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EVALUATION REPORT ON THE

TENTH ROUND OF MUTUAL EVALUATIONS

on the implementation of the European Investigation Order (EIO)

REPORT on the FEDERAL REPUBLIC OF GERMANY

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1. EXECUTIVE SUMMARY

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('the Directive') responded to a well-identified practical need for a comprehensive system based on mutual recognition, for obtaining evidence in cases with a cross-border dimension, replacing the previous fragmented evidence-gathering system, while taking into account the flexibility of the traditional system of mutual legal assistance ('MLA'). Moreover, the European Investigation Order ('EIO') was intended to create a high level of protection of fundamental rights and to implement already gathered practical experience, based on direct communication between European judicial authorities. Consequently, the EIO struck a balance between the approaches of mutual recognition and mutual assistance. After the Directive had been in effect for more than five years, it was decided, within the tenth round of mutual evaluations, to assess the application of the main instrument for gathering evidence.

The information provided by the Federal Republic of Germany in the questionnaire and during the on-site visit was detailed and comprehensive, and the evaluation visit was both well prepared and well organised by the German authorities. The evaluation team got a good overview of the strengths and weaknesses of the German system, which enabled them to identify some key issues that need to be addressed at national and European level, resulting in the recommendations made below in Chapter 21.1.

The Directive has been integrated into the *Gesetz über die Internationale Rechtshilfe in Strafsachen* – Act on International Cooperation in Criminal Matters ('IRG') –, which currently still represents, at least in terms of terminology, a traditional understanding of legal assistance, and which seems to be still present in the practice of some authorities. German practitioners are provided a robust system of guidelines for dealing with foreign countries in criminal matters *(Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten* – ('RiVASt'), but despite the very detailed and extensive guidance, one can still observe diverging practices. The reason might be that the provisions regarding specifically the EIO are not entirely updated due to an upcoming revision of the whole RiVASt. Until that happens, uniform implementing provisions have been agreed on and issued in the form of *Länder* decrees.

The majority of German authorities seems to be flexible, and cooperation with the authorities of other Member States generally works well based on mutual trust and mutual recognition.

The evaluation team found that German practitioners established pragmatic solutions in practice, especially in close regional cooperation with some neighbouring Member States, where they created common procedures and started to use adapted, bilingual forms and special communication channels. In the same context, provisional measures can be taken in the absence of an EIO on the basis of an informal notification of an EIO, with the EIO being issued shortly afterwards.

The evaluation team identified a potential need to revise the Directive with regard to several points. In their view, the key points where the EU legislator should consider amending the Directive are as follows:

- include the possibility for the victim to request an EIO, in accordance with the rights accorded to victims under national law;
- provide a possibility for consent to be given to the use of information already handed over between law enforcement authorities, or by way of spontaneous information exchange, as evidence in judicial criminal proceedings;
- include cross-border surveillance in the Directive;
- amend Annexes A and B;
- clarify the applicability of the rule of speciality;
- clarify whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures such as bugging of cars or GPS tracking; In the negative, to consider amending the Directive to introduce special provisions regulating the aforementioned other surveillance measures, including the scenario in which no technical assistance is needed from the other Member State.

The EU legislator is also invited to revisit the question of the participation of the accused person at the trial via videoconference from another Member State.

During the on-site visit, it was pointed out that there are often discussions on the choice of instrument between the issuing and executing authorities. For the sake of criminal proceedings, a solution must be found, but in the long run, the interrelation of mutual recognition instruments should be handled at European level. The evaluation team therefore saw fit to invite the Commission to provide guidelines on the interrelation of mutual recognition instruments.

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997[1] ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of the international arrangements in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters ('CATS') agreed after an informal procedure following its informal meeting on 10 May 2022, and as set out in the Directive, that the 10th round of mutual evaluations would focus on the EIO.

The aim of the 10th round of mutual evaluations is to provide real added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also – and in particular – relevant practical and operational aspects linked to the implementation of the Directive. This will allow areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the EU.

[1] Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.

More generally, strengthening coherent and effective implementation of this legal instrument would further enhance mutual trust among the Member States' judicial authorities and ensure better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice. Furthermore, the current evaluation process could provide helpful input to Member States in their implementation of the Directive.

The Federal Republic of Germany was the nineteenth Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS on 29 June 2022 by a silence procedure[2].

In accordance with Article 3 of the Joint Action, the Presidency has drawn up a list of experts in the evaluations to be carried out. Pursuant to a written request sent to delegations on 15 June 2022 by the Secretariat of the Council of European Union, Member States have nominated experts with substantial practical knowledge in the field.

Each evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the 10th round of mutual evaluations, it was agreed that the European Commission and the European Union Agency for Criminal Justice Cooperation ('Eurojust') should be invited as observers[3].

The experts tasked with evaluating the Federal Republic of Germany were Ms Judit Szabó (HU), Ms Barbara Ujlaki (LU) and Mr Johannes Martetschläger (AT). Observers were also present: Ms Christine Janssens (Eurojust), together with Ms Emma Kunsági from the General Secretariat of the Council.

[2] ST 10119/22.
[3] ST 10119/22.

This report was drawn up by the team of experts with the assistance of the General Secretariat of the Council, based on the detailed replies of the Federal Republic of Germany to the evaluation questionnaire, and the findings from the evaluation visit carried out in the Federal Republic of Germany between 20 and 22 February 2024, where the evaluation team interviewed the representatives of the Federal Ministry of Justice (*Bundesministerium der Justiz* – 'BMJ') , the Federal Office of Justice (*Bundesamt für Justiz* – 'BfJ'), the prosecution service, the judiciary, the revenue authority, the Federal Criminal Police Office (*Bundeskriminalamt* – 'BKA') a defence lawyer and an academic.

3. TRANSPOSITION

As regards the way of implementation, Germany decided against creating an independent body of legislation to encapsulate the various mutual recognition instruments. Instead, the Directive has been integrated into the IRG. The transposing legislation (§§ 91a-91j IRG) constitutes a second paragraph of the IRG's tenth part on 'Other Legal Assistance with the Member States of the European Union'. The decision to integrate the rules on the EIO into the IRG is not a mere technicality, since the IRG encompasses all national provisions on legal assistance in general. It still represents, at least terminologically, a traditional understanding of legal assistance. Consequently, the implementing provisions speak about MLA and use 'requesting Member State' and 'requested Member State' instead of 'issuing or executing authority'.

The justice administration at the federal and state level also agreed to adapt the RiVASt when implementing the Directive. The RiVASt are sub-statutory administrative provisions based on an agreement between federal and *Länder* level and published in the German Federal Gazette. The RiVASt supplement and interpret the IRG more narrowly. Specific provisions regarding the EIO are still to be created by revising the RiVASt. Currently, implementing provisions agreed upon and issued in the form of *Länder* decrees are being applied.

Following Recommendation No 2 of the Report on Germany during the 9th Round of mutual evaluations[4], Germany started a reform of the IRG by setting up a working group comprising the BMJ, the Ministries of Justice of the *Länder*, representatives of judicial authorities and academics (see Chapter 14.4). This group started its work in 2021. The main features of the reform would include a simplified system underlining the specialities of cooperation within the Member States based on mutual recognition and the implementation of rulings of the ECJ. The legislative process for the revised IRG has been initiated at the beginning of 2024 The RiVASt will have to be adapted to the new IRG accordingly.

Pursuant to § 77(1) IRG, the following acts apply analogously in the absence of special procedural rules provided for under the IRG:

- Code of Criminal Procedure (*Strafprozessordnung* – 'StPO');
- Youth Courts Act (*Jugendgerichtsgesetz* – JGG);
- Fiscal Code (*Abgabenordnung* – 'AO');
- Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten* – OWiG);
- Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG);
- Introductory Act to the Courts Constitution Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz* – EGGVG).

4. COMPETENT AUTHORITIES

4.1. Judicial authorities

Depending on the rules that apply in the *Länder* as regards jurisdiction in individual cases, all judicial authorities, in particular the Federal Public Prosecutor General at the Federal Court of Justice, the public prosecutor's offices ('PPO'), the general public prosecutor's offices ('GPPO'), the Central Office in Ludwigsburg[5] and all courts with jurisdiction for criminal matters can issue and execute an EIO.

[4] Doc 7960/1/20 REV 1, p. 144.
[5] Central Office of the Land Judicial Administrations for the Investigation of National Socialist Crimes (*Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*) (Administrative Agreement of 6 November 1958, as amended by the Agreement of 24 January 1967; accession of the new Länder by means of the Agreement of 13 June 1995 on 1 January 1995).

4.2. Administrative authorities

Administrative authorities with jurisdiction under the law of the Federal Republic of Germany for the prosecution and punishment of administrative offences can also issue and execute EIOs. Where an EIO is issued by an administrative authority, it must be validated. As a basic principle, this is carried out by the PPO at the regional court in whose district the administrative authority has its seat. By way of derogation from the above, the *Länder* can delegate this task to a specific court, or issue rules concerning the local jurisdiction of the PPO responsible for confirmation in another manner pursuant to § 91j(2) IRG.

This ensures that the *Länder* are able to coordinate the validation procedure with competencies already assigned at *Land* level and to optimise workflows, where necessary. During the evaluation visit, however, it emerged that none of the *Länder* has used this possibility.

The confirmation procedure is based on § 91j(2)–(4) IRG. Pursuant to § 91j(3) IRG, the PPO or court with jurisdiction checks that the conditions for issuing are met, and in particular that the request satisfies the principle of proportionality and that it would be possible to order the investigative measure indicated in the EIO under the same conditions in a comparable domestic case. If these conditions are met, the PPO or court with jurisdiction confirms the EIO using the form in section L of Annex A to the Directive. The EIO is subsequently transmitted to the executing State either by the administrative authority or by the PPO or court.

4.3. Revenue authorities

The German revenue authorities may conduct an investigation independently under criminal law pursuant to § 386(2) AO. Pursuant to § 6(2) (5) AO, the term ‘revenue authorities’ also covers the main customs offices including their agencies and the customs investigation offices.

The notification of the Federal Republic of Germany of 14 March 2017 on the implementation of the Directive was founded on the assumption that EIOs issued by the German revenue authorities conducting an investigation independently under criminal law pursuant to § 386(2) AO do not require validation by a judicial authority. This assumption has been, however, superseded by the ruling of the Court of Justice of the European Union ('CJEU') in case C-16/22 on 2 March 2023.

Although it follows from § 399(1) AO that German revenue authorities, when conducting an investigation independently on the basis of § 386(2) AO, have the same rights and obligations as the PPO has in an investigation, it emerges from the ruling of the CJEU that a revenue authority is not an issuing authority within the meaning of Article 2(c)(i) of the Directive, but an issuing authority within the meaning of Article 2(c)(ii) of the Directive. Consequently, an EIO issued by revenue authorities must be validated by a judicial authority within the meaning of Article 2(c)(i) of the Directive[6]. The Federal Republic of Germany is actively implementing this decision. The notification had been adjusted in line with Article 33(1)(a) of the Directive.

4.4. Other authorities

As regards the execution of incoming EIOs, the role of the police authorities, in particular the BKA and the criminal police offices of the *Länder*, merits particular attention. For example, these authorities can initiate the issuing of EIOs by the competent judicial authorities for cross-border investigative measures. In so far as they are tasked by the competent judicial authorities with the execution of the necessary investigative measures, they comply with the formalities and procedural requirements imposed by the issuing Member State ('issuing State').

In some cases, the police authorities may furthermore play a role in the efficient management and forwarding of incoming EIOs, for example in urgent matters or in cases where there had been police-to-police cooperation before the EIO was sent. It should be noted that the German police uses secured telecommunication systems on national and international level which are from time to time used to transmit EIOs.

[6] cf. ECJ, op. cit., paragraphs 33 et seq.

The Federal Republic of Germany has not designated a central authority within the meaning of Article 7(3) of the Directive. However, the BfJ, performing the functions of a central authority in relation to third states, sometimes receives incoming EIOs, which are immediately forwarded to the competent German executing authorities in urgent cases (see Chapter 6.4).

4.5. The right of the suspected or accused person or victim to request an EIO

Pursuant to § 163a(2) StPO, if the accused applies for evidence to be taken in his or her defence, such evidence is to be taken if it is of importance. Based on this provision, the accused or his or her lawyer is entitled to apply for evidence to be taken during the investigation, and such evidence is to be collected using an EIO where applicable. Against the background that § 160(2) StPO obliges the PPO to collect all evidence, including evidence of an exonerating nature, in order to find the truth, there are no explicit legal remedies available to the accused if the PPO fails to take the relevant evidence. However, no instances have been reported where the PPO unlawfully refused to take evidence following an application from the accused.

In the exceptional case that the accused is examined by a judge and, during this examination, he or she applies for certain exonerating evidence to be taken, the judge – pursuant to § 166(1) StPO – is furthermore required, in so far as he or she considers it of importance, to take such evidence if there is reason to fear that it may be lost or if the taking of the evidence may justify the release of the accused.

Once the action has been brought, the accused or the lawyer acting on his or her behalf can plead prior to the opening of the main proceedings by the court that a certain piece of evidence is to be collected, and the court can then ask the PPO to carry out further investigations. During the main proceeding the accused or his or her lawyer can apply for evidence to be taken as part of the criminal proceedings during the trial stage pursuant to § 244 StPO. The court must comply with an application for the taking of evidence if there is no reason to reject it pursuant to §§ 244 StPO or 245 StPO (e.g. the fact to be proven has already been proven or is common knowledge, the fact to be proven is irrelevant to the decision, the evidence is entirely inappropriate or the evidence is unobtainable).

The accused or the lawyer acting on his or her behalf can challenge a rejection of the application for the taking of evidence by means of an appeal on points of law pursuant to §§ 337 and 338(8) StPO, whereby the entire judgment would be contested by any such appeal.

Pursuant to § 395 StPO, in the case of certain criminal offences (in particular crimes against sexual self-determination and crimes resulting in injury or death), the injured person may join a public prosecution or an application in preventive detention proceedings as a private accessory prosecutor. Pursuant to § 397(1), third sentence, StPO, joining as a private accessory prosecutor means that the injured person or his or her lawyer can apply for evidence to be taken as part of the criminal proceedings in so far as the application for evidence to be taken relates to the crime entitling the injured person to join as a private accessory prosecutor.

On the basis of §§ 395 et seq. StPO, the private accessory prosecutor is also entitled, in this context, to seek a remedy against any unfavourable decisions; pursuant to § 401(1) StPO, such remedies may be sought independently of the PPO.

The expert team is of the opinion that it would be beneficial if the Directive itself contained a provision on the possibility for the victim to request an EIO, in accordance with the rights accorded to victims under national law (see *Recommendation No 22*).

5. SCOPE OF THE EIO AND ITS RELATIONSHIP TO OTHER INSTRUMENTS

Pursuant to Article 3 of the Directive, the EIO covers any investigative measure with the exception of the setting up of a joint investigation team ('JIT') and the gathering of evidence within such a team (see also recital 8 of the Directive). Recital 9 of the Directive states that the Directive does not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement ('CISA'). Finally, Article 25 of the Directive states that although the Directive applies to the hearing of witnesses or experts by telephone conference, it does not apply to the hearing of suspects by telephone conference. Other than that, all investigative measures are covered by the Directive. This principle is reflected in § 91a IRG (see also Chapter 5.4 for the relation between EIO and the CISA).

It should be noted that § 91a(3), first sentence, IRG excludes the application of the EIO to securing assets for the purpose of confiscation. For the sake of completeness, it should be noted that the forwarding and service of procedural documents is based on Article 5 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union adopted in 2000 ('2000 MLA Convention'), and thus is also not governed by §§ 91a et seq. IRG.

§§ 91a et seq. IRG accordingly relate to cross-border investigative measures aimed at obtaining evidence; a broad interpretation should be taken as a starting point in this respect.

5.1. Procedural stage of issuing an EIO

In the interpretation of the German authorities, the EIO only covers measures taken during the preliminary investigation and the main proceedings. The main criterion for the German implementing law is 'gathering evidence', which covers both the investigation of the criminal behaviour and the elements necessary for the determination of the penalty. Consequently, once a final decision has been handed down in the main proceedings, the question of gathering evidence becomes obsolete and the Directive no longer applies.

EIOs are therefore not used to request measures that are to be carried out after a final decision has been handed down or that involve the supervision of probation, or to request financial investigations whose aim is to trace incriminated assets after a confiscation order has been issued. In such cases, support is obtained from a foreign authority based on MLA[7].

For instance, in one case, a German court requested information on the basis of MLA from another Member State in connection with probation proceedings in order to determine whether the individual on probation was in pre-trial detention and the criminal charges upon which the detention order was based. The authorities of the other Member State took the view that this information should be provided only on the basis of an EIO. Consultations on this matter are still ongoing.

For the sake of pragmatism, however, a more generous interpretation is sometimes applied in practice and there have been cases reported where an EIO has been issued or executed by German authorities in enforcement proceedings. The evaluation team welcomes the flexibility shown by the German practitioners on a case-by-case basis. The vast majority of German practitioners reported no issues relating to the different stages of criminal proceedings.

5.2. Thin line between use of the EIO and use of other instruments

In general, the German practitioners reported no fundamental difficulties in identifying the investigative measures for which an EIO or another instrument should be issued, when acting as either issuing or executing authority. Below is a list of areas in which the German authorities reported uncertainties on the scope of the EIO.

[7] § 91a(2) IRG (SLGH/Trautmann, sixth edition 2020).

- **Transcripts of judgments.** It was reported that Member States take different approaches to deciding whether an EIO is necessary when requesting transcripts of judgments. Some Member States use standard MLA requests whereas others use the European Criminal Records Information System for this purpose. German executing authorities carry out case-by-case assessments to determine whether transcripts of judgments should be made available, even if the requests do not take the form of an EIO. The German authorities and the evaluation team believe that it would be helpful if all the Member States were to adopt a uniform approach.
- **Temporary transfer**. A Bavarian GPPO reported that they had received EIOs requesting the temporary transfer of a suspect for the purpose of conducting criminal proceedings on multiple occasions. In such cases, the GPPO informs the foreign authorities that a transfer is possible only if a European arrest warrant ('EAW') is forwarded. No problems have arisen in this regard.
- **Freezing**. Various cases were reported in which the issuing authority had used the wrong instrument and where precedence of the application of Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders led to the non-execution of an EIO.
- **Address or whereabouts of a person**. Member States also seem to have differing views on whether an EIO should be issued for determining an address for service or the current whereabouts of an individual. However, an individual's whereabouts are typically established via police channels, and such requests are typically associated with orders to carry out other investigative measures.

- A Bavarian PPO reported a case where an EIO was issued for the sole purpose of establishing an individual's whereabouts but was refused by the executing State on the grounds that the aim of the EIO was not the obtaining of evidence and suggested that an EAW should be issued and that they would then take responsibility for searching for the wanted individual on the basis of this EAW. This approach resulted in the surrender of the wanted individual. North Rhine-Westphalia reported a case in which the issuing State had requested that telecommunications surveillance be carried out with a view to apprehending a suspect and had then requested surrender on the basis of an EAW in the event that he was located.
- **Participation of an accused person in trials via videoconference** (see also Chapter 18.2.2.). Baden-Württemberg reported several incoming cases requesting the presence of the accused throughout the trial via videoconference. These requests were refused on the grounds that attendance at a trial was not an investigative measure within the meaning of the Directive. In some cases, reference was simultaneously made to the option of a non-trial hearing of the accused by videoconference instead of the desired attendance at trial, as well as to the option of a hearing by a German judge as an MLA request[8].
- **Personal data necessary for the enforcement of an administrative decision.** The vast majority of *Länder* reported no EIOs in relation to obtaining personal data necessary for the enforcement of an administrative decision. North Rhine-Westphalia alone reported that EIOs of this kind had been submitted by administrative authorities and validated, and that requests of this kind had also been received from other Member States. A revenue authority had furthermore issued an EIO relating to the sequestration of real estate. Bavaria reported cases where EIOs of this kind had been received, in particular regarding the enforcement of penalty notices in connection with road traffic offences.
- **Interplay with JITs**. Cases involving an EIO issued in a JIT setting occur rarely in practice, and no problems have arisen in the few cases encountered. In practice, problems concerning data transfer could be avoided by adding specific provisions to the JIT agreement.

[8] A comparable case is currently also the subject of a reference for a preliminary ruling before the ECJ (Joined Cases C-255/23 and C-285/23 (AVVA and Others)); cf. also responses to questions 47 and 51).

- **Several investigative measures which fall partly within the scope of the EIO**. German practitioners reported problems relating to requests for measures that fall partly within the scope of the Directive. In their opinion, issuing both an EIO and an MLA request can lead to delays and, as a result, loss of evidence, especially in urgent cases. The German authorities would therefore encourage issuing authorities to always include a reference to the EIO in the MLA request, and vice versa.

Practitioners furthermore reported that the typical approach taken when they receive an EIO requesting the implementation of measures that, in the view of the German authorities, do not fall within the scope of the EIO is to reinterpret the EIO as an MLA request, provided that all the necessary information is available (see *Best practice No 1*), and vice versa where an MLA request is issued instead of an EIO.

In the event that opinions differ as to whether a particular measure requires an EIO or a normal mutual assistance request to be issued, consultations are held with the relevant country in order to clarify the matter, where applicable with the involvement of the European Judicial Network ('EJN') Contact Point.

Based on the written replies to the questionnaire and the discussions held during the on-site visit, the experts are of the opinion that the authorities of issuing States should respect the scope of the Directive (see *Recommendation No 9*). At the same time, however, the expert team considers that Commission guidelines on the interplay between the various mutual recognition and MLA instruments would offer added value (see *Recommendation No 23*). Furthermore, Eurojust and the EJN are invited to update their *Joint Note*[9] on the practical application of the EIO (see *Recommendation No 25*).

[9] https://www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/european-investigation-order-eio/joint-note.

5.3. Information obtained through police cooperation or spontaneous information exchange

According to German practitioners, both incoming and outgoing EIOs regularly request the use, for judicial purposes, of information and evidence previously transmitted to the judicial authorities via police channels. Saxony reported that when EIOs are issued, the executing authority is informed of any plans to use the information transmitted by the police in connection with a preliminary investigation and asked to give consent to such use. According to Saxony, no problems have arisen in this connection.

Many authorities pointed out that there was a need for them to be able to apply EIOs in order to use information obtained through police cooperation, in particular in relation to offences involving organised crime, and most recently in connection with information from 'cryptophones' using SkyECC and EncroChat services. At the time of the evaluation visit, the German authorities were eagerly awaiting the outcome in Case C-670/22, particularly in relation to the conditions for transmission of evidence that had already been obtained in France, in part with regard to the reading of data from cryptophones used on the territory of Germany.

In its judgment, the CJEU clarified that the transmission of evidence already in the possession of the competent authorities of the executing State is subject to the same conditions as those that apply to the transmission of similar evidence in a purely domestic case[10]. The CJEU added that the fact that the French authorities had gathered the evidence in Germany and in the interest of the French investigation and at the same time to the benefit of their German counterparts was, in that respect, irrelevant[11].

[10] See judgment of the CJEU of 30 April 2024, Case C-670/22, *M.N. (EncroChat)*, para. 106. This judgment had not yet been handed down when the evaluation visit took place.
[11] Ibid., para 98.

Baden-Württemberg reported that one Member State requires an EIO for the use of information gathered by police as evidence. Germany, however, does not consider this to be within the scope of the EIO but rather to be within the scope of Framework Decision 2006/960/JHA, which will be replaced by Directive 2023/977on the exchange of information between the law enforcement authorities of Member States. Outgoing information gathered by police is usually categorised as usable in criminal proceedings after authorisation by the competent authority. From a dogmatic point of view, Germany sees no fundamental problem with an EIO being used for this purpose.

Images from surveillance cameras are another example of police intelligence which is transmitted to the judicial authorities, where the evidence is reportedly secured on a preliminary basis by the police based on the risk of its being lost.

In cases of spontaneous information exchange, German authorities sometimes give only parts of the evidence, expecting the receiving Member State to issue an EIO for the transmission of the rest.

The experience of German practitioners also shows that it would be beneficial if the Directive provided for a clear possibility for consent to be given to the use of information already handed over between law enforcement authorities, or by way of spontaneous information exchange, as evidence in judicial criminal proceedings (see *Recommendation No 22*).

5.4. Cross-border surveillance

Overall, the German authorities observed that the Member States vary in their approach to implementing the Directive in the area of cross-border surveillance. According to recital 9, the Directive should not apply to cross-border surveillance as referred to in the CISA. § 91a(2) IRG accordingly provides for an explicit exemption for cross-border surveillance from the scope of the EIO-specific provisions. This principle is essentially adhered to in practice.

In the case of requests issued by the Federal Public Prosecutor General, isolated problems have occurred with regard to the choice of legal basis. According to the Federal Public Prosecutor General, these are resolved by issuing requests for cross-border surveillance alone in the form of MLA requests, and requests for combined measures (e.g. vehicle interior surveillance, telecommunications surveillance) in the form of EIOs, with the same criteria applied to any incoming requests.

Incoming EIOs containing measures that, in the opinion of German executing authorities, fall outside the scope of the Directive are forwarded to the competent German authority, and the issuing authority is notified accordingly. According to German practitioners, however, it is sometimes unclear in practice whether and to what extent EIOs could be applied for cross-border surveillance.

The evaluation team concluded that cross-border surveillance is an area of cooperation in which a uniform approach is lacking among the Member States. Since the existing EU legislation on cross-border surveillance for use as evidence in criminal proceedings remains unclear and since it is a very important tool for practitioners in the fight against serious cross-border crime, it would be desirable to have a specific provision in the Directive (*see Recommendation No 22*) and a clear demarcation from Article 40 of the CISA is needed. In this regard, a possible revision of Article 28 of the Directive could be considered. The evaluation team also believes that it is important to consider the possibility of an *ex-post* notification system for cross-border surveillance and the (other) investigative measures covered under Article 28 of the Directive, similar to the mechanism provided for under Article 31 of the Directive.

6. CONTENT AND FORM

6.1. Challenges

No specific problems with completing the form were reported, though there was some uncertainty concerning whether the domestic order underlying the EIO had to be attached.

The majority of PPOs and courts reported that they regularly encounter cases of missing information or documents, but these can typically be obtained upon request. These cases mostly involve:

- incomplete or out-of-date details for the individual(s) in question;
- failure to provide details of the national provisions governing notices of rights;
- lack of information regarding whether an individual is to be heard as a witness or as a suspect;
- incomplete or vague information about the facts of the case;
- missing IBAN numbers or a failure to provide details of the relevant period as a basis for obtaining bank account information.

It is undeniable that cooperation through the EIO would be facilitated by forms being filled out in clear language, especially when the offence is being described. Issuing authorities should also refrain from copying the text of the underlying national order, and should ensure that any translations are of sufficient quality (see *Recommendation No 10*).

In cases where the issuing State has conducted criminal proceedings against a legal entity, difficulties have sometimes been encountered because details of the principal offence that is the subject of the proceedings are required under German law in order to implement the requested measures (e.g. the issuing of search warrants).

A number of practitioners expressed the view that the incomplete nature of some EIOs could also be attributed to defective translations of their content.

6.2. Suggestions for a potential revision of Annex A

Several German practitioners voiced criticism of Annex A; their suggestions for a potential revision are listed below.

- a future smart form could allow empty sections to be hidden;
- the questions should be highlighted in bold so that questions and answers are more visibly distinct from each other;
- similar information is requested in multiple different sections of the form, resulting in duplication of effort and an increased likelihood of errors[12];
- it would be helpful to include 'Search' as a checkbox in section C, since this is an investigative measure that is used relatively frequently;
- the heading '*Please describe the position the concerned person currently holds in the proceedings*' should also be included in section E1.(i), so that details can be provided about the status of natural persons as well as legal persons;
- there are specific difficulties to be considered with regard to complex requests involving a large number of investigative measures against various individuals. To avoid confusion, German practitioners issue several EIOs, even though this involves extra work and rising translation costs. As a possible solution, the various individuals subject to the measures could be clearly listed under section E, with the option of also making it clear which of the investigative measures requested under section C is aimed at which of the persons listed in section E;
- the use of input boxes to enter longer sections of text is often a frustrating experience, and copying individual pieces of information is a complicated task. The option of including tables in the description of the facts of the case would be welcomed;
- an address field for the details of the issuing and executing authorities should be inserted on page 1 of Annex A, which could be used instead of a cover letter;
- in cases involving multiple executing authorities in the same Member State, it would be helpful to include a statement in the form indicating whether the request has already been sent to other authorities. This would make it easier to assess whether the procedure ought to be split into two procedures and one handed over to other German authorities, particularly in the case of requests received from foreign authorities;

[12] Section C, on the investigative measures to be carried out, is too far from section G, on the grounds for issuing the EIO, and section H, under which details are to be provided about the additional requirements relating to the investigative measures to be carried out under section C. Frequent examples were reported of bank account details being requested in section C, but no mention being made until section H4 of the fact that bank statements covering a certain period of time were required in addition. The fact that these sections are so far apart means that this is easy to overlook. There should also be fewer sections overall, with a view to ensuring that a summary of all the relevant information can be provided in one place.

- it would be helpful to include an additional subsection requesting explicit details of any court orders or other documents that are attached; at present, the existence of any such orders or documents can only be identified (if at all) from the cover letter;
- the file numbers used in the issuing State should be requested earlier in the form than section K, as currently the task of searching for them sometimes proves difficult.

Some of the practitioners also noted that a number of the terms used were unclear, and that terminological explanations would be helpful. For example, it was reported that from the perspective of an issuing authority, it is hard to distinguish between the following items in section C: '*Obtaining information or evidence which is already in the possession of the executing authority*' and '*Obtaining information contained in databases held by police or judicial authorities*'. It was furthermore reported that confusion arises as a result of the use of the terms '*swindling*' and '*fraud*' in Annex D of the Directive, in particular since it is unclear whether these cover tax evasion. According to the practitioners, the Member States have different interpretations of this matter, which leads to uncertainty; tax evasion could therefore be included in brackets or as a separate category of offence.

The experts are of the opinion that there is some merit in the suggestions of the German practitioners, and the EU legislator is encouraged to amend the Directive by making Annex A more user-friendly (see *Recommendation No 22*).

6.3. Language regime

In accordance with the notification of the Federal Republic of Germany under Article 5(2) of the Directive, incoming requests to authorities in Germany on the basis of the Directive must be in German. In accordance with recital 14 of the Directive, the expert team invites all Member States, including the Federal Republic of Germany, to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language (*see Recommendations Nos 1 and 11).*

There were no reports of persistent problems relating to translations of EIOs issued by German authorities. In isolated instances, the executing State had requested a translation which was not strictly speaking provided for by the Directive (e.g. the translation of search warrants or court judgments), on the grounds that e.g. month-long delays could otherwise be expected. To ensure that an EIO can be executed, some German practitioners reportedly produce the requested translations themselves in spite of the associated additional workload and the costs involved.

German executing authorities stated that the quality of translation in EIOs to be executed varies dramatically. Although the quality is typically high enough to allow the EIO to be used as the basis for further work, individual EIOs have been sent back to the issuing authority on the grounds that the translation is poor, or specific queries have been sent to the issuing authority. In some cases, the translations are assumed to have been done using online translation tools. A certain number of EIOs have also been received that were only partially translated into German, and these were returned with a request for a full German translation. The issuing authorities complied with this request in each case.

No problems were reported in relation to the costs of translation.

6.4. Multiple requests in one EIO

As both an issuing State and an executing State, Germany is repeatedly confronted with cases involving several executing authorities. In order to avoid any delay in handling EIOs of this kind, when acting as an issuing State the German authorities regularly issue several EIOs simultaneously and transmit them to the relevant executing authorities if there is no centralised point of coordination in the executing State. The German issuing authorities welcomed the help provided by the EJN Atlas in these cases. Issuing several EIOs, however, requires increased effort on the part of the issuing authority.

As an executing State, Germany is repeatedly confronted with cases where requests concerning several different bank account numbers are received, even though the executing authority in question has territorial jurisdiction for only some of the account numbers listed. The competent authority which receives the EIO then assumes the coordinating role for the execution of the EIO. EIOs of this kind are split up according to the respective areas of jurisdiction and distributed to the competent executing authorities in each instance (see *Best practice No°2*).

A particular problem is that it is not generally possible to determine whether or not the issuing authority has already involved the correct executing authority in any investigative activities that do not fall within the competence of the executing authority. This results in internal handovers and divisions of tasks that may ultimately prove unnecessary. In some instances, if the executing authority that receives the request is not competent to deal with it, a 'collective EIO' of this kind is sent back to the issuing State with a suggestion that it issues the requests separately according to territorial jurisdiction.

A number of Member States have adopted the practice of sending requests to the BfJ or the BMJ in cases where there is uncertainty about the competent executing authority. The BMJ forwards EIOs of this kind immediately to the BfJ. In urgent cases, the latter forwards them to the competent body with the same promptness. If it is still necessary to determine the authority with territorial jurisdiction, the BfJ routinely asks the BKA for support beforehand. In general, the EJN Atlas should provide all necessary information.

If the competent German executing authority can be identified directly from the EIO or (with a reasonable amount of effort) using electronic tools, e.g. based on the IBAN or place of residence of a witness, the BfJ does this and assesses the level of urgency. In the absence of any urgency, it provides the issuing authority with the relevant information, sending the EIO back. In the event of uncertainty regarding jurisdiction, the BfJ is sometimes also asked to provide assistance via the EJN prior to the investigation.

In cases requiring a lot of coordination or the implementation of urgent investigative measures by multiple executing authorities, practitioners frequently involve the EJN Contact Point or Eurojust in order to guarantee that the process runs smoothly.

In the context of Germany being an issuing State, German practitioners have not reported any overarching problems. They did, however, report that executing States differ in their opinions as to whether a brief follow-up letter or email in English is sufficient when requesting additional investigations as part of the same procedure, or whether – contrary to the requirements imposed by German authorities when executing an EIO – a new EIO must be issued.

Speaking from the perspective of an issuing State, German practitioners also reported that sometimes, when EIOs are issued containing requests for the implementation of several investigative measures successively, only some of the investigations are carried out, and requests for follow-up measures are ignored. Examples include cases involving a request for investigations to establish the holder of an account and a subsequent hearing of suspects, where the establishment of the account holder was ultimately the only outcome.

Undoubtedly, complex cases requiring multiple requests, possibly involving multiple executing authorities and legal bases, require careful consideration. German issuing authorities therefore use cross-references when issuing multiple requests/orders with different legal bases or to several executing authorities for the same case, thereby informing the executing authority/authorities about the existence of these other requests/orders (see *Best practice No 3*).

Revenue authorities frequently issue EIOs to identify assets (e.g. bank accounts or real estate) deriving from the proceeds of crime. The information obtained using these EIOs about the location of the proceeds of crime and about available assets is typically used in a second step, on the basis of a freezing certificate, to provisionally freeze – pursuant to Regulation (EU) 2018/1805 – the proceeds of crime that will later be subject to confiscation. The delay between the two investigative measures sometimes poses a problem in connection with EIOs where the execution of one investigative measure is dependent on the outcome of the execution of the other investigative measure, since assets may have been moved around in the meantime.

When Germany is the authority responsible for executing EIOs, instances are repeatedly encountered where the issuing authority requests several investigative measures falling under the jurisdiction of different PPOs, and where the EIO does not make it clear whether it has also been sent to the other German PPOs concerned or whether the individual authorities have been asked only to implement measures falling within their own jurisdiction. It was reported that such cases result in huge amounts of work and massive coordination efforts. It can take as long as several months to work through 'aggregated EIOs' of this kind, making it impossible to meet the deadlines scheduled for their completion.

Therefore, issuing authorities should always indicate as much if an EIO or another related request/order is being sent to multiple executing authorities in the same Member State, for the sake of coordination (see *Recommendation No 12*).

If, during the execution of an EIO, it becomes clear that further investigative measures are needed, German authorities usually do not require an additional EIO, but rely on additional communication between the issuing and executing authorities, subject to the requirements set out by the investigating judge if he or she has to be involved under German law.

6.5. EIOs issued in urgent cases

As a basic principle, and pursuant to § 91d(1) IRG, the issuing State has to send an Annex A or Annex C. However, No 10(3) RiVASt also allows transmission of EIOs by telex, fax, email or even telephone in urgent cases and in so far as this is sufficient for the execution of requests received and the transmission of requests issued. An adequate level of data protection is to be ensured when transmitting personal data in this connection.

The approach taken to urgent cases in practice is based on the above, whereby the methodological details may differ depending on the individual case. EIOs that are received in the form of a verbal communication are sometimes accepted only if a brief email is also sent providing specific details of the issuing authority, the requested investigative measures, the facts underpinning the procedure and the circumstances justifying the urgency, since otherwise the authenticity of the request cannot be verified.

In very exceptional cases, EIOs that are issued in the form of a verbal communication are, conversely, regarded as sufficient if assurance is given that a written EIO will subsequently be forwarded promptly using Annex A. According to reports from some *Länder*, EIOs issued by telephone are initially taken merely as a prompt to carry out preparatory measures (e.g. logging the case, consulting the police and making preparations for any steps to be taken), and the requested investigative measures are carried out only once a written EIO has been received.

7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT INVESTIGATIVE MEASURE

When Germany acts as issuing authority, the authorities are always obliged to assess the proportionality – and thus also the necessity – of the investigative measure specified in the EIO, since the principle of the rule of law as part of the European and German *ordre public* dictates that every action by the state must be proportionate. This assessment is also carried out as part of the validation procedure for requests issued by German administrative authorities.

The assessment is carried out according to the general criteria that apply under European and German law, or in other words, whether the measure is suitable, necessary and appropriate, and furthermore whether it pursues a legitimate goal. Examples of points of reference for this assessment include the degree of suspicion, the seriousness of the offence, the severity of the intrusion associated with the investigative measure, the level of damage, the anticipated costs, the estimated time needed for the measure to be implemented and a prognostic evaluation of the chances of success of the requested investigative measure.

Examples of cases where the authorities eventually took an internal decision not to issue an EIO – e.g. where the specialised MLA team within a PPO refused a request from the investigating prosecutor – could include minor offences, offences committed a long time ago or offences that would require a large investigative effort relative to the small financial losses involved, as this might lead to the investigative measure being disproportionate to the circumstances of the offence.

The evaluation team was happy to see that, when Germany is the issuing State, the German authorities consistently scrutinise the proportionality principle. Several practitioners mentioned that when issuing an EIO, they add a note stating, 'If there is a more lenient measure, this can be used'. The evaluation team considered this good practice. However, the evaluation team also noted during the discussions that when seeking information from financial institutions, some German authorities tend to issue EIOs for searches of premises, 'assuming' that this can then be replaced by a less intrusive measure. The evaluation team believes that in such cases the proportionality principle would require that the less intrusive measure be requested in the EIO directly (see also Chapter 18.4).

In cases where Germany acts as executing State, the executing authority will carefully review the incoming EIO based on the existing information and carry out a proportionality check. If a less intrusive investigative measure than the one indicated in the EIO is available and can achieve the same outcome as the one indicated in the EIO, the less intrusive measure is to be taken, in accordance with § 91f(1) IRG.

Before having recourse to another investigative measure, the competent authority in the issuing State is to be notified without delay, in accordance with § 91f(4) IRG.

The German practitioners reported only a few cases where the measure involved was eventually deemed disproportionate or unnecessary. For instance, one case was reported where an EIO had to be refused after consultations because the offence concerned was, in the view of the German executing authorities, a minor offence, one which was already time-barred in Germany. In the view of the evaluation team, neither the 'minor' nature of the offence nor the fact of its being time-barred under the executing State's law is as such sufficed, in principle, as a reason to refuse the execution of the EIO.

During the evaluation visit, the German authorities and the evaluation team concluded that while proportionality is a fundamental principle in German and EU law, it should not serve as a pretext for non-execution under the Directive. The evaluation team was happy to learn that refusals based on proportionality only occurred in isolated cases and that in general the consultation mechanism (Article 6(2) of the Directive) was very successful in ensuring that a less intrusive measure was applied in the cases in which it was used.

In fact, there were many examples where consultations eventually led to a solution.

In one case, an incoming EIO requested the collation of a doctor's patient files and bank account transactions from a period of several years, even though this was not necessary based on the facts of the case as detailed. Following consultations with the issuing authority, the investigative measures requested were adjusted accordingly in terms of their scope and could then be implemented.

In another case, an EIO contained a request for bank account documents covering a period of three years to be reviewed, even though the allegedly fraudulent transfers were only carried out within a particular month, and hence the investigative measure seemed disproportionate. In this case, too, it was possible to restrict the investigative measure to the necessary length of time following consultations with the issuing authority.

In another case, the German authorities were asked to execute an EIO containing a request to assess a suspect's capacity to be held criminally responsible, in the context of an upcoming court hearing in the issuing State. Time constraints meant that it was impossible to meet this request. Since the suspect had already undergone an assessment of this kind in criminal proceedings conducted by the executing authority, it was possible to forward that assessment to the issuing authority, with the added benefit that this approach was less intrusive for the suspect. The issuing authority subsequently withdrew the original request for an assessment.

The German revenue authorities, when acting as executing authorities, sometimes encounter the problem that certain sections of incoming EIOs can be deemed disproportionate because it would be impossible to execute them within a reasonable period of time, meaning that the taking of evidence is not commensurate with the scope of the investigative measure. In particular, this may be the case because the information requested is not held centrally but must be obtained from a large number of other authorities, which involves a significant amount of coordination. The issuing authorities are frequently unaware of this fact and are informed of it during the consultations.

The assessment of proportionality carried out by the German customs authorities also incorporates the question of whether the investigative measure requested in the EIO might be implemented in a more straightforward manner using the mutual assistance arrangements under the Naples II Convention.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

The competent executing authority is typically identified using the EJN's Judicial Atlas, with the help of Eurojust, the EJN Contact Points and the joint centres for cross-border police cooperation where applicable. No problems were reported by practitioners in this connection, although the details in the EJN's Judicial Atlas are not always up to date or are sometimes incomplete *(see Recommendation No 13).*

As a general rule, an EIO that is accidentally transmitted by the German issuing authorities to the incorrect executing authority is forwarded on to the competent executing authority in accordance with Article 7(6) of the Directive (see *Best practice No 4*). However, a number of Member States return German requests without implementing them if they have been transmitted to executing authorities that do not have the jurisdiction to handle them *(see Recommendation No 14).*

A number of *Länder* reported that outgoing requests are routinely sent by post, since the current lack of any uniform encryption standards for the issuing and executing authorities in the Member States is regarded as problematic.

Broadly speaking, the majority of practitioners regarded the electronic transmission of EIOs as essentially sufficient and preferable, provided that there are no doubts regarding the sender's authenticity and provided that steps are taken to ensure the protection of privacy-related interests. Authenticity can be ensured by means of an electronic signature or an equivalent form of verification, for example. Most practitioners deemed it unnecessary to also send a copy of the original by post in such cases. On the other hand, however, it should be noted that the vast majority of German authorities still work with paper records, which is why a number of German authorities do prefer the original to be sent by post as well for record-keeping purposes.

Any problems relating to secure transmission, including authentication, should be resolved following the establishment of the e-Justice Communication via Online Data Exchange system (e-CODEX) and the e-Evidence Digital Exchange System ('e-EDES') on the basis of the uniform legal framework created by the Digitalisation Regulation[13]. The e-EDES is already being used at present in a large number of Member States and allows for secure transmission. Only a few PPOs are currently connected to this system in Germany. A faster roll-out of the system in Germany might reduce the problems associated with secure transmission, even before its use becomes mandatory *(see Recommendations Nos 2 and 15).*

[13] Electronic transmission of EIOs will become mandatory no later than four years after the entry into force of the Digitalisation Regulation (2021/0394 (COD)) (Article 26(3) in conjunction with Article 10(3)(1) of the Digitalisation Regulation).

After the EIO has been transmitted, communication typically takes place directly between the issuing and executing authorities. Contact is only made via Eurojust or the EJN in exceptional cases, particularly in the event of communication problems, delays, significant one-off cases, complex coordination tasks or urgency.

An exception to the general rule is Saxony, where, due to its proximity to the border, a special communications network has been set up between the Dresden GPPO and the PPOs close to the border in neighbouring Member States.

It was explained during the on-site visit that the Federal Republic of Germany has close regional cooperation with some neighbouring Member States, including common procedures, the use of adapted forms (e.g. shared bilingual forms) and communication channels (see *Best practice No 5*). Furthermore, in the same context of close regional cooperation, provisional measures can be taken in the absence of an EIO on the basis of an informal notification, with the EIO being issued shortly afterwards (e.g. video footage can be secured on a preliminary basis) (see *Best practice No 6*).

The revenue authorities furthermore reported that the executing authorities in other Member States are in some cases asked to indicate the enforcing authorities they have designated so that the issuing German revenue authority can contact them directly, provided that this is permitted by the executing authority. Particularly in complex cases, the advantage of this direct communication between the issuing German revenue authority and the enforcing authority in the executing State is that many operational problems can be solved expeditiously and expediently.

The BKA reported that communication with the issuing State can in limited cases also take place via SIENA or Interpol in accordance with a corresponding legal basis (see No. 123 RiVASt), provided that the police authorities are involved in the handling of the request and provided that this procedure is arranged with the German executing authority. Communications are then forwarded to the competent issuing authority via these police channels. Especially in urgent cases a quick and secure communication between the contact points involved can in this manner be guaranteed. The expert team is, however, of the opinion that the use of police channels for judicial purposes, such as cooperation based on the Directive, should be clearly regulated and should be limited to the aforementioned case of urgency. German authorities are encouraged to use judicial channels for transmitting EIOs and for follow-up questions on judicial cooperation under the Directive (see *Recommendation No 3*).

9. RECOGNITION AND EXECUTION OF THE EIO AND FORMALITIES

9.1. Compliance with formalities

The German practitioners did not report any major difficulties in relation to formalities.

There have been a few cases of EIOs being received without a completed section I. In such cases, the request is handled solely according to the provisions of national law. It is not known whether this gives rise to problems in the issuing State in connection with the use of evidence obtained.

With regard to the hearing of persons, it is sometimes unclear whether questioning by police is sufficient or whether the individual should be questioned by a judge, and whether the presence of witnesses should be enforced on a mandatory basis (e.g. with regard to notices of rights). In Germany, standard hearings may be conducted by the police, without needing to have a judge present, but in other Member States, the presence of a judicial authority might be required. Therefore, it is crucial that issuing judicial authorities expressly indicate this in section I.

The German revenue authorities proposed that issuing authorities in other Member States should always make it unequivocally clear in their requests whether a witness needs to be heard in person or can also be asked to divulge information in writing. The context for this proposal is that the written questioning of witnesses is not a recognised method in certain countries.

EIOs sometimes lack details regarding whether the presence of a defence counsel is mandatory during the hearing of a suspect. Sometimes circumstances arise where the presence of a defence counsel is required under German law; sometimes there are cases where the issuing authority asks for a hearing to be held in the presence of a defence counsel, and additional information regularly has to be obtained in these cases in order to clarify certain matters. Examples of such matters include the existence of a lawyer or defence counsel in the issuing State, the admissibility of a hearing in the absence of a defence counsel at the suspect's request, the refusal of a mandatory defence counsel or the assumption of costs for the mandatory defence counsel.

In other cases, the issuing authorities requested compliance with specific formalities for the hearing of a witness when Germany, as executing authority, considered that the person was not a witness but a suspect. In this regard, the evaluation team considered that, under the principle of mutual recognition, the issuing authority should probably have the final word on the person's status in the criminal proceedings in the issuing State and in accordance with their law, rather than the executing authority.

Based on these examples, the written input of the German authorities and the discussion held with the German practitioners during the on-site visit, it is apparent to the expert team that some issuing authorities do not provide sufficient information in section I of Annex A, in cases where there are some specific formalities that should be complied with in the execution of the requested investigative measure. Issuing authorities should be mindful of the different criminal procedural rules in the different Member States and duly include any specific formalities to be observed in section I (see *Recommendation No 16*).

In some cases, the execution of an EIO was denied by German executing authorities as the measures were deemed contrary to the fundamental principles of law. A number of *Länder* reported several cases where the issuing State requested that the record of a suspect's hearing be signed by the suspect, even if the latter did not divulge any information. Since, under German law, a suspect is not obliged to provide a signature in such cases, execution had to be refused after the issuing authority had been informed.

In the opinion of the expert team, however, this should not be a case for non-execution but rather a case of non-compliance with formalities. In such cases, German executing authorities should differentiate between non-recognition on one hand and non-compliance with formalities on the other hand and should provide sufficient information on the applicable German law, explaining why a certain formality could not be respected and Germany could draw up a document stating that the suspect refused the record of the hearing (*see Recommendation No 4*).

Pursuant to § 91h(1) IRG, requests are to be executed under the same terms as would apply if they had been made by a German authority; the same applies to any coercive measures that must be implemented while handling the requests. If the Federal Republic of Germany is the executing State, the execution of a coercive measure may therefore still be subject to judicial approval if this is provided for under German procedural law.

9.2. Underlying national order

From the perspective of Germany as executing authority, the majority of practitioners are of the opinion that it is not necessary for the issuing State to attach the relevant national court orders to an EIO. It is typically deemed satisfactory if the issuing State provides assurance that any judicial decision required under its national law has been obtained. It should be noted that neither the Directive nor the German transposing legislation provides for any need to attach the relevant national decisions.

Some practitioners stated that, in cases where there is a requirement for a prior judicial decision (*Richtervorbehalt*) under German law, the issuing authorities are sometimes asked to forward the relevant court orders. Such court orders are in many cases already attached to the EIO in any case. If – contrary to under German law – no judicial authorisation is needed for the investigative measure under the law of the issuing State, a substitute declaration is requested instead, i.e. a declaration making it clear that the conditions for the requested investigative measure under the law of the issuing Stat have been met.

Nevertheless, during the on-site visit, some uncertainty arose concerning whether the domestic order underlying an EIO has to be attached. One of the reasons for this uncertainty might have been No 114 RiVASt, which – though only applicable to cooperation with third states – was followed by some of the German practitioners when applying the Directive. The Federal Republic of Germany should therefore ensure that the guidance provided to practitioners properly indicates that there is no need to attach the underlying national order when applying the Directive (see *Recommendation No 5*).

Furthermore, German issuing authorities reported different approaches by foreign executing authorities with regard to attaching the domestic order. In the opinion of the expert team, Member States should not systematically ask for the underlying judicial order (see *Recommendation No 17*).

In fact, most German practitioners would prefer that a reasonable summary be provided, rather than the underlying judicial order. Some might say that the underlying judicial order is normally only needed if a vital piece of information is missing from Annex A. German practitioners, however, stated that in such cases, they would ask for additional information, not for the underlying judicial order.

10. RULE OF SPECIALITY

10.1. Rule of speciality from the perspective of German executing authorities

The German transposing legislation does not contain any provisions on the rule of speciality.

However, pursuant to § 91c(2) IRG, mutual assistance may, in certain cases, only be provided where the conditions of § 59(3) IRG are met. Pursuant to § 91c(2)2.(c) IRG, this also applies to investigative measures of a specific duration (e.g. the monitoring of individual account activities, the making of controlled deliveries, the use of covert investigators or the interception of telecommunications).

The German executing authority may specify that the evidence obtained may be used only in so far as such evidence would also be usable in the Federal Republic of Germany, i.e. for investigating a specified list of offences. This is a more lenient option than the alternative (the rejection of the request to transmit evidence). Consequently, the German authorities are of the view that the speciality rule is observed in this connection[14].

- During the on-site visit, German practitioners noted that the abovementioned limitation on the use of evidence is not necessarily communicated when the executing material is transmitted. The reason for this is that the German authorities 'assume' that other Member States will comply with the speciality rule and that the latter will thus ask the German authorities for consent if they would like to use the evidence for other purposes. German prosecutors were extremely surprised to hear from the expert team that the Member States hold differing views as to the application of the speciality rule when applying the Directive. In the opinion of the expert team, in light of these differences, executing authorities of all Member States, including the Federal Republic of Germany should duly inform the issuing State about the applicable rules of speciality (see *Recommendations Nos 6 and 18*).

[14] Cf. Bundestag printed matter 18/9757, p. 43.

In practice, the German executing authorities give consent for the evidence to be used in other proceedings if it would have been admissible under the StPO to obtain the evidence for the purpose of these proceedings, and if the evidence could also have been collected by means of a separate EIO. Requests of this kind are, however, very rare.

10.2. Rule of speciality from the perspective of German issuing authorities

German practitioners reported many cases in which the German issuing authority asked the executing authority for consent if the evidence was used in other domestic proceedings. Conversely, in the event of simple changes to the underlying facts, the executing authority is not typically asked to grant consent, provided that the relevant changes relate only to the legal assessment of the offence rather than the circumstances upon which the proceedings are based. One *Land* reported, however, that consent is also obtained if the charges are changed when the individual is indicted or the court's assessment in the initiating decision differs from the indictment.

In some cases, consent to use evidence obtained in other proceedings is sought from the executing authority if the evidence is particularly sensitive (e.g. SkyECC data) or in cases where the executing State refers explicitly to Article 19(3) of the Directive.

10.3. Opening of new criminal investigations following the execution of an EIO

In accordance with § 152(2) StPO the PPO is obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications. The manner in which the law enforcement agencies acquire that knowledge is essentially irrelevant. The German law does not impose a requirement to obtain the issuing State's consent before using the evidence, but some practitioners do so anyway.

A variety of approaches are otherwise taken by German practitioners to informing the issuing State. Depending on the individual case in question, information is provided only if a link exists with proceedings in the issuing State, or if the issuing State submits a corresponding request or might have a recognisable interest in receiving this information and provided that the investigative measures are not jeopardised. In addition, the Federal Republic of Germany seeks for broad consultation with the issuing State to ensure compliance with the principle of ne bis in idem. However, in the opinion of the expert team, for the sake of coordination, the issuing authority should always be informed if domestic proceedings are being opened based on information gathered during the execution of an EIO (see *Recommendations Nos 7* and *19*).

If the information stemming from the EIO reveals facts that are not punishable in the Federal Republic of Germany, criminal proceedings will not be initiated, since it would be necessary to transfer those proceedings to the issuing State. The circumstances are, however, reported to the issuing authority with a statement to the effect that the German authority assumes that a preliminary investigation will be initiated there.

The evaluation team notes that there are different interpretations among Member States as to the scenarios the speciality rule applies to, including the EIO, linked to questions of legality, opportunity and confidentiality. Several situations can be identified where the rule of speciality could potentially be applicable or give rise to differing interpretations.

Considering that these issues are not specific to the Federal Republic of Germany, the evaluation team invites the EU legislator to clarify the applicability of the rule of speciality in the context of the EIO and its interplay with data protection principles (see *Recommendation No 22*).

11. CONFIDENTIALITY

Deriving from the right to legal remedies (see Chapter 14), German criminal procedural law provides for the person affected to be instructed as to his or her rights, which goes hand in hand with the disclosure of the EIO (§ 35a(1) and 98(2), fifth sentence, StPO). An obligation to disclose an EIO may also result from § 33 StPO, for example. The provisions of the StPO apply mutatis mutandis to the granting of a request to inspect files in a mutual assistance procedure.

A request to inspect files may furthermore impose an obligation on the PPO or the court to disclose the EIO. Pursuant to § 147(1) StPO, the defence counsel is authorised to inspect those files which are available to the court or which would have to be submitted to the court if charges were brought, and to view items of evidence in official custody. A request to inspect files, justified under § 404 StPO, by the person affected or by his or her lawyer may also impose an obligation on the authorities to disclose the EIO.

In the event of covert measures (e.g. dragnet investigations, seizure of postal items, telecommunications surveillance, online searches, acoustic surveillance of private premises, covert investigations or observation, etc.), the persons affected are to be notified in line with the requirements set out in § 101(4), first sentence, StPO. In cases involving overt traffic data capture measures under § 100g StPO, the persons affected are notified in accordance with § 101a(6), first sentence, StPO.

At the same time, pursuant to Article 19(1) of the Directive, each Member State must take the necessary measures to ensure that, in the execution of an EIO, the issuing authority and the executing authority take due account of the confidentiality of the investigation. On the basis of the aforementioned provisions of the StPO, it is therefore possible to defer the disclosure of the EIO. Pursuant to § 101(5) StPO, in the case of covert investigations, notification is given only as soon as this can be done without endangering the purpose of the investigation or the life, physical integrity and personal liberty of another person or significant assets.

Pursuant to § 147(2), first sentence, StPO, a request to inspect files may be refused if the investigations have not yet been concluded and if the inspection of files would jeopardise the purpose of the investigation. On the other hand, § 147(2), second sentence, StPO provides for a counter-exception in the event that the accused is remanded in custody. Pursuant to § 147(4), first sentence, StPO, it is furthermore assumed that, in the case of an accused person who has no defence counsel, the purpose of the investigation even in other criminal proceedings cannot be endangered by the inspection of files, and that there are no overriding interests of third parties meriting protection which would constitute an obstacle thereto.

In practice, the EIO is typically disclosed to the person concerned as a result of the execution of the investigative measure requested in the EIO. This applies, in particular, if the person affected by the measure is directly involved. By way of contrast, and as explained above, § 101 StPO applies to covert investigations.

The majority of PPOs and courts reported that no problems relating to rules on disclosure in the other Member States had been encountered to date. In one case, the executing State stated that measures in connection with the EIO needed to be disclosed to the suspect. Since the measures involved were not covert, the German issuing authority agreed to the disclosure.

Speaking from the perspective of an executing authority, the Federal Public Prosecutor General stated that in one case where the confiscation of a data carrier had been requested, it had been impossible to comply with a non-disclosure requirement during the transmission of evidence. In consultation with the issuing authority, it proved possible to make the content of the requested evidence available by means of an ‘evaluation memorandum’, i.e. a summary of the information contained on the data carrier.

12. GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

From the perspective of both issuing and executing authorities, practitioners reported that execution is refused only in very rare instances. In the vast majority of cases, the non-execution of an EIO is attributed to factual reasons, for example because the individual to be heard cannot be found.

12.1. The Federal Republic of Germany as issuing State

German practitioners reported that, when Germany is the issuing State, consultation is the main rule when a possible ground for non-recognition or non-execution arises. The most common ground for non-execution in the practice is double criminality (see Chapter 12.3).

In some cases, EIOs were refused for reasons that were not so much related to the formal grounds for refusal, but rather to the validity of the EIO, either in relation to the required content (Article 5 of the Directive) or the authorities competent to issue it (Article 2(c) of the Directive). For instance, in one case, the executing State refused the execution of a search warrant because the objects to be searched for were not described in adequate detail. It was, however, impossible for the issuing authority to provide a more accurate description at that point in time.

In relation to the criteria for a competent issuing authority, reference should be made to fiscal and customs authorities in the aftermath of the judgment of the CJEU in Case C-16/22. In this judgment, the CJEU clarified that fiscal and customs authorities cannot be considered either a ‘judicial authority’ or a (judicial) ‘issuing authority’ within the meaning of Article 1(1) and Article 2(c)(i) of the Directive in so far as they assume the rights and obligations of a PPO pursuant to § 386(2) AO in conjunction with § 399(1) AO. Following this judgment, the execution of EIOs that had already been issued before the judgment had been handed down and had accordingly not yet been validated was refused by the executing authorities owing to the lack of judicial validation.

In other cases, German EIOs were refused because the use of the investigative measure concerned was restricted under the law of the executing State (Article 11(1)(h) of the Directive) or would not have been available in a similar domestic case. For instance, the execution of two outgoing requests issued by German revenue authorities with a view to obtaining banking documents under Article 27 of the Directive was refused because the threat of punishment for the tax evasion being prosecuted in the Federal Republic of Germany did not serve as sufficient grounds for violating banking secrecy in the executing State. The revenue authorities furthermore reported cases where a Member State was only willing to recognise and execute EIOs if it could be established that the elements of a crime of aggravated tax evasion or tax fraud under the law of the executing State were fulfilled.

Another example is a case in which the authorities of the executing State refused to carry out a search and confiscation following the theft of a mobile phone in the Federal Republic of Germany. The executing authority argued that under the national law of the executing State it was possible and to be assumed that the current owner had acquired the phone in good faith, despite its having been stolen in the Federal Republic of Germany. In a further case, the executing State refused to carry out an order to perform acoustic surveillance outside private premises because the requested measure would not have been available under domestic law for the offence concerned. The German issuing authority subsequently withdrew the EIO.

Finally, in a preliminary investigation conducted by the BKA, the executing authorities refused to carry out the surveillance of a vehicle's interior on the grounds that such a measure was possible only under the law of the executing State if the offence was punishable by a custodial sentence for a maximum period of at least 10 years. Although the German PPO assumed that the sentence imposed would meet this threshold, the authorities of the executing State did not share this opinion.

The expert team concluded that the aforementioned examples confirm that differences in requirements between issuing and executing States' procedural law often constitute a major trigger for refusal under one of the related grounds for non-execution in the Directive.

12.2. The Federal Republic of Germany as executing State

If grounds for non-recognition laid down in Article 11 of the Directive are identified by the executing authority, a consultation takes place in accordance with No 18 RiVASt and § 91f(4) IRG. Even though § 91f(4) IRG only provides for an obligation to inform, it is generally recognised that the provision also includes an obligation to consult, as required by Article 11(4) of the Directive.

In the event that a reason for non-execution can be resolved by contacting the competent authorities, the German authorities notify the issuing authority of any concerns using the Annex B form or directly (email, telephone, videoconference), involving the EJN and/or Eurojust as well where applicable. The aim is to obtain any information that is still missing or to dispel any misunderstandings with a view to being able to execute the requests contained in the incoming EIO.

From the perspective of executing authority, practitioners reported isolated cases where, after consultation, the EIO was not executed. Non-execution in these cases mainly involved grounds of double criminality (Article 11(1)(g) of the Directive, see Chapter 12.3), restrictions under domestic law (Article 11(1)(h) of the Directive), and investigative measures involving acts that could not be enforced under national law and/or would not be applicable in a similar domestic case (Article 31(3) of the Directive).

Where Article 11(1)(h) of the Directive was applied, special rules of proportionality applied under the applicable national criminal procedure law. These are laid down in § 100a StPO et seq. and only allow for an interception of telecommunications if the offence is ‘of particular severity in the individual case’ (see Chapter 10).

In certain rare cases, the execution of an EIO was refused for reasons of fact in connection with requirements regarding the content of the EIO (Article 5 of the Directive) – for instance, the absence of translations, defective translations or missing documents – provided that the deficiencies in the EIO had not been remedied despite a request to this effect. In a further example, a request for a search was rejected by a German authority because the facts of the case as detailed did not give rise to an adequate level of suspicion, and hence there was no basis for requesting the court order required in the Federal Republic of Germany. At the same time as rejecting the EIO, the German executing authority informed the issuing authority that a new EIO with the corresponding grounds giving rise to an adequate level of suspicion could be submitted at any time.

12.3. Double criminality

The majority of practitioners reported no severe problems with this ground for non-execution. However, in some isolated cases, this ground had led to a refusal. For instance, German authorities reported the non-execution of an EIO in a case where the existence of double criminality was questionable because criminality on the grounds of a breach of the maintenance obligation under § 170 of the German Criminal Code (*Strafgesetzbuch – Breach of maintenance obligation*) would not have been deemed relevant under German law owing to the suspect's inability to pay. In this case, the consultations before the refusal proved to be unsuccessful.

German authorities noted that the Member States have vastly differing interpretations regarding whether an offence is covered by the list set out in Annex D. The expert team noted, though, that Article 11(1)(g) of the Directive is clear on this: the issuing authority's assessment is decisive ('as indicated by the issuing authority in the EIO'). Some isolated cases were nevertheless reported where the executing State had refused to execute an outgoing request owing to the absence of double criminality, despite the fact that the issuing authority had indicated in the EIO that it related to an offence appearing in the list in Annex D. In the expert team's view, this is not correct, and executing states should comply with Article 11(1)(g) and not apply the double criminality test in relation to offences that are indicated by the issuing authority as being on the Annex D list.

In another case, the German executing authority refused the telephone surveillance on its territory after the notification had been transmitted to the German executing authority via Annex C by the issuing authority in accordance with Article 31(1)(2) of the Directive. Although, according to the issuing authority, the telephone surveillance was prompted by an offence appearing on the Annex D list of crimes (illicit drug trafficking), German law dictated that this was not an offence under the Narcotic Drugs Act (*Betäubungsmittelgesetz*), but merely a misdemeanour under the Medicinal Products Act (*Arzneimittelgesetz*), and thus not an offence that would justify telecommunications surveillance pursuant to § 100a StPO. Following consultations, the German executing authority accordingly refused to continue the telephone surveillance in accordance with §§ 91b(1)1. and 91c(2)(c)(dd) IRG.

While the German authority mentioned this example in the context of double criminality, the expert team wondered whether – in view of the specific investigative measure concerned (interception of telecommunications) – the applicable ground for non-execution would be that of Article 31(3) of the Directive, rather than Article 11(1)(g).

The revenue authorities reported that, if an EIO is issued in relation to tax evasion under § 370 AO, a dispute sometimes arises between the issuing and executing authorities as to whether tax evasion is covered by the list of offences in Annex D to the Directive. The Member States differ in their approaches to this matter, and some also impose specific conditions and thresholds on the tax evasion offence. In isolated cases, requests where ‘swindling’ or ‘fraud’ is categorised as “tax evasion” in the executing State the EIO has to be amended in the issuing Member State on request of the executing Member State from “tax evasion” into “swindling” or “fraud” with the aim to be able to execute the EIO now falling under Annex D. The expert team again questions whether this is in line with the logic of Article 11(1)(g) of the Directive as it does not seem that it should be for the issuing authority to ‘adjust’ to the executing Member State State’s categorisation. The categorization as a crime according to the law of the executing State follows the description of facts and not the legal category of the issuing State.

The majority of practitioners reported no cases where the double criminality test was invoked in relation to the investigative measures listed in Article 10(2) of the Directive. It was noted, however, that it is often the case that no information about predicate offences is provided in connection with incoming EIOs relating to suspected money laundering, particularly in the case of Member States where the burden of proof is reversed with regard to the illegal origin of assets. Therefore, any investigative measures under Article 10(2) of the Directive that were requested in this context raised questions over the presence of double criminality. In the expert team's view, Article 11(2) of the Directive clearly states that the double criminality rule should not apply in relation to investigative measures mentioned under Article 10(2) of the Directive.

12.4. Basic fundamental principles of the executing State's law and fundamental rights

The majority of practitioners reported no cases where the measure requested was refused on the grounds of its being contrary to the fundamental principles of the law of the executing State. In several cases, however, the German authorities, acting as executing authorities, received EIOs requesting a sample of a suspect's handwriting and refused the execution of these EIOs, since under German law a suspect cannot be obliged to participate in his or her own prosecution.

During the evaluation visit, the expert team and the German authorities also discussed a few other cases with issues emanating from fundamental principles of the German legal order in the context of compliance with formalities (see *supra* Chapter 9). The German authorities also confirmed to the expert team that they were not aware of any cases which had led to a refusal based on Article 11(1)(f) of the Directive (grounds relating to EU fundamental rights).

In another case, the issuing State requested that a particular individual be heard as a witness even though he or she already qualified as a suspect under German law. However, the status of suspect is assigned at different stages of the criminal proceedings in the different Member States, so there is no uniformity as to when a person qualifies as a suspect. In the aforementioned case, the issuing authorities were consulted and agreed to the individual being heard as a suspect.

13. TIME LIMITS

German issuing authorities reported that compliance with time limits varies between the Member States. Nevertheless, it can be concluded that non-compliance with time limits is very common. As a general rule, the reasons for a delay or reports of a delay are provided only upon request, if at all (see *Recommendation No 20*). If delays are reported, they are typically attributed to an excessive workload on the part of the executing authority.

In isolated cases, the involvement of the EJN is requested in connection with delays, which can, in many cases, facilitate the execution of the EIO.

Urgency is assessed on the basis of general national criteria. Examples of matters that are assumed to be urgent include cases in which the accused is detained, covert measures, impending loss of evidence, the need for coordinated search or surveillance measures, imminent time limits for the main hearing and the impending expiry of the statute of limitations. No fundamental problems have been encountered in this regard, according to reports from practitioners. In some cases, the EJN and/or Eurojust is also involved in matters of particular urgency.

According to the German executing authorities, time limits can typically be complied with. In some cases, mutual assistance matters are routinely treated as a priority in order to guarantee that they are handled promptly by both the PPOs and the police. In cases where non-compliance with the time limit is to be expected, the relevant authority is typically informed in line with Article 12(5) of the Directive. In some cases, however, the authority is informed only if the delay will foreseeably be a prolonged one. Reasons for delays include, in particular, transfers of proceedings to other authorities within the Federal Republic of Germany, delays on the part of the police, a lack of human resources and the complexity of investigations.

The urgency of an EIO is routinely assessed on the basis of the information provided in section B; alternatively, details provided in the EIO itself may indicate that the matter is particularly urgent for the aforementioned reasons.

In some cases, an issuing authority may request the handling of an EIO within a time limit that is so short that it is impossible or extremely challenging for the executing authority to comply with it for legal, human resources related or space-related reasons, or technical constraints, for example in the case of (video) hearings or psychological assessments. In some cases, it is reportedly impossible to comply with the extremely short time limits requested by the issuing State for the notice of summons prescribed by law, owing to the fact that the hearing is to be held so soon.

14. LEGAL REMEDIES

14.1. The Federal Republic of Germany as issuing State

Pursuant to Article 14(1) of the Directive Member States must ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. Legal remedies against the investigative measures indicated in the EIO can, in particular, be found in the StPO.

More specifically, an application for a court decision pursuant to § 98(2), second sentence, StPO and a complaint pursuant to § 304 StPO are potential options in this connection. § 98(2), second sentence, StPO, according to which the person affected by a seizure may at any time apply for a court decision, plays a decisive role in this regard. The provision is applicable *mutatis mutandis* to other investigative measures, meaning that the person affected is granted an effective legal remedy.

In addition, a complaint pursuant to § 304 StPO is admissible against all relevant orders handed down by courts of first instance. In particular, therefore, the person affected is granted legal remedies against the orders handed down by the investigating judge concerning the execution of an investigative measure.

If an EIO provides for an investigative measure that does not require an executed act, in the proper meaning of the word, against which the affected person could take action in accordance with the provisions of the StPO (for example, a request for information from an official register), an application for a court decision pursuant to § 77(1) IRG in conjunction with §§ 23 et seq. EGGVG is possible. According to these provisions, the affected person may apply for a court decision to review the legality of the orders, directives or other measures adopted by the judicial authorities to regulate individual matters, including in the area of criminal justice.

Affected persons who seek a legal remedy can also, as part of the legal remedy, lodge objections against the issuing of the EIO, which must then be reviewed by the court with jurisdiction for the legal remedy. This is in line with the Federal Constitutional Court's '*integration solution*'. In effect the court has to examine the admissibility of the issuing of the EIO even though there is no provision for a specific legal remedy for the EIO. It is intended to establish such a specific provision in the cause of the reform of the IRG (see Chapter 14.4.).

The defence lawyer stated that the legal framework of the legal remedies is in general acceptable and will be improved by the upcoming reform of the IRG (see Chapter 14.4).

14.2. The Federal Republic of Germany as executing State

If the Federal Republic of Germany acts as the executing State, the German executing authorities must initially determine whether a judicial order is necessary for the execution of an EIO. The person affected may lodge a complaint against this judicial order pursuant to § 304 StPO. In cases where a judicial order is not required, the affected person may apply for a judicial decision (see above) pursuant to § 98(2), second sentence, StPO, on a *mutatis mutandis* basis where applicable, or in accordance with §§ 23 et seq. EGGVG. Pursuant to Article 14(2) of the Directive the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State. In accordance with this provision the fundamental rights of the person affected are also reviewed by the appellate court in Germany as an executing State.

The *integration solution*[15] (see above Chapter 14.1) also applies in the context of a legal remedy that has been sought in cases where the Federal Republic of Germany acts as the executing State. It follows from this that a person who makes use of the aforementioned legal remedies can also lodge objections against the recognition or execution of the issuing State's EIO in this connection. As part of the integration solution, these objections are reviewed by the court competent for the legal remedy. If the court takes the view that the requirements for the recognition or execution of the EIO are not met, it cannot reject the recognition or execution but must instead refer the matter to a higher regional court for a decision.

German law furthermore provides for a specific legal remedy against the surrender of objects, in § 61(1), second sentence, IRG, wherein individuals can apply to a higher regional court on the grounds that their rights would be infringed by the surrender of objects under § 66 IRG or the recognition or execution of an EIO the aim of which is the surrender of objects.

14.3. Transposition of Article 14 of the Directive

Pursuant to Article 14(7) of the Directive, the issuing State must take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Member States must ensure, in this connection, that the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. Based on the constitutional imperative for a fair trial[16], past decisions by courts in the Federal Republic of Germany have identified typical cases involving grounds that might result in evidence being unusable.

[15] Federal Constitutional Court, order of 24 June 1997, 2 BvR 1581/95.
[16] Cf. for example §§130, 1, 25 et seq. of the Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE).

These take into account the provisions of Article 14(7) of the Directive. In the area of mutual assistance in criminal law matters, the benchmark of procedural fairness dictates that, when collecting evidence on a cross-border basis, what matters is whether reliable evidence can be collected in fair proceedings in keeping with the domestic legal order[17]. If evidence is usable on this basis, the principle of the free judicial evaluation of evidence under § 261 StPO and the principle of *in dubio pro reo* also ensure that the requirements of Article 14(7) of the Directive are met.

14.4. The future reform of the IRG

Based on the current plans for a reform of the IRG, which started in 2024, it is envisaged that the aforementioned legal protection will be expanded further, in particular by introducing the integration solution in the IRG.

In the new version of the IRG, the affected person is to be given the right to bring a direct action against the issuing of the EIO before the court, which can then reject the issuing of the EIO as inadmissible. It is envisaged that the scope of review will encompass the substantive requirements of Article 6(1) of the Directive. The aim of this development is the clarification and simplification of the rights of the person concerned. In addition, the jurisprudence of the CJEU in Case C-852/19 (*Gavanozov II*) will even better be taken into account.

In cases where Germany acts as the executing State, the legal protection of the person affected is to be reinforced in so far as the IRG would provide for an opportunity to apply for a judicial decision regarding the admissibility of the recognition and execution of the EIO.

For both situations, the draft IRG refers to the procedural rules regarding the legal remedies against the measure entailed in the EEA. Furthermore, it provides an additional provision which would apply in the exceptional event that the StPO or other acts did not provide any legal remedy against the measure, or when in doubt.

[17] §§58, 32, 41 of the Decisions of the Federal Court of Justice (*Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt) with further references.

15. OBLIGATION TO INFORM

German issuing authorities reported that the Annex B form is not transmitted in a significant number of cases, which should be remedied by all executing authorities (see *Recommendation No 21*). In the absence of prompt confirmation that the EIO has been executed, the issuing authorities typically request a progress update from the executing authority after three to six months. If no response is received, the authorities submit a further request after a certain period of time, involving Eurojust or the EJN as well where applicable. In a number of cases, it proved difficult to make contact with the executing authority for this purpose, since no contact details had been provided.

The German authorities stated that, when acting as executing authorities, they almost always transmit the Annex B form to the issuing authority immediately after receiving an EIO. The only time they would not send the form is when there would be little point in doing so because the request has been executed promptly (for example, when extracts from the record are transmitted). Likewise, in cases where the EIO has been forwarded to the executing authority with territorial jurisdiction by another German PPO and the authority to which the EIO was originally issued has already sent the Annex B form, the executing authority does not also send it.

German practitioners proposed some amendments to Annex B for consideration. It was suggested that inclusion of an email address should be mandatory, and that it would be helpful if contact details were highlighted. The following headings under point D were also proposed to make the process of completing the form more straightforward:

- 'Execution of the EIO is likely to be completed by …';
- 'Execution of the EIO will not be possible within the time frame you have requested, because …';

- ‘In so far as the EIO also contains a request for the collection of account statements from … bank/the hearing of the suspect … /the hearing of the witness …, the EIO has been transferred to the … PPO for jurisdiction-related reasons; the reference number assigned by the latter is not yet known.’;
- ‘Please clarify the facts of the case as follows, since otherwise the EIO cannot be executed: […]’;
- ‘Please clarify the requested investigative measure as follows, since otherwise a decision by an investigating judge, which is required under German law, cannot be applied for: […]’;
- ‘The proceedings have been merged with those under reference number ….’; and
- ‘Please transmit the original version of the EIO, which has not yet been received.’

The expert team would also consider it helpful if the EU legislator looked into the possibility of amending Annex B (see *Recommendation No 22*).

16. COSTS

Cases where costs are shared are of only secondary importance in practice. The German authorities accordingly encounter problems only rarely, when acting as either issuing or executing authorities.

A number of German executing authorities reported that if costs are likely to exceed EUR 1 500, they request from the issuing authority a declaration confirming the assumption of costs in advance. The revenue authorities reported that in certain isolated cases, executing States issue invoices for expenses incurred in connection with the execution of EIOs without prior consultation, or predicate the execution of EIOs on a corresponding assumption of costs (in particular for interpreting services).

In one case, the issuing authority requested a medical expert's opinion on a suspect's current state of health in connection with an offence committed in 2010. The German executing authority requested the payment of an advance on costs of EUR 10 000, since the issuing authorities had refused to recognise existing documentation of the suspect's state of health that established the level of nursing care needed and that was offered as an alternative. Consultations with the issuing authority have proved inconclusive to date.

The *Land* of Hamburg suggested that the principle whereby the executing authority bears the costs should be qualified. There are certain cases where it is not appropriate to impose on the executing authority the obligation to bear the costs, for example if the issuing State is not willing to provide an interpreter when hearings via videoconference are conducted.

Significant costs that are not always foreseeable, and hence cannot always be settled in advance, can also be incurred in connection with controlled deliveries. For example, during controlled deliveries by sea, the narcotics container involved needs to be unloaded temporarily from the ship in order to prepare it accordingly. The costs involved can easily run into five digits.

On the German side, it was suggested that the costs involved in providing a mandatory defence counsel during hearings should also be clearly regulated, since there has been a steady increase in cases requiring this. The evaluation team's view is that given the significant differences in costs across Member States, it is preferable to consult widely with the issuing State on all cases where a mandatory defence counsel is necessary.

When deciding whether costs are exceptionally high, practitioners initially use as a basis the criteria set out in recital 23 of the Directive. According to this recital, complex experts' opinions, extensive police operations or surveillance activities over a long period of time are examples of activities that may be associated with exceptionally high costs. In each individual case, costs are furthermore assessed with reference to the significance of the matter and the customary costs for a preliminary investigation within Germany. The nature and amount of the costs are typically accepted if they are comparable to those that would also have arisen under German law or in German proceedings. German practitioners routinely assume that the costs associated with experts' opinions will be exceptionally high.

In cases where the German executing authority assumes that the costs will be exceptionally high, it informs the issuing authority and asks for assurance that the costs will be borne by the latter, or engages in discussions with the issuing authority as to whether a more cost-effective alternative should be implemented.

If costs are exceptionally high, execution of the EIO is often delayed until a declaration is received to the effect that the costs will be borne by the issuing authority. Nevertheless, cases of significant delays or EIOs not being executed due to exceptionally high costs are very rare in practice.

In one case, the German executing authority refused an EIO requesting that two expert opinions be obtained simultaneously on the same matter, without there being any apparent objective need to do so. The executing authority deemed the costs of one expert opinion alone to be appropriate and necessary, and informed the issuing authority accordingly.

In another case, the issuing authority requested that extensive amounts of information relating to tax proceedings be copied and forwarded. Given that the documents involved were available only on paper and were so numerous that they filled several boxes, the German executing authority suggested that the issuing authorities should either send their own staff to scan or copy the documents or confirm in advance that the costs would be covered. A response has yet to be received.

The revenue authorities reported a similar case in which it would have taken a total of five employees around six weeks to complete all the copying requested in the incoming EIO. The German revenue authority therefore issued a refusal to the issuing authority and proposed as an alternative that the latter should inspect the evidence in situ and produce any copies as required. The issuing authority agreed to this proposal.

17. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS

The German authorities did not report any specific difficulties in this connection. Eurojust frequently provides support in cases where an increased level of coordination effort appears likely. This support is consistently viewed in a very positive light and perceived as helpful. There have been only isolated cases where time-related difficulties have arisen in relation to the coordination and timely rendering of the necessary judicial decisions or the coordination of searches, in spite of support from Eurojust.

The revenue authorities reported difficulties in connection with long postal times or extensive translation work resulting in a lack of preparation time or an absence of timely coordination. The involvement of the EJN or Eurojust or direct contact with the authorities involved allowed most of these difficulties to be resolved, however.

18. SPECIFIC INVESTIGATIVE MEASURES

18.1. Temporary transfer

The German authorities did not report any practical experience of temporary transfers but reported that there have been some isolated cases. While the option of carrying out a temporary transfer is thus not much used in practice, the German authorities stressed the importance of this measure in cases where a key witness is in detention in another Member state and his or her presence is required in Germany.

There is no special procedure to determine in advance whether the person in question will consent to his or her transfer. This may be done via police channels or known legal counsels.

18.2. Hearing by videoconference

18.2.1. General remarks

The German authorities reported that they had not encountered any major problems in relation to the status of the person to be heard. In the event of ambiguity as to whether an individual is to be heard as a suspect or as a witness, the relevant clarifications were usually provided by the issuing authority in response to a request from the German authority.

German law allows for the possibility of audiovisual hearings of accused persons. When Germany is acting as executing State, a representative of the competent German authority (in general the PPO, but a judge would also be possible) is in accordance with § 91h(3) 2nd sentence IRG always present during such hearings, while Germany as issuing State requires – from the German side – the presence of the PPO or a judge in the executing State depending on the underlying German provision of the measure.

Pursuant to § 91c(1) IRG, the person concerned must always give their prior consent to a hearing by videoconference. Execution of the EIO is thus refused if consent has not been granted. In such cases, the executing authority is typically contacted and alternative measures are discussed, for example a standard hearing.

Back in 2000, in the context of Article 10(9) of the 2000 MLA Convention, the Federal Republic of Germany had no fundamental objections to complying with a request to hear an accused person by videoconference in so far as it was also procedurally possible in the Member State to conduct a main trial against a defendant participating by videoconference, and in so far as consent was granted by the individual in question. The Federal Republic of Germany correspondingly issued a declaration in relation to Article 10(9) of the 2000 MLA Convention stating that the possibility of hearing an accused person via videoconference was not excluded *a priori*, but would only be considered on a voluntary basis.

Germany reported no fundamental problems in relation to the location of video hearings, from the perspective of either issuing authority or executing authority. The relevant technical equipment is typically available to both the courts and the PPOs or police stations. When hearings by videoconference are ordered, it is sometimes necessary to clarify which of the known technical standards the issuing State wishes to use when joining the conference. Arrangements are made in individual cases where the relevant technology is available only to the courts, although this can lead to delays and can mean that it is sometimes impossible to hold hearings on the specified date if they have been requested at short notice.

The *Land* of Berlin reported several cases involving Scandinavian Member States where requests were received to conduct videoconferences during which the parties to the proceedings would be in their own homes. Following consultations with the issuing authorities, however, it subsequently proved possible to use the video hearing room at the 'standby court'.

Bavaria reported a case involving a hearing by videoconference where it was impossible to add the issuing authority to the call for technical reasons relating to the data protection requirements of the software. This problem was resolved by broadcasting the hearing on Microsoft Teams in parallel.

18.2.2. Hearing of the accused during the main trial

Current practice regarding the participation of an accused person in the main trial via video link is patchy. The German authorities reported several cases where a request to conduct a hearing by videoconference was, in reality, a request to allow the accused to attend a full main trial by videoconference. These requests were mostly refused by German authorities. During the on-site visit, the German authorities clarified that in their view, the Directive is not applicable to hearings of the accused via videoconference throughout the entire main trial; especially as the German language version of Article 24 of the Directive translated the English word "hearing" with the German word "Vernehmung", which is to be understood as "questioning".

The hearing of the accused via video link must hence serve the questioning as a mean of gathering evidence. During the evaluation, the Federal Republic of Germany was closely observing developments in this area in relation to the referral for a preliminary ruling before the CJEU in Joined Cases C-255/23 and C-285/23. On 6 June 2024, however, the CJEU concluded in these cases that there was no need to rule on the requests for a preliminary ruling as the referring court had not suspended the national proceedings while awaiting the CJEU's decision. A further case was brought to CJEU (C-325/24). However, in that case the hearing via videoconference serve both – the gathering of evidence and the participation at the main trial.

The refusal of hearings of the accused via videoconference throughout the entire main trial is a commonly shared view among Member States: while the Directive applies to all stages of criminal proceedings, the scope of the EIO is limited to the gathering of evidence, which is not the purpose of hearings throughout the main trial.

During the on-site visit, the German authorities and the representative of the defence lawyers criticised the practice of hearing accused persons via videoconference during the main trial, as it risks negatively affecting their defence and other fundamental rights, and they emphasised the importance of in-person attendance.

The academia representative considered that the flexibility offered by being able to conduct videoconferences during the main trial is welcome in specific cases, e.g. where in-person attendance would be time-consuming and a major financial burden for the accused. The German authorities conceded that in some specific cases, where the accused does not live in Germany, is of a certain age or has limited financial means, or where there are many suspects, hearings via videoconference are conceivable.

On the whole, considering that, in some Member States, hearings of the accused via videoconference during the main trial may serve as evidence, that sometimes the threshold for issuing an EAW is not met, and that sometimes the accused expressly consents to and desires virtual participation, the evaluation team considers that a flexible and pragmatic case-by-case approach is desirable.

Given the differing views and practices among the Member States, the evaluation team considers that the question of the participation of accused persons in main trial proceedings via videoconference from another Member State should be revisited at EU level (see *Recommendation No 24*).

18.3. Hearing by telephone conference

German practitioners reported that the issuing authorities' approach to phone conferences when assigning the status of witness sometimes differed to that of the German executing authorities. This is presumably because the national law of a number of Member States requires a formality to be completed before an individual is assigned the status of suspect. If the German authorities are of the opinion that an individual to be heard should not (or should no longer) be heard as a witness, but should instead be heard as a suspect, a suspect hearing takes place once the individual has been instructed in accordance with the StPO. In practice, EIOs requesting that a witness or expert be heard via telephone conference are rare.

18.4. Information on bank and other financial accounts and banking and other financial operations

In response to the question of whether they had encountered particular issues with regard to the gathering of information on bank and other financial accounts (Article 26 of the Directive) or on banking and other financial operations (Article 27 of the Directive), the German authorities expressed regret that some Member States take an excessive amount of time (up to a year or more) to execute EIOs relating to a simple request for financial and banking information.

The German revenue authorities also emphasised that some Member States require specific thresholds for the communication of such information, and if those thresholds are not met, the information requested is withheld, sometimes leaving the German authorities no other avenues to shed light on certain criminal offences. The revenue authorities also mentioned that in their experience, there had been many cases where banks and other financial institutions had informed the suspect about the investigative measure requested in the EIO, even though they are not authorised to do so. This is why the German revenue authorities, in practice, try to gather as much information as possible before issuing an EIO for information on bank accounts.

Moreover, it was noted that real-time monitoring of bank accounts is not admissible in Germany but constitutes a useful investigative measure that practitioners would welcome.

During the on-site visit, the German practitioners also explained that some of the German issuing authorities tend to request a search of bank premises in their EIOs, when they only need specific documents and financial information. Usually, the competent executing authority then issues a production order for the required documents, which is accepted and deemed sufficient for the German issuing authorities. The German authorities explained that this was the established practice before the entry into force of the Directive, but has remained prevalent among some practitioners who consider it necessary to request a search of bank premises in order to avoid issues regarding the internal competences of the executing authorities. They have confirmed, however, that in practice they do not actually require bank premises to be searched.

The evaluation team invites the German issuing authorities to refrain from issuing EIOs for searches of bank premises when standard production orders are sufficient to obtain the financial information needed (see *Recommendation No°8*).

18.5. Covert investigations

Investigative measures in the context of criminal proceedings can be categorised as overt investigative measures – for example, searches and interrogations – or covert investigative measures, depending on whether the measure is carried out with or without the knowledge of the individual in question.

Covert investigative measures under German law include, in particular:

- telecommunications surveillance (§ 100a StPO);
- online searches (§ 100b StPO);
- acoustic surveillance of private premises (§ 100c StPO);
- acoustic surveillance outside of private premises (§ 100f StPO);
- other measures outside of private premises (§ 100h StPO);
- technical investigation measures in respect of mobile devices (§ 100i StPO);
- deployment of covert investigators (§ 110a StPO);
- longer-term observation (§ 163f StPO).

Some measures are designed to be open so that, in principle, those affected must be notified immediately. However, this notification can be deferred as long as its purpose is otherwise thwarted. These measures include, in particular:

- traffic data capture (§ 100g StPO);
- subscriber data requests (§ 100j StPO);

Covert investigators and 'police officers investigating in a non-overt manner' (*nicht offen ermittelnde Polizeibeamte*) act under a covert or false identity.

Covert investigators are officers within the police who carry out investigations using a long-term altered identity (§ 110a(2), first sentence, StPO). Police officers investigating in a non-overt manner are also officers carrying out covert investigations; in contrast to covert investigators, however, they are used only for short-term deployments (typically as undercover buyers of narcotics), and their deployment can therefore be based on the general clauses on investigations (§§ 161(1) and 163 (1) StPO).

Pursuant to Article 29(1) of the Directive, an EIO may be issued for the purpose of asking the executing state to assist the issuing state in investigating crimes by officers acting under a covert or false identity.

German legislation does not contain any requirements in relation to the manner in which the deployment of covert investigators should be handled. Pursuant to Article 29(4), third sentence, of the Directive, the duration of the covert investigation, the detailed conditions and the legal status of the officers concerned must always be agreed between the Member States involved with due regard for their national laws and procedures. Thus, the issuing State may not impose unilateral requirements.

The German competent authorities are therefore in a position to ensure that the legal status of foreign covert investigators is determined solely on the basis of German law during investigative activities within the territory of the Federal Republic of Germany. Foreign covert investigators do not have any powers conferred upon them by national law. The requirements and constraints to which they are subject during their activities are the same as those to which a 'police informant' (*Vertrauensperson*) would be subject to.

However, the status, missions and powers of police informants are not specifically regulated under German law but covered by the general investigation clause in § 163(1) second sentence StPO. The Federal Government has recently submitted a draft bill to regulate the prerequisites for missions of undercover investigators in more detail. The draft bill is now before the Bundestag for consultation.

The investigative measures can also be carried out exclusively by German officers. The deployment of an officer from another Member State is therefore not mandatory in the context of Article 29 of the Directive. If it is agreed that if foreign officers will be deployed, there is a special requirement for authorisation under German law (No 138 RiVASt).

In one case, the German executing authorities refused the deployment of a foreign covert investigator on the grounds that § 91c(2)2.(c)(cc) IRG in conjunction with § 110a(2) StPO only provided for the deployment of a German officer as a covert investigator. The authorities subsequently agreed to the deployment of the foreign police officer as a police informant who would work alongside the German police.

German practitioners also reported encountering some cases where differences in national law complicated the execution of an EIO.

In one case, for example, the executing authorities asked Germany for a more detailed explanation of the German term '*Bande'* (gang), since the law of the executing State applied more stringent requirements to the term '*kriminelle Vereinigung'* (criminal association) than German law did to the term '*Bande*'.

In another case involving the authorised deployment of a covert investigator, conversations with the target were recorded without court authorisation. It was therefore agreed with the issuing authority that the recording should not be used as evidence.

Baden-Württemberg reported a case in which the German issuing authorities requested authorisation to deploy a covert investigator to carry out covert activities on the territories of other Member States. The request related to investigations into fraudulent foreign exchange transactions. The executing authorities of one Member State refused the deployment of the covert investigators on the grounds that their activities were not permitted, since such activities were generally regarded as 'stings' that infringed the right to a fair trial. In the same case, the authorities of another Member State also refused the request on the grounds that the deployment of covert investigators was only permitted under their domestic law in cases involving more serious offences than swindling.

18.6. Interception of telecommunications

18.6.1. The legal framework regarding the interception of telecommunications at EU level

Articles 30 and 31 of the Directive do not define the term 'interception of telecommunications', and as a result, there are diverging views among Member States on which investigative measures are covered by those articles. The first sentence of recital 30 of the Directive states that possibilities to cooperate on the interception of telecommunications should not be limited to the content of telecommunications. Articles 30 and 31 of the Directive therefore cover not only the content of telecommunications, but also traffic and location data, except for historic traffic and location data, which fall under the general EIO regime.

When asked during the on-site visit about the weaknesses of the EIO regime with regard to the interception of telecommunications and special investigative measures, the German authorities took the view that cross-border GPS tracking and bugging of vehicles was an issue that poses legal challenges in the European Union and should be adequately addressed. The same goes for the use of electronic ankle bracelets, as well as a common understanding of which investigative measures fall under the definition of 'interception of telecommunications' within the different Member States.

The expert team notes in this regard that one of the major advantages of Article 31 of the Directive is the possibility of an *ex post* notification system and the simplified form (Annex C). It is crucial that both this *ex post* notification system and the form apply not only to the interception of telecommunications *senso strictu*, but also to other related investigative measures such as bugging of a car, GPS tracking and other forms of surveillance. The current EU legal framework is unsatisfactory and unclear in this regard. The EU legislator should refine the scope of measures falling within Articles 28 (see also Chapter 5) and 30 of the Directive and create for the measures falling under Article 28 the possibility of *ex post* notification and a simplified form, in line with Article 31 of the Directive.

The following subchapters will introduce a series of practical issues in connection with the interception of telecommunications and related investigative measures which have given rise to a recommendation to the EU legislator to adequately address them (see *Recommendation No 22*).

18.6.2. The legal framework regarding the interception of telecommunications under German law

The German provisions transposing Articles 30 and 31 of the Directive cover not only wiretapping (§ 100a StPO) but also, and in particular, source telecommunications surveillance, during which encrypted and ongoing communications can be accessed through the covert installation of spyware (§ 100a(1), second and third sentences, StPO), online searches allowing access to data (including stored data, § 100b StPO) and the capture of traffic data (§ 100g StPO).

During the on-site visit, differing views were expressed on whether online searches allowing access to stored data are indeed covered by Articles 30 and 31 of the Directive. The CJEU confirmed in Case C-670/22 *M.N. (EncroChat)* that the use of source telecommunications surveillance through spyware falls within the notion of ‘interception of telecommunications’ and thus within the scope of Articles 30 and 31 of the Directive.

In contrast, acoustic surveillance of private premises, for example through the use of bugging devices (§ 100c StPO), and acoustic surveillance outside private premises (§ 100f StPO) are not regarded as telecommunications surveillance, because they are direct interception measures the aim of which is not the surveillance of telecommunications[18], and therefore they do not fall under Articles 30 and 31 of the Directive.

The use of 'stingrays' for determining a location (§ 100i StPO) or for GPS tracking (§ 100h StPO) is an observation measure that does not fall within the scope of Articles 30 and 31 of the Directive, but instead falls within the scope of Article 28 of the Directive.

Pursuant to § 91c(2)2.(c)(dd) IRG, mutual assistance in cases involving requests for the interception of telecommunications may only be rendered where the conditions under which German authorities and courts are permitted to render each other mutual assistance in accordance with § 59(3) IRG are met. These conditions are not clearly regulated by the IRG, but it was explained during the on-site visit that once the conditions of the StPO (§§ 100a et seq.) for the different investigative measures are met, MLA for the exchange of the intercepted data is admissible at both national and international level.

The specific criteria used to assess whether telecommunications surveillance would be authorised in a similar domestic case include the facts of the case as detailed, with reference to the requirements laid down under national law in §§ 100a et seq. StPO (telecommunications surveillance), 100e StPO (procedure for measures under §§ 100a to 100c) and 101 StPO (procedural rules for undercover measures) for the requested investigative measure.

Aside from proportionality, factors that are checked in this connection include whether the facts of the case have been presented coherently and whether the information that has been transmitted allows a verifiable conclusion to be drawn regarding the presence of an offence appearing on the list of crimes strictly enumerated under § 100a(2) StPO. In so far as is necessary, the facts of the case as detailed are reinterpreted accordingly. If the facts of the case as detailed are manifestly contradictory, incomplete or incorrect, consultations are held with the issuing State (cf. No 18 RiVASt).

[18] cf. Bundestag printed matter 18/9757, p. 64; MV, NI.

As issuing authority, the German authorities have encountered cases where the executing authority refused to execute an EIO because the requested measure would not be available in a similar domestic case.

In one case, the executing authority of another Member State refused to install a GPS tracker on the vehicle of an escaped convict's boyfriend in order to determine the whereabouts of the escaped person. In another case, the executing authority refused to carry out interior surveillance of a vehicle. In another case, the execution of an EIO was refused by the executing authority on the grounds that the domestic law did not allow the use of wiretapping that might be to a third party's detriment, even if said third party was alleged to have received or transmitted messages intended for or originating from the accused, or if the suspect used said third party's telephone line ('*Nachrichtenmittler*'). The executing authority did not consult the German issuing authority before refusing the EIO.

Transmission of intercepted telecommunications is possible from the offices of the police authorities, but not from the PPOs or the courts, due to a lack of technical mean. The coordination between the police authorities and the PPOs required in this connection results in a brief delay in transmission. In accordance with § 100d(2) StPO findings in the core area of the private conduct of life which are made on the basis of a measure under § 100a to 100c StPO may not be used.

In contrast, the customs and revenue authorities are able to transmit intercepted telecommunications immediately to the issuing State.

18.6.3. The application of Article 31 and Annex C

The German authorities explained that the extent to which the Annex C form is used to notify a Member State where the subject of the interception is located and from which no technical assistance is necessary varies in practice. In some cases, the form is used regularly, and in some cases not at all.

Since vehicle bugging and GPS tracking qualify, according to the German authorities, as direct interception measures rather than as interception of telecommunications within the meaning of Articles 30 and 31 of the Directive, Annex C notifications are not appropriate.

During the on-site visit, the German authorities explained that when a bugged car leaves German territory, they issue a standard EIO request, without using Annex C, to the Member State concerned as soon as they become aware of either the planned or the actual border crossing. They conceded that an EIO might not be the proper instrument for the latter, but the evaluation team approves of this pragmatic approach of informing the Member State concerned of the border crossing regardless, even though it is uncertain whether or not the information gathered on the territory of the notified Member State may be used as evidence (see *Best practice No°7*).

Many Member States are affected by the legal uncertainty posed by car bugging in cross-border cases, and most cannot grant *ex post* approval in these cases. This can have major consequences in cases in which the evidence obtained through the bugging of a car is the main evidence in criminal proceedings against a person suspected of a very serious offence, but is considered 'inadmissible' due to the existing (EU) legal framework and particularly the lack of *ex post* notification. Consequently, as indicated above, the expert team believes it is important that the EU legislator address this issue (see Chapter 18.6.1).

In reference to Annex C, the German authorities mentioned that the EU legislator should consider extending the timeframe (96 hours) within which the notified Member State must notify the issuing State that the interception may not be carried out or of the conditions for using the evidence gathered (Articles 31(3) of the Directive) in the course of any revision of the Directive (see *Recommendation No°22*).

In the written replies to the questionnaire, the *Land* of Hamburg also identified as a problem the fact that it is not always possible to establish with certainty whether and when the 96-hour timeframe begins in the event of further enquiries. Therefore, for reasons of legal certainty – and as already provided for by the 2000 MLA Convention – rules should be adopted allowing an extension of the deadline. At the very least, provision should be made for Saturdays, Sundays and public holidays (in the executing State) not to be counted when calculating when the deadline will be. Although standby services are available on these days, the employees in question are not regularly assigned to tasks relating to mutual assistance.

The Land of Brandenburg proposed that the Annex C form could be improved by including technical location. The Land of Saxony furthermore proposed that part IV of section B (concerning the identity of the person concerned) should be amended to improve clarity in cases involving several persons.

19. STATISTICS

Standardised statistics for the Federal Republic of Germany are not collected. A number of *Länder* were able to forward statistics and in some cases estimations, but this data is not fit to draw any conclusions on the application of the Directive in the Federal Republic of Germany.

19.1. Statistics provided by Eurojust[19]

In the context of the evaluation visit, Eurojust provided statistics extracted from its Case Management System in relation to cases dealt with by Eurojust. These statistics included: (i) the total number of EIO-related cases at Eurojust; (ii) the number of bilateral and multilateral cases involving the German Desk at Eurojust; and (iii) the number of EIO-related cases in which the German Desk was either 'requesting' or 'requested'[20].

[19] The sources for these statistics are the Case Management System and an Excel overview from the Data Management Unit with data on coordination meetings, coordination centres and JITs. One case can involve more than one particularity. Liaison prosecutor cases have also been considered in this report. Due to the ongoing nature of certain cases, the figures may change after the reporting date.

[20] 'Requesting' means that a German national authority requested that the German Desk open a case at Eurojust vis-a-vis one or more other Member State; 'requested' means that another Desk at Eurojust opened, at the request of its national authority, a case vis-a-vis the German Desk.

Based on these statistics, it is interesting to note that, in terms of both bilateral and multilateral cases, there has been a steady increase in the number of Eurojust cases in recent years, and thus also in the support provided by Eurojust to German practitioners in relation to coordinating and facilitating the execution of EIOs.

EIO – all Eurojust	2017	2018	2019	2020	2021	2022	2023	Total
Bilateral cases	51	561	986	1 293	1 897	2 286	2 538	**9612**
Multilateral cases	37	231	341	464	419	427	435	**2354**
Total cases	**88**	**792**	**1 327**	**1 757**	**2 316**	**2 713**	**2 973**	**11 966**

EIO – Germany	2017	2018	2019	2020	2021	2022	2023	Total
Bilateral cases	8	137	216	325	586	818	883	**2 973**
Multilateral cases	26	91	142	160	205	207	206	**1 037**
Total cases	**34**	**228**	**358**	**485**	**791**	**1 025**	**1 089**	**4 010**

EIO – Germany	2017	2018	2019	2020	2021	2022	2023	Total
Outgoing cases	3	59	101	190	430	664	657	**2 104**
Incoming cases	31	169	258	295	361	361	432	**1 907**
Total cases	**34**	**228**	**359**	**485**	**791**	**1025**	**1089**	**4 011**

20. TRAINING

Training in the Federal Republic of Germany with regard to the EIO is provided by the *Länder* and by the Federal Government via the German Judicial Academy (*Deutschen Richterakademie* – DRA). The German Judicial Academy offers general training on the topic of '*International cooperation in criminal law matters*' on an annual basis.

As part of the further training provided by the *Land* of Bavaria, the EIO is covered in a three-day training event on international cooperation in criminal matters, which is offered on a regular basis (just under every two years) to a group of around 25 participants each time. The session is aimed, first and foremost, at public prosecutors who are tasked primarily with MLA within their respective departments. An entire day of training (around 7.5 hours) is devoted to the topic of incoming and outgoing mutual assistance requests, with a special focus on EIOs.

A one-day further training event entitled '*Investigations abroad – an introduction to the practical aspects of mutual assistance*', which will also focus on EIOs, is also in the pipeline, for groups of around 60 public prosecutors who are only occasionally tasked with mutual assistance matters within their departments. The event will last around 5 hours, and it, too, is set to be held at two-year intervals in the future.

In addition, the Munich I PPO offers a two-hour in-house further training session entitled '*Mutual assistance*' on an annual basis. The most recent session was held in 2022 and attended by 19 public prosecutors. The Munich GPPO also offered a training course entitled '*Mutual assistance*' in 2016 and 2017, with 44 and 52 attendees respectively.

The most recent in-house training event organised by the Munich I Regional Court was held in 2018.

Baden-Württemberg regularly organises further training events and training sessions on mutual assistance matters during which EIO-related issues are discussed. An annual 'contact meeting' takes place at *Land* level and is attended by the heads of the mutual assistance departments within the PPOs and employees of the Land criminal police office, with attendance figures varying between 35 and 40 each time. Decentralised options for further training are also offered at individual locations, but no statistics are available regarding these.

No relevant training sessions are offered in Berlin, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Saxony or Thuringia. However, attendance at the sessions organised at federal level is possible. Although no specific training sessions are held in Bremen owing to the fact that there are so few heads of mutual assistance departments, practitioners regularly attend the training sessions put on by Lower Saxony or organised at federal level.

Brandenburg and Lower Saxony reported that further training sessions are organised on the topic of international mutual assistance but that there are no sessions devoted specifically to EIOs. Up to half a day is devoted to EIO-related content during the training offered by Lower Saxony. The number of individuals receiving this training is around 60 per calendar year. As the organising *Land*, Lower Saxony is responsible for the content of further training courses held at the German Judicial Academy. Their quality is assessed directly by the German Judicial Academy.

Mutual assistance matters are handled centrally by a special section in Hamburg. The relevant heads of department attend a further training event at the German Judicial Academy as soon as possible; if necessary, additional further training events can be attended, and knowledge is shared within the section by individuals working very closely together. No statistics are available regarding the number of training sessions attended.

Some of the PPOs in Hessen offer relevant further training sessions, but no statistics are available in this connection.

The revenue authorities in certain *Länder* have set up a criminal law training alliance via which training courses can be delivered. Examples of such courses include a joint advanced training course entitled '*Tax investigations/department for criminal and administrative fines*', a basic training course on mutual assistance (which had 139 attendees in 2022), and a seminar entitled '*International mutual assistance*' (with 48 attendees each year). Online portals and manuals are also available as sources of information for employees.

As far as the police authorities are concerned, a platform called *Infopool IPZ* serves as the central information platform for the police forces in the Federal Government and the *Länder* in the area of international police cooperation. *Infopool IPZ* contains general and country-specific information on bilateral and multilateral police cooperation and international mutual assistance in criminal cases, including with regard to EIOs. It is hosted on the restricted police extranet (Extrapol) and is therefore accessible to all police stations.

Although training courses specifically devoted to EIOs do not form part of the programme offered by the BKA, below are two courses in which EIOs are covered (alongside many other topics).

- International cooperation between law enforcement agencies (module on '*Official police communications at international level*'): this training course lasts one week and is likely to be offered five times in 2023. The target audience is 60 to 70 attendees from federal and *Land* police authorities.
- International cooperation between law enforcement agencies (module on 'Mutual assistance'): this training course lasts one week and was scheduled to be held twice in 2023. The target audience is a maximum of 30 employees working in mutual assistance units within the federal and Land police authorities.

Suitable sessions are also advertised by the European Judicial Training Network (EJTN).

21. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

21.1. Recommendations

The team of experts involved in the assessment in the Federal Republic of Germany was able to perform a satisfactory review of the practical implementation and operation of the Directive.

The evaluation team saw fit to make several suggestions for the attention of the German authorities. Furthermore, based on the various examples of good practice, related recommendations are being put forward to the EU, its institutions and the EJTN. The Federal Republic of Germany should conduct an 18-month follow-up to the recommendations below after this report has been agreed by COPEN.

21.1.1. Recommendations to the Federal Republic of Germany

Recommendation No 1: in accordance with recital 14 of the Directive, the Federal Republic of Germany is invited to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to its official language (see Chapter 6.3).

Recommendation No 2: the Federal Republic of Germany should speed up the process of implementing e-EDES (see Chapter 8).

Recommendation No 3: the Federal Republic of Germany is encouraged to use judicial channels and limit the use of police channels when applying the Directive (see Chapter 8).

Recommendation No 4: German executing authorities should differentiate between non-recognition and non-compliance with formalities. Furthermore, German executing authorities should provide sufficient information on the applicable German law, should the requested formalities be considered to be against fundamental principles (see Chapter 9.1).

Recommendation No 5: the Federal Republic of Germany should ensure that the guidance provided to practitioners properly indicates that there is no need to attach the underlying national order when applying the Directive (see Chapter 9.2).

Recommendation No 6: German executing authorities should inform the issuing State about the applicable rules on speciality (see Chapter 10).

Recommendation No 7: for the sake of coordination, German executing authorities should inform the issuing State if domestic proceedings are being opened based on information in an EIO or information gathered during the execution of an EIO (see Chapter 10).

Recommendation No 8: when information is needed from financial institutions, German issuing authorities should refrain from issuing EIOs for searches of premises (see Chapter 18.4).

21.1.2. Recommendations to the other Member States

Recommendation No 9: issuing authorities should respect the scope of the Directive (see Chapter 5).

Recommendation No 10: issuing authorities should use clear language when describing the offence, should not copy the text of the underlying national order and should ensure that any translations are of sufficient quality (see Chapter 6.1).

Recommendation No 11: in accordance with recital 14 of the Directive, Member States are invited to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language (see Chapter 6.3).

Recommendation No 12: issuing authorities should always indicate as much if an EIO or another related request/order is being sent to multiple executing authorities in the same Member State, for the sake of coordination (see Chapter 6.5).

Recommendation No 13: Member States should keep the Judicial Atlas up to date and complete (see Chapter 8).

Recommendation No 14: executing States should apply Article 7(6) of the Directive in practice ('Where the authority in the executing State which receives the EIO has no competence to recognise the EIO or to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.') (see Chapter 8);

Recommendation No 15: Member States should speed up the process of implementing e-EDES (see Chapter 8).

Recommendation No 16: issuing authorities should be mindful of the different criminal procedural rules across the Member States and duly include any specific formalities to be observed in section I (see Chapter 9.1).

Recommendation No 17: executing authorities should not systematically ask for the underlying judicial order (see Chapter 9.2).

Recommendation No 18: executing authorities should inform the issuing State about the applicable rules on speciality (see Chapter 10).

Recommendation No 19: for the sake of coordination, executing authorities should inform the issuing State if domestic proceedings are being opened based on information in an EIO or information gathered during the execution of an EIO (see Chapter 10).

Recommendation No 20: Member States should respect the time limits and inform the issuing State of any delays, providing the reasons for the delay as well (see Chapter 13).

Recommendation No 21: Member States should systematically send Annex B (see Chapter 15).

21.1.3. Recommendations to the European Union and its institutions

Recommendation No 22: The EU legislator is encouraged to amend the Directive:

- by including the possibility for the victim to request an EIO, in accordance with the rights accorded to victims under national law (see Chapter 4.4);
- by providing a possibility for consent to be given to the use of information already handed over between law enforcement authorities, or by way of spontaneous information exchange, as evidence in judicial criminal proceedings (see Chapter 5.1);
- by including CBS in the Directive (see Chapter 5.4);
- by amending Annexes A and B (see Chapters 6.2 and 15);
- by clarifying the applicability of the rule of speciality (see Chapter 10);
- by clarifying whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures such as bugging of cars and GPS tracking, and if not, special provisions could be introduced regulating said measures, including the scenario in which no technical assistance is needed from the other Member State (see Chapter 18.6.1.);
- by allowing, for weekends and holidays, an extension of the deadline for notifications of interceptions without the assistance of other Member States (see Chapter 18.6.3).

Recommendation No 23: the Commission is invited to provide for guidelines on the interplay between the various mutual recognition instruments (see Chapter 5).

Recommendation No 24: the EU legislator is invited to revisit the question of the participation of accused persons in main trial proceedings via videoconference from another Member State (see Chapter 18.2).

21.1.4. Recommendations to Eurojust and the EJN

Recommendation No 25: Eurojust and the EJN are invited to update their *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* from 2019 (see Chapter 5).

21.2. Best practices

The Federal Republic of Germany is to be commended for:

1) handling incoming EIOs outside the scope of the Directive as MLA requests (see Chapter 5);

2) the fact that the German competent authority which receives an EIO then assumes the coordinating role in the event that multiple executing authorities are competent for its execution (see Chapter 6.5);

3) using cross-references when issuing multiple requests/orders with different legal bases or to several executing authorities for the same case, thereby informing the executing authority/authorities about the existence of these other requests/orders (see Chapter 6.5);

4) the fact that when an EIO is sent to a German authority which lacks competence, it is then forwarded to the competent authority *ex officio* (see Chapter 8);

5) the close regional cooperation with some neighbouring Member States, including common procedures, the use of adapted forms (e.g. shared bilingual forms) and communication channels (see Chapter 8);

6) in the same context of close regional cooperation, the fact that provisional measures can be taken in the absence of an EIO on the basis of an informal notification, with the EIO being issued shortly afterwards (e.g. video footage can be secured on a preliminary basis) (see Chapter 8);

7) issuing an Annex A as soon as the authorities become aware of a bugged car being in the territory of another Member State, for the sake of transparency and to foster mutual trust (see Chapter 8.6.3).

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT

Monday 19 February 2024	
During the day	**Arrival of experts**
19:30	**Working dinner at the invitation of the Federal Ministry of Justice**
Tuesday 20 February 2024 **Federal Ministry of Justice -** Mohrenstr. 37, 10117 Berlin	
09:30	**Welcoming** of the evaluation team – introductions
09:45	**Introduction to international cooperation in criminal matters in Germany – presentation and discussion** • Competent authorities for MLA with third states and EIOs at federal and state level • Overview of Germany's judicial and prosecutorial structure in the field of MLA and EIOs
10:45	**Coffee break**
11:00	**First round of discussions:** **MLA within the framework of the Directive** **a)** Prosecutors **b)** Judges **c)** Representative of revenue authority **d) Ministry of Justice of Baden-Württemberg** **e) Federal Office of Justice**

13:00	**Lunch break**
14:00	**First round of discussions (continuation)**
15:30	**Coffee break**
15:45	**Guided tour through the Federal Ministry of Justice**
16:30	**Internal meeting of the evaluation team**
Wednesday 21 February 2024	
09:30	**Second round of discussions:** **International cooperation in criminal matters from the perspective of police and other investigating authorities** - Q&A and discussions concerning the scope of the Directive and its relationship with other instruments - Practical consequences of the limitation of the Directive to evidentiary actions - Cross-border surveillance
11:00	**Coffee break**
11:15	**Second round of discussions (continuation)**
13:00	**Lunch break**
14:00	**Third round of discussions:** **Rulings of the CJEU and impact on the German EIO system** **1. <u>Overview of recent CJEU rulings</u>** **2. Q&A and <u>discussion</u> concerning:** - admissibility of evidence

	- legal remedies
15:15	**Coffee break**
15:30	**Fourth round of discussions:** **International cooperation in criminal matters from the perspective of the defence** **1. <u>Overview of challenges and best practices</u>** **2. <u>Discussion</u>**
16:30	**Internal meeting of the evaluation team**
Thursday 22 February 2024	
09:30	**Continuation of discussions (if needed)**
11:00	**Coffee break**
11:15	**Prospects for a revision of the IRG**
12:30	**Lunch break**
13:15	**Wrap-up session**
15:15	**Coffee break**
15:30	**Internal meeting of the evaluation team**

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYMS AND ABBREVIATIONS	FULL TERM
2000 MLA Convention	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted in 2000
AO	Fiscal Code – *Abgabenordnung*
BKA	Federal Criminal Police Office – *Bundeskriminalamt*
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CJEU	Court of Justice of the European Union
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters
EAW	European arrest warrant
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network
EJN Atlas	Judicial Atlas of the European Judicial Network
EJTN	European Judicial Training Network
Eurojust	European Union Agency for Criminal Justice Cooperation
Eurojust Regulation	Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), replacing and repealing Council Decision 2002/187/JHA
executing State	executing Member State

ACRONYMS AND ABBREVIATIONS	FULL TERM
GPPO	general public prosecutor's offices
IRG	Act on International Cooperation in Criminal Matters – *Gesetz über die Internationale Rechtshilfe in Strafsachen*
issuing State	issuing Member State
JIT	joint investigation team
Joint Action	Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime
MLA	mutual legal assistance
PPO	public prosecutor's office
RiVASt	Guidelines for dealing with foreign countries in criminal matters – *Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*
StPO	Code of Criminal Procedure – *Strafprozessordnung*