

CONSIDERATIONS REGARDING THE REFUSAL OF EXECUTION OF THE EUROPEAN ARREST WARRANT

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Abstract: *The third millennium comes up with a new framework in the field of social life, as well as in the field of cross-border crime, which faced significant increases, generated by the enlargement of the European Union, which eliminated internal border controls thus facilitating the movement of criminals and goods, which are the subject of organized crime and terrorism. The institution of extradition, in this context, experienced some operational imperfections, so that it was necessary to adopt new judicial procedures for the arrest and surrender of offenders in the Member States to the requesting State by establishing the European arrest warrant.*

Key words: *cross-border crime, EU space, extradition, procedures, European mandate*

1. Introduction

Having regard to the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584 / JHA), the objective of the European Union to become an area of freedom, security and justice for European citizens, has led to the elimination of extradition between Member States and its replacement by a system of transfer between judicial authorities.

On the other hand, the introduction of a new simplified system for handing over convicted or suspected persons for the purpose of enforcing convictions or prosecutions in criminal matters has eliminated the complexity and risks of delay inherent in extradition proceedings.

The traditional relations of cooperation, which prevailed until the adoption of the Framework Decision between the Member States have been replaced by a system based on free movement of judicial decisions in criminal matters, both pre-conviction and final.

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2. General aspects of the European Arrest Warrant

The European Arrest Warrant, governed by the Framework Decision, is the first embodiment, in the field of criminal law, based on the principle of mutual recognition which the European Council has described as the cornerstone of judicial cooperation, its mechanism being based on a high degree of trust between Member States.

According to art. 84 paragraph (1) of Law no. 302/2004 (transposing Article 1 of Framework Decision 2002/584 / JHA), the European arrest warrant is a judicial decision by which a competent judicial authority of a Member State of the Union European Union shall request the arrest and handing over of another person by a Member State for the purpose of prosecution, trial or execution of a custodial sentence or security measure. This court decision shall be enforced on the basis of the principle of mutual recognition.

As follows from this definition, a European arrest warrant is a judicial decision, which is always based on a pre-trial warrant, a warrant for the execution of the prison sentence or a decision to take a measure regarding deprivation of liberty, issued when there is the impossibility of implementing one of these measures due to the fact that the person concerned avoids enforcement in the territory of another Member State.

According to the Framework Decision, a European arrest warrant may be issued for the purpose of prosecuting offenses punishable under national law by a sentence or measure of deprivation of liberty with a maximum sentence of at least 12 months (during the criminal investigation, hearings and stages of the trial, until the conviction becomes final) or for the execution of a conviction or a security measure of at least four months.

2. Mandatory Grounds for Refusal

Framework Decision 2002/584 / JHA, as amended by Framework Decision 2009/299 / JHA, sets out a number of grounds for refusal of enforcement, some mandatory and some optional.

Art.98 of Law no. 302/2004 takes over these reasons for refusal, but makes some additions, meant to ensure the execution of EAW in good conditions.

In the EAW enforcement proceedings, the executing judicial authority is not empowered to verify the defences of the requested person on the merits of the case, respectively, whether or not he is guilty of committing criminal acts, as it has no competence to rule on the validity of the criminal investigation carried out by the issuing judicial authority or regarding the opportunity of arresting the requested person.

- I. A first mandatory ground for refusal is the situation where the offense underlying the arrest warrant is covered by the amnesty in the executing Member States, when it would have jurisdiction to prosecute that offense under its criminal law.

In this case, the condition set out in the Framework Decision is the competence of the executing State to prosecute the offense which is the subject of the EAW, either because part of the enforcement acts or the outcome of the offense were committed / occurred in the territory of the State of execution, either because the crime was committed by a Romanian citizen or by a citizen of another Member State against the Romanian State or of a citizen belonging to it.

II. Another mandatory ground for refusal is if, from the information available, it appears that the person pursued has been definitively tried for the same acts by a Member State other than the issuing State, provided that, in the case of a conviction, the sanction had been executed or is currently being executed or the execution is prescribed, the punishment has been pardoned or the crime has been amnestied or another cause has prevented the execution, according to the law of the sentencing state.

This ground for refusal shall be incidental only where the EAW has been issued for the purpose of serving a custodial sentence or security measure, and not when it is issued for the purpose of prosecuting the person concerned.

Thus, this reason for refusal is an application of the *ne bis in idem* principle, aiming to avoid situations in which a person executes twice a sentence for committing the same deed.

III. A final reason is that the person who is the subject of the European arrest warrant cannot, because of his or her age, be held criminally liable for the facts giving rise to that warrant, under the law of the executing Member State.

Thus, in Romania, the execution of the mandate will always be refused when it concerns persons under the age of 14.

With regard to persons aged between 14 and 16, the execution of the warrant will be refused only if, following the psychiatric examination, it is established that at the time of the act they had no discernment.

IV. Another optional ground for refusal is the limitation period for criminal proceedings or punishment, in accordance with the law of the Member State of enforcement, where the facts fall within the competence of that Member State in accordance with its criminal law.

We are in another situation where one of the conditions set out in the Framework Decision is the competence of the executing State to prosecute the offense which is the subject of the EAW, either because part of the enforcement acts or the result of the offense that had been committed also occurred on the territory of the executing state, either because the crime was committed by a Romanian citizen or by a citizen of another Member State against the Romanian state or by a citizen belonging to it.

It is also necessary that, in accordance with the national law of the executing State, the limitation period for criminal liability or the execution of the sentence be met.

Thus, this ground for refusal may be incidental both if the EAW is issued for criminal prosecution or trial and if it is issued for the execution of a final sentence.

Enforcement of the warrant may also be refused if the information available to the executing judicial authorities shows that the person sought had been definitively tried for the same acts by a third country, provided that, in the event of a conviction, the sentence had been executed or is currently being executed or can no longer be executed, in accordance with the law of the country of conviction.

This ground for refusal shall be incidental only where the EAW has been issued for the purpose of the execution of a custodial sentence or security measure, and not when it is issued for the purpose of prosecuting the person concerned.

Thus, this ground for refusal is an application of the *ne bis in idem* principle, but limited this time, given that the State which definitively convicted the person subject to the warrant is a third country and not a Member State of the European Union, in which case the executing State is not bound by the principle of mutual trust.

Therefore, it is up to the executing State if it fulfils its mandate or, on the contrary, it will refuse its execution.

Another reason for refusal is if the European arrest warrant was issued for the purpose of the execution of a custodial sentence or security measure, when the wanted person remains in the Member State of execution, is a national or resident, and that State undertakes to carry out that punishment or security measure in accordance with its national law.

As in the case of the previous optional refusal, this ground for refusal is incidental only if the EWA has been issued for the enforcement of a custodial sentence or security measure, not when it is issued for the purpose of prosecuting the person concerned.

Thus, provided that the person who is the subject of the EAW is a national or resident of the executing State, the latter may undertake to have the sentence executed on its territory in accordance with its national law.

Enforcement may also be refused where the European arrest warrant relates to offenses which, in accordance with the law of the Member State of enforcement, have been committed in whole or in part on the territory of the Member State of enforcement or in a place considered as such, or have been committed outside the territory of the issuing Member State and the law of the executing Member State does not authorize criminal prosecution for the same offenses committed outside its territory.

A final reason for refusal is to guarantee the right to defences of the person who is the subject of the European mandate.

Thus, the executing judicial authority may refuse to execute the European arrest warrant issued for the purpose of the execution of a sentence or a measure of

deprivation of liberty, if the person did not participate in the trial following the decision, except if the European arrest warrant states that the person has received, by any means, official information on the date and place set for that trial, so that it was unequivocally established that the person concerned was aware of the established process, or the person was informed that a decision can be pronounced if he does not appear at the trial.

Thus, enforcement cannot be refused if the person concerned, having knowledge of the established process, mandated a lawyer to defend him in the trial or, after the decision had been handed to him and he had been expressly informed of the right to a retrial or an appeal, in which the person has the right to be present and which allows the facts of the case, including new evidence, to be re-examined and which may lead to the cassation of the original decision, and they expressly stated that the retrial of the case or the promotion of an appeal within the appropriate time frame is not requested.

Where the person subject to the EWA has not been personally handed the final decision, but will be handed the decision without delay after the transfer and will be expressly informed of the right to a retrial or an appeal during which he has the right to be present and to be allowed to present the facts of the case, including new evidence, to be re-examined and which may lead to the annulment of the original decision and to be informed of the time within which he must request a retrial or promotion of an appeal, as stated in the relevant European arrest warrant, and cannot be refused the execution of the EAW, without infringing the right of defences.

3. Conclusions

If a European arrest warrant is issued for the purpose of the execution of a custodial sentence or security measure, under the conditions referred to in paragraph 1 (d), and the person concerned has not received any prior official information regarding the criminal proceedings against him, this person may request, when informed of the content of the European arrest warrant, a copy of the sentence, before the start of the handing over procedure.

Immediately after receiving the information on the application, the issuing authority will provide the requested person with a copy of the sentence, through the executing authority.

The request of the wanted person must not delay the handing over procedure or the decision to execute a European arrest warrant.

The sentence is provided to the person concerned for information purposes only; this will not be considered a formal notification of the judgment nor will it trigger the applicable time limits for requesting a new trial or an appeal.

Where the person surrendered under the conditions referred to in paragraph 1 (d) has requested a retrial or appeal, the detention of the person awaiting retrial or appeal shall

be reviewed in accordance with the law of the issuing Member State, until the completion of the procedures, either regularly or at the request of the person concerned.

Such a review shall provide, in particular, for the possibility of suspending or interrupting detention. The retrial of the case or the promotion of the appeal will begin in due time, after the transfer.

References

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