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DYNAMICS OF PRACTICAL AND LEGISLATIVE CHALLENGES FOR JUDICIAL COOPERATION IN CRIMINAL MATTERS

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Abstract: *In the area of freedom, security and justice, the attention is aimed, as qualitative orientation, towards the independence of the judicial systems and to the effectiveness of fundamental rights. The article aims to analyse the legislative novelties in the European law for judicial cooperation in criminal matters, as well as the status of their transposition in the national legislation, signalling at the same time the potential problems inherent for this process. Also, controversial aspects in judicial matters shall be revealed and a statistical analysis shall be carried out regarding the judicial cooperation in criminal matters within the jurisdiction of the Prosecutor's Office attached to the Brasov Court of Appeal, for the period 2014 – 2017.*

Key words: *judicial cooperation in criminal matters, European investigation order, Directive 2016/1919/EU.*

1. Introduction

In the European area, characterized in particular by adopting a minimum set of principles and values that are valid for citizens of the Member States of the European Union, the European legislation has consistently pursued the promulgation of a package of common and binding measures for the Member States, so that the citizens of the Union can benefit from the same fundamental rights and guarantees in any state, thus enhancing the prerequisites for mutual recognition of judicial acts and the modernization of the procedural framework, to the initial regulations applicable in the European states (European Convention for judicial assistance, adopted in Strasbourg on 20 April 1959 and the convention regarding the reciprocal judicial assistance in criminal matters between the member states of the European Union, 2000).

Consistent with this principle, the European legislation has obliged the Member States to transpose into their national law the various directives enacted in this respect, in addition to the other regulations adopted and which are of direct applicability.

Associated with a guaranteed freedom of movement for citizens of the EU Member States, this common fund of rights and guarantees recognized at European level places the European citizen the position of being able to effectively exert their fundamental rights recognized by the European Convention on Human Rights.

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It is precisely this increased freedom of movement for every European citizen that generates numerous situations in which Member States have to co-operate to prosecute individuals who have committed criminal offenses in other countries, where international judicial cooperation appears to be an objective necessity.

2. Legislation news regarding the judicial international collaboration in criminal matters

Along with the transposition of Directive 2014/41/UE of the European Parliament and Council of April 3 2014 regarding the European order of Investigation in criminal matters (Published in the EU official Journal L 130/1 of 1.5.2014) in Law 302/2004 regarding the judicial international collaboration in criminal matters (Published in the Official Monitor N. 594 of 01.07.2004 with the subsequent modifications by Law 236/2017 published in the Official Monitor N. 993 of 14 December 2017), the manner of collaboration has been established between the EU Member States, by transposing this directive, in the field of running the investigation measures in order to obtain evidence. Thus, in Law 302/2004 a new section has been inserted, i.e. section 6, containing the articles 268^{1}-268^{25}.

This new aproach is based on an unique tool called the European investigation order. An European investigation Order is going to be issued for the purpose of applying one or more specific investigation measures in view of gathering evidence or in view of sending over the evidence already collected by the competent authority in the execution state.

Pursuant to art. 268^{1} paragraph (2) item a), the European investigation order represents „a judicial decision issued or validated by a judicial authority of a member state, for the purpose of carrying out one or more specific investigation measures in another member state, in view of obtaining evidence or in view of sending the evidence already in posession of the competent authority in the execution state."

Thus, this new procedural tool shall facilitate the evidence related procedures outside the borders of the country, contributing to ensuring the cellerity of the procedures and finding the truth in the criminal cases.

The European investigation order replaces the old instruments of judicial collaboration in evidence matters such as the rogatory commissions, hearings by means of video conference and others.

In view of the novelty of this institution and the relatively recent date when it has been introduced into domestic law, judicial practice should signal any shortcomings in this procedure for obtaining evidence.

3. Measures to be transposed by the national legislation on guaranteeing the right to legal aid for vulnerable persons

The Directive (UE) 2016/1919 of the European Parliament and of the Council of 26 October 2016 (Published in the EU official Journal L 297/1 of 4.11.2016) sets common minimum standards for EU Member States regarding the right to free legal assistance for suspected and accused individuals in criminal proceedings and the ones subject to European arrest warrant proceedings.

Moreover, the Directive imposes these rights also on persons who had not initially been

suspected or accused persons but who became such persons in the course of interrogations lead by the police or another law enforcement authority, so that witnesses are assisted by a witness lawyer, given the possibility of self-incriminating in the course of the statement made before the judicial bodies.

In order to transpose this Directive into the national legislation, Member States that did not do so up to the present time, have a deadline: 25 May 2019.

Article 2 of the Directive requires the provision of free legal aid to suspected and accused persons in criminal proceedings who are deprived of their liberty or who are or may be present in a search or evidence-gathering act such as, for example, a group of people, confronting or reconstituting a crime.

The same Directive applies from the moment of arrest in the Member State of enforcement of the persons sought for according to the European arrest warrant procedure, the law regulated by the Directive being incident from the time when a decision on detention is taken, as well as during detention, at any stage of the proceedings until it is closed.

Under the Directive, free legal aid means financing assistance by a Member State from a lawyer whereby the right to access a lawyer is actually exerted.

According to the Directive in question, the spectrum of persons in respect to which the Member States have the obligation to provide free legal aid is extended and is no longer strictly subject to the gravity of the facts, as it is in the case of current national legislation, but a new criterion is being considered, according to which this obligation is analyzed by the Member States: namely the criterion of financial possibilities available to the suspected or accused persons, who receive free legal aid when they cannot afford to hire a lawyer as it is in the interest of the act of justice to provide legal assistance to the person concerned.

Thus, free legal assistance in trials will be analyzed by reference to two alternative or concomitant criteria, namely the criterion of material status and solidity.

Placing the focus of the material status criterion on which free legal aid is to be given reflects a sustained concern from the European legislator for the ongoing adaptation of the old procedural safeguards to the personal development stage of the individual precisely for a successful adaptation and personalization of rights otherwise enshrined by older normative acts which had not been able to achieve the desired aim.

Therefore, where a Member State applies the criterion of material status, elements such as income, capital, family circumstances of the person concerned and costs of legal assistance from a lawyer and the standard of living in the Member State concerned shall be taken into account in order to determine if the accused persons do not have sufficient resources to obtain legal assistance from a lawyer.

As can be noticed from the above, free legal aid is granted only to persons who, by reference to the criterion shown, prove that they cannot afford the services of a lawyer by their own means.

However, we consider that this criterion still has its limitations, as it leaves the representatives of the judicial bodies in the Member States broader discretionary opportunities to conclude if a person possesses the material possibilities for hiring a lawyer, therefore we consider that strict criteria are necessary to make such an analysis in order not to turn that right into an illusory guarantee, which can be achieved when transposing these provisions into the national law.

When Member States apply the criterion of soundness, account shall be taken of the seriousness of the offense, the complexity of the case and the degree of severity of the sanction in question in order to determine whether the interests of justice require the provision of free legal aid.

In any case, the criterion of soundness is considered to be met in the following situations:

(a) where a suspected or accused person is brought before a judge or a court or competent judicial body to rule on detention at any stage of the proceedings within the scope of this Directive; and

(b) during detention.

Similarly, the European Court of Human Rights has held that, when deciding on the granting of free legal aid, the national courts must take into account the seriousness of the offense imputed to the accused, the severity of the sanction to be applied, the complexity of the case and the personality of the accused person (Bîrsan, 2005, p.559).

Particular emphasis must be placed on the European legislator's stress not so much on the rights of the individual, but also on the interests of the judiciary, since it is not only for the interest of the individual suspected of committing an offense to receive legal aid, but especially in the interest of the judiciary to carry out transparent procedures guaranteeing all procedural rights to the parties and to the other participants, in order to lead to sound and fully justified solutions.

The right to free legal aid is to be granted without undue delay and at the latest before the person is questioned by the police, another law enforcement authority or a judicial authority, or before conducting research or activities such as reconstitution of a crime, confrontation or recognition from a group of people.

Granting free of charge legal assistance to suspects, accused persons or wanted persons considered vulnerable, is provided at their request, but may be rejected in whole or in part by the competent authority of each Member State, and the decision to do so will be communicated in writing to the person concerned. Against that decision, the individuals concerned have filed for an effective remedy under national law.

The transposition of this Directive into the national law will generate additional costs for the Romanian State to pay legal aid services provided by lawyers to persons deemed vulnerable under the normative act under consideration, while at the same time contributing to a qualitative increase in the act of justice, in the interests of justice, ensuring thus the exercise of the fundamental rights of the individual.

4. Practical issues encountered in carrying out the transfer of proceedings in criminal matters

I. By the Decision No. 15 of 22 May 2015 of the High Court of Cassation and Justice (Published in the Official Monitor no. 455 of June 24th, 2015) - The Criminal Law Enforcement Unit stated the following: „In the application of art. 17 of the Framework-Decision 2008/909/JAI of the Council of 27 November 2008, on the application of the principle of mutual recognition to judgments in criminal matters and art. 144 paragraph (1) Law No. 302/2004, republished, as subsequently amended and supplemented, it is established that:

After the transfer of the person sentenced by the foreign judicial authorities to the continued execution of the punishment in Romania, the length of the conviction time

considered by the sentencing state to be based on the work done and good conduct, granted to the convicted person by the foreign judicial authority, must not be reduced from the punishment that is being executed in Romania."

Without exposing the whole of the factual situation of the subject of the plea, it is essentially held that M.G. (Romanian citizen) was finally convicted by the judicial authorities in Italy for 8 years, 9 months and 28 days of imprisonment. The conviction was recognized in Romania (April 24, 2013) and the convict was transferred to a Romanian penitentiary in order to continue the execution of the sentence.

Up to the transfer to Romania, during the execution of the sentence in the sentencing state (Italy), the Italian judicial authorities granted M.G. a benefit (early release, according to the Italian law) consisting of the recognition of 360 days of execution, on the basis of the work done and the positive conduct shown by the convicted person during the execution of the punishment in Italy.

Regarding the question of law for which clarification is requested, the High Court of Cassation and Justice observes that it is necessary to analyze the provisions of art. 17 of the framework-decision 2008/909/JAI of the Council of 27 November 2008, respectively of art. 144 paragraph (1) Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, by reference to the provisions of Art. 73 of the Criminal Code, regarding the computation of punishments and cautionary measures executed abroad, art. 96 paragraph (1) Law No. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by the judicial bodies during the criminal trial, with further additions.

Article 17 of Council Framework Decision 2008/909 / JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union provides that: "(1) The execution of a punishment is governed by the law of the executing State. The authorities of the executing State are competent, subject to paragraphs 2 and 3, to decide on the enforcement procedures and to lay down all the related measures, including the grounds for early release or parole. (2) The competent authority of the executing State shall deduct the entire period of deprivation of liberty already enforced according to the sentence for which the judgment has been issued for the entire duration of the custodial sentence to be enforced. (...) 4. Member States may provide that any decision on early release or parole may take into account those provisions of national law indicated by the issuing State under which the person concerned is entitled to be released before term or conditionally at a given time. "

Pursuant to art.144 paragraph (1) Law No. 302/2004: "*when Romania is a state of execution, the execution of a custodial sentence or measure of deprivation of liberty imposed by a court order recognized by the Romanian court is governed by the Romanian law. The length of the period of deprivation of liberty executed in the issuing State is deducted from the total duration of the penalty or the deprivation of liberty to be executed in Romania* ", and according to par.3. "*when Romania is a state of execution, the execution of a custodial sentence or measure of deprivation of liberty imposed by a court order recognized by the Romanian court is governed by the Romanian law*".

At the same time, the High Court takes into account the fact that the Romanian legislator's omission to include explicit, express provisions in Title VI of Law no. 302/2004, which allows

the recognition of the provisions of a judgment given by a Member State of the European Union relating to institutions such as parole, does not lead to the impossibility of recognizing those provisions but, on the contrary, to their recognition under Art. 140^1 of Law No. 302/2004 on International Judicial Cooperation in Criminal Matters.

II. A particularly interesting issue analyzed by the courts of law in Brasov is the situation where there is only partial compatibility between the way of regulating the sanctions applicable to persons who have committed crimes on the territory of other states, but they end up serving the punishment in Romania.

In this respect, by the Criminal Sentence N. 28/F of 10 May 2018 issued in the file n. 171/64/2018 by the Brasov Court of Appeal found that by the petition filed by the Prosecutor's Office attached to the Brasov Court of Appeal on 3.04.2018, 101 and 103, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, ruled for the arrest measure and handing over the requested person to the Italian authorities, who issued a European arrest warrant against him.

In the complaint sent by the Italian authorities, it is mentioned that the person requested was sentenced to a six-year prison sentence for committing the trafficking offense in the form of complicity provided for in Art. 416.81 cpv., 110, 601 of the Italian Criminal Code, the fact that between August 2014 and March 2016, acting as an accomplice to other adult persons in a criminal group, committed several trafficking crimes, an European arrest warrant was issued for this purpose.

By the end of April 4, 2018, the provisional arrest of the requested person was ordered and the person requested by the KE acknowledged that he is the person to whom the European arrest warrant relates, but did not consent to handing the person over to the authorities issuing the European arrest warrant, and the refusal to consent to their surrender was justified as an optional refusal to execute the mandate provided by art. 98 paragraph 2 lit. c of Law 302/2004, stating that he is a Romanian citizen who is domiciled in Romania where he actually resides and also has relatives in Romania and does not want to execute the six years imprisonment imposed by the Italian authorities in Italy, but in a place of detention in Romania.

The requested person also indicated to the court that he wanted to execute the punishment imposed on him on the territory of Romania, of which he is a citizen, and for this purpose, he requested the Italian authorities to send the conviction order for recognition. Subsequently, the Ministry of Justice forwarded to the court the request of the Italian authorities for the main recognition of the judgment of conviction and the execution of the punishment in Romania according to art. 159 and the following, of Law 302/2004.

The court reunited the two requests and found in this context that the incident in the present case was the optional reason for refusing to execute the European arrest warrant provided for in Art. 98 paragraph 2 letter c of Law 302/2004, stating that he is a Romanian citizen, he is domiciled in Romania where he actually resides and also has relatives in Romania and does not want to execute the six years imprisonment imposed by the Italian authorities in Italy, but in a place of detention in Romania.

As regards the recognition of criminal sentences in Italy, the Court found by analyzing its content that the person requested, KE, was sentenced to six years imprisonment for

committing, during the time he was underage, the offense of "association for the purpose of committing trafficking in persons" and "trafficking in persons" provided by art. 416, 81, par. 2, 110, 601 of the Italian Criminal Code, that the conditions for recognition of the foreign judgment in an incidental way are fulfilled according to art. 98 paragraph 3 of Law 302/2004 related to art. 136 of the same law.

Thus, the judgment to be recognized is delivered by a court in Italy, it is final and enforceable, the deeds for which the Italian authorities have imposed a six-year sentence would have constituted, if the offenses were committed in Romania, "setting up an organized criminal group" provided by art. 367 of the Criminal code and „human traficking" as per art. 210 Criminal Code, the convicted person has consented to the execution of the punishment in Romania, there is no incidence of any of the reasons for non-recognition and non-execution provided in par. 2 of art. 136 Law 302/2004, and the execution in Romania of the prison sentence or the deprivation of liberty measure is likely to facilitate the social reintegration of the convicted person.

However, the court found that it was necessary to adapt the custodial sentence imposed on the person convicted, namely K. E., by the Italian authorities under Art. 135 paragraph 6 letter b item i and par. 7 and 8 of Law 302/2004, both in terms of the nature of the custodial sentence imposed by the foreign court which does not correspond under denomination with the penalties applicable to juveniles by Romanian criminal law and its duration, the six years' imprisonment exceeding the special maximum limit of the educational measure of deprivation of liberty that can be applied to a minor according to the Romanian legislation.

Thus, in view of the fact that the person condemned, namely K.E., was underage at the time of the offense, and according to Romanian law, underage offenders cannot be punished, but only restrictive educational measures depriving them of liberty can be applied. In the present case, in relation to the limits of punishment provided by the Romanian law for the offenses incumbent upon the convict and for which he was sentenced to six years imprisonment (1 to 5 years imprisonment for the offense of setting up an organized criminal group provisioned by art. 367 paragraph 1, Romanian Criminal Code and 3-10 Years Prison for Trafficking in Persons" provided by Art. 210 of the Romanian Criminal Code), he can be punished, according to art. 125 of the Criminal Code, with an educative measure entailing deprivation of liberty for maximum 5 years.

As such, considering that the deprivation of liberty imposed by the foreign judgment exceeds the maximum duration of the deprivation measure that may be applied to the person convicted, i.e. KE, under Romanian law, the court considers that the punishment imposed by the foreign authorities must be adjusted both in terms of nature and of duration, and consequently order that the convicted person finally executes the offenses of "establishing an organized criminal group" provided by art. 367 of the Criminal code and human trafficking according to the provisions of art. 210 Criminal Code, the educational measure of committal to a detention center for a period of 5 years.

It is not possible to proceed to a new individualization of the sanction applied to the juvenile, since the Romanian authorities in this case invested in solving the application for recognition are not competent to re-judge the case and thus to re-individualize the amount of the criminal sanction applied to the juvenile by the foreign courts, thus only an adaptation takes place in terms of the nature and duration of the sanction so that the deprivation of liberty imposed on

the minor corresponds to the executing state or the Romanian legislation; the lawfulness of the criminal sanction to be enforced in Romania is ensured thus, according to art. 2 of the Code of Criminal Procedure; as a result, the court can only reduce the amount of punishment imposed onto the juvenile up to the maximum limit of the educational measure depriving them of liberty provided by the Romanian legislation in force, under no circumstances being able to re-individualize the sanction and apply to the person requested an educational measure which is longer than the maximum prescribed by law.

That is also apparent from the provisions of Art. 136 paragraph 7 of Law 302/2004 stipulating that when "its duration exceeds, as the case may be, the special maximum limit of the punishment stipulated by the Romanian criminal law for the same offense or the general maximum limit of the prison sentence provided by the Romanian law", "Adaptation by the court of law the sentence of the punishment imposed by the foreign court is to reduce the penalty to the maximum allowed by Romanian criminal law for similar crimes."

5. Quantitative indicators in the international judicial cooperation activity of the Prosecutor's Office attached to the Braşov Court of Appeal

International judicial cooperation has experienced significant internal development in recent years, mainly due to the mobility currently enjoyed by the citizens of the European Union, thus implicitly of the criminal elements of society, which is also reflected in the statistical data existing at the level The Prosecutor's Office attached to the Braşov Court of Appeal, regarding the time between 2014-2017 (the statistical data was provided by the Prosecutor's Office attached to the Brasov Court of Appeal):

In the year 2014:

- 32 European arrest warrants, of which 10 were executed, 11 cases were filed and 3 other files were sent to other prosecutor's offices in the country for competent settlement; 13 European arrest warrants registered in 2012 (1 warrant) and 2013 (12 warrants) were in progress within the institution, of which 7 were assigned a ranking solution in 2014; 1 enforced request for extradition from the United Arab Emirates judicial authorities; 1 petition for criminal proceedings measures to be taken by Spain, the request for transfer of proceedings being made in 2012; 3 papers on the transfer of procedures to other states, formulated between 2009 and 2013; 9 requests for criminal proceedings to be taken by the Romanian judicial authorities; 23 requests for the recognition of judgments rendered abroad and the transfer of the sentenced person for the execution of the sentence in a Romanian penitentiary; 2 requests for international rogatory commissions to other states; 7 requests for international rogatory commissions from other states, of which 1 request was made by the judicial authorities of Canada, the only one within the competence of the Prosecutor's Office attached to the Brasov Court ofAppeal, the other being sent to the competent prosecutor's offices;

In the year 2015:

- 21 European arrest warrants, of which 4 were executed and 5 were ordered to be classified; 7 European arrest warrants registered in 2013 (2 warrants) and 2014 (5

warrants) were in progress, all of them being available for ranking in 2015; 9 requests for criminal proceedings to be taken by the Romanian judicial authorities; 2 requests for recognition of judgments passed abroad; 17 applications for the recognition of judgments passed abroad and the transfer of the convicted person for the purpose of serving the sentence in a Romanian penitentiary; 1 request for an international rogatory commission formulated by other states; 4 requests for international rogatory commissions formulated by other states of which 1 request for the competence of the Prosecutor's Office attached to the Brasov Court of Appeal, the other being sent to the competent prosecutor's offices;

In the year 2016:

- 46 European arrest warrants, out of which 22 were executed, 8 files were classified and 3 others were sent to other prosecutor's offices in the country for competent settlement; 12 European arrest warrants registered in 2012 (4 warrants), 2014 (2 warrants) and 2015 (6 warrants) were in progress, 9 of which were available for ranking in 2016; 1 enforced request for extradition from the judicial authorities of the United States; 12 requests for criminal proceedings to be taken by the Romanian judicial authorities; 2 requests for recognition of judgments passed abroad; 16 requests for the recognition of judgments passed abroad and the transfer of the sentenced person for the execution of the sentence in a penitentiary in Romania; 2 requests for international rogatory commissions to other states; 5 requests for international commissions from other states, of which 1 application was handed over to the Prosecutor's Office attached to the Târgu Mureş Court of Appeal, the others were sent to the competent prosecution offices of the Prosecutor's Office attached to the Brasov Court of Appeal;

In the year 2017:

- 28 European arrest warrants, out of which 18 were executed, 4 files were classified and 2 others were sent to other prosecutors' offices in the country for competent settlement; 11 European arrest warrants registered in 2013 (1 warrant), 2014 (18 warrants) and 2015 (6 warrants) were in progress, 6 of which were available for ranking; 1 enforced request for extradition from the judicial authorities in the United States; 12 requests for criminal proceedings to be taken by the Romanian judicial authorities; 4 requests for recognition of judgments passed abroad; 16 sentences for the execution of sentences in a penitentiary in Romania; 2 requests for international rogatory commissions to other states; And the other were sent to the Prosecutor's Office attached to the Court of Appeal of Brasov; the others were sent to the Prosecutor's Office attached to the Court of Appeal of Târgu Mureş;

6. Conclusions

In view of the transnational character of criminality, the European legislature has constantly tried to identify new legislative solutions that encourage judicial cooperation in criminal matters between states and facilitate the better conduct of criminal processes with foreign elements.

On the other hand, in European Union law, there is a growing interest in the rights conferred

on individuals accused of criminal offences, and there is a tendency to constantly develop the standards of protection offered by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

The new existing regulations at European level create difficulties for both the Romanian legislator who has to transpose these provisions into the domestic law and the law practitioners called upon to interpret and apply such provisions.

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