

THE EUROPEAN ARREST WARRANT - OPTIONAL REASONS FOR REFUSING ITS EXECUTION. CASE LAW ASPECTS

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Abstract: *This paper aims to bring to attention certain optional reasons for refusing the execution of a European arrest warrant, situations in which the courts can defeat the principle of mutual recognition and trust between the judicial authorities of the European Union states, which represents the “cornerstone” of judicial cooperation in criminal matters. The judicial enforcement authorities cannot refuse to execute a European arrest warrant except for reasons resulting from the Council Framework Decision No. 2002/584/JAI of 13 June 2002, however, in practice, the optional reasons for non-execution often raised problems, the wording of article 4 and article 4a leaving a margin in the judgment of the courts.*

Key words: *European arrest warrant, mutual recognition principle, reasons of refusal, right to a fair trial.*

1. The European arrest warrant, the “cornerstone” of judicial cooperation in criminal matters between the Member States of the European Union

The European arrest warrant is the main instrument of international judicial cooperation in criminal matters, which responds to the need of Member States to react promptly to the commission of crimes, in order to achieve the goals of the European Union. The reason for the European arrest warrant is the need to ensure that criminals cannot evade justice, its role being that of bringing the requested person before justice within the issuing state, for the implementation of criminal procedures, or for the execution of a penalty involving deprivation of liberty.

The European arrest warrant is executed based on the principle of mutual recognition and trust in accordance with the provisions of the Council Framework Decision No. 2002/584/JHA of 13 June 2002, amended by Framework Decision No. 2009/299/JHA of 26 February 2009.

Our country transposed the Framework Decision through Law No. 302/2004 on international judicial cooperation in criminal matters. According to the provisions of Article 84 para. (1) and para. (2) of the Law, the European arrest warrant is a judicial decision by which a competent judicial authority of a Member State of the European

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Union requests the arrest and surrender by another Member State of a person, for the purpose of criminal investigation, trial or execution of a penalty involving deprivation of liberty. It is also aimed at ensuring a simplified and quick procedure for handing over the person who is being prosecuted or who has to serve a penalty involving deprivation of liberty in another Member State, under the conditions in which the duration of the procedure should not exceed a term of 90 days, as per the provisions of Article 17 of the Framework Decision.

If Romania is the executing state, the role of the Romanian court in this procedure, the Courts of Appeal according to the functional competence, as it results from the economy of the provisions of art. 85 et sq. of the Law, is limited to verifying the form conditions of the mandate, to resolving any objections regarding the identity of the requested person, as well as to the reasons for refusing of surrender that he cites, without analysing the validity of the accusations brought to the requested person, which are under the jurisdiction of the issuing authority.

2. The possibility of Member States defeating the principle of mutual trust, by refusing to execute a European arrest warrant

Starting from the importance of the stated principle, the European Court of Justice firmly ruled that the enforcement authorities have the possibility to refuse the execution of a European arrest warrant only if one of the cases of mandatory or optional refusal is provided for by Articles 3 or 4 of the Framework Decision, otherwise the refusal can only be based on considerations regarding the respect of human rights.

According to the Court's case law, within the transposition of the Framework Decision into their domestic law, the Member States have a margin of appreciation, being free to transpose or not the respective reasons into their domestic law, or to limit the situations in which they can refuse the execution of the mandate.

In the national case law, the optional grounds for non-execution of the European arrest warrant provided by Article 4 of the Council's Framework Decision No. 2002/584/JHA dated 13 June 2002 have often raised problems, the legal text leaving to the judgment of the court the surrender of the requested person in relation to the concrete circumstances of the case and the special situation of the convicted person. Our country transposed these reasons into the provisions of Article 99 para. (2) of Law No. 302/2004, which will be further presented and analysed below.

3. Case law analysis of the optional reasons for refusing to execute the European arrest warrant, provided by Article 4 of the Framework Decision No. 2009/299/JHA, namely of Article 99 para. 2 of Law No. 302/2004

The situations provided for in Article 99 para. (2) of Law No. 302/2004 constitute optional reasons for refusing the Romanian judicial authority, the legislator using the expression may refuse so that they should not be applied whenever the courts find the existence of one of them, but it is necessary that the requested person is in a special situation, which to impose the refusal of surrender, a decision that is ordered taking into

account the reasons related, mainly, to ensure the smooth running of the procedure and the mutual recognition and trust that are the basis of the execution of the European arrest warrants, especially in the context of the requested person's particular criminal history.

From a procedural point of view, in the situation where the requested person declares that he agrees with his surrender, none of the grounds for refusal of execution are provided for in Article 98 of Law No. 302/2004, the court can rule by sentence both on the arrest and the surrender of the requested person. If, on the contrary, the requested person does not consent to his surrender to the issuing judicial authority, the procedure for executing the European arrest warrant continues with its hearing, exclusively regarding the existence of one of the mandatory or optional reasons for non-execution.

On the other hand, the Romanian courts can order the execution of a European arrest warrant, even without the consent of the requested person, if they consider that all the conditions for this have been met.

3.1. The reason provided by art. 99 para. (2) letter a) from Law No. 302/2004

The first case of optional refusal is provided by the provisions of Article 99 para. (2) letter a) from Law No. 302/2004 and represents the situation when for facts other than those provided for in art. 97 para. (1), which includes the enumeration of crimes for which double taxation is not necessary, surrender is subject to the condition that the facts that motivate the issuance of the European arrest warrant constitute a crime according to Romanian law, regardless of its constitutive elements or its legal framework. Thus, the non-fulfilment of the double criminality condition is analysed from the perspective of the optional reasons for refusal, this does not give rise to a mandatory reason.

3.2. The reason provided by art. 99 para. (2) letter b) from Law No. 302/2004

The second optional reason for refusal is provided by letter b) from Article 99 para. (2) of Law No. 302/2004, and is represented by the situation in which the person who is the subject of the European arrest warrant is subject to criminal proceedings in Romania for the same act that motivated the European arrest warrant, thus the court may refuse to execute the European arrest warrant (extraterritorial application of the *ne bis in idem* principle).

Practically it is necessary for the requested person to be subject to a criminal procedure in Romania for the same facts that motivated the issuing of the European arrest warrant, i.e., it is not enough that only a criminal prosecution *in rem* has started in Romania, but it must have ordered the continuation of the criminal investigation or to initiate the criminal action against the concerned person.

3.3. The reason provided by art. 99 para. (2) letter c) from Law No. 302/2004

One of the optional reasons most often invoked in their defence by the requested persons is the one provided for in art. 92 para. (2) letter c) which gives the court the

possibility to refuse execution when the European arrest warrant was issued for the purpose of executing a prison sentence or a penalty involving deprivation of liberty if the requested person is a Romanian citizen or lives in Romania and has a continuous and legal residence on the territory of Romania for a period of at least 5 years and if the person declares that they refuse to execute the punishment or security measure in the issuing Member State.

If the Romanian court finds the incidence in the case of the optional reason for refusing provided by art. 99 para. (2) letter c) from Law No. 302/2004, it will ask the requesting judicial authority to send the sentencing decision, if there is such a decision and the European enforcement order is issued for the execution of a penalty involving deprivation of liberty, as well as other information necessary for a possible recognition of the sentencing decision, so that it will acquire the legal force equivalent to a decision pronounced by the Romanian courts, and the execution of the sentence will take place in a penitentiary in Romania .

If, however, the Romanian court of execution finds the existence of a reason for refusing the execution of the mandate, be it an optional one, it no longer has the possibility of going through the incidental procedure of recognizing the decision that is the basis of the mandate, since the same premised situation cannot be capitalized both as an optional reason for refusing of the main request for execution of the European arrest warrant, based on art. 99 para. (1) and para. (2) of Law No. 302/2004, and as part of the incidental procedure provided by art. 99 para. (3) of the Law.

On the other hand, when the requested person invokes the incidence of the reason for refusing, provided by art. 99 para. (2) letter c) of Law No. 302/2004, the court invested with the execution of the European arrest warrant is obliged to effectively analyse the reason for refusing invoked, even if it is an optional one.

In one case, the first court held that the warrant was not issued for the purpose of executing a prison sentence or a custodial security measure and, moreover, the requested person is not in a special situation which would impose the refusal of surrender. Being heard, the requested person A. showed that he did not agree to serve the sentence in the issuing member state, invoking socio-family considerations, in the sense that he lived with his 96-year-old father in Romania, who was 90% blind, his mother was deceased, and he was the sole provider for his father, as well as the fact that he requested incidental recognition of the decision and execution of the sentence in Romania. The High Court of Cassation and Justice (Criminal Division, decision no. 669 of 26 October 2022) held, in a case, that the mention in the recitals, according to which surrender is the only measure to ensure the smooth running of the European arrest warrant execution procedure, does not constitute an effective analysis of the groundlessness of the reason for refusing invoked by the requested person, in the sense that, in order to respect the procedural rights of the requested person, including the right to defence, as they are regulated by the European Convention on Human Rights, it is necessary to refer for a retrial.

A more in-depth analysis must be carried out, with regard to this optional reason for refusal, with regard to foreign citizens who are on the territory of Romania and who are parties requested for the execution of a European arrest warrant. In their case, it must

be proven that they have a continuous and legal residence on the territory of Romania for a period of at least 5 years, if they refuse to serve the sentence in the issuing member state.

In such a situation, the High Court of Cassation and Justice (Criminal Division, decision no. 479 of 9 April 2015) found that this optional reason for refusing is not an incident, given that the requested person did not provide proof of legal and continuous residence on the territory of Romania for a period of at least 5 years, himself declaring that he has been in the country for only a few months, he is an Italian citizen and, according to his valid identity card, issued by the Italian authorities, he is listed as domiciled in Italy. Also, the other aspects invoked in the defence, regarding his family situation, cannot determine the refusal to execute the European arrest warrant.

3.4. The reason provided by art. 99 para. (2) letter d) from Law No. 302/2004

According to Article 99 para. (2) letter d) of Law No. 302/2004, another facultative reason for refusing is represented by the situation in which the person who is the subject of the European mandate has been definitively judged for the same facts in another third country that is not a Member State of the European Union, provided that, in case of conviction, the sanction has been executed or is currently being executed or the execution is prescribed or the crime has been amnestied or the punishment has been pardoned according to the law of the sentencing state.

In a case, the High Court of Cassation and Justice (Criminal Division, decision no. 752 of 29 November 2022) found that regarding the optional reason for refusing provided by Article 99 para. (2) letter d) of Law No. 302/2004, regarding the statute of limitations for the execution of some of the punishments, on the one hand, that the intervention of the statute of limitations constitutes an optional and not mandatory reason for refusing surrender, and on the other hand, according to Romanian law, the statute of limitations is interrupted by committing a crime again. Or, from the record sheet of the requested person, it appeared that he had a multitude of convictions, which exceeded those mentioned in the European arrest warrants, issued by recent final court decisions (2019-2022), therefore there is a strong presumption that he interrupted the statute of limitation by the commission of crimes after 2016.

3.5. The reason provided by art. 99 para. (2) letter e) from Law No. 302/2004

Another optional reason for refusing the execution of a European arrest warrant is provided by Article 99 para. (2) letter e) of Law No. 302/2004 and is represented by the situation in which the European the arrest warrant refers to crimes which, according to Romanian law, are committed on the territory of Romania.

This optional reason for refusing execution is applicable only when the European arrest warrant refers to crimes which, according to Romanian law, are committed on the territory of Romania, respectively the situations in which the crimes can be held against the requested person according to the principle of territoriality and personality of Romanian criminal law.

In case law (High Court of Cassation and Justice, Criminal Division, decision no. 626 of 12 October 2022), it was shown that it was not enough that some acts of execution of the alleged crime were committed on the territory of the Romanian state, because in such a situation, the law leaves to the discretion of the court the opportunity to refuse the execution of the European arrest warrant. A possible refusal can only be justified by the opportunity to start a criminal procedure in Romania for the same act that had motivated the European arrest warrant. However, as long as the judicial authorities in Romania have not initiated any procedure regarding the facts committed by the requested person, there can be no justification for the transfer of the procedures in the country. In such a situation, the court cannot approve the requested person's request for the purpose of ascertaining the incidence in question of the provisions of Article 98 para. (2) letter e) of Law No. 302/2004, with the consequence of the refusal of surrender.

3.6. The reason provided by art. 99 para. (2) letter f) of Law No. 302/2004

According to Article 99 para. (2) letter f) of Law No. 302/2004, the Romanian courts can refuse the execution of a European arrest warrant when the European warrant includes crimes that were committed outside the territory of the issuing state and the Romanian law does not allow the prosecution of these facts when they are committed outside the Romanian territory.

3.7. The reason provided by art. 99 para. (2) letter g) of Law No. 302/2004

One of the most cited optional reasons for refusing the European arrest warrant by the requested persons is the one provided by art. 99 para. (2) letter g) of Law No. 302/2004, regarding the situation in which, according to Romanian legislation, liability for the crime for which the European arrest warrant was issued or the execution of the imposed penalty have expired, if the facts had been within the competence of the Romanian authorities.

It is therefore necessary, according to Romanian legislation, that the liability for the crime for which the European arrest warrant was issued or the execution of the imposed penalty should have their statute of limitations expired, if the facts had been within the competence of the Romanian authorities. It clearly follows that the expiry of the statute of limitations for criminal liability can constitute such a reason for refusing execution only in the case of the European arrest warrant issued for the purpose of criminal prosecution or trial, and not in the case of the European arrest warrant issued for the execution of a prison sentence. In the latter situation, only the statute of limitations for the execution of the sentence will be analysed, regardless of whether the statute of limitations for criminal liability has expired.

The High Court of Cassation and Justice (Criminal Division, decision no. 37 of 17 January 2023) found, in a case, that the addressed Romanian court, the Iaşi Court of Appeal, wrongly held that the execution of the 1-year prison sentences and the two 6-month prison sentences imposed on the requested person through criminal sentences

passed by the courts from Italy, had an expired statute of limitations from the date of their being declared definitive, the statute of limitations for the execution of the punishments being provided by the Romanian criminal law. From the examination of the criminal record, it appears that the defendant committed several crimes on the territory of Romania on 22.02.2015, 19.08.2015 and 09.02.2020. Taking into account the provisions of the Criminal Code, regarding the fact that the statute of limitation for the execution of a sentence is interrupted by the commission of another crime, it is noted that the serving of the penalties imposed by the criminal sentences passed by the Italian courts would not have been time-barred, if the facts had been under the competence of the Romanian authorities. Moreover, according to Romanian criminal legislation, in the case of revoking the suspension of the execution of the sentence under supervision, the limitation period begins to run from the date when the revoking decision became final. Therefore, in this case, as a result of the suspension of the execution of the sentence, the limitation period began to run from the date when the revocation decision had become final, i.e. from the year 2021. Likewise, the course of the limitation period for the execution is also interrupted by committing a crime, so that, in relation to the commission of crimes on the territory of Romania by the requested person, the Supreme Court found that the limitation period for the execution of the punishments to which he was sentenced abroad was interrupted, so the provisions are not applicable Article 99 para. (2) letter g) from Law No. 302/2004.

In another case, the High Court of Cassation and Justice (Criminal Division, decision no. 331 of 27 April 2023) found that the first instance correctly denied the execution of a European arrest warrant, invoking the optional reason provided by Article 99 para. (2) letter g) of Law No. 302/2004, given that the requested person A had no criminal record in Romania, was currently integrated into society in Romania, had health problems, and was about to have a new-born child, so that a possible prosecution in France for an act committed as a minor, more than 6 years ago, cannot have beneficial effects on a social and educational level. Moreover, with reference to the time of issuing the European arrest warrant in question, more than 6 years from the date of the act and more than 5 years from the date of the decision regarding the arrest ordered according to the French legislation, the question of respecting the right of the requested person to a fair trial arised from the perspective of the duration of the proceedings, also taking into account that it was a juvenile defendant at the time of the act. The first court considered both the context of the procedure for issuing the European arrest warrant by the French judicial authorities, as well as the circumstances of the case and the fact that the European arrest warrant referred to an act for which the statute of limitations for criminal liability had expired, according to Romanian criminal law, and the requested person was a minor at the date of the commission of the crime.

3.8. The reason provided by art. 99 para. (2) letter h) of Law No. 302/2004

According to Article 99 para. (2) letter h) of Law No. 302/2004, the execution of a European arrest warrant can be refused when a Romanian judicial authority has decided either to abandon the criminal prosecution, or to file for the crime on which the

European arrest warrant was based, or has issued a final ruling against the requested person on the same facts, which prevents future proceedings. This optional reason for refusing essentially represents a particular application of the *ne bis in idem* principle.

3.9. The reason provided by art. 99 para. (2) letter i) from Law No. 302/2004

Quite often encountered in case law is also the reason provided by art. 99 para. (2) letter i) of Law No. 302/2004, according to which the execution of a European arrest warrant can be refused if the requested person was not aware of the criminal process in the requesting state.

The High Court of Cassation and Justice (Criminal Division, decision no. 38 of 17 January 2023) found that, according to the mentioned rule, the Romanian judicial enforcement authority can refuse the execution of the European arrest warrant if such a warrant was issued when the convicted person was not personally present at the trial. Or, the situation invoked is not incident in the present case, considering that the purpose for which the warrant was issued is not the execution of the sentence, but the trial of the requested person by the judicial authorities in Slovenia, the criminal trial against the Romanian citizen A. being in the phase in which it was necessary to carry out the preliminary hearing of the trial regarding the commission the crimes for which the warrant was issued; moreover, the very provision invoked by the defence refers to the convicted person – a situation that is not found in the case, the requested person not having been convicted abroad, which is why attendance at the trial cannot even be discussed, as requested by the defence.

Therefore, this optional reason for refusing the execution of the European arrest warrant cannot be retained when the warrant is issued precisely for the purpose of conducting investigations by the judicial authorities of the requesting state, where the requested person has the opportunity to build their defence which is considered necessary to prove their innocence.

Likewise, in order to establish the incidence of this optional reason for refusal, the court in the executing state, in some situations, must make additional checks and request information from the authorities of the requesting state.

Thus, in one case, the first court held that the documents submitted by the Italian authorities did not show beyond reasonable doubt that the requested person had personally been notified, by subpoena, fax or other similar means, about the date and place of the trial and about the legal consequences in case of non-appearance before the court. Although the requested person was present before the preliminary hearing judge at the Vercelli Court on 23 October 2015, when the trial of the case was ordered, the documents (the summons and the minutes) do not show that the requested person was also present at the time when the judge, after retiring for deliberation, pronounced the decision to start the trial on 22 February 2016. Also, it is not recorded whether the requested person was informed about the legal consequences of his failure to appear at the trial on the merits of the case. It was also noted that from the documents and information sent by the Italian authorities, it appears that the requested person was assisted by hired lawyers, but only in the preliminary stages of the trial on the merits of

the case, later, including at the time when the sentencing decision was pronounced, their hired lawyer was absent, thus being represented by a state-appointed defender. In relation to these findings, the court concluded that the requested person was tried in absentia and did not have the procedural guarantees of the knowledge of the place and time of the trial based on the accusation in criminal matters, nor did they have sufficient opportunity to personally designate a public or elected lawyer to represent them in the criminal trial. At the same time, it found that the file data did not unequivocally show that the requested person had waived, tacitly or expressly, the right to appear and defend themselves before a court called to rule on their guilt. On the other hand, in the appeal, the High Court of Cassation and Justice (Criminal Division, decision no. 811 of 27 December 2022) held that the first court erroneously held that the requested person did not have the procedural guarantee of having knowledge of the place and time of the trial based on the accusation in criminal matters, nor did they have sufficient opportunity to personally appoint a public or hired attorney, who could effectively represent them in the criminal trial, therefore this optional reason for refusing to execute the European arrest warrant is not mandatory.

4. Final Considerations regarding the optional reasons for refusing to execute a European arrest warrant

As was also shown in the analysis of certain reasons for refusing provided by Article 99 para. (2) of Law No. 302/2004, even if the text regulates optional reasons for refusing, their analysis is mandatory by the courts that analyze requests regarding the execution of a European arrest warrant.

At the same time, according to the case law of the European Court of Justice (case C-579/15, *Popławski*), any refusal to execute a European arrest warrant regarding the execution of a sentence (following a sentence to a penalty involving deprivation of liberty) determines a genuine commitment on the part of the executing state that it will execute the sentence, since prior to the refusal, the judicial authority in the executing state must verify whether there is in reality the possibility that the sentenced person will actually execute the sentence in accordance with its domestic law. If the executing Member State is unable to undertake to effectively execute the sentence, the executing judicial authority is tasked with executing the European arrest warrant and, therefore, handing over the wanted person to the issuing Member State.

On the other hand, the procedure regarding the execution of a European arrest warrant is a special procedure, derogating from the rules of common law, of urgent nature with direct consequences including the freedom of the person targeted by the European arrest warrant, so it is necessary that the requested person be assured of all the rights and guarantees of a fair trial provided by art. 6 of the European Convention on Human Rights, and, respectively, by art. 2 of the Protocol No. 7 to the Convention, regarding the right to two degrees of jurisdiction.

In this procedure, the Romanian court, as the executing judicial authority, does not have the competence to verify the validity of the solution ordered by the issuing judicial authority from a Member State of the European Union, on the basis on which the

European arrest warrant was issued, nor the appropriateness of the European arrest warrant. The national judge decides on the arrest and surrender of the requested person, after having previously checked the conditions related to the issuance of the warrant, the identification of the requested person, the existence of double criminalization of the criminal acts attributed to him, or if there are situations that constitute grounds for refusal, whether they are mandatory or optional.

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