

Procedures and Guarantees for the Issuing State in Case of Issuing a European Evidence Warrant. Critical Opinions

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Abstract: In this paper we have examined the provisions of the legislative act by which it provides a new form of legal assistance in criminal matters between the Member States, i.e. the European Warrant for obtaining Evidence. Under the examination there were considered the conditions for issuing the warrant, transmission and the conditions of use of personal data and the manner in which a warrant is issued after issuing a freezing order or other European warrant for obtaining evidence. The innovation it brings the current paper consist of the achieved examination, the critical opinions and the de lege ferenda proposals. The work can be useful to academics and practitioners who have specific responsibilities in the field of judicial cooperation in criminal matters between Member States (judges, prosecutors and lawyers).

Keywords: European Evidence Warrant; de lege ferenda proposals; legal assistance in criminal matters

1. Introduction

Since the second half of last century Europe has known an unprecedented evolution in terms of crime and especially the transnational organized one.

The registered scientific and technical progress and widening the democratization process across several states has created the possibility of easily movement of people and goods, thus leading to the development of human society as a whole. (Boroi, Rusu & Rusu, 2016, p. 4).

The increased danger determined by the transnational organized crime development, the need to prevent and combat more effectively in an organized framework worldwide, prompted the adoption of international zonal, regional or global instruments which were meant to unify the efforts of world's states (Rusu & Balan-Rusu, 2013, p. 13).

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Against this background it was adopted the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the smuggling of migrants by land, air and sea (both additional to the Convention), adopted in New York on 15 November 2000, the international legal instruments set some measures mainly aiming at international judicial cooperation in criminal matters in order to prevent and combat more effectively the transnational organized crime through joint effort of the countries of the world (Boroi, Rusu & Balan-Rusu, 2012, p. 17).

According to the Convention, the term *organized criminal group* designates a structured group of three or more persons, existing for a certain period and acting in agreement for the purpose of committing one or more serious crimes or offenses under the international legal instrument, in order to obtain, directly or indirectly, a financial or other material benefit.

In order to avoid a unilateral interpretation, from one state or another, the Convention defines the *crime of a transnational nature*, as that offense which:

- is committed in more than one state;
- is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another State;
- it is committed in one state, but it involves an organized criminal group that engages criminal activities in more than one State; or
- is committed in one state but has substantial effects in another state (Boroi & Rusu, 2008, p. 3).

Against this background of crime development of all kinds, after 2000, the European Union's activity of judicial cooperation in criminal matters has experienced an unprecedented development, being imposed new forms of cooperation, among which the European Arrest Warrant and the European evidence Warrant and the legal framework of such cooperation has been constantly perfected, such as the recognition and enforcement of decisions taken in another Member State of the European Union and judicial assistance (Boroi, Rusu & Rusu, 2016, p. 14).

Prior to the institution of the European Evidence warrant with the adoption of Council Framework Decision 2008/978/JHA of 18 December 2008 there were adopted legislative acts, among which we mention the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender

procedures between Member States and the Framework Decision 2003/577/JHA of 22 July 2003 on the execution within the European Union of orders on freezing property or evidence.

Although from an initial examination it could be regarded as inappropriate the adoption of a new European legal instrument governing the acquirement of evidence, given that it was already adopted another legislative act regulating freezing property or evidence, however, after a complex analysis it can be observed that the adoption of this second legal instrument has imposed as a necessity.

Among the causes that imposed the adoption of this new European legal instrument we mention:

- the orders on freezing property or evidence concerned only a part of the spectrum of judicial cooperation in criminal matters regarding evidence, in the sense that their subsequent transfer was not regulated, and it was left for the decision of the mutual assistance procedures;
- the need to apply the principle of mutual recognition to judgments under the form of the European Evidence warrant;
- European Evidence warrant can be used for obtaining objects, documents and data for their use in criminal proceedings.

Among the objects, documents or data covered by this form of cooperation there can be identified: objects, documents or data from a third party, from a search (including the premises of the suspect), data on the use of any services including financial transactions, statements, interviews and hearings, historical records and other documents, including the results of special investigative techniques.

In this context, the *European Evidence warrant* is defined as a judgment issued by a competent authority of a Member State for the purpose of obtaining objects, documents and data from another Member State in order to use them for the procedures provided for in the European legislative act.

Given its importance in the judicial cooperation in criminal matters at EU level, throughout this study we will proceed in examining the European legal instrument regarding the procedures and guarantees for the issuing State in case of issuing a European evidence warrant, formulating some critical opinions aiming at contributing to the improvement of the legal framework in the European Union.

2. Conditions for Issuing the European Evidence Warrant

Under the European legislative act under examination, the judicial bodies with specific tasks will issue a European evidence warrant only if all the following conditions are met:

- obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the procedures specified in European legal instrument (we consider here the procedures expressly mentioned in the text of art. 5 of the European legislative act);
- objects, documents or data can be obtained under the law of the issuing State within compatible proceedings, if they were available on the territory of the issuing State, even though they might use different procedural measures.

These conditions will be assessed for each case, only in the issuing State of the European evidence warrant (art. 7 of the European legislative act).

3. Transmission of the European Evidence Warrant

The European warrant evidence can be submitted to the competent authority of a Member State in whose territory the competent authority of the issuing State has reasonable reasons to believe that the objects, documents or data are relevant or, in the case of electronic data, that these data are directly accessible under the law of the executing State.

After issuance, the European evidence warrant (EEW) will be sent by the issuing authority to the executing authority by any means which leaves a written record under the conditions allowing the judicial authority of the executing State to establish the authenticity of the document. Subsequently all official communications between the two authorities will be achieved directly between the two (issuing and executing) authorities.

If the executing judicial authority is unknown, the issuing authority will first conduct all the verifications that are necessary, including through the contact points of the European Judicial Network.

If the issuing authority wishes so, the transmission may be effected via the contact points of the European Judicial Network.

If the EEW is received from another authority, which is not capable of recognition and enforcement, it will be sent to the competent judicial authority, without the involvement of the issuing authority.

The difficulties concerning the transmission or the authenticity of any document needed for the execution of the EEW are solved through direct contacts between the issuing and executing authorities involved or, where appropriate, through the intervention of the central authorities of the Member States (art. 8 of the European legislative act).

4. The European Evidence Warrant Referring to a Previous Warrant or a Freezing Order

If the issuing authority issues an EEW which supplements an earlier EEW or which is the result of a freezing order transmitted under the Framework Decision 2003/577 / JHA, it indicates that in the EEW according to the form set out in the examined European legislative act.

When, in accordance with the European legal act, the issuing authority participates in the execution of the EEW in the executing State, it may address, without bringing prejudice to the declarations made under art. 3, par. (2), an EEW which supplements the earlier EEW directly to the competent executing authority, for the duration of his presence in the State concerned (art. 9 of the European legislative act).

5. Conditions for Using Personal Data

The personal data will be used by the issuing State for the following purposes:

- the procedures for which the EEW may be issued;
- other judicial or administrative proceedings directly related to the procedures mentioned above;
- preventing an immediate and serious threat to the public security.

Except the cases described above, the personal data obtained under the considered legislative act, can be used only with prior consent of the executing State, unless the issuing State has obtained the consent of the person concerned.

In relation to the circumstances of each case, the executing State may require the Member State to which there were transmitted personal data to provide information on how it will use this data (art. 10 of the European legislative act).

6. Conclusions, Critical Opinions and *de Lege Ferenda* Proposals

The necessity to insure an area of freedom, security and justice in the European Union, which is also an assumed objective, imposed over time the improvement of the complex system of judicial cooperation in criminal matters between the Member States.

In this context, as the proliferation of organized crime promoted new forms of judicial cooperation in criminal matters, in fact, it completed the old known forms and applied by most countries with recognized democratic political regimes.

Amid this background it has been established this new form of international judicial cooperation in criminal matters between Member States, namely, the European evidence warrant.

Although in its essence of the European evidence warrant proves its usefulness, however, we consider that in judiciary practice it seems that there are some malfunctions caused by the wording of some texts.

Thus, in the case of the issuing State, it is provided that it can transmit a European evidence warrant in any Member State if it considers that in that territory there are objects, documents or data and that they may be available under the law of the executing state.

Therefore obtaining such evidence can be achieved each time in compliance with executing state's law.

The compliance with these requirements involves knowledge by the judicial authorities of the issuing state of the legislation of the enforcement state, which requires the allocation of sufficient time, something that determines to prolong the time of execution and thus a risk of extinction or damage the required evidence.

In order to increase the efficiency and thus reduce the need for possible execution of unnecessary acts, we propose the removal of these provisions.

Eliminating these provisions would lead to the liability of executing State, which anyway will implement his warrant only with respecting its internal law and it will reduce the time of execution.

As one general conclusion we consider that in essence, this new legislative establishes legal rules governing a new form of international judicial assistance in criminal matters, which may be adopted bilaterally between different countries of the world.

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