

The European Evidence Warrant. General Considerations. Some Critical Opinions

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Abstract: In this paper we have conducted a general examination of the instruments governing the European institution of the European evidence warrant, viewed as a new form of judicial cooperation in criminal matters between Member States of the European Union. The novelty consists of the conducted examination, the critical opinions and proposals de lege ferenda. The paper continues the scientific research achieved by publishing other studies and articles in some journals or proceedings of international or national conferences, which were examined by other European legal instruments regulating different forms of judicial cooperation in criminal matters or different forms of legal assistance. The work can be useful both to academics and practitioners, to the Romanian or European legislator with specific responsibilities in the area of international judicial cooperation in criminal matters.

Keywords: competent authorities; scope; types of procedures for which it can be issued

1. Introduction

In the recent years, all world countries faced a resurgence of crime caused by a number of internal and external factors.

The registered scientific and technical progress and widening the democratization process across several states has created the possibility of easily movement of people and goods, thus leading to the development of human society as a whole. This unquestionably positive effect on the development of society had also a negative effect which resulted in the proliferation of crime phenomenon worldwide (Boroi, Rusu & Balan-Rusu, 2012, p. 16).

Under these new conditions, the increased danger determined by the growth of transnational crime, the need to prevent and combat more effectively in an

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organized worldwide framework, prompted the adoption of international, zonal, regional or global instruments, which unified the efforts of the countries of the world (Rusu & Balan-Rusu, 2013, p. 13).

One of the most important legal instruments of this kind (if not the most important) is the United Nations Convention against Transnational Organized Crime, together with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against Smuggling of migrants by land, air and sea (both additional to the Convention), adopted in New York on 15 November 2000 and ratified by Romania by Law no. 565/2002.

The Convention and the two Additional Protocols establish a series of measures primarily aiming at improving international judicial cooperation in criminal matters among other countries, the main aim being to prevent and combat with more effectiveness, the transnational organized crime (Boroi, Rusu & Rusu, 2016, p. 5).

We mention that according to the depositions of art. 1 of the mentioned international legal instrument, the objective of the Convention is to promote the *cooperation in order to prevent and combat transnational organized crime more effectively*.

In order to avoid other interpretations the expression of *organized criminal group* was defined as a *group of three or more persons, existing for a certain period and acting in agreement, having the aim of committing one or more serious crimes or offenses established in international legislative act, in order to obtain, directly or indirectly, a financial or other material benefit* (Boroi, Rusu & Rusu, 2016, p. 5).

In the recent doctrine it was insisted that these organized crime groups, as time passes, have diversified their procedures and methods of action, directing them towards terrorism, trafficking in weapons, explosives, radioactive substances, drug trafficking beings and other serious crimes.

Investigating such acts and identifying perpetrators, imposed for the legislative systems to improve and reorganize the state institutions with responsibilities in this area and develop the complex activities of complex judicial cooperation in criminal matters (Rusu, 2015, p. 17).

However, after 2000, the European Union activity of judicial cooperation in criminal matters has experienced an unprecedented development, being established new forms of cooperation, among which we mention the European arrest warrant and the European evidence warrant, and the legislative framework of other forms

was perfected, such as the recognition and enforcement of decisions taken in another Member State of the European Union and the judicial assistance (Boroi, Rusu & Rusu, 2016, p. 14).

Against the background of crime and the need to intensify the activity of judicial cooperation in criminal matters between Member States, it was enacted a new European legal instrument which in its essence regulates a new form of judicial cooperation in criminal matters between Member States, the European evidence warrant.

The European legal instrument governing this new form of judicial cooperation in criminal matters between Member States is Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for their use in proceedings in criminal matters.

Prior to the adoption of this new European legal instrument governing a new form of judicial cooperation in criminal matters in the European Union, it was in force (and it is still current), another European legal instrument, namely Framework Decision 2003/577/JHA Council of 22 July 2003 on the execution within the European Union of orders of freezing property or evidence.

Although after briefly examining the names given to the two legal instruments, it would result an identity almost perfect in terms of their subject, however, the examination of the content leads to the conclusion that the adoption of the second law was imposed, as the first legislative act covered only a part of the spectrum of judicial cooperation in criminal matters with respect to evidence, their subsequent transfer, which was left at the decision of the mutual assistance procedures.

In the present paper we will undertake a general review of the European legal instrument by which it is regulated a new form of judicial cooperation in criminal matters between the Member States, an examination which includes the definition of the European evidence warrant Warrants, other definitions, designation of competent authorities, the scope, the types of procedures, and the content and form of the European evidence warrant.

Also within the examination we will formulate some critical observations on the provisions of texts, followed by some *de lege ferenda* proposals aiming at the improvement of the European legal system.

2. Definition of the European evidence warrant Warrant. The Obligation to Execute

Under the depositions of the examined European legislative act, the European evidence warrant (EEW) *is a judicial decision issued by a competent authority of a Member State for the purpose of obtaining objects, documents and data from another Member State in order to use the in proceedings referred to in art. 5 of the European legislative act.*

We mention that at art. 5 of the European legislative act there are mentioned the types of procedures for which it can be issued the European evidence warrant.

The principle under which the Member States will execute the European evidence warrant is the principle of mutual recognition.

Without insisting upon highlighting the importance of this principle, we only want to emphasize that it is the basic principle upon which it is based the entire activity on judicial cooperation in criminal matters between Member States of the European Union.

In all circumstances, the execution of the European evidence warrant will not prejudice to the respect for fundamental human rights.

3. Other Definitions

In order to avoid unilateral interpretations by the Member States, the European legislator has defined a number of terms and phrases, as follows:

- *Issuing State* - is the state which issued the European evidence warrant (EEW);
- *Executing State* - is the Member State in whose territory the objects, documents or data, or in case of electronic data, the Member State in which they are directly accessible under the law of the executing State; although the text does not provide it, we consider that in the defining structure of the executing State it is necessary to include the provision that the executing State has had received an EEW to execute it;
- *issuing authority* - means:
 - A judge, a court, a judge, a prosecutor; or
 - Any other judicial authority as defined by the issuing State, acting in the case concerned, as the authority investigating the criminal proceedings and

it is competent, in accordance with national law to order the obtaining of evidence in cross-border cases;

- *Executing authority* - means an authority which is, under the national legislation for implementing the European legislative act, the jurisdiction to recognize or execute an EEW in accordance with the articles of the examined European legislative act;

- *Search or seizure* - includes any measures of criminal procedure as a result of a requirement for a legal or natural person, under the legal compulsion, to provide or participate in providing objects, documents or data, measures a which, if not complied with, may be enforceable without the consent of such a person or it may result in a sanction.

The examination of these definitions set by the European legislator lead to the formulation of critical opinions regarding the way of defining the concept of search and seizure, which in the Romanian law are two distinct criminal law institutions, with different procedures of arrangement and execution.

4. Designation of Competent Authorities

Each Member State shall inform the General Secretariat of the Council on the authority or authorities, which are competent under its national legislation regarding the issuance and execution of an EEW. All this information will be made available to Member States and the Commission.

5. Scope

Under the depositions of the European legislative act, the European evidence warrant shall be issued in the requested State in order to obtain the objects, documents or data needed for the criminal proceedings.

The EEW will not be issued with the purpose of requiring the following activities:

- a) organize query, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other person;
- b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of a person, including DNA samples or fingerprints;

- c) obtain information in real time through techniques such as interception of communications, covert surveillance or monitoring of bank accounts;
- d) to analyze objects, documents and existing data; and
- e) to obtain communications data retained by providers of public electronic communication services or a public communication network.

However, the EEW may be issued to obtain objects, documents or data mentioned above, if they are already in the possession of the executing authority before the EEW is issued.

Regarding the exchange of information on criminal convictions, the extracts from criminal records will be carried out under the Framework Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from criminal records and from other relevant instruments.

If the issuing authority indicates so, the EEW also includes any other objects, documents or data which the executing authority discovers during the execution of the EEW and without further inquiries considers being relevant to the proceedings for which the EEW was issued.

Meanwhile, if the issuing authority so requests, EEW can cover taking statements from persons present during the execution of the EEW, which are directly related to the subject of the EEW. The relevant rules of the executing State, which applies in similar national cases, it is applied taking such statements (art. 4 of the examined European legislative act).

6. Type of Procedures for which it can be Issued the European Evidence Warrant

The European evidence warrant may be issued:

- a) as regards the criminal proceedings initiated by a judicial authority or to be brought before a judicial authority with respect to an offense under the law of the issuing State;
- b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State, being infringements of the rules of law and where the decision of the above may be subject to appeal before a court, having jurisdiction in particular in criminal matters;

c) within proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State, being infringements of the rules of law and where the decision of the above may be subject to subsequent appeal before a court having jurisdiction in particular in criminal matters; and

d) in connection with the above mentioned procedures [in letter a), b) and c)] which relate to offenses or crimes that can engage liability of legal persons or may lead to a criminal penalty of a legal person in the issuing State (art. 5 of the European legislative act).

7. Content and Form of the European Evidence Warrant

In terms of content and form of the European evidence warrant, we mention that the European legal instrument provided in the annex form (A), which must be completed and signed, and the content is certified by the appropriate issuing authority.

The European evidence warrant will be prepared and translated into the official language or into one of the official languages of the executing State.

8. Conclusions, Critical Opinions and de Lege Ferenda Proposals

According to the conducted examination, the European evidence warrant can be used to obtain any objects, documents and data for use in criminal proceedings in the issuing State. These may include, for example, objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including financial transactions, statements, query and hearings, historical records and other documents, including the results of special investigative techniques.

In this context, we consider that the European arrest warrant represents a new form of judicial cooperation in criminal matters, specific form and applicable only within the European Union.

In this context, we appreciate the usefulness of such judicial cooperation in criminal matters between Member States, as it can be applied from other states bilaterally or regionally.

Despite its usefulness, the examination revealed the existence of provisions at least questionable in terms of usability in practice.

Thus, we see that in the regulation of search and seizure that within the meaning of the law, these two institutions presuppose any measures under the criminal procedure following which a legal or natural person is required, under legal compulsion, to provide or participate in providing objects, documents or data and which, if not complied with, may be enforceable without the consent of such person or it may result in a penalty.

We see therefore that while search and seizure are two distinct institutions of criminal procedural law, with distinct procedures of issuing and executing, with distinct competence for issuing and executing, yet the legislator does not realize the differences.

We believe that, *de lege ferenda*, it is necessary to separately redefine the two institutions so that, in judicial practice it would not arise confusion for the enforcement of the provisions of the European legislative act.

We also notice that currently the Romanian legislator has not transposed into its national law this European legal instrument, although it should have been transposed since 19 January 2011, according to art. 23, par. (1) of the European legal instrument.

Despite these shortcomings, as a general conclusion we appreciate the usefulness of this European legal instrument in terms of judicial cooperation in criminal matters at EU level, considering that the European evidence warrant is, in its essence, a new form of European judicial cooperation in criminal matters, with possible extension to the other countries of the world.

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