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The regulation and practice of European Arrest Warrant

Introduction

According to Robert Schuman: „Europe's spirit is shaped by different qualities and diversity of intentions. The identity of fundamental ideas is compatible with the diversity of faith and traditions and with the responsibility for individual decisions. Today's Europe needs to be established based on a coexistence that is not only the set of nations competing with each other – sometimes hostile –, but also freely organized, consensual, working community.[1]

The European Union (EU) is a supranational economic and political organization, which has a serious interest enforcement. Althought the EU' power and influence based on the community of the Member States, but economically and financially independent of them, seperate entity, independent organization with specific interests. Since the EU does not mean the merge of nation states or the creation of a super state, rather the trust, association and affiliation among the states, the EU's autonomy and independence would worth a little without the cooperation of the Member States. The EU is not only unity, but also the community, whose operation is unthinkable without proper cooperation between the members. This is expressed by the community loyalty/fidelity principle, which includes three obligation itself. The first is the obligation of action, the second is the obligation of abstain from something, and the third is the obligation to cooperate. In the interest of this, the European Member States shall take all appropriate general and specific measures to ensure fulfillment of the obligations arising under the EU Treaty (TEU), and abstain from any actions that would jeopardize the attainment of the objectives laid down in the Treaty on the Functioning of the EU (TFEU).[2] But the EU's activity is not unlimited. Only act on those issues and make mandatory provisions of the Member States, which has delegated from the Member States. The EU is acting within the framework of the delegated powers and the objectives set out therin. This would include, inter alia, free movement of capital, goods, services and people, developing a common commercial, agricultural and fisheries policies, the development of undistorted competition, consumer protection, the approximation of national legislation, etc. In matters that do not fall within the exclusive competence of the EU, the Community shall act in accordance with the subsidiarity principle. This means that the EU only intervenes to the extent that the objectives of the proposed action can not be sufficiently achieved by the Member States and can therefore be better achieved at Community level. The EU activities in neither case go beyond what is necessary to achieve the goals that must comply with the principle of proportionality. The EU secondary legislation – which are both related to matters falling within the exclusive competence of the EU, on the other hand, these rules include the principle of subsidiarity – in spite of national loyalty does not apply in full. The Member States shall leave them ignored or violated in many cases. As a result, they need protection. With regard to the possibility of these protection, for many decades there has been no dispute that criminal law instruments are excluded from the scope of EU Pillar I. The criminal cooperation could conduct exclusively within the EU Pillar III. The key concept of this cooperation is the alignment and harmonization. It was replaced by the principle of mutual recognition. Its success is indicated by the number of Framework Decision brought in the nineties, but it does not change the fact that the prnciple did not appear in the rules of EU treaties. This took place in the Lisbon Treaty.[3]

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[1] Schumann, Robert: Európáért. Pro Pannonian Punlish Foundation, Pécs, 2004. 99.

[2] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union – Protocols – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences , https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, download: 25.05.2018

[3] Farkas, Ákos: A kölcsönös elismerés elve az európai büntetőjogban I., Ügyészségi szemle 2016/01. year I. no. 1. – Nemzetközi figyelő

The development of the principle of mutual recognition

The principle of mutual recognition applies multiple levels. The first is the area of judicial acts, according to which the EU Member States are recognize each other's specified actions as valid and enforceable without any special procedure being required. The principle of mutual recognition of the long-established principle of EU level (e.g. occupations, qualifications, mutual recognition of civil and commercial law court decisions), but taking shape over the last two decades in the field of criminal cooperation. First appearance linked to the EU summit, held in the England in Cardiff on 15-16 June 1998, where the then British Minister of Internal Affairs, Jack Straw has proposed that the principle of mutual recognition take as a funadamental principle of the EU's judicial cooperation, in the interest of make the fight against the terrorism, drugs and organized crime more efficient. Its like the United Kingdom model, where the decisions was made in the law and judicial system of English, Irish and Scottish, they apply this principle. Than the Eurpoean Council conclusions states that „the EU Council recognizes the need to strengthen the cooperation ability of national systems, so the Council will look into the possibility of how we can be more area to ensure handed down by the courts of the Member States mutual recognition of decisions".[4]

3 December 1998 in Vienna, the Council and the Commission adopted the Action Plan of freedom, security and justice area. This Action Plan filled with content the objectives of the Treaty of Amsterdam and defined the priority list of measure with a five-year schedule, which is necessary to build up the area. The essence of the objective is to ensure the people's free movement and safety in parallel. On the one hand, the area means the free movement of people based on the Schengen zone model, and on the other hand the protection of fundamental rights and the fight against all forms of discrimination. Highlights of the fight against all form of crime, and the importance of Europol. It reflect the EU's objective to ensure that equal access to all citizens to the truth.

The Action Plan is based on a coordinated package of measures:

a) in asylum, building on common standards to develop a uniform method and implement the Eurodac Convention
b) in the area of immigration, adopt common rules for entry, stay and reversed, more effective action against illegal immigrants, clarifying the rules on intra-EU movement of nationals of non-member states
c) in visa policy the aim is to adopt standards
d) in civil law and judicial cooperation should be settled the questions come from collision of the national laws, in particular the different contractual relationships
e) in field of police cooperation the purpose is to extend the cooperation between authorities, and to strengthen the cooperation of Europol and the judicial bodies
f) in criminal cases, to simplify the mutual assistance between national authorities and extradition, the mutual recognition of judgments and decisions, harmonization of criminal law.

In the following year, the principle of mutual recognition already appears among EU Summit – held in Finland in Tampere on 15-16 October 1999 – conclusions as a cornerstone of the civil and criminal cooperation between EU Members, which should be used to recognize the courts and other authorities decisions.[5]

The Treaty of Amsterdam signed on 2 October 1997 and came into force on 1 May 1999,[6] has taken over a number of areas previously referred to the third pillar to the first pillar, so the third pillar remained the area of police and judicial cooperation in criminal matters.[7]

Based on the Treaty of Amsterdam – which declared the EU the area of freedom, security and rights – it was becoming more vigorous demand for the Member States treated equally the requesting state's criminal procedure with their own criminal prcedure. This equal treatment means in the practice that the EU Member States recognize each other law enforcemnet activities without any further conditions and investigations. This can be achieved if the Member States shall impose the same conditions on the domestic prosecution of criminla conduct and the fulfillment of the legal aid does not bind by further conditions.[8]

In essentially, the idea of a unified European field of law based on the European territorial principle, based on this, which means that the extraditon as a criminal form of criminal cooperation is terminated and replaced by a procedure based on the European Arrest Warrant (EAW).[9]

Influenced of the Treaty of Amsterdam, the cooperation in field of fight against the crime got

[4] Cardiff European Council 15 and 16 June 1998 Presidency Conclusions, SN 150/1/98 Rev 1

[5] European Council 15-16_10_1999 Conclusions of the Presidency

[6] Treaty of Amstredam, https://hu.wikipedia.org/wiki/Amszterdami_szerz%C5%91d%C3%A9s, download: 25.05.2018.

[7] Bárd, Petra: A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül, http://www.okri.hu/images/stories/KT/KT45_2008/007_kt45_eu%20elfogatoparancs.pdf, download: 25.05.2018.

[8] Schwaighofer, Klaus-Ebensorenger, Stefan: Internationale Rechtshilfe in strafrechtlichen Angelegenheiten, Wien 2001. 15.

[9] Ligeti, Katalin: Büntetőjog és Bűnügyi együttműködés az Európai Unióban, Budapest, 2004. 85.

more emphasis, in order to create the field of a closer and more effective cooperation, freedom, security and justice. The priority field includes the organized crime, terrorism, trafficking in human beings and trafficking in children, drug and arms trafficking and fight against corruption and fraud. The Treaty called for police, costums, judicial and other authorities for closer cooperation, abolished the common measures, but left the conventions and common positions, and in addition to these, it introduced the use of the so-called framework decisions and other dicisions.

The principle of mutual recognition does not take a position on the issue of criminality or even impunity. The implementation of decisions belongs to the criminal cooperation between Member States, it means, if one Member State can not enforce its decision because of a physical reason, the other Member State will help without overrule or could be overrule either formally or merits the decision.[10]

The principle of mutual recognition in criminal matters helps the mutual recognition of judicial decisions, thereby its promotes the extension and „free movement" of state criminal powers.[11]

Recognition of a final judgment given in one Member State has a series of consequences in the other Member States. Aspects of fundamental importance for effective mutual recognition are:

- mutual information on convictions,
- the ne bis in idem principle,
- taking account of convictions in other Member States in the course of criminal proceedings,
- enforcement of criminal penalties and
- mutual recognition of disqualifications.

By the Lisbon Treaty, which was adopted on 13 December 2007 and came into force in 1 December 2009, the principle of mutual recognition became the determinate and codified principle of criminal cooperation. This lay down in the Title V of the TFEU Article 82 of Chapter 4, entitled „Judicial Cooperation in Criminal Matters".[12] According to this, „judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- prevent and settle conflicts of jurisdiction between Member States;
- support the training of the judiciary and judicial staff;
- facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions."[13]

According to the paragraph (2), this alignment is „extend necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States".

„They shall concern:

- mutual admissibility of evidence between Member States;
- the rights of individuals in criminal procedure;
- the rights of victims of crime;
- any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals".[14] This means that if the Member States' provisions, relating to the proof, the rights of persons involved in criminal proceedings (accused, defender) and rights of the injured party, reach the standards specified in the rules adopted by the European Parliament and Council Directives, the result of the proof must be taken as equivalent. Even if one or more Member States have instruments to prove a higher protection than in the other Member States with regard to the rights referred to above. The other field which has became very important by the principle of mutual recognition, is the criminal substantive law. In this respect, Article 83 of TFEU includes provisions. The essence of that, the European Parliament and the Council of the European Union

[10] Dr. Kondorosi Ferenc – dr. Ligeti Katalin: Az Európai büntetőjog kézikönyve, Budapest, 2008. 152.

[11] Farkas, Ákos: A kölcsönös elismerés elve az európai büntetőjogban I., Ügyészségi szemle 2016/01. year I. no. 1. – Nemzetközi figyelő

[12] Consolidated version of the Treaty on the Functioning of the European Union – PART THREE: UNION POLICIES AND INTERNAL ACTIONS – TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE – Chapter 4: Judicial cooperation in criminal matters – Article 82 (ex Article 31 TEU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E082, download: 25.05.2018.

[13] Consolidated version of the Treaty on the Functioning of the European Union – PART THREE: UNION POLICIES AND INTERNAL ACTIONS – TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE – Chapter 4: Judicial cooperation in criminal matters – Article 82 (ex Article 31 TEU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E082, download: 25.05.2018

[14] Consolidated version of the Treaty on the Functioning of the European Union – PART THREE: UNION POLICIES AND INTERNAL ACTIONS – TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE – Chapter 4: Judicial cooperation in criminal matters – Article 82 (ex Article 31 TEU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E082, download: 25.05.2018

by the ordinary legislative procedure can adopt directives with respect to the factum and sentence of those serious crimes which are the object of the criminal cooperation in the EU, such as terrorism, human trafficking and women and children for sexual exploitation, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, money and currency forgery, computer crime and organized crime, and these directives lay down minimum standards for these. So the Lisbon Treaty intends to squeeze the principle of mutual recognition between frame and not only leaves itt o the discretion of Member States. These kind of minimum standard could be establish concerning to other crimes which have the same charasteristics than the crimes mentioned aboved, and those are so serious offenses that, by their nature or effect, apply to several states, and because of this it is particularly important to continue fighting against them on a common basis.

In order to develop the European integration, the Lisbon Treaty subordinated the harmonization to the principle of mutual recognition, in the sense that tha principle of mutual recognition does not require the harmonization of the subtantive and procedural criminal law of the Member States, so it does not threaten their sovereignity.[15]

The provisions of European Arrest Warrant

An arrest warrant may be issued:

a) A EAW may be issued for the purposes of conducting a criminal prosecution in relation to acts punishable under domestic law by a custodial sentence or a detention order for a maximum period of at least 12 months.[16] It concerns criminal procedures where the requested person can be prosecuted.

b) A EAW may be issued for the purposes of execution of a sentence or detention order of at least four months. However, in situations where only a short period of the sentence remains to be served, competent judicial authorities are advised to consider whether issuing a EAW would be a proportionate measure.[17] It concerns enforceable custodial sentences or detention orders for criminal offences issued by a court. Although issuing a EAW is not possible for all crimes, but limited to those of sufficient severity, as explained in more detail below.

We can see some differences in practice of issuing EAW of Member States. In some Member States' legal systems, a EAW for the execution of a custodial sentence or a detention order can be issued even if the sentence is not final and still subject to judicial review, while in other Member States' legal systems, this type of EAW can be issued only when the custodial sentence or detention order is final. According to the Commission, it is recommended that the executing judicial authority recognises the issuing judicial authority's classification for the purpose of execution of the EAW, even if it does not harmonized to its own legal system in this regard. Here it should be noted that issuing judicial authorities are advised to consider whether in the particular case issuing a EAW would be proportionate and whether any less coercive Union measure could be used to achieve the right result.[18]

Returning to the aforementioned point a), a EAW may be issued for the purposes of conducting a criminal prosecution in relation to acts punishable under domestic law by a custodial sentence or a detention order for a maximum period of at least 12 months. This concerns to the maximum possible punishment for the offence laid down in the national law of the issuing Member State. In this regard, the maximum punishment in the law of the executing Member State is not relevant.

The Court of Justice states in the order of the Court of Justice in Case C-463/15 PPU, Openbaar Ministerie v A.[19], that the „Article 2(4) and Article 4.1 of Council Framework Decision 2002/584 (...) must be interpreted as precluding a situation in which surrender pursuant to a European arrest warrant is subject, in the executing Member State, not only to the condition that the act for which the arrest warrant was issued constitutes an offence under the law of that Member State, but also to the condition that it is under that same law, punishable by a custodial sentence of a maximum of at least twelve months." „Conducting a criminal prosecution" includes the pre-trial stage of criminal proceedings, however, the purpose of the EAW is not to transfer persons merely for questioning them as suspects. For that purpose other measures, such as a European Investigation Order (EIO) could be considered instead.[20]

Returning to the aforementioned point b), a EAW may be issued for the purposes of execution of a sentence or detention order of at least four months.[21] However, in situations where only a short period of the sentence remains to be served, competent judicial authorities are advised to consider whether issuing a EAW would be a proportionate action. Domestic rules on early or conditional release, probation or other

[15] Farkas, Ákos: A kölcsönös elismerés elve az európai büntetőjogban I., Ügyészségi szemle 2016/01. year I. no. 1. – Nemzetközi figyelő

[16] Article 2(1) of the Framework Decision on EAW

[17] Article 2(1) of the Framework Decision on EAW

[18] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.1

[19] Order of the Court of Justice of 25 September 2015, A., C-463/15 PPU, ECLI:EU:C:2015:634.

[20] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.1.1

[21] Article 2(1) of the Framework Decision on EAW

similar rules resulting in shorter effective imprisonment which may apply following the surrender to the issuing Member State are not relevant when ascertaining the minimum period of four months. There is no relation between the length of the actual and potential penalty. This means that where a person has already been sentenced to a combined custodial sentence for multiple offences and that judgement is four months or more, the EAW may be issued regardless of the maximum possible punishment for each of the individual offences. According to the propose of the Commission, where the person is known to reside in another Member State, the competent authorities of the issuing Member State are advised to consider the possibility of transferring the enforceable sentence to the Member State of residence, instead of issuing a European Arrest Warrant. In this cases, it could be necessary taking into account the person's social ties and chances for better rehabilitation in that Member State and other requirements in accordance with Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union 15.[22]

About the double incrimination

The Framework Decision does not define the double incrimination as the condition of the transfer, but a Member State may decide that the transfer depends on it.[23]

Nevertheless the EAW ignore the double incrimination in full in case of so-called cataloged crimes, and only if according to the law of the issuing State, the upper limit of the sentence at least three years imprisonment. Round of these crimes can expand by the Council. On the other hand, it may be a problem, that the Framework Decision does not define the cataloged crimes, so the factums of a crime of the difference Member States do not the same as the list in the EAW, and conflicts of interest may arise easily. In the lack of a unified penal code, we can only hope for the generous recognition of the Member States.[24]

The requirement for an enforcable judicial decision

The issuing judicial authorities must always ensure that there is an enforceable domestic judicial decision before issuing the EAW. The nature of this decision depends on the purpose of the EAW. It means when the EAW is issued for the purposes of prosecution, a national arrest warrant or any other enforceable judicial decision having the same effect must have been issued by the competent judicial authorities of the issuing Member State[25] prior to issuing a EAW. It was confirmed by the Court of Justice in its judgment in Case C-241/15 Bob-Dogi.[26]

In this Hungarian affair, the European Court of Justice sets, that the national arrest warrant or other judicial decision is distinct from the EAW itself. When the EAW is issued for the aims of execution of a custodial sentence or a detention order there must be an enforceable domestic judgment to that effect. As the Court of Justice noted in that case, the EAW system entails a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person – judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, and the protection that is afforded at the second level, at which a EAW is issued. The principle of that dual level of judicial protection is lacking in a situation where no domestic judicial decision on which the EAW will be based, has been taken by a national judicial authority before the EAW is issued.[27]

The Court of Justice said: „Article 8(1)(c) of Framework Decision 2002/584 (...) is to be interpreted as meaning that, where a European arrest warrant based on the existence of an 'arrest warrant' within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to Article 15(2) of Framework Decision 2002/584, as amended, and any other information available to it, that authority concludes that the European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant."[28]

The concept of "judicial decision" (that is distinct from the EAW itself) was further clarified by the Court of Justice in its judgment in Case C-453/16 PPU Özçelik, where it was concluded that a confirmation by the public prosecutor's office of a national arrest

[22] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.1.2

[23] Article 2(4) of the Framework Decision on EAW

[24] Bárd, Petra: A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül, http://www.okri.hu/images/stories/KT/KT45_2008/007_kt45_eu%20elfogatoparancs.pdf, download: 25.05.2018.

[25] Article 8(1)(c) of the Framework Decision on EAW

[26] Judgment of the Court of Justice of 1 June 2016, Bob-Dogi, C-241/15, ECLI:EU:C:2016:385

[27] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.1.3

[28] Judgment of the Court of Justice of 1 June 2016, Bob-Dogi, C-241/15, ECLI:EU:C:2016:385

warrant that was issued by the police, and on which the EAW is based, is covered by the term „judicial decision".[29]

According to the Court of Justice, „Article 8(1)(c) of the Council Framework Decision 2002/584/JHA (...) must be interpreted as meaning that a confirmation, such as that at issue in the main proceedings, by the public prosecutor's office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a 'judicial decision', within the meaning of that provision."[30]

The existence of the domestic judicial decision or arrest warrant must be indicated on the EAW form when the EAW is issued.[31]

Application of the European Arrest Warrant

For the Member State it is mandatory to issue the EAW in the required form which can be found in the Appendix 2. of EUbe.

The decision of issuing legal authority must be executed in the EU. The execution might be rejected or must be rejected if one of the optional or mandatory rejection causes can be subsists.

The EAW issued by foreign judicial authority is accepted by the Ministry of Justice as central authority and forwards it to the County Court of Budapest as Hungarian execution judicial authority in order to conduct the further proceedure.

EAW cannot be issued against an accused whose residence abroad is known, if the motion of the prosecution does not include the imposition of a custodial sentence.

The EAW must be uploaded with a scanned in original signature in PDF format to Central Records System (KöNYIR). Before uploading, the draft can be sent to the Ministry of Justice which on enquiry gives information about the suitability of filling out the format. The EAW must be sent to National Crime Cooperation Center (NEBEK) and the cognizant police authority according to the residence of the accused. As long as the accused does not have either permanent or temporary residence, the EAW must be sent to the cognizant police authority according to the seat of the issuing court.

After arresting the accused the EAW must be forthwith sent – via post, email or fax – to the Ministry of Justice so that they can have it translated.

Before issuing the EAW the principle of propotion must be considered as well as the aim of how the procedure might be reached in any different ways of legal methods (for example: hearing conducted by means of video conferencing or requested court).[32]

The classical „dual criminality" requirement has been changed by the EAW, to a case when the offence had to be punishable in the requesting as well as in the extraditing state.

Dual criminality means that in the case of 32 crimes mensioned below, delivery might be permitted if according to the law of issuing Member State, the upper limit of custodial sentence or measure for incarceration reaches 3 years. In the cases of crimes which are not included in 32 crimes, delivery might be permitted if the actions, because of which the EAW was issued, are also defined as crimes by the Hungarian law as well. (Subsection 3 of Section 3 of EUbe.)

A list of 32 offences has been introduced abolishing double criminality and causing surrender pursuant in lined with an EAW, if such offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, and as they are defined by the law of the issuing Member State.

They are the following:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,

[29] Judgment of the Court of Justice of 10 November 2016 Özçelik, C-453/16 PPU, ECLI:EU:C:2016:860.

[30] Judgment of the Court of Justice of 10 November 2016 Özçelik, C-453/16 PPU, ECLI:EU:C:2016:860.

[31] Article 8(l)(c) of the Framework Decision on EAW

[32] IM tájékoztató a nemzetközi vonatkozású büntetőügyek intézéséről – 2017. – http://www.kormany.hu/download/9/4f/90000/20160218%20IM%20t%C3%A1j%C3%A9koztat%C3%B3%20a%20nemzetk%C3%B6zi%20vonatkoz%C3%A1s%C3%BA%20b%C3%BCntet%C5%91%C3%BCgyek%20int%C3%A9z%C3%A9s%C3%A9r%C5%91l.pdf, download:25.05.2018

- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage[33]

The Framework Decision provides for a limited number of compulsory and optional bases for non-implementation.[34]

The compulsory grounds are:

1. amnesty in the executing Member State;

However, given that the jurisdiction to prosecute the crimes are not limitid to the territorial principle, but other principles of criminal jurisdiction exercise also can establish, the ground for refusal of such wording leaves room for abuse. For example, if „A" state's citizens commit a crime in state „B", and based on the active personal principle state „A" may acting against him or her and give grace to him or her. In this way, it can prevent that state „B" conduct criminal proceedings against the offender.[35]

2. ne bis in idem where a person has received final judgement in a Member State and the sentence was served or is being served or may no longer be executed by the sentencing Member State;

Like Article 54 of the Schengen Agreement on the European Arrest Warrant, it is also included in the so-called implementing elements, that cause for refusal exists only if the sentence has already been implemented, are implementing or the enforceability of the sanction ceased under the law of the Member State.[36]

3. the person is too young – below the age of criminal responsibility in the executing Member State.

Such as the UK and Ireland, some Member State have introduced an additional non-recognition ground in their national legislation based on a „human rights violation". Meanwhile, the Court of Justice developed extensive case law on ne bis in idem relating, inter alia, to the question of suspended custodial sentences (case C-288/05, Jürgen Kretzinger), limitation periods (case C-467/04, Gasparini and others), international conventions introducing possible double procedures (case C-436/04, Van Esbroeck), discontinuation of procedures by prosecution (joint cases C-187/01 in C-385/01, Gözütok and Brugge), suspenion of proceedings (case C-491/07, Turansky), definition of final judgement (C-261/09, Mantello), etc.[37]

In the Mantello case the interpretation of ne bis in idem principle arose as a problem. According to the legal gaudiance, druring examining the former conviction should be analyzed exclusively the historical facts, regardless the legal qualification and protected legal subject matter. But this principle can pose a problem in other cases, because the prosecution is also entitled to adopt decisions terminating the procedure, but this decesions have no re judicata effect – 1/20074. BK opinion and the 33/2013. (XI. 22.) decision of Constitutional Court.[38]

After the Lisbon Treaty a new EU level joined to protection provided by the international and national constitutions of the fundamental rights, which represents the EU's Charter of Fundamental Rights. According to the preliminary ruling on the case Akerberg Franson[39], the provisions of the Charter are binding when the EU Member State' court is acting in EU authority based on the ne bis in idem principle.[40]

The optional grounds for refusal are:

1. dual criminality outside the list of the above mentioned 32 offences, except in connection with taxes or duties, customs and exchange,
2. prosecution in the executing Member State for the same act,
3. decision in the executing Member State not to prosecute or to halt proceedings, or where a final sentence has been passed upon the person concerned in a Member State, in respect of the same acts, which prevents further proceedings,
4. proceedings have already lapsed in the executing Member State and the acts fall within the jurisdiction of that Mamber State under its own criminal law,

[33] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision Article 2. 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584, download: 25.05.2018.

[34] Handbook – Language training on the vocabulary of judicial cooperation in criminal matters – 2012. – file:///C:/Users/resand/Downloads/EJTN%20Linguistics%20Handbook%20-%20Manuel%20-%20Eng-FR-ebook.pdf – download: 10.10.2017.

[35] Ligeti, Katalin: Büntetőjog és Bűnügyi Együttműködés az Európai Unióban, Budapest, 2004. page 88–89.

[36] Ligeti, Katalin: Büntetőjog és Bűnügyi Együttműködés az Európai Unióban, Budapest, 2004. page 88–89.

[37] Handbook – Language training on the vocabulary of judicial cooperation in criminal matters – 2012. – file:///C:/Users/resand/Downloads/EJTN%20Linguistics%20Handbook%20-%20Manuel%20-%20Eng-FR-ebook.pdf – download: 10.10.2017.

[38] Dr. Koósné dr. Mohácsi Barbara: Aktuális problémák az európai elfogatóparancs végrehajtásakor. Belügyi Szemle, 2014/5., page 75. and 80.

[39] John Morijn: Akerberg and Melloni: what the ECJ said, did and may have left open, https://eutopialaw.com/2013/03/14/akerberg-and-melloni-what-the-ecj-said-did-and-may-have-left/, download: 25.05.2018.

[40] Dr. Elek Gabriella Lídia: Az európai elfogatóparancs átalakulása és fejlődése, Eurpai Jog, XVII. year, 2017. november

5. final judgement by a third state and the sentence is being served or may no longer be executed,

6. the requested person is staying in executing Member State or is a national or a resident there, and that State will execute the sentence or detention order,

7. offences have been committed in whole or in part in the territory of the executing Member State or have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory,

8. a sentence in absentia without specific safeguards as regards a re-trial.

At the same time specific guarantees can be ask for as regards a possibility for review on request or after minimally 20 years or existence of measures of clemency in the case of a custodial sentence, as well as a return after conviction to the executing state if the person is a national or resident of that state.

The EAW system provides for direct contacts between judicial authorities, and each Member State task to define such authorities. In practice they vary from ministries of justice, prosecutors to judges, so a central authority can also be organized as a State, to assist the judicial authorities.

The requested person has rights, such as:

- right to information about the EAW,
- possibility of consenting to surrender,
- assistance of legal counsel,
- right to interpretation and translation, and
- the right to be heard by a judicial authority in the executing state.[41]

During the delivery of the accused according to EAW, the principal of speciality also prevails.

The principal of speciality means that the extradited person can be prosecuted for an act that he or she did before his or her extradititon, for which he or she was asked for his or her extradition, and in which regard gave permission for his or her extradition.

The Paragraph (3) of Article 27 of Council Framework Decision 2002/584/JHA and the Subsection (2) of Section 30 of EUbe. establish special exceptions under the protection which gives by the rule of speciality.

The excepion of the Paragraph d) of Subsection (2) of Section 30 of EUbe. must be highlighted according to which the rule of speciality cannot be applied against the person if the measure or penalty for non-incarceration can be imposed, espically a fine can be imposed, not even in the case where the penalty or measure can result in the restriction of their personal liberty.

Based on this can be enforceable a fine which has been changed into a term of imprisonment or community service even in a case where convict did not disclaim his right of application of the speciality rule. It is important that if the rule of speciality is a bar of the conducting of criminal procedures or the execution of punishment, it must first be made clear to the defendant – according to Paragraph f) of Subsection (2) and Subsection (3) of Section 30 of EUbe. – to waive the right of application of the specialty rules. If the defendant says no, the Ministry of Justice will seek the judicial authority of the Member State in charge of extradition in order to grant consent [Paragraph g) of Subsection (2) of Section 30 of EUbe.].[42]

Although the European Arrest Warrant can be said to be successfull, the application raises several legal problems, such as; the question of proportionality in the issuing state due to its use for minor offences, the relationship with human rights and the ECHR as regards prison conditions, the definition of judicial authortity as regards the issue of denominating administrative authorities and prosecutors as „judicial authoritise", the relationship with Article 5 ECHR, etc.

About the proportionality

A EAW should always be proportional to its purpose. Even where the circumstances of the case fall within the scope of Article 2(1) of the Framework Decision on EAW, issuing judicial authorities are advised to consider whether issuing a European Arrest Warrant is justified in a particular case. Considering the severe consequences that the execution of a EAW has on the requested person's liberty and the limitation of free movement, the issuing judicial authorities should deliberate assessing a number of factors in order to determine whether issuing a EAW is justified.

In particular the following factors could be taken into account:

a) the preponderance of the crime (for example, the harm or danger it has caused);
b) the likely penalty imposed if the person is found guilty of the supposed offence (for example, whether it would be a custodial sentence);
c) the probability of detention of the person in the issuing Member State after surrender;
d) the victims' interest of the offence. In addition to, issuing judicial authorities should deliberate whether other judicial cooperation measures could be used instead of issuing a EAW. Other Union legal instruments on judicial cooperation in criminal matters provide for other measures that in many situations, are effective but less

[41] Handbook – Language training on the vocabulary of judicial cooperation in criminal matters – 2012. – file:///C:/Users/resand/Downloads/EJTN%20Linguistics%20Handbook%20-%20Manuel%20-%20Eng-FR-ebook.pdf – download: 10.10.2017.

[42] IM tájékoztató a nemzetközi vonatkozású büntetőügyek intézéséről – 2017. – http://www.kormany.hu/download/9/4f/90000/20160218%20IM%20t%C3%A1j%C3%A9koztat%C3%B3%20a%20nemzetk%C3%B6zi%20vonatkoz%C3%A1s%C3%BA%20b%C3%BCntet%C5%91%C3%BCgyek%20int%C3%A9z%C3%A9s%C3%A9r%C5%91l.pdf, download:25.05.2018

coercive. On a more general comment, applying the proportionality check before issuing a EAW can strengthen mutual trust among Member State's competent authorities. That's why it significantly redounds to the effective operation of the EAW throughout the Union.[43]

As recommended by the Commission, before deciding to issue a EAW, the issuing judicial authorities are advised to give due consideration to other possible measures. There are several provision available under Union legal instruments on judicial cooperation in criminal matters, based on the principle of mutual recognition, that suitable the EAW, moreover in some situations these provisions might be more appropriate than the EAW.

Such measures include, in particular:

a) the European Investigation Order (EIO);
b) the transfer of prisoners;
c) the transfer of probation decisions and alternative sanctions;
d) the European Supervision Order;
e) the enforcement of financial penalties.[44]

The Hungarian regulation of the European Arrest Warrant is based on the Act CLXXX of 2012 (EUbe.) on Criminal Cooperation with Member States of the European Union.

In this regulation, there was significant change by the Act XXXIX of 2017. The changes had been come into force partially from May 23, 2017 and partly from January 1, 2018.

The law amended the EUbe. and introduced the legal institution of the European Investigation Order (EIO).

The European Investigation Order is a request for legal aid issued by the competent authority in criminal proceedings which is intended to implement one or more procedural acts for the purpose of obtaining evidence, or transfer of available evidence from the competent authority of the executing Member State.

Our statute of criminal procedure – Act XIX of 1998 (Be.) – has been also changed from January 1, 2018.

According to the new law, international or European Arrest Warrant may only be issued, if the presence of the detained accused is abroad cannot be assured in the criminal procedure with a request for legal aid.[45] It means between Member States firstly it is necessary to issue a European Investigation Order, and if it is not applicable or it has some difficulty, can be issued a European Arrest Warrant.

According to Subsection (2a) of Section 532 of Be. to conduct the criminal procedure can be only in that case if the presence of the detained accused is abroad cannot be assured with a request for legal aid or it is not justify because of the preponderance of a crime or the judgement of the case.

In the event that the EAW has been perviously issued because the accused whereabouts are unknown, but later information is percieved that he or she is detained in prison abroad, therefor is necessary to undo the previously issued EAW, and issue a EIO.

The rules of EAW changed due to Aranyosi case judged by the European Court of Justice.[46]

In this preliminary ruling the European Court of Justice explained: „Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end."

As a result of the decision, the a new reason for refusal appeared also in our regulation from 1 of January 2018, that the execution of the European Arrest Warrant would seriously undermine the fundamental rights enshrined in the international

[43] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.4

[44] COMMISSION NOTICE of 28.9.2017, HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRAN, Brussels, 28.9.2017, Article 2.5

[45] Paragraph c) of Subsection (1) of Section 73/A of Hungarian Statute of Criminal Procedure

[46] Judgment of the Court of Justice of 5 April 2016 Aranyosi, C-404/15 ECLI:EU:C:2016:198

treaty or the European Union act in the course of criminal proceedings.[47]

Therefore does not result the violation of the fundamental rights of the accused, if the transfer of the accused allows for the prosecution by a Member State in which his or her right to use the mother tongue or the right to a defense is not ensured.

So in the cases when the injury of fundamental human rights might emerge because the penal institutions are overcrowded, the European Court of Justice stated that this fact cannot be the reason for automatic rejection of EAW. This decesion ensured the efficient operation of EAW in practice. On the other hand the European Court of Justice lay down the ensuring of the protection of fundamental human rights by claiming the mandatory adjournment of the implementation of the EAW. Although according to the European Court of Justice there is no opportunity for the executing state to demand specifield guarentees from the issuing state, but it might ask the issuing state to provide information in connection with excluding the injury of the fundamental rights regarding the persons concerned.

The new law stipulates, if the detainded accused is abroad, prior to issuing a European Arrest Warrant, consideration should be given to the possibility of using other legal aid measures which result in milder legal restriction (for example: EIO).[48]

Besides, the law clarifies, that the EAW is a seperate resolution in an appropriate form, not only a certification, next to a Hungarian court's decision.[49]

So in the case, when the authority responsible for implementation of the European Arrest Warrant gets informations about real risk of inhuman or degrading treatment of persons in custody in the issuing Member State, before deciding on transfer of the requested person, the authority should appreciate this risk. However, it is important to emphasize that during this assessment, with regard to detention conditions in the issuing Member State, the authority has to rely objective, reliable, accurate and sufficiently timely informations that are suitable for testing that circumstances in system-wide or generall which can prove the deficiency of the penal institutions affecting people or specific group of people.[50]

Custodial concerns against the European Arrest Warrant

I would like mention some examples regarding that while the today's mostly operating system established, several constitutional concerns raised in front of the Member States' institutions.

At first the Polish and the German Constitutional Court declared the EAW unconstitutional. The Cypriot Supreme Court, following the Polish argument, destroyed the lawon the implementattion of the Framework Decision.[51]

The Belgian Cour d'Arbitrage, which decides on constitutional matters, had previously indicated, that in some cases the abolition of the requirement of double incrimination may get involved in a conflict with human rights, and made a preliminary ruling to the European Court of Justice in this regard. This is, in some ways, more dangerous than the subjection of the Framework Decision into national constitutions, as the Belgian court asks about compatibility with EU law of the primery legal texts. Finally, however, the European Court of Justice ruled that the Framework Decision correspond to the Treaty on European Union.[52]

Due to the question of Regional Court of Gdansk, in 2005, the Polish Constitutional Court had to put under investigation the Subsection (1) of Section 607t of the criminal procedure code 1997, which allows the transfer of Polish citizens in other EU Member States by a European Arrest Warrant, in concerning that it is compatible with the Polish Constitution. The review is based on the Polish Constitution Article 55 (1), which states that „extradition of Polish citizens is forbidden". According to the decision of the Constitutional Court, the paragraph (1) of Section 607t of the criminal procedure code 1997 is not compatible with the Article 55 paragraph (1) of Constitution, if it authorizes the transfer of Polish citizens under a European Arrest Warrant in another EU Member State. However the Constitutional Court perceive difference between the EAW and the traditional extradition process, but stressed that the Constitution does not specify the criteria under which a distinction could be made between the transfer and extradition. However, it noted the Constitutional Court that the suspect terms of surrender under the European Arrest Warrant more onerous process than extradition regulated by the Criminal Procedure Act, so that led itt the conclude that the constitutional ban on extradition has to enforce increased transfers under the EAW. However, the obligation of the implementation of framework decisions bounds to

[47] Paragraph f) of Subsection (1) of Section 5 of EUbe.

[48] Subsection (3a) of Section 25 of EUbe.

[49] IM tájékoztató a nemzetközi vonatkozású büntetőügyek intézéséről – 2017. – http://www.kormany.hu/download/9/4f/90000/20160218%20IM%20t%C3%A1j%C3%A9koztat%C3%B3%20a%20nemzetk%C3%B6zi%20vonatkoz%C3%A1s%C3%BA%20b%C3%BCntet%C5%91%C3%BCgyek%20int%C3%A9z%C3%A9s%C3%A9r%C5%911.pdf, page 1–7., download:25.05.2018.

[50] Dr. Lehóczki, Balázs: Az európai elfogatóparancs végrehajtásának megatgadása az emberi jogokat sértő fogvatartási körülmények miatt, ACTA HUMANA Emberi Jogi Közlemények, Új folyam IV. no. 2016/2. page 154.

[51] Bárd, Petra: A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül, http://www.okri.hu/images/stories/KT/KT45_2008/007_kt45_eu%20elfogatoparancs.pdf, download: 25.05.2018.

[52] Judgement of the Court 3 May 2007. Advocaten Voor de Wereld WZV v Leden van de Ministerraad, C-303/05.

the Polish legislature also, namely as deducated from Article 9 of the Constitution, which states that „the Republic of Poland respects the obligations of international law". Nonetheless, the Constitutional Court declared the challanged section of the Criminal Procedure Act unconstitutional. With this decision, the Constitutional Court opposed the principle of the primacy of EU law, and joined in those states that do not recognize the priority of EU law over the national constitution. Later the Constitutional Court mitigated its position and use the Constitution Section 109 (3), and give 18 months to the legislator to fulfill its obligation during this period to implement the Framework Decision.[53]

On 28 April 2005 the German Federal Constitutional Court decided about a Spanish EAW constitutionality.[54] The applicant was a German-Syrian dual national whom against, as Al Qaeda's key figure in Europe, a Court of Madrid issued a EAW based on charge participation in a terrorism network. The Constitutional Court has suspended a procedure of decision about transfer and promised that this decision to be taken within six months. On 18 July 2005, the Constitutional Court actually made a final decision and destroyed German law on the European arrest Warrant, which disproportionately restrict the Constitution Article 16 (2) of the extradition ban, as well as breach of Article 19 (4), because it can not possible to appeal against the decision.[55] The german decision has assessed the execution law and because the instrument was a „faremwork decision", which only defines th objectives to be achieved, it is not excluded that it is possible to formulate an execution law which is appropriate to the Cunstitution.

However, it should be pointed out that against the above examples, in many cases the Constitutional Courts or Supreme Court rejected the attacks against the European Arrest Warrant.

Conclusion

As we could see, the cooperation in the third pillar is not conflict-free. The Member States' criminal sovereignty is still one of the most sensitive point in the European Union. It is clear that in the field of criminal cooperation the full alignment is still unthinkable. However, until the unified European Criminal Code be realized in the far future, the principle of mutual recognition can help. The mutual recognition is achieved where there is mutual trust, if the Membert States trust each other criminal system, procedural guarantees and can be sure that human rights are equally respected and enforce all Member States. The abandonment or maintenancement of double crimination may be an indicator of mutual recognition of criminal judgement, the criminal legal aid's approach and the simplification of the rules for extradition. may be an indicator.[56]

In my opinion, the absolute trust is still missing in the field of cooperation in criminal matters. This is shown by the fact, that the „high degree of confidence" mentioned by the European Council in Tampere was not enough to adopt act, and finally the terrorist attacks of 11 September 2001 against the United States shooked the Member States of the EU to concretely negotiate about the European Arrest Warrant. And although the Member States adopt EAW unanimously in 2002, but not an undivided success enjoyed before the ordinary courts and constitutional courts. The reason of this sensitivity may the relationship between fundamental rights and the state monopoly on punishment. It comes from that no democracy can have an unlimited punitive power, because the fundamental rights set limit of it. But I think Member States are not convinced of that the fundamental rights are keep respect egually everywhere in the EU.

Nevertheless, when I collected material for writing my thesis, I came to the conclusion, that the EAW has lived up to expectations. It has made surrender procedure faster, more effective and less political, and has given new rights, such as the deduction of time spent on remand from the final sentence served. The EAW appears as good tool in the fight against crime, and it is only possible to protect the 4 basic EU freedoms – free movements of persons, goods, services and capital – as basic prerequisites of sustainable development of the EU. But in the same time it shall not breach other human rights and freedoms. ■

[53] Bárd, Petra: A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül, http://www.okri.hu/images/stories/KT/KT45_2008/007_kt45_eu%20elfogatoparancs.pdf, download: 25.05.2018.

[54] BVerfG, 2 BvR 2236/04. 28 of April, 2005.

[55] BVerfG, 2 BvR 2236/04. 18. of July, 2005.

[56] Bárd, Petra: A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül, http://www.okri.hu/images/stories/KT/KT45_2008/007_kt45_eu%20elfogatoparancs.pdf, download: 25.05.2018.