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COMPLETION OF EU MEASURES THROUGH COURT DECISIONS: THE EXAMPLE OF THE EUROPAN ARREST WARRANT

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Abstract

The Council Framework Decision on the European Arrest Warrant (EAW) was adopted as an EU measure in 2002. With this Framework Decision, the system of the EAW was introduced in European Countries. The Melloni Case of the CJEU had an impact on EU Member States. After that, the German Federal Constitutional Court (GFCC) had the opportunity to treat the Melloni decision on the EAW. The GFCC checked it, based on the identity review, and opened a way of derogating the measure. The decision of the GFCC is called "Solange III." The CJEU reacted to the CFCC's decision and accepted it to some extent. Then, GFCC treated the CJEU's decision on the EAW again. Those decisions of the GFCC and CJEU contributed to complementing the EAW system through dialogue between them. This article aims to show the process of completion of an EU measure through court decisions, using the framework decision on the EAW as an example.

Keywords: Council Framework Decision on the EAW, Melloni Case, Solange III Decision, complementary role of the Court, development of EU law, Dialogue between the BVerfG (GFCC) and CJEU, uniform application of EU law, Guarantee of fundamental rights

Contents

I. *Introduction*

The council framework decision on the European arrest warrant (FDEAW) (2002/584/JHA) was adopted on 13 June 2002.[1] The EAW is "a judicial decision issued by a Member State with a view to arrest and surrender by another Member State of a requested person, for

[1] OJ of the EU 2002 L190/1, Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (Art. 1 para. 1 FDEAW). Member States are obliged to execute an EAW on the basis of the principle of mutual recognition (Art. 1 para. 2 FDEAW). This decision was adopted in the framework of the third pillar before the Treaty of Lisbon[2], based on Art. 31 (a) and (b) and Art. 34 (2) (b) TEU. The FDEAW was amended partly by Framework Decision 2009/299.[3] After the Treaty of Lisbon, subject matters of the third pillar are laid down in Chapters 4 and 5 of Title V Area of Freedom, Security and Justice in the Treaty on the Functioning of the European Union (TFEU).

An EU measure regarding a subject can be completed through amendments of the measure, replacement by a new measure or through decisions of the courts. This paper describes the process of completion of an EU measure by court decisions and how the dialogue between the Court of Justice of the EU (CJEU) and the German Federal Constitutional Court (GFCC) contributed to the completion.

II. *Case Law of the CJEU and GFCC*

1. Basic Position of the CJEU and Melloni Case

The Charter of EU fundamental rights was solemnly declared by the European Parliament, the European Commission and the Council in December 2000 in Nice. At that time, the Charter was not legally binding. However, after the Treaty of Lisbon the Charter has the same legal value as the TEU and TFEU. This means that the EU has its own binding catalogue of fundamental rights with the Treaty of Lisbon. The CJEU guarantees fundamental rights, relying on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and constitutional traditions common to the EU Member States. Article 53 of the Charter lays down, "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

In the Melloni Case[4] of 2013, Melloni (M) was sentenced *in absentia* to 10 years' imprisonment for bankruptcy fraud in June 2000 by an Italian court. He was arrested in Spain. An EAW was issued regarding his extradition by the Italian authorities for the execution of a prison sentence. An order to surrender M to the Italian authorities was made and M took action against the order before the Constitutional court in Spain. The Spanish constitutional court referred a preliminary ruling before the CJEU and asked "whether Art. 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing

[2] The Treaty of Lisbon entered into force on 1 December 2009.

[3] OJ of the EU 2009 L81/24, Council Framework Decision 2009/299 JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/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.

[4] Case C-399/11, Melloni v Ministerio Fiscal, Judgment of 26 February 2013, ECLI:EU:C:2013:107.

Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution."[5] According to the interpretation of the Spanish court, Art. 53 of the Charter gives general authorization to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter, and where necessary, to give it priority over the application of the provisions of EU law.[6] However, the CJEU did not accept that interpretation because such an interpretation would undermine the principle of the primacy of EU law, which is an essential feature of EU legal order.[7] As a result, Spain could not apply its constitution and was obliged to execute the FDEAW.

The CJEU makes clear that despite Art. 53 of the Charter, an EU measure has primacy over national constitutional law and Member States must implement the EU measure, in this case the FDEAW.

2. German Federal Constitutional Court (2 BvR 2735/14)[8]

According to the FDEAW, Member States are obliged to surrender the requested person to a Member State whenever the Member State issues a European arrest warrant through a judicial decision. A constitutional complaint in the case 2 BvR 2735/14 was sentenced in absence to a custodial sentence of 30 years for participating in a criminal organization as well as importing and processing cocaine before the Florence court in Italy. He was arrested in Germany on the basis of an extradition request by Italy, which was based on an EAW issued by the Florence court. Facing this, Düsseldorf Higher Court decided that the extradition to Italy would be permissible on 7 November 2014. He remonstrated against the decision and requested a refusal of the extradition before the Higher Regional Court, insisting that the sentence by the Italian court was passed in his absence and even he did not know about the case, and in addition, that the Italian criminal procedure was problematic. The Higher Regional Court rejected his remonstrance. Then, he made a constitutional complaint before the German Federal Constitutional Court (GFCC), claiming that the decision of the Higher Regional Court would violate his fundamental rights especially under Art. 1 sec. 1 Grundgesetz (GG, German Basic Law=German Constitution).

In this case, Schuldprinzip (English translation by the GFCC site is the principle of individual guilt) was a key concept. The GFCC presupposes that the principle of individual guilt is related to human dignity and is a subject matter of Art. 1 sec. 2 GG. As a result, the protection of fundamental rights is indispensable according to Art. 23 sec. 1 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG and infringement of the principle is not permissible, even if Germany is obliged to implement the EU measure as an EU Member State.

In the Solange II decision in 1986, the GFCC declared that it would refrain from reviewing a constitutional complaint regarding the EU measures as far as an equivalent guarantee of fundamental rights at the EU level as that at the German level is made.[9] After the

[5] Case C-399/11, note (4), para. 55.

[6] Case C-399/11, note (4), para. 56.

[7] Case C-399/11, note (4), paras. 57-59.

[8] BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015, 2 BvR 2735/14, ECLI: DE: BVerfG: 2015: rs20151215.2bvr273514.

[9] 2 BvR 197/83 vom 22. Oktober 1986; BVerfGE 73, 339.

Solange II decision, the GFCC had not reviewed any EU measures until this case. On the other hand, the identity review (Identität-Kontrolle) was introduced in the so-called Lisbon case of the GFCC.[10] The GFCC declared that it would review whether the inviolable core content of the constitutional identity of the GG[11] and the national identity of the Member States were safeguarded by the identity review pursuant to Art. 23 sec. 1 third sentence in conjunction with Art. 79 sec. 3 of the GG.[12] Further, the GFCC indicated that the identity review as well as the *ultra vires* review[13] might result in Union law being declared inapplicable in Germany.[14] However, in the Lisbon case the GFCC did not review the Treaty of Lisbon according to the identity review, but just showed readiness to make use of the identity review regarding EU measures, as necessary.

In the case of 2 BvR 2735/14, the GFCC used for the first time a new framework of a review of EU measures, i.e. the identity review. This means that the GFCC reviewed an EU measure, here the FDEAW, to determine whether there would be a serious violation of a fundamental right in the context of the identity review if a violation of the guarantee of human dignity were asserted. Thus, the GFCC does not refrain from reviewing EU measures, even if the conditions according to the Solange II decision are fulfilled. This decision might be considered as Solange III.[15] Chritoph Schönberger did not see the need to use the identity review.[16] Claus Dieter Classen commented that the GFCC used to be a dog that barks, but does not bite. This time the dog bit, but its reasoning was less persuasive.[17]

The order of the Second Senate of the GFCC has three problems from the viewpoint of EU law. The first problem is derogation from the principles of mutual trust and mutual recognition on which the FDEAW is based. Furthermore, in the above-mentioned Melloni case the CJEU clarified that Art. 4a (1) FDEAW "must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State."[18]

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[10] In the case the GFCC reviewed whether the Treaty of Lisbon was consistent with the GG; BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009, 2 BvE 2/08; BVerGE 123, 267; ECLI:DE:BVerfG:2009:es20090630.2ve000208; There is also a translation in English, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (last accessed on 7 November 2016).

[11] 2 BvE 2/08, note (10), para. 240.

[12] 2 BvE 2/08, note (10), para. 332.

[13] The *ultra vires* review means a review of whether the EU observes the principle of conferral and the EU measures transgress the boundaries of their competences accorded to them by way of conferral. The concept of the review appeared as "ausbrechende Rechtsakte" already in the so-called Maastricht case (2 BvR 2134/92, BVerfGE 89, 155), but in the so-called Lisbon case (2 BvE 2/08, note (10)) the name of the *ultra vires* review was used. After that the wording of the *ultra vires* review continues to be used ex. in the Honeywell case (BverfG, Beschluss des Zweiten Senats vom 6. Juni 2010, 2 BvR 2661/06, BVerGE 126, 286; ECLI:DE:BVerfG:2010:rs20100706.2bvr266106).

[14] 2 BvE 2/08, note (10), para. 241.

[15] Z.B. Dana Burchardt, "Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht-Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("*Solange III"/"Europäsicher Haftbefehl II*")," *ZaöRV* 2016, 527-551; Mathias Hong, "Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court," http: //verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/ (last accessed on 28 October 2016).

[16] Christoph Schönberger, "Anmerkung," *JZ* 8/2016, pp. 422-424.

[17] Claus Dieter Classen, "Zu wenig, zu fundamentalistisch-zur grundrechtlichen Kontrolle 'unionsrechtlich determinierter' nationaler Hoheitsakte," *EuR* 2015, p. 304, p. 312.

Although the GFCC recognized this sentence of the CJEU[19], it declared that the provisions of Art. 4a FDEAW would not relieve German authorities or courts of their obligation to ensure compliance with the principles of Art. 1 sec. 1 GG in the context of extraditions executing an EAW.[20] This means that the application of the FDEAW will be limited in the case that mutual trust wavers. The GFCC mentioned that the principle of mutual trust would not apply without limits.[21]

The second problem is derogation from the principle of primacy (the precedence of application of Union law) and uniform application of Union law. The GFCC recognizes that uniform application of law is of central importance for the success of the EU and without it, the Union could not continue to exist as a legal community.[22] However, the GFCC indicates that the principle of primacy only applies insofar as GG permits the transfer of sovereign powers and the application of the principle is able to be limited by GG'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)."[23] This means that the principle of primacy can be limited if constitutional identity would be affected. On the other hand, the GFCC made the following three declarations: The identity review would not violate the principle of sincere cooperation in Art. 4 (3) TEU.[24] If the GFCC, in exceptional cases and under narrowly defined conditions, declares an EU measure to be inapplicable in Germany, this would not contradict GG's openness to European law (Europarechtsfreundlichkeit).[25] In addition, this approach would not entail a substantial risk for the uniform application of Union law.[26]

The third problem is derogation from the obligation of referring to a preliminary ruling. According to Art. 267 TFEU, in principle national courts in the last instance must request a preliminary ruling before the CJEU. Only in exceptional cases where the CJEU has already given an interpretation or the correct application of Union law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved, do national courts not have to seek a preliminary ruling.[27] In this proceeding, the GFCC stated that it was not necessary to refer a preliminary ruling and did not do so. However, this attitude of the GFCC was problematic because there was no case law regarding a refusal to execute an EAW. This means that this case was not an exceptional case that allows national courts not to refer a preliminary ruling. This decision by the GFCC might be unilateral and not allowable according to Union law and even have the risk of affecting the effectiveness and uniform interpretation of EU law, which are critical for the Union.

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[18] Case C-399/11, Melloni v Ministerio Fiscal, Judgment of 26 February 2013, ECLI:EU:C:2013:107, para. 46.
[19] 2 BvR 2735/14, note (8), paras. 78 and 82.
[20] 2 BvR 2735/14, note (8), para. 83.
[21] 2 BvR 2735/14, note (8), para. 105.
[22] 2 BvR 2735/14, note (8), paras. 36 and 37.
[23] 2 BvR 2735/14, note (8), paras. 40 and 41.
[24] 2 BvR 2735/14, note (8), para. 44.
[25] 2 BvR 2735/14, note (8), para. 45.
[26] 2 BvR 2735/14, note (8), para. 46.
[27] Case 283/81, CILFIT v Ministry of Health, Judgment of 6 October 1982, ECLI:EU:C:1982:335, paras. 13 and 16.

3. Court of Justice of the European Union (C-405/15 and C-659/15 PPU)

The above-mentioned order of the GFCC was made on 15 December 2015. After this, it had drawn attention to how the CJEU reacted to the order. The CJEU had an opportunity to give its opinion in Joined cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru of 5 April 2016.[28]

In Case C-404/15, an EAW regarding Mr. Aranyosi (A), who is a Hungarian national, was at issue. A was accused of entering and stealing. In 2014, a Hungarian court issued two EAWs with respect to A, seeking his surrender to Hungarian judicial authorities for prosecution. He was arrested in Bremen (Germany) in January 2015. The Higher Regional Court of Bremen accepted that his crime constituted a criminal offence in Germany. However, the Regional Court was concerned that conditions of detention in Hungary might violate Art. 3 of the European Convention on Human Rights (ECHR) and EU fundamental rights. Therefore, the Regional Court decided to stay the proceedings and to request a preliminary ruling before the CJEU.

In Case C-659/15 PPU, an EAW regarding Mr. Căldăraru (C) was at issue. C is Romanian. He was convicted and sentenced for the offence of driving without a driving license by the Court of First Instance of Fagaras in Romania in April 2015. The conviction and sentence became final after the judgement by the Court of Appeal in October 2015. After this fact, the Court of First Instance of Fagaras issued an EAW with regard to C. In November 2015, C was arrested in Bremen. The Regional Court of Bremen where the case Aranyosi was just pending thought that the conditions of detention in Romania would be in breach of Art. 3 ECHR and EU fundamental rights. Considering Romania to be in violation of judgments of the European Court of Human Rights (ECtHR) by reason of the overcrowding in its prisons, it decided to stay the proceeding and to seek a preliminary ruling before the CJEU.

The CJEU was asked in essence whether Art.1 (3) FDEAW must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, the executing judicial authority may or must refuse to execute an issued EAW.

In the above-mentioned Melloni case, the CJEU indicated that derogation from the FDEAW was not allowable, even if the protection level of fundamental rights in a Member State is higher than that of the EU. In the above-mentioned 2BvR 2735/14 case, the GFCC showed that derogation from the FDEAW was allowable in exceptional circumstances, relying on the constitutional identity review. This case presented the opportunity for the CJEU to clarify its attitude. Despite the judgment in the Melloni case, in Joined cases C-405/15 and C-659/15 PPU the CJEU recognized the possibilities of derogation from the FDEAW, saying that limitations of the principles of mutual recognition and mutual trust between Member States can be made in exceptional circumstances and the FDEAW is not to have the effect of modifying the obligation to respect fundamental rights.[29] This indication means a confirmation of the decision of the GFCC, which justifies the derogation from the FEDAW in individual

[28] Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, Judgment of 5 April 2016, ECLI:EU:C:2016: 198; Cf. Michael Schwarz, "Der Europäische Gerischtshof bestätigt die Sollbruchstellen der Anerkennung", *EuR* 2016, 421-430.

[29] Joined Cases C-404/15 and C-659/15 PPU, note (28), paras. 82 and 83.

exceptional cases on the ground of the protection of fundamental rights.

In the above-mentioned German constitutional case, the GFCC stated that Schuldprinzip (the principle of individual guilt) is a matter of human dignity. In Joined cases C-405/15 and C-659/15 PPU, the CJEU judged that the prohibition of inhuman or degrading treatment or punishment in Art. 4 of the Charter is absolute in that it is closely linked to respect for human dignity, the subject of Art. 1 of the Charter.[30] This is formed in concert with the German judgment, which relates to human dignity. In addition, the CJEU clarified that the right guaranteed by Art. 4 of the charter is absolute.[31] It is also in concert with the interpretation of the GFCC, according to which the principle of individual guilt in Art.1 sec. 1 GG cannot be affected.

At the same time, the CJEU did not give national executing authorities a free hand, rather, it gave details about how and in what manner they should act.[32] In addition, the CJEU emphasized two points. The first point is that a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead to the refusal to execute an EAW.[33] The second point is that the execution of that warrant must be postponed in the case of inhuman or degrading treatment but it cannot be abandoned.[34] This means that the CJEU balances between the guarantee of fundamental rights and the effectiveness of the system of the EAW, while it recognizes derogation from the FDEAW, it indicates detailed suggestions for national executing authorities.

In Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, the CJEU guarantees fundamental rights through recognizing derogation from the FDEAW, facing the decision of the GFCC, which shows a strong will to protect fundamental rights, especially the principle of individual guilt. Those dialogues contribute to complementing the system of the EAW, considering and strengthening fundamental rights.

4. German Federal Constitutional Court (2 BvR 890/16)

Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru were decided on 5 April 2016. After the judgment, the GFCC had an opportunity to react to that judgment. This case, 2 BvR 890/16[35], was decided on 6 September 2016.

In this case, an extradition on the basis of an EAW to the UK was at issue. The constitutional complainant is Croatian and Irish. He was arrested in Berlin based on an EAW in February 2016. He was accused of shooting a man. The Higher Regional Court in Berlin decided that his extradition to the UK should be permissible. He challenged the decision and made a constitutional complaint before the GFCC. He insisted that according to UK law, the court might draw inferences from his silence regarding his guilt, while according to German law, the accused's right to remain silent is accepted and is related to constitutional identity in

[30] Joined Cases C-404/15 and C-659/15 PPU, note (28), para. 85.

[31] Joined Cases C-404/15 and C-659/15 PPU, note (28), para. 86.

[32] Joined Cases C-404/15 and C-659/15 PPU, note (28), paras. 88-103.

[33] Joined Cases C-404/15 and C-659/15 PPU, note (28), para. 91.

[34] Joined Cases C-404/15 and C-659/15 PPU, note (28), para. 98.

[35] BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 6. September 2016, 2 BvR 890/16; ECLI:DE:BVerfG:2016:rk20160906.2bvr089016; Press Release No. 65/2016, http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-065.html (last accessed on 7 November 2016).

Germany.

The GFCC indicated that the principle of the right not to incriminate oneself (der Grundsatz der Selbstbelastungsfreiheit) included the right of the accused in criminal proceedings to freely decide whether to make a statement (Aussage- und Entschließungsfreiheit) and no one might be forced to incriminate oneself or to actively contribute to one's own conviction.[36] Although the GFCC recognized that the principle of the right not to incriminate oneself originated from human dignity, it showed that a violation of Art.1 would occur only where the core content of the right was affected.[37] Finally, the GFCC declared, "an extradition based on a European arrest warrant is not impermissible on the mere grounds that the right not to incriminate oneself is not guaranteed in the procedural law of the requesting state to the same extent as is the case in German procedural law due to constitutional requirement" and "rather, extradition is impermissible only where the core content of the right not to incriminate oneself as protected by Art. 1 is no longer guaranteed."[38]

As a result of this decision, the German regional court should surrender the complainant to the UK according to the obligation of the FDEAW. This means that the GFCC accepts the obligation from the FDEAW and is ready to allow German courts to implement it. The attitude of the GFCC indicates that it respects in principle the decision of the CJEU and the obligations of the FDEAW, which are based on the principles of mutual trust and recognition. The GFCC reacted to the decision of the CJEU in Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru. Those are also dialogues between the CJEU and the GFCC.

III. *Concluding Remarks*

The GFCC and the CJEU have been in dialogue especially since 1974. The Nold case of the CJEU[39] and the so-called Solange decision by the GFCC[40] are considered as the first dialogue between them. The CJEU tried to show that it could ensure adequate protection of fundamental rights, relying on constitutional traditions common to the Member States as well as international treaties for the protection of human rights. On the other hand, the GFCC warned that it would review the EU measures as far as the Union (Community) law did not have a catalogue of fundamental rights decided on by the Parliament. Facing the practice of the CJEU, the GFCC indicated the above-mentioned Solange II decision of 1986 and had refrained from reviewing the EU measures until the above-mentioned case of GFCC, 2 BvR 2735/14 in December 2015.

In the Maastricht case[41] and in the Lisbon case[42] of the GFCC the *ultra vires* review was

[36] 2 BvR 890/16, note (35), paras. 34-35; Press Release No. 65/2016, note (35), Key Considerations of the Chamber 1. para. 2.

[37] 2 BvR 890/16, note (35), para. 36; Press Release No. 65/2016, note (35), Key Considerations of the Chamber 1. para. 2.

[38] 2 BvR 890/16, note (35), para. 36; Press Release No. 65/2016, note (35), Key Considerations of the Chamber 1. para. 2.

[39] Case 4/73, Nold KG v Commission, Judgment of 14 May 1974, ECLI:EU:C:1974:51.

[40] 2BvL 52/71; BVerfGE 37, 271

[41] 2 BvR 2134/92, note (13).

[42] 2 BvE 2/08, note (10).

referred. In the Mangold case[43], regarding Directive 2002/78 establishing a general framework for equal treatment in employment and occupation, especially age discrimination, the CJEU indicated that national courts should ensure that the provisions of the directives are fully effective, setting aside any provision of national law that might conflict with that law, even if the deadline of the transposition period of the referred directive does not expire. The GFCC reacted to this decision of the CJEU in the Honeywell case[44] calmly, although there had been strong criticism[45] of the decision of the CJEU. The GFCC declared that *ultra vires* review could only be considered if it is manifest that acts of EU organs had taken place outside the transferred competences and a breach of the principle of conferral was only manifest if the EU organs had transgressed the boundaries of their competences in a manner specifically violating the principle of conferral.[46] This dialogue resembles a kind of warning to EU organs not to transgress the competences that are conferred on them. The dialogue regarding the OMT decision between the GFCC and the CJEU is also a kind of warning about the competence division in the field of economic and monetary policy.[47]

Dialogues between the GFCC and the CJEU have several roles, including criticism of the democratic deficit and warning against transgressions of competences. This time, the dialogue between them regarding the FDEAW contributed to the completion of the EU measure from the aspect of the guarantee of fundamental rights. The FDEAW is based on the principles of mutual trust and mutual recognition. Uniform application of the measure is crucial. The CJEU insisted that there be uniform application of the FDEAW in the Melloni case, relying on the principle of primacy. The GFCC recognized the importance of the principle of primacy and the uniform application of EU measures, but insisted on derogation from the EDEAW, indicating that the principle of individual guilt is based on the core of human dignity in Art. 1 sec. GG in 2 BvR 2735/14.[48] The attitude of the GFCC might have damaged those fundamental principles of the Union. However, the CJEU accepted the approach to some extent in Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru.[49] Facing the decision of the CJEU, the GFCC showed the will to respect the above-mentioned principles and the will to implement the FDEAW in 2 BvR 890/16.[50] Those dialogues between the GFCC and CJEU could contribute to raising the protection level of fundamental rights, complementing the deficit or a kind of lack in the system of the EAW. This will be a model example for multilateral protection of fundamental rights.

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[43] Case C-144/04, Mangold v. Helm, Judgment of 22 November 2005, para. 77, ECLI:EU:C:2005:709.

[44] BVerfG, Beschluß des Zweiten Senats vom 6. Juli 2010, 2 BvR 2661/06, BVerfGE 126, 286, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106.

[45] Roman Herzog/Lüder Gerken, "Stoppt den Europäischen Gerichtshof," FAZ vom 8 September 2008, Nr. 210, S. 8.

[46] 2 BvR 2661/06, note (44), English version, BVerfG, Order of the Second Senate of 6 July, para. 61.

[47] BVerfG, Beschluss des Zweiten Senats vom 14. Januar 2014, 2 BvR 2728/13, ECLI: DE: BVerfG: 2014: rs20140114.2bvr272813); Case C-62/14, Gauweiler, Judgment of 16 June 2016:ECLI:EU:C:2015:400; BVerfG, Urteil des Zweiten Senats vom 21. Juni 2016, 2 BvR 2728/13:ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

[48] 2 BvR 2735/14, note (8).

[49] Joined Cases C-404/15 and C-659/15 PPU, note (28).

[50] 2 BvR 890/16, note (35).