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DEVELOPMENT

CJEU: Germany's Public Prosecution Authorities Cannot be Regarded as a "Judicial Authority" with Regard to EAWs—The Truth or a Misconstrual of the Legal Reality?

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Abstract
The judgment rendered by the Court of Justice of the European Union (CJEU) on May 27, 2019, deemed Germany's prosecution service (*Staatsanwaltschaft*) legally incompetent for the purpose of issuing European arrest warrants (EAW) due to its lack of institutional independence. As a consequence, the question of how the German criminal prosecution system differs from the approaches taken by other European countries issuing European arrest warrants arises and raises the question of whether the German prosecution service truly is insufficiently independent in this respect. Debates amongst legal scholars have ensued in the wake of the CJEU's judgment—the Court not yet having proffered any solutions regarding the re-establishment of the institutional independence—and this article shall discuss the lack of independence and acquaint the reader with possible solutions.

Keywords: Public prosecutor's office; staatsanwaltschaft; public prosecution authorities; issuing judicial authority; European Court of Justice; EAW; European Arrest Warrant

A. Findings of the Court in the Conjoined Cases C-508/18 and C-82/19 PPU and the Basic Procedure for Issuing a European Arrest Warrant (EAW)

I. Synopsis of the Main Proceedings

In case C-508/18, the public prosecution service's office in the northern German city of Lübeck (*Staatsanwaltschaft Lübeck*) issued an EAW against PG, a Lithuanian national residing in Ireland. The requested person instigated legal proceedings against this decision and sought to quash the arrest warrant on the grounds that, *inter alia*, the *Staatsanwaltschaft* in Germany and, therefore, the local *Staatsanwaltschaft* in Lübeck, did not qualify as a "judicial authority" within the meaning of Article 6 (1) of the Framework Decision 2002/584 on EAWs (hereinafter "the Framework Decision").[1] In a further but similar case, PI, who was the subject of an EAW issued by the *Staatsanwaltschaft* in the German town of Zwickau, challenged the arrest warrant against him

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[1]Joined Cases C-508/18 and C-82/19 PPU, OG v. Staatsanwaltschaft and Lübeck/PI v. Staatsanwaltschaft Zwickau, paras. 11–12 (May 27, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-508/18 [hereinafter Judgment of May 27].

in case C-82/19 PPU on similar grounds. Both cases were subsequently referred to the CJEU by the Supreme Court of Ireland for a preliminary ruling.[2] The CJEU merged the cases in its judgment of May 27, 2019 and ruled in favor of the defendants. It held that the *Staatsanwaltschaften* in Germany are exposed to the risk of being influenced by the executive and must, therefore, be excluded from the scope of the term "issuing judicial authority."[3]

In the following, it will be illustrated how EAWs are issued, especially in Germany, and whether the German prosecution authorities are in fact subordinate to the executive.

II. Basic Procedure for Issuing EAWs

The concept of the EAW was introduced by the Framework Decision, replacing the multilateral system of extradition based upon the European Convention on Extradition of December 13, 1957.[4] The judgment itself mentions that the underlying logic to the EAW is, first, the principle of mutual trust between the Member States and, second, the principle of mutual recognition which is derived therefrom. In order to implement these principles, the EAW was created to promulgate a European area without internal borders.[5]

Pursuant to Article 1(1) of the Framework Decision, an EAW resembles a "judicial decision" by a Member State aimed at the arrest and surrender of a requested person by another Member State. The competent judicial authorities in each Member State are those competent by virtue of the law of that specific state.[6] The Member States must inform the General Secretariat of the Council of the competent judicial authority within their jurisdiction. The term "judicial authority" itself, however, is not subject to autonomous interpretation by the Member States, thus a uniform interpretation throughout the European Union is required.[7] The term might be extended to authorities participating in the administration of justice within the legal system of the Member State in question,[8] as long as they are distinct from the executive branch of the government in line with the overriding principle of the separation of powers.[9] This therefore excludes, *inter alia*, police services or other administrative authorities.

In its *Bob-Dogi* decision,[10] the CJEU ordered a dual level of protection for the requested person when an EAW is issued, as EAWs are an autonomous judicial decision and are only enforceable when they are based upon a national arrest warrant.[11] Following this principle, both the national arrest warrant and the European arrest warrant itself are subject to review by a court.[12]

III. German Practice of Issuing European Arrest Warrants

In order to assess the findings of the CJEU and its consequences for the German criminal justice system, it is fundamental to understand the German practice of issuing European arrest warrants prior to the CJEU's judgment of May 27, 2019.

[2] *Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 22, 23, 24, 31.

[3] *Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 88, 90.

[4] ECJ, Case C-452/16 PPU, Poltotrak v. Rikspolissryrelsen, ECLI:EU:C:2016:858 (Nov. 10, 2016), para. 24, https://curia.europa.eu/juris/liste.jsf?num=C-452/16 [hereinafter *Poltorak*].

[5] *Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at para. 43.

[6] Also, for the following sentence: Article 6 Framework Decision.

[7] *Poltorak*, Case C-452/16 at paras. 30, 32.

[8] *Id.* at para. 33.

[9] Also, for following sentence, see *Poltorak*, Case C-452/16 at para. 35.

[10] Case C-241/15, Bob-Dogi v. Mátészalkai járásbíróság, (Jun. 1, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-241/156 [hereinafter Bob-Dogi].

[11] Otherwise, they must not be executed by the judicial authority tasked with the execution of the European arrest warrant. Article 8(1)(c) Framework Decision; *Bob-Dogi*, Case C-241/15 at para. 66.

[12] *Bob Dogi*, Case C-241/15 at para. 56.

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Pursuant to Article 8(1)(c) of the Framework Decision, the issuing authorities must always ensure that an enforceable domestic judicial decision has been rendered or an arrest warrant issued before an EAW can be issued.[13] In Germany, a criminal judge is competent both for issuing a domestic German arrest warrant, as stipulated in Sections 112 and 114f. of the German Code of Criminal Procedure (*Strafprozessordnung*; StPO), and for making further judicial decisions, for example, under Section 260 StPO in relation to the issuing of a judgment.

Prior to the CJEU's judgment, the German prosecution service had issued EAWs based upon the judicial decision rendered beforehand. The German prosecution service itself is, primarily, to be considered an investigative body whose main task is to execute the preliminary investigation by ascertaining both incriminating and exonerating circumstances leading to a possible indictment.[14] However, its competence concerning the issuing of EAWs is not derived from there. Pursuant to Article 6(3) of the Framework Decision, Germany declared its federal judicial authorities and the *Länder* Ministries of Justice competent with regard to the issuing of EAWs. The latter, however, further assigned this to the prosecution services pursuant to Section 74 II German Act on International Cooperation in Criminal Matters (*Gesetz über die international Rechtshilfe in Strafsachen*; IRG).[15]

In relation to the *Staatsanwaltschaften* in Germany, the CJEU held that it could, in principle, be covered by the term "judicial authority," stating that "a public prosecutor's office which is competent in criminal proceedings to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice of the relevant Member State."[16]

B. Reasons to Object to the Judgment of May 27, 2019

From a German perspective, and therefore including an extensive comprehension of the German system applied when granting an EAW, there are reasons to object to the judgment rendered by the CJEU.

I. The German Staatsanwaltschaft at the Crossroads Between the German Executive and the Judiciary

In order to understand why the *Staatsanwaltschaft* was deemed not to be a judicial authority in the sense of the Framework Decision, its position within the German system of the separation of powers must be clearly depicted. The German *Staatsanwaltschaft* can be described as a "bridge" between the executive and the judiciary. This is the case as, on the one hand, Article 92 of the German Basic Law (*Grundgesetz*; GG) assigns judicial power to the judges, the independence of the latter being guaranteed under Article 97 GG. From this point of view, the *Staatsanwaltschaft* is considered part of the executive.[17] In the same vein, German scholars[18] describe the *Staatsanwaltschaft* as being "the most independent authority in the world" and thereby refer to the high degree of independence ascribed to the German *Staatsanwaltschaft* from a German point of view.

On the other hand, Germany's highest courts consider the *Staatsanwaltschaft* to be a necessary organ of criminal justice which is on an equal footing with the criminal courts,[19] which themselves

[13]*Commission Notice on European Arrest Warrants*, at 16 (Sept. 28, 2017), https://e-justice.europa.eu/content_european_arrest_warrant-90-de.do; *Bob-Dogi*, Case C-241/15 at para. 55.

[14]Hans-Heiner Kühne, Strafprozessrecht 100 (2015); StPO § 160(2).

[15]Klaus-Michael Böhm, *Ohrfeige für die Musterknaben [. . .]*, Neue Zeitschrift für Wirtschaftsstrafrecht [325 (2019).

[16]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at para. 60.

[17]Kühne, *supra* note 14, at 100.

[18]Claus Roxin and Bernd Schünemann, Strafverfahrensrecht § 9, para. 11 (2017).

[19]Kühne, *supra* note 14, at 100.

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are part of the judiciary. As a result, the *Staatsanwaltschaft* in general is an executive authority that performs judicial duties[20] ranging from the execution of preliminary proceedings up to an indictment and the enforcement of the conviction (*Strafvollstreckung*.)[21] However, the term *Staatsanwaltschaft* does not entail one unitary executive authority. Instead, most *Staatsanwaltschaften* exist at the Regional and Higher Regional Courts of the *Länder* and are therefore considered to be a number of institutions separate from one another.[22]

As a consequence of this quasi-hybrid status of the *Staatsanwaltschaft*, a certain interconnection between the executive and the judiciary exists. The CJEU identified Sections 146 and 147 German Courts Constitution Act (*Gerichtsverfassungsgesetz*; GVG) as being this link. Section 146 GVG provides that "the officials of the *Staatsanwaltschaft* must comply with the service-related instructions of their superiors." It therefore applies to the hierarchy within the authority. Section 147 GVG defines a graduated right of instruction (*abgestuftes Weisungsrecht*) whereby "the power of supervision and direction shall lie with:

1. the Federal Minister of Justice and Consumer Protection in respect of the Federal Prosecutor General and the federal prosecutors; warrant by virtue of the law of that State.

2. the *Land* authority for the administration of justice in respect of all the officials of the *Staatsanwaltschaft* of the *Land* concerned;

3. the highest-ranking official of the *Staatsanwaltschaft* at the Higher Regional Courts and the Regional Courts in respect of all the officials of the *Staatsanwaltschaft* of the given court's area of jurisdiction."

II. The German Point of View: A Misinterpretation on the Part of the CJEU as Well as a Lack of Consideration for Existing German Control Mechanisms

It is this graduated right of instruction that the CJEU held to be an obstruction regarding the objectivity of the *Staatsanwaltschaften*. However, from a German point of view, there are several indications that the judgment by the CJEU should not necessarily be followed in its entirety due to the existence of sufficient safeguards under German law.

1. A Dual Level of Protection Set Out by the CJEU

The CJEU cited the aforementioned 2016 case of *Bob-Dogi*[23] in which it defined the EAW system as entailing a "dual level of protection of procedural . . . and fundamental rights."[24] As the EAW is a measure that is capable of impinging upon the right to liberty of the person concerned, both of these levels must guarantee the right to effective legal protection, as enshrined in Article 6 of the EU Charter of Fundamental Rights (CFR).[25]

Even though the CJEU was satisfied with the German course of action at the first level, it proceeded by stating that the German system, as described above, would not guarantee the necessary protection at the second level, for example, with regard to the prosecution authorities. The possibility for the Minister of Justice to influence the *Staatsanwaltschaft* through its graduated right of instruction results, the Court admonished, in a lack of objectivity[26] and, therefore, of independence[27] from the executive.

[20]Urs Kindhäuser and Kay Schuhmann, Strafprozessrecht 52 (2021).

[21]Ministry of Justice of North Rhine-Westphalia, *Aufgaben der Staatsanwaltschaft in der Strafvollstreckung*, Justiz Online, https://www.justiz.nrw.de/Gerichte_Behoerden/Staatsanwaltschaften/Strafvollstreckung/index.php.

[22]Dieter Inhofer, Beck´scher Onlinekommentar zur StPO, Article 141, paras. 1, 4, 5 (Jürgen-Peter Graf ed., 36th ed. 2020).

[23]*Bob-Dogi,* Case C-241/15 at para. 55.

[24]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at para. 67.

[25]*Id.* at para. 68.

[26]*Id.* at para. 73.

[27]*Id.* at para. 74.

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2. The German Safeguards Presented

During the proceedings, the German government presented to the CJEU a number of safeguards which serve to avoid any unlawful influence by the executive upon the judiciary.[28] The safeguards stem from the principle of legality (*Legalitätsprinzip*), a fundamental German doctrine enshrined in Article 20(3) GG. It prescribes that the executive is to be bound, *inter alia*, by law and justice and applies to all types of actions carried out by the executive. In the event of an infringement of the principle of legality, the act of law resulting from the action concerned by the infringement becomes void.[29] The principle itself was raised by the German government in the present case[30] and it applies to the actions of the *Staatsanwaltschaft*. It ensures that any instructions by the Minister of Justice given pursuant to Sections 146 and 147 GVG do not exceed the bounds of the law, whether they are of primary or secondary nature. Statutory limits can be found in the StPO and the GVG and the fundamental principle of legality is outlined on numerous occasions therein.

One restriction presented by the German government is Section 160(2) StPO. It states that the *Staatsanwaltschaft* is bound by objectivity and neutrality. This obligation applies when ascertaining both incriminating and exonerating circumstances and when reviewing the facts of a case.[31] As a result, even though an instruction by the Minister of Justice on the basis of Sections 146 and 147 GVG could be issued without infringing upon the first restriction, the *Staatsanwaltschaft* would not be able to follow it, otherwise the act resulting therefrom would be void and therefore, not binding.[32]

Another existing limit that was, however, not presented in the case, is the principle of objectivity set down in Section 152 II StPO. It states that the *Staatsanwaltschaft* is obliged to intervene concerning any criminal offense and without taking into account any political influence. Practically, this safeguard prescribes that the *Staatsanwaltschaft* is bound to take action even in the event that an instruction based upon Sections 146 or 147 GVG requires it not to do so[33] as such instruction infringes both the principles of objectivity and legality. In addition to the existence of the aforementioned safeguards, none of the *Staatsanwaltschaften* put the right of instruction set down in Sections 146 and 147 GVG to actual use in the cases at hand either.

3. A Debatable Insufficiency of Independence

In spite of the existence of the aforementioned safeguards, the CJEU still held that the *Staatsanwaltschaften* in Germany cannot be qualified as an "issuing judicial authority" in the sense of Article 6(1) Framework Decision[34] as these were nevertheless exposed to the risk of being influenced or instructed by the Minister of Justice when issuing EAWs.

From a German legal point of view, it is hard to retrace the reasoning of the CJEU. As correctly recognized by the CJEU with regard to the dual level of protection, Germany affords procedural and fundamental rights to the requested person at the first level.[35] This has to be carried out by the judge and before court as, in general, Article 104 II GG prescribes a so-called judicial order requirement (*Richtervorbehalt*). As a general rule, the executive cannot order any measures

[28]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 79, 80, 81.

[29]Stefan Huster and Johannes Rux, Beck´scher Onlinekommentar Grundgesetz, Article 20, para. 170 (Epping & Hillgruber eds., 43d ed. 2019).

[30]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 88, 90.

[31]Böhm, *supra* note 15, at 327.

[32]Holger Brocke, Münchener Kommentar zur Strafprozessordnung, § 146 GVG, paras. 14, 15 (Hans Kudlich ed., 1st ed. 2014).

[33]Herbert Diemer, Karlsruher Kommentar zur Strafprozessordnung, § 152, para. 6(a) (Rolf Hannich ed., 8th ed. 2019); Böhm, *supra* note 15, at 327.

[34]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 88, 90.

[35]*Id.* at paras. 71–76.

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resulting in a deprivation of liberty as is the case through a European arrest warrant.[36] Only a judge can order this.

Specifically, in order to issue European arrest warrants, the StPO cumulatively requires that a strong suspicion against, Section 112 I StPO, and grounds for the detention of the requested person, Section 112 II StPO, are proven. With regard to these requirements, the StPO specifies the judicial decision requirement in Section 114 I StPO. It states that it is the judge who is obliged to assure that the decision to issue an arrest warrant depriving the requested person of their liberty complies with the principle of proportionality (*Verhältnismäßigkeitsprinzip*, Section 112 I 2 StPO). Therefore, strong suspicion and the grounds for detention must be deemed proportional by the judge, for example, at the first level of protection set out by the CJEU.

According to the CJEU, compliance with the principle of proportionality must, however, be reviewed at the second level and, therefore, by the issuing judicial authority within the Member State concerned.[37] The CJEU criticized that at this is the stage it would be possible for the German Minister of Justice to exert undue influence under the ambit of Section 146 or Section 147 GVG.

Considering the requirement of a court's decision and its specifications at the first level, together with the above-mentioned safeguards at the second level, there is practically no space left for the Minister to exert undue influence on the decision of the *Staatsanwaltschaft* at either of the two levels. From a German legal perspective, it is therefore strongly contended that the *Staatsanwaltschaft* is dependent upon the executive.

C. Reasons to Object to the German Procedure

As stated above, the judgment of the CJEU is not without certain flaws, however, neither is the German procedure for issuing EAWs. During the proceedings, it was conveyed to the CJEU that the governments of the *Länder* in question voluntarily declined their entitlement to interfere in criminal proceedings, however, these declarations do not rule out the possibility of a Minister of Justice instructing the subordinate *Staatsanwaltschaft* to issue an EAW or to receive a short briefing on the facts of any given case.[38] This raises the issue of whether the possibility of a court review of the alert for arrest—and thus of an EAW—would serve as a sufficient legal remedy to quash any governmental interference.[39] The CJEU ruled out such redress as it held that a review by the court *a posteriori* is not a sufficient legal remedy, due to the fact that any instruction in any given case is permitted under German law.

One could agree with the CJEU's position and could further argue that the majority of defendants would probably never detect any governmental interference, as there are no stringent requirements for documentation,[40] and they would, therefore, not be aware of the necessity to petition for a judicial order. Furthermore, the issuing of EAWs should not be instigated by investigative aspects but rather by aspects of legality or the principle of proportionality and should therefore be subject once more to a judicial order.[41]

Disregarding the constitutional and legislative safeguards and their provisions, the *Staatsanwaltschaften* are still subordinate to the executive and issuing an EAW still severely

[36]Henning Radtke, Beck´scher Onlinekommentar Grundgesetz, Article 104, paras. 20–26 (Epping & Hillgruber eds., 43d ed. 2019).

[37]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at paras. 71, 75.

[38]Anna Oehmichen, *Bedeutung und Wirkung der Auslegung des Begriffs der "Ausstellenden Justizbehörde" [. . .]* [FD-StrafR] 417966 (2019).

[39]Oberlandesgericht Brandenburg [OLG Brandenburg] [Higher Regional Court Brandenburg], 2 Vas 3/06, (Sept. 14, 2006), Neue Zeitschrift für Strafrecht [NStZ] 54, https://openjur.de/u/273801.html.

[40]Oehmichen, *supra* note 37.

[41]*Id.*

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infringes on the fundamental rights of the requested person.[42] Save for the aspects already discussed, the severe criticism found in academic legal texts, and especially the rebuke from the CJEU, cannot be ignored.

D. Possible Solutions

All criticism aside, the question arising from the judgment is how the German *Staatsanwaltschaft* can attain a state of independence from the executive, or whether there are other possible solutions which would help to establish an independent issuing authority in Germany.

A first approach would entail the possibility for *Staatsanwaltschaften* to maintain the competence to issue an EAW by abolishing the external right to issue instructions conferred upon the Minister of Justice under Section 147 GVG. This solution has been the subject of lengthy discussions since 2009,[43] however, to date it has not been implemented. A second approach would be to revoke the competence to issue an EAW from the *Staatsanwaltschaften* and to confer it upon judges.[44] This could be done by establishing a national judicial order requirement for the second level, as set out by the CJEU. In practical terms, a judge would then decide whether an EAW can be issued or not, and the courts would, as such, be the competent issuing authorities in the sense of Article 6(1) Framework Decision. A third approach could involve simply maintaining the existing legal situation and basing a different set of procedures upon the current legislation.[45] The new procedure could, for example, contain the following steps: a public prosecutor wishing to issue an EAW would first petition the Local Court *(Amtsgericht)*.[46] The Local Court then investigates the request by the public prosecutor and issues an EAW. The Local Court would then be considered to be the issuing authority and its competence could be based upon either Sections 131(1), 162 StPO or Sections 131(1), 457(3) StPO, depending on whether the substantive requirements of these sections are met. Finally, the *Staatsanwaltschaft* could transfer the EAW to the competent judicial authority of the Member State in question.

It still remains to be seen which approach will be taken by the German government. Two different approaches that conform to European Law could be considered, as Germany's neighboring governments in Austria and France also took steps in order to solve the issues regarding the lack of independence of their respective prosecution authorities.

I. Austrian Approach

In Austria, the public prosecutor's offices are, pursuant to Section 2(1) Austrian Law on Public Prosecutor's Offices (*Staatsanwaltschaftsgesetz*; StAG), also directly subordinate to a higher public prosecutor's office, which itself is subordinate to the Austrian Federal Minister of Justice.[47] However, any instructions from the executive must be in writing and added to the criminal file, which is transferred in full to the court responsible for the matter.[48] As in Germany, the Austrian

[42]*Id.*

[43]Markus Gierok, *Begriff der den Europäischen Haftbefehl ausstellenden Justizbehörde*, ZEITSCHRIFT FÜR INTERNATIONALES WIRTSCHAFTSRECHT 268, 289 (2019); Christoph Frank, *Abschaffung des externen Weisungsrechts – Die Zeit ist reif*, ZEITSCHRIFT FÜR RECHTSPOLITIK 147 (2010).

[44]Gierok, *supra* note 42, at 269.

[45]*Id.*

[46]The *Amtsgericht* is the court of first instance within the hierarchy of German courts.

[47]Case C-489/19 PPU, NJ v. Generalstaatsanwaltschaft Berlin, para. 8 (Oct. 9, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-489/19 [hereinafter NJ, Case-489/19 PPU].

[48]*Id.* at para. 44.

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public prosecutors shall exercise their powers only in a manner proportionate to the seriousness of the offence.[49]

The main difference with regard to Austria is embodied within Section 29(1) Austrian Law on Judicial Cooperation in Criminal Matters with Member States of the European Union (*Gesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union*; EU-GJZ), which provides that the public prosecutor's offices shall make an order for arrest by issuing a court-endorsed EAW.[50] The judiciary therefore decides on provisional detention and similar enforcement measures autonomously and may even order further investigations by the criminal police or request factual clarification from the case file by the public prosecutor's office in question.[51] While the court takes into account measures based upon a request by the public prosecutor's office, it is not bound by the results and indications of the investigation transmitted therein.[52]

The CJEU ruled in a judgment of October 9, 2019 that due to the aforementioned provisions, the decision by an Austrian court exceeds a mere confirmation of the public prosecutor's office's request. It thus resembles an independent and autonomous decision in full awareness of any instructions or orders regarding the criminal matter that the public prosecution may have been subject to.[53] The Austrian procedure of issuing an EAW therefore satisfies the requirements of objectivity and independence[54] which the CJEU negated in its judgment of May 27, 2019 regarding Germany.

II. French Approach

In France, criminal procedural law was subject to reforms when the right of instruction formerly conferred upon the French Minister of Justice was abolished in 2013. The abolition of this right of instruction had been discussed at length,[55] lastly by the former French president François Hollande during his election campaign and by the former Minister of Justice, Christiane Taubira.[56] Prior to the reforms, Section 30(2) of the French criminal procedure code (*code de procédure pénale*; CPP) allowed the Minister of Justice to issue general instructions for public action to the magistrates of the public prosecutor's office. Section 30(3) CPP permitted the issuing of written instructions by the Minister of Justice to the prosecutors (*magistrats du ministère public*) directing them to institute proceedings in individual cases.[57] Therefore, the French legal situation prior to the reforms was comparable to the legal status in Germany as set out by Sections 146 and 147 GVG.

The reforms to the CPP in 2013 were not directly connected to European law. Instead, the overall aim of the reform was, first, to prevent the ruling power from protecting its political views or attempting to harm the opposing parties through the right of instruction and, second, to reinforce the equality of the accused under French law.[58] As a result, Section 30 CPP now provides under subsection 3 that the Minister of Justice may not address any instructions to the magistrates

[49]*Id.* at para. 10.
[50]*Id.* at para. 9.
[51]*Id.* at para. 12.
[52]*Id.* at para. 45.
[53]*Id.* at paras. 47, 49.
[54]*Id.* at paras. 46, 48.
[55]Etienne Vergès, *Politique pénale et action publique: la difficile conciliation du modèle français de ministère public et des standards européens*, Dalloz Revue de science criminelle et de droit pénal comparé, No. 2013/3, 605, 606 (2013).
[56]Assemblée Nationale, *projet de loi n° 845*, (Mar. 27, 2013), http://www.assemblee-nationale.fr/14/projets/pl0845.asp (Fr.).
[57]*See* Code de procédure pénale [C. pr. Pén.] [Criminal Procedure Code] Art. 937, § 30 (Fr.). This is version of Section 30 CPP as effective before the reformation, https://www.legifrance.gouv.fr/affichCode.do;jsessionid=1B7619279C71E6289DB1796E33CF6B24.tplgfr22s_1?idSectionTA=LEGISCTA000006152027&cidTexte=LEGITEXT000006071154&dateTexte=20120404.
[58]Vergès, *supra* note 54, at 609, 610.

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of the public prosecutor's office in individual cases. The general right of instruction, however, was maintained under Section 30(2) CPP.

With regard to this concept, the CJEU held in 2019 that the French system, as reformed in 2013, guarantees the officials of the public prosecutor's office have the power, independently of the executive, to examine the necessity and proportionality of issuing an EAW. This independence is based upon Sections 30 and 31 CCP and Article 64 of the French Constitution which guarantees the independence of the judicial authorities which consist of the members of the judiciary and of the public prosecutor's office.[59] The French public prosecutor's office therefore qualifies as a judicial authority in the sense of Article 6(1) Framework Decision.

The current French legislation is thus an example of how the independence requirement of the CJEU and Article 6(1) of the Framework Decision could also be met in Germany: by abolishing the individual right of instruction of the German Minister of Justice as set out in Section 147 GVG.

E. Issues of Competence Arising from the Judgment

As mentioned above, the judgment of May 27, 2019 is still reverberating throughout the German criminal justice system as the German *Staatsanwaltschaften* are not entitled to issue European arrest warrants. In order to prosecute offenders efficiently, a procedure has to be introduced in order to bridge the time until a permanent solution can be presented. The issues arising from the current situation will be illustrated in the following.

I. The Necessity for a Statutory Entitlement and the Current Situation

The issuing of EAWs infringes the right to liberty and security enshrined within Article 6 CFR.[60] German jurisprudence introduced the term *Gesetzesvorbehalt*—the reservation of statutory powers—to describe the main requirement for an infringement of fundamental rights. The infringement may only be based upon an act of parliament[61] or the term "law" in general.[62]

The Framework Decision and the German Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*; IRG) entitled the German Federal Government to defer its competence in affairs of international cooperation in criminal matters to the *Länder*.[63] In turn, the Ministers of Justice of the *Länder* deferred their competence to the local *Staatsanwaltschaften* and the chief prosecutor of the office in question.[64] Following the CJEU's judgment, some *Länder* Ministries of Justice issued decrees in which they renounced the initial deferral of competence to the *Staatsanwaltschaften* and instead declared the criminal courts

[59]Joined Cases C-566/19 PPU and C-626/19 PPU, JR v. Procureur de la République pres. le tribunal de Grande instance de Lyon/YC v. Procureur de la République pres. le tribunal de Grande instance de Tours, paras. 50–58 (Dec. 12, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-566/19 [hereinafter JR/YC].

[60]*Judgment of May 27*, Joined Cases C-508/18 and C-82/19 at para. 68.

[61]Bernd Grzeszick, Maunz/Dürig, Grundgesetz-Kommentar, Article 20, para. 98 (Maunz & Dürig eds., 90th ed. 2020).

[62]Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391, article 52 [hereinafter ECFR].

[63]Landgericht Dortmund, Jun. 12, 2019, 34 Qs 28/19, BeckRS 15042, paras. 4, 5.

[64]Bayerisches Gesetz- und Verordnungsblatt [BayGBl], Zuständigkeitsverordnung [ZuStV], Jun. 16, 2015, Section 78 (no. 1), 184, 203; Free Hanseatic City of Bremen: Allgemeine Verfügung [. . .] zur Übertragung der Ausübung von Befugnissen im Rechtshilfeverkehr [. . .] in strafrechtlichen Angelegenheiten [. . .] [DelegationsAV], Aug. 19, 2004; North Rhine-Westphalia: Section 1.2.1.7 Gemeinsamer Runderlass [. . .], Dec. 16, 2016, Justizministerialblatt für das Land Nordrhein-Westfalen [JMB, NRW], 16, 18 (2017); Saxony: Section 5 (2) Zuständigkeitsverordnung Rechtshilfe [Rh-ZuVO], Nov. 9, 2004, Sächsisches Gesetz- und Verordnungsblatt [SächsGVBl.] 580 (2004); Schleswig-Holsteinische Anzeigen [SchlHA], Nov. 2, 2004, paras. 3 and 4 AV des MJF [. . .] (II 303/9350 - 38 SH), 14.

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to be the competent authority to issue an EAW.[65] However, such mere instructions by the Ministries of Justice to subordinate offices do not satisfy the necessary requirements for being regarded as a sufficient statutory entitlement, especially not as a competence *ultima ratio* (*Auffangzuständigkeit*).[66]

Lacking statutory entitlement based upon the deferral of competence, the jurisprudence now focuses on the more general sections of Germany's Code of Criminal Procedure (StPO).

II. European Arrest Warrant as an Alert for Arrest (Sections 77 IRG, 131 StPO)

On the one hand, Section 77 IRG and Section 131 StPO could entitle the Local Courts to issue EAWs. Section 131 StPO governs alerts for arrest which may, pursuant to Section 131 (1) StPO, be issued by the judge or the *Staatsanwaltschaft* in question.[67] Caselaw argues that this provision also allows an application beyond the German territory.[68] As Section 131 StPO grants the authority to issue alerts in the Schengen Information System (SIS),[69] which is equivalent to an EAW,[70] competence on the part of the judiciary is not unthinkable, as long as the EAW is issued as an alert in the SIS.

On the other hand, it can be argued that Section 77(1) IRG proscribes a subsidiary application of the StPO in cases of international cooperation in criminal matters.[71] Additionally, Section 131 StPO only governs the alert for arrest, which is an official request to conduct a search for the requested person.[72] The arrest itself, however, cannot be based upon this section, save for the national arrest warrant, as it has to be issued within one week of the alert for arrest.[73] The alert for arrest is a less severe procedure regarding fundamental rights as it only concerns the arrest of a person, unlike the EAW which is issued in order to ensure the arrest *and* the surrender of the requested person.[74] Following this chain of argument, the criminal courts cannot be competent for issuing EAWs as they lack the statutory entitlement.

III. European Arrest Warrant as Part of a Judicial Investigation (Section 162 StPO)

Another statutory entitlement could be granted under Section 162 StPO, which governs the requirements for the investigating judge to issue a judicial investigation.[75] The Regional Court of Bamberg (*Landgericht Bamberg*; LG Bamberg) held that issuing an alert for arrest supports the course of the criminal trial and can therefore be defined as part of a judicial investigation,

[65]As in North Rhine-Westphalia, where the Head Prosecutor of the office in question is obliged to present a request for arrest and surrender to the Amtsgericht [Local Court], which then decides on the matter. Amtsgericht Dortmund, Jul. 9, 2019, 730 AR 11/19, BeckRS 14294, para. 5; Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court Hamm], Aug. 8, 2019, 2 Ws 96/19, BeckRS 17146, para. 17.

[66]AG Dortmund, *supra* note 64, at para. 5; LG Dortmund, *supra* note 62, at paras. 2, 7; OLG Hamm, *supra* note 64, at para. 17; Opposing: Oberlandesgericht München [OLG München] [Higher Regional Court Munich], Jun. 13, 2019, 2 Ws 587/19, BeckRS 12391, para. 16; Inhofer, *supra* note 22, art. 6 RB-EuHB, para. 1.

[67]*See* Strafprozessordnung [StPO] [Code of Criminal Procedure], § 131(1), https://www.gesetze-im-internet.de/englisch_stpo/.

[68]Oberlandesgericht Celle [OLG Celle] [Higher Regional Court Celle], 2 VAs 3/09, Neue Zeitschrift für Strafrecht [NStZ] 534 (2010).

[69]Oberlandesgericht Zweibrücken [OLG Zweibrücken] [Higher Regional Court Zweibrücken], 1 Ws 203/19, Neue Juristische Wochenschrift [NJW] 2869, 2870, 2871, paras. 7, 8, 9 (2019).

[70]Framework Decision, article 9(3).

[71]Gerson Trüg & Anna Ulrich, *Auf der Suche nach der verlorenen Kompetenz – Der Erlass Europäischer Haftbefehle,* Neue Juristische Wochenschrift 2811, 2812 (2019).

[72]Sönke Gerold, MüKoStPO, § 131 para. 4.

[73]Gesetzentwurf der Bundesregierung [Federal Bill], Deutscher Bundestag: Drucksachen [BT] 14/1484, https://dserver.bundestag.de/btd/14/014/1401484.pdf, 20 [hereinafter BT-Drucks. 14/1484]; Trüg & Ulrich, *supra* note 70, at 2811, 2812.

[74]Framework Decision, article 1(1); Trüg & Ulrich, *supra* note 70, at 2811, 2812.

[75]StPO [German Code of Criminal Procedure] § 162(1).

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which ultimately grants the Local Court the right to issue EAWs.[76] The judges of the LG Bamberg interpreted Section 78(1) of the Bavarian State Government's Ordinance Regulating the Allocation of Responsibilities (*Bayerische Zuständigkeitsverordnung*; BayZustV)[77] in a manner that reduces the role of the *Staatsanwaltschaft* in issuing EAWs to a supporting one. Furthermore, according to the LG Bamberg, the office in question still decides on the EAW itself, however, based solely upon a national arrest warrant issued by a judge beforehand.[78] The main requirement for the public prosecutor to perform this obligation would be an initial national arrest warrant, which would then be transmitted to the Federal Criminal Police Office (*Bundeskriminalamt*; BKA) in order to be converted into an EAW.[79]

Two German legal scholars oppose this line of argument as they claim that the EAW is aimed at the arrest and surrender of the requested person, as prescribed in Article 1(1) Framework Decision, to ensure a fair and unhindered trial and not at investigating the facts of each individual case.[80] Furthermore, Section 162 StPO resembles a so-called *lex generalis*. Section 74 IRG implements its own assignment of competence in international criminal matters which dislodges the application of the more general provisions of the StPO. Pursuant to the IRG, the *Länder* deferred the competence to issue European arrest warrants to the *Staatsanwaltschaften* and a judicial competence can therefore not be based upon provisions of the StPO as there was no intention to grant the Local Courts this competence.[81]

F. Conclusion

The aforementioned issues of competence display how imminent the threat of not being entitled to issue EAWs is to the German criminal justice system. As some Ministries of Justice of the *Länder* simply regard the provisions of the StPO discussed above as sufficient concerning the statutory entitlement of the judicature, the example of two neighboring EU Member States illustrates to the Federal Government that change could be achieved through reform. However, the issuing of EAWs by the criminal courts on the basis of questionable and highly controversial legal grounds should not become a permanent solution.

[76]Landgericht Bamberg [LG Bamberg] [Regional Court Bamberg], Case No. 21 Qs 25/19, BeckRS 17250, para. 10 (June 26, 2019), https://openjur.de/u/2238241.html.

[77]The Bavarian law is the relevant law as Bamberg is part of Bavaria.

[78]LG Bamberg, Case No. 21 Qs 25/19 at para. 13.

[79]*Id.*

[80]Trüg & Ulrich, *supra* note 70, at 2811, 2813.

[81]Also regarding the two previous sentences, see LG Dortmund, *supra* note 62, at paras. 4, 5; Trüg & Ulrich, *supra* note 70, at 2811, 2813, 2814.

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