Editorial

Mutual trust

Mutual trust is at the heart of the European Union. Although the Union lacks a general mechanism to enforce its rules and decisions, member states usually comply with them. This remarkable fact can in part be explained by self interest: although individual rules and decisions may be found harmful and are ducked from time to time, all member states know they win by sticking to the rules of the game. The member state that grudgingly applies a rule or a decision, trusts all the others to do the same most of the time. If this were not so, the system would break down, in spite of the European Court of Justice denying the rule of reciprocity legal status in the Union.

Mutual trust is also at the basis of the mutual recognition of national decisions, which in the field of the free movement of goods and persons has served the Union so well.

In its Tampere meeting of 1999 the European Council made mutual recognition of judicial decisions and judgments the cornerstone of Union judicial cooperation in criminal matters. One of the first concrete results of Tampere, the Framework Decision on the European Arrest Warrant of 13 June, 2002 is 'based on a high level of confidence between Member States'. In actual fact it seems to breathe *mistrust* of states having a liberal criminal law tradition.

The Framework Decision abolishes the principle of double criminality between member states as the basis for extradition (or 'surrender', in the newspeak of the Decision). However, states can opt to maintain it, except for 32 specified crimes (Article 2). Implicitly, by not listing them as mandatory or optional grounds for non-execution of arrest warrants (Articles 3 and 4), the Decision obliges member states to surrender nationals. It also ends the political offences exception.

From the beginning the Arrest Warrant Framework Decision has encountered constitutional obstacles. The Italian government originally could not back the Decision, holding it would jeopardise national sovereignty, but finally ceded, warning however that implementation necessitated a constitutional amendment. Berlusconi added that if the required majority for the amendment could not be found, Italy would stay outside the system, 'just as England and others have remained outside the euro, for example'. The constitutional amendment in France

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in 2003, needed to enable this country to accept the deletion of the political offences exception, was only the starting signal for more stiff constitutional resistance in other member states. The Czech constitutional court is said to have adjourned its decision until the Court of Justice has ruled on preliminary questions raised by the Belgian *Arbitragehof* (see *infra*), but the Polish, Cypriot and German constitutional courts already objected to their national implementing acts. Most often, the ban on extradition of nationals was at issue (on the Polish decision see Adam Łazowski, 1 *EuConst* (2005), p. 569). The *Bundesverfassungsgericht* judged on 18 July 2005 that the implementing act did not give Germans the constitutionally required level of protection. Although this can be overcome by adaptation of the implementing act and does not require constitutional amendment, it raises the more fundamental constitutional questions.

The most sensitive spot in Arrest Warrant Framework Decision does not appear to lie in its assumption that all members' legal systems are sufficiently in agreement with human rights standards, allowing to disregard human rights defences in individual cases. According to the *Bundesverfassungsgericht,* the existence of a common human rights standard on account of the European Convention on Human Rights, does not make constitutional review in individual cases superfluous. Similarly, contracting states to the European Convention on Human Rights are not absolved from their conventional responsibilities towards a person transferred to another state simply because the latter is also a contracting state. As much follows from the *T.I.* v. *United Kingdom* decision of the European Court of Human Rights.

Neither is the deletion of the double criminality principle as such the weak spot. As the *Bundesverfassungsgericht* argues, persons that have committed a crime within one member state should not find refuge in other member states where these acts are not punishable. This is the reverse side of the medal of free movement and settlement, which European citizens enjoy.

The real weak spot of the Framework Decision seems to be that its lifting of the double criminality requirement is not restricted to acts committed in the territory of the prosecuting state. When it extends to acts committed within the territory of another member state, it actually expresses distrust of that state. Would mutual trust in each others' legal systems not at least exclude arrest warrants for acts not punishable in the member state where they are committed?

It would seem that the principle of mutual trust and its expression in the rule of mutual recognition require substantial rethinking. The *Bundesverfassungsgericht* decision sparks this rethinking, giving it a specific impulsion. A German national who has not left the Federal Republic of Germany and has not committed a crime according to German law, should not be extradited. The German legislator will be able to comply with this constitutional requirement thanks to Article

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4(7)(a) of the Framework Decision. This allows the non-execution of an arrest warrant if it relates to offences which 'are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such'.

Just like the Framework Decision itself, the *Bundesverfassungsgericht's* decision is ultimately dissatisfactory, even intellectually. For one thing it is discriminatory, helping Germans in Germany, but not (necessarily) other European citizens or third country nationals there. That, however, does not decide its constitutional relevance. Whatever the legal or intellectual merits, the decision inevitably launches another European constitutional dialogue of judiciaries, the sort of which has been initiated by the *Bundesverfassungsgericht* before and which have been indispensable to constitutional thinking and development in Europe.

On 13 July 2005, just a few days before the German verdict, Belgium's constitutional court addressed two preliminary questions to the Court of Justice on the same subject. In the second question its asks whether the deletion of the double criminality for 32 specified criminal acts is in conformity with Article 6(2) of the European Union Treaty, and more specifically with the principles of legality, equality and non-discrimination. This means the Court of Justice will in turn have to deal with the same fundamental questions as the *Bundesverfassungsgericht*.

These are grounds largely uncharted and lying wide open for constitutional scholarship.

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