

The extradition saga continues: Is the latest ruling a win for Puigdemont, Spain, or for mutual trust?



A German court has ruled that former Catalan president Carles Puigdemont can be extradited to Spain on charges of misusing public funds, but not on a charge of rebellion, which carries a more severe punishment. As [Auke Willems](#) explains, the net result is a situation with no clear winners: Spain cannot prosecute Puigdemont on charges of rebellion; Puigdemont has been dealt a blow in his efforts to remain outside the hands of the Spanish authorities; and the already fragile notion of mutual trust in European law is now subject to even greater pressure.



Carles Puigdemont, Credit: [Convergència Democràtica de Catalunya \(CC BY 2.0\)](#)

The Puigdemont extradition saga continues. A German court in Schleswig Holstein has ruled that Puigdemont can be extradited to Spain, but only on charges of corruption, and not for rebellion. This ruling will not mark the end of the saga, as Puigdemont has already announced he will appeal. But the ruling by the German court is important nevertheless, and appears to be a sort of compromise: extradition yes, but not on the most serious (and controversial) ground. This post will take stock for now and attempt to identify who gained (or lost) most from the latest twist in this tale.

The road to Schleswig Holstein

As is well known by now, the story began when Puigdemont fled to Belgium following charges in Spain because of his involvement in the contested independence referendum in October 2017. [A request for his extradition followed](#), in the form of a [European Arrest Warrant](#). The European Arrest Warrant, the flagship EU criminal law instrument, applies the principle of mutual recognition to extradition, meaning that extradition (or 'surrender' to use the exact terminology) can only be refused on a limited number of grounds. Most importantly, surrender is a judicial procedure, unlike extradition, which is a political decision (often ultimately made by the appropriate Minister of Justice, rather than a judge). The European Arrest Warrant is based on a presumed level of mutual trust between EU Member States, which is justified primarily because of equivalence in safeguarding fundamental rights, more precisely the right to a fair trial.

Following arguments in a Belgian court, it appeared judges were contemplating to halt extradition partially because of a lack of dual criminality. [Spanish authorities revoked the extradition request in response](#). Puigdemont subsequently remained in Belgium, and enjoyed his newly obtained freedom. The events that followed could inspire the script of a Scandinavian crime thriller. While on a trip by car to Finland, Spain reinstated its European Arrest Warrant. Puigdemont was however not arrested in Finland, or Denmark when passing through, but in Germany. [It has been suggested that Spanish authorities 'chose' to make the arrest in Germany](#), as it would have laws similar to Spain. Soon after a German court allowed Puigdemont [to await the decision on bail](#), it held in a [preliminary decision](#) that extradition could not take place on rebellion charges for a lack of dual criminality.

The dual criminality rule

In short, according to the dual (or double) criminality requirement, the (allegedly) criminal conduct underlying the extradition request must be criminalised in both (requesting and requested) jurisdictions. Consequently, if multiple charges are brought against an individual, and dual criminality is only established for certain crimes, then the subsequent national prosecution can only be on those charges. This is the so-called 'specialty rule', under which an extradited person is subject to prosecution only for those offences for which s/he was surrendered. The dual criminality rule thus has the capability to limit or rule out extradition altogether.

Dual criminality is a fundamental principle of extradition law and ensures that states cannot be forced to facilitate the prosecution of conduct they do not deem criminal. Inspired on a high level of trust between Member States, the European Arrest Warrant aimed to abolish dual criminality, but only managed to do so partially. The European law contains a list of 32 crimes for which dual criminality is no longer required. However, if a Member State wishes, crimes not listed remain subject to dual criminality. This is questionable in terms of trust, as the presumed trust does not seem to reach further than the 32 crimes listed.

The German court applied the rule and found that dual criminality is missing regarding rebellion, as this is not a crime under German law. The closest possible offence, high treason, is also not applicable according to the Court, as Puigdemont's actions were not accompanied by violence (as was already [expected by German legal experts](#)). Moreover, the court found that breach of the public peace is also not relevant here.

It only found dual criminality for the crime of corruption (or graft, misuse of public funds, or embezzlement) in relation to the public funds used to organise the contested referendum. Hence, under this ruling, Spain can only charge Puigdemont for that particular crime. Thereby significantly tying the hands of Spanish prosecutors, and instead of charging him with a crime punishable by a 30-year term, the crime of graft is punishable with eight years.

Is the application of dual criminality still in line with the mutual recognition principle?

Another rule of extradition law relevant to mention here is that extradition requests must contain *prima facie* evidence (establishing a basic case against the fugitive from justice). This requirement has also been abolished by the European Arrest Warrant, again inspired by mutual trust. This has been [criticised for enabling politically motivated charges](#), as it takes away the basic opportunity of the executing state to assess whether the evidence against the individual holds up.

In this case, the German court went beyond the standardised form that constitutes the European Arrest Warrant, and looked into the available evidence to establish whether violence had been used by Puigdemont. This was indeed necessary to determine whether dual criminality can be satisfied here. It nevertheless goes against the spirit of the European Arrest Warrant. As put by Professor [Bachmaier](#), 'A strict legal interpretation of the requirement of double criminality might be technically correct, but it appears to contradict the general rule, i.e., the obligation to cooperate. In the end, the condition of double criminality is based less on the protection of fundamental rights than on a deeply rooted concept of national sovereignty.'

This is particularly pressing, as one can imagine that an assessment of the evidence available might have led to a different conclusion by Spanish judges. They might have very well found that Puigdemont's actions incited violent behaviour, or as argued by German prosecutors, 'that the violence in Catalonia on election day can be attributed to the wanted individual.'

What does the case say about mutual trust?

[As noted here](#), the case presented a test for Europe's justice model found on mutual trust. The idea is that because all legal systems within the EU are equivalent, judicial authorities can defer to each other's decisions. The German court ensured that the high level of trust underpinning European cooperation was not tarnished by the events in Spain, and remained as high as ever. It explicitly rejected Puigdemont's claim that he would not receive a fair trial and was at risk of political persecution in Spain: 'It is a far-fetched accusation against the Spanish state as a member of the European Union's community of values and common judicial area. The court has unconditional faith that Spanish judicial authorities will respect the requirements of national and international law.'

By allowing Puigdemont's extradition, the court also materially supports mutual trust and in effect defers to Spanish demands. At the same time, by disallowing prosecution on rebellion (or similar) charges, the German court does reach into the Spanish legal system, and significantly constrains Spanish prosecutors. This raises the question, is the court just paying lip service to mutual trust, or is it actually giving sufficient deference to Spanish demands and is the case just highlighting that there are limits to mutual trust.

Any winners?

Where does all this leave us? In other words, is this compromise ruling favourable to any of the parties or interests involved? Spain's main interest was to prosecute Puigdemont on charges of rebellion, under the current ruling this is no longer possible. Nevertheless, the ruling enables prosecution. Whether this will satisfy Spanish interests remains to be seen. There is the option to withdraw the European Arrest Warrant like it did in the first instance when an unfavourable Belgian ruling was impending. [It appears that Spain is considering doing this once more.](#)

Puigdemont in turn has hailed the German ruling as a victory. In a [tweet](#) he said that 'the German justice system says that the October 1 referendum was not a rebellion'. To be clear, that is not what the court said, all it established was that rebellion is not criminalised in Germany. But as Puigdemont fought to remain outside of the hands of Spanish authorities, it seems fair to say that '[his troubles aren't over](#)'. Moreover, the continuation of the legal proceedings means he cannot be re-appointed regional president of Catalonia.

How about European law, that has been drawn in right from the start. The questions into trust raised above cut right at the heart of the EU's Area of Freedom, Security and Justice. The German court is explicitly mindful of the importance of mutual trust, but nevertheless disbars extradition on rebellion or similar charges. The implications of one highly unusual case might be limited for a scheme that is used more than ten thousand times every year. But, considering this is the most visible case in years, it sends out the signal that there is still leeway for requested judicial authorities to evaluate extradition requests.

But whether you like/dislike the sight of politicians in prison, or are a defender of European unity, on balance, there is no clear winner. The German court has manoeuvred carefully in this highly politically charged case and came up with a compromise that satisfies/dissatisfies all parties to some extent. It is now for a higher court, possibly even the European Court of Justice, to settle the matter for good.

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Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.

About the author



Auke Willems – LSE

Auke Willems is a Fellow in EU Law at the LSE's European Institute.