THE EUROPEAN ARREST WARRANT AND THE HUMAN RIGHTS

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Abstract

In this article we proposed to mainly analyze the institution of the European Arrest Warrant, and its implications on the right of individual liberty, taking into account the procedure regulated by the Council of European Union Framework Decision 2002/584/JHA of June 13th 2002.
In the first part we present the context in which the framework decision was adopted, with a special focus on the purpose of this instrument, that has been conceived in order to replace the existent and old extradition system of the member states, requiring that each national judicial authority with an executory role recognize the surrender request of another member state.
In the same time, this instrument, that always implies the arrest of a suspect or of a condamned person, is able to prejudice the right to individual liberty, a risk that has been proved to be real in the entire period since 2004, the year of entering into force of the European decision on the European Arrest Warrant.
This is the reason for what we proposed to analyze the limits and the guarantees of the right to individual liberty contained by the Decision 2002/584/JHA and also in the national regulations, with a special focus on the Romanian legal approach by the Law no. 302/2004, concerning the international judicial cooperation in criminal matters.

Key words: international crime, extradition procedure, European arrest warrant, mutual recognition, principle of double criminality

Introduction to the European arrest warrant

Traditional judicial cooperation in criminal matters is based on a variety of international legal instruments that, in their majority, are characterized by the principle of request: a sovereign state addresses a request to another sovereign state, which then decides whether to grant it. This system is, however, extremely slow, because of its complexity, or for this reason, the European Council met in October 1999 in Tampere with the declared intention to create a Union of freedom, security and justice, for which purpose it proposed that the principle of mutual recognition of judicial decisions should become the cornerstone of judicial cooperation in both criminal and civil matters. [1]

MATERIALS AND RESEARCH METHOD

EU Member States practice has shown that the mere reconsideration of the traditional principles on extradition is a cumbersome approach, which is opposed by the states, and which is unable to provide effective and rapid solutions in judicial cooperation in criminal matters. EU reaction to this phenomenon was illustrated by the treaty of Amsterdam, which was an important step in the development of international judicial cooperation in criminal matters at the level of the Union. [1]

This is the reason why, taking advantage of the new instruments of cooperation introduced by the Amsterdam Treaty under Pillar III, the mechanism of surrendering a person within the territory of a Member State at the request of the judicial authorities of another Member State was completely reformed through a framework decision. Thus, it was adopted a fundamental document in this field, namely the *EU Council Framework Decision no. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (published in the Official Journal of the European Communities No.190/1 /18.7.2002) through which the Council's decision taken in Tampere in 1999 was materialized, namely that between the Member States, the formal extradition procedure is to be replaced by a simplified surrender procedure that runs between the issuing judicial authority and the executing judicial authority, which may be assisted by a central, appointed authority in the Member States, or by the contact points of the European Judicial Network. [2] (*The European*

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Judicial Network in criminal matters was created by the Council Joint Action 98/428/JHA of 29 June 1998 consisting of contact points, designated by each Member State, intended to facilitate the judicial cooperation between Member States, the provision of necessary legal and practical information to national judicial authorities and the coordination improvement of judicial cooperation).

RESULTS

The idea of a European arrest warrant is based on the objective established by Title VI Art. 29-42, former Art. K-K9, TEU, namely to provide citizens with a high level of protection, in an area of freedom, security and justice, by developing common action of the Member States in the field of police and judicial cooperation in criminal matters, and by preventing racism and xenophobia. It was clear from the beginning that this objective can only be achieved by preventing and combating organized and unorganized crime, through cooperation between police, customs and judicial authorities, both directly and through Europol and, where necessary, by harmonization of the criminal law in the Member States.

Common action in the area of judicial cooperation in criminal matters is concerned, among others, with facilitating the extradition procedures between Member States by ensuring free and equal access to justice, as well as by guaranteeing the fundamental rights and freedoms

The European Commission, after the European Council in Tampere, using the right of legislative co-initiative introduced in Pillar III by the Treaty of Amsterdam (Art. 34 para. 2 TEU) began drafting a European arrest warrant, which was almost completed when the terrorist attacks took place on 11 September 2001 in the USA. The events in the USA have led to the acceleration of the adoption procedure of the Commission's proposal, so that, only a week after the attacks, the European Commission presented the proposal for the Framework Decision on the European arrest warrant and the surrender procedures between Member States. Subsequently the European Council included the European arrest warrant in the European Counter-Terrorism Strategy, although its scope is not limited to terrorist offences.

The new system provided by the EAW has replaced since 1 January 2004 the traditional procedures of extradition between Member States, procedures that were no longer adapted to the requirements of a common space of freedom, security and justice, but exposed to crimes, in which national borders are becoming less important in order not to be impediments in the fight against crime.

The definition of the European arrest warrant

According to Art. 1 of the Framework Decision, *the European arrest warrant is a judicial decision issued by a competent authority of a Member State with a view to the arrest and surrender by the competent authority of another Member State of a requested person, for the purposes of conducting a criminal prosecution, standing trial or executing a custodial sentence or detention order*.

According to the European Court of Justice, the transition from extradition to the European arrest warrant constitutes a complete change of direction. Both are institutions that serve the same purpose - to surrender to the competent authorities of another state a person who has been accused of or convicted for an offence, so that he/she can be subjected to a criminal prosecution, a trial or an execution of a sentence. But the similarities between the two institutions stop here, since, with extradition the connection is established between two sovereign states, the requesting and requested state, which act on independent positions, whereas with the European arrest warrant the connection is established directly between the competent judicial authorities in those two states. (Streteanu, *op.cit.*, p. 6). The transformation of the execution procedure of the European Arrest Warrant into a judicial one is proven by the fact that most Member States authorize direct contact between judicial authorities in different stages of the procedure.

The principle of double criminality is the principle which entails that the act which is the subject of the extradition request be stated in the legislation of both states, the requesting State and the requested State. This does not require the act to have the same name or be part of the same category of offences in the two legislations, but what matters is that the act in its materiality to be stated in the criminal law of both states. The European arrest warrant brings a novelty in terms of this specific principle of extradition. Thus, the Framework Decision, in Article 2 paragraph 2 nominates 32 offences for which, if a European arrest warrant is issued, the surrender shall be granted even if the condition of double criminality is not met, and if that offence, regardless of its name in the issuing State, is sanctioned by its law with a custodial sentence of at least three years. The 32 offences include participation in a criminal organization, terrorism, trafficking in human

beings, trafficking in narcotic drugs, weapons, explosives, sexual abuse and child pornography.

As for the other offences that do not meet the two conditions mentioned above, the executing authority may refuse the request for surrender, when it considers that the guarantees for the protection of the rights of the extradited person provided by the issuing State are not sufficient. The main argument for removing double criminality refers however to the need to check for this requirement. It was considered that, in some cases, this verification can cause an extension of the duration of the extradition procedure.

The application of the principle of mutual recognition

As stated in the Preamble of the Framework Decision, the European arrest warrant is the first concrete measure in criminal law implementing the principle of mutual recognition. Besides, the Council of Europe met in Tampere in 1999 for the creation of a Union of freedom, security and justice, enshrined the principle of mutual recognition as the cornerstone of judicial cooperation in the EU. This principle was originally developed in the common market, in criminal matters being applied first with the regulation of the European arrest warrant.

The principle of mutual recognition consists of each national judicial authority *ipso facto* recognizing the request for surrender of a person made by other judicial authority belonging to another Member State with a minimum of formalities. For example, if a judge or prosecutor in Paris requests the arrest and surrender of a person for an act falling under the European arrest warrant, that person may be arrested in Rome or Budapest and is to be surrendered to the judge in Paris, following a minimum control. According to this principle, the European arrest warrant is the object of a simple review of legality in all Member States without being subjected to some conformity conditions under the legal system of the executing State. For this reason, the Framework Decision contains an exhaustive list of grounds for refusal to execute a European arrest warrant.

Theoretically, this is the way this system should operate, as the judge in Budapest or Rome can have full confidence in that in Paris, being convinced that the French judge will comply with all principles of human rights and fundamental freedoms, as well as with the fact that the requested person will have a fair trial, conducted in a reasonable period of time and judged by an independent judge. Therefore, the principle of mutual recognition has been associated, since its consecration, with the concept of mutual trust and with the protection of human rights. In other words, as expressed in the doctrine, "there can be no recognition without mutual trust, which in turn means quality, efficiency and independence of the legal systems in different Member States."

Based on the decisions taken in Tampere, the European Commission drew up a program of measures to implement the principle of mutual recognition in criminal matters, which contained 24 specific measures, among which the European arrest warrant. The program also stated that mutual trust between Member States is based on the common obligation to respect the principles of liberty, democracy, respect for fundamental rights and freedoms and the rule of law, obligation stated in Art. 6 TEU.

This principle is not an absolute one, its application being limited to a determined number of offences - Art. 2 par. 2 - and is taken into consideration against the grounds the executing judicial authorities must or may have, in some cases, to refuse to execute a European arrest warrant.

As regards the application of the European arrest warrant, according to Art. 31 paragraph 4 of the Framework Decision from 1 January 2004, between Member States, the European arrest warrant replaces all previous instruments concerning extradition. Also, according to Art. 32 of the Framework Decision, the European arrest warrant has unlimited retroactive applicability.

The execution of the European arrest warrant

With regard to the execution of a European arrest warrant, the doctrine speaks of "the judicialization" of the execution procedure of the European arrest warrant, as, according to Art. 6 of the Framework Decision, the authorities involved in the procedure of the arrest warrant, both the issuing and the executing ones, must be competent judicial authorities to issue or execute an arrest warrant under the law of the issuing State or of the executing State. The Framework Decision does not define the term *judicial authority*, allowing the Member States the freedom and competence to designate these authorities.

Article 5 par. 4 of the ECHR guarantees the arrested person the right to bring an appeal before a court. According to the ECHR case law, *a court* is any body which is independent and impartial and which has the competence to take a binding decision on the situation of the detained person. The prosecutor was not considered court within the meaning of Art. 5 paragraph 4 of the ECHR, and therefore, if the issuing judicial authority may be a prosecutor or a judge, the execution one must always

be a judge or other authority that can take a decision on keeping into detention the person in question.

Concerning the refusal to execute a European arrest warrant, the grounds for non-execution of a European arrest warrant are exhaustively provided by the Framework Decision. Thus, it divides the grounds for refusal into two categories, namely the category of those mandatory provided in Art. 2 and that of those optional, which are listed in Articles 3 and 4 of the Framework Decision. The grounds for refusal are basically identical to those of extradition, with some specificity. Unlike extradition, in the case of the European arrest warrant it is not possible the non-surrender of foreigners who enjoy jurisdiction immunity in Romania, of persons who have committed military or political offences, as the (alleged) mutual trust no longer justifies their existence. At the same time, the removal of the double criminality condition has also consequences on the restructuring of the grounds for refusal, some disappearing altogether, some becoming optional.

A major change occurred with the introduction of the European arrest warrant is the problem of extradition - or in the new phrasing, *the surrender* – of one's own citizens. Extradition in its classical sense, did not allow, as a rule, the extradition of one's own citizens, most states only accepting this as an exception, in some restrictive conditions. In the case of surrender through a European arrest warrant the principle of non-extradition of one's own citizens was waived, starting from the idea of European citizenship. Nationality is at most an optional ground for refusal which can be exercised only in some restrictive conditions. According to Art. 4 paragraph (6), the State may refuse the execution when the requested person is a national or resident of the executing State and the State undertakes the enforcement of the punishment under domestic law. Moreover, according to Art. 5 par. (3), when a European arrest warrant was issued in order to pursue a citizen or national of the executing State, then the state can execute the warrant provided that, if the concerned person will be sentenced to a custodial sentence, he/she is to be returned to the requested State to serve the sentence in that state, assuming that this way the person's social reintegration is favored. Regarding extradition, most countries have imposed additional conditions on the extradition of their own citizens, of which the most important is the condition of reciprocity. The reason lies in the diversity of legal systems of the Contracting Parties to the European Convention on Extradition of 1957, "parties that share a number of common principles, which does not however exclude the existence of significant differences in terms of standards applicable between these states", especially regarding the protection of human rights. Thus, for example, in France or in Italy respecting human rights is a priority and it is far more developed than in Armenia or Azerbaijan. This precaution is no longer justified, according to the authors of the Framework Decision, with the European warrant, as the citizens of the Member States are also European citizens, and therefore are not considered "foreign" on the territory of other European Member States, as the countries share the same social and moral values.

Domestic regulations

In the national law, the provisions of the Framework Decision were transposed in the provisions of Law no. 302/2004 published in the Official Gazette no. 377/31.05.2011, amended by Law no. 224/2006 published in the Official Gazette no. 534/21 June 2006 and by Law no. 300/2013 published in the Official Gazette no. 772/12.11.2013. According to Art. 77 of Law no. 302, the European arrest warrant is a judicial decision issued by a judicial authority of a Member State of the European Union, called issuing State, with a view to the arrest and surrender by another Member State, named executing State, of a requested person for the purposes of conducting a criminal prosecution, standing trial or executing a custodial sentence or detention order.

Strictly analyzing the regulation of the European arrest warrant issued by the competent Romanian judicial authority, one can speak of the European warrant as a court decision, because, according to Art. 78 par. 1 of the law, in Romania the courts are designated as issuing judicial authorities. According to Art. 189 par. 2 of Law no. 302/2004, on 1 January 2007, when Romania acceded to the European Union, the provisions in Title III of this regulation would replace the statutory provisions on extradition. On 9 February 2007 the first Romanian citizen was surrendered under a European arrest warrant, a woman accomplice in the murder of a Belgian citizen.

The European arrest warrant and the human rights

The effects of the European arrest warrant on human rights caused more discussions and controversies than one could have imagined. These discussions have taken place mainly in the West, which, in the opinion of an author demonstrates "the shyness" of the states in Central and Eastern Europe before the EU. Significant problems connected with human rights observance appeared in the application of European arrest warrants,

which demonstrates that, although legislation seems impeccable, practice has revealed numerous violations of human rights.

The Framework Decision mentions human rights protection on two occasions. In the Preamble, by means of Art. 12, the Decision states the possibility to refuse to surrender a person if the request for surrender was initiated on discriminatory reasons, then the next article "advises" Member States not to allow removal, expulsion and extradition where there is a risk for that person to be subjected to inhuman, degrading treatment or the death penalty. Article 1.3 of the Framework Decision provides that it does not change the obligation to respect human rights as stipulated in Art. 6 of the Treaty on European Union.

However, since the preamble is not mandatory - that is the states implement or not its content by their free choice, the states' reaction has been different. Thus, some Member States have transposed in part or in full the provisions of the Preamble. The United Kingdom also included human rights violations among the grounds for refusal of the European arrest warrant, thus risking the violation of the provisions of the Framework Decision. Other countries have not transposed the provisions of the Preamble. Seven countries, although they have not expressly transposed these provisions into national legislation, have declared that they will apply the European Arrest Warrant only to the extent permitted by human rights protection.

Doctrine has considered that this choice of the European legislator gives the impression that human rights protection is only formal, not being an obstacle to broadening European cooperation. Regarding Art. 1, paragraph (3) of the Framework Decision, we agree with the authors who consider that the wording of this article is confused, overly simplified and therefore it does not have great utility.

After the entry into force of the Framework Decision, following a program of harmonization of legal systems, according to the reports of the Council of Europe commissioners appointed to monitor fundamental rights in the Member States, there were recorded major deficiencies regarding their protection. Thus, it was noted that in Italy, Spain, Romania and Latvia prisons were overpopulated. In Estonia the culprit's right to defense had been violated by not granting free legal assistance. Hungary was criticized for having the persons in preventive arrest held in locations not adequately equipped for longer periods.

Procedural differences were also noticed. Thus, while in some countries the right to a lawyer is assured right after the arrest, in other Member States, such as the Netherlands, the lawyer does not have the right to be present at the interrogation of the defendant. The integrity of the Dutch police is deemed as a sufficient guarantee. Moreover, through some of the judgments of national courts, Member States conveyed their express distrust in having human rights protection insured by the other countries. Thus in Ramda case, the Supreme Court of England and Wales argued that France being party to the European Convention on Human Rights is not in itself a sufficient guarantee for the unconditional extradition of British citizens. In Francisco Irastorza Dorronsoro case, the Court of Appeal in Pau refused an extradition request based on the statement of a third party, according to which the extradited person might be subjected to inhuman treatment in Spain.

According to the ECHR's Annual Report, most violations of the Convention were in connection to Art. 6, namely the right to a fair trial. Of the first five countries to have received most convictions, three are EU Member States. Thus, in Khider case, the Court condemned France for inhuman and degrading treatment based on the fact that Mr. Khider, classified as a high-risk detainee, during his seven years of imprisonment had been transferred 14 times, regularly subjected to body searches and isolated for long periods of time. Germany was convicted under Article 5 for the excessive length of preventive detention. Although the plaintiff had served his sentence, being subjected for the last 10 years to this preventive measure, the authorities still considered him dangerous and prolonged the measure, reason for which the Strasbourg Court allowed the plaintiff's application.

By listing these cases, we just wanted to illustrate some of the human rights violations committed by the Member States, which could be the main reasons for non-execution of European arrest warrants. Or, accession to the European Convention on Human Rights does not guarantee in itself human rights observance. Indeed, it could be argued that, although full compliance is not guaranteed by signing the Convention, its proportional observance is however guaranteed, due to the standards imposed by the Convention and to the uniform control of the ECHR.

However doctrine was not in agreement with this point of view, since statistics and history demonstrate the opposite. For these reasons, it was considered that a concrete clause which provides the non-execution of a European arrest warrant in the case of human rights violations would have been welcome, since such a clause would have strengthen the confidence of Member States in the institution of the European arrest warrant and would have favored his transposition into national law.

CONCLUSIONS

The most important modification brought by the introduction of the European arrest warrant has been the transition from a judicial-administrative cooperation to a purely judicial cooperation. Thus, according to Art. 6 of the Framework Decision, the authorities involved in the procedure of the European arrest warrant, both the issuing and the executing ones, must be competent judicial authorities to issue or execute a European arrest warrant under the law of the issuing or executing State. But as the Framework Decision leaves to the Member States the designation and selection of these judicial authorities, one will consider the criterion laid down by the ECHR through Art. 5, as a selection criterion. Thus "Art. 5 guarantees the person's right to bring an appeal before a court. According to the ECtHR case law, by 'court' one means any body which is independent and impartial and which has the competence to take a binding decision on the situation of the detained person. The prosecutor was not considered 'court' within the meaning of the ECHR and therefore, if the issuing judicial authority may be a prosecutor or a judge, the execution one must always be a judge or other authority that can take a decision on keeping into detention the person in question." However, some States, such as Denmark, Switzerland, Finland and Sweden, have involved executive authorities in the procedure of issue or issue and execution of the European arrest warrant, a choice that caused certain impediments in the execution of some European arrest warrants.

The simplification and accelaration of the surrender procedure under a European arrest warrant resulted in the effectiveness of the procedure. The reports of the European Commission on the implementation of the European arrest warrant show that, in the new procedure, the surrender of the requested person takes between 13 and 43 days, unlike the extradition procedure that sometimes takes more than 9 months. Although the report has identified some shortcomings in the implementation of Framework Decision by the Member States, the overall conclusion is that the impact of the European arrest warrant is positive, since the indicators of judicial control, effectiveness and speed are favorable, and the fundamental rights are equally controlled.

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