

LEGAL ASPECTS OF THE EUROPEAN ARREST WARRANT

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***Abstract:** The procedure for transferring of a person differs fundamentally from traditional extradition procedures by eliminating the division of tasks between the two parties, namely the Ministry of Justice and the court. However, starting the procedure is similar. So far, the Ministry of Justice has checked that the documentation submitted was according with the provisions of the Convention. Currently, the procedure begins in court, with all due diligence. The competent courts are courts of appeal. The court that receives the European arrest warrant verifies whether it is competent, if not, it sends the warrant further to the competent court.*

The competent court for enforcement must verify whether the formal conditions of the European arrest warrant are fulfilled. If no translation is attached, the court requires the issuing judicial authority to translate it. The procedure is suspended until getting the translation. After obtaining it, the Court of Appeal must give a decision on the European arrest warrant.

***Keywords:** Decision, extradition, version, agreement, convention, treaty*

1. INTRODUCTION

The purpose of extradition is to bring the suspect of crime, as soon as possible, in the country where the offense was committed and there, to bring the suspect before the court in whose jurisdiction the crime was committed. This transnational cooperation requires a legal basis and should proceed according to interstate rules provided for and guaranteed for such a situation. Extradition is, from this point of view, a commitment between the governments of sovereign states to entrust a person to another state in order to prosecute certain offenses or to execute the punishment of imprisonment or to apply preventive measures.

The legal institution of extradition belongs to several areas of the law. It is about international law, national law and international criminal law.

As historical evolution, we must remember the fact that of existing legal fundamentals have been:

- a. national laws that can be regarded as guaranteeing reciprocity between two sovereign states as the basis for the extradition of a particular person;

- b. Treaties between two or more States;
- c. in addition, valid universal principles of international law such as: the principle of reciprocity, the principle of specialty and the principle of international diplomacy.

As early as the eighteenth century extradition treaties were closed between the cities and principalities northern Italian states. Thus, the Statutes of Pistoia in 1296 forbade exiled Florentines the residence. Podesta from Crema established in 1290 that all exiles of Cremona had to leave town and region the same day; otherwise they would be turned over to the city of Cremona.

By early nineteenth century, extradition was a political act of the highest authority, deriving from absolute powers, which, in the interest of the state, could avoid the asylum principle. Hugo Grotius (1583-1645) is considered the founder of the theory of extradition law.

If at first extradition was considered a purely administrative act, with the theory of separation of powers the idea has established that at least the material prerequisites of extradition must be checked and determined first by a court in its consultative or decisive quality. This shift from political principle to the principle of law was made quite early, for example, in Austria, namely by Royal Decree of 10.12.1808.

2. CONTENT

Regarding the international extradition rules, the long history of law on extradition in Europe is contained in the European Convention of Extradition of 13.12.1957, issued by the Council, ratified by all Member States of the European Union and the two Additional Protocols of 1975 and 1978 which were also ratified by many EU Member States. Many countries have used the opportunity to make reservations at the various individual provisions. They also signed many bilateral treaties and multilateral conventions that comprise different rules.

Successively, the agreement on simplification and modernization of procedures for transmitting requests for extradition was signed (Sant Sebastian agreement of 26.05.1989), the Convention on simplified extradition procedures Convention on Extradition of 10.03.1995 and 27.09.1996.

In the Convention implementing the Schengen Agreement specific issues of extradition law are addressed in Articles 59-66. Much practical importance is given in the Schengen Information System (SIS) and conventions on specific offenses that include their own legal provisions for extradition are included.

As far as fundamentals of extradition are concerned, we must note that the guiding principle of traditional law regarding extradition is: there is no obligation for extradition without the existence of a Treaty. This is a basic principle of international law and sovereignty resulting from a state, meaning that it has "sovereign right" on all persons within its territory. The common

international law does not have a requirement for extradition, either. It provides only the modality in which the state must respond to an extradition request. After an interstate exercise, the addressee tries to explain the refusal or reject the request even in the absence of a treaty, for diplomatic reasons. This is especially true when a reciprocal relationship is established.

As far as the types of extradition treaties are concerned, we must remember the principle that there are two different types of such treaties:

1. Treaties to identify the facts that attract extradition by “enumeration method”, i.e. a list of crimes;
2. Treaties where there are circumstances that attract extradition by the “elimination” method.

The mixed method is an intermediate phase where, besides a list of facts that fall under extradition there is also provided the condition of a minimum degree of criminal sanction. When using the elimination method we cannot exclude the possibility of changing unilaterally the content of the treaty by changing the national law, such as an amendment to the penal system, lowering or raising the custodial sentences, and exoneration. It is not necessary to obtain the consent of the other party, because it has already accepted the possibility of future changes with unreserved acceptance of the method of elimination.

As far as the traditional principles of extradition are concerned, we note the following:

- Principles of reciprocity;
- Principles of specialty;
- Principles of double criminality;
- Principles of non-extradition for a political offense;
- Principles of non-extradition for a fiscal and military offense;

and as punishment that is not allowed, there are: death penalty and the danger of political persecution.

The traditional extradition procedure is based on the idea that in most countries it is characterized by two components: the judges’ decision and administrative decision (political). The legal procedure usually begins with the arrest of the person and continues with a hearing before the judge. If extradition is legitimate and documents are made available from a higher level court to the Ministry of Justice, which is to decide on the approval or rejection of extradition definitively. The administrative decision of the Ministry of Justice can be made by taking into account considerations of state policy.

As legal foundations extradition is based in Europe on treaties passed by the Council of Europe. In the past 15 years, the European Union has adopted a series of conventions, including the 1995 Convention on simplified extradition procedures between Member States of the European Union and the 1996 Convention on Extradition between Member States. However, because of the numerous possibilities of reservation and various declarations, their application

has become increasingly difficult due to the increasingly numerous requests. E.U. initiatives had as main objective to simplify and speed up procedures and contributed to some fully-unified application. It is difficult even for specialists in the field to fit a case of extradition exactly and to investigate legal foundations.

Regarding the principle of mutual recognition of judgments under the Framework Decision of the European arrest warrant, at a conference in Tanpere in October 1999, the European Council presented with the help of Heads of State and Government members of the Member States, the principle of mutual recognition of judicial decisions as basic principle for judicial cooperation. Furthermore, for the first time, the board decided replacement of extradition procedures with an effective and rapid extradition of wanted persons. On the one hand, E.U. has considerably intensified its legislative work in criminal matters in the context of "the third pillar", since the Treaty of Amsterdam of 02/10/1997, which entered on 05.01.1999. This happened primarily through alignment of legislation among Member States by means of framework decisions. A second trend appears to simplify and accelerate the extradition procedure which was a long-term objective.

The aim of the decision is to reorganize extradition law within the European Union, under the principles of mutual recognition of judgments and mutual trust between Member States. Civil law "extradition" is located at the intersection of international law and international criminal law and it has a special importance as far as the harmonization of criminal law provisions of the European Union is concerned.

The decision on the EAW does not provide an automatic extradition, but leaves Member States room to provide the transposition of the European arrest warrant in the material premises. The decision provides, in addition to the mandatory reserve (Article 3) and the series of mandatory and optional reasons for rejection (art. 4 and 5). The decision leaves enough room for Member State to take action regarding its transposition.

The decision of the Council of 13.06.2002 on the European arrest warrant and the extradition procedures among Member States of the European Union, was published in the Official Journal L.190 of 18.07.2003, and is one of the most important instruments of the European Union to implement the principle of mutual recognition of decisions in other Member States. The decisions do not constitute, in accordance with Article 34 paragraph 2 b, a directly applicable right in the European Union. Their provisions are compulsory, but must be implemented with respect to national legislation.

According to Article 1 of the Decision, the European arrest warrant is a judicial decision taken in one Member State in order to retain and extradite a person wanted by another country to be prosecuted or to impose a custodial sentence or to deprive of liberty. Paragraph 2 requires Member States to execute any European arrest warrant under the mutual recognition principle according

to the Decision. Paragraph 3 provides that the decision is without prejudice to Member States' obligation to respect fundamental rights and the general principles of law, as in Article 6 of the EU Treaty.

In the Decision on the European arrest warrant the following were replaced among Member States, regulating extradition:

- European Convention of 1957 regarding extradition, with additional protocols, as well as the European Convention on Combating Terrorism of 1978 in relation to extradition;
- the Convention between Member States of the European Communities on simplification of requesting procedures 26/05/1989;
- Convention on simplified extradition procedure in 1995;
- Convention on extradition of 1996;
- Provisions on extradition in the 1990 Schengen Convention.

The new regulatory procedure was simplified and accelerated. The whole political and administrative phase has been replaced by an exclusively judicial procedure. The procedure itself has been substantially amended the regulations in the decision. From a procedure involving two sides, sovereign states, only one remained.

Regarding the position of the subject of the person under the European arrest warrant the application of the European Convention on Human Rights is taken into consideration and subjective rights of persons are recognize which means that the execution of a European Arrest Warrant issued by a Member State of the European Union, or through another Member State of the European Union, can retain and arrest in another Member State, a person whose trial has been initiated in another Member State in order to surrender it to the requesting State. This classification, as a coercive measure and instrument of procedural criminal law, allows access to numerous guarantees because, unlike traditional extradition, the European Convention on Human Rights contains explicit rights and procedural guarantees adapted to the prosecution, which ensures the protection of the accused and must protect him from discretionary treatments in criminal proceedings. Hence, the implication that a person who is subject to the European Arrest Warrant cannot be subjected to torture or inhuman or degrading treatment. At any time, the accused may request the State acting in its jurisdiction - the executing State, after the person has been caught - and the issuing State after the surrender was made, to respect the guarantees contained in Articles 5 and 6 ECHR.

3. CONCLUSIONS

The Decision is so far the most high profile in the history of extradition especially in terms of simplifying and accelerating the procedure. On the one hand, it eliminates the traditional barriers in case of political, military and fiscal

offenses and non-transmission of their citizens; on the other hand, extradition proceedings are waived in two stages. The approval procedure is now legal proceedings. This new approach finds expression in the terminology changed. The phrase "extradition" no longer used, instead the phrase "surrender" is used.

The terms 'applicant State' and "soliciting" state are replaced with "issuing judicial authority and enforcement" or "the issuing State and the executing Member State." Member States may continue to apply or to sign bilateral or multilateral agreements to simplify and facilitate the procedures.

The Council's Decision on the European arrest warrant has been transposed into national law by Title III of the Law no. 302 / 2004 on international judicial cooperation in criminal matters, as amended by Law no. 224 / 2006. Title III of the abovementioned law which came into force with the accession to the European Union.

In a statement by the EU Council of 18 December 2006, document 16907/06, COPEN 134 EJM 33 EUROJUST 56, Romania announces the transposition of the Decision on the European arrest warrant by Law 303/2004, the national legal provisions to take effect on January 1, 2007.

According to article 6 paragraph 3 of the Decision on the European arrest warrant, General Secretariat informed that in accordance with the Romanian law, the court is the competent authority to issue a European arrest warrant. Any court is competent, that has jurisdiction with powers to issue arrest warrants, arrest warrants in criminal proceedings or to order the execution of a custodial sentence. The competent courts to execute a European Arrest Warrant are the courts of appeal. According to Article 7 of the Decision on the European arrest warrant, the Ministry of Justice in Romania has been designated as the competent authority to support the competent judicial authorities.

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