Extradition Proceedings in Germany – The Legal Procedure for Dealing with Incoming Requests for Extradition

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I. Introduction

When extradition proceedings are initiated against someone (hereafter defendant), thus putting them in a situation whereby they may be extradited to their homeland or another country, defendants have recourse to the laws of the country in which they are currently residing. This Article outlines the sequence of proceedings, which are applicable in Germany.

Extradition proceedings are covered by the laws on International Judicial Assistance in Criminal Matters. Such proceedings are not criminal proceedings, but constitute a formal process in support of the foreign prosecution. In extradition proceedings, save for certain exceptions, the guilt of the defendant is not investigated (for exceptions see § 10 para. 2 IRG). In Germany, following receipt of a request for extradition, to which the "Laws on International Judicial Assistance in Criminal Matters" (IRG) are predominantly applicable, an exclusive decision will be reached on whether the defendant should be extradited and whether, until such decision is reached, the defendant should be taken into custody.

Extradition proceedings apply their own terminology. The IRG has retained the use of conventional terms through the implementation of the European Framework Decision by the European Law on Arrest Warrants (EuHbG), although the "Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union" (RbEuHb) applies different terms and instead of "extradition" speaks of a simplified process of „surrender of individuals". Following the implementation of the EuHbG, two separate stages of extradition have been incorporated into the German IRG, namely the conventional format – in the absence of any specific international agreement (§ 1 para. 3 IRG) – and the format applied to Member States of the EU on the basis of the European Law on Arrest Warrants, which, despite the term used, does not constitute an arrest warrant per se, but is a request for extradition. Even according to the EuHbG, Member States of the EU are prohibited from enacting any such binding rules with respect to detaining defendants during extradition proceedings.

The newly legislated § 1 para. 4 IRG states that the European Arrest Warrant (EuHb) is basically part of the higher-ranking extradition system of the IRG (see BT-Report 15/718).

Additionally, specifically in Germany, the laws on extradition proceedings also provide "Guidelines for Cooperating with Neighbouring Countries in Criminal Matters" (RiVASt), which mirror the IRG. Public prosecutors and other authorities, to a wider extent even the courts, are obligated to adhere to these Guidelines (see No. 3 para. 1 RiVASt). The Guidelines are also deemed to be a valuable code of practice for determining the sequence of proceedings.

Furthermore, in Germany, the internal extradition process as set forth in the IRG is divided into two stages, on the one hand there is the process of judicial "admissibility", in which the legality of the extradition is decided upon by the higher regional court (Oberlandesgericht: OLG), and on the other hand, the so-called "approval procedure", in which the competent authorities examine the legitimacy of the extradition request but also its external and criminal political appropriateness. Under the scope of the European Arrest Warrant, the "approval procedure" has been modified into a two-phase process by the EuHbG, which is founded on the basic obligation to authorise the extradition in favour of the Member States (§ 79 IRG).

II. Jurisdiction, Legal Process, Principles of Procedure

In Germany, the parties responsible for the extradition proceedings and the decision on custody are the public prosecutor (GenStA) and the higher regional court (OLG) located in the district where the defendant was detained, or, in the absence of detention, in the district where notice of the extradition was served (§ 14 IRG). § 14 IRG is a conclusive special regulation; once the location of jurisdiction has been determined, it remains as such until the conclusion of the extradition proceedings.

The decisions made by the higher regional court may not be challenged (§ 13 para. 1 2nd phr. IRG), however, the court is entitled to amend its decision in the light of new evidence (§ 34 IRG).

The Federal Supreme Court will only rule on individual aspects of law as presented by the higher regional court in a preliminary ruling process (§ 42 IRG).

The defendant is entitled to file an appeal against the decision of the higher regional court with the Federal Constitutional Court on a constitutional matter, although – if the violation of the due process of the law is to be criticised – this can only happen following a hearing in accordance with §§ 33a StPO, 77 IRG (see Federal Constitutional Law (BVerfG) NstZ 2001, 203; BVerfG, Ruling from 7.4.2003 - 2 BVQ 14/03).

1. Case Principles applied by the Higher Regional Court (OLG)

The proceedings heard before the higher regional court bear similar traits to the Code of Criminal Procedure. Parallel principles and guarantees apply and as set forth in §77 IRG, reference is made to the provisions of the Code of the Organisation of the Courts (GVG) and its introductory law (EGVG), the Code of Criminal Procedure (StPO), the German constitution (GG), the German Fiscal Code (AO), and the law on regulatory offences (OwiG). The extradition proceedings bestow upon the defendant their essential rights, usually acceded in criminal proceedings. The defendant has a right to be heard (Art. 103 para.1 GG), he also has the right to remain silent (§§ 21 para. 2 2nd phr., 22 para. 2 2nd phr., 28 para. 2 2nd phr. IRG), at any given time in the proceedings the defendant may avail of "legal counsel" (§ 40 para. 1 IRG) and, under certain circumstances the defendant may also be assigned mandatory counsel (§ 40 para. 2 IRG). Above all, any measures involving the restriction on freedom are subject to the decision of the judge (Art. 104 para.1, 2 GG) and a decision on custody is subject to the instruction set forth in the constitutional laws, namely that the proceedings be dealt with as quickly as possible.

2. Approval Procedure

In Germany, the assessment of the approval granted with respect to an extradition request is carried out by means of an administrative process, in which again the legality, but also the external and criminal political appropriateness of the extradition are examined. Inter-state issues, for example the international obligation to extradite the defendant or discretionary authority are not covered by the process of admissibility but by the approval procedure.

III. Sequence of Proceedings

1. Issuance of Search Warrant for the Defendant

Extradition proceedings usually commence with a search warrant being issued for the defendant, either nationally via INPOL or internationally via the SIS (Schengen Information System) or through Interpol, unless it is common knowledge that the place of residence of the person to be detained is in Germany. The public prosecutor and the officials of the police service are authorised to temporarily detain a person, if the prerequisites of an extradition arrest warrant have been fulfilled (§ 19 para.1 IRG).

In Germany, if the defendant becomes aware of the search warrant prior to being detained, under certain circumstances it may make sense for the defendant to surrender to the extradition proceedings in order to possibly avoid detention measures and to be granted admission to bail. Important to note is that neither in conventional extradition proceedings nor in the process as set forth in the European Arrest Warrant is it compulsory for the defendant to be detained for the duration of the proceedings.

Regardless of any potential evidence presented by the country requesting extradition, the public prosecutor and the higher regional court will assess whether there are sufficient reasons to justify detention (see § 15 IRG: risk of flight or collusion).

The public prosecutor is authorised to cancel the warrant for custody issued against the defendant at any time during the course of the extradition proceedings (see §§ 21 para. 7, 2nd phr., 24 para.2 IRG).

2. Hearing before the Judge at the Local Court (§§ 21, 22 IRG) and Detention Order

Immediately after having been detained, or on the following day at the latest, the defendant has to be heard by the judge based at the local court (§ 21 para.1, § 22 para.1 IRG). This hearing does not give the defendant the opportunity to request his release from custody; indeed, there are only very few exceptions whereby the local judge is authorised to grant the defendant's release.

It is the role of the local judge to extensively instruct and question the defendant (see § 22 para.2 IRG) however, this is merely a means of preparing the case for the higher regional court and under normal circumstances the judge at the local court is not authorised to release the defendant. Only if the examination reveals that the person detained is not the person against whom the arrest warrant was issued, or if the extradition arrest warrant is cancelled or if its enforcement is suspended, is the local judge obliged to release the defendant (§ 21 para.3, § 22 para.3 IRG). If none of these prerequisites are evident, then once the order to detain has been issued, the local judge will request the transfer of the defendant to the competent remand centre (No. 40 para. 3 RiVASt).

The local judge also instructs the defendant with respect to both options, namely simplified extradition proceedings, which take into account the principles of speciality (§ 41 para.1 IRG) and also simplified proceedings, which exclude the principles of speciality (§ 41 para. 2 IRG).

Only then and by means of a written extradition arrest warrant, will the locally competent higher regional court rule on either provisional or full extradition custody (§ 17 para. 1 IRG).

If, with respect to the detention order, the defendant raises objections, which are not clearly unfounded, or if the local judge has reservations against enforcing the detention order, the local judge shall inform the public prosecutor immediately and via the quickest means in order for the public prosecutor to request the immediate decision of the higher regional court (§ 21 para. 5 IRG). It is incumbent upon the local judge to send the public prosecutor the transcript of the assessment with the relevant documentation, which is then passed on to the higher regional court, assuming the proceedings are to be continued.

Best Practice

The defence counsel is entitled to present submissions of defence to the public prosecutor and the higher regional court at any time and should accordingly observe when decisions are due to be reached and allow sufficient time to prepare submissions in advance of the various deadlines.

3. Simplified Extradition Proceedings

If the defendant officially confirms his agreement with the simplified extradition proceedings by means of a declaration filed with the official transcript (§ 41 para. 4 IRG), the local judge shall inform the public prosecutor of this fact over the telephone. In such an event, extradition may be authorised in the absence of conventional extradition proceedings, unless, due to the particular nature of the case and following superior advice, the public prosecutor continues with his application for the initiation of conventional extradition proceedings (No. 49 RiVASt).

Simultaneously, the defendant is also entitled to waive adherence to the principles of speciality as set forth in § 11 IRG. In this event, the country requesting extradition may extend the parameters of the prosecution after extradition to include criminal deeds, which were not mentioned in the original request for extradition. As the defendant's agreement may not be withdrawn once given (§ 41 para. 3 IRG), the defence counsel would have to assert the invalidity of the declaration of agreement on the part of the defendant in the absence of instruction concerning the declaration of consent.

4. Application from the Public Prosecutor for the Issuance of a Provisional Extradition Arrest Warrant against the Defendant according to § 16 IRG

Following the hearing by the local judge, it is incumbent upon the public prosecutor to immediately seek the decision on detention from the higher regional court (§ 21 para. 4 2nd phr. IRG), if it is the intention of the public prosecutor to keep the defendant in custody.

This is not automatic, nor can the country requesting extradition from Germany force the court to decide in favour of detaining the defendant in the extradition proceedings. This represents a sovereign sanction, which is outside the powers of the requesting country (BGHSt 30, 152 cont., 159; 32, 221 cont., 230 with reference to BVerfGE 57, 9 cont., 32).

The decision to detain the defendant, applied for by the public prosecutor immediately following apprehension and reached by the higher regional court, is typically supported in extradition proceedings by a very narrow fact basis, upon which the defendant is, where possible, expected to expand to give light to favourable circumstances. According to § 25 para.1 IRG, the higher regional court is authorised to cancel the enforcement of the extradition arrest warrant, if less radical measures offer guarantee of the assurance of the proceedings. As in other proceedings concerning custodial measures, the concern is to dispel the risk of flight and collusion (see § 15 IRG), even though the risk of collusion rarely comes into consideration in extradition proceedings.

IV. Conventional Extradition Proceedings

The course of events in conventional extradition proceedings differentiate somewhat from extradition proceedings pursuant to the European Arrest Warrant.

1. Extradition Arrest Warrant issued by the Higher Regional Court according to §§ 15, 16 IRG

Following the assessment by the local judge, the decision of the higher regional court with respect to an extradition arrest or provisional extradition arrest is made immediately without the need for further negotiation.

In fact, the higher regional court is authorised to issue a provisional extradition arrest warrant before the request for extradition has been received, if it acknowledges a sound justification for the arrest. The only situation whereby this action would not apply would be in the event that the extradition per se is deemed inadmissible (for further details of inadmissibility criteria see § 15 para. 2 IRG).

According to § 16 para. 2 IRG, the – provisional – extradition arrest warrant can only be overruled, if the defendant has been in extradition custody for a total of two months following the date of seizure or following the date when provisional detention was imposed and if the request for extradition along with supporting documentation has not yet been received. If the request for provisional extradition custody is being filed by a country outside Europe, the deadline is extended to three months.

Upon receipt of the request for extradition and supporting documentation, it is incumbent upon the higher regional court to decide on the duration of custody. Adherence to this pre-set process is also a prerequisite for a formal, orderly request for extradition, as otherwise the necessary examination of the legitimacy of the reasons for the request cannot be guaranteed (see OLG Düsseldorf StV 2004, 146).

The decision on both the provisional and the conventional extradition arrest is given in a written arrest warrant (extradition arrest warrant) by the higher regional court (§ 17 para.1 IRG). Details have to include the name of the defendant, the country to which the defendant would be extradited subject to the circumstances of the case, the crime supposedly committed by the defendant, details of the request, or in the case of § 16 para.1 no. 2, the facts, which reveal that the defendant is suspected of a crime which has given rise to the request for extradition, as well as the reason for detention and the facts which have given rise to such reason.

Upon receipt of the request for extradition, the public prosecutor will apply either for the continuation of provisional extradition custody pursuant to § 16 para. 3 IRG or for a decision to be reached on the extradition custody pursuant to § 15 IRG as well as the questioning of the defendant pursuant to § 28 para.1 IRG. Thus, the process to determine the admissibility of extradition is initiated.

2. Examination by the Judge at the Local Court according to § 28 para. 2 IRG

Upon receipt of the extradition request by the higher regional court, a further hearing is scheduled before the local court at the place of residence of the defendant (§ 28 para. 1 IRG). A hearing before

the higher regional court will only take place under exceptional circumstances; otherwise, at no stage does the higher regional court come face to face with the defendant.

During the hearing, which in itself is a means of preparation for the decision on the admissibility of the case, the defendant is entitled to raise his objections to the extradition, the factual basis of which, in this often complicated process, his counsel may have outlined in previous submissions to the court. The defendant may only be questioned about the charge, if the public prosecutor has filed an exceptional application for the examination of the defendant; any information provided by the defendant must be included in the judicial transcript. If the defendant decides against raising any objections, the local judge will once again instruct the defendant of the possibility of a simplified extradition and its legal consequences (§ 41 IRG) and will then make note of the defendant's declaration in the judicial transcript (§28 para. 3 IRG).

The questioning of the defendant on the extradition request pursuant to § 28 para. 2 IRG may also take place during the same hearing at the special request of the higher regional court pursuant to §§21, 22 IRG.

3. Decision to Extend the Period of Custody for more than Two Months according to § 26 IRG

Having ruled in favour of the extradition arrest, it is incumbent upon the higher regional court to renew its decision on the continuation of custody every two months (§ 26 para. 1 2nd phr. IRG). The extradition arrest warrant must be cancelled, if the prerequisites for provisional or conventional extradition arrest are no longer present or if the extradition is deemed to be inadmissible (§ 24 para.1 IRG).

The extradition arrest warrant should also be cancelled, if the public prosecutor files an application for the same (§ 24 para.1 IRG), which must be done if the foreign authorities have withdrawn their request for arrest or – possibly on request – if the foreign country declares that it no longer has an interest in the arrest or extradition of the defendant (No. 44 RiVASt).

4. Application from the Public Prosecutor for a Decision on the Admissibility of the Extradition Arrest according to § 29 IRG

Admissibility proceedings, which take place pursuant to §§ 29 cont. IRG, assume that the public prosecutor has applied to the higher regional court to rule on the admissibility of the extradition (§ 29 para.1 IRG).

During the application proceedings, the public prosecutor also investigates whether criminal proceedings are already pending against the defendant in Germany or if a custodial sentence or a care order are pending enforcement (No. 45 RiVASt), however, the motions of the extradition proceedings are not impeded in any way by a criminal claim asserted in Germany. It merely has to be taken into account that the execution of the extradition may be delayed somewhat because of this (No. 45 RiVASt).

A foreign national may not be deported from Germany until the decision on extradition has been reached. The public prosecutor will inform the local aliens' authority that extradition proceedings have been initiated (No. 46 RiVASt). If naturalisation proceedings have already been initiated with respect to the defendant, the public prosecutor will also inform the naturalisation authorities accordingly (No. 48 RiVASt).

5. Preparation of its Decision by the Higher Regional Court according to § 30 IRG

Preparation of its decision on the admissibility of the extradition request pursuant to § 30 IRG presupposes that the higher regional court is in possession of all necessary supporting extradition documentation, which should have been submitted by the public prosecutor along with its application. If the supporting documentation is deemed incomplete and thus the higher regional court is unable to reach an assessment on the admissibility on the extradition, the higher regional court will only reach its decision once the country requesting extradition has been given the opportunity to submit

additional documentation (§ 30 para.1.1st phr. IRG). A deadline may be set for this submission (§ 30 para.1 2nd phr. IRG).

The higher regional court is also authorised to question the defendant (§ 30 para.2 1st phr. IRG) and to hear other forms of evidence relating to the admissibility of the extradition. In exceptional cases as set forth in § 10 para. 2, namely if an investigation is carried out into the suspicion of guilt, evidence is also heard to determine whether the defendant is deemed sufficiently suspect with respect to the crime of which he is accused. The format and extent of the taking of evidence is determined by the court, which is itself not bound by any such applications, waivers or earlier decisions (§ 30 para. 2 IRG).

As part of the preparation for its decision, the higher regional court may also schedule oral proceedings (§ 30 para. 3 IRG). This is something that defence counsels will always press for, as otherwise, the ruling judge, who is deciding upon the fate of the defendant, never actually has the occasion to meet the defendant in person. Under normal circumstances a face to face hearing only takes place before the judge at the local court, who is not ultimately the final decision maker (§§ 21, 22 IRG). If we consider that once the decision on the admissibility of extradition has been reached, the defendant has no further recourse to the courts, either relating to the admissibility or to points of law - with the exception of filing an appeal on a constitutional issue - then it is self-evident that counsel should not only present all the facts to the higher regional court, but also present the defendant to the court in person.

6. Reference to the Federal Supreme Court by the Higher Regional Court according to § 42 IRG

According to § 42 IRG, the higher regional court is entitled to request clarification on a legal matter of basic significance from the Federal Supreme Court. Such a submission is also permitted, if the higher regional court wishes to clarify a legal matter relating to extradition that deviates from an earlier decision of the Federal Supreme Court or deviates from a decision reached by another higher regional court following the introduction of the IRG. A decision is also sought from the Federal Supreme Court, if requested by the Federal Attorney General or the public prosecutor to provide clarification on a specific legal matter (§ 42 para. 2 IRG).

7. Ruling by the Higher Regional Court on the Admissibility of the Extradition according to § 32 IRG

A judicial decision on the admissibility of an extradition request is recorded along with its justification in an incontestable decision pursuant to § 32. The decision will be made known to the public prosecutor, the defendant and the defence counsel (§ 40 IRG).

Even if, pursuant to prevailing case law of the Federal Constitutional Laws (BVerfG), extradition proceedings set forth an extensive duty to undergo a full investigation and revelation of facts on the part of the higher regional court and public prosecutor (see BVerfGE 8, 81, 84 cont.), the defence counsel has to ensure that at the time of making its decision, the court is in possession of all and any objections to the extradition request. For example, there may be circumstances giving rise to certain obstacles or bans on extradition, which may have befallen the defendant in the country requesting extradition, which the court is unable to assess if the defendant fails to declare these to the court. The burden of proof is incumbent upon the state authorities to prove the absence of obstacles to the extradition (see Schomburg/Lagodny/Gless/Hack, International Legal Assistance in Criminal Matters, Introductory note 135).

The list of possible obstacles to the extradition is considerable; to name but a few examples, it is deemed to be an extradition obstacle if there is evidence of violation either now, or anticipated, against the Convention on Human Rights (MRK) and against the caveat of ordre public. Furthermore there are numerous obstacles relating to specific procedures, which can extend from problems with enforcement of judgements in absentia, to political persecution, double criminality through to the statute of limitation, all of which by no means can all be listed here.

The basic principle "in dubio pro reo" argues in favour of the defendant, if in reference to the presence of actual prerequisites for an extradition obstacle, further possibilities of clarification can be eliminated.

The judicial decision, which concludes that extradition is inadmissible, also obligates the approving authorities based on the guarantee of effective legal protection (Art. 19 para. 4 GG).

8. Renewed Decision on the Admissibility of the Extradition according to § 33 IRG

If, following the decision of the higher regional court on the admissibility of extradition, circumstances arise, which may justify a differing decision, the higher regional court will make a renewed decision either of its own motion or upon application of the public prosecutor or of the defendant (§§ 33.1 IRG; for reference see OLG Hamm, court decision from 2.7.2004 – (2) 4 Ausl A 29/03 – BeckRS 2007, 17072).

The higher regional court may adjourn the extradition for the duration of these renewed examination proceedings (§§ 33 para. 4 IRG), in particular if, following a provisional assessment, it cannot be excluded that the extradition may be deemed inadmissible due to reasons submitted by the defendant (see Lagodny in: Schomburg/Lacodny u.a. §§ 30 IRG note 34 with further verification).

As § 30 para. 2 and 30 para. 3 as well as §§ 31, 32 apply accordingly in such renewed judicial examination proceedings (§ 30 para. 3 IRG), the higher regional court may also re-examine the defendant and without any obligation to earlier injunctions the court may request new evidence on the admissibility of the extradition and it may also schedule an oral hearing.

9. Remonstrance, Subsequent Questioning of the Defendant according to § 3a StPO; § 77 IRG

§ 77 IRG allows for the applicability of additional laws, namely those of the Code of Criminal Procedure (StPO). Thus, at any time during the extradition proceedings, the defendant may file an action for the violation of his claim to a rightful hearing (§§ 33a StPO) and thereby cause by resolution the proceedings to be set back to their status prior to the decision of the higher regional court.

10. Constitutional Complaint against the Ruling of the Higher Regional Court – Application for a Temporary Order

The defendant is only entitled to appeal against the higher regional court's decision in favour of extradition by means of a constitutional complaint.

Best Practice

It is recommended that an application for a temporary injunction be filed simultaneously as this means that the extradition proceedings may not be continued until a decision is reached on the constitutional complaint.

Constitutional complaints, along with full written justification, have to be filed within a deadline of one month (§ 93 para. 1 1st phr. BVerfGG). This period, which may not be extended, commences on the day when the decision on admissibility is made known (§ 32 IRG). The constitutional complaint, filed with the Federal Constitutional Court, shall detail the defendant's reasons for claiming the violation of his basic rights or similar rights as a consequence of the higher regional court's decision on the admissibility of extradition – the complaint is not deemed to constitute a review of the whole case, merely a right to review a claim of violation of constitutional rights.

The submission of the constitutional complaint shall make reference to the higher regional court's decision, against which the complaint is directed and shall also list the basic rights or similar rights, which the defendant is claiming to have been violated. The following subjective rights may be contested, Art. 1 – 12 (excluding 12a), 13 – 19 (excluding 17-18), 20 para. 4, 33, 38 para. 1 1st phr., 101, 103, 104 GG. It is incumbent upon the defendant to provide details of the violation claim.

If it is contested that the legal right to be heard was not given (Art. 103 para. 1 GG), the constitutional complaint is only deemed admissible if attempts have already been made to find a remedy at the higher regional court through submission of an objection to the hearing (see §§ 33a, 356a StPO).

11. Approval of the Extradition Request

If the higher regional court declares the extradition request to be admissible, the public prosecutor shall inform its superiors and provide copies of the transcript and judicial decisions (No. SO RiVASt). Thus commences the approval procedure.

Aside from the obligation to adhere to the decision dismissing extradition in the judicial proceedings (§§ 12, 56.1 IRG), the approval procedure is not covered by the IRG. Its legal nature is controversial (for further opinion see Schomburc/Lacodny, Commentary, note 115 cont.) Equally controversial is whether the defendant is entitled to file an appeal against the decision on the approval (for further opinion see Schomburg/Lacodny, § 12 note 22 cont.)

As, from an administrational judicial perspective, the contestability of the approval is also, in part, supported by legislation – contrary to others OVG Berlin, court decision from 26.3.2001 – OVG 2 L 3.01 and OVG 2, p. 2.01 – the defence counsel is also obliged to take into consideration the action against the Federal Republic submitted to the Court of Administration.

We are here assuming an extensive area of discretion on the part of the approving authorities, which from a legal perspective is only verifiable to a limited degree.

The competency of approval lies with the Federal Ministry of Justice, which however, by means of agreement on competency from 1.7.1993 transferred this authority to the justice administrations of the individual states, who in turn are also entitled to delegate this right further.

The approving authority is obliged to make its own independent ruling on the admissibility of the extradition. It will have in its possession a report from the public prosecutor (No. 50 RiVASt). If the approving authority rejects the extradition request, the proceedings are deemed to be concluded. The enforcement of extradition is set forth in No. 52 RiVASt.

12. Principle of Speciality (§ 11 IRG) – Supplementary Request (§ 35 IRG)

Once the defendant has been extradited, the country requesting extradition is entitled to file a so-called "supplementary request", if it intends to accuse the defendant of crimes, details of which were not outlined in the original request for extradition. However, the country in question is prevented from pursuing the defendant in accordance with the principle of speciality (§ 11 IRG) as this principle protects the defendant from being pursued for other crimes following extradition (for details of waiver options see above III.3.).

It is once again the higher regional court that is responsible for delivering the judicial decision hereupon (§ 35 IRG – extension of the approval for extradition). According to § 35, approval may be given, if it is proven that the extradited party had the opportunity to respond to the request for extradition and if the higher regional court decided that extradition was admissible due to the crime committed, or if it is proven that the defendant declared his agreement with the enforcement of the punishment or other sanctions as set forth in the transcript of the judge from the country requesting extradition and that due to the nature of the crime, extradition is deemed admissible.

§§ 10 para.1, 29, 30 para.1 and 2 2nd-4th phr., para. 3, § 31 para. 1 and 4, §§ 32, 33 para. 1 and 2 apply accordingly to these proceedings. The Guidelines on incoming requests for extradition also apply in this instance (No. 56 RiVASt).

V. European Arrest Warrant

The first version of the European Arrest Warrant Act (EuHbG) in Germany dating from 21.7.2004 was deemed null and void by the German Constitutional Court (BVerfG) with court decision dated 18.7.2005 due to its incompatibility with the German Basic Law (GG). The change from the German system of search and extradite within the territory of the EU Member States finally took place on

2.8.2006 with the introduction of the Law on the Implementation of the Framework Decision on the European Arrest Warrant (European Arrest Warrant Act – EuHbG; for historical detail see BT-Report 15/178; BT-Report 15/2677 and BT-Report 16/1024).

This law was integrated as Section 8 of the Law on International Judicial Assistance in Criminal Matters (IRG). Since 2.8.2006, the articles of §§ 78 cont. IRG are applicable, regardless of time and date of the extradition request and retroactively applicable to already pending actions (see OLG Cologne, StV 2005, 150; OLG Stuttgart StV 2004, 546; NStZ-RR 2005, 115).

With respect to any EU Member States, the prerequisites for admissibility as well as internal procedures are subject to the provisions of the IRG.

1. Significant new Legislation set forth in Section 8 of the IRG

The most revolutionary new regulation in the EuHbG within Germany was the basic obligation to extradite a German national to a requesting Member State for purposes of prosecution (§ 80 IRG). The previously valid ban on extraditing German nationals (Art. 16 para. 2 GG, § 2 IRG) was – following a necessary amendment to the Constitutional Law - partially lifted in favour of the new system of search and extradite within Member States (see Art. 16 para. 2 2nd phr. GG).

This does not mean that a German national is no longer entitled to defend himself against an extradition request filed within Europe. Even the European Arrest Warrant Act requires that each case be ruled individually based on the full facts provided in supporting documentation or based on an existing European Arrest Warrant. The defendant is also entitled to claim that following judgement in a European Member State, for reasons of social rehabilitation he should be returned to Germany to serve any sentence imposed. Consequently, the extradition of a German national for purposes of sentence execution is only admissible with the defendant's agreement. The approving authorities are entitled to provide foreign nationals whose place of residence is Germany the same protection from extradition as German nationals (§ 83b.2 IRG).

In addition to the non-extradition of own nationals for purposes of sentence execution, the EuHbG overturns a second cornerstone of the formal extradition right: mutual criminal liability will not be investigated, if the crime, which is the subject of the extradition request, is deemed to be a catalogue crime (§ 81 para. 4 IRG).

According to § 82 IRG, the following Articles § 5 (mutuality), § 6 para. 1 (political crimes, political persecution), § 7 (military crimes) and, in so far that there is evidence of a European Arrest Warrant, § 11 (speciality) are not applicable. Thus, the traditional bans on extradition are lifted. In so far as the principle of speciality is concerned, § 78 RbEuHb provides that each Member State is responsible for observing the principle of speciality. Germany has incorporated this proviso in § 83h IRG.

§ 83 IRG provides for additional extradition bans, namely § 83 para. 1 sets forth the prohibition of double criminality (ne bis in idem), if judgement has already been passed by a Member State in respect of the same offence; § 83 para. 2 prevents extradition if the defendant was a minor at the time when the offence was committed (§ 19 StGB); § 83 para. 3 prevents extradition if the defendant did not personally appear at the trial where the decision was rendered and § 83 para. 4 prevents extradition if the defendant is threatened with life imprisonment in the country seeking extradition, unless the intention is to carry out a review of such a sentence, either following application or upon the court's own motion, at the latest after 20 years.

§ 10 para. 2, which, under certain circumstances allows for an investigation into the suspected crime, is also applicable within the framework of the European Arrest Warrant.

2. Amendments to Procedural Rules pursuant to the European Arrest Warrant Act (EuHbG)

Less spectacular are the amendments to the process introduced by the European Arrest Warrant Act. Following a European Arrest Warrant, the internal process does not deviate considerably from the conventional extradition process of the IRG.

The IRG adheres to the since modified two-stage process, namely the judicial admissibility proceedings and the approval procedure.

If a European Arrest Warrant is issued, then according to § 1 para. 4 IRG the general rules of the IRG apply to the (extradition) proceedings, unless the provisions of Section 8 of the IRG (§§ 78 – 81 IRG) take precedence.

3. Imposition of Deadlines according to § 83c IRG

§ 83c IRG provides a new regulation on deadlines: in normal cases, 60 days are allowed from the date of detention to the decision on extradition according to § 83c IRG, 10 days are allowed following communication of the consent to the simplified proceedings (§ 83c IRG) and a further 10 days are allowed following the date of consent for the defendant to be surrendered (§ 83c para. 3 IRG). If these deadlines are exceeded, this is of no detrimental consequence to the extradition and does not lead to the release of the defendant (see BT-Report 15/1718 p. 22). The deadlines set forth in § 83c IRG also provide for the general principle of proportionality, which means that if there is a considerable failing in meeting the given deadlines, justification for prolonged detention may be brought into question (see OLG Karlsruhe NJW 2005, 1206 cont., 2005, 1207, 1208; OLG Karlsruhe NJW 2007, 617, 618; OLG Hamburg court decision from 3.5.2005 – Vers. 28/03).

4. § 83a IRG – Extradition Documentation

The applicability of §§ 78 cont. IRG presupposes that a European Arrest Warrant has been made. In lieu of the previous format for extradition requests, often involving the submission of extremely extensive supporting documentation, the European Arrest Warrant involves the filling out of one standard form, although however, if submitted, extradition documentation as provided for in § 10 IRG will also be acknowledged. If the information required by § 83a para. 1 IRG is included in the submission, it suffices for the notification to be registered in the Schengen Information System (§ 83a para. 2 IRG).

The legal requirements for content and format of the European Arrest Warrant are set forth in § 83a IRG. If such requirements remain unfulfilled, then as a rule the only option is to initiate conventional extradition proceedings pursuant to IRG. It may also be the case that the court can only rule in favour of provisional extradition custody (§ 16 IRG), in which case the deadlines for the submission of extradition documentation are set forth in § 16 para. 2 IRG.

Pursuant to § 83a IRG the European Arrest Warrant has to include details on the identity of the defendant, the judicial authorities issuing the warrant, the decision on which the warrant is based, the legal classification of the crime, the description of the crime and extent of participation of the defendant as well as the proposed sentence (§ 83a para 1 IRG).

Even if a standard form is to be used for the European Arrest Warrant by all the EU Member States, this does not imply per se that the minimum requirements will be fulfilled, in particular with respect to the requirements to provide a description of the crime. Pursuant to § 83a para. 1, No. 5 IRG, the European Arrest Warrant shall contain details of the description of the circumstances under which the crime was committed, including the time and place of the offence and the extent of participation of the defendant. This requirement supposedly provides for the protection guaranteed by the principle of speciality and prevents further prosecution in the country submitting the extradition request (see OLG Cologne, court decision dated 30.3.2005 – Vers. 25/05, Vers. 11 3/05). What is necessary is a description of the historical facts (see BT-Report16/1024, p. 18; BT-Report 15/1718, p. 20; OLG Stuttgart NJW 2007, 61, 3, 614), in order to bring about the subsumption as one element of the crime (see OLG Karlsruhe StV 2007, 139, 140); also the crime description has to reveal whether the remaining prerequisites are satisfied for the extradition, e.g. classification as a tortuous act pursuant to § 81 No. 4 or decisive internal or foreign reference pursuant to § 80 para. 1 and 2 (see OLG Karlsruhe, court decision dated 18.6.2007 – 1 AK 72/06).

Admissibility of an extradition request does not presuppose that the European Arrest Warrant is provided in the German language or that a German translation exists (see BT-Report 16/1024 p. 18;

BT-Report 15/1718, p. 20; OLG Stuttgart StV 2004, 546) in particular if all concerned have relevant knowledge of the language in question.

5. The European Arrest Warrant and Questions on Custody in Internal Extradition Proceedings

When a European Arrest Warrant has been issued, the two most important questions are still to be dealt with, namely whether the defendant should remain in custody for the term of the extradition proceedings and whether he will actually be extradited when the proceedings have been concluded.

Until the higher regional court has reached its decision on extradition custody pursuant to § 15 IRG, the proceedings themselves do not differentiate from conventional extradition proceedings. Once the search warrant has been issued in INPOL, SIS or via Interpol, the defendant will be detained pursuant to § 19 IRG. Immediately upon being detained, the defendant shall be presented before the judge at the local court (§ 22 para. 1 IRG), who will instruct and question the defendant accordingly (§ 22 para. 2 IRG), but who is not authorised to make a decision on the question of detention. The judge at the local court issues a court order to detain the defendant until the higher regional court has reached its decision (§ 22 para. 3 IRG).

Art. 12 of the Framework Decision 2002/584.jl of the Council from 13.6.2002 on the European Arrest Warrant with the title "Imprisonment of the Defendant" expressly provides that in internal proceedings it is decided whether or not the defendant should be taken into custody. A provisional release from custody is expressly permitted at any time pursuant to internal legal provisions applied within the enforcing country, if the competent authorities of the Member State ensure the necessary steps to prevent the defendant from taking flight (see Art. 12 of the Framework Decision).

Even with the European Arrest Warrant, extradition custody (§ 15 IRG) cannot be imposed if the extradition is likely to be deemed inadmissible (§ 15 para. 2 IRG) and the defendant is entitled to present substantiating facts at the very initial stages of proceedings, which will support an end result of inadmissibility according to § 15 para. 2.

As a general rule, the defence counsel should ensure that the court is in a position to take into consideration all facts, which counteract the risk of flight, namely the defendant's social integration, their living conditions and income status at their place of residence; their close family and professional ties, if appropriate the fact that they are of mature years and of poor health and the fact that they will remain at their place of domicile despite the knowledge that they may be detained. In particular with foreign nationals it is important to stress the fact that the roots of their identity are in Germany.

6. Provisional Decision on Approval by the Public Prosecutor and Communication to the Defendant (§ 79 para. 2, IRG)

The approval procedure as set forth by the European Arrest Warrant is implemented in two stages and is shaped by the basic obligation to approve (§ 79 IRG).

The first stage involves the approving authorities – the Federal states having transferred this competency to the public prosecutor – exclusively deciding on the assertion or non-assertion of the conclusive list of obstacles to the approval procedure as set forth in § 83b IRG and then deciding whether or not to file an application to the higher regional court, which in turn will decide on the admissibility of the extradition request. If the higher regional court rules that the extradition is admissible, the second stage involves the final decision of the public prosecutor to authorise this process in the form of a special injunction.

The initial decision to point to obstacles (as assigned to the public prosecutor by the Federal States), has to be set forth in a specific format as per the application for admissibility (see KG Berlin NStZ 2007, 110) as the decision then needs to be communicated to the defendant (see BT-Report 16/1024, p. 13) and his reaction to the decision needs to be heard (§ 79 para. 2 IRG). This guarantees a comprehensive, effective defence for the defendant (BT-Report 16/1024, p. 11, 12).

It is necessary to provide detailed reasons for the initial decision as this is a discretionary judgement on the part of the approving authorities and only extends to the standard obstacles as set forth in §

83b IRG. Thus, the reasons have to clearly show that the approving authority is aware of its discretion and has investigated all obstacles on the basis of concrete circumstances. If it can be demonstrated that there is an obstacle to the approval procedure, the decision has to clearly reflect the documented considerations of the public prosecutor. This applies also if the authority will waive the assertion of the obstacle.

Taking the basic obligation to acknowledge the European Arrest Warrant (§ 79 IRG), it is necessary to determine the advantages and disadvantages of criminal prosecution at home or abroad, to confirm the nationality and place of domicile of the defendant, the availability of evidence, the status of any on-going proceedings, the social and family needs of the defendant (Art. 8 European Convention on Human Rights, Art. 6 GG) and the interests of the defendant (BT-Report 16/1024, p. 13), for example, the duration of the proceedings, term of imprisonment and likely sentence as well as the possibility of transferring the case back.

As the competent approving authority, the public prosecutor will communicate its initial decision to the defendant and give him the opportunity to comment within an appropriate deadline (see KG Berlin NStZ 2007, 110).

7. Application from the Public Prosecutor for a Decision on the Admissibility of the Extradition Request according to § 29 IRG

If the prosecutor fails to find any obstacles to the approval procedure pursuant to § 83b IRG, they will urge the higher regional court to rule on the non-assertion of obstacles as well as on the admissibility of extradition. The higher regional court can only make a decision on the admissibility question once it has received the initial decision, with which it is satisfied both in form and in content (see KG Berlin NStZ, 110).

8. Review of the Provisional Decision on Approval and Decision from the Higher Regional Court on the Admissibility of Extradition according to § 29 IRG

The higher regional court reviews the initial decision reached by the approving authorities, namely to refrain from asserting obstacles to the approval procedure. The higher regional court only has a restricted competency in this regard, as the public prosecutor, as the approving authority, has the greater discretion (see reasons set forth in Reg. E, BT-Report 16/1024, p. 13). The higher regional court's own responsibility is to review the extradition request.

9. Simplified Extradition Procedure

If the defendant agrees to his extradition being dealt with in simplified extradition proceedings according to § 41 IRG, there is no necessity to review the decision of the approving authorities, i.e. the extradition of the defendant can be approved without the need for conventional extradition proceedings.

10. Authorisation of the Extradition Request by the Public Prosecutor

In a second stage, following the higher regional court's decision on admissibility, the final decision on approval is reached in the form of a special injunction.

In this final decision, the public prosecutor is entitled to deviate from its first decision (see BT-Report 16/1024, p. 14). If circumstances have changed or have only become known later in the proceedings, this may lead to the need for a renewed decision on the approval of the non-assertion of obstacles. This decision also has to be communicated to the higher regional court pursuant to §§ 79 para. 3 IRG and 33 IRG. The defendant also has a right to apply for a renewed decision to be reached (§ 33 para. 1 IRG).

11. Renewed decision on the Admissibility of the Extradition

The procedure set forth in § 33 IRG, which, following the higher regional court's decision on admissibility, requires the need for a renewed decision, if there is a change in circumstances, is also applicable in the case of the European Arrest Warrant.

If, namely, following the first decision of the higher regional court on the admissibility of extradition, circumstances arise, which may justify a different outcome in the ruling from the higher regional court, the higher regional court will either make its own motion - or act upon the request of the public prosecutor or the defendant - to review and make a new decision with respect to the extradition request. Pursuant to § 79 para. 3 IRG the same applies to the decision of the public prosecutor to waive the right to assert obstacles to the consent process. In the meantime, the higher regional court may rule to postpone the extradition proceedings.

12. Enforcement of the Extradition by the Public Prosecutor

While the deadlines set forth in § 83c IRG serve to accelerate the extradition proceedings on the basis of the European Arrest Warrant - although if deadlines are exceeded there are no immediate consequences to the detriment of the case - when the proceedings are brought to a close, a cutting rule comes into effect pursuant to § 83d IRG: according to this regulation, the defendant will be released from custody, if he isn't surrendered to the requesting country within a period of 10 days following the agreed surrender date (§ 83c para. 3 IRG), unless a new surrender date is agreed upon within this 10 day term.