

Editorial

Starting with this issue the European Criminal Law Review not only improves its design and appearance, from now on the responsible publisher is the renowned “Nomos Verlagsgesellschaft” which specialises in European Law. We, the editors, are very grateful to the people responsible at Nomos for hosting the EuCLR and for taking care of a professional and effective way of publishing our journal in the future.

However, whilst the EuCLR makes further progress the European Union seems to be on the decline. Never before have there been so many threats to the EU – from the inside as well as from the outside: mass immigration from Syria and other countries, hundreds of victims due to multiple acts of cowardice by terrorists of the Islamic State in the heart of Europe, the constant threat of extremist attacks in all Member States, the ongoing discussion about excluding Greece from the Schengen area, the negative Dutch referendum on 6th April as to the EU agreement for closer relations with Ukraine and finally the imminent “Brexit” and the corresponding “compromise” agreed upon at the EU summit in Brussels on 19th February in order to make the British population vote in favour of staying within the EU in the referendum scheduled for the 23rd June this year.

These are just some catchwords to be mentioned. The increasing number of problems and crises endanger what the fathers and mothers of the Treaty on European Union once formulated as the fundamental objective of an “ever closer union among the peoples of Europe”. Obviously – in fear of Great Britain leaving the EU – the Member States have now even agreed to depart from this very basic aim and to accept a “splendid isolation” of the United Kingdom within the EU in the above mentioned compromise: the UK – if remaining a member of the EU at all – will not be bound to an “ever closer union” with other EU member states. But can there be a “union” if the members explicitly pursue different aims? What is the use of a “union” if members can successfully threaten to leave it should their egoisms not be accepted by the others? It may turn out that what has been agreed upon in Brussels was a “rotten compromise”, which will in turn “compromise” the European Union as a whole.

Apart from politicians haggling over the fate of Europe it is most alarming that the confidence of European citizens in “their” Union is diminishing considerably, the trust in its mechanisms among the population is generally low and nationalist parties gain support in nearly all Member States. Finally and most shockingly border fortifications consisting of barbed wire and walls reappear within Europe! Internal border controls – the pure contrast to the idea of free movement throughout the Union which once formed one of the main assets and benefits of the European common market – are meanwhile even widely accepted by public opinion; e.g. 58% of all Germans favour border controls according to a recent opinion poll (effectuated by the ZDF-Politbarometer, published on 19th February 2016).

In addition to all that a current decision of the German Constitutional Court deserves mentioning as it may be interpreted at least *prima facie* as a considerable “pin-

prick” to the European justice system and to the jurisprudence of the CJEU especially. In Germany it provoked headlines as “Karlsruhe challenges European Court” (Süddeutsche Zeitung, 26.1.2016) or “The Federal Constitutional Court underlines its claim to control European Law” (Frankfurter Allgemeine Zeitung, 26.1.2016). In an order dated 15th December 2015, the 2nd senate of the Karlsruhe Court expresses that “in individual cases, protection of fundamental rights by the Federal Constitutional Court may include review of sovereign acts determined by Union law if this is indispensable to protect the constitutional identity guaranteed by Art. 79 sec. 3 of the (German) Basic Law”, the latter referring especially to the inviolability of human dignity. The case deals with a European arrest warrant from Italy against a US citizen who had been firmly sentenced *in absentia* to a custodial sentence of thirty years in 1994 by an Italian court. According to the German *Oberlandesgericht*, which has competence in this case, he should be extradited to Italy, but this decision was challenged before the Federal Constitutional Court. The case, however, is characterised by a high degree of uncertainty (on the part of the German courts at least) as to the legal possibilities Italian law provides for an effective factual and legal control of the judgment *in absentia* after an extradition to Italy. In contrast to the *Oberlandesgericht*, which gave trust to the information obtained from the Italian General Prosecutor and thus assumed that sufficient control would be possible in Italy, the Constitutional Court holds that there is an infringement of the “guilt principle” which hinders an extradition to Italy.

The Federal Constitutional Court – as a starting point and in so far in compliance with the jurisprudence of the CJEU – accepts that all sovereign acts of the European Union as well as all acts of German public authority that have been determined by Union law are, due to the precedence of Union law, not to be measured against the standard of fundamental rights enshrined in the Basic Law. But as the Federal Constitutional Court finds the reason for the precedence of EU law within the German constitution, the precedence in its opinion only applies insofar as the Basic Law and the German Act of Assent permit or provide for a transfer of sovereign rights. The scope of this conferral is thus considered to be limited by the so-called Basic Law’s “constitutional identity” that is neither open to constitutional amendments nor to European integration (cf. Art. 23 sec. 1 sentence 3; Art. 79 sec. 3 Basic Law), the Federal Constitutional Court thus being competent for an “identity review”.

In relation to criminal law this identity review especially encompasses the protection of human dignity in the sense of the German Basic Law (Art. 1 sec. 1), part of it being the “guilt principle”. According to the Federal Constitutional Court, an extradition for the purpose of executing a sentence passed *in absentia* is therefore only compatible with the guarantee of human dignity and the rule of law if the accused’s individual guilt has been determined by the competent foreign court. From this the Karlsruhe Court derives that effective respect for the principle of individual guilt is at risk if it is not clear that the true facts of the case have been established. This also presupposes that the personality of the accused has been taken into account and, therefore, as a rule, that the accused was present at trial. In other words, minimum guarantees of defence rights in the foreign state are indispensable. This also entails consequences for German

courts which decide on an extradition, particularly when its aim is the execution of a sentence rendered *in absentia*: they have to investigate and establish the facts of the case and the kind of treatment the requested person will have to expect in the requesting state. This does not mean that German courts always have to review in detail the grounds for a European arrest warrant. At this point the Constitutional Court refers to the European principle of “mutual trust”, which is of eminent importance to the CJEU (e.g. in CJEU [Grand Chamber], judgment of 26th February 2013 - Melloni [marg. 36 et seq.] or in Opinion of the CJEU 2/13 [Full Court] of 18th December 2014 – ECHR accession [marg. 191 et seq.]). Nevertheless, the judges in Karlsruhe stress that there must be limits to that principle when “trust is shaken”. As a consequence the competent German court is under an obligation to investigate the legal situation and practice in the requesting state if the person concerned has submitted sufficient indications that requirements which are absolutely essential for the protection of human dignity will not be met in case of his or her extradition.

After establishing those principles – which could well be interpreted as attacking the line of thought behind the mutual trust principle as understood by the CJEU – the Constitutional Court clearly makes a drawback: in the present context, it sees no need for restricting the precedence of Union law by applying German constitutional law. In the eyes of the Constitutional Court the Framework Decision itself, as well as the German implementing legislation, are to be interpreted so as to respect the minimum guarantees of defence rights required by the human dignity clause in the context of an extradition. Thus in the end European law – at least as understood by the German Constitutional Court! – provides an identical level of protection as the German constitution in the present case. The Court bases this view on the fact that the principle of mutual trust is not unlimited even in European law. Furthermore, it maintains that Art. 4a sec. 1 letter d (i) of the Framework Decision has to be read as prescribing – without any discretion on the part of the courts in the requesting state – a procedure that allows for the merits of the case (including fresh evidence) to be re-examined, which may in the end lead to the original decision being reversed. This is why the Constitutional Court holds that even under European law the German court deciding on the execution of a European arrest warrant can investigate – where necessary – the facts of the case and the kind of treatment the requested person will have to expect in the issuing state, as long as the extradition system established by the Framework Decision remains effective in practice. As a consequence, the level of protection with regard to the rights of the accused under Union law is considered not be lower than the one provided by Art. 1 sec. 1 GG.

In the case at stake, however, the *Oberlandesgericht* – in the view of the Federal Constitutional Court – would have had reasons for further investigations, as the complainant asserted in a substantiated manner that the Italian procedural law did not provide him with the opportunity to have a new evidentiary hearing at the appeals stage. The information given by Italian authorities was not precise enough so that – as a consequence – “trust was shaken” and further investigations into the legal situation and

future treatment of the complainant in Italy would have been necessary before allowing the extradition.

So – what does the German Constitutional Court tell us with this decision? Certainly it is a fairly strange reasoning which does on the one hand not break with the precedence of European law, but which on the other hand may be said to contain a “hidden warning”:

The operative part of the court order as such can be seen as rather pro-European, since the Court does not deny the application of European law in case of a presumed contradiction with German constitutional standards (here: as to the protection of human dignity in general and the “guilt principle” especially) and bases its findings on European primary and secondary law, especially the Framework Decision on the European arrest warrant. The rather “autonomous” and less European-minded part of the decision starts when the Constitutional Court gives Art. 4a sec. 1 letter d (i) of the Framework Decision its autonomous interpretation and – in addition to that – maintains that the EU principle of mutual recognition allows more flexibility. The Court’s opinion is well founded and in the end absolutely reasonable. But: it is definitely not the task of a national Constitutional Court to give an autonomous interpretation to European legislative acts and treaty principles! The Federal Constitutional Court’s recourse to the “acte clair” doctrine, which in the court’s opinion shall justify the omission of a request for a preliminary ruling by the CJEU, is doubtful as the points in question have not been decided yet and are far from being clear (which can already be seen by the pure number of pages filled and the huge effort the Constitutional Court made to elaborate its view).

It might be that the Federal Constitutional Court wanted to demonstrate that, although it did not invoke a national “constitutional brake” in this particular case, it would be prepared to do so in other cases. Therefore, what makes this decision so important is its message to the CJEU: Do not go too far with your blind belief in mutual trust!

The Editors