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## **The European Arrest Warrant**

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**Abstract:** In the paper it is generally examined the institution of the European arrest warrant according to the latest changes and additions through the adoption of a new European legislative act. The paper is a continuation of research in the area of judicial cooperation in criminal matters in the European Union. It may be useful to the judicial bodies with the responsibilities of issuing and executing a specific European arrest warrant and to academics and students in law schools. The research results, the essential contribution, the originality consist of the general examination of the institution, the critical remarks and proposals for amending and completing certain provisions insufficiently clear.

**Keywords:** crime; critical opinions; judicial cooperation

### **1. Introduction**

The Romanian doctrine, as the European one, has revealed that the oldest and well known form of international judicial cooperation in criminal matters is considered to be the extradition.

In its historical evolution, the institution of extradition has been a permanent subject of negotiations between the world countries, the ultimate goal being to find the most effective ways to surrender offenders' refugee in another state. Bilateral agreements have resulted in treaties, conventions or other similar instruments that have played a decisive role in preventing and fighting crime more effectively. (Rusu, 2010, p. 19).

One of the fundamental problems that caused many political-legal discussions between the countries of the world was of course the extradition of their own citizens. (Boroi & Rusu, 2008, p. 299)

For a long time, all world countries (except U.S. and Britain, but only bilaterally and under certain conditions) did not accept the extradition of their citizens, moreover they did not committed even to judge according to the internal laws on those who have committed criminal acts in other states. (Boroi & Rusu, 2008, p. 299)

Developing world Member countries even since the beginning of the last century, especially since the second half, it has created new possibilities for moving people and goods, something that caused new mutations and the structure of cross-border crime, mutations generally defined by the possibility of moving criminal elements, for ensuring a high quality organization and logistics.

In this context particularly complex, aware of the increased danger represented by the attempt to globalize some serious forms of organized crime, among which we mention terrorism, drug trafficking, trafficking in arms and ammunition, human flesh etc., the European governments have continuously insisted upon the improvement of international judicial cooperation in criminal matters. (Rusu, 2010, p. 20)

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The first and the most important step in the direction of 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 of 13 December 1957. (Boroi & Rusu, 2008, p. 299)

Although initially the mentioned European legislative act proved its effectiveness, contributing decisively to the improvement of complex business and crime prevention at the level of Europe, being subsequently updated by two additional protocols, however, in time this institution proved as such to have large gaps. (Rusu, 2009, p. 19)

The establishment of the European Union and subsequently the Schengen Area created new opportunities of criminal elements and implicitly the growth of crime, increased possibilities of territorial expansion of action by the admission to new states. In the new context created in the early XXI<sup>st</sup> century, the movement of offenders from one corner to another of Europe, is without any risk. (Rusu, 2009, p. 19)

Against this background, which led to increased crime, the European Union's objective of becoming an area of freedom, security and justice, seemed to be in danger. (Boroi & Rusu, 2008, p. 300)

No doubt the new security threats of Member States, this time more current and also dangerous, has prompted the establishment of new procedures between Member States, a procedure that simplifies the entire activity. In this context, very complex, with major implications regarding the evolution of the European Union, it was adopted the Framework Decision 2002/584/JHA of 13 July 2002 on the European arrest warrant and surrender procedures between Member States.

The importance of this international instrument stems from the novelty elements that they bring in the surrender procedure of criminals between Member States, by simplification and efficiency with which it is achieved within the EU judicial cooperation.

Among the innovations that the European arrest warrant brings (in relation to the institution of extradition), note the following:

- widening the scope to include new types of offenses of increased gravity;
- renouncing at verifying the double incrimination procedure for these groups of offenses;
- simplifying the surrender procedures;
- increase the efficiency by shortening deadlines;
- simplifying the administrative stage;
- possibility of direct cooperation between the judicial institutions;
- surrender their citizens;
- complying with the provisions of the Framework Decision by all Member States (Rusu, 2009, p. 49).

We can say that the establishment of the European arrest warrant replaces the extradition institution in the relations of cooperation in criminal matters between Member States of the European Union. Thus, under the procedural aspect, the EU Member States, the European arrest warrant has practically replaced the European Convention on Extradition, an international instrument remaining in force as being applicable in its relations between European Union Member State and another Member State not being EU member, or between two countries not members of the European Union, but only of the Council of Europe.

## **2. Acts that Allow Surrender**

The examination of the mentioned European legislative act depositions leads to the conclusion that only a series of crimes, regarded as being more serious (included in several groups), regardless of the title that it is used in the legislation of the issuing state, if it is sanctioned by the law of the issuing State with a sentence or a custodial measure for a maximum period of at least three years, it will not be subject to checking the condition of double incrimination.

These types of offenses are expressly mentioned in article 2 line (2) of Framework Decision 2002/584/JHA, the European legislator can still leave the possibility of their extent depending on the overall evolution of the recorded crime in each Member State. (Rusu, 2010, p. 21)

Meanwhile, the European legislative act provides that for other offenses, other than those mentioned above, surrender is subordinated to the condition that the facts justifying the European arrest warrant would represent an offense under the laws of both countries involved, regardless of their constituent elements or their legal integration, a condition which is expressly stated in the international law and the Romanian and European doctrine as “double incrimination”.

According to European legislative act, the Member States have two categories of reasons to refuse to execute a European arrest warrant, of which the first falls into the *mandatory reasons*, and the second into the optional reasons. (Boroi & Rusu, 2008, p. 313)

### **3. Mandatory and Optional Reasons for Refusing the Execution of the Warrant**

The European legislative act provides that the executing judicial authority (of any Member State) will refuse to execute the European arrest warrant in the following cases:

- a) when, according to the available information, that person was prosecuted for the same offense finally judged by a Member State, other than the issuer, under the condition that, if convicted, the penalty has been executed or currently being in execution, or may no longer be executed under the law of the convicting Member State;
- b) the offense on which the European arrest warrant is covered by amnesty in the executing Member State where that State had jurisdiction to prosecute the offense under its criminal law;
- c) the person who is the subject of European arrest warrant cannot, because of the age, be held criminally responsible for the acts mentioned in the warrant, under the law of the executing Member State.

We find therefore, that whenever the executing judicial authorities will notice the existence of one of the above mentioned situations, they will necessarily refuse to execute the European arrest warrant. The provisions of the European legislative act is mandatory, they can leave no room for interpretation, regardless of the common will of the States directly concerned, of course in concrete cases.

#### **Optional Reasons**

The European legislative act provides some optional grounds for refusal to execute a European arrest warrant by the judicial authority of the executing State, namely:

- when surrender is submitted to the condition upon the facts justifying the issuance of European arrest warrant it would represent an offense under the executing State law, regardless of their elements or legal classification, the act underlying the European arrest warrant is not a offense, in accordance with the law of the enforcement state; in exceptional cases relating to taxes, customs and exchange, the execution of European arrest warrant cannot be refused because the state law enforcement does not require the same type of fees or taxes or it does not contain the same type of rules on taxes, customs and foreign exchange just as the law of the issuing Member State;
- the person who is the subject of European arrest warrant is subject to criminal proceeding in the executing Member State for the same offense motivating the European arrest warrant;
- the judicial authorities of the executing Member State have decided either not to prosecute for the offense on which the European arrest warrant or to terminate it, or where the requested person has made a final judgment in a Member State for the same facts that prevent further proceedings;
- when the prosecution or punishment was prescribed in accordance with the executing Member State and the acts fall within the competence of that State, under its criminal law;

- when the information is available to the executing judicial authority that the requested person was finally judged for the same acts of a third country, under the condition that, in case of conviction, the sentence was executed or at that time was under execution or it may no longer be executed under the law of the sentencing country;
- when the European arrest warrant was issued for a penalty or a deprivation of liberty measure, then the requested person is staying in the executing Member State, is a national or resident thereof, and that State undertakes to execute the sentence or detention order in accordance with the national law;
- the European arrest warrant relates to offenses: in accordance with the executing Member State, the offenses have been committed wholly or partly within the executing Member State or in a place treated as such, or were committed outside the territory of the issuing Member State and the executing Member State's law does not allow prosecution for the same offenses when committed outside its territory.

So whenever it will be incident, in one of the reasons listed above, the executing Member State will have available two alternatives, namely: being denied the execution of warrants relying on the provisions of article 4 of the European legislative act (and other reasons justified by the provisions of its internal law), or proceed to the execution of the European arrest warrant, without justifying the reason. (Rusu, 2010, p. 23)

According to the interpretation of the provisions of the European legislative act, it results in both cases, that the executing Member State will proceed correctly, because as mentioned, these reasons that can be invoked are optional for the executing State, the responsibility for the adopted manner it belongs exclusively to that state.

#### **4. Changes and Additions to the European Legislative Act Framework**

Both in doctrine and legal practice, observing some failure in the text of the Framework Decision 2002/584/JHA, on ensuring that the right of the person in question to be present at its trial, was later adopted Framework Decision 2009/299/JAI of the Council of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, strengthening the procedural rights of persons and encouraging the application of the principle of mutual recognition to decisions rendered in the absence of the person in question at the trial.

In our opinion, this change has occurred because, according to Framework Decision 2002/584/JHA, the executing authority may request the issuing authority to give certain assurances considered sufficient to ensure the person subject to the European arrest warrant, that will have the possibility to seek a retrial in the issuing Member State, being present when the judgment is passed. Regarding the *sufficient* nature of such insurance, we see that it was left to the executing judicial authority, without being provided other clear criteria based on which this authority may act.

On the other hand, note that the right of the accused person of being present in person at trial is included in the right to a fair trial according to article 6 of the Convention on Human Rights and Fundamental Freedoms. Meanwhile, note that while the Court ruled that the accused person's right to be present in person at trial is not absolute, it can give up, voluntarily and unconstrained by anyone expressly or impliedly, but clearly, to this right.

Given these considerations, the European legislative act mentioned above, there were some additions and changes to the optional supplementation refuse reasons of the European arrest warrant enforcement by a member state under certain conditions.

Thus, by the Council Framework Decision 2009/299/JAI, article 2, it was introduced a new article, namely the fourth, called "*Decisions rendered following a process in which the person was not present at the trial*".

These new provisions provide that the executing judicial authority may refuse to execute the European arrest warrant issued in the purpose of executing a penalty or a deprivation of liberty measure, if the person was not present at the trial when the judgment was passed.

From this general rule, an exception is the situation where the European arrest warrant states that the person, in accordance with further procedural requirements defined in the legislation of the issuing Member state, in useful time, it was summoned in person (and thus informed) with the date and place established for the trial which led to the decision, whether actually received by other means, any official information about the date and place of that process and it was informed that a decision can be rendered if it did not appear at trial, or, with knowledge of the established trial, instructed a lawyer (who may be appointed by the person or ex officio, to defend the process), which actually participated effectively to the trial defending the regarded person. (Rusu, 2010, p. 24)

Another exception to the above general rule refers to a situation where, after being passed the judgment and being expressly informed about its right to a retrial or to appeal, in which it is entitled to participate and which allows the case, including new evidence, to be reviewed and it may lead for the original decision to being reversed, the person has expressly stated that it does not contest the decision or it did not request the retrial or promote remedies in due time. (Rusu, 2010, p. 24)

A final exception concerns the situation where, although the person concerned was not informed with the decision, it was not delivered personally and immediately after delivery and it will expressly be informed about the right to a retrial or an appeal to which is entitled to be present and it will allow that the situation of the case, including new evidence to be reviewed and it may lead to the dissolution of the original case and also, it will be informed about the timeframe in which it should request a retrial or promotion of an appeal according to the European arrest warrant.

Also, in case the European arrest warrant is issued for a penalty or a deprivation of liberty measure, under the conditions mentioned above, and the person in question has not previously received any official information on the procedures proceedings against him, the person may request, when informed of the contents of the European arrest warrant, a copy of the judgment before being surrendered. On the receipt of information upon request, the issuing authority shall provide the wanted person a copy of the judgment by the executing authority. It is worth mentioning that the application of the requested person must not delay the surrender procedure or the decision to execute the European arrest warrant.

When the person surrendered under the same conditions (as above) requested a retrial or appeal, the person's detention awaiting retrial or an appeal is reviewed in accordance with the issuing Member State, to the completion of proceedings, either ex officio or at the request of the concerned person. Such review shall provide, in particular the possibility to suspend or discontinue the detention. Retrial or appeal will begin in due time after the surrender. (Rusu, 2010, p. 24)

## **5. Conclusions and Critical Remarks**

The main changes and additions to the legislative act that regulates the delivery under a European arrest warrant, the European legislator has introduced other optional reasons, besides those already existing, which can lead to the refusal to execute a European arrest warrant issued by another Member State. These changes and additions provide better conditions and the right of the person under the European arrest warrant issued to enforce a penalty or a deprivation of liberty measure, for the retrial of the cause where it has been convicted in his absence at the trial.

This solution has imposed due to the European Court of Human Rights, which called respecting the provisions of article 6 of the Convention on Human Rights and Fundamental Freedoms, as well as criticisms on the doctrine.

Although the establishment of a European arrest warrant, as amended and supplemented (to which it was referred), represents in our opinion a great success in the complex work of preventing and

combating crime of all kinds in the European Union, the research of its provisions has led to the conclusion of the existence of rules at least questionable, if not likely to change and complete.

A first critical opinion regards the failure of taking into account by the European legislator the ways of executing some custodial measures for offenders. Thus, out of the definition of a European arrest warrant, it results that it is executed for *the achievement of criminal investigation or for a penalty execution or a deprivation of liberty measure*. We note that the above provisions make no reference to safety measures that may be taken against a minor (according to our legislation, internment in a rehabilitation center and hospitalization in a medical-educational institute). In this situation, given that the European legislative act expressly states the cases where it is executed a European arrest warrant, where the warrant is required for the execution of educational measures, this will not be possible. Thus, the juvenile offender against whom it was taken such a measure and avoid the execution moving in another Member State cannot surrender to the executing state based on a European arrest warrant.

Of course the situation is different if against the minor it is achieved prosecution because, this time, the Member State in which he committed the offense may issue a European arrest warrant and the addressing Member State can execute it, in compliance with the mandatory or optional reasons for refusal.

This situation has not been noticed by any Romanian legislator, which in the special law defines the European arrest warrant in the same way, basically copying the text drafted by the European legislator and excluding the surrender of the minor offender to carry out a security measure.

Given the above, we believe it is urgent to complement the European legislative act according to the specified reasons, by including custodial educational measures among the reasons that a European arrest warrant may be issued and executed.

We also believe that our special law must be supplemented with the same provisions. A possible addition may be achieved only by the Romanian legislator for the above purposes that would lead to the execution by the Romanian judicial authorities of a European arrest warrant issued by another Member State, and hence the impossibility of requiring such a warrant execution, under current provisions of the European legislative act. However, in this situation (when the special law would be completed) there is the possibility of issuing by the Romanian judicial authorities a European arrest warrant and its execution and therefore, only when in the state law enforcement there are provisions on the execution of such warrant and in the case of minors against whom a custodial security measure was taken. (Rusu, 2010, p. 25)

The second critical opinion concerns the way in which the difference between some of the optional and mandatory grounds for the refusal of executing a European arrest warrant, an aspect mentioned in the European legislative act and Romanian special law.

Thus, one of the reasons provided in the European legislative act, at article 4, line (4), which provides that the addressed Member State may refuse to execute a European arrest warrant *when it was decided the prosecution or punishment under the law of the executing Member State and the acts fall within the competence of the Member State in accordance with its criminal law*.

In our opinion, in the case law, in such a situation it cannot be discussed an option of the executing Member State, but only a mandatory one. We argue this view on the grounds that in the case of criminal liability or penalty, the person concerned cannot tolerate any criminal sanction, except safety measures.

As a general conclusion, we consider that in order to ensure an effective judicial cooperation in criminal matters between Member States, it is absolutely necessary to amend and supplement the European legislative act and the special law, according to the achieved examination and suggestions.

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