Procedures and Guarantees for the Executing State in Case of Executing the European Evidence Warrant. Some Critical Opinions

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Abstract: The purpose of this paper is to submit to specialists in the fields, the examination procedures and guarantees for the State which has to execute a European Evidence Warrant with some personal opinions. The paper continues some previous examinations conducted on judicial cooperation in criminal matters in the European Union, the examined legislative act representing an absolute novelty in this area. The relevant results and conclusions of the study are relevant in the executing State examination procedures, procedures which in our opinion has some shortcomings, which in practice may lead to some conflicts between the judicial bodies involved. The work can be useful to both theorists and practitioners in the field, while the Romanian judicial authorities must apply those provisions. The essential contribution of this paper consists of the formulated critical views, the opinions aiming at the amendment and completion of the legislative act.

Keywords: judicial cooperation; critical reviews; objects; documents and data

1. Introduction

The unprecedented growth of transnational crime in the last decades, prompted an increase in the specific activities for cooperation between the countries of the world, the ultimate goal being to achieve a reduction in crime and hence more safety of their own citizens (Boroi, Rusu, & Balan-Rusu, 2012, p. 20).

In a recent opinion expressed in the doctrine it was alleged that enhancing the specific activities of judicial cooperation in criminal matters at global level and implicitly continuous improvement, and it was achieved in two main directions.

The first direction concerns the national legal frameworks, in relation to providing modern logistics and training of internal bodies empowered to prevent and combat transnational crime.

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The second course of action envisages the accession states concerned to global or regional international instruments governing the institution of international judicial cooperation in criminal matters and enhancing the cooperation in the field (Rusu & Rusu, 2013, p. 15).

Increasing the specific activities of cooperation in criminal matters between Member States of the European Union was gradually imposed almost as an objective necessity, due to the tendency of proliferation of crime in the recent years.

Thus, we can say that the development of the European countries since the second half of the last century has created new possibilities of movement of citizens and assets in Europe, something which led to new mutations also in the structure of cross-border crime, mutations which were defined generally by the possibility of moving criminal elements, providing an efficient organization and modern logistics (Rusu, 2010, p. 20).

In those circumstances, the establishment of an organized framework for judicial cooperation in criminal matters, it was imposed implicitly, being in fact the only concrete way, effective, for prevention and especially to combat crime of all kinds, the immediate goal being to defend of internal security of the states and the safety of citizens.

The first and most important step towards improving and modernizing the institution of extradition was made in the second half of the last century by the Council of Europe, by adopting the European Convention on Extradition on December 13, 1957 (Boroi & Rusu, 2008, p. 299).

The establishment of the European Union and subsequently the establishment of the Schengen area have created new possibilities for action of the criminal elements and thus increase crime, possibilities enhanced by increasing the territory of action by the admission of new states (Rusu, 2009, p. 19).

In these circumstances improving the complex activity of cooperation in criminal matters was oriented at EU level in two main directions.

The first direction is represented by the adoption of an appropriate legislative framework of the moment, that all the Member States are obliged to apply in the cooperation relations with other Member States, giving it even a certain primacy in relation to the national law.

This applies to decisions, framework decisions and directives governing specific cooperation activities in this area, such as the recognition and enforcement of judgments of deprivation or non-deprivation of liberty, the recognition and enforcement of a European arrest warrant, recognition and enforcement of financial penalties, recognition and enforcement of pecuniary penalties, transfer of sentenced persons, transfer of proceedings in criminal matters, etc.

The second direction, equally important is the establishment of European cooperation bodies, each Member State is obliged to set up their own institutions, corresponding to the European ones. Among these structures we mention: Eurojust, Europol, SIRENE service, etc. Also in this direction there were carried out training and perfecting courses of justice bodies and police, with the aim of acquiring new legislation and the new investigative techniques of the crime of all kinds.

In the recent doctrine it was showed that after 2000, at the European Union level, the judicial activity of cooperation in criminal matters has experienced an unprecedented development, being imposed new forms of cooperation, among which we mention the European arrest warrant and the European Evidence Warrant, and in within the legislative framework of other forms it has been improved constantly other forms such as the recognition and enforcement of decisions taken in another Member State of the European Union and legal assistance (Boroi, Rusu & Rusu, 2016, p. 14).

Thus, amid the ongoing activity of ensuring a coherent legislative framework it was adopted the Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence warrant for the purpose of obtaining objects, documents and data for use within the proceedings in criminal matters.[1]

In accordance with the depositions of the European legislative act mentioned above, the European Evidence warrant can be used by other Member States' judicial authorities in order to obtain any objects, documents and data for their use in proceedings in criminal matters.

A European evidence warrant can be issued for: obtaining objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including the financial transactions, statements, interviews and hearings, historical records and other documents, including the results of special investigative techniques.

[1] Published in the EU Official Journal L 350/72 of 30.12.2008.

At the same time, in order to confer the status of legitimate status, the European evidence warrant is issued only by judges, courts, investigating magistrates, prosecutors and other judicial authorities as defined by the Member States.

In this paper, we will proceed in examining this new form of judicial cooperation in criminal matters regarding: the recognition and enforcement, formalities to be fulfilled by Member State of enforcement, grounds for non-recognition and implicitly non-execution, dual incrimination and other crimes involving the recognition and enforcement, deadlines for recognition, execution and transfer postponement of recognition or enforcement and information obligation.

We will also formulate a series of critical comments and *de lege ferenda* proposals aiming at the improvement of the European and national legal framework.

2. Recognition and Enforcement of a European Evidence Warrant

The general rule stated in the articles of the European legislative act mentioned above, it is that the competent judicial authorities of the Member States will recognize and execute the European evidence warrant, according to art. 8 without requiring any further formality, and it shall forthwith take the necessary measures for its execution, in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition, non-execution or postponement.

Regarding the concrete procedure of execution, it is left up to the decision of each Member State of enforcement which will provide objects, documents or data required under the warrant, except in accordance with the provisions of its internal legal, including the case it will chose coercive measures.

In this context, each Member State will guarantee, on the one hand that any measure that would be available in a similar domestic case in the executing State are also available for the enforcement of the warrant, and secondly that the measures, including the search and seizure, they are available for execution of the warrant, in the case which it relates to an offense referred to expressly in examined legislative act[1].

In the case of requesting the search or application of seizure, and the warrant was not issued by a judge, a court, a judge or a prosecutor, and it was not validated by a

[1] Council Framework Decision 2008/978/JHA, art. 11, par. (2).

competent national authority of the issuing State, the competent authority of the executing State may, where appropriate, not to execute the warrant, provided that before making this decision, to consult the issuing authority.

Given the differences between the legal systems of the Member States, in accordance with the examined legislative act, whichever may make a statement at the time of its adoption, or may address a subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, a judge or a prosecutor when, under the law of the executing State in a similar national case, the measures necessary to execute the warrant should be ordered or supervised by a judge, a court, a judge or a prosecutor.[1]

As part of effective enforcement of the warrant, the executing authority will comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in the framework law and provided that such formalities and procedures are not contrary to the legal fundamental principles of the executing State.

3. Grounds for Non-Recognition and Non-Execution

Under the examined legislative act the recognition or enforcement of a European evidence warrant may be refused in the following conditions:

a) in the case where the execution of the warrant would contravene the *ne bis in idem* principle;

b) if, in the cases mentioned in art. 14, par. (3) the warrant relates to acts which would not constitute an offense under the law of the executing State[2];

c) in the case where the execution of the warrant is not possible by means of which the executing authority has, pursuant to art. 11, par. (3);

d) in the case where the law of the executing State provided an immunity or privilege that makes it impossible to execute the warrant;

[1] Council Framework Decision 2008/978/JHA, art. 11, par. (5).
[2] Art. 14, par. (3) mentions the situation in which the warrant relates to serious offenses for which it is not necessary that the condition of dual incrimination and the execution would require a search or seizure, in which case the execution or recognition may be subject to the condition of dual incrimination.

e) if, in one of the cases mentioned in art. 11, par. (4) or (5), the warrant has not been validated;

f) in the case where the warrant relates to offenses which:

(i) there are considered under the law of the executing State as having been committed wholly, mainly on its territory or in a place equivalent to its territory; or

(ii) they were committed outside the issuing and executing State, and the legislation does not allow the legal proceedings in respect of such offenses, where they are committed outside the territory of that State;

g) if, in a specific case, its execution would harm the fundamental interests of national security would jeopardize the source of information or involve the use of classified information relating to specific intelligence activities; or

h) in the case where the form set out in the Annex is incomplete or manifestly incorrect and it has not been completed or corrected within a reasonable deadline set by the executing authority.

In all cases when it appears incident one of the situations mentioned above, the non-performance or non-recognition decision will be made by the competent judicial body, which can only be a judge, a court, an instruction judge or a prosecutor. We note that the European legislative act excludes any implications in the activity of recognition and enforcement of such a warrant, of judicial bodies other than those expressly mentioned.

However, when the European Evidence warrant was issued by a judicial authority, other than the one of the four specifically mentioned, and it has not been validated by one of the four mentioned judicial institutions, the decision for recognition and enforcement can be made by any other competent judicial authority under the law of the executing State, but only where this is provided in the law of the enforcement state.

In the cases where the offenses are considered by the executing State as having been committed wholly or mainly or primarily on its territory, or in a place equivalent to its territory, before making a decision on recognition and enforcement of the warrant, the judicial authority concerned will consult with Eurojust. When the judicial authority of the executing state does not agree with the acceptance of Eurojust, the Member States shall ensure that it motivates the decision and the Council will be informed.

In the cases mentioned above under letter (a), (g) and (h), before deciding the non-recognition or non-execution of the warrant, in whole or in part, the competent authority of the executing State shall consult the competent authority of the issuing State, by any means, providing information mutually.

5. Grounds for Postponement, Recognition or Enforcement of the Warrant

Under the European legislative act, recognizing the warrant may be postponed in the executing State in the case where:

a) the form provided in the Annex of the legislative act is incomplete or manifestly incorrect, until the form has been completed or corrected; or

b) in the cases provided for in Art. 11, para. (4) and (5), the warrant was not validated until it is conducted the validation.

At the same time the execution of the warrant may be delayed execution in the executing State, in the case where:

a) its execution might prejudice a criminal investigation or a criminal investigation in progress, as long as the executing State deems it necessary; or

b) the objects, documents or data concerned are already being used in other proceedings until they are no longer needed for that purpose.

In accordance with the articles of the examined European legislative, the decision to postpone recognition or execution of the warrant shall be taken only by a judge, a court, a judge or a prosecutor.

When the warrant was issued by another judicial authority, and has not been validated by one of the judicial authorities mentioned above, the decision may be taken by any other competent judicial authority in the executing State, in accordance with its laws (if such provisions exist).

As soon as the ground for postponement ceases to exist, the executing authority will take the necessary measures for enforcement and it will inform the relevant competent authority of the issuing State by any means which leaves a written record.

5. Types of Crimes and Offenses for which a Warrant may be required

Unlike other laws governing various forms of judicial cooperation in criminal matters in the European Union, recognizing a European evidence warrant is not subject to the verification of double incrimination, only in two situations expressly provided, i.e. undertaking searches and the applying seizure.

However, they will not be subject to the verification of double incrimination a number of crimes or types of serious crimes if in the issuing State it is punishable by a sentence of deprivation of liberty or detention order, the maximum penalty being of at least three years.

In order to avoid unilateral interpretations that would lead to difficulties in the activity for cooperation between Member States, in the European legislative act there were nominated the crimes and groups of crimes, those being:

- 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 fraud affecting the financial interests of the European Communities within the meaning of the Convention of 26 June 1995 on the protection of the European Communities;
- laundering the proceeds of crime;
- counterfeiting, including counterfeiting of the euro;
- cybercrime;
- environmental crime, including with illicit trafficking in endangered animal species and illicit trafficking in endangered species and varieties of plants endangered;
- the complicity in the smuggling of illegal immigrants and illegal residents;
- murder, grievous bodily injury;
- illicit trafficking in human organs and tissue;
- kidnapping, illegal restraint and hostage-taking;
- racism and xenophobia;
- organized or armed robbery;
- illicit trafficking in cultural goods, including antiques and works of art;

- scam;
- 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/ships;
- sabotage.

After reading the offenses and the types of crimes mentioned above, we find that all of them are rated as serious in the laws of all Member States of the European Union.

When the warrant is not related to any of the crimes or types of offenses listed above, and its execution requires search or seizure, the recognition or enforcement may be subject to the condition of dual incrimination.

However an exception refers to the situation where the offenses in connection with taxes or duties, customs and exchange, recognition or enforcement may be refused invoking the ground that the law of the executing State does not impose the same kind of tax or duty or it does not include the same type of regulations, in relation to taxes or duties, customs and exchange, as the law of the issuing state.

6. Deadlines for Recognition, Execution and Transfer

In case of refusal of recognition and/or enforcement, the decision will be taken as soon as possible, no later than 30 days.

In the case where there are grounds for postponement (of the aforementioned), or if the executing authority already has the objects, documents or data sought, it takes the objects, documents or data without delay and, without bringing prejudice to par. (4), within 60 days of receipt by the competent authority executing the warrant.

Also, in a particular case, the competent executing authority cannot meet the deadlines set out above, it shall inform without delay the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for execution of the warrant.

Except the occasion where an appeal is in progress, or there are grounds for postponement, the executing State shall transfer to the issuing State without undue delay, the objects documents or data obtained in the executing activity of the warrant.

In the case where these objects, documents or data are necessary to the judicial authorities of the executing State, it will request their return, when they are no longer needed.

7. The Obligation of the Executing Judicial Authority to Inform

Under the provisions of the European legislative act, the executing judicial authority shall inform the issuing authority immediately by any means:

a) if during the execution of the warrant, the executing authority considers, without further inquiries, that it may be appropriate to undertake investigative measures not initially foreseen or it could not be specified when issuing a warrant, in order to enable the issuing authority to take additional measures in the case concerned;

b) if the competent authority of the executing State establishes that the warrant was not executed under the law of the executing State;

c) if the executing State authority establishes that, in that case, it cannot comply with formalities and procedures expressly indicated by the issuing authority.

Also, the same judicial authority shall inform the issuing competent authority, without delay, by any means which leaves a written record:

a) on transferring the warrant by the competent authority responsible for its execution;

b) on any decision to refuse recognition or enforcement of the warrant, together with the reasons thereof;

c) on the postponement of the execution or recognition of the warrant, the main reasons of the delay and, if possible, the expected duration of the postponement;

d) regarding the impossibility of enforcing the warrant, as the objects, documents or data have disappeared, been destroyed or cannot be found in the location indicated in the warrant or the place where the objects, documents or data have not been indicated sufficiently clear in a specific place, even after the consultation with the competent authority of the issuing State.

7. Remedies

In accordance with the European legislation in the field, and in full compliance with the European Court of Human Rights, the legislative act stipulates the possibility of using remedies for individuals who believe that by executing the depositions of the international instrument in question it was brought a prejudice or a law was violated.

Thus, under the examined legislative act, the Member States shall take all measures necessary to ensure that any interested party, including third parties of good-faith, have legal remedies against the recognition and execution of the warrant, in order to defend their legitimate interests. However, the Member States may limit the remedies, in cases where the warrant is executed by use of coercive measures. The action will be brought before a competent court in the executing State under its domestic law.

The substantive reasons for issuing the warrant, including whether the conditions laid down in the law examined may be challenged only in an action brought before a court in the issuing State.

At the same time, the Member States shall ensure that any time limits for exercising the right to bring an action, apply so as to ensure the stakeholders the opportunity to have recourse to effective remedy.

When the action is brought in the executing state, the judicial authority of the issuing State is informed in this regard and on the grounds invoked, in order to submit the arguments that it deems necessary. Also, the judicial authority of the executing State shall be informed of the outcome of the action.

Both the issuing and the execution authorities will take all necessary measures to facilitate the exercise of the right to bring legal actions, in particular by providing to the interested parties relevant and adequate information.

In the case where it was introduced such a remedy, the executing State may suspend the transfer of objects, documents and data pending the outcome thereof.

From the examination of the provisions of the European legislative act that the issuing and recognition and/or execution of a European evidence warrant, any person who considers himself harmed in his rights, brings an appeal, both in the State of issuance and of recognition and enforcement.

In those circumstances, the appeal may be filed against both the issuing state of a European Evidence Warrant, the action itself is sent to the issuing State and against the procedures for recognition and enforcement of such a warrant.

In both cases, however, the action will be introduced in the State of enforcement, which will be sent to the competent authority of the issuing State.

8. Conclusions and Critical Opinions

The examined legislative act is in our opinion a new European instrument which contributes to the improvement of the complex system of judicial cooperation in criminal matters between Member States.

With the adoption of this legislative act, it shall be established in the European Union a new form of judicial cooperation in criminal matters between Member States, a form which governs specific activities for recognition and enforcement of a judgment requiring objects documents or data for criminal proceedings in another Member State, other than the one in which they are found.

The examination of Title III of Council Framework Decision 2008/978 / JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for their use in criminal matters proceedings allows us to formulate critical opinions regarding a series of regulatory imperfections in the legislative act.

A first critical remark concerns the possibility for Member States to issue a European evidence warrant and the authorities, other than judicial ones. We appreciate that given the importance of the institution, and the judicial activities executed in such a situation, such a warrant, should only be issued by a judicial authority or a court, judge, magistrate or prosecutor. The four categories listed by the judicial authorities in the European legislative act is sufficient and we think that

it is not necessary that in a Member State or another, the warrant to be issued by another authority, which is not part of the mentioned ones.

Another observation concerns some grounds for non-recognition or non-execution of such a warrant. This applies to the way the legislator expresses or "EEW recognition or enforcement *may* be refused" (sub. nrc.). This means that the executing State may recognize or not such a warrant, the articles of the European legislative act leaving to the decision of the State the next course of action. We believe that the situation appears incident to the principle of *non bis in idem*, as it cannot be discussed of an express refusal of recognition and enforcement from the executing State.

A final critical remark concerns the situation where the person who suffered the recognition and enforcement of such a warrant, uses an appeal. Under the European legislative act, the person concerned shall have two possibilities, namely to use an appeal against the issue of the warrant or against the decision of the executing State to recognize and execute the warrant. Although the European legislative act does not provide it, we consider that in the first case, the action will be introduced in the Member State of enforcement, which in turn will send it for settlement to the competent judicial authority of the issuing Member State, and in the second case in the State of enforcement. We believe that in such a situation, the executing State must necessarily suspend the transfer of objects, documents or data. The European legislative act stipulates that the executing State "may" suspend the transfer of objects, documents or data.

As a general conclusion, although the European legislative act in question is subject to changes and additions, we believe that its adoption represents another important step in improving the complex activity of judicial cooperation in criminal matters between Member States.

9. Bibliography

Boroi, Alexandru; Rusu, Ion & Balan-Rusu, Minodora-Ioana (2012). *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation.* Saarbrücken/Germany: LAP LAMBERT Academic Publishing DANUBIUS University.

Rusu, Ion & Rusu, Minodora-Ioana (2013). *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence.* Saarbrücken/Germany: LAP LAMBERT Academic Publishing, DANUBIUS University.

Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, published in the Official Journal of the European Union L 350/72 of 30.12.2008.

Rusu, Ion (2010). The European Arrest Warrant According to the Latest Changes and Additions. *Proceedings, 5th Edition of The International Conference. European Integration Realities and Perspectives*. Galati: Editura Universitară Danubius.

Boroi, Alexandru & Rusu, Ion (2008). *Cooperarea judiciară internaţională în materie penală/International judicial cooperation in criminal matters.* Bucharest: C.H. Beck.

Rusu, Ion (2009). Mandatul european de arestare în urma modificărilor aduse de Legea nr. 222/2008/The European arrest warrant following the amendments to Law no. 222/2008. *Caiete de Drept Penal nr. 1/2009/Criminal Law Notebooks*, no. 1/2009. Bucharest: C.H. Beck.

Boroi, Alexandru (coord.); Rusu, Ion & Rusu, Minodora-Ioana (2016). *Tratat de cooperare judiciară internațională în materie penală/Treaty of international judicial cooperation in criminal matters.* Bucharest: C.H. Beck.