

LEGAL NATURE OF THE DEPRIVATION MEASURE ORDERED DURING THE PROCEDURE FOR THE EXECUTION OF THE EUROPEAN ARREST WARRANT¹

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Abstract

In the framework of the procedure for the execution of the European arrest warrant, as a form of international judicial cooperation in criminal matters, it is necessary to take preventive measures of deprivation of liberty against the person requested by the issuing State. In order not to infringe the right to liberty and security of the requested person, deprivation of liberty through these measures must be carried out in strict compliance with the legal requirements set out in both international documents and domestic legislation of the Member States of the European Union. Compliance with the law can be ensured, however, only by developing clear, predictable legal rules that, as far as possible, do not give rise to different interpretations in judicial practice. From this perspective, starting from the finding of the non-unitary interpretation and application of some provisions of the Romanian special law on international judicial cooperation in criminal matters (Law no. 302/2004, republished), this study addresses the issue of the legal nature of custodial measures ordered prior to the resolution of the request for the execution of a European arrest warrant, respectively prior to the surrender based on a European arrest warrant, ending with a concrete proposal of law ferenda on completing these provisions in order to ensure a unification of judicial practice in the field.

Keywords: international judicial cooperation in criminal matters, European arrest warrant, the right to liberty and security of person, custodial measures, unification of judicial practice.

JEL Classification: K14, K33

1. Introduction

Realizing the distinction between the notions of "international criminal law" (as a branch of international law⁴) and "international criminal law" (in the sense of international judicial cooperation in criminal matters), we note in the more recent legal literature⁵ a tendency to expand the definition of international criminal law, by including some aspects of international criminal law, as follows: "the set of norms or customs of public international law that govern the cooperation between states in criminal matters or establish the obligation of the states parties to criminalize a certain criminal conduct contrary to the fundamental values accepted on universal plan or to hand over persons accused of crimes against humanity, war crimes or genocide to international criminal tribunals".

Moreover, since the XVI International Congress of Criminal Law (September 5-11, 1999, Budapest), the need for a multidisciplinary perspective regarding the creation and evolution of international systems in the fight against criminality has been discussed, especially in what concerns the interaction between international organization theory, on the one hand, and criminal and international law, on the other⁶.

In this context, the present study deals with some aspects regarding the duration of the deprivation of liberty that can be ordered as preventive arrest in the framework of the procedure for the execution of the European arrest warrant, taking into account the European standards for the

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⁴ In the general sense of international norms that criminalize the so-called international crimes (war crimes, crimes against humanity, genocide) and that seek to bring criminal responsibility to those who commit such acts – Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, p. 3.

⁵ Florin-Răzvan Radu, *Drept european și internațional penal*, Ed. C.H. Beck, Bucharest, 2013, pp. 169-170.

⁶ *Resoluciones de los Congresos de la Asociación Internacional de Derecho Penal (1926-2009)*, „Nouvelles Études Pénales” N° 23/2012, Edición a cargo de José Luis de la Cuesta, Isidoro Blanco Cordero, Imprimé en France, p. 198.

protection of the fundamental right to freedom and the safety of the person, in view of the different legal nature of the preventive measures that may be taken during this procedure.

Thus, the first section is dedicated to some general considerations regarding the fundamental right to freedom and security, as enshrined in documents developed at the international and European level, as well as in our domestic legislation.

In the second section, the exceptional nature of preventive custodial measures that can legally limit the right to freedom and safety during criminal proceedings is highlighted.

The third section addresses the institution of the European arrest warrant, as a form of international judicial cooperation in criminal matters, under the conditions of the transition from the principles of mutual recognition and trust to the principle of enhanced cooperation.

In the fourth section, starting from the non-unitary interpretation and application of some provisions of Law no. 302/2004 republished in 2019⁷, issue discussed at the Meeting of the Presidents of the Criminal Sections of the High Court of Cassation and Justice and Courts of Appeal (December 18, 2020, Bucharest)⁸, the opinion agreed at this meeting is presented, considering the different legal nature of preventive measures that can be taken prior to the resolution of the application for the execution of the European arrest warrant, respectively prior to surrender based on a European arrest warrant.

The conclusions section, underlining the importance of the unification of judicial practice in the field, contains a proposal *de lege ferenda*, in the sense of introducing some provisions in the contents of Law no. 302/2004 which expressly provides that, during the arrest for the purpose of surrender based on a European arrest warrant, the duration of the provisional arrest ordered prior to the resolution of the request for the execution of that warrant is not included.

2. The fundamental right to individual freedom and security of the person

The right to freedom and security of the person is one of the fundamental human rights, it is part of the category of civil rights and is enshrined both internationally (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights), European (Charter of Rights European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms), as well as in the internal legislation of the states, including our legislation (the Constitution, the Code of Criminal Procedure).

As it has been appreciated since its establishment, the essential purpose of this right aims to protect natural persons against possible arbitrary actions of state authorities, in the sense that deprivation of liberty is an exceptional measure, which can only be taken in well-founded cases and according to legal procedures.

At *the international level*, the first reference document in this matter is the Universal Declaration of Human Rights⁹, an international soft-law act, adopted on December 10, 1948; within it, at art. 3 states that "every human being has the right to life, liberty and security of person".

Later, in 1966, the right to freedom and safety of the person was regulated much more widely and in detail in the content of art. 9 of the International Covenant on Civil and Political Rights¹⁰; this article contains 5 paragraphs in which are established the rights that must be respected in the event that a measure depriving of liberty is taken against a person. From the first paragraph, the following is specified: "every person has the right to freedom and security of his person. No one may be arbitrarily arrested or detained. No one can be deprived of his liberty except for legal

⁷ Law no. 302/2004 regarding international judicial cooperation in criminal matters, republished in the Official Gazette of Romania no. 411 of May 27, 2019.

⁸ Minutes of the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the courts of appeal (December 18, 2020, Bucharest), p. 97, document available online at <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf>, accessed on 10.05.2022.

⁹ The Universal Declaration of Human Rights, document available online at https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/rum.pdf, accessed on 27.05.2022.

¹⁰ International Covenant on Civil and Political Rights, document available online at <https://legislatie.just.ro/Public/DetaliuDocumentAfis/82590>, accessed on 27.05.2022.

reasons and in accordance with the procedure provided by law"; further, the rights of the person deprived of liberty are stated: the right to be informed to the arrested person, from the moment of his arrest, what are the reasons for the arrest and what accusation is brought against him, to be brought before a judge, not to exceed the reasonable duration of the arrest, expediency in judging the case, ensuring the arrestee's participation in all court sessions, the right of the arrested person to appeal against the measure, as well as the right to obtain reparations in case he was victim of illegal detention or arrest. Respect for all these rights of the person temporarily deprived of his freedom must be ensured by the state authorities. Practically, the legal consecration of the right to freedom and security imposes on the states a series of positive obligations, aimed at ensuring respect for the freedom and security of the human being, as well as transparency and fairness in the process of administration of justice.

On a *European level*, the Charter of Fundamental Rights of the European Union¹¹ provides, in Title II - Freedoms, in art. 6, in a general and very succinct way, that "everyone has the right to liberty and security".

The Convention for the Protection of Human Rights and Fundamental Freedoms¹² regulates, at the European level, the content of the right to freedom and security of the person. Within this treaty, the right to freedom and security of the human being is enshrined in detail in art. 5; the provisions of this article, whose content we will refer to below, have given rise to abundant jurisprudence¹³.

All democratic societies must ensure respect for the right to liberty and security. The right to freedom refers to the freedom of movement of the human being, to move or not to a certain place, etc. The right to security, in the sense of the Convention, refers to the protection of natural persons against "arbitrary interference by public authority with the right to freedom"¹⁴.

The notion of freedom is not defined in the Convention, but deprivation of freedom means taking the measure of keeping the person in a detention facility, even if, within that facility, the possibility of movement is quite large. At the same time, if the person is not confined in a certain perimeter, it is not considered that he is deprived of his freedom.

It should also be mentioned that the provisions of art. 5 of the Convention applies only to situations of deprivation of liberty. The restrictive measures of freedom fall under Protocol no. 4 of September 16, 1963, recognizing certain rights and freedoms, other than those already included in the Convention and in the first additional Protocol to the Convention¹⁵. According to the practice of the Commission, and then of the European Court of Human Rights, the difference between custodial measures and restrictive measures is quantitative, and the practice is rich and diverse, not always being easy to identify objective criteria for distinguishing between the two categories of measures.

Regarding the actual content of art. 5 of the Convention, it includes 5 paragraphs in which both the situations in which the deprivation of liberty is legitimate and the rights of persons legally deprived of their liberty are described¹⁶.

¹¹ The Charter of Fundamental Rights of the European Union, document available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=DE>, accessed on 27.05.2022.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, document available online at <http://ier.gov.ro/wp-content/uploads/2018/11/Convenția-pentru-apărarea-drepturilor-omului-și-a-libertăților-fundamentale.pdf>, accessed on 27.05.2022.

¹³ Radu Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații*, vol. I, Ed. C.H. Beck, Bucharest, 2007, p. 186.

¹⁴ Report of the European Commission of Human Rights of 17 December 1976, p. 173, *apud* Radu Chiriță, *op. cit.*, p. 186.

¹⁵ According to art. 2 of Protocol no. 4 of September 16, 1963: „Article 2 – Freedom of movement. 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.” (https://www.echr.coe.int/Documents/Library_Collection_P4postP11_ETS046E_ENG.pdf, accessed on 29.05.2022).

¹⁶ Article 5 of the European Convention on Human Rights has the following content: „Article 5 – Right to liberty and security. 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a. the lawful detention of a person after conviction by a competent court; b. the

In paragraph 1 of art. 5 of the Convention states that "everyone has the right to liberty and security and no person shall be deprived of his liberty". Next, the situations in which the deprivation of liberty of an individual is legal are presented. These situations are exceptions, are expressly mentioned and are to be strictly interpreted. As it has been emphasized in the specialized literature¹⁷, "in order not to be arbitrary, [...] any deprivation of liberty must be legal from a substantive point of view (provided by domestic law) and from a procedural point of view (to be applied in accordance with the internal procedure)". In order for the deprivation of a person's liberty to be legal, it is necessary that the measure be provided for by law and fall within one of the 6 situations provided for by the Convention.

The first of the exceptional situations provided for by the Convention (art. 5 paragraph 1 letters a-f) refers to: the legal detention of a person who has been tried by a competent court and convicted by a final judgment (letter a); any possession exceeding these conditions is illegal. For example, in the Case *Ogică against Romania*, the Court judged that the 3-day delay in the release of the applicant for administrative reasons was illegal¹⁸ and obliged the Romanian state to pay 8000 euros as moral damages to the applicant.

The second situation, provided for in art. 5 paragraph 1 letter b), refers to the deprivation of liberty for non-execution of the provisions of a decision pronounced according to the law or for non-execution of a legal obligation; for this measure to be legal, it is necessary that the decision has been communicated to the person concerned.

The exception from letter c) concerns the situation of detention and preventive arrest. This situation is accompanied by the procedural guarantees provided by paragraph 2 of art. 5 (the right to be informed about the reasons for detention or arrest), paragraph 3 (the right to be brought before a magistrate), paragraph 4 (the right to appeal), respectively paragraph 5 (the right to compensation in case of arrest or illegal detention).

The other three exceptional situations refer to: the detention of a minor in order to apply an educational measure to him or to be brought before the court (letter d), the detention of a person suffering from a contagious disease to be treated and not spread the disease, or of a mentally deranged person, alcoholic, drug addict or a vagabond (letter e) and the detention of foreigners in order to carry out the procedure of expulsion or extradition or to prevent their illegal access to the territory of a state.

In all situations of deprivation of liberty, the person in question benefits from a series of rights and guarantees that are expressly provided for in paragraphs 2 - 5 of art. 5 of the Convention, also indicated by us, in this article. These guarantees are also applicable to the persons against whom the European arrest warrant is executed, of course together with the other specific legal provisions of this criminal procedural institution.

Regarding the regulations of the *internal law* of Romania, we must start by mentioning the constitutional provisions. Thus, the Romanian Constitution provides, in the content of art. 23

lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

¹⁷ Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, Ed. Hamangiu, Bucharest, 2019, p. 139.

¹⁸ ECtHR, Case *Ogică against Romania* (Application no. 24708/03), document available online at <http://ier.gov.ro/wp-content/uploads/cedo/Cauza-Ogica-impotriva-Romaniei.pdf>, accessed at dated 29.05.2022.

(Individual freedom), at para. (1), the fact that "*individual freedom and security of the person are inviolable*"¹⁹. Art. 23 of the Constitution includes a total of 13 paragraphs in which fundamental aspects are regulated regarding: the fact that search, detention and arrest can only be done in accordance with the law - para. (2), the duration of detention which can be a maximum of 24 hours - para. (3), the fact that the preventive arrest measure can only be ordered by a judge and only during a criminal trial - para. (4), duration of preventive arrest - para. (5) and (6), the possibility of contesting the preventive arrest measure - para. (7), making known the reasons for the arrest and/or accusation as soon as possible - para. (8), release immediately if the reasons that led to the taking of the measure have disappeared - para. (9), the possibility of being released during the criminal process - para. (10), the presumption of innocence until the final conviction - para. (11), the legal character of the punishment - para. (12), as well as the fact that the measure of deprivation of liberty can only be taken against a person as a criminal sanction - para. (13).

Finally, the conditions and reasons for which the measure of deprivation of liberty or detention can be legally ordered are expressly provided and detailed in the contents of the Romanian Criminal Code and the Romanian Code of Criminal Procedure. As for the right to freedom and security, it is expressly regulated in the content of art. 9 of the Criminal Procedure Code²⁰. According to this legal provision [art. 9 para. (1) Criminal Procedure Code], the right of every person to liberty and security is guaranteed throughout the criminal process. Deprivative and restrictive measures of freedom have an exceptional character and are applied according to the law. Any arrested person must be informed as soon as possible about the accusation brought against him, he can appeal against his arrest, he must be released immediately if the reasons that led to the taking of the said measure no longer exist, and he can obtain compensation if the custodial measure was unlawfully imposed on her.

It can be observed, both from the content of the constitutional norms and from the content of the criminal procedural provisions, that the Romanian legislator has properly included in the domestic legislation the provisions of the international and European treaties in the matter of the right to safety and freedom.

3. Preventive measures – as legal exceptions to the principle of guaranteeing the right to freedom and safety in the criminal process

In the current Romanian Code of Criminal Procedure, a series of fundamental principles are enshrined (in art. 2 - art. 12) under the name of "principles of the application of criminal procedural law", as rules that are the basis of the entire criminal process²¹, among which also includes the principle of guaranteeing the right to freedom and security (art. 9).

Analyzing the way in which it is regulated, in art. 9 Criminal Procedure Code, the principle of guaranteeing the right to freedom and safety, it is noted that, after the statement, of a general nature, in para. (1), of the right of any person to freedom and safety in the criminal process, there follows a list of a series of guarantees that give content to this right²²; the first of these guarantees is provided in para. (2) and refers to the exceptional character of the measures by which the person's freedom can be limited: "any privative or restrictive measure of freedom is ordered exceptionally

¹⁹ The Constitution of Romania, adopted in 1991, republished in the Official Gazette of Romania no. 767 of October 31, 2003.

²⁰ Art. 9 (Right to liberty and security): "(1) During the criminal process, the right of any person to freedom and safety is guaranteed. (2) Any privative or restrictive measure of freedom is ordered exceptionally and only in the cases and under the conditions provided by law. (3) Any arrested person has the right to be informed as soon as possible and in a language he understands about the reasons for his arrest and has the right to file an appeal against the disposition of the measure. (4) When it is found that a measure depriving or restricting freedom was ordered illegally, the competent judicial bodies have the obligation to order the revocation of the measure and, as the case may be, the release of the detained or arrested person. (5) Any person against whom a custodial measure was ordered illegally, during the criminal process, has the right to compensation for the damage suffered, under the conditions provided by law." (The Criminal Procedure Code, adopted by Law no. 135/2010, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions).

²¹ Anca-Lelia Lorincz, *Drept procesual penal*, vol. I, Ed. Universul Juridic, Bucharest, 2015, pp. 30-31.

²² Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală*, Ed. Universul Juridic, Bucharest, 2014, pp. 152-153.

and only in the cases and under the conditions provided by law".

Moreover, this first guarantee represents a transposition, in the domestic legislation, of the conventional rule contained in art. 5 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "no one can be deprived of his liberty, except in the following cases and according to legal means", among these cases there are also those specific to the criminal process [i.e. , those from art. 5 paragraph 1 letter a) (detention on the basis of a conviction), letter c) (detention and preventive arrest) and letter f) (detention with a view to extradition)].

As I mentioned before, for the restriction of the principle of guaranteeing the right to freedom and security to be lawful, in other words for the preventive measure limiting this principle to be considered a legal exception, that measure must be ordered in compliance with all provisions from internal legislation (both substantive and procedural law), legislation which, in turn, must comply with the European Convention²³.

In this sense, the European Court of Human Rights has shown that the notion on which the expression "according to legal means" is based from the content of art. 5 paragraph 1 of the Convention is that of fair and adequate procedure, which implies that preventive measures must be taken and applied by a competent authority and must not be arbitrary²⁴.

Criminal procedural legislation in Romania regulates the possibility of taking, during criminal proceedings, therefore as procedural measures, two categories of preventive measures: custodial measures (detention, preventive arrest, house arrest) and restrictive measures of freedom (control judicial and judicial control on bail), the purpose of these measures being the prevention or removal of situations that would prevent the conduct of judicial activities.

Regarding the exceptional nature of procedural measures, we find that the jurisprudence of the European Court of Human Rights refers to this condition only with regard to custodial measures. In the Case *Wemhoff v. Germany* (Judgment of June 27, 1968)²⁵, the Court considered that "preventive detention must have an exceptional character, the state of freedom being the normal state - and it must not be prolonged beyond reasonable limits - regardless of the fact that will be imputed or not from the punishment".

This interpretation of the Strasbourg court, by relating the exceptional character of preventive procedural measures only to measures depriving of liberty, is explained by the fact that the conventional text itself refers only to "deprivation of liberty" (art. 5 paragraph 1 of the Convention for the defense of human rights and fundamental freedoms), not to the restriction of freedom. Under this aspect, the Romanian legislator ensured, through the provisions of the current Code of Criminal Procedure (art. 9), a level of protection higher than the European standard.

4. The European arrest warrant, under the conditions of "consolidation" of international judicial cooperation in criminal matters at the level of the member states of the European Union

Within the framework of the Tampere European Council (Finland, October 15-16, 1999), the principle of mutual recognition²⁶ was established as the "cornerstone" of judicial cooperation between the member states of the European Union²⁷.

²³ Mihail Udroi, Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, Ed. C.H. Beck, Bucharest, 2008, pp. 393-394.

²⁴ ECtHR., Case of Winterwerp against the Netherlands (Judgment of 24 October 1979, paragraph 45), document available online at <https://jurisprudencedo.com/Winterwerp-contr-Olanda-Persona-incapabila-Dreptul-la-liberate-si-siguranta.html>, accessed on 01.06.2022.

²⁵ The document is available online at <https://hudoc.echr.coe.int/eng?i=001-57595>, accessed on 01.06.2022.

²⁶ The principle of mutual recognition requires that what is a product, a service or a judicial decision of a state legal order is also recognized in the other member states of the European Union.

²⁷ *Îndrumar pentru aplicarea de către judecători și procurori a principalelor instrumente juridice comunitare privind cooperarea judiciară în materie penală [Guide for the application by judges and prosecutors of the main EU legal instruments on judicial cooperation in criminal matters]*, Ministry of Justice, Directorate of International Law and Treaties, Information no. 71267 of August 1, 2006, p. 5.

Thus, from the desire to create a common judicial space of the European Union²⁸, in the wider context of the concept of "space of freedom, security and justice", judicial cooperation in criminal matters (in the sense of judicial cooperation between the member states of the European Union) was initially based on the principles of mutual recognition and trust.

The most obvious result of the application of the principle of mutual recognition was the regulation of the European arrest warrant, a true revolution in criminal cooperation between member states²⁹.

In fact, the European arrest warrant was designed as a simplified form of international judicial cooperation in criminal matters, which replaced, based on the Framework Decision no. 584/JAI of June 13, 2002³⁰, the classic procedure of extradition between the member states of the European Union, with the exception of a few states that have expressed reservations, in the sense of declaring that they will continue to resolve, according to the rules of extradition, the requests related to the facts committed before a certain date indicated by them (for example, for acts committed before the entry into force of the framework decision, as was the case in France, Italy and Austria).

As defined in art. 84 of Law no. 302/2004 republished in 2019, the European arrest warrant is a judicial decision by which a competent judicial authority of a member state of the European Union requests the arrest and surrender by another member state of a person, for the purpose of criminal prosecution, trial or execution of a sentence or a custodial security measure.

So, of all forms of international judicial cooperation in criminal matters [extradition, surrender on the basis of a European arrest warrant, transfer of proceedings in criminal matters, recognition and execution of judgments, transfer of convicted persons, judicial assistance in criminal matters, other forms of cooperation - art. 1 paragraph (1) from Law no. 302/2004 republished in 2019], the European arrest warrant is the most obvious manifestation of the principle of mutual recognition.

After 2017, the concept of "mutual recognition" was replaced by that of "enhanced cooperation", a concept in application of which the European Prosecutor's Office was established, by the EU Regulation. no. 1939/2017³¹.

Conceived as a consolidated instrument of judicial cooperation in criminal matters, the European Public Prosecutor's Office is an indivisible authority of the European Union, with legal personality, which carries out criminal prosecution acts and exercises criminal action before the competent courts of the Member States, with regard to crimes against the financial interests of the European Union, as provided for in the E.U. Directive no. 1371/2017³².

Moreover, by Law no. 6/2021 regarding the establishment of measures for the implementation of the EU Regulation no. 1939/2017³³, it was provided (in art. 4) that "whenever a normative act refers to the prosecutor or the criminal prosecution body, the reference is considered to be made to the European delegated prosecutor, as well as, as the case may be, to the European public prosecutor, if this ensures the fulfillment of their powers under the EPPO Regulation³⁴". Also, as it appears from the content of art. 14 of Law no. 6/2021, the European Public Prosecutor's Office may propose to the competent judge, according to the provisions of the special law regulating international judicial cooperation in criminal matters (Law no. 302/2004), to issue a

²⁸ The common judicial area was designed to ensure the possibility for European citizens to turn to justice in any of the member states as in their own country; at the same time, the aim was to remove the risk of criminals exploiting the differences between the legal systems of the member states, by regulating (within this common judicial space) the recognition and enforcement abroad of court decisions without the formalities provided for in the classic conventions on international legal assistance – *Ibidem*.

²⁹ George Antoniu, *Legea penală română în condițiile postaderării*, „Revista de Drept Penal” no. 2/2008, p. 15.

³⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, published in the Official Journal of the EU, series L, no. 190 of July 18, 2003, with subsequent amendments and additions.

³¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation with regard to the establishment of the European Public Prosecutor's Office (EPPO), published in the Official Journal of the EU, series L, no. 283 of October 31, 2017.

³² Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud against the financial interests of the Union by means of criminal law, published in the Official Journal of the EU, series L, no. 198 of July 28, 2017.

³³ Law no. 6/2021, published in the Official Gazette of Romania no. 167 of February 18, 2021.

³⁴ European Public Prosecutor's Office.

European arrest warrant.

5. The different legal nature of preventive custodial measures ordered prior to surrender on the basis of a European arrest warrant

In our legislation, the procedure for executing a European arrest warrant issued by another member state of the European Union is regulated within the provisions of art. 97 - art. 116 of Law no. 302/2004 republished in 2019; carrying out this procedure also involves taking preventive or restrictive measures of freedom.

Thus, in a brief presentation of the procedure for the execution of the European arrest warrant, it should be mentioned that, currently, the regulation distinguishes between the hypothesis of reporting in the Schengen Information System and the hypothesis of receiving a European arrest warrant:

- in case of a notification in the Schengen Information System (which is not accompanied by a European arrest warrant), the provisions of art. 102 of Law no. 302/2004 republished in 2019, in which case the prosecutor from the prosecutor's office attached to the court of appeal in whose jurisdiction the requested person was caught notifies the court of appeal to assess whether to take the measure of provisional arrest with a view to surrender. The judge of the competent court of appeal can accept the prosecutor's proposal, ordering the provisional arrest for a maximum of 15 days, or reject the proposal, ordering, if necessary, the release of the detained person, as well as the application, for a duration of maximum 30 days, of one of the non-custodial preventive measures provided for in the Criminal Procedure Code (respectively, judicial review or judicial review on bail³⁵).

- in case of receiving a European arrest warrant, the provisions of art. 100, art. 101, art. 103 and art. 104 of Law no. 302/2004 republished in 2019, in which case the prosecutor, after completing the preliminary procedures, notifies the competent court of appeal with the proposal to take the measure of arresting the requested person. Based on the requested person's option, the judge can issue a sentence on both the arrest and the surrender (if the person in question agrees to the surrender) or order the arrest with a view to surrender (if the person in question does not consent to the surrender) by means of a reasoned conclusion. In both situations, the initial duration of the arrest cannot exceed 30 days, and the total duration, until surrender to the requesting state (issuer of the European arrest warrant), cannot exceed 180 days. The court periodically checks, at an interval of no more than 30 days, whether it is necessary to maintain the arrest with a view to surrender and, in the case of the release of the requested person, orders the measure of judicial control, judicial control on bail or house arrest according to the provisions of the Code of criminal procedure, following that, subsequently, in the assumption of the admission of the request for execution, to order by the surrender decision and the arrest with a view to the surrender to the issuing judicial authority.

The amendments and additions to Law no. 302/2004 (which led to its 2nd republication, in 2019) generated different interpretations of the Romanian courts regarding the legal nature of the deprivation of liberty ordered prior to surrender based on a European arrest warrant, problem discussed at the Meeting of the Presidents of the Criminal Sections of the High Court of Cassation and Justice and Courts of Appeal (December 18, 2020, Bucharest).

Specifically, as recorded in the Minutes of the meeting³⁶, in a first orientation, the courts appreciate that, after taking the measure of provisional arrest with a view to surrender [according to art. 102 para. (5) from Law no. 302/2004 republished in 2019] and the receipt of the European arrest warrant, if the request for the execution of the warrant is accepted, the measure of arrest already ordered will be maintained, without taking the measure of arrest with a view to surrender, as a measure distinct from provisional arrest. Also in this interpretation, a different practice is found in

³⁵ We appreciate that the measure of house arrest can also be ordered, although, by legal nature, this is a measure depriving of liberty.

³⁶ Document available online at <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf>, accessed on 06/05/2022.

relation to the moment from which the duration of the arrest for the purpose of surrender is calculated: either the date of the ruling, or the date of expiry of the duration of the provisional arrest.

According to the second guideline, there are courts that, after taking the measure of provisional arrest with a view to surrender [art. 102 para. (5) from Law no. 302/2004 republished in 2019] and the receipt of the European arrest warrant, if they accept the request for execution, order the arrest with a view to surrender for a duration of up to 30 days, as a procedural measure distinct from the provisional arrest with a view to surrender.

The opinion outlined at the meeting (which was, by the way, also the opinion of the National Institute of Magistracy, agreed by the participants since the stage of prior consultations) is in the sense of the second interpretation, considering that, if it is introduced a signal in the Schengen Information System, the European arrest warrant being subsequently communicated, distinct preventive measures are applicable: on the one hand, the provisional measures provided for in art. 102 para. (5) from Law no. 302/2004 republished in 2019, and on the other hand, the preventive measures provided for in art. 104 para. (8) and (11) of Law no. 302/2004 republished in 2019.

Therefore, provisional arrest with a view to surrender (arranged after receiving a signal in the Schengen Information System) is a distinct measure, provided for in art. 102 para. (5) letter a) from Law no. 302/2004 republished in 2019, which can be taken for a maximum of 15 days, and cannot be extended or maintained beyond this time limit. After receiving the European arrest warrant and presenting it to the court, taking the measure of arrest in order to surrender (which is no longer characterized as "provisional") the requested person is regulated in art. 104 para. (8) and (11) of Law no. 302/2004 republished in 2019, the initial duration of deprivation of liberty not exceeding 30 days, with the possibility of maintaining it for a total duration of no more than 180 days.

Therefore, assuming the application for the execution of the European arrest warrant is accepted, taking the measure of arresting the requested person in order to hand him over to the issuing judicial authority becomes mandatory based on an express legal provision, namely the one contained in art. 104 para. (11) from Law no. 302/2004 republished in 2019.

Beyond the theoretical aspect of the interpretation of the provisions regarding the taking of preventive measures within the procedure for the execution of the European arrest warrant, this issue has consequences regarding the way of calculating the duration of the deprivation of liberty of the requested person, in the sense of deducting or not the period of arrest ordered prior to the settlement of the application for the execution of the warrant from the period of the arrest ordered for surrender, in case this application is accepted.

6. Conclusions

Related to the protection standards of fundamental human rights, a distinction³⁷ was made between the internal criminal process, on the one hand, and mutual legal assistance procedures, on the other hand, in the sense that, for example, the procedural guarantees of deprivation of freedom from detention and arrest in criminal proceedings (domestic proceedings) in the requesting state does not apply to detention and arrest for extradition from the requested state.

However, respect for fundamental human rights (in this case, the right to liberty and security) is an obligation of all states, not only domestically, but also in the context of international judicial cooperation. The same approach is required with regard to international judicial cooperation between the member states of the European Union; even if the principle of mutual recognition and its implementation in the specific forms of cooperation in criminal matters at the level of the member states (such as the European arrest warrant) establish concrete cooperation obligations, they do not exempt the states from the duty to respect human rights³⁸. For this reason, the domestic legislation of the requested state may assume a higher level of protection compared to international

³⁷ Martin Böse, *International Law and Treaty Obligations, Mutual Legal Assistance and EU Instruments*, in Darryl K. Brown, Jenia I. Turner, Bettina Weisser (editors), *The Oxford Handbook of Criminal Process*, Oxford University Press, 2019, p. 657.

³⁸ *Ibidem*, p. 658.

standards, the condition being, however, that this level is ensured by an express, clear regulation that does not lead to different interpretations in practice.

Noting the existence of such different interpretations regarding the provisions of Law no. 302/2004, and taking into account the opinion agreed at the Meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the courts of appeal in December 2020, in the absence of a decision of the supreme court (taken following the judgment of an appeal in the interest of the law or a referrals in order to issue a preliminary decision), to ensure a unified judicial practice, we propose to complete para. (10) of art. 104 of Law no. 302/2004 republished in 2019, by introducing the third thesis with the following content: "*The duration of the provisional arrest ordered according to art. 102 para. (5) is not deducted from the duration of the arrest for surrender.*"

Bibliography

1. Anca-Lelia Lorincz, *Drept procesual penal*, vol. I, Ed. Universul Juridic, Bucharest, 2015.
2. Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008.
3. Convention for the Protection of Human Rights and Fundamental Freedoms, document available online at <http://ier.gov.ro/wp-content/uploads/2018/11/Convenția-pentru-apărarea-drepturilor-omului-și-a-libertăților-fundamentale.pdf>, accessed on 27.05.2022.
4. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, published in the Official Journal of the EU, series L, no. 190 of July 18, 2003, with subsequent amendments and additions.
5. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation with regard to the establishment of the European Public Prosecutor's Office (EPPO), published in the Official Journal of the EU, series L, no. 283 of October 31, 2017.
6. Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală*, Ed. Universul Juridic, Bucharest, 2014.
7. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud against the financial interests of the Union by means of criminal law, published in the Official Journal of the EU, series L, no. 198 of July 28, 2017.
8. ECtHR, Case *Ogică against Romania* (Application no. 24708/03), document available online at <http://ier.gov.ro/wp-content/uploads/cedo/Cauza-Ogica-impotriva-Romaniei.pdf>, accessed at dated 29.05.2022.
9. ECtHR., *Case of Winterwerp against the Netherlands* (Judgment of 24 October 1979, paragraph 45), document available online at <https://jurisprudencedo.com/Winterwerp-contra-Olanda-Persona-incapabila-Dreptul-la-liberate-si-siguranta.html>, accessed on 01. 06.2022.
10. Florin-Răzvan Radu, *Drept european și internațional penal*, Ed. C.H. Beck, Bucharest, 2013.
11. George Antoniu, *Legea penală română în condițiile postaderării*, „Revista de Drept Penal” no. 2/2008.
12. *Îndrumar pentru aplicarea judiciară în materie penală [Guide for the application by judges and prosecutors of the main EU legal instruments on judicial cooperation in criminal matters]*, Ministry of Justice, Directorate of International Law and Treaties, Information no. 71267 of August 1, 2006.
13. International Covenant on Civil and Political Rights, document available online at <https://legislatie.just.ro/Public/DetaliiDocument Afis/82590>, accessed on 27.05.2022.
14. Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, Ed. Hamangiu, Bucharest, 2019.
15. Law no. 302/2004 regarding international judicial cooperation in criminal matters, republished in the Official Gazette of Romania no. 411 of May 27, 2019.
16. Martin Böse, *International Law and Treaty Obligations, Mutual Legal Assistance and EU Instruments*, in Darryl K. Brown, Jenia I. Turner, Bettina Weisser (editors), *The Oxford Handbook of Criminal Process*, Oxford University Press, 2019.
17. Mihail Udriou, Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, Ed. C.H. Beck, Bucharest, 2008.
18. Radu Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații*, vol. I, Ed. C.H. Beck, Bucharest, 2007.
19. *Resoluciones de los Congresos de la Asociación Internacional de Derecho Penal (1926-2009)*, „Nouvelles Études Pénales” N° 23/2012, Edición a cargo de José Luis de la Cuesta, Isidoro Blanco Cordero, Imprimé en France.
20. The Charter of Fundamental Rights of the European Union, document available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=DE>, accessed on 27.05.2022.
21. The Constitution of Romania, adopted in 1991, republished in the Official Gazette of Romania no. 767 of

October 31, 2003.

22. The Universal Declaration of Human Rights, document available online at https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/rum.pdf, accessed on 27.05.2022.