

The European Arrest Warrant According to the Latest Changes and Additions

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Abstract: Based on a dysfunction detected during the surrender of a pursued person under the European Convention on Extradition, the European Union instituted a new procedure that is the European arrest warrant. Because initially the provisions of the Framework Decision 2002/584/JHA did not provide clear legal rules regarding which procedure to follow if the wanted person was not present at the trial, this situation was observed also by the European Court of Human Rights, it was amended and supplemented accordingly by adopting the Framework Decision 2009/299/JAI. The evaluation of the provisions of both acts highlights the existence of some incomplete legal rules, which in time they will cause some dysfunctions regarding the issuing and the enforcement of a European arrest warrant. We also consider modifying and expanding the legal rules relating to mandatory and optional reasons for the refusal of enforcement of a European arrest warrant, and the inclusion of educational deprivation of liberty measures in the category of the reasons that justify the request of the execution of a European arrest warrant. The originality of the work results from the analysis of the recent changes of the European legislative framework document and the critical opinions expressed about some stipulations, which in our opinion are incomplete. The paper can be useful not only for the Romanian legislator, but also for the European one, from the perspective of modifying the concerned legal acts and also the doctrine. It has a major importance in this domain for ensuring an area of freedom, security and justice in the European Union.

Keywords: Romanian legislator; European Union; European arrest warrant; international judicial cooperation

1. Preliminary Considerations

International judicial cooperation in penal matters between countries of the world has known various forms over time in relation to the overall evolution of human society. The oldest and also well-known form of international judicial cooperation in penal matters, assessed by experts is the institution of extradition.

In its historical development, the institution of extradition has been a constant subject of negotiations between countries around the world, the ultimate goal being to find the most effective ways to surrender the offenders, being refugee in another state. Bilateral agreements have materialized in treaties, conventions or similar means, which had a role in fighting and preventing crime more effectively.

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).

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 judged those who committed criminal acts in other states, according to their national laws (Boroi & Rusu, 2008, p. 299).

The development of European countries since the second half of last century has created new opportunities for moving citizens and assets in Europe, an aspect which led to new moves also in the structure of cross-border crime, mutations defined by the movement possibilities of criminal elements, to ensure efficient organization and logistics. In that very complex context, aware of the greater danger represented by the globalization of some serious forms of organized crime, including terrorism, arms trafficking, ammunition, explosives, drugs, human flesh, etc., the European states governments have always insisted on improving the international judicial cooperation in penal matters.

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 the mentioned initial European legislative act has proven its effectiveness, contributing decisively to the development of complex activity of crime fighting and prevention across Europe and was later updated with two additional protocols, the institution itself, however, has proven to have large gaps.

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.

Considering this situation, 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).

The emergence of this new situation determined the establishment of a new procedure to turn in offenders between Member States, which simplifies the whole activity so that all persons who have committed offenses in the EU area are identified and handed over to the states where they have committed offenses in order to be prosecuted, trialled or executing the sentence or deprivation of liberty measures.

In this context, it was adopted Framework Decision 2002/584/JHA of July 13, 2002 on the European arrest warrant and surrender procedures between Member States.¹

The importance of this international instrument results from the new elements that are brought in the surrender of offenders' procedure between the Member States, by simplification and promptness with which it is achieved the judicial cooperation within the EU.

Among the innovations of the European arrest warrant (in relation to the institution of extradition), we mention the following:

- 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;

¹ Published in the Official Journal no. L 190/2002.

- 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 (Rusu, 2009, p. 49) etc.

The specialised literature mentioned that, in fact, the mechanism of a European arrest warrant relates to the forced transfer of a person from a Member State to another (replacing traditional procedure of extradition), it is a horizontal system which replaces the extradition in all matters, extending to all subjects, by mutual recognition of judicial decisions, which should be automatically executed throughout the EU. (Stroe, 2007, p. 283)

For the EU Member States, the European arrest warrant has virtually replaced the European Convention on extradition, an international instrument that still remains in effect as applicable in the relations between the EU Member State and another state which is not a member of the European Union, or between two states that are not members of the European Union, but only of the Council of Europe.

2. Facts that Allow Surrender

According to the depositions of the European legislative act there are considered a series of offenses, considered to be more serious (included in several groups), regardless the name it has in the laws of the issuing state, if there are sanctioned by the issuing state law with a punishment or involving deprivation of liberty measure for a maximum period of at least three years, it will not be submitted for verification of fulfilling the condition of double incrimination.

These groups of offenses are specifically mentioned in art. 2. (2) of Framework Decision 2002/584/JHA, the European legislator leaving still the possibility of extending these groups of offenses, according to the overall evolution of the recorded crime at the level of each Member State.

For the facts, other than those mentioned above, the turning in is conditioned by the facts that justify the issuance of a European arrest warrant to an offense, under the laws of both involved countries, regardless the constituent elements or the legal status (double incrimination).

3. Mandatory or Optional Reasons for the Refusal of Executing a Warrant

According to the European legislative act, the Member States have two categories of reasons for refusing to execution of a European arrest warrant, which are required first *mandatory reasons* and secondly *optional reasons* (Boroi & Rusu, 2008, p. 313).

3.1. Mandatory Reasons

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, the person has been prosecuted decisively for the same offenses judged by a Member State, other than the issuer, under the condition that in case of conviction, the penalty has been executed or currently being executed or may no longer be executed under the law of the convicting Member State;
- b) when the offense on which the European arrest warrant is based on is covered by amnesty in the executing Member State, when it would have jurisdiction to prosecute criminal offenses under its internal law;
- c) when the person who is subject to European arrest warrant cannot, because of his age, be held criminally responsible for the acts at the origin of the warrant under the law of the executing Member State.

We see therefore that whenever the judicial authorities of the executing State will observe the existence of one of the situations mentioned above, it will obligatorily refuse to execute the European arrest warrant.

3.2. Optional Reasons

The European legislative act provided some optional reasons for the refusal of executing a European arrest warrant by the competent judicial authority of the executing State, namely:

- when the surrender is conditioned by the acts that justify the issuance of a European arrest warrant it represents an offense according to state execution law enforcement, independently of the constituent elements or its legal status, the act which is the basis of the European arrest warrant is not an offense according to state law enforcement; in exceptional cases relating to taxes, customs and exchange, the execution of the European cannot be refused on the grounds that state law enforcement does not require the same kind of tax or taxes or it does not contain the same type of regulations concerning taxes, customs and foreign exchange as the issuing State law;
- when the person who is the subject of the European arrest warrant is submitted to criminal proceedings in the executing member state for the same act that motivates the European arrest warrant;
- when the judicial authorities of the executing Member State have decided either not to prosecute the offense on which the European arrest warrant was issued or to end it, or when the wanted person has been the subject of a final decision in a Member State for the same acts which prevents further proceedings;
- when it was passed the prosecution or the sentence, according to the executing Member State right, and the acts fall within the competence of that State, according to its penal laws;
- when according to the available information of executing judicial authority it results that the wanted person was finally judged for the same acts of a third country, under the condition that in case of conviction, the sentence would be in that moment under execution or it may not be executed according to laws of the sentencing country;

- when the European arrest warrant was issued for the purpose of sentence execution for deprivation of liberty measures where the wanted person remains in the executing Member State and he is a citizen or resident of it, then that State undertakes to execute this sentence or safety measure according to its internal law;

- when the European arrest warrant relates to offences where: according to the Member law enforcement, it has been committed wholly or partially offenses on the territory of the executing Member State or in a place treated as such, or it has been committed outside the territory of the issuing Member State and Member State law enforcement does not allow prosecution for the same offenses committed outside its territory.

Therefore whenever an incident will take place following the reasons listed above, the executing Member State will have two alternatives, namely: either it denies the arrest warrant according to article 4 of the European normative act (and other legitimate reasons justified by its internal law depositions) or proceed to the execution of the European arrest warrant, without giving any reason.

We must clear out that in both cases the executing Member State will proceed correctly, because as we mentioned before, these reasons may be invoked, they are optional for state enforcement, responsibility for the adopted method; it belongs to it exclusively.

4. Changes and Additions to the European Legislative Act

After being found some dysfunction in the Framework Decision 2002/584/JHA (about ensuring the right of a person to be present at a trial), it was subsequently adopted the Council Framework Decision of 26 February 2009/299/JAI 2009 amending Framework Decision 2002/584/JHA 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, reinforcing the procedural rights of persons and to encourage the principle of mutual recognition of decisions rendered in the absence of the person at the trial.¹

Thus, that change occurred because, in accordance with Framework Decision 2002/584/JHA the executing authority may request the issuing authority to give certain assurances sufficient enough to ensure the person, which is subject to the European arrest warrant, that it can seek a retrial in the issuing Member State, being present when the decision is pronounced. Regarding the nature of such *enough* assurance, we noticed that it was left to the estimation of the executing judicial authority, without being provided other clear criteria which such authority may establish.

Furthermore we must mention that the right of the accused person to be present in person at the 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 the Court declared that the accused person's right to be present on trial is not absolute, it may renounce voluntarily and expressly or tacitly and clearly to this right.

Given these considerations according to the European legislative act mentioned above, there were made a number of additions and changes regarding expanding the optional grounds for refusal of executing a European arrest warrant by a member state under certain conditions.

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

Thus, the 2009/299/JAI Council Framework Decision, article 2 was completed with a new item, namely the 4a, called “*the decisions rendered following a trial at which the person was not present.*”

These new depositions stipulate that the executing judicial authority may refuse to execute the European arrest warrant issued for the purpose of executing a sentence or involving the deprivation of liberty measures, if the person was not present to the trial where it was decided the sentence. From this general rule, the exception is when in the European arrest warrant is stated that a person, in accordance with other procedural requirements defined in the legislation of the issuing Member State, in time, it was summoned in person (and thus informed) regarding the date and place of the trial according to which resulted the decision, or it actually received, by other means, an official note regarding the date and place of that trial, or being informed that it may be given a legal decision of the established trial, even if it is not presented at trial, or, being aware of the scheduled trial, instructed a lawyer (which can be named by the person or *ex officio*, to defend it at the trial), who actually attended the trial defending his client.

Another exception to the general rule mentioned above refers to a situation in which, after being given the decision and it was expressly informed of the right to a retrial or an appeal, in which it has the right to be present and which allows the situation of the case, including the new evidence, to be reviewed and it may lead to the abolition of the initial decision; the person in question has expressly stated that it did not contest the decision or demanded a retrial or tried an appeal within the right terms.

A final exception to the situation where, although the decision was not being postponed, the person will receive personally and immediately and without delay after the surrender and it will be expressly informed about the right to a retrial or an appeal to which is entitled to be present and which allows the inclusion of new evidence, to be reviewed and it may lead to the abolition of the initial decision; the person in question has expressly stated that it did not contest the decision or demand a retrial or tried an appeal as stated in the European arrest warrant. Also, if the European arrest warrant is issued for executing a sentence or deprivation of liberty measures in the above conditions and the concerned person has not previously received any official information on procedures against his person, he might ask, when informed of the contents of the European arrest warrant, a copy of the decision, before being surrendered. Immediately after receiving information on the application, issuing authority shall provide the wanted person a copy of the decision through the executing authority. We must note that the application of the requested person must not delay the turning in procedure or the decision of executing the European arrest warrant.

When the person turned in under the same conditions (as mentioned above) requesting a retrial or appeal, the detention of that person, which awaits retrial or an appeal, is reviewed according to the law of the issuing Member State until the completion of the procedures, either *ex officio* or at the request of the person in question. Such revision shall provide, in particular, the possibility of suspending or interruption of the detention. Retrial or appeal will begin in due time, after turning in.

5. Conclusions and Critical Remarks

According to the amendments and additions of this legislative act, the European legislator has introduced some optional reasons which may lead to the refusal of a European arrest warrant execution issued by another Member State. The purpose of these changes and additions was to ensure the right of the person, under the European arrest warrant issued for the execution of a sentence or a custodial measure, to seek a retrial of the case, being convicted in his absence.

The legislator chose a solution based on article 6 of the Convention on Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.

Although the establishment of a European arrest warrant, with subsequent amendments (to which we referred), is, in our opinion, a great success in the complex activity of crime fighting and prevention of all types in the European Union; the research of these stipulations lead to the conclusion that there are questionable rules, if not susceptible for amending and supplementing.

A first critical opinion concerns the not taking into account by the European legislator of the ways to execute some liberty deprivation measures for juvenile offenders. Thus, by the definition of a European arrest warrant, it results that it can be executed for prosecution or in the purpose of executing a sentence or deprivation of liberty measures. Note that the above provisions make no reference to safety measures that may be taken against the child (according to the provisions of our legislation, hospitalisation to a rehabilitation centre and in a medical-educational institute). In this situation, given that the European legislative act states expressly the case in which a European arrest warrant is executed, where the warrant is required for the execution of educational measures, this will not be possible. Thus, the juvenile offender against whom such action was taken, and it avoids its performance by moving in another Member State; it will not be possible the surrender to executing State according based on the European arrest warrant.

Obviously it would be a different situation if against the child it is executed a prosecution, because this time, the Member State, where the offense was performed, may issue a European arrest warrant and the addressed Member State may execute it, following the mandatory or optional reasons for refusal.

This situation has not been observed by any Romanian legislator; the special law defines European arrest warrant in the same way, basically copying the text prepared by the European legislator and excluding the surrender of the juvenile offender for executing a safety measure.

Given the above, we consider that it is urgent to complete the European legislative act according to the ones mentioned above by including educational measures involving deprivation of liberty among the reasons for which it may issue and execute a European arrest warrant.

We also believe that our special law must be supplemented with the same provisions. An addition made only by the Romanian legislator within the meaning of the above mentioned statements would lead to the possibility of execution by the Romanian judicial authorities of a European arrest warrant issued by another Member State, and thus the impossibility to request the execution of such warrant, under the current provisions of the European legislative act. However, in such situation (where the addition would be made in the special law), there is the possibility of issuing a European arrest warrant by the Romanian judicial authorities and implicitly its execution; this could happen only when in the state law enforcement there is the stipulation to execute such warrant and also only for minors against whom it was performed a safety measure involving deprivation of liberty.

Furthermore, note that the contents of article 4a (1) 2009/299/JAI Framework Decision of 26 February 2009 (legislative act amending and supplementing the Framework Decision 2002/584/JHA of June 13, 2002), European legislator, referring to the voluntary reasons for refusing the enforcement of a European arrest warrant, using the phrase European arrest warrant issued for the purpose of *executing a sentence or measure involving deprivation of liberty*. Interpreting the term used by the European legislator which virtually replaces the phrase *punishment or safety measure involving deprivation of liberty* with *the sentences or measures involving deprivation of liberty*, it may induce firstly the idea that the European arrest warrant can be executed in the case of any punishment or other deprivation of liberty measure, hence the educational ones also (considering that in the phrase the deprivation of liberty measure it includes both safety measures and the educational ones).

However, we consider that such interpretation cannot be done, as those stipulations relate only to the voluntary possibility of the executing state to refuse to execute a European arrest warrant, when the wanted person was not present at the trial when the sentence was passed.

These stipulations are not correlated with those of article 1 line (1) of the Framework Decision 2002/584/JHA of June 13, 2002, a situation where a European arrest warrant issued for the execution of educational measures is not possible.

In these circumstances we consider that the only way to remedy this dysfunction is amending and supplementing both the European legislative act and the special law.

Another critical opinion concerns the way in which are differentiated the mandatory from voluntary reasons, for the refusal of executing a European arrest warrant, in the European legislative act and in the special law. Thus, some voluntary reasons that can be invoked by executing Member State are in our view at least questionable, given their direct effect in the situation where the European arrest warrant is executed. One of these reasons is provided in the stipulations of the European legislative act article 4 (4), which provides that the requested Member State may refuse to execute a European arrest warrant when it was issued the prosecution or sentence under the law of the executing Member State and the facts are the Member State' competence according to its penal law.

We consider that such situation cannot put into question a voluntary option of executing Member State, but only a mandatory one. We believe that under the consideration that in case of criminal liability or penalty execution, the person cannot bear any criminal penalty, except for safety measures (according to Romanian penal law).

The examination of legal rules on mandatory reasons for refusal of executing a European arrest warrant is incomplete, in our view.

Thus, we consider necessary to mention another mandatory reason, that is when the person for whom the extradition is requested, it should benefit from jurisdiction immunity in the executing member state.

Romanian special law provides the same provisions, which is why we consider that it no longer requires a critical examination.

As a general conclusion, we consider that in order to ensure 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 these examinations and suggestions.

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