

**ISSUES RELATED TO THE TRANSPOSITION
INTO THE ROMANIAN LAW
OF THE FRAMEWORK DECISION 2002/584/JHA ON THE EUROPEAN
ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN
MEMBER STATES**

MARIA DIANA IONESCU
Faculty of Law, University Babeş-Bolyai Cluj-Napoca, Romania

GHEORGHITA MATEUT

Key words: judicial cooperation, criminal matters, mutual recognition, European arrest warrant.

In 1999 the European Council decided that the principle of mutual recognition should become the cornerstone for judicial cooperation in criminal matters. A first response was given with the 2000 EU Convention on mutual assistance in criminal matters. In the 2005 Hague program, the Council reaffirmed the importance of full implementation of the principle of mutual recognition in all stages of criminal procedure.

As a reflection, in the field of the third EU pillar, at 13 June 2002, the Framework Decision on the EAW and the surrender procedures between Member States was adopted. This Framework Decision has been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the third EU pillar and based on the principle of mutual recognition.

Although the principle of mutual recognition was well known in the context of the first pillar, it was a new concept in relation to criminal matters. In its Communication of 26 July 2000 on mutual recognition of final decisions in criminal matters the Commission stated the following:

„Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are acceptable as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied”.

Mutual recognition in its purest manifestation implies that it should be possible to execute a judicial decision of a member state in any other member state. The fact that the decision could not have been issued by the executing member state in a similar domestic case may not be a reason not to execute it.

Although was sustained by the most important organisms of the EU, the principle of mutual recognition within the EU third pillar had raised serious objections from some member states. We can give the example of Germany and Italy.

According to the decision of Federal Constitutional Court from 18 July 2005 the cooperation should be based on a limited mutual recognition within the EU third pillar. And the Italian law which transposes the EAW framework decision appears to be one which negates the framework decision, rather than implementing it, because it offers to the Italian executing state new ground of refusal and impose to the Italian courts to control the merits of the case and also to effectively judge the foreign state and its constitutional system.

In the Romanian system, the implementation of the EAW framework decision was realized by the introducing into the Law no. 302/2004 of a third title which dispositions had entered into force in the first of January 2007, in the moment of the integration of Romania in the EU.

The implementation of the EAW Framework decision caused constitutional problems in several member states mainly because their constitutions prohibited extraditing their own nationals as required in the Framework decision. Based on this rule, the Constitutional Tribunal of Poland declared on the 27 April 2005 that the implementing law is unconstitutional.

The article 19 of the Constitution was modified by the Law no. 419/2003 and, in its new form, disposes that the Romanian citizens can be extradited from Romania only if the following conditions are observed: 1) the application of an international convention in which Romania is a part; 2) on the basis of reciprocity; 3) in the conditions of the law.

The EAW framework decision is not a convention. But this framework decision is rooted in the TUE (article 31 and 34) which is an international convention. So, the law implementing the EAW framework decision is based on an international convention and, in conclusion, the Romanian system does not have problems with the constitutionality of the procedure of surrender the Romanian citizens to another member state.

The principle of mutual recognition was interpreted by the Supreme Court of Justice and by the Constitutional Court. The Supreme Court declared in the decision no. 4045/2007 that „it is not in the competence of the executing court to analyze the existence of factual basis and the validity of the accusations, the principle of mutual recognition and trust being applied”. Also, in the decision no. 2862/2007, the Supreme Court declared that the Romanian court, in the quality of executing authority, does not have the competence to make an analysis concerning the opportunity or the legality of the prosecution in the issuing state, or concerning the opportunity of the preventive detention decided by the issuing state. This kind of analysis would infringe the principle of mutual recognition of the judicial decisions in criminal matters.

The Constitutional Court has the same view. In the decision no. 400/2007 the Court declared that the Romanian judge does not have to make an analysis concerning the opportunity or the legality of the prosecution or of the conviction in the issuing state, or concerning the opportunity of the preventive detention decided by the issuing state. This kind of analysis would infringe, in the eyes of the Constitutional Court, the principle of mutual recognition of the judicial decisions in criminal matters.

In conclusion, in the Romanian system, the confidence in the criminal justice systems of the others member states is absolute. The implementation law and the national jurisprudence, in the same way like the framework decision, do not impose any type of control over the criminal justice system of others members state. In the Romanian system, the judicial decision of the issuing state is put into practice without any type of preliminary control of the factual basis and of the legality of the acts of the issuing judicial authority.

Contact - email: dionescu@law.ubbcluj.ro, diana2000x@yahoo.com.

