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Pre-trial arrest warrant

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Abstract. Referring to the provisions of the Romanian Constitution, individual freedom and security of person appear to be inviolable, unless criminal proceedings have been initiated against the person. Crime is that state of affairs which brings a high degree of danger to society. It consists in committing criminal acts with guilt, punishable by a criminal fine and/or deprivation of liberty. Preventive measures have the role of helping in the criminal process by meeting or removing situations of danger that could prevent the court from finding out the truth, as well as restricting the freedom of persons who have committed crimes or about whom there is reasonable suspicion that they are going to commit an act provided by criminal law. The deprivation of liberty of individuals who have committed crimes is a necessary measure for their re-education and aims to prevent the commission of other criminal acts. Among preventive measures, the most serious form is pre-trial detention. This is one of the most severe custodial measures by which the accused is interrupted from performing certain actions that could hinder the criminal process or its purpose. Pre-trial detention may be implemented only after the substantive conditions of the pre-trial detention warrant have been cumulatively met. Therefore, the arrest is a procedural measure without which pre-trial detention could not be ordered. It is a procedural act of particular importance because it presents, concretely, the act(s) of which the accused is accused and through this prism the necessary measures are taken to charge the defendant. The arrest warrant is the main document that makes the difference in order to establish a person's guilt.

Keywords. warrant, pre-trial detention, code, defendant, european warrant

1. General notions regarding the preventive arrest warrant

1.1 The definition and purpose of the preventive arrest warrant

The preventive arrest warrant is a procedural act issued by the judge of rights and freedoms in order to execute the decision ordering the arrest of the defendant, implicitly bringing him before the courts.

A pre-trial detention warrant is a judicial measure aimed at arresting a person for the purpose of criminal prosecution or serving a custodial sentence or detention order.

"Based on the conclusion ordering the preventive detention of the defendant, the judge of rights and freedoms of the first instance or, as the case may be, of the hierarchically superior court shall immediately issue the preventive arrest warrant. If, by the same conclusion, the preventive detention of several defendants has been ordered, a warrant is issued for each of them.

The pre-trial arrest warrant reads:

a) the court to which the judge of rights and freedoms who ordered preventive detention belongs;

- b) Date of issue of the mandate;
c) name, surname and capacity of the judge of rights and freedoms who issued the warrant;
d) identity data of the defendant;
e) the duration for which preventive detention of the defendant was ordered, with an indication of the date on which it ends;
f) showing the act of which the defendant is accused, indicating the date and place of its commission, legal classification, offense and punishment provided by law;
g) The concrete grounds for pre-trial detention;
h) Order to arrest the defendant;
i) indication of the place where the defendant will be held in custody;
j) signature of the judge of rights and freedoms;
k) signature of the defendant present. If he refuses to sign, an appropriate mention shall be made in the mandate.”¹

1.2 Issuance of the preventive arrest warrant

In order to be able to order the measure of preventive arrest, the following conditions must be cumulatively met

- the general conditions provided by law for any of the preventive measures („detention, judicial control, judicial control on bail, house arrest, preventive arrest”²)
- special conditions provided by law for preventive arrest(„The special detention regime of minors, in relation to the particularities of their age, so that the preventive measures taken against them do not prejudice their physical, mental or moral development, shall be established by the Law on execution of sentences and measures ordered by judicial bodies during criminal proceedings”³
- „the existence of one or more of the cases that would allow the preventive measure to be taken;”⁴

The general conditions laid down in art. 202, para. (1) The CPC shall be required to be fulfilled in case of ordering any of the preventive measures, regardless of severity, and shall cover the following aspects:

- there is solid evidence or indications that a person has committed a criminal offence
- it is necessary for the proper conduct of the criminal proceedings, to prevent the suspect or accused person from absconding from prosecution or trial, or to prevent another criminal offence from being committed;
- there is no cause preventing the initiation or exercise of criminal proceedings⁵;
- the preventive measure is proportionate to the seriousness of the accusation against the person against whom it is taken and necessary to achieve the aim pursued by ordering it

¹ Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

² Code of Criminal Procedure, Art. 202, para. (4)

³ Code of Criminal Procedure, Art. 244

⁴ Code of Criminal Procedure, Art. 223, para. (1) and (2)

⁵ Code of Criminal Procedure, art. 15

With regard to the special conditions required for ordering pre-trial detention, the law provides that: "The measure of preventive detention may be taken by the judge of rights and freedoms, during criminal investigation, by the judge of the preliminary chamber, in the preliminary chamber proceedings or by the court before which the case is pending, During the trial, only if the evidence shows reasonable suspicion that the defendant has committed a crime and there is any of the following situations: the defendant has fled or gone into hiding in order to evade prosecution, the defendant tries to influence another participant in the commission of the crime, the defendant exerts pressure on the injured person".⁶

It can be noted that in reality the "special conditions" provided by the legislator in Article 223, paragraph 1 refer, on the one hand, to taking preventive arrest, only against the accused (not the suspect), while the second represents, in fact, a resumption of one of the general conditions regarding the existence of a reasonable suspicion regarding the commission of the crime. The only difference is that reasonable suspicion of the crime must arise from the evidence.

The cases that allow preventive arrest to be taken are found in the Code of Criminal Procedure and are independent of the existence of a state of danger to public order:

- a) The defendant fled or hid in order to evade prosecution or trial, or made preparations of any kind for such acts
- b) The defendant attempts to influence another participant in the crime, a witness or expert, or to destroy, alter, conceal or steal material evidence or cause another person to engage in such conduct;
- c) the defendant exerts pressure on the injured person or tries to make a fraudulent settlement with him
- d) there is reasonable suspicion that, after criminal proceedings have been instituted against him, the defendant has intentionally committed a new offence or is preparing to commit a new offence"⁷

Receiving the file, the judge of rights and freedoms will first set the deadline for solving the case (day and hour when the proposal will be judged). In setting this settlement deadline, it is necessary to take into account, on the one hand, the complexity of the case, the volume of materials to be studied by both the judge and the defendant's defender, ensuring an effective right to defense, etc. and, on the other hand, by its nature, by the purpose for which the preventive measure is requested, the trial of the application must be carried out expeditiously.

"According to the procedural rules, the judge of rights and freedoms had to set a short deadline of several hours if the defendant is in custody (the time limit must be fixed before the expiry of the duration of detention)"⁸. It is also a rule of recommendation, given that the expiry of the period of detention before the resolution of the proposal for preventive arrest determines the immediate release of the defendant, but does not affect the legality of the proposal for preventive detention, does not prevent the resolution of e. Thus, although detention is not mandatory in order to propose pre-trial detention, in many cases the prosecutor first decides to take this preventive measure. Given that the prosecutor has the obligation to notify the judge with the proposal for preventive arrest at least 6 hours before the expiry of the 24-hour term of detention and he makes the notification at the limit of 6 hours, the time remaining for carrying

⁶ Code of Criminal Procedure, Art. 223, para. (1)

⁷ Code of Criminal Procedure, Art. 223, para. (1)

⁸ Code of Criminal Procedure, art. 225, alin. (2)

out administrative matters (registration of the file, summoning the defendant, informing the defender or appointing one ex officio), For the study by the magistrate and, possibly, by the defence counsel or defenders, of the case materials, for the conduct of the court hearing and for the resolution of the proposal, especially in complex cases with several defendants, appears to be insufficient. After fixing the date and time of solving the proposal, they are communicated to the prosecutor and the defendant's defense counsel (elected or appointed ex officio).

If the defendant is in custody, bringing him to court is the responsibility of the prosecutor, who has the obligation to inform the administration of the Center for Preventive Arrest and Detention, in order to present the detainee to court. If the defendant is at liberty, he must be duly summoned to settle the motion. The obligation to summon also subsists if the defendant is deprived of liberty in the execution of a custodial sentence or in the execution of a preventive measure involving deprivation of liberty in another case.

"The unlawful fulfillment of the summons procedure, given that the defendant does not appear at the court, cannot be replaced by the presence of the chosen defender, given that the presence of the defendant is mandatory at the trial of the proposal for preventive arrest, and in cases where it can be solved in the absence of the defendant are expressly and exhaustively provided by law.

In the event that the same proposal for preventive detention is requested, taking action against several defendants, and carrying out the summons procedure with some of them would impede the expeditious resolution of the proposal in relation to the others, the judge of rights and freedoms may order the splitting of the case and the separate settlement of the formulated proposals.

The defendant's defender, notified of the day and hour fixed for the trial of the proposal for preventive arrest, has the right to study the case file, the court having the correlative obligation to provide him with the file⁹. The trial of the case, during the criminal investigation phase, takes place in the council chamber, under conditions of non-publicity.

To the extent that the defendant is present at the deadline fixed for solving the case, the judge of rights and freedoms will proceed to hear him, to inform him of the crime of which he is accused, of the legal classification and of the right not to make statements, drawing his attention to the fact that everything he declares can be used against him¹⁰. If he agrees to give statements, the hearing shall cover not only the reasons for requesting pre-trial detention but also the matters pertaining to the act for which he is charged.

The resolution of the proposal for preventive arrest is made by the judge of rights and freedoms, by reasoned conclusion, pronounced in the council chamber. Following deliberation, the solutions that can be adopted can be:

- The judge accepts the proposal for pre-trial detention of the defendant and may order its replacement by judicial control, judicial control on bail or house arrest;

- The judge rejects the motion for pre-trial detention of the defendant, without ordering another preventive measure, and releases the defendant after the expiry of its duration;¹¹

- If the judge of rights and freedoms finds the proposal for arrest to be well founded, he orders its admission and, consequently, the measure of preventive arrest against the defendant, establishing by conclusion its duration (maximum 30 days). In the maximum

⁹ Code of Criminal Procedure, art. 92

¹⁰ Code of Criminal Procedure, art. 225, alin. (8)

¹¹ Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

duration of preventive detention, unlike the old code, the duration of any preventive measure of detention previously ordered in the same case will not be taken into account.

Once the proposal for pre-trial detention is accepted, the judge of rights and freedoms issues the preventive arrest warrant. According to the law on execution of sentences and measures ordered by judicial bodies during criminal proceedings, "preventive arrest shall be executed only on the basis of a preventive arrest warrant issued in accordance with the provisions of the Code of Criminal Procedure."¹² If in the case of other preventive, custodial or non-custodial measures (detention, judicial control, judicial control on bail and house arrest), The order of the prosecutor or, as the case may be, the reasoned conclusion of the judge or court is the basis for their execution, in the case of preventive arrest the arrest warrant is the only basis for its execution. Pre-trial detention shall be carried out, during criminal investigation, in detention and pre-trial detention centres.

The reception of the arrested defendant in the preventive arrest and detention center is made only on the basis of the preventive arrest warrant, issued according to the procedural provisions, the defendant cannot be incarcerated only on the basis of the conclusion by which the preventive measure was ordered.¹³

The preventive arrest warrant shall be issued by the judge of rights and freedoms who ordered, during the criminal investigation, the preventive arrest of the defendant and shall contain the mandatory particulars provided by art. 230 para. (2) The C.P.C. The warrant shall be issued immediately, i.e. immediately after the resolution by admission of the proposal for preventive arrest. By the content regulated by law, the preventive arrest warrant has an individual character, meaning that, in the event that the proposal for preventive arrest against several defendants has been accepted by imprisonment, a separate execution warrant will be issued for each of them.¹⁴

By reference to the procedure for the execution of the preventive measure, we conclude that the preventive arrest warrant is issued in three original copies: one will be kept at the issuing court, one will be handed over, at the time of arrest, to the defendant against whom the measure was ordered, and the third will be handed over to the administration of the place of detention together with the defendant's submission.¹⁵

The execution of the preventive arrest warrant shall be carried out by the bodies of the Ministry of Internal Affairs. Specifically, by executing the preventive detention measure, the judge of rights and freedoms orders these bodies to arrest the defendant, respectively to deprive him of liberty for the duration indicated by him.

The execution of the warrant is done differently depending on whether or not the defendant is present at the court premises at the time of ordering pre-trial detention and issuing the preventive arrest warrant. If he is present (whether at liberty or still under the power of the detention warrant), the warrant is issued immediately and a copy is given to him under his signature.¹⁶

¹² Law 254/2013 on the execution of custodial sentences and measures ordered by judicial bodies during criminal proceedings, art. 2

¹³ Ivan Anane, *Investigation of criminal investigation bodies*, Pro Universitaria Publishing House, Bucharest, 2014

¹⁴ Code of Criminal Procedure, Art. 230

¹⁵ Ivan Anane, *Management of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

¹⁶ Rusu I., Boroi A., *International judicial cooperation in criminal matters*, C.H. Beck Publishing House, Bucharest, 2020

Also, a second original copy of the execution warrant is handed over to the police body responsible for depositing the defendant at the place of detention, this copy being handed over to the detention and preventive arrest center as a basis for receiving the defendant in custody and depriving him of liberty for the period indicated in the warrant.

If the defendant was not at the court premises at the time of issuing the preventive arrest warrant in order to enforce the preventive measure, two original copies shall be submitted to the police body of the defendant's domicile or residence or to the police body in whose territorial jurisdiction the court is located.¹⁷ In order to be able to execute with maximum celerity the measure ordered by the judge, the communication of the execution warrant can also be done by means of distance communication (fax, e-mail or other such means that allow the intended person to establish the authenticity of the document thus issued). Until receiving the original document, the police body may proceed to preventive arrest of the defendant on the basis of his copy, transmitted by means of distance communication.

Along with the handing over of preventive arrest warrants by police bodies, the judge of rights and freedoms must also give effectiveness to the provisions of art. 230, para. (5) C.P.C. regarding the right of the injured person to be notified, upon request, about the release in any way of the person shown, so the judge draws up a report in which he records the request of the injured person, communicating it to the police bodies in charge of enforcing the preventive measure.

The police body, having received the warrant, must carry out checks at the defendant's home or residence, identify him, arrest him and deposit him in the pre-trial detention centre established by the judge and indicated in the warrant.¹⁸ The procedural law expressly provided for the right of the police body to enter, in order to execute the preventive arrest warrant, into any domicile or residence of a natural person, as well as into the headquarters of any legal person, without the consent of the holder and without the need for any other legal formalities, provided that there are serious indications from which there is a reasonable suspicion that the person in the warrant is in that domicile or residence.

To the extent that the arrest warrant contains material errors, but they do not prevent the identification of the person concerned and the establishment of the preventive measure ordered, the police body will proceed to execute the issued warrant, requesting at the same time the court to rectify the errors found. The period for which pre-trial detention was ordered starts to run from the date of execution of the measure against the defendant in custody. If, following the investigations, the police body does not find the defendant to arrest him, this circumstance is ascertained through a report and the judge of rights and freedoms is notified about the impossibility, at the same time the police bodies have the obligation to notify the competent bodies so that the defendant is pursued and consigned at border crossing points.

The prosecution is requested by the police body that found the impossibility of enforcing the preventive arrest measure¹⁹ and is ordered by order by the General Inspector of the Romanian Police.

¹⁷ Gheorghe Buzescu, *Place and role of the civil servant in the state apparatus*, Sitech Publishing House, Craiova, 2017

¹⁸ Code of Criminal Procedure, Art. 230

¹⁹ Code of Criminal Procedure, art. 521

The purpose of prosecution is to identify²⁰, search, carry out and apprehend a person in order to bring him before judicial bodies or to enforce certain court decisions according to art. 521, para. (1) CPC In the procedure of tracing for identification, the location and apprehension of wanted persons may be carried out, according to art. 523, para. (1) C.P.C., a series of activities, namely: technical surveillance, detention, surrender, and search of correspondence and objects, search, seizure of objects or documents. As regards border signs, according to art. 24 of H.G. nr. 445/2002 for the approval of the methodological norms of O.U.G> nr. 105/2001 regarding the state border of Romania, these are those information that are transmitted to the border police and customs authority regarding persons, means of transport, goods and other goods, located in one of the institutions provided by law and which are to be checked during the state border crossing control, in order to prohibit entry or exit into / from Romania, thorough monitoring or control. The request for prosecution is approved by the management of the General Inspectorate of Border Police and is sent to the territorial units through the dispatch of this institution²¹.

1.3 Content of the preventive arrest warrant

Based on the conclusion ordering the preventive detention of the defendant, the judge of rights and freedoms of the first instance or, as the case may be, of the hierarchically superior court immediately issues the preventive arrest warrant.

If by the same conclusion the preventive arrest of several defendants was ordered, a warrant is issued for each of them.

The pre-trial arrest warrant reads:

- the court to which the judge of rights and freedoms who ordered preventive detention belongs;
- the date of issuance of the warrant, the name, surname and capacity of the judge of rights and freedoms who issued the warrant;
- identity data of the defendant; the duration for which preventive detention of the defendant was ordered, indicating the date on which it ends;
- showing the act of which the defendant is accused, indicating the date and place of its commission, legal classification²², offense and punishment provided by law;
- the concrete grounds for pre-trial detention;
- order to arrest the accused; indication of the place where the defendant will be held in custody;
- signature of the judge of rights and freedoms

The preventive arrest warrant shall be drawn up in four originals.

When the arrest warrant has been issued after hearing the defendant, the judge who issued the warrant shall hand over a copy of the warrant to the arrested person and to the police authority.

The police body shall hand over the original copy of the preventive arrest warrant and the report provided for in para. (5) the administration of the place of detention.

²⁰ Ivan Anane, *Elements of computerized evidence of the person*, Pro Universitaria Publishing House, Bucharest, 2015

²¹ Gheorghe Buzescu, *Internal and international police cooperation*, Sitech Publishing House, Craiova, 2020

²² Gheorghe Buzescu, *Particularities of contravention law*, Sitech Publishing House, Craiova 2017

If the injured person has requested notification of the release of the arrested person in any way, the judge who issued the warrant records this in a report, which he hands over to the police body.²³

2. Execution of the preventive arrest warrant

2.1 Execution of the preventive arrest warrant issued in the presence of the defendant

When the warrant contains all necessary information, the court will request the Prosecutor General of the Public Prosecutor's Office attached to the Court of Appeal to take the necessary steps to identify the person, detain him and appear before the court.²⁴ No later than 24 hours after detention, the prosecutor will present the requested person to the court, and then within 48 hours of arrest, the court will proceed to hear the requested person.

Art. 230 C.P.P. (Law no. 135/2010) took over, with slight modifications, the provisions of art. 151 and art. 152 para. (1) of the previous Code of Criminal Procedure.

Recently, para. (5) of Art. 230 CPC by GEO nr. 18/2016, adding the hypothesis of the escape of the arrested person, to that of the release in any way of the arrested person.

- Issuance of the preventive arrest warrant.

On the basis of the conclusion ordering the preventive detention of the defendant, the judge of rights and freedoms of the first instance or, as the case may be, of the hierarchically superior court immediately issues the preventive arrest warrant. We note that the conclusion ordering pre-trial detention is the procedural act, and the preventive arrest warrant is the procedural act, since it executes the provision contained in the conclusion.

If, by the same conclusion, the preventive detention of several defendants has been ordered, a warrant is issued for each of them, which is, as such, individual .

- Content of the pre-trial detention warrant.

The warrant for the defendant's pre-trial detention shall include::

- a) the court to which the judge of rights and freedoms who ordered pre-trial detention belongs;
- b) the date of issue of the mandate;
- c) name, surname and capacity of the judge of rights and freedoms who issued the warrant;
- d) identity data of the defendant;
- e) the duration for which preventive detention of the defendant was ordered, specifying the date on which it ends;
- f) showing the act of which the defendant is accused, indicating the date and place of its commission, legal classification, offense and punishment provided by law;
- g) the concrete grounds for pre-trial detention;
- h) order to arrest the accused;
- i) indication of the place where the defendant under preventive arrest will be held, which is usually the custody of the police inspectorate located within the jurisdiction of the court to which the judge who ordered the preventive detention measure belongs;
- j) signature of the judge of rights and freedoms;

²³ Code of Criminal Procedure, Art. 230, para. (5)

²⁴ Ivan Anane, *Management of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

k) signature of the defendant present; If he refuses to sign, an appropriate mention shall be made in the mandate.

Of particular importance are the mentions regarding the indication of the act of which the defendant is accused, indicating the date and place of its commission, its legal classification, the name of the crime and the punishment provided by law, as well as the indication of the concrete grounds that led to preventive arrest, since in relation to these mentions it is possible to verify the legality and merits of issuing the preventive arrest warrant. At the same time, the order to arrest the defendant and the indication of the place where he will be held constitute the legal order of the authority for those executing the preventive arrest warrant.

Regarding the concrete grounds that led to preventive arrest, the new law (like the previous one) takes into account the cases provided for in Article 223 of the Code of Civil Procedure.

The preventive arrest warrant is drawn up in four original copies: one remains in the court file, one is attached to the criminal investigation file, one is handed over to the defendant, and one is handed over to the police body, which he then hands over to the place of detention.

- Execution of the preventive arrest warrant.

The new criminal procedure law, like the previous one, contains two separate regulations on the execution of the preventive arrest warrant, depending on whether the measure of arrest was ordered in the presence of the defendant or in his absence.

Although the regulations on the execution of the preventive arrest warrant had to be based in the same article, as in the previous Code of Criminal Procedure, the legislature of the new criminal procedure law deviated from this rule and introduced them in two separate articles. Thus, the execution of the preventive arrest warrant issued in the presence of the defendant was provided for in Art. 230 C.P.P., and the execution of the preventive arrest warrant issued in the absence of the defendant was provided for in art. 231 CPC

When the arrest warrant has been issued after hearing the defendant and he is present at the time of issuance, the judge who issued the warrant hands over a copy of the warrant to the arrested person and to the police.

The arrest warrant may also be transmitted to the police by fax, electronic mail or any other means capable of producing a written document, under conditions enabling the authorities to which it is addressed to establish its authenticity.

The police authority handcuffs the defendant and leads him to the place of detention mentioned in the arrest warrant, where he hands him over, together with the original copy of the preventive arrest warrant and, possibly, with the report provided for in para. (5) of Article 230 CPC.

- Ensuring the safety of the injured party.

If the aggrieved person has requested notification of the release in any way or of the escape of the arrested person, the judge who issued the warrant shall record this in a report, which he shall hand over to the police.

- Judgments of the European Court of Human Rights on the content of the pre-trial detention warrant.

The European Court of Human Rights (hereinafter ECHR or Strasbourg Court) notes that the Romanian Government did not dispute the fact that the applicant's pre-trial detention was ordered in breach of the relevant provisions of domestic law, on the one hand, because there were no good reasons justifying the issuance of the arrest warrant and, on the other hand,

because the prosecutor failed to mention, as provided for in art. 146 CPC 1968, the reasons justifying the assessment that the applicant's release endangered public order.

In these circumstances, C.E.D.O. considers that, in this case, failure to comply with the legal provisions governing preventive detention in domestic law, a fact recognized by the domestic courts and not disputed by the Romanian Government, is obviously established and entails violation of Article 5 para. 1 point (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁵

2.2 Execution of the preventive arrest warrant issued in the absence of the defendant

Code of Criminal Procedure, similar to the old regulation (Article 152, para. (2), (3) and (4) C.P.P. 1968) provided for a procedure for confirming the measure of preventive detention ordered in the absence of the defendant, meaning that the judge of rights and freedoms ordered the admission of the proposal for preventive detention of the defendant, even if he did not appear or could not be present at the hearing²⁶. Thus, the absence of the defendant refers to the trial without his physical presence, of the proposal for preventive arrest, and not only the issuance of the preventive arrest warrant in the absence of the defendant, as the marginal name of art. 231 CPC.

The presence of the defendant is mandatory at the trial of the proposal for preventive detention made by the prosecutor during the criminal investigation.

The preventive arrest warrant is issued in the absence of the defendant when:

- a) Pre-trial detention was ordered in the absence of the accused. Two original copies of the warrant shall be handed over to the police authorities in whose area the defendant resides. If the defendant does not reside in Romania, then the copies are handed over to the police authorities in whose territorial jurisdiction the court is located
- b) In order to execute the preventive arrest warrant, police authorities may enter the domicile or residence of any natural person without their will, as well as the domicile or residence of any legal persons;
- c) If preventive detention was ordered in absentia due to a state of health, force majeure or state of necessity, then he will be presented before the courts upon termination of these cases;

When deciding on the proposal for preventive arrest in absentia of the defendant by the prosecutor, the judge of rights and freedoms may issue the preventive arrest warrant. If the judge issues the warrant, then the police authorities have the obligation to identify, search and arrest the defendant as well as to bring him to court.

In this case, consideration should also be given to the procedure for confirming preventive detention ordered in the absence of the defendant in which the judge of rights and freedoms ordered the admission of the defendant's proposal for preventive detention, even if he was not present or could not be present at the court hearing.

Therefore, the absence of the presence of the defendant triggers the obligation to follow the procedure of confirming the warrant aimed at the hypothesis of trial in the absence of the defendant, of the proposal for preventive arrest and not only the issuance of the preventive arrest warrant in the absence of the defendant.

²⁵ [http:// MagazineProlege.ro/](http://MagazineProlege.ro/) Pre-trial arrest warrant

²⁶ Code of Criminal Procedure, art. 231

If, between the issuance of the preventive arrest warrant and the arrest of the defendant, the case has been transferred to the preliminary chamber judge, the defendant shall be brought before the judicial officer who took over the case.

Depending on the causes that determined the lack of presence of the defendant, bringing him before the court is done:

- No later than 24 hours after arrest;
- At the end of the occasions which decided on the proposal for pre-trial detention in absentia;

„The confirmation procedure will be carried out with the mandatory participation of the prosecutor, the defendant and his/her defence counsel, in compliance with the same procedural provisions regarding the trial of the proposal for preventive detention. The defendant thus present shall be informed of the crime for which he is accused and of his procedural rights, the reasons for which it was previously ordered to grant the motion for pre-trial detention and shall be asked for a statement on the charges brought, respectively the reasons for arrest. The defendant has the right to make a statement or to avail himself of the right to remain silent.”²⁷

"Assessing the defendant's statement in the context of the evidence administered and the reasons taken into account when taking the measure, the judicial body may order confirmation of preventive detention and execution of the warrant, revocation of preventive detention and release of the defendant, if he is not arrested in another case or, where appropriate, replacement of arrest by one of the preventive measures (detention, judicial control, judicial control on bail, house arrest, pre-trial detention)²⁸ and release of the defendant, unless arrested in another case.

The judge of rights and freedoms, the judge of the preliminary chamber or the court will decide by reasoned conclusion.

In the situation in which the accused appeared before the judge and was asked if he wanted to give statements and, as the case may be, gave statements or resorted to silence, he subsequently leaves the trial room (expiring the duration of the 24-hour detention, being put in *liebertate*) not being present at the time when the solution for admitting the proposal for preventive arrest and implicitly the issuance of the preventive arrest warrant was pronounced. The confirmatory procedure is no longer necessary for implementation as the purpose of the measure is to enable the defendant to be heard by the judge of rights and freedoms on the charges and grounds for pre-trial detention.

2.3 Failure to find the person referred to in the preventive arrest warrant

When the person mentioned in the preventive arrest warrant has not been found, the police body in charge of executing the warrant shall draw up a report stating this and notifying the judge of rights and freedoms who ordered the preventive detention measure, as well as the competent bodies for prosecution and detention at border crossing points.²⁹

Prosecution shall be ordered in the following cases:

- a) where the preventive arrest warrant, the warrant providing for a custodial sentence, the measure of medical admission or expulsion could not be executed because of the absence of the defendant;

²⁷ <https://zdocs.ro/doc/arrest-warrant-g1x3gn7n7g1y>

²⁸ Code of Criminal Procedure, art. 202

²⁹ Gheorghe Buzescu, *Police Law - University Course*, Sitech Publishing House, Craiova, 2019

b) when the person has fled from the detention, detention or educational center; when there is a reasonable suspicion that an internationally wanted person is on Romanian territory;

The prosecution is requested by the police body that found the impossibility of executing the warrant and is ordered by order by the General Inspectorate of Romanian Police. In this procedure, in order to locate the arrested defendant, technical surveillance, detention, handing over and search of correspondence and objects, search, seizure of objects or documents may be ordered.

The order of prosecution shall be communicated in copy to the person before whom the defendant is to be handed over at the time of his apprehension, as well as to the judicial body that ordered this measure.

3. Elemente de drept comparat privind mandatul de arestare preventivă

3.1 French Code of Criminal Procedure

“Under France's criminal code, only the judge of freedoms and detention can issue a warrant for detention against the person against whom the prosecution is directed. The warrant is an order given to the person who runs the penitentiary to receive and detain the person stipulated in the warrant. According to the name of the warrant, the person concerned can only be detained, not sought or arrested, except for the person who has absconded from execution after being notified.”³⁰

The detention warrant permits the arrest of the person named in the warrant, but does not authorize his detention for a long period. In addition, the warrant may be enforced only after the person on whose behalf it was issued has been questioned and only if the offence committed provides for criminal or correctional punishment of imprisonment.

According to French law, the arrest of the accused cannot be made without him.

In order to order pre-trial detention, the accused may be brought immediately before the investigating judge by the police authorities on the basis of a detention warrant, using force if necessary.

The body in charge of executing the warrant may not enter the home of a citizen before 06.00 or after 21.00. If the wanted person is on the run or has his domicile outside France, the investigating judge, after receiving the opinion of the Public Prosecutor of the Republic, may issue an arrest warrant if the offence carries a prison sentence or a more serious one. In most cases, a warrant is issued which in turn decides to issue a warrant for detention after the arrest of the defendant has been ordered.

The arrest warrant sums up the advantages of the arrest warrant and the detention warrant.

A person arrested pursuant to a detention warrant shall, not later than 24 hours after his arrest, be brought before the investigating judge or, in his absence, before the president of the tribunal or the judge designated to question him and, where appropriate, to decide on pre-trial detention, in accordance with Article 145 of the French CPP.

If the person is arrested more than 200 km from the premises of the investigating judge who issued the warrant, he or she will be taken no later than 24 hours after the arrest before the judge of freedoms and detention at the place of arrest, who shall question the person concerned after informing him that he has the right not to make statements. The fulfilment of this obligation shall be recorded in minutes.

³⁰ [http:// MagazineProlege.ro/ Pre-trial arrest warrant /#_ftn16](http://MagazineProlege.ro/Pre-trial%20arrest%20warrant/#_ftn16)

In correctional and criminal matters, a warrant may be issued only for the execution of an order for preventive arrest or provisional detention.

The person in charge of executing the warrant hands over the person mentioned in the warrant to the head of the penitentiary, drawing up an act to this effect.

3.2 German Code of Criminal Procedure

In Germany, the Code of Criminal Procedure has another meaning for the pre-trial arrest warrant.

A first significance is outlined by the fact that the preventive arrest warrant allows the arrest of the defendant even in his absence, in order to verify the legality of the measures taken.

The second significance is the issuance of the arrest warrant by the judge, only after analyzing the conditions of legality of provisional arrest against the defendant.

German law provides for imprisonment by the judge imposing a warrant for pre-trial detention.

In these situations, the German pre-trial detention warrant contains:

- the name of the accused;
- the act that the defendant is suspected of having committed, the place and time of committing it, the legal classification as well as the punishment provided by law;
- reason for arrest; elements revealing reasonable suspicion of committing the act and the reason for arrest, except where State security is endangered.

3.3 Bulgarian Code of Criminal Procedure

The Bulgarian Code of Criminal Procedure provides that the prosecutor is competent to issue an arrest warrant against the person being prosecuted.

At this stage of the criminal proceedings, Bulgarian law does not provide for the possibility for the court, i.e. the judge, to be present at the issuing of the arrest warrant or to carry out checks for the arrest warrant either before or after it is issued.

Bulgarian law establishes that a European Arrest Warrant can only be appealed to the prosecutor's office of the higher court.

As far as the arrest warrant is concerned, it aims to bring a person suspected of committing an act stipulated by the criminal law before the police authorities.

The arrest warrant is subject to appeal only before the public prosecutor.

3.4 European pre-trial arrest warrant

The European arrest warrant appears to be regulated due to the necessity and simplification of procedures for the extradition and surrender of persons evading prosecution, trial or execution of a sentence.

The European arrest warrant constitutes the first concrete measure in applying the principle of mutual recognition of criminal judgments, from which the Tampere European Council of 15 and 16 October 1999 decided to make the 'cornerstone' of judicial cooperation between the Member States of the European Union. For Member States that have transposed the Framework Decision, it replaces in most cases the extradition procedure.³¹

A 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 arresting and surrendering

³¹ Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

to another Member State a requested person for the purposes of criminal prosecution, trial or for the purpose of executing a custodial sentence or detention order.³²

From a legal point of view, the European arrest warrant is defined as a judicial decision and should not be confused with the pre-trial arrest warrant under national law. A European arrest warrant is a judicial decision based on a warrant for preventive arrest or execution of a criminal sentence, which cannot be executed because the person concerned absconds in the territory of another Member State of the European Union.

A European arrest warrant is a legal act 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 custodial sentence or detention order³³. The European arrest warrant shall be executed on the basis of the principle of mutual recognition and trust³⁴. The procedure for transmitting the European arrest warrant is governed by Articles 82 to 83 of the Law, which transpose the provisions of Article 10 of Framework Decision No 584/2002 on the European arrest warrant and the surrender procedures between Member States.

In general, the European Arrest Warrant applies to the following types of crime:

- a) membership in a criminal organization;
- b) terrorism;
- c) trafficking in human beings;
- d) sexual exploitation of children and child pornography;
- e) illicit trafficking in narcotic drugs and psychotropic substances;
- f) illicit trafficking in arms, ammunition and explosives; corporation;
- g) defraud;
- h) Spoofing;
- i) cybercrime;
- j) organized or armed robberies;
- k) illicit trafficking in human organs and tissues;

So we can say that the European Arrest Warrant is issued, most of the time, for the most serious crimes that can be committed.

- Conditions for issuing the European arrest warrant

The European arrest warrant is issued for prosecution or trial, as the case may be, if Romanian criminal law provides for a custodial sentence of at least one year or for the execution of a sentence if it is longer than 4 months.

The court which ordered the warrant may request the authorities of that Member State to hand over the property constituting evidence in the case.

When the person concerned has been prosecuted internationally for extradition, the court immediately informs the Centre for International Police Cooperation within the MIA about the issuance of the European Arrest Warrant. As far as costs are concerned, they shall accrue to the State which executed a European arrest warrant and the other costs shall accrue to the issuing State.

The European arrest warrant shall contain:

³² Law nr. 302/2004 on international judicial cooperation in criminal matters, art. 77

³³ Rusu I., Boroi A., *International judicial cooperation in criminal matters*, C.H. Beck Publishing House, Bucharest, 2020

³⁴ Ramework Decision nr. 584/2002, on the European arrest warrant and the surrender procedures between Member States, art. 6

- a) the identity and nationality of the requested person;
- b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- c) proof of a final judgment, preventive arrest warrant or any other enforceable court decision having the same effect;
- d) nature and legal classification of the crime description of the circumstances in which the crime was committed: time, place, degree of participation in the crime of the person;
- e) the penalty imposed,
- f) if the judgment has become final or the scale of penalties prescribed for the offence under the law of the issuing State;
- g) if possible, other consequences of the offence;
 - Filling in the European arrest warrant form

The judicial authority issuing the European arrest warrant must confirm the identity of the person and verify whether one of the grounds for non-execution applies. Judicial bodies must thoroughly describe the offence(s) in the warrant form.

The form must contain photographs and fingerprints of the person wanted internationally and must be added to the SIS alert if available. In addition, the contact details and mobile phone number of the competent office and of the person responsible must be transmitted, so that information that the person shown in the European arrest warrant has been found can be transmitted immediately and at any time of the day.

- Transmission of the European arrest warrant.

The European arrest warrant shall be sent by a secure means of transmission which shall include a written form so that the competent judicial authorities can verify its authenticity. If the whereabouts of the wanted person are unknown, the European Arrest Warrant shall be transmitted via the Schengen Information System. If the judicial authority issuing the European arrest warrant does not know the judicial authority executing the warrant, then the necessary investigations shall be carried out through the contact points of the European Judicial Network in order to obtain the necessary information from the executing State. The transmission of the European Arrest Warrant to the two countries that do not use SIS (Ireland and Cyprus) will be done via Interpol, but an Interpol alert is not subject to arrest.

- Time limit for execution of the European arrest warrant

Strict deadlines are laid down for the execution of a European arrest warrant. This period depends on the consent or disagreement of the requested person for his surrender. Regardless of these deadlines, any European mandate must be processed as a matter of urgency.

If the requested person consents to his surrender, the execution of the warrant must take place within 10 days at the latest. If the person mentioned in the mandate does not agree to his surrender, then the execution of the European mandate shall take place within 60 days.

In relation to the Framework Decision of the European mandate, consent cannot be revoked. According to the law, a person arrested on the basis of a European Arrest Warrant will enjoy the following rights:

- be assisted by defence counsel chosen or appointed by the court of its own motion
- the right to inform a third person of the deprivation of liberty;
- the right to communicate with third parties;
- the right to communicate with consular authorities;

- benefit from the services of an interpreter when they do not know³⁵

Romanian Rights of children subject to a European Arrest Warrant:

- the right to be informed;
- the child's right to have his/her parent informed;
- the right to a lawyer;
- the right to medical examinations;
- the right to treatment when deprived of liberty;
- the right to privacy;
- the right of the child to be accompanied by the parent during criminal

proceedings;

„According to the rules in force, the person referred to in the European arrest warrant shall enjoy the following rights, as subsequently amended and supplemented::

- the right to have an interpreter free of charge (if you do not understand, do not express yourself well or cannot communicate in the language spoken by the authorities,
- you have the right to have an interpreter free of charge); the right to be informed about the content of the European arrest warrant (the new amendment stipulates that if the defendant has been convicted in absentia, then he or she has the right to be given a copy of the judgment);
- the right of access to a lawyer (if the defendant has been provisionally arrested on the basis of a European Arrest Warrant, he/she has the right to request the assistance of a lawyer in the issuing State, chosen or appointed ex officio);
- the right to interpretation and translation (the interpreter will help you communicate with your lawyer and the Romanian authorities, speak, give statements and make conclusions in court)”³⁶

If in 2017, the order of the Ministry of Justice, of the Minister of Internal Affairs, of the President of the High Court of Cassation and Justice and of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice provided for the rights of persons arrested on the basis of a European arrest warrant in Annexes 1 and 2, the new amendment of the law provides for the rights of minors deprived of liberty in criminal proceedings in another annex (Annex no.3).³⁷

- Retention of requested persons in detention in the executing Member State

If the person has been arrested on the basis of a European arrest warrant, the judicial authority must decide whether the person will be detained or released pending the decision on the execution of the European arrest warrant. Therefore, detention is not compulsory and the person subject to the European arrest warrant can be provisionally released, in accordance with the criminal law of the executing Member State.

If the person is not under detention, the competent authority of the executing State is obliged to take measures to prevent the person from evading prosecution.

³⁵ Rusu I., Boroi A., *International judicial cooperation in criminal matters*, C.H. Beck Publishing House, Bucharest, 2020

³⁶ Order of the Ministry of Justice nr. 563/C of 17 February 2022 on the model of written information given to suspects or accused persons in criminal proceedings in which they are deprived of liberty or to persons who are arrested for the purpose of executing a European arrest warrant, Annex no.1, letter G, Annex no.2, lit. A, C and D

³⁷ Order of the Minister of Justice nr. 563/C of 17 February 2022 on the model of written information given to suspects or accused persons in criminal proceedings in which they are deprived of liberty or to persons who are arrested for the purpose of executing a European arrest warrant, Article 1

The decision on detention is taken in accordance with national law, as well as Article 6 of the Charter of Fundamental Rights of the EU, which states that everyone has the right to liberty and security and sets out the conditions and limits for the use of pre-trial detention in European arrest warrant proceedings;

- Time limit for surrender of the person provided for in the mandate

The surrender of the person starts immediately after the final decision on the execution of the warrant has been taken, i.e. as soon as possible, i.e. no later than 10 days after the execution of the European mandate. If surrender within 10 days has been impracticable, the competent judicial authority must immediately contact the authorities of the State where surrender was to take place with a view to arranging another date for surrender. In this case, too, the new date set must not exceed 10 days. The judicial bodies must set a deadline (between 6-10 days) for the translation of the European arrest warrant. The warrant must be translated into one of the official languages of the executing State or into another language it has declared it accepts.

- Deferred or conditional surrender

The executing judicial bodies, having decided that the European arrest warrant may be executed, may request that the surrender of the accused person be postponed so that he or she may be prosecuted in the executing Member State or, if he or she has already been charged, serve in its territory a sentence received on the basis of an act other than that covered by the European arrest warrant.

The executing judicial authority may temporarily hand over the requested person to the Member State which issued the European Warrant, under conditions agreed between the authorities of the executing and issuing States.

In reaching its decision, the court shall take into account all the circumstances of the case and the need to execute the European arrest warrant.³⁸

The proposal for pre-trial detention is addressed to the institution of the judge of rights and freedoms of the competent court. The specific appointment of one of the judges is made, after the case is registered with the court, by computerized method."³⁹

The withdrawal of the European mandate shall take place when::

- a) the causes justifying its issuance have disappeared;
- b) when the person concerned has been extradited or surrendered to Romania;
- c) when carried out by the issuing court;

„The grounds for mandatory non-execution of the European arrest warrant shall be ordered where::

- the offence referred to in the European arrest warrant is covered by amnesty in the executing Member State or where it has jurisdiction to prosecute it under its criminal law;
- if it appears from information held by the executing judicial authority that the pursued person has been finally tried by a Member State on the same facts;
- where the person subject to the European arrest warrant cannot, because of his age, be held criminally liable for the acts indicated in the European arrest warrant, under the law of the executing Member State;⁴⁰

³⁸ Radu F.R., From extradition to the European Arrest Warrant, A Historical and Legal Glance, Law Magazine nr. 2/2018

³⁹ Tudor G., Constantinescu M., European Arrest Warrant, Hamangiu Publishing House, 2017

⁴⁰ Framework Decision No .../... Regulation (EC) No 584/2002 on the European preventive arrest warrant and surrender procedures between Member States, Article 3

Grounds for optional non-execution of the European arrest warrant:

- where the person named in the European arrest warrant is prosecuted in the executing State for the same offence;
- where the penalty has been barred in accordance with the law of the executing Member State and the facts fall within its jurisdiction; where the judicial bodies of the executing Member State have decided not to prosecute or to discontinue it, or
- where the prosecuted person is the subject of a final decision in a Member State for the same acts;

„Officials of the authorities of one Party prosecuting in their country a person who has committed or participated in the commission of an offence forming the basis of the European arrest warrant shall be authorised to continue the pursuit without a time limit in the territory of the State of the other Party without prior authorisation from that Party.”⁴¹

Once the internationally wanted person has been found and is arrested in another Member State, the judicial authorities of the issuing Member State must respond swiftly to requests for information and other information from the authorities of the executing Member State.

The competent authorities of the issuing Member State shall be guided by good practices of cooperation and communication with the competent authorities of the executing Member State.

If the judicial authority which issued the European Warrant decides to withdraw it, it must immediately report it to the executing judicial authority, in particular where the requested person has been deprived of liberty in a detention system. It must also be ensured that the SIS alert is deleted.

The issuing judicial authority may at any time transmit all additional and useful information to the executing judicial authority.

The European Arrest Warrant replaced extradition procedures as of 1 January 2004 for all EU Member States.

Using the European Arrest Warrant fights cross-border crime, but EU Member States can improve the way it is used

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