The German Federal Constitutional Court's ruling on the European Arrest Warrant

The Bundesverfassungsgericht (BVerfG) has now published its December 2015 ruling in favour of a claimant who had lodged a constitutional complaint against the decision to allow his surrender to Italy on the basis of a European arrest warrant issued by the Italian authorities. In its ruling, the German Constitutional Court appears to be departing from its previous 'Solange' case law on the examination of EU acts against fundamental rights enshrined in the Basic Law (Grundgesetz).

The European Arrest Warrant and convictions in absentia

The European arrest warrant (EAW) is based on the principle of mutual recognition which underpins the whole field of EU judicial cooperation. This means that an EAW issued by a Member State is to be executed by the requested Member State, without examining the case under its own national substantive or procedural criminal law, and that a surrender can only be refused in the cases set out in the EAW Framework Decision (EAW FD). Accordingly, a Member State cannot refuse to surrender requested persons who have been, for instance, convicted in their absence, just because its national law does not provide for trials in absentia (without the presence of the accused). Moreover, the EAW FD of 2002 was revised in 2009 to better guarantee the procedural rights of accused and convicted persons.

The EAW FD in fact contains provisions regarding the specific case of trials in absentia. Under Article 4a(1)d, in cases in which the person concerned was not personally served with the sentence or detention order, the execution of the EAW cannot be refused if he or she 'will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;'.

In the landmark Melloni case, referred for preliminary ruling to the Court of Justice of the EU (CJEU) by the Spanish Constitutional Court, the CJEU examined some of the in absentia provisions of the EAW FD against the requirements of a fair trial and effective judicial remedy contained in the EU Charter of Fundamental Rights and the European Convention on Human Rights. It held that the surrender of persons who had been informed of the trial but had not appeared in person meets these protection standards. (In the Melloni case, the convicted person had been informed of the trial but chose only to be represented by a lawyer instead of attending himself.) The Court concluded that since Article 4a(1) of the EAW FD contains an exhaustive list of circumstances, the executing state cannot make the surrender conditional on the right to a retrial, except in the situations specified therein.

The ruling of the German Constitutional Court: on the EAW

Facts of the case

The claimant is a US national who in 1992 was convicted in absentia by the Court of Appeal in Florence to 30 years in prison for membership of a criminal organisation, as well as the import and possession of cocaine. He was arrested in Germany in 2014, on the basis of an EAW. The claimant lodged a complaint against the execution of the European arrest warrant by the German authorities, arguing that Italian criminal procedure would not allow him to be subject to a new trial with the hearing of evidence, but only to an appeal procedure which would not necessarily include the examination of the facts. The Higher Regional Court of Düsseldorf had ruled in November 2014 that his surrender to Italy was permissible, after receiving assurances from the Florence Prosecutor’s Office that the claimant would be able to lodge an appeal against the 1992 ruling, and thus have his case heard, provided the Italian Court accepted to hear the appeal.
The arguments of the ruling

The Constitutional Court first acknowledges the principle of mutual recognition and the high level of confidence between Member States on which the EAW mechanism is based, and thus its implementation may be suspended only in the event of a serious and persistent breach by a Member State of the EU values, as determined by the Council under the Article 7 TEU mechanism (recital 10 of the EAW FD). But the Court then states that this mutual trust can be undermined when there is a strong indication that, in a case of surrender to another EU Member State, the human dignity of the person requested might not be respected. According to the BVerfG, an EAW should not be executed if it is in conflict with the EU Charter of Fundamental Rights. For the Court this was the case with the arrest warrant in question since the applicable Italian legislation did not guarantee a new trial, with the hearing of evidence, for the person convicted in absentia, and therefore the surrender could entail a violation of his right to an effective judicial remedy under the EU Charter. As a result, the Court referred the case back to the Higher Regional Court for a final decision on the execution of the warrant taking due account of the claimant's rights under the Charter.

No reference to the CJEU for a preliminary ruling

The Constitutional Court decided not to refer the question of the correct interpretation of the EAW FD to the CJEU under Article 267 TFEU. The aim of preliminary rulings is to ensure the proper application and uniform interpretation of EU law in all Member States. However, the BVerfG applied the acte claire doctrine saying that a final instance court is not required to refer the matter to the CJEU when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The Higher Regional Court of Düsseldorf could however still request a preliminary ruling from the CJEU.

The ruling: on the relationship between EU law and national constitutions

The Court framed its examination of the EAW FD against the EU Charter of Fundamental Rights within the question of the extent to which sovereign acts of the European Union and acts of German public authorities based on EU law are, due to the precedence of Union law, exempted from examination against the fundamental rights of the Basic Law. The BVerfG had previously answered this question in 1986 through its famous 'Solangé' doctrine: as long as the EU's level of protection of fundamental rights were substantially equal to the protection afforded by the German constitution, the Court would not review Union acts in light of the fundamental rights of the Basic Law. This has also been in conformity with the principle of primacy of EU law, not only over ordinary national law, but also over national constitutional provisions, in order to guarantee the uniform application of EU law in all Member States and thus to ensure the effectiveness (effet utile) of EU law (established CJEU case law).

However, in its EAW ruling, the Constitutional Court states that the primacy of EU law can apply only regarding sovereign powers that have been transferred to the EU without encroaching upon the country's constitutional identity. Up until now, the BVerfG had undertaken this 'constitutional identity review' in relation to alleged ultra vires acts of the EU (mainly with regard to EU economic governance measures). Now, for the first time, it has undertaken a fundamental-rights examination of EU law (against the Solange approach) within its constitutional identity review. The fundamental right in question is human dignity (Article 1, Basic Law), and in particular, the principle of 'no punishment without guilt'. The right to human dignity is covered by the 'eternity clause' of the Basic Law – meaning that a constitutional reform may not amend this provision, so it is thus an essential part of the German constitutional identity.

The BVerfG concludes that, as a result of the constitutional-identity review, an EU act may need to be disapplied in Germany. It held that this would not be at odds with the principle of sincere cooperation (Article 4(3) TEU) since the EU must respect the Member States' national identities (Article 4(2) TEU), of which the constitutional identity is part. Being able to interpret the EAW FD according to the EU Charter, according to the Court, allowed the same protection of the human dignity right as under the Basic Law.

The CJEU on the application of higher constitutional standards

In the Melloni case, the CJEU had had to deal with the question of whether Article 53 of the EU Charter (the Charter as a minimum protection standard) authorises a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. The CJEU rejected this with regard to the EAW FD since this would undermine the principle of the primacy of EU law, as well as the principles of mutual trust and recognition and would, therefore, compromise the efficacy of the EAW FD.