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Eurowarrant: European Extradition in the 21st Century

Overcoming constitutional barriers -
The public law challenges for the EAW in national constitutional courts

The Austrian Example

1. Introduction

The European Warrant of Arrest, which was agreed by the Council of Ministers in December 2001 has been under discussion since then.

I personally learned about the project in spring 2001 at a conference organized by the Swedish Presidency. And most people agreed at that time that there was the necessity to improve cooperation concerning extradition among the EU member states. But at the same time, most of the participants agreed also that this draft was not a particularly useful basis for further discussion. Too many principles of international criminal law had been set aside without regarding the comparability of the differences in penal law of the EU member states.

And then September 11 came. And in striving to prove that the European Union was able to come quickly to solutions when needed, the framework decision on the European Warrant of Arrest was adopted.

2. Framework Decisions

Looking at this complex from a constitutional point of view, let me first look at the instrument of framework decisions itself:

The basis for framework decisions is article 34 of the Amsterdam Treaty. According to this provision framework decisions are to be adopted unanimously *"for the purpose of*

approximation of the law and regulations of Member States. 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."

Even though the Amsterdam Treaty was ratified by the Austrian parliament with the necessary 2/3 majority and thus on a constitutional level, the problem arises of whether a member of the government can bind the parliament by agreeing in the EU council to a framework decision which involves national constitutional law. This is of particular importance when the government is not invested with the qualified majority in parliament to adopt or amend constitutional law.

2.1. The possibilities of parliament to influence council decisions

Considering that the legislation by the European council of ministers reduces the parliament's legislative power, Austria established at the time of accession to the Union a parliamentarian procedure by which ministers can be bound to parliament's positions in their negotiations in the EU council of ministers.

The European arrest warrant was discussed in the respective parliamentarian committee, without, however, agreeing on a binding resolution to be given to the minister on how to use his vote in the council.

3. Extradition of Own Nationals The Crucial Point of the Framework Decision According to Austrian Constitutional Law

The Austrian Law on Extradition and Mutual Assistance in Criminal Matters which entered into force in 1980 and which was at the time the first instrument in Europe to cover all forms of international cooperation contains an absolute prohibition of extradition of own nationals[1]. This provision was enacted on the constitutional level in order to prevent easy amendment. It bans not only direct extradition but also extradition in transit[2].

[1] Art. 12 ARHG (Auslieferungs- und Rechtshilfegesetz)
Federal Law Gazette N° 529/1979

[2] Art. 44 ARHG, see also sub fn 1)

3.1. Extradition of Own Nationals according to the Framework Decision on the European Warrant of Arrest

The European Warrant of Arrest refers to the question of nationality only in the context of execution of sentences and opens a ground for non-execution if the person sought is a national of the executing state, if this state undertakes to execute the sentence[3].

There are, however no exceptions for the surrender of own nationals, neither in the field of obligatory execution for one of the offences as contained in the list[4] nor in other cases, where at least an examination of double criminality is permitted.

3.1.1. The Austrian Dilemma

These provisions are clearly in contradiction to Austrian constitutional law. And this contradiction has to be resolved within the period of transition which was granted until the end of 2008.

I do not want to say that it is an insurmountable problem, because Austria has, in some other cases, made exceptions of the absolute prohibition of the extradition of own nationals.

In this respect I would like to mention the legislation regulating the cooperation with the International Ad Hoc Tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR)[5] or the International Criminal Court (ICC)[6]. In both bills there is a constitutional provision permitting the extradition, extradition by transit and surrender of an Austrian national for the prosecution of offences prosecuted by these international tribunals or by the ICC or for the sake of enforcing a sentence passed by these.

3.1.2. Comparable Problems

[3] Cf. Art. 4 Para. 6

[4] Cf. Art. 2 Para. 2

[5] Federal Law Gazette N° 263/1996

[6] Federal Law Gazette I N° 135/2002

The Federal Republic of Germany had been facing similar problems, because Article 16 Para. 2 of the German Constitution contained a comparable absolute prohibition of the extradition of German nationals.

When amending this provision, the German Parliament solved the problem of the principle of non-extradition of own nationals with regard to the cooperation with the international tribunals, and created at the same time the basis for the implementation of the European Warrant of Arrest.

While emphasizing the general principle of non-extradition of own nationals, the amended article admits the extradition of nationals “to a member state of the European Union or to an international court of justice as long as the rule of law is upheld”, if such extradition is provided by law.

4. **Other possible difficulties in the implementation of the European Arrest Warrant according to Austrian constitution**

Apart from this obvious difficulty in implementing the framework decision on the European Arrest Warrant let me touch upon another possible problem with a view to the European Convention of Human Rights.

Article 5 para. 1 lit (f) of the Convention permits detention with a view to extradition. But according to Austrian law such detention is only admissible if there are reasonable grounds to believe that the facts upon which the extradition request is based can lead to extradition of the person. This means that there is the obligation to examine - on the basis of the foreign warrant of arrest - whether all conditions for extradition are met. Thus the judge issuing the national warrant of arrest has to examine whether there is reasonable suspicion of having committed an offence as this is required in art. 5 para.1 lit (c). This leads to the crucial question of double criminality, which is one of the basic conditions for extradition.

Looking now at the framework decision, double criminality is no longer required if one of the offences contained in the list of Article 2 para. 2 and punishable with at least three years of imprisonment is at stake. Thus the judicial authorities of the executing state – in deciding whether the requested person should remain in detention – will have to issue a

national warrant of arrest[7] or pass at least a similar judicial decision even in cases where the act underlying extradition is not punishable in this state. This will certainly lead to discussions of national procedural law as well as general principles of criminal law. This question will be of particular interest if the Supreme Court is called upon to decide on an extraordinary remedy[8] contesting such decision because of the violation of personal freedom. This extraordinary remedy was established in 1992 for violations of the right of personal liberty in criminal cases. It is admissible if there are no further ordinary appeals.

To solve these problems and to ensure a full compliance with the framework decision on the European Arrest Warrant, a constitutional law would have to be passed that permits detention in cases where a European Arrest Warrant exists even when the crime for which this warrant was issued would not constitute an offence according to Austrian law. And even then the question of compatibility with the European Conventions of Human Rights, which is on constitutional level in Austria, remains unanswered.

5. **Conclusions**

Let me first of all emphasize that I am absolutely in favour of a continuing integration of Europe. Let me also underline that I can see the progress made in the different areas and in particular in the field of home affairs and justice in order to create an area of security, peace and justice.

But let me also express my doubts whether the progress which was made in this field, and in particular after September 11 2001, was not a little bit too fast.

Looking in particular at the sensibility of criminal law the time has not yet come for a common European penal law. It was a wise decision that cooperation in civil matters was moved under the first pillar, while cooperation in criminal matters remained in the third pillar.

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[7] cf. Art. 13 of the Framework Decision
When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with national law, provided that the competent authority of the executing State takes all the measures it deems necessary to prevent the person absconding .

[8] In 1992 Austria passed a law opening an extraordinary remedy to the supreme court in case of the alleged violation of the fundamental right of personal freedom in criminal proceedings. Federal Law Gazette 864/1992

I think that conventions within the area of the third pillar had been the better instrument of progressing in the field of criminal law than the framework decisions are, because in the case of conventions the national parliaments had their role and their say in adopting new rules, in particular when constitutional law was involved.

Thus I would strongly advocate for harmonization, or better, approximation of the criminal law within the European Union before making further steps of integration. And if framework decisions are adopted, there should be particular sensibility if constitutional law of a member state is involved. And this not only because of the sensibility of criminal law but also in consideration of democracy and the attribution of democratic powers.