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Seminar 2: The pre-Lisbon instruments: Special focus on the European Arrest Warrant

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Overview of national implementation of the European Arrest Warrant

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Overview of National Implementation of the EAW

**Seminar 2: The Pre-Lisbon instruments:
Special Focus on the European Arrest
Warrant**

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Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

- ✓ **Historical Conditions Regarding the Framework Decision**
- Intended to counteract the negative consequences of free movement of people as a catalyst for reform of the European extradition system.
- Conclusions of Tampere European Council of 15 and 16 October 1999 to further simplify the extradition system (point 35 of the Conclusions).
- The Framework Decision on the EAW was passed very quickly, under strong political pressure following the terrorist attacks of Sept. 11 2001.

✓ **Preamble to the Framework Decision**

- 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 (1).
- The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities (5).
- The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance (9).
- In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition (11).
- **This Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (...)** This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media (12).
- **No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (13).**

✓ **Mutual Recognition**

- **From the Preamble to the Framework Decision:**
The mechanism of the European arrest warrant is based on a high level of confidence between Member States. (...)(10).
- **Resolution of the Supreme Court dated July 20, 2006, I KZP 21/06 (*Belgium v. Adam G.*)**

From the *ratio decidendi*:

"The admissibility of **negative verification** of premises providing grounds for issuing the warrant in the Member State of its execution must be, as emphasised above, limited to **absolutely exceptional cases, as governed by the principle of mutual trust**, which constitutes the basis of judicial cooperation between Member States of the European Union.

The opinion presented requires a supplementary statement that the assessment of conformity or lack of conformity with premises for issuing the European arrest warrant **must in each case be made from the perspective of the domestic law of the Member State issuing the warrant**, and always take into account provisions of the Framework Decision, transposed to the domestic legal order in the form of the domestic regulations subject to interpretation in the case at hand. An attempt at such verification by the judicial authorities of the Member State executing the warrant, in view of legal regulations of that State and not the law of the Member State issuing the warrant, could lead (though not necessarily, taking into account the fact that domestic regulations should precisely transpose the same Council Framework Decision), to chaos and severely breach the principle of mutual trust. The judicial authorities of the Member State issuing the warrant cannot be required to take into account premises for issuing the warrant in view of regulations of the Member State of execution."

- **Constitutional Tribunal Judgment dated October 5, 2010, SK 26/08, (*UK v. Jakub T.*)**

From the *ratio decidendi*:

“The Constitutional Tribunal held that the principle of mutual trust should be of primary importance in the interpretation of the EAW regulations. The European arrest warrant is based on the principle of mutual recognition of decision of foreign judicial authorities. This is highlighted in point six of the preamble to the Framework Decision. The concept of mutual recognition of foreign judgments is based on the acceptance of differences between legal systems in Member States and trust to the judgments issued by foreign judicial authorities.”

- **Judgment of the Court of Justice of the European Union dated February 11, 2003 in criminal proceedings against Hüseyin Güzütok (C-187/01) and Klaus Brügge (C-385/01)**

“(…) there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.(33)”

✓ **Difficulties with Transposition of Framework Decision on EAW Deriving from Constitutional Requirements in Certain Member States**

- **Poland**

"In the case of Poland, only the provision of the law authorising surrender of nationals was deemed unconstitutional (Article 55(1)¹). But this provision continued to be applied until 6 November 2006, the deadline set by the Constitutional Court to allow the Government time to bring the constitution into line with the European obligation. During this period Poland therefore continued to surrender its nationals. The Polish Code of Criminal Procedure was amended following the revision of the Constitution on 7 November 2006. Although the amendments did not enter into force until 26 December 2006, the new Article 55 of the Constitution was made directly applicable in Polish law from 7 November 2006 by decision of the Constitutional Tribunal.

In accordance with current wording of Art. 55 of the Constitution it allows the surrender of Polish citizens based on an EAW under specific requirements. These requirements are:

- (a) the act was committed outside Poland;
- (b) the act was or would be qualified as an offence in Poland, at the time of its commission as well as at the time the EAW is issued (double criminality); and
- (c) the surrender does not breach human rights and freedoms."

¹Constitutional Tribunal judgment dated April 27, 2005, P 1/05

- **Cyprus**

"In the case of Cyprus, the Supreme Court held that the surrendering of Cypriots was unconstitutional, obliging the Government, as in Poland, to embark on a constitution revision, which came into force on 28 July 2006. The new Article 11 as thus amended places, however, a time constraint on the possibility of surrendering nationals inasmuch as this is possible only for acts committed after the date of accession of CY to the Union, i.e. 1 May 2004. The Constitution thus revised allows, moreover, the extradition of Cypriots for acts committed subsequent to the revision on the basis of international conventions ratified by Cyprus."

- **Germany**

"In the case of Germany, the Constitutional Court considered it necessary to annul the entire law adopted for the execution of the European arrest warrant, on the ground that certain provisions were in conflict with the Basic Law. So between 18 July 2005 and 2 August 2006, the date on which the new German implementing law took effect, Germany stopped surrendering or even extraditing its nationals. It agreed to surrender other wanted persons only under the extradition arrangements. It did, however, continue to issue European arrest warrants for other Member States.

This situation gave rise to an unprecedented period of legal uncertainty. Two Member States (Spain and Hungary) invoked a principle of reciprocity and during this period refused to recognise the European arrest warrants that DE continued to issue. ES and HU considered that as DE was no longer applying the principle of mutual trust, it could not demand in return that the other Member States accept its requests for the surrender of non-nationals. This situation ended on 2 August 2006 with the entry into force of the new implementing law adopted on 20 July 2006. ..

Source: Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [SEC(2007) 979] /* COM/2007/0407 final */

- ✓ **Jurisprudence of the European Court of Justice**

- **C-303/05 Advocaten voor de Wereld**

In domestic proceedings *Advocaten voor de Wereld* intended to question the validity of transposition of the Framework Decision on EAW into Belgian domestic law. The reason was **lack of clarity and lack of precision of the list of offences** which do not require verification of double criminality. According to the association it violates or at least could undermine the principle of legality of criminal offences and penalties. The European Court of Justice rejected the argument of *Advocaten voor de Wereld* that the removal of verification of double criminality for certain offences mentioned in the Framework Decision was contrary to Art. 6(2) EU or, more specifically the principle of legality in criminal matters.

From the *ratio decidendi*:

- **The principle of the legality** of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in **Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (49)**.
- This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable (see, *inter alia*, European Court of Human Rights judgment of 22 June 2000 in *Coëme and Others v Belgium*, Reports 2000-VII, § 145) (50).
- Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, **the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'**. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract (52).
- Accordingly, **while Article 2(2) of the Framework Decision dispenses with verification of double criminality** for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, **must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality** of criminal offences and penalties (53).

Authorities involved in the issuing and execution of a EAW

- **Determination of the competent judicial authorities (Art. 6 of FD on EAW)**

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.
2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.
3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

- **Polish EAW issuing authority**

In the pretrial phase, EAW is issued by the Circuit Court (**Sąd Okręgowy**) upon motion by the **prosecutor**.

In the trial and executive phases of criminal proceedings, the EAW is issued by the Circuit Court (**Sąd Okręgowy**) *ex officio* or upon motion of the appropriate Regional Court (**Sąd Rejonowy**).

Vide Art. 607a of CPC

- **EAW issuing authorities in selected EU member states (Art. 6 s. 1 of FD)**

- Austria: Investigative judge (der Untersuchungsrichter)
- the Czech Republic: each circuit judge in pre-trial phase or the judge who is to consider the case during the trial
- Denmark: Minister of Justice
- France: General Prosecutors and prosecutors of the Republic (Procureurs généraux; procureurs de la République), investigative judges, judges hearing the case and penitentiary judges
- Holland: Prosecutor
- Germany: Prosecutor of National Court (Landgerichte)
- United Kingdom:
 - 1) England and Wales - district judge-magistrates' courts
 - 2) Scotland - sheriff
 - 3) Northern Ireland – justice of the peace, a resident magistrate, Crown Court judge

Please note that above authorities vary in domestic law depending on whether EAW is to be issued in pre-trial phase, in the trial phase or in penitentiary or executive proceedings.

Source: *Piotr Hofmański (red.), Adam Górski, Andrzej Sakowicz, Dobrosława Szumilo-Kulczycka, Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej, Oficyna 2008.*

Mandatory and optional circumstances under which and EAW will be discharged by Polish court

✓ Grounds for mandatory non-execution of the EAW

1. if in accordance with Polish law the offence is covered by **amnesty**;
2. if there is an earlier valid judgment against the same person for the same act (*res iudicata*);
3. if there is an **earlier judgment on surrender** of the person to another Member State;
4. if the person cannot be held criminally responsible because of his/her age (**15 years old for serious offences, otherwise 17 years old**);
5. if the execution of the EAW would **violate human rights or freedoms**;
nota bene: the FD does not indicate such grounds for refusal to execute a EAW. However, see s. (12) of FD Preamble.
6. if the grounds for the EAW is a crime committed for political reasons without using violence (**Article 607p s. 1 of the CPC**).
nota bene: the FD does not indicate such grounds for refusal to execute a EAW. However, see s. (12) of FD Preamble.
7. if the EAW was issued against a Polish national, it can be executed provided that the offence for which the EAW was issued, had not been committed on the territory of the Republic of Poland, nor on a Polish ship or aircraft and constituted an offence under the law of the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland both when it was committed and when the EAW was received (**Article 607p s. 2 of the CPC**).
nota bene: the FD provides this is an optional basis for refusal to execute a EAW.
8. The EAW, issued for the purpose of execution of the penalty of deprivation of liberty or other measure involving deprivation of liberty against a Polish citizen, or enjoying asylum in the Republic of Poland, shall not be executed, unless such a person consents for surrender. (**Article 607s. S. 1 of the CPC**). In such case the Polish court orders the performance the sentence in Poland (**Art. 607s s. 3 of the CPC**).
nota bene: the FD provides this is an optional basis for refusal to execute a EAW, regardless of whether the EAW concerns a Polish citizen or person permanently residing in the executing state.

✓ Grounds for optional non-execution of the EAW (Art. 607r of the CPC):

1. an offence constituting the grounds for European Warrant other than those mentioned in Art. 607w, is **not considered an offence according to Polish law**; (exception re. relevant charges, taxes, duties or foreign currency rules *vide* Art. 607r s. 2 of the CPC);
2. **criminal proceedings are pending in the Republic of Poland** against the defendant in connection with an offence constituting the grounds for the European Warrant;
3. a final and valid decision on **refusal to institute proceedings**, or a final and valid decision to **discontinue** the proceedings or another final and valid **decision concluding proceedings** in the case has been issued with respect to the defendant in connection with the criminal act constituting the grounds for the European Warrant;
4. according to Polish law, prosecution or execution of penalty are barred by **statute of limitation**, and the offences concerned are within jurisdiction of Polish courts;
5. the European Arrest Warrant concerns offences which, according to Polish law, have been **committed** wholly or partially on **the territory of the Republic of Poland** or onboard of the Polish ship or aircraft;
6. **life imprisonment** or other measure involving deprivation of liberty without possibility of application for earlier release may be imposed in the issuing state that issued the European Warrant for the prohibited act which the European Arrest Warrant concerns
7. the EAW was issued for performance of prison sentence or other detentive measures imposed **in absentia** trial unless:
 - the person was summoned effectively or notified of the date and time of the hearing and instructed that failure to appear would not impede the issue of the judgment or if the defendant had a defense lawyer who was present at the hearing,
 - the defendant filed to file a motion to reinstate proceedings or declared that would not file such motion, after having received a written copy of the judgment along with instructions as to how to file such motion,
 - the issuing authority declares that immediately upon the transfer of the defendant to the issuing state the defendant will be provided with a copy of the judgment along with instructions indicating the right, deadline and manner of filing a motion for reinitiation of the proceedings.

Please note that the last of above listed non-executions grounds (point 7) was added as Art. 607 r s. 3 of the CPC by way of implementation of the amendments of the EAW Framework Decision introduced by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24–36).

Lack of Double Criminality Requirement for the Crime for Which the Defendant is to be Extradited

- Double criminality is required with regard to a Polish citizen. This is a result of only partial implementation of Art. 2 s. 2 of the FD, since the amendment of Art. 55 s. 2 of the Polish Constitution and the resulting amendment of the CPC excluded the use of art. 607w CPC against a Polish citizen.
- In order to exclude the double criminality requirement, two conditions must be met:
 - 1) the crime must be listed in the catalogue of crimes in art. 607 w of the CPC,
 - 2) the crime must be punishable in the issuing state with a punishment of 3 years deprivation of liberty or other measuring involving deprivation of liberty for such period.

- Art. 607w of the CPC

If the EAW concerns a foreigner, the fact that an act is not a criminal offence according to Polish law does not prevent the EAW from being executed, if the Warrant concerns an act punishable in the issuing State by a penalty of at least 3 years of deprivation of liberty or the act for which another measure involving deprivation of liberty for the same period may be imposed, constituting one of the following offences:

- 1) participation in an organized group or association having for its purpose the commission of offences,
- 2) terrorist acts,
- 3) trafficking in human beings,
- 4) offence against sexual liberty or decency causing harm to a minor,
- 5) illegal production, processing, trafficking or smuggling intoxicating substances, precursors, replacement substances or psychotropic substances,
- 6) illegal traffic in arms, ammunition, explosives or radioactive substances,
- 7) bribery and trading in influence,
- 8) fraud,
- 9) introducing into financial circulation the assets derived from illegal or undisclosed sources,
- 10) forgery or circulation of forged money or other means of payments,
- 11) offences against the protection of data collected, stored, processed or transmitted in a computer system,
- 12) offences against the environment, including illegal transactions in animal or plant species threatened with extinction,
- 13) aiding illegal crossing of a State border or illegal stay in the territory of the State,
- 14) homicide,
- 15) causing serious bodily injury,

- 15) causing serious bodily injury,
- 16) illegal traffic in human organs or tissues,
- 17) illegal deprivation of liberty,
- 18) kidnapping,
- 19) taking or retaining hostages,
- 20) offence committed for national, ethnic, racial reasons or due to religious beliefs or lack of them,
- 21) robbery with the use or the of threat to use firearm,
- 22) extortion with the use or the of threat to use firearm,
- 23) illegal trafficking in goods of cultural value,
- 24) embezzlement,
- 25) forgery of products or trafficking in forged products,
- 26) forgery of documents or using forged documents,
- 27) illegal trafficking in hormones or similar substances,
- 28) trafficking in stolen motor vehicles,
- 29) rape,
- 30) arson,
- 31) offences under jurisdiction of International Criminal Court,
- 32) hijacking of a ship or aircraft,
- 33) sabotage.

- Transposing this catalogue of crimes, the Polish legislator used the nomenclature of Polish substantive criminal law. This has raised concerns that it would have been correct to directly translate the catalogue from the FD, instead of replacing it with Polish names of specific criminal offences from the Polish Criminal Code, since this may distort the scope of crimes indicated in the FD.
- As regards the transposition into domestic law of the catalogue of criminal offences indicated in the FD, *vide* ECJ judgment in C-303/05 *Advocaten voor de Wereld* .

Possibility of Review of Decisions Regarding the EAW

✓ Possibility of Review of Decisions Regarding the Issue of the EAW

Polish law does not provide for an appeal measure concerning the issuance of the EAW.

• confirmed by Supreme Court resolution of January 20, 2005, I KZP 29/04

From the *ratio decidendi*:

The Framework Decision does not provide for possibility of appeal against a decision on issuing the European Arrest Warrant. Article 11 of the Decision, defining the rights of the defendant, indicates only the right to be notified of the EAW and its contents, of the possibility of granting consent to be surrendered to the judicial authority which issued the EAW, and the right to legal counsel and a legal interpreter in accordance with the law of the executing state.

Recognizing, in the light of the above arguments, that the lack of an expressly stipulated regulation giving legal basis to appeal a decision on the EAW in chapter 65a of the CPC constitutes an intentional decision of the Rational Legislator, the Court also rejected suggestions that the decision on the European Arrest Warrant may be regarded as a kind of decision "regarding precautionary measures" as understood by Article 459 s. 2 of the CPC.

In the process of issuing the European Arrest Warrant, the guarantee functions of the judicial verification of deprivation of liberty of the defendant are fulfilled therefore in the issuing state - by the opportunity to challenge the decision, which was the basis for issuing the warrant, whereas in the executing state - by the opportunity to challenge a decision on transfer.

- The challenges are however available against any procedural decisions which provide grounds for issuing the EAW, such as ruling on applying or extending the temporary arrest.

- In most Member State's domestic law does not provide for an appeal measure concerning the issuance of the EAW, e.g.:

Austria
Belgium
Cyprus
Finland
Germany
Hungary
Lithuania
Malta
Slovenia

Only in Denmark the requested person is entitled to appeal against the decision concerning issuance of the EAW.

✓ **Possibility of Review of Decisions Concerning Execution of EAW**

- Under Polish law the court's decision on surrender may be subject to an appeal. The appeal may be brought either by the prosecutor or by the suspect within three days from the announcement of the court's decision. If the suspect is deprived of liberty and does not participate in the court's session, the 3 day period starts to run on the date the decision is delivered (607I s. 3 of the CPC). Additionally, the provisions referring to appeal against preventive measures, such as preliminary detention, shall apply respectively, i.e. the appeal must be brought within seven days from the announcement or delivery of the decision.
- Exception: Prosecutor General and Human Rights Commissioner (Ombudsman) may file cassatory appeal to the Supreme Court (Resolution of Supreme Court of October 17, 1996, I KZP 27/96).

✓ **Polish Jurisprudence Regarding Grounds for Review of Judgments Concerning Execution of EAW**

- **Decision of Court of Appeal in Katowice, July 21, 2010, II AKz 478/10**
The EAW concerns the transfer of the requested person for the purpose of execution of the final sentence and thus concerns execution proceedings. Therefore arguments which aim to prove that because of lack of sanity the act of the requested person would not be an offence are incomprehensible. **During the EAW proceedings the Polish court is not entitled to interfere in the substantive assessment of the final sentence issued by the foreign court. It is inadmissible to control substantive content of the foreign court's decisions.** Lack of sanity at the moment of committing the offence would be, at most, a reason to reinstate proceedings, if such procedure is provided in the law of the country where the decision was issued. **A lack of sanity cannot be, during the EAW proceedings in Poland, a reason to refuse of execution based on the EAW because this is not a circumstance referred to in Art. 607r s. 1 p.1 of the CPC.**
- **Decision of Court of Appeal in Kraków, February 19, 2008, II AKz 56/08**
The Polish court during proceedings regarding the EAW does not examine whether are sufficient grounds to believe that the arrested person has committed a crime abroad and what the character of the offence is. Member States' courts mutually recognize that they act in accordance with the principles of democratic legal state and civil right standards, which include, *inter alia* prohibition of deprivation of liberty without sufficient legal grounds. It is assumed that court which issued the warrant has evidence of committing a crime and if the court who is imposing the arrest were to have them, it would justified the issuing of the same decision. **If evidence were to be brought to the executing state, translated into Polish etc., this would slow down the procedure, contrary to its assumptions.**

EAW Proceedings Regarding Detentive and Non-Detentive Measures

- an EAW issued in another country is not in itself a legal basis for the deprivation of liberty of the requested person
- a circuit court can decide upon preliminary detention at the prosecutor's request and determine it for the duration of the defendant's surrender. The maximum custodial period is 100 days (Art. 607k s. 3 of the CPC)
- before receiving the EAW the court may order that the suspect be detained for up to 7 days if the authority which issued the EAW requests so and confirms that a valid judgment or other decision forming the grounds for imprisonment has been passed
- no special grounds for temporary arrest, possible only after the conditions normally required under Polish law are met (Art. 249 of the CCP). However rulings of Polish courts of appeal show that this approach stand is not fully accepted, the principle of mutual trust between issuing and executing state prevails.

Polish Jurisprudence Regarding Grounds for Temporary Arrest in EAW Cases

- **Decision of Court of Appeal in Katowice, February 3, 2010, II AKz 38/10**
The court which imposes temporary arrest in the EAW proceedings is not principally entitled to examine if the general condition to impose precautionary measure mentioned in Art. 249 s. 1 of the CPC exists because it would remain in conflict with the principle of the mutual recognition on which the regulation of the EAW is based. However in the situation mentioned in Art. 607k s. 3 of the CPC **the court should take into consideration the principle of *ultima ratio* of this the most severe precautionary measure** and support its decision of imposing this measure with the existence of special conditions mentioned in Art. 258 of the CPC, taking into consideration the purpose of the EAW, i.e. to prevent the escape of the requested person before their transfer to the issuing state.
- **Decision of Court of Appeal in Łódź, July 15, 2009, II AKz 470/09**
The Provisions of the Framework Decision on the EAW **do not allow the conclusion that the court has an obligation in every case to impose temporary arrest on the requested person.** As stated in Art. 12 of the FD, when the requested person is arrested on the grounds of a EAW, the executing judicial authority shall decide whether the requested person should be deprived of liberty under the law of the executing Member State. The European legislator expects that the transfer of the person who is sought will be achieved, including the possibility of refraining from use of temporary arrest, if only the judicial authority of the executing State prevents the escape of the requested person by any other means and thus ensures their transfer to the issuing State.

- **Decision of the Court of Appeal in Katowice of July 18, 2007, II AKz 478/07**

The very fact of issuing of the European Arrest Warrant means that there is no need to verify the evidence base of the decision on the temporary arrest. Therefore, in such situation, there is no basis for analysis of existence of the condition indicated in Article 249 s. 1 of the CPC.

- **Decision of the Court of Appeal in Katowice of October 25, 2006, II AKz 685/06**

The very fact of issuing of the European Arrest Warrant means that there is no need to verify the evidence underlying the decision regarding temporary arrest. Therefore, in such situation, there is no basis for analysis of existence of the condition indicated in Article 249 s. 1 of the CPC. **However, there can be no automatism, because conducting proceedings regarding transfer of the defendant to the issuing state does not always require isolation of such person. This results from Article 607k s. 3 of the CPC.** This means that if there is a need to impose temporary arrest connected with transferring the defendant on the basis of the EAW, there is no need to verify the premises indicated in Article 249 of the CPC, but it is certain that temporary arrest is possible only if one of the specific conditions of imposing temporary arrest referred to in Article 258 *in fine* of the CPC is fulfilled.

Analysis of the issue of existence of one of the specific premises indicated in the above mentioned provision, intended for domestic situations, cannot in any case be based on uncritical transposition of the situations described therein to a interstate level. These premises must be seen through the prism of primary goal, which is the issued warrant, which is in fact a request for transfer of the defendant, who is already absent from the territory of issuing state, and sometimes also a citizen of another country. So it is obvious that such person to a larger extent has the possibility to evade criminal responsibility. In this situation, Article 258 of the CPC receives a new dimension, because it has to be seen by through the formula of obstruction of proceedings related to the execution of the European Arrest Warrant.

The Issue of Proportionality in EAW Cases

- EAW should not be issued in insignificant cases, Member States should not bear disproportionate efforts in execution of the EAW.

- Art. 2.1 of FD on EAW

A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

- Art. 607b of the CPC

A Warrant may not be issued:

- in connection with criminal proceedings against the person prosecuted for the offence punishable by the deprivation of liberty for up to one year;
- in order to execute the penalty of deprivation of liberty for up to 4 months or another measure involving deprivation of liberty for up to 4 months.

✓ **The issue of proportionality seen by the Commission**

- General agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of Article 2(1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires.

✓ **The Commission's recommendations**

- Several aspects should be considered before issuing the EAW:
 - the seriousness of the offence,
 - the length of the sentence,
 - the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and
 - cost/benefit analysis of the execution of the EAW.
- Take positive steps to ensure that practitioners use the Council handbook on the EAW (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied. (The amended handbook now sets out the factors to be assessed when issuing an EAW and possible alternatives to be considered before issuing an EAW).
- All Member States should apply a proportionality test, **including those jurisdictions where prosecution is mandatory.**

/ COM/2011/0175 final */ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*

Thank you for
your attention

Advocate Mikołaj Pietrzak