

**Transilvania University of Braşov
Faculty of Law and Sociology
Association OmniaLex**

PROCEEDINGS
International Conference
JUSTICE AND COMMUNITY
INTEGRATION
Second edition

14th – 15th of May 2009

**Transilvania University of Brasov Publishing House
OmniaLex Publishing House
2009**

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THE RIGHTS OF THE PERSON REQUIRED ON THE BASIS OF A EUROPEAN ARREST WARRANT

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Abstract: *The European Union must maintain and develop an area of freedom, security and justice, that a common judicial area in which citizens can seek justice in any Member State, as if their own country*⁴⁷⁸.

At the European Council in Tampere (Finland) on 15 and 16 October 1999 was recognized that the mutual recognition of judicial decisions is the "cornerstone" of a true European law-enforcement area.

The European arrest warrant proposed by the Commission in Council Framework Decision nr.584/JAI of 13 June 2002 is designed to replace the current extradition system by requiring each national judicial authority (the executing judicial authority) to recognise, ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). As of 1 July 2004, the framework decision will therefore replace the existing texts, such as: the 1957 European Extradition Convention and the 1978 European Convention on the suppression of terrorism as regards extradition; the agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests; the 1995 Convention on the simplified extradition procedure; the 1996 Convention on extradition; the relevant provision of the Schengen agreement.

In our law, in Title III of the Law no.302/2004 on international judicial cooperation in criminal matters, as amended and supplemented by Law no. 224/2006, Emergency Ordinance no. 103/2006, Law no. 222/2008 has been fully transposed, the Framework Decision on European arrest warrant and surrender procedures between Member States of the European Union.

In accordance with Article 1 paragraph 1 of Council Framework Decision nr.584/JAI of 13 June 2002 the European arrest warrant is any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of requested person, for the purposes of conducting a criminal prosecution, executing a custodial sentence, executing a detention order.

The warrant applies in the following cases: where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months; for offences punishable by imprisonment or a detention order for maximum period of at least one year.

If they are punishable in the issuing Member State by a custodial sentence of at least three years, the following offences among others, may give rise to surrender without verification of the double criminality of the act: the participation to a criminal organized group; terrorism; trafficking in human beings; sexual exploitation of children and infantile pornography; illicit traffic in drugs and psychotropic substances; illicit traffic in weapons, ammunitions and explosive substances; corruption; fraud, including against the financial interests of the European Communities, according to

⁴⁷⁸ Doru Mercan, The European arrest warrant. Procedure execution, in the Journal of criminal law No 3, Bucharest, publishing "Monitorul Oficial", 2007, p.70.

the Convention on the protection of the financial interests of the European Communities from July 26, 1995; laundering of the proceeds of crimes; counterfeiting of currency including counterfeiting of the euro; computer-related crimes; environmental crime, including illicit trafficking in protected animal and vegetal species; facilitation of illegal entry and stay; murder, grievous bodily injury; illicit trade in human organs and tissue; illegal deprivation of freedom, kidnapping; racism and xenophobia; robbery and armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; embezzlement; counterfeiting of goods; counterfeiting of official papers and use of counterfeited official papers; counterfeiting of means of payment; illegal trafficking in hormonal substances and other growth promoters; illegal trafficking in nuclear and radioactive materials; trafficking in stolen vehicles; rape; intentioned arson; offences in the competence of the International Criminal Court; unlawful seizure of aircraft and ships; sabotage.

For criminal acts other than those mentioned above, surrender may be subject to the condition that the act for which surrender is requested constitutes an offence under the law of executing Member State (double criminality rule).

The rights of the person arrested on the basis of a European arrest warrant are:

1. The arrested person has the right to be informed with regard to the content of the European arrest warrant;

To be valid European Arrest Warrant shall contain the following information: identity and nationality of the requested person; name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; mention of the existence of a final court decision, or a warrant for preventive arrest or of any other enforceable court decision having the same effect ; nature and legal classification of the offence; a description of the circumstances under which the offence was committed, including the time, place, and degree of participation of the requested person; the penalty handed down, if the court decision has remained final, or the penalty provided in the law of the Issuing State for the offence committed; if possible, other consequences of the offence.

European Arrest Warrants sent to the Romanian authorities for execution shall be translated into Romanian, English or French.

Court is required to verify the identity of the person required and ensure that she has a copy of the European arrest warrant.

2. The arrested person has the right to be assisted by a defense lawyer, chosen by arrested person or ex officio appointed by the court;

The resolution no. 945 of March 14th 2008 of the High Court of Cassation and Justice, Criminal Section, showed that by declining the request of the chosen defense counsel for adjournment of the case and appointment of a defense counsel appointed by the judge, starting the prosecution of the case and rendering of the decision concerning the execution of the European arrest warrant, the Court violated the right to defense of the requested person, right guaranteed by art. 24 of the Constitution, art. 6 Criminal Codes and art. 6 of the European Convention for Human Rights, whereas the simple appointment of a defense counsel appointed by the judge, without granting it the actual opportunity to examine the papers of the case, does not lead to the fulfillment of the obligation for provision of legal assistance and means the deprive the requested person of actual defense, which infringes his /her right to defense.

The provisions of art. 171 (4¹) Criminal Codes stipulate 'When legal assistance is compulsory, if the chosen defense counsel fails to appear without solid grounds (...) at the established hearing date and fails to provide substitution (...) the court takes actions to appoint a court defense counsel, granting a delay of 3 days at the minimum for the defense preparation'.

The mere appointment of a defense counsel without giving him/her actual possibility to examine the papers does not lead to the fulfillment of the obligation of providing legal assistance. The appointment of a defense counsel by the judge, as above described, does not assure the necessity to observe the dispositions of art. 6 (3) (c) of the European Convention for Human Rights.

In accordance with art. 6 (3) (b) of the aforementioned Convention, any accused is entitled to decide on the necessary time and facilitation for the preparation of his /her defense, and according to art. 6 (4) Criminal Codes, any of the parties is entitled to be assisted by the defense counsel during the criminal proceedings. Correlative to this right, the paragraph (5) art. 6 sets forth the obligation of the legal authorities to take all necessary actions intended to provide the legal assistance of the indicted or accused person, if only he /she has no any chosen defense counsel.

The High Court of Cassation and Justice considered also the Decision of the European Court of Human Rights, in the case *Criossant c. Germany* (September 25th 1992), which retained that the confidential relation between the client and the counsel cannot be deemed as an absolute one, and it is subject to certain limits, in case the court must decide whether the justice interests request for the accused to be defended or not by the counsel chosen by him /her. The court must take into account the accused intention, but can also skip over this intention, if there are relevant and sufficient reasons to consider it in the interest of justice.

3. *The arrested person who does not understand or speak Romanian language has the right to an interpreter, ensured by the court free of charge.*

4. *Person required under a European arrest warrant should be informed about the opportunity that is offered to agree to surrender to the issuing judicial authority. Consent from teaching and, where appropriate, express renunciation to the right not to be taught, you be given to the judicial authority of enforcement, in accordance with the law of the Member State of enforcement and listed in a report. Consent and, where appropriate, the waiver must be obtained under conditions which show that the person has expressed freely and in full knowledge of the consequences thereof. Consent is basically irreversible, if the State decides that it is revocable in accordance with applicable law⁴⁷⁹.*

In our law, the speciality rule is mentioned in article 100 which „Consent to prosecution, trial, sentencing or holding a person by the Romanian authorities for other acts committed prior to its surrender under a European arrest warrant is presumed to have been given by those Member States which have submitted a notification in this regard the General Secretariat Council of the European Union, if the judicial enforcement provides otherwise in its surrender decision.”

Except for the situations mentioned in para (1) and (4), the person surrendered to the Romanian authorities may not be prosecuted, tried or deprived of freedom for another offence committed before his surrender, unless the executing State authorizes this. For this purpose, the issuing Romanian judicial authority shall

⁴⁷⁹ Ilie Măgureanu, *The European arrest warrant and the surrender procedures between Member States*, in the *Journal of criminal law* No 3, publishing "Monitorul Oficial", Bucharest, 2008, p.44-45.

present to the executing judicial authority a request for authorization, accompanied by the information provided in Article 79 paragraph 1.

In relations with other Member States than those stipulated in paragraph 1, the consent authority of the Roman judicial enforcement is necessary. In this respect, the competent judge shall decide the final conclusion given in the council chamber without summoning the parties no later than 30 days of receiving the request, without prejudice to the guarantees referred to art. 87.

The previous paragraphs shall not apply under one of the following circumstances:

- a) When the requested person expressly renounced the speciality rule before the executing judicial authority, before the surrender.
- b) When the requested person renounced, after surrender, the use of the speciality rule in connection to certain offences previous to his surrender. The statement of renunciation of the speciality rule shall be given before the competent judicial authority of the issuing Member State, and an official record shall be drawn up according to the internal law of the latter State. The requested person shall have a right to be assisted by a lawyer. Renunciation of the speciality rule must be willed and in full awareness of its consequences.
- c) When, while having had the possibility to leave the territory of the Member State to which he was surrendered, the person concerned did not do so within 45 days from his final release, or when he returned to this territory after having left it.
- d) When the offence is not sanctioned with a penalty involving deprivation of freedom.
- e) When, at the end of the criminal trial, no penalty involving deprivation of freedom and no security measure is applied.

5. If the arrested person does not consent to surrender in the manner shown above, it has the right to be heard by the executing judicial authority, in accordance with the law of the Member State of enforcement.

In Romania, the hearing person required under a European arrest warrant is made under the provisions of the Code of Criminal Procedure .

6. During the proceedings of execution of the European arrest warrant by the Romanian legal courts, in compliance with the provisions of art. 87 (1) (a) of the Law 302 /2004 if the European arrest warrant was issued for the purpose of the execution of a punishment enforced by a decision rendered in absentia or if the person concerned was not duly summoned for the prosecution date and venue which led to taking the decision in absentia, the issuant judicial authority will provide an assurance considered sufficient, able to guarantee to the person, object of the European arrest warrant, that he /she will have the possibility to obtain the re-prosecution of the case in the issuant member state in his /her presence.⁴⁸⁰

The *non bis in idem* principle, according to which no-one may be prosecuted or convicted twice for the same facts or the same punishable conduct, does not exclude the re-prosecution of the case of the person convicted in absentia and, consequently, in case the issuant judicial authority communicates to the Romanian prosecution court both the information related to the regulation of the *non bis in idem* principle and to the regulation of the possibility for the person convicted in absentia to obtain the re-prosecution of the case in the issuant member state, the requirement stipulated by art. 87 (1) (a) of the Law 302 /2004 is fulfilled.

⁴⁸⁰ See the decision of the High Court of Justice no 1118 as of 26 March 2008, Criminal Section, unpublished.

7. The right person required under a European arrest warrant to be judged as a matter of urgency, with the timeliness of surrender and the consequences arising out of here.

The European Arrest Warrant shall be solved and executed in emergency procedure.

Should the requested person consent to the surrender, a decision shall be handed down within 10 days from the court session in which the requested person expressed consent to surrender.

If the requested person does not consent to the surrender, a decision shall be handed down within 60 days from the arrest.

When, for justified reasons, a decision cannot be handed down within the terms mentioned in the previous paragraphs, the court may postpone the handing down for 30 days, while announcing this to the issuing judicial authority, together with the grounds for postponement and while maintaining the measures necessary in view of surrender.

Surrender shall be performed by the Center for International Police cooperation within the Ministries of Interior and Administrative Reform within 10 days from the handing down of the court decision on surrender.

Should the maximum terms for surrender expire while the person concerned was not received by the Issuing State, the requested person shall be released, while this shall not be grounds for refusing the execution of a future European Arrest Warrant based on the same acts.

In all cases, at the time of surrender, the executing Romanian judicial authority shall make known to the issuing judicial authority the length of deprivation of freedom undergone by the person requested, so that it may be deducted from the penalty or security measure to be applied.

A special situation appear when a person referred to by a European Arrest Warrant enjoys immunity in Romania, the terms shall begin from the date when the executing judicial authority was informed of the removal or withdrawal of immunity.

When a person referred to by a European Arrest Warrant is in Romania following his extradition from a third State that is not a member of the European Union, and the surrender is limited to the offence for which it was granted, the terms in the previous paragraph shall start when the authorities of the State that extradited the requested person give their consent for the speciality rule to lose its effect, and the person may be surrendered to the State that issued the European Arrest Warrant. Until the decision is made, the executing judicial authority shall take the measures necessary for surrender, if required.

8. The person arrested has the right to exercise the review of the appeal as follows:

Against the decisions provided for in article 90 paragraph (2), (8), (9) of Law no.302/ 2004 an appeal can be made in 24 hours from the issuing.

The decision mentioned in article 94 paragraph (1) may be appealed in 5 days from the issuing,

Appeal against the said decision which ordered the person teaching is required suspension of execution, except for provisions on arrest measure. The case will be sent to the court of appeal within 24 hours.

The appeal issued in the conditions mentioned in article 94 paragraph (1) is solved by preference, in maximum 3 days from the transmission of the file to the High Court of Justice and Cassation.

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Printed at:
Transilvania University Of Brașov
Publishing House B-dul Iuliu Maniu 41A
Tel: 0268 – 476050

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Publishing House accredited by CNCIS
Address no.1615 / 29 May 2002

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ISSN 2066 - 8848