

EXTRADITION BETWEEN THE EUROPEAN UNION - ICELAND AND NORWAY. CRITICAL COMMENTS¹

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Abstract

The subject matter of this study deals with the provisions of the International Agreement establishing the procedures for the surrender of persons requested for having committed crimes, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, between the European Union on the one hand, and Norway and Iceland on the other hand.

Also, within the research's tenour there were also laid down some critical comments pointing at the need to supplement the provisions of the international instrument for cooperation.

The research's results are materialized in the analysis of the international instrument, the identification of incomplete legal regulations that, in the actual cooperation business will cause breakdowns in advancing some practical proposals for amendments and supplements.

The study serves the purpose of theorists and practitioners in this particularly complex area.

Keywords: *arrest warrant, proposals for supplementation.*

Introduction

Crime fighting has been a constant concern of all States of the world, since ancient times. As the relations of cooperation between the States of the world boosted, particularly from the economic point of view, various possibilities have arisen as to the movement of individuals, on all continents.

Thus, crime at a global level has experienced new forms of expression, some extremely violent, the perpetrators of these types of actions succeeding in many situations to avoid criminal liability, flying to the winds out of the country where they have committed the relevant acts and hiding in the territory of other States².

Under these circumstances, with the passage of time, crime has been manifested in the most diverse and violent forms, being a threat to the individual security of citizens or even to the internal security of certain States. The development of real opportunities for the movement of citizens across Europe (starting with the second half of the last century) has

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² See, I. Rusu, M.I.Rusu, *Extrădarea activă (Active Extradition)*, Revista de Drept Penal (*The Criminal Law Review*) No. 3/2010, p. 54.

resulted in new mutations in the structure of cross-border crime, mutations generally entailed by the possibility of criminal elements' movement, by ensuring a highly developed organization and logistics³.

We can argue that, on account of these transformations, particularly in recent decades, in Europe as well as worldwide, crime has witnessed unprecedented development, gathering way in the most diverse forms, some of them extremely severe, endangering thereby the safety of both individuals and collectivity, or even the existence of certain States⁴.

The growing danger stemming from the evolution of organized crime, as well as the possibility to avoid the criminal prosecution or trial of crimes' perpetrators, called forth the world's States to step up work on the international judicial cooperation, this being the only way to prevent and fight the phenomenon in its entirety.

Research on the evolution of forms of international judicial cooperation in criminal matters highlights the fact that the oldest and, at the same time, the best known form of international judicial cooperation in criminal matters is rightfully considered extradition.

The European States have addressed this particularly complex issue on two tiers, respectively internally, through the adoption of a law which could support the extradition of individuals, including their own citizens, and externally, through the permanent trend to simplify the surrender procedures, on account of bilateral or regional covenants.

Sensing this imminent danger for the entire European Community, the Council of Europe adopted on December 13th, 1957 the European Convention on Extradition, the first major piece of legislation in this area, which has been ratified over time by all European States⁵.

The establishment of the European Union and the Schengen area subsequently, which also prompted free movement of people and goods in an expanded area, has led to the emergence of significant mutations in the criminal area, namely it led to easy movement and, generally, without major risks of offenders in any Member State of the European Union or Schengen area and, inferentially, the possibility to avoid criminal liability⁶.

At European Union level, the measures taken so far have focussed on two main issues, namely the adoption of a coherent regulatory framework that would contribute to the enhancement of specific judicial cooperation activities in criminal matters between the Member States⁷ and the adoption of international instruments for cooperation between Member States and the other States across Europe or worldwide⁸.

The Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European

³See, I. Rusu, *Mandatul european de arestare, în urma modificărilor aduse de Legea nr. 222/2008 (The European Arrest Warrant, following Amendments under Law No. 222/2008)*, Caiete de Drept Penal (*Criminal Law Books*) No. 1/2009, pp. 18-19.

⁴See, I. Rusu, *Transferul de proceduri în materie penală (The Transfer of Proceedings in Criminal Matters)*, Dreptul (*Law*) No. 6/2009, p. 186.

⁵See, M.I.Rusu, I. Rusu, *Particularitățile executării mandatului european de arestare în cazul infracțiunilor transfrontaliere (Particularities of Execution of the European Arrest Warrant in the case of Cross-border Crime)*, Dreptul (*Law*) No. 9/2011, p. 191.

⁶*Ibidem*, p. 192.

⁷See: Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, the Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, etc.

⁸See: Agreement on mutual legal assistance between the European Union and the United States of America, the Agreement on extradition between the European Union and the United States of America, the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, etc.

Union and Iceland and Norway represents the international instrument in the field of judicial cooperation in criminal matters, according to which the Contracting States shall extradite certain categories of citizens.

The importance of this international instrument for judicial cooperation in criminal matters arises from the fact that it must be implemented by all Member States of the European Union, therefore Romania included, its implementation helping to prevent and fight crime in all areas.

In the study hereby we shall proceed to examine the provisions of this international instrument, as well as to advance some critical comments.

I. General Approaches. According to the provisions of the international instrument, the Contracting Parties, by signing thereof, are committed to improving surrender for the purpose of criminal prosecution or the execution of sentences. Surrender will be carried out on the basis of an arrest warrant issued by the competent authorities of each Member State or in Iceland or Norway.

The arrest warrant is defined as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The arrest warrant may be issued provided the following conditions are met:

- the acts for which the warrant is issued shall be punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months;

- where a sentence has been passed or a detention order has been made, for sentences of at least four months.

In both cases, the double criminality requirement must also be met, whatever the constituent elements or legal classification in the executing State.

The first exception to the general rule regarding the execution of an arrest warrant (shown above) consists in the obligation of executing a relevant warrant in connection with the acts of any person contributing to the committing, by a group of persons acting towards a common purpose, of one or more offences in the field of terrorism provided for in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, as well as Articles 1, 2, 3 and 4 of the Council Framework Decision of June 13th, 2002 on combating terrorism, in the field of illicit traffic in narcotic drugs and psychotropic substances or crimes of homicide, serious bodily injury, kidnapping, illegal restraint, hostage-taking and rape, punishable by a custodial sentence or detention order with a maximum of at least 12 months, even where the said person does not take part in the actual execution of the relevant offence or offences; its contribution must have been intentional and committed fully aware that such participation shall contribute to the achievement of the organization's criminal activity.

The second exception relates to the execution of an arrest warrant in the case of certain types of offences for which the double criminality requirement is not necessary, but these acts must be punishable in the issuing State by a custodial sentence or detention order for a maximum of at least three years. These types of crimes cover: participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud, including that affecting the financial interests of the European Communities, within the meaning of the Convention of

July 26th, 1995 on the protection of the European Communities' financial interests; laundering of the proceeds of crime; counterfeiting currency, including of the euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissues; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear and radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft and ships, and sabotage.

We note that all types of crimes mentioned above, for which the double criminality requirement is not necessary to be met, are deemed serious crimes under the laws of all the Member States of the European Union.

Likewise, it turns out that these crimes are set out in the judicial cooperation plan in criminal matters at European Union level in all regulations adopted in recent years.

In terms of the provisions under review, we point out hereby that these have many elements of similarity, being almost identical to those referred to in Council Framework Decision 2002/584/JHA of June 13th, 2002 on the European arrest warrant and the surrender procedures between Member States.

1. Grounds for mandatory and optional non-execution of the arrest warrant. a) Mandatory grounds.

According to the provisions of the international instrument, Member States shall refuse to execute the European arrest warrant in the following cases:

- if the offence on which the European arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

- if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts, provided that, where there has been sentence, the sentence has been served, or is currently being served or may no longer be executed, under the law of the sentencing Member State;

- if the person who is the subject of the European arrest warrant may not, owing to his/her age, be held criminally responsible for the acts on which the arrest warrant is based, under the law of the executing State⁹.

We hereby point out that, out of the interpretation of the provisions of the international instrument, it appears that these mandatory grounds under which the execution of an arrest warrant is refused shall be valid only for the Member States of the European Union, Iceland and Norway excluded. We argue that it is fairly normal that the two Contracting States, even if the relevant legislation fails to set forth, raise any of these grounds. In this context, we appreciate that a possible refusal of enforcement of an arrest warrant by the competent judicial authorities of Iceland or Norway, pursuant to the aforementioned provisions, should be grounded in all circumstances and also raised, only after consideration of each specific situation by the judicial authorities of the States concerned.

⁹ Article 4 of the Agreement.

b). Optional grounds. In addition to the cases mentioned above, Member States and Iceland and Norway may establish the duty or the option for their relevant executing judicial authorities to refuse the execution of the European arrest warrant in the following cases:

- if the act on which the arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties, customs and exchange regulations as the law of the issuing Member State;

- where the person who is the subject of the arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

- where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based, or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

- where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State, and the acts fall within the jurisdiction of that Member State, under its own criminal law;

- if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same act, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed, under the law of the sentencing country;

- if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

- where the arrest warrant relates to offences which:

- are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

- have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

We hereby point out that all the grounds for refusal to execute an arrest warrant are optional and not mandatory to any of the States concerned. Likewise, these grounds are analyzed for each individual case by the competent judicial authorities of the Member State concerned on the one hand and Iceland or Norway on the other hand.

2. Exceptions relating to political offences and nationality. Executing an arrest warrant may not be refused on the grounds that the executing State may regard the offence as a political one, an offence connected with a political offence or an offence inspired by political reasons. This provision is as up-to-date as possible, having regard to the entire European legislation in this field.

However, given the seriousness of the offences of terrorism, the Act provides that the Contracting Parties may make a statement that the abovementioned provisions shall apply only in respect of:

- offences referred to in Articles 1 and 2 of the European Convention on the suppression of terrorism;- offences of conspiracy or association, corresponding to the acts described in Article 3(3), for committing one or more of the offences referred to in Articles 1 and 2 of the European Convention on the suppression of terrorism; and

- Articles 1, 2, 3 and 4 of the Council Framework Decision of June 13th, 2002 on combating terrorism.

Where an arrest warrant has been issued by a State which has made a statement under the aforementioned, the executing State may apply the principle of reciprocity.

Also, executing an arrest warrant may not be refused on the grounds that the person who is the subject of the request is a national of the executing State. In these circumstances, the Contracting Parties may make a statement under which the surrender of nationals can be achieved only if certain conditions imposed by the executing Member State are met.

3. *Guarantees to be given by the issuing Member State in particular cases.* The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

- where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

- if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

- where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State¹⁰.

Out of the assessment of the provisions referred to above, it follows that each Member State or Norway or Iceland, through their competent judicial bodies, may refuse to execute an arrest warrant, unless certain conditions are met. This refusal is at the discretion of the executing Member State, which can claim or not meeting the said conditions. We appreciate that all the conditions laid down in the international instrument should be met each and every time, and, therefore, the failure to enter obligations by the Member State having issued the

¹⁰ Article 8 of the Agreement.

arrest warrant will inevitably lead to refusal of execution, whether a Member State or Iceland or Norway are faced with this situation.

Besides, it turns out that these conditions are set out in the majority of European regulations governing one form or another in judicial cooperation in criminal matters between the Member States.

At the same time, we hereby point out that the imposition of such conditions is not mandatory for the Contracting Parties, but optional.

4. Content and form of the European arrest warrant. The European arrest warrant issued under the international instrument under review shall contain the following information (set out in the form, also):

- the identity and nationality of the requested person;
- the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 2 and 3;
- the nature and legal classification of the offence, particularly in respect of Article 3 (scope);
- a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- if possible, other consequences of the offence.

The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Contracting Party, on the adoption of the relevant instrument or at a later date, may state in a declaration that it will accept a translation in one or more other official languages of a Member State¹¹.

II. The surrender procedure under the European arrest warrant.

1. Transmission of a European arrest warrant, rights of a requested person, decision of the competent authority

When the location of the requested person is known to the judicial authority in the issuing Member State, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority, without any other further formalities. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS). Such an alert in the Schengen Information System shall be equivalent to a European arrest warrant, provided it is accompanied by the information set out in the arrest warrant.

If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries to establish the competent authority, including using information obtained from the executing Member State. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on the International Criminal Police Organization (INTERPOL) to transmit a European arrest warrant. Likewise, the issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State

¹¹ *Ibidem*, Article 11 of the Agreement.

to establish its authenticity. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly. All difficulties concerning the transmission or the authenticity of any European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the two Member States involved.

As regards the rights of the arrested person, we note hereby that, first, it will be informed, in accordance with the national law of the executing Member State, of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority. Also, the said person will be informed that he or she has the right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State. The executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the relevant Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the “speciality rule”, shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State. These statements of the requested person shall be established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel. Both consent and renunciation shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State. In principle, the consent to surrender may not be revoked. However, each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in the international instrument. Norway and Iceland, on the one hand, and the European Union, on behalf of any of its Member States, on the other hand, can make along with the notification a statement indicating that they wish to have recourse to this possibility and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

Where the person concerned does not consent to his or her surrender after her/him being arrested, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

If two or more Member States have issued a European arrest warrant or an arrest warrant for the same person, the decision on which of the arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

In special cases, the executing judicial authority of a Member State may seek the advice of Eurojust in order to determine the order of execution of the arrest warrants. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes

precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to above and those mentioned in the applicable convention.

2. Time limits, procedures, hearing the person, privileges and immunities. The general rule established under the provisions of the international instrument is that a European arrest warrant shall be dealt with and executed as a matter of urgency. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person. Where in specific cases the time limits laid down hereinbefore cannot be observed, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

Reasons must be given for any refusal to execute a European arrest warrant by the executing judicial authority.

Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must agree that the requested person should be heard, as well as the temporary transfer of the requested person, under the conditions determined by mutual agreement between the two judicial authorities.

The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned, no later than 10 days after the final decision on the execution of the European arrest warrant. If the surrender of the requested person within the period laid down hereinbefore is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health.

Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to above shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

3. Postponed or conditional surrender and transit. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted or, if he or she has already been sentenced, so that he or she may serve a sentence passed. However, instead of postponed surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement in writing.

On the subject of transit, the general rule established under the regulation is that each Member State shall permit the transit through its territory of a requested person who is the subject of execution of a European arrest warrant, provided that the Member State of transit has been previously given information on:

- the identity and nationality of the person subject to the European arrest warrant;
- the existence of a European arrest warrant;
- the nature and legal classification of the offence;
- the description of the circumstances of the offence, including the date and place.

The Member State executing an arrest warrant in the case of nationals under certain conditions may, under the same conditions, refuse transit of nationals in its territory or subject this transit to the same conditions. The Contracting Parties shall communicate to each other which is the authority designated in each Member State for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests.

III. Effects of the surrender.

1. *Criminal prosecution for other offences.* The general rule established in the international relations of judicial cooperation in criminal matters is that the person who is the subject of surrender on the basis of an arrest warrant shall not be held criminally liable for an offence committed prior to his or her surrender other than that for which he or she was surrendered. However, the Contracting Parties may notify that, in relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

In this context, the person surrendered will be held criminally liable for other offences committed prior to his or her surrender, in the following cases:

- when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;
- the offence is not punishable by a custodial sentence or detention order;
- the criminal proceedings do not give rise to the application of a measure restricting personal liberty;
- when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;
- when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule;
- when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;
- where the executing judicial authority which surrendered the person gives its consent thereto.

We set out hereby that, in order to obtain the consent of the executing judicial authority, the issuing judicial authority shall submit a request accompanied by all the information required and a relevant translation thereof. Consent shall be given when the offence for which it is requested is itself subject to surrender. Consent shall be refused on the grounds for non-execution of the European arrest warrant or for other reasons or the exception related to political offences or the exception related to nationality. The decision shall be taken no later than 30 days after receipt of the request.

2. *Surrender or subsequent extradition.* The Contracting Parties may notify each other that, in the relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

In any case, a person who has been surrendered pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

- where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

- where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

- where the requested person is not subject to the speciality rule.

The executing judicial authority consents to the surrender of the person concerned to another Member State according to the following rules:

- the request for consent shall be submitted in compliance with the provisions set forth hereinbefore;

- consent shall be given when the offence for which it is requested is itself subject to surrender;

- the decision shall be taken no later than 30 days after receipt of the request;

- consent shall be refused on the grounds referred to above.

3. *Handing over of property.* At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which may be required as evidence and has been acquired by the requested person as a result of the offence. The property referred to above shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person. If the property referred to above is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

IV. Critical comments. The adoption of this international instrument, which establishes a new form of international judicial cooperation in criminal matters, represents an important step in the joint effort of the European States in the complex task of preventing and combating more effectively the criminality of all genres.

Although this international cooperation instrument has its unchallengeable importance, its analysis allows us to lay down some critical comments, with reference to certain provisions which may cause malfunctions in the surrender of individuals pursuant to a European arrest warrant.

The first and, as we judge it, the most important comment concerns the absence of a procedure for recognizing the arrest warrant issued by a judicial authority of a Member State or by a competent judicial authority in Norway or Iceland.

In our doctrine, it was claimed that the most important form of international judicial cooperation in criminal matters is recognition and enforcement of criminal judgments and judicial acts passed by a competent authority of another State¹².

Although this form of cooperation has not been explicitly recognized, it has been applied since ancient times, the most cogent examples being represented by international conventions and treaties on extradition.

At the level of the Council of Europe, the first legal instrument governing the institution of recognition and enforcement of criminal judgments was the European Convention on the International Validity of Criminal Judgments, concluded at the Hague on May 28th, 1970¹³.

Subsequently, all legal instruments adopted in the field of judicial cooperation in criminal matters in the European Union are based on the recognition and enforcement of criminal judgments and other judicial acts, by another Member State.

In this context, we appreciate that the international instrument under review should have made provision for a special method of recognition of the arrest warrant, regarded as concrete result that embodies a court ruling. In other words, it should be recognized in the first place the judgment on which the issuance of the arrest warrant is based.

Another critical comment refers to the definition of the arrest warrant, which fails to consider the arrest and surrender for prosecution of the requested person. Thus, according to the provisions set forth under Article 2(5) of the international instrument under review, the arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. We appreciate that it is absolutely necessary to supplement the aforementioned provisions, so as to consider the option of the requested person's arrest and surrender for the prosecution thereof, as well, but only when the relevant Court judges that the presence of such person is required.

Also, in the case of grounds for mandatory refusal to execute a European arrest warrant, it should have been also provided for the case in which the requested person is not held criminally liable due to his or her irresponsibility, caused by a mental illness. We point out

¹² See, I. Rusu, M. I. Rusu, *Observații critice referitoare la aplicarea principiului recunoașterii reciproce în cazul hotărârilor judecătorești care impun pedepse sau măsuri privative de libertate, în scopul executării lor într-un stat membru al Uniunii Europene, (Critical comments relating to the application of the principle of mutual recognition of judgments imposing custodial sentences or detention orders, for the purpose of their execution in a Member State of the European Union)*, Revista Dreptul (Law Review) No. 2/2010, p. 224.

¹³ *Ibidem*, p. 224.

that the current provisions cover only the lack of criminal liability owing to the age [Article 4 (3)].

As regards the procedure for transmitting a European arrest warrant, we appreciate that prior to taking a decision, the issuing Member State must make a series of checks in order to determine the exact location of the requested person. This police-like task cannot be achieved by any Court of law, which is why we believe that prior to transmitting the arrest warrant, the competent court will request the internal police units within INTERPOL to identify the location of the person in question, that, within the framework of the international police cooperation activities, will proceed to the identification of the person and the place where he or she is located. After receiving the response, the competent court will send the arrest warrant directly to the competent judicial authority to recognize and execute the same. In view of these considerations, we hold that the provisions of Article 13 should be supplemented for the purposes set forth herein.

Another critical comment relates to ensuring the rights of the defence of the requested person, if consent to surrender. The current provisions stipulate only that the person concerned has the right to legal counsel, but not the obligation of the legal bodies for the execution of the arrest warrant to ensure compulsory assistance by a legal counsel (Article 16). We argue that these provisions flagrantly infringe upon the provisions of Article 6(3)(b) and (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this context, we appreciate that the aforementioned provisions should be supplemented by a new paragraph, setting forth the mandatory duty of the legal bodies within the executing Member State to secure the rights of the defence by a lawyer, either chosen or appointed ex officio. The adoption of such supplementations would make it possible to avoid any possible abuses on the part of legal bodies involved and, inferentially, it would entrench the correctness of taking the consent to surrender.

According to the provisions set forth under Article 17, where the arrested person does not consent to his or her surrender as referred to in Article 16, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State. We note hereby that these provisions are incomplete, as these fail to show what that statement should provide for, fail to establish the compulsoriness of securing defence by a lawyer, either chosen or appointed and fail to show where it must reach or what the statement may serve to. All these comments should lead to the adoption of new provisions within the same Article, by supplementing the same.

In the case of multiple requests, the ones relating to the execution of custodial sentences or detention orders should be considered separately, in order to ensure the possibility of the person concerned to execute the custodial sentence or the detention order in the country of residence or citizenship.

According to the provisions set forth under Article 22, the requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court, the hearing being conducted in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities. We argue that these provisions should be supplemented by the compulsoriness of hearing the requested person only in the presence of a legal counsel, and this person's statement to be signed also by the legal counsel having provided legal assistance. We point out hereby that this hearing should not be confused with the one conducted in the case of refusal of consent to the surrender referred to above, because this occurs pending the decision to surrender.

A special case deals with the surrender of a person enjoying a series of privileges or immunities established under the law of the executing Member State or any international conventions or treaties. According to the provisions of Article 23, the executing Member State, or, where appropriate, the issuing one, shall refer to the competent institutions requesting that these privileges or immunities be waived, and subsequent to such waiver, it shall ensure surrender. The provisions of the international instrument end here, making no reference to the situation where a privilege or immunity is not waived, in which case the person concerned will not be surrendered, the consequence being that the same will no longer be held criminally liable for the offence committed. We argue that, in this case, the international instrument should stipulate, presumably, the possibility of surrender, after the requested person will no longer enjoy the relevant privilege or immunity. Admittedly, in such a case it will be considered in the first place the term of prescription of criminal liability, which is why we argue that the adoption of another regulation at European Union level deems requisite.

Another provision, at least questionable as we may judge it, is the one provided for in Article 27(1), setting forth the postponement of the execution of the European arrest warrant so that he or she may be prosecuted or may serve a sentence. Similarly to the previous situation, here also arises the question of statute-barred criminal liability, as well as that of serving a sentence in the State of origin or in the State in which the person concerned resides.

We also argue that, in the case where the person concerned, after his or her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his or her surrender in the issuing Member State, it deems necessary to take a compulsory statement in the presence of a legal counsel, either chosen or appointed *ex officio*. The current provisions only provide for the right of the person to be assisted by a legal counsel, and not the compulsoriness of the legal bodies to ensure the presence of a legal counsel in taking the statement or the drafting of any other document in compliance with the law of the issuing Member State.

Another critical comment relates to the possible freezing of property that may serve as evidence or has been acquired by the requested person as a result of the offence for which surrender is requested. According to the provisions of the international instrument (Article 32), this property shall be seized at the request of the arrest warrant's issuing authority or on its own initiative. We point out hereby that a simple request to freeze such property is not sufficient, and we believe that this request should be accompanied by the court ruling having ordered the said measure. Concurrently, we argue that this court ruling had to be recognized first by the judicial authority in the executing Member State, and after this mandatory procedure, it should be enforced. These details are not set forth in the international instrument under review.

Lastly, a final critical comment relates to the absence of legal proceedings prior to the issuance of the arrest warrant, different procedures, depending on the issuing Member State. Thus, if a Member State of the European Union is concerned, the competent court will issue first an arrest warrant, which is valid in the territory of that Member State. If, following checks carried out by the competent bodies of the Member State, with tasks assigned in relation to the surrender and imprisonment of the person who is the subject of the arrest warrant, it ensues that the person concerned is a refugee or is hiding in the territory of another Member State, the same court shall issue the European arrest warrant. If the same checks reveal that the person is hiding in the territory of Norway or Iceland, the same court will issue the arrest warrant pursuant to the international instrument under review. For the Member

States, we appreciate that it is possible to issue both warrants, considering the possible movement of the requested person throughout the territory of the European Union or Norway and Iceland. Where the issuing State is Norway or Iceland, and the checks carried out by their competent bodies reveal that the requested person is in the territory of a Member State, the legal bodies of the two States will issue an arrest warrant that will be transmitted for execution to the said State.

We hereby set forth that all the critical comments laid down, establishing the need to supplement the regulation with new provisions, point at issues related to procedure and to the need of recognition of the judicial decision rendered by the competent judicial authorities of the issuing Member State, by the executing Member State. The establishment of new legal rules in this area would knock out the possibility of refusal to execute an arrest warrant by claiming the lack of clear provisions.

It is fairly clear that the piece of legislation in question leaves it to the States concerned to settle any disputes in this matter, normal and necessary situation as it is, but insufficient as we judge it.

Conclusions

In our doctrine it was rightfully argued that extradition is the most important form of international judicial cooperation in criminal matters, being applied over time, in different ways¹⁴.

Because Norway and Iceland are not part of the European Union, the European arrest warrant could not be applied, which is why, for the surrender of questionable evidence or convicted persons it was found a new way, namely the surrender pursuant to the arrest warrant.

The adoption of the international instrument under review came into prominence as an objective necessity, given the proliferation of crime, the international character of organized crime and the permanent trend to avoid criminal liability by perpetrators of crimes, using the most sophisticated methods.

The arrest warrant established under the international instrument under review should not have been confused with the European arrest warrant, nor with the arrest warrant issued by a court in any case.

Thus, according to the doctrine and the Framework Decision, the European arrest warrant is a judicial decision issued by a competent judicial authority of a Member State of the European Union, with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order¹⁵.

On the other hand, within the framework of criminal proceedings, any court may issue a preventive detention order or a warrant for the execution of a custodial sentence or detention order.

The arrest warrant issued pursuant to the international instrument under review constitutes a judicial decision, which may be taken by the judicial authorities of any Member State of the European Union or by the judicial authorities of Norway or Iceland, for criminal

¹⁴ See, A. Boroi, I. Rusu, *Cooperarea judiciară internațională în materie penală, Curs master, (International Judicial Cooperation in Criminal Matters, Master Course)*, C.H. Beck Publishing House, Bucharest, 2008, p. 114.

¹⁵ *Ibidem*, p. 304.

prosecution or for the execution of a custodial sentence, against an individual absconding from criminal prosecution or the execution of a custodial sentence and who is hiding in the territory of a Member State or Norway or Iceland.

Although the international instrument fails to provide, we judge that the procedure of issuing an arrest warrant is specific to the field, that is, until its issuance, other judicial activities should be carried out, which vary depending on the issuing State (if it is a member of the European Union or whether it is Norway or Iceland).

As a general conclusion, we argue that the establishment of the arrest warrant (including all the critical comments put forward herein), is an important step in the work of preventing and fighting crime at European level.

In its capacity as a Member State of the European Union, Romania must fully implement the provisions of the Agreement, in accordance with its domestic law.

References:

1. A. Boroi, I. Rusu, *Cooperarea judiciară internațională în materie penală, Curs master, (International Judicial Cooperation in Criminal Matters, Master Course)*, C.H. Beck Publishing House, Bucharest, 2008.

2. I. Rusu, M.I.Rusu, *Extrădarea activă (Active Extradition)*, *Revista de Drept Penal (The Criminal Law Review)* No. 3/2010.

3. I. Rusu, *Mandatul european de arestare, în urma modificărilor aduse de Legea nr. 222/2008 (The European Arrest Warrant, following Amendments under Law No. 222/2008)*, *Caiete de Drept Penal (Criminal Law Books)* No. 1/2009.

4. I. Rusu, *Transferul de proceduri în materie penală (The Transfer of Proceedings in Criminal Matters)*, *Dreptul (Law)* No. 6/2009.

5. M.I. Rusu, I. Rusu, *Particularitățile executării mandatului european de arestare în cazul infracțiunilor transfrontaliere (Particularities of Execution of the European Arrest Warrant in the case of Cross-border Crime)*, *Dreptul (Law)* No. 9/2011.

6. I. Rusu, M. I. Rusu, *Observații critice referitoare la aplicarea principiului recunoașterii reciproce în cazul hotărârilor judecătorești care impun pedepse sau măsuri privative de libertate, în scopul executării lor într-un stat membru al Uniunii Europene, (Critical comments relating to the application of the principle of mutual recognition of judgments imposing custodial sentences or detention orders, for the purpose of their execution in a Member State of the European Union)*, *Revista Dreptul (Law Review)* No. 2/2010.