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**Re-Individualizing the Criminal**

**Sanctions of Deprivation of Liberty in the European Union**

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**Abstract:** The subsequent recognition of the execution of criminal penalties of deprivation of liberty by another Member State, other than the one of the conviction, is an act of mutual trust between Member States of the European Union. However, the differences between criminal legal norms, particularly regarding the minimum and maximum limits of some punishment prescribed for the same offense, require a different approach in the sense that a member cannot recognize and then enforce a sentence of deprivation of liberty with the maximum limits greater than its own legislation, for the same offense. This very sensitive issue was solved by adopting the Framework Decision 2008/909/JHA of the Council from 27 November 2008, where the European legislative act allows the executing Member State the re-individualization of the deprivation of liberty sentence, the goal being that the penalty imposed is compatible with the internal law of the enforcement state. In the implementation of European legislative act depositions, any member State which has recognized such a court order, based on a legal decision ordered by a competent judicial body may still re-individualize the penalty regarding its maximum limit. The examination of the European legislative act highlights also some flaws that must be corrected, taking into account the possibility for the executing Member States to fully modify the applied punishment, as regards both its nature and its proportion applied in the sentencing State.

**Keywords:** deprivation of liberty; re-individualization; European legislative act

**1. Introduction**

European legislative act governing the recognition of judgments imposing custodial sentences or measures involving deprivation of liberty in order to execute them in another EU country (other than the issuing state) is 2008/909/JHA Council Framework Decision of 27 November 2008 on the appliance of the principle of mutual recognition in case of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

As stated in the title, the European legislative act provides the possibility to execute a penalty of imprisonment in the state other than the convicting one, that is the Member State that has received a court order for its recognition and enforcement.

The penalty of imprisonment in the executing State is meant to increase the chances of social rehabilitation of the sentenced persons. (Rusu, 2011, p. 561)

The execution of the sentence in a state, other than the convicting one, has the role to increase the chances of social rehabilitation of the sentenced persons. In this respect, the judicial authorities of the

condemning State will take account of the person's attachment to the executing State, the fact that the person in question considers or not the executing State as a place where he has family, linguistic, cultural, social, economic ties or any other type.

Although the European legislative act was not implemented in our legislation, currently, if the Romanian state is required by another EU member state to recognize and enforce such a court, the Romanian judicial authorities under the European legislative act will recognize and enforce, with certain exceptions.

In these circumstances, the executing Member State has the possibility of re-individualizing the criminal law sanction of deprivation of liberty applied to the person in question.

## **2. The Necessary Conditions**

According to European legislative act depositions, under the condition that the convicted person is in the issuing or the executing State and that the person in question gives the consent (if necessary), a court order, accompanied by the certificate may be submitted to one of the following states:

- to the Member State of the convicted person's citizenship, where the person lives, or
- to the Member State of citizenship, in which, although is not a Member State where the person lives, the convicted person will be deported, as soon as he is exempted from the execution under a sentence of expulsion or deportation order included in the court decision or in a judicial or administrative decision or in any action taken as a result of that decision, or
- to any Member State other than the ones mentioned above, whose competent authority agrees to transferring the legal decision and the certificate towards the member State in question.<sup>1</sup>

Proceeding to the interpretation of European legislative act depositions, it results that the Romanian state, will also receive such a certificate in the following situations:

- the convict is a Romanian citizen or although is not a Romanian citizen, he lives on the Romanian territory;
- the convicted although is a Romanian citizen he does not live in Romania, but is in course of being deported under an expulsion order as soon as he is relieved from the execution of the sentence;
- the Romanian state accepts the transmission of judicial decision and the certificate, under the conditions other than those mentioned above.

The general rule for transmitting a court order accompanied by a certificate is that these documents may be transferred only with the consent of the sentenced person. However, in accordance with the European legislative act, the consent of the sentenced person will not be required when the court decision accompanied by a certified is rendered to:

- Member State of citizenship where the convicted person lives;
- Member State in which the convicted person will be deported after being released from the execution of the sentence under an expulsion or deportation order included in the judicial or administrative decision or any action taken as a result of that decision;

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<sup>1</sup> 2008/909/JHA Framework Decision of 27 November 2008, article 4.

- Member State in which the sentenced person has fled or if he has returned because of ongoing criminal proceedings against him which is in the issuing state or following the conviction in the issuing state. (Rusu & Rusu, 2010, p. 229)

### **3. Re-Individualization of Criminal Penalties of Deprivation of Liberty**

If a Romanian citizen residing in Romania, has committed a crime on the territory of a EU member state, after being convicted by the judicial authorities of that State, the convicting state may issue the certificate and the legal decision in the Romanian State, in order to acknowledge and subsequently enforce that decision in Romania, without requiring the consent of the convicted person.

After receiving the above mentioned documents, the competent court of appeal, shall have a few options, namely:

1. When it finds that there are accomplished all the conditions provided by the internal legislation and European legislative act, it will recognize the judicial decision issued by the judicial authority of the convicting Member State and it will enforce it as it was passed; in this case, imprisonment will be performed within the limits set by the convicting court of the Member State, the Romanian court has no jurisdiction to re-individualize it. We mention that the competent Romanian judicial authorities shall also have the opportunity and obligation to proceed to the individualization of executing the penalty in prison. Also, any acts of amnesty, pardon, will produce legal effects and in this case, the Romanian judicial authorities have the obligation to inform the judicial authorities of the convicting State. (Rusu, 2011, p. 562)

2. It will proceed to partial recognition and enforcement of the decision emanating from a competent judicial organ of the convicting state. In this situation, the competent territorial court of appeal may consult the competent authority of the sentencing state to find a solution acceptable to both parties. According to the depositions of the European legislative act regulation, the two competent authorities may reach to an agreement, as part of the recognition and partial enforcement of a sentence, under the condition that such recognition and enforcement may not result in prolonging the duration of the sentence.<sup>1</sup>

Partial recognition and enforcement of judgments relating to a penalty or other deprivation of liberty measure, are not covered by our legislation. In this context, the European legislation does not expressly provide, what is the partial recognition, or in other words what can be recognized as partial. We believe that the European legislator referred to the quantum of punishment and the execution regime of the sentence of deprivation of liberty.

We appreciate that in such a case we are not in the position of re-individualization of sentence, because the Romanian court will recognize for example the executed period by the convicted person in the sentencing State before transferring to Romania, during which it will be deducted from the total length of sentence. (Rusu 2011, p. 562)

We are instead in the presence of re-individualization, in terms of the executing regime and facilities that the convicted could benefit from (by the consideration of the executing part of the sentence).

3. Postponing the recognition of the decision is that a third option available to the competent court of appeal, a variant that does not involve specific activities of individualization.

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<sup>1</sup> 2008/909/JHA Framework Decision of 27 November 2008, article 10.

4. Re-individualization of punishment is a last resort that the court may adopt, in certain circumstances, expressly provided by the European legislative act.<sup>1</sup>

As regards the nature and the length of sentence, the general rule of recognition and enforcement of such penalty is the existence of double incrimination. The European legislative act provides other categories of offenses for which it is not imposed the necessity of double incrimination, only under the condition that, according to the law, the maximum penalty should be of at least three years.

As mentioned above, according to the provisions of the mentioned European legislative act, the general rule is that the judgments concerning the sentences of deprivation of liberty are enforced in the executing Member State as they were ordered by the court of the convicting Member State. Under these conditions, the re-individualization of the sanction of criminal law applied by a court of another Member State may take place in two situations, namely: when the applied sentence does not correspond to our law in terms of its quantum (or any other Member State) and when the penalty does not correspond in terms of its nature. Thus, when the sentence imposed in another EU country is incompatible with the depositions of our internal legislation as regards its duration, the Romanian court may proceed to its re-individualization (adaptation). But it will proceed to re-individualization only when the penalty imposed by the sentencing State court exceeds the maximum penalty prescribed by our law for similar offenses. The sanction being individualized as such, it cannot be less than the maximum penalty provided for similar crimes according to our internal law [article 8, paragraph (2) of the European legislative act]. For example, note that we will be in such a situation, when a Romanian citizen who is resident in the country, is convicted in an EU member state for committing an offense of destruction by guilt, to a punishment of 4 years imprisonment. Territorial competent court of appeal will proceed in the first phase to the recognition of the judgment in question, and then it will proceed to the re-individualization of the sentence. (Rusu, 2011, p. 563)

In this situation the re-individualization of punishment is required because according to the provisions of article 219, paragraph (1) of the Penal Code, the punishment provided by the law is imprisonment from one month to two years or fine. Noting that the penalty imposed by the sentencing state court is of four years, so more than the maximum sentence under the Romanian law for committing the same offense, the court of appeal, within the framework of re-individualization process, shall take note of this situation and will establish a 2-year prison sentence. We note that in this situation, the Romanian court has no other options available; it cannot even apply the general criteria of individualization of punishment under the Romanian law, or other provisions of the Romanian law. The only criterion, for the court is obliged to take into account, is the maximum sentence provided by the Romanian law for the offense committed abroad. We appreciate that this individualization is somehow inappropriate because the court, within the individuation process, will not take into account the criteria established by law, but an express provision of the European legislative act which cannot be ignored (Rusu 2011, p. 563).

Although in our law the penalties are quite high, in judicial practice situations may arise in which the penalty imposed in the sentencing Member State is less than the minimum sentence required by Romanian law for committing that same crimes. Because, according to the European legislative act and the special law, the situation of the convicted cannot be aggravated, this time the punishment will not be re-individualized, following to be executed in the specified quantum in the sentencing State.<sup>2</sup> But we note that the re-individualization is not mandatory for the Romanian state, the measure itself is

<sup>1</sup> 2008/909/JHA Framework Decision of 27 November 2008, article 8.

<sup>2</sup> 2008/909/JHA Framework Decision of the Council article 8, paragraph (4) and Law no 302/2004 with its subsequent modifications and completions, article 146, paragraph (1).

left for the use of the judicial authorities. Also we note that the procedure described is valid for all Member States, which are in the situation of being the issuing or the executing state.

The second situation in which the re-individualization of the sentence is imposed by the Romanian courts is where the penalty applied by a competent court of another Member State is incompatible with our internal legislation regarding its nature, in which case the competent judicial authority (the court) can decide to adapt the provided penalty or measure to similar offenses in our internal legislation. Such a penalty, after individualization, must correspond as closely as possible to the punishment imposed in the sentencing State and therefore, the punishment cannot be turned into a financial penalty under the provisions of article 8, paragraph (3) of the European legislative act (Rusu & Rusu, 2010, p. 231).

As we mentioned before, in both cases in which the Romanian judiciary bodies have made a re-individualization of the penalty applied by a court in another Member State, the applied sanction should not be by its nature or duration greater than the sanction applied in the issuing State. Therefore, the judicial authorities of the Romanian state, may proceed to the re-individualization of the applied penalty by a competent court of another Member State, only in the two cases expressly provided by the European legislative act, both being cases of incompatibility with our legislation in the length or nature of the punishment.

#### **4. Conclusions**

Achieving one of the most important proposed objective, namely to ensure an area of freedom, security and justice in the European Union, involves certainly the improvement of the complex system of judicial cooperation in criminal matters between Member States. Obtaining positive results in the activity of judicial cooperation in criminal matters in the European Union can only be achieved under the recognition and enforcement of judgments between Member States. The current differences between Member States' laws, visible differences in the quantum and nature of punishments for the same offense or of the same kind cause some difficulties in terms of opportunity recognition and subsequently the execution of punishments. In these circumstances, it has become a necessity drafting a new legislative act that would allow the executing Member States the re-individualization of punishment in the sentencing State, under certain conditions. The purpose of enforcing custodial sentences, in another Member State, other than sentencing one, is to increase the chances of social rehabilitation of the sentenced persons. Although the European legislative act has not been transposed in our internal legislation, in accordance with the Romanian Constitution depositions<sup>1</sup> and the Treaty of Lisbon,<sup>2</sup> it will produce legal effects, being applicable to the Romanian courts. Undoubtedly the adoption of this legislative act was necessary and its implementation by all Member States will lead to

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<sup>1</sup> The Romanian Constitution, published in Official Monitor no. 233 of 21 November 1991, revised by Law no. 429/2003, law which was approved by national Referendum on 18-19 October 2003 and entered into force on 29 October 2003, its publication in the Official Monitor no. 758 of 29 October 2003 of the Constitutional Court Decision no. 3 of 22 October 2003 for the conformation of the national referendum from 18-19 October 2003 on the Romanian Constitution Law Review. Following the review, the Constitution was republished by the Legislative Council under article 152 of the Constitution, by updating the names and giving the texts a new numbering, in the Official Monitor no. 767 of 31 October 2003. See article 11, paragraph (1)

<sup>2</sup> Lisbon Treaty signed on 13 December 2007 brought a series of additions and changes to the existing treaties. The consolidated version of the Treaty on European Union and the Treaty on the functioning of European Union was published in the Official Journal of the European Union C 115 / 1, 09.05.2008. The Lisbon Treaty was ratified by Romania by Law no. 13 of February 7, 2008 for ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty on establishing the European Community signed in Lisbon on 13 December 2007, published in the Official Monitor no. 107 of 12 February 2008.

the achievement of the EU goals on the line of judicial cooperation in criminal matters. According to the stated ones, the examination of the European legislative act, leads to the conclusion that it contains some depositions that may hinder the activity of re-individualization of deprivation of liberty sentence in the executing State.

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