

THE TRANSPOSITION OF THE FRAME-DECISION REGARDING THE EUROPEAN WARRANT OF ARREST IN THE ROMANIAN LAW

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Abstract

The European warrant of arrest represents a genuine revolution in what regards the procedure of persons' extradition and surrender who get round the criminal accusation, lawsuit or the execution of a punishment. If the simplification of the extradition procedures was an objective of the European Union' member states regarding the way in which this simplification should be realised, the positions of the member states were different.

Key words

The European warrant of arrest; The extradition procedures; European Union.

For a long time, the main form of international, judicial cooperation in penal matter, unanimous recognized, but with some restrictions, was extradition.

Although initially, the judicial cooperation was realized through bilateral conventions concluded between different states, the main criteria being the geographic one (especially vicinity) subsequently, once with the acknowledgement of the danger represented by the organized crime both for the security of the citizens and for the state institutions the world's states found new forms of cooperation especially at regional level.

The adoption by the European Council, in the middle of the last century, of the European Convention of extradition, completed and successively modified by means of two additional protocols, fully contributed to the prevention and the rebuttal of the transnational criminality, with all its severe forms of manifestation, as terrorism, gunrunning, drugs traffic and human beings traffic.

The founding of the European Union and, later, of the Schengen space created new possibilities of action for the delinquent elements and, implicitly, the escalation of the criminality, accentuated possibilities for the enlargement of the territory of action through the adhesion of the new member states.

Do to this background, which determined the escalation of criminality, the objective of the European Union to become a space of liberty, security and justice, seemed to be in danger¹.

The experience cumulated in time, during the complex activity of international, judicial cooperation in penal matter by implementing the provisions of the European convention of extradition, was faced with some problems, mainly administrative ones, which lead to the diminishing of the efficiency of the act of justice.

The solution which was found was to institute new procedures of surrender the offenders between the member states, procedure which will simplify the whole activity, so all persons who commit offences in the European Union's space to be identified and surrendered to the states on which territory they committed the deeds, in order to be tried and convicted as soon as possible.

In the doctrine was specified that, in essence, the step towards the European warrant was made by the terms of the conclusions resulted from the Tampere meeting: the formal procedure of extradition should be suppressed by the member states for the persons who have the tendency to elude justice, after they were the subject of a permanent conviction and replaced by a simple transfer of the person².

Given the above, in order to cover the negative aspects found in the execution of the European Convention on Extradition, the European Union adopted the Framework Decision. 2002/584/JHA of June 13, 2002 on the European arrest warrant and surrender procedures between Member States³.

The importance of this international instrument results even from the elements of originality brought by the procedure of surrender the offenders between the member states through the simplification and the promptness with which is made the judicial cooperation in the boundaries of the European Union.

The main novelties brought by the endorsing of the frame Decision refers to:

- the enlargement of the sphere of applicability to include new types of offences of a greater gravity;

¹ A. Boroi, I. Rusu, *Cooperarea judiciară internațională în materie penală*, Ed. CH Beck, București, 2008, p. 300.

² G. Stroe, *Mandatul de arestare european. Dreptul românesc în condițiile post-aderării la Uniunea Europeană*, vol. V, Institutul de Cercetări Juridice, Ed. Dacoromână TDC, București, 2007, p. 281.

³ JOCE L190/2002, p. 1.

- the renunciation to the procedure of verifying the double incrimination in the case of these groups of offences;
- the simplification of the procedures of surrender;
- the increase of the efficiency through the shortening of the terms of surrender;
- the simplification of the administrative stage;
- the possibility of a direct collaboration between the judicial institutions;
- the surrender of their own citizens;
- the obligation to respect the provisions of the frame Decision by all the member states.

The adopting of the frame Decision at the European Union level makes the provisions of European Convention of extradition inapplicable between the member states. Practically, at the level of the European Union, the European Convention of extradition is replaced by the European warrant.

Consistent to the obligations assumed in the complex process of prevention and struggle against the trans-frontier criminality, Romania, since 2004, as future member of the European Union, adopted the Law nr. 302/2004 regarding the international, judicial cooperation in penal matter, normative act in which were transposed, in the internal legislation, the provisions of the frame Decision mentioned above. Subsequently, the normative act was successively modified through many normative acts, the last modification and completion being made by the adopting of the Law nr. 222/2008⁴.

In what regards the field of application of the European warrant of arrest, in the Romanian Law the frame Decision nr. 584/JAI/2002 was transposed through the dispositions art. 81 and 85.

Article 81 regulates the object and the conditions of releasing an European warrant of arrest by the competent Romanian Authorities. Thus, according to the present form of this article, “(1) in the situation stipulated by the art. 66 paragraph (1) is emitted an European warrant of arrest when the prescription of the penal responsibility or the execution of the punishment or the amnesty or the reprieve was not applied, according to the Romanian law and is completed one of the following conditions:

⁴ I. Rusu, *Mandatul european de arestare, în urma modificărilor aduse de Legea nr. 222/2008*, în CDP nr. 1/2009, p. 48.

- a. The punishment foreseen by the law is at least of a year, if the arrest and the punishment is demanded to exercise the penal pursuit or trial;
- b. The punishment or the safety measure depriving of liberty applied is of at least 4 months, if the arrest and the surrender is demanded for the execution of the punishment or for the safety measure depriving of liberty.”

The rules of release and transmission of the European warrants of arrest emitted by the Romanian judicial authorities are settled by the art. 82 – art. 83 from the Law nr. 302/2004. The transmission can be made by any mean which provided a written prove allowing to the judicial authorities to verify its authenticity.

The Romanian law has many alternative means of communication, encouraging as much as possible the direct contact between the issuing Romanian judicial authorities and the ones from the other member states, being also used the transmission through Interpol. The European warrant of arrest is transmitted in copy to the Minister of Justice according to the dispositions art. 83 paragraph (6) from the Law 302/2004 as it was modified by Law nr. 222/2008.

In order to identify the competent authority of fulfilling, the emitting Romanian authorities can use the Atlas available on the site of the European Judicial Network⁵ or can call the contact points of Romania for R.J.E. or the contact points for R.J.E. from the member state of execution⁶.

In the case in which the European warrant of arrest was emitted for the penal pursuit or the trial of a person, the Romanian emitting instance has the possibility that, until the pronouncing of a resolution by the authority of execution on the procedure of surrender, ask that authority the examination of that person, according to the art. 19 from the frame Decision or the temporary surrender of that person. From practical point of view, this situation is necessary for the acts which are urgent or for the acts which necessitate the presence of the person or to avoid the repeated postponing of the cause.

The taking over must be made in 10 days from the date of the foreign judicial authority final decision, with the exception of special cases or if there is a legal motif to postpone it, the over fulfillment of this term could lead to the release of that person. In special occasions or for other independent reasons, the competent Romanian authority for taking over has the obligation to inform the foreign authority on the case, which renders the

⁵ http://www.ejn-crimjust.europa.eu/EAW_atlas.aspx

⁶ http://www.ejn-crimjust.europa.eu/contact_points.aspx

taking over impossible, and in this case the taking over should be executed until the expiration of another 10 days term.

The obligatory reasons of major necessity belonging to a European warrant of arrest provided in art. 3 from the frame Decision were also transposed in the Romanian law (art. 88 paragraph 1):

- a. when, from the information it disposes, results that the pursued person was definitively judged for the same deeds by a state member, other than the remittent state, with the condition that in case of the conviction, the sanction be executed or to be, in that moment in execution or the execution to be prescribed, the punishment of being pardoned or the offence of being amnesty or to intervene another cause which stops the execution, according to the law of the state of conviction;
- b. when the offence on which the European warrant is based is under the protection of the amnesty in Romania, if the Romanian authorities have, according to the Romanian law, the competence to institute proceedings against that offence;
- c. when the person submitted to the European warrant does not answers criminal, due to his age, for the deeds on which the warrant is based according to the Romanian law.

In the boundaries and the spirit of the frame Decision, according to the Romanian law, the simple tenure of Romanian citizenship by a person does not constitute a reason of denial for the surrender. In spite all these, when the European warrant of arrest was emitted for the proceedings in criminal matters the instance can subordinate the surrender to the condition that that person to be send in Romania to execute the punishment pronounced eventually against him. When the European warrant of arrest was emitted for the punishment's execution, the surrender can be refused only if the pronounced punishment is compatible with the Romanian legislation and the competent Romanian authorities guarantee to do the execution of this punishment in Romania. A very good completion to clarify the judicial and practical ways in which is realized the execution of the punishment in Romania in the situation of the failure to act of a European warrant in the hypostasis provided in the art. 88 paragraph (2) p.c was brought by the Law nr. 222/2008⁷, paragraphs (3) and (4).

In what regards the procedure of issuing the European warrants of arrest, is eliminated a problem which determined a fragmented practice related to the judge who is entitled to emit the European warrant of arrest. According to

⁷ Law no. 222/2008 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters was published in the Official Gazette, Part I no. 758 of 10.11.2008.

the new form of the art. 81 paragraph (2): “The European warrant of arrest is emitted, during the phase of proceedings in criminal matters, by the judge commissioned by the president of the instance which has to judge that cause and during the trial and execution phase by the judge commissioned by the president of the first instance or of the execution instance, in the following conditions:

- at the introduction of the prosecutor who does and surveys the proceedings in criminal matters of a person, if the arrest and the surrender are demanded for these reasons;
- at the writ of summons which decided that the accused is remanded in custody or which decided the safety measures, according to the case, or the body which must execute the warrant, if the arrest and surrender are demanded for judgment or the execution of the prison punishment or of a safety measure abridgement of liberty.”

Also, in the new paragraphs newly introduced of the same article 81 is definitely clarified a problem which appeared in the judicial practice: is an ending for the emitting of an European warrant of arrest necessary or not? Now, the paragraph (3) and (4) of the art. 81 stipulate: “(3) The competent judge verifies the fulfillment of the conditions stipulated in paragraph (1) and proceeds, by case, in this way:

- a. Emits the European warrant of arrest and supervises taking measures for its transmission, according to the dispositions art. 82 and 83; if the person is placed on the territory of the European Union member state, decides the translation of the European warrant of arrest, in 24 hours, according to paragraph (6);
- b. Finds that, by reasoned ending, the conditions stipulated in paragraph (1) are not fulfilled in order to emit a European warrant of arrest.

In what regards the procedure of implementation of the European warrant of arrest, to eliminate the inconvenient represented by the situation in which the courts, judicial authorities of implementation, being directly applied by the foreign emitting judicial authorities with a European warrant of arrest which constituted a case, fixed a trial term. The result was the observation that that person was not found on the territory of Romania and this trial term facilitated the procedure of implementation of the European warrant of arrest. So, new articles were introduced 88-88 which regulates a series of previous procedures, which enhance the role of the prosecutor in the procedure of implementation of the European warrant of arrest, keeping in mind the imperative of respect the fundamental human rights. This newly introduced procedure respects other national legislation of applying the frame Decision. In this regard, must be mentioned the appointment of the

prosecutor's offices near the courts of appeal as authorities which can use the European warrant of arrest (art. 78 paragraph (2)).

The Romanian law guarantees to a person, as the Constitutional Court stated, all the procedural rights, if that person has a procedural quality different from the defendant one from the internal penal procedure, being essential that in the penal procedure of the emitting state to be respected the right to a correct trial, because there, in the emitting state, that person has the status of suspect or accused. All the procedural guaranties previous assured are maintained and even strengthen by the Law nr. 222/2008, an example in this regard being the new article 90. The person has (with the exception of the situation in which agrees with the surrender) the right to appeal both against the closing on which the arrest was made and against the decision to surrender, in the terms stipulated by art. 94⁸.

Taking into consideration the imperative of respecting the very short terms of implementation of an European warrant of arrest and considering the fact that some time these terms could not be respected as a result of the advance of unconstitutional exceptions, clearly without base only for the purpose of delaying the procedure, a new 93 article was introduced which stipulates that the trial of the implementation will be made in term of 45 days from the notice of the Constitutional Court.

Another problem which must be solved by the Law 222/2008 is the one related to the necessity to emit an internal warrant of arrest when the arrest is made on the basis of an European warrant of arrest, as title for the arrest, as for the moment it was instituted in the case of the delayed surrender. The solutions gave by the Romanian law, Law nr. 222/2008 (art. 90 paragraph (13) and art. 94 paragraph (3)) are in our opinion, the correct one because the European warrant of arrest which is a judicial decision *sui generis* which replace the classic demand of extradition, but which, in spite of the symbolic name chosen by the European lawyer does not have the judicial nature of a warrant of arrest, because the judicial authority from the emitting state does not orders, and could not do it, the arrest of the person, but, as results from the first paragraph of the European warrant of arrest demands to the judicial authority of implementation the arrest and the surrender of the person on the basis of the mutual recognition principle of decisions. This does not exclude that in some states as Hungary, the equivalence of the European warrant of arrest with the internal warrant, but for this is necessary a corresponding procedural implementation in the internal law.

By the Law 222/2008 clarified a series of other aspects as the institution which assures the taking over/the surrender (specifying that in the Ministry of Internal Affairs and Administrative Reform the competent service is the

⁸ Florin Răzvan Radu, *Cooperarea judiciară internațională și europeană în materie penală – îndrumar pentru practicieni*, Wolters Kluwer, București, 2009, p. 151-152.

International Center for Police Cooperation), art. 100 and 102, referring to the “multiple warrants”.

So, the adopting of the frame Decision at the European Union level, makes the provisions of the European Convention of extradition inapplicable between the member states. Practically, at the level of the European Union, the European Convention of extradition is replaced by the European warrant of arrest.

In spite all these, at Europe level, the European Convention of extradition remains valid being applied in two distinct situations namely:

When the extradition of a person between two states is imposed, of which one is member of European Union and the other state does not have this quality, indifferent of their position.

When the extradition between two European states is imposed which are not members of the European Union⁹.

In other words Romania, through its designed judicial organs, will obligatory apply the stipulations of the frame Decision (and those of the special law) when is demanded the surrender of a person by a member state of the European Union, or when such state demands the surrender of a person found on the state’s territory.

In the same conditions, Romania will apply the stipulations of the European Convention of extradition when is demanded the surrender of a person found on the territory of an European state which is not part of the European Union, or when a state from Europe which is not part of the European Union demands the surrender of a person which is found on the territory of Romania (respecting the conditions imposed by the Romanian law and by the European Convention of extradition).

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⁹ I. Rusu, *op. cit.*, p. 49.