

## **The Issuance and Transmission of a European Arrest Warrant by the Romanian Judicial Authorities**

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**Abstract:** The European arrest warrant is the most important form of judicial cooperation in penal matters within the European Union, which is based on the mutual recognition of criminal judgments. The European legislative act that governs the institution is the Framework Decision no. 2002/584/JHA of 13 July 2002 on the European arrest warrant and the surrender procedures between Member States, amended and supplemented by the Council Framework Decision of 2009/299/JAI February 26, 2009. Although the first piece of the European legislative act has been transposed into our legislation by the Law no. 302/2004 on international judicial cooperation in criminal matters, with subsequent amendments, the modifying normative act has not been transposed into national law. The research conducted on the depositions of special law and of the European legislative act, and especially on their implications in the internal and European judiciary practice, demonstrates the existence of some incomplete stipulations, secures the workability of the issuing, transmission and identification, pursuing and handing over the persons wanted by the Romanian judicial authorities in the Member States. A very special situation which is determined by the omission of national and EU legislator, in order to include the category of the persons submitted to the handing over and the minors against whom it was applied an educational and a deprivation of liberty measure, a situation which leads directly to the non execution of such sanctions of the minors. The originality of the work consists of the critical observation and also the proposals of *lege ferenda* which covers both the Romanian special law and also the European legislative act. At the same time the critical observations are useful not only for Romanian legislator who intends to supplement and modify the special law, but also for our doctrine.

**Keywords:** Romanian legislator; European Union; European arrest warrant; Romanian judicial authorities

### **1. Preliminary Considerations. The Need and Importance of the European Arrest Warrant in the Complex Activity of Crime Fighting and Prevention in the European Union**

The transboundary crime fighting and prevention is a constant preoccupation of states with democratic political regimes around the world since ancient times.

The experience in this field for each state of the world has demonstrated with observable arguments that transboundary crime fighting and prevention with all its forms of expression can only be achieved under the conditions of adopting a new coherent legislation in the domain, and also the intensification and diversification of forms of international judicial cooperation in penal matters.

The first and most important form of international judicial cooperation in penal matters, adopted by the states of the world which has proven its effectiveness over time, including nowadays, is the extradition.

One of the most basic problems that caused countless discussions at political and legal level between the countries of the world was of course the extradition of their own citizens (Boroi & Rusu, 2008, p. 299).

According to the principle of respecting sovereignty, for a long time, all the states of the world (except U.S. and Great Britain, but only bilaterally and under certain conditions) have not accepted the extradition of their citizens, furthermore they have not committed into judging those who committed criminal acts in other states, according to their national laws (Boroi & Rusu, 2008, p. 299).

Since the second half of last century, European States Cooperation at multiple levels also created the possibility to move easier assets and people from one country to another. This new situation has brought new mutations in the structure of transboundary crime; these mutations are generally caused by the attempt to globalize some serious forms of organized crime including terrorism, drug trafficking, trafficking of arms and ammunition, human flesh, radioactive substances, etc.

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

Although initially the European legislative act has proved its effectiveness, being ultimately updated with two additional protocols, the institution itself has proven large gaps, because of new mutations that occurred in the overall evolution of crime and also the organization of European States.

European Union establishment and subsequently the Schengen Area have created new opportunities for criminal elements and, implicitly, increased crime, strengthening the opportunities to enlarge the action territory by joining new states. In the new context created in the early twenty-first century, the movement of criminals from one corner to another of Europe is without any risk.

The found solution was that of establishing a new procedure for surrendering criminals between the Member States in order to simplify the whole activity, so that all who committed crimes within the European Union would be identified and turned in to the States where they have committed the offenses in order to be trialed and convicted as soon as possible, or in order to execute a sentence or deprivation of liberty measures.

Our doctrine sustains that, “essentially, the step towards the European arrest warrant was made in terms of the conclusions established at Tampere: *formal extradition procedure should be abolished among the Member States, for the people that tend to escape the responsibility in front of justice, after being convicted, and it should be replaced by a simple transfer of the person.*

Concerning the warrant, it was mentioned the European Union strategy in Recommendation 28 in the prevention and control of organized crime matter, which provided the possibility of creating long term, a European legal space in extradition matters and to examine in this context the issue of extradition in the absentia procedures (lack) in full respect of fundamental rights guaranteed by the European Convention on Human Rights. Following the events of September 11, 2001 in New York, it was invoked the creation of a European arrest warrant by the European officials through a Framework Decision. The warrant covers an identical area to that of extradition, which it replaces, referring both

to the stage before the sentence is passed in a criminal trial and also after its passing (Stroe, 2007, p. 281).

Another author that examines the same issue states that “the practice of EU Member States has shown that the mere reconsideration of traditional principles in extradition matters is a cumbersome approach, which faces the opposition of the states, and it is unable to provide effective and rapid solutions in the international judiciary cooperation in penal matter. Under these circumstances, after taking advantage of the new cooperation instruments introduced by the Treaty of Amsterdam within the third pillar, through a framework decision it has been completely reformed the resending mechanism of a person in a Member State at the request of the judicial authorities of another Member State” (Streteanu, 2008, p. 2).

According to the changes and transformations occurring in the European Union and the tendency to increase crime, it was adopted the Framework Decision 2002/584/JHA of July 13, 2002 on the European arrest warrant and surrender procedures between Member States.<sup>1</sup>

The importance of this international instrument results from the new events that are brought in the surrender procedure of offenders between the Member States, and so the EU judicial cooperation achieved through simplification and efficiency.

The European arrest warrant, a valid institution only within the European Union, has virtually replaced the European Convention on Extradition, an international instrument that still remains in force as it is applicable in the relations between an EU member state and a non EU member state which or between two countries that are not members of the European Union, but only of Council of Europe only.

## **2. Definition of a European Arrest Warrant, the Competent Romanian Authorities**

Being aware of the need to adapt its own laws to the new requirements imposed by its status as European Union member state and the need to effectively participate to Member States' effort of fighting and preventing crime within the European Union, Romania has transposed into its national law the main stipulations of EU legal acts in the domain. Thus, the national regulatory framework that governs the activities of international judicial cooperation in penal matters is the Law no. 302/2004 with subsequent amendments concerning international judicial cooperation in penal matters.<sup>2</sup>

According to the law, the European arrest warrant is a judicial decision by which a competent judicial authority of a Member State of the Union requires the arrest and surrender by another Member State of a person for the purpose of prosecution, trial or execution of sentence or deprivation of liberty measures.<sup>3</sup>

The definition adopted by our legislator is almost identical in form and content with the one in the European legislative act, which states that the European arrest warrant is a judicial decision issued by

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<sup>1</sup> Published in the Official Journal of the European Union no. L 190 / 1, from July 18, 2002, p. 1-20.

<sup>2</sup> Published in the Official Monitor, Part I, no. 594 of July 1, 2004, as amended by Law no. 224/2006, published in the Official Monitor, Part I, no. 534 of July 21, 2006, the Government Emergency Ordinance no. 103/2007 regarding some measures for facilitating international police cooperation, published in the Official Monitor, Part I, no. 1019 of December 21, 2006, approved by Law no. 104/2007 published in the Official Monitor, Part I, no. 275 of April 25, 2006 and Law no. 222/2008 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor, Part I, no. 758 of November 10, 2008.

<sup>3</sup> Law no. 302/2004 with subsequent amendments, Art. 77 paragraph (1).

a Member State in order to arrest and surrender by another Member State of a wanted person for prosecution or for execution of sentence or deprivation of liberty measures.<sup>1</sup>

European arrest warrant is executed on the basis of mutual recognition and confidence, a fundamental principle that is the basis of specific activities of judicial cooperation in penal matters at EU level.

The Romanian judicial authorities authorized to issue a European arrest warrant are the courts and the courts of appeal are the ones that execute.

Since the legislator did not nominate a particular category of courts, the interpretation of the text leads to the conclusion that all Romanian courts have jurisdiction to issue a European arrest warrant.

Romanian central authority is the Ministry of Justice and Citizen's Liberties, as such it has the role to send a European arrest warrant issued by a Romanian court to the competent authority of the requesting State, if the issuing court for some reason cannot transmit it directly, or when the Member State has designated the receiving authority to be the Ministry of Justice.

The Ministry of Justice and Citizen's Liberties keep track of the European arrest warrants issued (received), for statistical purposes and it will perform any other duties stipulated by laws designed to assist and support the Romanian judicial authorities, for issuing and executing the European arrest warrant.

### **3. The Procedure for Issuing the European Arrest Warrant**

When an arrest warrant or execution of a sentence or a safety measure issued by a Romanian court cannot be executed because the defendant or the convict is no longer in Romania, the issuing court, according to the proposal of the prosecutor informed by the police, will issue an international warrant for extradition prosecution that will be transmitted to the International Police Cooperation Centre within the General Inspectorate of Romanian Police, to spread the information on all channels in order to identify the person.

Given the fact that the person in question can hide also on the European Union' territory, after issuing the international warrant tracking, the court will also issue the European arrest warrant (according to the law); if one of the following conditions are fulfilled, penalty or security measure provided by law or imposed by the court:

- whether the arrest and surrender is required in order to exercise criminal prosecution, the penalty, provided by Romanian law, must be of at least a year;
- whether the arrest and surrender is required for the execution of a sentence or a safety measure for deprivation of liberty, the imposed sentence or the safety measure must be of at least four months.

In the prosecution stage, the European arrest warrant will be issued by the judge designated by the president of the court, which has the authority to sentence; in trial and execution phase European arrest warrant will be issued by the president judge of first instance or by the executing court in the following situations:

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<sup>1</sup> 2002/584/JHA Framework Decision, article 1 (1).

- at the notification of the prosecutor conducting or supervising the prosecution of the wanted person, if the arrest and surrender is required for the prosecution;
- at the notification of the court which ordered the preventive arrest of the defendant or who decided on safety measures, as appropriate, or the local police body where the warrant is enforced, whether the arrest and surrender is requested for trial or executing the penalty of imprisonment or deprivation of liberty measures.

After verifying the above conditions, the competent court will proceed as follows:

- issues a European arrest warrant and also monitors the taken measures for its transmission, in compliance with the laws and it translates into the required language within 24 hours (when the wanted person has been identified in a Member State); in that case, the judge will inform the competent prosecutor who performs or supervises the prosecution or the court depending on the case;
- by motivated decision, it finds that the conditions required by law to issue a European arrest warrant are not fulfilled, in this case, the judge will communicate to the prosecution the conclusion that performs or supervises the prosecutor or criminal court before which the criminal case; the conclusion can be challenged with an appeal by the prosecutor, within three days from the statement; if it will be accepted it will go further to a superior court judge within three days of case registration, in case of admission the first court is obliged to issue the European arrest warrant.

#### **4. Transmitting the Warrant**

As regards the European arrest warrant forwarding method, we mentioned that when the location of the requested person is identified in a Member State, without knowing the area within the state where the person is hiding, sending the European arrest warrant will be achieved through the Centre for International Police Cooperation.

If it is known the area where the person in question is hiding, the issuing court may forward the European arrest warrant directly to the executing judicial authority of that state (only when that authority is known).

Moreover, the court in question may require the introduction of person's description in the Schengen Information System (SIS) through the NISA. In this case, the alert brought by the Schengen Information System is equivalent to a European arrest warrant, if it is accompanied by the information provided by law (these information are usually in the arrest warrant) by sending the original arrest warrant transmitted by the Romanian Court.

The Romanian court may forward the European arrest warrant by any secure means of transmission, which ultimately leaves a written trail, under the condition that the executing judicial authority of the Member State may check its authenticity.

When the hiding place of the person is unknown, forwarding the European arrest warrant is made by the International Police Cooperation Centre, which will spread through the Schengen Information System or the channels of the International Criminal Police Organization (Interpol), depending on each case. In this case, transmission may also be achieved through secure European Judicial Network.

Any difficulties that may intervene in relation to the transmission or authentication of a European arrest warrant may be solved through direct contact between the issuing Romanian court and executing judicial court of the Member State or by the Ministry of Justice and Citizen Liberties.

In relation to each situation, after forwarding the European arrest warrant, the issuing Romanian court may submit any additional information necessary to execute the warrant.

## 5. Acts for which it May Be Required the Surrender

Regarding the acts for which surrender may be required under a European arrest warrant, the general rule is the need of double incrimination, regardless the name of the offense in the executing State, legal status or constituents.

This stipulation provided by the law requires the need to run some checks by Romanian court before sending the warrant.

Under the law, requesting the surrender under a European arrest warrant can be made when the condition of double incrimination is not fulfilled, for certain categories of offenses, for which Romanian law provides punishments or deprivation of liberty measures, which has a limit of at least three years.<sup>1</sup>

Thus we consider that the offenses for which it may be issued a European arrest warrant by the Romanian judicial authorities may be divided into two distinct categories, namely:

- offenses under the article 85 (1) of Law no. 302/2004, with subsequent amendments<sup>2</sup> [these offenses are also taken from the Framework Decision, art. 2. (2)];
- other offenses under the law of the Romanian state, under the condition of dual incrimination.

## 6. Conclusions Critical Remarks and Proposals of *Lege Ferenda*

Therefore, we conclude that the European arrest warrant appeared firstly after raising the level of criminality, and secondly as a result of some dysfunctions regarding the surrender of people observed by other countries, based on the conventions and treaties governing the extradition institution.

No doubt the establishment of a European arrest warrant is an undeniable improvement in the complex crime prevention and fighting activity within the European Union.

Among the innovations of the European arrest warrant (in relation to the institution of extradition), we mention the following (Rusu, 2009, p. 49):

- broadening the applicability scope by including new types of more serious offenses;
- the renunciation to the procedure for double incrimination verification in the case of these groups of offenses;
- simplify the surrender procedure;

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<sup>1</sup> These are distinct categories of crimes specified in article 85 line (1) of Law no. 302/2004, as amended by art. I, section 36 of Law no. 222/2008.

<sup>2</sup> Last modification was made by publication of Law no. 222/2008.

- increasing the efficiency by shortening the deadlines;
- simplifying the administrative stage;
- possibility of direct collaboration between the judicial institutions;
- surrender its citizens;
- complying with the provisions of the Framework Decision by all Member States.

Taking into account the accused person's right to be in person at the trial, included the right to a fair trial provided in article 6 of the Convention on Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, and that this was not mentioned in the European legislative act, the legislator proceeded in amending and supplementing it.

Thus, 2009/299/JAI Council Framework Decision of 26 February 2009 amending Framework Decision 2002/584/JHA 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947 / JHA, strengthening the procedural rights of individuals and encouraging the principle of mutual recognition of decisions rendered in the absence of the person in question during the proceedings<sup>1</sup> (article 2), amended and supplemented by Framework Decision 2002/584/JHA.

Although European legislative act depositions have not been transposed in the internal law, however it still produces legal effects, therefore the provisions are mandatory for the Romanian courts.

Taking into account the above European legislative act, the courts will consider the need for retrial of the case in which the person sentenced to a detention or imprisonment was not present at the trial. The exception to this general rule are a number of situations, including: quoting procedure, the procedure of informing the person concerned about possible consequences that may incur, hiring a lawyer to defend the interests of the offender, giving up on the retrial procedure etc.

Therefore, although these provisions do not appear in the special law, the courts will have to apply it, based, this time, on the European legislative act and not on the Romanian law. Any misunderstanding and failure of the European legislative act depositions may lead to the refusal of enforcing the European arresting warrant by the competent judicial authority of the executing Member State.

Another criticism of our special law concerns the way of forwarding the European arrest warrant, with special observations related to the procedure of identifying the wanted person.

In this context, we consider that the first problem that can arise in legal practice when issuing and forwarding a European arrest warrant it relates to the identification of the Member State in whose territory the person is hiding and of the municipality and address of that person.

In order to solve this problem, we consider necessary that after the notification of the judicial bodies empowered with enforcing the arrest or execution of the sentence, about the impossibility of performance due to the disappearance of the person's home, the court must issue a tracking international warrant, under which the specialized police formations should take urgently the measures to search and catch the wanted person. Since the international track warrant contains and requests the temporary arresting for extradition purposes, we consider that in practice, after identifying the concerned person, according to the state in which he is in, it may encounter two different cases namely:

- A first case concerns the possibility that the state in which the arrested person is identified and prosecuted is not a member of the European Union; in this case, the person will be arrested for prosecution under international warrant issued by the Romanian competent court, then the

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<sup>1</sup> Published in the Official Journal of the European Union no. L 81/24 of 03.27.2009.

- procedural formalities, specific for extradition will begin, being established by treaty or bilateral agreement between Romania and the state;
- In the second case, the person is identified and arrested according to the warrant of international pursuing, but in a Member State territory; the procedure in this case is different, that is the Romanian police authorities will have to inform competent court to issue a European arrest warrant, following the surrender of the concerned person, being carried out under its provisions and not in compliance with extradition procedures, which in this case are not applicable.

We believe that these provisions are necessary because the special law does not provide clearer rules on this subject, which is why we consider it is necessary to amend and supplement it, according to our observations.

A series of critical remarks are appropriate also in terms of direct transmission of European arrest warrant. Thus, the European and national legislator, by the introduction of this procedure, wanted to simplify the surrender process while increasing the efficiency of forwarding the European arrest warrant.

However, we consider that in the practical activity, more dysfunctions will occur, generally related to the difficulties that the judges must face when it must identify the competent court in the executing State. In this context, we believe that identifying and then communicating to the competent court of another Member State should remain an exclusive task of the competent authority of the Ministry of Justice and Citizen's liberties.

Another observation, with major implications regarding the administration of justice, regards the way it is defined the European arrest warrant, both in the European legislative act and in the special law, and implicitly the legal consequences that arise from this situation.

Thus, in accordance with the two mentioned acts, the European arrest warrant is issued by a Member State for the arrest and surrender by another Member State of a person who is in its territory, for prosecution or for executing a punishment or a deprivation of liberty measure.

The two definitions are identical to that provided by our special law; they are practically almost copied from European legislative act.

From the European legislative act of interpretation and those of the special law, it results that the European arrest warrant will be available only in particular situations, namely: to carry out a sentence or a detention, both custodial and prosecution.

Therefore, for any other measure beyond the ones mentioned above, it will not be possible to issue a European arrest warrant.

Note that in the definition of a European arrest warrant there are omitted the educational measures of imprisonment, criminal penalties, under both our law and other European countries which it is applied only to young offenders.

In these circumstances, when against a minor it will be decided such a measure, and he will hide on the territory of another Member State, the courts of any member country (including Romania) will not issue a European arrest, because this is not mentioned in the definition of a European arrest warrant.

Moreover, in this particular situation the institution of extradition is not efficient either because, according to the Romanian law, it may be extradited from Romania the people who are prosecuted or sent to court for a crime or is wanted for the execution of a sentence or safety measure. Consequently,



the Romanian judicial authorities will not request the extradition of a person but in these same conditions where it approves the extradition at the request of another state.

The educational measures of imprisonment under our laws are hospitalization in a rehabilitation centre (article 104 of Criminal Code) and in a medical-educational institute (article 105 of Criminal Code).

The legal interpretation of the two acts (at national and European level), every time the Romanian court (or another Member State) will establish for a juvenile offender one of two specified educational measures (or others under the law of the concerned Member State) and the minor in question lies in another Member State, that court may not issue a European arrest warrant and therefore the minor does not execute the juvenile criminal sanction.

To remedy this omission (which seems to be quite serious), we consider necessary to change these laws (Framework Decision 2002/584/JHA and Law no. 302/2004) by the replacing the “punishment or a deprivation of liberty measures” with the phrase “criminal penalties of imprisonment.”

The amendment of the European legislative act regards art. 1. (1), and the special law, article 77. A possible unilateral change, according to the ones mentioned above, of the national legislative act will lead only to the possibility of Romanian judiciary authorities to only execute and not to issue a European arrest warrant (in this special situation which we consider).

We appreciate that these comments and proposals of *lege ferenda*, are useful both for Romanian legislator who may intend to modify the special law and for European legislator, which will also have to proceed in modifying and supplementing the concerned normative act.

This critical examination may also be useful for practitioners and for internal or European doctrine in the field, which is to decide regarding the efficiency and especially the development of a European arrest warrant institution.

## **7. References**

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