



The European Arrest Warrant and in Absentia Convictions

24-25 October 2019, Maastricht



Rights and obligations always go together

The correlative obligation of a relative right consists in the duty of the passive subject to have the behaviour assumed by the nature of the active subjective right, that is TO DO or NOT TO DO something

Right to defence

- the (at least) 3 sides of it ...
- Suspects/accused have the right to defend him/herself or be assisted by a lawyer
- Judicial bodies are under the obligation to consider ex officio to collecting and submit evidence also in favor of a suspect/accused person
- Suspects/accused have the right to legal assistance assured by a lawyer
- unilaterally or within the whole context of the administration of justice?
- to be exercised always *in good faith*, according to the goal for which the law recognizes it

Right to defence

- Article 24 of the Romanian Constitution/Article 15 of Law 302/2004 on judicial organization *parties have the right to be assisted during the course of proceedings to be assisted by a lawyer, chosen or ex officio*
- Article 10 of CPP - *the parties (accused person) and main subjects in the proceedings (suspect) have the right to defend themselves or be assisted by a lawyer.*
- Article 83 of CPP – among which right to be informed that he/she has the right to have a chosen lawyer or *an ex officio one when legal assistance is mandatory*

Mandatory legal assistance of suspect/accused person

- when underage, detained in a detention center or an educational center, when placed under *garde a vue* (24 hours) by prosecutor or arrested by the judge, even in a different case, and when a safety measure was ordered remanding him/her to a medical facility, even in a different case, as well as in other situations established by law;
- when a judicial body believes that a suspect or accused person could not prepare their defense on his/her own;
- during the course of preliminary chamber procedure and trial, in cases where the law establishes life detention or an imprisonment penalty exceeding 5 years for the committed offense.

Ex officio Lawyer – Suspects/Accused persons

- the right to benefit from the time and facilities necessary for the preparation and implementation of an effective defense (e.g. during the preliminary chamber procedure at least 20 days are to be given)
- obligation to ensure an effective and concrete legal assistance for the suspect/accused person
- obligation to contact the suspect/accused person - notified by the Office for Legal Assistance of the Bar Association about having an ex officio lawyer appointed (power-of-attorney, contact details of the lawyer, reference to the case file and judicial body in charge)

Ex officio lawyer - judicial bodies

- the judicial body under the obligation to ensure having an ex officio lawyer designated/appointed when legal assistance is mandatory and
 - There is no chosen lawyer
 - There is a chosen lawyer BUT *is unjustifiably absent, does not ensure a replacement or refuses unjustifiably to ensure the defense, even though the use of all procedure rights was ensured - reasonable term and facilities required for the preparation of an effective defense are to be given (during the trial stage a minimum 3 days shall be granted)*
 - the ex officio lawyer is under the obligation to present whenever asked by the judicial body
 - during the trial, when absent, and no other ex officio lawyer can be designated, the case is adjourned
- mandate of an *ex officio* lawyer ceases when the chosen lawyer appears

Rights of the lawyer

- *During the investigation/stage*

- the right to be present during performance of any criminal investigation act, except for special surveillance or investigation methods, bodily or vehicle searches, in case of in-the-act offenses.
- Right to ask to be informed of the date and time when a criminal investigation act is performed or of the hearing conducted by the Judge for Rights and Liberties

- *During preliminary chamber procedure/trial*

- Right to consult the case file, to assist the accused persons, to exercise the accused's procedural rights, to file complaints, applications, motions, to raise exceptions and objections

Duly summoned and the procedure fulfilled

- Summon will indicate that
 - In case Article 90 CPP applies, having a lawyer is mandatory *and, in case the party does not chose a lawyer, to assist him/her, an ex officio lawyer is to be appointed*
 - the summoned party is entitled, so as to exercise the right to defense, to consult the case file as deposited within the Court or prosecutor's office archives
 - consequences of failure to present before the judicial body (.. *In absentia trial*)
- The trial may take place only if the victim and the parties have been duly summoned and the procedure fulfilled ... *The presence of the party in court, in person or through a representative or a chosen lawyer or appointed, if the latter contacted the person they represent, shall cover any irregularity related to the summoning procedure.*

EAW based on in absentia convictions

- Article 4a) of FD on EAW – Article 93 and 99 (2) i) of Law 302/2004
- RO issuing judge is to check preliminary which of the legal hypotheses of 4a) is the incident and rightly fill in the EAW form
- In case of 4a) 1) b) – if the case file does not offer any indication to the mandate given, RO issuing judge may ask the ex officio lawyer to state on the concrete terms of his/her professional relation and the accused person (e.g. was he/she ever in contact with the client?)
- As executing state – optional ground of refusal