



THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
**EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES**

European Warrant for Obtaining Evidence

Minodora-Ioana Bălan-Rusu¹

Abstract: This paper concerns a general examination of the European legislative act regulating the activity of obtaining evidence for their use in criminal proceedings, its importance resulting from the novelty that it represents. The research may be useful both to Romanian and European judicial authorities with responsibilities for judicial cooperation in criminal matters and also to theorists that examine the complex cooperation system at EU level. The research results, the essential contribution, its originality consist of the critical general examination of the concerned normative act, and also the proposals to amend and supplement some provisions which may cause dysfunctions in practice.

Keywords: crime; judicial cooperation; proposals

1. Introduction

The development of European countries since the second half of last century has created new possibilities for moving people and goods in Europe, which caused new mutations in the structure of cross-border crime, mutations generally defined by the possibility of moving criminal elements, to ensure efficient organization and permanent logistics. (Rusu, 2010, p. 20)

In these very complex conditions, European countries, aware of the increasing perspective of cross-border crimes globalization and organized crime, they have increasingly insisted on initiating an organized framework for judicial cooperation in criminal matters.

The first and most important step in the improvement and modernization of the institution of extradition was made in the second half of last century by the European Council, by adopting the European Convention on Extradition on 13 December 1957. (Boroi & Rusu, 2008, p. 299)

By establishing the European Union among other facilities granted to their citizens, it also appeared the one of the free movement of persons and goods within the Union, an aspect which led inevitably to increasing crime of all kinds and especially the cross-border and organized crime.

The establishment of the European Union and subsequently the Schengen area created new possibilities of actions to the crime element and thus increase criminality, exacerbated possibilities of increasing the opportunities the action territory by the admitting new states. (Rusu, 2009, p. 19)

Although the system of cooperation in criminal matters between European countries, achieved by the compliance of European Convention on Extradition has worked for a while in good conditions, however, as time has passed it was proved to be increasingly ineffective. This conclusion had to find a solution, as the crime was in a constant increase.

The found solution was establishing a new surrender procedures of criminals between Member States to a procedure that would simplify the whole activity, so that all that all offenders that have committed

¹ Legal Counselor S.C. SOTIREX S.R.L. Bacău, PhD in progress at Titu Maiorescu University Bucharest, Romania, Address: 70 Dionisie Lupu St., Bucharest, Sector 1, Romania, Tel. 004016507430, Fax: 0040-1-3112297. Corresponding author: oana_rusu86@yahoo.com.

crimes in the European Union would be identified and returned to the States where the crime was committed, for trial and conviction in the shortest time. (Rusu, 2009, p. 19)

In this very complex context, with major implications in the evolution of the European Union, it was adopted the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant for obtaining evidence and surrender procedures between Member States.

The importance of this legal instrument for judicial cooperation in criminal matters arising from the innovations that it brings in the procedure of looking for wanted persons between Member States, by simplification and efficiency through judicial cooperation is achieved.

Among the innovations it brings the European arrest warrant for obtaining evidence in relation to extradition, we note the following:

- widening the scope of applicability by including new types of offenses of increased gravity;
- renouncing to verification procedure of double criminality for groups of offenses;
- simplifying the surrender procedures;
- increasing efficiency by shortening deadlines;
- simplifying the administrative stage;
- possibility of direct cooperation between competent judicial institutions;
- surrender of their citizens;
- complying with the provisions of the Framework Decision by all States (Rusu, 2009, p. 49).

Despite its significance, however, the most important form of judicial cooperation in criminal matters between Member States is considered to be the recognition and enforcement of criminal judgments emanating from another Member State. Surrender a person under a the European arrest warrant for obtaining evidence can be based only on its recognition and enforcement by the judicial authority of the executing Member State. In order to ensure an organized framework for judicial cooperation in criminal matters, at the level of European Union were subsequently added several acts. In this context, of improving cooperation relations between Member States it was adopted Framework Decision 2008/978/JHA of 18 December 2008 on the European Warrant for obtaining evidence for obtaining objects, documents and data for their use in criminal matters proceedings.

Under the mentioned European legislative act, the European Warrant for obtaining evidence may be used by Member States' judicial authorities in order to obtain any objects, documents and data for using them during criminal matters proceedings.

They are issued only by judges, courts, judges, prosecutors and other judicial authorities, the European Warrant for obtaining evidence may be issued for: obtaining objects, documents or data from a third party, coming after a search, including the suspect's residence, previous data on the use of any services including financial transactions, statements, interviews and hearings, historical records and other documents, including the results of special investigation techniques.

In this paper we proceed in examining the new forms of judicial cooperation in criminal matters between Member States, in what regards the legal nature, definition, scope, types of procedures, issuance and transfer of the European Warrant for obtaining evidence, subsequently we will examine other institutions of this form of cooperation.

2. The Need of Adopting, Defining and Execution Requirements

The objective of the examined European legislative act is to replace the system of mutual assistance in criminal matters for obtaining objects, documents or data between Member States.

The European Arrest Evidence must be issued only for obtaining objects, documents or data; the search is necessary and proportionate to the criminal or other proceedings concerned.

At the same time the issuance of such a document must be achieved by the issuing State only if the objects, documents or data could be obtained, in a compatible case, according to its internal law. In

other words, at the issuance of a European Evidence warrant issuing authority it must be considered also the possibility of executing a warrant under its own laws.

According to mentioned European legislative act, the European Warrant for obtaining evidence is a judicial decision issued by a competent authority of a Member State in order to obtain objects, documents and data from another Member State for their use in authorized expressly mentioned proceedings.

European Arrest Evidence will be executed based on the principle of mutual recognition under the provisions of the examined legislative act.

In order to avoid a unilateral interpretation that will not be in agreement with the European legislator's will within the legislative act there were defined some activities and institutions that we reproduce in order to understand the examined institution:

- *Issuing State* means the Member State that issued the European Warrant for obtaining evidence ;
- *Executing State* means the Member State in whose territory are the objects, documents or data or, in case of electronic data, the Member State in which they are directly accessible under the law of the executing State;
- *Issuing authority means*: A judge, a court, an instruction judge, prosecutor, or any other judicial authority, as defined by the law of the issuer, acting, in that case, as the authority leading the criminal investigation which is part, in accordance with the internal law, to dispose the obtaining evidence in cross-border cases;
- *Executing authority* means an authority which is, under the national legislation, implementing the examined European legislative act, the power to recognize or execute a European Warrant for obtaining evidence ;
- *Search or seizure* of include any measures Criminal Procedure from which a legal or natural person is required under legal constraint, to provide or participate in providing objects, documents or data, measures, which, in case of failure, can be enforceable without the consent of such person or it may lead to a penalty.

3. The Scope, Types of Procedures, the Content of the Warrant

The European Arrest Evidence may be issued in order to obtain, in the executing state objects, documents or data necessary for the issuing state for procedures expressly provided.

The European Arrest Evidence can not be issued for the purpose of requiring the executing authority the following:

- to organize query, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other persons;
- carry out bodily examinations or obtain bodily material or biometric data directly on a person's body, including DNA samples and fingerprints;
- to obtain real time information through technical means and the interception of communications, under cover surveillance or monitoring bank accounts;
- to explore objects, documents and data;
- to obtain communications data retained by communications service providers of public electronic communications or by a public communication network.

Please note that the European Warrant for obtaining evidence may still be issued in connection with the above described, unless the objects, documents or data are already in the possession of the executing authority before issuing the warrant.

When the issuing authority indicates as such, the European Warrant for obtaining evidence may include any other objects, documents or data which the executing authority discovers during the

execution of the warrant, and that, without further inquiries it considers to be relevant for the procedures to which the warrant was issued.

Also, if the issuing authority requests it so, the European Warrant for obtaining evidence may include taking statements from persons present during its execution, which are directly related to the warrant.

Under the European legislative act, the European Warrant for obtaining evidence may be issued:

- on criminal proceedings initiated by a judicial authority or will be brought before a court on an offense under the national law of the issuing State;
- on proceedings initiated by the administrative authorities of facts which are subject to criminal sanctions under the national law of the issuing State as they represent infringements of the rules of law and in the case where the decision of the mentioned authorities may be subject to appeal before a competent court, particularly in criminal matters;
- in proceedings instituted by the judicial authorities on the facts which are subject to criminal sanctions under national law of the issuing State as it represents infringements of the rules of law and in the case where the decision of the mentioned authorities may be subject to further appeal to the a competent court, especially in criminal matters;
- In connection with the above, which relate to acts or offenses that can incur the liability of a legal entity or it may lead to criminal sanctions of a legal person of the issuing State.

In terms of the content of the warrant, it must be designed in accordance with Annex, it will be filled in, signed, and the content will be certified as correct by the issuing authority. The European Arrest Evidence will be prepared and translated by the issuing in the official language or the official language of the executing state.

4. Issue and Submission of European Warrant for Obtaining Evidence

For issuing the European warrant for obtaining evidence it is required that each Member State takes measures to ensure that it is issued only when the issuing authority considers to have been met the following conditions:

- obtaining the sought objects, documents or data is necessary and proportionate to the purposes and the procedures provided in the mentioned above legislative act;
- the objects, documents or data can be obtained under the law of the issuing state within compatible proceedings, if that would be available within the issuing State, even if they could use different procedural measures.

The European Arrest Warrant for obtaining Evidence may be submitted to the competent authority of a Member State in whose territory the competent authority of the issuing State has reasonable grounds to believe that the documents or data objects are relevant or not, if electronic data, as these data are directly accessible under the law of the executing State. The warrant will be sent without delay by any means which leaves a written record and under the conditions of allowing the executing State to establish authenticity. After transmitting, all subsequent official communications will take place directly between the two authorities (issuing and execution).

If deemed necessary, each Member State may designate one or more central authorities in order to grant specialized support to the authorities directly involved. If necessary, a Member State may entrust its central authority or authorities sending and receiving, by the administration, of the European Warrant for obtaining evidence and every official correspondence. Of course all these decisions must take into consideration the internal law of that State.

Transmission of the European Warrant for obtaining evidence may also be made via the secure telecommunications system of the European Judicial Network.

When out of various reasons the executing authority of the executing Member State is not known, the issuing authority shall make all necessary investigations, including the contact points of the European Judicial Network, in order to obtain the necessary information from the executing State.

In the case where the judicial authority of the executing State receives a European Warrant for obtaining evidence finds that it is not competent to execute it according to its national legislation, it will send the warrant to a competent authority and it shall inform about it the issuing authority.

Any difficulties that arise during the execution of the warrant shall be settled by the two authorities involved, or if not possible, through the intervention of central authorities of both Member States.

When out of various reasons the issuing judicial authority shall issue a warrant that supplements a previous one, or is the result of a freezing order transmitted under Framework Decision 2003/577/JHA, it will indicate this aspect in the content of the warrant.

If the issuing authority participates in the execution of the European Warrant for obtaining evidence in the executing State, it may submit a new warrant that complements the first, directly to the enforcement authority, while being on the territory of the executing state.

The personal data obtained can be used by the issuer for the following purposes:

- procedures for which the European warrant for obtaining evidence may be issued;
- other judicial and administrative proceedings directly related to the above;
- preventing a serious and imminent threat to public security.

The use in other purposes that those mentioned above of personal data may be used only with prior consent of the executing State, unless the issuing State has obtained the consent of the person in question.

5. Conclusions and Critical Opinions

In our opinion the adoption of this European Legislative Act it is absolutely necessary because of Member States' will to increase the specific activities of judicial cooperation in criminal matters, the aim being preventing and fighting against the crime of all kinds more effectively. Also adopting this European tool of judicial cooperation will contribute in achieving the objective assumed by the European Union that is to ensure an area of freedom, security and justice.

The examined the legislative act will facilitate obtaining objects, documents or other data absolutely necessary in the investigations or court proceedings, which represent evidence in the criminal proceedings of a natural or legal person in another state, other than where they were. Examining this legislative act allows us to formulate some critical opinions, which would contribute to improving the system of judicial cooperation, possibly by modifying and supplementing it. A first observation concerns the fact that by its norms, the legislative act s is not a clear distinction between objects, documents or data that need to be collected from businesses. We believe that in these circumstances, there should be adopted some clear provisions, especially given their distinct status towards individuals. The provision contained in article 7 of the examined legislative act implying that any issuance of the European Warrant on obtaining the evidence it should be reviewed and approved by another institution of the issuing Member State. We believe that such a provision is unnecessary, the self-responsibility belonging only to the issuing judicial authority and not to other administrative institutions. A final critical observation concerns the content of article 8 line (4) of the examined legislative act which provides that, under the executing judicial authority it is not known, the issuing authority shall make all the necessary investigations, including the contact points of the European Judicial Network. We believe that in such a case, the issuing authority should contact the Ministry of Justice of the issuing State, an institution that will carry through the necessary checks, service or specialized compartment. As a general conclusion we consider that the adoption of this legislative act it will contribute to improving the judicial cooperation system in criminal matters between Member States.

6. Bibliography

Rusu, Ion (2010). The European Arrest Warrant According to the Latest Changes and Additions. *Proceedings, 5th Edition of The International Conference. European Integration Realities and Perspectives*. Galati: Editura Universitară Danubius, pp. 19-27.

Boroi, Alexandru & Rusu, Ion (2008). *Cooperarea judiciară internațională în materie penală/ International judicial cooperation in criminal matters*. Bucharest: C.H. Beck.

Rusu, Ion (2009). Mandatul European de arestare în urma modificărilor aduse de Legea nr. 222/2008/ The European arrest warrant following the changes to the Law no. 222/2008. *Caiete de Drept Penal/ Notes of Criminal Law no. 1/2009*. Bucharest: C.H. Beck, pp. 17-49.

***Framework Decision 2008/978/JHA of 18 December 2008 on the European warrant for obtaining evidence, objects, documents and data for use in criminal proceedings, published in the Official Journal of the European Union L 350 / 72 from 30.12.2008.