EUROPEAN ARREST WARRANT. THEORETICAL APPROACHES AND PERSPECTIVES UNDER JUDICIAL PRACTICE[*)]

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Abstract

The authoress examines the essential features of European Arrest Warrant and adequately debates several problems which raised in Romanian judicial practice regarding the issuing and enforcement of EAW.

Keywords: *European Arrest Warrant; international judicial cooperation; mutual recognition of judgments*

1. Preliminary approaches. Given that transnational organized crime has reached, along with the opening of borders, an increasingly larger scale, international judicial cooperation in criminal matters constitutes, conjointly with police cooperation, the only effective means to address this phenomenon.

With reference to the wider effort to find and use the most effective ways of achieving judicial cooperation in criminal matters, in terms of the means of legislative technique used, we highlight hereby that there has been ascertained increasingly preference for European legal instruments bearing an implementation under the law of the Member States of the European Union as simplified. Thus, it was settled upon the pre-eminent use of Framework Decisions to the detriment of Conventions assuming being ratified by signatory States and, inferentially, more laborious implementing procedure under national law[1)]. The purposes of applying these legal techniques are harmonization of national legislation with EU legislation and the development of simplified and expedient procedures to help optimize the capacity of Member States to promptly and effectively respond within bounds of efforts to fight criminality[2)].

Taking our stand upon these political and legal realities, the European Arrest Warrant holds a prominent place in the mechanisms of international judicial cooperation in criminal matters, based on Title VI of the Treaty on European Union and, therefore, the principle of mutual recognition of judgments characterized by participants in Tampere European Council as the „cornerstone" of a genuine European judicial space.

[*)] Article translated from the Romanian language. It was published in RDP no. 1/2011, pp. 74-85.

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[1)] EU Convention on Mutual Assistance in Criminal Matters of May 29th, 2000 became effective but in August 2005, date on which the condition of eight ratifications was met.

[2)] Elsen Charles, 2007, *De la Maastricht la Haga: politica cooperării judiciare şi poliţieneşti*, in ERA Forum no. 8/2007: 13-26.

Thus, Council Framework Decision no. 2002/584/JHA of June 13th, 2002, on the European Arrest Warrant and the surrender procedures between Member States, which was transposed into national law by Law no. 302/2004 on international judicial cooperation in criminal matters – Title III – as originally amended by Law no. 224/2006[3)] and subsequently by Law no. 222/2008[4)], stands for the measure with the greatest impact so far in the history of extradition, especially in terms of simplifying and accelerating the procedure. On the one hand, it eliminates the traditional barriers, such as the principle of double criminality, the refusal of surrender of a person sought in case of political, military and tax offenses, and non-surrender of own citizens, and on the other hand, it withholds the execution of a 2-stage traditional extradition procedure, namely, the warrant's issuing by a competent court and then approval granted by an administrative body. Currently, the proceedings are merely judicial, without any administrative stage, involvement of executive bodied being limited, consisting, generally, in assisting judicial authorities.

According to Article 77 para. 1 of Law no. 302/2004, as amended, „the European Arrest Warrant is a judicial decision by means of which a competent judicial authority of a Member State of the European Union calls for arrest and surrender by another Member State of a person, for the purpose of criminal prosecution, trial or enforcement of sentence or a deprivation of liberty safeguards".

Paragraph 2 of Article 77 of the aforementioned law provides that „the European Arrest Warrant is enforced on the basis of recognition and mutual trust, in accordance with the Council Framework Decision no. 2002/584/JHA of June 13th, 2002, published in the Official Journal of the European Communities no. L 190/1 of July 18th, 2002".

From the definition given to the European Arrest Warrant it appears that it is a judicial decision given in a Member State and substantiates under the form of detention and surrender of a person sought through another Member State, with the view to carry out prosecution, trial or enforcement of a sentence or a deprivation of liberty safeguards. Therefore, the national judicial authority of a Member State of the European Union (the enforcement authority) is committed to recognize the request of a judicial authority of another Member State (the issuing authority) on surrender *ipso facto* and minimum control of the person sought.

The European Arrest Warrant should not be confused with the preventive detention order in domestic law. The European Arrest Warrant is a judicial decision always based on a preventive detention order or a warrant of imprisonment issued under domestic law. The European Arrest Warrant is issued exclusively when a preventive detention order or a warrant of imprisonment can

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[3)] Published in the Official Journal no. 534 of June 21st, 2006.

[4)] Published in the Official Journal no. 758 of November 10th, 2008.

not be enforced in the country, because the person subject to the relevant warrant circumvented enforcement being on the territory of another European Union Member State. Content and form of the European Arrest Warrant are provided for in Article 79 of Law no. 302/2004, and must be prepared in accordance with the form in Annex no. 1.

As regards information required to be filled in the European Arrest Warrant, this was subject to reference before the Constitutional Court, the subject of plea of unconstitutionality being provisions of Article 79 para. 1 letter c)[5)]. The authors of the plea of unconstitutionality argued that the aforementioned wording of law prevents knowledge considered when ruling upon preventive detention by the issuing judicial authority and fails to provide that the warrant be ordered by a judge. In addition, the person sought is not heard, is not a defendant and is not notified on the grounds of the request for arrest.

The Constitutional Court[6)] held that the authors of the plea take their stand upon a wrong premise, namely that the enforcement court should rule on the merits of the measure ordered by the foreign judicial authority. The European Arrest Warrant is a substantial measure, which implements the principle of mutual recognition of judgments in criminal law. Under consistency of the Council Framework Decision no. 2002/584/JHA of June 13th, 2002, the judicial authority of the Member State in which the individual was arrested may decide upon its surrender, so not rule on the merits of the preventive measure or judgment passed in the requesting State. The person sought may choose to challenge the merits of the decision passed in an EU Member State in the State in which the relevant decision was issued, where it will benefit from all existing procedural guarantees. Likewise, the Romanian judge will rule upon the arrest of the person sought after checking beforehand fulfillment of conditions required for issuing the European Arrest Warrant.

2. Issuance of the European Arrest Warrant. In Romania, the judicial authorities issuing the European Arrest Warrant are law courts[7)] (district courts, tribunals, courts of appeal), and the procedure for issuance of a European Arrest Warrant by the Romanian authorities is covered in Chapter II of Title III of Law no. 302/2004.

On our part, we intend to focus on the following issues:

[5)] According to Article 79 para. (1) c) of Law no. 302/2004, the European Arrest Warrant must contain „mentioning the existence of a final court decision, a preventive detention order or any other enforceable court decision, having the same effect falling within the provisions of Article 81 and Article 85 of the aforementioned law".

[6)] On these lines, the Constitutional Court decisions no. 400, 419, passed in 2007.

[7)] Article 78 para. 1 of Law no. 302/2004, as subsequently amended and supplemented.

a) *The competent judge to issue the European Arrest Warrant if the preventive detention order was issued during the prosecution stage, and the case reached the appeal's trial stage, legal remedy respectively.*

As per Article 81 para. 2 of Law no. 302/2004, competent to issue the European Arrest Warrant during the prosecution stage is the judge authorized by the president of the court who would have jurisdiction to hear the case on the merits, and during the trial and execution stages by the judge authorized by the President of first instance, or of the execution court.

As set forth under Article 77 para. 1 of Law no. 302/2004, the European Arrest Warrant is also issued, *inter alia*, for the purpose of trial proceedings.

In one case, settled before amendments to Law no. 302/2004 by Law no. 222/2008 and ruling the appeal in the interest of law[8)], where the High Court of Cassation and Justice ruled that the European Arrest Warrant issue does not involve drawing a conclusion because it is not a question of legal proceedings, the law court that issued against the defendant a preventive detention order during prosecution for the offense of aggravated theft, covered in Articles 208, 209 of the Criminal Code, serving the defendant a sentence of imprisonment, notified by the Center for International Police Cooperation – National Bureau of Interpol with the request for issuing the European Arrest Warrant, by resolution, declined jurisdiction to hear the case in favor of the court, on the ground that the latter court, competent for hearing the appeal filed by the defendant against the conviction, has jurisdiction to rule also upon the request for issuing the European Arrest Warrant. In turn, the court of law, by resolution, declined jurisdiction in favor of the district court and referred to the common superior court for settling the negative conflict of competence.

The Court referred with settlement of the conflict of competence established that the judge within the district court that issued the preventive detention order during prosecution shall rule upon the request for issuing the European Arrest Warrant, in relation to mandatory rules covered under Article 81 para. 2 of Law no. 302/2004. The circumstance that, in the meantime, the first court decision sentencing the person against whom the preventive detention order has been issued – which could not be enforced on account of the fact that the defendant fled the country – was challenged by appeal, can not draw jurisdiction of the judiciary control court, the court issuing the European Arrest Warrant, respectively, because it would defeat the rule on jurisdiction settled under the aforementioned special law[9)].

As a matter of fact, the issue was solved by amendment to Article 81 para. 2 of Law no. 222/2008 which provides that, during the trial, irrespective of the

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[8)] Decision no. 39 of September 22nd, 2008 issued by the High Court of Cassation and Justice (Joint Sections), published in Official Journal no. 161 of March 16th, 2009.

[9)] The High Court of Cassation and Justice ruled also in concert, Criminal Section, Decision no. 1054 of June 2nd, 2008.

procedural stage (merits, appeal, recourse), the European Arrest Warrant is issued by the judge appointed by the President of the Court of First Instance.

b) *Issuing the European Arrest Warrant for a convict on whose behalf there have been issued several warrants of imprisonment based on a final conviction order.*

The question is whether, for the relevant case, the judge issues a single European Arrest Warrant or a number of European Arrest Warrants equal to the number of warrants of execution issued on the basis of final court decisions.

In default of explicit rules, it could be argued fairness of issuing a European Arrest Warrant encompassing all warrants of imprisonment issued against an individual finally convicted by several court orders, since the purpose of issuing a European Arrest Warrant is that of surrender to the requesting State of a person, regardless of the number of sentences to be executed, or, in case of preventive detention, regardless of the number of criminal offenses it's being charged with.

We believe, however, that the solution required in the case is that of issuing a European Arrest Warrant for each warrant of serving a sentence of imprisonment, issued against the convict – the person sought.

In grounding our opinion we consider, on the one hand, provisions of Article 77 para. (1) of Law no. 304/2004, setting forth that „the European Arrest Warrant is a judicial decision issued by the competent judicial authority of an EU Member State ..., for the purpose of executing a sentence or a deprivation of liberty safeguards", and on the other hand, the solution framed is required to be adopted also for the fact that it is possible that the requested judicial authority may distinctly and dissimilarly appreciate meeting of imperative conditions that give way to admitting the request on multiple execution warrants issued by the requesting judicial authority and, as such, the procedures to be delayed and hampered.

3. Execution of the European Arrest Warrant. The procedure covering execution of the European Arrest Warrant is set forth under Chapter III, Title III of Law no. 302/2004, as amended.

According to the provisions of Article 78 para. 2 of the aforementioned law, judicial authorities to execute the European Arrest Warrant are Courts of Appeal. In our viewpoint, this solution entails some clarification.

Supervision by the Court of Appeal as judicial authorities to enforce the European Arrest Warrant is different from the one made by the same in terms of extradition, *i.e.* it no longer requires checking the condition of double criminality, but in few cases. If the judicial authority issuing the European Arrest Warrant has retained a legal qualification linked to one of the 32 crimes listed in Article 85 and crimes are punishable under the law of the issuing State by a custodial sentence or a deprivation of liberty safeguards, whose maximum term is at least three years, the Romanian court has no jurisdiction to consider this qualification, nor to

control double criminality. For more circumstances apart from those provided under Article 85 para. 1 of Law no. 302/2004 – Article 2 para. 2 of the Framework Decision – the Romanian legislature left to the discretion of the judge whether the European Arrest Warrant is enforced when the condition of double criminality is not met.

On the other hand, limitation under the Romanian law is not a ground for refusal of surrender but in exceptional cases, namely when the facts that are subject to the European Arrest Warrant will be prosecuted and ruled upon by the Romanian judicial authorities.

Also, Romanian citizenship of the person sought does not stand anymore as a mandatory ground for refusal of surrender[10]. When the European Arrest Warrant was issued for criminal prosecution or trial, the court may subordinate surrender provided that, should a custodial sentence be passed, the person surrendered to be transferred to Romania for serving the sentence. If the European Arrest Warrant was issued against a Romanian citizen for carrying out a penalty or a deprivation of liberty safeguards, the person sought will be asked by the judge whether he/she agrees to serve the sentence or security measure in the issuing Member State[11].

c) *The ability of the competent court judge to enforce the European Arrest Warrant to choose between custody of the person sought and another deprivation of liberty safeguards if the person sought does not consent to surrender and it is requisite to grant a deadline for passing a decision on surrender.*

In another case[12], the court vested with the application to enforce the European Arrest Warrant, finding that it meets all requirements set forth under Article 79 of Law no. 302/2004 and is accompanied by a translation into the Romanian language, by a grounded decision, in accordance with provisions set forth under Article 90 para. 2 of the aforementioned law, ruled upon arrest of the person sought, a preventive measure whose legality and rationality was subject to regular check as per para. 9 of Article 90.

In another case[13], the court ruled upon the person sought the measure of not leaving the place of residence for a period of 30 days. Essentially, in grounding the decision it was noted that data favorably characterizing the person sought, namely no criminal record, the fact that he/she is married, is employed and has a dependent minor child, are sufficient guarantees that the person concerned will not try to evade and that the measure of obligation not to leave the city is sufficient to ensure his presence at trial. On the other hand, adopting a tougher measure, namely preventive detention, would have been liable to cause irreparable loss for the person concerned in respect of his family, emotionally and materially, and, as per amendments to Law no. 302/2004, the custody measure may not

[10] Article 87 para. 2 of Law no. 302/2004.
[11] Article 90 para 4 of Law no. 302/2004.
[12] Court of Appeal Piteşti, Resolution no. 118/F/19.11.2008, unpublished.
[13] Court of Appeal Piteşti, Resolution no. 125/F/28.11.2008, unpublished.

necessarily be taken compulsorily and in any circumstance, but the judge has the opportunity to appreciate against the data it holds whether this particular measure, or a more indulgent one, would be appropriate. Finally, in the decision's considerations, the judge also called down the fact that, although it disputes not the veracity of data submitted by the issuing authorities of the European Arrest Warrant, there are serious doubts in terms of the identity of the person sought, and until verification of issues reported, ruling upon preventive detention, with all restrictions agist, would be excessive and unreasonable in relation to personal data of the person concerned and covered thereby.

We argue that the first solution is fair.

In accordance with Article 90 para. 8 of Law no. 302/2004, as amended and supplemented, where, under the procedure of execution of the European Arrest Warrant, the person sought does not consent to surrender to the judicial authority issuing the European Arrest Warrant, and the judge deems necessary to grant a deadline for ruling upon the surrender, arresting the person sought is ruled by a grounded resolution.

The imperative terms employed by the legislature require unequivocal conclusion in the sense that, if it finds that the European Arrest Warrant formally meets conditions laid down in Article 79 of the law to be executed at the request of the applicant State – the situation in this case – the judge can not choose between preventive detention and non-custodial preventive measure of compelling not to leave the place of residence.

It is true that Article 90 para. 11 of the Law provides for the possibility of taking a non-custodial preventive measures up against the person sought, *i.e.* the measure of obligation not to leave the place of residence as provided in Article 145 under the Criminal Procedure Code, but the latter measure may be ordered only after the original deprivation of liberty of the person sought, throughout the judicial process to enforce the European Arrest Warrant[14)].

This interpretation ensues from the sequence of legal texts, given that, on the one hand, taking the measure of obligation not to leave the city is provided in a paragraph subsequent to the one on the arrest of the person sought, and on the other hand, it is related to its „release", which necessarily implies an original state of imprisonment, pre-existent. It is not irrelevant the fact that the measure of obligation not to leave the city is dealt with, since in Article 90 para. 10 it is provided for the maximum duration of detention of the person sought, the release standing for a mandatory consequence where the maximum term of 180 days has been exceeded.

[14)] According to Article 90 para. 11 of Law no. 302/2004, as amended, „should the person sought be released, the court has to rule upon the same the measure of obligation not to leave the city, the provisions of Article 145 of the Criminal Procedure Code being applied correspondingly ...".

In other words, the measure of obligation not to leave the city can be ordered as an alternative to preventive detention, but only during court proceedings for enforcement of the European Arrest Warrant, depending on the duration and outcome of the checks that the judge is bound to carry on in terms of the possible effect of one of the mandatory or non-mandatory grounds for non-execution of the warrant, or with reference to objections to identity that the person sought may raise[15)].

The situation is different from the one covered by Article 90 para. 2 of Law no. 302/2004, which regulates the hypothesis where the person sought was detained on the alert sent by the International Criminal Police Organization (Interpol), when the legislature sensed to enable the judge that, depending on the particularities of the case, including data that characterize the person sought, to choose between the arrest of the relevant person or taking up against it the measure of obligation not to leave the city for a period of 5 days.

In another case[16)], the court ordered, pursuant to Article 90 para. 11 of Law no. 302/2004, to take up against the person sought the measure of obligation not to leave the city, along with the burden of obligations under Art. 145 para. 1^1 Criminal Procedure Code, on grounds that, essentially, after having heard the person sought and who failed to agree to surrender, it carried forth that, for acts surrender is requested by the judicial authority issuing the European Arrest Warrant, the same was convicted in Romania by a decision which is not final. In proving the claim, the person sought filed the required documents.

In grounding its decision, the trial court held, primarily, that arresting the person sought during the enforcement of the European Arrest Warrant would be inefficient, given that a preventive detention measure has already been taken in another case and that, in relation to the mandatory provisions of Article 90 para. 11 of Law no. 302/2004, the measure of obligation not to leave the city is required to be taken if the more severe measure of arrest is not taken, although the latter measure was not possible, nor did it have any immediate purpose (the person sought being preventively detained in the case pending before the Romanian courts).

It is true that, under Article 77 para. 2 of Law no. 302/2004, the European Arrest Warrant is enforced on the basis of the principle of recognition and mutual trust, in accordance with the Council Framework Decision no. 2002/584/JHA of June 13th, 2002 and that, according to Article 90 para. 8 of the aforementioned law, if the person sought does not consent to surrender, and the judge deems necessary to grant a deadline for passing a decision thereupon, detention of the person sought during the enforcement of the European Arrest Warrant is ordered on account of grounded resolution.

[15)] High Court of Cassation and Justice, Criminal Division, Decision no. 4214/2008.

[16)] Court of Appeal Piteşti, Resolution no. 1017/2009, unpublished.

The compulsory terms used by the legislature conclude that, in such circumstances, the judge can not choose between detention and a non-custodial measure, deprivation of liberty of the person sought being compulsory if it is found that the European Arrest Warrant formally meets the conditions required by law to be enforced.

In other words, the measure of obligation not to leave the city can be ordered as an alternative to custody, but only during court proceedings for enforcement of the European Arrest Warrant, depending on the duration and outcome of the checks that the judge is bound to carry on in terms of the possible effect of one of the mandatory or non-mandatory grounds for non-execution of the warrant, or with reference to objections to identity that the person sought may raise.

Though, equally true is the fact that, should the person sought raise a circumstance that is covered by the grounds for non-enforcement of the European Arrest Warrant provided by law, and there were filed data confirming with a high degree of probability defenses of the person sought, meeting of formal conditions of the European Arrest Warrant is not sufficient anymore for deprivation of liberty of the person sought, although establishing with certainty the effect of the said ground challenges some additional steps. In this case, the judge can not take any preventive measure, custodial or non-custodial, following that, by the decision on the merits, should enforcement of the European Arrest Warrant be ordered, also to rule upon the arrest of the person sought to surrender[17)].

d) *Interpretation of Article 96 para. 1 and 2 of Law no. 302/2004. The court that ruled upon effective surrender of the person sought by a final decision, does it have also authority to order its arrest if surrender failed to occur within the term prescribed by the laws mentioned above?*

In a case[18)], the court ordered a 30-day extension of the preventive detention order for the person sought, on the ground that surrender of the person sought was not possible, for objective reasons, within 10 days since the surrender decision was final. The term of 30 days covering extension of the preventive detention period of the person sought was calculated from the day following the expiry of 29 days, the period for which the person sought has been previously arrested by the sentence of enforcement of the European arrest warrant. It was judged that the provisions of Article 90 para. 10 of Law no. 302/2004 are applicable in the case.

In another case[19)], the court referred with a request which called to order the arrest of the person sought on the grounds that its surrender to the authority issuing the European Arrest Warrant could not be accomplished within 10 days of the surrender decision became final, finding that provisions under Article 96 para. 2 of the aforementioned law are applicable, by sentence, set a new date for

[17)] High Court of Cassation and Justice, Judgment in criminal case no. 4214/2008.
[18)] Court of Appeal Ploieşti, Judgment in criminal case no. 139/F/2008, unpublished.
[19)] Court of Appeal Piteşti, Judgment in criminal case no. 261/2009, unpublished.

surrender within 10 days, counting from the date on which the judicial authorities involved originally agreed upon the date on which surrender shall take place, and maintained detention of the person sought until its effective surrender within the newly established term by the court.

We argue that both solutions passed are patient of comments.

The provisions of Article 96 of Law no. 302/2004, which regulate the institution of surrender of the person sought, set forth in paragraph 1 that surrender is carried into effect by the Center for International Police Cooperation within the Ministry of Administration and Interior, assisted by the police unit within the premises of the detention place, within 10 days of the surrender decision be final.

Paragraph 2 of the aforementioned law regulates the situation where, for reasons beyond the control of one of the issuing or enforcing Member States, surrender can not be carried out within the period specified in paragraph 1 and provides that, in this case, the judicial authorities involved shall set a new date for surrender, which shall take place within 10 days of the newly agreed date.

The provisions of Article 90 para. 10 of Law no. 302/2004, raised in grounding the original decision, are not applicable in our viewpoint, because these legal provisions govern the enforcement procedure of the European Arrest Warrant, namely, the trial phase completed with passing a decision (ruling) on surrender and arrest of the person sought with the view of surrender to the judicial authority issuing the European Arrest Warrant.

We argue hereby that provisions of Article 96 para. 2 of Law no. 302/2004, raised in grounding the second decisions, have been misinterpreted and did not entail obligation for the trial court to set a new date for surrender of the person sought.

Subsequent to ruling upon the decision of surrender of the person sought and arrest thereof for surrender to the judicial authority issuing the European Arrest Warrant, the Court was divested. Therefore, the problem of surrender – taking over the person sought is the exclusive attribute of the International Police Cooperation Centre within the Ministry of Administration and Interior, which must rule upon in accordance with Article 96 of Law no. 302/2004.

Consequently, the solution that had to be delivered *a fortiori* was to reject the claim which called for extension of detention term of the person sought, after the decision which favorably resolved the request for enforcement of the European Arrest Warrant became final.

e) *Interpretation of Article 90 para. 13 of Law no. 302/2004 regarding the issuance of arrest warrant when the person sought was originally arrested as per Article 90 para. 2 of the relevant law.*

According to the provisions of Article 90 para. 13 of Law no. 302/2004, „after drafting the sentence provided for in Article 94 or the decision referred to in para. 2 or 9, as appropriate, the judge shall promptly issue an arrest warrant".

Article 90 para. 2 covers the case where the person sought was detained on the alert sent by Interpol on which the court, referred to according to the aforementioned law text, ordered the arrest for a period of 5 days, within which period it is provided for the prosecutor to forward the European Arrest Warrant accompanied by a translation into the Romanian language. In this case, along with the arrest of the person sought, the judge must immediately issue an arrest warrant covered by provisions under the Criminal Procedure Code as for its content and execution are concerned – Article 90 para. 13.

The question is whether, after ruling upon the enforcement of the European Arrest Warrant, surrender and arrest of the person sought for surrender, it is also required the issuance of another arrest warrant in question.

In the absence of explicit rules, we argue that by the sentence passed, according to Article 90 para. 5 and 6 of Law no. 302/2004, it is sufficient for the judge to maintain arrest for surrender of the person sought without ruling upon its arrest once again – procedural measure taken under the procedure covered by Article 90 para. 2 – without issuing a new arrest warrant. This is because, once the custody measure being taken by decision for a period of five days, when the arrest warrant was issued, it is sufficient to maintain the preventive detention measure for surrender, legal formula ensuing expressly from provisions under Article 90 para. 9 of Law no. 302/2004.

If a new arrest warrant was issued, there may be called down termination *de facto* of preventive detention at its expiry, where the surrender of the person sought – an administrative procedure – can not be achieved within the period set in the arrest warrant, procedure which, under Article 96 of Law no. 302/2004, may be conducted for a period greater than that fixed in the arrest warrant.

Therefore, the solution applicable in the case is maintenance of the previously ruled upon arrest, according to Article 90 para. 2, until the date of effective surrender of the person sought, surrender that may in no case exceed 180 days, as required by Article 90 para. 10 of Law no. 302/2004[20)].

The court is however bound, by decision under which it orders enforcement of the European Arrest Warrant, to rule upon maintenance of detention of the person sought, previously ordered measure by a grounded resolution. This is because the court is undertaking proceedings in the meaning of Article 90 para. 9 of Law no. 302/2004 when ruling upon enforcement of the European Arrest Warrant and surrender of the person sought, the decision being not final and, therefore, subject to judicial control[21)]. The mention in the sentence by which the court ordered the enforcement of the European Arrest Warrant and surrender of the person sought,

[20)] On the same lines, the Court of Appeal Pitesti, Judgment in criminal case no.: 14/F/2010, 29/F/2010, unpublished.

[21)] High Court of Cassation and Justice, Judgment in criminal case, Resolution no. 5731/2007.

noting that it was arrested for a period of 29 days, is contrary to legal provisions mentioned above[22)].

f) *Preventive measures that may be taken against the person sought for postponement of surrender.*

According to the provisions of Article 97 para. 1 of Law no. 302/2004, where the person sought is being prosecuted or sued by the Romanian judicial authorities for an offense different from the one which motivates the European Arrest Warrant, the enforcement Romanian judicial authority may postpone surrender until the end of the trial or until the execution of the sentence, even if enforcement of warrant was ordered.

The question is whether, by the decision that allowed the request to enforce the European Arrest Warrant, it may be taken at the same time the measure of obligation not to leave the city and for what period up against the person sought on whose name was ordered postponement of surrender to foreign judicial authorities.

It could be argued that, in this case, there can not be ruled upon the measure provided in Article 145 under the Criminal Procedure Code, since, from the interpretation of Article 90 para. 11 of Law no. 302/2004, it ensues that this non-custodial preventive measure may be ordered only previously to passing judgment admitting request for enforcement of the European Arrest Warrant, and Article 94 para. 3 of the law does not provide for the possibility of taking such measure in case of postponement of surrender.

Article 90 of Law no. 302/2004, which covers the enforcement of the European Arrest Warrant, refers to taking the measure of obligation not to leave the city in terms of Article 145 Civil Procedure Code, in two paragraphs, paragraph 2 and paragraph 11, respectively.

Para. 2 of Article 90 provides that „if the person was detained under Article 88^3, the judge may order, by a grounded resolution, on the alert sent by the International Criminal Police Organization (Interpol), detention of the person sought or obligation not to leave the city for a period of five days ...".

According to Article 90 para. 11 of the aforementioned law, „should the person sought be released, the court has to rule upon the same the measure of obligation not to leave the city, the provisions of Article 145 of the Criminal Procedure Code being applied correspondingly ...".

Out of the interpretation of Article 90 para. 11, it ensues that the preventive measure of obligation not to leave the city may be taken only until ruling upon

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[22)] The Court of Appeal Pitesti, Judgment in criminal case no. 127/F/2008, unpublished. The Court ordered the arrest of the person sought by resolution for a period of 29 days and settled a deadline for requesting additional information with the view of surrender. Subsequently, by sentence, it ordered enforcement of the European Arrest Warrant, surrender of the person sought and found that it was arrested for a period of 29 days, but without ruling upon maintenance of the preventive detention measure.

surrender of the person sought (along with surrender, the court is bound to order arrest for surrender). Therefore, application of the measure provided for in Article 145 Criminal Procedure Code can not be ordered following court's ruling upon the surrender of the person sought.

However, Article 94 of Law no. 302/2004, under para. 3, when covering the case where surrender of the person sought has been postponed, makes no reference to the possibility of taking the measure provided for in Article 145 of the Criminal Procedure Code, but only to the existence or non-existence of a preventive detention order or sentence of imprisonment, issued by the Romanian judicial authorities and the moment it will be enforced.

Without disputing the merits of the arguments above, we believe however that, in default of a sufficiently clear legal text (Article 94 para. 3 of Law no. 302/2004), by the decision which allows the request filed by foreign judicial authorities to enforce a European Arrest Warrant and rules upon postponing the surrender of the person sought, there can be also taken the measure of obligation not to leave the city, where application of the measure is possible until passing the decision, according to Article 94 of law, the measure ceasing on the date of surrender. The solution is imperative the more so as up against the person sought and subject to surrender postponing ordering – as it undergoes criminal proceedings in Romania – there was not issued a preventive detention order, case in which taking against it the measure provided for in Article 145 under the Criminal Procedure Code is advisable also from the perspective of stringency to enforce the European Arrest Warrant, requirement that the judge should consider in passing judgment referred to in Article 94 para. 1 of Law no. 302/2004[23)].

Without claiming to have exhausted all aspects related to the procedure of issuing and enforcing the European Arrest Warrant, there were highlighted in study hereby some of the issues courts were faced with in settling claims for the issuance, enforcement of the European Arrest Warrant, respectively.

References

Buneci, Petre. Duvac, Constantin. Dobleagă, Ovidiu Florin. (2008). *Ocrotirea prin mijloace penale şi procesual penale a intereselor financiare ale Uniunii Europene,* „Pro Universitaria" Publishing House, Bucharest;

Elsen, Charles. *De la Maastricht la Haga: politica cooperării judiciare şi poliţieneşti*, in ERA Forum no. 8/2007;

Radu, Florin Răzvan. *Legea nr. 302/2004 privind cooperarea judiciară internaţională în materie penală – Un pas important spre integrarea României în spaţiul de libertate, securitate şi de justiţie al Uniunii Europene şi un răspuns ferm la noile provocări ale criminalităţii internaţionale*, Dr., no. 2, 2005;

[23)] High Court of Cassation and Justice, Judgment in criminal case no. 1050/2009, Judgment in criminal case no. 2904/2007, Judgment in criminal case no. 3611/2007.

Radu, Florin Răzvan. *De la extrădare la mandatul european de arestare. O privire istorică şi juridică*, Dr., no. 2, 2006;

Constitutional Court, Resolutions no. 400/2007 and no. 419/2007;

High Court of Cassation and Justice (Joint Sections), Resolution no. 39 of September 22nd, 2008, published in the Official Journal no. 161 of March 16th, 2009;

High Court of Cassation and Justice, Judgments in criminal cases no.: 1050/2009, 4214/2008, 5731/2007, 2904/2007, 3611/2007

High Court of Cassation and Justice, Criminal Division, Resolution no. 1054 of June 2nd, 2008.

Court of Appeal Ploieşti, Judgment in criminal case no. 139/F/2008, unpublished;

Court of Appeal Piteşti, Resolutions no.: 29/F/2010, 14/F/2010, 261/2009, 125/F/28.11.2008, 127/F/2008, 118/F/19.11.2008.