

Poland

Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005.

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INTRODUCTION

Just as some were getting ready to uncork bottles of champagne in celebration of the first anniversary of the enlargement of the European Union with ten member states, the Polish Constitutional Tribunal delivered an important judgment¹ assessing the conformity of provisions of the Penal Procedure Code,² transposing the European Arrest Warrant with the Polish Constitution.³ In the decision, which potentially has effects beyond the Polish legal system, the Tribunal annulled the transposing legislation (with a delay of 18 months) because it infringed Article 55(1), which states that ‘The extradition of a Polish citizen shall be prohibited’.

The Tribunal’s decision raises a number of questions connected not only with the framework decision on the European Arrest Warrant,⁴ but also with the legal character of the third pillar of the European Union and legislation based upon it. It coincides with two other recent judicial developments of pivotal importance,

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¹ Judgment of 27 April 2005 in the Case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05] nyr. The summary of the judgment in English is available at the official website of the Constitutional Tribunal at <www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf>. Quotes from the judgment which refer to paragraphs in the ‘summary of the judgment’ originate from this document; references to other paragraphs refer to the Polish original.

² Penal Procedure Code of 6 June 1997 (as amended) [Kodeks postępowania karnego z dnia 6 czerwca 1997 roku], Dziennik Ustaw [1997] No. 89, Item 555.

³ The Constitution of the Republic of Poland of 2 April 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku] Dziennik Ustaw [1997] No. 78, Item 483 (hereinafter referred to as Constitution). The English translation of the Constitution is available in A. Pol and W. Odrowąż-Sypniewski (eds.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials* 2nd edn. (Warsaw, Chancellery of the Sejm 2000) p. 25. All the quotes from the Constitution inserted throughout this contribution originate from this book unless stated otherwise.

⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, *OJ* 2002 L 190/1.

the Constitutional Tribunal's ruling on the conformity of the Accession Treaty with the Polish Constitution⁵ and the judgment of the European Court of Justice in the *Pupino* case.⁶ Here these latter two decisions will only incidentally be referred to.⁷

From the very beginning the European Arrest Warrant framework decision has been met with a considerable amount of criticism and it has, to phrase it diplomatically, inspired varying opinions.⁸ Although the decision on the European Arrest Warrant gained momentum in the aftermath of the atrocities of September 11th, it was preceded by years of deliberations and not always very successful attempts to simplify extradition procedures between the member states.⁹ Notwithstanding the various legal problems concerning the transposition as well as the application of the framework decision, it has already proved its usefulness in practice, and it may be considered as an important step towards the creation of a real 'Area of Freedom, Security and Justice'.¹⁰ The judgment of the Polish Constitutional Tribunal adds to the ongoing debate, especially when it comes to discussion on the nature of such concepts as 'extradition' and 'surrender'.¹¹

To the Polish insiders the judgment does not come as a complete surprise. The problem of the constitutional prohibition on the extradition of Polish citizens had

⁵ Judgment of 11 May 2005 in the Case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt. K 18/04] nyr. The summary of the judgment in English is available at the official website of the Constitutional Tribunal at <www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf>.

⁶ ECJ, Case C-105/03 *Criminal Proceedings against Maria Pupino*, ECR [2005] nyr.

⁷ A case-note by the same author on the Accession Treaty judgment will appear in the next edition of *EuConst*.

⁸ See, *inter alia*, R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague, T.M.C. Asser Press 2004); M. Plachta, 'European Arrest Warrant: Revolution in Extradition?', 2 *European Journal of Crime, Criminal Law and Criminal Justice* (2003) p. 177; J. Wouters, F. Naert, 'Of arrest warrants, terrorist offences and extradition deals: An appraisal of the EU's main criminal law measures against terrorism after "11 September"', 41 *CMLRev.* (2004) p. 909; A. Górski, A. Sakowicz, 'Komentarz do Decyzji Ramowej 2002/584/WSiSW' [Commentary to the Framework Decision 2002/584/JHA] in E. Zielińska (eds.), *Prawo Wspólnot Europejskich a prawo polskie. Dokumenty karne, część II* [Law of the European Communities and Polish law. Penal documents, part II] (Warsaw, Oficyna Naukowa 2005) p. 266; E. Piontek, 'Europejski Nakaz Aresztowania' [European Arrest Warrant] 4 *Państwo i Prawo* (2004) p. 33.

⁹ For a historical account see M. Plachta, W. van Ballegooij, 'The Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union', in Blekxtoon and Van Ballegooij (eds.), *supra* n. 8, at p. 13-38.

¹⁰ See Report from the Commission based on Art. 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the member states, COM (2005) 63 final; Commission Staff Working Document Annexed to the Report from the Commission based on Art. 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the member states, SEC (2005) 267.

¹¹ See O. Lagodny, "Extradition" without a Granting Procedure: The Concept of "Surrender", in Blekxtoon and Van Ballegooij, *supra* n. 8, at p. 39-45; Plachta, *supra* n. 8, at p. 190-194.

led to heated discussions during the adoption of the annulled provisions. Before that, it was already a controversial issue during the process leading to the ratification of the Rome Statute of the International Criminal Court and the surrender procedure provided therein. However, what is surprising is the Tribunal's conservatism, especially when taking into account its very pro-European jurisprudence in the period preceding the accession.¹² Before analysing the judgment, some background information on the transposition of the European Arrest Warrant framework decision into Polish law will be given.

TRANSPOSITION OF THE EUROPEAN ARREST WARRANT FRAMEWORK DECISION INTO POLISH LAW

As all other applicant countries, Poland had to approximate its legal system to the *acquis communautaire* in order to meet the accession criteria.¹³ Formally the obligation was imposed by a best endeavours clause provided for in Article 68 of the Europe Agreement creating a framework for association with the European Communities.¹⁴ The application for membership, which was submitted in 1994, led to a reinterpretation of the provision into an absolute obligation to approximate the domestic legal system to the law of the European Union.¹⁵ In substantive terms it extended the non-exhaustive list contained in Article 69 of the Europe Agreement to legislation adopted in all three pillars of the European Union. Since

¹² In a number of cases the Constitutional Tribunal argued that an obligation to approximate domestic law with the *acquis communautaire* is not only realised by legislative interventions but also by pro-European interpretation of Polish law. See S. Biernat, 'Die "europäische" Rechtsprechung polnischer Gerichte vor dem Beitritt zur Europäischen Union', in J. Masing, W. Erbguth (eds.), *Die Bedeutung der Rechtsprechung im System der Rechtsquellen. Europarecht und nationales Recht* (Stuttgart, Richard Boorberg Verlag 2005) p. 191; A. Łazowski, 'Proeuropejska wykładnia prawa przez polskie sądy i organy administracji jako mechanizm dostosowania systemu prawnego do *acquis communautaire*' [Pro-European Interpretation of Law as a Method of Approximation of Legal System with *Acquis Communautaire*], in E. Piontek (eds.) *Prawo polskie a prawo Unii Europejskiej* [Polish Law and Law of the European Union] (Warsaw, Liber 2003) p. 181.

¹³ See Ch. Hillion, 'The Copenhagen Criteria and their Progeny', in Ch. Hillion (ed.), *EU Enlargement. A Legal Approach* (Oxford-Portland Oregon, Hart Publishing 2004) p. 1; M. Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria', XXV *POLYBIL* (2001) p. 219; F. Hoffmeister, 'Changing requirements for Membership', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (The Hague, T.M.C. Asser Press 2002) p. 90.

¹⁴ *OJ* 1993 L 348/2.

¹⁵ See E. Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union – A Polish Perspective', 1 *Yearbook of Polish European Studies* (1997) p. 73; A. Łazowski, 'Approximation of Laws', in Ott and Inglis, *supra* n. 13, at p. 631; A. Łazowski, 'Adaptation of the Polish Legal System to European Union Law: Selected Aspects', *Sussex European Institute Working Paper* No. 45.

permanent opt-outs were out of the question,¹⁶ only some transitional periods were negotiated during the accession talks which ended up in the legal framework of the Accession Treaty.¹⁷

As part of the pre-accession works Poland also had to transpose an increasing number of framework decisions,¹⁸ including the Framework Decision on the European Arrest Warrant. Neither Poland nor the European Union requested transitional periods in this respect. Because the transposition date of the European Arrest Warrant framework decision¹⁹ preceded the date of accession, Poland had to have the transposing legislation in force on 1 May 2004. In September 2003 the government introduced a bill in the *Sejm*, the lower house of the Polish parliament, amending the Penal Code, Penal Procedure Code and Minor Offences Code.²⁰ The aims of the proposed legislation were threefold. It had to implement the Council of Europe Convention on Cybercrime,²¹ the Convention on the protection of the European Communities' financial interests²² and, last but not least, the European Arrest Warrant framework decision. As a matter of fact it was the first ever framework decision transposed into Polish law. Therefore its implementation was considered as a testing ground for future transposition efforts. The Act was adopted on 18 March 2004 and entered into force on 1 May 2004.²³ The provisions transposing the framework decision were inserted into the Penal Procedure Code as Chapter 65a (Articles 607a-607j), which regulates the issuing of European Arrest Warrants by the Polish authorities, and Chapter 65b (Articles 607k-607zc), which regulates the execution of the European Arrest Warrants originating from other member states.²⁴

¹⁶ See K. Inglis, 'The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Member States of the European Union', in Hillion, *supra* n. 13, at p. 77.

¹⁷ *OJ* 2003 L 236/17.

¹⁸ See A. Łazowski, 'Implementation of the Third Pillar Acquis. A Challenge for the Applicant Countries?', in G. de Kerchove, A. Weyembergh (eds.), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* (Éditions de l'Université de Bruxelles, Bruxelles 2003) p. 157.

¹⁹ Art. 34(1) of the European Arrest Warrant framework decision set the implementation date on 31 Dec. 2003.

²⁰ Bill amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation [Projekt ustawy – o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego], Doc. No. 2031 of 19 Sept. 2003 r.

²¹ Council of Europe Treaty Series No. 185.

²² *OJ* 1995 C 316/49.

²³ Act amending the Criminal Code, Criminal Procedure Code and Minor Offences Code [Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń], *Dziennik Ustaw* [2004] No. 69 Item 626.

²⁴ For an overview of these provisions see, *inter alia*, T. Grzegorzczuk, 'Procedowanie w sprawie europejskiego nakazu aresztowania' [Procedure on the European Arrest Warrant], 4 *Prokuratura i Prawo* (2005) p. 7; W. Grzeszczyk, 'Zmiany w prawie karnym wprowadzone ustawą z dnia 16 kwietnia 2004 r.' [Changes to Penal Law Introduced by the Act of Parliament of April 16, 2004], 9 *Prokuratura i Prawo* (2004) p. 71.

FACTUAL BACKGROUND AND ARGUMENTS RAISED BY THE REGIONAL COURT IN GDAŃSK

According to Article 3 of the Constitutional Tribunal Act²⁵ 'Any court may refer a question of law to the Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or a statute if the answer to this question of law determines the matter pending before the court'. In the discussed case a reference was made by the Criminal Division of the Regional Court in Gdańsk, which had received a European Arrest Warrant by the Netherlands requesting the surrender of a Polish citizen. Before giving suit to the request the Court wanted to have clarified whether the surrender of Polish citizens pursuant to Article 607t Penal Procedure Code was acceptable in the light of Article 55(1) of the Constitution.²⁶ The referring court raised several questions. The first concerned the introduction of the surrender procedure into the Polish legal system. The definition of extradition is contained in Article 602 Penal Procedure Code, which states that 'subject to exceptions established in Chapters 65b and 66a extradition is a transfer of the person who is pursued or sentenced on the initiative of the other state'. The referring court wondered whether this wording allowed for the conclusion that extradition is different from the 'surrender procedure' envisaged by the European Arrest Warrant framework decision and by the Statute of the International Criminal Court (the latter is regulated in Chapter 66a Penal Procedure Code). In this context, the Gdańsk Regional Court also pointed to the fact that Chapter 65a Penal Procedure Code was not referred to in Article 602. Secondly, the Gdańsk Regional Court doubted, in view of the Constitution, whether the national legislature with the transposing legislation wanted to allow the surrender of Polish citizens. It noted that the *travaux préparatoires* of the Constitution show that, while Article 55(1) in its original version contained exceptions allowing extradition of nationals when required by an international agreement, the text was reformulated during the drafting process in order to create an absolute ban on the extradition of nationals. Thirdly, the referring court argued that a pro-European interpretation of Article 55(1) of the Constitution, i.e., the exclusion of the European Arrest Warrant surrender from the extradition ban, is dubious. Fourthly, the Gdańsk Regional Court claimed that the drafters of the framework decision only intended to simplify the existing extradition procedure, implying that the surrender procedure was a species of extradition. Finally, it was argued that three old member states, which previously had similar provisions in their legal systems, have introduced amendments in order to fully transpose the

²⁵ The Constitutional Tribunal Act (as amended) [Ustawa z dnia 1 sierpnia 1997 o Trybunale Konstytucyjnym] Dziennik Ustaw (1997) No. 102, Item 643.

²⁶ It was added during the hearing that the reference dealt only with Art. 607 § 1 Penal Procedure Code. See para. II-1 of the judgment.

European Arrest Warrant framework decision. In other words, the referring court implied that the Constitution should have been changed in order to transpose the framework decision.

EXTRADITION VERSUS SURRENDER: TWO SIDES OF THE SAME COIN?

The nature of the surrender procedure is at the heart of the decision. As said before, the ratification of the Rome Statute on the International Criminal Court led to heated discussions, which gained impetus during the legislative procedure leading to adoption of the contested legislation. The compatibility of the proposed provisions with Article 55(1) of the Constitution was addressed in numerous diverging expert opinions²⁷ as well as in an opinion of the Legislative Council (a governmental advisory body).²⁸ During the proceedings before the Constitutional Tribunal, the General Public Prosecutor as well as the Speaker of the *Sejm* presented their views. Both reached the conclusion that the contested provisions did not breach Article 55(1) of the Constitution.

The first part of the decision is devoted to a rather superfluous and superficial analysis of the legal nature of the third pillar of the European Union in general and of framework decisions in particular (paragraphs III-2.1-2.4). For instance in paragraph 2.1 the Tribunal briefly concluded that the main difference between the first pillar of the European Union on the one hand, and the second and third on the other, is the intergovernmental character of the latter, without taking into consideration developments of the Treaty of Amsterdam²⁹ and the Treaty establishing a Constitution for Europe.³⁰ The Tribunal's position on the legal nature of secondary legislation based on the third pillar was also not very clear. It rightly concluded that these acts belong to the secondary law of the European Union

²⁷ See, *inter alia*, E. Piontek, 'Opinia uzupełniająca w przedmiocie wdrożenia ENA do prawa polskiego' [Supplementary Opinion on Implementation of EUROPEAN ARREST WARRANT in Polish Law]; P. Sarnecki, 'Opinia na temat konstytucyjności projektu ustawy w sprawie nowelizacji kodeksu karnego, kodeksu postępowania karnego i kodeksu wykroczeń' [Opinion on Conformity with the Constitution of the Bill amending the Penal Code, Penal Procedure Code and Minor Offences Code]; M. Płachta, 'Opinia w sprawie projektu ustawy o zmianie Kodeksu karnego, Kodeksu postępowania karnego oraz Kodeksu wykroczeń' [Opinion on the Bill amending the Penal Code, Penal Procedure Code and Minor Offences Code]. All of the above opinions are available at the website of the Sejm (lower chamber of the Polish Parliament) at <<http://orka.sejm.gov.pl/rexdomk4.nsf/Opwsdr?OpenForm&2031>>.

²⁸ See 'Opinia o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego [europejski nakaz aresztowania]' [Opinion on the Bill amending the Penal Code and Penal Procedure Code [European Arrest Warrant]], in 42 *Przegląd Legislacyjny* (2004) p. 147.

²⁹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ* 1997 C 340/1.

³⁰ Treaty establishing a Constitution for Europe, *OJ* 2004 C 310/1.

(and not the European Community). At the same time it stated in the preceding paragraph that the technique of implementation of framework decisions is equal to the technique of implementing first pillar directives. It further presented rather contradictory and sometimes extreme opinions based on academic literature (e.g., the opinion that framework decisions are part of public international law). Again, in paragraph 2.4 the Constitutional Tribunal used a shortcut saying that the obligation to transpose the framework decisions arises from Article 9 of the Constitution, which states that Poland shall respect international law, without mentioning that the origins of the obligation lies in Article 34(2) of the European Union Treaty. It is interesting to note that the Constitutional Tribunal also refers to the principle of mutual trust, which is at the heart of the third pillar and the European Arrest Warrant framework decision.³¹

Paragraph 3 of the judgment deals with extradition and surrender procedures. After an exposé on the evolution of Polish provisions on extradition and the history of Article 55(1) of the Constitution, the questions referred by the Regional Court in Gdańsk are treated. On the basis of a literal interpretation Polish scholars argued that extradition and surrender are of a different nature, and thus Article 55(1) is not infringed. For instance E. Zielińska and P. Kruszyński argue that it is clear from the preamble of the framework decision that the differentiation between the two terms is not accidental and the terms must not be given the same meaning.³² The Constitutional Tribunal rejects this argument by simply stating that the Constitution does not mention the surrender procedure.

The Tribunal also rejects the argument put forward by the Legislative Council.³³ This Council had submitted that a clarification of the differences between the two procedures in the Penal Procedure Code suffices to exclude surrender from the scope of Article 55(1) of the Constitution.³⁴ The Constitutional Tribu-

³¹ See more S. de Groot, 'Mutual Trust in (European) Extradition Law', in Blekxtoon and Van Ballegooij (eds.), *supra* n. 8, at p. 83.

³² E. Zielińska, 'Ekstradycja a europejski nakaz aresztowania. Studium różnic' [Extradition and the European Arrest Warrant. The Study of Differences] as quoted by the Constitutional Tribunal in para. III-3.2. of the judgment; P. Kruszyński, 'Europejski Nakaz Aresztowania jako forma realizacji zasady wzajemnego wykonywania orzeczeń w ramach UE – Jaką rolę należy przypisać E.N.A. w procesie tworzenia Wspólnego Obszaru Wolności Bezpieczeństwa i Sprawiedliwości UE – opierającego się na zasadzie wzajemnego uznawania i wykonywania orzeczeń?' [European Arrest Warrant as a Form of Realisation of the Principle of Mutual Execution of Judgments in the EU – What is the Role of European Arrest Warrant in the Creation of an Area of Freedom, Security and Justice based on the Principle of Mutual Trust and Execution of Judgments?] as quoted by the Constitutional Tribunal in para. III-3.2 of the judgment.

³³ Para. III-3.3 of the judgment. It shall be noted that the opinion of the Legislative Council was not adopted unanimously.

³⁴ See *supra* n. 28 at p. 156.

nal however holds that statutory terms may not bind and define the interpretation of constitutional norms.³⁵ *A contrario*, the interpretation of the Constitution determines the interpretation of the Acts of Parliament.

The Constitutional Tribunal made a reference to the well-established principle of ‘indirect effect’, which requires interpretation of domestic law as far as possible in accordance with Community law.³⁶ When the constitutional court took its decision, the *Pupino* case was still pending at the Court of Justice. Therefore the Tribunal’s analysis could not take into account the extension by the Court of Justice of the principle of indirect effect, *mutatis mutandis*, to third pillar legislation. The Constitutional Tribunal did not exclude the possibility of extending the obligation to the third pillar act, albeit subject to limitations already set out in the existing jurisprudence of the European Court of Justice (paragraph III-3.4).

Subsequently the Tribunal analyses the differences between extradition and the surrender procedure. On the basis of various elements in the surrender procedure, among others the lack of double criminality requirement for certain offences, the exclusive involvement of judicial authorities in it and the *quasi* abolition of two key barriers to extradition (no extradition of nationals and for political offence), the Tribunal concludes that the surrender procedure differs not only formally but also substantially from extradition. However, the differences have been defined in the statutory provisions and may not impose a particular interpretation of Article 55(1) of the Constitution. The latter does not give the differences. Therefore extradition and surrender can only be considered as two separate procedures if they differ by nature. This however is not the case: both involve the transfer of a person to another country for the purpose of criminal prosecution or the execution of a sentence. In the words of the Tribunal:

since the essence (core) of extradition lies in the transfer of a prosecuted, or sentenced, person for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them, the surrendering of a person prosecuted on the basis of an EAW for the purpose of conducting a criminal prosecution against them or executing an imposed custodial sentence or another

³⁵ ‘Constitutional notions have an autonomous nature in relation to binding acts of lower rank. The meaning of terms contained in ordinary statutes may not determine the interpretation of constitutional provisions; otherwise the guarantees contained in these provisions would lose any sense. On the contrary, it is constitutional norms that dictate the manner and direction of interpreting statutory provisions. The starting point for the interpretation of constitutional notions is the understanding of terms used in the text of the Constitution, shaped historically and defined within legal doctrine’ (Para. 1, summary of the judgment).

³⁶ See, *inter alia*, ECJ Case 14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR [1984] 1891. For an academic appraisal see, *inter alia*, S. Drake, ‘Twenty years after Von Colson: the impact of “indirect effect” on the protection of the individual’s Community rights’, 30 *ELRev.* (2005) p. 329-348.

measure consisting in the deprivation of liberty, on the territory of another Member State, must be viewed as a form of extradition within the meaning of Article 55(1) of the Constitution. (Paragraph 3, summary of the judgment)

The fact that the Constitution preceded the adoption of the European Arrest Warrant provisions does not exclude the application of Article 55(1) Constitution *pro futuro* – to new types of similar procedures subsequently established (paragraph III-3.6).

The Legislative Council and the General Public Prosecutor had argued that even if the surrender procedure would fall under Article 55(1) of the Constitution, the infringement could be justified on account of Article 31.3 of the Constitution. This Article reads:

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

The essence of freedoms and rights provided for in Article 55(1) of the Constitution is the right to protection from the Polish state and the right to a fair trial. The Legislative Council argued that in view of the (procedural) rights given in the European Arrest Warrant framework decision, the essence of constitutionally protected freedoms and rights is not affected. The Constitutional Tribunal however also rejects these submissions reasoning that the extradition ban is without exception (paragraph III-4.2). With the same reasoning it rejects arguments based on Union citizenship and the non-applicability of Article 55(1) to extradition and surrender to Union member states (paragraph III-4.3).

Article 607t Penal Procedure Code, allowing the surrender of Polish citizens to the member states of the European Union, is therefore contrary to Article 55(1) of the Constitution.

The legal effect of the Tribunal's judgments declaring provisions of Polish law contrary to the Constitution is their annulment. In principle, unconstitutional provisions lose their force on the date of publication of the judgment in the State Gazette (in most of the cases this is *Dziennik Ustaw*).³⁷ However, exceptionally the Constitutional Tribunal has the power to postpone the date for repeal; in case of acts of parliament the transitional period may not be longer than 18 months (Article 190(3) Constitution). The Constitutional Tribunal took into account

³⁷ Only the verdict is published in the State Gazette, complete texts of judgments are subsequently published in the annual Constitutional Tribunal Reports.

various legal factors – *inter alia*, the protection of individuals' rights, obligations to respect international law and the complexity and potential duration of the constitutional revision procedure – before deciding to delay the annulment of the contested provision by the maximum period available, namely 18 months (paragraph III-5.1-5.9). In consequence, Article 607t of the Penal Procedure Code is fully applicable until the expiry of the transitional period.³⁸

CONSEQUENCES

It is clear that the judgment has short- and long-term legal and political consequences. First of all, Polish courts, including the Regional Court in Gdańsk which made the reference, have to apply Article 607t of the Penal Procedure Code during the transitional period of 18 months following the publication of the judgment; they may not apply Article 55(1) of the Constitution to refuse the surrender of Polish citizens (paragraph III-5.4). However, if after 18 months Article 55(1) has not been changed, the courts will have no other choice but to refuse the surrender of Polish citizens. It should be noticed that as it stands, the well-established principle of supremacy of Community law is not applicable here, since the framework decision was adopted within the third pillar of the European Union. Therefore the *modus operandi* established by the European Court of Justice in the *Simmenthal* case is not applicable.³⁹ However if the Treaty establishing a Constitution for Europe enters into force, its Article I-6 extends the principle of supremacy to all Union law.⁴⁰ This could lead to an interesting constitutional stalemate. It is also noted that neither the Constitutional Tribunal nor other Polish courts at present have the competence to make preliminary references to the European Court of Justice under Article 35 of the European Union Treaty. The bill aimed at giving them this competence is pending at the Polish parliament and will not be in force within the next months.

When it comes to action at the legislative level the options are more than limited. The principle of loyal co-operation enshrined in Article 10 of the Treaty establishing the European Community is also applicable in the third pillar, as

³⁸ It is not the first time that the Constitutional Tribunal has used the option provided for in Art. 190(3) Constitution. In fact there is a long saga of judgments in which the vital legal problem of delaying the annulment of the unconstitutional measures has been addressed. Some of the judgments raised numerous concerns and led also to judgments of the Supreme Court.

³⁹ ECJ, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECR [1978] p. 644; Case C-416/00 *Tommaso Morellato v. Comune di Padova*, ECR [2003] I-9343. See, *inter alia*, K. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press 2001).

⁴⁰ 'The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States'.

spelled out by the European Court in the *Pupino* case.⁴¹ Together with Article 9 of the Constitution, which declares that 'Poland shall respect international law binding upon it', this leaves no doubt that action is needed in order to secure proper and complete transposition of the framework decision. The only available option is revision of Article 55(1) of the Constitution. This is what the Constitutional Tribunal suggests when it argues that 'Amendment of the Constitution has been used for a long time as an instrument of securing the effectiveness of EU law in the legal orders of the Member States' (paragraph III-7.2). The remark is followed by numerous examples of revision of the Spanish, French and German constitutions. Surprisingly, the Constitutional Tribunal does not refer to constitutional revisions in the other new member states, which are clearly aimed at accommodating Union law in the domestic legal systems, and of which some were clearly influenced by the framework decision on the European Arrest Warrant.⁴²

However, bearing this in mind one has to be aware of the Polish political context with relatively strong anti-European parties in the current (and potentially the next) parliament.⁴³ This is one of the reasons why the Constitution has not been changed before accession, although numerous of its provisions are probably contrary to Union law.⁴⁴ At this stage it is too early to predict whether the judgment will give impetus for a broad revision of the Constitution, or only to a modification of Article 55(1). Whatever the option chosen, it is possible that Poland returns to the original wording of Article 55(1) during the drafting of the Constitution, which allowed extradition of nationals when this was required by international agreement. The revision procedure in Article 235 Constitution involves both houses of the Parliament. Since Article 55(1) is placed in Chapter II of the Constitution, a nationwide referendum on the revision may be requested by

⁴¹ As the Tribunal states in para. 42 of the judgment 'It would be difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion'.

⁴² Latvia may serve as an excellent example. See A. Endzins, 'Development of the Constitutional Court Jurisdiction in the Context of EU Membership', Paper presented at the Congress 'The Enlarged EU: Evaluation of the First Year', University of Regensburg, 1-2 July 2005, on file with the author.

⁴³ The parliamentary elections are scheduled for Sept. 2005. For a political account of Eurosceptical parties in Poland see, *inter alia*, A. Szczerbiak, 'After The Election, Nearing The Endgame: The Polish Euro-Debate In The Run Up To The 2003 EU Accession Referendum', *Sussex European Institute Working Paper* No. 53.

⁴⁴ See K. Wójtowicz, 'Proposed Changes in the Polish Constitution of 1997 ahead of Poland's Accession to the European Union', 25 *POLYBIL* (2001) p. 27-44; A. Albi, "'Europe" Articles in the Constitutions of Central and Eastern European Countries', 42 *CMLRev.* (2005) p. 399, at p. 408.

one fifth of the members of the *Sejm* or of the Senate (the upper chamber of the Polish Parliament), or by the President of the Republic.

Finally, it is worth considering the effects of this judgment from a Union perspective.⁴⁵ Until the expiry of the 18 months transitional period Poland fulfils its obligations arising from the framework decision. The hypothetical failure of the constitutional revision combined with annulment of Article 607t of the Penal Procedure Code will definitely put Poland in a difficult position. As long as the Treaty establishing a Constitution for Europe is not in force, the European Commission has no power to initiate an infraction procedure against member states under the third pillar. However, the hypothetical situation might lead to litigation between other member states and Poland on the base of Article 35(7) of the Union Treaty.⁴⁶ Moreover, as is explicitly acknowledged by the Constitutional Tribunal in its judgment, it may lead to application of the safeguard clause based on Article 39 of the Act on Conditions of Accession.⁴⁷ In case of shortcomings or risks of them in the transposition or implementation of framework decisions or any other instruments dealing with mutual recognition, the Commission may take various measures, including suspension of application of the relevant parts of European Union law to the new member state. However, its application is unlikely mainly due to political reasons. Also, the expiry of the 18 months transitional period will take place in the last six months of the three-year period during which the safeguard clause may be operational. This will leave the European Commission with a very limited time to initiate and complete the procedure. In case the constitutional revision of Article 55(1) fails, there is always another option for Poland. It may always try to initiate legislation at Union level amending the framework decision on the European Arrest Warrant.⁴⁸

CONCLUSIONS

The discussed judgment of the Polish Constitutional Tribunal inspires various reactions and comments. Definitely it cannot be considered in black and white terms. Although the decision is based on the Polish legal context and the Constitution in particular, it is difficult to resist the impression that the Tribunal's posi-

⁴⁵ Interestingly enough, these issues are partly discussed in the judgment of the Constitutional Tribunal (see para. III-5.8).

⁴⁶ The ECJ has jurisdiction 'to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Art. 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members'.

⁴⁷ See K. Inglis, *supra* n.16, at p. 103-106.

⁴⁸ Art. 34 EU Treaty. For more on legislative procedure in the third pillar of the European Union, see E. Denza, *Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press 2002) p. 262-264.

tion is influenced by the jurisprudence of the constitutional courts of some of the old member states and Germany in particular.

Looking at the Tribunal's analysis of the extradition and surrender procedures, one may easily detect the difficulties in determining the legal character of the latter. The Tribunal gives precedence to substantive elements above procedural and formal ones. The question is whether taking on board these differentiating factors really excludes a pro-European interpretation of Article 55(1) of the Constitution? Would the answer to the question be different if the judgment of the Court of Justice in the *Pupino* case had been delivered earlier? Taking into account the limitations to indirect effect and the argument presented by the Tribunal the answer to both questions seems to be negative.

The judgment is certainly not anti-European and undermining the rationale for European Union law. To the contrary, many of the Tribunal's arguments show clear support for European integration and the creation of an Area for Freedom, Security and Justice of the judgment (paragraph III-5.8). It specifically has to be noted that the Constitutional Tribunal did not question the necessity and usefulness of the European Arrest Warrant. One of the arguments leading up to the imposition of the 18 months transitional period was to allow operation of the surrender machinery while the necessary constitutional revision is made.

The judgment also raises questions relating to the legal nature of third pillar legislation in domestic legal systems and concerning its relationship with national constitutions. Article 1-6 of the Treaty establishing a Constitution for Europe extends the principle of supremacy to all Union law. One can easily imagine the consequences of its application to the discussed case. Following the referenda fiascos in France and the Netherlands the entry into force of the Treaty however seems unlikely or at least delayed.

