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**Recognition and Enforcement of Foreign Judgments if the Convicted
Person is in Romania. Critical Observations**

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Abstract: In this paper we have examined the institution of recognition and enforcement of foreign judgments, if the sentenced person is in Romania, according to the Romanian special law provisions in force. We have also considered the formulation of critical observations aiming at identifying failures of the law and hence the proposal of amending and supplementing the texts. Among these drawbacks of the Romanian law we mention the absence of compulsory insurance of defense in the trial stage of the application for recognition to the trial court and the absence of the person from hearing an appeal, the obligatory presence being only for the prosecutor. The paper continues the research of the international judicial cooperation forms in criminal matters conducted by the publication of other similar studies, and the innovations consist precisely in the examination of institution and identification of provisions of the law that can cause dysfunctions in the procedure of recognition and enforcement of such judgments. The paper can be useful to academics, theorists, practitioners and the legislator in terms of introducing amendments and additions in the text of the law.

Keywords: Sanction of criminal law; mandatory grounds for non-recognition; judgment procedure; call

1. Introduction

As highlighted in the recent doctrine, examined individually, each of the forms of judicial cooperation in criminal matters adopted at EU level has its importance, on a first examination it is quite difficult to establish a hierarchy of their importance.

This hierarchy is difficult to achieve also due to the fact that in practice, each of the mentioned forms is important because of the moment in which it is applied or it requires its application by another Member State (Rusu & Balan-Rusu, 2013, p. 83).

On the other hand, when we examine the particularly complex institution of recognition of criminal judgments and foreign judicial acts, it must include both criminal judgments emanating from the Romanian judicial authorities and those emanating from the competent judicial authorities of other countries (Boroi & Rusu, 2008, p. 347).

Our opinion, acquired from the general European and Romanian doctrine, is that, in terms of judicial cooperation in criminal matters between Member States of the European Union and the recognition and enforcement of judgments and other judicial acts emanating from another competent institution in another Member State is the most important form of cooperation (Rusu & Balan-Rusu, 2013, p. 83).

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This form of international judicial cooperation in criminal matters in Romania's relations with countries other than the EU members has certain features which are regulated point by point in the Romanian law.

Thus, the Romanian legislator has regulated distinctly the institutions of recognition and enforcement of foreign judgments, if the person is serving a criminal law sanction in another Member State or in Romania.

In the present work we undertake an examination on the procedure for recognizing foreign judgments if the person convicted in a third State, is on the territory of Romania.

We mention that this institution is governed by Title V, Chapter II, Section 2 of Law no. 302/2004 on international judicial cooperation in criminal matters.¹

2. The Procedure for Recognition of the Foreign Judgment and Taking Preventive Measures

After the transmission of the documents and information provided by law (art. 132 of the special law) by the issuing State, the Ministry of Justice through its specialized directorate submits them to the office attached to the court of appeal in whose territorial jurisdiction resides the sentenced person or, in the case where he is in detention, in the territorial jurisdiction of the detention place for the purpose of referral to the competent court of appeal.

After receiving the file, the assigned prosecutor verifies if:

- the enforcement of the foreign judgment in Romania would be contrary to the principle of *non bis in idem*;
- the convicted person is prosecuted in Romania for the same offenses for which the foreign judgment was rendered;
- the convicted person is prosecuted in Romania for crimes other than those for which the foreign judgment was rendered;
- It is incident with any of the refusal grounds established in art. 136 par. (2) of the special law [art. 134 par. (2) a) -d) of the special law].

Also, the prosecutor will check the possibility of provisions governing the specialty rule, meaning to ascertain whether the person benefits from this rule.

After performing the mentioned above checks and declaring that the provisions of the law are met, the prosecutor notifies the competent court of appeal to decide.

The court is assembled by one judge, in the council chamber, summoning the convicted person, the prosecutor's presence is mandatory.

Although the law does not expressly provide it, we consider that at least at the request of the convicted person it should be assisted by the chosen attorney.

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We believe that in conducting this procedure, given its importance and complexity, the convicted person must be provided with mandatory legal assistance, which is why we suggest supplementing the law with such provisions.

The object of the procedure for recognition of the foreign judgment is to check the following conditions:

- The judgment is final and enforceable;
- There is double incrimination; if the penalty was imposed for several crimes, this condition is checked for each crime separately;
- it is not incident any grounds for non-recognition and non-execution of a foreign judgment under art. 136, par. (2); if the court finds the incidence of any of the compulsory grounds for non-recognition and non-execution, the court may still decide the recognition and enforcement, if they are confident that the execution of the sentence in Romania would contribute significantly to the social reintegration of the convicted person;
- the execution of the sentence of life imprisonment or imprisonment or the custodial measure in Romania is likely to facilitate the social reintegration of the convicted person;
- There are no mandatory or optional reasons for refusal of recognition and enforcement of foreign judgment (Boroi, Rusu & Rusu, 2016 p).

The mandatory reasons for which according to the Romanian law the foreign judgment shall not be recognized and implicitly enforced are:

- the recognition and enforcement in Romania of the foreign judgment would be contrary to the fundamental principles of the legal system of the Romanian state;
- the judgment relates to a political offense or an offense connected with a political offense or an military offense that is not an offense of common law;
- the sentence has been imposed on grounds of race, religion, sex, nationality, language, political or ideological opinion or membership in a particular social group;
- The person has been finally convicted in Romania for the same criminal offenses. If the foreign judgment has been passed for other offenses, the court may order partial recognition of it, if the other conditions are met;
- the person has been convicted in another state for the same crimes, and the foreign judgment passed in this state has been previously recognized by Romania;
- the convicted person benefits in Romania from immunity from prosecution;
- The penalty was imposed on a person who is not criminally liable under the Romanian law;
- The penalty is a measure of psychiatric or medical treatment that cannot be enforced in Romania or, where applicable, it provides for medical or therapeutic treatment that cannot be supervised in Romania, in accordance with the national legal or healthcare system;
- The sentenced person has left Romania establishing his domicile in another state, and his links with the Romanian state are not significant;
- The convicted person has committed a serious crime, such as to alarm the society, or has had close relations with members of criminal organizations, likely to cast doubt upon his social reinsertion in Romania;
- There are objective indications that the judgment was given in breach of fundamental rights and freedoms, in particular, the sentence has been imposed to sentence the convicted person on grounds of sex, race, religion, ethnic origin, nationality, language, political beliefs or sexual orientation and the convicted person had no possibility to challenge these circumstances to the European Court of Human Rights or an international court.

So whenever the court shall determine the incidence of a single case of the ones mentioned above, it will refuse the recognition and implicitly the enforcement of foreign judgment, even if the other conditions required by the Romanian law are met.

At the same time, the court will also examine the possibility of the following optional grounds for refusing recognition and enforcement:

- The person is under investigation in Romania for the same criminal offense for which he was convicted abroad. If the judgment has been passed for other offenses, the court may order partial recognition of it, if the other conditions are met;
- When the issuing State has refused the application under art. 134, par. (1) of the special law.

No doubt when the court becomes aware of any optional reason for refusing the recognition and enforcement, the recognition and enforcement of the decision may be taken if all the conditions provided by law are met. So, unlike the mandatory reasons, in the case of optional reasons court may decide the recognition and enforcement of the foreign judgment.

Also, in the case where the convicted person is under investigation in Romania for the crime for which he was convicted abroad, instead of refusing the recognition, the court may order either the recognition of the foreign judgment or suspending the proceedings until a decision is passed in the criminal case found before the Romanian judicial authorities.

At the express request of the issuing State it may be taken against the convicted person one of the preventive measures provided by the Romanian Criminal Procedure Code.

For choosing preventive measures it will be taken into account the sentence imposed in the issuing State, the nature of the crime, health, age, history and other circumstances of the person against whom the action is taken.

Under the Romanian law, the *remand measure may be taken against the convicted person if the committed offense is one of the categories of offenses mentioned in art. 96, para. (1) and the following circumstances exist:*

- a) the sentenced person has fled from the issuing State in order to evade prosecution, trial or imprisonment and took refuge in Romania; or*
- b) the sentence imposed by the foreign court or to execute the remainder is at least one year in prison [art. 137, par. (5) of the special law].*

We note that the provisions of art. 96, para. (1) from the special law there are provided the offenses and serious crime groups, which do not require verification of double incrimination in the case of the execution of a European Arrest Warrant.

The duration of any preventive measure is of no more than 180 days, and the preventive measures rightfully cease:

- At the deadline prescribed by law or the deadline stipulated by the Romanian judicial authorities;
- When, before passing a judgment for recognition of the foreign judgment, the preventive arrest or house arrest reached the duration of imprisonment sentence imposed abroad; or
- Whether the remand was ordered prior to receiving an application for recognition and enforcement of foreign judgment when, within 30 days of the remand it was not received by the directorate of the Ministry of Justice the information provided by the Romanian law (we consider the information provided in art. 132 of the special law).

The legal situation of the convicted cannot be aggravated as a result of the duration of the preventive measure of deprivation of liberty imposed by the Romanian judicial body.

From the study of legal rules governing the conditions in which there are taken preventive measures in the case of the procedure for recognition and enforcement of a final judgment in a third State and the convicted person is identified in Romania, it follows a number of features that exceed the Romanian Code of criminal procedure.

First we find that there are significant differences in the general conditions to be met in order to order one of the preventive measures provided by the Romanian law.

Thus, the court must consider the following issues:

- the existence of a specific request of the issuing State, which it calls for a preventive measure against the sentenced person;
- which are the reasons supporting the request for the issuing State, which is the preventive measure that is requested to be applied by the Romanian judicial authorities and if this measure is provided in the Romanian law;
- the special conditions in which the convicted person is, namely those concerning the imposed sentence, the nature of the crime, health, age, criminal record or other situations which involve the convicted person.

In the case where the issuing State through its judicial authorities expressly calls for remand of the convicted person or house arrest, in addition to finding whether the conditions are applicable to all categories of preventive measures mentioned above, the Romanian court should meet the following conditions:

- The offense for which the person was convicted is part of the group of crimes for which it is not required the existence of double incrimination in the case of executing a European Arrest Warrant;
- The convicted person fled in order to evade the enforcement of the sentence imposed in the issuing State and he was identified in Romania;
- The sentence imposed by the foreign court or the remaining is of at least one year;
- The legal status of the convicted cannot be aggravated as a result of the preventive measure of deprivation of liberty ordered by the Romanian judicial body.

In the case where the Romanian court finds that these conditions are not met, the remand or house arrest cannot be arranged.

The interpretation of the depositions of the Romanian law raises a question of law, which is the possibility of the Romanian court to take against the convicted person one of the preventive measures of the Romanian law, when there is no specific request of this kind from behalf of the issuing State.

Our view is that while the issuing State does not explicitly request taking a preventive measure, the Romanian court may not order such a measure.

Significant differences related to the Romanian law provisions, appear also on the duration of the preventive measures which, regardless of their nature it cannot be longer than 180 days.

Under the law, the sentence shall be drawn up within 10 days of the ruling, and against it, it may appeal within 10 days, the prosecutor, ex officio or at the request of the Minister of Justice and the convicted person. In the case of the convicted person the time flows from the decision or, in case he did not attend both the debate and the pronouncement of the decision, from the communication copy on the device. The file will be submitted to the court of appeal within three days, and the appeal shall

be heard within 10 days, in closed session, without summoning the convicted person, the prosecutor's presence is mandatory (Boroi, Rusu & Rusu, 2016, p).

We maintain constant opinion about the unconstitutionality of the provisions that relate to hearing an appeal in the boardroom without summoning the convicted person.

We appreciate that not only the convicted person should be summoned, but it must also be ensured proper defense.

We believe that until establishing the unconstitutionality of this text or changing it by the legislator, in the judicial practice, the courts in Romania in line with the decisions promoted by the Constitutional Court will have to summon the person concerned, assisted by lawyer chosen or appointed ex officio. If it is not possible to ensure the person's presence in court of appeal, it has to be represented by the lawyer chosen or appointed ex officio.

3. The Notification of Foreign Judgment and the Appeal of the Sentenced Person

If the prosecutor on the case, after checking the file notes that the judgment was given in the absence of the convicted person shall notify the person convicted on the decision. The notification must include the following:

- It was received a request for recognition and enforcement in Romania of the sentence established by the court decision;
- Is entitled to challenge the foreign judgment and to file appeal in this regard, if this right is conferred by the law of the issuing State;
- That the appeal is subject to the jurisdiction of the issuing State;
- That the appeal is submitted to the competent prosecutor or prosecutor attached to the court of appeal in whose area is resident or if he is in detention in the constituency of which the detention place is;
- The deadline for appeal is 30 days and it shall start from the date of receipt;
- The failure to file the appeal within the deadline of 30 days has the consequence of considering the foreign judgment as being passed in his presence.

A copy of the notification will be sent to the specialized directorate within the Ministry of Justice.

If, within 30 days the convicted person has not filed for an appeal, the prosecutor will inform the competent court of appeal.

If on the expiry of the 30 days it is found that the convicted person submitted an appeal, the prosecutor decides its ranking and returns the file to the specialized directorate of the Ministry of Justice, with the appeal and other documents filed by the convicted person (Boroi, Rusu & Rusu, 2016, p).

4. Conclusion

The conducted examination highlights the way in which Romania has regulated the institution of recognition and enforcement of criminal law sanctions of deprivation of liberty imposed by a court of a foreign state and the sentenced person is in Romania.

At the same time, we found certain legislative inconsistencies causing some failure in carrying out the procedures established by the law.

A first critical remark concerns the need to mention in the law the compulsoriness of insuring the legal assistance of the person subject to this procedure, in the trial court. We appreciate that the mere mention that the person concerned is summoned is not sufficient because this person should be compulsorily provided with legal aid, given the complexity of the procedure and its effects even bilaterally, although extrajudicial.

Another issue that will cause some failure in the interpretation and enforcement of proceedings before the appellate court is related to the depositions of the law according to which, hearing an appeal is made in the boardroom without summoning the convicted person.

We believe that, given the need to respect the fundamental principles of Romanian criminal trial, and some recent decisions of the Constitutional Court, the convicted person must be summoned, ensuring the right to defense.

As a general conclusion, we consider that regulating a procedure for recognition and enforcement of a judgment by which a foreign court imposed a criminal penalty of deprivation of liberty and the sentenced person is in Romania, was absolutely necessary.

Undoubtedly the critical remarks in this work, as well as others that will be promoted in the future doctrine will be likely to promote a series of amendments to the law in force.

5. Bibliography

Rusu, I. & Balan-Rusu, M.-I. (2013). *The European Arrest Warrant, European and Romanian Legislation, Doctrine and Jurisprudence*. Saarbrücken: University Danubius & LAP LAMBERT.

Boroi, Al. & Rusu, I. (2008). *Cooperarea judiciară internațională în materie penală, Curs master/International judicial cooperation in criminal matters, master course*. Bucharest: C.H. Beck.

Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, subsequently supplemented and amended by several acts, republished, published in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011, the last change being promoted by Law no. 300/2013 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

Boroi, Al.; Rusu, I. & Rusu, M.-I. (2016). *Cooperarea judiciară internațională în materie penală, Tratat/International judicial cooperation in criminal matters, Treaty*. Bucharest: C.H. Beck.

Constitutional Court Decision no. 506 of 30 June 2015, published in the Official Monitor of Romania, Part I, no. 539 of 07/20/2015.

Radu, M. (2014). *Buletinul Rețelei Judiciare în materie penală/Bulletin Judicial Network in criminal matters*. Bucharest: Hamangiu.

Morar, I.-C. (2012). *Buletinul Rețelei Judiciare în materie penală/Bulletin of Judicial Network in Criminal Matters*. Bucharest: Hamangiu.

Morar, I.-C. (2014). *Cooperarea judiciară internațională în materie penală/International judicial cooperation in criminal matters*. Bucharest: Hamangiu.