BASIC DIFFERENCES BETWEEN EUROPEAN ARREST WARRANT AND EXTRADITION PROCEDURES

by

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Extradition is the oldest, classic form of international cooperation of states in criminal cases. Even though it is often treated as the most appropriate instrument in fighting various crimes which are international by nature (such as acts of terrorism), it has always been problematic and has faced the most serious crisis in the recent decades. The source of the crisis lies mostly in limitations (the so-called obstacles to extradition) which have appeared in the course of the development of the institution. These obstacles involve e.g. the principle of double criminality, prohibition of extradition of the country's own citizens and prohibition of extradition in case of political nature of crimes. Other reasons, such as formal issues related with proceedings, costs of proceedings, lengthy extradition processes etc. are also problematic. There have been various ways suggested to deal with these problems. However, if we bear in mind the lack of trust in the standards of justice administration in other countries (with respect to substantive criminal law and procedural criminal law as well as organizational structure), it has been believed that the present problems may be solved by modernization and simplification of procedures (easier surrender of criminals)[1].

An idea to simplify extradition procedures among member countries of the European Union appeared long ago but it became more specific only at the conference of the European Council in Tampere in 1999[2]. The Council decided that formal extradition procedures existing between the EU member states should be annulled with respect to sentenced criminals and people evading the administration of justice and that the latter should be substituted with a routine surrender of such people, in accordance with art. 6 of the European Union Treaty

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[1] Michał Płachta, *Europejski nakaz aresztowania (wydania) – kłopotliwa „rewolucja" w ekstradycji* (European Arrest Warrant – A Troublesome "Revolution" in Extradition), 3 STUDIA EUROPEJSKIE, !!!!!, 56-58 (2002).
[2] The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union.

(EUT)[3]. For some cases of extradition, a possibility of quick procedures, which ensure the validity of the principles of lawful trial, should be considered[4]. Therefore, the introduction of a simple and fast transfer of suspects to a country from which, for example, a suspect has escaped has been advocated. As it has been pointed out, the new instrument for international cooperation in criminal cases was to constitute significant progress in the realization of the vision of the area of freedom, security and justice, which the territory of the European Union should be, in accordance with art. 2 section 4 of the Amsterdam Treaty of 1997[5].

The attack on WTC in New York on 11th September 2001[6] made European countries realize that the vision of freedom, security and justice in Europe is far from being carried out. It was also the time of intensified works on the European Arrest Warrant[7]. Thus, the instrument of preventing crimes in all forms became a priority. Section 37 of the conclusion of the European Council of Tampere of 15th and 16th October 1999, the main European legal act connected with this instrument, was most important. In this section the necessity to implement the rule of mutual recognition of court decisions was stated, without which the European Arrest Warrant would be impracticable and the principle *ne bis in idem* would not be respected in the EU. Pursuant to the conclusions of the abovementioned European Council in Tampere, section 35 in particular, it was also assumed that formal extradition procedures between EU Member States need to be cancelled with reference to sentenced criminals who escape justice and extradition procedures connected with criminal suspects must be made hastened. European Arrest Warrant (of surrender) itself has become the first means in the

[3] Article 6 (ex Article F):
"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies".
[4] *See:* http://www.europarl.europa.eu/summits/tam_en.htm.
[5] *See:* http://www.eurotreaties.com/amsterdamtreaty.pdf.
[6] Terrorist attacks on U.S. Homeland, September 11, 2001: Two hijacked airliners crashed into the twin towers of the World Trade Center. Soon thereafter, the Pentagon was struck by a third hijacked plane. A fourth hijacked plane, suspected to be bound for a high-profile target in Washington, crashed into a field in southern Pennsylvania. The attacks killed 3,025 U.S. citizens and other nationals. President Bush and Cabinet officials indicated that Usama Bin Laden was the prime suspect and that they considered the United States in a state of war with international terrorism. In the aftermath of the attacks, the United States formed the Global Coalition Against Terrorism (*see:* http://www.state.gov/r/pa/ho/pubs/fs/5902.htm).
[7] The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

realization of the programme of mutual recogniton and has been introduced as the Framework Decision of 13th June 2002 on European Arrest Warrant [8].

Pursuant to the provisions of the Framework Decision, formal extradition procedures used so far in the relations of EU member states based on the Convention on Extradition of 13th December 1957 are annuled and substituted with the system of surrender of persons to courts[9]. What needs to be stressed, in the relations of EU Member States with third countries, extradition procedures are still applied, which is significant if we take into consideration a clear distinction between the two institutions: European Arrest Warrant and extradition.

Pursuant to the European Arrest Warrant a basic difference between extradition and surrender consists in the shift from the fundamental principle of double criminality[10] in relations between states (art. 2 of the Framework Decision on European Arrest Warrant). In case of many deeds listed in the Framework Decision as qualifying a person to surrender on the basis of the European Arrest Warrant, the only condition is treating an act as a crime in the country issuing the warrant and prison sentence of at least 3 years as a regular punishment for this act. However, the subject scope of the European Arrest Warrant has been restricted to 32 enumerated types of crimes (art. 2 section 2 of the Framework Decision on European Arrest Warrant). For crimes, which are not included in this list, double criminality may be a reason for refusing to surrender a person, although not necessarily; this is to be decided by the court competent in terms of decisions on surrender. The obligation to execute the European Arrest Warrant is also applicable when a person, to whom the European Arrest Warrant refers, is a citizen of the country to which the warrant is directed. Refusal to surrender a citizen of a given country by the country to which the European Arrest Warrant has been forwarded is only acceptable if the warrant has been issued in order to execute the ruled prison sentence or

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[8] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA, 18 July 2002).

[9] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States:
"THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Parliament,
Whereas:
According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

[10] Michał Płachta, *The Role of Double Criminality in International Cooperation in Penal Matters* in DOUBLE CRIMINALITY. STUDIES IN INTERNATIONAL CRIMINAL LAW (N. JAREBORG ED.), !!!!!, 111 (1989); Lech Gardocki, *Podwójna przestępność czynu w prawie ekstradycyjnym* (Double Criminality of Offence in Extradition Law), **Numer** PROBLEMY NAUK PENALNYCH – PRACE NAUKOWE UNIWERSYTETU ŚLĄSKIEGO, !!!!!, 69 (1996).

a detention order and this country undertakes to execute the custodial sentence or a detention order in accordance with the law of the country (art. 4 section 6 of the Framework Decision on European Arrest Warrant). If the European Arrest Warrant has been issued in order to prosecute for a crime not judged yet, the country obliged to execute the warrant may surrender its citizen to the Member State executing the warrant, with the aim of serving a prison sentence there or executing a detention order ruled in the warrant issued in a Member State, provided that the person will be surrendered after a court hearing (art. 5 section 3 of the Framework Decision on European Arrest Warrant).

Another difference between the two institutions lies in varied organizational structure and competences. The European Arrest Warrant provides for the modification of two-stage extradition proceedings and transformation into uniform proceedings conducted by the organ of justice competent in issuing European Arrest Warrant in a given country (art. 9 of the Framework Decision on European Arrest Warrant). Should extradition proceedings be radically simplified and made faster, it will result in the direct transfer of warrants to proper organs of justice administration without the mediation of a diplomatic channel or other intermediate elements[11].

The Framework Decision on the European Arrest Warrant finally puts an end to two deeply rooted and largely controversial extradition obstacles, namely the citizenship of a wanted person and political character of a crime. These have been mentioned in neither the catalogue of obligatory nor the catalogue of optional grounds for refusal to execute an arrest warrant[12]. When it comes to the citizenship of a criminal, the creation of unique judicial space in the European Union has made it possible to disregard the citizenship of a wanted person in order to facilitate and hasten the procedure of surrender. With reference to political crimes, the lack of definition of this kind of crime in international law and numerous obstacles faced in cooperation of countries when prosecuting and punishing such offenders (frequently such serious crimes as acts of terrorism have been categorized as political crimes) have led to the abandonment of the ban on surrendering political offenders within the European Arrest Warrant. The Framework Decision does not refer to political crimes and thanks to this fact, a certain kind of offenders may not avoid penalties, no matter where they are and what the motivation behind their acts is.

[11] *Stosowanie Europejskiego Nakazu Aresztowania do obywateli polskich*, Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r., 42/4/A/2005, Sygn. akt P 1/05 (sentence issued in the Journal of Laws of 2005, No. 77, item 680).
[12] M. Płachta, (note 1), 56-58.

When a political crime has ceased to constitute grounds for refusal to issue an arrest warrant, the circumstances leading to obligatory refusal to issue a warrant have been reduced to the following four cases:

- amnesty in the executing country,
- legally valid judgment made in one of the member countries if the penalty has been executed, is being executed or cannot be executed due to legal reasons,
- age of a wanted person,
- risk of the judgment of capital punishment to a wanted person, the risk of torturing the person or exposing them to inhuman or humiliating treatment or punishment.

It should be emphasised that the transposition of the Framework Decision made on 13th December 2002 through the amendment to the Polish code of criminal conduct has led to distinction in the Polish legal order into two institutions: extradition and European Arrest Warrant. When it comes to extradition, in principle it is prohibited in relation to the citizens of Poland, pursuant to art. 55 section 1 of the Constitution of the Republic of Poland[13] but as a result of amendments made on 8th September 2006, the Constitution provides for two exceptions in the cases as follows:

- deed under the petition for extradition was commited outside the territory of the Republic of Poland and in accordance with the law of the Republic of Poland it was a crime or would be a crime in accordance with the law of the Republic of Poland if it was commited in the territory of the Republic of Poland, both at the time when it was commited and at the time of submitting a petition, and this deed does not require the compliance with the conditions specified in section 2 points 1 and 2;
- extradition is to be executed upon the petition of the international judicial institution established pursuant to an international agreement ratified by the Republic of Poland, in

[13] Article 55 of the Constitution of the Republic of Poland of 2 April 1997:
"1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.
2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body".

connection with acts of genocide, crimes against humanity, war crimes or agreession, which are all under the jurisdiction of this institution.

European Arrest Warrant has been introduced to serve in accordance with its intended aim, i.e. as an instrument of simplified procedures of surrendering a citizen of one Member State for judgment by another Member State[14]. What needs to be stressed out, the act on the amendment to the Constitution of the Republic of Poland passed on 8th September 2006 and effective as of 7th November 2007, enacted in consequence of the judgment of the Constitutional Tribunal, allows for surrender of a citizen of Poland to another country or to an international judicial institution if this option results from the international agreement ratified by the Republic of Poland or from the act which is equivalent to the execution of an act of law instituted by an international organization to which the Republic of Poland belongs[15].

Both extradition and European Arrest Warrant are important instruments to fight crimes. For example, extradition is commonly treated as the most effective tool in combating international terrorism, making it possible to prevent impunity of terrorists and leading to the weaker impact of terrorism and to the limitation of its range. As a sort of a legal process based on a treaty, on mutuality or the law of the country, extradition makes it possible for one country to surrender the accused or the person sentenced for the act which is a violation of the law of the country petitioning for extradition or of international criminal law, to another country in order to execute court proceedings or to serve the sentence in the country petitioning for extradition for the crime specified in the petition for extradition[16]. Unfortunately, one of the disadvantages of the extradition system is its bureaucracy. In practice, extradition is a procedure with advanced formal requirements and it lasts long, it is complicated and costly. Finally, it does not always guarantee success in the form of the actual surrender of a wanted person. This may happen due to for example a widely held opinion that the surrender of a person is an act of the sovereignity of a state. However, the authorities of the interested states arrange extradition itself[17].

In case of European Arrest Warrant, in turn, it is not a "political institution" which is decisive in the surrender of a person but the court in the country where the wanted person is staying. Competent judicial bodies are the authors and addressees of the arrest warrant and the

[14] See chapters 65a and 65b of the Polish Code of Penal Proceedings of 1997 (Dz.U. of 1997, no. 89, item 555 as amended).

[15] *Wider see:* MARCIN MARCINKO, WYBRANE ASPEKTY WALKI Z TERRORYZMEM W PRAWIE MIĘDZYNARODOWYM (SELECTED ASPECTS OF COMBATING TERRORISM IN INTERNATIONAL LAW), 33-34 – forthcoming.

[16] M. Cherif Bassiouni, *Reflections on International Extradition* in FESTSCHRIFT FÜR OTTO TRIFFTERER ZUM 65. GEBURTSTAG (K. SCHMOLLER ED.), 714, 715 (1996).

[17] *See:* MICHAŁ PŁACHTA, KIDNAPING MIĘDZYNARODOWY W SŁUŻBIE PRAWA (INTERNATIONAL KIDNAPPING IN SERVICE OF LAW), 15 (2000).

decision on the warrant is made by a court. The role of administrative bodies has been restricted to purely technical issues, such as the transfer and reception of a warrant. Unlike extradition, the principle of double criminality is not applicable to the European Arrest Warrant, which means there is no need to check whether the country due to surrender a criminal also penalizes the act for which the criminal is to be punished in the country submitting a petition for extradition. It suffices if a given deed is penalized in the country which has issued the arrest warrant. The main idea of the authors of the European Arrest Warrant was to facilitate as much as possible the surrender of a criminal from one EU Member State to another. Overall, after taking into account the faults of the extradition system, especially its lengthy procedures and low effectiveness, formal extradition procedures have been abandoned for the less formal surrender, which is mainly characterized by the restriction of subject premises for refusal to surrender and by its implementation in the whole area of the European Union. As such, the European Arrest Warrant seems, at least in the European judicial space, to be a better and more effective means of fighting crimes, including international or transnational crimes.