

**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**

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Abstract: The Framework Decision 2002/584/JHA was transposed into the Romanian law by Law no. 302/2004 regarding the judicial cooperation in the criminal law area. At that time, for a candidate state to accession into the European Union, the transposition came as an obligation to respect the Community acquis before joining the EU. Law no. 302/2004 was modified by Law no. 224/2006 and entered into force in first of January 2007. This study aims to analyze the perception of the principle of mutual recognition into the Romanian legal system, the case-law of the Romanian courts and the jurisprudence of the Romanian Constitutional Court.

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

I. General issues on the EAW Framework Decision

1. In 1999 the European Council decided that the principle of mutual recognition should become the cornerstone for judicial cooperation in criminal matters. The traditional system of extradition and mutual legal assistance appeared to be in general slow. Moreover, the establishment of a common area of freedom, security and justice, introduced by the Treaty of Amsterdam, required a new way of carrying out judicial cooperation in EU.

A first response was given with the 2000 EU Convention on mutual assistance in criminal matters and, 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.

2. 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 adopted¹. 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. It arose from the need to respond to the danger of terrorism and cross-border crime, something that has been felt more accurately after 11 September 2001².

Its main purpose is to simplify and expedite procedures for extradition of persons convicted or accused of crimes between the EU member states. It took the procedure from the hands of politicians and made it purely judicial matter whereby only the courts of the member states cooperate without the need to turn to the executive which traditionally participated in the process of extradition³.

3. This Framework Decision reflects the idea that judicial cooperation between member states should no longer be regarded as a matter of international relations between sovereign states that decide on a case – by – case basis whether or not to render the requested assistance.

That's why the philosophy of EAW is based on the idea that the judicial decision pronounced by a court from one member state is recognized and put in practice into another member state in the same way like a national one. In this view, the judicial decisions pronounced in criminal matters have a great liberty of movement into the EU and have Union – wide legal effects in the purpose is that of creating a common area of freedom, security and justice.

II. The principle of mutual recognition between members states in the field of criminal law

¹ The Framework decision is published in the Official Journal of the European Communities no. L190/1 from 18.07.2002.

² For general considerations on the grounds which stay on the basis of the EAW, see Munteanu, C.-S., *Mandatul European de arestare. Un instrument juridic apt sa inlocuiasca extradarea*, in *Caiete de drept penal*, nr. 1/2007, p. 91-94

³ Komárek, J., *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, New York, New York University School of Law, 2005, 27 pages, ISSN 1087-2221, p. 8.

4. The mechanism of the EAW is based on a great confidence between the member states. The executing state has trust in the judicial decision of the issuing state and, based on this trust, puts this decision into practice. This confidence is the essential element which stays on the basis of the principle of mutual recognition between members states in the field of criminal law.

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. Based on the idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state or could not take such a decision or would have taken an entirely different decision in a comparable case”.

5. 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. This means in the first place that traditional grounds for refusal based on the nature of the offence (political, fiscal), nationality of the person or related to sovereignty, security, public policy or other essential interests of the state should be abolished. Furthermore, differences in legislation concerning substantial, procedural or sanction law should not impede cooperation between member states and may not be a reason not to provide the requested assistance.

6. 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. A powerful voice was the German one.

7. According to the decision of Federal Constitutional Court (FCC) from 18 July 2005 the cooperation should be based on a limited mutual recognition within the EU third pillar⁴. The key word in this sentence was „limited”. While the ECJ stated in *Gozotok and Bruge* [C-385/01, 2003] that

„there is a necessary implication that the member states have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other members states even when the outcome would be different if its own national law were applied”, the German Constitutional Court takes a very different view.

The FCC of Germany admits that, because every member state must respect the principles listed in article 6 (1) TEU, the foundation for mutual trusts exists. However, in the FCC’s opinion this does not liberate the legislator from the duty to react if the trust is shaken. This is why, according to the FCC, in every individual case a concrete review of whether the rights of the prosecuted are respected should be made.

The existence of article 6 (1) EU and article 7 EU

„does not justify the assumption that state law structures of the EU member states are materially synchronized and that proportional national review of individual cases is nugatory”.

As a result, in case of German nationals, the whole of the EAW approach must be replaced by a procedure under which all circumstances of the case and also the system of criminal justice of the requesting member state will be examined.

This is a very different perspective as compare to the one sustained by the principle of mutual recognition in the interpretation of the ECJ. On the basis of this principle, the executing

⁴ For further discussions, see Komárek, J., *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, p. 14 - 18; Benke, K., *Mandatul european de arestare in jurisprudenta instantelor constitutionale*, in SUBB Iurisprudentia nr. 1/2007, p. 74-77.

state must have a total confidence in the criminal justice of the issuing state and must eliminate all types of preliminary control of the factual basis and of the legality of the acts of the issuing judicial authority. This confidence determines that a control over this system and over his compatibility with the national standards of protection of human rights to be unnecessary.

The concerns raised by the FCC of Germany are different from those expressed in the cases concerning first pillar constitutional conflicts: while in community law it is the European standards created by the ECJ which may be in conflict with the standards provided by national laws, in the case of criminal cooperation based on mutual recognition the standards of other Members States are at play.

We have to recognize that some of the new Member States, and Romania is a good example, still have problems with their judiciary and it is understandable that a Constitutional Court like the German one is not willing to give up all control over what happens in these countries with persons surrendered.

8. In the same way of doubt is also the Italian example. The Italian law which transposes the EAW framework decision appears to be one which negates the framework decision, rather than implementing it⁵. It offers to the Italian executing state new ground of refusal, both explicit and implicit. Italian courts will be called upon not only to control the merits of the case, but also to effectively judge the foreign state and its constitutional system. Moreover, the principle of dual criminality will return as the rule in the Italian system, while the framework decision had made it the exception.

9. The case of Germany and Italy must be viewed in the context of this contrast between Europe with its impulse towards integration and the national systems with their instinct of self-

⁵ Impalà, F., *The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, Utrecht Law Review, vol. 1, nr. 2/2005., p. 56.

preservation⁶. In the criminal field, the center of gravity is shifting from the national level to the supra-national level. The growing menace constituted by terrorism and by cross-border criminality demands an appropriate response at EU level. But our national systems are still highly resistant to change coming from outside.

10. As we can see the principle of mutual recognition in the field of criminal cooperation is considered problematic. The principal cause of this consideration is due to the fact that most fundamental rights are at stake in the field of criminal justice. While perhaps the majority of the previous cases of constitutional conflict concerned economic rights, which follows from the nature of the first pillar law, criminal justice cooperation involves rights such as human dignity, liberty, protection from torture and the like. That's why the Constitutional courts may be inclined to stress their role as guarantors of individuals' rights at the expense of creating a coherent legal order, although significant mutual trust is possible because the member states built their legal orders on structural principles that guarantee the protection of fundamental rights and freedoms.

III. The implementation of the EAW framework decision in the Romanian system

11. In the process of integration of Romania into the EU, the assimilation of the European norms in the field of judicial cooperation was seen as an obligatory demand. This is why the judicial cooperation in criminal matters was an important part of the Chapter 24 of the negotiations.

12. Until now the only framework decision based on the principle of mutual recognition which is implemented into the Romanian system is the one concerning the EAW. This implementation was realized by the introducing into the Law no. 302/2004 concerning the international judicial cooperation in criminal matters of the third Title concerning the application of the Council framework decision on the EAW and the surrender procedures between Member

⁶ Impalà, F., *The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, p. 61.

States. Taken in consideration the experience of the others members states after a year of application, this law was amended and supplemented by Law no. 224/2006.

These dispositions concerning the EAW had entered in force in the first of January 2007, in the moment of the integration of Romania in the EU.

In 2007, the executive initiated a project of law for the modification of the Law no. 302/2004. The objective of this project is the implementation of others three framework decisions based on the principle of mutual recognition in criminal matters:

1) The framework decision of 22 July 2003 on the execution in the EU of orders freezing property and evidence;

2) The framework decision of 24 February 2005 on the application of the mutual recognition to financial penalties;

3) The framework decision of 6 October 2005 on the application of the mutual recognition to confiscation orders.

For the moment this project is to be discussed by the Chamber of Deputies. Unfortunately, the first chamber of the Romanian parliament, the Senate, did not adopted it because the lack of votes due to the absence of the senators.

IV. The compatibility with the Romanian Constitution of the Law which implement the EAW into the national system

13. 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 rule which prohibits the extradition of the nationals is founded on mistrust in criminal justice systems of other countries and the need of the national state to protect his citizens. Conversely, the criminal justice cooperation within the area of freedom, security and justice is based on the member states' mutual trust in their systems of criminal justice.

14. Some member states changed their constitution to be able to fully implement the framework decision, as was the case of Germany. Romania too is one of these examples and this is why our system did not have the same problems like Poland.

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.

This change of the Romanian constitution was based on the future integration of our state into the EU. Even the Constitutional Court has declared in the decision no. 148/2003 that „in the purpose of fulfilling some demands of the European law, demands imposed by the fight against terrorism, cross-border criminality, organized crime, it is necessary to modify the constitutional interdiction concerning the extradition of Romanian citizens”.

15. The only discussion on the compatibility of the EAW with the art. 19 of the Constitution was the one which concern the equivalence between a framework decision and an international convention. The Constitution recognizes only the application of an international convention as an exception from the interdiction concerning the extradition of Romanian citizens. And, for sure, 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 convention⁷. 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.

V. The interpretation of the principle of mutual recognition by the Romanian courts in the context of the implementation of the EAW

16. The Law no. 302/2004 makes a reference to the principle of the mutual recognition in criminal matters. In art. 77 [the definition of the EAW], this law disposes that:

⁷ Streteanu, F, *Cateva consideratii privind mandatul european de arestare*, in *Caiete de drept penal*, nr. 1/2008, p. 13.

„ (1) The European arrest warrant is a judicial decision issued by the competent judicial authority of a Member State of the European Union, with a view to the arrest and surrender to another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(2) Member States shall execute any EAW on the basis of the principle of mutual recognition and confidence, in accordance with the provisions of the Council Framework Decision No. 2002/584/JHA of 13 June 2002, published in the Official Journal of the European Communities No. L 190 /1 of 18 July 2002”.

But the law does not make an interpretation of this principle.

Also, the validity of such a principle was not put into question into the process of implementing the EAW. In the field of the principle of the mutual recognition under the third pillar of the EU, neither the Romanian legislator neither, in the same way, as we will see, our constitutional court did not have the same doubts like the Italian legislator or the FCC of Germany. Moreover, since the very start of the negotiations, Romania did not know a strong political reaction to this principle. Like many others aspects of the integration into the EU, the principle of mutual recognition of the decisions in criminal matters was taken like a „thing given” which is not to be discussed.

17. 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, in the eyes of the Supreme Court, the principle of mutual recognition and trust.

The Constitutional Court has the same view.

The first reference of Constitutional Court concerning the EAW was made in the decision no. 134/2007:

„for Romania, after the integration in the EU, the EAW is the cornerstone of the judicial cooperation based on the principle of mutual recognition of decisions pronounced in criminal matters. In fact, the application of the EAW framework decision has like objective to simplify and expedite procedures for extradition and, in the same way, to transform the EU into an area free of security and justice”.

Concerning this decision we can make two observations.

First, our constitutional court was very enthusiastic and impatience to make an interpretation of the EAW and of the principle of mutual recognition. The case which was submitted to the court had no relation with the EAW. It concerned some legal dispositions related to the extradition and this case was submitted to the court before the entry in force of the dispositions concerning the EAW. So this consideration of the court had no connection with the matters submitted to her analyze.

Second, it is not correct to sustain that the EU is „an area free of security and justice”. The right terminology is the one referring to the „area of freedom, security and justice” and the differences between these two are considerable. In other words, it was nice for the Romanian CC to say something about this interesting area which is the EU. But the affirmation was in fact amusing.

In others decision the Romanian Constitutional Court sustained the principle of mutual recognition in the form that was imposed by the framework decision. 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 the same way, in the decision no. 419/2007 the Court said that the EAW is a concrete measure which transpose the principle of mutual recognition and, in this view, the executing authority does not have to verify the grounds of decision on preventive detention or of the decision of conviction.

18. In the same way, neither the law nor the jurisprudence of the Supreme Court or the Constitutional Court imposes a control over the compatibility of the issuing state criminal system with the national standard of the protection of human rights.

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. As we mention above, taken in consideration some kind of mistrust in the others criminal justice systems, the Constitutional Court of Germany and the Italian law impose this type of control.

19. In conclusion, in the field of EAW, in the Romanian system the principle of mutual recognition is absolute. In fact, the implementation law did not say a word beyond the conception imposed by the framework decision. Romania did not introduce others grounds for refusal and did not extend the application of the exception concerning dual criminality. Since Romania was in the process of negotiation for the integration in the EU, the law was totally in line with the framework decision. In this context, the obedience of the Romanian legislator face to the demands of the EU was significant.

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