

# Transfer of Procedure in Criminal Matters in Romanian Legislation<sup>1</sup>

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**Abstract:** Aware of the obligations assumed in fighting crime, Romania translated in its internal legislation the European Convention on the transfer of procedure in criminal matters, adopted in Strasbourg on 15 May 1972, ratified through Government's Ordinance no.77/1999. The transfer of procedure in criminal matters is one of the forms of international judicial cooperation in criminal matter and represents an act on mutual trust in the organizing activity for crime pursuit at the international level. According to law, the procedure transfer in criminal matter consists in performing criminal procedure or continuing the procedures initiated by the competent Romanian authorities for an action that represents a crime, in accordance with the Romanian law and transferring it to another state. The procedure transfer in criminal matters is accomplished only if the conditions expressly provisioned by law are fulfilled, respecting the non bis in idem principle.

**Keywords:** prosecution, trial, International judicial cooperation.

## 1. The European Convention on Procedure Transfer in Criminal Matters. Introductory Considerations

During the last decades, in Europe as well as in the rest of the world, criminality faced an unprecedented development, displayed in diverse ways, some of extreme gravity. This situation was immediately observed by the Europe's Council and resulted in new attitudes and measures stemming from this organ. The first and most important measure meant to contribute directly to a more efficient prevention and fighting against crime consists in the intensification of specific activities in judicial cooperation among member states.

In this context, the European Convention of criminal procedure transfer was framed.

The Convention is a European instrument in virtue of which the member states, based on mutual trust, organize the quest of international contraventions, aiming at punishing those committing them and at avoiding the risks following competence conflicts.<sup>2</sup>

According to the relevant normative act, the term "contravention refers to those actions that consist in crimes and those mentioned by the legal dispositions provisioned by Annex no.3 in the Convention, provided that, when the contravention is subjected to the competence of an administrative authority, the interested individual has the possibility to bring the specific case in front of a court".<sup>3</sup> The sanctions refer

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<sup>1</sup> The institution is examined according with the last modifications brought by Law no.222/2008 on the modification and completion of Law no.302/2004, on the international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no.758 on 10 November 2008.

<sup>2</sup> *Al.Boroi, I.Rusu, op. cit., p. 335.*

<sup>3</sup> The European Convention on criminal procedure transfer, Article 1 a), Annex 3 mentioned in the text, comprises contraventions, other than the criminal ones.

to any punishment or other measures occasioned by, or brought in by the violation of the legal provisions stated in Annex no.3.<sup>4</sup>

### 1.1 Pursuance request.

When a person is suspected to have committed a breach, according to the law of a contractor state, that state can solicit another one to begin the pursuance.<sup>5</sup>

The pursuance cannot be exerted in the solicited state except for the cases in which the relevant action of the solicitation is a breach in the territory of that state and its author is liable to conviction based on the solicited state's law. In case the breach is committed by a person invested with a public position in the solicitor state or a person invested with a public position in an institution or a public commodity in that state, the breach will be viewed by the solicitor state as being committed by a person invested with a position in that state or regarding a person, institution or commodity belonging in the latter state to the one committing the breach.<sup>6</sup>

According to the conventions provisions, a contractor state can solicit another state to start the pursuance in one (or more) of the following cases:

- a) If the culprit has a regular residence in the solicited state
- b) If the culprit is a citizen of the solicited state and if the state is his state of origin
- c) If the culprit executes or is about to execute a liberty privative punishment in the solicited state
- d) When the culprit is the subject of a judicial pursuance in the solicited state for the same breach or different breaches
- e) When the transfer of the pursuance is considered to be justified by the interest in discovering the truth and most of all if the most important evidence pieces are in the solicited state
- f) If it is considered that the execution of a possible conviction in the solicited state is susceptible to ameliorate the social integration possibilities of the culprit
- g) If it is considered that the culprit's presence at the hearings cannot be provided in the solicited state.
- h) If the solicitor state is not in the condition to execute a possible conviction, even in the case of extradition and that the solicited state is able to provide that.<sup>7</sup>

In case the culprit was affectively convicted in a contractor state, that state, that state will not be able to solicit the transfer of the pursuance for one or more of the abovementioned cases, except for the cases in which it cannot provide for the conviction, even in case of extradition and when the other contractor state does not accept the principle of executing a decision taken overseas or refuse the execution of another type of decision.<sup>8</sup>

After receiving and examination of a request, the competent authorities of the solicited state will decide according to its own legislation.

The solicited state will not carry forward the request in the following cases:

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<sup>4</sup> Ibidem, art. 1 lit b).

<sup>5</sup> *Al.Boroi, I.Rusu*, Cooperarea judiciară internațională în materie penală, Ed. C.H.Beck, București, 2009, p. 335

<sup>6</sup> The European convention on the transfer of procedure in criminal matter, article 7, paragraph 2.

<sup>7</sup> Ibidem, art. 8, parag. 1

<sup>8</sup> Ibidem, art.8, parag. 2.

- If the request does not comply with the dispositions in Article 6, paragraph 1 and Article 7 paragraph 1.<sup>9</sup>
- If the exert of the pursuance is contrary to the dispositions in Article 35 (non bis in idem)
- If, at the date mentioned on the request the prescription of the public action is fulfilled in the solicitor state, according to its legislation.

Without prejudice to the abovementioned dispositions, the solicited state cannot completely or partially refuse the request, except in one or more of the following situations:

- a) If it considers that the reason on which the request is based, applying article 8, is not justified
- b) If the culprit doesn't have the usual residence in the solicited state
- c) If the culprit is not citizen of the solicited state and didn't have the usual residence in that state when the breach was committed
- d) If the state considers that the breach that caused the pursuance has a political, military or strictly fiscal character
- e) If it considers that there are serious reasons to believe that the pursuance request is determined by race, nationality or political opinions reasons
- f) If its own law is already applicable to the breach and if, according to that law, the public action is prescribed when receiving the request; in this case the provisions of Article 26 paragraph 2 will not be applied.
- g) If its competence is based exclusively on the provisions of article 2 and when receiving the request the public action is prescribed according to its own law, taking into account the 6 months extension of the prescription date mentioned in article 23.
- h) If the breach was committed outside the solicitor state's territory
- i) If the pursuance is contrary to the international commitments of the solicited state
- j) If the pursuance is contrary to the fundamental principles of the judicial order in the solicited state
- k) If the solicitor state broke a procedure rule of this convention.<sup>10</sup>

The solicited state revokes the acceptance of the request if, following this acceptance, a reason not to carry forward the request (abovementioned) is discovered.

Besides that, the solicited state can revoke accepting the request in the following cases:

- a) If it is obvious that the culprit's presence cannot be provided for in the hearing in the state and in case a possible conviction could not be exerted in that state;
- b) If one of the refusal reasons mentioned above is discovered before the beginning of the trial in a court or
- c) In other cases, provided that the solicitor state agrees.

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<sup>9</sup> Article 6, par.1 states that in the case in which a person is suspected to have committed a crime according to the law of a contractor state, that state can solicit a pursuance in the cases and following the conditions stemming from the present convention. Article 7, par.1 states that the pursuance cannot be exerted on the territory of the solicited state except for the case in which the action that determined the pursuance would be a breach, if it is committed on the territory of that state and its author is liable to a conviction and in virtue of the laws of that state.

<sup>10</sup> Ibidem, art. 11.

## **1.2 The transfer procedure.**

The transfer requests have to be written and addressed either by the Ministry of Justice in the solicitor state or the solicitor state's authorities towards the solicited one, following the return in the same manner.

According to the provisions in article 2 of the Government's Ordinance no.77/1999 on the ratification of the European Convention on the transfer of procedure in criminal matters, adopted in Strasbourg on 15 May 1972<sup>11</sup>, the requests on the transfer of procedure will be addressed to the Prosecutor's Office in The High Court of Cassation and Justice and in the judgment stage to the Ministry of Justice (in case Romania is the solicited state).

In urgent cases, the requests and necessary communications will be sent through INTERPOL (The International Police of Criminal Police).

When a contractor state considers that the information provided by another contractor state is not sufficient, that state can request their completion and establish a deadline for the receipt. The pursuance request is accompanied by its original or a certified copy of the criminal record, together with all the useful documentation. In case the culprit is in remand and the solicitor state is not in the condition to annex the documents to the pursuance request, they can be subsequently sent. The solicitor state informs in writing the solicited state on all the procedure documents or the relevant measures for the public actions taken in the solicitor state after issuing the request. The solicited state immediately informs the solicitor state on its decision concerning the pursuance request. Besides, the solicited state has to inform the solicitor state in case of abandoning the pursuance or the decisions taken after the deployment of the procedure. A certified copy of any written decision has to be sent to the solicitor state.

According to the provisions in Article 2 G.O no.77/1999, all the requests and documents annexed will be transmitted to the Romanian authorities, together with a English or French translated version.

## **1.3 The effects of the request of pursuance in the solicitor state.**

After transmitting the request of pursuance, the solicitor state does not have the right to pursue the culprit for the action that resulted in the request or execute a decision taken before. Until the notification of the solicited state's decision on a request of pursuance, the solicitor state maintains the right to proceed in all the pursuance actions, except the ones that result in the intimation of the judicial instance or a competent administrative authority to decide in the breach. The solicitor state resumes the right of pursuance and execution in the following situations:

- a) If the solicited state informs it on its decision not to carry forward the request;
- b) If the solicited state informs it that it refuses the acceptance of the request;
- c) The solicited state informs it that it revokes the acceptance of the request;
- d) If the solicited state informs on its decision not to carry forward the criminal pursuance of that request or to interrupt it
- e) If it retracts the request before the solicited state informs it on the decision to carry forward the request.

In the solicited state, the request of pursuance issued according to the abovementioned has the effect of a six months extension of the public action's term of prescription.

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<sup>11</sup> Published in the Official Monitor in Romania, Part I, no. 420 on 31 August 1999.

#### **1.4 The effects of the request of pursuance in the solicited state.**

In case the competence of the solicited state is based exclusively on the provisions of Article 2, the term of prescription of the public action in this state is extended by six months. If the pursuance is subordinated to a complaint in the two states, the complaint filed in the solicitor state has the same value as the one from the solicited state. If the complaint is necessary only in the solicited state, that state can proceed the pursuance even in the absence of the complaint, if the person is entitled to formulate it doesn't oppose within a month from receiving the notice in which the competent authority informs him/her on this right.

Any act in aiming at the pursuance, accomplished in the solicitor state according to its effectual laws and regulations has the same value in the solicited state as if it was executed by the authorities of that state, without that assimilation to have the effect of giving a superior force to that act, the one that it has in the solicitor state. Any act that breaks the prescription, laid down in the solicitor state, has the same effects in the solicited state and vice versa.

#### **1.5 Provisional measures in the solicited state.**

When the solicitor state announces its intention to transmit a request of pursuance and if the solicited state's competence is based exclusively on the provisions of article 2, the solicitor state has the authority to proceed to the preventive arrest of the culprit, following the solicitor state's request:

- a) The law of the solicited state authorizes preventive detention for that breach
- b) There are reasons to be believed that the culprit will disappear or be in the situation to destroy evidence.

The preventive arrest request will mention the existence of an arrest warrant or any other act with the same force, issued within the forms prescribed by the law of the solicitor state. Besides, there will be mentioned the type of breach that results in the prosecution, when and where it was committed as well as the accurate description of the culprit. It is also necessary that the document mentioned above contains a short description of the circumstances in which the action was committed. The preventive arrest request is sent directly by the solicitor state's authorities, to the correspondent authorities of the solicited state, through mail or telegraph or by any other means accepted by the solicited state. The solicitor state will be informed, without delay, regarding the result of its request.

After receiving the request of pursuance, together with the above mentioned documents, the solicited state has the competence to apply all the temporary measures, including the preventive arrest of the accused and seizure, whose application is allowed by law, if the breach causing the pursuit was committed on its territory.

The temporary measures presented above can come to an end in all the cases mentioned in article 21, paragraph 2 (when the solicitor state can resume the right to prosecution and execution).

In case a person was arrested within the norms abovementioned, it has to be released if the solicited state does not receive the request of pursuance within 18 days from the date of arrest. Besides that, the release of a arrested person will be taken in the situation in which the documents that accompany the request weren't received by the solicited state within 15 days from the receipt of the pursuance request. The detention period will not exceed 40 days.

#### **1.6 The plurality of criminal procedure.**

Any contractor state that, before the beginning or during the following of a crime that is not considered to have a political or military character, is aware of the existence in another contractor state of a pursuance procedure against the same person, for the same actions, examines if it can give up its own pursuance,

either to suspend it or transmit it to the other state. When the state in question considers opportune that in the specific stage will not give up its own pursuance or not suspend it, informs the other contractor state about that fact, in duly time and pronounce the substantive decision.

In the interest of discovering the truth and applying an adequate sanction, the interested stated examine if it is opportune that a single pursuance should be intended, when:

- a) Many different actions, that are all criminal infractions according t the criminal law of these states, are attributed either to one person or more persons that have acted together
- b) A single action that represents a breach according to the criminal law of each of these states is attributed to different persons acting together.

### **1.7 Non bis in idem.**

A person that represents the object of a definitive and executor criminal decision cannot be pursued, convicted or subjected to the execution of a breach in another contractor state twice:

- a) When that person was acquitted
- b) When the imposed sanction:
  - (i) Was completely executed or is running
  - (ii) Was pardoned or totally amnestied or the unexecuted part of it
  - (iii) Cannot be executed because of the prescription.

Still, a contractor state is not obliged, except for the case in which itself solicited the pursuance, to recognize the non bis in idem effect, if the action that resulted in the judgment was committed against a person, institution or commodity that has a public status in that country or if the person herself had a public statute in that country. Moreover, a contractor state in which the action was committed or is considered to have been committed, in accordance with the law of that state is not obliged to recognize the non bis in idem effect, except for the case in which the state itself solicited the pursuance. If a new pursuance is intended against a judicial person for the same action in another contractor state, then any period of liberty deprivation, exerted while executing the decision, has to be deduced from the penalty which will be issued.

## **2. Transfer of Procedure in Criminal Matters in the Romanian Legislation<sup>12</sup>**

### **2.1. Competence.**

Any contractor state has the competence to exert a pursuance, in accordance with its own laws, on any crime to which the criminal law of another contractor state is applied. The competence can be exerted only as a result of a request sent by another contractor state.

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<sup>12</sup> The European Convention on the transfer of procedure in criminal matters was translated in our legislation throughout Law no.302/2004 on the international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no.594 on 1 July 2004. This act was amended and completed through Law no.224/2006, published in the Official Monitor of Romania, Part I, no. 534 on 21 June 2006, the Government's Emergency Ordinance no.103/2006 on some measures concerning facilitating the cooperation with the international police, published in the Official Monitor of Romania, Part I, no. 1019 on 21 December 2006, approved through Law no.104/2007, published in the Official Monitor of Romania, Part I, no. 275 on 25 April 2007 and Law no.222/2008 on the modification and completion of Law no.302/2004 on the international judicial cooperation in criminal procedure, published in the Official Monitor of Romania, Part I, no. 758 on 10 November 2008.

In order to apply the convention's provisions, every contractor state, in accordance with its own laws, can disclaim the pursuance in justice or abandon it for a suspect person who is or will be pursued for the same criminal action in another contractor state.<sup>13</sup> Giving the effects of the pursuance request in the solicitor state, any decision to disclaim the procedure is temporary as long as a definitive decision in the other contractor state does not intervene.

The solicitor state will cease the pursuance in exclusive virtue of the abovementioned provisions when the right to punishment is extended, according to the solicitor state's law, for another cause than the prescription, situation in which the provisions of article 10, c), article 11, f) and article 22, 23 and 26 are applied.

## **2.2. The notion and necessary conditions.**

The transfer of procedure in criminal matters is a form of international judicial cooperation, established among different European states.

The transfer of procedure in criminal matters consists in performing criminal procedure or continuing the procedure set up by the competent judicial authorities in Romania, for an action that represents a crime according to the Romanian law and transfer of that procedure to another state.<sup>14</sup>

According to the law's provisions, the Romanian judicial authorities can solicit the competent authorities of another state the exertion of a criminal procedure or its continuation, if the transfer of criminal procedure serves the interests of a good administration of justice or favors the social reintegration in case of conviction, in the following situation:

- a) If the culprit is executing a punishment on the territory of the solicited state, for a crime more serious than the one committed in Romania
- b) The culprit lives in the solicited state and according to its law, the extradition or transmission was rejected or would be rejected in case of formulating such a request or issuance or a European arrest warrant.
- c) The culprit lives in the solicited state and, according to its law, the recognition of the definitive criminal decision issued by the Romanian court was refused or is not compatible with the internal judicial order of that state, if the convicted person hasn't started the execution of the punishment and the execution is not possible even under the conditions of extradition or transmission.

Likewise, the transfer of criminal procedure can be solicited when the Romanian judicial authorities assert that, depending on the case, the presence of the culprit cannot be provided for and that is possible on the territory of the foreign country.

## **2.3. The transfer request of criminal procedure. The procedure and transmission of the request.**

The transfer of criminal procedure is solicited in virtue of a decision issued by the court that has the competence to solve the case in first instance, if the procedure refers to the prosecution action or the instance that judges the case, if the procedure refers to the judicial activity.

Thus, following the proposition issued by the prosecutor that carries out or supervises the prosecution or officio, if the abovementioned conditions are fulfilled, the instance disposes the transfer of criminal procedure through a motivated closure. In case of criminal procedure transfer, the prosecutor's proposition

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<sup>13</sup> *Al.Boroi, I.Rusu*, op. cit. p. 335.

<sup>14</sup> *A.Boroi, I.Rusu*, op. cit. p. 343.

will be solved in the council room by a single judge, irrespective of the nature of the crime and the prosecutor's presence is mandatory. The closure mentioned above can be attacked by appeal. The appeal has to be made within 5 days from the decision. The file will be advanced to the instance within 5 days, and the appeal is judged within 30 days from the registration date.

The closure that determines the transfer of procedure, remained definitive, suspends the term of prescription in a criminal liability as well as the continuation of the criminal procedure already begun, in virtue of the documents and the urgent demarches.

The transfer request of criminal procedure will be formulated by the prosecutor that performs or supervises the prosecution or by the court and is transmitted to The Prosecutor's Office in The High Court of Cassation and Justice or the Ministry of Justice (according to the law), accompanied by copies certified by a competent Romanian magistrate of all the procedure documents, except for the case in which the foreign state solicits the original file and documents. In case the original file won't be transmitted to the foreign state (only in the case in which it wasn't solicited by that state) this will be archived. When the original file will be transmitted to the foreign state at its request, a certified copy of it will be kept in the archive. The restitution of the original is solicited in case the prosecution or judgment is not assumed by the solicited state.

The transmission of the request to transfer criminal procedure, on a way in virtue of the law, will be provided for by the Ministry of Justice or the Prosecutor's Office in The High Court of Cassation and Justice.

#### **2.4. The effects of the transfer.**

According to the law, after the transfer of the criminal procedure by the solicited state, the Romanian judicial authorities cannot begin another procedure for the same action. The suspension of the prescription of criminal liability is maintained until the solution of the case by the competent authorities in the solicited state.

Even so, the Romanian state recovers the right to begin or resume the prosecution in a specific case, if:

- a) The solicited state informs it that it cannot finalize the transferred prosecution
- b) After the event, is informed on the existence of a reason that, according to the provisions of a special law<sup>15</sup> would prevent the transfer request of the criminal procedure.

In case of conviction, the decision of the initial procedure or the one continued in the solicited state, with a definitive character, is enrolled in the judicial record and has the same effects as if it were taken by a Romanian instance (article 113 of the special law).<sup>16</sup>

#### **2.5. Take-over of the prosecution or the criminal procedure.**

The take-over requests on criminal procedure addressed by a foreign country directly to the Romanian offices or instances will be sent by them to the Ministry of Justice or the Prosecutor's Office in The High Court of Cassation and Justice, which will consequently proceed according to the law's provisions mentioned above.

The settlement of the transfer request or the prosecution falls under the competence of the office in the appeal court in the circumscription where the culprit resides or was identified. The take-over request of the

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<sup>15</sup> Law no.302/2004 on international judicial cooperation in criminal matter, with the subsequent modifications and completion.

<sup>16</sup> A.Boroi, I.Rusu, op. cit. p. 345.



judgment will be settled by the criminal office of the appeal court in the circumscription where the culprit lives or was identified.<sup>17</sup>

The competent general prosecutor or the assigned prosecutor disposes of the prosecution following the request according to the provisions of the criminal Code procedure.

The take-over request on the judgment will be transmitted by the Ministry of Justice to the prosecutor's office in the appeal court competent to solve it. After the receipt of the request, the competent general prosecutor will address to the appeal court with the request's admission or rejection proposition. After the institution, the appeal court is subjected to appeal within 5 days after the judgment. In case the request is considered admissible, the judgment carries on according to the criminal procedure code's provisions.

The Romanian state will inform the solicited state through one of the two central authorities (the Ministry of Justice or Prosecutor's Office in The High Court of Cassation and Justice) on the solution to accept or reject the transfer request on criminal matters (the competent authorities of the solicitor state will be informed).

## **2.6. The plurality of criminal procedure.**

Any contractor state that, before the initiation or during the prosecution in a crime that doesn't have political or military implications is aware of the existence of another prosecution in progress, in another country and against the same individual can renounce to its own prosecution, suspend it or transfer it to the specific state. When the state in question does not consider as being opportune, in that stage, to renounce to its own prosecution or suspend it, informs the other contractor state on that matter and in any case, before the substantive decision is taken.

In order to find the truth and apply an adequate sanction, the interested states examine if it is opportune that a unique prosecution should be intended by one of them and in an affirmative case, they will determine which one will carry on when:

- a) More different actions that are all crimes, according to the criminal law of each of those states are attributed to either one or more persons that acted together.
- b) A unique action that is a crime according to the criminal law of each of those states is attributed to either one or more persons that acted together.

## **2.7. The application of the principle non bis in idem.**

According to the law, a person against which a definitive decision was taken, on the territory of a member state of the Schengen area cannot be prosecuted or trialed for the same actions if in case of conviction, the decision was executed, is in progress or cannot be executed according to the laws of the state that issued the conviction.

The abovementioned dispositions will not be applied if:

- a) The specific actions in the foreign decision were completely or partly committed on the territory of Romania; in this case, the exception does not apply if the actions were committed partly in the member state where the decision was taken.
- b) The specific actions in the foreign decision are a crime against the state security or other essential interests of Romania.

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<sup>17</sup> Ibidem, op. cit. p. 345.

- c) The specific actions in the foreign decision were committed by a Romanian official by the violation of his service obligations.

The exceptions mentioned above will not be applied when, for the same actions, the interested member state asked for the take-over of the prosecution or was granted the extradition of the person in question.

### **3. Conclusions**

Consequent with the obligations assumed at an international level, through the activities of prevention and fighting against crime, Romania translated in the internal legislation, the provisions of the European Convention on the transfer of procedure in criminal matters, adopted in Strasbourg on 15 May 1972 and ratified through Government's Ordinance no.77/1999.

Consequently, the translation of the convention's provisions in the internal legislation was accomplished through the adoption of law no.302/2004 on international judicial cooperation on criminal matters (normative act modified and completed several times, last through Law no.222/2008) in which the Title IV regulates the institution of procedure transfer in criminal matters.

The procedure transfer in criminal matters represents a distinct form of judicial cooperation in criminal matters that consist in the realization of criminal procedure or continuation of procedures initiated by the Romanian authorities for an action that represents a crime according to the Romania criminal law and its transfer in another state.

The transfer request of the criminal procedure can aim both at the prosecution stage as well at the trial one.

At the prosecutor's proposition that performs or supervises the prosecution or officio, if the conditions stated by law are fulfilled, the instance will dispose to the transfer or criminal procedure through motivated closure.

The request will be formulated by the prosecutor who performs or supervises the prosecution or the instance and will be transmitted to the Prosecutor's Office in The High Court of Cassation and Justice or the Ministry of Justice, accompanied by copies certified by a competent Romanian magistrate of all the procedure documents except for the case in which the solicited state requires transmitting the original documents. In case of transmitting the original file, a certified copy will be kept in the archive and when the copy of the documents is sent, the original file will be archived.

Along with the benefic effect in what concerns fighting against crime, the transfer of procedure in criminal matters also represents an act of mutual trust at an international level, in the organization of a prosecution as well as in the application of specific sanctions, provisioned by the law to their authors.

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