

European Arrest Warrant and Adaptation of Ukrainian Legislation in the Context of European Integration: Czech Experience

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Summary: The article deals with the issue of the European Arrest Warrant, especially in the context of the constitutional consequences of the implementation of the Framework Decision in the national legal systems of the Czech Republic (as an EU Member State) and Ukraine (as a candidate country). After a general introduction to the institution of the European Arrest Warrant, the authors focus in particular on the possible constitutional and legal complications of its implementation in Ukrainian legislation and practice. The main problems include the conflict of its essence with the principle of non-extradition of own citizens. The article analyses this problem and its possible solutions, including in the context of how other states, in particular the Czech Republic and Poland, have approached this issue.

Key words: European Arrest Warrant, extradition, surrender, transfer, Constitution, Constitutional Court, Czech Republic, Ukraine

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1. Introduction

The European arrest warrant (EAW) enables the suspects of criminal offences to be prosecuted and facilitates the execution of criminal sentences and custodial orders across the European Union. The Framework Decision on the EAW placed from its very inception a strong emphasis on security and fighting impunity by facilitating, simplifying and accelerating extradition among EU Member States' criminal justice authorities. The EAW was designed to function on the basis of mutual and quasi-automatic recognition of foreign criminal justice decisions in the area of surrender. An almost unconditional trust is awarded to the authorities of the issuing State to systematise a presumption of legality, proportionality, and overall appropriateness of their decisions.¹

As in neighbouring countries, the European Arrest Warrant became “famous” in the Czech Republic immediately after its adoption in the form of the Framework Decision. From the outset, the constitutional courts had to deal with the constitutional conformity of the principle according to which their citizens could be transferred to another EU Member State for criminal proceedings, and with other constitutional aspects of the implementation of the Framework Decision. The constitutional courts have chosen different ways to deal with the same problem.² The Polish Constitutional Tribunal required the constitution-maker to amend the wording of the constitutional provisions,³ the German Federal Constitutional Court annulled the national implementing norm,⁴ the Czech Constitutional Court chose the path of a friendly Euroconform interpretation of the Constitution (see below for more details),⁵ while the Slovak Constitutional Court did not reach a merits review at all for procedural reasons.⁶ However, the European Arrest Warrant has successfully overcome these national constitutional challenges and has been used for two decades by the judicial authorities of the Member States for the surrender of criminally prosecuted persons within Europe.

¹ BÁRD, P., CARRERA, S., STEFAN, M. *The Judicialisation of the European Arrest Warrant (Rule of Law and Fundamental Rights as Preconditions for Merited Mutual Trust)*. CEPS, 2023 [online]. Available at: <https://www.ceps.eu/ceps-publications/the-judicialisation-of-the-european-arrest-warrant/>

² VIKARSKÁ, Z., DŘÍNOVSKÁ, N. Evropský zatýkací rozkaz ve stínu krize právního státu: dům postavený na písku. *Právník*. 2022, no. 12, pp. 1176–1195.

³ NUBBERGER, A. Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant. *International Journal of Constitutional Law*. 2008, no. 1, pp. 162–170.

⁴ NOHLEN, N. Germany: The European Arrest Warrant Case. *International Journal of Constitutional Law*. 2008, no. 1, pp. 153–161.

⁵ The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, Pl. ÚS 66/04.

⁶ Resolution of the Constitutional Court of the Slovak Republic, Case No. PL. ÚS 12/2012 of 11 July 2012.

Ukraine, as a candidate country, will also have to deal with implementation as part of the accession process. In general, the process of accession of new countries to the EU is very difficult and long. Candidate countries have to fulfil a number of requirements, especially the Copenhagen criteria.⁷ During the accession process, a candidate country demonstrates that it meets the accession criteria and that it is able to assume the rights and obligations of EU membership.⁸ Depending on the specific situation, a candidate country must therefore often undergo significant reforms to reflect EU law (*the acquis*) in its legal system and practice.^{9,10} Therefore, Ukraine will also have to deal with possible constitutional obstacles to the application of the EAW in its national legislation and practice.

The article introduces the essence of EAW and the basic process of its implementation. Subsequently, the authors examine the extent to which Ukraine's legal system, including its Constitution, is ready for the implementation of the Framework Decision. The article highlights what – especially interpretative – problems may arise in practice with the application of the EAW. Inspiration and solutions to problematic situations can be found in the practice of other EU Member States that have already implemented the EAW. In this respect, the article provides both a look at the Polish approach and, in particular, a detailed analysis of the “friendly” approach of the Czech Republic and its Constitutional Court to this issue. There is also a reflection on another important constitutional law issue related to the EAW, which will undoubtedly affect Ukraine as well. This is the question of the extent to which the authorities of the requested state may refuse an extradition request if certain fundamental rights standards are not respected in the requesting state.

⁷ The Copenhagen criteria include political, economic and legislative requirements that a candidate country must meet. For more details see VEEBEL, V. *Relevance of Copenhagen Criteria in Actual Accession: Principles, Methods and Shortcomings of EU Pre-accession Evaluation. Studies of Transition States and Societies*. 2011, no. 3 [online]. Available at: https://www.researchgate.net/publication/289540668_Relevance_of_Copenhagen_Criteria_in_Actual_Accession_Principles_Methods_and_Shortcomings_of_EU_Pre-accession_Evaluation.

⁸ WAKELIN, E. *EU Conditionality: An Effective Means for Policy Reform?* 2013 [online]. Available at: <https://www.e-ir.info/2013/11/01/eu-conditionality-an-effective-means-for-policy-reform/>.

⁹ GRABBE, H. (2002). European Union Conditionality and the “Acquis Communautaire”. *International Political Science Review*. 2002, 23(3), pp. 249–268.

¹⁰ Schimmelfennig and Sedelmeier define enlargement as “a process of gradual and formal horizontal institutionalization of organizational rules and norms”. See SCHIMMELFENNIG, F., SEDELMEIER, U. Theorizing EU enlargement: research focus, hypotheses, and the state of research. *Journal of European Public Policy*. 2002, no. 4, p. 503.

2. The European Arrest Warrant

The European Arrest Warrant was introduced by the Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and Surrender Procedures between Member States (“the Framework Decision”). The Framework Decision came into effect in 2004, replacing the multilateral extradition mechanism established by the European Convention on Extradition (1957). Council Framework Decision 2009/299/JHA, which addressed trials in absentia, updated the Framework Decision 2002/584/JHA in February 2009 by adding a clear and common basis for not implementing the decisions made when the parties involved were not present at the trial. In addition, six directives have strengthened the procedural rights of individuals detained under the EAW. These include the right to information, the right to legal representation, the right to interpretation and translation, the right to strengthen certain aspects of the presumption of innocence, the right to be present at the trial, procedural safeguards for children, and legal aid.

The Framework Decision replaced the previous extradition system with a simpler and faster process for surrendering required individuals for the purposes of pursuing a criminal prosecution or enforcing a prison sentence or detention order. It operates on the premise of mutual recognition. The judicial decision of the issuing Member State shall be acknowledged in the executing Member State without further procedures, unless there are grounds for non-execution.

The definition of the EAW is provided in the Art. 2 of the Framework Decision 2002/584/JHA¹¹. Thus the EAW is “a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”.

In compliance with Art. 6 all Member States have informed the General Secretariat of the Council of the judicial authorities that possess the authority to issue and carry out the EAW. Their judicial authorities have the authority to look into and judge criminal matters.

In number of its judgements the Court of Justice of the European Union defined what these judicial authorities are. According to the Court of Justice, the definition of “judicial authority” in Art. 6 (1) of the Framework Decision must be interpreted more widely to include the authorities involved in the administration of criminal justice in a Member State, rather than just the judges or courts of

¹¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>

that state¹². Public prosecutors' offices are therefore considered issuing judicial authorities, so long as they are not at risk of being directly or indirectly subject to directives or instructions in a particular case from the executive, like a Minister for Justice, in connection with the adoption of a decision to issue the EAW. The Court of Justice further explained that a police force¹³ or an executive branch of a Member State, like the Ministry of Justice¹⁴, cannot be construed as being under the definition of "judicial authority."

Under Art. 7 EAWs and other relevant official letters can be administratively transmitted and received by the competent judicial authorities with the help of one or more central authorities designated by the Member States. According to Art. 7 (1), a sizable portion of Member States have appointed a central authority. This is usually their Ministry of Justice. Some Member States gave the designated central authority or authorities additional powers not permitted by Art. 7 (2). For example, the central authorities are in charge of approving incoming EAW in advance, or they may, under specific circumstances, delay the implementation of a surrender ruling.

The EAW must be translated into the official language or languages of the executing Member State by the appropriate issuing authority in accordance with Art. 8 (2). The acceptance of a translation in one or more additional official EU languages is up to the individual member states. According to a declaration deposited by more than half of the Member States, European arrest warrants in languages other than their own (usually English) are accepted.

The scope of the EAW application is defined as follows: for actions that carry a maximum punishment of at least 12 months in custody or a detention order under the laws of the issuing Member State, or for penalties of at least 4 months in custody or detention orders when a sentence has already been imposed.

Requests are issued uniformly by completing an EAW form in order to make them easy to understand and comply with. However, a national arrest warrant,

¹² Joined Cases C-508/18 and C-82/19 PPU: Judgment of the Court (Grand Chamber) of 27 May 2019 [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CA0508>; Joined Cases C-566/19 PPU and C-626/19 PPU. Judgment of the Court (First Chamber) of 12 December 2019. JR and YC. 2019 [online]. Available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62019CJ0566>; Case C-625/19 PPU. Judgment of the Court (First Chamber) of 12 December 2019. XD. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0625>

¹³ Case C-452/16 PPU. Judgment of the Court (Fourth Chamber) of 10 November 2016. *Openbaar Ministerie v Krzysztof Marek Poltorak* [online]. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=185246&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=762916>

¹⁴ Case C-477/16 PPU. Judgment of the Court (Fourth Chamber) of 10 November 2016. *Openbaar Ministerie v Ruslanas Kovalkovas*. [online]. Available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62016CJ0477>.

enforceable judgment, or other comparable court order must always have been issued before and apart from the EAW.

The Framework Decision's Art. 8 (1) specifies what must be included in the EAW. To ensure the first level of judicial protection, this includes, in particular:

- proof of an enforceable court order (such as a national arrest warrant) which must be separate from the European arrest warrant itself;
- the type and legal classification of the offense;
- description of the circumstances surrounding the offense, including the time, location, and extent of the requested person's involvement in the offense and the penalty imposed.

According to Art. 10 (5), any issues pertaining to the authenticity or transmission of any document required to carry out the European arrest warrant must be resolved directly between the relevant judicial authorities or, if necessary, with the assistance of the Member States' central authorities.

Art. 15 (2) provides for the executing judicial authority to request the relevant supplemental information be provided as soon as possible if it determines that the information provided by the issuing Member State is insufficient to enable it to make a surrender decision. Specifically, this relates to Framework Decision Arts. 3 through 5 and Art. 8. Given the necessity of adhering to the deadlines outlined in Art. 17, the executing judicial authority may establish a deadline for receiving this information.

Art. 2 (2) indicates 32 categories of criminal offenses that result in surrender without the need for proof of double criminality, provided that the offenses are defined by the laws of the issuing Member State and carry a maximum sentence of three years in custody or a detention order. In compliance with the provisions of the Art. 83 of the Treaty on the Functioning of the European Union, some of these 32 offenses have undergone some degree of harmonization at the EU level.

For offenses that are not on the abovementioned list or for offenses that are on the list but do not meet the three-year threshold, the executing judicial authority may confirm double criminality. Therefore, regardless of the components or how it is defined, surrender may be contingent on the conduct for which the EAW has been issued being considered crimes under the laws of the executing Member State (Art. 2 (4)).

The necessary and optional grounds for non-execution of the EAW (Arts. 3, 4, and 4a of the Framework Decision) restrict the general responsibility to execute a EAW stated in Art. 1 (2). The mandatory grounds are as follows: if the offence on which the EAW is based is covered by amnesty in the executing Member State; *Ne bis in idem* (if the executing judicial authority is notified that a Member State has ultimately rendered a judgment against the requested individual for the same acts); if the person who is the subject of the EAW may not,

owing to his/her age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State. Only the grounds for optional non-execution listed in its national statute may be invoked by the executing judicial authority. Moreover, defying the EAW is intended to be an exception that must be strictly interpreted.

According to Art. 5, the executing judicial authority may be subject to certain conditions that are fully specified in Art. 5 when implementing the EAW in accordance with its national law. These requirements may be connected to the re-examination of life sentences or the return of citizens and residents to the executing Member State to serve out term in custody imposed on them in the issuing Member State.

The required individual is granted a number of procedural rights by the Framework Decision. In line with Art. 11, the person being requested is entitled to information about the EAW and its contents, the opportunity to agree to surrender, and the assistance of an interpreter and legal counsel. The implementing Member State's national law must be followed when granting these rights. Furthermore, the rights outlined in the Framework Decision have been reinforced and expanded by the directives on minimum procedural rights.

Moreover, there are other provisions of the EAW Framework Decision which provide for additional procedural rights. Thus, in compliance with Art. 13 (2), Member States must take the required steps to guarantee that the renunciation of the speciality rule entitlement and the consent to surrender (as mentioned in Art. 27 (2)) are established in a way that demonstrates that the parties involved have done so voluntarily and fully understand the repercussions before the executing authority. The requested individual must therefore be entitled to legal representation. Also, according to Art. 14, the arrested person has the right to be heard by the executing judicial authority in line with the laws of the executing Member State if they refuse to surrender. According to Art. 23 (5), the requested individual must be freed after the surrender deadline has passed.

Art. 27 of the Framework Decision provides that a individuals which have been surrendered cannot be charged with a crime, given a term, or otherwise deprived of their freedom for a crime they did not commit before turning themselves in. Unless the executing judicial authority specifies otherwise in its decision on surrender, the Framework Decision allows Member States to notify that they renounce the rule of speciality in their relations with other Member States that have given the same notification. Furthermore, in accordance with Art. 13, Art. 27 (3) allows for a number of exceptions to the rule of speciality, including the requested person's renunciation of the rule of specialist.

According to the Framework Decision's Art. 15 (1), the surrender decision must, in theory, be made within stringent time constraints. All EAWs must be

handled and carried out immediately, regardless of these deadlines (Art. 17 (1)). According to Art. 17 (2), the final decision about the execution of the EAW should be made within 10 days of the requested person's consent to surrender.

In exceptional circumstances, a EAW may be extended by an additional 30 days if it cannot be implemented within the relevant time frames. According to Art. 17 (4), the executing judicial authority is required to notify the issuing judicial authority right away and provide an explanation for the delay.

The executing judicial authority must make sure that the material requirements for the person's effective surrender are met as long as it hasn't made a final decision about the EAW under Art. 17 (5).

According to Art. 17 (7), in the event that a Member State is unable to adhere to the relevant deadlines, it is required to notify Eurojust and provide an explanation for the delay. Furthermore, in order to assess how the Framework Decision is being implemented, a Member State that has repeatedly witnessed delays from another Member State in carrying out EAW is required to notify the Council.

As soon as the final decision about the execution of the EAW is made, the deadline for turning over the required individual begins to run. As soon as feasible, in compliance with Art. 23 (1) the relevant authorities should coordinate and decide on the subject's surrender. According to Art. 23 (2), the surrender must occur at least 10 days following the final decision for the execution of the EAW. Art. 23 (3) and (4) deal with extensions of the time limits, respectively, when urgent humanitarian reasons or events outside of any Member State's control prohibit the requested person from surrendering within the 10-day term.

As of 2024 the European Commission published four reports on the Framework Decision's implementation. The 4th Report¹⁵ was published in July, 2020. The overall evaluation shows that the Framework Decision on EAW is being implemented to a fairly satisfactory degree. But more significant compliance problems were also found when the national implementing measures were evaluated. This specifically relates to extra justifications for non-executions and not adhering to time limits.

June 7, 2022 the Commission published the guidelines¹⁶ on extradition to third states which summarise the case-law of the Court of Justice. They also

¹⁵ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.COM/2020/270 final [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=COM%3A2020%3A270%3AFIN>

¹⁶ Guidelines on Extradition to Third States [online]. Available at: https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en#the-4th-implementation-report~:text=7%20JUNE%202022-,Guidelines%20on%20Extradition%20to%20Third%20States,-English

take into account the experience that has been gained over the last five years in applying “the Petruhhin mechanism” across the EU, Iceland and Norway. In 2016, the Court of Justice of the European Union (Court of Justice) introduced in the judgment in the case *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*¹⁷ specific obligations for Member States that do not extradite their own nationals when they receive an extradition request from a third State for the prosecution of an EU citizen who is a national of another Member State and who has exercised his/her right to free movement under Article 21(1) of the Treaty on the Functioning of the European Union (TFEU).

The Petruhhin judgment was the first case in which the Court of Justice ruled that an EU Member State must start a consultation process with the EU citizen’s home country when it receives a request for extradition from a third party regarding a citizen of another EU Member State. This provides the EU Member State with the chance to use the EAW to prosecute its citizens. The purpose of the special duties placed on Member States that refrain from extraditing their own persons is to guarantee that their own citizens and other EU members are treated equally. Subsequent case law further outlined the responsibilities of member states.

3. European Arrest Warrant: the adaptation of Ukrainian legislation in the context of European integration

On February 7, 2019, a significant event took place for Ukraine: the Preamble to the Constitution was amended by a provision on the “irreversibility of Ukraine’s European and Euro-Atlantic course”, which finally defined the key directions of foreign policy and accelerated the process of European integration. The following significant step on this path was the granting of EU candidate status to Ukraine on June 23, 2022. These developments request for a thorough reform of Ukraine’s legal system, harmonization of its national legislation with the EU *acquis*, and updating of its regulations in the areas of criminal justice, personal data protection, intellectual property, environmental protection, transport, infrastructure, agriculture, etc. The experience of EU member states reflects the lengthiness of this process and, even in peaceful conditions, can take years, sometimes decades.

¹⁷ Judgment of the Court (Grand Chamber) of 6 September 2016. *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*. Case C-182/15 [online]. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0182>

In the Czech Republic, for example, it took 8 years from the application for EU membership on January 17, 1996, to actual membership on May 1, 2004.

The European Commission has identified priority areas for reform, including the completion of judicial reform (namely the selection and appointment of Constitutional Court judges), protection of the rights of national minorities, adoption of the law regulating media, improvement of anti-corruption legislation, etc. Despite the difficult conditions of martial law, Ukraine has made significant progress in implementing reforms, which was noted by European Commission President Ursula von der Leyen, and this opened the door to starting negotiations on EU accession. Consequently, on June 25, 2024, the first Intergovernmental Conference between Ukraine and the EU took place in Luxembourg, marking the official start of negotiations on Ukraine's accession to the European Union. However, these are only the initial reforms on the path to full European integration. The issue of comprehensive updating of the Constitution of Ukraine in the context of European integration remains unaddressed by the national legislator. Indeed, in the future, Ukraine, like any other EU country, will face the problem of harmonizing the provisions of the national Constitution with EU law. The first problem of the kind is that the Constitution of Ukraine does not contain an article granting the basis to ratify a treaty related to the transfer of part of its sovereign rights to a supranational entity, as required by EU accession. Therefore, it is necessary to start laying the constitutional foundations aimed at joining the EU from this point.

After thorough examining of the experience of constitutional reforms in EU member states, it can be concluded that the introduction of the EAW, established by the Framework Decision, caused a particularly large number of controversies. In the year of the Framework Decision's entry into force in 2004, the constitutions of 14 out of 25 countries contained provisions prohibiting or at least restricting the surrender or extradition of their citizens.¹⁸ These issues have caused wide discussions in the academic community.

In particular, the problems of implementation of the EAW were discussed at the conference "The European Arrest Warrant and its Implementation in the Member States of the European Union" held in Poland at the Jagiellonian University, Kraków from November 9 to 11, 2006. Session 1 "Constitutional Problems – can they be overcome?"¹⁹ was devoted to constitutional issues of imple-

¹⁸ HRYTSKIV, A. V. *European Arrest Warrant as an Institution of Criminal Law of the European Union*. Dissertation for the degree of Doctor of Philosophy in the field of knowledge 29 "International Relations", specialty 293 "International Law". Ivan Franko National University of Lviv, Lviv, 2024, p. 156.

¹⁹ *The European Arrest Warrant and its Implementation in the Member States of the European Union* – GÓRSKI, A., HOFMANSKI, P. (eds.). Warszawa, 2008, 301, pp. 12–38 [online].

mentation. Experts from 15 EU member states presented papers on the problems of implementing the EEA in their countries. The experts' research has reflected that nine countries (Belgium, Czech Republic, Greece, Hungary, Lithuania, the Netherlands, Slovenia, Spain, Sweden, and the United Kingdom) have taken the position of distinguishing between the EAW and extradition (prohibition of extradition of their own citizens), and six countries (Denmark, Cyprus, Finland, Germany, Malta, Poland, and Spain) consider surrender under the EAW as a form of extradition.²⁰

Therefore, one cannot trace a common position in the scientific literature, EU legislation, or case law of EU member states on the correlation between the categories of EEA and extradition/surrender.

Certain states amended their constitutions before the Framework Decision entered into force (Portugal, Slovenia, France), while others, having implemented the EEA to their legal systems, found that the implementing acts were inconsistent with the provisions of national constitutions. Thus, there are a number of decisions of constitutional courts declaring unconstitutional the acts that implemented the EEA Framework Decision.

The constitutional courts, in particular, have been faced with the question of whether surrender under the EEA is a form of extradition or whether it is a special legal institute distinct from extradition. In particular, this issue was considered by the constitutional courts of Poland, Germany, Cyprus, the Czech Republic, etc.

An analysis of the Constitution of Ukraine, in particular Article 25(2), suggests that Ukraine will also face this problem in the future. So the major focus should be laid on its analysis, first by quoting its content: "A citizen of Ukraine may not be expelled from Ukraine or extradited to another state."²¹ It follows from the provisions of this Article that a citizen of Ukraine cannot be extradited to another state. However, it should be emphasized that, first, this restriction applies only to its own citizens and does not apply to foreigners. Secondly, it is necessary to find out what the constitutional author means by the term "extradited". After all, national legislation and international legal documents use three similar terms: "extradition", "surrender" and "transfer". However, international documents and Ukrainian national legislation in terms of this wording usage render insufficient clarity. In certain cases, they are used as synonyms. Quite

Available at: <https://www.law.uj.edu.pl/kpk/strona/wp-content/uploads/2014/11/5-publikacja.pdf>.

²⁰ HRYTSKIV, A. V. *European Arrest Warrant as an Institution of Criminal Law of the European Union*. Dissertation for the degree of Doctor of Philosophy in the field of knowledge 29 "International Relations", specialty 293 "International Law". Ivan Franko National University of Lviv, Lviv, 2024, p. 86.

²¹ Constitution of Ukraine, 1996 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>

often, the terms “transfer” and “extradition” are interchanged in translation, which creates even more confusion.

In order to conclude on whether the EEA is consistent with the provisions of the current Constitution of Ukraine, it is necessary to establish the essence and content of the terms applied both by national legislation and by international documents, including those ratified by Ukraine. It is also necessary to establish whether the EEA can be considered a new institution in terms of implementation in the legal system of Ukraine, or whether it is still a type of extradition.

Within the framework of the Council of Europe, there are two main acts that Ukraine has ratified related to extradition/transfer of persons. The first one is the European Convention on Extradition, 1957, which Ukraine ratified in 1998. Its official translation to Ukrainian uses the term “extradition”. According to this Convention, “The Contracting Parties undertake **to surrender** to each other, ... all persons against whom the competent authorities of the requesting Party are proceeding for an offense or who are wanted by said authorities for the execution of a sentence or detention order”²². “The Contracting Parties undertake to surrender to each other ... all persons who are being prosecuted by the competent authorities of the requesting Party for an offense or who are wanted by said authorities for the purpose of carrying out a sentence or detention order.” However, Ukraine ratified the Convention with reservations: “Ukraine will not extradite Ukrainian citizens to another state. For the purposes of this Convention, a citizen of Ukraine is any person who, in accordance with the laws of Ukraine, is a citizen of Ukraine at the time of the decision to extradite” – paragraph 1.1) of the Law of Ukraine “On Ratification of the European Convention on Extradition” of January 16, 1998.²³ This is fully consistent with the provisions of the Constitution of Ukraine.

The second act is the Convention on the Transfer of Sentenced Persons (1983). Its official translation to Ukrainian uses the term “transfer”. According to the provisions of this Convention, “a person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. ...A sentenced person may be transferred under this Convention only on the following conditions: if that person is a national of the administering State”²⁴ (a person sentenced in the territory of a Party may be transferred to the territory

²² European Convention on Extradition, 1957 [online]. Available at: <https://rm.coe.int/1680064587>

²³ The Law of Ukraine “On Ratification of the European Convention on Extradition” of January 16, 1998 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/43/98-%D0%B2%D1%80#Text>

²⁴ Convention on the Transfer of Sentenced Persons, 1983 [online]. Available at: <https://rm.coe.int/1680079529>

of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him... A sentenced person may be transferred under this Convention only on the following conditions: if that person is a national of the State of execution of the sentence). It follows from the provisions of this Convention that the purpose of its adoption is to provide foreigners sentenced to imprisonment for a criminal offense, the opportunity to serve their sentence in the country of their citizenship (to their own countries).

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offense should be given the opportunity to serve their sentences within their own society; and considering that this objective can best be achieved by having them transferred to their own countries. Thus, according to the Convention on the Transfer of Sentenced Persons, a citizen of Ukraine has the opportunity to return to Ukraine to serve his sentence. Accordingly, the institution of transfer under the provisions of this Convention is different from extradition and is consistent with the provisions of the Constitution of Ukraine

Furthermore, let us consider the use of the relevant terms in the Criminal Procedure Code of Ukraine. Analysis of its provisions allows us to state that the term “transfer” is used in the following cases:

1. Temporary transfer of a person to testify or participate in other procedural actions;
2. Actual (physical) transfer of a person when applying the extradition procedure;
3. Transfer of a citizen of Ukraine to Ukraine or a person convicted in Ukraine to serve a sentence in the country of his/her citizenship (analogous to the procedure provided for in the 1983 Convention on the Transfer of Sentenced Persons);
4. Temporary transfer of a person to the International Criminal Court for procedural actions.

Thus, the transfer institution provided for by the Criminal Procedure Code of Ukraine and the Convention on the Transfer of Sentenced Persons is different from the EEA in its essence, purpose and procedures.

As for the terms extradition and surrender, the Criminal Procedure Code of Ukraine equates them. Article 541 provides the following explanation of the terms: “2) extradition means the extradition of a person to the state whose competent authorities are looking for that person for criminal prosecution or execution of a sentence. Extradition includes: an official request to establish the location of the person to be extradited in the territory of the requested state and extradition of such person; verification of circumstances that may impede extradition; decision-making on the request; actual transfer of such person to the jurisdiction of

the requesting state.”²⁵ The authorities that carry out extradition under Article 574 are the Office of the Prosecutor General and the Ministry of Justice of Ukraine. Thus, extradition under the CPC is similar to the EEA in terms of its purpose, but has procedural peculiarities, which will be discussed below.

It is worth noting that the Constitutional Court of Ukraine in Case No. 1-35/2001 of July 11, 2001 “On the Rome Statute” also distinguished between the concepts of “extradition” and “transfer”. In this case, it interpreted part two of Article 25 of the Constitution of Ukraine. Ukraine signed the Rome Statute of the International Criminal Court on January 20, 2000, but did not ratify it, as the President of Ukraine filed a constitutional petition with the Constitutional Court of Ukraine to provide an opinion on the compliance of the Rome Statute of the International Criminal Court with the provisions of the Constitution of Ukraine.

The subject of consideration by the Constitutional Court, among other things, was the issue of compliance of paragraph 1 of Article 89 of the Rome Statute with part two of Article 25 of the Constitution of Ukraine, according to which a citizen of Ukraine cannot be extradited to another state, including in criminal proceedings.

According to Article 89(1) of the Rome Statute, “the Court may transmit a request for the arrest and surrender a person, together with the material supporting the request set forth in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”²⁶

The Constitutional Court of Ukraine has taken the position of distinguishing between the concepts of “transfer” (or extradition), which means the delivery of a person to another equally sovereign state, and “surrender”, which means the delivery of a person by the state to the Court. In addition, the term “surrender” used in the Rome Statute has been translated into Ukrainian as “transfer”, while the term “surrender” found in the European Convention on Extradition is translated into Ukrainian as “extradition”. Thus, even through translation, the legislator tried to distinguish these two concepts. Having analysed the concepts used in national legislation, it can be concluded that transfer is usually temporary, while extradition is mostly permanent.

²⁵ Code of Criminal Procedure of Ukraine, 13.04.2021 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>

²⁶ Opinion of the Constitutional Court of Ukraine of 11.07.2001. N 3-B/2001 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/v003v710-01#Text>

Here is the Court's reasoning in more detail, which may further serve as a basis for making a decision on the possibility of implementing the European Arrest Warrant in the Ukrainian legal system:

"2.3.1 The terms "transfer" and "extradition" are often considered synonymous in the common understanding, but in international legal documents and specialized literature they have different meanings, which makes their legal nature non-identical.

International legal documents and specialized literature assume that the delivery of a person to another equally sovereign state is fundamentally different from the delivery of a person to a Court established in accordance with international law with the participation and consent of the states concerned. While the former is denoted in international legal terminology by the term "extradition" or "extradition" (from the Latin *ex* – from, out of and *traditio* – transfer), the latter is denoted by the term "transfer".

This international legal practice is also followed by the Statute, according to Article 102 of which the term "surrender" means the delivery of a person by a State to the Court, pursuant to this Statute, "extradition" means the surrender of a person by one State to another as provided by treaty, convention or national legislation.

2.3.2. According to part two of Article 25 of the Constitution of Ukraine, the extradition of Ukrainian citizens to another state is prohibited. That is, this prohibition applies only to national, not international jurisdiction. It is intended to guarantee the impartiality of judicial proceedings and the fairness and legality of punishment for its citizens."²⁷

In addition, Para 2.3.3 of the Judgment states: "constitutional provisions prohibiting the extradition of Ukrainian citizens (even if the concept of 'extradition' is broadly interpreted) cannot be considered separately from Ukraine's international legal obligations."²⁸

Therefore, the Constitutional Court stated that "there are no grounds to recognize Article 89, paragraph 1, and Article 107, paragraph 3 of the Statute as contrary to the requirements of part two of Article 25 of the Constitution of Ukraine."²⁹ In other words, the transfer of a Ukrainian citizen to the International Criminal Court does not contradict part two of Article 25 of the Constitution of Ukraine.

The EEA will be a new concept for Ukraine's legal system, so in the course of its future implementation, it will be important to take into account the

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

experience of other countries that have applied different approaches to its implementation and harmonization with the provisions of national constitutions. Particularly notable in this regard are the examples of Poland and the Czech Republic, where constitutional courts took different positions in addressing this issue.

The Framework Decisions, by their nature, as already mentioned, are not directly binding and require the state to take appropriate measures to implement them, leaving the choice of such measures to the discretion of the state. Poland, like some other countries, decided to implement the Judgment by amending the Criminal Procedure Code by adding two new sections: 65(a) Application to a Member State of the European Union to **transfer** a person prosecuted under the European Arrest Warrant, which regulates the issuance (“przekazanie” in Polish) of the EAW by Polish courts, and 65(b) Occurrence of a Member State of the European Union to **transfer** a person prosecuted on the basis of a European arrest warrant,³⁰ which concerns the issuance of such a warrant by other Member States in respect of persons located in Poland. However, when the need to apply these provisions in practice (the Polish citizen was to be extradited to the Netherlands) arose, the court faced the problem of inconsistency between the provisions of the Criminal Procedure Code and Article 55(1) of the Polish Constitution, which at that time prohibited the extradition of its own citizens and had the following wording: “Extradition of a Polish citizen is prohibited.” The District Court of Gdańsk appealed to the Constitutional Tribunal of Poland for clarification. In its Judgment No. P1/05 of April 27, 2005, the Tribunal assessed the constitutionality of the amendments to the CPC. In para. 2.4. of the Judgment, the Constitutional Tribunal noted that according to Article 9 of the Polish Constitution, the state is obliged to comply with international law, the norms of which are binding on it. Poland must implement EU legislation, including the provisions of the EEA. However, the provisions of EU secondary law and the acts implementing them into national law do not guarantee automatic compatibility with the provisions of the Constitution. Therefore, the Tribunal recognized its right to assess their constitutionality.³¹

Paragraph 4.2. of the judgment of the Constitutional Tribunal of Poland states that the interpretation of Article 55 of the Constitution gives grounds to assert that the prohibition of extradition of Polish citizens is absolute and the

³⁰ Code of Criminal Procedure of Poland 06.06.1997 [online]. Available at: <https://www.global-regulation.com/translation/poland/7050083/the-act-of-6-june-1997.-the-code-of-criminal-procedure.html>

³¹ Judgment of the Constitutional Tribunal of Poland No. P1/05 of April 27, 2005. Polish Constitutional Court, Judgment of April 27, 2005 (P 1/05). Available at: http://trybunal.gov.pl/fileadm/in/content/omowienia/P_1_05_PL.pdf

subjective personal right of a citizen arising from it cannot be subject to any restrictions, as their introduction would impede the exercise of this right. The Constitutional Tribunal took a principled position in defending the constitutional rights of Polish citizens. However, the interpretation could focus on the terminological differences between the concepts of “extradition” (Polish: “ekstradycja”), which is used in the Polish Constitution, and “surrender” (Polish: “przekazanie”), which is used in the Framework Decision. It should be noted that in the Judgment the Tribunal expressed its commitment to the principle of commitment to European integration when interpreting the Constitution and legislation: when the same legal provision can be interpreted in different ways, the interpretation that is most consistent with EU law should be chosen. At the same time, the Tribunal noted that the limits of application of this principle of interpretation were set by the EU itself – it is to prevent the deterioration of a person’s situation, in particular, by establishing or increasing criminal liability. Therefore, a situation in which the introduction of the EEA into Polish legal system by means of an appropriate interpretation of the Constitution, which, at the same time, leads to a restriction of the rights and freedoms of citizens, is unacceptable.

Notable is also another warning made by the Constitutional Tribunal of Poland: The Constitution does not provide for any exceptions. Using historical interpretation, the Tribunal examined the materials of the discussion of this article during the adoption of the Constitution and noted that the proposal to add the wording “unless otherwise provided by an international agreement” was rejected. However, in paragraph 17 of the Judgment, the Tribunal emphasized that the implementation of the EEA is “the highest priority for the Polish legislator” and the absence of relevant legislation may be considered a violation of Poland’s international obligations.

At the same time, the Constitutional Tribunal of Poland found a compromise: the court postponed the expiration of the provisions of the Criminal Procedure Code for 18 months from the date of the announcement of the decision, as stated in Part II of the Resolution. The possibility of postponement is provided for in Article 190(3) of the Polish Constitution. At the time, namely on September 8, 2006, the Polish Sejm made the necessary amendments to Article 55 of the Constitution, thus redrafting part 1 of this article: “The extradition of a Polish citizen is prohibited, except in the cases provided for in paragraphs 2 and 3” (paragraph 2 contains a reservation: if it is provided for by an international treaty ratified by Poland).

The Tribunal’s judgment received different assessments: some analysts considered it a recognition of the primacy of EU law, as it forced the Parliament to amend the Constitution, effectively enshrining the rule that if EU law does

not comply with the Constitution, it must be amended.³² Others considered this decision to be anti-European.

At the same time, the Code of Criminal Procedure of Poland uses the term “extradition” and prohibits the extradition of Polish citizens. At the same time, the institute of extradition itself continues to be applied in relations with third countries that are not members of the EU. Article 604. Prohibition of extradition. § 1. A release shall be inadmissible if: 1) the person whose application concerns is a Polish citizen or uses in the Republic of Poland the right of asylum³³; (Article 604. [Prohibition of extradition] § 1. Extradition is inadmissible if: 1) the person in question is a Polish citizen or enjoys the right of asylum in the Republic of Poland).

Thus, the concepts of “surrender” and “extradition” are distinguished in the Polish legal system.

The Framework Decision also distinguishes between the concepts of “extradition” and “surrender”. According to para. 5, “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 with a system of **surrender** between judicial authorities.”³⁴ Thus, this Decision replaces the complex and time-consuming extradition procedure between EU Member States provided for by the European Convention on Extradition with a simplified surrender procedure based on the principle of mutual recognition of judgments and mutual trust between Member States in respect of human rights guarantees. At the same time, the Convention continues to apply in the EU member states’ relations with third countries. Thus, the differences in terminology cannot be considered accidental. The intention of the drafters of the Framework Decision was to introduce a new legal institution, different from extradition, into legal circulation.

Therefore, we cannot agree with the domestic researchers of the EOA M.I. Traskevych and O.G. Turchenko that “in the Framework Decision “extradition”, “surrender” and “transfer” are used as synonyms.”³⁵

³² KOWALIK-BANCZYK, K. “Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law.” *German Law Journal*. 2005, pp. 1360–1361.

³³ Code of Criminal Procedure 06.06.1997 [online]. Available at: <https://www.global-regulation.com/translation/poland/7050083/the-act-of-6-june-1997.-the-code-of-criminal-procedure.html>.

³⁴ Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and surrender procedures between member states. 2002 OJ (L 190) 1 [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>

³⁵ TRASKEVYCH, M. I., TURCHENKO, O. G. European Arrest Warrant. *Bulletin of the Student Scientific Society of Vasyl' Stus Donetsk National University* / ed. by I. Khadzhynov (chairman) and others. Vinnytsia: Vasyl' Stus Donetsk National University, 2020. Issue 12, Vol. 1, P. 101 [online]. Available at: <https://jvestnik-sss.donnu.edu.ua/article/view/8428/8427>

However, another domestic researcher of EEA, A. Hrytskiv, considers EEA as a form of extradition. This is the title of Chapter II of his dissertation: “EEA as a New Form of Extradition Within the EU.”³⁶

The content of the European Arrest Warrant is different from the categories of “extradition” and “transfer” considered by the Constitutional Court of Ukraine (hereinafter – “CCU”) in the Rome Statute Case for compliance with Article 25 of the Constitution of Ukraine. However, the CCU, when adopting the Decision, emphasized that “the constitutional prohibition of extradition of Ukrainian citizens (even if the concept of “extradition” is broadly interpreted) cannot be considered separately from international legal obligations” – para. 2.3.3. of the Judgment.³⁷ Thus, the CCU took the position of the principle of *pacta sunt servanda*. Moreover, the practice of the Constitutional Court of Ukraine, at one time, introduced a principle similar in content to the previously mentioned principle of commitment to European integration – the “principle of friendly attitude to international law”. The principle of “friendly attitude to international law” means the interpretation of constitutional provisions in a manner that is most consistent with Ukraine’s international legal obligations. It primarily concerns the consideration of the ECHR judgments in the CCU’s interpretative activities.

The former CCU Chief Justice S. Shevchuk has noted in an interview with the weekly “Law and Business”: “in accordance with the “principle of friendly attitude to international law”, the practice of interpretation and implementation of conventional rights of the ECHR should be taken into account when considering cases in constitutional proceedings in cases where constitutional rights are consistent with the relevant conventional rights.”³⁸ Until now, due to the application of the “principle of friendly attitude to international law,” human rights protection has been mainly in line with the ECHR case law, but in the future, the application of this principle may extend to EU law or be transformed into another principle – the principle of commitment to European integration (euro-conform interpretation). After all, accession to the EU and recognition of the principle of primacy of EU law will force the CCU to look for new approaches to harmonizing national law with EU law. However, indeed, the application of this principle should not

³⁶ HRYTSKIV, A. V. *The European Arrest Warrant as an Institution of the Criminal Law of the European Union*. Dissertation for the degree of Doctor of Philosophy in the field of knowledge 29 “International Relations”, specialty 293 “International Law”. Ivan Franko National University of Lviv, Lviv, 2024, P. 86 ff.

³⁷ Opinion of the Constitutional Court of Ukraine of 11.07.2001. N 3-B/2001 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/v003v710-01#Text>

³⁸ SCHEVCHUK, S. Courts of general jurisdiction often do not see the fundamental nature of constitutional rights and apply laws. *Law and Business*. 2016, No. 48 (1294) [online]. Available at: <https://ccu.gov.ua/publikaciya/intervyu-suddi-ksu-stanislava-shevchuka-shchotyzhnevkyu-zakon-i-biznes-no-48-26>

lead to violation of other fundamental human rights principles guaranteed by the Constitution of Ukraine, stipulating “constitutional rights and freedoms of a person and citizen may not be restricted, except in cases provided for by the Constitution of Ukraine” – Article 64 of the Constitution of Ukraine.

4. European Arrest Warrant – Czech experience

Based on its accession to the EU, the Czech Republic was obliged to implement the European Arrest Warrant as part of the EU *acquis* on the date of its accession, i. e. on 1 May 2004. The legal regulation of the EAW was adopted at EU level in the form of a Framework Decision, i. e. an instrument of intergovernmental cooperation in the third pillar of the EU, requiring the adoption of national implementing legislation in individual Member States. As Framework Decisions are binding in result, not in form and means, Member States have approached implementation in different ways. Some have taken the route of a specific law, others have reflected the provisions in the criminal code or in the law on international judicial cooperation. The Czech Republic then chose the path of amendment of the Criminal Code (Amendment No. 537/2004 Coll.) and the Code of Criminal Procedure (Amendment No. 539/2004 Coll.).³⁹ However, the implementation of the EAW in the Czech Republic encountered many obstacles, which were based primarily on Czech constitutional law and the principles arising from it.

The amendments to the Criminal Code and the Code of Criminal Procedure,⁴⁰ which contained provisions implementing the Framework Decision nationally, were prepared in time, but provoked an extensive political and (constitutional) legal debate. Initially, the Government of the Czech Republic, at the same time as drafting the two amendments, proposed an amendment to Article 14 of the Charter of Fundamental Rights in the form of a new paragraph 5, which was to read: *‘A citizen may be transferred to a Member State of the European Union for prosecution or imprisonment if this results from the obligations of the Czech Republic as a Member State of the European Union, which cannot be limited or excluded.’* However, the draft amendment to the Charter was rejected by Parliament. The amendments to the Criminal Code and the Criminal Procedure Code were eventually adopted, against the veto of the President of the Republic. They did not come into force until autumn 2004, i. e. with considerable delay.⁴¹

³⁹ VATUCH, P. Evropský zatýkací rozkaz. *Právní rádce*. 2004, no. 4, p. 61.

⁴⁰ Act No. 140/1961 Coll., Criminal Code (already repealed and replaced by Act No. 40/2009 Coll., Criminal Code), Act No. 141/1961 Coll., Criminal Procedure Code.

⁴¹ The second step in the implementation of the Framework Decision in the Czech legal order consisted in the exclusion of international law obligations by notification under Article 28(3) of the

The basic principle underlying the surrender of persons on the basis of the EAW is the principle of mutual trust (in the structure and functioning of the judicial systems of the other Member States of the European Union, which guarantee a fair trial). The EAW is based on the principle of mutual recognition in criminal law, which was introduced by the Treaty of Amsterdam. According to Pikna, the principle of mutual recognition has gone well beyond the original concept of the third pillar of the European Union and can be considered a “federalising step in the conception of the Union”, with individual Member States surrendering their sovereignty in this area to other Member States.⁴² The fact that the European Arrest Warrant mechanism is based on a high degree of trust between the Member States of the European Union was also confirmed by the CJEU soon after the adoption of the Framework Decision, when it stated that Member States have mutual trust in their criminal justice systems and that each Member State recognises the criminal law applicable in another Member State, even if the application of its own law would lead to a different result (cf. Similarly, the Czech Constitutional Court has stated that the concept of the EAW based on mutual trust prevents the executing Member State from being entitled to review the validity of the European Arrest Warrant (cf. e. g. Resolution IV ÚS 3770/16 of 14 February 2017). Another principle on which the institution of the EAW is based is the principle of judicial review, which is manifested, first, by the fact that the decision to issue a euro-warrant is a decision of a judicial authority and, second, by the fact that the decision to execute the euro-warrant in the requested State is issued by a judicial authority and the role of the central administrative authorities is limited to administrative assistance. Finally, the principle of the protection of human rights is also a key principle influencing the application of the EAW (more on this below).

As Hamulák notes, due to the content of the Framework Decision, the sensitivity of the criminal justice area and the groundbreaking innovations in the field of extradition brought about by the Euro-warrant, it was only a matter of time before the friction between an effective system of judicial cooperation in criminal matters on the one hand and the constitutional principles of the EU Member States on the other, would come before the constitutional protection bodies in the respective Member States.⁴³ This is what has happened in the Czech

European Convention on Extradition. See POLÁK, P. *Rámcová rozhodnutí a zásada vzájemného uznávání rozhodnutí v trestních věcech*. Praha: LexisNexis CZ, 2007, p. 65.

⁴² PIKNA, B. *Evropský prostor svobody, bezpečnosti a práva prizmatem Lisabonské smlouvy*. Praha: Linde, 2010, p. 312.

⁴³ O. Hamulák analyses the whole situation in great detail in his book. See HAMULÁK, O. *Eurozatykač, tři ústavní soudy a dominance práva Evropské unie*. Olomouc: Iuridicum Olomoucense,

Republic.⁴⁴ The aforementioned amendments to the Criminal Code and the Criminal Procedure Code were challenged by a constitutional complaint and became the subject of review by the Constitutional Court of the Czech Republic. In the constitutional complaint, a group of MPs and senators claimed, first of all, that the amendments were in breach of several articles of the Charter of Fundamental Rights and Freedoms, i. e. their unconstitutionality. In particular, it was argued that the amendments contravened Article 14(4) of the Charter, which stipulates that a citizen may not be forced to leave his or her country, and Article 39 of the Charter, according to which “only the law determines what conduct constitutes a criminal offence and what punishment, as well as other harm to rights or property, may be imposed for its commission”.⁴⁵

The proposal to repeal the transposition regulations presented the Constitutional Court with the unprecedented task of dealing with the question of the relationship between European law and the Czech constitutional order. First, the exclusive power of the Minister of Justice to authorise extradition, the admissibility of which was previously approved by the Regional Court or the Supreme Court, is replaced by a decision of the competent court, which is guided only by law (including the conditions of the EAW) and not by any political considerations (protection of the interests of the state, reciprocity).⁴⁶ The Framework Decision also broke the principle of double criminality for certain acts (e. g. participation in an organised criminal group, terrorism, etc.) and also limited the principle of non-extradition of own citizens for prosecution or execution of sentences, within the Member States of the European Union.⁴⁷

With regard to the question of the relationship between Czech and European law, the Constitutional Court of the Czech Republic has established in its decision-making the general principles of constitutional review of cases in which European law is applied. It follows from them that Article 4 of the Constitution of the Czech Republic⁴⁸ must be interpreted in the light of Article 1(2) and Article

2011. Available at: https://www.academia.edu/6254097/Eurozatyka%C4%8D_r%C5%99i_%C3%BAstavn%C3%AD_soudy_a_dominance_pr%C3%A1va_Evropsk%C3%A9_unie

⁴⁴ The Czech Republic was not the only country to address the constitutionality of the European Arrest Warrant, as it was also the case (for example) in Poland and Germany – see FILIP, J. *Evropský zatýkací rozkaz před ústavními soudy. Časopis pro právní vědu a praxi*. 2005, no. 2, pp. 155–162; KOMÁREK, J. *Vztah práva Evropské unie a právního řádu ČR očima tří rozhodnutí Ústavního soudu. Soudní rozhledy*. 2008, no. 10, pp. 357–366, or FILIP, J. *BVerfG – eurozatykač ano, ale právněstátně transponovaný. Právní zpravodaj*. 2005, no. 9, pp. 12–16.

⁴⁵ The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, Pl. ÚS 66/04.

⁴⁶ ZEMÁNEK, J. *Evropskoprávní meze přezkumu ústavnosti transpozice rámcového rozhodnutí o eurozatykači. Právní rozhledy*. 2006, no. 3, pp. 90–95.

⁴⁷ ŠÁMAL, P. et al. *Trestní zákoník. Komentář*. Praha: Beck, 2023, pp. 166–167.

⁴⁸ Article 4 of the Constitution of the Czech Republic states: Fundamental rights and freedoms shall be protected by the judiciary.

10a of the Constitution⁴⁹ as meaning that the duty of the judiciary (including the Constitutional Court) in providing protection to fundamental rights and freedoms is to ensure compliance with the obligations arising for the Czech Republic from European law.⁵⁰ The judiciary is therefore obliged to interpret and apply national law in a Euro-compatible manner.⁵¹ A Euroconform interpretation of national law must be based not only on the text of the relevant EU legislation, but also on the interpretative conclusions adopted by the competent EU institutions, in particular the Court of Justice of the European Union. In relation to the question before us, it can thus be added that, although the Framework Decision cannot have direct effect, its binding nature implies an obligation to interpret national legislation in a manner consistent with the Framework Decision.⁵²

Returning to the case of the constitutional complaint against the amendments introducing the European Arrest Warrant into Czech law, the Constitutional Court of the Czech Republic rejected the motion to annul the provisions in question. In other words, it did not accept the claim that the new legislation was unconstitutional. In its reasoning, the Constitutional Court stated that Article 1(2) of the Constitution of the Czech Republic, in conjunction with the principle of cooperation laid down in Article 10 of the EC Treaty, implies a constitutional principle according to which domestic legislation, including the Constitution, is to be interpreted in accordance with the principles of European integration and cooperation between Community and Member State authorities. Therefore, if there are several interpretations of the Constitution, of which the Charter of Fundamental Rights and Freedoms is a part, only some of which lead to the achievement of the commitment assumed by the Czech Republic in connection with its membership in the EU, it is necessary to choose an interpretation which supports the implementation of that commitment, and not an interpretation which prevents such implementation.⁵³

⁴⁹ Article 1(2) of the Constitution provides that the Czech Republic shall comply with its obligations under international law. Article 10a of the Constitution states that an international treaty may delegate certain powers of the Czech Republic's organs to an international organisation or institution.

⁵⁰ The judgment of the Constitutional Court of the Czech Republic of 8 February 2022, No. ÚS III ÚS 213/21.

⁵¹ The judgment of the Constitutional Court of the Czech Republic, No. I.ÚS 615/17 of 10 August 2017, the judgment of the Constitutional Court of the Czech Republic, No. II. ÚS 2778/19 of 5 November 2019, or the judgment of the Constitutional Court of the Czech Republic, No. I. ÚS 945/20 of 16 December 2020.

⁵² The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, Pl. ÚS 66/04. Cf. also the judgment of the Grand Chamber of the Court of Justice of the EU in the *Pupino* case (C-105/03) of 16 June 2005.

⁵³ The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, no. Pl. ÚS 66/04.

As regards the alleged infringement of Article 14(4) of the Charter, the Court stated that it was not true that the national adoption of the EAW had undermined the permanent relationship between the citizen and the State. A citizen surrendered for criminal proceedings in an EU Member State remains, even during the duration of those proceedings, under the protection of the Czech State. The EAW allows only for the time-limited surrender of a citizen for prosecution in an EU Member State for a specifically defined offence, and nothing prevents him from returning to the territory of the Czech Republic at the end of those proceedings. The citizen has the right to defend himself against the measures taken by the law enforcement authorities during surrender pursuant to the EAW by means of legal remedies (including a constitutional complaint). The Constitutional Court further added that the advantages associated with the status of EU citizenship are also supplemented by obligations and responsibilities.⁵⁴ Investigating and combating crime occurring in the European area cannot be successfully carried out within a single Member State, but requires broad international cooperation and the introduction of more effective mechanisms, including the EAW. Therefore, the temporary surrender of a citizen for criminal proceedings pending in another EU Member State, conditional on his subsequent repatriation, is not and cannot constitute a compulsion to leave the country within the meaning of Article 14(4) of the Charter of Fundamental Rights and Freedoms.

The Constitutional Court did not find the new regulation to be in conflict with Article 39 of the Charter of Fundamental Rights and Freedoms.⁵⁵ The Court stressed that surrender pursuant to a European Arrest Warrant does not constitute the imposition of a sentence within the meaning of Articles 39 and 40 of the Charter. Therefore, the adoption of the amendment does not result in the criminal law of all EU Member States becoming applicable in the Czech Republic. It only means that the Czech Republic assists other EU Member States in enforcing their criminal law.⁵⁶ *“By abandoning the principle of reciprocal criminality in relation to EU Member States, the Czech Republic does not in any way violate the principle of legality. Generally speaking, the requirement of reciprocal criminality can be abandoned as a safeguard in relations between EU Member States that have a sufficient level of convergence of values and mutual trust, are democratic regimes that respect the principles of the “rule of law” and are bound by the obligation to respect this principle. This is precisely the situation where the level of convergence between the 25 EU Member States has*

⁵⁴ Ibid.

⁵⁵ The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, no. Pl. ÚS 66/04.

⁵⁶ FILIP, J. Evropský zatykačí rozkaz a rozhodování ústavních soudů. *Právní zpravodaj*. 2005, no. 8, pp. 1–7.

*reached such a level of mutual trust that they no longer feel the need to cling to the principle of reciprocal criminality.”*⁵⁷

In addition to the above, it can be summarised that the very friendly attitude of the Constitutional Court of the Czech Republic can be a valuable source of inspiration for new candidate countries, including Ukraine. This is because these countries too will face the problematic issues mentioned above, where European law clashes with national law and breaks some of its constitutional principles. Unlike the much more vigorous positions of, for example, the German or Polish judiciary on the identical problem, the Czech position, based on a Euroconform interpretation of the points at issue, can be considered very accommodating and constructive.

Another area where the application of the EAW runs up against the limits and guarantees of constitutional law is the question of the protection of human rights and the rule of law. Furthermore, an important constitutional law issue is the extent to which the authorities of the requested State may refuse an extradition request if certain standards of fundamental rights are not respected in the requesting State. It is the above-mentioned principle of mutual trust that significantly limits the possible review of decisions in criminal matters issued by the courts of another Member State. In relation to the European Arrest Warrant, these limits are first and foremost set by the Framework Decision itself, which defines the circumstances which constitute (mandatory) or at least may constitute (optional) grounds for not complying with the EAW. Further exceptions to the otherwise generally set obligation to execute the EAW were then formulated by the case-law of the Court of Justice, but the path to them was not simple and straightforward. In 2013, the CJEU, in its *Melloni* judgment⁵⁸, confirmed the thesis that the list of grounds for refusing to execute a euro-warrant is exhaustive and cannot be extended to include other grounds, however important. The *Melloni* case concerned an Italian citizen who had been convicted in absentia in Italy and who was requested by the Italian judicial authorities using a euro-warrant from Spain. However, the Spanish courts perceived the Italian criminal law as insufficient. The Spanish Constitutional Tribunal asked the Court of Justice its first ever preliminary question, asking whether the Spanish courts could refuse to extradite Mr Melloni to Italy on the grounds of protecting his procedural rights – a ground which, although not mentioned in the Framework Decision, flows directly from the EU Charter of Fundamental Rights (which guarantees in Article 47 the right to an effective remedy and a fair trial and in Article 48(2) the right of defence). In its judgment, the Court, applying a linguistic and teleological interpretation,

⁵⁷ The judgment of the Constitutional Court of the Czech Republic of 3 May 2006, no. Pl. ÚS 66/04.

⁵⁸ Judgment of the CJEU of 26 February 2013 in Case C-399/11 *Melloni*.

concludes that the provisions of the Framework Decision do not allow such an interpretation and that it is therefore impossible for the Spanish courts to refuse to transfer Mr Melloni to Italy. The problematic nature of the Melloni decision lies first and foremost in the fact that it significantly overrides the (European) principle of mutual trust over (domestic) concerns about the level of protection of human rights. The Spanish courts have been instructed by the Court to rely more on the principle of mutual trust – i. e. to proceed on the presumption that Italian procedural law is “good enough for all Europeans” – than to insist on a higher national standard of human rights protection in the criminal justice system.⁵⁹

Fortunately, this attitude of the CJEU has changed in 3 years with the landmark judgment in *Aranyosi and Căldăraru*.⁶⁰ Here, the Court stated that the principles of mutual trust and mutual recognition may be limited “in exceptional circumstances” and referred to Article 1(3) of the Framework Decision, according to which the obligation to respect fundamental rights should not be affected by the European Arrest Warrant mechanism. He then formulated an entirely new test, consisting of two steps. If the executing judicial authority is aware of a real risk of inhuman or degrading treatment in the issuing Member State, it must assess (1) whether there is a real risk in the Member State (objective test) and (2) whether that risk is posed to the particular person to be surrendered to that State (subjective test). However, a mere finding of a general danger is not sufficient to refuse to execute a euro-warrant. Even if an objective danger is found, the executing judicial authority must ask the issuing judicial authority for additional information and verify whether this danger is present for the specific person concerned.

Unfortunately, at the time of the *Aranyosi and Căldăraru* judgment, it was unclear whether the newly created test applied only to Article 4 of the EU Charter of Fundamental Rights, which prohibits inhuman and degrading treatment, or to all the rights it guarantees. The answer was provided by the Court of Justice two years later in *LM (Celmer)*,⁶¹ in which it applied its two-step test to Article 47 of the EU Charter of Fundamental Rights, making it a generally applicable standard.⁶² The Irish court was deciding whether or not to extradite Mr Celmer to Poland, and it was clear that the so-called objective test was likely to be met; but the Irish court asked the Court whether, in a case of such a serious systemic violation of the rule

⁵⁹ VIKARSKÁ, Z., DŘÍNOVSKÁ, N. Evropský zatýkací rozkaz ve stínu krize právního státu: dům postavený na písku. *Právník*. 2022, no. 12, pp. 1176–1195.

⁶⁰ Judgment of the CJEU of 5 April 2016 in Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru*.

⁶¹ Judgment of the CJEU of 25 July 2018 in Case C-216/18 PPU *LM (Celmer)*.

⁶² ŠLOSARČÍK, I. Eurozatykač, polská soudní reforma a narušení důvěry mezi unijními státy. *Jurisprudence*. 2018, No. 6, pp. 37–43.

of law, it was even necessary to examine step two, and if so, how this subjective test should be applied and what specific guarantees the Irish court should actually require from the Polish authorities. However, the Court has not abandoned its two-step test even in the context of a systemic breach of the rule of law.⁶³ Indeed, the European Arrest Warrant mechanism cannot be completely suspended against a State simply on the basis that the Commission has initiated a dialogue with that State under Article 7(1) TEU. While such a step is a particularly relevant source of information on the imminent danger in the country concerned, the executing judicial authority must always take a second step and assess the impact of systemic deficiencies on the violation of the rights of the particular person concerned.⁶⁴ The fact that the CJEU is so “stubbornly” insisting on the subjective test is subject to criticism, and some Member States and their courts no longer respect this case law and do not apply the subjective test.⁶⁵

In particular, Vikarská and Dřínovská, in their article from 2022, state, “The European Arrest Warrant mechanism needs the Member States to trust each other in order to function. The design of the Framework Decision, however, suggests that the euro-warrant has been heading towards dysfunctionality since its introduction. While the possibilities for refusing to surrender a requested person are only very narrowly defined in the legislative text, practice shows that there are significant differences in the level of protection of fundamental rights between Member States. Moreover, these differences have become more pronounced in recent years and mutual trust is gradually turning into a fiction. However, resolving the loss of mutual trust between Member States is essential in matters of criminal cooperation – and if the Court of Justice is unwilling to do so, it is high time for the EU legislator to intervene. It is at least as undesirable that the legislation (and subsequent practice) of transferring persons should contain deficiencies in the protection of the fundamental rights of those persons, or that the European Union should become a space in which the commission of crime is effectively unpunishable in some of its Member States.” One can only agree with these words.

For the sake of complexity, it should be added that since 1 January 2014, practically the entire issue of international judicial cooperation in criminal matters has been regulated in the Czech Republic by a new, special law, which can undoubtedly be considered a law of a code nature. It also includes the institution

⁶³ VIKARSKÁ, Z., DŘÍNOVSKÁ, N. Evropský zatýkací rozkaz ve stínu krize právního státu: dům postavený na písku. *Právník*. 2022, no. 12, pp. 1176–1195.

⁶⁴ The CJEU has maintained this conclusion, for example, in its judgment of 17 December 2020 in Joined Cases C-354/20 PPU and C-412/20 PPU L and P.

⁶⁵ VIKARSKÁ, Z., DŘÍNOVSKÁ, N. Evropský zatýkací rozkaz ve stínu krize právního státu: dům postavený na písku. *Právník*. 2022, no. 12, pp. 1176–1195.

of the EAW. This is Act No. 104/2013 Coll., on international judicial cooperation in criminal matters.⁶⁶

5. Conclusions

Despite the fact that Ukrainian legal literature and sources of law have not yet developed a unified approach to the translation of the concept of the surrender procedures provided for by the EEA (it is translated as extradition, which is prohibited under Article 25 of the CCU, or as transfer), we should proceed from its content, the analysis thereof provides grounds to assert that extradition and the EEA are different legal institutions. Transfer under the EEA is a consequence of mutual recognition of judgments, while extradition is a form of international cooperation (a manifestation of international cooperation). Transfer is usually temporary, while extradition is mostly permanent. Transfer under the EEA is carried out by a court decision, while extradition is carried out by a decision of administrative authorities. And these are not all the differences that distinguish these two institutions.

Therefore, in our opinion, the issue of compliance of the EEA with the Constitution can be resolved by means of interpretation techniques done e. g. by the Constitutional Court of Czech Republic. In this respect, it can be highly recommended that the Constitutional Courts of the candidate countries interpret and apply national law in a Euroconform manner. Such a Euroconform interpretation should be based not only on the text of the relevant EU legislation, but also on the interpretative conclusions adopted by the competent EU institutions, in particular the Court of Justice of the European Union. National legislation, including the Constitution, should be interpreted in accordance with the principles of European integration and cooperation between the Community institutions and the national authorities. Therefore, if there are several possible interpretations of the Constitution, only some of which lead to the achievement of a commitment entered into in the context of EU membership, the interpretation which supports the realisation of that commitment should be chosen, rather than one which prevents it.

Countries are united in the EU on the basis of common values and constitutional principles, including respect for human rights, effective judicial protection and independence of the judiciary. The states have put a lot of effort into developing common standards in the field of combating crime and achieving a common goal of creating a space of freedom, security and justice. Therefore, future EU

⁶⁶ For more details see JELÍNEK, J., GRÍVNA, T., ROMŽA, S., TLAPÁK NAVRÁTILOVÁ, J., SYKOVÁ, A. *Trestní právo Evropské unie*. Praha: Leges, 2019, pp. 270–289.

members, such as Ukraine, Moldova, and hopefully Georgia and others, should join the EU by accepting the values on which the Union is based and adopting the rules in force at the time of accession. They are the property of the EU and the expression of the common interests of its member states.

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