THE EUROPEAN ARREST WARRANT REFLECTED IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA

Bogdan MICU*
Associated professor, Law Faculty, Nicolae Titulescu University

Abstract: A member state of the European Union since 2007, Romania is bound to implement in its domestic legislation many of the provisions of the Acquis Communautaire, including those of the Framework-Decision no. 2002/584/JHA of the Council of the European Union, dated June 13, 2002 on the European arrest warrant and the surrender procedures between Member States. This is a tool for judicial cooperation in criminal matters which enables the Members States to provide assistance to one another in a rapid manner based on the principle of mutual trust, which should apply within the European Union. As it is normal in a democratic state, the national provisions covered by exceptions for non-compliance with the Constitution invoked before the Constitutional Court of Romania, but they have always passed the test of compliance with the Fundamental Law.

Keywords: European arrest warrant, constitutionality, mutual trust, cooperation in criminal matters.

1. The regulatory framework for the European arrest warrant in the Romanian legislation

In Romania, the Title III of the Law no. 302/2004 on the judicial cooperation in criminal matters¹, stipulates that “in terms of cooperation with the European Union Member States for the enforcement of the Framework-Decision no. 2002/584/JHA of the Council of the European Union dated June 13, 2002 on the European arrest warrant and the surrender procedures between the Member States². These provisions have been included in the domestic regulations as a result of the acceptance and implementation of the principle of mutual trust applicable among the European Union Member States.

* e-mail: bogdan.micu@mnpartners.ro

¹ Republished in the Official Gazette of Romania, Part I, no. 377 of May 31, 2011, as subsequently amended and supplemented.

² Published in the Official Journal of the European Communities no. L 190/1 of July 18, 2002.
Pursuant to the art. 84 herein, the European arrest warrant is a judicial decision whereby a competent judicial authority in a Member State of the European Union requests for the arrest and surrender of a person towards another Member State, in order to allow for the performance of the criminal prosecution, trial or for execution of custodial sentence or of a measure involving deprivation of liberty.

According to the Romanian law, the judiciary authorities competent to issue European arrest warrants are the courts of law and the Romanian judiciary authorities competent for the enforcement are the courts of appeal. In terms of competence to receive the European arrest warrant, the Romanian law indicates the Ministry of Justice and the prosecutors’ offices attached to the courts of appeal of the jurisdiction where the concerned person was located. In case the whereabouts of the concerned person remain unknown, the European arrest warrant will be sent to Romania and directed to the Prosecutor’s Office attached to the Court of Appeal of Bucharest.

The Romanian central authority is the Ministry of Justice, which, in this capacity (art. 85 para 4 of the Law no. 302/2004): a) receives the European arrest warrant issued by a judicial authority from another Member State of the European Union and forwards it to the prosecutor’s office attached to the court of appeal of the jurisdiction where the concerned person was located or to the Prosecutor’s Office attached to the Court of Appeal of Bucharest, in case the concerned person was not located, whenever the issuer judicial authority is unable to forward the European arrest warrant directly to the recipient Romanian judiciary authorities; b) forwards the issued European arrest warrant to a Romanian judicial authority, if this is unable to forward it directly to the foreign recipient judicial authority or when a Member State where the mandate is to be executed indicated the Ministry of Justice as the recipient authority; c) keeps record of the European arrest warrants issued or received by the Romanian judicial authorities, for statistical purposes; d) carries out any other tasks, established by law in order to assist and support the Romanian judicial authorities for the issuing and enforcement of the European arrest warrants.

The requirements to be fulfilled by the European arrest warrant in terms of content and form are indicated in the art. 86 of the Law no. 302/2004. This piece of law establishes that the European arrest warrant shall include the following data: a) the identity and citizenship of the requested person; b) the name, address, phone and fax numbers an email address of the issuer judicial authority; c) the mention regarding the existence of a final judgment, a custody warrant or any other enforceable judgment having the same effect which allows for cooperation; d) the nature and judicial classification of the offence; e) a description of the circumstances of the offence, including the time, place, level of involvement of the
requested person; f) the sentence passed, if the judgment remained final or the punishment stipulated by the law for the committed offence; g) other consequences of the offence, if possible.

The European arrest warrant forwarded to the competent authorities of another Member State needs to be translated into the official language(s) of the enforcement state or in one or several of the official languages of the institutions of the European Union, that the respective state accepts, according to the declaration submitted to the General Secretariat of the Council of the European Union. The European Arrest warrant forwarded to the Romanian authorities in order to be executed needs to be translated in Romanian or in either French or English.

2. Extradition of Own Citizens as Regulated by the Romanian Constitution

In Romania, since the EU pre-accession period, the Constitutional Court found that “in order to express certain requirements of the Acquis Communautaire regarding the fight against terrorism, transnational criminality, organized crime, drug and human trafficking the circumstances of the constitutional interdiction regarding the extradition of Romanian citizens need to be presented”3. Under these circumstances, the art. 19 para (1) and (2) of the Constitution, as reviewed by the Law no. 429/2003, stipulates that a Romania citizen may be extradited from Romania provided that three conditions are met: the existence of an international convention that Romania is a part of, based on mutuality and according to the law.

Under these circumstances, Romania has not experienced any difficulties in the implementation at national level of the cooperation instrument called the European arrest warrant, and it happened in other states, despite the existence of the exceptions raised by the litigants or even by courts *ex officio*4.

3. Decisions of the Constitutional Court of Romania in relation to the European arrest warrant

As regards the constitutionality control over the national regulation implementing the European arrest warrant – the Law no. 302/2004, the Constitutional Court issued several decisions regarding its constitutionality.

The first reference to the European arrest warrant from the jurisprudence of the Constitutional Court of Romania is found in the Decision no. 134 of February 20, 20075. It refers to an exception for non-compliance with the Constitution of the provisions of the art. 54 (turned 52 after the re-publication of the law) para (2) of the Law no. 302/2004 on the international judicial cooperation in criminal matters justified according to its author by the fact that the said legal provisions infringe

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4 All the notifications and the decisions passed in this respect may be viewed on the official website of the Constitutional Court of Romania - https://www.ccr.ro/CCRSearch/MainSearch/SearchForm.aspx
5 Published in the Official Gazette of Romania, Part I, no. 190 of March 20, 2007.
the constitutional provisions of the art. 17 regarding the Romanian citizens living abroad and of the art. 21 para (3) on the parties’ right to a fair trial, because the Romanian judiciary observes, without any censorship, an arrest warrant issue abroad in the absence of the concerned person and without subpoenaing them. In relation to this exception, the Ombudsman presented an opinion whereby the exception for non-compliance with the Constitution is not justified, because, if the court of law competent to decide also on the fulfilment of the extradition requirement would decide on the grounds of the criminal prosecution or sentence or on the opportunity of taking these measures, this would be an infringement of the provisions of the art. 19 para (2) of the Constitution, whereby, "By derogation from the provisions of the paragraph (1), the Romanian citizens may be extradited based on the international conventions that Romania is part of, according to the law and based on mutuality."

The piece of law claimed to be unconstitutional states that the art.54 (52 after re-publication) para (2) of the Law no. 302/2004 with the following wording: "The Court of Appeal is not competent to state on the justification of the prosecution or conviction for which the foreign authority requires the extradition, nor on the opportunity of the extradition."

After examining the invoked exception of unconstitutionality, the Court retained that the procedure of passive extradition stipulated in the Law no. 302/2004 is the natural expression of the constitutional norm, whereby the Romanian citizens may be extradited based on the international conventions that Romania is part of, according to the law and based on mutuality - art. 19 para (2). Consequently, the regulation of the procedure for judging such an incident lies, according the art. 126 para (2) of the Fundamental Law, with the Romanian lawmaker, of course complying with the fundamental rights and freedoms, among which there is the right to a fair trial.

Moreover, the Court showed that by virtue of the art 17 of the Constitution, given that they are Romanian citizens, the Romanian citizens living abroad enjoy the protection of the Romanian state. This implies the existence of agreement and conventions enabling a judicial cooperation in line with the generally acknowledged norms of the international law. Thus, “the protection invoked by the author of the exception for non-compliance with the Constitution may be turned into a case of impunity for anti-social actions perpetrated on the territory of a foreign state, the Romanian court being obliged to the check only the compliance with the conditions required for the extradition, not to state whether the prosecution or conviction established by the foreign authority is well grounded or not nor on the opportunity of the extradition. Otherwise, this would be an infringement of the principle of mutual recognition of criminal judgments.

In particular, the Constitutional Court shows that for “Romania, after joining the European Union, the European arrest warrant is the vault key of the judicial cooperation implementing the principle of the mutual recognition of repressive judgments. Moreover, the framework Decision of the Council of the European Union dated June 13, 2002, intended on the one hand, the implementation of a simplified procedure to replace the formal and cumbersome procedure of extradition established by the international documents, and on the other hand, the transformation of the European Union into a free area of security and justice”.

Since the first year of Romania’s accession into the European Union, the Constitutional Court of Romania stated that the simplified cooperation instrument represented by the European arrest warrant is in line with the provisions of the Romanian Constitution.

As regards the application of the institution of the European arrest warrant over time, the art. 108 (currently the art. 122) of the Law no. 302/2004, whereby, “The decisions herein shall apply to the European arrest warrants received by the Romanian authorities after its entry into force, although they concern facts occurred prior to this date”. The date referred to in the respective piece of law is January 1, 2007, the date of Romania’s accession to the European Union. The text was challenged or grounds of unconstitutionality, the author of the exception raised claiming, in essence, that the judicial situation which is about to occur and which the Constitutional Court may prevent is the occurrence of certain differentiations and inequalities in the application of the law for the Romanian citizens, which would infringe the provisions of the art. 16 para (2) of the Constitution regarding the equal treatment of the citizens in front of the law. This is because, based on the art.108 (currently the art. 122) of the Law no.302/2004, the Romania citizens benefit from a differentiated legal treatment for a random situation, namely the entry into force of certain provisions of the Law no. 302/2004. Moreover, the impugned legal provisions are considered to be applied retroactively, generating effects on facts that occurred before the provisions came into force. The art. 19 para (2) of the Fundamental law is invoked as well, whereby, "By derogation from the provisions of the para (1), the Romanian citizens may be extradited based on the international conventions that Romania is part of, according to the law and based on mutuality". In support of the exception, it was also shown the infringement of the provisions of the art.15 para (2) of the Constitution, whereby "The law provides for the future only, except for the more favourable criminal or contravention law".

The examination by the Constitutional Court of the exception for non-compliance with the Constitution revealed that is was not justified for several reasons. First, the provisions of the art.108 (art. 122 now) para (1) of the Law no. 302/2004 include the transitional norms establishing that the Title III of this law is applicable to the said procedural documents (European arrest and surrender warrants) issued after it became effective, although they refer to facts occurred
before this date. Consequently, the impugned piece of law does not refer to the past, but only to documents issued after the norms applicable in this matter became effective, in full compliance with the provisions of the art. 15 of the Constitution. The aspect regarding the fact that the facts for which the European arrest warrants are issued may have occurred prior to the new regulation do not make the respective norm applicable retroactively, as it refers to procedural documents and facts, a field in which the new law is immediately applicable.

Moreover, the Court emphasized that contrary to the allegations of the author of the exception, the art. 108 (now art. 122) para (1) of the Law no. 302/2004 does not grant any privilege or discrimination, by establishing the same judicial regime for the persons in identical situations (for whom European arrest and surrender warrants were issued after the Title III of the Law no. 302/2004 became effective), in line with the constitutional provisions regarding the equality of the citizens in front of the law, and those stating that "Justice is unique, impartial and equal for all". Based on these considerations, the Constitutional Court, by the Decision no. 445 of May 10, 2007\textsuperscript{7}, confirmed that the Title III on the European arrest warrant from the Law no. 302/2004 is applicable for the European arrest and surrender warrants issued after it became effective (January 1, 2007), although they refer to facts occurred prior to this date.

In the Decision no. 400/2007\textsuperscript{8}, the Constitutional Court of Romania shows explicitly that the “Romanian judge decides on the arrest of the requested person by virtue of the law,” only after having checked the compliance with the required conditions regarding the issuing of the warrant and does not decide on the justification of the prosecution or sanction established by the foreign authority nor on the opportunity of the arrest. Otherwise this would infringe the principle of mutual recognition of criminal judgments.” In the same case it is very clearly emphasized that “the deprivation of liberty as a result of the issuing of a European arrest warrant does not equal the issuing of a custody order by the Romanian judge according to the Code of Criminal Procedure.”\textsuperscript{9}

In another situation, the domestic legal provisions regarding the European arrest warrant have been challenged on ground of contradiction with the Romanian Constitution, the author of the exception showing that the art. 79 (art. 86 after re-publication) para (1) letter c) of the law “does not allow us to know the grounds considered by the issuer for deciding on the custody order and does not stipulate that the arrest warrant be issued by a judge. The person concerned by such a warrant is not heard, is not considered as a defendant and does not know

\textsuperscript{7} Published in the Official Gazette of Romania, Part I, no. 318 of May 11, 2007.
\textsuperscript{9} The same considerations were reiterated in the Decision of the Constitutional Court of Romania no. 424/2008, published in the Official Gazette of Romania, Part I, no. 363 of May 12, 2008.
the justification for the arrest request. After examining the exception of unconstitutionality, the Constitutional Court of Romania shows that the author of the exception starts from a wrong premise, i.e. the fact that the enforcement court needs to decide whether the measure ordered by the foreign judicial authority is justified or not. The court for constitutional litigations shows that “the European arrest warrant is a correct measure that implements the principle of mutual recognition of criminal judgments. In the logic of the Council’s Framework-Decision no. 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures applicable between Member States, implemented at national level through the Law no. 302/2004, the judiciary authority of the Member State where the person was arrested may decide to surrender the person and not to decide whether the custody measure or the judgment pronounced in the demanding state is justified or not.” It is obvious that the justification of this measure and thus of the judgement pronounced in a Member State of the European Union will be challenged in the state where the respective decision was issued, where the requested person will enjoy all the existing procedural guarantees.

The Constitutional Court of Romania also rejected an exception showing that the domestic norms that transpose the cooperation instrument of the European arrest warrant into the domestic legislation, “….also affect the independence of the Romanian judge, as this decides, mechanically, on the arrest, without censoring the first court’s decision.” The arguments invoked where the same referring to the application of the principle of mutual recognition of criminal judgments. In the same decision, the Court, acknowledges the constitutionality of the national provisions whereby the European arrest warrant forwarded for execution to the Romanian authorities needs to be translated into Romanian or in either English or French (as stipulated by the provisions of the art. 8 point 20 of the Framework-Decision of 2002.

In the Decision no. 583/2007, the Constitutional Court of Romania acknowledges again the constitutionality of the national provisions regarding the European arrest warrant and shows that “…the custody measure taken in order to surrender a person to a member State of European Union represents measure of temporary deprivation of according to the art. 23 para (2) of the Romanian

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11 The same considerations were reiterated in the Decision of the Constitutional Court of Romania no. 1127/2007, published in the Official Gazette of Romania, Part I, no. 2 of January 3, 2008.
13 The same considerations were reiterated in the Decision of the Constitutional Court of Romania, no. 61/2008, Published in the Official Gazette of Romania, Part I, no. 142 of February 25, 2008.
Constitution, which fully complies with the constitutional requirements of the art. 21, the part having all the procedural guarantees specific for a fair trial, such the possibility to invoke certain mandatory reasons for refusal of enforcement, the hearing of the arrested person, the existence of the possibility of appeal against the arrest decision etc”.

The domestic provisions have withstood claims for non-compliance with the Constitution and infringement of the right to defence, because the court doesn’t check the documents accompanying the European arrest warrant in public meeting. The court showed once again that such criticism may not be admitted because “all the documents checked by the Romanian judge are included in the file, hence are available for examination by the person concerned by the European arrest warrant”. Thus, the domestic law does not restrict at all the right to defence. On the contrary, the Court shows that “these legal provisions do not include any infringement of the invoked constitutional texts, allowing the concerned persons to know the judgment based on which the European warrant was issued.”

As regards the procedure of issuing the European arrest warrant, a Romanian plaintiff showed before the Constitutional Court of Romania that the latter should have indicated in terminis the Romanian judge’s obligation to issue the European Arrest warrant in presence of a chosen or ex officio appointed defence lawyer and should establish a special remedy against this procedure. The Constitutional Court of Romania rejected the exception formulated as inadmissible and showed that the aspects raised by the author were solved by means of a recourse in the interest of the law, as an instrument for the unification of the national jurisprudence, by the High Court of Cassation and Justice of Romania, the Joint Section that stated that the European arrest warrant is intended to ensure that the person suspected for having committed a crime or having been concerned by a final sentence in Romania is brought into the country as soon as possible, it is not a jurisdictional procedure, it does not require a decision. The Constitutional Court considers that “… it would have been useless and inopportune to go through another jurisdictional procedure in this respect, as long as the arrest order has been itself through the stages that ensured the guarantees regarding the right to the defence and the remedies”.

By validating once again the domestic regulation regarding the European arrest warrant, the Constitutional Court of Romania shows in another situation that based on these provisions, in order to prevent a potential deprivation of liberty ordered by the Romanian judicial authorities for the enforcement of a European arrest warrant, the interested party has full liberty to defend him/herself and to appear in front of the authority that issued the warrant. Starting from the

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premise of the infringement of the fundamental rights and freedoms by a state that Romania signed agreements of international mutual cooperation with represents an abuse of rights. The mere fact that the Romanian state signed such an agreement guarantees and ensures the protection of its citizens’ rights and freedoms when they enter into the jurisdiction of the contracting authority, the Law no. 302/2004 on the forms of international judicial cooperation in criminal matters within the limits indicated in the art. 3, under the conditions of international mutual courtesy, confidentiality and based on the non bis in idem principle.”

In another situation, the Constitutional Court of Romania, examining an exception of unconstitutionality showed that “the provisions regarding the conversion of the sentence refer explicitly and exclusively to the incompatibility of the duration of the resulting punishment with the Romanian legislation and not the incompatibility between the systems which results in the enforcement of a punishment resulting from a series of offences, or the system of arithmetic plurality or judicial plurality. Consequently, if the resulting punishment was applied through arithmetic plurality, according to the legislation of the sentencing state, the court may not replace the arithmetic plurality with the rules of the judicial plurality established by the Romanian Criminal Code. Otherwise, this would be an infringement of the principle of mutual recognition of criminal judgments”.

4. Conclusions

Therefore, until the date of this material, the domestic provisions regarding the implementation of the instrument of cooperation of the European arrest warrant have passed the test of conformity with the Fundamental Law of Romania whenever exceptions for non-compliance with the Constitution have been raised.

The Constitutional Court of Romania does not hesitate to make direct reference to the provisions of the Framework-Decision on the European arrest warrant and to assess the national provisions from the point of view of their conformity with the European provisions.

The Constitutional Court of Romania has constantly pointed out that the arrest made in order to surrender the person based on a European arrest warrant

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18 The Constitutional Court of Romania is not handling another exception of non-constitutionality regarding the European arrest warrant, which is covered by the file no. 9D/2015, registered on January 16, 2015, but no decision was issued yet in this respect https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx. By May 11th, 2015, date of presenting this paper.
does not abide by the laws of the custody from the national legislation, as it is a measure intended to ensure the execution of the judicial cooperation within the European Union.

The Constitutional Court of Romania has constantly compared the domestic legislation and the principle of mutual recognition of the criminal judgments between the Member States of the European Union. In many of its interventions, the Court has shown that a certain interpretation or potentially a certain modification of the domestic legislation would lead to infringements of the principle that are inadmissible in the context of the relations promoted in the Union.

References