the Council of the European Union on November 5, 2024.[37] This regulation will not be included in the country reports but the NARs will address the relevance of this regulation for effective and coherent application of the existing instruments in their analysis in the separate memorandum.

The aforementioned cooperation instruments have been transposed into German law and form part of the Act on International Cooperation in Criminal Matters – AICCM[38]. The current discussion on a reform of this Act has triggered a discussion on whether cross-border cooperation within the Union should be regulated in a separate statute, but the prevailing opinion preferred a comprehensive statute on international cooperation in criminal matters, be it with Member States or third countries. In September 2024, the Federal Ministry of Justice published the draft bill for this reform that includes provisions for cross border cooperation both within the European Union (part 3) and with third countries (part 2). However, given the current political situation in Germany, it remains uncertain whether, and if so, when these proposed changes will be adopted.[39]

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[35] FD 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ* 2009, L328/42 is not listed here. Although there are strong links with the conventions on transfer of proceedings in criminal matters (see 1.2 below), this framework decision does not regulate any form of judicial cooperation. Moreover, this framework decision only applies to parallel proceedings in more than one MS against the same person for the same acts.

[36] Incorrect transposition into national law *per se* is out of scope. Incorrect transposition is only relevant if it has an impact on the "effective and coherent" application of the instruments. If, e.g., the NAR is of the opinion that transposition of the optional grounds for refusal of Directive 2014/41/EU as mandatory grounds for refusal is in contravention of that directive *and has a negative impact on the "effective and coherent application" of instruments*, this is relevant and worthy of mention.

[37] Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, *OJ* L 2024/3011.

[38] In the version of the announcement of 27 June 1994, BGBl. I S. 1537, last updated on 12 July 2024, BGBl. I No. 234; for the English translation see https://www.gesetze-im-internet.de/englisch_irg/.

[39] See the draft bill with explanatory memorandum https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_IRG_Reform.html (last accessed on 4 December 2024).

(a) FD 2002/584/JHA has been transposed into part 8 (sections 78 to 83j) of the AICCM. After the Constitutional Court had declared the first implementation act[40] null and void[41], the German legislator had to adopt a new act on the EAW[42]. According to the ruling of the Constitutional Court, the constitutional ban on extradition of German citizens (Art. 16(2) Basic Law – BL) requires the German legislator to transpose the optional ground for refusal under Art. 4 No. 7 lit. a FD EAW as a mandatory one as far as surrender of German citizens is concerned.[43] According to the draft bill on the reform of the AICCM, the executing authority shall have the discretion required under the FD, yet Art. 16(2) Basic Law must be taken into account in the exercise of this discretion on a case-by-case basis, which may be significantly limited in the case of German citizens.[44]

The same applies to the optional ground for refusal (Art. 4 No. 6 FD EAW) and the return guarantee (Art. 5 No. 3 FD EAW) that explicitly refer to the surrender of the executing state's nationals.[45] If the executing authority has refused to surrender the person, Germany will not automatically initiate the enforcement of the sentence, but request the issuing authority to transfer enforcement by sending of the FD 2008/909-certificate. [46]

As a consequence, a German national may only be surrendered for the purpose of enforcement (execution of a sentence, Art. 6 No. 6 FD EAW) if the person sought has given his[47] consent (section 80(3) AICCM). If consent is not given, the enforcement of the sentence in Germany is considered as a less intrusive means compared to the surrender of the person to another Member State against his will for the purpose of enforcement there.[48] If the sentenced person

[40] Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz – EuHbG) of 21 July 2004, Bundesgesetzblatt I, p. 1748.

[41] German Constitutional Court (Bundesverfassungsgericht), Judgment of 18 July 2005 – 2 BvR 2236/04, ECLI:DE:BVerfG:2005:rs20050718.2bvr223604, official court reports (BVerfGE) 113, 273; Bundesgesetzblatt 2005 I, p. 2300.

[42] Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz - EuHbG) of 20 July 2006, Bundesgesetzblatt I, p. 1721.

[43] German Constitutional Court (Bundesverfassungsgericht), Judgment of 18 July 2005 – 2 BvR 2236/04, ECLI:DE:BVerfG:2005:rs20050718.2bvr223604, official court reports (BVerfGE) 113, 273, at 306.

[44] See section 155(1) and (2) of the draft bill and p. 333, 335 of the explanatory memorandum by the Federal Ministry of Justice of 11 September 2024.

[45] See section 155(3) of the draft bill and p. 334 of the explanatory memorandum by the Federal Ministry of Justice of 11 September 2024.

[46] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 108; Böse, "§ 84a" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 5; Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 537, 672; Hackner, „Vor § 84 IRG" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed., (C.H. Beck, 2020), p. 19.

[47] With a view to readability, 'he' is used instead of 'he/she/they'.

[48] Cf. Lagodny, "Auslieferung und Überstellung deutscher Staatsangehöriger", (2000) *Zeitschrift für Rechtspolitik*, p. 175 (at 176).

does not consent, the German authorities will request the issuing authority to transfer enforcement by sending of the FD 2008/909-certificate.[49]

The rules on surrender of a German national for the purpose of prosecution are more complex. In addition to the mandatory return guarantee (section 80(1) No. 1, (2)1 No. 1 AICCM), the execution of the EAW is subject to the condition that the relevant offence has a substantial link to the issuing state (section 80(1) No. 2 AICCM). If there is no such link to the issuing Member State, section 80(2) will apply. The person must not be surrendered if the offence has a substantial link to German territory (section 80(2)1 No. 2 AICCM). Otherwise (so-called 'mixed cases'), a German national may be surrendered if the double criminality requirement (Art. 4 No. 1 FD EAW) is met and the interests of the national in his non-extradition do not outweigh the interests of the issuing state (section 80(2)1 No. 3 AICCM). When balancing the interests, special regard shall be had to the nature of the offence, the practical requirements and possibilities of an effective prosecution and the rights and interests of the person sought as (section 80(2)2 AICCM). The wording of the provision is based on the judgment of the Federal Constitutional Court on the EAW.[50]

Moreover, Germany has transposed optional refusal grounds into mandatory ones ('Zulässigkeitsvoraussetzungen') where such transposition corresponds to the general rules on international cooperation in criminal matters.[51] This applies to Art. 4 No. 1 FD EAW (double criminality, section 81 No. 3 and No. 4 AICCM), Art. 4 No. 4 FD EAW (prosecution or enforcement time-barred, sections 82 and 9 No. 2 AICCM), Art. 4a FD EAW (convictions *in absentia*, section 83(1) No. 3, (2) to (4) AICCM), and Art. 5 No. 2 FD EAW (life-long-imprisonment, section 83(1) No. 4 AICCM). Other optional grounds for refusal have been transposed in a way that leaves a margin of discretion to the executing authority ('Bewilligungshindernisse', section 83b AICCM); however, the exercise of this discretion is subject to judicial review (section 79 AICCM).
In the draft bill for the reform of the AICCM, the previous distinction between 'Zulässigkeitsvoraussetzungen' and 'Bewilligungshindernisse' has been replaced by 'zwingende Ablehnungsgründe' (mandatory grounds for refusal) and 'fakultative

[49] See note 46.
[50] Federal Constitutional Court, official court reports (BVerfGE) vol. 113, p. 273 (at 303).
[51] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 15/1718, p. 11-12.

Ablehnungsgründe' (optional grounds for refusal) to align the terminology with the case law of the European Court of Justice. Furthermore, optional grounds for refusal (e.g. Art. 4a; Art. 5 No. 2 and 3 FD EAW) are no longer transposed as mandatory ones; instead, they grant the executing judicial authority a margin of discretion. It should be noted, however, that only a few of these grounds are expressly referred to as 'fakultative Ablehnungsgründe' (e.g. Art. 4 No. 4 FD EAW).

(b) FD 2008/909/JHA has been transposed into part 9 (sections 84 to 85f) of the AICCM. In contrast to Art. 9 of the Framework Decision, German law distinguishes between optional ('Bewilligungshindernisse' - section 84d AICCM) and mandatory ('Zulässigkeitsvoraussetzungen' - sections 84a, 84b AICCM) grounds for refusal. The latter applies to Art. 9(1) lit. c (*ne bis in idem* - section 84b(1) No. 3 AICCM), lit. d (double criminality - section 84a(1) No. 2, (2) AICCM), lit. e (enforcement time-barred - section 84b(1) No. 4 AICCM), lit. f (immunity of the sentenced person – sections 84(2), 77(2) AICCM), lit. g (no criminal liability due to the age of the sentenced person – section 84b(1) No. 1 AICCM), lit. i (conviction *in absentia* – section 84b(1) No. 2, (3), (4) AICCM), lit. k (no equivalent sanction in the German legal order – section 84a(1) No. 1 lit. b AICCM).[52]

(c) FD 2008/947/JHA has also been transposed into part 9 (sections 90a to 90n) of the AICCM. Again, the German legislator has provided for optional and mandatory grounds for refusal although Art. 11 FD 2008/947/JHA states that the competent authority 'may' refuse to recognise the judgment or probation decision of the issuing state. The list of mandatory grounds for refusal (sections 90b, 90c AICCM) corresponds *cum grano salis* to the refusal grounds according to sections 84a, 84b AICCM (*supra* (b)); in particular, the execution of a probation measure or alternative sanction is subject to the condition that an equivalent measure exists in the German legal order.[53]
The scope of the implementing provisions on Germany as the issuing MS (sections 90l to 90n AICCM) is limited to the supervision of probation measures and does not extend to conditional sentences and alternative sanctions because the latter are not foreseen in the German sentencing regime.[54] The Youth Courts Act (YCA – 'Jugendgerichtsgesetz') provides for alternative

[52] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 42-43, 107-117.
[53] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 68-69, 151-162.
[54] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 187.

sanctions such as instructions (section 10 YCA), conditions (section 15) and youth detention (section 16 YCA), but according to the German government, supervision of juvenile offenders should be a matter for German courts only, due to the divergent sanctioning regimes among the Member States.[55] Depending upon the experiences with the implementation practice and future developments regarding the harmonisation of juvenile criminal law, the scope of the provisions transposing FD 2008/947/JHA could be extended to the other sanctions for juveniles under German law.[56]

As the transfer of supervision requires a custodial sentence the enforcement of which has been suspended on probation (section 90l(1)1 No. 1 AICCM: 'deren Vollstreckung oder weitere Vollstreckung zur Bewährung ausgesetzt wurde'), these provisions do not apply to the postponement of enforcement under section 35 of the Narcotics Act (NA – 'Betäubungsmittelgesetz'). This provision applies where the enforcement of a custodial sentence cannot be suspended on probation because the convicted person cannot be expected to commit no further crimes; instead, the enforcement is postponed to allow the convicted person to undergo therapy ('Therapie statt Strafvollzug').[57] Despite the similar reasoning, German law clearly distinguishes suspension on probation and postponement so that section 90l AICCM does not apply to the latter.

(d) Part 9 of the AICCM also contains the provisions transposing FD 2009/829/JHA (sections 90o to 90z AICCM). As in the Framework Decisions mentioned before, the optional grounds for non-recognition under Art. 15 FD 2009/829/JHA have been transposed as mandatory 'Zulässigkeitsvoraussetzungen' (section 90p AICCM) and optional 'Bewilligungshindernisse' (section 90r AICCM). Again, mandatory grounds for non-recognition correspond to traditional obstacles to cooperation (e.g. double-criminality requirement, the principle *ne bis in idem* etc., see *supra* (a) to (c)).[58]

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[55] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 187-188; Rothärmel, "Die grenzüberschreitende Abgabe und Übernahme der Bewährungsüberwachung nach Umsetzung des Rahmenbeschlusses 2008/947/JI unter Berücksichtigung von Besonderheiten des Jugendstrafrechts", (2016) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe,* 232 (at 233).

[56] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 187-188; Rothärmel, "Die grenzüberschreitende Abgabe und Übernahme der Bewährungsüberwachung nach Umsetzung des Rahmenbeschlusses 2008/947/JI unter Berücksichtigung von Besonderheiten des Jugendstrafrechts", (2016) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe,* 232 (at 234).

[57] Kornprobst, "§ 35 BtMG" in *Münchener Kommentar zum StGB*, *Volume 7 Nebenstrafrecht I* 4th ed.(C.H. Beck, 2022), paras 3, 5, 8.

[58] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4894, p. 27-28, 40-47.

(e) Directive 2014/41/EU on the European Investigation Order has been transposed into part 10 (sections 91a to 91j) of the AICCM. In contrast to Art. 11 of the EIO Directive, German law provides for both optional ('Bewilligungshindernisse' – section 91e AICCM) and mandatory ('Zulässigkeitsvoraussetzungen' – sections 91b, 91c AICCM) grounds for refusal; the latter include privileges and immunities (Art. 11(1) lit. a EIO Directive), thresholds for the requested investigative measure under the law of the executing state (Art. 11(1) lit. c, h EIO Directive), the double criminality requirement (Art. 11(1) lit. g EIO Directive) and the European *ordre public* (Art. 11(1) lit. f EIO Directive).[59] The draft bill on the reform of the AICCM has maintained this distinction.[60]

1.2. Ratification of conventions

(a) EU Convention on Mutual Assistance in Criminal Matters;
(b) European Convention on the Transfer of Proceedings in Criminal Matters;
(c) European Convention on Mutual Assistance in Criminal Matters.

Explain for each of those instruments whether your MS ratified them. If not, explain why not. If so, explain whether your MS implemented them into national law and, if so, whether in separate laws or as a part of the Code of Criminal Procedure; also list any reservations and declarations your MS made that could have an impact on coherence.[61]

Germany has ratified the EU Convention and the European Convention on Mutual Assistance in Criminal Matters.[62] In the German legal order, a transposition of international treaties on cooperation in criminal matters is not necessary as far as their provisions are self-executing. The corresponding treaty provisions take precedence over the general provisions of the AICCM (section 1(3) AICCM). Accordingly, there are no implementing provisions in the act on the ratification of the EU Convention on MLA, and the act ratifying the Council of Europe Convention contains only few such provisions. For instance, the double criminality requirement for search and seizure (Art. 5(1) lit. a, c) is implemented as a mandatory refusal ground (Art. 2(3) of the Act ratifying the Council of Europe Convention), and that service of a summons on an accused person shall be transmitted a month before the date set for appearance

[59] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/9757, p. 28, 57-65.
[60] See sections 261, 262 of the draft bill and the explanatory memorandum of the Federal Ministry of Justice, p. 372.
[61] The CoE is in the process of analysing and reviewing reservations and declarations pertaining to its conventions.
[62] Bundesgesetzblatt 1964 II, p. 1369; Bundesgesetzblatt 2005 II, p. 650.

(Art. 2(4) of the Act ratifying the Council of Europe Convention; see also Art. 7(4) of the Convention). Likewise the optional grounds for refusing the transfer of detained persons (Art. 11(1) Council of Europe Convention) have been implemented as mandatory (Art. 3(1) Act ratifying the Council of Europe Convention).

Germany has not ratified the European Convention on the Transfer of Proceedings in Criminal Matters, due to persisting concerns that a determination of the forum and the applicable law by a transfer of proceedings would violate the principle *nulla poena sine lege* (Art. 103(2) Basic Law) and the right to the natural judge ('Garantie des gesetzlichen Richters' – Art. 101(1)2 Basic Law).[63] As a consequence, a transfer of proceedings may only be triggered by a laying of information in connection with proceedings under Art. 21 of the Council of Europe Convention on Mutual Assistance in Criminal Matters and bilateral treaties supplementing this Convention[64]. In contrast to other cooperation instruments, the transfer of criminal proceedings is not governed by specific provisions in the AICCM because it does not fall within the scope of legal assistance as defined in section 59(2) AICCM (assistance in foreign proceedings in a criminal matter). Thus, transfer of criminal proceedings is based upon a transmission of information that triggers a criminal investigation rather than a request for prosecution.[65] Thereby, the mechanism comes close to the spontaneous exchange of information (Art. 7 EU Convention on Mutual Assistance) that has been implemented in section 92c AICCM. According to section 92c(2) No. 1 lit. a AICCM, a public prosecutor may, without a request, transmit personal data to another Member State if the transmission is suited to instituting criminal proceedings in the other Member State. The spontaneous transmission of data, however, does not extend to the transmission of the case file.[66] In this regard, Art. 21 of the

[63] Oehler, *Internationales Strafrecht,* 2nd ed. (Heymanns, 1983), para 688; see also Trautmann, in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed., (C.H. Beck, 2020), p. 1304; for a detailed assessment see Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 90-98; these concerns are not mentioned by Kubiciel, "Europäisches Übereinkommen über die Übertragung der Strafverfolgung" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 769, and they have not been raised in the debate on the regulation on transfer of proceedings in criminal matters, see the recommendation of the Legal Committee Bundesrats-Drucksache, 175/1/23 and the statement of the German Bar Association by the Criminal Law Committee No. 41/2023.

[64] See e.g. Art. XI of the bilateral treaty with the Kingdom of the Netherlands of 30 August 1979, Bundesgesetzblatt 1981 II, p. 1158. Germany has concluded similar treaties with Austria, France, Italy, the Czech Republic and the former Yugoslavia (Croatia, Slovenia), see Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 32, with further references.

[65] Federal Court of Justice (*Bundesgerichtshof)*, Judgment of 10 June 1999 - 4 StR 87–98, (1999) *Neue Zeitschrift für Strafrecht,* 579 (at 580); Trautmann and Zimmermann, "Vor § 59 IRG" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 17.

[66] See with regard to the general provision (section 61a AICCM) the explanatory memorandum of the German government, Bundestags-Drucksache No. 15/5487, p. 5; Trautmann, "§ 61a IRG" in Schomburg /Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 15.

Council of Europe Convention on Mutual Assistance in Criminal Matters, and the bilateral treaties supplementing this Convention in particular, allow for a broader understanding.[67] Accordingly, No. 146(2) of the Guidelines for International Cooperation in Criminal Matters – GICCM ('Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVASt'*)* expressly provides that an outgoing request for prosecution shall contain a copy of the case file.

Under Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters[68], requesting authorities (designated central authorities, see Art. 20) will be able to initiate a transfer of proceedings either on their own initiative or following a proposal from a suspect, accused person, or victim (recital (24)). According to Art. 33(1), the Regulation replaces the existing mechanism under Art. 21 of the Council of Europe Convention on Mutual Assistance in Criminal Matters (see, however, with regard to the spontaneous exchange of information *infra* 3.2. (a)) and establishes a request-based mechanism that requires a completed request form (Art. 8(1)) and at least the essential parts of any written supporting documentation or information, translated into a language accepted by the requested State (Art. 8(5)). Where the requested authority has accepted the transfer of criminal proceedings, Art. 9(1) obligates the requesting authority to provide all relevant documents necessary for processing the transfer request, which includes the case file.

1.3. Competent (judicial) authorities and central authorities

1.3.1. Competent (judicial) authorities

(a) FD 2002/584/JHA;
(b) FD 2008/909/JHA;
(c) FD 2008/947/JHA;
(d) FD 2009/829/JHA;
(e) Directive 2014/41/EU;
(f) EU Convention on Mutual Assistance in Criminal Matters;
(g) European Convention on the Transfer of Proceedings in Criminal Matters;
(h) European Convention on Mutual Assistance in Criminal Matters.

Describe which (judicial) authorities are competent under each of those instruments.

[67] Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 61, 64.
[68] 2023/0093(COD).

Concerning FD 2009/829/JHA and FD 2008/947/JHA: explain how the condition of equivalence[69] is met (Art. 3(2) of FD 2008/947/JHA; Article 6(2) of FD 2009/829/JHA) if the designated competent authority is not a 'judicial' authority. Also, if the designated competent authority is not a 'judicial' authority, explain the reasons for the choice.
Explain how the right to an effective remedy before a tribunal (Article 47(1) of the Charter) is guaranteed, if the competent authority is not a court.

According to the general rule on the competent authorities for incoming and outgoing requests (section 74 AICCM), the exercise of this competence has been delegated to the governments of the states ('Länder').[70] The states further delegated the competence to issue an EAW to the public prosecution service having local jurisdiction.[71]
In accordance with Article 6(3) of FD 2002/584/JHA Germany had declared[72] that the competent judicial authorities pursuant to Article 6(1) were the Ministries of Justice of the Federal Republic and of the 'Länder', who had delegated the execution of their powers under the FD to issue outgoing requests to the public prosecutor's offices of the 'Länder' and to the regional courts, and the power to authorize incoming requests Article 6(2) to the chief public prosecutor's offices of the 'Länder'.[73]

Thereby, the public prosecution service has acted as the judicial authority competent for issuing a European Arrest Warrant until the Court of Justice held that the German public prosecution service did not qualify as judicial authority because it could be subject to instructions by the ministry of justice and, therefore, lacked the institutional framework necessary for the effective

[69] See *MR2.0: some preliminary explorations*, p. 16.
[70] See the jurisdictional agreement of the Federal Government and the state (*Länder*) governments of 28 April 2004 (Federal Bulletin [Bundesanzeiger], p. 11494), which entered into force on 1 May 2004 and the jurisdiction regulations of the individual federal states.
[71] Section 5 No. 2 Regulation on the competence in international cooperation in criminal matters in Bavaria of 29 June 2004 (Bay GVBl. 2004, p. 260; section I.6.c) of the circular on the competences in international cooperation in criminal matters in Brandenburg of 4 September 2020, JMBl. 2020, p. 130; section A.2. of the circular on cooperation in international cooperation in criminal matters in Hamburg of 28 December 2010, HmbJVBL 2011, p. 28; part 1 chapter 2 No. 1 of the circular on competences in international cooperation in criminal matters in Mecklenburg-Vorpommern of 13 August 2004, Amtsbl. M-V 2004, p. 846; section 1.6 of the circular on competences in international cooperation in criminal matters in Niedersachsen of 13 October 2005, Nds. MBl. 2005, p. 858; section 1.2.1.7 of the circular on the competences in international cooperation in criminal matters in Nordrhein-Westfalen of 16 December 2016, JMBl. NRW 2017, p. 74; section 2 No. 3 lit. a Regulation on the competences in international cooperation in criminal matters in Thüringen of 30 January 2013, GVBl. 2013, p. 62.
[72] Notification of 7 September 2006, Council-Document No. 12509/06.
[73] Hackner, "RB-EUHb" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 17.

judicial protection of the rights of the individual by an independent body.[74] As a consequence, European Arrest Warrants are no longer issued by the public prosecution service on its own, but based upon authorisation by the district court. The court decision is to be based upon the power to issue an (international) arrest notice (section 131(1) of the Code on Criminal Procedure - CPP) and/or the power to adopt court decisions necessary for the enforcement of the sentence (section 457(3)3 CPP).[75] So, the issuing authority for EAWs is now the court competent for issuing (or maintaining) the national arrest warrant.[76]

Subsequently the declaration ex Article 6(3) of FD 2002/584/JHA was recently amended,[77] and now exclusively designates courts as the competent authorities, instead of public prosecution offices. The local, regional or higher regional courts, as well as the Federal Court of Justice, are now listed as the issuing judicial authorities under Article 6(1) FD 2002/584/JHA, whereas the executing judicial authorities under Article 6(2) FD 2002/584/JHA are the higher regional courts.

The requirement of a court decision has led to significant delays, in particular with regard to EAWs for the purpose of enforcement.[78]

The competence to transfer the enforcement of custodial sanctions in another Member State (FD 2008/909/JHA) lies with the enforcement authority (section 85 AICCM), i.e. the prosecution service having local jurisdiction, which depends on the court that has conducted the trial at first instance (section 451 CPP, sections 4, 7 Regulation on the enforcement of criminal sentences).[79] The public prosecution service decides whether the FD 2002/584/JHA-route (execution-EAW) or the FD 2008/909-route is taken, as it is responsible for initiating either of these proceedings. If the sentenced person is in Germany and does not consent to the transfer of enforcement, prior authorisation by the Higher Regional Court is required because the transfer of the convicted person will considerably change the conditions under which the sentence is served (sections 85a(1), 71(4) AICCM). If the convicted person is not in Germany,

[74] CJEU, Judgment of 27 May 2019, Joined Cases C-508/18 and C-82/19, OG and PI, EU:C:2019:456, para 64 ff.
[75] Higher Regional Court Zweibrücken, decision of 11 July 2019 – 1 Ws 203/19, (2019) *Neue Juristische Wochenschrift*, p. 2869; Higher Regional Court Hamm, decision of 1 August 2019 – 2 Ws 96/19, juris; for the position of the government see also Bundestags-Drucksache 19/11017, p. 25
[76] Hackner, "Vor § 78 IRG" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 16c.
[77] Notification of 18 February 2025, Council-Document No. 6150/25.
[78] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 67.
[79] Appl, "§ 451 StPO" in *Karlsruher Kommentar zur Strafprozessordnung*, 9th ed. (C.H. Beck, 2023), para 10-11.

the decision of the public prosecution service is not subject to judicial review (section 85d sent. 3 AICCM). Unless the convicted person consents to the transfer of enforcement, the lack of a legal remedy is in breach with the constitutional right to judicial review (Art. 19 para. 4 GG).[80]
The competence to transfer the supervision of probation (FD 2008/947/JHA) to another Member State also lies with the competent enforcement authority (section 90l AICCM), which is the public prosecutor's office having local jurisdiction. Prior authorisation by the Higher Regional Court is not required because the transfer requires consent of the sentenced person (section 90l(2) AICCM; see also section 90m AICCM),[81] which constitutes an implicit waiver of judicial protection (section 90p(1)2 AICCM).
The competence to transfer the monitoring of supervision measures to avoid remand detention lies with the court with jurisdiction to issue the arrest warrant and to take further measures on remand detention (section 90y(1)1 AICCM and section 126 CPP).
According to the general rules, the states have delegated the competence to issue an EIO to the public prosecution service having local jurisdiction.[82] So, the investigating authority may, in principle, make the choice to either motion to issue an EAW or an EIO. In any case the choice made by the public prosecutor is subject to judicial review of the court deciding upon the issuing of an EAW (proportionality check).
However, if the investigating respectively issuing authority is not a judicial authority (judge, court, public prosecutor), but an administrative authority (e.g. a financial authority or a police authority) a validation by the competent public prosecution service is required (section 91j(2)2 AICCM). If the investigative measure requires prior authorisation by a court, state law may provide that the same court may also validate the EIO (section 91j(4) AICCM).
According to the general rules, the states have delegated the competence to issue an EIO to the public prosecution service having local jurisdiction as far as EU law or international treaties allow for requests to be made directly between the competent judicial authorities.[83] This

[80] See Böse, "§ 85d" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), Internationaler Rechtshilfeverkehr in Strafsachen, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 4.
[81] Hackner, "§ 90m IRG" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed.(C.H. Beck, 2020), para 1.
[82] Section I.6.e) of the circular on the competences in international cooperation in criminal matters in Brandenburg of 4 September 2020, JMBl. 2020, p. 130; sections 1.2.1.5 and 1.2.1.7 of the circular on the competences in international cooperation in criminal matters in Nordrhein-Westfalen of 16 December 2016, JMBl. NRW 2017, p. 74; section 2 No. 5 Regulation on the competences in international cooperation in criminal matters in Thüringen of 30 January 2013, GVBl. 2013, p. 62.
[83] Section I.6.e) of the circular on the competences in international cooperation in criminal matters in Brandenburg of 4 September 2020, JMBl. 2020, p. 130; sections 1.2.1.5 and 1.2.1.7 of the circular on the competences in international cooperation in criminal matters in Nordrhein-Westfalen of 16 December 2016, JMBl. NRW 2017, p. 74; section 2 No. 5 Regulation on the competences in international cooperation in criminal matters in Thüringen of 30 January 2013, GVBl. 2013, p. 62.

condition is met by the EU Convention on Mutual Assistance in Criminal Matters (Art. 6(1)2) that also applies to the laying of information in connection with criminal proceedings under Art. 21 European Convention on Mutual Assistance in Criminal Matters (Art. 6(1)3 of the EU Convention) that serves as a legal basis for the transfer of criminal proceedings in the German criminal justice system.

As the public prosecutor's office is a judicial authority, the requirement of equivalence is met. In contrast to EAW proceedings, judicial protection by court authorisation is not required if the sentenced person has given his consent which is considered as an implicit waiver of judicial protection.[84] If consent is not given, the transfer of the sentenced person requires authorisation by court (sections 85a, 85c AICCM).[85] However, if the convicted person is already in the other Member States, there is no judicial protection ex ante (court authorisation) nor a legal remedy against the decision to transfer enforcement (e.g. with regard to detention conditions in the executing Member State).[86] As far as the EIO is concerned, the draft bill on the reform of the AICCM expressly provides for a legal remedy against outgoing EIOs.[87]

1.3.2. Central authorities

Did your MS designate "central authorities" (within the meaning of the instruments)? If so, which authorities and what are their respective competences? What is the role of the central authority in choosing the form of cooperation?[88]

In the notification on the transposition of the FD EAW, the German government declared the Federal Ministry of Justice and the corresponding ministries of the states as competent judicial authorities and that these ministries further delegated the exercise of their competences to the public prosecution service at the district courts.[89] So, as a general rule, the competence to issue an EAW laid with the public prosecution service and the competent court (*supra* 1.3.1).

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[84] Böse, "§ 85d" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C. F. Müller, Jun. 2024), para 4.

[85] See the explanatory memorandum Bundestags-Drucksache 18/4347, p. 146; Bock, "§ 85d" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 405; Böse, "§ 85d" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C. F. Müller, Jun. 2024), para 4; Hackner, "§ 85d" in Schomburg/Lagodny (Eds.) *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 4.

[86] Bundestags-Drucksache No. 18/4347, p. 139; for a critical assessment of the gaps in judicial protection: Böse, "§ 85d" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C. F. Müller, Jun. 2024), para 4.

[87] See section 276 of the draft bill and the explanatory memorandum of the Federal Ministry of Justice, p. 389.

[88] It is assumed that the central authority has no role in deciding whether to as for judicial cooperation, and if so, which form of judicial cooperation. However, if that assumption does not hold true for your MS, please explain.

[89] Notification of 8 September 2004, Council-Document No. 12180/04, p. 1.

Accordingly, the German government had not notified a central authority (Art. 33(1) lit. c and Art. 7(3) EIO Directive).[90]

Germany has only recently made use of the possibility of appointing central judicial authorities under Article 7 FD 2002/584/JHA.[91] As a consequence of the exclusive designation of courts as competent judicial authorities, the Public Prosecutor General of the Federal Court of Justice; the public prosecution offices at the higher regional courts (i.e. offices of the chief public prosecutors); and the public prosecution offices at the regional courts were designated as central authorities to assist the competent courts in issuing or executing EAWs.[92]

The public prosecution offices at the relevant courts perform the tasks assigned to central authorities under Article 7(1), including the transmission and reception of EAWs, all related official correspondence, and the practical organization of their execution. For EAWs issued by other MS, the public prosecution offices at the higher regional courts serve as central authorities, with jurisdiction defined geographically based on the judicial district of the higher regional court.

1.3.3. Coordination

Are there any mechanisms (in law or in practice) for coordinating between:

- different (judicial) authorities that are competent under one and the same instrument/convention and;
- different (judicial) authorities that are competent under different instruments/conventions?

In general, the German system does not provide for coordination mechanisms because all cooperation instruments are available to the authority that is in charge of conducting proceedings (public prosecutor in the pre-trial and enforcement stage, court in the trial stage). At the public prosecutor's office at the district court, there is usually a department for international cooperation for advising and supporting the investigating prosecutor; thus, both act as 'hands of the same body'[93]. The decision on whether or not to use one of the cooperation instruments (and which one) is taken by the prosecutor that is in charge of the investigation.[94]

[90] Notification of 14 March 2017, p. 3.
[91] Notification of 18 February 2025, Council-Document No. 6150/25.
[92] The Public Prosecutor General at the Federal Court of Justice serves as the central authority for EAWs issued by the Federal Court of Justice, while the public prosecution offices having local jurisdiction at the higher regional courts and at the regional courts act as the central authority for EAWs issued by their respective courts.
[93] Public Prosecutor's Office III (interview).
[94] Public Prosecutor's Office III (interview); Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); Office of the Prosecutor General (interview).

As has been mentioned before (*supra* 1.3.1.), the public prosecutor is not an independent authority, but subject to instructions; the state's ministry of justice does not interfere in individual cases, but issues general instructions to ensure a uniform prosecution practice.[95] A sort of coordination is necessary where a cooperation instrument is subject to court authorisation, e.g. an EAW is issued by a judge upon application of the public prosecutor (*supra* 1.3.1.).[96] The issuing court, however, has no special department for international cooperation; so, the application and the practical implementation of the EAW mainly lies in the hands of the public prosecution service.[97]

As a rule, investigation and prosecution in different proceedings are not coordinated, the public prosecutor rather focuses on its own investigation. A coordination of proceedings may be necessary in complex cases where two or more public prosecutor offices are involved in the investigation, but there is no specific mechanism for initiating contact, rather it depends on the respective public prosecutor's offices.[98]

In the enforcement stage, the enforcing authority shall establish whether the convicted person is prosecuted or has been convicted for other offences and contact the competent authority in order to coordinate these proceedings with its own request for enforcement (No. 107 GICCM).

2. The instruments and investigation/prosecution

General introduction

As discussed in the proposal, our perspective is the perspective of the competent national authority that has to decide whether or not to request judicial cooperation in a criminal case with a particular transnational component:

- either the person concerned resides in another Member State;
- or he is a national or resident of another Member State (but present in the issuing Member State).

In order to establish (a lack of) coherence and effectiveness when applying the instruments, chapters 2 and 3 are divided according to the general goals pursued by the competent national

[95] State's Ministry of Justice (interview).
[96] District Court (interview).
[97] District Court (interview).
[98] Federal Ministry of Justice (interview); Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).

authority: investigation/prosecution on the one hand (Chapter 2) and enforcement of a sentence on the other (Chapter 3). Chapters 2-5 correspond to elements I and II of the methodology.

As to Chapter 2, the goal of investigation and/or prosecution can only be pursued in the stages preceding the stage of enforcement of a sentence. Those stages are the pre-trial stage and the trial stage. Thus, the concept of "prosecution" includes the trial. It is not excluded that at the trial stage – and thus during "prosecution" – investigative measures (such as interrogating the defendant in another MS) are carried out.
The pre-trial stage comprises the investigation into an offence from the moment the authorities become aware that an offence has been committed (even when the probable author of that offence is not yet known) up to the decision that the probable author of the offence must stand trial. The trial stage starts from the moment the competent national authority decides that the person concerned must stand trial. It ends when the decision of a court to convict the person concerned and to impose a sentence on him becomes final and enforceable. It comprises, therefore, a trial on appeal. Proceedings in which only questions of law are addressed are excluded. During such proceedings, there is no need for forms of judicial cooperation that are in the scope of the project, i.e. that are capable of prejudicing the liberty of the person concerned (see p. 6).[99]

The chapter on investigation/prosecution is subdivided into:

- a general part, identifying *in abstracto* the instruments that can be employed to pursue the general goal of investigation/prosecution (i.e. their "applicability") (2.1), and
- a specific part, identifying the considerations that play a role when deciding on whether to employ those instruments *in concreto* in the pre-trial and trial stages (2.2 and 2.3) in connection with more specific goals that are pursued (i.e. their "application" in a given case).

[99] Of course, once the sentence is final it may be necessary to order the arrest and detention of the person concerned to ensure the enforcement of the sentence, but this concerns the enforcement stage, not the trial stage.

2.1. Applicability of the instruments according to EU law[100]

In Section 2.1, the listed instruments are those that – in our preliminary view – apply to that particular stage from the of EU-law perspective. This means that in this stage national law and national arrangements are not relevant.[101]

From the perspective of EU law, there are doubts regarding the applicability of some of the instruments listed.[102] These instruments are denoted by a question mark in red, like this: 'FD 2009/829/JHA (?)'. The reason for the question mark is explained in red. The NARs will give their opinion on the applicability of those instruments from the perspective of EU law. Please refer to the case-law of the CJEU, national case-law, legal literature and national parliamentary debates where relevant.[103]

2.1.1. Pre-trial stage

The pre-trial stage is subdivided into two parts:[104]

- substage 1: the national authorities have reasonable grounds for believing that a certain person has committed the offence but cannot yet order his arrest and detention on remand under national law.
- substage 2: arrest and detention on remand are possible under national law.

Each of the two substages corresponds to a subsection: section 2.1.1.1 (substage 1) and section 2.1.1.2 (substage 2). Each of those subsections distinguishes between two situations: either the suspect is present in the issuing Member State or he is present in another Member State.

[100] Order of the instruments in accordance with sections 1.1 and 1.2.
[101] Considerations with regard to national law and arrangements are relevant when dealing with the application of instruments *in concreto*, therefore in Chapter 2.2 and 2.3.
[102] See also *MR2.0: some preliminary explorations*, p. 5-9.
[103] With regard to national sources: only insofar as they concern the applicability/the scope of the EU instrument.
[104] There is a third stage that precedes the two substages mentioned but that substage is out of scope (substage 0: the national authorities are aware that an offence has been committed but the probable author of that offence is unknown as yet). See the introduction to Chapter 1.

2.1.1.1. Substage 1 (no detention on remand possible)[105]

(a) Person concerned present in issuing MS
- FD 2009/829/JHA (?)
- Directive 2014/41/EU
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(b) Person concerned present in another MS
- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FD 2009/829/JHA seems to require that detention on remand is possible as a precondition to issuing an ESO. After all, ESO is 'an alternative to provisional detention' (Art. 1). Is it possible under EU law to issue an ESO, if detention on remand itself is not possible?
Although an EAW, in general, can be issued in the pre-trial stage, it is not mentioned here, because in substage 1 it is not possible to order detention on remand.

In substage 1 (no detention on remand possible), an ESO is considered as an alternative to provisional detention (Art. 1 FD 2009/829/JHA) even where, according to the law of the issuing Member State, a provisional detention could not be imposed *ab initio* (recital (4) FD 2009/829/JHA). Thus, according to EU law, an ESO may be issued even if detention on remand cannot be ordered yet.[106] If the suspect does not comply with the ESO, his detention will be ordered.[107] So, EU law allows for a stage model (stage 1: supervision, stage 2: detention order),

[105] It may be that according to the law of some MS a reasonable suspicion of a sufficiently serious offence does not suffice for ordering detention on remand. In the Netherlands, for instance, there must be a "serious suspicion" ("ernstige bezwaren") which is more than a reasonable suspicion.
[106] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 16.
[107] See the explanatory memorandum, ibid, p. 16.

but does not preclude an approach where a supervision order replaces a detention order so that the latter is a precondition to issuing a supervision order (substitution model).[108]
As far as incoming supervision orders are concerned, the German government – like other Member States - has filed a declaration under Art. 21(3) FD 2009/829/JHA that it will apply the minimum threshold of Article 2(1) FD 2002/584/JHA (crime punishable by the law of the issuing Member State by a custodial sentence for a maximum period of at least 12 months) in deciding on the surrender of the supervised person to the issuing State where the issuing state has ordered his arrest and detention.[109] As a consequence, the issuing MS will not issue a supervision order for crimes below this threshold because the person concerned will not be surrendered if it does not comply with the supervision measures; instead, the issuing MS will issue and execute a (national) arrest warrant and, thereby, counteract the objective of FD 2009/829/JHA to enhance the right to liberty and to promote the use of non-custodial measures (recital (4)).[110] For Germany as the issuing MS, these concerns seem less relevant as a (domestic) arrest warrant is a pre-condition for the issuing of an ESO (*infra* 2.2.1. substage 1).

According to EU law, the issuing of an EIO (e.g. for an interrogation via videoconference) does not require that detention on remand is possible; the same applies to serving a summons to the suspect (Art. 5 EU Convention on Mutual Assistance) as there is no threshold for the interrogation of a suspect.
The aforementioned cooperation instruments will be used where the suspect is in another Member State (scenario (b)); if the suspect is present in the issuing Member State (scenario (a)), there is no need for cross-border cooperation.

The legal basis for the transfer of criminal proceedings (Art. 21 of the Council of Europe Convention on Mutual Assistance in Criminal Matters) does not specify a threshold or

[108] Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?", (2014) *Zeitschrift für internationale Strafrechtsdogmatik,* 216 (at 226-227: 'Stufenmodell' and 'Substitutionmodell').
[109] Council-Document No. 12106/16; for corresponding notifications of other MS see Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?", (2014) *Zeitschrift für internationale Strafrechtsdogmatik,* 216 (at 225).
[110] Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?", (2014) *Zeitschrift für Internationale Strafrechtsdogmatik,* 216 (at 225-226); see also the European Criminal Policy Initiative, "A Manifesto on European Criminal Procedure Law", (2013) *Zeitschrift für Internationale Strafrechtsdogmatik,* 430 (at 438), referring to the maximum penalty of at least three years imprisonment for the exception from the double criminality requirement (Art. 14(1) FD 2009/829/JHA).

substantive requirements for outgoing requests. Thus, criminal proceedings can be transferred irrespective of whether or not detention on remand is possible (or ordered) and whether the suspect is present in the issuing state (Germany) or another Member State.

2.1.1.2. Substage 2 (detention on remand possible)

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Does this mean that under EU law detention on remand must be ordered as a precondition to issuing an ESO subsequently?

EU law prescribes that the issuing authority must be able to order supervision measures as an alternative to provisional detention; it depends upon the Member State's criminal justice system whether such alternatives must be considered before an arrest warrant is issued or before such a warrant – that has been issued – is executed. Germany has chosen the latter option (*infra* 2.2.1. substage 1).

As has been mentioned before (*supra* 2.1.1.1.), there is no need for transnational cooperation instruments for an interrogation (temporary transfer, videoconference, summons) if the accused person is present in the issuing Member State whereas transfer of criminal proceedings is also possible if the accused person is in the issuing (requesting) Member State.

(ii) person in detention on remand

- FD 2009/829/JHA
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

If the accused person is detained on the basis of an arrest warrant, the execution of the arrest warrant may be suspended where the purpose of detention can be achieved by supervision measures (section 116 CCP) and the transfer of the execution of such measures (section 90y AICCM). As regards the other cooperation instruments, the considerations under i) apply accordingly.

(b) Person concerned present in another MS

(i) detention on remand possible but not ordered

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(ii) detention on remand ordered

- FD 2002/584/JHA (?)
- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

What is the view in your country on whether it is possible, under EU law,[111] to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect/accused?

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures

[111] At various places the Annotated Index requires the NARs to put forward their opinion on the applicability of certain instruments to certain substages, either as a matter of EU law or as a matter of national law. These are different questions. It may well be that a certain instrument does apply as a matter of EU law, but does not apply as a matter national law, and vice versa. It may also be that a certain instrument allows a MS to refrain from providing for a certain measure but that a MS has chosen not to make use of that option. The answer to such questions may show that there are defects – (in the former situation) or legitimate choices (in the latter situation) that stand in the way of "effective and coherent" application of the instruments (see p. 3).

concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

According to the Commission's Handbook on the European Arrest Warrant, 'the purpose of the EAW is not to transfer persons merely for questioning them', because for that purpose other cooperation instruments (e.g. the EIO) are available.[112] Although the interrogation of the suspect is covered by the scope of the FD EAW (Art. 1(1) – 'prosecution'), the issuing of a EAW for that purpose would be in breach with the proportionality principle if a less intrusive means (e.g. interrogation by videoconference, summoning the accused person) were available (see also for the requirement of a domestic arrest warrant *infra* 2.2.2.).[113]

According to Art. 9(1) FD 2009/829/JHA, 'a decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State. The wording ("having been informed") implies that only a person who has not yet returned consents to their return. This interpretation of Art. 9(1) FD 2009/829/JHD is also supported by its drafting history, as in the original draft (then Article 7(1)), the wording "...has returned or consents to return..." was chosen. [114] Therefore, the scope of FD 2009/829/JHA does not cover the scenario that an ESO is issued if the person concerned has already left the issuing Member State (Germany) and has returned to his home country.[115] The limited scope of the Framework Decision notwithstanding, EU law does not preclude the Member States from a transposition into domestic law that allows for the issuing of an ESO where the suspect has already returned to another Member State (i.e. the executing Member State). If an ESO could not be issued, the remaining option would be to issue an EAW, and this would be disproportionate where the same purpose could be achieved by a less severe means, i.e. the ESO (see *infra* 2.2.2.).

[112] Commission Notice – Handbook on How to Issue and Execute a European Arrest Warrant, 17 November 2023 - C(2023) 7782 final, p. 15.
[113] Higher Regional Court Karlsruhe, Decision of 21 December 2016 - AK119/16, ECLI:DE:OLGKARL:2016:1221.1AK119.16.0A, (2016) BeckRS, 21411; proportionality is explicitly specified as a requirement for an EAW in section 169 para. 1 of the draft bill by the Federal Ministry of Justice of 11 September 2024.
[114] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 17-18.
[115] Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.

The public prosecutor may issue an EIO in order to examine the accused person via videoconference (Art. 24(1)2 DR 2014/41/EU) or to request his examination by a judicial authority of the executing Member State. In contrast, the transfer of a suspect who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons for the purpose of prosecution (recital (25) DR 2014/41/EU). So, as a matter of principle, Art. 22 of DR 2014/41/EU allows for an interrogation of the accused person, but temporary transfer is exclusively governed by the provisions on the EAW.[116] A transfer might be considered for questioning convicted persons serving their sentence in another Member State.[117] According to the prevailing opinion, this case is also covered by the EAW that includes the option of conditional and temporary surrender (Art. 18(1) lit. b FD EAW).[118]

As far as the other cooperation instruments (summons, transfer of criminal proceedings) are concerned, the considerations on substage 1 apply accordingly.

2.1.2. Trial Stage

(a) Person concerned present in issuing MS

(i) detention on remand possible[119] but not ordered

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

[116] See the explanatory memorandum to the law implementing DR 2014/41/EU, Bundestags-Drucksache 18/9757, p. 65; Böse, "§ 91j" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C. F. Müller, Jun. 2024), para. 11; Trautmann, "§ 91j" in Schomburg/Lagodny (Eds.) *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 11; Wörner, "§ 91c" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571. This view is also supported by defence counsels, see Defence Lawyer I (interview).

[117] Public Prosecutor's Office III (interview).

[118] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 503; academic expert (interview).

[119] The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*). After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence.
Consequently, proceedings concerning an offence which only carries a non-custodial sanction are out of scope.

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Does this mean that, under EU law, detention on remand must be ordered as a precondition to issuing an ESO subsequently?

According to EU law, an ESO may be issued even if detention on remand cannot be ordered yet (*supra* 2.1.1. substage 1; see, however, for the corresponding requirement under German law *infra* 2.2.1.).

(ii) person concerned in detention on remand
- FD 2009/829/JHA
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

If the accused person is detained in the issuing Member State (Germany), the competent court may issue an ESO (*supra* 2.1.1. substage 2). In this case, the accused person is present in the issuing Member State, recourse to the EIO and the EU Convention on Mutual Assistance is not necessary (*supra* 2.1.1.).
Art. 21 of the Council of Europe Convention on Mutual Legal Assistance does not preclude a transfer of proceedings in the trial phase.

(b) Person concerned is present in another MS
(i) detention on remand possible but not ordered
- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be

forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

FD 2009/829/JHA does not cover the scenario that an ESO is issued if the person concerned has already left the issuing Member State (Germany) and has returned to his home country, but does not preclude the Member States from a transposition into domestic law that allows for the issuing of an ESO where the suspect has already returned to another Member State (*supra* 2.1.1.).

Although an EAW, in general, can be issued in the trial stage, it is not mentioned here, because detention on remand is not ordered.
Directive 2014/41 sets rules that apply to 'all stages of criminal proceedings, including the trial phase' (recital (25). At the same time, these rules pertain to carrying out 'investigative' measures 'with a view to gathering evidence' (recital (25)).

> Under Directive 2014/41, is a videoconference possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?[120]
> If not: is such a videoconference possible without issuing an EIO?[121]

The wording of Art. 24 DR 2014/41/EU does not suggest an interpretation that this provision can be applied to ensure the presence of the accused person at the trial as the term 'hearing' is limited to the part of the trials where the accused person is examined (see also the version in German – 'Vernehmung' and Dutch – 'Verhoor'); the use of the same term for the examination of witnesses and experts (Art. 24(1)1 DR 2014/41/EU) supports this strict interpretation. Admittedly, the right to be present at the trial shall enable the accused person to exercise his right to be heard, but the scope of the EIO is limited to investigative measures to obtain evidence (Art.1(1) DR 2014/41/EU) rather than to ensure the right to be present at the trial (see in this regard DR 2016/343/EU).
Despite these concerns, the German government followed a wider understanding of Art. 10 of the EU Convention on Mutual Assistance (the blueprint for Art. 24 DR 2014/41/EU) that

[120] Cf. Case C-285/23.
[121] Cf. Case C-255/23.

extended to incoming requests for a videoconference for the sole purpose of ensuring the participation of the accused person in the trial, if the law of the other MS allows for a criminal trial in via videoconference and the accused person has given his consent.[122]
In any case, even without issuing an EIO, incoming requests[123] for a videoconference to ensure the presence of the accused at the trial can be granted and executed under the general rules on mutual legal assistance according to EU law (see, however, the limitations under German law *infra* 2.3. (b)).[124]

Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

The scope of Art. 24(1) DR 2014/41/EU expressly covers the interrogation of the accused person, irrespective of the stage of proceedings. Therefore, a videoconference for this purpose in the trial phase will be possible (see, however, with regard to the limitations under German law *infra* 2.3. (b)). As far as the EIO is not applicable, Art. 10(9) of the EU Convention on Mutual Assistance (Denmark) and Art. 9 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters (Ireland) provide a legal basis to proceed accordingly.[125]

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

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[122] Explanatory memorandum ('Denkschrift') to the EU Convention on Mutual Assistance, Bundestags-Drucksache No. 15/4233, p. 23; this provision still applies to cooperation with Denmark, likewise Art. 9 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters with Ireland.
[123] See an example of an incoming request Rinio, "Hauptverhandlung per Videokonferenz im Wege der internationalen Rechtshilfe in Strafsachen", (2004) *Neue Zeitschrift für Strafrecht,* 188.
[124] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 907; Rinio, "Hauptverhandlung per Videokonferenz im Wege der internationalen Rechtshilfe in Strafsachen", (2004) *Neue Zeitschrift für Strafrecht,* 188 (at 189-191); Trautmann and Zimmermann, "§ 59 IRG" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 103.
[125] Explanatory memorandum ('Denkschrift') to the EU Convention on Mutual Assistance, Bundestags-Drucksache No. 15/4233, p. 23; Gleß/Wahl, "Art. 10 EU-RhÜbk" in Schomburg/Lagodny (Eds.) *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 23; Kubiciel, "Art. 10 EU-RhÜbk." in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 306; Leonhardt, *Die Europäische Ermittlungsanordnung in Strafsachen* (Springer, 2017), p. 76; according to EJN however Denmark does not grant requests for hearing by videoconference involving the accused person/suspect: https://www.ejn-crimjust.europa.eu/ejn2021/FichesBelgesDetail/EN/A.12/260/277 (last accessed on 13 March 2025).

As has been mentioned before (*supra* 2.1.1.), the transfer of an accused person who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons for the purpose of prosecution (recital (25) DR 2014/41/EU). So, as a matter of principle, Art. 22 of DR 2014/41/EU allows for an interrogation of the accused person, but temporary transfer is exclusively governed by the provisions on the EAW.[126]

If the accused person is another Member State, the trial court may serve a summons to him (Art. 5 EU Convention on Mutual Assistance).

A transfer of criminal proceedings under Art. 21 of the European Convention on Legal Assistance is not limited to the pre-trial stage, but may as well be considered in the trial phase.

(ii) detention on remand ordered

- FD 2002/584/JHA[127]
- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An EAW may only be issued on the basis of a domestic arrest warrant. Moreover, the issuing of an EAW requires an additional proportionality assessment (*supra* 2.1.1.).

[126] See the explanatory memorandum to the law implementing DR 2014/41/EU, Bundestags-Drucksache 18/9757, p. 65; Böse, "§ 91j" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 11; Trautmann, "§ 91j" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 11; Wörner, "§ 91c" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571.

[127] The ultimate objective of a prosecution-EAW is surrender to the issuing MS in order to conduct a criminal prosecution (which includes the trial stage). Pending the decision on the execution of a *prosecution*-EAW, FD 2002/584/JHA provides for two forms of intermediate judicial cooperation in connection with the prosecution in the issuing MS: hearing the person concerned in the executing MS by a judicial authority of that MS (Art. 18(1)(a) and Art. 19 FD 2002/584/JHA) or temporarily transferring the person concerned to the issuing MS to be heard there (Art. 19(1)(b) and (2) FD 2002/584/JHA).

As in the pre-trial stage (*supra* 2.1.1.), an arrest warrant ordering detention on remand may be a precondition to issuing an ESO. If detention has been ordered, the trial court may suspend the execution of the arrest warrant and adopt supervision measures and to issue an ESO.

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

As has been mentioned before, the scope of FD 2009/829/JHA does not cover the scenario that an ESO is issued if the person concerned has already left the issuing Member State (Germany) and has returned to his home country (*supra* 2.1.1.).[128] EU law, however, does not preclude the issuing of an ESO where the suspect has already returned to another Member State.[129] In this case, the executing Member State is not obliged to recognize and monitor the supervision measures.[130]

Directive 2014/41 sets rules that apply to 'all stages of criminal proceedings, including the trial phase' (recital (25). At the same time, these rules pertain to carrying out 'investigative' measures 'with a view to gathering evidence' (recital (25)).

> Under Directive 2014/41, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO?[131] Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

[128] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18; Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.
[129] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18, 59.
[130] Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.
[131] Cf. Case C-255/23 and Case C-285/23.

The considerations on scenario i) apply accordingly. The trial court may examine him by videoconference and issue an EIO to that end.[132]

> Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

Again, the considerations on scenario i) apply accordingly. The transfer of an accused person who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons for the purpose of prosecution (recital (25) DR 2014/41/EU).[133]

If the accused person is detained in another Member State, a summons (Art. 5 EU Convention on Mutual Assistance) will not be the suitable instrument to make that person to appear before court.

As has been elaborated for scenario i), criminal proceedings may still be transferred at the trial stage. This instrument might be an option where the German authorities have issued an EAW, but the executing Member State does not surrendered the accused person (*supra* 2.1.1.).

2.2. Applicability and application of the instruments at the pre-trial stage according to national law

General introduction

In this section, the object is to tie instruments that are applicable *in abstracto* in the various (sub)stages of the pre-trial stage to *specific* needs for judicial cooperation.

[132] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 906.
[133] See the explanatory memorandum to the law implementing DR 2014/41/EU, Bundestags-Drucksache 18/9757, p. 65; Böse, "§ 91j" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 11; Trautmann, "§ 91j" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 11; Wörner, "§ 91c" in Ambos/König/Rackow, *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571.

This presupposes that the instruments that are applicable *in abstracto* according to both EU law (see paragraph 2.1) and *national law*. If there are applicability issues according to national law concerning the pre-trial stage, the NARs are requested to address them in this paragraph.

Given our person based approach and given the focus on (alternatives to) measures concerning deprivation of liberty, in the pre-trial stage the specific needs for judicial cooperation are basically twofold:

(aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);[134]

(bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution (whether or not he is present in the issuing MS).[135] This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.[136]

However, as a safety-valve, we have included the option '(dd) other?'[137]

With regard to each substage and each subdivision of each substage (present in issuing MS/present in another MS; detention on remand not possible/detention on remand possible; detention on remand possible but not ordered/detention on remand ordered) the NAR will first describe which national authority is in charge of the investigation/prosecution at that stage and, with regard to each specific need for judicial cooperation, which national authority is competent to request that form of judicial cooperation at that stage.[138] Please be as concrete as possible: do not just mention 'the Public Prosecutor's Office' or 'the court', but specify to which tier of jurisdiction the competent authorities belong, e.g. 'the Public Prosecutor's Office at the first instance court' or 'the first instance court' and, where relevant, specify their territorial competence, e.g. 'the Public Prosecutor's Office at the first instance court in X' or 'the first instance court in X'.

[134] (aa) concerns measures which require the presence of the person concerned, such as interrogation (whether or not by videoconference) or confrontation. For convenience's sake, we will use 'interrogation' as a short hand designation.
[135] Later on, we will clarify why the situation in which the person is in the issuing MS is also taken into account.
[136] *E.g.*, by summoning the person concerned.
[137] Not '(cc)'. That designation is reserved for something else. See the introduction to section 2.3.
[138] Refer to the relevant provisions of national law and, if necessary, to national case-law in the footnotes.

The NAR will examine whether the competent national authority takes into account less intrusive alternatives when deciding on which form of judicial cooperation to request and which instrument(s) to apply. The NAR will describe in a factual way which considerations play a role[139] when the competent national authority has to take that decision. To that end, the NARs will (also) endeavour to ascertain whether:

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects an accused persons subject to pre-trial detention and on material detention conditions);[140]
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;[141]
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audio-visual transmission)/telephone conference to that end.

In the country report, only these considerations will be described. In a *separate* memorandum, the NAR will express his opinion on whether the decisions of the competent national authorities on the application of the various instruments are 'effective and coherent' (within the meaning of *MR2.0: some preliminary explorations*).[142] These four separate memoranda will, in turn, form the basis of the overarching analysis in the end report.

Some of the instruments are followed by a question mark in red. Those are the instruments whose applicability under EU law is under doubt (see 2.1). The NARs will provide their assessment regarding the applicability of those instruments within the framework of national

[139] That means that at this point no normative approach as to which considerations should play a role should be used. The normative approach is reserved for the separate memorandum.
[140] *OJ* 2023, L 86/44.
[141] This calls for an exercise in thinking in scenarios: if the requested form of judicial cooperation does not achieve its intended result, what other form(s) of judicial cooperation will the issuing judicial authority then employ?
[142] See footnote 1.

law. Please refer to case-law of the CJEU, to national case-law and legal literature, where relevant. Also, refer to infringement proceedings against the NAR's MS, where relevant.

The issuing authority must abide by the rules on criminal proceedings and must not issue a decision that could not be taken (and executed) in a purely domestic setting (see also Art. 6(1) lit. b DR 2014/41/EU).[143] As to the relevant criteria, the impact on the right to liberty and the availability of less intrusive means are considered most important as the issuing authority is bound by the principle of proportionality.[144] A similar view was taken on the impact on free movement rights as far as arrest and detention are concerned[145] whereas public prosecutors considered this issue less relevant because EAWs are usually issued for the most serious crimes[146]. The national attribution of competences was not considered a relevant factor.[147] A judge raised the lack of information about and experience in how to use the cooperation instruments.[148]

On the other hand, public prosecutors have pointed out that the effectiveness of the instrument is equally important because quick results are essential for a criminal investigation. If a request is not successful, the investigating public prosecutor will still seek to achieve the result (e.g. by adapting the requests to requirements under the law of the executing Member States[149]).[150] If, however, the requested Member State does not respond at all, the public prosecutor might refrain from sending further requests to the authorities of this Member State.[151] On the other hand, since the principle of mandatory prosecution obliges public prosecutors and courts to investigate and prosecute crimes, another Member State's failure to respond does not provide sufficient reason not to use the corresponding cooperation instrument (e.g. the EAW) in another case.[152] Moreover, the responsiveness may depend upon the crime that is under investigation: An instrument that does not work for fraud cases, may turn out to bring quick results in a

[143] Academic expert (interview).
[144] Federal Ministry of Justice (interview); District Court (interview); academic expert (interview); Office of the Prosecutor General (interview); Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); Public Prosecutor's Office III (interview); Defence Lawyer III (interview); State's Ministry of Justice (interview).
[145] Federal Ministry of Justice (interview); District Court (interview); Defence Lawyer III (interview); Defence Lawyer II (interview). A similar view was taken by the State's Ministry of Justice (interview).
[146] Public Prosecutor's Office I (interview); see also Office of the Prosecutor General (interview): not relevant.
[147] Federal Ministry of Justice (interview); State's Ministry of Justice (interview).
[148] District Court (interview).
[149] Public Prosecutor's Office II (interview).
[150] Public Prosecutor's Office III (interview).
[151] Federal Ministry of Justice (interview); Office of the Prosecutor General (interview); Public Prosecutor's Office III (interview); similarly State's Ministry of Justice (interview).
[152] Public Prosecutor's Office III (interview); similarly District Court (interview).

murder case.[153] As a matter of principle, costs should not provide sufficient reason not to have recourse to a suitable cooperation instrument.[154] As of now, there are no findings on the costs of issuing (or executing) an EAW yet; in any case, videoconferences are less costly because the technical equipment is available for the judicial authorities.[155] On the other hand, significant costs for translation of documents (e.g. the investigation file for the purpose of a transfer of proceedings) are considered an important factor.[156] In this regard, recourse to translations by AI tools should be taken into consideration.[157] In practice, this issue is sometimes solved by consultations that may result in an agreement on the distribution of the relevant costs.[158] Art. 19(2) of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters provides for sharing of 'large or exceptional' costs, too. Apart from this issue, the issuing authority usually does not enter into consultations on the choice of the cooperation instrument unless in large-scale or complex investigations.[159] Alternatively, it may consult with the ministry of justice or the EJN contact point on how to proceed.[160] According to a judge, consultations often fail for lack of information on how to establish and contact the competent authority in the executing Member State.[161] On the other hand, personal contact with the executing authority (instead of the mere transmission of a written request) is considered of crucial importance for a smooth cooperation.[162]

2.2.1. Substage 1 (no detention on remand possible)

(a) Person concerned present in issuing MS

(bb) Ensuring that the suspect is available[163]

- FD 2009/829/JHA (?)

ESO possible under national law?

According to EU law, an ESO may be issued even if detention on remand cannot be ordered yet (*supra* 2.1.1.). So, it depends upon the Member State's criminal justice system whether

[153] Office of the Prosecutor General (interview).
[154] District Court (interview); Public Prosecutor's Office III (interview).
[155] Federal Ministry of Justice (interview).
[156] Federal Ministry of Justice (interview); Office of the Prosecutor General (interview); Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview). A contrary view is taken by Public Prosecutor's Office III (interview).
[157] Federal Ministry of Justice (interview).
[158] Office of the Prosecutor General (interview).
[159] Public Prosecutor's Office III (interview); Public Prosecutor's Office I (interview).
[160] State's Ministry of Justice (interview).
[161] District Court (interview).
[162] Federal Ministry of Justice (interview).
[163] '(aa)' does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

such alternatives must be considered before an arrest warrant is issued or before such a warrant – that has been issued – is executed. Germany has chosen the latter option so that the issuing of an arrest warrant is a precondition to the issuing of supervision measures under FD 2009/829/JHA.

In the German criminal justice system, detention on remand may be ordered against an accused person if he is strongly suspected of having committed the offence and there is a ground for arrest (e.g. risk of flight or tampering with evidence, section 112 CCP). If there is a ground for arrest, but the purpose of detention can be achieved by less severe measures (supervision, bail), the execution of the arrest warrant can be suspended (section 116 CCP). Supervision measures are, thus, not an alternative to the arrest warrant, but to its execution. Thus, according to German law, the issuing of an arrest warrant is a precondition to issuing an ESO (section 90y AICCM).[164] Accordingly, the court must withdraw the ESO if the conditions for issuing an arrest warrant are no longer met (section 90z(1) AICCM). As a consequence, the concerns about the threshold of Art. 2(1) FD 2002/584/JHA (*supra* 2.1.1.1.) seem less relevant because remand detention for the purpose of prosecuting petty offences must be in conformity with the proportionality principle (section 112(1)2 CCP).[165] This applies in particular to offences punishable by imprisonment for a term not exceeding six months (section 113 CCP); nevertheless, even in this case, the court may order detention on remand on the ground of a risk of flight if the defendant has no permanent residence within Germany (section 113(2) No. 2 CCP).

However, even where detention on remand is not possible, the court may order the accused person to provide adequate security for the anticipated fine and the costs of the proceedings and to authorize a person residing within the district of the competent court to accept service of the penalty order if the accused person is strongly suspected of having committed an offence and has no residence in Germany (section 132 CCP). Such an order enables the court to issue and execute a penalty order (section 407 CCP) after the period for lodging an objection to that order has expired.[166] According to the Court of Justice, EU law does not preclude such a mechanism, provided that, as soon as the person concerned has actually become aware of the

[164] See the explanatory memorandum, ibid., p. 16; Riegel, "§ 90y IRG" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 2.

[165] See also Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?", (2014) *Zeitschrift für Internationale Strafrechtsdogmatik,* 216 (at 227); see also section 171(3) of the draft bill on the reform of the AICCM and the explanatory memorandum of the Federal Ministry of Justice, p. 348.

[166] Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?", (2014) *Zeitschrift für Internationale Strafrechtsdogmatik,* 216 (at 231-232).

order, he should be placed in the same situation as if that order had been served on him personally and, in particular, that he has the whole of the prescribed period for lodging an objection to that order.[167] As a consequence, the enforcement of the penalty order bears the risk that the convicted person files an application to be granted restoration of the status quo ante in order to lodge an objection to the penalty order.[168] Accordingly, defence counsels have raised their concerns about this mechanism[169] that has apparently not been used in recent judicial practice[170]. As an alternative to the authorisation mechanism under section 132 CCP, service through a mandatory electronic postbox, as a digital alternative to the conventional "analog" letterbox, set up by the respective state justice administration, might be an option to create a more reliable means of communication for the judiciary and the accused.[171] In the area of judicial cooperation in civil and commercial matters, the Digitalisation Regulation[172] provides for electronic service of judicial documents through the European electronic access point on the European e-Justice Portal; *de lege ferenda* the EU legislator might extend the scope of this mechanism to judicial cooperation in criminal matters.

(dd) Other (?)

(b) Person concerned is present in another MS

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- DR 2014/41[173]

Temporary transfer[174]

The transfer of a suspect who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of

[167] CJEU, Judgment of 22 March 2017 – Joined Cases C-124/16, C-188/16 and C-213/16, *Tranca, Reiter and Opria*, EU:C:2017:228, para 51.
[168] Seifert, "Zustellungsvollmacht, Strafbefehlsverfahren und der fair-trial-Grundsatz", (2018) *Strafverteidiger,* 123 (at 127-128).
[169] Defence Lawyer III (interview); Defence Lawyer II (interview).
[170] Federal Ministry of Justice (interview); Public Prosecutor's Office III (interview)('dead horse').
[171] Seifert, "Zustellungsvollmacht, Strafbefehlsverfahren und der fair-trial-Grundsatz", (2018) *Strafverteidiger,* 123 (at 128).
[172] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, *OJ* L 2023/2844: Art. 24 inserts Art. 19a Regulation (EU) 2020/1784.
[173] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.
[174] It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

accused persons (*supra* 2.1.1.). This view is also reflected in No. 119(4) GICCM stating that the transfer of an accused person for prosecution is exclusively governed by the rules on (provisional) extradition.[175] The AICCM, however, does not provide for a temporary transfer of the arrested person to the issuing Member State; accordingly, there is no practice on outgoing requests for temporary transfer of the suspect.[176]

Videoconference

According to national law, the issuing of an EIO (e.g. for an interrogation via videoconference) does not require that detention on remand is possible because there is no threshold for the interrogation of a suspect. In contrast to other countries[177], however, German prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person in order to comply with the latter's right to be heard.[178] As a matter of principle, this cooperation instrument is available and used for the interrogation of suspects and accused persons.[179]

- EU Convention on Mutual Assistance

Inviting him for an interrogation or confrontation etc. (sending/service documents)

Serving a summons to the accused person is not subject to a particular threshold under national law, either. Again, prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person.[180] In practice, it is often difficult to establish that the summons has been served to the defendant so that he is actually aware of the intended interrogation (see also *supra* 2.1.1.); in this regard a harmonized framework for serving summons and other documents would be useful.[181]

If the defendant is summoned for an interrogation, the summons is served without a warning he will be arrested and brought before the court if he fails to appear (see for domestic cases: sections 133(2), 163a(3)2 CCP) because the issuing state must not exercise its jurisdiction to

[175] Academic expert (interview).
[176] Federal Ministry of Justice (interview).
[177] State's Ministry of Justice (interview) reported of corresponding incoming requests.
[178] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); Public Prosecutor's Office III (interview).
[179] Federal Ministry of Justice (interview).
[180] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[181] Federal Ministry of Justice (interview).

enforce on the territory of a foreign state; therefore, the warning is added a note that coercive measures are not executed on the territory of the requested state (No. 116(1)2 GICCM).[182]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

Criminal proceedings can be transferred irrespective of whether or not detention on remand is possible (or ordered) and whether the suspect is present in the issuing state (Germany) or another Member State. However, a transfer of criminal proceedings usually requires that the accused person has been given the opportunity to give a statement,[183] this requirement has also been included in Art. 6(3) lit. b of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters. Moreover, a defence lawyer criticized the lack of a proper legal basis and the cumbersome procedure.[184] The latter concerns have also been raised with regard to the draft regulation on transfer of proceedings in criminal matters.[185] So, a transfer of proceedings is not an alternative to the interrogation of the accused person.

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

ESO possible under national law?

No, if detention on remand is not possible (i.e. without an arrest warrant), an ESO must not be issued, either (*supra* (a)).

- EU Convention on Mutual Assistance

[182] See with regard to summons to the trial: Higher Regional Court Berlin, Decision of 10 November 2010 – 3 Ws 459/10, (2011) *Neue Zeitschrift für Strafrecht,* 653 (at 654); Higher Regional Court Karlsruhe Decision of 16 September 2014 - 2 Ws 334/14, (2015) *Strafverteidiger,* 346.
[183] Public Prosecutor's Office I (interview).
[184] Defence Lawyer III (interview).
[185] State's Ministry of Justice (interview).

Keeping in contact with him while he's abroad (sending/service documents)

As has been mentioned before, serving a summons or other documents to the accused person is not subject to a particular threshold. In practice, however, public prosecutors do not use this cooperation instrument.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that the suspect is available for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option.

Criminal proceedings can be transferred irrespective of whether or not detention on remand is possible (or ordered) and whether the suspect is present in the issuing state (Germany) or another Member State. If the suspect, however, is present in another Member State and cannot be surrendered on the basis of an EAW, the public prosecutor shall consider a transfer of proceedings (No. 145(1) GICCM); this applies in particular to cases where the evidence is located in the requested state, too.[186] These factors are also expressly listed as criteria for requesting the transfer of criminal proceedings in Art. 5(2) lit. c to e of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters. Regarding the location of the evidence (Art. 5(2) lit. e) though, the requesting authority is encouraged to take into account the possibility of obtaining evidence from other Member States through the EIO first (recital (29)).

A transfer of proceedings usually requires that the investigating public prosecutor has concluded the investigation (as far as possible) and can trust in the willingness and capacity of the requested state to take over criminal proceedings.[187] In practice, other Member States are more likely to take over prosecution in an early phase of the investigation; in a later stage, transfer of proceedings has not turned out to overcome obstacles to surrender and to avoid impunity.[188] The prosecution of petty offences will rarely meet the latter requirement; in such

[186] Public Prosecutor's Office I (interview).
[187] Public Prosecutor's Office I (interview).
[188] Federal Ministry of Justice (interview).

cases, public prosecutors often decide not to prosecute (sections 153 ff. CCP).[189] In contrast, if the accused person is present, there is no need for a transfer of proceedings.[190] On the other hand, the proceedings can be transferred to the Member State where the accused person and the victim have their permanent residence because this may enable the suspect to keep contact with his family and facilitate his reintegration into society.[191] Furthermore, the place of the criminal activities are a relevant factor.[192] These factors are also listed as some of the criteria for requesting a transfer of criminal proceedings, according to Art. 5(2) lit. b, j, i and a of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters.

(dd) Other (?)

2.2.2. Substage 2 (detention on remand possible)

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered[193]

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

ESO possible under national law?

If detention on remand is not possible (i.e. without an arrest warrant), an ESO must not be issued, either (*supra* 2.2.1. (a)). The court, however, may issue an arrest warrant (section 112 CCP) and, at the same time, suspend its enforcement (section 116 CCP). In this case, the court may issue an ESO and transfer supervision to another MS (see *infra* sub (ii)).

(dd) Other (?)

(ii) person concerned in detention on remand

If the accused person is detained in the issuing MS, the competent court may suspend the enforcement of the arrest warrant and issue an ESO (section 90y(1) AICCM). The transfer requires the consent of the detained person (section 90y(1)2 No. 2 AICCM; see also Art. 9(1) FD 2009/829/JHA).

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[189] Public Prosecutor's Office I (interview); State's Ministry of Justice (interview).
[190] Public Prosecutor's Office I (interview).
[191] Public Prosecutor's Office III (interview); Defence Lawyer III (interview); State's Ministry of Justice (interview).
[192] State's Ministry of Justice (interview).
[193] '(aa)' does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

The decision to issue an ESO lies within the discretion of the competent court (section 90y(1) AICCM: 'may'); the public prosecution office must be given the opportunity to make a statement (section 90y(1)3 AICCM). Although the defendant has no right to a non-custodial measure as an alternative to detention on remand (Art. 2(2) FD 2009/829/JHA), the court must comply with the principle of proportionality and issue an ESO as a less intrusive means if the objective of detention on remand is achieved in an equivalent effective manner.[194] Issuing an ESO, however, might not be as effective as detention in the issuing MS where the defendant does not comply with the supervision measures and absconds from justice[195]; in this case, the mechanism under FD 2009/829/JHA is considered too lengthy and complex a procedure, in particular because the executing authority must not order the arrest of the defendant on its own motion, but has to notify the issuing authority that will take that decision.[196] These concerns apply in particular to traveling criminal defendants without a permanent residence.[197] According to a defence counsel, some courts have established a practice of direct supervision according to which a foreign police station sends a fax confirming that the accused person has reported to its office.[198] Defence counsels criticize that detention in Germany is considered the easier and more effective way to ensure that the accused person does not escape from justice.[199] They argue that the fact that the accused person's permanent residence is in another Member State does not *per se* establish a risk of flight as a ground for detention.[200] In contrast, public prosecutors held that in some cases, a residence abroad could be tantamount to the risk of flight; in such cases, the accused person may be brought to judgment in accelerated proceedings (sections 417 ff. CCP) and the duration of remand detention will be credited against a determinate sentence of imprisonment (section 51(1) CC).[201] Accordingly, the cooperation

[194] Esser, "Europäische Initiativen zur Begrenzung der Untersuchungshaft" in Joerden and Swarzc (Eds.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (Duncker & Humblot, 2007), p. 233 (at 249); Morgenstern, "§ 15 Vollstreckungshilfe" in Böse (Ed.), *Europäisches Strafrecht*, 2nd ed. (Nomos, 2021), para 120.
[195] See also with regard to cases where the surrender of the requested person failed after he or she had been released by the executing authority: Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 66.
[196] Public Prosecutor's Office III (interview); see also Morgenstern, "§ 15 Vollstreckungshilfe" in Böse (Ed.), *Europäisches Strafrecht*, 2nd ed. (Nomos, 2021), para 124; Morgenstern, "Pre-trial detention in Germany: a liberal approach, but not for all" in Morgenstern/Hammerschick/Rogan (Eds.), *European Perspectives on pre-trial detention. A means of last resort?* (2023), p. 8 (at 97), referring to statements of practitioners.
[197] State's Ministry of Justice (interview).
[198] Defence Lawyer III (interview); see also Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 143.
[199] Defence Lawyer I (interview).
[200] Defence Lawyer I (interview); similarly Federal Ministry of Justice (interview).
[201] Public Prosecutor's Office III (interview); similarly Federal Ministry of Justice (interview).

instrument is not used by or even unknown among practitioners.[202] According to the ministry of justice, only three ESOs have been issued in Germany.[203] Training programs and a circular on the ESO might help to overcome these shortcomings.[204]

These findings correspond to the expectations of the legislator: According to the German government, the fact that the defendant is a resident of another MS is not sufficient to establish a risk of flight; without a ground for detention, the court cannot issue an arrest warrant nor an ESO. For the prosecution of minor offences, German law provides for less intrusive alternatives: Public prosecutors may file an application to the court to issue a penalty order that is then to be served to the accused person. A summary penalty order may impose only non-custodial sanctions; if the accused person has defence counsel, imprisonment for a term not exceeding one year may also be imposed, provided its enforcement is suspended on probation (section 407(2) CCP). Alternatively, the public prosecutor may dispense with the bringing of public charges and concurrently impose conditions on and issue directions to the accused person (section 153a CCP, e.g. payment of a certain amount of money). In these cases, detention on remand due to the risk of flight would be disproportionate where the accused person provides adequate security for the anticipated fine and the costs of the proceedings (section 127a CCP).[205]

However, there may be cases where a ground for detention can be established (e.g. the risk of flight is derived from the level of the expected sentence), but the purpose of remand detention can be achieved by a less intrusive means (section 116 CCP); the ESO enables the court to adopt directions or other supervision measures to the same extent as in purely domestic cases.[206] In its decision, the court must consider the objectives in Art. 2(1) FD 2009/829/JHA, i.e. the promoting the use of non-custodial measures as less intrusive means (proportionality) and the rights of the defendant (Art. 18 TFEU) on the one hand and the interest in effective

[202] District Court (interview); Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); Defence Lawyer III (interview); Defence Lawyer II (interview); see also Morgenstern, "Pre-trial detention in Germany: a liberal approach, but not for all" in Morgenstern/Hammerschick/Rogan (Eds.), *European Perspectives on pre-trial detention. A means of last resort?* (2023), p. 8 (at 97), referring to statements of practitioners.

[203] Federal Ministry of Justice (interview).

[204] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 134.

[205] See the explanatory memorandum of the German government, Bundestags-Drucksache 18/4894, p. 17, and the recommendation of the Bundesrat, Bundesrats-Drucksache No. 654/1/06, p. 3.

[206] Schlothauer, "Haftverschonung bei Untersuchungshaft im europäischen Kontext" in Herzog/Schlothauer/Wohlers/Wolter (Eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte* (2016), p. 313 (at 315-316).

prosecution on the other (see also recitals (5), (18) FD 2009/829/JHA).[207] If the judge suspends the enforcement of the arrest warrant and issues an ESO, the release of the detained person can be ordered upon the condition that the other MS accepts the request to monitor the supervision measures.[208]

(b) Person concerned is present in another MS

(i) detention on remand possible but not ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- DR 2014/41[209]

Temporary transfer[210]

The transfer of a suspect who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons (*supra* 2.1.1.). According to public prosecutors, such a transfer would be disproportionate because the accused person had a right to remain silent.[211] This corresponds to the view of the ministries of justice.[212]

Videoconference

German law allows for the issuing of an EIO for an interrogation via videoconference. In practice, however, prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person.[213] An interrogation by videoconference is limited to exceptional cases (e.g. questioning a crown witness in a case related to organized crime).[214] As a matter of principle, this cooperation instrument is available and used for the interrogation of suspects and accused persons.[215]

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[207] Schlothauer, "Haftverschonung bei Untersuchungshaft im europäischen Kontext" in Herzog/Schlothauer/Wohlers/Wolter (Eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte* (2016), p. 313 (317-318).
[208] Schlothauer, "Haftverschonung bei Untersuchungshaft im europäischen Kontext" in Herzog/Schlothauer/Wohlers/Wolter (Eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte* (2016), p. 313 (at 322-323).
[209] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.
[210] It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).
[211] Public Prosecutor's Office I (interview).
[212] Federal Ministry of Justice (interview); State's Ministry of Justice (interview).
[213] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); State's Ministry of Justice (interview).
[214] Public Prosecutor's Office III (interview).
[215] Federal Ministry of Justice (interview).

- EU Convention on Mutual Assistance

Inviting him for, e.g., an interrogation (sending/service documents)

Serving a summons to the accused person is not subject to a particular threshold, either. Again, prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person.[216]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

As has been mentioned before (*supra* 2.1.1.), a transfer of criminal proceedings usually requires that the accused person has been given the opportunity to give a statement,[217] a requirement that has also been included in Art. 6(3) lit. b of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters. So, a transfer of proceedings is not an alternative to the interrogation of the accused person.

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

If detention on remand is not possible (i.e. without an arrest warrant), an ESO must not be issued, either (*supra* 2.2.1. (a)).

- EU Convention on Mutual Assistance

[216] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[217] Public Prosecutor's Office I (interview).

Keeping in contact with him while he's abroad (sending/service documents)

Serving a summons or other documents to the accused person is not subject to a particular threshold. In practice, however, public prosecutors do not use this cooperation instrument.

- Convention on Transfer on Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

Criminal proceedings can be transferred irrespective of whether or not detention on remand is possible (or ordered) and whether the suspect is present in the issuing state (Germany) or another Member State. If the suspect, however, is present in another Member State and the issuing of an EAW would be disproportionate, the public prosecutor shall consider a transfer of proceedings (No. 145(1) GICCM). In practice, however, the requested state is often unwilling to take proceedings for petty offences.[218]

(dd) Other (?)

(ii) detention on remand ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- FD 2002/584/JHA (?)

Under national law, is it possible to issue a prosecution-EAW for the sole[219] purpose of interrogating the requested person as a suspect?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

[218] Public Prosecutor's Office I (interview).

[219] It is rumoured that the issuing judicial authorities of one MS issue an EAW just to hear the requested person. After having heard the surrendered person, he is then released.

An EAW may only be issued on the basis of a domestic arrest warrant whereas the decision that the accused person is to be brought to the court (or the public prosecutor) for the purpose of his examination ('Vorführung', sections 133(2), 134, 163a(2)2 CCP) is not sufficient (see, however, with regard to the presence of the accused person at the trial stage *infra* 2.3.).[220] The options under Art. 18, 19 FD EAW are available if an EAW has been issued, but they do not extend the legal basis of remand detention under the law of the issuing state.[221] According to public prosecutors, the issuing of an EAW would be disproportionate because the accused person had a right to remain silent.[222] Defence counsels shared this view and argued that arrest and detention are not required to ensure that the accused person can exercise his right to be heard, either, because this right can be exercised by a written statement as well.[223] Defence counsels pointed out that in some Member States (such as the Netherlands) the executing authorities use the option to release the arrested person if detention is not necessary to prevent the person from absconding and to ensure surrender. In such a case, the issuing (German) authority granted safe conduct (section 295 CCP) in order to question the accused person in Germany; after the interrogation, the court revoked the arrest warrant and the proceedings were closed by transaction (section 153a CCP).[224]

- DR 2014/41[225]

Temporary transfer[226]

The transfer of a suspect who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons (*supra* 2.1.1.). According to public prosecutors, arresting and transferring a person to be interrogated as a suspect would be disproportionate because the accused person

[220] Higher Regional Court Stuttgart, Decision of 25 February 2010 - 1 Ausl. (24) 1246/09, (2010) *Neue Juristische Wochenschrift*, p. 1617 (at 1619); Burchard, "§ 14 Auslieferung – Europäischer Haftbefehl" in Böse (Ed.), *Europäisches Strafrecht*, 2nd ed., Nomos 2021, para. 55.
[221] Academic expert (interview).
[222] Public Prosecutor's Office I (interview). According to a State's Ministry of Justice (interview), no such case has been reported in its federal state.
[223] Defence Lawyer I (interview); Defence Lawyer II (interview).
[224] Defence Lawyer II (interview); see also Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 143.
[225] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.
[226] It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

had a right not to make any statement on the charges (privilege against self-incrimination).[227] This corresponds to the view of the ministries of justice.[228]

Videoconference

German law allows for the issuing of an EIO for an interrogation via videoconference. In practice, however, prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person.[229] As a matter of principle, this cooperation instrument is available and used for the interrogation of suspects and accused persons.[230]

- EU Convention on Mutual Assistance

Summoning him, e.g., to an interrogation while he's abroad (sending/service documents)

Serving a summons to the accused person is not subject to a particular threshold, either. Again, prosecutors do not use this cooperation instrument; instead, they request for an interrogation by the police or a written statement by the accused person.[231]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for, e.g., interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

As has been mentioned before (*supra* 2.1.1.), a transfer of criminal proceedings usually requires that the accused person has been given the opportunity to give a statement,[232] a requirement that has also been included in Art. 6(3) lit. b of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters. So, a transfer of proceedings is not an alternative to the interrogation of the accused person.

[227] Public Prosecutor's Office I (interview).
[228] Federal Ministry of Justice (interview); State's Ministry of Justice (interview).
[229] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[230] Federal Ministry of Justice (interview).
[231] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[232] Public Prosecutor's Office I (interview).

(bb) Ensuring that the suspect is available

- FD 2002/584/JHA

Prosecution-EAW

An EAW may only be issued on the basis of a domestic arrest warrant that requires strong suspicion and a ground for arrest (e.g. risk of flight or tampering with evidence, section 112 CCP). Moreover, the decision to issue an EAW must comply with the proportionality principle. If there are major proportionality concerns, the courts will not issue a national arrest warrant which is a pre-condition for the EAW. Wherever possible, the issuing authority shall have recourse to less intrusive alternatives that are equally suitable for achieving the intended purpose.

In the proportionality assessment, the duration of surrender proceedings, the detention conditions in the executing Member State, but also the personal and financial resources (costs) must be taken into account (No. 88, 149 GICCM). According to public prosecutors, an EAW is not issued unless the expected sentence is imprisonment of less than two years.[233]

- FD 2009/829/JHA (?)

ESO possible under national law?

As has been mentioned before (*supra* 2.1.1.), the scope of FD 2009/829/JHA does not cover the scenario that an ESO is issued if the person concerned has already left the issuing Member State (Germany) and has returned to his home country.[234] The limited scope of the Framework Decision notwithstanding, EU law does not preclude the Member States from a transposition into domestic law that allows for the issuing of an ESO where the suspect has already returned to another Member State (i.e. the executing Member State). If an ESO could not be issued, the remaining option would be to issue an EAW, and this would be disproportionate where the same purpose could be achieved by a less severe means (the ESO). Therefore, the German legislator extended the scope of section 90y AICCM to cases where the accused person has already returned to another Member State (section 90y(1) No. 3 AICCM).[235] Due to the limited

[233] Public Prosecutor's Office I (interview).
[234] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18; Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.
[235] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18, 59.

scope of FD 2009/829/JHA, however, the executing Member State is not obliged to recognize and monitor the supervision measures.[236]

If the defendant has already left the issuing MS and has returned to his home MS, an ESO can be issued without the consent of the defendant (section 90y(1) No. 3 AICCM).[237] The decision to issue an ESO is at the discretion of the competent judge ('may'); the considerations on scenario (a) apply accordingly. If the executing MS refuses to monitor the supervision measures, the issuing judge may revoke the suspension of the enforcement of the arrest warrant (section 116(4) No. 3 CCP).[238]

According to defence counsels, the fact that the accused person returned to his home country cannot be equated to flight and, thereby, establish a ground for detention; in other words, an arrest warrant cannot be based upon the fact that the defendant has not assured to appear before court.[239] Even where the executing authority executes a German EAW without keeping the accused person in detention (Art. 12 FD EAW), the enforcement of the arrest warrant is not suspended after the accused person has been surrendered to the German authorities; instead, the person is detained while the investigation is completed. According to a defence lawyer, it would have been less intrusive to question the accused person (e.g. by videoconference) and to prepare the indictment while the accused person is released on bail in the executing Member State.[240] Finally, a defence lawyer criticized that German courts do not use the option of an oral hearing of the arrested person by videoconference (section 118a(2)2 CCP) in cross-border cases, i.e. when a (German) EAW has been executed by another Member State.[241] Art. 6 of the Digitalisation Regulation[242] expressly provides for this option, nevertheless its effects on the digitalisation of judicial cooperation depend on the technical implementation of the necessary IT infrastructure.[243] According to Art. 12 of Directive (EU) 2023/2843, the decentralized IT

[236] Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.
[237] Morgenstern, "Die Europäische Überwachungsanordnung - Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?" in (2014) *Zeitschrift für Internationale Strafrechtsdogmatik,* 216 (at 229).
[238] Schlothauer, "Haftverschonung bei Untersuchungshaft im europäischen Kontext" in Herzog/Schlothauer/Wohlers/Wolter (Eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte* (2016), p. 313 (at 324).
[239] Wolf, "Fluchtvermutung statt Fluchtprognose - zur Diskriminierung von EU-Ausländern in der Fluchtgefahrpraxis", (2019) *Strafverteidiger,* 573 (at 574-575).
[240] Defence Lawyer III (interview).
[241] Defence Lawyer III (interview); see also Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 143.
[242] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, *OJ* L 2023/2844; see also section 164(1) No. 1 of the draft bill on the reform of the AICCM.
[243] Voß and Singer, "Digitalisierung der justiziellen Zusammenarbeit", (2024) *Recht Digital*, 173 (at 179).

system is to be set up within two years, calculated from the entry into force of the implementing acts on the technical requirements of the systems (the 17th of January 2026 for FD 2002/584/JHA, Art. 10(3) lit. a of Regulation 2023/2844). As a result, the impact of the regulation on video conferencing will not become apparent until spring 2028 at the earliest.
However, the existing provision in German law is hardly used in court practice.[244] As a consequence, the issuing authority will not take a decision to suspend the execution of the arrest warrant before the executing authority has been surrendered the requested person, which renders the cooperation instrument ineffectual in court practice.[245]

- EU Convention on Mutual Assistance

Keeping in touch with him while he's abroad (sending/service documents)

Serving a summons or other documents to the accused person is not subject to a particular threshold. Public prosecutors may file an application to the court to issue a penalty order that is then to be served to the accused person. A summary penalty order may impose only non-custodial sanctions; if the accused person has defence counsel, imprisonment for a term not exceeding one year may also be imposed, provided its enforcement is suspended on probation (section 407(2) CCP). Alternatively, the public prosecutor may dispense with the preferment of public charges and concurrently impose conditions on and issue directions to the accused person (section 153a CCP, e.g. payment of a certain amount of money). Recourse to Art. 5 of the EU Convention is not necessary if the accused person has authorized a person residing within the district of the competent court to accept service of the penalty order (section 132 CCP, see *supra* 2.2.1.).

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

[244] State's Ministry of Justice (interview); District Court (interview).
[245] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 134-135; see also with regard to the trial phase District Court (interview).

Criminal proceedings can be transferred irrespective of whether or not detention on remand is possible (or ordered) and whether the suspect is present in the issuing state (Germany) or another Member State. If the suspect, however, is present in another Member State and that has refused to execute an EAW and surrender the accused person, the public prosecutor shall consider a transfer of proceedings (No. 145(1) GICCM).[246]

(dd) Other (?)

2.3. Applicability and application of the instruments at the trial stage according to national law

General introduction

In section 2.3, the various instruments will be linked to specific needs for judicial cooperation at the trial stage. The needs in this section are as follows:

(aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS); [247]

(bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution or ensuring his availability for the trial (whether or not he is present in the issuing MS). This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.

(cc) ensuring the suspect's presence at trial:

(dd) other (?)

Nota bene: the trial stage is part of the investigation/prosecution phase. That is why (aa) is also included. As stated before, at the trial stage, and thus during "prosecution", there may be a need for investigative measures.

What was said in the introduction to section 2.2 concerning the task of the NAR applies *mutatis mutandis* to this section. To be clear: applicability according to national law is only to be addressed if there are applicability issues.

[246] State's Ministry of Justice (interview); also expressly listed as criteria for requesting the transfer of criminal proceedings in Art. 5(2) lit. c and d of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters.

[247] See the Introduction to section 2.2.

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered[248]

(bb) Ensuring that the suspect is available[249]

- FD 2009/829/JHA (?)

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention on remand is possible but not ordered, and, if so, under what conditions?

As in the pre-trial stage (*supra* 2.2.1.), an arrest warrant ordering detention on remand is a precondition to issuing an ESO. In the trial stage, the trial court is competent to suspend the execution of the arrest warrant, to adopt supervision measures and to issue an ESO (sections 90y AICCM, 126(2) CCP).

If the accused person is present in the issuing Member State, recourse to the EIO and the EU Convention on Mutual Assistance is not necessary (*supra* 2.2.1.). Likewise, a transfer of proceedings will hardly serve the proper administration of justice if the accused person is present in the issuing state and the trial, thus, can be continued in this state.

(dd) Other (?)

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures and availability for trial is ensured.

(b) Person concerned is present in another MS

(i) detention on remand possible but not ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

[248] In the pre-trial stage, we distinguish between situations in which detention on remand is not possible (yet) (substage 1) and situations in which it is possible (substage 2). That distinction is not repeated in the trial stage. We consider the relation between the pre-trial sate and the trial stage to be of a chronological nature. Since the trial stage follows substage 2 of the pre-trial stage, it is implied that detention on remand is possible during the trial stage. Of course, there may well be situations in which during the trial stage keeping the person concerned in detention is no longer possible, e.g. in case of undue delay. However, the perspective of this project is of a 'regular' criminal prosecution in which the precepts of Art. 5 and 6 ECHR are adhered to.

[249] '(aa)' does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

- DR 2014/41[250] (?)

Temporary transfer[251]/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?[252] If not: is such a videoconference possible without issuing an EIO?[253]

German law does not allow the courts to request for a hearing by videoconference for the purpose of enabling the accused person to participate in the trial because the presence of the accused person is mandatory (section 230 CCP; see the exception under section 232(1) CCP); in essence presence requires the physical presence in the courtroom, while "indirect participation" by means of a video transmission is not sufficient.[254] Accordingly, a hearing by videoconference during the trial is limited to witnesses and experts (section 247a CCP).[255] Whereas section 128a of the Code on Civil Procedure and similar provisions expressly allow for an oral hearing by videoconference, a criminal trial still requires the physical presence of the accused person because the court shall gain an immediate impression of the accused person.[256] There is, however, an exception to this general rule according to which the accused person may be released from the obligation to be (physically) present at the trial where the expected sentence will not exceed imprisonment for a term of six months or a fine of 180 daily rates (section 233(1) CCP). In this case, the court may examine the accused person by videoconference (section 233(2)3 CCP). Whereas the legislative draft of the government provided for an interrogation by videoconference during the trial[257], the Parliament adopted an amendment that requires the examination of the accused person to be conducted 'outside the

[250] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.
[251] It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 8).
[252] Cf. Case C-285/23.
[253] Cf. Case C-255/23.
[254] Hackner, "Vor § 68 IRG" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 81; Arnoldi, "§ 230" in *Münchener Kommentar zur Strafprozessordnung*, 2nd ed. (C.H. Beck, 2024), para 10; Rinio, "Hauptverhandlung per Videokonferenz im Wege der internationalen Rechtshilfe in Strafsachen", (2004) *Neue Zeitschrift für Strafrecht,* 188 (at 190); Beukelmann, "Das (virtuelle) Anwesenheitsrecht des Angeklagten", (2024) *Neue Juristische Wochenschrift-Spezial*, 504.
[255] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 906; Hackner, "Vor § 68 IRG" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 81.
[256] See the explanatory memorandum to the draft on the act on supporting the use of videoconference-tools in judicial proceedings, Bundestags-Drucksache No. 17/1224, p. 11; similarly Federal Ministry of Justice (interview); District Court (interview).
[257] See the explanatory memorandum to the draft on the act on supporting the use of videoconference-tools in judicial proceedings, Bundestags-Drucksache No. 17/1224, p. 9, 11.

main hearing' (section 233(2)3 CCP).[258] This amendment might originate from the fact that the interrogation by videoconference has been introduced as an alternative to the examination by a commissioned or requested judge that is usually conducted outside the main hearing (section 233(2)1 CCP). This legislative choice, however, has been subject to severe criticism that the result of the examination is not part of the main hearing and, thus, must be introduced as evidence in the trial (reading out of the protocol on the examination).[259] Accordingly, it is considered equivalent to the participation and the interrogation of the accused person in the main hearing.[260] Up to now, no case has been reported where this provision has been applied, apparently because the procedure is too cumbersome.[261] Nevertheless, as far as the trial court may examine the accused person by videoconference, it may issue an EIO (or initiate a request) to that end (see *supra* 2.1.2.).[262] As far as cooperation with Denmark and Ireland is concerned, these considerations apply accordingly; a corresponding request can be based upon Art. 10 of the EU Convention on Mutual Assistance (Denmark) or Art. 9 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters (Ireland).[263]

Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

As has been mentioned before, German law does not allow for a trial *in absentia*. Nevertheless, an interrogation by videoconference may be considered where the accused person is released from the obligation to appear before court (*supra* on the previous question). As far as this exception applies, an EIO may be issued for this purpose.

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

[258] See the report of the Parliament's Committee on Legal Affairs, Bundestags-Drucksache 17/12418, p. 16.
[259] Arnoldi, "§ 233" in *Münchener Kommentar zur Strafprozessordnung*, 2nd ed. (C.H. Beck, 2024), para 15; Becker, "§ 233" in Löwe-Rosenberg (Ed.), *Strafprozessordnung, Band 6 - §§ 212-255a*, 27th ed. (de Gruyter, 2020), para 29.
[260] District Court (interview).
[261] Federal Ministry of Justice (interview); State's Ministry of Justice (interview); see also District Court (interview).
[262] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 906.
[263] Denmark, however, has declared that it will not grant such requests, https://www.ejn-crimjust.europa.eu/ejn2021/FichesBelgesDetail/EN/A.12/260/277 (last accessed on 13 March 2025).

As has been mentioned before (*supra* 2.1.1.), the transfer of an accused person who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons for the purpose of prosecution (recital (25) DR 2014/41/EU).[264] The option of temporary surrender (Art. 24(2) FD 2002/584/JHA) has not yet been implemented by the German legislator (see *supra* 2.1.1.); a corresponding provision in German law would enable the trial court to ensure the availability (and the presence) of the suspect in the trial phase.[265]

- EU Convention on Mutual Assistance

If the accused person is another Member State, the trial court may serve a summons to him (Art. 5 EU Convention on Mutual Assistance). However, as German law does not allow for trials *in absentia*, serving a summons to the accused person for the sole purpose of an interrogation would be in breach with the rules of procedure.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for executing investigative measure/prosecution in the issuing MS, e.g. interrogation. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

A transfer of criminal proceedings is not limited to the pre-trial stage. According to No. 146(3) GICCM, the request to take criminal proceedings shall be accompanied by the indictment or judgment that has been filed or delivered in the proceedings to be transferred. This implies that criminal proceedings may still be transferred at the trial stage.[266] The request form (Annex I, Section D(2)) of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters

[264] See the explanatory memorandum to the law implementing DR 2014/41/EU, Bundestags-Drucksache 18/9757, p. 65; Böse, "§ 91j" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 11; Trautmann, "§ 91j" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 11; Wörner, "§ 91c" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571.
[265] Federal Ministry of Justice (interview).
[266] Federal Ministry of Justice (interview).

also lists the trial as a possible stage to transfer proceedings. However, in most cases, a transfer of proceedings in the pre-trial stage will be more efficient and save resources of the criminal justice system. Public prosecutors could not report of a single case where criminal proceedings had been transferred at the trial stage.[267]

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO, when the person concerned is in the MS of his lawful and ordinary residence and detention is not ordered?

In the trial stage, the trial court is competent to suspend the execution of the arrest warrant, to adopt supervision measures and to issue an ESO (sections 90y AICCM, 126(2) CCP). However, as in the pre-trial stage (*supra* 2.2.1), an arrest warrant ordering detention on remand is a precondition to issuing an ESO. If the accused person does not appear before court, the trial court will usually issue an EAW; if the person has been surrendered, the court will decide upon whether the execution of the (domestic) arrest warrant is suspended.[268] These rules apply accordingly where the accused person has returned to his home country (see *supra* 2.2.1. (b)).

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

If the accused person is in another Member State, the trial court may serve documents to him (Art. 5 EU Convention on Mutual Assistance). Moreover, due to the accused person's right to be present at the trial, the court must summon the accused person and provide him with the information that is necessary to exercise his right to participate in the trial. In practice, it is often difficult to establish that the summons has been served to the defendant so that he is actually aware of the trial (see also *supra* 2.1.1.); in this regard a harmonized framework for serving summons and other documents would be useful.[269] If the accused person has a defence counsel, this problem is usually addressed by serving the summons to the counsel, provided that he is authorized to accept the service of documents addressed to the accused person.[270]

[267] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); the same view was taken by a State's Ministry of Justice (interview).
[268] District Court (interview).
[269] Federal Ministry of Justice (interview).
[270] District Court (interview); Defence Lawyer II (interview).

The summons is served without a warning he will be arrested and brought before the court if he fails to appear (see for domestic cases: section 216(1)1 CCP) because the issuing state must not exercise its jurisdiction to enforce on the territory of a foreign state; therefore, the warning is added a note that coercive measures are not executed on the territory of the requested state (No. 116(1)2 GICCM).[271] From the perspective of the defendant, the information that he cannot be arrested in a foreign state it would be misleading if the German authorities could issue an EAW for this purpose.[272]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for ensuring that the suspect is available for executing investigative/prosecution measures nor for ensuring his availability for the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

As has been mentioned above, a transfer of criminal proceedings is not limited to the pre-trial stage. No. 146(3) GICCM implicitly covers a transfer in the trial-stage. However, in most cases, a transfer of proceedings in the pre-trial stage will be more efficient and save resources of the criminal justice system. Public prosecutors could not report of a single case where criminal proceedings had been transferred at the trial stage.[273]

(cc) Ensuring the suspect's presence at trial

The considerations on scenario (bb) apply accordingly because the availability and the presence of the accused person in the trial phase cannot be distinguished in the German criminal justice system; both aspects originate from the obligation to be present at the trial (section 230 CCP).

- FD 2009/829/JHA (?)

[271] Higher Regional Court Berlin, Decision of 10 November 2010 – 3 Ws 459/10, (2011) *Neue Zeitschrift für Strafrecht,* 653 (at 654); Higher Regional Court Karlsruhe Decision of 16 September 2014 - 2 Ws 334/14, (2015) *Strafverteidiger,* 346.
[272] Public Prosecutor's Office III (interview); academic expert (interview).
[273] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); the same view was taken by a State's Ministry of Justice (interview).

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence and no detention on remand is ordered?

- DR 2014/41 (?)[274]

Is it possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer)?

- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(dd) Other (?)

(ii) detention on remand ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

- FD 2002/584/JHA

Prosecution-EAW. Is it possible under national law to issue a prosecution-EAW just to execute investigative measures, such as an interrogation?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

An EAW may only be issued on the basis of a domestic arrest warrant (*supra* 2.2.1.). In the trial phase, the court may issue an arrest warrant if the accused person has failed to appear

[274] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

before court and his arrest is necessary to ensure the presence of the accused person at the trial (section 230(2) CCP). According to some authors, an EAW may be issued on the basis of such an arrest warrant.[275] This interpretation, however, transforms the EAW into an instrument to make the accused person to appear before court for the purpose of his examination ('Vorführung', sections 133(2), 134, CCP) and, thereby, raises concerns with regard to the proportionality principle (see *supra* 2.1.1.).[276] For similar reasons, a judge considered the issuing of an EAW for the sole purpose of ensuring the presence of the accused person at the trial to be clearly disproportionate[277], but there is no uniform practice on this issue[278].

Moreover, an arrest warrant must not be issued unless the accused person has been warned that he will be arrested and brought before the court if he fails to appear without excuse (sections 216(1), 230(2) CCP). If the person concerned is not present in the issuing state, a domestic arrest warrant cannot be executed and the warning has to be modified accordingly (see *supra* 2.3. with regard to Art. 5 of the EU Convention on Mutual Assistance).[279] So, if there is no proper warning, an EAW cannot be issued on the basis of a domestic arrest warrant pursuant to section 230(2) CCP.[280]

- DR 2014/41[281] (?)

Temporary transfer[282]/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the

[275] Heger and Wolter, in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 2 para 644; von Heintschel-Heinegg, "§ 37 Europäischer Haftbefehl" in Sieber/Satzger/von Heintschel-Heinegg (Eds.), *Europäisches Strafrecht*, 2nd ed. (Nomos, 2014), para 7.

[276] Higher Regional Court Stuttgart, Decision of 25 February 2010 - 1 Ausl. (24) 1246/09, (2010*) Neue Juristische Wochenschrift*, 1617 (at 1619); Burchard, "§ 14 Auslieferung – Europäischer Haftbefehl" in Böse (Ed.), *Europäisches Strafrecht*, 2nd ed. (Nomos, 2021), para. 55; see also Constitutional Court, decision of 15 March 2007 – 1 BvR 1887/06, ECLI:DE:BVerfG:2007:rk20070315.1bvr188706, (2007) *Neue Juristische Wochenschrift,,* 2318, where the Court considered 10 days detention in a purely domestic case disproportionate.

[277] District Court (interview).

[278] Federal Ministry of Justice (interview).

[279] Higher Regional Court Berlin, Decision of 10 November 2010 – 3 Ws 459/10, (2011) *Neue Zeitschrift für Strafrecht,* 653 (at 654); Higher Regional Court Karlsruhe Decision of 16 September 2014 - 2 Ws 334/14, (2015) *Strafverteidiger,* 346.

[280] Public Prosecutor's Office III (interview).

[281] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

[282] It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 8).

purpose of gathering evidence)?[283] If not: is such a videoconference possible without issuing an EIO?[284]

German law does not allow the courts to request for a hearing by videoconference for the purpose of enabling the accused person to participate in the trial because the (physical) presence of the accused person is mandatory (section 230 CCP; see the exception under section 232(1) CCP); accordingly, a hearing by videoconference during the trial is limited to witnesses and experts (section 247a CCP).[285] Whereas section 128a of the Code on Civil Procedure and similar provisions expressly allow for an oral hearing by videoconference, a criminal trial still requires the physical presence of the accused person because the court shall gain an immediate impression of the accused person.[286] There is, however, an exception to this general rule according to which the accused person may be released from the obligation to be (physically) present at the trial where the expected sentence will not exceed imprisonment for a term of six months or a fine of 180 daily rates (section 233(1) CCP). In this case, the court may examine the accused person by videoconference (section 233(2)3 CCP). Whereas the legislative draft of the government provided for an interrogation by videoconference during the trial[287], the Parliament adopted an amendment that requires the examination of the accused person to be conducted 'outside the main hearing' (section 233(2)3 CCP).[288] This amendment might originate from the fact that the interrogation by videoconference has been introduced as an alternative to the examination by a commissioned or requested judge that is usually conducted outside the main hearing (section 233(2)1 CCP). This legislative choice, however, has been subject to severe criticism that the result of the examination is not part of the main hearing and, thus, must be introduced as evidence in the trial (reading out of the protocol on the examination).[289] Nevertheless, as far as the trial court may examine the accused person by

[283] Cf. Case C-285/23.
[284] Cf. Case C-255/23.
[285] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck 2023), para 906; Hackner, "Vor § 68 IRG" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 81.
[286] See the explanatory memorandum to the draft on the act on supporting the use of videoconference-tools in judicial proceedings, Bundestags-Drucksache No. 17/1224, p. 11.
[287] See the explanatory memorandum to the draft on the act on supporting the use of videoconference-tools in judicial proceedings, Bundestags-Drucksache No. 17/1224, p. 9, 11.
[288] See the report of the Parliament's Committee on Legal Affairs, Bundestags-Drucksache 17/12418, p. 16.
[289] Arnoldi, "§ 233" in *Münchener Kommentar zur Strafprozessordnung*, 2nd ed. (C.H. Beck, 2024), para 15; Becker, "§ 233" in Löwe-Rosenberg, *Strafprozessordnung, Band 6 - §§ 212-255a*, 27th ed. (de Gruyter, 2020), para 29.

videoconference, it may issue an EIO (or initiate a request) to that end.[290] This option, however, seems to be hardly used in court practice.[291]

Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

As has been mentioned before, German law does not allow for a trial *in absentia*. Nevertheless, an interrogation by videoconference may be considered where the accused person is released from the obligation to appear before court (*supra* on the previous question). As far as this exception applies, an EIO may be issued for this purpose.

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

As has been mentioned before (*supra* 2.1.1.), the transfer of an accused person who is detained in another Member State, cannot be requested by an EIO because the EAW is the suitable and primary cooperation instrument for the surrender of accused persons for the purpose of prosecution (recital (25) DR 2014/41/EU; see also *infra* on scenario (bb) with regard to temporary surrender).[292]

- EU Convention on Mutual Assistance

Inviting him, e.g., to an interrogation (serving summons abroad)

As German law does not allow for trials *in absentia*, serving a summons to the accused person for the sole purpose of an interrogation would be in breach with the rules of procedure, since it implies the absence of the accused during the rest of the trial.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

[290] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), para 906.
[291] Defence Lawyer II (interview); State's Ministry of Justice (interview).
[292] See the explanatory memorandum to the law implementing DR 2014/41/EU, Bundestags-Drucksache 18/9757, p. 65; Böse, "§ 91j" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 11; Trautmann, "§ 91j" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6 th ed. (C.H. Beck, 2020), para 11; Wörner, "§ 91c" in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571.

Transfer proceedings to the MS where the accused is present. This is not an instrument that provides for executing investigative measures/prosecution in the issuing MS, e.g. an interrogation in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

In general, criminal proceedings are not transferred in the trial phase (see *supra* sub (a)). Moreover, a transfer of criminal proceedings usually requires that the accused person has been given the opportunity to give a statement,[293] a requirement that has also been included in Art. 6(3) lit. b of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters. So, a transfer of proceedings is not an alternative to the interrogation of the accused person.

(bb) Ensuring that the suspect is available

- FD 2002/584/JHA

Prosecution-EAW

An EAW may only be issued on the basis of a domestic arrest warrant that requires strong suspicion and a ground for arrest (e.g. risk of flight or tampering with evidence, section 112 CCP). Moreover, the decision to issue of an EAW must comply with the proportionality principle. If there are major proportionality concerns, the courts will not issue a national arrest warrant which is a pre-condition for the EAW. Wherever possible, the issuing authority shall have recourse to less intrusive alternatives that are equally suitable for achieving the intended purpose.

According to public prosecutors, an EAW is not issued unless the expected sentence is imprisonment for a minimum of two years.[294] The implementation of the provision on temporary transfer (Art. 24(2) FD 2002/584/JHA, see *supra* 2.1.1.) would enable the trial court to ensure the availability and the presence of the suspect in the trial phase.[295]

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence?

[293] Public Prosecutor's Office I (interview).
[294] Public Prosecutor's Office I (interview).
[295] Federal Ministry of Justice (interview).

As has been mentioned before, the scope of FD 2009/829/JHA does not cover the scenario that an ESO is issued if the person concerned has already left the issuing Member State (Germany) and has returned to his home country (*supra* 2.1.1.).[296] German law, however, allows for the issuing of an ESO where the suspect has already returned to another Member State (section 90y(1) No. 3 AICCM).[297] In this case, the executing Member State is not obliged to recognize and monitor the supervision measures.[298]

- EU Convention on Mutual Assistance

Keeping in contact with the person concerned while he is abroad (sending/service of documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present (in order for him to be present at the trial in that MS). This is not an instrument that provides for ensuring that a suspect is available for executing investigative measures/prosecution in the issuing MS, e.g. interrogation, nor for ensuring his availability for the benefit of the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(cc) Ensuring the suspect's presence at trial

The considerations on scenario (bb) apply accordingly because the availability and the presence of the accused person in the trial phase cannot be distinguished in the German criminal justice system; both aspects originate from the obligation to be present at the trial (section 230 CCP).

- FD 2002/584/JHA

Prosecution-EAW

- FD 2009/829/JHA (?)

[296] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18; Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.
[297] See the explanatory memorandum to the draft on the transposition of FD 2009/829/JHA into German law, Bundestags-Drucksache 18/4894, p. 18, 59.
[298] Dornbusch, "§ 90y" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 2.

Is it possible under national law to issue an ESO when the person concerned is the MS of his ordinary residence?

- DR 2014/41 (?)[299]

Is it possible under national law to employ an EIO for the purpose of ensuring the presence of the accused at the trial (either through a videoconference or a temporary transfer)?

- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- European Convention on Transfer/European Convention on Mutual Assistance in Criminal Matters (?)

Transfer of proceedings. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(dd) Other (?)

3. The instruments and sentence enforcement

General introduction

The enforcement stage starts once the sentence imposed on the convicted person (custodial sentence/measure of deprivation of liberty, alternative sanction, probation decision) is final and enforceable.

As with Chapter 2, first, the instruments that are applicable to the enforcement stage *in abstracto* are listed (section 3.1), distinguishing between two situations: the person concerned is present in the issuing MS and he is present in another MS. Subsequently, in section 3.2 specific needs for judicial cooperation are tied to the various instruments. These needs are:

(ee) enforcement in another MS;

(ff) enforcement in the issuing MS (if the person concerned is present in another MS).

[299] Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

As with sections 2.2 and 2.3, the NAR will:

- describe which national authority is in charge of the enforcement stage and which national authority is competent to request judicial cooperation concerning enforcement of the sentence;
- address applicability issues according to national law if there are such issues;
- describe which considerations play a role when the competent national authority has to take a decision on requesting judicial cooperation and on which instrument(s) to employ.

In the German criminal justice system, the public prosecutor's office at the district court is in charge of the enforcement of criminal sentences (section 451 CCP); the public prosecution office at the Higher Regional Court or the Federal Prosecutor General are competent where they have brought the charges in the first instance trial (section 4 of the Regulation on the Enforcement of Criminal Sentences, RECS – 'Strafvollstreckungsordnung'). The competence *ratione loci* follows the local jurisdiction of the first instance court (section 7 RECS; see also section 143(1) Courts Constitution Act, CCA – 'Gerichtsverfassungsgesetz'). In particular, the public prosecutor's office may issue an arrest warrant for the enforcement of a sentence of imprisonment if the convicted person, after being summoned to commence the sentence, has not appeared or is suspected of having absconded (section 457(2) CCP). A court authorisation is not required because the trial court has set the sentence of imprisonment.[300] The competence of the public prosecution office as enforcing authority notwithstanding, certain enforcement decisions (e.g. to suspend the remainder of a sentence on probation) fall within the competence of the court in whose district the penal institution is located in which the convicted person is detained or – in other cases – the first instance court (section 462a CCP). The latter applies to the supervision of the convicted person and the decision to revoke the suspension of the enforcement of a sentence of imprisonment (sections 453b, 462a(2) CCP). In proceedings against juvenile offenders, the enforcing authority is the youth court judge (sections 82, 110 YCA).[301]

[300] Federal Court of Justice, decision of 17 April 1959 – 4 ARs 1/59, 13 Official Court Reports (BGHSt) 97 (at 100); Graalmann-Scheerer, "§ 457" in Löwe-Rosenberg, *StPO – Band 10/1 - §§ 449-463e*, 27th ed. (de Gruyter, 2022), para 12.
[301] See the explanatory memorandum on the act transposing FD 2008/909/JHA and FD 2008/947/JHA, Bundestags-Drucksache 18/4347, p. 137, 186.

The enforcing public prosecutor is competent to initiate a transfer of the enforcement of custodial sentences (section 85(1)1 AICCM, FD 2008/909/JHA) and the supervision of probation measures (section 90l(1) AICCM, FD 2008/947/JHA).[302] So, the decision on recourse to and the choice of one of the cooperation instruments is taken by the authority that is in charge of enforcement of the relevant sentence. Nevertheless, the transfer of enforcement of custodial sentences without consent of the sentenced person being present in Germany requires the authorisation of the Higher Regional Court (sections 85(2)1 No. 2, 85a, 85c, 71(4) AICCM). The enforcing authority submits its application to the Higher Regional Court via the prosecutor general's office (No. 166g(4) GICCM). Even though the public prosecutor is the competent authority, it is subject to instructions of the prosecutor general (sections 145, 146 CCA).[303]

Likewise, the decision to issue an EAW for the purpose of enforcement must be taken by the first instance court (section 457(3)3 CCP, *supra* 1.3.1.).

Before initiating the transfer of enforcement of custodial sentences, the enforcing authority obtains the opinion of the penal institution in which the sentenced person is detained (No. 166g(2)2 GICCM). As far as the transfer of supervision of probation measures is concerned, the enforcing authority shall consult with the competent court (No. 166m(1)2 GICCM).

In doing so, the NAR will take into account the list of considerations mentioned in the introduction to section 2.3 where applicable, *viz*. whether

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects an accused persons subject to pre-trial detention and on material detention conditions);[304]
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;

[302] See the explanatory memorandum on the act transposing FD 2008/909/JHA and FD 2008/947/JHA, Bundestags-Drucksache 18/4347, p. 137 and 186.
[303] Higher Regional Court Celle, decision of 11 July 2016 – 1 AR (Ausl) 53/16, (2016) *Strafverteidiger Forum,* 431 (at 432); Hackner, "§ 85" in Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 5.
[304] *OJ* 2023, L 86/44.

- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;[305]
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audiovisual transmission)/telephone conference to that end.

In addition to those considerations, the NAR will take into account whether 'composite sentences' (sentences composed of unconditional deprivation of liberty and conditional deprivation of liberty present problems.[306]

In general, most of the considerations on the criteria for the choice of cooperation instruments in the investigatory and trial stage apply accordingly to the enforcement of sentences. However, if a sentence of imprisonment has been imposed by the trial court, it is not a matter for the enforcement authority to assess whether this sentence is proportionate or if there is a less intrusive alternative.[307] This observation notwithstanding, the fundamental rights of the convicted person, and his interest in reintegration into society must be taken into account in the enforcement stage and the determination of the Member State in which the sentence shall be executed.[308] In order to facilitate the prisoner's reintegration into society, the enforcement of the sentence should be transferred in an early stage of the enforcement process.[309] If the convicted person suffers from a serious or protracted illness, the choice of the cooperation instrument should not affect the availability of adequate medical treatment.[310] Some ministries of justice use the consultation mechanism under Art. 4(3) FD 2008/909/JHA in order to explore the options of early release and the framework for supervising the sentenced person.[311]

[305] This might require thinking of different scenarios. For instance, what if the sought-after instrument for judicial cooperation does not result in the desired outcome? To what alternative form(s) of judicial cooperation will the issuing authority resort to?
[306] In the Netherlands, e.g., the courts can impose the following sentence: a sentence of four years deprivation of liberty, of which two years will not be enforced as long as the person concerned complies with certain conditions during a probation period of three years.
[307] Public Prosecutor's Office III (interview).
[308] District Court (interview); Office of the Prosecutor General (interview); Public Prosecutor's Office III (interview); State's Ministry of Justice (interview).
[309] Federal Ministry of Justice (interview).
[310] Defence Lawyer III (interview).
[311] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 94.

3.1. Applicability of the instruments or conventions according to EU law

(a) Person concerned is present in issuing MS

- FD 2008/909/JHA
- FD 2008/947/JHA
- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

FD 2008/909/JHA applies to convicted persons present in the issuing MS (Art. 4(1) FD 2008/909/JHA; see also section 85(2) AICCM).

FD 2008/947/JHA applies to convicted persons that have not left (and, thus, are still present in) the issuing MS (Art. 5(1) FD 2008/947/JHA; see also section 90l(2)1 AICCM). According to the Court of Justice, a custodial sentence whose execution is suspended subject to the sole condition that the convicted person does not commit a new criminal offence during a probation period falls within the scope of the FD.[312]

Art. 21 of the European Convention on Mutual Legal Assistance does not preclude the transfer of criminal proceedings where the court has delivered a final judgment. The principle *ne bis in idem* (Art. 50 CFR, Art. 54 CISA) does not bar a transfer of criminal proceedings, either. The protection by this principle is subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced' (Art. 54 CISA), and the Court of Justice has held that this condition is compatible with Art. 50 CFR (see also recital (56) of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters).[313] Bilateral treaties supplementing Art. 21 of the European Convention on Mutual Legal Assistance provide that domestic criminal proceedings (and enforcement proceedings) must not be continued after the requested state has initiated criminal proceedings.[314] As the scope of these provisions extend to the enforcement proceedings, they imply that a transfer of proceedings is still possible after a German court has delivered a final judgment.

It is possible under EU law to 'divide' composite sentences and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?

[312] CJEU, Judgment of 26 March 2020 – Case C-2/19, *A.P.,* EU:C:2020:237.
[313] CJEU (GC), Judgment of 27 May 2014 – Case C-129/14 PPU, *Zoran Spasic*, EU:C:2014:586.
[314] See e.g. Art. XI(4) of the bilateral treaty with the Kingdom of the Netherlands of 30 August 1979, Bundesgesetzblatt 1981 II, p. 1158. Germany has concluded similar treaties with Austria, France, Italy, the Czech Republic and the former Yugoslavia (Croatia, Slovenia), see Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 34-35, with further references.

The German sanctioning system does not provide for composite sentences of imprisonment, but the court determines a final (aggregate) sentence ('Gesamtstrafe', sections 54, 55 CC); if the accused person is sentenced to imprisonment, the court decides whether the enforcement of the whole sentence is suspended on probation (sections 56, 58 CC).[315] The suspension may not be limited to a part of the sentence (section 56(4)1 CC). As a consequence, the question is not relevant for outgoing requests because there is no need to split up the unconditional and the conditional part of a composite sentence of imprisonment.

As far as incoming requests are concerned, the unconditional part takes the lead, and requests are executed under the rules implementing FD 2008/909/JHA (sections 84 ff. AICCM): The conditional part of the sentence is adapted to a decision to suspend the enforcement of the conditional part (Art. 8(3) FD 2008/909/JHA, section 84g(5) No. 1 AICCM).[316] The leading role of the unconditional part might be due to the fact that the focus of the enforcement process lies on this part whereas the conditional part will not be relevant before the convicted person is released; nevertheless, there is no discussion on the relationship between FD 2008/909/JHA and FD 2008/947/JHA in Germany. Irrespective of the German sanctioning system, which does not provide for composite sentences, Art. 1(3) FD 2008/947/JHA and Art. 3(3) FD 2008/909/JHA specify that the framework decisions are only applicable to their respective areas, which indicates that such a division of composite sentences is possible according to EU law.

(b) Person concerned is present in another MS

- FD 2002/584/JHA
- FD 2008/909/JHA
- FD 2008/947/JHA
- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

FD 2008/909/JHA applies to convicted persons present in the executing MS (Art. 4(1) FD 2008/909/JHA; see also section 85(3)2 AICCM).

[315] Frister, "§ 54" in Kindhäuser/Neumann/Paeffgen/Saliger (Eds), *Nomos Kommentar StGB*, 6th ed. (Nomos, 2023), para 27, with further references.

[316] Higher Regional Court Karlsruhe, decision of 31 January 2017 – 1 Ws 235/16, (2018) *Strafverteidiger,* 576 (at 577); Böse, "§ 84a" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (57th installment, C.F. Müller, Jun. 2024), para. 4; Böse, "§ 84g" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds), *Internationaler Rechtshilfeverkehr in Strafsachen* 3rd ed. (57th installment, Jun. 2024), para 12, 25; Hackner, "§84a" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 4.

FD 2008/947/JHA applies to convicted persons that have returned to the executing MS (Art. 5(1) FD 2008/947/JHA; see also section 90l(3)2 AICCM).

Art. 5 of the EU Convention on Mutual Assistance allows for serving a summons to the convicted person to commence the sentence (section 27 RECS – 'Strafvollstreckungsordnung').

Art. 21 of the European Convention on Mutual Legal Assistance does not preclude the transfer of criminal proceedings where the court has delivered a final judgment. As has been mentioned before, criminal proceedings may be transferred irrespective of whether the accused person is in the requesting or the requested state.

It is possible under EU law to 'divide' 'composite sentences' and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?

The considerations on scenario (a) apply accordingly.

3.2. Applicability and application of the instruments and conventions according to national law

(a) Person concerned is present in issuing MS

(ee) enforcement in another MS[317]

- FD 2008/909/JHA

Enforcement of a custodial sentence

If the convicted person is in the issuing MS (Germany), the enforcement of a custodial sentence requires the transfer of that person. In these cases – which are the vast majority in judicial practice[318] - the transfer of enforcement requires either the consent of the convicted person (section 85(2)1 No. 1 AICCM) or the authorisation by the Higher Regional Court (section 85(2)1 No. 2, section 85a AICCM).

In the latter case, the court declares, upon application by the enforcing authority (section 85c AICCM), enforcement of the custodial sentence in the other Member State to be permissible. Local jurisdiction lies with the court in whose district the penal institution is located in which the convicted person is detained (sections 85a(1), 71(4)2, 3 AICCM; section 462a(1) CCP).

[317] As the person concerned is present in the *issuing* MS, enforcement in the *issuing* MS does not require judicial cooperation.

[318] Federal Ministry of Justice (interview).

The enforcing authority gives the sentenced person the opportunity to make a statement (section 85(1)2 AICCM).

Where the consent of the convicted person is not required, the enforcement may be transferred if the convicted person is a national of the executing MS and has his centre of vital interests in that MS (section 85c No. 1 AICCM) or the convicted person is obliged, based on the findings of the competent agency, to leave the Federal Republic of Germany (section 85c No. 2 AICCM, referring to section 50 of the Residence Act, 'Aufenthaltsgesetz'). In any case, a transfer of German nationals is not permitted without their consent (section 85c AICCM: 'person who is not a German national or on a stateless person').

According to the interviewed public prosecutors, they only file an application for a transfer of enforcement where the sentenced person has given his consent; in such cases, a transfer against the will of the sentenced person is considered to be in breach with the proportionality principle.[319] So, section 85(2)1 No. 2 AICCM does not seem to be relevant in practice. The same concerns have been raised where a return guarantee had been given to the home country.[320] Therefore, the issuing authority often assures that the sentenced person is returned at his request.[321]

The transfer of enforcement lies within the discretion of the enforcing authority (section 85(1) AICCM: 'may transfer').[322] In exercising its discretion, the public prosecutor must take into consideration the interests of the sentenced person (his reintegration into society) and the public interest in the effective enforcement of the imposed sentence (and the conditions of enforcement in the executing MS such as the rules on suspension of the remainder of the custodial sentence).[323] So, if the enforcing authority has grounds to believe that the executing Member State will release the convicted person before he has served a considerable part of the sentence, it will be reluctant towards a transfer of enforcement.[324] These problems result from the divergent laws on the enforcement of custodial sentences and can hardly overcome by mere consultations; nevertheless, these issues must be addressed in direct communications between the sentencing and the executing Member State.[325] If the sentence to be served is imprisonment

[319] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[320] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview).
[321] State's Ministry of Justice (interview).
[322] Brodowski, "§ 22" in Müller/Schlothauer/Knauer (Eds.), *Anwaltshandbuch Strafverteidigung,* 3rd ed. (C.H. Beck, 2022), para. 47.
[323] Brodowski, "§ 22" in Müller/Schlothauer/Knauer (Eds.), *Anwaltshandbuch Strafverteidigung,* 3rd ed. (C.H. Beck, 2022), para. 47; Hackner, "§ 85" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), paras 10, 11.
[324] Public Prosecutor's Office I (interview).
[325] Federal Ministry of Justice (interview).

of less than one year, the enforcing authority does not initiate a transfer of proceedings; in such cases the enforcement of the remaining sentence can be suspended (section 57 CC) or the enforcing authority can dispense with enforcement if the convicted person is deported from German territory (section 456a(1) CCP).[326] A transfer of enforcement of custodial sentences is not initiated where the detention conditions in the executing MS are not in conformity with the European *ordre public* (Art. 4 CFR).[327] Where the custodial sentence is linked to medical (psychiatric) treatment, the transfer depends upon whether the executing MS provides for suitable facility and the corresponding legal framework.[328]

- FD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

As has been mentioned above (*supra* 1.1.), the scope of the implementing provisions on Germany as the issuing MS is limited to the supervision of probation measures and does not extend to conditional sentences and alternative sanctions because the latter are not foreseen in the German sentencing regime.[329] Section 90l(1)1 No. 2 AICCM suggests an interpretation that requires obligations ('Auflagen') and instructions ('Weisungen') imposed on the sentenced person, but according to the Court of Justice[330], this provision applies to the supervision of the legal obligation not to commit a new criminal offence during a probation period (section 56f(1) No. 1 CC), too.[331]

Accordingly, the public prosecutor, acting as enforcing authority, may transfer the enforcement of a sanction involving deprivation of liberty whose enforcement or further enforcement was suspended on probation (section 90l(1)1 No. 1 AICCM) and the supervision of obligations and instructions imposed on the sentenced person for the full duration or a part of the probation period (section 90l(1)1 No. 2 AICCM) to another MS. According to section 90l(1)2 AICCM, enforcement (No. 1) may only be transferred in conjunction with supervision (No. 2). The term 'transfer' is to be understood as a corresponding German request because it is for the requested

[326] Public Prosecutor's Office III (interview).
[327] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 99; explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 155; Böse, "§ 85" in Grützner/Pötz/Kreß/Gazeas/Brodowski (Eds), *Internationaler Rechtshilfeverkehr in Strafsachen,* 3rd ed. (57th installment, Jun. 2024), para 9; see also section 141(3) of the draft bill on the reform of the AICCM.
[328] Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 99, 101.
[329] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 187.
[330] CJEU, Judgment of 26 March 2020 – Case C-2/19*, A.P.,* EU:C:2020:237.
[331] Morgenstern, "§ 15 Vollstreckungshilfe" in Böse (Ed), *Europäisches Strafrecht*, 2nd ed. (Nomos, 2021), para 84.

(executing) MS to decide whether to take over supervision of probation measures only or to assume responsibility for subsequent decisions, e.g. on the revocation of the suspension of enforcement, as well (Art. 11(4), Art. 14(3) FD 2008/947/JHA).[332]

If the convicted person is in the issuing MS (Germany), the transfer of supervision requires consent of that person (section 90l(2)1 AICCM). This requirement originates from Art. 5(1) FD 2008/947/JHA that limits the transfer of supervision to cases where the convicted person has returned or wants to return to the MS where he is lawfully and ordinarily residing; according to the German government, consent of the sentenced person provides for legal certainty and facilitates transfer proceedings because a court authorisation is not necessary.[333]

The transfer of supervision lies within the discretion of the enforcing authority (section 90l(1) AICCM: 'may transfer'). In exercising its discretion, the public prosecutor must take into consideration the interests of the sentenced person (his reintegration into society[334]) and the public interest in the effective enforcement of the imposed sentence (such as the enforcement conditions and practice in the executing MS).[335] The transfer of supervision can be an option where the convicted person has not sufficient command of the German language to undergo a therapy (section 56c(2) No. 6 CC).[336] Before taking its decision, the enforcing authority gives the sentenced person the opportunity to make a statement (section 90l(1)3 AICCM).

This cooperation instrument is rarely used by German enforcing authorities.[337] In the interviews with public prosecutors, no cases were reported. According to a public prosecutor, conditions or directions are not imposed where the enforcement of the remaining sentence is suspended (section 57 CC) and the convicted person leaves the country; in case of sexual offences and child abuse in particular, directions might be necessary (e.g. supervision by a probation officer and/or psychiatric treatment), but no such case was reported.[338] According to defence lawyers, instructions (e.g. to report on a change of residence) are usually supervised by domestic

[332] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 187; Rothärmel, " Die grenzüberschreitende Abgabe und Übernahme der Bewährungsüberwachung nach Umsetzung des Rahmenbeschlusses 2008/947/JI unter Berücksichtigung von Besonderheiten des Jugendstrafrechts", (2016) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe,* 232 (at 233).

[333] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 189.

[334] Brodowski, "§ 22" in Müller/Schlothauer/Knauer (Eds.), *Anwaltshandbuch Strafverteidigung,* 3rd ed. (C.H. Beck, 2022), para. 51.

[335] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 188; Hackner, "§ 90l" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 7; Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 92.

[336] Graf von Luckner, "Anmerkung zu EuGH (1. Kammer), Urt. V. 26.3.2020 – C-2/19", (2020) *Neue Zeitschrift für Strafrecht,* 688 (at 689-690); Morgenstern, "Europäische Standards für Bewährungshilfe", (2012) *Bewährungshilfe,* 213 (at 231).

[337] Federal Ministry of Justice (interview); State's Ministry of Justice (interview).

[338] Public Prosecutor's Office III (interview).

(German) courts.[339] German courts tend to retain their jurisdiction in enforcement proceedings and the power to decide on whether to revoke the suspension of enforcement; instead of transferring enforcement and supervision to another Member State, the court requests the probationary service of another Member State for assistance in supervising the convicted person.[340] In such cases, defence lawyers seek to ensure that the convicted person complies with the instructions in order to prevent the suspension from being revoked.[341]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters (?)

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to recognise the sentence?

The AICCM does not contain any provision on the transfer of criminal proceedings. The applicable guidelines provide that a corresponding request should be accompanied by a copy of the judgment (No. 146(3) GICCM). This implies that criminal proceedings may still be transferred after the trial has been closed and a judgment has been delivered by the court. One might argue, however, that a transfer of criminal proceedings is no longer possible where such proceedings have been finally disposed of: If the competent court (or public prosecution office) must not continue or resume domestic criminal proceedings, they must not transfer such proceedings, either. As far as Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters is concerned, the request form only covers the trial and the pre-trial stage and, thereby, seems to imply that proceedings cannot be transferred in a later stage of proceedings (appeal or enforcement). On the other hand, the transfer of criminal proceedings is based upon Art. 21 of the European Convention on Mutual Legal Assistance ('laying of information in connection with proceedings'). Accordingly, the transfer of proceedings is based upon an exchange of information rather than a request-based mechanism: The German 'request' is an equivalent to a report of a crime that triggers a criminal investigation in the receiving ('requested') state.[342] As the termination of domestic proceedings does not bar a spontaneous exchange of information (recital (11) of Regulation (EU) 2024/3011 on the transfer of

[339] Defence Lawyer III (interview); Defence Lawyer II (interview).
[340] District Court (interview).
[341] Defence Lawyer II (interview).
[342] Federal Court of Justice, Judgment of 19 October 1976 – 1 StR 154/76, (1977) *Goltdammers Archiv,* 110 (at 111); Judgment of 10 June 1999 – 4 StR 87-98, (1999) *Neue Zeitschrift für Strafrecht,* 579 (at 580); Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 36, with further references.

proceedings in criminal matters), a transfer of proceedings can still be triggered by spontaneous exchange of information (Art. 7 of the EU Convention on Mutual Assistance, see also *supra* 3.1., with regard to bilateral treaties supplementing Art. 21 of the European Convention on Mutual Legal Assistance).[343] This might be considered where a request for the enforcement of the imposed sentence is not appropriate (see for a request-based transfer of proceedings: No. 146(2) GICCM).[344] However, a transfer of criminal proceedings does not serve the interest in an efficient administration of justice and the existence of two final judgments on the same facts will raise further problems.[345] Accordingly, the draft provisions on the transfer of criminal proceedings focus on the transfer of proceedings in the investigation and trial phase.[346]

It is possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

As the German sanctioning regime does not provide for 'composite sentences', there is no discussion on this issue. In the case of incoming requests the conditional part takes the lead and is executed under the rules implementing FD 2008/909/JHA (sections 84 ff. AICCM), whereas the conditional part of the sentence is adapted to a decision to suspend the enforcement of the conditional part (Art. 8(3) FD 2008/909/JHA, section 84g(5) No. 1 AICCM) (see *supra* 3.1.).

(b) Person is present in another MS

(ee) enforcement in another MS

- FD 2008/909/JHA

Enforcement of a custodial sentence

If the sentenced person is present in the other MS, the transfer of enforcement does not require his consent; an authorisation by the Higher Regional Court is not required, either.[347]

The transfer of enforcement lies within the discretion of the enforcing authority (section 85(1) AICCM: 'may transfer'); in exercising its discretion, the public prosecutor must take into consideration the interests of the sentenced person (his reintegration into society) and the public interest in the effective enforcement of the imposed sentence (see *supra* with regard to scenario

[343] Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 44.
[344] See also Federal Ministry of Justice (interview).
[345] Federal Ministry of Justice (interview); District Court (interview).
[346] Sections 137 ff. AICCM (draft of December 2023).
[347] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 143.

(a)). The latter requirement might not be met if the conditions of enforcement (e.g. execution of a custodial sentence by home detention) are considered to be less severe and inadequate; in this case, the enforcing authority will issue an EAW for the purpose of enforcement.[348] According to the German government, the transfer of enforcement is usually appropriate where the other MS has refused to execute an EAW and to surrender the convicted person; in such cases, a transfer of enforcement under FD 2008/909/JHA will ensure that the executing MS will not enforce the sentence on its own, but in accordance with the conditions set out by EU law (Art. 17 FD 2008/909/JHA).[349]

- FD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

According to German law, probation measures may be ordered even if the released person will take his residence in another MS; in this case, supervision can be exercised by German authorities or transferred to the state where the convicted person resides.[350] As has been mentioned above (*supra* on scenario (a)), German courts tend to retain their jurisdiction in enforcement proceedings and the power to decide on whether to revoke the suspension of enforcement; instead of transferring enforcement and supervision to another Member State, the court requests the probationary service of another Member State for assistance in supervising the convicted person.[351]

If the sentenced person is in the other (executing) MS, the supervision of probation measures may be transferred without his expressed consent; the return to that MS is taken as an implicit consent.[352] For the same reason, an authorisation by the Higher Regional Court is not required, either.[353] The Higher Regional Court, however, is competent for an application of the convicted person challenging the decision of the enforcing authority not to transfer the supervision of probation measures (section 90m AICCM).

[348] Public Prosecutor's Office III (interview).
[349] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 137-138.
[350] Higher Regional Court München, decision of 8 March 2013 – 1 Ws 84/13 and 88/13, (2013) *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport,* 211; Higher Regional Court Braunschweig, decision of 18 November 2013 – 1 Ws 333/13, (2013) *BeckRS,* 20361.
[351] District Court (interview).
[352] COM (2014) 47 final, p. 8; explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 189; Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen* 4th ed. (C.H. Beck, 2023), para 737.
[353] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 189.

The transfer of supervision lies within the discretion of the enforcing authority (section 90l(1) AICCM: 'may transfer'); in exercising its discretion, the public prosecutor must take into consideration the interests of the sentenced person (his reintegration into society) and the public interest in the effective enforcement of the imposed sentence (*supra* on scenario (a)).[354] Before taking its decision, the enforcing authority gives the sentenced person the opportunity to make a statement (section 90l(1)3 AICCM).

Art. 5 of the EU Convention on Mutual Assistance allows for serving a summons to the convicted person to commence the sentence (section 27 RECS – 'Strafvollstreckungsordnung'). A summons may be appropriate where the residence of the convicted person is known, but this instrument is rarely used in judicial practice. This might be due to the fact that enforcement usually follows the judgment, so there is no need for a summons as the person is present (or even in remand detention).[355]

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to surrender the person concerned and refuses to recognise the sentence?

It is possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

The AICCM does not contain any provision on the transfer of criminal proceedings. The applicable Guidelines provide that a corresponding request should be accompanied by a copy of the judgment (No. 146(3) GICCM). This implies that criminal proceedings may still be transferred after the trial has been closed and a judgment has been delivered by the court. One might argue, however, that a transfer of criminal proceedings is no longer possible where such proceedings have been finally disposed of: If the competent court (or public prosecution office) must not continue or resume domestic criminal proceedings, they must not transfer such

[354] See the explanatory memorandum of the German government, Bundestags-Drucksache No. 18/4347, p. 188; Hackner, "§ 90l" in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 7.
[355] Public Prosecutor's Office III (interview).

proceedings, either. On the other hand, the transfer of criminal proceedings is based upon Art. 21 of the European Convention on Mutual Legal Assistance ('laying of information in connection with proceedings'). Accordingly, the transfer of proceedings is based upon an exchange of information rather than a request-based mechanism: The German 'request' is an equivalent to a report of a crime that triggers a criminal investigation in the receiving ('requested') state.[356] As the termination of domestic proceedings does not bar a spontaneous exchange of information (recital (11) of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters), a transfer of proceedings can still be triggered by spontaneous exchange of information (Art. 7 of the EU Convention on Mutual Assistance, see also *supra* 3.2.(a)). This view finds support in the fact that the Guidelines on International Cooperation in Criminal Matters expressly recommend a transfer of proceedings where a request for the enforcement of the sentence is not appropriate (No. 145(2) GICCM). In such cases, it might be the better option for the convicted person to surrender to the authorities of the sentencing state and to serve the sentence in that Member State.[357]

(ff) enforcement in issuing MS

- FD 2002/584/JHA

Execution-EAW with regard to a custodial sentence

An EAW for the purpose of enforcement requires a national arrest warrant. The enforcing authority (the public prosecutor) may issue such a warrant if the convicted person, after being summoned to commence the sentence, has not appeared, if he is suspected of having absconded or if a prisoner escapes or otherwise evades serving the sentence (section 457(2) CCP).

On the basis of a (national) arrest warrant for enforcement of a custodial sentence, the public prosecutor may apply to the court for issuing an EAW if a custodial sentence of no less than four months is to be enforced (Art. 2(1) FD 2002/584/JHA; see also for incoming EAW's section 81 No. 2 AICCM). In Germany, this minimum threshold is considered too low; instead, in practice public prosecutors apply a threshold of seven or even ten months, irrespective of an express threshold determined by law.[358] If this threshold is not met, the transfer of enforcement under FD 2008/909/JHA might be an alternative, unless the executing Member State applies

[356] Federal Court of Justice, Judgment of 19 October 1976 – 1 StR 154/76, (1977) *Goltdammers Archiv,* 110 (at 111); Judgment of 10 June 1999 – 4 StR 87-98, (1999) *Neue Zeitschrift für Strafrecht,* 579 (at 580); Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), p. 36, with further references.
[357] Defence Lawyer II (interview).
[358] See Böse and Wahl, "Country Report Germany" in Albers/Beauvais/Bohnert/Böse/Langbroek/Renier/Wahl (Eds.), *Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters,* (the Hague, 2013), p. 212 (at 224).

Art. 9(1)(h) of FD 2008/909/JHA, which was implemented in German law as an optional ground for refusal ('Bewilligungshindernis' - section 84d No. 4 AICCM).

4. Anticipating the application of instruments: sentencing

This Chapter is the odd one out. It concerns a stage in which cooperation is not yet necessary. However, at the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. Unlike the previous two chapters, the focus is on a stage of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish whether in sentencing an accused person who is a national of another Member State or who resides in another Member State, judges take into account the (im)possibilities of judicial cooperation with regard to enforcement of that sentence, should the need arise. In other words, whether in sentencing judges anticipate possible needs and problems related to judicial cooperation,[359] as well as whether national law allows them to do so.

At least two issues are of interest here:[360]

- *Conditional sentences* and *probation decisions*[361] and *alternative* sanctions.[362] Is the fact that the accused person resides in another Member State a factor in determining whether to impose a specific sanction, especially if a person residing in the issuing Member State would receive a similar sanction for comparable offences?

The fact that the convicted person resides abroad has given rise to concerns that a criminal sentence is either not suspended on probation or that the suspension of enforcement will not be supplemented by probation measures because a supervision of such measures will be practically impossible.[363] According to the Federal Court of Justice, however, practical

[359] So this chapter is, unlike the chapters 2 and 3, not about applying instruments itself but about anticipating possible problems in the future with applying instruments.
[360] We invite the NARs to identify and include other issues.
[361] See the definition of both in Art. 2(3) and (5) of FD 2008/947/JHA.
[362] See the definition in Art. 2(4) of FD 2008/947/JHA.
[363] Graf von Luckner, "Anmerkung zu EuGH (1. Kammer), Urt. v. 26.3.2020 – C-2/19", (2020) *Neue Zeitschrift für Strafrecht,* 688 (at 689); Rothärmel, "Die grenzüberschreitende Abgabe und Übernahme der Bewährungsüberwachung nach Umsetzung des Rahmenbeschlusses 2008/947/JI unter Berücksichtigung von

difficulties in supervising probation measures abroad do not establish sufficient reason not to suspend the enforcement of a custodial sentence where the conditions for a suspension are met.[364] This view is confirmed by the interview with a judge.[365] Instead, German authorities are obliged to ensure that the convicted person complies with probation measures and, if necessary, to use the existing cooperation instruments for supervision such as FD 2008/947/JHA.[366]

In practice, however, courts do not impose conditions or instructions they cannot supervise.[367] According to a defence lawyer, if the convicted person has left the country, German authorities might have less interest in preventing him from committing further crimes.[368]

In contrast, problems related to cross-border supervision may be relevant where alternative sanctions do not fall within the scope of the German provisions implementing FD 2008/947/JHA such as the postponement of enforcement (section 35 NA, *supra* 1.1.). According to the prevailing opinion, the enforcement of the sentence must not be postponed if the convicted person undergoes a therapy abroad where an effective supervision cannot be ensured.[369] Nevertheless, courts have granted postponement on the basis of a case-by-case assessment, referring to the close cooperation within the Union.[370]

- *composite* sentences (see the introduction to Chapter 3). Does the fact that such sentences are governed by two different judicial cooperation regimes – and, consequently, that enforcing such sentences in another Member State may cause difficulties – play a role in deciding whether or not to impose such a sentence?

Besonderheiten des Jugendstrafrechts", (2016) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe,* 232 (at 234); Staudigl and Weber, "Europäische Bewährungsüberwachung", (2008) *Neue Zeitschrift für Strafrecht,* 17 (at 18).

[364] Federal Court of Justice, decision of 3 May 2011 - 5 StR 123/11, (2011) *BeckRS,* 13560.

[365] District Court (interview).

[366] Higher Regional Court München, decision of 8 March 2013 – 1 Ws 84/13 and 88/13, (2013) *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport,* 211; Higher Regional Court Braunschweig, decision of 18 November 2013 – 1 Ws 333/13, (2013) *BeckRS,* 20361; both referring to the obligation to interpret national law in conformity with EU law.

[367] Federal Ministry of Justice (interview); Public Prosecutor's Office III (interview); Defence Lawyer I (interview).

[368] Defence Lawyer III (interview).

[369] District Court Trier, decision of 21 November 2021 – 8031 Js 24537/20, (2021) *BeckRS,* 37436; Fabricius, "§ 35" in Körner/Patzak/Volkmer (Eds.), *BtMG*, 11th ed. (C.H. Beck, 2024), para 193, 241; Kornprobst, "§ 35 BtMG" in *Münchener Kommentar zum StGB*, *Volume 7 Nebenstrafrecht I,* 4th ed. (C.H. Beck, 2022), para 70.

[370] District Court Kleve, decision of 24 February 2000 – 1 KLs 76/99, (2000) *Strafverteidiger,* 325; District Court Trier, decision of 21 November 2021 – 8031 Js 24537/20, (2021) *BeckRS,* 37436.

This issue is not relevant as the German sanctioning system does not provide for composite sentences, i.e. a combination of unconditional and conditional sentences (*supra* 3.1.)

In general, difficulties and problems related to transnational enforcement are not relevant, at least not mentioned among the criteria relevant for sentencing (see the general rule in section 46 CC). So, this factor is not taken into account.[371]

Nevertheless, the offender's sensitivity to punishment may play a role in that respect so that the fact that the convicted person must serve a custodial sentence in a foreign country and without having regular contact to his family might be considered as a mitigating factor unless there is an option to serve the sentence in his home country.[372] This approach, however, has been criticized because the court cannot anticipate whether or not (and when) the convicted person will be transferred to his home country.[373] In practice, a negotiated agreement on the outcome of the trial may include an assurance to transfer the enforcement of the sentence to the home country of the accused person.[374]

A convicted person with a nationality of (or a permanent residence in) another Member State enjoys the right to equal treatment and must not be discriminated on grounds of nationality (Art. 18 TFEU); accordingly, the enforcement of the sentence is governed by the same rules.[375] On the other hand, the rights of a convicted person and his interest in reintegration into society may call for a transfer of enforcement to his home country. So, the right to equal treatment refers to the enforcement regime of the sentencing state (Germany: equal treatment of German nationals and other EU citizens) and the enforcing state (equal treatment of persons convicted domestically and abroad).[376]

5. Miscellaneous: whereabouts unknown and *in absentia*

This Chapter is also an odd one out. It concerns stages in which cooperation is not sought or in which it is not necessary yet. When making decisions about going to trial and informing the

[371] Public Prosecutor's Office I (interview); Public Prosecutor's Office II (interview); Defence Lawyer I (interview).
[372] Federal Court of Justice, Judgment of 9 September 1997 – 1 StR 408/97, 43 official court reports (BGHSt) , 233 (at 234); Judgment of 23 August 2005 - 5 StR 195/05, (2006) *Neue Zeitschrift für Strafrecht,* 35.
[373] Streng, "§ 46" in Kindhäuser/Neumann/Paeffgen/Saliger (Eds.), *Nomos Kommentar Strafgesetzbuch*, 6th ed. (Nomos, 2023), para 147; District Court (interview).
[374] District Court (interview); Defence Lawyer II (interview).
[375] Public Prosecutor's Office III (interview).
[376] Academic expert (interview).

suspect of the date and place the whereabouts of the accused may be unknown. When the whereabouts are known and he is abroad, whatever a Member State does may have consequences for asking for cooperation now or at a later stage. At the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. As in the previous Chapter, the focus of this last one is on stages of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the stage of preparations for the trial and the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish what decisions authorities take in seeking the whereabouts of the accused. Not knowing the whereabouts of the suspect is a problem, because it means that the authorities do not know what measures are possible and with whom cooperation must be sought. Do they ask for information from other states, do they introduce a Schengen-alert, do they issue an EAW or do they simply wait? There is very little known at this early stage and especially not on whether and if so, what instruments of cooperation are used.

If an EAW has been issued and the whereabouts of a person are unknown, the judge usually issues an alert for arrest and surrender (section 131 CCP, Art. 26 Decision 2007/533/JHA). If the issuing authority has grounds to believe that the person wanted for arrest is in a certain Member State, a bilateral request (and a direct transmission of the EAW) can be appropriate.[377] In judicial practice, however, a Schengen alert is the rule if an EAW has been issued.[378] These measures can be supplemented by targeted searches in the Schengen area.[379]
If no EAW has been issued (e.g. because arrest and detention for surrender are considered disproportionate) and the accused or convicted person shall be summoned or served with a penalty order, the public prosecutor or the competent court may issue an alert for the purpose of communicating the accused person's place of residence or domicile (Art. 34 Decision 2007/533/JHA).

[377] Federal Ministry of Justice (interview).
[378] State's Ministry of Justice (interview).
[379] Public Prosecutor's Office III (interview).

According to defence lawyers, the choice between these two instruments seems to be very difficult in court practice.[380] There are cases in which a judge has revoked a national arrest warrant (and the corresponding EAW) because the address of the accused person had been established and detention was no longer justified by a risk of flight.[381] Overall, alerts for the purpose of communicating the suspect's place of residence are rare.[382]

Depending on national criminal procedure, a Member State may or may not have the possibility to conduct trials in the absence of the accused. It would be relevant to know to what extent judges consider the pros and cons of asking for cooperation when taking a decision on the summons of the accused as well as on whether or not to proceed to trial without the accused present.

At least two issues are of interest here:[383]
The summons to an accused abroad may be sent directly by mail without any assistance from the Member State in which the accused resides. It may also be sent with the assistance of its authorities. The former may be faster, the latter may give more certainty about whether the accused received the summons and wishes to be present at the trial. Is this a matter that is considered by courts? To what extent does the choice for one or the other relate to the (im)possibility the national system may have to conduct proceedings in the absence of the accused? Is it considered that if the accused is in the other Member State, whether a transfer of proceedings might be more appropriate in this case?

As has been mentioned above (*supra* 2.1.2.), a trial in the absence of the accused person are generally prohibited in Germany, and the exceptions to this rule are rather limited (sections 232, 233 CCP).
The choice whether to send the summons directly by mail or with the assistance of the other MS is relevant for serving the accused person with a penalty order. In this regard, assistance by the other MS is preferred for reasons of legal certainty. For similar reasons, the legislator has provided for the option to authorize a person residing within the district of the competent court to accept service of the penalty order (section 132 CCP); nevertheless, the penalty order

[380] Defence Lawyer I (interview).
[381] Defence Lawyer III (interview).
[382] Federal Ministry of Justice (interview).
[383] We invite the NARs to identify and include other issues.

cannot be enforced unless the person was able to lodge an objection to the order (*supra* 2.2.1.). In contrast, a summons is usually sent directly by mail in order to ensure that the accused person is informed in due time.[384] A formal request might sometimes be granted and executed after months or even a year. If the accused person has a defence counsel in Germany, a summons and other documents are served to the latter so that the aforementioned problems will not arise.[385] In order to facilitate the enforcement of penalty orders, a harmonized framework for serving summons and other documents should be established.[386]

There is a follow-up question to that. When taking the decision to allow *in absentia* proceedings to be held, does the judge consider that the *in absentia* character of the proceedings may have consequences when later international cooperation is needed? For example: FD 2002/584/JHA applies other, more severe, conditions to such judgements than to other judgments.

As has been mentioned before, this question is not relevant for Germany as the issuing MS, as German law does not allow for trials *in absentia*.

6. Memorandum

In the **pre-trial stage**, the cooperation instruments (EAW and its less intrusive alternatives) can serve two purposes, namely the interrogation of the suspect and ensuring his availability for the investigation.

In Germany, an EAW must not be issued for the mere purpose of interrogating the suspect. An EAW must be based upon a national arrest warrant, and the need for an examination of the suspect is no sufficient ground for detention on remand. According to the Commission's Handbook on the European Arrest Warrant, the issuing of an EAW for this purpose would be in breach with the proportionality principle, and German practitioners pointed to the suspect's right to remain silent. Likewise, a transfer of the suspect must not be based upon an EIO; transfer of the suspect is exclusively governed by the EAW regime (see Art. 19(1) lit. b FD 2002/584/JHA).

Thus, the suitable cooperation instrument for the interrogation of the suspect is the EIO (interrogation by the executing authority, videoconference); the suspect may be served with a summons (Art. 5 EU Convention on Mutual Assistance). In practice, German prosecutors

[384] District Court (interview).
[385] Defence Lawyer II (interview).
[386] Federal Ministry of Justice (interview).

request for an interrogation by the police or for a written statement of the suspect. Transfer of proceedings is not an alternative to the interrogation of the suspect because proceedings are not transferred without the defendant being heard, a requirement that has also been included in Art. 6(3) lit. b of Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters.

An EAW may be issued in order to ensure the suspect's availability for criminal proceedings in the issuing Member State (Germany) if the conditions for a national arrest warrant (strong suspicion and a ground for detention such as flight, risk of flight or tampering with evidence) are met and the EAW is proportionate.

In this situation, an ESO may be used as a less intrusive means. According to EU law, an ESO may only be issued if the suspect is still present in the issuing Member State (Germany), but under German law an ESO may be issued as well if the person has already left Germany and stays in another Member State. However, the ESO is hardly used in court practice.

On one hand, the procedure is criticised as cumbersome and ineffective: If the suspect does not comply with supervision measure, the executing authority must notify the issuing court that is exclusively competent to order the arrest of the suspect and to issue an EAW. To avoid this time-consuming procedure, it might be an alternative to link both instruments (EAW and ESO) in a manner that the ESO can be combined with a request for provisional detention that is subject to the condition that the suspect does not comply with the supervision measures. This will allow the issuing authority to decide upon the issuing of an EAW without bearing the risk that the EAW cannot be executed because the suspect has gone into hiding. Alternatively, the EU legislator might consider the informal practice that foreign police authorities assist German courts in supervising the suspect (e.g. by informing German courts that the suspect has complied with the instruction to report to the police of another Member State). Apparently, this is a rather flexible approach, the practicability of which depends largely on the involved institutions and persons.

If the instrument aims at ensuring the suspect's availability (in the sense that he does not escape from justice), neither the EIO nor the EU Convention on Mutual Assistance are appropriate cooperation instruments. Nevertheless, the use of videoconferences in surrender proceedings (Art. 6 of the Digitalisation Regulation; see also section 118a(2)2 CCP) can significantly improve judicial protection of the arrested person by allowing him to object to the decision to issue an EAW (and the underlying national arrest warrant).

The transfer of criminal proceedings is an option if the executing Member State has refused to surrender the suspect, but is usually not taken into account as an alternative to the issuing of an EAW; it is rather a 'second best' (remaining) option. In practice, public prosecutors seek to

conclude proceedings by transaction (section 153a CCP) or a penalty order by the court (section 407 CCP). In the latter case, detention on remand due to the risk of flight would be disproportionate if the accused person provides adequate security for the anticipated fine and the costs of the proceedings (section 127a CCP). The existing framework to serve the accused person with summons and other documents, however, does not ensure that he has actually become aware of the penalty order. A harmonized framework for serving summons and other documents (e.g. by electronic service via access points as provided by the Digitalisation Regulation) would facilitate and enhance the enforcement of penalty orders.

In the **trial stage**, the (physical) presence of the accused person is mandatory (section 230 CCP). In Germany, trials *in absentia* are permitted in exceptional cases only (section 233(1) CCP). In such cases, the mere purpose of interrogating the suspect does not provide sufficient reason to issue an EAW. Instead, the court may examine the accused person by videoconference outside the hearing (section 233(2)3 CCP) and issue an EIO to this end; the result of the examination will be introduced as evidence in the trial. However, it seems that this provision is rarely used in court practice.

German law requires the accused person to be physically present at the trial; a 'virtual' presence by videoconference is not sufficient.[387] Accordingly, an EIO to this end is not an alternative to an EAW that shall ensure the suspect's availability and presence at the trial. Again, an EAW must be based upon a national arrest warrant that requires a ground for detention (e.g. flight or risk of light). In the trial phase, the court may also issue an arrest warrant to ensure the presence of the accused person at the trial (section 230(2) CCP). However, an EAW that is issued on the basis of such an arrest warrant raises serious concerns with regard to the proportionality principle, but there is no uniform practice on this issue. As far as the enforcement of a national arrest warrant is suspended, the trial court may issue an ESO; in this respect, the considerations on the pre-trial stage apply accordingly to the trial stage.

As the accused person has a right (and duty) to be present at the trial, the court must summon him and provide the information necessary to exercise the right to participate in the trial; insofar, the summons should be taken into consideration as a less intrusive means to arrest and detention. In practice, however, it is often difficult to establish whether the summons has been

[387] Roth, "Die grenzüberschreitende Videovernehmung von Zeugen und Beschuldigten", (2024) *Neue Zeitschrift für Strafrecht*, 329 (at 330); Rinio, "Hauptverhandlung per Videokonferenz im Wege der internationalen Rechtshilfe in Strafsachen", (2004) *Neue Zeitschrift für Strafrecht,* 188; Beukelmann, "Das (virtuelle) Anwesenheitsrecht des Angeklagten", (2024) *Neue Juristische Wochenschrift-Spezial*, 504.

served and the accused is actually aware of the trial. In this respect, a harmonized framework for serving summons and other documents would enhance cooperation, too (see *supra* with regard to the pre-trial stage) by providing a model to ensure that the accused person has actually obtained knowledge. This framework could also provide guidance about the warnings for the accused person that he will be arrested and brought before court by issuing and executing an EAW (insofar as this option is in conformity with the proportionality principle).
If the presence and participation of the accused person in the trial cannot be ensured by the aforementioned instruments, alternatives to trial and judgment may be taken into consideration, e.g. a transaction (section 153a(2) CCP) or a penalty order (section 408a CCP); the enforcement of the latter requires an effective mechanism for serving penalty orders (see *supra* with regard to the pre-trial stage). In contrast, even though German law allows for transfer of criminal proceedings in the trial stage, this cooperation instrument is used in the pre-trial stage rather than in the trial stage.

In the **enforcement stage**, EU law distinguishes the transnational enforcement of custodial sentences on the one hand, and the enforcement of alternative sanctions and probation decisions on the other. As the German sanctioning system does not provide for composite sentences (i.e. a combination of conditional and unconditional sentences), this is not an issue for the enforcing authorities in Germany whereas incoming requests are dealt with under the regime of FD 2008/909/JHA only (see *supra* 3.1.).

The transfer of enforcement of custodial sentences must balance the interests of the convicted person in his reintegration of society and the public interest in the effective enforcement of the imposed sentence. In general, the first criterion supports a transfer of enforcement to the prisoner's home country in an early stage; nevertheless, the divergent laws on sentence enforcement, probation and conditional release have given rise to concerns that the executing state will release the convicted person before he has served a considerable part of the sentence. To some extent, transparent communication and consultations can address these concerns, but they cannot overcome the problems resulting from divergent enforcement regimes. The patchwork of transnational sentence enforcement might be addressed by calling upon the trial court to take into consideration that the sentence will be executed in another Member State. This approach, however, faces two objections: 1) The trial court cannot anticipate if (and when) the enforcing authority will transfer the enforcement of the sentence (unless the judgment is based upon a negotiated agreement that includes the corresponding assurance of the public

prosecution service). 2) The fact that the convicted person is a national of another Member State and will potentially serve his sentence in that state is not considered a legitimate criterion for sentencing (see section 46 PC).

As far as the transnational enforcement of alternative sanctions and probation decisions is concerned, the scope of the law implementing FD 2008/947/JHA for Germany as the sentencing Member State is limited to probation decisions, but does not extend to alternative sanctions (under the Youth Courts Act) and conditional sentences; due to the divergent sanctioning regimes among the Member States, supervision of juvenile offenders is considered to be a matter for German courts only. Moreover, the small number of cases supports the view that German court are reluctant to transfer supervision and the enforcement of custodial sentence, but tend to retain the competence to decide on whether to revoke suspension of enforcement and/or adapt probation measures. Instead, there is an informal practice to request authorities of another Member State (e.g. the probation service) for assistance (e.g. by keeping in contact with the convicted person). This approach avoids the aforementioned problems resulting from divergent enforcement regimes.

If the convicted person is in another Member State, the enforcing authority may summon him to serve the sentence. This is be appropriate where the residence of the convicted person is known, but this instrument is rarely used in judicial practice. If the whereabouts of the convicted person are unknown, the enforcing authority will apply to the court for issuing an EAW for the purpose of enforcement.

The final judgment notwithstanding, the enforcing authority may initiate a transfer of criminal proceedings as long as the sentence enforcement is not or has not been enforced (Art. 54 CISA); in practice, however, judicial authorities seek to enforce the judgment that has already been delivered.

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