

Bundesverfassungsgericht - Press office -

Press release no. 64/2005 of 18 July 2005

on the [judgment](#) of 18 July 2005 - 2 BvR 2236/04 -

European Arrest Warrant Act void

In its judgment of 18 July 2005, the Second Senate of the Federal Constitutional Court declared the European Arrest Warrant Act (*Europäisches Haftbefehlsgesetz*) void. According to the Court, the Act encroaches upon the freedom from extradition (Article 16.2 of the Basic Law (*Grundgesetz - GG*)) in a disproportionate manner because the legislature has not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned. Moreover, the European Arrest Warrant Act infringes the guarantee of recourse to a court (Article 19.4 of the Basic Law) because there is no possibility of challenging the judicial decision that grants extradition. Hence, the extradition of a German citizen is not possible as long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law.

As a result, the constitutional complaint lodged by the complainant, who is supposed to be extradited to Spain for criminal prosecution on the basis of a European arrest warrant (Press release no. 20/2005 of 24 February 2005), was successful. The order of the Higher Regional Court (*Oberlandesgericht*) and the judicial authority's decision that grants extradition were reversed.

Judge Broß, who agrees with the result of the judgment, Judge Gerhardt and Judge Lübke-Wolff have each appended a dissenting opinion to the Federal Constitutional Court decision.

The decision is essentially based on the following considerations:

1. The European Arrest Warrant Act infringes Article 16.2 sentence 1 of the Basic Law (ban on extradition) because the legislature has not complied with the prerequisites of the qualified proviso of legality under Article 16.2 sentence 2 of the Basic Law when implementing the Framework Decision on the European arrest warrant.

The ban on the extradition of Germans is based on Article 16.2 sentence 1 of the Basic Law. The fundamental right that is enshrined therein guarantees the citizens' special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. The protection of German citizens from extradition, can, however, be restricted by law subject to certain prerequisites pursuant to Article 16.2 sentence 2 of the Basic Law. The restriction of the protection from extradition is not a waiver of a state task that actually is essential. The cooperation that is put into practice in the "Third Pillar" of the European Union (police and judicial cooperation in criminal matters) in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, in particular with a view to the principle of subsidiarity.

When adopting the Act Implementing the Framework Decision on the European Arrest Warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate.

In particular, the legislature had to see to it that the encroachment upon the scope of protection provided by Article 16.2 of the Basic Law is considerate.

The ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. Persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently qualified as illegal where it complies with the law in force at the respective point in time. The confidence in one's own legal system is protected in a particular manner where the act on which the request for extradition is based has a significant domestic connecting factor. Whoever, as a German, commits a criminal offence in his or her own legal area need, in principle, not fear extradition to another state power. The result of the assessment is different, however, where a significant connecting factor to a foreign country exists as regards the alleged offence. Whoever acts within another legal system must reckon with his or her being held responsible there as well.

The European Arrest Warrant Act does not come up to this standard. It encroaches upon the freedom from extradition in a disproportionate manner. When implementing the Framework Decision, the legislature has failed to take sufficient account of the especially protected interests of German citizens; in particular, the legislature has not exhausted the scope afforded to it by the framework legislation. It could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision. The Framework Decision permits, for instance, the executing judicial authorities to refuse to execute the European arrest warrant if it relates to offences that have been committed in the territory of the requested Member State. As regards such offences with a significant domestic connecting factor, the legislature would have had to create the possibility of refusing the extradition of Germans. Apart from this, the Arrest Warrant Act shows a gap of protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings in the domestic territory have been dismissed or because the institution of proceedings has been refused. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor's Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. The deficiencies of the legal regulation are also not sufficiently compensated by the fact that the European Arrest Warrant Act provides the possibility of serving in one's home state a prison sentence that has been imposed abroad. Admittedly, this is, in principle, a measure to protect the state's own citizens, but it merely concerns the serving of the sentence and not criminal prosecution.

2. By excluding recourse to a court against the grant of extradition to a European Union Member State, the European Arrest Warrant Act infringes Article 19.4 of the Basic Law (guarantee of recourse to a court).

The European Arrest Warrant Act partly incorporates the grounds for optional non-execution of the European Arrest Warrant that are provided in the Framework Decision. In doing so, the German legislature has essentially opted for a discretionary solution. What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gives rise to is that, in the case of extraditions to a European Union Member State, the authority responsible for granting extradition no longer merely decides on foreign-policy and general-policy aspects of the request for extradition but has to enter into a process of weighing up whose subject is in particular criminal prosecution in the home state of the person affected. The fact that the procedure for granting extradition is complemented by additional constituent elements of offences that are contingent on discretion results in a qualitative change of the grant. The decision to be made, which is based on the weighing up of facts and circumstances, serves to protect the prosecuted person's fundamental rights and may not be removed from judicial review.

3. The European Arrest Warrant Act is void. The legislature will have to revise the grounds for the inadmissibility of the extradition of Germans and will draft the case-by-case decision on extradition in such a way that it is an act of application of the law which is based on weighing up. Moreover, amendments are necessary as regards the drafting of the decision on the grant of extradition and concerning the decision's relation to admissibility.

As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a European Union Member State is not possible. Extraditions can, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen - IRG*) in the version that was valid before the entry into force of the European Arrest Warrant Act.

Judge Broß's dissenting opinion

Judge Broß agrees with the result of the decision of the Senate majority but not with its grounds. In his opinion, the European Arrest Warrant Act is void already because it does not take account of the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law). He puts forward that an extradition of German citizens is only a possibility if a realisation of the state's claim to criminal prosecution in the domestic territory were doomed to fail for factual reasons in the particular case. Only this would open the way for the duty to be performed on the next highest level, i.e. by the European Union Member States. According to Judge Broß, the Senate misjudges the meaning and scope of the principle of subsidiarity and of the principle of proportionality where the Senate considers it admissible to provide, in the case of offences with a significant connecting factor to a foreign country, the possibility of extraditing German citizens without any substantive restriction. The confidence of the prosecuted person in his or her own legal system is protected in a particular manner precisely where the act on which the request for extradition is based shows a significant connecting factor to a foreign country. It is above all in such cases that the state's duty to protect and the principle of subsidiarity must prove their worth, not only in the case of offences with a significant domestic connecting factor.

Judge Lübbe-Wolff's dissenting opinion

Judge Lübbe-Wolff shares the Senate majority's opinion that the European Arrest Warrant Act does not take sufficient account of the fundamental rights of persons potentially affected by it, but does not agree with parts of the grounds and with the dictum on the legal consequences. She states that to rule out violations of the constitution, it would have been sufficient to establish that as regards certain specified cases, extraditions on the basis of the Act are inadmissible until the entry into force of a new regulation that is in conformity with the constitution. The declaration of nullity of the law, however, rules out extradition on account of a European arrest warrant also in cases that pose no constitutional problems whatsoever - even, for instance, the extradition of citizens of the requesting state on account of offences committed in this state. The Federal Republic of Germany is thus forced to infringe European Union law, a situation which could have been avoided without infringing the constitution. On the basis of a more restricted dictum on the legal consequences, which would have been called for according to Judge Lübbe-Wolff, the new Higher Regional Court decision which is due now need not necessarily be in favour of the complainant because it has not yet been clarified whether the complainant's case falls within one of the groups of cases for which the regulations of the European Arrest Warrant Act are insufficient.

Judge Gerhardt's dissenting opinion

Judge Gerhardt takes the view that the constitutional complaint would have had to be rejected as unfounded. He states that the declaration of nullity of the European Arrest Warrant Act is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. With its decision, the Senate contradicts the case-law of the Court of Justice of the European Communities, which, in its Pupino judgment of 16 June 2005, emphasised that the principle of the Member

States' loyal cooperation in the area of police and judicial cooperation in criminal matters also, and particularly, applies as regards the implementation of Framework Decisions. According to Judge Gerhardt, the objectives of protection that are pursued by the Basic Law's ban on extradition are achieved by the Framework Decision and the European Arrest Warrant Act. The Court of Justice of the European Communities, which is competent to interpret the Framework Decision, will counteract the enforcement of a Member State's excessive criminal legislation. The European Arrest Warrant Act makes it possible to refuse extradition in cases in which prosecution abroad would place a disproportionate burden on the person affected. Even if the examination of proportionality, which is indicated under constitutional law, is not explicitly mentioned in the Act, there are, after the Federal Constitutional Court's clarification to this effect, no grounds for assuming that authorities and courts ignore their obvious duty to observe this precept. There is no deficiency as regards legal protection.

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Karlsruhe, 18 July 2005