
The European Arrest Warrant before the Romanian Judicial Authorities

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Abstract: *The European Arrest Warrant is one of the major instruments of international cooperation in criminal matters for maintaining and developing an area of freedom, security and justice in the European Union, based on trust between Member States through mutual recognition of court judgments, establishing, as shown before, the “cornerstone” of judicial cooperation between these states.*

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1. OVERVIEW

In response to these Romania’s European integration process, in order to harmonize the domestic legislation, inter alia, Title III of Law no. 302/2004 on international judicial cooperation¹, amended and supplemented by Law no. 224/2006², established the legal institution of European Arrest Warrant, with the aim of replacing cumbersome extradition procedures, different from one country to the other; of shortening the inherent delays in these procedures, and introducing a new simplified system for the surrender of sentenced or suspected persons, for the purposes of execution or prosecution of criminal sentences.

The enshrinement of these institutions into the domestic criminal law is an embodiment of the provisions of 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, a Framework Decision recognizing the European Arrest Warrant as the first concrete measure in the field of criminal law implementing the principle of mutual recognition of judicial decisions – this recognition being the “cornerstone” of judicial cooperation between the Member States of the European Union³.

In turn, the Framework Decision is an important achievement of the long-term goal of creating a European area of security, freedom and justice based on the cooperation between the Member States of the European Union.

Thus, as far back as the Treaty of Amsterdam it was stipulated that the European Union must maintain and develop an area of freedom, security and justice, where freedom presupposes the existence of a common judicial area, the European citizens being able to seek justice in any member state same as in their own country. Moreover, this desideratum aims at eliminating the possibility for criminals to exploit the differences between the criminal justice systems of other states, requiring judgments to be recognized and enforced abroad without the formalities provided by the ‘classical’ conventions on international legal aid.

At the Tampere European Council of 15-16 October 1999, it was stated that mutual recognition of judgments is the cornerstone of judicial cooperation between the Member States of the European Union.

The 2002/584/JHA Council Framework Decision of 13 June 2002 materialized the decision taken in Tampere, aiming to replace the formal extradition procedure between the Member States of

¹ Published in the Official Gazette no. 302 of 1 May 2019

² Published in the Official Gazette no. 534 of 21 June 2006

³ http://www.just.ro/rtrv_mc.php?param=cji_penal_instrumente

the European Union in the case of persons avoiding the execution of a custodial sentence or prosecution with a simplified surrender procedure based on a European Arrest Warrant.

According to Article 1 of the above-mentioned Framework Decision, **the European Arrest Warrant is defined** as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order.

In the light of this definition in the Framework Decision, the European Arrest Warrant should not be confused with the pre-trial detention order in the national law, as the European Arrest Warrant is a judicial decision, which is always based on a pre-trial detention or conviction warrant issued under the domestic law. Moreover, a European Arrest Warrant is only issued when a pre-trial detention or conviction warrant cannot be executed by a Member State of the European Union as the person in question is avoiding arrest by being in the territory of another Member State.

After the entry into force of the provisions of the Law's Title III entitled "Provisions on cooperation with the European Union Member States in the implementation of 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States", in relation to the European Union Member States these provisions have replaced the extradition provisions, unless the Member State in whose territory the person sought is has made statements for non-enforcement of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States of the European Union for deeds committed before a certain date (the Romanian State has not made any statement in this regard).

2. THE ROMANIAN JUDICIAL AUTHORITIES WITH ISSUING AND EXECUTING COMPETENCE AND THE CONTENT OF THE WARRANT

According to Art. 84 paragraph 1 of the national law, the European Arrest Warrant is a **judicial decision** issued by the competent judicial authority of a Member State of the European Union for the surrender of requested persons to another Member State for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order.

The competent Romanian authorities are:

- The issuing judicial authorities, namely the competent legal courts which have previously issued the pre-trial detention warrant in the course of the criminal prosecution or during trial or the courts enforcing final judgments of conviction;

- The judicial authorities for the execution of the European Arrest Warrant, which are the courts of appeal;

- The Romanian central authority, the Ministry of Justice, with the role of support, assistance and consultancy in carrying out the procedures (Art. 86 paragraph 3 of the Law).

The content of a European Arrest Warrant does not differ much from that of ordinary arrest warrants; it is included in Art. 87 and in Annex no. 1 to Law no. 302/2004, namely:

- The identity and nationality of the requested person;

- The name, address, telephone and fax numbers and email address of the issuing judicial authority;

- Evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 81 and 85 of the Law;

- The nature and legal classification of the offense, particularly in respect of Article 97;

- A description of the circumstances in which the offense was committed, including the time, place and degree of participation in the offense by the requested person;

- The penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offense under the law of the issuing Member State;

- If possible, other consequences of the offense.

The European Arrest Warrant sent to the competent authority of another Member State must be translated into the official language or official languages of the executing Member State or into one or more other official languages of the Institutions of the European Communities, as accepted by that State. According to the declaration submitted to the General Secretariat of the European Union Council, the arrest warrants sent for execution to the Romanian authorities must be translated into Romanian or into English or French.

3. THE PROCEDURES FOR ISSUING AND EXECUTING A EUROPEAN ARREST WARRANT

3.1. The active procedure (when the Romanian State is the issuer)

The law regulates **two situations** where the Romanian judicial authorities can issue a European Arrest Warrant, ex officio or at the request of the prosecutor (Art. 89):

a) In order to carry out the criminal pre-trial procedure or the trial, if the deed is punished by the Romanian criminal legislation with a custodial sentence of at least two years;

b) In order to enforce the sentence, if the imposed punishment is longer than one year.

c) In order to enforce the measure of deprivation of liberty, the punishment duration is of 6 months or longer

If the whereabouts of the requested person are known, the pre-trial detention warrant issued by the competent Romanian judicial authority may be sent directly to the executing judicial authority.

The issuing judicial authority may request entering the particulars of the person concerned into the Schengen Information System (SIS) through the National Alert Information System. For this purpose, the provisions of Art. 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the abolition of checks at the common borders apply.

The alert entered into the Schengen Information System is equivalent to a European Arrest Warrant if accompanied by the information set out in the Annex. Thus, on a transitional basis, until the time when the Schengen Information System will be able to transmit all the information mentioned in the Annex, the alert is equivalent to a European Arrest Warrant pending the sending of the original document.

The Romanian judicial authorities may transmit the European Arrest Warrant by any secure transmission means leaving a written record, provided that the executing judicial authority can verify its authenticity.

If the Romanian issuing judicial authority does not know the executing judicial authority, the necessary investigation will be carried out, including through the contact points of the European Judicial Network or through the Specialized Directorate of the Ministry of Justice, for obtaining the required information from the executing Member State (Art. 90).

In cases with the element of urgency, when a European Arrest Warrant for criminal prosecution or trial has been issued, the Romanian issuing judicial authority may request a temporary surrender of the person sought to Romania for hearing purposes from the executing judicial authority of the state where the sought person was caught before they rule on the final surrender, or may request to authorize taking that person's statement in the territory of the executing state.

Also, if the presence of the person sought before the Romanian judicial authorities is required for hearing and the foreign executing judicial authority ordered the suspension of the surrender pending the end of an ongoing trial or until the execution of the sentence imposed in the executing state for an offense different from the one in the European Arrest Warrant, the issuing Romanian

judicial authority will be able to request a temporary surrender of the person for hearing or trial, and will return the person after the hearing until the grounds for suspension cease.

In connection with the active procedure for issuing the European Arrest Warrant by the competent Romanian legal courts, the **doctrine** justly expressed the opinion that the provisions of Law no. 302/2004 are deficient, in the sense that although the legal definition provides that the European Arrest Warrant is a judicial decision, therefore a court decision, no express procedural provisions were provided on how to issue the warrant, which would require a trial in an appropriate procedural framework and the ruling of a judgment, thus ensuring the dual function required for any court decision – of a processual measure, to order the issuance of the warrant, and of a procedural measure, to fulfil the provision of the processual measure, of requesting the arrest and surrender of the requested person. Therefore, by only filling out the annexed standard form of the European Arrest Warrant, the requirements of the European Arrest Warrant as defined are not fulfilled – the definition being given both by the Council Framework Decision and by the domestic legislation⁴.

Another significant shortcoming was found in terms of the active procedure, namely that no deadline was set for the European Arrest Warrant to be issued by the competent courts.

In relation to the above criticisms, it is concluded that a **legislative intervention** for the amendment of Law no. 302/2004 is necessary, aiming at closing the gaps identified for ensuring an effective implementation in practice of the European Arrest Warrant when it is issued by the Romanian authorities.

3.2. The passive procedure (when the Romanian State is the executing state)

Issues concerning the substantive conditions for the execution of the European Arrest Warrant.

As a principle, a European Arrest Warrant can solely be executed if the offense for which it was issued is criminalized by the legislation of both the issuing state and the Romanian State (**the condition of double criminality**).

The condition of double criminality **is not required** and the surrender will be granted by the Romanian State when the arrest warrant is issued for selected serious offenses (a number of 32) sanctioned with imprisonment or a custodial measure for a period of at least 3 years in the issuing state. The offenses to which the condition of double criminality does not apply are listed in Art. 97 paragraph 1 of Law no. 302/2004, as subsequently amended and supplemented (for example: membership in organized crime groups, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, ammunition and explosives, corruption, fraud, money laundering, counterfeiting, illicit trafficking in human organs and tissues, etc.)

When a Romanian judicial authority (prosecutor's office or legal court) receives a European Arrest Warrant but has no jurisdiction in resolving it, sends the warrant to the competent executing judicial authority, namely the competent court of appeal, at the same time informing the issuing judicial authority in this regard.

The Romanian executing judicial authority verifies in advance whether the European Arrest Warrant is accompanied by translations; if the warrant is not translated, the Romanian executing judicial authority may communicate this fact to the issuing judicial authority, in order to get the translation submitted as soon as possible, or, if possible, may order the translation to be carried out, the proceedings being suspended until receipt of the translation.

⁴ I. C. Morar, *The Concept of a European Arrest Warrant in the Romanian Criminal Legislation*, in "Curierul judiciar" no. 7-8/2006.

At the same time, the Romanian executing judicial authorities send all the European Arrest Warrants received by them for execution to the Ministry of Justice, as the central authority in the field.

The execution of a European Arrest Warrant by the Romanian executing judicial authorities **may be subject to the following conditions:**

a) If the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence imposed by a judicial decision rendered in absentia or if the person concerned has not been legally summoned, the issuing judicial authority shall provide sufficient assurance to guarantee that the person concerned will be entitled to a retrial in the issuing Member State in his/her presence;

b) Where the offense on which the European Arrest Warrant is based is punished by a custodial life sentence or lifetime detention order, the legal provisions of the issuing Member State must provide for the possibility of asking for a review of the sentence or of the punishment imposed or to apply for parole after having served at least twenty years of the sentence or of the custodial sentence imposed, or measures of clemency.

As an additional guarantee granted to Romanian citizens, paragraph 2 of Art. 98 states that they may be surrendered on the basis of a European Arrest Warrant issued for the purpose of criminal prosecution or trial provided that, in the event of a custodial sentence, the person surrendered will be transferred to Romania for execution of the sentence.

The Romanian judicial authority **will** (mandatorily) **refuse** the execution of the European Arrest Warrant when:

- The person sought has already been tried for the same offenses by a Member State other than the issuing State or, in the case of a conviction, the sentence has been executed or is currently being enforced or the enforcement has been time-barred, or the punishment has been pardoned or the offense was amnestied, or another cause that intervened prevents the execution of the sentencing state under the legal provisions;

- The offense on which the European Arrest Warrant is based is subject to amnesty in Romania, if the Romanian authorities have, according to the Romanian law, the competence to prosecute that offense;

- The person who is the subject of the European Arrest Warrant is not criminally liable due to age, in accordance with the Romanian criminal law (Art. 99 paragraph 1 letter c).

The Romanian executing judicial authority **may** (optionally) **refuse** the execution of the European Arrest Warrant in the following cases provided by Art. 99 paragraph 2 of Law no. 302/2004, of which we present the most important situations:

- Where the person who is the subject of the European Arrest Warrant is being criminally prosecuted in Romania for the same act as that on which the European Arrest Warrant is based;

- Where the European Arrest Warrant has been issued for the purpose of executing a prison sentence or a custodial sentence if the requested person is a Romanian citizen or lives in Romania and has a continuous legal residence in Romania for a period of at least 5 years and declares that it refuses to execute the sentence or custodial sentence in the issuing Member State;

- Where a final judgment has been passed upon the person who is the subject of the European Arrest Warrant in a third non-EU state, in respect of the same acts, provided that, in the event of a conviction, the sanction has been executed or is undergoing execution or execution is statute-barred or the offense to have been amnestied or the punishment to have been pardoned according to the law of the sentencing state;

- Where the European Arrest Warrant refers to offenses, which, according to Romanian legislation, are committed on the Romanian territory;

- Where the European Arrest Warrant includes offenses that were committed outside the territory of the issuing state and the Romanian law does not allow the prosecution of those offenses when they were committed outside of the Romanian territory;
- Where, according to the Romanian legislation, the liability for the offenses on which the European Arrest Warrant or the execution of the imposed sentence are based have been statute-barred, if the acts would have been within the competence of the Romanian authorities;
- Where a Romanian judicial authority has either decided to discontinue the criminal prosecution or to close the case for the offense on which the European Arrest Warrant is based or for which it has been issued, or has ruled a final decision against the requested person for the same acts, which prevents future proceedings;
- Where the convicted person has not been personally present at the trial.

4. DIFFERENCES BETWEEN THE EUROPEAN ARREST WARRANT AND THE EXTRADITION PROCEDURE

The most important element of the novelty in the European Arrest Warrant compared to the extradition procedure is the **elimination of the administrative phase**.

Thus, according to the legal instruments of extradition, this procedure involves two phases: an administrative one and a judicial one. In the administrative phase, central authorities have an essential role to play, especially in the case of active extradition, where the central authority of the requesting state, at the proposal of the competent judicial authority, formulates and transmits, directly or diplomatically, the extradition request; but also in the case of passive extradition, where the central authority of the requesting state examines the extradition requests received under the formal point of view of international regularity and either notifies the competent judicial authority or, if the formal requirements are not met, returns the extradition request stating the reasons.

Given the objective of removing or limiting the formalities, which are likely to make the extradition procedure extremely difficult, the new surrender system based on a European Arrest Warrant eliminates the administrative phase; the cooperation on the surrender of persons who are avoiding prosecution, trial or the execution of sentences almost completely takes place between the competent judicial authorities of the Member States, the central authorities being able to assist the competent judicial authorities or to act as transmitting authorities.

Therefore, if for the extradition procedure the final decision on whether or not to surrender the requested person is also a political one, with the European Arrest Warrant the entire proceedings take place between the issuing and the executing judicial authority, the issuing decision or, as the case may be, the execution decision exclusively belonging to the legal courts.

A significant difference between the European Arrest Warrant system and the extradition procedure concerns the **offense circumstances**, the new system establishing a number of 32 categories of serious offenses as exceptions from the double criminality rule, in which cases surrender can be granted without verifying this status of double criminality.

An equally important difference concerns the duration of the proceedings, as the European Arrest Warrant system regulates a **time limit** for the execution and surrender procedure as opposed to extradition, where no such limit is provided for.

In the European Arrest Warrant system, the competent judicial authority to which such a warrant was referred is required to resolve and to execute the warrant as a matter of urgency, which also involves the arrest of the requested person during the proceedings before the executing judicial authority. On the other hand, the measure of provisional arrest in order to extradite the requested person is not mandatory and if this measure has been taken, it expires after 40 days if the extradition

documents are not received within this time frame. These provisions represent the main cause of the extradition procedure inefficiency.

The European Arrest Warrant, as regulated by the 2002/584/JHA Council Framework Decision of 13 June 2002 and the domestic criminal law by Law no. 302/2004, ensures the necessary balance between effectiveness and strict guarantees for complying with the procedural rights of the requested person.

Finally, according to the system established by the European Arrest Warrant, the Member States of the European Union can no longer refuse to surrender their own citizens, as this system is based on the principle that every citizen of the European Union must be held accountable for his acts before the courts of the entire Union. However, when surrendering the requested person for prosecution or trial, it is possible for a Member State (and for the Romanian State) to request that the person be returned for the execution of the sentence, with the purpose of a better social reintegration.

In conclusion, the European Arrest Warrant is one of the major instruments of international cooperation in criminal matters for maintaining and developing an area of freedom, security and justice in the European Union, based on trust between Member States through mutual recognition of court judgments, establishing, as shown before, the “cornerstone” of judicial cooperation between these states.

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