

THE EUROPEAN ARREST WARRANT. MEASURES OF PROCESS THAT CAN BE APPLIED IN CASE THE EUROPEAN ARREST WARRANT IS FULFILLED

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Abstract

From the legal point of view, the European Arrest Warrant is defined as a legal decision issued by the competent authority of a state member of the European Union in order to arrest and turn in to other state member, of a person requested as a result of performing a criminal investigation, trial or for the purpose of executing a freedom privative measure¹.

Key words: *European Arrest Warrant, competent authority, execution.*

From the legal point of view, the European Arrest Warrant is defined as a legal decision issued by the competent authority of a state member of the European Union in order to arrest and turn in to other state member, of a person requested as a result of performing a criminal investigation, trial or for the purpose of executing a freedom privative measure².

The execution of the European Arrest Warrant is based on the principle of reciprocal recognition and trust that is inserted also in the Decision-frame of the Council of June 13, 2002 concerning the European Arrest Warrant and the procedures of turning in between state members³.

For the taking of the decision of training a European Arrest Warrant, that would replace the procedure of extradition stipulated in the international

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¹ F. Razvan Radu, *Cooperare judiciară internațională și europeană în materie penală*, Wolters Kluwer, Bucuresti, 2009, p. 125. (Legal International Cooperation in Criminal Matter, Wolters Kluwer, Bucharest, 2009, p. 125).

² F. Razvan Radu, *Cooperare judiciară internațională și europeană în materie penală*, Wolters Kluwer, Bucuresti, 2009, p. 125. (Legal International Cooperation in Criminal Matter, Wolters Kluwer, Bucharest, 2009, p. 125).

³ Al. Boroi, I. Rus, *Cooperare judiciară internațională în materie penală*, CH Back, Bucuresti, 2008, p. 304.

treaties referring to extradition, was firstly considered, the proposed objective, that the union would become space of liberty, security and justice, that cannot be reached optimally in the system of conventions of extradition, that institute a formal and unwieldy procedure of extradition.¹

The European Arrest Warrant replaces the request of extradition, it implies a more simplified procedure and it presents itself under the shape of a form.

The decision – frame concerning the European Arrest Warrant and the procedures of turning in between the state members of the European Union was transposed fully in the 3rd Title of Law no. 302/2004 concerning international legal cooperation in criminal matter, such as it was modified and completed by Law no. 224/2006 and recently by Law no. 222/2008.

According to the provisions of above mentioned law, the issuing, transmitting, execution of the European Arrest Warrant, are procedures of limited applicability, having incidence only in the state members of the European Union and Gibraltar.

The authorities competent in executing the European Arrest Warrant are the Appeal Courts according to article 78 paragraph (2) of Law no. 302/2004.

Taking into consideration the effects that the European Arrest Warrant must produce and namely arresting and turning in of the requested person (that are stipulated since the definition given by the lawgiver to the European Arrest Warrant in article 77 of Law), it is necessary to analyze the process measures that can be taken for the execution of this warrant, as well as the legal grounds that lay at the basis of taking such measures by the competent legal authorities.

Law 302/2004 with the subsequent modifications and completions stipulates that in order to execute the European Arrest Warrant, towards the requested person the following provisional measures can be taken:

- a). Measure of detention
- b). Measure of the obligation of not leaving the country/ the locality
- c). Measure of arrest

These process measures are provisional and not preventive, because they are considered in the procedure of executing the European Arrest

¹ F. Răzvan Radu, *op. cit.*, p. 124. (quoted work, p. 124)

Warrant. They apply based on a warrant (of preventive arrest or punishment execution) issued by the legal competent bodies of the requesting state.

The provisional measures are entities of criminal process law with character of constraint by which the requested person is prevented to undertake certain activities that would reflect negatively on the development of the trial in the requesting state and implicitly on the execution of the European Arrest Warrant.

These entities of criminal process law contain an element of extraneity (the European Arrest Warrant issued by the requesting foreign state) and produce effects also in the international law.

The remand measures, in exchange, are entities of criminal process law with character of constraint, by which the accused or defendant is prevented from undertaking certain activities that would reflect negatively on the trial or on reaching its purpose.¹ They produce effects in the internal law.

The purpose of the remand measures, according to article 136 of the criminal procedure Code, is to ensure the good development of the trial or to prevent the circumvention of the accused or defendant from criminal investigation, justice or punishment execution.²

The provisional measures, together with the purpose provided for the preventive measures, are taken also with the purpose of turning in the requested person to the competent authorities of the requesting state.

The measure of detention:

The detention of the requested person is regulated by article 88² of the Law. This measure is disposed by the prosecutor by motivated decree and can last at least 24 hours.

The detained person is immediately informed in the language he understands about the reason for the detention and the contents of the European Arrest Warrant. Likewise, he will be handed in a copy after the warrant and its translation. The detained person has the right to request the notification on the taken measure to a family member or other person designated by them.

This disposition is not imperative, the lawgiver giving the possibility to the prosecutor to reject this solicitation in the case in which he is aware of

¹ S. Siserman, *Drept procesual penal. Partea generală*, Albastră, Cluj-Napoca, 2007, p. 296.

² S. Siserman, *op. cit.*, p. 298. (quoted work, p. 298).

the existence of other European Arrest Warrants issued against other participants to the perpetration of the crime, or in the case in which the notification of other persons would affect the execution of the European Arrest Warrant. In the case in which the requested person is a child, the detention term is reduced to half and can be extended, in the case in which it would be necessary, on an 8 hour duration, by motivated decree.

In order to detain the requested person, the competent body can enter any household where the requested person would live, without the consent of it or of the person that owns or uses the household. In the case in which the requested person is found at the registered office of a legal entity the competent bodies will enter in order to arrest the requested person without the permission of its legal representative. (article 88² of Law no. 302/2004 introduced by article 1 point 43 of Law no. 222/2008)¹

An exception from the dispositions of article 88² is the situation stipulated at article 88³. This exception was introduced in Law 302/2004 by article 1 point 43 of Law no. 222/2008.

The regulation is reported to the emergency situation and gives the police body the right to dispose the detention. The emergency situation occurs when there is a signaling transmitted through the International Organization of Criminal Police (Interpol) concerning a certain person that is guilty for a deed punished by the criminal law.

The signaling is not equivalent to a European Arrest Warrant but, based on this signaling the detention of the requested person can be demanded and introduced in the data base of this organization.

In the case mentioned previously, the International Police Cooperation Center within the Ministry of Administration and Home Affairs requested immediately to the corresponding National Central Office Interpol, the transmission towards the competent prosecutor's office, within at most 48 hours since the detention of the wanted person, of the European Arrest Warrant. The requested person is immediately informed about the reason of the detention, in the language that he or she understands.

In the situation in which the measure was taken by the criminal investigation body of the forensic police, it is obligated to present the wanted person to the prosecutor designated by the general prosecutor within the

¹ G. Tudor, M. Costinescu, *Mandatul European de arestare*, Hamangiu, Bucuresti, 2009, p. 169, 170.

Appeal Court in whose circumscription was detained. The appearance in front of these bodies will be done in the first 10 hours since the detention.

By the provisions of this article, as an exception from the criminal procedure dispositions, the police body is empowered to dispose the detention of the wanted person.

The measure of the obligation of not leaving the locality/the country:

The preventive measure of the obligation of not leaving the locality or the country, in internal law, was introduced by Law no. 281/2003 and consists of the debt imposed to the accused or defendant of not leaving the locality/country without the agreement of the body that disposed this measure. It can be taken by the prosecutor or the judge in the course of the criminal investigation or court throughout the trial. Article 145 paragraph 1¹ introduced by Law 356/2006, modified by Government Emergency Decision 60/2006, stipulates the obligation of the one towards which such a measure was disposed, of observing certain obligations throughout this measure. This preventive measure can be maintained (in law terms) when it is necessary.

The provisional measure of the obligation of not leaving the locality or the country was initially regulated, previously to the modifications brought by Law no. 222/2008.

In the specialty literature was estimated that the court could also take measures concerning the obligation of not leaving the country concerning the requested person.

In the case in which it was disposed the execution of the European Arrest Warrant and the measure concerning the requested person of the obligation of not leaving the country is applied, the court had the obligation, in the case in which the prosecutor proposed taking other measure, that by decision, to show both the reasons for which it did not approve the solicitation of the prosecutor to take the measure proposed by him, and [according to article 137 paragraph of the criminal procedure Code] the grounds that determined the taking of the provisional measure of the obligation of not leaving the country.¹

By the mandate given to the court of disposing the obligation of not

¹ G. Tudor, M. Costinescu, *op. cit.*, p. 214.

ICCJ, Sectia penala, decizia nr. 6083 din 27 decembrie 2007, www.scj.ro (Criminal Department, Decision no. 6083 of December 27, 2007)

leaving the locality, were observed the dispositions of the frame-Decision. In this sense the frame-Decision of the European Council of June 13, 2002 concerning the European Arrest Warrant and the procedures of turning in between the state members (2002/584/JAI), in article 12 stipulates: „When a person is arrested based on a European Arrest Warrant, the legal authority of execution decides if *the wanted person* must be kept in detention, according to the internal law of the state member of execution, with the condition that the competent authority of this state member take any measure considered necessary, in order to avoid the escape of the wanted person.

By Law no. 302/2004, such as it was modified by Law no. 222/2008, the possibility of applying the provisional measure of not leaving the country is no longer existent, and the mandate of the court of disposing a different measure than the arrest, was reduced to the provisions of article 90¹. Paragraph (2) of this article stipulates that in the case in which a person was detained under the conditions shown at article 88³ (excepting article 88² – in case of emergency), the judge can dispose by motivated closing, the arrest of the requested person or the measure of the obligation of not leaving the locality in terms of 5 days.

In comparison with the imperative terms used by the lawgiver, the judge can opt (in the ordinary procedure) between the measure of provisional arrest, and a freedom non-privative measure, the arrest of the requested person being required, if it is noticed that the European Arrest Warrant meets formally the conditions stipulated by the law to be executed.

Article 90 paragraph (11) of the Law regulates the possibility of taking the measure of not leaving the locality concerning the requested person, according to article 145 of the criminal procedure Code, but only in the case in which the requested person is rendered free, throughout the procedure of executing the European Arrest Warrant. So, the measure of the obligation of not leaving the locality can be made as an alternative to the measure of arrest, but only throughout the legal procedure of executing the European Arrest Warrant, depending on the duration and the results of the verifications that the judge is obligated to undertake concerning a possible incidence hereof of one of the obligatory or optional reasons of non-execution of the warrant or concerning the objections related to the identity that the requested person can pose.¹

¹ ICCJ, Sectia penala, decizia nr. 4214 din 22 decembrie 2008, www.scj.ro (Criminal department, Decision no. 4214 of December 22, 2008)

As opposed to the preventive measure of the obligation of not leaving the locality, the provisional measure of the procedure of executing the European Arrest Warrant, can be disposed by the court under the conditions stipulated by Law 302/2004 (with the subsequent modifications).

In the case in which the provisions of article 88³ are incident the court has the obligation of postponing the cause and it will be necessary the setting of a 5 day period for the presentation by the prosecutor of the European Arrest Warrant in the Romanian language.

The judge has the obligation to inform the requested person, brought in front of him, about the rights stipulated at article 91, the effects of the specialty rule, the possibility of consenting to the turning in and the irrevocable nature of this consent. In the minute drawn up upon this occasion, it will be registered the declaration concerning the consent and the mention whether the requested person renounced or not at the specialty rule. I once more underline that this 5 day period is allotted only for the presentation by the prosecutor of the European Arrest Warrant.

The 5 day period stipulated by article 90¹ paragraph (2) bore numerous discussions accompanied by the application of some different solutions in the case of some identical situations occurred in the legal practice.

So, some courts considered that at the expiry of the 5 day period, in the case in which the prosecutor did not present the European Arrest Warrant, the court had the power and can grant period further more until the receipt of the warrant, disposing that at the closing of the 5 day period the measure of arrest should be replaced by the measure of not leaving the locality (in the case in which initially the court estimated that the arrest measure was necessary). This solution though, might lead to a restriction of the rights of the requested person and does not have correspondence in any provision of Law no.302/2004, criminal procedure Code or frame-Decision.

According to other opinions, to which we concur, was noticed that after the expiry of the 5 day period, in the case in which the warrant was not submitted, if the court decided the necessity of applying the measure of arrest, when presenting the wanted person and signaled afterwards by the Interpol (before the granting of the 5 day period), the measure of arrest ceases by rights. In this case the requested person must be set free, and the court disinvests itself pronouncing a closing in this sense. Subsequently, after the receipt of the warrant, the prosecutor will notify once more the court with

the execution of the warrant.¹

Taking into consideration that in the absence of the European Arrest Warrant, the court is notified only based on the Interpol signaling, that does not equal with the warrant, this solution is considered the most pertinent as applicability and in conformity with the legal provisions.

As a result of the previous statements, we consider that the 5 day period stipulated in article 90¹ paragraph (2) is an imperative term.

Measure of arrest:

Preventive arrest from the internal criminology is a freedom privative preventive measure that can be taken with the fulfillment of the conditions stipulated by article 146 of the criminal procedure Code (the conditions stipulated at article 143 of the criminal procedure code must be met, namely there must exist evidence or solid grounds that the accused/defendant perpetrated a deed that is stipulated by the criminal law; for the perpetrated crime the law will stipulate the punishment with prison; there must exist one of the cases stipulated by article 148 of the criminal procedure Code). It can be disposed by the president of the court or by the judge empowered by him, throughout the criminal investigation also by the court throughout the trial (article 147 of the criminal procedure Code).²

The provisional arrest of the requested person and the preventive arrest from the Romanian process law, there are two process measures with similarities, but also with fundamental differences. So that even if both are disposed and maintained by the judge, the provisional arrest is disposed for the purpose of the turning in without the verification of the fulfilling of the conditions at article 146 of the Criminal Procedure Code, presented above. This measure is disposed based on the principle of reciprocal recognition and trust.

The European Arrest Warrant must not be mistaken for the preventive arrest warrant of the internal law, because the European Arrest Warrant is a legal decision that is always based on the preventive arrest warrant or the execution of a punishment issued under the terms of the law, by the legal authority from the requesting state. The European Arrest Warrant will be issued only in that situation in which the preventive arrest warrant or of execution of punishment could not be fulfilled in the country, because the

¹ G. Tudor, M. Costinescu, *op. cit.*, p. 175.

² S. Siserman, *op. cit.*, p. 315, 317.

targeted person circumvents on the territory of another state member of the E.U.¹

The provisional arrest disposed in order to turn in the requested person is a temporary, freedom privative measure, according to article 23 paragraph (2) from the Romanian Constitution, that fully meets the constitutional high demands stipulated by article 21, the party being given all the process guarantees specific to a fair trial.²

Such as results from article 77 of Law 302/2004, through the European Arrest Warrant it is required the arrest and turning in of a person, for the purpose of performing the criminal investigation, the execution of a punishment or of a freedom privative measure.

The provisional arrest can be disposed by a motivated closing, both by the usual procedure, on an initial 30 days duration, that can be extended, and also as in the case stipulated by article 88³ on a 5 day period (until the presenting by the prosecutor of the European Arrest Warrant).

The measure of arrest corresponding to the execution of the European Arrest Warrant presents some peculiarities. It cannot be enforced on the territory of the Romanian state directly by the issuing state, thus being appealed the dispositions of modified Law no. 302/2004, which involves the obligation of turning in the requested person, circumstance that justifies the measure of arresting the person. As a result, the court will decide the arrest of the person and not the preventive arrest.³

The arrest of the person in order to the turning in can be made only after listening to them in the presence of the defender. Under this aspect, the High Court of Cassation and Justice, Criminal Department ruled a decision, sanctioning with voidness the closing on the arrest without that fact that the requested person would benefit in practice from defense⁴.

According to the dispositions of article 90 paragraph (6) of the Law, in the situation in which the requested person consents to the turning in, if none of the cases of rejection stipulated by article 88 is incident, the judge can rule by sentence, according to article 94, altogether on the arrest and on the turning in.

¹Al. Boroi, I. Rus, *op. cit.*, p. 305. (quoted work, p. 305)

²G. Tudor, M. Costinescu, *op. cit.*, p 201. (quoted work, p. 201)

³I. Cristina Morar, M. Zainea, *Cooperare judiciară în materie penală, Culegere de practică judiciară*, C. H. Back, Bucuresti, 2008, p. 308.

⁴ICCJ , Sectia penala, dec. nr.945 din 14 martie 2008; www. scj. Ro (Criminal Departemnt, no. 945 of March 14, 2008)

If the person does not agree to the turning in, the procedure continues with the hearing of the person, limited to their position concerning the warrants and the possible rejection motives, respective identity objections (article 91 paragraph (7) from the Law).

Both in the case in which the person agrees on turning in, and in the situation in which they does not agree, if the judge estimates necessary to give a period of time for taking a decision concerning the turning in , the arrest is disposed by closing. On the grounds of article 91 paragraph (8), as well as of paragraph (12), which shows that, if the judge estimates that information or supplementary guarantees are necessary, he postpones the cause, setting a term for data receipt. The lawgiver wished to let the judge decide, depending on the circumstances of each brief, if it was necessary to run through two stages, independently of the consent or lack of consent of the person.

Paragraph (10) stipulates that the initial duration of the arrest cannot exceed 30 days, and the total duration, until the effective turning in by the issuing state member, cannot exceed 180 days. It is necessary to state that the dispositions of modified Law no.302/2004 by which referrals are made to the initial arrest period of 30 days stipulated by the lawgiver as maximum period, must be associated with the dispositions of the Romanian criminal process law.

Taking into consideration that the provisional arrest can bear two stages, we have to analyze them separately.

In the normal procedure, in the situation in which the person was detained for a period of 24 hours, in the initial period of 30 days for which the arrest will be disposed, the duration of the detention will be also included (the 29 days arrest will be thus disposed). If the person appears in the same day it is disposed an arrest of 30 days.

In the case of the emergency procedure (in case of signaling through the Interpol) stipulated by article 88³, form the initial arrest period the period of 5 days will be reduced, if the court disposed the arrest of the requested person during this period. If the wanted person and signaled through Interpol was detained and is presented in the same day to the court, the arrest will be disposed on a 5 day duration, period in which the prosecutor is obligated to present the European Arrest Warrant (as we previously had shown).

It will be deducted the time while the person was freedom deprived as a result of the administrative measure of presenting in front of the court, this deduction being taken into account when it is specified the hour when the

provisional arrest begins and ends. The initial arrest period in the special procedure will be of 25 days and can be maintained under the conditions of the law.

The court is obligated to check periodically, but no later than 30 days, if the maintaining of the arrest for turning in is required. In this sense, the court sentences a motivated closing, taking into consideration the terms provided at article 95 of the Law.

The initial arrest period cannot exceed 30 days, and the total period until the turning in to an issuing state cannot exceed 180 days.¹

Law 302/2004 with the subsequent modifications in article 95 stipulates the following terms:

„(1) The European Arrest Warrant is solved and executed under emergency regime.

(2) In the case stipulated at article 90 paragraph (5), the decision concerning the execution of the European Arrest Warrant must be sentenced the latest in a period of 10 days from the trial period to which the requested person has expressed the consent at turning in.

(3) In the other cases, the definite decision concerning the execution of the European Arrest Warrant is sentenced in a period of 60 days since the date of the arrest of the requested person.”

The 60 days period stipulated at article 95 paragraph (3) of the Law, does not concern the maximum duration of the arrest of the requested person, but the sentencing of the decision concerning the execution of the European Arrest Warrant, in the case in which the wanted person does not consent to the turning in. If the period of 60 days cannot be observed due to exceptional reasons, such as the adjournment of the trial as a result of the intimation of the Constitutional Court, the Romanian court has the obligation of informing Eurojust concerning the impossibility of observing the period, stating the reasons for the delay, without the obligation of releasing the requested person. In this sense was sentenced also the High Court of Cassation and Justice, Criminal department, by decision no. 5264 of November 5, 2007.²

Propositions of “de lege ferenda”: It is required that as a new modification of Law 302/2004, the lawgiver must stipulate the introduction

¹ G. Tudor, M. Costinescu, *op. cit.*, p 202.

² ICCJ, Secția penală, decizia nr. 5264 din 5 noiembrie 2007, www.scj.ro (ICCJ, Criminal Department, Decision no. 5264 of November 5, 2007)

of some procedures that would lead to the uniform feature of the court practices, in the situations in which the application of article 88³ is necessary.

We refer to the situation in which the 5 days period, inside of which the prosecutor must present the European Arrest Warrant expires, the warrant was not presented to the court. As a result of the described situation also in the above presentations, the measure of arrest ceases by rights, the person waiting to be released. This practice of some courts, although in conformity with the legal provisions, does not present efficacy because, in the situation in which the person is released, until a new investment of the court with a European Arrest Warrant, the wanted person can leave the territory of the country, the legal authorities that issue the European Arrest Warrant will continue to search the person on the territory of other state.

In this situation the purpose of the trial that every person that perpetrated a crime should be criminally held responsible is no longer reached.

Consequently it is necessary that the lawgiver finds a solution with applicability in this case, for instance the granting to the court of the mandate to prolong this term, and the stipulation of some limitative situation in which it can be extended.

In conclusion: the detention, the obligation of not leaving the locality/the country and the arrest, are provisional process measures, that are decided by the competent legal bodies, for the purpose of turning in the requested person tot the legal bodies from the issuing state of the European Arrest Warrant. The detention, by exception, in the case stipulated at article 88³ can be decided also by the research bodies of the legal police in case of emergency, otherwise, the measure is decided by the prosecutor. The measure of the obligation of not leaving the locality/country is decided only by the court, and the measure of arrest also. In all situations the rights of the requested person will be observed. For the situations in which the law is silent, meaning there are no provisions that can be applied to the intervened brief, it is requested that the modified provisions of Law 302/2004, should be completed with the provisions of the Romanian criminal process law. Likewise the decisions of the High Court of Cassation and Justice will be applied.