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SURRENDER VS. EXTRADITION: A COMPARISON FOCUSED ON INNOVATIONS OF EUROPEAN ARREST WARRANT

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Abstract: The European Union was aware of unwanted side-effect of the free movement of persons which has been the equally free movement criminals. With regards to Tampere European Council conclusions the traditional extradition procedures were replaced by the surrender procedure within Member States of the European Union. The article answers the question how the surrender procedure differs from classic extradition. It deals with the comparison of the surrender procedure and the extradition mechanism focused on innovations of the European arrest warrant. It points out at necessity of simpler and faster procedure in the EU. Further, it focuses on the comparison of the legal basis of both procedures and on procedural issues.

Keywords: Surrender procedure, Extradition, European arrest warrant, Convention vs. framework decision, Mutual recognition of judicial decisions in criminal matters in the EU, Removal of the double criminality requirement.

Introduction

At the end of the 1980's the outside world became aware for the first time of the huge extent of the financial damage which the European Community (hereinafter "EC") suffers, partly as a result of laxity and carelessness on the part of national authorities. It was due to fraud, which was frequently internationally organized, including tax evasion and customs fraud. People became sufficiently aware that this also damaged the EC's credibility. Protection of the EC's financial interests gradually gained greater political priority.[2] In those times the European

1 Ph.D. student of the Criminal Law, email: libor.klimek(at)yahoo,com

2 De WITTE, B. – GEECLLIOED, A. et INGHELRAM, J.: *Legal Instruments, Decision-Making and EU Finances.* In: McDONNELL, A. – KAPTEYN, P. J. G. – MORTELMANS, K. et

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arrest warrant (hereinafter "EAW") was designed for protecting the EC's financial interests[3], but it did not become successful.

However, after the 9/11 plane attacks in the USA the EAW was being discussed again and introduced as a procedural tool in the area of judicial co-operation in criminal matters in the EU. It is based on the surrender procedure, which replaced traditional extradition procedures between the EU Member States. The question is how the surrender procedure differs from classic extradition. This article deals with the comparison of the surrender procedure and the extradition mechanism. It points out at the necessity of simpler and faster procedure in the EU and than focuses on the comparison of the legal basis of both procedures and on procedural issues.

I. Necessity of Simpler and Faster Procedure

The EU Member States were aware of unwanted side-effect of the free movement of goods, persons, services and capital within Europe, which has been the equally free movement of crime and criminals. This produced a growth in certain forms of trans-national crime. It has also reinforced the much older and simpler phenomenon of people committing offences in country "A", whose justice they seek to escape by running off to country "B". The result has been a rapid increase in the number of suspects and convicted persons whose extradition is sought by one EU country from another.[4]

The European Council held a special meeting on 15 and 16 October 1999 in Tampere (Finland) on the creation of an area of freedom, security and justice in the EU. The European Council was determined to develop the EU as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam.[5] The European Council sent a strong political message to reaffirm the importance of this objective and agreed on a number of policy orientations and priorities which would speedily make this area a reality. With regards to Presidency Conclusions[6] of meeting and in particular point 35 thereof, the formal extradition procedure should be abolished among the EU

TIMMERMANS, Ch. W. A. (eds.): *The law of the European Union and the European Communities.* Alphen aan den Rijn : Kluwer Law International, 2008, p. 399.

3 See DELMAS-MARTY, M. et VERVAELE, J. A. E.: *Corpus Juris, Volume 1.* Intersentia, 2000.

4 SPENCER, J. R.: *The European arrest warrant*. In: BELL, J. et KILPATRICK, C. (eds.): The *Cambridge Yearbook of European Legal Studies,* Vol. 6, 2003–2004. Oxford – Portland : Hart Publishing, 2005, p. 202.

5 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. OJ C 340 of 10.11.1997.

6 *Presidency Conclusions, Tampere European Council 15–16 October 1999, European Council.* In: VERMEULEN, G.: *Essential texts on International and European Criminal Law.* 4th edition. Antwerpen : Maklu Publishers, 2005, pp. 327–341.

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Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons.

After the attacks on New York and Washington the enactment of the EAW became a top priority for the EU's political leaders. The European Commission submitted a Proposal for a Framework Decision on the EAW and the surrender procedures between Member States.[7] In preparing this proposal, the Commission departments organised a series of interviews in the EU Member States with legal practitioners, judicial officers, lawyers, academics and ministry officials responsible for extradition in almost all the Member States. In 2002 the Council of the EU adopted the Council framework decision on the European arrest warrant and the surrender procedures between Member States[8] (hereinafter "FWD"). The EAW provided for in FWD is the first concrete measure in the field of EU Criminal Law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial co-operation in the EU.

II. Legal Basis: Convention vs. Framework Decision

Extradition can be defined as a process whereby States provide to each other assistance in criminal matters. It does not exist as an obligation upon states in customary law.[9] The principal rules and practices of extradition constitute a significant body of international law. In certain important matters there is considerable uniformity in bilateral treaties and municipal extradition statutes. In many other respects, extradition treaties and legislation present a complex and varying picture throughout the world. Many States insist on reciprocity and require an international agreement for extradition. To achieve this international co-operation some form of arrangement is necessary between the states involved. The arrangement may be based on a treaty, bilateral or multilateral, or on the application with respect to the requesting State of the requested State's domestic extradition legislation.

Apart from numerous bilateral agreements, the basic multilateral treaty in Europe is the European Convention on Extradition[10] (and its additional protocols), adopted by the Council of Europe in 1957, which represents a traditional scheme on extradition. It is the oldest of the conventions relating to penal matters prepared within the Council of Europe. Extradition is normally subject to

7 Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between Member States. COM(2001) 522.

8 Council framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190/1 of 18.7.2002.

9 SHAW, M. N.: *International Law.* 6th edition. Cambridge University Press, 2008, p. 686.

10 European Convention on Extradition. Paris, Council of Europe, 1957 (came into force in 1960).

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strict requirements. In addition, at the level of the EU extradition is covered in further conventions (see below).

On the other hand, the co-operation intra Third Pillar of the EU (1993–2009) used own legal mechanism performed by specific legal instruments. As we have seen, the EAW was introduced by framework decision, not by convention. With regards to the Treaty on EU (as amended by the Treaty of Nice) the framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. Aforementioned provision added – they shall not entail direct effect.[11] The drafters of the Treaty on EU made this addition so the case law of the Court of Justice on the direct effect of directive provisions (implemented late, incorrectly or not at all) do not apply to framework decisions.[12] Framework decisions can best be compared with the legal instrument of a directive. Both instruments are binding upon the EU Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, framework decisions do not entail direct effect. It implies that the EU Member States were required to introduce national legislation to bring the EAW into force.

The EU Member States had to introduce legislation to bring the EAW into force by 1 January 2004.[13] Despite the fact that in the case Maria Pupino[14] the Court of Justice accepted the obligation to interpret national legislation in conformity with framework decisions, implementing the EAW appeared conflicts of laws what prevented its full application throughout the EU for a time in 2005 and 2006. Some of the national implementing provisions were found to be unconstitutional in certain EU Member States (Poland, Germany and Cyprus).[15] Moreover, the implementation in the United Kingdom has been far from a straightforward task. Both at the level of legislative drafting for implementation, and at the level of judicial interpretation, a number of sensitive issues had to be addressed. From a legislative drafting point of view, it has been pointed out repeatedly that the Extradition Act 2003 (law implementing the EAW in the UK) does not follow the same wording and structure of the FWD. This choice may be explained by the effort to ensure continuity with pre-existing extradition law and practice, in

11 See Article 34(2) of the Treaty on EU as amended by the Treaty of Nice. OJ C 321/E/5 of 29.12.2006.

12 BORGERS, M. J.: *Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters.* In: European Journal of Crime, Criminal Law and Criminal Justice, Vol. 18, No. 2 (2010), p. 4.

13 The FWD came into force on 7 July 2002 and the deadline to introduce legislation to bring the EAW into force was 31 December 2003.

14 Judgment of the Court of Justice of the EC of 16 June 2005 – Case C-105/03 – Maria Pupino.

15 Report 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. COM (2007) 407 final.

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particular bearing in mind that the Extradition Act extends beyond the implementation of the EAW to a general reform of the UK extradition system.[16]

Implemented provisions of the FWD did not derogate extradition conventions, nor did not provide cancellation. The conventions became obsolete. Without prejudice to their application in relations between Member States of the EU and third states, from 1 January 2004, the FWD replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between Member States of the EU:

- the European Convention on Extradition, its first Additional Protocol and the Second Additional Protocol,
- the European Convention on the suppression of terrorism[17] (as far as extradition is concerned),
- the Agreement on the simplification and modernization of methods of transmitting extradition requests,
- the Convention on simplified extradition procedure between the Member States of the EU[18],
- the Convention relating to extradition between the Member States of the EU[19],
- the Convention implementing the Schengen Agreement[20] (Title III, Chapter 4).

In 2004 a non profit making association *Advocaten voor de Wereld* brought an action before Belgian court in which it sought the annulment, in whole or in part, of the Belgian law transposing the provisions of the FWD into national law. Belgium referred for a preliminary ruling to the Court of Justice question concerning the validity of the framework decision, whether the FWD was compatible with the Treaty on EU for purposes of EAW adoption. This was the case that

16 MITSILEGAS, V.: *Drafting to Implement EU Law: the European Arrest Warrant in the United Kingdom.* In: STEFANOU, C. et XANTHAKI, H. (eds.): Drafting Legislation – A Modern Approach, Aldershot : Ashgate, 2009, p. 211.

17 European Convention on the suppression of terrorism. Council of Europe, Strasbourg, 1975.

18 Convention drawn up on the Basis of Art. K.3 of the Treaty on European Union on a simplified extradition Procedure between the Member States of the European Union of 10 March 1995. OJ C 78 of 30.3.1995.

19 Convention of 27 September 1996 drawn up on the Basis of Art. K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union. OJ C 313 of 13.10.1996.

20 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ C 239/9 of 22.9.2000.

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gave the Court of Justice the opportunity to make an authoritative decision that would settle the EAW question, a highly controversial and delicate matter that involves structural issues pertaining to the EU, national constitutional limits, and the authority of European and national courts.[21] Naturally, the EAW could equally have been the subject of a convention, but it was within the Council's discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied. The Court of Justice ruled that examination of the questions submitted has revealed no factor capable of affecting the validity of the FWD.[22]

III. Selected Procedural Issues

In the previous system the provisional arrest warrant and the extradition request were two separate phases of the procedure. The request for extradition is normally made formally through the diplomatic channel, accompanied by the arrest warrant, information about the identity of the accused, and the basic facts of the offence. In most states, the request is scrutinised by the courts. The final decision is taken usually by the executive, to which the domestic law will usually give discretion to refuse the request, subject only to treaty obligations.[23] The surrender procedure does not distinguish the two phases. The mechanism of the EAW is based on the mutual recognition of judicial decisions in criminal matters. When a judicial authority of a Member State of the EU requests the surrender of a person, its decision must be recognised and executed automatically throughout the EU. The surrender procedure is primarily judicial, i.e. the political phase inherent in the extradition procedure is abolished. The removal of these two procedural levels improves the effectiveness and speed of surrender mechanism. As pointed out by *Otto Lagodny*, the FWD generally avoids the term "extradition" as well as the word "requested" state. Instead, it uses "surrender" and "executing judicial authority". The major and relevant change is of a procedural nature, not a matter of substance or of concept.[24]

Below, we focus on selected procedural issues, namely the impact of EU citizenship in surrender procedure, the principle of mutual recognition of judicial decisions in criminal matters in the EU, the consequences of the removal of the

21 SARMIENTO, D.: *European Union: The European Arrest Warrant and the quest for constitutional coherence.* In: International Journal of Constitutional Law, Vol. 6, Issue 1 (2008), p. 171.

22 Judgment of the Court of Justice of the EC of 3 May 2007 – Case C-303/05 – Advocaten voor de Wereld.

23 AUST, A.: *Handbook of International Law.* 2nd edition. New York : Cambridge University Press New York, 2010, p. 247.

24 LAGODNY, O.: *"Extradition" without a granting procedure: The concept of "surrender"*. In: BLEKXTOON, R. et Van BALLEGOOIJ, W. (eds.): Handbook on the European Arrest Warrant. The Hague : T. M. C. Asser Press, 2005, pp. 39–40.

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double criminality requirement, the execution of the surrender request and the time limits.

3.1 Nationals vs. EU Citizens

Many states do not allow the extradition of nationals to another state, but this is usually in circumstances where the state concerned has wide powers to prosecute nationals for offences committed abroad.[25] On the other hand, the surrender procedure takes account of the principle of citizenship of the EU. The primary criterion is not nationality but the place of the person's main residence, in particular with regard to the execution of sentences. This idea is made for facilitating the execution of the sentence passed in the country of arrest when it is there that the person is the most likely to achieve integration, and moreover, when the EAW is executed, for making it possible to make it conditional on the guarantee of the person's subsequent return for the execution of the sentence passed by the foreign authority.[26] The FWD relies upon EU citizenship to explain that nationals of Member States are no longer protected against extradition in another Member State if the EAW is issued. At least in some EU Member States, the right not to be extradited to a foreign jurisdiction has long been considered an important element of nationality. Therefore, constitutional laws had to be changed to implement the Council framework decision on a European Arrest Warrant.[27]

The citizens of the EU Member States have, in addition to their rights as citizens of their own countries, additional rights as EU citizens, which among other things guarantees them freedom of movement throughout the EU. The EU is the area of freedom, security and justice which facilitates the free movement of citizens and also ensures their security and protection. The EAW arises from these realities and makes co-operation between the bodies responsible for conducting criminal proceedings more effective.[28]

3.2 Mutual Recognition of Judicial Decisions: Obligation to recognize and execute the European Arrest Warrant automatically throughout the entire EU

Within the EU, the impetus for greater co-operation in criminal matters was the belief that criminals were benefiting from the free movement of persons at the heart of the internal market. The UK Presidency of the EU proposed to make

25 SHAW, M. N.: *International Law. 6th edition.* Cambridge University Press, 2008, p. 687.

26 Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between Member States. COM(2001) 522.

27 HAILBRONNER, K.: *Nationality in public international law and european law.* In: BAUBÖCK, R, – ERSBØLL, E. – GROENENDIJK, K. et WALDRAUCH, H. (eds.): *Acquisition and Loss of Nationality : Volume I: Comparative Analyses : Policies and Trends in 15 European Countries.* Amsterdam : Amsterdam University Press, 2006, p. 88.

28 Decision of the Constitutional Court of the Czech republic of 3 May 2006 – Pl. ÚS 66/04 (434/2006 Coll.)

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the principle of mutual recognition the cornerstone of increased co-operation in criminal justice in Europe. The idea behind the UK proposal was based on an analogy with the internal market of the EU. Following the *Cassis de Dijon*[29] case, mutual recognition paved the way for the completion of the market. If the same principle could be harnessed in relation to criminal justice, then a European criminal law could be built without facing the difficult task of adopting harmonising measures.[30]

Mutual recognition of judicial decisions has dominated the development of EU Criminal Law. The central aim of this principle is the quasi-automatic recognition and execution of judicial decisions in criminal matters from Member State "A" to other Member States of the EU, with minimal formalities and limited grounds for refusal. The political appeal of mutual recognition for the EU Member States lies in the fact that, instead of embarking in a very visible attempt to harmonise their criminal laws under the banner of the EU, they can promote judicial co-operation by not having to change in principle their criminal laws – they "only" agree to accept judicial decisions emanating from other Member States.[31] This mechanism is widely understood as being based on the thought that while another Member State may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Based on this idea of equivalence and the trust it is based on, the results the other Member State has reached are allowed to take effect in one's own sphere of legal influence. A decision taken by an authority in one Member State could be accepted as such in another Member State, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case.

In real terms the mutual recognition of judicial decisions comprises the establishment of the free circulation of judicial decisions that have full and direct affect across the entire EU. It is therefore founded on the idea of equivalence between the decision of the issuing State and those of the executing State and reciprocal confidence between Member States in the quality of their respective judicial procedures, a guarantee of judicial security.[32] For purposes of the EAW above mentioned implies that when a judicial authority of a EU Member State

29 Judgment of the Court of Justice of the EC of 20 February 1979 – Case C-120/78 – Cassis de Dijon (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein).

30 MURPHY, C. C.: *The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust?* In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): *Crime Within the Area of Freedom, Security and Justice: A European Public Order.* Cambridge University Press, 2011, p. 225.

31 MITSILEGAS, V.: *Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance.* In: BALZAQ, T. et CARRERA, S. (eds.): Security Versus Freedom? : A Challenge for Europe's Future. Aldershot : Ashgate, 2006, p. 279.

32 GAY, C.: *The European Arrest Warrant and its application by the Member States.* In: European Issues, No. 16/2006.

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requests the surrender of a person, its decision must be recognized and executed automatically throughout the entire EU, either because such person has been convicted of an offence or because such person is being prosecuted.[33] On the other hand, the EU leaders should always keep in mind that the principle of mutual recognition of judicial decisions is envisaged not only to strengthen co-operation in the fight against the impunity of those labelled as criminals, but also to enhance the protection of individual rights in judicial proceedings. Ensuring this balance is crucial for a common sense of justice.[34] Moreover, as pointed out *Valsamis Mitsilegas*, applying the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. The adoption of the FWD constituted a spectacular development for EU Criminal Law.[35]

3.3 Removal of the Double Criminality Requirement

Extradition treaties almost always incorporate the principle of speciality and the double criminality principle. The idea of the double criminality principle is that the extradition is granted only if the act for which extradition is sought is a crime in both the requesting and the requested states, although it does not have to be called by the same name.[36] Under the European Convention on Extradition the main condition under which a requested state is obliged to extradite a person to a requesting state is the requirement that the act in relation to which the extradition is requested is punishable under the laws of the requesting state and of the requested state. The absence of double criminality is a mandatory ground for refusing the requested extradition. The main rationale for this requirement is that states are reluctant to apply their sovereign powers for the enforcement of norms contrary to their own conceptions of law.[37]

However, the principle of mutual recognition of judicial decisions has caused the abolition of the double criminality requirement. The long negotiations on this point led to an overall compromise. The rule of double criminality was abolished in terms of the sentence and only the sentence as defined by the domestic law of the issuing state is now taken into account. The verification of double criminality is abolished for a list of 32 offences (categories of crimes) in the FWD, for instance sexual exploitation of children and child pornography, computer-related crime (i.e. cyber crime), rape, or trafficking in human beings.[38] Two con-

33 Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between Member States. COM(2001) 522.

34 APAP, J. et CARRERA, S.: *European Arrest Warrant : A Good Testing Ground for Mutual Recognition in the Enlarged EU?* Brussels: Centre for European Policy Studies, 2004, p. 17.

35 MITSILEGAS, V.: *EU Criminal Law*. Oxford – Portland : Hart Publishing, 2009, p. 115.

36 AUST, A.: *Handbook of International Law.* 2nd edition. New York : Cambridge University Press New York, 2010, p. 247.

37 KEIZER, N.: *The Double Criminality Requirement.* In: BLEKXTOON, R. et Van BALLEGOOIJ, W. (eds.): Handbook on the European Arrest Warrant. The Hague : T. M. C. Asser Press, 2005, p. 138.

38 Complete list of all offences see Article 2(2) of the FWD.

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ditions must be fulfilled: firstly, the offence described in the EAW is punishable in the state of issue by a custodial sentence or a detention order for a maximum period of at least three years, and secondly, the offence falls under one or more of the 32 offences mentioned in the FWD. If those conditions are fulfilled, the EAW gives rise to surrender without verification of the double criminality of the act.

3.4 Execution of the Request

A significant difference between the traditional extraditions before the implementation of the FWD is that there are now limited grounds for a refusal to surrender. The reasoning which lies behind the removal of the traditional grounds for non-surrender is based on the principle of mutual trust in the integrity of judicial systems in other Member States. Confidence and trust in the judicial processes applied in other Member States leads to a presumption in favour of surrender.[39] The cases of refusal to execute the EAW are limited and are listed in order to simplify and accelerate the procedure. The limited grounds for non-execution of the EAW are divided into mandatory and optional.

The FWD introduced a limited scope of the mandatory non-execution of the EAW, namely amnesty, the principle of ne bis in idem, and the minor age of the requested person. Further, it introduced a limited scope of the optional grounds. However, many Member States of the EU have interpreted optional grounds as meaning that the State may choose whether a judge is required to refuse surrender where one of the grounds exists or whether the judge has discretion in the matter. As a consequence many States have made these grounds for refusal mandatory. At the same time, since they are optional some Member States have not transposed them at all. Hence the implementation of optional grounds amounts to a patchwork which is contrary to the FWD.[40]

3.5 Time Limits

Where a classical extradition takes a few months or years, the FWD imposes time limits for the executing authority to take a decision on the EAW request. They are divided into two parts: time limits and procedures for the decision to execute the EAW, and time limits for surrender of the requested person.

Firstly, with regards to the FWD, the EAW shall be dealt with and executed as a matter of urgency. If the person arrested has given consent to being surrendered, the final decision should be taken within 10 days after the consent has been given. If the person does not consent to her/his surrender, the final decision on the execution of the EAW should be taken within 60 days after the arrest of

39 ŁAZOWSKI, A. et NASH, S.: *Detention*. In: KEIJYER, N. et Van SLIEDREGT, E. (eds.): *The European Arrest Warrant in Practice.* The Hague : T. M. C. Asser Press, 2009, p. 40.

40 Report from the Commission based on Article 34 of the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Annex (revised version). SEC(2006) 79.

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the requested person. Where in specific cases the EAW can not be executed within these time limits, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

Secondly, the FWD gives the executing authorities 10 days to actually surrender the person sought by the issuing State after the final decision on the execution of the EAW. If the surrender of the requested person within this period is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for instance, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the EAW shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

Conclusion

The answer to the question how the surrender procedure differs from classic extradition is not easy to conclude. As we have seen, the basic multilateral treaty in the field of extradition is the European Convention on Extradition, adopted by the Council of Europe. The surrender procedure was introduced by the EU by the Council framework decision on the European arrest warrant. Implemented provisions of the FWD did not derogate extradition conventions, nor did not provide cancellation. The conventions became obsolete. Without prejudice to their application in relations between Member States of the EU and third states, from 1 January 2004, the FWD replaced the corresponding provisions of conventions applicable in the field of extradition in relations between Member States of the EU.

Further, in the extradition procedure the provisional arrest warrant and the extradition request were two separate phases of the procedure. The request for extradition is normally made formally through the diplomatic channel and the request is scrutinised by the courts. The final decision is taken usually by the executive, to which the domestic law will usually give discretion to refuse the request, subject only to treaty obligations. The surrender procedure does not distinguish the two phases. The mechanism of the EAW is based on the mutual recognition of judicial decisions in criminal matters in the EU. When a judicial authority of a Member State of the EU requests the surrender of a person, its decision must be recognised and executed automatically throughout the EU. The

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surrender procedure is primarily judicial, i.e. the political phase inherent in the extradition procedure is abolished.

Many states do not allow the extradition of nationals to another state. On the other hand, the surrender procedure takes account of the principle of citizenship of the EU. The primary criterion is not nationality but the place of the person's main residence, in particular with regard to the execution of sentences. The FWD relies upon EU citizenship to explain that nationals of Member States are no longer protected against extradition in another Member State if the EAW is issued.

Extradition treaties almost always incorporate the double criminality principle. The idea of this principle is that the extradition is granted only if the act for which extradition is sought is a crime in both the requesting and the requested states, although it does not have to be called by the same name. The principle of mutual recognition of judicial decisions has caused the abolition of the double criminality requirement. The rule of double criminality was abolished in terms of the sentence and only the sentence as defined by the domestic law of the issuing state is now taken into account. The verification of double criminality is abolished for a list of 32 offences in the FWD.

A significant difference between the traditional extraditions before the implementation of the FWD is that there are now limited grounds for a refusal to surrender. The reasoning which lies behind the removal of the traditional grounds for non-surrender is based on the principle of mutual trust in the integrity of judicial systems in other Member States of the EU. Confidence and trust in the judicial processes applied in other Member States leads to a presumption in favour of surrender. The cases of refusal to execute the EAW are limited and are listed in order to simplify and accelerate the procedure.

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