

Judicial Cooperation Based On a European Evidence Warrant

Lect. dr. Mihaela Laura Pamfil¹

¹*Petre Andrei University of Iasi, Faculty of Law, michaela_laura@yahoo.com*

Abstract. The assurance of a better judicial cooperation between European Union Member States is a constant preoccupation of the Council of Europe, taking into consideration that the European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. The achievement of this objective is only possible if among EU Member States there is a high level of confidence and a mutual recognition of the decisions issued by the competent judicial authorities. The European arrest warrant was the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as cornerstone of judicial cooperation. It was followed by other measures designed to create the legal framework of the judicial cooperation; some of these measures concerns the fight against corruption, terrorism, cross-border criminality, racism and xenophobia while others are applicable in any case, such as the order of freezing the property and the evidence. On 18 December 2008, a new instrument was created in order to improve the judicial cooperation between the Member States: the European evidence warrant. Its purpose is to assure the obtaining of the objects, documents and data which may be used as evidence in proceedings in criminal matters in issuing State, from another Member State. So, the aim of this Framework Decision is to complete the provision of the Decision on the execution of orders freezing property and evidence which is not talking about the transfer of the evidence after the freezing.

Romania, like the other European Union Member States must transpose the provision of this Decision in the national law by 19 January 2011. That is why we would like to analyse the procedures and the safeguards provided by this Decision and to show the way we see the European evidence warrant settled in our legislation.

Keywords: procedures, safeguards, issuing authority, executing authority, compliance

In Romania, the legal framework for judicial cooperation between the EU Member States in the field of criminal law is the Law no. 302/2004. This law offers legal base for every form of judicial cooperation: extradition, execution of a European warrant arrest, transfer of the sentenced persons and validity of foreign judgements, transfer of the criminal proceedings, mutual legal assistance, execution of orders freezing property and evidence. Therefore, the dispositions of the Council Framework Decision on the European evidence warrant must be included in the same law. Taking into consideration the actual dispositions of the law, we think that the most appropriate place is after the section regarding the freezing property and evidence but this is quite difficult. The successive modification of the law led to a count of articles using exponents and is difficult to insert new articles into a sequence of exponents. The regulation of the European evidence warrant should be inserted after the Article 187³³ and before Article 187³⁴. It is possible to use letters as exponents, as well as in the Criminal Procedure Code in the matter of the underage arrest term, but the best way to solve the problem is, in our opinion, the republication of the law using a new counting of the articles. In a new form of the law, the European evidence warrant together with the order of freezing property and evidence should be the object of a chapter called The Cooperation with the EU Member States in evidence matters.

The European Evidence Warrant (EEW) is a judicial decision which meant to be used to obtain any objects, documents and data for use in proceedings in criminal matters for which it may be issued. This may include for example objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including

financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques. I must be said that the EEW shall not be issued for the purpose of requiring the executing authority to conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party; to carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints; to obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts, to conduct analysis of existing objects, documents or data or to obtain communications data retained by providers of a publicly available electronic communications service or a public communications network. The objects, data or documents obtained by these procedural measures may be asked by an EEW if they are already in the possession of the executing authority before the EEW is issued. Notwithstanding, the hearing of a present person during the execution of the EEW and directly related to the subject of the warrant is allowed if is requested by the issuing authority. The carrying out a search or seizure for the execution of the EEW is also allowed if it is necessary. In order to assure the effectiveness of judicial cooperation, the EEW must show which are the objects, documents or data sought, their description, their location, if is known or the last known location, the person (legal or natural) believed to hold them, if he is not the person whom the proceedings are or may be taking place. Where the issuing authority issues an EEW which supplements an earlier EEW or which is a follow-up to a freezing order transmitted under Framework Decision 2003/577/JHA, it shall indicate this fact in the EEW.

The designation of the issuing and the executing authorities is up to each Member State. The Decision shows only the minimal requirements for these authorities; in the 8th point of the preamble for issuing authority is specified that the EEW should be issued only by judges, courts, investigating magistrates, public prosecutors and certain other judicial authorities as defined by Member States in accordance with this Framework Decision. As for the executing authority the 2nd line of the 13th Article provides that the decision to refuse the execution or recognition of the EEW shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Each States has also the possibility to designate one or more central authorities to assist the competent authorities. In our opinion, in Romania the central authority must be the Ministry of Justice and Citizens Liberties, as well as in the matter of the European arrest warrant. The role of the Ministry will be to receive the warrants and to send them to the executing authorities whether the issuing authority is from Romania or abroad. The Minister will be responsible for the administrative transmission and reception of the EEW as well as for other official correspondence relating thereto. As for the issuing and the executing authority we think that these could be the Courts of Appeal. Although the Decision provides that the EEW may be issued or executed by a prosecutor, we consider that is better to grant the right to issue and to execute a EEW only to the judges. This opinion is based on the provisions of the 7th Article which says that the issuing of an EEW is possible only if the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used. In the same time, we have taken into consideration the fact that in the Romanian legislation a search may be authorized only by the judge and the objects, documents or data sought could be obtain by this measure. For the same reason, the executing authority must be a judge.

After the designation of the competent authority, Romania shall inform about this the General Secretariat of the Council, in order to make this information available to all Member State and the Commission. In the same time, Romania must state in a declaration deposited with the General Secretariat which are the official languages of the Union accepted for the EEW.

The EEW may be issued:

- (a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- (b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the

decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

The issuing of an EEW is possible only where obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the criminal or other proceedings concerned. The fulfilling of this condition may be assessed only in the issuing State in each case. This is the main safeguard provided for the issuing authority.

The EEW may be transmitted to the competent authority of a Member State in which the competent authority of the issuing State has reasonable grounds to believe that relevant objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State. It shall be transmitted without delay from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. The transmission may be made directly between the issuing authority and the executing authority or via central authority, if the State decides to designate one. If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State. When the authority in the executing State which receives the EEW has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EEW to the executing authority and so inform the issuing authority. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the EEW shall be dealt with by direct contacts between the issuing and executing authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

The executing authority shall recognise an EEW, transmitted in this way without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State. Each Member State shall ensure that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW and that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences expressly set out in the Decision. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. The Decision uses as examples for the formalities the official stamping of a document, the presence of a representative from the issuing State or the recording of times and dates to create a chain of evidence.

An important safeguard for the executing authority is settled by the last line of the 11th Article. In accordance with these provisions, each Member State may, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring a validation of the EEW in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EEW would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case. If the issuing authority is

not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

The recognition or execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure. For some expressly shown offences (14th Article, 2nd line¹), the verification of double criminality is not required even when it is necessary to carry out a search or seizure, but it is compulsory that these offences are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

The executing State may refuse the recognition or the execution of an EEW in certain cases. In accordance with the provisions of the 13th Article, recognition or execution of the EEW may be refused in the executing State:

- (a) if its execution would infringe the *ne bis in idem* principle;
- (b) if, in cases referred to in Article 14(3), the EEW relates to acts which would not constitute an offence under the law of the executing State;
- (c) if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case in accordance with Article 11(3);
- (d) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW;
- (e) if, in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated;
- (f) if the EEW relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;
- (g) if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; or
- (h) if the form is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

Inserting certain cases where the EEW may be refused is an important safeguard for the issuing authority. In any other cases but those shown, the executing authority is forced to cooperate and to execute the EEW in order to ensure effective and consistent cooperation on obtaining objects, documents or data for use in proceedings in criminal matters throughout the European Union. The decision of refuse recognition or execution shall be taken as soon as possible no later than 30 days after the receipt of the EEW by the competent executing authority.

¹ participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, murder, kidnapping, illegal restraint and hostage-taking, racism and xenophobia and other. The list may be changed by the Council, after consultation of the European Parliament. The Decision provides that the condition of double criminality shall be further examined by the Council by 19 January 2014 in the light of any information transmitted to the Council.

The executing State has also the right to postpone the recognition or execution of an EEW in several cases, mentioned by the 16th Article. The postponement is caused either by the form or by the lack of validation from a judge or a prosecutor or by the necessity of keeping the objects, documents or data sought in the States. If the execution of the EEW might prejudice an ongoing criminal investigation or prosecution or if the objects, documents or data concerned are already being used in other proceedings, the execution of the EEW may be postponed until such time as the executing States deems reasonable or until such time as they are no longer required for this purpose. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EEW and inform the relevant competent authority in the issuing State thereof by any means capable of producing a written record.

The achievement of a effective cooperation impose to the executing authority a obligation to inform the issuing authority about the problems occurred during the execution of the EEW. According to 17th Article, the executing authority shall inform the issuing authority immediately by any means:

(a) if the executing authority, in the course of the execution of the EEW, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EEW was issued, in order to enable the issuing authority to take further action in the specific case;

(b) if the competent authority of the executing State establishes that the EEW was not executed in a manner consistent with the law of the executing State;

(c) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 12.

Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record.

The executing authority must also inform the issuing authority without delay by any means capable of producing a written record:

(a) of the transmission of the EEW to the competent authority responsible for its execution

(b) of any decision to refuse recognition or execution of the EEW, together with the reasons for the decision;

(c) of the postponement of the execution or recognition of the EEW, the underlying reasons and, if possible, the expected duration of the postponement;

(d) of the impossibility to execute the EEW because the objects, documents or data have disappeared, been destroyed or cannot be found in the location indicated in the EEW or because the location of the objects, documents or data has not been indicated in a sufficiently precise manner, even after consultation with the competent authority of the issuing State.

The recognition and the execution of the EEW may not be done with the violation of the legitimate interests of the interested parties or of the third parties. That is why the Decision provides that each Member State shall put in place the necessary arrangements to ensure that any party or *bona fide* third parties have legal remedies against the recognition and the execution of an EEW. The determination of the legal remedy is left to the discretion of the State. In Romania, we think that the most appropriate remedy is the recourse either we speak about Romania as an executing State or an issuing State. We must highlight that the substantive reasons for issuing the EEW, including whether the conditions established for the issuing the warrant have been met, may be challenged only in an action brought before a court in the issuing State, because the entire responsibility for issuing the warrant belongs to the issuing State. For any other reason, the action shall be brought before a court in the executing State in accordance with the law of that State.

The legal remedies provided by the law must be effective for interested parties. Therefore, the Member States shall take the necessary measures to facilitate the exercise of the right to bring actions, in particular by providing interested parties with relevant and adequate information and by ensuring adequate time limits for bringing the action.

Romania, like the other European Union Member States must transpose the provision of this Decision in the national law by 19 January 2011. So, there is enough time for the legislator to find a solution for inserting this form of cooperation in the national legislation. At the first sight the European Evidence Warrant seems to be an important step in accomplishment of a closer and a better cooperation between the Member States of European Union, but the jurisprudence will assess the effectiveness of this Framework Decision. This is the reason why the Council has stated in the preamble that Member States are encouraged even from to draw up, for themselves and in the interest of the European Union, tables which as far as possible show the correlation between the provisions of this Framework Decision and the national implementation measures and to communicate this to the Commission together with the text of the national law implementing this Framework Decision.