JUDGMENT
dated 27 April 2005
File reference No P 1/05*

In the name of the Republic of Poland

The Constitutional Tribunal composed of the following bench:

Marek Safjan – as Chairman
Teresa Dębowska-Romanowska
Marian Grzybowski
Adam Jamróz
Wiesław Johann
Biruta Lewaszkiewicz-Petrykowska
Ewa Łętowska
Marek Mazurkiewicz
Andrzej Mączyński
Janusz Niemcewicz
Jerzy Stępień
Mirosław Wyrzykowski – as Rapporteur
Marian Zdyb
Bohdan Zdziennicki,

Recording Clerk: Grażyna Szałygo,

having reviewed the case, with the participation of the court submitting the legal question as well as of the Sejm [Lower House of Parliament] and of the Prosecutor General, at the hearing on 27 April 2005, concerning the legal question lodged by the Regional Court in Gdańsk, requesting to consider the conformity of:

Article 607t § 1 of the Act dated 6 June 1997 – the Code of Penal Procedure (Journal of Laws - Dz. U. No 89, Item 555 with amendments), allowing the surrender of a Polish citizen to a Member State of the European Union subject to the European Arrest Warrant, with Article 55 Paragraph 1 of the Constitution [of Poland],

has ruled as follows:

I

Article 607t § 1 of the Act dated 6 June 1997 – the Code of Penal Procedure (Journal of Laws - Dz. U. No 89, Item 555 with amendments), **within the scope allowing the surrender of a Polish citizen to a Member State of the European Union subject to the European Arrest Warrant, is incompatible with Article 55 Paragraph 1 of the Constitution of the Republic of Poland.**

II

* **OTK ZU (Jurisdiction of the Constitutional Tribunal. Official Collection) No 4/A/2005, item 42**. The Judgement was published in Journal of Laws – Dz.U. No 77, item 680, dated 4 May, 2005.

The provision of the law indicated in Section I shall have no legally binding force upon the lapse of 18 months from the date of publication [of this judgment].

REASONS FOR THE JUDGMENT:

I

1. The Regional Court in Gdańsk IV Criminal Department, by its decision dated 27 January 2005, file reference No IV Kop 23/04, has lodged the legal question with the Constitutional Tribunal concerning the conformity of Article 607t of the Act dated 6 June 1997 – the Code of Penal Procedure (Journal of Laws - Dz. U. No 89, Item 555 with amendments), allowing the surrender of a Polish citizen to a member state of the European Union, with Article 55 Paragraph 1 of the Constitution.

1.1. The legal question was formulated in connection with the case in progress filed by the District Prosecutor's Office at the Regional Court in Gdańsk concerning the issuance, subject to a European Arrest Warrant (hereafter referred to as EAW or European Warrant), of a decision concerning the surrender of Maria D. in order to enable the conduct of proceedings against her on the territory of the Kingdom of the Netherlands. According to the opinion of the Court, prior to consideration of the above indicated application, it is necessary to obtain the verdict of the Tribunal on whether the Article 607t of the Code of Penal Procedure is consistent with Article 55 Paragraph 1 of the Constitution, disallowing the extradition of any Polish citizen.

1.2. Until 1 May 2004 the Code of Penal Procedure did not contain the concept of "extradition", although Article 604 § 1 Item 1 in force at the time did not leave any room for doubt – according to the Court – that the intention of the legislator was to provide for absolute prohibition of extradition of any Polish citizen. The legal status was changed from the date of 1 May 2004; Chapter 65 of the Code of Penal Procedure was given the following title: "Extradition and transportation of indicted or convicted persons or surrender of objects upon the request of foreign states". Based on the provision of Article 602 of the Code of Penal Procedure it may be assumed that extradition consists in the surrender of an indicted or convicted person to a foreign state in order to: 1) conduct criminal proceedings; 2) serve punishment as stated in a court sentence; or 3) execute penal treatment. The same provision contains the reservation that the respective definition does not apply to regulations contained in Chapter 65b and 66a of the Code of Penal Procedure. According to the Court, however, there is doubt as to whether such reservations give sufficient grounds to decide that the above quoted chapters do not regulate the problem of extradition.

The Court raising the legal question noted thereby, that as a consequence of the transposition of the EAW to the Polish legal system, two chapters were introduced: 65a and 65b. This gives reason to consider the fact that Chapter 65a of the Code of Penal Procedure was not also excluded from the definition of extradition.

1.3. According to the opinion of the Regional Court in Gdańsk, the assumption that the legislator acts rationally is incapable of removing the doubt as to whether the distinction alone, which is applied in the Code of Penal Procedure, between the terms: extradition (Article 602 § 1), surrender (Article 602 § 2) and transfer (Article 607t), may indeed give rise to such far reaching consequences for the scope of protection of civil rights, as to waive the guarantees provided by Article 55 Paragraph 1 of the Constitution.

In order to defend the stipulation of the rationality of the legislator one ought to assume that as the changes in the Code of Penal Procedure introducing Article 607t were adopted after the entry into force of the Constitution dating from the year 1997, the intention of the legislator was to express consent to the surrender, subject to the EAW, of a Polish citizen to another member state of the EU. Yet, in the course of the work on the draft of the Constitution, a statement that it was admissible, "provided that an international treaty did not rule otherwise", was deleted. Therefore, it should be assumed that the intention of the legislator was to provide such regulation, by virtue of which any Polish citizen could enjoy the guarantee that the state assures his right to the Polish court and that in case of his conviction abroad the Polish state would not surrender him to another state for the purpose of serving a penalty of imprisonment.

1.4. According to the opinion of the Regional Court in Gdańsk, the thesis that the interpretation of the Constitution concerning conformity with it of the legal regulations introduced to the Polish legal system as a result of Poland's accession to the European Union should be done in a "friendly mode of interpretation" with regards to the provisions originating from the "Union", is a risky one. The application of such interpretation to Article 55 of the Constitution, which would lead to the narrowing of the scope of constitutional freedoms and personal rights of citizens, seems inadmissible.

The constitutional legislator vested the provisions of the Constitution referring to personal rights and liberties with particularly high ranking, as indicated by the institution of the constitutional complaint, serving the needs of their protection, regulated in Article 79 of the Constitution. Therefore, one cannot allow the situation to arise that "a wish to introduce some provision to the Polish legal order should forcibly impose such interpretation of the provisions of the Constitution, which would result in the limitation of civil rights and liberties".

1.5. The Court lodging the legal question noted that the objective of the authors of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (hereafter referred to as: the Framework Decision of 13 June 2002) was – according to the intentions expressed in the recitals 1 and 13 of that Act – to simplify the extradition procedures between the Member States of the Union. One should therefore not apply any other name of any legal act in the light of the "Union's" legal regulations, than that prevailing on the grounds of the Constitution.

1.6. The Regional Court in Gdańsk pointed at the examples of Austria, Germany and the United Kingdom as Member States of the European Union, which have regulated the issue of extradition of their own citizens in a similar manner as the provision of Article 55 Paragraph 1 of the [Polish] Constitution, and which in connection with the obligation to implement the Framework Decision have adopted or initiated the respective changes in their national legal order (also by means of amendment of the Constitution).

1.7. The problem of the relationship between the European Arrest Warrant and the constitutional prohibition of extradition of Polish citizens is a source of doubts and diverse views among representatives of academic study of constitutional and international law, as well as members of the Legislative Council advising the Chairman of the Council of Ministers. Most of them express the conviction that only the Constitutional Tribunal may ultimately resolve this issue, and as it is on such an outcome that the substance of the decision of the Regional Court in Gdańsk concerning the

surrender of M.D. to the judicial authorities of the Kingdom of Netherlands is conditional, it was necessary to lodge the respective legal question.

2. The Prosecutor General, upon the request from the Constitutional Tribunal, submitted in attachment to the letter dated 22 February 2005, the copies of legal opinions prepared as commissioned by it, by experts and representatives of academic learning on the law, concerning the Act of 18 March 2004 on the amendment of the Law – on the Criminal Code, the Law – on the Code of Penal Procedure, and the Law – on the Code of Petty Offences, within the scope related with the European Arrest Warrant. The attachments have included the opinions (quoted in the subsequent part of this Justification) of the following persons: Prof. W. Czapliński (*The problem of conformity of the Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant with the provision of Article 55 of the 1997 Constitution*), Prof. K. Działocha and Dr. M. Masternak-Kubiak (*Opinion concerning the implementation of the European Union Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*), Prof. P. Kruszyński (*The European Arrest Warrant as a form of implementation of the principle of mutual execution of sentences within the EU – What role should be attributed to the EAW within the process of development of the Common EU Space of Liberty, Security and Justice – based on the principle of mutual recognition and enforcement of judicial decisions?*), Prof. E. Piontek (*The status of the European Arrest Warrant*), Prof. W. Sokolewicz (*Legal opinion concerning the draft text – dated 24 June 2003 – of the Act amending the Law on the Criminal Code and the Law on the Code of Penal Procedure*), as well as by Prof. E. Zielińska (*Extradition versus the European Arrest Warrant. A study of differences.*).

Moreover, in a letter dated 25 March 2005, the Prosecutor General presented his own stance concerning this matter. According to his judgement, Article 607t § 1 of the Code of Penal Procedure, within the scope concerning the surrender of a Polish citizen, is consistent with Article 55 Paragraph 1 of the Constitution of the Republic of Poland, whereas the proceedings concerning the constitutionality of Article 607t § 2 of the Code of Penal Procedure should be discontinued on the grounds of Article 39 Paragraph 1 Item 1 of the Act of 1 August 1997 on the Constitutional Tribunal, due to the inadmissibility of the rendering of judgment.

2.1. According to the Prosecutor General, the doubt expressed in the legal question clearly indicates that the above question – in spite of the fact that the Regional Court covered the entire provision of Article 607t of the Code of Penal Procedure by it – essentially concerns only § 1 of the previously indicated provision and that within the scope referring to a Polish citizen. Therefore, the scope of constitutionality control should be limited to this particular subject matter. As the verdict on the case in progress before the court lodging the legal question is dependent on the answer to this particular legal query, it is inadmissible to adjudicate on the constitutionality of Article 607t § 2 of the Code of Penal Procedure (Article 193 of the Constitution) and for this reason the proceedings should be discontinued in that part.

2.2. Referring to the nature of the Framework Decision and the obligation of its enactment by the EU Member States, the Prosecutor General concluded that the ratification by Poland of the Accession Treaty implied that the legislator was unable – without violating Article 9 of the Constitution – to refuse the surrender of a Polish citizen

to the judicial authorities of other EU Member States. Therewith the necessity arose to consider anew the legal regulation adopted in Article 55 Paragraph 1 of the Constitution.

The Constitution does not define the notion of extradition, and therefore the legislator, has applied an admissible manipulation to the Article 602 § 1 of the Code of Penal Procedure. Yet, the consequence of recognition that surrender in accordance with the EAW procedure is a qualitatively different legal institution than extradition is that the prohibition of any extradition of a Polish citizen enshrined in Article 55 Paragraph 1 of the Constitution does not apply to the surrender procedure.

2.3. The Prosecutor General put forward numerous arguments, which according to his opinion were supposed to justify the constitutional admissibility of surrender of a Polish citizen on the basis of an EAW, as a new institution applicable only in relations between EU Member States, existing in parallel to extradition (which is described in Article 55 Paragraph 1 of the Constitution), which remains in force with respect to third countries. He finally indicated that:

– surrender is decided on by an independent court, whereas the grounds for extradition consist in a decision of an executive authority, which constitutes a political element;

– extradition means final surrender, under which there is total entrustment of authority over the indicted person to another state and resignation from one's own jurisdiction over such a person, whereas surrender with respect to a Polish citizen is conditional (after legally valid conclusion of penal proceedings such a citizen is sent back to the territory of the Republic of Poland, where the sentence is served);

– extradition is a form of international cooperation, consisting in mutual surrender of persons, against whom criminal proceedings are in progress, or of persons convicted by legally valid sentences to punishment by imprisonment, whereas surrender on the basis of the EAW constitutes a form of mutual recognition of judicial decisions of EU Member States;

– in principle, extradition is a treaty based institution (which implies that surrender may take place only on the grounds of a specific international agreement, and exceptionally also on the basis of reciprocity), whereas surrender takes place exclusively on the grounds of provisions of European law incorporated into the national law of a member state;

– the application in the Framework Decision of the term *"surrender"* in contrast to the term *"extradition"* should be interpreted – following the principles of interpretation of international law – as intentional and authentic differentiation between two different institutions, and not only as an insignificant linguistic feat.

2.4. The Prosecutor General found it to be justified to assess the problem in the present case in question also from the point of view stemming from Article 55 Paragraph 1 of the Constitution, considering the subjective right, consisting of the right of any Polish citizen to enjoy protection on the part of the Republic of Poland and being awarded a fair and open trial before an independent and impartial court in the democratic state ruled by the law. Following the position presented in the *Opinion of the Legislative Council concerning the draft act amending the Law – on the Criminal Code, the Law – on the Code of Penal Procedure, and the Law – on the Code of Petty Offences,* taking into account the arguments presented therein, he concluded that the surrender of a Polish citizen on the basis of the EAW to another EU member state fulfils the constitutional conditions of admissibility of establishing limitations (Article 31 Paragraph 3) and does

not infringe upon the essence of the right derived from Article 55 Paragraph 1 of the Constitution.

3. The Marshal of the Sejm [Speaker of the Lower Chamber of Parliament] also adopted a position with regards to the respective legal question, as in the letter dated 13 April 2005 he expressed the view that the Article 607t of the Code of Penal Procedure in question was in conformity with Article 55 Paragraph 1 of the Constitution.

3.1. The Marshal of the Sejm reminded of the principles of interpretation of international law specified in the 1969 Vienna Convention on Treaty Law and he found that these should be applied with respect to the third pillar laws of the EU. Therefore, referring to the recitals of the Framework Decision of 13 June 2002, he stressed that its authors' clearly expressed intention had been to create a new institution, distinct from extradition. He also noted that the above indicated Framework Decision applies the term "surrender" to relations among Member States, whereas with respect to relations with third countries it applies the traditional term of "extradition".

3.2. Article 602 § 1 of the Code of Penal Procedure provides that, subject to the provisions of Chapter 65b and 66a, extradition consists of the surrender of an indicted or convicted person, upon the request of a foreign state, for the purposes specified in § 2. This implies that the delivery from the territory of the Republic of Poland of a person indicted by the European Warrant was not regarded as extradition according to the provisions laid down in the Code of Penal Procedure, and therefore the legislator had fulfilled the suggestion expressed in the opinion of the Legislative Council to amend the Code of Penal Procedure in such manner, as to leave no doubt on the grounds of Polish law that these two institutions were distinct and separate ones.

Furthermore, according to the opinion of the Sejm, the EAW is not identical with extradition also because of the fact that – differently than the latter – it had no political nature, but only the legal procedural one, and moreover it was based on the principle of reciprocal confidence among the Member States of the EU as to their systems of justice, whereas extradition was just a phenomenon of international cooperation.

3.3. The Marshal of the Sejm underlined that improper implementation of the provisions of the Framework Decision and the introduction of the prohibition of surrender of Polish citizens could be regarded as an infringement of the obligation of the Republic of Poland to observe the international laws binding it (Article 9 of the Constitution). This is also related with the risk of the so called safeguard clause being applied to Poland, as formulated in Article 39 of the Act on the conditions of accession.

Referring to the views expressed in the case law of the Constitutional Tribunal (judgments dated 27 May 2003, reference No. K 11/03 and dated 31 May 2004, reference No. K 15/04), which decided that the interpretation of existing legislation should take into account the constitutional principle of favouring the process of European integration and cooperation among states, as well as reminding of the principle developed on the basis of Community law concerning the obligation that national lawmakers and courts should interpret national laws compatibly with European law, the Marshal of the Sejm recognised the need to apply this principle of interpretation also with respect to the scope of application of Article 55 Paragraph 1 of the Constitution.

II

1. At the hearing on 27 April 2005 the representative of the Regional Court in Gdańsk defined the legal question more precisely by stating, that as it follows from the thesis contained in the question – the object of doubts concerning conformity with Article 55 Paragraph 1 of the Constitution concerns only Paragraph 1 of Article 607t of the Code of Penal Procedure, whereas with regards to the rest of its scope he upheld the hitherto maintained position and the argumentation referred to as its justification.

Informing the Constitutional Tribunal about the hitherto existing practice of application by the Regional Court in Gdańsk of the Article 607t of the Code of Penal Procedure, he pointed out that amongst the judicial decisions issued by that court concerning the surrender of Polish citizens abroad only one such decision has become legally valid up to now (in the case of all other ones the prescribed time limit for lodging a complaint had not lapsed yet). In the case concluded with the legally binding decision, the indicted person had expressed consent to be surrendered to the judiciary authorities in Germany and to being subjected to penal liability for possible other crimes other than those indicated in the EAW. Nevertheless, owing to the fact that proceedings against that person are in progress on the territory of Poland, the legally valid decision concerning this person's surrender has not as yet been executed.

According to the view of the representative of the Regional Court in Gdańsk, the expression of consent by the indicted person to be surrendered cannot have any significance for the resolution of doubts concerning the constitutionality of Article 607t § 1 of the Code of Penal Procedure. Nevertheless, the possible elimination from the legal system of the questioned provision could lead to divergences in the adjudication practice of the courts, especially if they found that consent on the part of a Polish citizen was treated as implying the resolution of the collision with Article 55 Paragraph 1 of the Constitution.

2. The representative of the Sejm upheld the position of the Marshal of the Sejm expressed in his letter of 13 April 2005.

Responding to a question formulated by the Tribunal, he admitted that the works on the amendment of the Code of Penal Procedure were accompanied by doubts concerning the conformity of the considered proposals with respect to Article 55 Paragraph 1 of the Constitution. They were finally resolved by adopting the view that more precise definition in the legislative act of what is meant by extradition, and what is the significance of the EAW, would result in the implemented institution of surrender not infringing upon the Constitution.

According to the opinion of the representative of the Sejm, the legal consequences of a judgment of the Constitutional Tribunal hypothetically determining the incompatibility with the Constitution of the controlled norm would consist of the impossibility for Polish citizens to be surrendered subject to the EAW, whereas parliament would have to adapt the law to Article 55 Paragraph 1 of the Constitution.

3. In spite of the fact that the representative of the Regional Court in Gdańsk specified the legal question more precisely, the representative of the Prosecutor General fully upheld the view contained in his letter, and also within the scope of the discontinuation request contained within it.

When discussing the as yet existing practice of application of the provision of the Code of Penal Procedure subject to control in the present case, the representative of the Prosecutor General pointed out that since 14 April 2005 Polish courts have adopted decisions concerning the surrender to foreign judicial bodies of 12 Polish citizens (in 9

cases the respective decisions had been executed, in 3 cases they remain suspended). According to the same procedure, other states have surrendered to Poland one person having both Polish and German citizenship.

The representative of the Prosecutor General confirmed that the doubts concerning the constitutionality of the amendment of the Code of Penal Procedure had been considered both in the Sejm, and at earlier stages of legislative work. The legislator, however, had not availed himself of any other solutions (as for example various kinds of adaptation periods), in recognition of the fact that procedure and mode of implementation of the Framework Decision proposed by the Government was contained within the currently binding legal order.

When considering the consequences of potential postponement of the deadline by which Article 607t § 1 of the Code of Penal Procedure would lose its binding force, the representative of the Prosecutor General expressed the opinion that until the date determined in the judgment, the respective unconstitutional provision would continue to be in force and ought to be applied by the courts.

4. All participants in the proceedings assessed positively the institution of surrender on the basis of the EAW, recognising that it is an adequate instrument at the present stage of development of social relations and the related criminality (especially organised and cross-border crime), simultaneously assuring the proper and effective enforcement of justice and guaranteeing a high standard of protection of rights and freedoms for the individual in the course of court proceedings.

5. The hearing was also attended by representatives of the Minister of Foreign Affairs. They reminded of the essence of the Framework Decision in the system of sources of European Union law and the consequences of possible desistance from its enactment on the part of Member States of the EU. They pointed out that in order to avoid negative consequences resulting from a possible infringement of the obligation to correctly implement the Framework Decision of 13 June 2002, Poland (according to the law of treaties and European Union law) could possibly: 1) apply for the suspension of application with respect to it of the aforementioned Framework Decision, or 2) step forward with the initiative for a change of the same Framework Decision, but in both cases the unanimous consent of all the other Member States of the European Union would be required.

III

The Constitutional Tribunal took the following elements into consideration:

1. The assessment of the justification of the claim presented in the legal question requires the prior presentation of the regulations contained in the Code of Penal Procedure, which concern the surrender of an indicted person, who is a Polish citizen, on the basis of a European Arrest Warrant, including above all the provision subject to control in connection with the present case.

1.1. As a result of the amendment of the Code of Penal Procedure introduced by the Act of 18 March 2004 on the amendment of the Law – on the Criminal Code, the Law – on the Code of Penal Procedure and the Law – on the Code of Petty Offences (Journal of Laws - Dz. U. No 69, Item 626), the objective of which was to enact the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest

Warrant and the surrender procedures between Member States (discussed further hereafter), the concept was adopted of introducing into the Code two new chapters: Chapter 65a, regulating the situations, in which the EAW is being issued by Polish courts, and Chapter 65b, regulating the situations, in which EU Member States address an EAW to Poland. At the same time the definition of extradition was introduced into the Code of Penal Procedure, indicating that in the Polish legal system extradition was a different legal institution than the surrender of a person on the basis of an EAW (Article 602 of the Code of Penal Procedure).

1.2. The object of the proceedings before the Regional Court in Gdańsk (initiated by the application filed by the District Prosecution Office) consists of the surrender to an EU member state (the Kingdom of Netherlands) of a Polish citizen indicted by the European Warrant, in order to enable the conduct of criminal proceedings against her. Both the *petitum* and the justification of the legal question indicate unequivocally that the issue giving rise to doubts on the part of the court concerning conformity with Article 55 Paragraph 1 of the Constitution consists in admissibility of surrender of a Polish citizen by means of such procedure. Nevertheless, the provision indicated as the object of control in *petitum* of the legal question consisted originally of the entire Article 607t of the Code of Penal Procedure, which in its § 1 establishes an additional (facultative) condition, the fulfilment of which may be set out by a Polish court as the prerequisite for the surrender of a person being a Polish citizen, whereas in § 2 it lays down the consequences of conviction of such a person in the state where the EAW was issued.

Analysis of the scope of control formulated in the legal question leads to the conclusion, however, that the normative content challenged by the court is contained only in § 1 Article 607t of the Code of Penal Procedure. Also the more precise elaboration of the legal question done at the hearing by the representative of the Regional Court in Gdańsk decides the fact that the object of the review in the present case consists of § 1 of Article 607t of the Code of Penal Procedure within the scope allowing the surrender of a Polish citizen to a member state of the European Union pursuant to the European Arrest Warrant.

1.3. In some expert opinions and academic studies doubts are being expressed as to conformity with Article 55 of the Constitution of the institution of surrender on the basis of the EAW concerning not only a Polish citizen, but also of a person suspected of having committed a criminal act without the use of violence for political motives. Nevertheless, the principle expressed in Article 66 of the Act of 1 August 1997 on the Constitutional Tribunal binding the Constitutional Tribunal by the limits of the legal question (the scope of which is determined, in turn, by the subject matter of the case considered by the court) results in consequence that the above indicated issue cannot be the object of the ruling pronounced in the present case.

2. The regulation challenged through the legal question was introduced into the Code of Penal Procedure by virtue of the above mentioned Act of 18 March 2004 amending the Law – on the Criminal Code, the Law – on the Code of Penal Procedure and the Law – on the Code of Petty Offences. The Code of Penal Procedure was amended in order to implement into the national legal order the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. This circumstance needs to be discussed more broadly, as it is of essential significance both for the comprehension of the intentions of the Polish legislator, stemming from the European Union law, of the

limitations to which the legislator was subject, as well as for the subsequent assessment of the consequences of establishment of the unconstitutional nature of the implementing law.

2.1. Framework Decisions constitute a particular legal instrument of the third pillar, introduced into EU law by the Amsterdam Treaty. Framework Decisions correspond conceptually and in terms of structure to first pillar directives. According to Article 34 Paragraph 2 letter b of the Treaty Establishing the European Union (EU TREATY), Framework Decisions are adopted in order to enhance the convergence of legislative and executive provisions, bind the Member States with respect to the result, which is intended to be achieved, but they still leave the choice of forms and instruments to the discretion of the national authorities. In contrast to directives, however, they cannot generate any immediate effect, even if their provisions are precise and unconditional. Framework Decisions do not grant any rights nor do they impose any obligations upon individuals in the Member States. Their enactment in national law should be governed by principles analogous to the principles of transposition of directives (concerning this subject matter, see: *Zapewnienie skuteczności prawu Unii Europejskiej w prawie polskim. Wytyczne polityki legislacyjnej i techniki prawodawczej [Assurance of effectiveness of EU law in Polish law. Guidelines for legislative policy and lawmaking technique]*, UKIE [Office of the Committee for European Integration], Warsaw 2003, pp. 32-33).

Acts issued under the third pillar of the EU (similarly as under the second pillar) may be classified as pertaining to derivative EU law (rather than Community law). Differences in relation to acts of the first pillar result from the different features of the particular pillars of the Union: whereas the first pillar is based on the so called Community method, assuming the existence of competencies of EC institutions as pertaining to an international organisation, the second and third pillars are based on intergovernmental cooperation amongst the Member States. The views are expressed that in the face of the lack of international legal personality of the EU, the acts of its institutions (the European Council or the EU Council within the scope of the second and third pillars) ought to be attributed not to the EU as such, but to the states, the representatives of which are included in the composition of the above indicated institutions. According to such an approach, the law of the second and third pillar constitutes international public law, although it features certain particularities owing to the significant degree of integration of the states concerned, as implied by the EU TREATY. But still, also different views are expressed, according to which, in spite of the lack of clearly attributed legal personality of the EU, it does possess its own competencies, realised through its institutions, which is more clear after the changes introduced to the EU TREATY by the Amsterdam Treaty (S. Biernat, *Źródła prawa Unii Europejskiej /Sources of the European Union law/* [in:] *Prawo Unii Europejskiej /European Union Law/*, ed. by: J. Barcz, Warsaw 2004, p. 222).

2.2. The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States is set in the specific realities of the present stage of development of social, political and legal relations within the EU. A negative consequence of the freedom of movement of persons and of the absence of controls on the internal borders consists also in the increase of incidence of criminality, which has given rise to the need for development of more effective forms of cooperation addressing the requirements of combating it. The Framework Decision of 13 June 2002, therefore, was created as an expression of the will

of the Member States to introduce a new institution into legal relations, which would replace extradition (which procedure often causes lengthiness of proceedings), whereby that new institution is based on the well known principle of reciprocal recognition of judicial decisions (as noted in Recitals 5 and 6 of the Framework Decision) as well as on mutual confidence among the Member States as far as the guarantees of respect for human rights are concerned. This is why the refusal to execute (suspend execution) the EAW is permissible only in the case when the European Council finds under the procedure of Articles 6 and 7 EU TREATY that the respective member state seriously and persistently infringes human rights (recital 10 of the Framework Decision). Moreover, pursuant to Recital 13 of the Framework Decision, no one may be expelled or extradited to a state, where serious risk exists of such a person becoming exposed to the application of: capital punishment, torture or other inhuman or degrading sanctions.

Pursuant to the provision of Article 34 Paragraph 1 of the Framework Decision of 13 June 2002, the Member States have been required to take up the necessary adaptation measures assuring the implementation of the EAW into national law, by 31 December 2003 at the latest.

2.3. In the negotiating position during the negotiations of membership of the European Union, the Republic of Poland did not request any transition periods or derogations concerning the area of justice and home affairs, so therefore within the scope of relations, in which the EAW is established (see: Council of Ministers, Report on the results of EU membership negotiations of the Republic of Poland *[Raport na temat rezultatów negocjacji o członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej]*, Warsaw, December 2002, Item 24, presenting the results of negotiations concerning the area of justice and home affairs, pp. 37-38). As a result of this, once membership of the European Union was obtained, Poland, by adopting the *acquis*, was automatically bound by primary and derivative law of the Union, including the obligation to enact the Framework Decision of 13 June 2002. The respective legislative measures were undertaken in advance as appropriate in order to allow the entry into force by 1 May 2004 of the amended provisions of the Code of Penal Procedure implementing the institution of the European Warrant. Legislative initiative in this regard was taken by the Council of Ministers, which, when preparing the draft act, consulted the opinion of the Legislative Council as to conformity with the Constitution of the surrender of Polish citizens indicted on the basis of the EAW to other Member States. The position of the Council was not unanimous, but most of its members accepted the view that the institution of surrender could be regarded as admissible in the Polish constitutional order. Such a conclusion was approved by the Council of Ministers (see: Justification of the government proposal of the draft act amending the Law – on the Criminal Code, the Law – on the Code of Penal Procedure, the Law – on the Code of Petty Offences, publication No 2031, pp. 35-45), and subsequently – in the course of legislative procedure – the same was also done by the parliamentary Legislative Committee (see: Opinion No 230 of the Legislative Committee adopted at the meeting on 10 December 2003 *[Opinia nr 230 Komisji Ustawodawczej uchwalona na posiedzeniu 10 grudnia 2003]*.).

2.4. The obligation to implement the Framework Decisions is a constitutional requirement stemming from Article 9 of the Constitution, but its enactment does not assure automatically and in every case the material conformity of the provisions of derivative EU law and of legislative acts implementing them to the national law with the norms of the Constitution. The basic function of the Constitutional Tribunal in the political system consists of reviewing the conformity of normative acts with the

Constitution, and the same task applies also to situations, where the claim of unconstitutionality concerns that part of the scope regulated by a legislative act, which serves the purposes of implementation of EU law.

3. According to Article 55 Paragraph 1 of the Constitution, indicated in the legal question as the reference model for the purposes of control: "Extradition of a Polish citizen is prohibited". The issue on which the resolution of the present case is dependent, therefore, consists of the determination of the meaning and possibly of the limits of that constitutional prohibition, as well as the answer to the question, whether the surrender of a Polish citizen indicted on the grounds of a European Arrest Warrant to a member state of the European Union is a form of extradition.

The views presented in this regard by representatives of scientific study are neither uniform nor unequivocal. Even in the textbook by distinguished experts knowledgeable on the European law, having the ambitions to unify the standard of teaching of EU law as an academic subject (*Prawo Unii Europejskiej [European Union Law]*, ed. by J. Barcz, Warsaw 2004), where doubts are voiced as to the conformity of the EAW with Article 55 Paragraph 1 of the Constitution (p. 154), the characteristics of the institution of surrender on the basis of the European Arrest Warrant, is situated in a sub-paragraph entitled "Extradition" (pp. 1135-1136).

3.1. Before the entry into force of the Constitution of 1997, the institution of extradition did not have the rank of pertaining to the constitutional order. This concept was also absent in legislation. It appeared incidentally in the regulation issued by the Minister of Internal Affairs dated 30 July 1938 in agreement with the Minister of the State Treasury, Foreign Affairs and Military Matters concerning the control of the movement of persons crossing the State borders (Journal of Laws - Dz. U. No 65, Item 489), and subsequently in the regulation issued by the Minister of Justice dated 11 April 1992 – Rules of internal exercise of functions of the general organisational units of the Prosecutor's Office (Journal of Laws - Dz. U. No 38, Item 163). Traditionally, in the Polish legal language the term "extradition" used to be replaced by the word "surrender". The same was the case in the Code of Penal Procedure dating from 19 April 1969 and 6 June 1997 (until the time when it was amended by the act implementing the Framework Decision of 13 June 2002). This is why it should be assumed that when the constitutional lawmaker applied the term "extradition" he regarded it as being identical with the statutory term "surrender", which is the term describing the legally defined institution, consisting in the surrender of an indicted person at the request of a foreign state in order to enable the conduct of criminal proceedings against such a person or such person's serving punishment stated in a sentence. The use by the constitutional lawmaker of the already existing term "surrender" should not be interpreted as referral to a procedure specifically defined in the pre-constitutional Code of Penal Procedure and developed in the practice of operation of state organs, but rather in terms of the sense (substance) of that institution.

According to the provisions of the Code of Penal Procedure, which were in force before the entry into force of the Constitution of 1997, it was possible to refuse the extradition of Polish citizens (in keeping with the earlier comments referred to as "surrender" at the time), provided that international agreements, to which Poland was a party did not rule otherwise. By the provision of Article 55 Paragraph 1 of the Constitution, the prohibition of extradition of Polish citizens was elevated to the rank of a constitutional norm and was formulated without allowing for any derogations. Although in the course of the works of the Constitutional Committee of the National

Assembly it was considered whether not to introduce an exception to this prohibition (as proposed by the Standing Expert Team) by adding the reservation reading "unless an international treaty provides otherwise". Finally, however, this proposal was rejected both by the Committee and by the National Assembly, where the above indicated proposal was voted on as a motion lodged by the minority (see: Bulletin of the Constitutional Committee of the National Assembly *[Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego]* No XV, pp. 123-124 and No XVI, pp. 26-27). It should also be remembered that in the course of the debates at the Constitutional Committee of the National Assembly, as a justification for the need to grant the discussed prohibition a full and unconditional capacity, the view was expressed that extradition of fellow citizens would constitute a "most far reaching limitation of state sovereignty".

When introducing to the Constitution of 1997 the institution of extradition and stating that it could not apply to Polish citizens, the constitutional lawmaker – even as he foresaw the future EU membership of Poland – could not take into account any provisions referring to the European Arrest Warrant. Although already at the time of the work on the new constitution of Poland, work was under way within the EU Council on the drafting of conventions intended to lead to the simplification of extradition procedures between the Member States (more on this subject, see: C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki [European Community law. Issues in theory and practice]*, Warsaw 2000, pp. 387-392), but nevertheless, only the Framework Decision of 13 June 2002 created the obligation for the EU Member States to surrender their own citizens indicted under the EAW.

3.2. One of the arguments pointed out by the representatives of academic research, intended to call for the recognition that surrender under the EAW is a different institution than extradition, refers to linguistic interpretation. P. Kruszyński stipulates that as the Framework Decision of 13 June 2002 uses the notion of "surrender", and not of "extradition", therefore these two concepts cannot be regarded as being identical. A view to the contrary would have had to lead to the conclusion that the lawmaker was acting irrationally (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? [The European Arrest Warrant as a form of implementation of the principle of reciprocal enforcement of judicial decisions within the EU – What role should be attributed to the EAW in the process of development of the Common Area of Freedom, Security and Justice of the EU – based on the principle of reciprocity of recognition and enforcement of sentences?]*, p. 5). A similar position is maintained by E. Zielińska, who notes that "In the Framework Decision under consideration the English term *surrender* has been used, which appears next to the term *extradition*. The recitals of the Framework Decision also clearly imply that the terminological distinctions were not accidental: the intention of the authors of the drafted text was to create a new and different legal institution, which should replace extradition between the Member States, whereas traditional extradition (…) would continue to apply between Member States and third countries" (E. Zielińska, *Ekstradycja a europejski nakaz aresztowania. Studium różnic [Extradition versus the European Arrest Warrant. A study of differences]*, p. 5).

It should be noted, however, that in contrast to the Framework Decision of 13 June 2002 and to the amended Code of Penal Procedure, in the text of the Constitution of the Republic of Poland, apart from the term "extradition", the term "surrender" as a name of a legal institution does not appear (although it happens to be used with a different

meaning, e.g. in Article 41 Paragraph 3). This circumstance rules out the admissibility of usage of the above described mode of argumentation concerning the present case under consideration, i.e. for the assessment of constitutionality of Article 607t § 1 within the scope allowing for the surrender of a Polish citizen to a member state of the European Union on the basis of a European Arrest Warrant.

3.3. It should be stressed that – contrariwise to the views expressed by the Legislative Council (*opinia z 14 sierpnia 2003 r. o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego,* "Przegląd Legislacyjny" [*Opinion dated 14 August 2003 concerning the draft Act amending the Law – on the Criminal Code and the Law - on the Code of Penal Procedure*,Legislative Review] 2/2004, p. 156) and by some other representatives of academic legal learning (K. Działocha and M. Masternak-Kubiak, *Opinia o implementacji Decyzji Ramowej Rady Unii Europejskiej z 13 czerwca 2002 r. w sprawie europejskiego nakazu aresztowania i procedur przekazywania między państwami członkowskimi [Opinion on the implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States]*, p. 7), shared both by the Marshal of the Sejm and by the Prosecutor General – in order to eliminate the doubts existing on the basis of Polish law, as to whether extradition is a legal institution distinct from surrender on the basis of the European Arrest Warrant, the respective amendment of the Code of Penal Procedure, i.a. introducing into the legislative act and defining within it the constitutional term of "extradition", would not be sufficient.

One cannot agree with the position of the Legislative Council, according to which "in the face of statutory definition of extradition and distinguishing it from surrender of an indicted person between law enforcement agencies of EU Member States, the claim of incompatibility with the Constitution of the surrender procedure applied to a Polish citizen or to a person enjoying asylum in Poland, on the grounds of the European Arrest Warrant" (*ibidem*, p. 156).

When interpreting constitutional concepts, definitions formulated in legal acts of a subordinate order cannot have meanings that bind and determine the mode of their interpretation. As it has many times been stressed in the case law of the Tribunal, constitutional concepts are autonomous in relation to the legislation in force. This implies that the meaning of particular terms adopted in legislative acts cannot determine the mode of interpretation of constitutional regulations, as in such case the guarantees contained therein would lose any sense whatsoever. To the contrary, it is the constitutional norms that should impose the mode and orientation of interpretation of the provisions of other acts. The point of departure for the interpretation of the Constitution, in turn, consists in the comprehension of the terms used in the text of the given act of law, as historically developed and determined in legal doctrine (see, i.a.: Judgment of 14 March 2000, ref. P. 5/99, OTK ZU No 2/2000, Item 60; Judgment of 10 May 2000, ref. K. 21/99, OTK ZU No 4/2000, Item 109; and Judgment of 7 February 2001, ref. K 27/00, OTK ZU No 2/2001, Item 29).

3.4. A much less unequivocal issue consists of the question whether the interpretation of Article 55 Paragraph 1 of the Constitution must be done taking into account the obligation binding all Member States to apply interpretation consistent with EU law. R. Ostrihansky concludes that: "On the basis of the first pillar the principle has developed consisting of the obligation for the courts to interpret national law in conformity with European law. There are no grounds to reject the grounds for the existence of the same principle in the sphere of the third pillar, wherever acts legally

binding the states are enacted. The principle of pro-European interpretation of national law applies to the courts, but it should be applied even more so by the legislator, whose task is to reflect the obligation binding the state in national law." (R. Ostrihansky, *Nakazać zakazane. Europejski nakaz aresztowania a Konstytucja [To enforce what is prohibited. The European arrest warrant versus the Constitution]*, "Rzeczpospolita" newspaper, 10 October 2003).

Doubts arise from the fact that the obligation to apply consistent interpretation concerns, above all, Community law, whereas it is not fully clear, whether and to what extent, it may be attached to the laws of the second and third pillar. It should be noted that although in the provisions of the EU TREATY concerning these pillars there is no unequivocal equivalent of Article 10 EC Treaty (which binds the Member States by the obligation, i.a., to adopt all possible measures to assure the performance of obligations stemming from membership), but nevertheless in the sphere of police and judicial cooperation concerning criminal matters (III pillar), we encounter the equivalent of Article 249 Indent 3 EC Treaty. It consists of Article 34 Paragraph 2 letter b EU TREATY, which when referring to Framework Decisions obliges the Member States to adopt measures in order to achieve the result assumed therein. Furthermore, the Court of Justice has the power to adjudicate in the sphere of the third pillar, including also the pre-judicial mode. There is therefore at least one potential possibility of clearly recognising the obligation to apply interpretation that is in conformity with the law of the third pillar. Potential jurisdiction of the Court of Justice (Article 35 EU TREATY) and some sources of derivative law, which have been finally precisely specified (Article 34 EU TREATY), allow for the stipulation that the obligation to apply consistent interpretation cannot be ruled out. In particular, attention should be drawn to Framework Decisions, which essentially correspond with directives, with the sole difference, however, that the treaty clearly precludes the possibility of the Framework Decisions having direct effects. In their case the obligation to apply consistent interpretation could be derived from the obligation to achieve the set result (C. Mik, *Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej [Interpretation of national law consistent with EU law]*, paper for the Convention of Theory of Law and Philosophy of Law Chairs, Gniezno 26-29 September 2004, p. 24).

The resolution of the above presented dilemma – unless with the entry into force of the Constitutional Treaty it might become outdated – may become of essential practical significance in the future. In the present case, however, it is not necessary, as the obligation to apply pro-EU interpretation of the national law has its limits – *notabene* these were indicated by the European Court of Justice – namely whenever its consequences would consist of deteriorating the situation of individuals, and especially if it implied the introduction or aggravation of penal liability. Yet, there is no doubt that the surrender of a person indicted on the basis of the EAW in order to conduct criminal proceedings against this person in connection with an act, which according to Polish law is not a crime, could lead to the aggravation of the situation of the indicted person.

To summarize this part of the analysis it should be concluded that the answer to the initial question raised, whether the surrender to a EU member state of a Polish citizen indicted on the basis of the European Arrest Warrant is a form of extradition, can only be given as the result of comparison of these two institutions.

3.5. Among the basic elements, pertinently identified and indicated in legal doctrine (especially, see: M. Płachta, *Europejski nakaz aresztowania (wydania): kłopotliwa "rewolucja" w ekstradycji [European arrest (surrender) warrant: a cumbersome "revolution" concerning extradition]*, "Studia Europejskie" [European

Studies] No 3/2002, pp. 56-58), which differentiate surrender on the basis of the EAW from traditional extradition procedures (which should also comprise the procedure regulated in Chapter 65 of the Code of Penal Procedure being classified as pertaining to the category of extradition), the following need to be mentioned:

a) Departure from the principle, which is fundamental for extradition procedures, of double criminality of an act, given that it suffices that a given act: 1) is regarded as a crime in the country issuing the warrant; 2) it is liable to the punishment of at least 3 years of imprisonment; and 3) it is contained in the closed catalogue of 33 types of crimes (Article 607w of the Code of Penal Procedure). The requirement of double criminality applies only to the remaining acts (Article 607r § 1 Item 1 of the Code of Penal Procedure).

However, according to Article 604 § 1 of the Code of Penal Procedure, the lack of double criminality or double penal liability of an act is an absolute impediment barring extradition. Prior to issuing a decision the court considers whether the act described in the application bears the attributes of an offence according to the Polish law and whether no circumstances occur that would preclude the criminality or liability to punishment of the act in question (the issue, of whether an act is a crime owing to the degree of its social noxiousness, is considered, provided that doubt arises in that regard). In order to determine, that there is no double criminality of an act, it is not necessary for an identical offence category to exist in the Polish law as that in the legislation of the state lodging the application. It suffices that the act described in the request corresponds to the attributes of a crime foreseen in the Polish law.

b) Differences in the sphere of organisation and competencies. In the case of the procedure of extradition the final decision concerning surrender (or refusal to surrender) of the indicted person is reserved to an organ of executive power and is not subject to appeal or control on the part of the court (the Code of Penal Procedure does not foresee any course of appeal and the verdict is not an administrative decision as defined in the Code of Administrative Procedure). Complaint is allowed, however, against a decision of the court (Article 603 of the Code of Penal Procedure), which nevertheless concerns only the legal admissibility of surrender. The court verifies, therefore, whether legal impediments barring extradition do not exist, which are specified in Article 604 § 1 of the Code of Penal Procedure or in an appropriate international treaty. The circumstances indicated in Article 604 § 2, however, on the basis of which it is possible to refuse surrender a person, cannot provide the grounds for establishing that such surrender is legally inadmissible. A court decision determining the legal inadmissibility of surrender results in the impossibility of its enforcement. If the court concludes, however, that surrender is legally admissible – this does not yet determine the nature of the decision, which is subsequently taken by the Minister of Justice, who has a degree of discretion in this regard. The final verdict concerning the response to such a request belongs, therefore, to the Minister of Justice, who may refuse to authorise extradition based on the provisions of the Code of Penal Procedure owing to the existence of so called relative impediments to extradition, which are specified in Article 604 § 2 of the Code of Penal Procedure (the respective list is not exhaustive, another justification may consist, e.g., of humanitarian reasons). In the case of extradition proceedings based on an international treaty, however, the surrender of an indicted person is obligatory, provided that the required conditions are fulfilled (this is why the list of relative impediments to extradition is a closed one).

Yet, the EAW foresees that the hitherto existing two-stage extradition proceedings are to be transformed into a single procedure conducted by such an organ of administration of justice, which is competent for the issue of the EAW in accordance with national law. According to Article 607l § 1 of the Code of Penal Procedure, the issue of surrender is adjudicated by the court at a hearing, whereas § 3 of the same article provides that the court verdict concerning such a case may be subject to appeal. The final verdict and therefore also consideration of so called facultative reasons for refusal to execute an EAW (specified in Article 607r of the Code of Penal Procedure), rests with the court.

c) Radical simplification and acceleration of the extradition procedure. It is reflected, among other things, in the fact that orders may be transmitted directly between the competent bodies of the administration of justice, without the intermediation of diplomatic channels or any other intermediary links. Changes were introduced with respect to the regulation of the duration of such procedure. The provisions of the Code of Penal Procedure do not specify time limits for consideration of extradition requests (there is no particular deadline binding the court issuing the decision concerning the admissibility of surrender of a person or binding the Minister of Justice deciding on the surrender of the person). In the case of the EAW, the Code of Penal Procedure (Article 607m and 607n) foresees very short time limits, first for the decision on surrender (as a rule 10 or 60 days) and subsequently for the actual transferral of the indicted person (10 days).

d) Elimination of two impediments barring extradition: citizenship of the indicted person and the political nature of the offence. They have not been specified in either the catalogue of obligatory or of facultative grounds for refusal to execute the warrant (Article 607p and 607r of the Code of Penal Procedure). However, a solution was adopted consisting of the arrangement, whereby if the EAW concerns a citizen of the state enforcing the warrant, the surrender of such a person may only take place subject to the condition, that after the legally valid conclusion of proceedings that person shall be returned to the state enforcing the warrant, for the purpose of serving the sentence of punishment there (Article 607t of the Code of Penal Procedure).

3.6. The presented differences between surrender on the basis of the EAW and extradition indicate that the institutions under comparison differ not only in terms of their name, but also of content attached to them by the lawmaker. They consist of such content, however, which was determined by legislative act and which cannot define – as already previously noted – a constitutional institution.

The Constitution does not regulate those aspects, which determine the difference between the statutory institutions of surrender and extradition. This implies that the surrender of a person indicted on the basis of a European Warrant could only be regarded as an institution differing from extradition, which is mentioned in Article 55 Paragraph 1 of the Constitution, if its substance was essentially different. As the (core) sense of extradition consists of the surrender to a foreign state of an indicted or convicted person, in order to enable the conduct of criminal proceedings against this person, or the serving of punishment established by a sentence concerning this person, therefore the surrender of a person indicted by the EAW for the purpose of conduct against that person on the territory of another EU member state of criminal proceedings or of serving of a delivered sentence of imprisonment or some other custodial measure, must be recognised as its modality. If surrender is only a category (type, particular form) of extradition as

regulated in Article 55 Paragraph 1 of the Constitution, then its particular elements (differences in relation to the statutory institution of extradition) cannot result in the derogation of the constitutional impediment barring surrender, consisting of Polish citizenship of the indicted person.

Even the assumption that the constitutional lawmaker, when formulating the prohibition of extradition in Article 55 Paragraph 1 of the Constitution, referred it to the traditional model of extradition, reflected in the regulations of the Code of Penal Procedure in force at the time, (the system of surrender of persons between judicial authorities on the basis of the EAW – as already mentioned in section 3.1. – was created later), cannot constitute an impediment for the recognition that the respective provision is also oriented *pro futuro* and constitutes the prohibition of introduction into the legal system of such new institutions, which would fulfil the essence of extradition and could be used with respect to Polish citizens. It is also not without significance that from the point of view of the indicted person, surrender on the basis of the European Arrest Warrant is a more painful institution than that of extradition regulated in the Code of Penal Procedure and in international conventions binding Poland. The aggravation of the painfulness occurs both in the area of material elements (e.g. the exclusion of the principle of double susceptibility to punishment of the respective act) and of procedural ones (i.a. very short time limits for the execution of the EAW) of the two institutions under comparison. Therefore, the conclusion is justified (*argumentum a minori ad maius*), that as the constitutional lawmaker by prohibiting extradition of a Polish citizen sought to rule out the possibility of his/her being surrendered to a foreign state for the purposes of conducting criminal proceedings against him/her or of serving punishment, to which he/she was convicted, by the procedure of extradition regulated by statute and by treaty, so the same prohibition applies even more to surrender based on the EAW, which is realised for the same purpose (i.e. is essentially identical) and is subject to a more painful regime.

4. The establishment by the Tribunal that the surrender of indicted persons between judicial authorities of EU Member States on the basis of the EAW is a variation of the procedure of extradition does not resolve the doubts expressed in the legal question concerning the constitutionality of the provision of the Code of Penal Procedure challenged by the court. After all, one should take into account the stipulation raised by some representatives of doctrinal thought that when considering the procedure of surrender with respect to a Polish citizen, the problem should not be limited just to the issue of the prohibition stemming from Article 55 Paragraph 1 of the Constitution, but should also be examined in connection with other regulations.

4.1. According to the position put forward by the Legislative Council (*Opinion of 14 August 2003 concerning the draft act on the amendment of the Law – on the Criminal Code and of the Law – on the Code of Penal Procedure*, "Przegląd Legislacyjny" [Legislative Review] 2/2004, pp. 157-158) and also by K. Działocha and M. Masternak-Kubiak (*Opinion concerning the implementation of the EU Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, pp. 7-8), shared also by the Prosecutor General, the basis for the introduction by virtue of a legislative act of a derogation of the prohibition expressed in Article 55 Paragraph 1 is provided by other provisions of the Constitution – without infringing upon its substance.

Article 31 Paragraph 3 of the Constitution allows limitations to be applied to constitutional fundamental rights, if those „are necessary in the democratic state for the

assurance of its security or public order, or for the protection of the environment, health and public morality, or of liberties and rights of other persons". The catalogue of offences specified in the Framework Decision clearly points at acts constituting threats to security of the democratic state (terrorism), public order (organised crime), protection of the environment, health (illegal trafficking of drugs) and public morality, as well as freedoms and rights of other persons. It is obvious that the Republic of Poland is interested in combating such kinds of crime and in the effective prosecution of its perpetrators, as well as convicting them by *due process of law* proper for the democratic state governed by the law.

In the opinions mentioned above it is noted that in accordance with the provisions of Article 31 Paragraph 3 of the Constitution, limitations of constitutional rights cannot infringe upon the essence of such rights. Nevertheless, it is pointed out that the essence of the subjective right stemming from the constitutional prohibition of extradition consists in the right of a Polish citizen to be protected by the Republic of Poland and to be granted just and open trial before an independent and impartial court in the democratic state governed by the law. Therefore, according to the above indicated authors, given the guarantees attached to the European Arrest Warrant procedure, the substance of the rights guaranteed by Article 55 Paragraph 1 of the Constitution is not harmed.

4.2. The Constitutional Tribunal does not share the above presented view. The prohibition of extradition cannot be regarded as being tantamount to the right of the Polish citizen to enjoy protection on the part of the Republic of Poland and being granted the assurance of just and open trial before an independent and impartial court in a democratic state governed by the law. These rights are regulated *expressis verbis* in separate provisions of the Constitution (Article 36 and Article 45 Paragraph 1). The obliteration of differences between these provisions and the prohibition of extradition together with the resulting consequences is improper, as it would necessitate the adoption of the assumption that the norm expressed in Article 55 Paragraph 1 was *superfluous* in relation to Article 36 and Article 45 Paragraph 1, and as such was redundant in the text of the Constitution. Such orientation of interpretation would contradict the assumption of rationality of the legislator. Moreover, Article 45 Paragraph 1 grants the right to just and open adjudication without unjustified delay by a competent, detached, impartial and independent court of law to "everyone", and therefore regardless of one's citizenship (or even the lack thereof). In this situation the attribution of the same meaning (substance) to the norm of Article 55 Paragraph 1 and Article 45 Paragraph 1 would lead in consequence to intrinsic contradiction (in terms of subjective scope of the rights derived from both of these provisions) of the regulations of the Constitution.

As a consequence of the above findings concerning the meaning of the term „extradition" (see: section 3.1. of the justification of the present judgment) one has to assume that the prohibition of extradition formulated in Article 55 Paragraph 1 of the Constitution expresses the right of the citizen of the Republic of Poland to penal liability to a Polish court of law. His surrender on the basis of the EAW to another EU member state, however, would be an infringement of such substance. From this point of view it should be recognised that the prohibition of extradition of a Polish citizen, formulated in Article 55 Paragraph 1 of the Constitution, is of the absolute kind, and the subjective personal right of the citizens stemming from it cannot be subject to any limitations, as their introduction would make it impossible to exercise that right.

The Constitutional Tribunal shares the view that the right of the individual "anchored in Article 55 Paragraph is an absolute one and it cannot be limited by any ordinary legislative acts. This is substantiated both by the categorical wording of that

constitutional provision and by the very nature of the institution regulated therein. <<Limited>> extradition is inconceivable (…): either one is accountable in state A, or in state B, *tertium non datur*" (P. Sarnecki, *Opinia na temat konstytucyjności projektu ustawy w sprawie nowelizacji kodeksu karnego, kodeksu postępowania karnego i kodeksu wykroczeń [Opinion concerning the constitutionality of the draft act amending the Criminal Code, the Code of Penal Procedure and the Code of Petty Offences] (print 2031)*, p. 2).

4.3. The observation made by some representatives of legal doctrine is right that as Poland obtained the membership of the EU, as citizens of the Republic of Poland at the same time became citizens of the Union, the concept of "citizenship of the Republic of Poland" gained a different meaning (W. Sokolewicz, *Opinia prawna o projekcie – datowanym 24 VI 2003 – ustawy o zmianie ustawy Kodeks Karny oraz ustawy Kodeks Postępowania Karnego [Legal opinion concerning the draft – dated 24-06-2003 – of the Act amending the Law on the Criminal Code and the Law on the Code of Penal Procedure]*, p. 3; also: E. Piontek, *Europejski nakaz aresztowania [The European Arrest Warrant]*, "Państwo i Prawo" [The State and the Law] No 4/2004, pp. 40-41). This "different meaning" introduces – according to E. Piontek – completely new elements to the institution of citizenship, both in the direct context of the dispositions of Part II EC Treaty: Citizenship of the Union (Articles 17-22) and of the case law of community courts developed on their basis, as well as indirectly in the context of other provisions of Community law, starting from regulations establishing the freedom of movement of persons and of undertaking and conducting business activities on the area of the entire EU. Generally speaking, this implies that according to Community law a citizen of any member state is not regarded as an "alien" subject on the territory of other Member States. On the other hand, on third country territory citizens of any member state, as citizens of the Union, are entitled to protection on the part of the member state, which has its representative mission there.

The above indicated circumstance ought to constitute a significant argument in favour of the justified nature of the derogation of the prohibition of extradition of our own citizens to other EU Member States. Nevertheless it cannot constitute a sufficient premise for the derivation of the existence of such limitation of the scope of normative regulation of Article 55 Paragraph 1 of the Constitution only by means of dynamic interpretation of this provision.

It is difficult to accept this line of reasoning not only due to the fact that the surrender procedure based on the EAW is not so much a consequence of the introduction of the institution of "Citizenship of the Union", as a response to the already earlier developed right of citizens of EU Member States to freely move and stay on the territory of any other member state. It should be stressed, above all, that even if citizenship of the Union is connected with the gaining of certain rights, it cannot result in the diminishment of the guarantee functions of the provisions of the Constitution concerning the rights and freedoms of the individual. Moreover, as long as the Constitution attaches a certain set of rights and obligations with the fact of possession of Polish citizenship (regardless of the rights and obligations pertaining to "anyone", who is subject to the jurisdiction of the Republic of Poland), such citizenship must constitute an essential criterion for the assessment of the legal status of the individual. The weakening of the juridical significance of citizenship when reconstructing the significance and scope of obligations of the state stemming from the provisions of the Constitution – especially those formulated as categorically as it is done in Article 55 Paragraph 1 – would have to lead, in consequence, to the undermining of the obligations of the citizens linked with them, as

formulated in Article 82 and Article 85 of the Constitution. It should be recognised, therefore, that regardless of the observable universal phenomenon of limitation of the role of state citizenship in determining the legal status of individuals (both in systems of national law and on the international plane), without an appropriate change of the provisions of the Constitution, which attaches certain legal consequences to Polish citizenship, it is not possible to modify the latter only by means of interpretation.

In connection with the present analysis it is worth noting that state citizenship is not an institution that would have completely no meaning even in the sphere of EU law. Article 17 Paragraph 1 of the Treaty establishing the European Community grants statutory recognition to citizenship of the Union, granting it to every person having the citizenship of a member state and unequivocally indicating that "Citizenship of the Union shall complement and not replace national citizenship." It is therefore rightly being concluded that citizenship of the Union is an accidental and dependent relationship: "Accidental owing to the fact that it does not replace citizenship of the Member States, but only complements it. It is therefore an additional element, a structure built up on top of citizenship of the Member States. Such nature of citizenship also makes it completely dependent on the possession of national citizenship" (C. Mik, *Europejskie prawo … [European law ...]*, pp. 420-421).

4.4. In conclusion it should be stated that Article 607t § 1 of the Code of Penal Procedure, within the scope allowing the surrender of a Polish citizen to a member state of the European Union on the basis of the European Arrest Warrant, is incompatible with Article 55 Paragraph 1 of the Constitution.

5. The judgment of the Constitutional Tribunal establishing the unconstitutionality of Article 607t § 1 of the Code of Penal Procedure causes the elimination of any binding force of that provision. In the present case under consideration, however, this direct effect of the judgment is not tantamount to assuring the conformity of the legal status with the Constitution and is not sufficient for this purpose. This objective can only be achieved through the intervention of the legislator. Notwithstanding, taking into the account Article 9 of the Constitution, which states that „The Republic of Poland shall observe international law binding it", and given the obligations implied by membership of Poland in the European Union, it is indispensable to change the law in force in such manner, as to enable not only full implementation of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, but also such as to assure its conformity with the Constitution. In order to enable the accomplishment of this task, therefore, one cannot rule out the appropriate amendment of Article 55 Paragraph 1 of the Constitution, so as to provide that this provision would foresee the exception from the prohibition of extradition of Polish citizens allowing for their surrender on the basis of the EAW to other Member States of the European Union. In the case of amendment of the Constitution, the bringing of national law to conformity with the requirements of the Union will also require the restitution by the legislator of the provisions concerning the EAW, which as a result of the judgment of the Constitutional Tribunal shall have been eliminated from the legal order.

5.1. Considering that the time limit for the enactment of the above indicated Framework Decision has lapsed on 31 December 2003 and that with regard to Poland the obligation to implement it exists since the date of its accession to EU membership, i.e. from 1 May 2004, the Tribunal has deemed it necessary to consider the possibility of

deferral of the cancelling of the binding force of Article 607t § 1 of the Code of Penal Procedure.

Detailed analysis of Article 190 Paragraph 3 of the Constitution enables to conclude that the above provision:

– establishes the rule, according to which the judgments of the Constitutional Tribunal enter into force on the day of their announcement (by publication in the official journal, in which the respective normative act was published, or – in the case when the respective act had not been published – in the Official Journal "Monitor Polski"; see: Article 190 Paragraph 2);

– it vests the Constitutional Tribunal with the competence to determine a different term for the cancellation of binding force of a provision found to be incompatible with an act placed hierarchically at a higher level;

– it indicates the time limits, within which the Tribunal is allowed discretion in determining the length of the period of time, by which the loss of binding force of a provision may be deferred (maximum by 18 months in the case of a legislative act and 12 months in the case of other normative acts);

– it does not limit the discretion of the Tribunal in determining the time term for the loss of binding force of a deficient provision only in the situation when the verdict is the result of abstract control, i.e. it enables the exercise by the Tribunal of the competence under consideration also in cases initiated by the lodging of a legal question or of a constitutional complaint;

– it does not introduce any exceptions (restraints) concerning the application of the institution of deferral with regard to the nature or content of the provisions of the Constitution (or any norms or values able to be reconstructed on such basis) constituting benchmarks for such control;

– apart from the necessity to consult the opinion of the Council of Ministers in the case of judgments, which involve financial outlays not foreseen in the budget law, it does not formulate any conditions, the fulfilment of which or the existence of which would be a prerequisite for the possibility of deferral of the loss of binding force of deficient regulations; it also does not indicate that the use of such competence can occur in "exceptional cases" or "under particular circumstances";

– apart from due care for the balance of the state budget (which may be derived from the above noted obligation to consult), it does not indicate any criteria, which the Tribunal should be guided by when deciding on a different term for the loss of binding force, or on the length of time lapsing between the announcement of its judgment and the loss of binding force.

It should be noted that also the Act of 1 August 1997 on the Constitutional Tribunal (see: Article 44 and Article 71 Paragraph 2) did not introduce any additional restraints in the form, e.g., of conditions or premises concerning the use of the institution of determination by the Tribunal of the time term, when the loss of binding force of a controlled legal regulation was to occur, which institution was unknown under the rule of the previously existing constitutional provisions.

The Constitutional Tribunal, therefore, is entitled to freely dispose of the competence granted it by Article 190 Paragraph 3 of the Constitution. Such discretion does not mean arbitrariness, however. Although it is difficult to precisely determine any universal limits to such discretion, its scope is indirectly determined by the consequences resulting from the deferral of the time, when the binding force of provisions established as being inconsistent with the control benchmark lapses. Such deferral implies that the given provision temporarily remains within the sphere of legal behaviour, although such a provision was found to be inconsistent with an act placed hierarchically higher up in

the system of sources of the law. It is worth remembering that indirectly the deficiency of unconstitutionality encumbers every normative act, which is inconsistent with a higher ranking act, as it infringes upon one of the basic formal properties of the system of sources of the law in a democratic state governed by the rule of law – its consistency. Nevertheless, the very maintenance in force of an unconstitutional provision of a normative act, being an inevitable consequence of the potential application by the Tribunal of the discussed institution of deferral (in spite of the fact that it may be negatively assessed by some representatives of academic knowledge), is temporarily defined exception from the rule of hierarchical consistency of the legal system and of the principle of superiority of the Constitution, clearly allowed by the constitutional lawmaker himself. Of course, the existence of such exceptions *in concreto* is decided on by the Constitutional Tribunal, whereby it determines in relation to each particular provision subject to its control the time when such provisions lose their binding force.

Every decision of this kind must imply the balancing of the values, the infringement of which will constitute a foreseeable consequence of the prolonged application of unconstitutional provisions, in relation to values protected by the deferral of the entry into force of the respective judgment. There is no doubt that the Constitutional Tribunal should be guided especially by care to assure the protection of constitutional rights and liberties of individuals. It should be noted, however, that the possibility for the Tribunal to prolong the period, over which the rights and liberties are limited as a consequence of maintaining in force given unconstitutional provisions, is not subject to such restrictive and unequivocally formulated conditions, as the limitations regulated in Article 31 Paragraph 3 of the Constitution, which restrain the scope of action of the legislator in this regard. The Tribunal disposes of more discretion here. Therefore, it is admissible that the deferral (of course only within time limits specified by the constitutional lawmaker) can be applied owing to values other than those specified in Article 31 Paragraph 3 (i.e. security and public order, protection of the environment, health and public morality, as well as freedoms and rights of other persons), and – when this becomes inevitable - even if it should lead to temporary maintenance in force of the regulations limiting the constitutional freedoms and rights. A conclusion to the contrary of the above would be unacceptable, as Article 190 Paragraph 3 does not rule out the possibility (as already mentioned earlier) of prolongation by the Tribunal of the period of application even in the case of provisions infringing the limits set in Article 31 Paragraph 3 of the Constitution.

5.2. According to the Tribunal, above all the constitutional obligation of Poland to observe the international law, which binds it, but also care to assure security and public order, the assurance of which is enhanced by the surrender of indicted persons to other states, so as to make them face trial, and also due to the fact that Poland and other Member States of the European Union are bound by the community of principles of the political system, assuring proper administration of justice and trial before an independent court of law, are constitutionally justifying the prolongation of the application of Article 607t § 1 of the Code of Penal Procedure, even if that is connected with the deprivation of Polish citizens of the guarantees resulting from the prohibition of extradition within the scope, which is necessary for the implementation of the institution of surrender on the basis of the EAW. Argumentation in favour of this is provided additionally by due care to realise the value consisting of Poland's credibility in international relations, as a state respecting the fundamental principle of such relations, namely that *pacta sunt servanda* (Article 9 of the Constitution).

For the above reasons and taking into account the complexity of the subject matter, as well as high quality demands (including those concerning time constraints) placed on the constitutional procedure of adapting the Code of Penal Procedure to the Constitution, the Tribunal decided to defer by 18 months the time when the provision considered shall lose its binding force with respect to the scope, which has been challenged in the legal question and recognised as being incompatible with the Constitution. This time period is counted from the date of publication of the respective judgment of the Constitutional Tribunal in the Journal of Laws. That is the maximum constitutionally admissible term. From this moment on, the status of the law does not change, and therefore the previously existing regulation of Article 607t § 1 of the Code of Penal of Procedure maintains its binding force. The judgment of the Constitutional Tribunal determines the consequences for the future and cannot provide the basis for questioning legally valid court verdicts adopted earlier on.

The above circumstances cause the situation that over the period of deferral of entry into force of the present judgment the Polish state shall fulfil the obligation of implementing the Framework Decision.

5.3. A judgment that defers the time when the provision is to cease having binding force is not of the directly cassation (derogatory) kind, as it does not eliminate the unconstitutional (illegal) provisions from the legal system from the date of publication of the respective judgment. The consequence of judgment of this kind is the necessity to launch a series of actions, which should aim to amend the deficient provisions prior to the lapse of the deadline set by the Tribunal. This change, therefore, ought to be an indirect effect of the ruling of the Tribunal, which on its own does not have the powers to shape any new formulation of legal regulations.

The competence of the Tribunal under discussion, regulated in Article 190 Paragraph 3 of the Constitution cannot be perceived in just a single dimension – only as the right to decide on the prolongation of binding force, and therefore of the application of a provision inconsistent with the Constitution. Indeed, it is a law, the enactment of which triggers the obligation of the appropriate duly authorised bodies of public authority to immediately initiate the respective legislative proceedings. In situations, when in order to accomplish the restitution of the state of conformity with the Constitution it suffices to eliminate a deficient provision of the law, there is not reason to defer that moment in time. The obligation to undertake legislative intervention does not arise. A particular sanction in the case of the lawmaker's failure to fulfil the above indicated obligation (and therefore at the same time the guarantee of its implementation) within the time deadline set by the Constitutional Tribunal, consists in the elimination from the legal system of the unconstitutional norm. It may be assumed, therefore, that the setting of a different time limit for the cessation of binding force of an unconstitutional provision is a measure, the application of which *de facto* leads to weaker (less radical) interference within the system of the law in force.

In the case under consideration, the immediate elimination (from the date of publication of the judgment) of the provision challenged through the legal question would have led to the violation of international obligations binding Poland. The use made by the Constitutional Tribunal of the competence regulated in Article 190 Paragraph 3 assures, on the one hand, that the appropriate state bodies are provided with time for possible undertaking of measures able to prevent the consequences, which would have resulted from the failure to enact the Framework Decision of 13 June 2002, and on the other hand, it causes that the judgement establishing the unconstitutionality of Article 607t §1 of the Code of Penal Procedure does not directly interfere with the sphere

of politics and international law. According to the Constitution, it is the President of the Republic of Poland who is the representative of the state in external relations (Article 133 Paragraph 1), whereas general leadership in the domain of relations with other states and international organisations is exercised by the Council of Ministers (Article 146 Paragraph 4 Sub-Paragraph 9), which is also responsible for concluding, approving and terminating international agreements (Article 146 Paragraph 4 Sub-Paragraph 10). Therefore, the verdict of the Tribunal contained in Part II of the present judgment is an expression of the judges' reasonable restraint – which is derived from the principle of separation and cooperation of powers. In a situation, therefore, where the cessation of binding force of a provision found to be unconstitutional could cause the violation of international obligations of the Republic of Poland, the institution of prolongation of the period of its application gains importance in the sphere of international obligations of the state. Its application provides a solution enabling Poland to fulfil the obligations that it has assumed (until such time, when the contradictions in the domestic legal order shall have been removed).

5.4. The effect of the deferral of the moment of cessation of the binding force of Article 607t § 1 of the Code of Penal Procedure is such that over the period of 18 months after the publication of the judgment of the Constitutional Tribunal the respective provision should continue to be applied by the administration of justice (unless it is earlier annulled or amended by the legislator), in spite of the fact that the presumption of its constitutionality has been refuted. Polish courts, therefore, cannot refuse to surrender Polish citizens indicted by European Arrest Warrants.

It is worth reminding that the above position concerning the legal consequences of the determination by the Constitutional Tribunal of a later date of cessation of binding force of the provision of the law being incompatible with the Constitution (in relation to the date of publication of the respective judgment) has been consistently applied in the case law of the Tribunal. In the judgment of 2 July 2003 (ref. K 25/01, OTK ZU No 6/A/2003, Item 60) the Constitutional Tribunal concluded that until the indicated point in time the provision found to be inconsistent with the Constitution continued to have its binding force and therefore had to be observed and applied by all of its addressees. Indeed, according to Article 190 Paragraph 1 of the Constitution, also this verdict contained in the text of the judgment of the Constitutional Tribunal is not only final, but has universally binding force. The scope of such binding force covers also all the courts of law, as the Constitution does not foresee any exception from the rule expressed in Article 190 Paragraph 1. Allowance for an exception in this regard is not justified by Article 178 Paragraph 1 of the Constitution, which indicates the normative act, to which the judges of the courts specified in Article 175 of the Constitution are subordinated. The subordination of judges to the Constitution and to legislative acts concerns a different issue than the generally binding force of the judgments of the Constitutional Tribunal, issued as a result of control of normative acts.

As a result of this judgment the courts of law cannot refer to the principle of direct application of the Constitution in such manner, which would lead to disregarding the verdict of the Constitutional Tribunal and to refusal of surrender of a Polish citizen under the EAW based on reference to Article 55 Paragraph 1 of the Constitution. The Constitutional Tribunal has ruled not only that the provision referred to in the legal question is inconsistent with Article 55 Paragraph 1 of the Constitution, but also that despite the establishment of its unconstitutionality it should be applied by the courts over

the duration of the term specified in the judgment. Both parts of the judgment are equally final and generally binding.

The views of the Tribunal concerning the consequences of determining the scope of validity of an unconstitutional legal provision have not always been shared (see: judgment of the Supreme Court of 10 November 1999, ref. I CKN 204/98, OSNC 2000, No 5, Item 94). It should therefore be stressed the more so, that in one of its latest resolutions raising this issue the Supreme Court stated that: "From the analysis of the doctrine it follows that the decisive majority of the authors has expressed views in favour of the prospective effect of deferred judgments. Recently, also the Supreme Court has opted to adopt this view" (quoted from the Resolution of the Supreme Court of 23 January 2004, ref. III CZP 112/03, "Wokanda" 2004, No 7-8, Item 8; see also: the Resolution of the Supreme Court referred to therein of 3 July 2003, ref. III CZP 45/03, OSNC 2004, No 9, Item 136 and Judgment of the Supreme Court of 29 March 2000, ref. III RN 96/98, OSNP 2000, No 13, Item 500; similarly also: Supreme Court Judgment of 12 March 2003, ref. I PZ 157/02, OSNP 2004, No 14, Item 244). Owing to the generally prevailing binding force of judgments of the Constitutional Tribunal (Article 190 Paragraph 1 of the Constitution), the Supreme Court decided that it was bound by the judgment of the Tribunal also with respect to the scope within which the Tribunal determines the time term of cessation of binding force of a provision that is incompatible with the Constitution. It stated moreover, that Article 190 Paragraph 3 of the Constitution clearly implies that if the Tribunal defers the cessation of binding force of a faulty norm, it still remains in force over the period indicated in the respective judgment. This implies, in turn, that the courts and other subjects should apply the respective norm. Its disregard throughout such a period would essentially imply the dismissal of the sense of any such deferral, and therefore also of the sense of Article 190 Paragraph 3 of the Constitution.

5.5. Article 9 of the Constitution is not only a grandiose declaration addressed to the international community, but also an obligation of state bodies, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland. Apart from appropriate changes in the national legal order, the implementation of this obligation may require the bodies of public administration to undertake specific actions within the scope of their assigned competencies. Therefore, both due to the effect of deferral (consisting of the maintenance of the binding force), as well as owing to Article 9 of the Constitution, it should be concluded and recognised that the courts are temporarily obliged to continue to apply Article 607t § 1 of the Code of Penal Procedure.

5.6. The consequence specified in Part II of the judgment – deferral of the time of cessation of binding force of Article 607t § 1 of the Code of Penal Procedure – should be taken into account also in the proceedings being conducted before the court that lodged the legal question. That court should also take into account the substantial arguments quoted also in the justification of the legal question and shared by the other participants of the proceedings and by the Constitutional Tribunal, in favour of the purposefulness and rationality of the application of the European Arrest Warrant.

The requirement of observance by Poland of international agreements that bind it (Article 9 of the Constitution) and the obligations assumed by it through accession to the European Union do not allow to waive the effect of deferral with respect to the case, which constituted the cause behind the initiation of proceedings before the Tribunal (different nature of the situation, see: Judgment of 18 May 2004, ref. SK 38/03, OTK ZU

No 5/A/2004, Item 45; and Judgment of 27 October 2004, ref. SK 1/04, OTK ZU No 9/A/2004, Item 96).

5.7. Changes of the Constitution have been applied since many years as necessary means of assuring the effectiveness of EU law in national legal orders of the Member States. Without examining the specificities and the sources of the judgments, which were decisive in particular cases for the resolution of the issue of necessity of amendment of the Constitution, it is still worth noting a number of examples of such constitutional practices in the Member States of the European Union.

An amendment of the Constitution of the V-th French Republic of 4 October 1958 was introduced as a consequence of recognition by the Constitutional Council in its decision 92-308 DC of 9 April 1992, that the ratification of the Treaty of Maastricht could be carried out only after the appropriate revision of the Constitution. The Council found that certain provisions of the above mentioned Treaty (concerning passive electoral rights in local elections) were infringing upon the Article 3 of the Constitution (national sovereignty belongs to the French people). Among the regulations introduced into the Constitution as a result of the revision connected with the ratification of the Treaty of Maastricht, among others, there were the Articles 88-2 and 88-3.

The issue of assuring the citizens of EU Member States the right of candidacy in local elections has contributed to the respective change of the Constitution also in Spain. In its judgment of 1 July 1992 the Spanish Constitutional Court stated that the active and passive electoral rights foreseen by the Treaty of Maastricht for persons, who are not citizens of Spain, but are citizens of the Union, was reflected in Article 13 Paragraph 2 of the Constitution only with respect to active electoral rights. Without a change of the Constitution, however, it was not possible to grant passive electoral rights to persons not possessing Spanish citizenship just by virtue of the treaty or of a legislative act. As a consequence of the above noted judgment, Article 13 Paragraph 2 of the Constitution [of Spain] was amended on 27 August 1992.

Also the change of the Constitutional Law of the Federal Republic of Germany, introduced by the Act of 27 October 2000, was undertaken in order to implement a European law – in this particular case being of a derivative nature, i.e. the Council Directive 76/207/EEC of 9 February 1976 establishing the principle of equality of women and men with respect to access to employment, working conditions, etc. In the judgment of 11 January 2000 on the case C-285/98 Tanja Kreil versus Germany, the European Court of Justice concluded that the principle formulated in the directive results in precluding the application of the respective provisions of the German law. This is why Article 12a Paragraph 4 *in fine* of the Constitutional Law was amended, which had ruled that the employment of women in the army could under no circumstances concern any service connected with the use of arms.

5.8. At the same time the Constitutional Tribunal reminds that the failure by the legislator to undertake the appropriate lawmaking steps within the indicated period of time, notwithstanding the fact that it will lead to the infringement of the already mentioned constitutional obligation for the Republic of Poland to observe international laws that bind it, may also be connected with serious consequences in terms of European Union law. Above all, one needs to indicate here Article 39 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia, as well as the amendments to the Treaties

establishing the European Union, being an integral part of the so called Accession Treaty and described as the disciplining clause. According to its content, should a new member state manifest serious deficiencies in the transposition, implementation or application of Framework Decisions, the Commission (at the request of a member state or on its own initiative) may take the necessary measures, which may assume the form of temporary suspension of the application of the respective provisions and decisions in the relations between the new member state and the other Member States.

5.9. It should be clearly noted that the necessity of timely performance by the legislator of the obligations resulting from the present judgment is justified more broadly than only by its juridical grounds or economic reasons – resulting from the possible application of sanctions against Poland.

The growth of criminality, especially of organised and cross-border crime, imposes the necessity to seek procedural remedies adequate to the scale, intensity and specificity of this phenomenon, which would enable appropriately prompt reaction on the part of the bodies responsible for the administration of justice. Effectiveness in combating of such crime depends to a large degree on the development of more advanced forms of cooperation between the Member States of the EU than the traditional extradition procedure. This is possible thanks to the high level of mutual confidence between legal systems, built on the basis of principles of political systems assuring the protection of fundamental human rights and liberties. Common standards of such protection justify the resignation from some of the formal guarantees, which are contained in the classical instruments of international cooperation.

The system of surrender of persons between court bodies created by the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the procedure of surrender between Member States should serve not only for the implementation of the objective of the Union consisting of the establishment of an area of freedom, security and justice. The Constitutional Tribunal stresses once again that the institution of the EAW is of major significance also for the proper functioning of the administration of justice in Poland, and above all for the strengthening of internal security, and therefore the assurance of its ability to function ought to constitute the highest priority for the Polish legislator.

For reasons described above the Constitutional Tribunal adopted the judgment as in its sentence.