Headnotes

to the order of the Second Senate of 15 December 2015

- 2 BvR 2735/14 -

1.The Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG.

2.The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue.

3.The principle of individual guilt is part of the constitutional identity. It must therefore be ensured that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial.

4.German public authority must not assist other states in violating human dignity. The extent and the scope of the investigations, which German courts must conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards required by Art. 1 sec. 1 GG.

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 2735/14 –

IN THE NAME OF THE PEOPLE

In the proceedings

on
the constitutional complaint

of Mr R(…),

– authorised representative: Rechtsanwältin Josipa Salm-Francki,
Berliner Allee 57, 40212 Düsseldorf –

against the order of the Düsseldorf Higher Regional Court (*Oberlandesgericht*)

of 7 November 2014 – III - 3 Ausl 108/14 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on 15 December 2015:

1.The order of the Düsseldorf Higher Regional Court of 7 November 2014 – III - 3 Ausl 108/14 – violates the complainant's fundamental right under Article 1 of the Basic Law (*Grundgesetz* – GG) insofar as it declares the extradition of the complainant permissible; this part of the order is reversed. Thus, the order of the Düsseldorf Higher Regional Court of 27 November 2014 – III - 3 Ausl 108/14 – is moot.

2.The matter is remanded to the Düsseldorf Higher Regional Court.

3.The *Land* North Rhine-Westphalia shall reimburse the complainant for the necessary expenses.

R e a s o n s:

A.

The constitutional complaint relates to the extradition [1] of the complainant to Italy on the basis of a European arrest warrant, which was issued for the purpose of executing a criminal sentence rendered against the complainant in his absence. 1

I.

1. The complainant is a national of the United States of America. In 1992, by final judgment of the Florence *Corte di Appello*, he was sentenced in absence to a custodial sentence of 30 years for participating in a criminal organisation as well as importing and possessing cocaine. In 2014, he was arrested in Germany on the basis of an extradition request by the Italian Republic, which was based on a European arrest warrant issued in the same year by the Prosecutor General's Office of the Florence *Corte di Appello*. 2

a) By means of the European arrest warrant, the extradition of the complainant is requested to facilitate the execution of the custodial sentence imposed on him. The European arrest warrant indicates that the complainant was not personally served with the 1992 decision on which the judgment is based. In this regard, the European arrest warrant form reads as follows: 3

> d) Indicate if the person appeared in person at the trial resulting in the decision:

1. *Translator's note: The term "extradition" is used in the translation of the Gesetz für die Internationale Rechtshilfe in Strafsachen, Act on International Cooperation in Criminal Matters – available in English at http://www.gesetze-im-internet.de/englisch_irg/index.html, translation provided by Prof. Dr. Michael Bohlander and Prof. Wolfgang Schomburg, – that transposes the Framework Decision on the European arrest warrant into German law. The German term used in that Act is indeed "Auslieferung". The English-language version of the Framework Decision on the European arrest warrant uses the term "surrender", the German version the term "Übergabe". Therefore, in this order, in most cases the term "extradition" is used. However, this usually does not apply in cases where the Framework Decision on the European arrest warrant is referred to.*

1. Yes, the person appeared in person at the trial resulting in the decision.

2. No, the person did not appear in person at the trial resulting in the decision.

3. If you have ticked the box under point 2, please confirm the existence of one of the following:

3.4 the person was not personally served with the decision, but

-the person will be personally served with this decision without delay after the surrender; and

-when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she 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; and

-the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be …… days.

The Florence Prosecutor General's Office marked point 3.4 with a cross. However, point 2, in which the requesting authority confirms that the person to be extradited did not appear in person at the trial resulting in the decision, was left open. Nor did the Florence Prosecutor General's Office indicate the timeframe for requesting a retrial or appeal mentioned in point 3.4 of the European arrest warrant form. 4

b) Letter d, point 3.4 of the European arrest warrant form is based on Art. 4a sec. 1 letter d of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States (OJ EU No. L 190 of 18 July 2002, p. 1) as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ EU No. L 81 of 27 March 2009, p. 24) (hereinafter referred to as Framework Decision on the European arrest warrant – Framework Decision). Art. 4a sec. 1 of the Framework Decision reads as follows: 5

Decisions rendered following a trial at which the person did not appear in person

(1) The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

a) in due time:

i) either was summoned in person and thereby informed of the

scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

b) being aware of the scheduled trial, had given a mandate to a legal counsellor [2], who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

c) after being served with the decision and being expressly informed about the 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:

i) expressly stated that he or she does not contest the decision;

or

ii) did not request a retrial or appeal within the applicable time frame;

or

d) was not personally served with the decision but:

i) 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;

and

ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

2. *Translator's note: As a rule, in this order, the term "defence counsel" is used.*

Italy has submitted a declaration, which is admissible under Article 8 section 3 of Framework Decision 2009/299/JHA (OJ EU No. L 97 of 16 April 2009, p. 26), as a consequence of which the Framework Decision applies with effect from 1 January 2014 at the latest to the recognition and execution of decisions which are issued by the competent Italian authorities after a trial in which the person concerned had been absent. 6

c) The provisions of [German] national law relevant for the execution of a European arrest warrant are contained in the Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen* – IRG) (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I 1982 p. 2071). § 73 and § 83, in the version of the Act of 20 July 2006 (BGBl I p. 1721), which is applicable here, read [3]: 7

Section 73 Limitations on Assistance

> Legal assistance and transmission of data without request shall not be granted if this would conflict with basic [4] principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

Section 83 Additional Conditions of Admissibility

> Extradition shall not be admissible
>
> 3. if in the case of a request for the purpose of enforcement the sentence on which the request is based was issued in absentia [5] of the person sought [6] and the person sought had not been personally summoned to or otherwise been informed about the date of the hearing which led to the judgment in absentia unless the person sought, in a case where defence counsel had been appointed, frustrated the service of a summons through flight in the knowledge of the proceedings against him, or if after his transfer [7] he is granted a trial de novo in which the charges against him will be reviewed in their entirety and where he will be given the right to be present at the trial. (…)

d) By order of 14 August 2014, the Düsseldorf Higher Regional Court (*Oberlandesgericht*) decided that with regard to the sentence rendered in absence, at present, it could not determine whether the conditions stipulated in § 83 no. 3 IRG were met in 8

3. *Translator's note: The translation is taken from the source cited above. In this order, admissibility within the meaning of § 83 is referred to as "permissibility". In addition, "section" is referred to as "§".*
4. *Translator's note: referred to as "fundamental" in this order.*
5. *Translator's note: As a rule, this order uses "in absence".*
6. *Translator's note: As a rule, this order uses "requested person".*
7. *Translator's note: As a rule, this order uses "surrender" as does the Framework Decision.*

the case at hand.

According to the Higher Regional Court, the information given by the Italian judicial authorities did not provide the necessary certainty that, after his surrender, the complainant would be given the opportunity of a full review of the sentence handed down in his absence by way of a re-examination of the facts relating to the charges and of the ensuing legal consequence. In the opinion of the court, it cannot be inferred from the European arrest warrant that the complainant would be able to achieve this by means of a simple appeal that does not require certain conditions to be met and that does not impose on him the burden of proof. According to the Higher Regional Court, the extraordinary remedy of retrial under Art. 630 et seq. of the Italian Code of Criminal Procedure (*Codice di procedura penale* – CPP) is an instrument of exceptional nature and is as such bound by strictly regulated grounds for retrial, in particular the existence of fresh evidence. For this reason, the Higher Regional Court requested additional information from the Italian authorities regarding the complainant's actual knowledge of the trial date, and his representation by counsel, as well as an assurance that, after his surrender [to Italy], he would, without reservations, have the right to a retrial at which he would be present, and in which the factual findings with regard to the charges brought against him would be fully re-examined. 9

By letter dated 7 October 2014, the Florence Prosecutor General's Office stated that under Art. 175 CPP the convicted person would be able, within thirty days, to apply for reinstatement with regard to the time limit for appeal, which, in case of an extradition from abroad, would start to run on the date of surrender; the judge in charge at the time at which the application is submitted would decide on the application and, in case of a conviction, the judge competent for appeals would decide; if the request for reinstating the time limit were rejected, an appeal in a court of cassation (*Kassationsbeschwerde*) could be lodged. Furthermore, the letter stated ([*English translation of the*] quote from the [*German*] translation commissioned in the initial proceedings): 10

> Should the application be granted, a new trial must be held against the convicted person, who will again be summoned by order. The convicted person is assured his right of defence without reservations.

The Prosecutor General's Office also provided the wording of Art. 175 CPP in the version of the Act No. 60 of 22 April 2005, i.e. in the version applicable prior to the reform of criminal procedure in 2014. An excerpt from this reads as follows ([*English translation of the*] quote from the [*German*] translation commissioned in the initial proceedings): 11

> 2. If a judgment by default, or a penal order, has been issued, the convicted person will, upon application, be granted reinstatement to the time limits for appeal or objection, unless he or she was aware of the proceedings or the order and has voluntarily waived the right to object or appeal. To this end, the judicial authorities will undertake

every necessary examination.

The Florence Prosecutor General's Office did not give any additional information regarding the complainant's knowledge of the trial date and his representation by counsel. 12

e) In his brief dated 21 October 2014, the complainant claimed that he had been convicted in absence and without his knowledge. Furthermore, referring to German legal doctrine, he stated that reinstating him into the position to lodge an appeal was no equivalent to being granted the right to a trial at first instance, of which he had been deprived. He claimed that because of the courts' limited competence to hear evidence in such cases, the "late" appeal did not, as a rule, meet the requirements that apply if the right to be heard is granted at a later stage. He stated that, normally, no new evidence was heard during the main hearing of the appeal. He claimed that the court would decide on the basis of the case files only, and that the hearing of fresh evidence was only possible in exceptional cases. According to him, the present legal situation did not provide for the hearing of fresh evidence in case of a conviction in absence. The complainant informed the Higher Regional Court of the content of the relevant Art. 603 CPP in Italian and German. Since its entry into force in 1988, sections 1 to 3 of Article 603 CPP have not been amended. They read as follows (Italienische Strafprozessordung, Zweisprachige Ausgabe, Bauer/König/Kreuzer/Riz/Zanon, 1991 – Italian Code of Criminal Procedure, Bilingual edition [8]): 13

> 1. If a party has applied, in the brief of appeal or statement of reasons submitted pursuant to Article 585 section 4, for a new hearing of evidence, which had already been heard during the trial at first instance, or for hearing fresh evidence, the court shall order a new hearing of evidence in the main hearing if it is not in a position to decide the case on the basis of the case file.
>
> 2. If the fresh evidence did not come into existence or was not discovered until after the trial at first instance, the court shall, within the limits provided for in Article 495 section 1, order a new hearing of evidence in the main hearing.
>
> 3. The court shall order on its own accord a new hearing of evidence in the main hearing if the court considers it to be indispensable (604 sec. 6).

The complainant asserted that, under Art. 603 sec. 4 CPP 1988, which might be applicable (although repealed by the Act of 28 April 2014 in the meantime), a retrial would only be conducted if the convicted person proved that, through no fault of his own, he had not, in any way or at any time, been aware of the proceedings against him. The complainant also provided the wording of Art. 603 sec. 4 CPP 1988 in Italian and German. It reads as follows (Italian Code of Criminal Procedure, Bilingual edition 14

8. *Translator's note: translated into English for this order's translation.*

[9], – Italienische Strafprozessordung, Zweisprachige Ausgabe, Bauer/König/Kreuzer/Riz/Zanon, 1991):

> 4. The court shall also order a new hearing of evidence in the main hearing, upon application by the accused who had been absent by default at the trial at the first instance and if he shows that he was unable to appear due to events of a coincidental nature, or *force majeure*, or because he was not aware of the decree summoning him to appear, provided that he is not responsible for these circumstances or that he has not deliberately evaded taking note of the trial proceedings if the summons to the first instance was served on the defence counsel in the cases provided for in Article 159, Article 161 section 4 and Article 169.

15 The complainant argued that the provisions on the burden of proof and the burden of production in Art. 603 sec. 4 CPP 1988 were identical with those in the earlier versions of Art. 175 sec. 2 CPP (applicable before 2005). According to him, pursuant to these provisions, the convicted person is subject to the burden of proof and of production with regard to the fact that he or she had not been aware of the proceedings. He stated that according to the unanimous jurisprudence of the higher regional courts such legal arrangements constitute an obstacle to extradition. He claimed that it should have been obvious to the court that Art. 603 sec. 4 CPP 1988 applied to him, because, according to a decision by the Italian *Corte di Cassazione* of 17 July 2014 (No. 36848), the previous legal situation applied to trials that were conducted in absence of the accused before the Act of 28 April 2014 entered into force. The complainant provided the Higher Regional Court with the wording of the decision of the *Corte di Cassazione*. He claimed that further evidence proving that Art. 603 sec. 4 CPP 1988 applied to him was provided by the fact that the Florence Prosecutor General's Office sent the 2005 version of Art. 175 CPP, which had been applicable prior to the 2014 reform of criminal procedure.

16 f) By the challenged order of 7 November 2014, the Higher Regional Court declared the extradition to be permissible. According to that court, § 83 no. 3 IRG poses no obstacle to extradition. Based on the additional information provided by the Florence Prosecutor General's Office on 7 October 2014, that court proceeded from the assumption that the complainant, after his surrender, would have the right to a retrial in which the charges against him would be fully examined and at which he would have the right to be present. In the court's opinion, such re-examination of the charges was guaranteed by the legal remedy of reinstatement to the former legal position under Art. 175 CPP in the version communicated to it. Accordingly, the convicted person would "upon application, be reinstated in the time limits for appeals or objections, unless he [was] aware of the proceedings or the summons and voluntarily waived the right to object or appeal".

9. *Translator's note: translated into English for this order's translation.*

According to the Higher Regional Court, it could assume that an actually effective legal remedy of reinstatement to the former legal position was available to the complainant, which was dependent [10] upon his application and not subject to the discretion of the Italian judicial authorities. At the same time, according to the court, a comprehensive review of the sentence rendered in absence was guaranteed. In the court's opinion, it could remain undecided whether this review takes place at the appeals stage or as part of a new trial at first instance. According to the Higher Regional Court, it was even doubtful whether the complainant's objection that appeal proceedings under Italian law did not offer a comprehensive re-examination within the meaning of § 83 No. 3 IRG was convincing at all. Even if – as stated by the complainant – in Italian appeal proceedings ("*appello*", Art. 593 et seq. CPP), as a rule, no fresh evidence was heard in the main hearing, the appeal would, according to the court, nonetheless be a legal remedy that results in a review of the facts and the law (with reference to Maiwald, Einführung in das italienische Strafrecht und Strafprozessrecht [Introduction to Italian Criminal Law and Criminal Procedural Law] 2009, p. 237). According to the court, this means that a full review of the facts and the law pertaining to the sentence rendered in absence would take place, during the course of which the taking of fresh evidence is "in any case not impossible". 17

In the opinion of the Higher Regional Court, such proceedings satisfy the requirements of § 83 no. 3 IRG. The court based its opinion on the following considerations: that the provision is based upon Art. 5 No. 1 of the Framework Decision (in the version of 13 June 2002, OJ EU No. L 190 of 18 July 2002, p. 1); that when the Framework Decision was transposed into German law, the conditions under which a sentence rendered in absence could form the basis for an extradition were approximated to the principles developed in the jurisprudence of the courts and legal doctrine with regard to § 73 IRG; but that no right to a new trial in the sense of full review of the facts and the law as in the first instance could be derived from the principles developed with regard to § 73 IRG. In the opinion of the court, the opportunity to be heard and being able to defend oneself effectively after becoming aware of the sentence were sufficient. According to the court, there was no indication that with the introduction of § 83 no. 3 IRG, the standards developed with regard to § 73 IRG were meant to be raised. 18

The Higher Regional Court stated that notwithstanding these general considerations, it was sufficiently clear from the reply letter from the Florence Prosecutor General's Office of 7 October 2014 that the charges against the complainant in the present case would be fully re-examined in a new trial. The court was of the opinion that, according to this letter, the complainant would, in case of a reinstatement, be granted the express right to a retrial and a new summons, and he would, without reservations, be assured of his right to defence. In the court's opinion, this rendered the question irrelevant as to whether the complainant may have a right to have the original decision declared void (*Nichtigkeitsfeststellungsklage*) and/or to have a retrial pursuant to Art. 19

10. *Translator's note: only.*

603 sec. 4 CPP. The court considered it therefore unnecessary to obtain a legal opinion on the current legal situation in Italy.

2. a) In his remonstrance of 13 November 2014, the complainant claimed that under Italian criminal procedural law the most he would be able to achieve with reinstatement to the former legal position under Art. 175 CPP would be a reinstatement into the time limit for appeals. This, he claimed, could already be inferred from the letter of 7 October 2014 from the Florence Prosecutor General's Office. In his opinion, where the Prosecutor General's Office stated that a new main hearing against the convicted person would take place, the complainant claimed that the only tenable interpretation would be that it referred to the main hearing in the context of appeals proceedings (Art. 593 et seq. CPP), since Art. 175 CPP merely permitted reinstatement into the time limit for an appeal. The complainant claimed that, under Italian criminal procedural law, he would only under very exceptional circumstances have the right to question witnesses for the prosecution or to have them questioned, or to have witnesses for the defence summoned and examined under the same conditions as apply to witnesses for the prosecution, since he bears the burden of proof that he had not been aware of the original proceedings against him at the relevant time. He claimed that, in addition, it is at the discretion of the judge whether to take fresh evidence or not. 20

b) By order of 27 November 2014 the Higher Regional Court rejected the complainant's remonstrance as unfounded. The court stated that it upheld its opinion that the very possibility – that is effectively available – of having the time limit for appeal in Italian appeals proceedings reinstated provided the complainant with the possibility to have the charges against him fully re-examined as mandated by § 83 No. 3 IRG, since this would ensure a full review of the validity of the charges brought against the complainant not only in law but also in fact. The court stated that in view of the additional information provided by the Florence Prosecutor General's Office on 7 October 2014, it could not find that the complainant's rights of defence under Art. 6 sec. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) would be restricted in an appellate hearing. It further stated that according to the case-law of the European Court of Human Rights, there was no right to have the trial at first instance repeated if, at the first instance, the sentence had been rendered in absence; rather, according to the court, a new trial before a court of appeal is considered sufficient. 21

In the court's opinion, the fact that the European Court of Human Rights in 1985 considered the late appeal under Italian law to provide an insufficient possibility for review did not lead to a different assessment in the present case. The court argued that under the provisions in force at the time, the court of appeal was permitted to decide on the validity of the charges from a factual and legal perspective only if it was of the opinion that the competent authorities had violated the provisions to be complied with when a prosecuted person was declared "*latitante*" (gone into hiding) or when procedural documents were being served; moreover, the accused would have had to prove that he or she had not intended to evade justice. 22

However, the court stated that, even when taking into consideration the objections raised by the complainant, it was unable to discern any such restrictions of competence on the Italian court of appeal with regard to the appeal proceedings now applicable to the complainant. The possibility, afforded in these proceedings, to hear evidence already having been heard during first instance proceedings as part of the review of the sentence rendered in absence satisfied the requirements – that have already been comprehensively set out in the court's order of 7 November 2014 – for a full re-examination of the charges within the meaning of § 83 No. 3 IRG. The court stated that, in this respect, in deciding on whether an extradition to another Member State of the European Union is permissible, the specific structure and practice of appeal proceedings under German law could not be taken as the standard to be expected. 23

II.

Upon application for a preliminary injunction filed jointly with the constitutional complaint, the Third Chamber of the Second Senate decided, by order of 27 November 2014, to temporarily suspend the complainant's surrender to the authorities of the Italian Republic until the decision on the constitutional complaint, or for a maximum period of six months. By order of 13 May 2015, the Third Chamber of the Second Senate, and by order of 3 November 2015, the Second Senate both renewed the preliminary injunction of 27 November for a period of another six months, albeit until the decision on the constitutional complaint at the longest (§ 32 sec. 6 sentence 2 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). 24

III.

In his constitutional complaint, the complainant claims a violation of his fundamental rights under Art. 1, Art. 2 sec. 1 and sec. 2 sentence 2, Art. 3 and Art. 103 sec. 1 GG, of his fundamental right to a fair trial (Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG, Art. 6 sec. 3 ECHR), a violation of the minimum standards under international law, which are binding pursuant to Art. 25 GG, as well as a violation of Art. 6 sec. 3 ECHR. He claims that at no point in time was he aware of investigation proceedings or criminal proceedings being conducted against him in Italy. He further argues that there is no guarantee that after his extradition to Italy, he will be afforded the right to a trial in which the charges against him will be re-examined on fact and in law in his presence. 25

According to the complainant, the Italian government did not provide a sufficient assurance [11] in this respect. He claims that the letter by the Florence Public Prosecutor General of 7 October 2014 does not have the necessary binding effect under international law. In his opinion, the Higher Regional Court was not entitled to replace the missing explicit assurance with its own assessment of the Florence Public Prosecutor General's letter of 7 October 2014; instead, it ought to have examined whether this 26

11. *Translator's note: diplomatic.*

assurance could be trusted with absolute certainty. According to the complainant, the court failed to avail itself of existing opportunities to obtain information, such as obtaining an expert opinion from the Max Planck Institute for Foreign and International Criminal Law.

He further argues that the Florence Public Prosecutor General's letter does neither indicate the manner in which nor the court before which the proceedings will be conducted. He reasons that since Art. 175 CPP only affords reinstatement of the time limit for appeal, new taking of evidence is not guaranteed under the Italian Code of Criminal Procedure (Arts. 593 et seq. CPP). According to him, appellate proceedings are conducted solely on the basis of the case file; new evidence is only heard in exceptional cases, which would depend on the complainant being able to prove that he was not aware of the proceedings conducted against him in absence. Furthermore, in his opinion, it would be at the discretion of the judge whether to take new evidence. According to the complainant, the letter of the Italian Public Prosecutor General does not indicate that "retrial" is intended to mean a trial at first instance. 27

IV.

The files of the initial proceedings were available to the Senate. The German *Bundestag*, the *Bundesrat,* the Federal Government, the governments of all *Laender* (federal states), the Public Prosecutor General of the Federal Court of Justice (*Generalbundesanwalt*) and the Düsseldorf Public Prosecutor General had the opportunity to submit a statement. Of the parties entitled to submit statements only the *Generalbundesanwalt* has submitted a statement. In his view, the constitutional complaint is unfounded. 28

He states that the application of the law by the Higher Regional Court is unobjectionable under constitutional law; that the regular court's assessment of the statements provided by the Italian criminal prosecution authorities is at any rate tenable; that the Higher Regional Court remained within its competence when interpreting the Florence Public Prosecutor General's statement of 7 October 2014 as a binding assurance under international law that new proceedings would be conducted in which compliance with the complainant's full rights of defence would be ensured; and that the statement contains the assurance of proceedings in which the charges will be re-examined with regard to the facts as well as the assurance that compliance with the rights of defence will be ensured. 29

The *Generalbundesanwalt* further argues that under the Constitution, the Higher Regional Court was not required to further clarify the facts of the case. In his opinion, the fact that the Higher Regional Court trusts the statement of the Florence Public Prosecutor General is constitutionally unobjectionable. He bases his view on the following considerations: Italy is a Member State of the European Union, and as such is bound by the requirements of the European Union Framework Decisions and the European Convention on Human Rights when applying its national law. Therefore, in his view, the Higher Regional Court could not be expected to assume that Italy would vio- 30

late the obligations under international law entered into, in particular since this would counteract the principle of mutual recognition, a principle characteristic of the law of the European Union.

31 According to the *Generalbundesanwalt*, the complainant errs in claiming that the Higher Regional Court inadequately interpreted the rules of Italian criminal procedure law. In the Public Prosecutor General's view, the complainant's argument that it follows from the jurisprudence of the Italian *Corte di Cassazione* that Art. 175 CCP in its previous version must be applied to sentences rendered prior to 28 April 2014 is not convincing. In the opinion of the Public Prosecutor General of the Federal Court of Justice, the submissions in the application do not support such interpretation. In his view, the complainant's claim that the Italian *Corte di Cassazione* – in blatant breach of the European Convention on Human Rights and against the clear intent of the Italian legislature – had returned to the legal situation applicable prior to the year 2005 appears so improbable that it required no further discussion by the court. In addition, the statements of the complainant primarily refer to the provisions on nullity proceedings which were apparently repealed in 2014.

32 In the *Generalbundesanwalt*'s opinion, the complainant's claim that the burden of proof was imposed on him to his detriment is contradicted at the very least by the statement of the Florence Public Prosecutor General of 7 October 2014 confirming the applicability of the rules on burden of proof under Art. 175 CPP in the version in force since 2005. In the view of the *Generalbundesanwalt*, this version cannot be interpreted to contain a burden of proof to the detriment of the accused. In his opinion, the Higher Regional Court, therefore, had no reason to assume that, in a new trial, the complainant would have to prove that he had not been aware of the proceedings in his absence against him.

33 The *Generalbundesanwalt* states that in view of the assurance given by the Italian authorities, the Higher Regional Court did not have to consider the question whether the new main proceedings against the complainant would be conducted as first instance proceedings or – in case of an unsuccessful application to declare the 1992 judgment rendered in absence void – as appellate proceedings. In his opinion, the Higher Regional Court remained within it competence in basing its decision in particular on the assumption that, after the complainant's surrender, the charges against him would be examined in a trial court in which compliance with all rights of defence would be ensured. In his view, this was assured in the statement by the Florence Public Prosecutor General of 7 October 2014 under letter d. According to the *Generalbundesanwalt*, in addition, the constitutional requirements are met if, after his surrender [12], the complainant is afforded his right to be heard and to effective defence in a trial. In his view, based on the assurance given, the Higher Regional Court was allowed to assume that these minimum requirements would be met.

12. *Translator's note: In German, the term "Überstellung" is used, as this is the general term used in extradition procedures. In the Framework Decision, this term is only used in the context of Art. 18, where the English version uses the term "transfer".*

B.

The constitutional complaint is admissible. The strict requirements for conducting an identity review (*Identitätskontrolle*) (cf. para. 49) are met. The complainant's brief discusses, correctly in essence, the constitutional aspects of criminal sentences rendered in absence of the requested person, and the related obligations of the courts to investigate (*Aufklärungspflichten*). The possibility that the complainant, after his surrender to Italy, will not be provided with a legal remedy with which he can challenge the sentence rendered in absence in a manner that safeguards his rights of defence that are, under the Basic Law, inalienable and encompassed by the guarantee of human dignity under Art. 1 sec. 1 GG (§ 23 sec. 1 sentence 2, § 92 BVerfGG), can reasonably be deduced from the constitutional complaint. If a violation of the guarantee of human dignity is asserted, the Federal Constitutional Court reviews such a serious violation of a fundamental right in the context of the identity review (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 113, 273 <295 et seq.>; 123, 267 <344, 353 and 354>; 126, 286 <302 and 303>; 129, 78 <100>; 134, 366 <384 and 385 para. 27>; on that point cf. C.I.2. to 5.) – notwithstanding its past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively (cf. BVerfGE 73, 339 <378 et seq.>; 102, 147 <161 et seq.>). 34

C.

The constitutional complaint is also well-founded. The challenged decision violates the complainant's right under Art. 1 sec. 1 in conjunction with Art. 23 sec. 1 sentence 3 and Art. 79 sec. 3 GG. 35

I.

In general, sovereign acts of the European Union and acts of German public authority – to the extent that they are determined by Union law – are, due to the precedence of application of European Union Law (*Anwendungsvorrang des Unionsrechts* [13]), not to be measured against the standard of the fundamental rights enshrined in the Basic Law (1.). However, the precedence of application of European Union Law is limited by the constitutional principles that are beyond the reach of European integration (*integrationsfest*) pursuant to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG (2.). This in particular encompasses the principles contained in Art. 1 GG, including the principle of individual guilt in criminal law, which is rooted in the guarantee of human dignity (3.). It has to be ensured that, also in applying the law of the European Union or legal provisions that originate from German public authority but that are determined by Union law, these principles are guaranteed in every individual case (4.). However, one can only claim a violation of this inalienable core of funda- 36

13. *Translator's note: in the German legal system, this signifies that, within the scope of application of Union law, as a rule, German law is not applied; however, it remains in force and continues to apply in cases that are not within the scope of application of Union law.*

mental rights protection before the Federal Constitutional Court if one submits in a substantiated manner that the dignity of the person is in fact interfered with (5.).

1. Pursuant to Art. 23 sec. 1 sentence 1 GG, the Federal Republic of Germany participates in establishing and developing the European Union. Uniform application of its law is of central importance for the success of the European Union (cf. BVerfGE 73, 339 <368>; 123, 267 <399>; 126, 286 <301 and 302>). Without ensuring uniform application and effectiveness of its law, it would not be able to continue to exist as a legal community of currently 28 Member States (see, fundamentally, ECJ, Judgment of 15 July 1964, Costa/ENEL, 6/64, ECR 1964, p. 1251 <1269 et seq.>). In this respect, Art. 23 sec. 1 GG also assures that Union law is effective and will be enforced (cf. BVerfGE 126, 286 <302>). 37

Therefore, through the authorisation to transfer sovereign powers to the European Union – an authorisation provided under Art. 23 sec. 1 sentence 2 GG –, the Basic Law endorses the precedence of application accorded to Union law by the Acts of Assent to the Treaties. As a rule, the precedence of application of European Union Law also applies with regard to national constitutional law (cf. BVerfGE 129, 78 <100>), and, in conflict, as a rule, it results in national law being inapplicable in the specific case (cf. BVerfGE 126, 286 <301>). 38

Based on Art. 23 sec. 1 GG, the legislature deciding on European integration matters not only may, generally and in all matters, exempt European Union institutions and agencies from being bound by the fundamental rights and other guarantees under the Basic Law, to the extent that they exercise public authority in Germany, but also German entities that execute law of the European Union (cf. Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht, 1989, pp. 247 et seq.). This in particular applies to the legislature at federal and at state level if they transpose secondary or tertiary law without possessing a leeway to design (*Gestaltungsspielraum*) [14] (cf. BVerfGE 118, 79 <95>; 122, 1 <20>). In contrast, the legal acts that are issued in using an existing leeway to design are amenable to scrutiny by the Federal Constitutional Court (cf. BVerfGE 122, 1 <20 and 21>; 129, 78 <90 and 91>). 39

2. However, the precedence of application of European Union Law only applies insofar as the Basic Law and the Act of Assent permit or provide for the transfer of sovereign powers (cf. BVerfGE 73, 339 <375 and 376>; 89, 155 <190>; 123, 267 <348 et seq.>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>). The national order giving effect to Union law at national level (*Rechtsanwendungsbefehl),* contained in the Act of Assent, may only be given within the framework of the applicable constitutional order (cf. BVerfGE 123, 267 <402>). Limits to opening German statehood – limits that apply beyond the specific design of the European integration agenda laid down in the Act of Assent – follow from the Basic Law's constitutional identity as stip- 40

14. *Translator's note: In the case-law of the European Court of Human Rights, such leeway is often referred to as "margin of appreciation".*

ulated in Art. 79 sec. 3 GG (a). This is compatible with the principle of sincere cooperation (Art. 4 sec. 3 TEU) (b) and is corroborated by the fact that the constitutional law of most Member States of the European Union contains similar limits (c).

a) The scope of precedence of application of European Union Law is mainly limited by the Basic Law's constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration (*verfassungsänderungs- und integrationsfest*) (aa). The constitutional identity is safeguarded by the identity review conducted by the Federal Constitutional Court. (bb). 41

aa) To the extent that acts of an institution or an agency of the European Union have an effect that affects the constitutional identity protected by Art. 79 sec. 3 GG in conjunction with the principles laid down in Arts. 1 and 20 GG, they transgress the limits of open statehood set by the Basic Law. Such an act cannot be based on an authorisation under primary law, because the legislature deciding on European integration matters, despite acting with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG, cannot transfer sovereign powers to the European Union which, if exercised, would affect the constitutional identity protected by Art. 79 sec. 3 GG (cf. BVerfGE 113, 273 <296>; 123, 267 <348>; 134, 366 <384 para. 27>). Nor can it be based on initially constitutional conferrals that have supposedly evolved through a development of the law, because the institution or the agency of the European Union would thereby act ultra vires (cf. BVerfGE 134, 366 <384 para. 27>). 42

bb) Within the framework of the identity review, one has to review whether the principles laid down as inalienable by Art. 79 sec. 3 GG are affected by an act of the European Union (cf. BVerfGE 123, 267 <344, 353 and 354>; 126, 286 <302>; 129, 78 <100>; 134, 366 <384 and 385 para. 27>). The result of such a review may be that in exceptional cases – as is the case with the "*Solange"* reservation ("as long as" reservation) (cf. BVerfGE 37, 271 <277 et seq.>; 73, 339 <387>; 102, 147 <161 et seq.>) or with the *ultra vires* review (BVerfGE 58, 1 <30 and 31>; 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353 et seq.>; 126, 286 <302 et seq.>; 134, 366 <382 et seq., paras. 23 et seq.>) –, Union law must be declared inapplicable in Germany. However, to prevent German authorities and courts from simply disregarding the Union law's claim to validity, the application of Art. 79 sec. 3 GG in a manner that is open to European law in order to protect the effectiveness of the Union legal order and that takes into account the legal concept expressed in Art. 100 sec. 1 GG require that finding a violation of the constitutional identity is reserved for the Federal Constitutional Court (cf. BVerfGE 123, 267 <354>). This is underlined by Art. 100 sec. 2 GG according to which in case of doubts whether a general rule of international law creates rights and duties for the individual, the court must refer the question to the Federal Constitutional Court (cf. BVerfGE 37, 271 <285>). An identity review may also be triggered by a constitutional complaint (Art. 93 sec. 1 no. 4a GG) (cf. BVerfGE 123, 267 <354 and 355). 43

b) The identity review does not violate the principle of sincere cooperation within the meaning of Art. 4 sec. 3 TEU. It is rather inherent in the concept of Art. 4 sec. 2 sentence 1 TEU (cf., on taking into consideration the national identity, ECJ, Judgment of 2 July 1996, Commission v Luxembourg, C-473/93, ECR 1996, I-3207, para. 35; Judgment of 14 October 2004, Omega, C-36/02, ECR 2004, I-9609, paras. 31 et seq.; Judgment of 12 June 2014, Digibet and Albers, C-156/13, EU:C:2014:1756, para. 34) and corresponds to the special nature of the European Union. The European Union is an association of sovereign states (*Staatenverbund*), of constitutions (*Verfassungsverbund* [15] *)*, of administrations (*Verwaltungsverbund*) and of courts (*Rechtsprechungsverbund* [16] *)*. This structure is ultimately based on international treaties concluded between the Member States. As “masters of the treaties” (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order (cf. BVerfGE 75, 223 <242>; 89, 155 <190>; 123, 267 <348 and 349, 381 et seq.>; 126, 286 <302 and 303>; 134, 366 <384 para. 26>). It is not decisive whether this rule – as in France (Art. 55 of the French Constitution), Austria (Federal Constitutional Act on the Accession of Austria to the European Union – *Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union*, Federal Law Gazette of the Republic of Austria – *BGBl für die Republik Österreich* no. 744/1994) or Spain (Art. 96 sec. 1 of the Spanish Constitution) – is expressly provided for in national constitutional law or – as in the United Kingdom – in the Act of Assent (European Communities Act 1972; cf. Court of Appeal, Macarthys v. Smith, <1981> 1 All ER 111 <120>; Macarthys v. Smith, <1979> 3 All ER 325 <329>; House of Lords, Garland v. British Rail Engineering, <1983> 2 All ER 402 <415>) or whether it is deduced from the Act of Assent by way of a systematic, a teleological, and a historical interpretation – as in Germany – or whether the precedence of European Union Law over national law is achieved by a case-by-case application of national law to individual cases – as in Italy (cf. *Corte Costituzionale*, Decision no. 170/1984, Granital, Europäische Grundrechte-Zeitschrift – EuGRZ 1985, p. 98). 44

Therefore, if the Federal Constitutional Court, in exceptional cases and under narrowly defined conditions, declares an act of an institution or an agency of the European Union to be inapplicable in Germany, this does not contradict the Basic Law’s openness to European law (Preamble, Art. 23 sec. 1 sentence 1 GG) (cf. BVerfGE 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174 and 175>; 102, 147 <162 et seq.>; 123, 267 <354, 401>). 45

This approach does not entail a substantial risk for the uniform application of Union law. On the one hand, violations of the principles of Art. 1 GG in particular, which are at issue here, will only occur rarely – for the reason alone that Art. 6 TEU, the Charter of Fundamental Rights and the case-law of the Court of Justice of the European Union generally ensure an effective protection of fundamental rights vis-à-vis acts of 46

15. *Translator’s note: sometimes referred to as multilevel constitutionalism.*
16. *Translator’s note: sometimes referred to as multilevel cooperation of courts.*

institutions, bodies and agencies of the European Union (cf., e.g., ECJ, Judgment of 9 November 2010, Schecke und Eifert, C-92/09 and C-93/09, ECR 2010, I-11063, paras. 43 et seq.; Judgment of 8 April 2014, Digital Rights Ireland and Seitlinger, C-293/12 and C-594/12, EU:C:2014:238, paras. 23 et seq.; Judgment of 13 May 2014, Google Spain and Google, C-131/12, EU:C:2014:317, paras. 42 et seq., 62 et seq., 89 et seq.; Judgment of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, paras. 91 et seq.). On the other hand, the powers of review reserved to the Federal Constitutional Court are to be exercised with restraint and in a manner open to European law (cf. BVerfGE 126, 286 <303>). To the extent required, it will base its review of the European act in question on the interpretation of that act provided by the Court of Justice of the European Union in a preliminary ruling pursuant to Art. 267 sec. 3 TFEU (Treaty on the Functioning of the European Union). This does not only apply in the context of the *ultra vires* review, but also applies to declaring inapplicable an act of an institution, body or agency of the European Union in Germany, because it affects the constitutional identity protected by Art. 79 sec. 3 in conjunction with Art. 1 and 20 GG (cf. BVerfGE 123, 267 <353>; 126, 286 <304>; 134, 366 <385 para. 27>).

c) The fact that the identity review conducted by the Federal Constitutional Court is compatible with Union law is in addition corroborated by the fact that, notwithstanding varieties in the details, the constitutional law of many other Member States of the European Union also contains provisions to protect the constitutional identity and to limit the transfer of sovereign powers to the European Union (cf. in this respect BVerfGE 134, 366 <387 para. 30>). The vast majority of Constitutional Courts and Supreme Courts of the other Member States, within their respective jurisdiction, share the Federal Constitutional Court's view that the precedence (of application) of European Union law does not apply unrestrictedly, but that it is restricted by national (constitutional) law (cf. for the Kingdom of Denmark: Højesteret, Judgment of 6 April 1998 – I 361/1997 –, para. 9.8; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 – 3-4-1-6-12 –, paras. 128, 223; for the French Republic: Conseil constitutionnel, Decision no. 2006-540 DC of 27 July 2006, 19th recital; Decision no. 2011-631 DC of 9 June 2011, 45th recital; Conseil d'État, Judgment of 8 February 2007, no. 287110 <Ass.>, Société Arcelor Atlantique et Lorraine, Europarecht – EuR 2008, p. 57 <60 and 61>; for Ireland: Supreme Court of Ireland, Crotty v. An Taoiseach, <1987>, I.R. 713 <783>; S.P.U.C. <Ireland> Ltd. v. Grogan, <1989>, I.R. 753 <765>; for the Italian Republic: Corte Costituzionale, Decision no. 98/1965, Acciaierie San Michele, EuR 1966, p. 146; Decision no. 183/1973, Frontini, EuR 1974, p. 255; Decision no. 170/1984, Granital, EuGRZ 1985, p. 98; Decision no. 232/1989, Fragd; Decision no. 168/1991; Decision no. 117/1994, Zerini; for the Republic of Latvia: Satversmes tiesa, Judgment of 7 April 2009 – 2008-35-01 –, para. 17; for the Republic of Poland: Trybunal Konstytucyjny, Judgments of 11 May 2005 – K 18/04 –, paras. 4.1., 10.2.; of 24 November 2010–- K 32/09 –, paras. 2.1. et seq.; of 16 November 2011 -— SK 45/09 -—, paras. 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, Declaration of 13 December 2004, DTC 1/2004, Ground 2, EuR 2005, S. 339 <343> and Decision of 13 February 2014, STC 26/2014, no. 3 of the recitals, Human

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Rights Law Journal – HRLJ 2014, p. 475 <477 and 478>; for the Czech Republic: Ústavni Soud, Judgment of 8 March 2006, Pl. ÚS 50/04, para. VI.B.; Judgment of 3 May 2006, Pl. ÚS 66/04, para. 53; Judgment of 26 November 2008, Pl. ÚS 19/08, paras. 97, 113, 196; Judgment of 3 November 2009, Pl. ÚS 29/09, paras. 110 et seq.; Judgment of 31 January 2012, Pl. ÚS 5/12, para. VII.; for the United Kingdom: High Court, Judgment of 18 February 2002, Thoburn v. Sunderland City Council, <2002> EWHC 195 <Ad-min>, para. 69; UK Supreme Court, Judgment of 22 January 2014, R <on the application of HS2 Action Alliance Limited> v. The Secretary of State for Transport, <2014> UKSC 3, paras. 79, 207; Judgment of 25 March 2015, Pham v. Secretary of State for the Home Department, <2015> UKSC 19, paras. 54, 58, 72 to 92).

3. The interests that are protected by the constitutional identity laid down in Art. 79 sec. 3 GG, interests that are also protected against interferences by public authority exercised supranationally, include the principles of Art. 1 GG, and thereby include the duty of all state authority to respect and protect human dignity (Art. 1 sec. 1 sentence 2 GG), but they also include the principle, enshrined in the guarantee of human dignity, that any punishment presupposes individual guilt (cf. BVerfGE 123, 267 <413>). 48

4. The protected interests that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, are beyond the reach of European integration must not be touched in individual cases (cf. BVerfGE 113, 273 <295 et seq.>; 123, 267 <344>; 126, 286 <302 and 303>; 129, 78 <100>; 129, 124 <177 et seq.>; 132, 195 <239 et seq. paras. 106 et seq.>; 134, 366 <384 et seq. paras. 27 et seq.>). This holds especially true with regard to Art. 1 sec. 1 GG. Human dignity constitutes the highest legal value within the constitutional order (cf. BVerfGE 27, 1 <6>; 30, 173 <193>; 32, 98 <108>; 117, 71 <89>). To respect and protect human dignity forms part of the foundational principles of the Basic Law (cf. BVerfGE 45, 187 <227>; 131, 268 <286>; established jurisprudence of the Federal Constitutional Court), principles which the Basic Law's "mandate to integrate" (*Integrationsauftrag*) and its openness to European law – characteristics of the Basic Law that have found their expression in the Preamble and in Art. 23 sec. 1 sentence 1 GG – must also take into account (cf. BVerfGE 123, 267 <354>; 126, 286 <303>; 129, 124 <172>; 132, 287 <292 para. 11>). Against this backdrop, the Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights that is indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG. 49

5. The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue. The complainant must substantiate in detail to what extent the guarantee of human dignity that is protected by Article 1 GG is violated in the individual case. 50

II.

The challenged decision rendered by the Higher Regional Court transgresses the limits set by Art. 1 sec. 1 in conjunction with Art. 23 sec. 1 sentence 3 and Art. 79 sec. 3 GG. Executing the Framework Decision on the European arrest warrant affects the principle of individual guilt, a principle that is rooted in the guarantee of human dignity (Art. 1 sec. 1 GG) and in the principle of the rule of law (Art. 20 sec. 3 GG) and that forms part of the inalienable constitutional identity under the Basic Law (1.). This fact justifies and mandates a review of the Higher Regional Court's decision, a review according to the standards of the Basic Law, but limited to this protected interest, although the Higher Regional Court's decision is determined by Union law (2.). On the one hand, the requirements set by Union law, and by German law transposing it, on which the decision is based, comply with the requirements set by Art. 1 sec. 1 GG, as they guarantee the mandatory rights of the requested person in the context of extraditions for the purpose of executing sentences rendered in absence of the person concerned and as they do not only allow the courts that deal with the extradition to investigate appropriately, but they demand it (3.). On the other hand, however, in applying those provisions, the Higher Regional Court violated the principle of individual guilt and thereby violated the complainant's right under Art. 1 sec. 1 GG, because with regard to the interpretation of the dispositions of the Framework Decision and the Act on International Cooperation in Criminal Matters, its application of the law did not adequately take into account the significance and the scope of human dignity (4.). 51

1. Art. 1 sec. 1 GG can be violated by executing the Framework Decision on the European arrest warrant, because, in extraditing a person with the purpose of executing a sentence rendered in the absence of the requested person, one enforces, through criminal law, a reaction to socio-ethical misconduct, a reaction that is incompatible with the guarantee of human dignity and the rule of law (*Rechtstaatsprinzip*) unless the individual blameworthiness (*individuelle Vorwerfbarkeit*) of the person concerned has been determined by the competent court (a). Therefore, one must also ensure compliance with the minimum procedural rights of the accused guaranteed under the rule of law and aimed at establishing the true facts of the case, rights that are necessary to ensure the effectiveness of the substantive component of the principle of individual guilt, in the extradition procedure determined by Union law that is triggered by a European arrest warrant (b). 52

a) Criminal law is based on the principle of individual guilt (BVerfGE 123, 267 <413>; 133, 168 <197 para. 53>). This principle governing the entire field of punitive action by the state is enshrined in the guarantee of dignity and responsibility for oneself (*Eigenverantwortlichkeit*) and in the rule of law (cf. BVerfGE 45, 187 <259 and 260>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 and 254>; 130, 1 <26>; 133, 168 <197 para. 53>). As the principle of individual guilt is founded on the guarantee of human dignity under Art. 1 sec. 1 GG, it forms part of the constitutional identity that is inalienable pursuant to Art. 79 sec. 3 GG, and that is also protected against interferences by public authority exercised supranationally (cf. BVerfGE 123, 267 <413>). 53

Therefore, one must also ensure that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial.

aa) The principle of “No criminal sanction without guilt” (“Keine Strafe ohne Schuld” – ”*nulla poena sine culpa*“) presupposes the responsibility of the person, who can decide on his or her actions him- or herself, and who, by virtue of his or her free will, can distinguish between right and wrong and act accordingly. The protection of human dignity is based on the idea of the human being as a spiritual and moral being who is predisposed to freely define and to develop him- or herself (cf. BVerfGE 45, 187 <227>; 123, 267 <413>; 133, 168 <197 para. 54>). Therefore, in the area of the administration of criminal justice, Art. 1 sec. 1 GG determines the concept of the nature of criminal sanctions and the relationship between guilt and atonement (cf. BVerfGE 95, 96 <140>) as well as the principle that any criminal sanction presupposes guilt (cf. BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>; 123, 267 <413>; 133, 168 <197 and 198 para. 54>). By way of criminal sanction, the offender is reproached of a socio-ethical misconduct (cf. BVerfGE 20, 323 <331>; 95, 96 <140>; 110, 1 <13>; 133, 168 <198 para. 54>). The judgment that a person’s behaviour has been unworthy (*Unwerturteil*), which ensues from the criminal sanction, affects the person concerned with regard to his or her right to being valued and respected, a right that is rooted in human dignity (cf. BVerfGE 96, 245 <249>; 101, 275 <287>). Such a reaction by the state is incompatible with the guarantee of human dignity and the rule of law unless the individual blameworthiness of the person is determined (cf. BVerfGE 20, 323 <331>; 95, 96 <140>; 133, 168 <198 para. 54>). 54

bb) As a consequence, the principle of individual guilt is at the same time a mandatory requirement under the principle of the rule of law. The rule of law is one of the fundamental principles under the Basic Law (BVerfGE 20, 323 <331>; 133, 168 <198 para. 55>). It ensures that freedoms can be exercised by affording legal certainty, by binding state authority to the law, and by protecting legitimate expectations (BVerfGE 95, 96 <130>). The principle of the rule of law also encompasses the claim for substantive justice as one of the guiding principles of the Basic Law (cf. BVerfGE 7, 89 <92>; 7, 194 <196>; 45, 187 <246>; 74, 129 <152>; 122, 248 <272>) and comprises the principle of equality before the law as one of the fundamental postulates of justice (cf. BVerfGE 84, 90 <121>). In the field of criminal law, these objectives laid down by the principle of the rule of law are incorporated through the principle that there must not be punishment without guilt (BVerfGE 95, 96 <130 and 131>; 133, 168 <198 para. 55>). According to the idea of justice, the constituent elements of a criminal offence have to correspond adequately to the legal consequences envisaged (cf. BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 50, 205 <214 and 215>; 120, 224 <241>; established jurisprudence of the Federal Constitutional Court). There has to be a just proportion between the punishment on the one hand and the gravity of the offence, and the guilt of the offender, on the other hand (cf. BVerfGE 20, 323 <331>; 45, 187 <228>; 50, 5 <12>; 73, 206 <253>; 86, 288 <313>; 96, 245 <249>; 109, 133 55

<171>; 110, 1 <13>; 120, 224 <254>; 133, 168 <198 para. 55>). In this sense, the criminal sanction is aimed at justly compensating guilt (cf. BVerfGE 45, 187 <253 and 254>; 109, 133 <173>; 120, 224 <253 and 254>; 133, 168 <198 para. 55>).

b) The effectiveness of the principle of individual guilt is at risk if one does not ensure that the true facts of the case are established (aa). Meting out an appropriate criminal sanction, which also constitutes a socio-ethical reproach, presupposes that the court concerned takes into account the personality of the accused, and therefore, as a rule, that the accused is present at the trial. As a consequence, the principle of individual guilt mandates that minimum rights of the accused are guaranteed in criminal trials to ensure that the accused can present circumstances to the court, and have them reviewed, that might be exonerating or relevant for sentencing (bb). These guarantees must be complied with in extradition proceedings for the purpose of executing sentences rendered in the absence of the requested person in the trial (cc). 56

aa) Establishing the true facts of the case, which is indispensable for realising the substantive component of the principle of individual guilt, is the central objective of criminal proceedings (cf. BVerfGE 57, 250 <275>; 118, 212 <231>; 122, 248 <270>; 130, 1 <26>; 133, 168 <199 para. 56>). It is the function of criminal proceedings to enforce the right of the state to inflict punishment (*Strafanspruch des Staates*) in a procedure provided for and governed by law (*justizförmig*) in order to protect legal interests of individuals and of the general public and to ensure that the fundamental rights of the person at risk of punishment are effectively protected. In criminal proceedings, one has to ensure that the dignity of the human being as a person acting on his or her own responsibility is complied with, as well as the principle derived from the rule of law that one may not impose a criminal sanction without guilt, and that corresponding measures under procedural law are provided (cf. BVerfGE 122, 248 <270>; 133, 168 <199 para. 56>). One has to establish, in accordance with the relevant procedural rules, that the offence was committed and that the offender was guilty (cf. BVerfGE 9, 167 <169>; 74, 358 <371>; 133, 168 <199 para. 56>). The offender is presumed innocent until his or her guilt is proven (cf. BVerfGE 35, 311 <320>; 74, 358 <371>; established jurisprudence of the Federal Constitutional Court). 57

bb) Criminal proceedings have the aim and the function of meting out a criminal sanction that is appropriate with regard to the offender and the offence. In the German legal sphere, a criminal sanction is much more than an interference with rights (*Rechtseingriff*) or harm (*Übel*) that bears upon the offender. One of the characteristic features of a criminal sanction, besides such interference or harm, is the blame (*Tadel*) or reproach that is expressed via the sentence. This is meant as a socio-ethical reproach or a specific moral disapproval. Under the Basic Law, a criminal sanction does not merely imply the reproach of a violation of the law, but the violation of the part of the law that has a more fundamental foundation, that is to say a socio-ethical one (cf. BVerfGE 25, 269 <286>; 90, 145 <200 - separate opinion>; 95, 96 <140>; 96, 10 <25>; 96, 245 <249>; 109, 133 <167>; 109, 190 <217>; 120, 224 <240>; 123, 267 <408>; cf., in comparison to a criminal sanction, the assessment of 58

administrative sanctions in BVerfGE 42, 261 <263>; e.g., for just some examples from legal doctrine Weigend, in: Leipziger Kommentar, vol. 1, 12th edition 2007, Introduction para. 1; Radtke, in: MüKo, StGB, Preliminary remark concerning §§ 38 et seq., para. 14; idem, Goltdammer's Archiv für Strafrecht – GA 2011, pp. 636 <646>; Roxin, Strafrecht AT, vol. 1, 4th ed. 2006, § 3 para. 46, p. 89). This implies, however, that a criminal sanction that does not comprehensively take into account the personality of the offender cannot be a criminal sanction that is appropriate with regard to the dignity of the accused. As a consequence, this presupposes, as a rule, that a court, in an oral hearing in the presence of the accused, gains an insight into the accused's personality, his motifs, his perspective on the offence, on the victim and the circumstances of the offence. It has to be ensured that the accused at least has the right to personally present circumstances to the court, in particular such of a justifying, excusing, or mitigating nature, the judge and the accused being face to face. This follows from the fact that if one reproaches someone of socio-ethical misconduct, this constitutes a reproach that bears upon the personality of the sentenced person (cf. BVerfGE 96, 245 <249>; 101, 275 <287>), a reproach affecting the person concerned with regard to his or her right to be valued and respected, a right that is rooted in human dignity.

cc) The minimum guarantees of rights of the accused in criminal proceedings, guarantees that are mandated by the principle of individual guilt, must also be observed in decisions on the extradition of persons requested for the purpose of executing sentences rendered in the absence of the requested person at the trial (1). In this respect, German courts are under a responsibility to ensure that those guarantees will be observed ("*Gewährleistungsverantwortung*") by the requesting state (2). 59

(1) In its established jurisprudence, the Federal Constitutional Court has taken the view that, in extraditing requested persons for the purpose of executing sentences rendered in their absence, one has to respect the inalienable constitutional principles (cf. BVerfGE 59, 280 <282 et seq.>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 3, 27 <32>; 3, 314 <317>; 6, 13 <18>; 6, 334 <341 and 342>; German Federal Constitutional Court, *Bundesverfassungsgericht* (BVerfG), Order of the First Chamber of the Second Senate of 17 November 1986 – 2 BvR 1255/86 –, Neue Juristische Wochenschrift – NJW 1987, p. 830 <830>; Order of the Third Chamber of the Second Senate of 24 January 1991 – 2 BvR 1704/90 –, NJW 1991, pp. 1411 <1411>) or the indispensable constituents of the German public order (BVerfGE 63, 332 <338>) respectively. This is the reason why the Senate in the past had declared extraditions for the purpose of executing foreign sentences that were rendered in the absence of the requested person to be impermissible if the requested person had neither been informed about the proceedings, nor about their conclusion nor, after gaining knowledge of those facts, had had an actually effective possibility to use his or her right to be heard and to defend him- or herself effectively (cf. BVerfGE 63, 332 <338>; BVerfGK 3, 27 <32 and 33>; 3, 314 <318>; 6, 13 <18>; BVerfG, Order of the Third Cham- 60

ber of the Second Senate of 24 January 1991 - 2 BvR 1704/90 -, NJW 1991, pp. 1411 <1411>).

To achieve that the requesting state does not treat a requested person as a mere object of proceedings […] conducted by that state, the requested person must have the possibility to influence proceedings, to submit a statement with regard to the charges brought against him or her, to present exonerating circumstances and to have them reviewed and, if this is warranted, taken into account. 61

(2) In this respect, the courts competent for extraditions also bear responsibility for the treatment of the requested person in the requesting state. While, as the rule, the German public authority's responsibility under fundamental rights ends where a foreign sovereign state determines the essential features of a course of events according to its own free will that is independent of the Federal Republic of Germany's, (cf. BVerfGE 66, 39 <56 et seq., 63 and 64>), German public authority must not assist other states in violating human dignity (cf. BVerfGE 59, 280 <282 and 283>; 60, 348 <355 et seq.>; 63, 332 <337 and 338>; 75, 1 <19>; 108, 129 <136 and 137>; 113, 154 <162 and 163>). 62

Therefore, the court that decides on an extradition is under the obligation to investigate and establish the facts of the case, an obligation that also falls within the scope of Art. 1 sec. 1 GG. This applies notwithstanding the fact that the principle of mutual trust governs extraditions within Europe (b). 63

(a) It is not possible to determine the content and the extent of the procedural obligation to investigate in judicial extradition proceedings in an abstract and general manner; they depend on the circumstances of the individual case. 64

The facts that must be established by German courts in particular include what kind of treatment the requested person will have to expect in the requesting state. In assessing whether an extradition is permissible, as a rule, they must, *ex officio*, use those means of investigation available to them to establish whether constitutional law principles are violated as had been asserted by the requested persons; the person concerned is not under a burden of proof (cf. BVerfGE 8, 81 <84 and 85>; 52, 391 <406 and 407>; 63, 215 <225>; 64, 46 <59>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 29 May 1996 – 2 BvR 66/96 –, EuGRZ 1996, pp. 324 <326>; Order of the Third Chamber of the Second Senate of 15 December 1996 – 2 BvR 2407/96 –, juris, para. 6; Order of the First Chamber of the Second Senate of 9 September 2000 – 2 BvR 1560/00 –, NJW 2001, pp. 3111 <3112>). 65

The extent and the scope of the investigations, which the courts must conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards required by Art. 1 sec. 1 GG. The courts may use as evidence any means that, according to the 66

rules of logic, to general or to scientific knowledge, are, or might be, suitable to convince themselves that facts that are essential for the decision exist and that the assessment or evaluation of facts is correct (cf. W.-R. Schenke, in: Kopp/Schenke, VwGO, 21th ed. 2015, § 98 para. 3; Lagodny, in: Schomburg/Lagodny/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed. 2012, § 30 para. 22). Furthermore, asking the requesting state to submit additional documents is another possibility (cf. § 30 sec. 1, § 78 sec. 1 IRG). It might also become necessary to request an expert legal opinion or official information (*amtliche Auskunft*).

(b) This does not signify that German courts always have to review the reasons of an extradition request in detail. In particular within Europe, the principle of mutual trust applies in extradition proceedings. However, this trust can be shaken. The principles that govern extraditions based on international agreements (aa) can be applied by analogy to extraditions executing the Framework Decision on the European arrest warrant to the extent at issue in this case (bb). 67

(aa) With regard to extraditions between Germany and other states, as a rule, the requesting state deserves trust that it will comply with the principles of the rule of law and the protection of human rights. This principle of mutual trust is to be applied as long as trust is not shaken due to pertinent facts (cf. BVerfGE 109, 13 <35 and 36>; 109, 38 <61>). Exceptions can only be justified in atypical cases (cf. BVerfGE 60, 348 <355 and 356>; 63, 197 <206>; 109, 13 <33>; 109, 38 <59>). 68

The requested person is – as in asylum proceedings – under a burden of producing evidence that provide sufficient indications for the entities participating in the decision on the permissibility of the extradition to conduct further investigations (cf. BVerfGK 6, 334 <342>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 29 May 1996 – 2 BvR 66/96 –, EuGRZ 1996, pp. 324 <326>). In particular, there may be cause for a review of whether the extradition and the case file it is based on meet the minimum standard of fundamental rights protection required under the Basic Law if an extradition has the purpose of executing a foreign sentence that was rendered in the absence of the requested person (cf. BVerfGE 59, 280 <282 et seq.>; 63, 332 <337>; BVerfGK 3, 27 <31 and 32>; 6, 13 <17>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 24 January 1991 – 2 BvR 1704/90 –, NJW 1991, pp. 1411 <1411>). 69

As a rule, an assurance [to the effect that this minimum standard will be guaranteed] that is given in extradition proceedings and that is binding under public international law is suitable to overcome potential concerns with regard to the permissibility of the extradition; this holds true unless it is to be expected that the assurance will not be complied with in the individual case (cf. BVerfGE 63, 215 <224>; 109, 38 <62>; BVerfGK 2, 165 <172 and 173>; 3, 159 <165>; 6, 13 <19>; 6, 334 <343>; 13, 128 <136>; 13, 557 <561>; 14, 372 <377>; Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 9 December 2008 – 2 BvR 2386/08 –, juris, para. 16). 70

The risk of a treatment contrary to human rights that is alleged by the requested person is not as such an obstacle to the extradition if its existence merely cannot be completely ruled out due to an incident that has become known and that happened in the past. Rather, there have to be reasonable grounds to believe that there is a risk of a treatment contrary to human rights (cf. BVerfGE 108, 129 <138>; BVerfG, Orders of the Third Chamber of the Second Senate of 22 June 1992 – 2 BvR 1901/91 –, juris, para. 4; of 31 May 1994 – 2 BvR 1193/93 –, NJW 1994, pp. 2883 <2884>; of 29 May 1996 – 2 BvR 66/96 –, EuGRZ 1996, pp. 324 <326>). There have to be convincing reasons to believe that there is a considerable probability that the requesting state will not observe the minimum standards required by public international law in the specific case. As a rule, the obligation to produce specific factual prima facie evidence can only be dispensed with if there is a continuous practice of gross, obvious or systematic violations of human rights in the requesting state. Extradition to states that have a continuous practice of widespread and systematic violations of human rights will usually result in a violation of fundamental principles of the German constitutional order being probable (cf. BVerfGE 108, 129 <138 and 139>; Federal Constitutional Court, Order of the First Chamber of the Second Senate of 15 October 2007 – 2 BvR 1680/07 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2008, pp. 71 <72>). 71

(bb) As far as the protection of the principle of individual guilt is concerned, this also applies to extraditions that take place on the basis of the Framework Decision on the European arrest warrant. 72

On the one hand, as a rule, one has to place particular trust in a Member State of the European Union with regard to its compliance with the principles of the rule of law and of human rights protection. The European Union professes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (cf. Art. 2 TEU). Its Member States are all bound by the European Convention on Human Rights. Furthermore, they are bound by the guarantees under the Charter of Fundamental Rights when they are implementing Union law (cf. Art. 51 sec. 1 of the Charter of Fundamental Rights of the European Union – CFR). Trust in the compliance with the principles of the rule of law and of human rights protection encompasses in particular the details given by the requesting Member State in the European arrest warrant. Therefore, in general, the court that is competent to decide on whether the extradition is permissible is not under an obligation to use all possibilities available to investigate whether, or to establish as a fact that, one can trust the requesting Member State to observe the principle of individual guilt. 73

On the other hand, however, the principle of mutual trust is shaken if there are indications based on facts that the requirements indispensable for the protection of human dignity would not be complied with in the case of an extradition. In this respect, the court that decides on whether the extradition is permissible is under an obligation to investigate both the legal situation and legal practice of the requesting Member State if the person concerned has submitted sufficient indications that such investiga- 74

tions are warranted. The fact that the sentence that is to be executed by way of extradition was rendered in the absence of the requested person cannot be the sole reason for reviewing whether the extradition complies with the constitutional identity of the Basic Law. This is due to the fact that a Member State that requests an extradition for the purpose of executing a judicial decision that had been rendered in the absence of the requested person according to Art. 4a sec. 1of the Framework Decision, by duly completing the relevant form, at the same time states that the requested person either was actually aware of the scheduled trial and was informed that a decision might be handed down if he or she did not appear for the trial (cf. Art. 4a sec. 1 letter a of the Framework Decision), or that the requested person, being aware of the scheduled trial, was defended by a counsellor at the trial (cf. Art. 4a sec. 1 letter b of the Framework Decision), or that the requested person has the 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; (cf. Art. 4a sec. 1 letters c and d of the Framework Decision).

If, after conclusion of the investigations, the court becomes aware that the minimum standards mandated by the Basic Law will not be complied with by the requesting state, the court must not permit the extradition. 75

2. To ensure compliance with the principle of individual guilt, which is beyond the reach of European integration, the Court is justified in conducting, and under an obligation to conduct, a review of the Higher Regional Court's decision, although that decision is determined by Union law, a review according to the standards of the Basic Law and that is limited to ensuring observance of the procedural minimum guarantees. As a rule, the Framework Decision is accorded precedence of application within the German legal order (a). According to the case-law of the Court of Justice of the European Union, the Framework Decision exhaustively deals with extraditions of persons who were sentenced in absence (b). However, this does not relieve the Higher Regional Court of its obligation to ensure that the principles of Art. 1 sec. 1 GG, in its manifestation as principle of individual guilt, are also complied with in the context of extraditions based on a European arrest warrant (c.). 76

a) The precedence of application of European Union Law also extends to Framework Decisions. In this regard, the principle that national law must be interpreted in conformity with Union law (*Prinzip der unionsrechtskonformen Auslegung*) requires the national courts, having regard to the entire national legal order and by applying the methods of interpretation that are recognised there, to do anything within their competence to ensure the full effectiveness of Union law and to achieve a result that is in conformity with the objective pursued with the Framework Decision (cf. ECJ, Judgment of 5 October 2004, Pfeiffer, C-397/01 to C-403/01, ECR 2004, I-8835, paras. 115 and 116; Judgment of 5 September 2012, Lopes Da Silva Jorge, C-42/11, EU:C:2012:517, para. 56). 77

In substance, the Court of Justice has already held several times that national judicial authorities may only refuse to execute a European arrest warrant in the cases provided for by the Framework Decision (cf. ECJ, Judgment of 1 December 2008, Leymann and Pustovarov, C-388/08 PPU, ECR 2008, I-8993, para. 51; Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 36 with further references). In the case Melloni, it emphasised that the effectiveness of the Framework Decision cannot be allowed to be undermined by a state invoking rules of national law; the same holds true even for law of constitutional status (cf. ECJ, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 59). Until now, the Court [of Justice of the European Union] has not dealt with limits to interpreting national law in conformity with a Framework Decision (*rahmenbeschlusskonforme Auslegung*), although the Spanish *Tribunal Constitucional* had based its request for a preliminary ruling on the argument that extraditions for the purpose of executing sentences rendered in the absence of the requested person potentially violated the core content of a fair trial within the meaning of the Spanish Constitution, a violation that might affect human dignity (cf. ECJ, loc. cit., para. 20; subsequently, the Spanish *Tribunal Constitucional*, however, emphasised that if it were no longer possible to reconcile the law of the European Union in its further development with the Spanish Constitution, preserving the sovereignty of the Spanish people and the supremacy of the Constitution […] could lead [17] the Court, in a final instance, to solve the problems through the constitutional procedures envisaged; such was the content of its decision of 13 February 2014, STC 26/2014, Ground 3, HRLJ 2014, pp. 475 <478>). 78

b) According to the case-law of the Court of Justice, Art. 4a of the Framework Decision exhaustively regulates which conditions may be set for an extradition to execute sentences rendered in absence of the requested person at the trial. 79

Pursuant to Art. 1 sec. 2 of the Framework Decision, the Member States execute a European arrest warrant according to the principle of mutual recognition and according to the provisions of the Framework Decision. As a rule, they are under an obligation to execute a European arrest warrant, and they may only attach preconditions to its execution in those cases that are mentioned in Art. 3 to 5 of the Framework Decision (cf. ECJ, Judgment of 1 December 2008, Leymann and Pustovarov, C-388/08 PPU, ECR 2008, I-8993, para. 51; Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 36 with further references). 80

According to the Court of Justice, the execution of a European arrest warrant may – as envisaged in the 10th recital of the preamble to the Framework Decision –be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6 sec. 1 TEU, determined by the Council pursuant to Art. 7 sec. 1 TEU with the consequences set out in Art. 7 sec. 2 TEU (cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 49). It further held that the principle of mutual recognition [of judgments handed down in another Member State] was based on mutual trust between Member States, in the fact that 81

17. *Translator's note: literal translation of the German wording would be "require".*

their respective national legal orders [18] are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights. It concluded that, therefore, the parties against which a European arrest warrant have been issued had to pursue legal remedies within the legal system of the Member State of origin if they wanted to challenge the lawfulness of prosecution, of the execution of the sentence, of imposing a custodial measure of prevention [19], or of the criminal trial that has led to imposing a custodial sentence or a custodial measure of prevention, (cf. ECJ, Judgment of 22 December 2010, Aguirre Zarraga, C-491/10 PPU, ECR 2010, I-14247, paras. 70 and 71).

In the Melloni case, the Court of Justice decided specifically with regard to Art. 4a of the Framework Decision that the execution of an arrest warrant must not be made dependent on the condition that a sentence rendered in the issuing state in the absence of the accused is open to review (cf. ECJ, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 46) if the person concerned is in one of the four situations provided for in that provision (cf. ECJ, loc. cit., para. 61). Furthermore, Art. 53 CFR does not allow Member States to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State (cf. ECJ, loc. cit., para. 64). 82

c) These stipulations, however, do not relieve German authorities or courts of their obligation to ensure that the principles of Art. 1 sec. 1 GG are complied with in the context of extraditions executing a European arrest warrant (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). Rather, they must ensure that in executing the Framework Decision on the European arrest warrant and the Act on International Cooperation in Criminal Matters, the minimum guarantees of the rights of the accused required by Art. 1 sec. 1 GG will also be observed in the requesting Member State, or – where this is impossible – refrain from extraditing the person concerned. To this extent, the principle of mutual trust that governs extraditions within Europe is limited by human dignity guaranteed under Art. 1 sec. 1 GG. It is to this extent, as well, that the court is under a constitutional obligation to conduct the investigations mentioned above. 83

3. In the present context, however, there is no need for limiting the precedence of application of the Framework Decision by having recourse to Art. 79 sec. 3 GG in conjunction with Art. 1 sec. 1 GG because both the Framework Decision (a) and the Act on International Cooperation in Criminal Matters transposing it (b) require an interpretation that takes into account the minimum guarantees of the rights of the accused that are required by Art. 1 sec 1 GG in the context of an extradition. In this regard, the relevant standards of Union law satisfy the minimum guarantees of the 84

18. *Translator's note: referred to as "national legal systems" in the judgment cited below.*

19. *Translator's note: referred to as "detention order" in the Framework Decision; referred to as "custodial measure" in the translation of the German Criminal Code provided at https://www.gesetze-im-internet.de/englisch_stgb/index.html.*

rights of the accused that are mandated by the Basic Law to uphold the principle of individual guilt, which is beyond the reach of European integration.

a) The obligation to execute a European arrest warrant is already limited under Union law (cf. Vogel, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, vol. I, Art. 82 AEUV, para. 37 <March 2011>; Gaede, NJW 2013, pp. 1279 <1280>). The confidence between Member States, which, pursuant to recital 10 of the Preamble to the Framework Decision, is the basis of the mechanism of the European arrest warrant, can be shaken; in individual cases, considerable violations of fundamental rights can occur even if the respective national legal systems are, in principle, capable of providing an effective protection of fundamental rights that is equivalent to the protection provided under the Basic Law. Even according to Union law standards, a European arrest warrant is not to be executed if it does not meet the requirements stipulated by the Framework Decision (aa) or if the extradition would entail a violation of Union fundamental rights (bb). Also under a Union law perspective, the principle of mutual trust does not apply without limitations in this regard (cc), with the result that the denial of extradition on the basis of a European arrest warrant for the execution of a sentence rendered in the absence of the requested person can be justified under certain preconditions (dd). 85

aa) Pursuant to Art. 4a sec. 1 of the Framework Decision, the executing judicial authority may refuse to execute a European arrest warrant issued for the purpose of executing a custodial sentence if certain preconditions are not met. 86

Art. 4a sec. 1 letters a and b of the Framework Decision provides for an obligation to extradite a person for the execution of a decision rendered following a trial at which the person did not appear in person if the person actually received official information of the trial and was informed that a decision might be handed down if he or she did not appear for the trial, or if the person, being aware of the trial, was indeed represented by a defence counsel. These are cases in which the person, of his or her own free will, and unequivocally, waived his or her right to be personally present at the trial. 87

In contrast, Art. 4a sec. 1 letters c and d of the Framework Decision covers scenarios in which the person concerned has the right to challenge the sentence via a legal remedy that allows the merits of the case [20], including fresh evidence, to be re-examined, and which may lead to the original decision being reversed. Thus, in these cases, the accused is offered the opportunity to have a court review the facts pertaining to the charges brought against him or her. This requires that the court competent for potential appeal or retrial proceedings also hear the accused; procedural law must enable this court to examine not only the law but also the facts pertaining to the charges brought against the accused. To the extent that Art. 4a sec. 1 letter d (i) of the Framework Decision prescribes a procedure that allows for [21] the merits of the 88

20. *Translator's note: This order employs the German term "Sachverhalt", which refers to the facts of the case.*

case, including fresh evidence, to be re-examined, and which "may" [22] lead to the original decision being reversed, this provision does not provide for discretion of the courts dealing with such a case; rather, the term "may" used in Art. 4a sec. 1 letter d (i) of the Framework Decision serves to describe the powers of the court and signifies more or less "to be able to" [23]. More aptly, the English version mentions 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 the French version mentions a "nouvelle procédure de jugement ou (…) une procédure d'appel, à laquelle l'intéressé a le droit de participer et qui permet de réexaminer l'affaire sur le fond, en tenant compte des nouveaux éléments de preuve".

This interpretation of Art. 4a sec. 1 letter d (i) of the Framework Decision corresponds to the intent of the European legislature as well. The provision was inserted in the Framework Decision on the European arrest warrant by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ EU no. L 81 of 27 March 2009, p. 24 – Framework Decision on decisions rendered in the absence of the person concerned). Pursuant to Art. 1 sec. 1 of the Framework Decision, its objective was to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States. Recital 11 of the Framework Decision on decisions rendered in the absence of the person concerned at the trial reads: 89

> Common solutions concerning grounds for non-recognition in the relevant existing Framework Decisions should take into account the diversity of situations with regard to the right of the person concerned to a retrial or an appeal. Such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed.

The wording "the merits of the case, including fresh evidence are re-examined" shows that the Council obviously did not assume that the judge competent for the appeal or retrial had discretion, but rather that the person concerned had a right to the evidence presented by him or her for his or her exoneration to be examined or re-examined.

21. *Translator's note: The German version of the Framework Decision uses the word "kann".*
22. *Translator's note: The German version of the Framework Decision uses the word "kann".*
23. *Translator's note: quotation marks also used in the German version.*

Teleological considerations corroborate this finding. If a court were allowed to refrain from re-examining the facts of the case against the will of the person sentenced in his or her absence, the court could frustrate a re-examination of the charges brought against that person. The defence would be deprived of the possibility to request the admission of new evidence in the retrial (cf. European Court of Human Rights – ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 85). The procedural possibility to challenge the judgment rendered in the absence of the person concerned would prove ineffective in this case (see also ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). 90

bb) The fact that the Member States of the European Union are bound by the fundamental rights (1), that the Charter of Fundamental Rights guides the interpretation of secondary law (*Ausstrahlungswirkung*) (2), and the case-law of the European Court of Human Rights, which is relevant for determining the factual scope of Art. 4a sec. 1 of the Framework Decision, also argue in favour of this interpretation of Art. 4a sec. 1 letter d (i) of the Framework Decision (3). 91

(1) Notwithstanding Art. 7 TEU, the Member States of the European Union may not assist each other in committing violations of human rights (Art. 6 sec. 1 TEU; cf. Munich Higher Regional Court, Order of 15 May 2013 – OLG Ausl 31 Ausl A 442/13 119/13> –, Der Strafverteidiger – StV 2013, pp. 710 <711>). When implementing Union law, they must respect the fundamental rights of the European Union (cf. Art. 51 sec. 1 CFR; ECJ, Judgment of 12 November 1969, Stauder, 29/69, ECR 1969, p. 419, para. 7; Judgment of 13 July 1989, Wachauf, 5/88, ECR 1989, p. 2609, para. 19; Judgment of 16 June 2005, Pupino, C-105/03, ECR 2005, I-5285, paras. 58 and 59). These are therefore also decisive for the interpretation (cf. ECJ, Judgment of 13 December 1983, Commission/Council, 218/82, ECR 1983, p. 4063, para. 15; Judgment of 16 June 2005, Pupino, C-105/03, ECR 2005, I-5285, paras. 58 et seq.) and the lawfulness (cf. Arts. 263, 267 sec. 1 letter b TFEU; Art. 51 sec. 1 CFR; ECJ, Judgment of 3 May 2007, Advocaten voor de Wereld, C-303/05, ECR 2007, I-3633, para. 45; Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paras. 48 et seq.) of the Framework Decision on the European arrest warrant. 92

In this vein, Art. 1 sec. 3 of the Framework Decision explicitly states that the Framework Decision should not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. Pursuant to recital 12, the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof (sentence 1). Therefore, nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a 93

person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons (sentence 2). Pursuant to recital 13, no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Against this backdrop, a European arrest warrant is not to be executed if this would conflict with the Charter of Fundamental Rights, which takes precedence over the Framework Decision on the European arrest warrant (cf. Commission Document COM <2006> 8 final of 24 January 2006, p. 7 and COM <2011> 175 final of 11 April 2011, p. 7; *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 15/1718, p. 14; *Bundesrat* document, *Bundesratsdrucksache* – BRDrucks 70/06, p. 31; Opinions of: Advocate General Bot, delivered on 24 March 2009, Case C-123/08 – Wolzenburg, ECR 2009, I-9621, paras. 147 et seq,. and, delivered on 7 September 2010, Case C-261/09 – Mantello, ECR 2010, I-11477, paras. 87 and 88; of Advocate General Cruz Villalón, delivered on 6 July 2010, C-306/09 – I.B., ECR 2010, I-10341, paras. 43 and 44; of Advocate General Mengozzi, delivered on 20 March 2012, Case C-42/11 – Lopes da Silva Jorge, EU:C:2012:151, para. 28; of Advocate General Sharpston, delivered on 18 October 2012, Case C-396/11 – Radu, EU:C:2012:648, paras. 69 et seq.). 94

This is confirmed by the legislative history of the Framework Decision. It is true that incompatibility of an extradition request with the fundamental principles of the Member State of execution or of the *ordre public*, which had been suggested as an additional ground for refusal, was not included in the text of the Framework Decision. However, the only reason why this proposal was not taken up was that Art. 1 sec. 3 of the Framework Decision as well as recitals 10, 12, 13 and 14 set out that the strict respect of the fundamental rights and individual freedoms as guaranteed by the European Convention for the Protection of Human Rights and resulting from the constitutional traditions common to the Member States as general principles of the Union's law (Art. 6 sec. 2 TEU) must be ensured (cf. Council Document 14867/01 of 4 December 2001, p. 3). 95

(2) With regard to extraditions for the execution of sentences rendered in the absence of the accused, the Charter of Fundamental Rights of the European Union mandates that also the court competent for potential appeal or retrial proceedings hear the accused; procedural law must enable that court to examine not only the law but also the facts pertaining to the charges brought against the accused. 96

The right to an effective remedy is a general principle of Union law (cf. ECJ, Judgment of 15 May 1986, Johnston, 222/84, ECR 1986, p. 1651, para. 19; Explanations Relating to the Charter of Fundamental Rights, OJ EU no. C 303 of 14 December 2007, pp. 17 <29>). This also includes, as part of that guarantee, the right to be heard in the context of judicial proceedings under Art. 47 of the Charter of Fundamental 97

Rights (cf. Mayer, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, vol. I, following Art. 6 TEU, para. 369 <July 2010>). This right guarantees that the court decides about the application only after listening to the parties and assessing the evidence, and that it must give reasons for its decision (cf. ECJ, Judgment of 10 December 1998, Schröder and Thamann/Commission, C-221/97 P, ECR 1998, I-8255, para. 24).

(3) Pursuant to Art. 52 sec. 3 sentence 1 CFR, in so far as the rights in the Charter correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they shall have the same meaning and scope as those laid down by the said Convention. Union law can provide more extensive protection (cf. Art. 52 sec. 3 sentence 2 of the Charter of Fundamental Rights); the level of protection provided by the Charter of Fundamental Rights may, however, not fall below that of the Convention. According to the Explanations Relating to the Charter of Fundamental Rights, Art. 47 sec. 2 of the Charter of Fundamental Rights corresponds to Art. 6 sec. 1 of the Convention and Art. 48 of the Charter to Art. 6 secs. 2 and 3 of the Convention (cf. Explanations Relating to the Charter of Fundamental Rights, OJ EU no. C 303 of 14 December 2007, p. 17 <30>). Against this backdrop, the guarantees of Article 6 ECHR, as interpreted by the European Court of Human Rights, establish minimum guarantees also with regard to the Framework Decision, which may not fall below them. 98

According to the European Convention on Human Rights, extradition is impermissible where "substantial grounds" [24] have been shown for believing that the person concerned, if extradited, faces a real risk [25] of being subjected to torture or to inhuman or degrading treatment (cf. ECtHR <Plenary>, Soering v. The United Kingdom, judgment of 7 July 1989, no. 14038/88, para. 91) or "risks suffering a flagrant denial of a fair trial" [26] (cf. ECtHR <Plenary>, Soering v. The United Kingdom, judgment of 7 July 1989, no. 14038/88, para. 113). 99

In this regard, Art. 6 ECHR imposes on every national court an obligation to check whether the accused has had the opportunity to apprise himself of the proceedings against him (cf. ECtHR, Somogyi v. Italy, judgment of 18 May 2004, no. 67972/01, para. 72). Moreover, Art. 6 sec. 1 ECHR grants a right to a fair hearing and, in substance, the right to adversarial proceedings. Each party must in principle have the opportunity to adduce evidence and to comment on all evidence adduced or observations filed with a view to influencing the court's decision (cf. ECtHR, Mantovanelli v. France, judgment of 18 March 1997, no. 21497/93, para. 33). The court is under a duty to conduct a proper examination of the submissions, arguments and evidence 100

24. *Translator's note: The German version of this order uses both the German term "begründete Tatsachen" as well as the English term.*
25. *Translator's note: The German version of this order uses both a German translation as well as the English term.*
26. *Translator's note: The German version of this order uses both the German term "eklatante Verweigerung eines fairen Verfahrens droht" and the English equivalent.*

adduced by the parties (cf. ECtHR, Van de Hurk v. The Netherlands, judgment of 19 April 1994, no. 16034/90, para. 59). With regard to criminal proceedings, this means that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (cf. ECtHR, Lietzow v. Germany, judgment of 13 February 2001, no. 24479/94, para. 44).

For a fair trial, it is of capital importance that an accused should appear [at the trial] (cf. ECtHR, Poitrimol v. France, judgment of 23 November 1993, no. 14032/88, para. 35). This not only generally serves the purpose of ensuring the accused's right to a hearing but also gives the court the opportunity to verify the accuracy of his statements and to compare them with those of the victim and of the witnesses (cf. ECtHR, loc. cit., para. 35). Although not expressly mentioned in Art. 6 sec. 1 ECHR, the object and purpose of this right show that a person charged with a criminal offence is entitled to take part in the hearing (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 27). Proceedings conducted in the absence of the accused can, however, be compatible with the Convention if the accused has waived both his or her right to be personally present at the trial and the right of defence, or if a court, after having heard the accused, re-examines both the facts and the law pertaining to the charges brought against the accused (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, paras. 29 and 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). 101

The presence of the defence – be it in the initial proceedings or upon retrial – is one of the essential requirements of Art. 6 ECHR. If in retrial proceedings the defence is allowed to participate in the proceedings before the court (of appeal) and to request the admission of new evidence, this entails the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole can be regarded as fair (cf. ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 85). Conversely, a court's refusal to reopen criminal proceedings which have been held *in absentia* will – notwithstanding the exceptions mentioned – as a rule, constitute an infringement of Article 6 or the principles embodied therein (cf. ECtHR, Stoichkov v. Bulgaria, judgment of 24 March 2005, no. 9808/02, para. 56). 102

A remedy must be effective in this regard. A person charged with a criminal offence must therefore not be left with the burden of proving that he or she was not seeking to evade justice or that his or her absence was due to *force majeure* (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 30). At the same time, the national authorities are at liberty to assess whether the accused showed good cause for his or her absence or whether there was anything in the case file to support a finding that the accused had been absent for reasons beyond his or her control (cf. ECtHR, Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para 57; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 88). 103

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, his or her right to a fair trial (cf. ECtHR, Kwiatkowska v. Italy, decision of 30 November 2000, no. 52868/99; Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 86). The waiver must, however, be unequivocal and satisfy certain minimum requirements (cf. ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02). Where a person charged with a criminal offence [27] who has not been notified [28] in person is, on an insufficient factual basis, considered to be a fugitive ("*latitante*"), this does not in any event justify the presumption that the person has of his or her own free will waived his or her right to appear at the trial and defend him- or herself (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 28; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 87). 104

cc) The fact that the principle of mutual trust does not apply without limits even according to Union law at the same time signifies that the national judicial authorities, upon relevant indications, are authorised, and under an obligation under Union law, to review whether the requirements under the rule of law have been complied with, even if the European arrest warrant formally meets the requirements of the Framework Decision (cf. Böse, in: Grützner/Pötz/Kreß, Internationaler Rechtshilfeverkehr in Strafsachen, 3rd ed., before § 78 paras. 26, 35 <June 2012>). Thus, not only does Union law not stand in the way of investigating whether the national judicial authorities comply with the requirements under the rule of law guaranteed by the Charter of Fundamental Rights; Union law indeed demands such investigations. The European Commission is right in its view that the obligation to execute a European arrest warrant no longer applies where the executing judicial authority, taking into account all the circumstances of the case, is convinced that surrender would result in a breach of a requested person's fundamental rights (cf. Commission document COM <2011> 175 final of 11 April 2011, p. 7). Ensuing delays in the extradition procedures must be tolerated even if this runs counter to the objective of the Framework Decision on the European arrest warrant to speed up extradition (cf. recitals 1 and 5 of the Preamble to the Framework Decision). Correspondingly, the Framework Decision does not lay down rigid time limits for the execution of a European arrest warrant (cf. Art. 17 sec. 2 <"should">, sec. 3 <"should">, sec. 4 <"specific cases">, sec. 7 <"in exceptional circumstances"> of the Framework Decision). 105

According to recital 12, the Framework Decision allows Member States to apply their constitutional rules aimed at ensuring a lawful and fair trial (cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 53). Apart from this, decisions on the execution of the European arrest warrant must be subject to adequate judicial review by the courts of the Member States (recital 8; cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 46). Also from a Union law 106

27. *Translator's note: A literal translation of the German-language version of this order would be "the accused".*
28. *Translator's note: A literal translation from German would read "informed".*

perspective, however, an effective judicial review within the meaning of Arts. 47, 52 sec. 3 CFR, Arts. 6, 13 ECHR presupposes that the court that decides about the extradition is able to conduct the relevant investigations as long as the extradition system established by the Framework Decision remains effective in practice (cf. ECJ, loc. cit., para. 53; with regard to the similar problem existing in asylum law: ECJ, Judgment of 21 December 2011, N. S., C-411/10 and C-493/10, ECJ 2011, I-13905, para. 94).

dd) As a consequence, the requirements under Union law with regard to the execution of a European arrest warrant are not lower than those that are required by Art. 1 sec. 1 GG as minimum guarantees of the rights of the accused. It can therefore remain undecided whether and to what extent, in interpreting the Framework Decision on the European arrest warrant, one must have recourse to Art. 4 sec. 2 sentence 1 TEU, pursuant to which the European Union shall respect the national identities of its Member States, and the Framework Decision therefore must be interpreted taking into account the legal situation in the respective Member State (cf. v. Bogdandy/Schill, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, vol. I, Art. 4 TEU para. 13 <Sept. 2013>). 107

b) In this respect, the Act on International Cooperation in Criminal Matters that transposes the Framework Decision into German law also does not raise concerns with regard to the principle of individual guilt and its contents that are enshrined in the guarantee of human dignity. § 73 sentence 2 IRG provides that requests under Part VIII (Extradition and Transit between Member States of the European Union) shall not be permissible if compliance would violate the principles in Art. 6 TEU. Regardless of how this reference may be understood in detail, it does not, in any event, prevent the authorities and courts, when interpreting §§ 78 et seq. IRG, from taking into account the directives of Art. 1 sec. 1 GG (cf., for a general explanation, BVerfGE 7, 198 <205 et seq.>; 115, 320 <367>; established jurisprudence of the Federal Constitutional Court). 108

4. The challenged decision rendered by the Higher Regional Court does not entirely meet these requirements. The Higher Regional Court's assessment that the complainant's extradition is only permissible if he is provided with an effective legal remedy after his surrender is correct. However, the court failed to recognise the extent of its obligation to investigate and to establish the facts and thereby failed to recognise the significance and the scope of Art. 1 sec. 1 GG (a). The complainant asserted in a substantiated manner that the Italian procedural law did not provide him with the opportunity to have a new hearing of evidence at the appeals stage. The Higher Regional Court failed to sufficiently follow up on that issue. It contented itself with finding that a hearing of evidence in Italy was "in any case not impossible" ("*jedenfalls nicht ausgeschlossen*"). Its decision therefore violates the complainant's rights under Art. 1 sec. 1 GG (b). 109

a) In executing the Framework Decision on the European arrest warrant and the Act 110

on International Cooperation in Criminal Matters, the courts have to ensure in every individual case that the rights of the requested person are safeguarded at least to the extent that the content of the rights is protected by Art. 1 sec. 1 GG. With regard to the principle of individual guilt enshrined in Art. 1 sec. 1 GG, this includes that a requested person who has been sentenced in his or her absence and who has not been informed about the trial and its conclusion will at least be provided with the real opportunity to defend him- or herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate him or her and by having them reviewed. The court that decides whether it is permissible to extradite the requested person is in this respect under an obligation to investigate the legal situation and the legal practice of the requesting state if the person concerned has submitted sufficient indications to warrant such investigations. The content and the extent of the investigations have to be determined in accordance with the indications submitted by the requested person that the procedure falls below the minimum standards guaranteed by human dignity. If, after completion of the investigation, it is established that the requesting state fails to comply with this minimum standard, the competent court must not declare the extradition to be permissible.

b) The Italian Republic – as all other Member States of the European Union – is generally to be trusted to comply with the principles of the rule of law and the protection of human rights in extradition proceedings also. However, in the case at hand, questions have arisen that would have required further investigation of the facts. 111

As can be inferred from the European arrest warrant, the Florence Public Prosecutor General stated that the complainant was not personally served with the decision imposing the custodial sentence, but will be served with the decision without delay after his surrender. It further stated that the complainant is entitled to a retrial or appeal, in which he is allowed to participate and which allows the facts of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed. It hereby stated implicitly that the complainant will be provided the opportunity of a review of the facts and the law pertaining to the charges against him after having been heard by a court. Furthermore, the Florence Public Prosecutor General stated in its letter of 7 October 2014 that the complainant has the right, within 30 days, to apply for reinstatement into the time limit for appeal, and, without reservations, the right to defend himself. 112

However, in the case at hand, this was not sufficient to ensure compliance with the minimum standard of the rights of the accused prescribed by Art. 1 sec. 1 GG and thereby, with the complainant's status as a holder of rights in the criminal proceedings to be conducted in Italy. The complainant has submitted substantial indications that, notwithstanding the assurance provided by the Florence Public Prosecutor General, he is not afforded the real opportunity to defend himself effectively, in particular to submit and have examined circumstances that may exonerate him (aa). The Higher Regional Court's argument that it is sufficient that taking of new evidence in appellate proceedings is "in any case not impossible" is not suitable to overcome the concerns 113

raised by the complainant (bb). Also with regard to other circumstances, there would have been reason for the Higher Regional Court to examine more closely whether the complainant, in a trial, will be granted the minimum rights of defence to which he is entitled (cc).

aa) In his brief of 21 October 2014 to the Higher Regional Court, the complainant stated that he had been convicted in absence and without being aware of the conviction, and that he had not of his own free will and unequivocally waived his right to be present. He plausibly argued that reinstatement into the former procedural position afforded to him under Italian law would only result in his reinstatement into the time limit for appeal. Citing sources on Italian criminal procedural law in German, he further stated that due to the appellate court's limited competence for review, the late appeal possible under Italian law did not meet the requirements applicable if the right to be heard was granted at a later stage, because, as a rule, no new evidence would be heard in the appellate proceedings. In order to prove this, the complainant communicated the contents of Art. 603 CPP, as amended by the Act of 28 April 2014 and in the version governing the legal situation prior to the entry into force of that Act to the Higher Regional Court in Italian and German. 114

It seems to follow from the wording of Art. 603 CPP that in appellate proceedings, there is generally no new hearing of evidence. According to section 3 of that Article, the court only orders a new hearing of evidence on its own accord if it considers this to be indispensable. If a party requests a hearing of evidence, the court orders such a hearing of evidence if it cannot decide on the basis of the case file (sec. 1), or if the new evidence did not come into existence or was discovered only after the first instance proceedings (sec. 2). Pursuant to a former version of Art. 603 sec. 4 CPP (1988), which, according to the complainant, was repealed only by the Act of 28 April 2014, the judge only orders a new hearing of evidence if the accused who was not present during the first-instance proceedings so requests and proves that he or she was not able to appear before the court either due to events of a coincidental nature, or *force majeure,* or because he or she was not aware of the summons, provided that this was not caused by his or her own fault, or he or she has not of his or her own free will refused to take cognisance of the trial. The complainant plausibly argued that sec. 4 CPP 1988 might apply to him. To support this he also referred to a decision ("*Sentenza*") of the Italian *Corte di Cassazione* of 17 July 2014 pursuant to which the old legal situation applied to appeals of convictions in absence of the person concerned rendered prior to the entry into force of the Act of 28 April 2014. He submitted the text of this decision to the Higher Regional Court. It is also not improbable that the old legal situation could in fact be applicable to the present case, because in his letter of 7 October 2014, the Florence Public Prosecutor General sent the text of Art. 175 CPP in the version applicable prior to the reform of criminal procedure that took place in 2014. The complainant also pointed this out to the Higher Regional Court. 115

Based on the submissions made by the complainant, it is therefore to be feared that Italian law does not afford him the opportunity of a new hearing of evidence in appel- 116

late proceedings. If Art. 603 sec. 4 CPP 1988 applies, he would have to produce negative evidence that he was not able to appear before the court because of events of a coincidental nature, or *force majeure*, or because he was not aware of the summons, provided that this was not caused by his own fault or – if the summons was served by the court of first instance by delivery to the defence counsel – that he has not of his own free will refused to take cognisance of the trial. This wording corresponds to the one in Art. 175 CCP in the version in force until 2005. According to that Article, the accused could request reinstatement into the former procedural position in order to file an appeal if he or she proved that he or she had in fact not been aware of the summons, provided that this fact was not caused by his or her own fault, or, in case the default judgment had been served upon the defence counsel by hand delivery, the accused did not deliberately refuse to take cognisance of the trial (cf. Italienische Strafprozessordnung, Zweisprachige Ausgabe, Bauer/König/Kreuzer/Riz/Zanon, 1991). Since it is almost impossible to prove negative facts, the higher regional courts (cf. Berlin Court of Appeal, *Kammergericht Berlin* – KG, Order of 19 December 1991 – Ausl A 413/91 –, StV 1993, p. 207; Nuremberg Higher Regional Court, *Oberlandesgericht* – OLG, Order of 31 July 1997 – Ausl. 9/97 –, StV 1997, pp. 648 <649>; OLG Thuringia, Order of 2 February 1998 – Ausl 2/97 –, StV 1999, pp. 265 <267 and 268>; OLG Düsseldorf, Order of 27 August 1998 – 4 Ausl (A) 201/98 - 259 - 250/98 III –, StV 1999, pp. 270 <272>; OLG Karlsruhe, Order of 28 August 1998 – 1 AK 14/98 –, StV 1999, pp. 268 <270>; OLG Cologne, Order of 15 January 2003 – Ausl 913/01 –, juris, para. 38; OLG Karlsruhe, Order of 14 September 2004 – 1 AK 0/04 –, juris, para. 10; OLG Karlsruhe, Order of 14 September 2004 – 1 AK 6/04 –, StV 2004, pp. 547 <548>), the Federal Court of Justice (cf. Decisions of the Federal Court of Justice in Criminal Matters, *Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt 47, 120 <126>) as well as the First Section and the Grand Chamber of the European Court of Human Rights (cf. ECtHR <First Section>, Sejdovic v. Italy, judgment of 10 November 2004, no. 56581/00, para. 40; ECtHR < GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, paras. 103 et seq.) objected to the old version of Art. 175 CPP with regard to the protected interests at issue here. Already in 1985, in the case Colozza v. Italy, the European Court of Human Rights criticised that the legal remedy of “late appeal” under Italian law was not effective, because the appellate court could only decide on the merits of the case, as regards the factual and legal issues, if the person concerned was able to prove that he or she had not been seeking to evade justice (cf. ECtHR Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 31).

Even if Art. 603 CPP were applied as amended by the Act of 28 April 2014, is it likely that the complainant is not afforded the effective opportunity to defend himself. Pursuant to Art. 603 CPP, a hearing of evidence only takes place if the evidence has come into existence or was discovered after the first instance judgment (sec. 2), if the judge cannot decide on the basis of the case file (sec. 1), or if the judge considers hearing of evidence indispensable (sec. 3). The wording of Art. 603 CPP in the version on which the Higher Regional Court based its decision suggests that the court 117

hearing the appeal has a wide margin of assessment (*Beurteilungsspielraum*) regarding the decision to have a new evidentiary hearing. It does, however, not impose an obligation on the appellate court to generally hear evidence upon request of the accused. In view of the unspecific wording of Art. 603 secs. 1 to 3 CPP, it is therefore unclear whether the obligation to establish the truth in criminal proceedings has been duly taken into account.

The complainant's concerns regarding Italian appellate proceedings are corroborated by the fact that, in the past, several Higher Regional Courts refused to permit extraditions to Italy in cases in which the requested persons had been sentenced in their absence, arguing that under Italian law, there was, at the appeals stage, no new comprehensive judicial review of the decision on the merits (cf. OLG Frankfurt, 2 Ausl. 54/82, 2 September 1983, no. U 75, in: Eser/Lagodny/Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed.1993, pp. 285 <288 and 289>; OLG Munich, OLG Ausl. 77/85, 26 June 1985, no. U 112, in: Eser/Lagodny/Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed. 1993, pp. 412 <416>; KG Berlin, (4) Ausl. A. 277/85 (143/85), 24 March 1986, no. U 123, in: Eser/Lagodny/Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed. 1993, pp. 435 <438>; OLG Schleswig-Holstein, Order of 14 January 1994 – 1 Ausl 8/93 –, StV 1996, p. 102 <103>). These concerns are also shared in legal doctrine (cf. Schomburg/Hackner and Lagodny, both in: Schomburg/Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed. 2012, § 15 IRG para. 33e and § 73 IRG para. 86, respectively). 118

bb) The Higher Regional Court was under an obligation to follow up on the substantiated and plausible objections made by the complainant. Its investigations have proven to be insufficient. 119

The Higher Regional Court attempts to overcome the concerns raised by the complainant by arguing that a comprehensive review pertaining to the facts and the law of the conviction in absence in appellate proceedings in Italy where a new hearing of evidence is "in any case not impossible", is sufficient to safeguard the complainant's rights. However, this does not guarantee that the complainant, after becoming aware of the sentence rendered in his absence, is afforded the opportunity to defend himself effectively, in particular to present evidence exonerating him and have it extensively and exhaustively reviewed and, if necessary, taken into account. 120

Nor is the argument very convincing that even if in Italian appellate proceedings, as a rule, there were no new hearing of evidence, such proceedings still constituted a legal remedy by which both the facts and the law are re-examined. It remains unclear how the issues of fact can be thoroughly examined without a hearing of evidence. Furthermore, the Higher Regional Court bases its view on a single source (Maiwald, Einführung in das italienische Strafrecht und Strafprozessrecht, 2009, p. 237). This source does not provide a detailed presentation of appeal proceedings under Italian 121

criminal law. Rather, also this source points out that second-instance proceedings as a rule are decided based on the case file and no new hearing of evidence is conducted. How this fact can be reconciled with the fact that the issues of fact are [supposedly] re-examined is left uncommented. It does not follow from the source referred to that the merits of the decision rendered in absence will be thoroughly re-examined and that an unrestricted opportunity to newly hear evidence already heard in the first-instance proceedings will be provided, as the Higher Regional Court assumes.

Nor can the decision of the Higher Regional Court be based on the argument stated in its order of 27 November 2014 that in case of first-instance sentences rendered in absence there is no right to a retrial at a trial court, and that a new hearing before an appellate court is sufficient. The case-law of the European Court of Human Rights, which must also be taken into account for the interpretation of the fundamental rights of the Basic Law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317>; 120, 180 <200 and 201>; 128, 326 <367 and 368>), clearly states that the court must re-examine the merits [29] of the charges against the convicted person after having heard that person (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 29; Einhorn v. France, judgment of 16 October 2001 no. 71555/01, para. 33). Furthermore, the procedural resources of the Contracting State available in law and in practice must prove to be effective (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). As the Higher Regional Court correctly states, it follows from the judgment in the case Colozza v. Italy that in case of a judgment in absence rendered by a first-instance court there is no entitlement to a new first-instance trial. However, it cannot be inferred from the judgment that the person convicted *in absentia* who was not aware of the first-instance proceedings is, from the outset, not granted the right to a hearing of evidence. Rather, the European Court of Human Rights emphasises in its established case-law the right emanating from Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) to adduce evidence and to comment on all evidence or statements presented which are aimed at influencing the decision of the court (cf. ECtHR, Mantovanelli v. France, judgment of 18 March 1997, no. 21497/93, para. 33; Lietzow v. Germany, judgment of 13 February 2001, no. 24479/94, para. 44). 122

In view of the above, in this respect, the opinion of the Higher Regional Court that it is sufficient if in Italian appellate proceedings on the merits the factual and legal issues of the conviction rendered in absence are thoroughly examined while a new hearing of evidence is “in any case not impossible”, falls short of the relevant standards. 123

cc) Considering the Higher Regional Court’s obligation to investigate and establish the facts of the case, it must also be taken into account that in light of the objections by the European Court of Human Rights in the past and the large number of amend- 124

29. *Translator’s note: The German-language version of this order emphasises that this refers to both the law and the facts.*

ments to the Italian *Codice Penale*, for a German judge, it is difficult to have an overview of the legal situation in Italy. Nor did the statement of 7 October 2014 provided by the Florence Public Prosecutor General contribute substantially to clarify the situation. The Higher Regional Court requested the Italian judicial authorities to provide additional information on whether the complainant was in fact aware of the trial date and on his representation by counsel, or to give an assurance that, after his surrender, the complainant would, without reservation, be granted the right to a retrial in his presence in which the charge against him would be fully examined. Although he had not indicated in the European arrest warrant whether the complainant had personally appeared at the trial leading to his conviction, the Florence Public Prosecutor General did not provide additional information regarding the complainant's knowledge of the trial date and his representation by counsel. Nor did the Public Prosecutor General give an assurance that, after his surrender, the complainant would, without reservation, be granted the right to a retrial in his presence with full review of the charges against him. Despite the Higher Regional Court's specific request for information and assurance, the Public Prosecutor General merely indicated in abstract terms that, provided "the request were granted", a new trial against the convicted person would be held. The complainant was assured that his right of defence would be honoured without reservation; however, the extent of this right of defence remained unclear.

D.

There is no need for a preliminary ruling by the Court of Justice of the European Union under Art. 267 TFEU. The correct application of Union law is so obvious as to leave no scope for any reasonable doubt ("acte clair", cf. ECJ, Judgment of 6 October 1982, CILFIT, 283/81 [1982] ECR p. 3415, paras. 16 et seq.). In the case at hand, there is no conflict between Union law and the protection of human dignity under Art. 1 sec. 1 GG in conjunction with Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG. As shown above, the Framework Decision on the European arrest warrant does not require German courts and authorities to execute a European arrest warrant without reviewing its compliance with the requirements ensuing from Art. 1 sec. 1 GG. This is not changed by the fact that the limits of the obligation to investigate and establish the facts of the case, in particular as regards the scope of investigations permissible under Union law and the related delays in the execution of the arrest warrant, have not yet clearly been defined in the case-law of the Court of Justice of the European Union. At least in the case to be decided here, there is no indication of a conflict of Union law with the obligation of the Higher Regional Court to examine more extensively whether the complainant's rights would be safeguarded. This holds true in particular for the substantiated indications submitted by the complainant to the Higher Regional Court that under Italian [criminal] procedural law he was not afforded an opportunity to defend himself effectively. 125

E.

The constitutional complaint is admissible and well-founded. Therefore, pursuant to § 34a sec. 2 BVerfGG, the complainant shall be fully reimbursed for his necessary expenses . 126

Voßkuhle	Landau	Huber
Hermanns	Müller	Kessal-Wulf
König		Maidowski

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