GENERAL FRAMEWORK OF IMPLEMENTING DECISION NO. 2002/584/JAI ON THE EUROPEAN ARREST WARRANT

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Abstract:

The European Union has given birth to a unique form of judicial cooperation in the field of criminal matters, freedom of movement creating new opportunities for the cross-border criminality. In such conditions, in order to face the new challengings, there has been established the aim of the maintainance and the development of a common space of freedom, secutiry and justice.

The accomplishment of such desiderata has imposed simplified procedures of cooperation between the Member states consisting in recognition and compliance of court orders outside the state without the formalities stipulated in the classical conventions regarding the international legal assistance, which had been accomplished by adopting the Framework decision on the European arrest warrant.

Yet, numerous institutional courts of the European states have faced difficulties on the concordance of certain provisions in the fundamental law and the implementation law of this present decision in what concerns the sovereignty of the states, the nationality exception, the principle of legality, the principle of dual criminality.

Such objections have placed the European states in front of two contrary interests, on one side that of the European integration, of judicial cooperation in the field of criminal matters and of development of common space of freedom, security and justice, and on the other side, that of the preservation of national sovereignty and of the protection of own nationals.

In such context, according sovereingty an absolute value means waiving interdependence, cooperation, and their lacking render the sovereginty useless.

To this conclusion have came, without any reserve, the majority of the European states after the terrorist attacks in the United States of America on the 11th of September 2001, events which stood at the basis of the speediness of adopting and implementing the framework decision on the European arrest warrant.

Key words: international judicial cooperation in the field of criminal matters, extradition, European arrest warrant, nationality exception

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INTRODUCTION

The holistic development of our human society, its states and nations, has been made possible as a consequence of the international relationships established and sedimented in time.

At the international cooperation basis has been permanently stood the principle of respect for independence and states' sovereignty, implicitly for their national legislation, reflected in their legal regulations, as well as for the mutual confidence in a well regulated institutional framework.

Unprecedented development of the international relationships in the contemporary society has been accompanied by an increase, also unprecedented, of the international criminality, by proliferation of certain forms of criminality on the territory of certain states (Bulai C. and Bulai N.B., 2007) and of difficulties in holding criminals liable.

In such context, extradition represents the legal instrument of one of the oldest forms of collaboration between states in order to combat criminality.

Extradition appeared as a consequence of absolute monarchies' need to preserve their authority. Yet, in time, it has evolved in the same time as the society in its ensemble developped, until becoming today one of the most efficient forms of battle against transnational criminality. (Boroi and Rusu, 2008).

Extradition is defined as being a bilateral act, both political and legal, by means of which the state on which teritory there is a wrongdoer, surrender him to the state where the crime was committed or the state which interests were injured by the commission of the crime or which

national he is, in order to hold him legally responsible or to serve the sentence to which he has been convicted by binding judgement (Dobrinoiu s.a., 1995).

In the context of the two world wars, there has been noticed that it is absolutely necessary that sovereign states cooperate, hence the ceation of international organisations such as the United Nations Organisation, the European Council, the Economic European Community etc. which influenced the bilateral treaties in the field of extradition to be more commonly replaced by multilateral treaties.

History of law regarding extradition in Europe is included in the European Convention on extradition from the 13th of December 1957, issued by the Council of Europe, ratified by all Member states of the European Union, as well as in the two additional protocols, from 1975 and respectively 1978, which have also been ratified by several Member state of the European Union, some of them raising doubts at several individual formulations.

Consequently, the European Union has counted, even since the beginning, on the idea of extradition of nationals convicted to serve a sentence, which idea was reconsidered once again, by agreeing several treaties by means of which it has been tried, during time, to adapt the concept of extradition to the evolution of the European Union.

In such sens, we detail the most important instruments of regulation of extradition which followed the Convention from 1957 : the Benelux Union Treaty regarding extradition and common assistance in the field of criminal matters (1962), the Agreement between the twelve Member states of the European Community concerning the simplification and modernization of the means of transmission of the extradition requests, since the 26th of May 1989, the Convention on the 19th of June 1990 of putting into force the Schengen Agreement on the 14th of July 1985 of gradual elimination of checks at common borders, the Convention regarding the simplified procedure of extradition between Member States of the European Union on the 10th of March 1995.

A special importance in judicial cooperation in the field of criminal matters is given to the Amsterdam Treaty (1999) which stipulates that the European Union shall maintain and develop a common space of freedom, security and justice. The accomplishment of such desiderata has as advantage the existence of a judicial common space, in which European nationals can appeal to the justice in one of the Member States the same way they appeal in their own country. Yet, on the other side, such benefit creates the possibility for the criminals to exploit the difference between the legal systems of the states. In such conditions it is mandatory, in order to eliminate this present danger, that all court orders are recognized and complied in the foreign area without the formalities stipulated in the classical conventions regarding international legal assistance.

ADOPTING THE FRAMEWORK DECISION NO. 2002/584/JAI

The European Union has given birth to a unique form of judicial cooperation in the field of criminal matters, freedom of movement creating new opportunities for the cross-border criminality. For this reason, in order to face the new challenges, it has been considered necessary the extension of the Union's competences in the field of justice and internal affairs. Such thing has been accomplished first by the Maastricht Treaty (1992) and then it became widespread once with the entering into force of the Amsterdam Treaty (1997).

Thus, although principially the criminal matters hasn't made the object of the legislative unification at the European level, criminal law being considered an expression of the sovereingty of every Member state, attribute which doesn't disappear by the adheration the the E.U. [1], reality has outlined the necessity of a continual proximity of the national criminal laws of the Member states in order to face in a more efficient manner the danger represented by the phenomenon of criminality at the European and world levels.

Taking into consideration the important differences existing between the Member states' national legislations and even inside their legal systems, there have been identified two ways of surpassing this obstacle : mutual recognition and harmonisation. The supporters of the mutual recognition consider that the harmonisation of the national legislations of the Member states is not

necessary as long as the courts in a state recognize and comply the court orders from another Member state. In such sens, there has been given an example : art. IV of the United States of America's Constitution, according to which each Member state must offer full faith and credit to the judicial proceedings in another state (Radu, 2008).

In such context, in 1999, the European Council from Tampere, Finland, on the 15th and the 16th of October 1999, has statuted that mutual recognition of the court orders must become the conerstone of judicial cooperation in the field of criminal matters between the EU Member states, by adopting a Plan of measures meant to give life to this principle.

The terrorist attacks in the United State of America on the 11th of September 2001 represent the events leading both at the adoption of the framework decision regarding the harmonisation of criminal law in Member states – the Framework Decision regarding the combatting of terrorism, and at the adoption of the most efficient instrument based on mutual recognition – the Framework Decicion no. 584/13.06.2002 regarding the European arrest warrant and the extradition procedures between the Member states of the European Union.

Thus, by means of the Framework Decision no. 584/13.06.2002 of the European Unions's Council there has been materialized the decision taken inside the European Council from Tampere that, between the Member states of the European Union, the formal procedure of extradition, in the case of nationals attempting to elude the compliance of a freedom's privative sentence, should be replaced by a procedure of extradition more simplified, in the case of nationals attempting to elude the criminal prosecution and trial.

In conformity with art. 1 from the Framework decision, the European arrest warrant is a legal decision issued by a Member state in view of arresting and surrendering by another Member State of a prosecuted national, in order to accomplish the criminal prosecution in the purpose of executing a punishment of a freedom's privative security measure.

In Romania, the Framework decision on the European arrest warrant is transposed in full content in the IIIrd Title of Law 302/2004 on the international judicial cooperation in the field of criminal matters [2] altered and completed by Law no. 224 on the 1st of June 2006 [3] and by Law no. 222/2008 [4], art. 77 para. 1 preserving the definition according to which the European arrest warrant is a legal decision by means of which a competent legal authority from a European Union Member state requests another Member state arresting and surrendering a national, in the purpose of accomplishing the criminal prosecution, trial or executing a punishment or a freedom's privative security measure.

While between the Member states of the European Union extradition has been replaced by the European arrest warrant, the regulations regarding extradition still find their application in the relationships between Romania and the states outside the European Union, in such situation being possible to issue an international criminal prosecution warrant in view of extradition.

NATIONALITY EXCEPTION

The extraordinary result of the European Council from the end of year 2001 has consisted, on one side, on an instrument facilitating the cooperation against cross-border criminality but which, on another side, does not respond to all exigences of respecting the right to defense.

This new orientation brought by the Amsterdam Treaty and the European Council from Tampere, the creation of a favorable framework for extradition as simplified as possible concretized by the adoption of a framework decision on the European arrest warrant, brings into discussion the sovereignty of the Member states or “the nationality exception in the law of extradition”.

For centuries, it has been accepted that the states have the sovereign right to refuse the extradition of their nationals. Such right is based on national constitutional regulations stipulating that the national has the right to remain on the territory of the state, without being expelled or extradited. In other words, the sovereign authority is the only one to have the power of controlling the nationals. Such assertion is based on three premices : the state owes its subjects the protection of

its laws, it is impossible to have full faith in the justice of a foreign state, is disadvantageous to be trialed in a foreign country (Stănilă, 2007).

Thus, after a long period of time in which European states have put the base of a mutual judicial cooperation and made efforts in order to develop the legal cooperation forms, the states' waiving of their sovereign right to invoque the nationality of the defendant or of the convicted , has constituted a reason of refusinge the request regarding the adoption of the Framework decision on the European arrest warrant.

The European Convention on extradition (1957) has confirmed the right of the parties to refuse surrendering their own nationals thus giving birth to the principle of the exception of nationality. The Convention stipulated the freedom of the contracting states to attach a declaration in the content of which to define the term "national" for the application of the convention's provisions. In the content, it is provided the *aut dedere aut judicare* principle [5] as a compensation of the negative consequences of the exception of nationality. It opposes as well extradition, consolidating the principle of the exception of nationality, the Beneleux Union Treaty on extradition and common assistance in the field criminal matters (1962), the Convention of putting into practice the Schengen Agreement on the 14th of July 1985 (1990).

The traditional regime of the exception of nationality begins to loose its power once with the adoption the the Convention on extradition between the Member states of the European Unions (1996) which leaves us to forsee the conclusions of the European Council of Tampere (1999).

The exception of nationality places us between two contrary interests, on one side, that of the European integration, of the judicial cooperation in the field of criminal matters and of development of a common space of freedom, security and justice, and on other side, that of the national sovereignty and of the protection of it's own nationals. In such context, according the sovereignty an absolute value means waiving interindependence, cooperation, yet their lacking render the existence of the sovereignty useless.

The Framework decision on the European arrest warrant has contributed decisively to the declining of the principle of nationality. Articles 3 and 4 from the Framework decision on the European arrest warrant make reference to the mandatory and optional reasons of refusal of the execution of the European arrest warrant.

Thus, the exception of nationality, in the new European regulation of the cooperation in the field of criminal matters, is considered being a facultative reason of refusal of execution of the European arrest warrant, which invocation is limited to certain conditions strictly stipulated.

The application of the Framework decision on the European arrest has created a series of constitutional implications and litigations with the national laws in certain states, especially in what concerns the exception of nationality.

CONSTITUTIONAL IMPLICATIONS

Adopted under the impulse if the dramatic events on the 11th of September 2001, the Framework decision on the European arrest warrant has risen constitutional problems in many Member states in the process of their transposition in their internal law and ulteriorly the transposition, under at least three aspects : the extradition of their own citizens, the rights and processual and double incrimination (Radu, 2008).

Extradition being considered an act of sovereignty of the state (Popescu, 1994) justifies the attitude of several constitutional systems, inclusively from the Member states of the European Union, of maintaining the rule of non-extradition for their own nationals, although this represents one of the obstacles in the way of an efficient cooperation between states in the field of criminal matters.

The cooperation between the European Union's Member states, as a consequence of the European Council from Tampere from 1999, is based on mutual confidence, as the presumption sitting at the base of the non-extradition rule of its own nationals does not exist. The framework decision on the European Arrest warrant does not regulate, by mandatory of facultative reasons of

non-execution of an European arrest warrant the citizenship of the prosecuted person. In spite of all these, analysing the situations adjusted by art. 4 pt. 6 [6] and art. 5 pt. 3 [7] from the framework decision, we notice a derogation from the regulation of extradition of own nationals, instituted implicitely by this present framework decision. Yet, the interpretation *per a contrario* of such texts, as well as their systematic interpretation, lead to the ferm conclusion that the rule is surrendering own nationals.

Thus, numerous Member state has been forced, before transposing this framework decision in their internal legislation, to revise the fundamental law interdicting the extradition of its own subjects.

In Poland, the Constitutional Court has been summoned to pronounce on the constitutionality of certain provisions from the Criminal Code regarding the implementation of the European arrest warrant, taking into consideration that the Polish fundamental law interdicts the extradition of own subjects. The Polish Constitutional Court decides to revoke the respective provisions of the Criminal Code.

In Great Britain, although nationalist press manifested a very sceptical attitude towards the Corpus Juris project and accomplished its role of the forth power in a state, the events on the 11th of September 2001 have determined an acceleration of the European cooperation in the field of criminal matters, thus redering possible the adoption of the Framework decision on the European arrest warrant.

In Belgium, the Constitutional Court has been summoned regarding the fact that international cooperation in the field of criminal matters should be regulated by a convention and not by a Framework decision. Another reason for the notification consists on the partial derogation of the principle of dual criminality which would constitute, according to claimants, a breach of the principle of legality in the field of criminal matters.

Absolute interdiction of its own nationals has been consecrated by the Constitution of Romania since 1991 in art. 19 para. (1) [8]. In the process of European adheration, inclusively in order to be able to transpose the Framework decision on the European arrest warrant, it was imposed the revision of the Consitution of Romania under this aspect as well. Yet, at least formally, non-extradition of its own subjectss has remained a rule even after the revision in October 2003, para. (2) [9], newly introduced setting the conditions under which, as an exception to the rule, Romanian nationals can be extradited from Romania.

Although art. 19 from the Constitution has been revised also for the facilitation of the application of the European arrest warrant in cases in which legal authorities are requested the extradition of certain Romanian nationals, the form under which it has been edited the second paragraph of this article, does not respond adequately to this objective, allowing the extradition of Romanian nationals if there are met three cummulative conditions : the existence of a convention permitting the extradition of own subjects, the accomplishment of the conditions stipulated by the law and the existence of the mutuality in what concerns the extradition of own subjects.

Yet the European arrest warrant is not instituted by means of an international convention, but by means of a framework decision of the Council, which aspect sat at the basis of invoking certain exception of nonconsitutionality of the provisions of Law 302/2004 on international judicial cooperation in the field of criminal matters.

Thus, Constitutional Court has been summoned in several occasions regarding the constitutionality of certain provisions of Law no. 302/2004, altered in what concerns the procedures of the European arrest warrant and the conceding of certain rights and pledges of the person to be extradited on the basis of such warrant.

By analizing the notifications of the Constitutional Court, it is interesting the fact that all dealing with the consitutionality controle date since year 2007, probably on the basis of the intensification of discussions regarding the problems of implementation of the framework decision in the Member states of the EU. It is even more interesting the fact that the Romanian constitutional court refused all these exceptions of nonconstitutionality, supporting this way the Romanian enactor

summoning the existant problems in the original draft of Law no. 302/2004 and solving them in 2006 and 2008 [10].

CONCLUSIONS

Although initially the idea of an European arrest warrant, bringing into discussion the prejudice of the Member states' sovereignty and accomplishment of certain pledges, has been welcomed with scepticism, the terrorist attacks on the 11th of September 2001 in the United States of America have convinced the EU states of the necessity of adopting a legal instrument which constributes to the maintainance and the development of a comon space of freedom, security and justice.

The European arrest warrant replaces the procedures regarding extradition in the relationships between all the Member states of the EU, the regulations regarding extradition still finding their apllicability in the relationships between the EU Member states and the other states of the world.

Adopting and implementing the Framework decision on the European arrest warrant represents an instrument of enforcement of the international legal order preparing the necessary framework for a future unification of the criminal law and criminal procedure legislation at the European level, because, efficient international repression measures should responded to an internationalization of the crime.

NOTES

[1] Such conclusion results clearly from the provisions of the Rome Treaty, signed on the 25th of March 1957, entered into force on the 1st of January 1958, altered by the Single European Act from the 17-28thof February 1986, from the contents of the Treaty on the European Union from the 7th of February 1992 (the Maastricht Treaty), from the Amsterdam Treaty entered into force on the 1st of May 1999 and from the provisions of the Nice Treaty, documents in which it is outlines that the EU Member states does not renounce to their sovereignty in what concerns the criminality and sanction of dangerous fact for the judicial order; criminal law and criminal procedure law remaining in the competence of Member States.

[2] Published in O. G. no. 594 from 1stof July 2004.

[3] Published in O. G. no. 534 from 21stof June 2006.

[4] Published in O. G. no. 758 from 10th of November 2008.

[5] Liability of a state, according international public law, to prosecute persons guilty of international crimes as long as any other state didn't requested their extradition, no matter if the crimes were committed on the territory of a state other than the one which will prosecute them.

[6] In the situation in which the European arrest warrant is issued in the purpose of serving a penalty or a freedom' privative security measure, whenever the prosecuted person remains in the Executing Member state, is a foreign national or resident, and this state is charged to execute this penalty or freedom's privative security measurein conformity with the national legislation.

[7] Whenever a person makes the object of a European arrest warrant in the purpose of criminal prosecution, is a foreign national or resident of the Requesting Member stat, the surrendering must be submitted to the condition that after being heard, the person is returned the Executing Member state in order to serve the sentence or the freedom' privative security measure pronounced againt her in the Issuer Member state.

[8] In such sens, art. 19 para. (1) from the Romanian Constitution stipulates that : a Romanian citizen cannot be extradited or expelled from Romania.

[9] Art. 19 para. (2) from the Romanian Constitution : By derogation from the provisions in paragraph (1), Romanian citizens based on the international conventions to which Romania is a party, upon conditions of the law and reciprocity.

[10] See decisions no. 400, 419, 443 and 583 year 2007 pronounced by the Constitutional Court of Romania.

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