

Peculiarities of the Enforcement of the European Arrest Warrant in the Case of an Illegal Liberty Deprivation

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Abstract: The illegal deprivation of liberty is, under the current context, one of the most serious offenses, being treated differently in the European Union. The need to prevent and combat this violation, it has led the European legislator to include it under different names in the European legislative act that governs the institution of the European arrest warrant. In this context, the European arrest warrant is the most important form of judicial cooperation in penal matters between the Member States of the EU, which is based on mutual recognition of criminal judgments. The research conducted on how it is regulated the enforcement of the European arrest warrant in the case of illegal liberty deprivation in the European legislative act (the Framework Decision 2002/584/JHA) leads to the conclusion that the legislature failed to mention the violation in question in the group of the violation for which it was not necessary the inspection of the double incrimination, but, still, including the offenses as kidnapping, illegal restraint and hostage-taking. Even if the Romanian legislator included this violation in the above mentioned group, this situation is not solved, because it will cause some problems in the request by the Romanian judicial authorities of the enforcement of such warrant. Another criticized issue, observed not only in the European legislative act, but also in the internal law, is related to the lack of stipulations, which can lead to the possibility of issuing and executing a European arrest warrant and for the execution of educational measures for illegal deprivation of liberty and also others. Also, in order to increase the effectiveness of the execution of a European arrest warrant, we consider that it should be granted executive powers of all courts of Romania. The originality of the work consists of the critical observations and the *lege ferenda* proposal which covers both the European legislative act and the Romanian Law. At the same time, the critical opinions are useful for the Romanian legislator that intends to supplement and amend the special law, and for the European one also for amending and supplementing the European Framework Decision 2002/584/JHA.

Keywords: *lege ferenda*; illegal deprivation of liberty; European arrest warrant; European legislative act

1. Introductory Considerations

Within the complex activities of international judicial cooperation in criminal matters, one of the most important problems observed in the past by all states of the world was the handing in of the people against whom it was performed a penal pursuit or they were convicted in a state and they were hiding in a different state.

This situation has found its resolution only in the second half of the nineteenth century, when it appeared the institution of extradition, which operated only on the basis of international bilateral instruments concluded in particular on geographic and neighbourhood criteria.

However, the extradition of their own citizens was not accepted, such a measure being considered (wrongly) as a breach of the state sovereignty principle.

In Europe, the issue of extradition has been definitively solved later, at mid 20th century starting with the adoption by the European Extradition Convention of the European Council at 13th December 1957 and the two additional protocols concluded in Strasbourg on October 15th, 1975 and 17th March 1978¹.

Due to the establishment of the European Union among other facilities offered to its own citizens, it has emerged also the free movement of persons and assets within the Union, something which also led, inevitably, to increasing crime of all kinds and in particular the transborder and organized crime.

The growing danger, represented by new manifestations of organized crime becoming more violent, has led the Member States to strengthen and improve the forms of cooperation in criminal matters, both in legislative and institutional terms.

Ascertaining the occurrence of flaws in turning in activity between Member States of some wanted persons, according to the extradition institution, at the level of the EU, it was decided to adopt new instrument, designed to simplify this form of cooperation.

Given this information, in order to replace the institution of extradition it has been adopted Framework Decision 2002/584/JHA of the Council of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States.²

In line with European legislation, being in the preparatory phase of EU accession, Romania has transposed into its national law the European legislative act by the Law no. 302/2004 on international judicial cooperation in criminal matters³, an normative act modified and filled in several times, depending on the adoption of other European instruments for cooperation between Member States.

According to the special laws⁴, the European arrest warrant is a judicial decision by a competent judicial authority of a Member State of the Union calls for the arrest and surrender of a person by another Member State, for the purpose of prosecution, trial or serving a punishment or a security measure of privative liberty.

2. Peculiarities of the Execution of European Arrest Warrant

Regarding the types of crimes that can execute a European arrest warrant, a general rule established by the provisions of article 2 of Framework Decision 2002/584/JHA 2 of 13th June 2002 on the European arrest warrant and surrender procedures between Member States, there is the need of double incrimination, punishment or security measures of privative liberty, provided by issuer state law for the committed offense it must be of at least twelve months, and in the case of executing a sentence or security measures, it must be for at least four months.

In order to prevent and combat more effectively the crimes which present a greater seriousness, within the paragraph (2) of the same article there are many types of crimes that required the existence of a double incrimination, the only condition mentioned by the legislator is that the punishment or security measure of privative liberty provided in the issuing State must have a maximum duration of at least three years.

¹ Ratified by Romania according to the Law no. 80/1997, published in Official Monitor no. 89, May 14th, 1997.

² Published in the Official Journal of the European Union no. L 190 / 1 of July 18th, 2002.

³ Published in Official Monitor no. 594 from July 1st, 2004.

⁴ Law no. 302/2004 on international judicial cooperation in criminal matters, with subsequent amendments.

The examination of genres (groups) of crimes referred to in article 2 alignment (2) of the European legislative act induces the idea of the existence of various groups of offenses; the only element of similarity between them would be its gravity and therefore the maximum limits of sentences or security measures provided by the law.

Also note that the offence illegal deprivation of liberty is not mentioned in the above mentioned crime groups.

Although the illegal deprivation of liberty is not mentioned, we consider that it may be included in a special group known as "kidnapping, illegal restraint and hostage-taking."

The European legislative act, referred to above, has been implemented in our law by Law no. 302/2004 on international judicial cooperation in criminal matters (with subsequent amendments).

Special Law provides in article 85 align (1) the main types of offenses for which the existence of double offense is not required, as mentioned in section 16 crime group called "abduction, illegal deprivation of liberty and hostage-taking."

Note that the European legislative act has not taken into account and it did not mention specifically the offense of illegal deprivation of liberty, trying to assimilate it into the group of kidnapping, hostage-taking or illegal restraint.

In this context, in case of issuing or executing a European arrest warrant for the offense of illegal deprivation of liberty, there are a series of peculiarities, which differ, depending upon the feature of the Romanian state, that is as soliciting state or executing state.

Also, both the issuing and execution of a European arrest warrant by the Romanian judicial authorities is also conditioned on how the offense is under investigation and designated for illegal deprivation of liberty in other states laws.

In this context, referring to the way in which the freedom of the individual is protected by rules of criminal law in Europe, the specialized literature has sustained that as a first noticed aspect is that the crime of illegal deprivation of liberty is called differently, however with some obvious elements of similarity.

Thus, in some penal offense codes it is called *illegal lack of liberty*, namely, Germany (§ 239) and Finland (Chapter 25, Section 1), and other *illegal deprivation of liberty*, such as Sweden (Chapter IV Section 2), Moldova (article 166) and Kosovo (article 162). In other penal codes the constituent elements of the offense of illegal deprivation of liberty may be found in the offenses of sequestration, such as Portugal and Spain 158 (chapter I). Other codes provide the offense codes examined in chapters or sections generically called "*about the abduction and sequestration*" or "*illegal detention and sequestration*" (France and Spain).

Regarding the active subject of crime, the general rule is that of not being qualified, being any person who meets the general conditions required by law to have this quality. The only exceptions in which the active subject may have an official quality are provided in the laws of France and Spain.

Regarding the minimum age for engaging in penal responsibility offense of the active subject, we must point out that there are different features specific to certain countries.

On the standard and more severe ways, we must mention that, except Swedish Penal Code, where the crime of illegal deprivation of liberty reflects an aggravated way of kidnapping offence, the other codes provide their own aggravated ways (Rusu & Rusu 2010, p. 342).

So, given the above, we consider necessary to define the activities of the Romanian judicial bodies in relation to their position, that is the issuance or enforcement of a European arrest warrant relating to the performance of an offence of illegal deprivation of liberty.

2.1. The Romanian State as a Requesting State

Thus, the Romanian state has the status of a requesting state in the case of examined offence, the Romanian judicial authorities will issue a European arrest warrant requesting the Member State, where the identified wanted person is found, its arrest and surrender.

The execution of this warrant will not raise any issue for some Member States which incriminate this offence, naming it identically or in a similar way to the one in our law. This applies to Germany (§ 239, which names the offence in question identically to the one mentioned in our law, that is "illegal freedom deprivation"), Sweden (Chapter 4, Section 2 designates the offence in a similar way that is "illegal lack of freedom"), Finland (Chapter 25, Sections 1 and 2 as "illegal deprivation of liberty" and "illegal deprivation of liberty under aggravating circumstances") etc.

Since basically there are no problems regarding naming the offence as such, we will not dwell on this, the only problem that may occur during the execution are those related to identifying the competent court and following the procedure established in the European normative act and the Romanian special law or state law enforcement.

As argued in doctrine, there are also other Member States, where the crime of illegal deprivation of liberty does not exist as name. Among these states we mention: Portugal (under chapter IV article 158 it is incriminated the offence of "sequestration"), Belgium (under Chapter IV called "about attacks on individual freedom and the inviolability of the residence, perpetrated by individuals, there are incriminated the acts of "illegal arrest or detention of a person), Netherlands (Chapter XVIII entitled "serious violations of personal liberty).

We mention that although this offence is not found under this denomination in the laws of the up mentioned states (and others), in the contents of the offences which we interpret as assimilated to illegal deprivation of liberty offence, there are found some constituents, in particular those related to the objective side, the subject and object of the offence.

In this case, the execution of a European arrest warrant issued by a court in the country, by another competent judicial authority of the State in which the wanted person is identified, it involves a series of specific features.

Thus, each time, the Romanian judicial authorities are necessary to fit the crime of illegal deprivation of liberty among those mentioned in article 2 (2) of the European legislative act, that of "kidnapping, sequestration and hostage-taking."

The second feature regards the completion of the European arrest warrant in accordance with article 8 paragraph 1 of the European legislative act and the article 79 paragraph (1) of the special law. This aspect has a particular importance because it offers to the state's executing judicial authority the possibility to fit the crime of illegal deprivation of liberty in the above mentioned group and to consider it to be assimilated.

2.2. Romanian State as Executing State

In this situation there is a series of distinct features, being related to the Romanian state quality as executing state of a European arrest warrant relating to the crime of illegal deprivation of liberty.

Thus, in case of receiving a European arrest warrant from a Member State whose legislation is not incriminated by the offense of illegal deprivation of liberty, the competent Romanian judicial authorities (courts of appeal) should examine its content, as is mandatory fitting in the above category (kidnapping, sequestration and hostage-taking).

Thus, firstly the competent Romanian court will consider that the crime of kidnapping under the European legislative act (or any law of the requesting State) is in our law a way of achieving the objective side of the material element of illegal deprivation of their liberty offense and not a stand-alone offense as provided in other states' laws. In this situation (when it is requested the arrest and surrender of a person for the offense of kidnapping), the competent court will proceed to execute the European arrest warrant, not being able to invoke the lack of the incrimination of kidnapping offense in our legislation, a stand-alone offense.

Other cases of this type occur when a Member State (of those mentioned above or others) requires Romanian judicial authorities to execute a European arrest warrant for an offense which is not called the same in the Romanian legislation, but its content presents similar elements with the illegal deprivation of liberty offense provided by our legislation. As the previous situation, the competent court of appeal decides to execute the European arrest warrant, without invoking the mentioned reasons.

Another peculiarity occurs when a Member State requests the execution of a European arrest warrant for an offense which is not mentioned in art. 85 paragraph (1) of the special law, a case where the competent court of appeal decides to execute the mandate, only if the facts (fact), that motivates the issuing of the warrant by the Requesting State, are an offense under the Romanian law, regardless the constituent elements or the gravity of the offense (double incrimination).

3. Conclusions and Critical Opinions

As mentioned above, in case of issuing a European arrest warrant for the illegal deprivation of liberty offense, some new particularities arise.

In conclusion we notice that these particularities regarding the execution of a European arrest warrant in case of the illegal deprivation of liberty offense by the Romanian judicial authorities reside in the non-inclusion of this offense in the group mentioned in the European legislative act (which does not require the existence of double incrimination).

Therefore a first critical remark concerns precisely this situation, according to the stipulations of the European legislative act in question. The fact that the Romanian legislator included this offense in the category of the ones where it is not required the verification of double incrimination in its special law, in our view represents a very important understanding element, considering the evolution of tendencies in criminal offence on this segment. However, this situation leads to the emergence of differences in issuing and executing a European arrest warrant, meaning that the Romanian judicial authorities will always execute such a mandate, while the judicial authorities of another Member State,

at the request of the Romanian ones will implement this mandate after they will fit the illegal deprivation of liberty offence in one of the listed categories in the European legislative act.

This situation, which ultimately leads to decreasing the effectiveness of justice, can not find its resolution unless they include the offense of illegal deprivation of liberty in the category of those for which double incrimination is not required, by expanding the group of offenses "kidnapping, sequestration and hostage-taking" with illegal deprivation of liberty offense (article 2 paragraph (2) of Framework Decision 2002/584/JHA).

Another critical remark refers to the absence in the European arrest warrant of the situation where a person can be turned in also in case of performing the educational measures involving deprivation of liberty. According to article 1, paragraph (1) of the European legislative act, the European arrest warrant is executed in order to arrest and surrender a person by another Member State for prosecution or for executing a sentence or security measures of liberty deprivation. Note that by the definition of a European arrest warrant it results that it is executing for prosecution in case of all crimes, so including that of illegal deprivation of liberty, or serving a sentence or deprivation of liberty security measures (including in case of illegal deprivation of liberty). The European legislator has not taken into account the possibility of executing a European arrest warrant in case of a legal decision on the execution of an educational measure, specific measures of depriving liberty, a specific measure for juvenile offenders.

In these circumstances, taking into consideration both the European legislation act and the special law, in case of issuing a European arrest warrant requesting the surrender of a minor against whom there are carried out criminal proceedings for the offense of illegal deprivation of liberty, the requesting Member State shall proceed to identify and handing in the minor in question.

If, however, against the minor in question the court has ordered an educational measure (such as in our law, hospitalization in a re-education centre or in a medical-educational institute), and it is exempt to get away from execution by escaping on territory of another Member State, the state in question cannot issue a European arrest warrant. We encounter a paradoxical situation in which against a citizen it may be issued a European arrest warrant for prosecution and it cannot issue another warrant for the execution of educational measure given in the same in the same case (which was prosecuted).

According to Romanian Penal Code [article 101 points c) and d), 104, 105] the custodial educational measures that can be taken against a juvenile who committed a crime are the hospitalization in a re-education centre or in a medical-educational institute. So as we mentioned above, taking into consideration the depositions of the European legislative act and the special law, in case in which against a minor who committed an offense of illegal deprivation of liberty is imposed this deprivation of liberty measure and the minor takes refuge in another Member State, the state that imposes the measures cannot issue a European arrest warrant, because the European normative act does not stipulate it. This aspect will lead to the non-execution of penal law sanction applied to juvenile offender and implicitly to the non-fulfilment of the penal law purposes. The situation seems to be even more serious, being inspired by the European legislative act, the Romanian legislator has not provided at least the execution of the European arrest warrant in such situation. In this instance we must mention that it is not incident the institution of extradition, because the cases in which it is requested or granted are identical to those described in the European arrest warrant. Undoubtedly, the solution is to supplement the two acts (European legislative act and the special law), with stipulations which include the enforcement measures involving the educational deprivation of liberty measures, in case of offenses of illegal deprivation of liberty and others.

Another critical remark concerns the competence of executing a European arrest warrant in case of crime illegal deprivation of liberty offense (as in fact for all offenses). Thus, according to Romanian special law, the execution of a European arrest warrant, regardless the offense or quality of the person is given to the courts of appeal. We believe it is required granting the execution competency of the European arrest warrant to all courts in Romania, as well as for issuing the European arrest warrant.

This measure requires amending article 78 paragraph (1) and (2) of the special law and it will substantially lead to increasing the efficiency in the execution of a European arrest warrant.

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