SOURCES OF EXTRADITION LAW IN THE LEGAL SYSTEM OF THE EUROPEAN UNION

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INTRODUCTION

The institution of extradition is regulated primarily by international agreements at the multilateral or bilateral level and in the domestic law of each country.

Among the regulations related to extradition, nowadays bilateral extradition agreements dominate, which ration the terms and conditions of the mutual transfer of persons suspected or convicted, in order to conduct criminal proceedings or the execution of the sentence. On the basis of the bilateral agreement, extradition between countries is executed, assuming that neither of the countries is simultaneously a party in a multilateral extradition agreement. Bilateral agreements can also modify, respecting the parties of this agreement, the content in the legislation of a multilateral agreement.

The basis for extradition could also be reciprocity, involving the release of alleged criminals or persons repealing from execution of the penalty, if the country of the offender can expect similar conduct in the future from the country asking for extradition. As a result of the spread of the view that extradition is not a political instrument of governance, but should primarily serve the purposes of justice, reciprocity began to lose its former importance. While earlier, as a rule resulting from political reasons it was partly justified, now in a situation where extradition is an indispensable tool for international legal assistance in criminal matters, reciprocity cannot be regarded as a sine qua non for extradition, but only as a condition desirable and justified.

The source of extradition law is mainly international agreements. The regulations in domestic law are subsidiary to the contracts and are generally used when there is a lack of an appropriate international

DOI: 10.1515/wrlae-2018-0059

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3 B Wierzbicki (n 2)101.
agreement. The principle of mutuality is, however, not usually regarded as an independent legal basis for extradition, but as a condition whose realization requires terms of the agreement or domestic law.

The European Union plays an important role in the improvement and unification of the sources of extradition law. Within its framework, legal instruments were developed and adopted which completely regulate the institution of extradition between Member States and between the EU and third countries.

I. THE INSTITUTION OF EXTRADITION WITHIN THE EUROPEAN UNION LAW

The actions involving the formation and unification of the sources of extradition law and the modernization of the institution of extradition, were taken primarily in the field of the third pillar, covering police and judicial cooperation in criminal matters. The beginning of this cooperation aimed at reducing and fighting against terrorism and organized crime and was adopted in 1975 by Home Affairs Ministers of Member States of European Community, at an informal meeting in Rome, which led to the appointment of the TREVI (Terrorisme, Radicalisme, Extremisme, Violence, Internationale).

Outside the framework of the European Union, between the Benelux countries, France and the Federal Republic of Germany, on 14 June 1985 the Agreement, known as the Agreement from Schengen, was signed, regarding the gradual abolition of checks at their common borders.

Details of the arrangements of this Agreement have been implemented in the Convention signed in Schengen on 19 June 1990, introducing Agreement between the Governments of the Benelux Economic Union States, the Federal Republic of Germany and the French Republic for the gradual abolition of checks at common borders. The Convention

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6 P Durys and F Jasiński report that the Trevi group name derives from the famous Roman fountain “di Trevi”, which is situated near the place of meeting of ministers. See P Durys, F Jasiński, ‘Zwalczanie terroryzmu w ramach Unii Europejskiej’ (2000) 6 Wspólnoty Europejskie 38.
implementing the agreement was a breakthrough that initiated the phase of dynamic development of cooperation in criminal matters between the Member States of the European Communities. It is not just agreement for "the gradual abolition of checks at internal borders" but also - and perhaps primarily - the Convention on the elimination of the consequences of that control. It had to take into account the circumstances of the easier movement of criminals and the fact that citizens crossing borders without internal controls within the Schengen area will commit crimes outside their home area of jurisdiction. Therefore, it became necessary to introduce solutions to facilitate the prosecution and sentencing of such individuals.

To ensure safety, threatened by a lack of controls at the internal borders of the state - the parties agreed on various compensatory measures, which include, inter alia, cooperation in the field of qualified legal assistance and extradition.

The purpose of the regulations about mutual legal assistance in criminal matters, extradition and the rules of transferring individuals in order to fulfill criminal convictions was to supplement and facilitate the application of the following conventions:


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10 Convention entered into force on 18.04.1960, ETS No 24. Polish text of convention P Durys, F Jasiński, Walka z terroryzmem międzynarodowym. Wybór dokumentów (2001) 91 – 102; Poland has deposited its instrument of ratification on 15.06.1993: OJ 1994, no. 70, item 307. Party to the Convention are the following countries: Norway (since 18.04.1960); Sweden (since 18.04.1960); Turkey (since 18.04.1960); Greece (since 27.08.1961); Denmark (since 12.12.1962); Italy (since 4.11.1963); Ireland (since 31.07.1966); Switzerland (since 20.03.1967); Netherlands (since 15.05.1969); Austria (since 19.08.1969); Liechtenstein (since 26.01.1970); Cyprus (since 22.04.1971); Finland (since 10.08.1971); Germany (since 1.01.1977); Luxemburg (since 16.01.1977); Spain (since 15.08.1982); Iceland (since 18.09.1984); France (since 11.05.1986); Portugal (Since 25.04.1990); Great Britain (since 14.05.1991); Czech Republic (since 1.01.1993); Slovakia (since 1.01.1993); Hungary (since 11.10.1993); Bulgaria (since 15.09.1994); Croatia (since 25.04.1995); Slovenia (since 17.05.1995); Lithuania (since 18.09.1995); Malta (since 17.06.1996); Estonia (since 27.07.1997); Latvia (since 31.07.1997); Belgium (Since 27.11.1997); Romania (since 9.12.1977); Moldavia (since 31.12.1997); Ukraine (since 9.06.1998); Albania (since 17.08.1998); Macedonia (since 26.10.1999); Russia (since 9.03.2000); Andorra (since 11.01.2001); Georgia (since 13.09.2001) and Armenia (since 25.04.2002). In addition to the Member States, the Council of Europe (except for San Marino and Bosnia and Herzegovina) also parties to the Convention are Israel and South Africa. See. Explanatory Report available online: http://conventions.coe.int (access: 20.12.2015).

2. European Convention on Mutual Assistance in Criminal Matters of 20 April 1959\textsuperscript{12}, along with additional Protocol signed 1978\textsuperscript{13}, and also

3. Convention on the Transfer of Sentenced Persons of 21 of March 1983\textsuperscript{14}.

Convention implementing the agreement in Title III "Police and Security", in Chapter 4, Articles 59 to 66, regulates issues concerning extradition. It also contains decision aimed at facilitating the extradition procedures\textsuperscript{15}.

The Executive Convention extended the scope of extraditable offences to tax offences, established the principle of direct communication of central authorities (i.e.: national Ministries of Justice) and introduced the possibility of extradition of a person who is willing to be extradited without "formal extradition proceedings", the so-called simplified extradition. According to J. Garstka, the most relevant - from a practical point of view, is the execution of extradition - it also should be acknowledged to include in the structure of the extradition proceedings the Schengen Information System, by leveling the alert based on Article 95 of the Convention Implementing with the request for temporary arrest, in accordance with article 16 of the Convention of the Council of Europe. The Schengen Information System has become a permanent part of issuance procedures, allowing the effective retention of wanted persons. It should not be forgotten that so far, neither the Convention nor the Schengen Information System alone, has covered all EU countries\textsuperscript{16}.

Another step aimed at improving the sources of extradition law (so-called "fax" convention\textsuperscript{17}) was signing on 26 May 1989 in San Sebastian between Member States of the European Communities. The Convention aims at the simplification and modernization of methods of transmitting extradition requests.

The Treaty of European Union signed on 7 February 1992 in Maastricht, in articles 29 and 31 defining "issues of common interest" refers to specific actions in the field of judicial cooperation in criminal matters.

Article 31 of the Treaty, among the matters of mutual interest, lists benefits of extradition between the Member States of the European Union. In order to develop the arrangements of Articles 29 and 31 of the Treaty on

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\textsuperscript{12}OJ 1999, no 76, item 854.
\textsuperscript{13}OJ 1999, no 76.
\textsuperscript{15}On the subject of extradition cooperation of states within the Schengen acquis see Declaration of the Schengen Executive Committee on extradition from 26\textsuperscript{16} of June 1996, OJ 2000, no L 239/435.
\textsuperscript{16}Garstka (n 9) 351.
\textsuperscript{17}The agreement was concluded within the framework of European Political Cooperation (EPC – European Political Cooperation). See S Przyjemski, Prawo Współnot Europejskich a prawo polskie. Prawo karne (1997) 55.
European Union, steps have been taken towards the introduction of amendments to the extradition system.

During the informal meeting of Justice Ministers in Limelette, which took place on 27 - 28 September 1993 the agreement on the abolition of restrictions on the application of the European Convention on Extradition from the 1957\textsuperscript{18} was reached. As a result of actions taken in this direction recognizing the similarities in politics and trust in the criminal justice system between Member States of European Union the following were adopted:

1. The Convention on simplified extradition procedure, established on the basis of Article K. 3 of the Treaty on European Union signed on 30 March 1995\textsuperscript{19}, which was the first of this type of remedy adopted under the third pillar of the European Union. The basic assumptions of this Convention refer to existing solutions in extradition law of European countries, especially the French extradition law\textsuperscript{20}. It restricted the amount of information required and introduced - for Shengen regulations - simplified extradition, regulating also the issue of the possibility of disclaiming the specialty rule by the searched person. The Convention also provides for rules concerning the deadlines under which various actions within the extradition procedure may be carried out. If they fail to meet the deadlines they are not subject to any sanctions, however, they reflect the will of accelerating the extradition procedures\textsuperscript{21}. According to C. Mik, the Convention is characterized as service in relation to the European Convention on Extradition of 1957, by facilitating its application and supplementing its terms\textsuperscript{22},

2. The Convention on Extradition between the Member States of the European Union of 27 September 1996\textsuperscript{23}, established on the basis of Article K. of the Treaty on the European Union. The main objective of this Convention is to define the legal framework for extradition within the European Union\textsuperscript{24}. The Convention has broadened the scope of extraditable offences again, lowering the upper limit of the legal minimum required to recognize a crime for extradition from 12 to 6 months. But it also included within its scope means other than a custodial sentence, involving the deprivation of liberty in the

\textsuperscript{21} Garstka (n 9) 351.
\textsuperscript{24} A Gruszczak, Unia Europejska wobec przestępczości (2002) 105.
institution of a kind other than a prison. It introduced - although not in a binding way - the principle of extraditing its own citizens, leaving the possibility to derogate from giving its own citizens. The Convention established a system of periodic review and repeated the requirements of the "fax" Conventions on the transmission of applications, taking into account also the possibility of using other means of telecommunications, such as e-mail.

The Treaty of Amsterdam of 2 October 1997 set a new goal for the Union, which is "an area of freedom, security and justice," which guarantees the free movement of persons, while ensuring appropriate control measures at the external borders, to prevent and combat crime. The Treaty included the "Protocol on the inclusion of the Schengen acquis into the framework of the European Union", allowing the application of the principles established by the parties to agreements on cooperation in the field of Justice and Home Affairs. The transfer of certain matters to the first pillar and the incorporation of the Schengen acquis into the framework of the European Union resulted in leaving those in the third pillar essentially based on relating to judicial cooperation in criminal matters and police cooperation, which still relied on legal international mechanisms (Article 61e TEU). The consequence of this was to change the name of this pillar for "Cooperation between police and judicial authorities in criminal matters'. Article 29 of the Treaty on European Union states that "the Union's objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common actions among the Member States in the field of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. The main objective of this cooperation - increasing the security of citizens - is to be achieved by preventing, and fighting against, crime, especially organized crime, and in

25 J Garstka (n 9) 351 – 352.
27 Art. 29 (earlier K. 1), which states: „celm Unii jest zapewnienie obywatelowom wysokiego poziomu bezpieczenstwa w obszarze wolnosci, bezpieczenstwa i sprawiedliwosci, poprzez podejmowanie przez Polska Czlowkowskie wspólnych dzia³aœw w zakresie wspólpracy policyjnej i sadowej w sprawach karnych oraz przez zapobieganie rasizmowi i ksenofobii i zwalczanie tych zjawisk”, Dokumenty europejskie (n 26) 73.
31 Dokumenty europejskie. (n 26) 73.
particular with regard to terrorism, trafficking people and offences against children, illegal drugs, arms trafficking, bribery and fraud.

The Treaty of Amsterdam in the reformed Article K. 3 (now Article 31 TEU), in the field of judicial cooperation in criminal matters states the need to "facilitate extradition between Member States".32

On the 29th of September 2000 the Convention on Mutual Assistance in Criminal Matters between Member States of European Union was passed.33 Additionally on 16 October 2001 an Additional Protocol was adopted to this Convention34.

The Nice Treaty from the 26th of February 200135, confirmed the aim of the EU, which is "(...) to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police and judicial cooperation in criminal matters and by preventing and fighting against racism and xenophobia."36 This objective requires the establishment of close cooperation between states, their judicial and police services, which will serve to prevent and combat all forms of crime. The instrument in the struggle to achieve this objective was supposed to be legal acts adopted under the third pillar of the Union, and in particular the conventions and framework decisions.37

By virtue of Article 31, paragraph 2 of the Treaty, the European Council is obliged, inter alia, to facilitate close cooperation between Eurojust and the European Judicial Network, in particular with the aim to facilitate the execution of requests for legal assistance and extradition.

Due to the fact that existing EU legislation on extradition failed to meet the hopes pinned on them, and that there was a real threat from rampant terrorism, the European Union saw the need to accelerate the legislative work on the issue of extradition.38

Representatives of Heads of State and Government, President of the Commission, the European Parliament and the High Representative for Common Foreign and Security Policy, at the extraordinary European Council in Brussels on 12 September 2001, called for the development of a European arrest warrant and extradition in accordance with the Tampere

32 Cf Dokumenty europejskie (n 26) 75.
33 OJ 2000 C 197/1. The Convention expands the circle of proceedings in which legal aid should be granted. The regulation in Art. 3, par. 2 requires legal assistance in proceedings against a legal person - both in proceedings conducted by administrative authorities, described in the same manner as in Art. 49 of the Convention implementing the Schengen Agreement. (Article 49 specifies the types of proceedings in which - in addition to criminal proceedings - mutual assistance will be provided).
34 OJ 2001 C 326/2.
35 OJ 2004, no 90, item 864, appendix 2.
36 Cf art. 29 of the Treaty.
Conclusions\(^{39}\). The United States effectively and strongly pushed for EU member states to adopt, as soon as possible, a legal basis for the European arrest warrant, in the light of the horizontal approach to fighting international terrorism\(^{40}\).

The Draft Framework Decision on the European arrest warrant was adopted by the Commission on 19th September 2001, and on September 21, 2001 at the extraordinary European Council in Brussels a detailed plan of action confirming an agreement on the European arrest warrant\(^{41}\).

Work on the Framework Decision lasted only 3 months, and its current shape differs from the original version of the decision proposed by the Commission on 19 September 2001. This project contained a number of definitions of items that were omitted in the final version of the decision\(^{42}\).

The result of these works is the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of 13 June 2002\(^{43}\). It is the first instrument of the European Union, implementing the principle of mutual recognition\(^{44}\).

The preamble to the Framework Decision on the EAW determines the abolition of formal extradition proceedings in relation to people trying to evade justice after final conviction and accelerates extradition procedures in reference to people suspected of committing a crime and is intended to "avoid the complexity and risk of delays in the current extradition procedures"\(^{45}\).

The Framework Decision on the EAW, upon its entry into force\(^{46}\) is supposed to replace all the Acts, existing up to now, underlying the extradition rules between Member States of European Union, namely:

- European Convention on Extradition from 1957


\(^{42}\) More information on the genesis of the Framework Decision Jasiński, ‘Europejski Nakaz Aresztowania’ (n 40) 63 – 64.


\(^{45}\) Jasiński, ‘Europejski Nakaz Aresztowania’ (n 40) 64.

\(^{46}\) The decision came into force under Art. 35 at the time of its publication, while under the premise in Art. 32, it was to take effect from 1.01.2004 Poland implemented the Framework Decision Act of 18. 03. 2004 Amending the Act of the Penal Code - Code of Criminal Procedure and the Code of offenses; OJ 2004, no 69, item 626.
- European Convention on the Suppression of Terrorism from 1977 (in the part relating to extradition)
- The European Communities Convention on the simplification and modernization of methods of transmitting extradition requests from 1989
- Convention implementing the Schengen Agreement signed in 1990 (Title III, Chapter IV)
- The Convention on simplified extradition procedure between Member States of European Union of 1995
- The Convention on extradition between Member States of the European Union of 1996

Regulation included in article 31, paragraph 1 of the decision to replace the existing extradition conventions applicable in relations between Member States does not mean, of course, that with the date of entry into force of the decision they lose their legal force. According to paragraph 2, Member States may continue to apply bilateral or multilateral agreements "(...) to the extent of broader and deeper treatment of orders of this Framework Decision and, in the longer term serving to simplify and facilitate the procedures for surrender individuals subjected to European arrest warrant (...) ".

A comparative analysis of the regulations contained in the indicated agreements on extradition and the Framework Decision on the EAW, however, leads to the conclusion that contractual arrangements are not able to expand and deepen regulatory framework decision.

At the same time, June 13, 2002, a framework decision of the Council of the European Union on fighting terrorism was undertaken, which obliges Member States to establish, under its domestic law, standards that will enable the extradition of perpetrators of terrorist acts.

On June 28, 2003, in accordance with the mandate of the Council of 6 June 2003, the Treaty on Extradition and Mutual Assistance in Criminal Matters between the European Union and the United States was signed. The Treaty aims to strengthen cooperation between the parties in relation to extradition relations between Member States of European Union and the United States. The regulations of this Treaty modify the regulations

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49OJ 2002 L 164/3.
contained in bilateral agreements on extradition applicable to relations with the United States. The Treaty also included regulations with regard to the concept of extraditable offences, rules for the transfer and authentication of documents, temporary extradition, multiple requests for extradition, transit rules and the death penalty. The Parties also agreed to make a joint review on the implementation of the Treaty, not later than five years from the date of its entry into force.

Council Decision 2009/933 / CFSP dated 30 November 2009 on the extension, on behalf of the European Union, the territorial scope of the Agreement on extradition between the European Union and the United States of America, increased the territorial scope of the said contract to the Dutch Antilles and Aruba.

On 28 June 2006 the Agreement was concluded between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. The model simplifies procedures for issuing, adopted in the agreement and broadly corresponds to the European arrest warrant, although to some extent forms of cooperation are not as advanced as in the Framework Decision on the EAW from 2002. The scope of the Agreement is narrowed compared to the European arrest warrant by introducing, with a few exceptions, the possibility of checking dual criminality, making statements about the refusal to execute the European arrest warrant because of the political nature of the crime (except for crimes of a terrorist nature), making statements about the lack of obligation of executing the order in relation to its own citizens and the ability of citizens to refuse transit through the territory of their own state. Although there are no significant differences in the content of this Agreement, to a large extent it reproduces the regulations of the Framework Decision on the European arrest warrant of 2002 thanks to which a model of extradition relations based on the European Arrest Warrant, which previously had applicable only between the Member States of the European Union can also be implemented in relations with Iceland and Norway.

Fulfillment of the regulations contained in the decision on the EAW of 2002 are regulations in the legislation of the European Union, which specify minimum standards, among others, about the rights of suspects and

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56 Cf art. 1 Decision, OJ 2009 L 325/4.

57 OJ 2006 L 292/2.

58 Cf n 57 2.

59 OJ 2006 L 292/2.
accused individuals under investigation concerning the European arrest warrant arising from the right to a fair trial.

The first act of this type is the Council Framework Decision of 26 February 2009, amending Framework Decisions 2002/584 / JHA, 2005/214 / JHA, 2006/783 / JHA, 2008/909 / JHA, 2008/947 / JHA, thereby enhancing the rights of individuals and fostering the application of the principle of mutual recognition to decisions judged in the absence of person at the trial, whose main objective is to clarify the basis for making the decision despite the absence of the person at the trial60. The decision constitutes the inadmissibility of refusal to execute a European arrest warrant issued for the purpose of executing a custodial sentence or detention order for a hearing at which the individual concerned fails to appear in person, after fulfilling described the terms of its content61.


Another such act is Directive of the European Parliament and the Council 2012/13 / EU of 22 May 2012 about the right to information in criminal proceedings64. The Directive regulates the rights of individuals subjected to a European arrest warrant for prompt and adequate instruction about their rights, under national law, implementing the EAW of 2002 in the executing Member State65.

One of the last sources containing norms of EU extradition law in terms of minimum standards under the law to a fair trial is the Directive of the European Parliament and the Council 2013/48 / EU of 22 October 2013 on the right to a lawyer in criminal proceedings and in proceedings relating to the European Arrest Warrant and on of the right to inform a third party of deprivation of liberty and the right to communicate with third parties and consular authorities during imprisonment66. It defines the scope of the right of access to a lawyer and represents the obligation to guarantee this right in a manner and time to allow the effective execution of rights. It also clarifies the right to meet and communicate with a lawyer and the right to the


62 OJ 2010 L 280/1.

63 Cf art. 1 - 3 of directive (n 62).

64 OJ 2012 L 142/1.

65 Cf art. 5 of directive (n 64). The implementation of the standards contained in the directive to the Polish domestic legal order through the power of the Minister of Justice from 11 June 2015 on determining the of the model instructions on the powers of a retained on the basis of a European Arrest Warrant, Dz. U. 2015, item 874.

66 OJ 2013 L 294/1.
presence and participation of a lawyer during interrogation by the executing judicial authority, while maintaining the confidentiality of communication between the suspects and the accused and their lawyers. Analyzed Acts clarify the standards for the decision on the EAW of 2002 thus strengthening the procedural guarantees of individuals in proceedings on the European arrest warrant and facilitate the application of the principle of mutual recognition.

CONCLUSIONS

To summarize the above discussion, it should be noted that within the European Union, a coherent system of co-ordinated regulations allowing for cooperation of the judicial authorities of each Member Country was developed. EU extradition law in the last decade was a subject to significant evolution to reflect the changes made in primary law international agreements and the Acts signed by the institutions of the European Union. The main factor affecting the intensification of the activities of the Member States of the European Union, aiming to produce a coherent and effective system to combat crime, was the lack of sufficient capacity on the side of the Council of Europe, enabling the effective elimination of the risks arising from the internationalization of crime, the cause of which, according to P. Hofmański, lies in the diversity of countries under terms of relation to democratic traditions, resulting in the lack of mutual trust. On the European continent, the extradition system in the recent years, has been based on the European Convention on Extradition of 13 December 1957, which reflected all the rules and obstacles to extradition, in their classic, traditional, but unfortunately incoherent state to the current development of social recognition. The situation was not improved by adoption of the two Additional Protocols of 15 October 1975 and of 17 March 1978. Consequently, issues related to the modernization of the institution of extradition began to be a major subject of discussion in the European Union. Independently from the Council of Europe system, within the European Union a regulatory system was designed to increase the efficiency of the fight against crime and therefore improve and enhance the effectiveness of extradition.

The primary source of extradition law within the EU legal system as an instrument comprehensively regulating the issues of extradition between

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67 Cf art. 3 – 10 (n 6).
69 R Kmiecik, A Przyborowska – Klimczak (n 54) 207 – 208.
70 P Hofmański (n 68) 6.
72 More on the subject i.e. L Brodowski (n 61) 18 - 21.
Member States is the analyzed above Framework Decision on the EAW from 2002, which is currently the most modern measure, which definitely improved cooperation between Member States of the European Union and it has been operating in all of the legal systems of the Member States. The regulations of this instrument led to the elimination of most of the barriers that impede the effective extradition cooperation. The Reports of the European Commission dated 23 February 2005, 24 January 2006 and 11 April 2011 regarding the implementation of the Framework Decision on the EAW from 2002 stated that, after overcoming initial difficulties in implementing the rules, the European arrest warrant is now widely used, and general trends that can be observed, demonstrate the effectiveness of the transfer on the basis of the warrant.

It should be stressed that law instruments developed within the European Union became a model and an impulse for action to simplify and accelerate the extradition procedure undertaken under the auspices of the Council of Europe, which resulted in the adoption, on 10 November 2010 in Strasbourg, of The Third Additional Protocol to the European Convention on Extradition and the Fourth Additional Protocol to the European Convention on Extradition on 20 September 2012 in Vienna.

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73 More on the subject see i.e. L Brodowski (n 61) 22 - 25.
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