International and European Criminal Law

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2. The Codification of the Principle of Mutual Recognition in art. 82 TFEU

Although the principle of mutual recognition has *de facto* formed the basis for all framework decisions in the field of criminal procedure since the European Council in Tampere, it was not until the Treaty of Lisbon entered into force that this principle was incorporated into primary European law (art. 82 (1) TFEU; cf also art. III-270 TCE). Now art. 82 (1) subpara. 2 (a) and (d) TFEU assigns the competence to the EU to enact rules for all Member States concerning the mutual recognition of judgments and all forms of judicial decisions. 32

a) Scope of Application. Pursuant to art. 82 (1) subpara. 2 TFEU, the EU may lay down rules and procedures for ensuring Union-wide recognition of all forms of judgments and judicial decisions (lit. a) and facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of these decisions (lit. d). Lit. a), which is considered more specific than the general catch-all provision in lit. d), is to be interpreted extensively and contains all measures for mutual recognition in the widest sense of judicial decisions that are taken in the course of a criminal proceeding. Lit. d) therefore only remains applicable beyond the facilitation of mutual recognition. In particular, it covers measures of other authorities than the judicial authorities engaged in criminal prosecution or criminal enforcement measures (e. g. tax- and customs authorities) and decisions that cannot be classified as "judicial" (e. g. orders by executing authorities).[109] 33

b) Distinction from Approximation Measures Pursuant to art. 82 (2) TFEU. Approximation of national provisions is not permissible on the basis of art. 82 (1) subpara. 2 TFEU. This follows both from the wording of art. 82 (1) subpara. 1 TFEU, which limits approximation of domestic law to the areas referred to in paragraph 2 and art. 83 TFEU, as well as from the structure of art. 82 TFEU. 34

Art. 82 (2) subpara. 2 TFEU confines approximation of criminal procedural laws to the expressly listed areas. This restriction would be by-passed if art. 82 (1) subpara. 2 TFEU allowed further approximation. Furthermore, the "emergency brake" in art. 82 (3) TFEU, which is meant to protect criminal law systems, does not apply to art. 82 (1), but only to art. 82 (2) TFEU.

This, in turn, does not mean that directives are not potential "measures" under art. 82 (1) subpara. 2 TFEU as this provision, unlike art. 82 (2) TFEU, is not restricted to a particular type of legislative act. If, however, a directive was adopted in order to set rules for mutual recognition, this would of course lead to a certain approximation of the national legal systems. The following approach seems reasonable in order to distinguish between art. 82 (1) subpara. 2 and art. 82 (2) TFEU: Art. 82 (1) subpara. 2 TFEU does not allow approximation of criminal procedural laws in a stricter sense. A directive based on art. 82 (1) subpara. 2 TFEU must mainly contain rules concerning the co-operation between Member States – in other words: the traditional area of mutual judicial assistance. In contrast, those procedural law provisions that would also be applicable to a criminal proceeding without cross-border implications cannot be approximated pursuant to art. 82 (1) subpara. 2 TFEU.[110] The legal acts based on art. 82 (1) subpara. 2 TFEU that have been passed so far[111] adhere to this differentiation. 35

The majority of legal acts that rely on the principle of mutual recognition were passed as framework decisions prior to the coming-into-force of the Lisbon Treaty. Even 36

[109] Streinz-*Satzger*, art. 82 AEUV, para. 44.
[110] On the whole issue, see Grabitz/Hilf/Nettesheim-*Vogel/Eisele*, art. 82 AEUV para. 50.
[111] See paras 51 et seqq.

though the Treaty of Lisbon no longer knows this form of legal act (cf art. 288 TFEU) framework decisions maintain their relevance pursuant to art. 9 of Protocol No. 36 to the Lisbon Treaty: They preserve their legal effects and have been transformed into supranational Union law following the expiration of the five year transitional period. Hence it is now possible to have their implementation reviewed by the ECJ by way of an infringement proceeding.[112]

3. Legislative Acts on the Basis of the Principle of Mutual Recognition

37 **a) The European Arrest Warrant. aa) The Framework Decision.** The Council framework decision of 13th June 2002 on the **European arrest warrant** and the surrender procedures between Member States,[113] which was mainly based on art. 31 (1) (a), (b), 34 (2) (b) TEU o.v., constituted the first application of the principle of mutual recognition in the area of criminal law. In this respect, it is perceived as a role model for subsequent legislative acts.[114] Its main purpose is to abolish (between EU Member States) the traditional procedure of extradition which is widely considered to be time-consuming, cumbersome and complex. On the one hand, the traditional procedure is characterised by two stages: the legal examination of the admissibility of extradition (which is, for instance, in Germany carried out by the higher regional courts (*Oberlandesgerichte*), §§ 12 et seqq. of the German Act on Mutual Legal Assistance (*Gesetz über internationale Rechtshilfe in Strafsachen* [IRG]) is necessarily followed by a political decision, the so-called grant of extradition. This grant is subject to a discretionary decision made on a case-by-case basis with regard to foreign policy considerations by government officials (cf § 74 IRG). This influence of political considerations has often been blamed for the inefficiencies of the extradition procedure.[115] On the other hand, **double criminality** is traditionally a fundamental principle of extradition. The conduct in respect of which the request for extradition is made has to be a criminal offence under the law of the requesting state as well as the state addressed with the request. The latter can thus refuse its cooperation if a foreign offence is unknown to its own law.[116] The accused person therefore has the possibility of raising various objections with respect to substantive law against his or her extradition which serves the purpose of protecting the individual but at the same time diminishes the effectiveness of the extradition procedure.[117]

38 With the introduction of the European arrest warrant,[118] which throughout Europe is to be issued in a unified form strictly regulated by the framework decision, the element of a political authorisation is abandoned; instead, the procedure is to be controlled exclusively by the judiciary. The principle of double criminality has been maintained insofar as the extradition can in general be made conditional on the relevant conduct

[112] Cf art. 10 (1) of Protocol No. 36 on transitional provisions; on the whole issue, see also § 7 para. 111.

[113] Framework Decision 2002/584/JHA, OJ (EC) 2002 No. L 190/1.

[114] See *Mitsilegas*, EU Criminal Law, p. 120; *Rohlff*, Europäischer Haftbefehl, p. 35.

[115] *Rohlff*, Europäischer Haftbefehl, p. 41; *Xanthopoulou*, NJECL 7 (2015), 32, 33.

[116] *Klimek*, European Arrest Warrant, pp. 81 et seq.; *Klip*, Eur. Criminal Law, pp. 382 et seqq.; *Oehler*, ZStW 96 (1984), 555, 557; in more detail e. g. *Asp/v. Hirsch/Frände*, ZIS 1 (2006), 512 et seqq.; *Hackner*, in: Wabnitz/Janovsky, Handbuch, ch. 24 para. 134.

[117] For criticism against the principle of double criminality, see *Asp/v. Hirsch/Frände*, ZIS 1 (2006), 512, 515 et seqq; *Lagodny,* in: Schomburg et al. (eds), Internationale Rechtshilfe in Strafsachen, § 3 IRG para. 2; *Vogel*, JZ 2001, 937, 942.

[118] According to art. 2 (1) of the framework decision, an arrest warrant "may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months" (arrest warrant of extradition) or "where a sentence has been passed or a detention order has been made, for sentences of at least four months" (arrest warrant of execution).

being a criminal offence under the law of the Member State of execution as well. However, if the arrest warrant is issued in respect of one of the 32 criminal offences explicitly listed in art. 2 (2) of the framework decision ("positive list"), double criminality is not required.[119] This conception, however, poses problems because the **catalogue offences** are only outlined roughly, for instance as "computer-related crime", "counterfeiting and piracy of products", "racism" or "xenophobia". Since the determination of whether a catalogue offence is given is to be made under the national law of the issuing Member State,[120] in some cases it will be very difficult to determine whether an offence falls within one of the headings.[121]

39 In art. 3 and art. 4 as well as in art. 4 a, which was newly introduced via the Framework Decision 2009/299/JI (see para. 85), the framework decision itself contains grounds for non-execution of the arrest warrant. **Grounds for mandatory non-execution** are, for instance, amnesty, the lack of criminal accountability of the suspect under the law of the Member State of execution due to the suspect's age or a final decision in a Member State[122] that hinders any further prosecution. Besides the absence of double criminality in case of non-catalogue offences, **grounds for optional non-execution** are, for example, cases where the prosecution is statute-barred pursuant to the law of the executing Member State, where the person is prosecuted for the same act in the executing Member State or where proceedings have been terminated.[123] Finally, art. 5 stipulates that the execution of the European arrest warrant can be made dependent on special guarantees of the issuing state. For arrest warrants against citizens of the executing Member State, for instance, surrender may be made subject to the condition "that the person is returned to the executing Member State in order to serve the custodial sentence or detention order passed against him in the issuing Member State".[124]

40 **bb) The Implementation of the Framework Decision within the Member States.** The Member States were obliged to implement the framework decision by the end of 2003. The implementation process took quite different form throughout the Member States.[125] The differences within national implementation acts are especially vast concerning the treatment of the framework decision's grounds for non-execution. Some countries even introduced new grounds for non-execution that are not envisioned by the framework decision. In the UK, for example, the extradition can be refused for reasons of national security (sec. 208 of the Extradition Act 2003[126]). Art. 8 (3) of the Italian implementation act[127] forbids extradition if an Italian citizen is to be extradited

[119] On the principle of double criminality and its modifications by the framework decision, see in detail *Pohl*, Vorbehalt und Anerkennung, pp. 136 et seqq.; cf also *Klimek*, European Arrest Warrant, p. 81.

[120] Art. 2 (2) of the framework decision.

[121] For a critical view, see only *Roxin/Schünemann*, Strafverfahrensrecht, § 3 paras 21 et seq.; *Schünemann*, GA 2002, 501, 507 et seq. The deficient harmonisation of national offences contained in the catalogue of art. 2 (2) of the framework decision is also lamented by *Peers*, CMLR 41 (2004), 5, 29 et seqq.

[122] Art. 3 No. 2 of the framework decision, see para. 74. For decisions of a non-EU Member State only an optional ground for non-execution is in place, cf art. 4 No. 5 of the framework decision.

[123] For a general caveat with respect to the protection of human rights *Peers*, EU Justice, pp. 708 et seq.; cf concerning the grounds of non-execution *de Groot*, in: Blextoon/van Ballegooij (eds), European Arrest Warrant, pp. 93 et seq.

[124] See further *Böse,* in: Momsen et al. (eds), Fragmentarisches Strafrecht, pp. 240 et seqq.; *von Heintschel-Heinegg/Rohlff*, GA 2003, 44; for more details, see *de Groot*, in: Blextoon/van Ballegooij (eds), European Arrest Warrant, pp. 93 et seq.

[125] On the implementation by the Member States, see COM (2011) 175 final; see also *Fletcher/Lööf/Gilmore,* EU Criminal Law, pp. 117 et seq.; for a less critical view, see *Peers*, EU Justice, pp. 709 et seq.

[126] See http://www.legislation.gov.uk/ukpga/2003/41/pdfs/ukpga_20030041_en.pdf (last visited July 2017).

[127] Legge 22 aprile 2005, n. 69, available under http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2005;69 (last visited July 2017).

on account of a crime committed where he or she has been in error as to the prohibition of the act. Finally, the Italian legislator has distanced himself even further from the objectives of the framework decision by simply transposing the catalogue of offences in art. 2 (2) of the framework decision into a list of specific offences under Italian law (art. 8 (1)). As a result, extradition will thus only be possible if it concerns offences for which criminal liability exists in Italy. Ultimately, the principle of double criminality therefore is preserved at least *de facto*.

41 Overruling the objection of the *Bundesrat*, the *Bundestag* passed the German implementation act (German Act on the Implemenation of the European Arrest Warrant [*Europäisches Haftbefehlsgesetz*], EuHbG) on 16th June 2004, which came into force on 23rd August 2004. It integrated the European arrest warrant into the terminology ("extradition", "issued state" and "issuing state") and system of the pre-existing national act on mutual legal assistance (IRG).[128] In its judgment of 18th July 2005,[129] the BVerfG upheld an individual constitutional complaint and declared this (first) EuHbG to be void. The complainant, a German and Syrian dual national living in Germany who was suspected of being a key figure of the Al-Qaeda-network, was supposed to be extradited to Spain where he was prosecuted for participation in a criminal organisation and terrorism. The conduct of which he was accused – namely support of a foreign terrorist organisation – was not a criminal offence in Germany at that time. But since double criminality is not required for cases of "terrorism" according to the framework decision, this did not impede the execution of the European arrest warrant issued by Spain.

42 The BVerfG declared the EuHbG (as the legal basis for the extradition) unconstitutional and void for two reasons:

– First, it considered the fundamental right to **freedom from extradition** (art. 16 (2) GG) to be violated. This fundamental right for German citizens is subject (pursuant to an amendment in 2000) to a **reservation** allowing the extradition of Germans (inside the EU or to an international court) as long as fundamental constitutional principles are upheld. According to the Court, the legislator is obliged to implement the objective of the framework decision in accordance with the principle of proportionality; in particular, the legislator has to take account of fundamental rights as far as possible when exercising margins of discretion left by the framework decision. Art. 4 no. 7 of the framework decision provides that "the execution of the European arrest warrant can be refused where it relates to offences that are regarded by the law of the executing Member State as having been committed in whole or in part on the territory of the executing Member State". The BVerfG held that the German legislator, by making use of this discretion, should have provided a ground for non-execution for crimes with a "significant domestic connecting factor". According to the Court, "charges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated on the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens. A significant domestic connecting factor exists in any case if essential parts of the site of crime and place where the result of the act occurred are located on German state territory".[130] The Court found that in these cases the trust of citizens to be held

[128] For criticism, see *Wehnert*, StraFo 2003, 356, 359 et seq.

[129] BVerfG, Judgment of 18th July 2005, 2 BvR 2236/04 = BVerfGE 113, 273, translation available under http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html (last visited July 2017); see *Satzger/Pohl*, JICJ 2006, 686 et seq.; see also *von Heintschel-Heinegg*, in: Sieber et al. (eds), Europ. StR, § 37 paras 16 et seqq.

[130] BVerfG, Judgment of 18th July 2005, 2 BvR 2236/04 = BVerfGE 113, 273, 302, translation available under http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html (last visited July 2017).

criminally liable only according to their own national legal system was protected by art. 16 II GG in connection with the principle of the rule of law. For the Court, this was especially true if the conduct was in no way punishable according to national criminal law.

– Second, the Court found a violation of art. 19 (4) GG due to the lack of any possibility for judicial review in Germany of the grant of extradition under the EuHbG. While this has been (and still is) generally accepted for the traditional procedure, where the grant of extradition is a political decision protected by the executive's prerogatives, the Court considered it a violation of the constitutional guarantee of access to the courts due to the procedure having become "judicialised" under the EuHbG. The act provides for discretionary judicial decision on enumerated grounds for non-execution which – at least in part – have the purpose of protecting the individual. The citizen therefore has a right to an effective judicial remedy even at this stage.

On 20th July 2006, the Bundestag then passed a new EuHbG which came into force on 2nd August 2006. The guidelines expounded by the BVerfG were taken into account; the reservation of a significant domestic connecting factor is now contained in § 80 (1) no. 2 and (2) no. 2 n.v. of the national act on mutual legal assistance (IRG). Whereas the ECJ has left the question of the admissibility of the new German provisions open,[131] it declared a Dutch statute which allowed refusal of the extradition of foreigners after at least five years of lawful residence within the Netherlands to be in conformity with Union law.[132] In view of a French provision that provided for the possibility to refuse an extradition of foreigners in contrast to nationals, the ECJ declared that legally at least the possibility must be maintained for nationals and EU-foreigners to be treated equally.[133] **43**

In some Member States, complications with respect to constitutional law, similar to those in Germany,[134] arose: the Polish Constitutional Court, for example, declared the Polish implementation act invalid due to a violation of the constitutional ban on the extradition of Polish citizens.[135] After a constitutional amendment, a new implementation act, requiring double criminality for Polish citizens, was passed in 2006.[136] In Cyprus the Constitutional Court held that for the same reasons an implementation of the framework decision was possible only after the constitution had been amended.[137] The Czech Constitutional Court, by contrast, dismissed an action against the national implementation act.[138] **44**

The Belgian implementation act was also challenged. In this context, the *Cour d'Arbitrage* referred three questions concerning the legality of the framework decision to the ECJ: the first question was whether the European arrest warrant should have been regulated by a convention and not by a framework decision. The ECJ[139] rightly pointed **45**

[131] ECJ, Judgment of 17th July 2008, Case C-66/08 "Kozlowski" ECR 2008, I-6041, with remarks by *Böhm*, NJW 2008, 3183.

[132] ECJ, Judgment of 6th October 2009, Case C-123/08 "Wolzenburg" with remarks by *Janssens*, CMLR 47 (2010), 831.

[133] ECJ, Judgment of 5th September 2012, Case C-42/11 "Lopes Da Silva Jorge", para. 51.

[134] See the overview of *Satzger/Pohl*, JICJ 2006, 686, 690; *Fletcher/Lööf/Gilmore,* EU Criminal Law, pp. 119 et seqq.

[135] An English version of the decision is available under http://www.trybunal.gov.pl/eu/case-list/judicial-decisions/art/6079-application-of-the-european-arrest-warrant-to-polish-citizens/ (last visited July 2017).

[136] For the development in Poland, see in more detail *Nalewajko*, ZIS 2 (2007), 113.

[137] Judgment of 7th November 2005; the English version can be found in Council Document No. 14281/05.

[138] Judgment of 3rd May 2006 (Pl. ÚS 66/04); the English version is available under http://www.usoud.cz/en/decisions/20060503-pl-us-6604-european-arrest-warrant-1/ (last visited July 2017).

[139] ECJ, Judgment of 3rd May 2007, Case C-303/05 "Advocaten voor de Wereld" ECR 2007, I-3633; cf *Fletcher/Lööf/Gilmore*, EU Criminal Law, pp. 120 et seq.

out that the TEU did not establish any order of priority between those different legal instruments. The second question was whether or not the almost complete abandonment of the prerequisite of double criminality was consistent with the **principle of legality** (*nullum crimen sine lege*) as a general legal principle of EU law according to art. 6 (2) TEU o.v. The ECJ stated that the principle of *nullum crimen* was observed since the law of the issuing state would contain sufficiently clear definitions of the criminal offences even if the conduct was not punishable in the executing state. At such a level of generality, this statement must seem highly problematic as the offender is not expected to anticipate criminal liability according to the law of the issuing state to the same extent in all situations.[140] The third question related to a possible violation of the principle of equality and non-discrimination that might be attributed to the fact that only some crimes were excluded from the test of double criminality. For the ECJ, it was sufficient to highlight the inherent seriousness of these crimes as sufficiently affecting public order and public safety to justify the dispensation of double criminality.

It is submitted that the questions posed by the Cour d'Arbitrage were not suitable to trigger an intensive and conclusive examination of the legality of the framework decision. Especially the – not very satisfying – examination of the *nullum crimen*-principle by the ECJ demonstrates that considerable doubts still remain.

46 **b) European Supervision Order.** Shortly before the Treaty of Lisbon entered into force, the framework decision on a European supervision order was enacted.[141] This instrument governs the mutual recognition of measures taken by a Member State in order to prevent a suspect from escaping justice and avoiding pre-trial custody. The relevant measures are listed in art. 8 of the framework decision. The Member State may *inter alia* require the suspect to report any change of residence, to remain at a specific place or to refrain from entering a specific place or area. As is the case in relation to the European arrest warrant, double criminality is required for the application of the framework decision to certain enumerated offences. The European supervision order safeguards the trial in a manner that is often less detrimental to the suspect because courts otherwise tend to presume that foreign nationals in general are particularly likely to escape and thus aliens are frequently taken into pre-trial custody.[142] The framework decision is a welcome step towards forming a common judicial area where such discrimination is not acceptable. The European supervision order may cause courts to consider alternative measures which would allow the suspect to return to his or her home country and await the trial there instead of spending time in custody of the prosecuting Member State. The European arrest warrant may still supplement those measures if the suspect later refuses to return for trial.

47 **c) Mutual Judicial Assistance Concerning Evidence and the European Investigation Order.** Just as the European arrest warrant has replaced extraditions, the complex traditional procedures of mutual judicial assistance are to be simplified at a European level on the basis of the principle of mutual recognition with regard to evidence as well.

Mutual recognition, however, poses problems also in this regard: When evidence is collected during a purely domestic investigation, only the procedural law of the respective Member State is applicable (Member State A). Should another Member State (Member State B) later request a specific piece of evidence in order to use it in a

[140] See also *Braum*, wistra 2007, 401, 404 et seq.; cf also the arguments of the BVerfG concerning crimes with a significant domestic connecting factor, see para. 42.

[141] Council Framework Decision 2009/829/JHA, OJ (EU) 2009 No. L 294/20.

[142] Cf SEC (2004) 1064, pp. 75 et seqq.; *Schünemann*, in: Schünemann (ed.), A Programme for European Criminal Justice, pp. 354 et seq.

proceeding in B, the domestic requirements for collecting evidence that should have been adhered to in B cannot be observed any more.[143] The result may be a "Patchwork-Proceeding" that disregards the rights of the individual. So-called *forum regit actum* arrangements (such as art. 12 cl.1 of the framework decision on the European evidence warrant or now art. 9 (2) of the directive on the European investigation order, see para. 52) may be able to counteract this imbalance.[144] It is, however, within the discretion of the issuing state in how far, if at all, these arrangements are actually utilised. Moreover, the executing state may invoke a collision with fundamental legal principles and thus disregard these arrangements. Therefore, further harmonisation of procedural rights[145] by the Union is indispensable as a counter-weight to the progressive development of the law governing mutual legal assistance relating to evidence.

The Council framework decision on the execution of orders freezing property or evidence in the European Union[146] is aimed at preventing the loss of evidence that is located in another Member State. However, this framework decision governs only preliminary measures. The subsequent transfer of evidence remains subject to the traditional rules of mutual judicial assistance – with all its disadvantages. 48

Thus, following extensive negotiations, a **framework decision on the European evidence warrant** for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (EEW) was adopted.[147] It has, however, been superseded by the directive on the European investigation order (see para. 50 et seqq.) which has come into force meanwhile and is significantly more extensive as to substance; the European evidence warrant therefore never gained practical relevance. 49

Particularly, the European evidence warrant was applicable only to evidence already collected. For this reason the Commission contemplated further acts for the mutual recognition of evidence. Still during the transformation period for the EEW the Commission presented a Green Paper on obtaining evidence in criminal matters from one Member State to another[148] which was partially criticised amongst scholars.[149] In the year 2010 the Commission found itself virtually "overtaken" by an initiative presented by eight Member States in accordance with art. 76 lit. b TFEU.[150] Following four years of preparatory work,[151] the **directive on the European investigation order in criminal matters**[152] (EIO) came into force in May 2014. 50

This is the second legislative act – after the directive on the **European protection order**[153] – based on art. 82 (1) TFEU which applies (to a large extent) the concept of 51

[143] *ECPI*, ZIS 8 (2013), 412, 417; *Mangiaracina*, Utrecht Law Review 2014, 113, 115; *Zerbes*, in: Asp (ed.), The EPPO, p. 210, 217; *F. Zimmermann*, Strafgewaltkonflikte in der EU, p. 66.

[144] In detail *ECPI*, ZIS 8 (2013), 412, 417.

[145] See paras 90 et seqq.

[146] Council Framework Decision 2003/577/JHA, OJ (EU) 2003 No. L 196/45.

[147] Council Framework Decision 2008/978/JI, OJ (EU) 2008 No. L 350/72; on this *Krüßmann*, StraFo 2008, 458. Regarding the Commission's original proposal (COM [2003] 688 final); cf the extensive and critical analysis of *Ahlbrecht*, NStZ 2006, 70; *Kotzurek*, ZIS 1 (2006), 123 as well as *Williams*, in: Vervaele (ed.), European Evidence Warrant, pp. 69 et seqq. Further *Gleß*, Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung, 2006, pp. 165 et seqq. On the consequences for German criminal proceedings, see *Esser*, in: FS Roxin, 2011, pp. 1497 et seqq. Regarding the way of functioning and the procedure, cf *Gleß*, in: Sieber et al. (eds), Europ. StR, § 38 paras 22 et seqq.

[148] COM (2009) 624 final.

[149] *Ambos*, ZIS 5 (2010), 557; *Busemann*, ZIS 5 (2010), 552; *Schünemann/Roger*, ZIS 5 (2010), 92 as well as *F. Zimmermann/Glaser/Motz*, EuCLR 1 (2011), 56, 70 et seqq.

[150] Council Document No. 9145/10 of 29th April 2010.

[151] On the development, see *Gleß*, in: Sieber et al. (eds), Europ. StR, § 38 fn 128.

[152] Directive 2014/41/EU, OJ (EU) 2014 No. L 140/1.

[153] Directive 2011/99/EU, OJ (EU) 2011 No. L 338/2.

mutual recognition.[154] Pursuant to its art. 34, it replaces[155] earlier international law conventions on judicial assistance from 22nd May 2017 onwards[156] as well as the framework decisions on protective measures[157] and the European evidence warrant[158]. Therewith, the separate instruments of the European law on evidence are combined in one legal act and a unified legal framework for the collection and transfer of evidence within the Union is created.[159]

52 The **EIO-directive** thus surpasses the framework decision on the evidence warrant, as it does not only cover the transfer of already collected evidence, but also provides for measures for evidence collection. Pursuant to its art. 3, the directive covers all types of evidence and its gathering, solely excluding the setting up of joint investigation teams and the collection of evidence within such teams.[160] Fully in line with the concept of mutual recognition[161] the directive strengthens the position of the issuing state, accepting that the "whether or not" of a specific measure is to be generally determined by recourse to the law of the issuing state.[162] This is illustrated by the terminology employed, as the directive now makes reference to "order" and not "request",[163] but also by the arrangement of terms according to which the executing authority must take its decisions and measures within specific time limits. The issuing state must verify in every single case whether the measure is proportionate and whether it could have been ordered under the same conditions in a similar, but purely domestic case (art. 6 (1) EIO). An EIO issued in accordance with these requirements has to be recognised by every Member State "without any further formality being required" and must be executed like a domestic order without a cross-border dimension (art. 9 (1) EIO). The law of the executing state therefore only governs the modalities of the enforcement ("how"). But even this is affected by the powers of the issuing state: Similar to art. 12 of the framework decision on the European evidence warrant[164], the issuing state may, pursuant to art. 9 (2) of the EIO-directive and in accordance with the *forum regit actum* principle, indicate certain "formalities and procedures" the executing state has to comply with, unless they are contrary to fundamental principles of its law.[165]

53 In return, art. 11 (1) of the directive contains grounds which justify the refusal of the execution of an investigation order. These include, for example, the violation of immunities or privileges, essential national security interests or the *ne bis in idem*

[154] See paras 26 et seqq.

[155] This does not apply to both Ireland and Denmark. Pursuant to art. 4 a (1) and art. 2 of Protocol No. 21, as well as art. 2 of Protocol No. 22 to the Treaty of Lisbon the previous instruments continue to be binding upon and applicable to these two states, as they are not participating in the new directive; cf *Belfiore*, EuCLR 5 (2015), 312, 316, fn 22; *F. Zimmermann*, ZStW 127 (2015), 143, 149.

[156] For an overview, see *F. Zimmermann/Glaser/Motz*, EuCLR 1 (2011), 56, 57 et seqq.

[157] Council Framework Decision 2003/577/JI, OJ (EU) 2003 No. L 196/45.

[158] Council Framework Decision 2008/978/JI, OJ (EU) 2008 No. L 350/72.

[159] *Belfiore*, EuCLR 5 (2015), 312, 316; *Böse*, ZIS 9 (2014), 152; *Esser*, in: FS Roxin, 2011, pp. 1508 et seqq.; *Zerbes*, EuCLR 5 (2015), 304, 309 et seqq.

[160] *Allegrezza*, in: Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, pp. 53 et seq.; cf also *Schuster*, StV 2015, 393.

[161] *Armada*, NJECL 7 (2015), 8, 22; *Weyembergh*, in: Ligeti (ed.), Toward a Prosecutor for the European Union, 2013, pp. 972 et seqq.; *F. Zimmermann*, ZStW 127 (2015), 143, 147 et seqq.

[162] *Armada*, NJECL 7 (2015), 8, 14; *Vermeulen/De Bondt/Van Damme*, EU Cross-Border Gathering and Use of Evidence in Criminal Matters, p. 105; *F. Zimmermann*, Strafgewaltkonflikte in der EU, pp. 64 et seq.; see also paras 26 et seqq.

[163] See also *Ambos*, ZIS 5 (2010), 557.

[164] See para. 47.

[165] In detail on the interpretation of this provision, see *F. Zimmermann*, ZStW 127 (2015), 143, 150 et seqq.; in general *Armada*, NJECL 7 (2015), 8, 21 et seqq.; *Daniele*, NJECL 7 (2015), 179 et seqq.; *Gleß*, ZStW 125 (2013), 573, 592 et seqq.