

UNION AND TRANSPOSITION REGULATIONS CONCERNING THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION OF FINANCIAL SANCTIONS IN CRIMINAL MATTERS

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ABSTRACT:

JUDICIAL COOPERATION WITHIN THE EUROPEAN UNION IS AN INTERSTATE PROCEDURE THAT EXCEEDS TRADITIONAL JUDICIAL COOPERATION INVOLVING LEGAL INSTRUMENTS WITH WELL-DEFINED REGULATORY AREAS AND "ANCHORED" IN THE REALITIES OF THE UNION MEMBER STATES ON THE PROBLEMS OF CRIME AND TRAFFICKING OF ANY KIND.

JUDICIAL COOPERATION IN CRIMINAL MATTERS AT THE LEVEL OF THE EUROPEAN UNION HAS AS FUNDAMENTAL ELEMENT THE PRINCIPLE OF MUTUAL RECOGNITION, APPROVED FOR THE FIRST TIME AT THE MEETING OF THE EUROPEAN COUNCIL IN TAMPERE (1999). ONE YEAR LATER, THE COUNCIL OF THE EUROPEAN UNION ADOPTS A PROGRAM OF MEASURES FOR THE IMPLEMENTATION OF THE PRINCIPLE OF MUTUAL RECOGNITION OF DECISIONS IN CRIMINAL MATTERS, THE UNION LEGISLATOR SEEKING TO ADOPT AN INSTRUMENT TO IMPLEMENT THIS PRINCIPLE, RESPECTIVELY, THE COUNCIL FRAMEWORK DECISION 2005/214 / JHA OF 24 FEBRUARY 2005 ON THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION OF PECUNIARY SANCTIONS².

THE UNION NORM WAS TRANSPOSED INTO THE ROMANIAN LEGISLATION BY LAW NO. 302/2004 REGARDING INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS, AMENDED AND SUPPLEMENTED BY LAW NO. 222/2008, WHICH REGULATES WITHIN THE SECTION 4-ENTITLED "PROVISIONS REGARDING THE COOPERATION WITH THE MEMBER STATES OF THE EUROPEAN UNION IN THE APPLICATION OF THE FRAMEWORK DECISION 2005/214 / JHA" ISSUES REGARDING THE PROCEDURAL ASPECTS OF APPLYING THE UNION PROVISION.

KEYWORDS: MUTUAL RECOGNITION, SANCTIONS, CRIMINAL CASE, CROSS-BORDER CHARACTER.

I. INTRODUCTION

Traditional judicial cooperation in criminal matters can be defined as an interstate relationship in which a sovereign state through the competent judicial authority sends a request to the correlative judicial authority belonging to another sovereign state, and the latter decides whether to execute the request (for example, extradition between Romania and

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² OJ L 76, 22.3.2005, 16–30

the USA). In the framework of traditional judicial cooperation the states involved work on the basis of agreements as legal instruments.

At European Union level, we retain a much faster, more dynamic and simplified form of judicial cooperation compared to the traditional one, based on the principle of mutual recognition, a principle whose main purpose is to overcome the difficulties generated by the diversity of the judicial systems in the Member States. Specifically, Article 82 (e.g. Article 31 TEU) TFEU provides in paragraph 1 "judicial cooperation in criminal matters at Union level", which is based on the principle of mutual recognition of judicial rulings and decisions.

According to this principle, each national judicial authority of an EU member state must, ipso facto:

- a) recognize the applications submitted by a judicial authority from another Member State, referring specifically to those judicial documents issued before the pronouncement of a judicial ruling, specific to the phase of criminal prosecution or the phase of judgment, especially those which allow the competent authorities to act quickly to obtain evidence (European Evidence Warrant), to make goods unavailable (European order for unavailability), to obtain the protection of injured persons in a criminal case (European protection order) or simply to transfer the persons sought (European arrest warrant).
- b) recognize and execute the judicial rulings delivered by a judicial authority from another Member State of the European Union. (European confiscation order)

II. RECOGNITION AND ENFORCEMENT OF DECISIONS ON FINANCIAL SANCTIONS APPLIED IN CRIMINAL CASES ACCORDING TO COUNCIL FRAMEWORK DECISION 2005/214 / JHA OF 24 FEBRUARY 2005 ON THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION OF FINANCIAL SANCTIONS³

Field of regulation According to Article 1, the regulatory area of the framework decision constitutes the procedure for recognizing and executing a definitive criminal decision by which financial sanctions have been ordered, for the following offenses regulated by the legislation of the issuing State for which no double incrimination is required: corruption, human trafficking, kidnapping, sequestration and hostage-taking, terrorism, participation in a criminal organization, sexual exploitation of children and child pornography, fraud, including that affecting the financial interests of the European Union, computer crimes, complicity in fraudulent passing border and illegal stay, organized or armed robbery, etc⁴.

Specifically, the judicial or administrative authority of a Member State sends a financial sanction directly to an authority of another Member State, the latter recognizing and executing the decision without other formalities, unless one of the grounds for non-recognition is invoked.

³Council Framework Decision 2005/214 / JHA of 24 February 2005 on the application of the principle of mutual recognition of financial sanctions, was amended by Council Framework Decision 2009/299 / JHA of 26 February 2009 amending Framework Decisions 2002/584 / JHA , 2005/214 / JHA, 2006/783 / JHA, 2008/909 / JHA and 2008/947 / JHA, to strengthen the procedural rights of individuals and to encourage the application of the principle of mutual recognition regarding decisions rendered in the absence of the person concerned from the trial.

⁴ Article 4 of the Framework Decision 2005/214

The financial sanction imposed by the judicial or administrative authority is issued against an individual or legal body and is submitted for recognition and enforcement to the competent authority of the Member State in which that person owns at least one property or earns income.

From the above explanations, we can conclude that the framework decision applies to the financial sanctions provided for criminal acts, mandatory with a cross-border character.

In the acceptance of the present normative text, the "decision" means a definitive decision that imposes the payment of a financial sanction to a natural or legal person having the capacity of convict, issued by: a) a court of the issuing state for a criminal offense under the law of the issuing state ; or b) an authority of the issuing State, other than a court, for a criminal offense under the law of the issuing State, provided that the person concerned has had the opportunity to judge his case by a court with special jurisdiction in criminal matters.

What is meant by "financial sanction"?

"Financial penalty" means the obligation to pay:

- a) an amount of money imposed by a court or an authority of the issuing State for a conviction for a crime, imposed by a decision.
- b) compensation imposed in the same decision for the benefit of the victims, when the victim cannot be a civil party and the court acts on the basis of its criminal jurisdiction.
- c) an amount of money for the expenses of the judicial or administrative procedures related to the decision;
- d) an amount of money for a public fund or a victim support organization, imposed in the same decision.

Article 187³⁴ (2) of Law no. 222/2008 amending and supplementing Law no. 302/2004 regarding the international judicial cooperation in criminal matters, the norm of transposition of the framework decision, uses the term of *pecuniary punishment* similar to the one of criminal sanction regulated by the Union norm. In the acceptance of the norm of implementation by pecuniary punishment is understood the obligation to pay:

- a) an amount of money as a conviction for a crime, delivered by a decision;
- b) the compensation given by the same judgment for the benefit of the victims, if the victim cannot be a civil party to the trial, and the court acts in the exercise of its competence in criminal matters;
- c) an amount of money related to the expenses caused by the judicial or administrative procedure that led to the ruling;
- d) an amount of money to a public fund or a victim support organization, issued by the same decision.

We can see from the presentation of the two texts that the Romanian legislator has just taken over the union text, so we understand that at national level efforts are being made to achieve legislative harmonization on the component of judicial cooperation in criminal matters.

The financial sanction does not concern:

- (i) the confiscation orders of the instruments or proceeds of the crime;
- (ii) orders which are of a civil nature and result from a claim for compensation or restitution and which are enforceable in accordance with Regulation (EC) no.

44/2001 of the Council of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters⁵

Who can have the status of issuing state or executing state?

The Union law provides that "issuing State" may be any Member State in which a final criminal decision has been given⁶. We can add that the issuing state is the state on whose territory the criminal act was committed and which implicitly through its judicial bodies can start the criminal prosecution respectively the judgment of the suspected or accused natural or legal person according to its own legislation.

The same framework decision defines the "executing State" as the Member State to which a decision has been transmitted for the purpose of enforcement⁷. This may be the state in which the convicted person has property or income, has his habitual residence or registered office, regardless of whether it is a natural or legal person.

In order to initiate a suprastate, union procedure for recognizing and executing a decision on financial sanctions applied in a criminal case, the following steps must be considered:

A)- *Identification of the competent authorities to apply the provisions of this Union norm and the transmission of the criminal decision accompanied by the certificate.* Pursuant to Article 2 (1) of this Union rule, each Member State has the obligation to inform the General Secretariat of the Council about the designation of the competent authority or authorities when the Member State is the issuing or executing State.

Article 187³⁵ of Law no. 222/2008 clarifies the general concept of "competent authority" inserted in the text of the framework decision. Thus, at the national level, it works as authorities in cross-border cases (1) "competent to issue a decision, the courts" (2) "competent to execute a decision, the courts"; (3) "The Romanian central authority ... is the Ministry of Justice, which has the role of assisting the courts and of transmitting and receiving the decisions in case the direct contact is not possible".

If the competent authority⁸ of the executing State is not known to the competent authority of the issuing State, the latter shall take all necessary steps, including through the contact points⁹ of the European Judicial Network¹⁰ to obtain information from the executing State. (The contact points in Romania represent a group of legal practitioners from the Ministry of Justice, prosecutors from the General Prosecutor's Office or judges from the higher courts).

B)- *The delivering of a definitive criminal decision in the issuing Member State;*

⁵ OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) no. 2245/2004 of the Commission (OJ L 381, 28.12.2004, 0).

⁶ article 1 (c); similarly has art. 187³⁴ (3) in the sense that "the issuing State means the Member State in which a decision has been delivered, within the meaning defined by the framework decision"

⁷ article 1 (d); similarly has art. 187³⁴ (4) in the sense that "the executing State means the Member State to which a decision has been sent for execution".

⁸ The competent authorities can be found in the atlas on the website of the European Judicial Network (<http://www.ejn-crimjust.europa.eu>) or through the contact points on this page according to keywords.

⁹ Each Member State designates a contact point (persons with legal training, in principle from the relevant ministry, or magistrates) If the authority of the executing Member State is not known, the contact point provides information in this regard..

¹⁰ The European Judicial Network offers support for: identifying the competent local authority in the executing Member State and establishing direct contact with the latter; obtaining information on the regulations related to judicial cooperation in another Member State; offering specialized support regarding the collaboration between the issuing and the requesting states.

Article (1) of Law no. 222/2008 amending and supplementing Law no. 302/2004 regulates the specific situation in which the Romanian state is the issuing state. In such a situation (1) "The ruling, together with a certificate may be transmitted by the Romanian judicial authorities directly to the issuing competent enforcement authority of the Member State in which the natural or legal person against whom the judgment was delivered has goods or a source of income, has his/her habitual residence or, in the case of legal entities, has its registered office. (2) The certificate must be prepared according to the standard form provided in the annex no. 3. The certificate must be signed, and its content certified as being compliant, by the issuing Romanian judicial authority. (3) The ruling or a certified copy thereof, together with the certificate, shall be transmitted directly to the competent authority of the executing State by any means that allows a written registration, under conditions that allow the executing State to establish the authenticity. The original of the judgment or a certified copy thereof, together with the original certificate, shall be transmitted to the executing State, upon its request. All official communications shall be made directly between the respective competent authorities. (4) A decision may not be transmitted simultaneously to several executing states. (5) If the competent authority of the executing State is not known to the issuing Romanian judicial authority, the latter will carry out all the necessary investigations, including through the contact points of the European Judicial Network, in order to obtain the necessary information from the executing State".

C)-Identification of the union state in which the convicted person (natural or legal person) has property or income, habitual residence or registered office;

D)- Transmission by the competent authority of the issuing Member State directly to the competent authorities of the executing State of the definitive criminal decision together with a certificate - the annex which must be translated into a language accepted by the executing Member State.

The clarifying provisions bring us the texts of the transposition law identifying two situations:

- the situation in which Romania is the issuing state, and then "the issuing Romanian judicial authorities will translate the certificate into the language or one of the official languages of the executing State or into another language accepted by it, according to the statements notified to the General Secretariat of the Council of the European Union."¹¹
- the situation in which Romania is executing state and, in this case "The certificate sent to the Romanian authorities must be translated into Romanian" The certificate transmitted to the Romanian authorities must be translated into Romanian.¹²

The issuing Member State does not transmit a decision simultaneously to several EU Member States, but only to one executing State at a time. However, the issuing Member State may forward the request of another Member State if:

- the issuing Member State cancels the request for enforcement, or

¹¹art. 187³⁹ (1) of Law no. 222/2008 amending and supplementing Law no. 302/2004 regarding international judicial cooperation in criminal matters

¹² art. 187³⁹ (3) of Law no. 222/2008 amending and supplementing Law no. 302/2004 regarding international judicial cooperation in criminal matters

- the executing state informs the issuing state that the execution is not possible because the convicted person has no property or income, nor the habitual residence or registered office in the executing state.

The procedure for recognizing and executing criminal decisions by the executing state involves the following stages:

1) *The recognition by the competent authority of the executing State of the decision issued in the issuing Member State without double criminality verification, in the case of the 39 offenses mentioned in Article 5 of the framework decision*¹³.

What does double incrimination mean? This means that the executing State cannot refuse to recognize and enforce a decision, if the latter refers to an offense that is not incriminated in the executing State, but is included in the list in Article 5 of the Framework Decision.

For offenses other than those on the list of 39 offenses, the executing State may condition the recognition and enforcement of a decision on the fact that the decision concerns a fact that would represent an offense under the law of the executing State, whatever its constituent elements.

2) *The condition of the recognition of a criminal decision.* In order to recognize the decision, article 6 stipulates that the certificate, the completed form must be attached. On the contrary, the competent authorities of the executing State may refuse the execution of the decision if the certificate is not presented, is incomplete or obviously does not correspond to the decision. In such a situation, the executing State will immediately inform the issuing State, which, will complete the certificate or correct the errors and transmit it to the executing State again.

For the specific situation in which Romania is an executing state, article 187⁴¹ (1) of Law no. 222/2008 amending and supplementing Law no. 302/2004 stipulates that "The Romanian judicial enforcement authorities recognize a decision without other formalities and immediately take all the necessary measures for its execution, unless it finds that one of the reasons for non-recognition or non-execution provided for in art. 18742 in the sense that "(1) The Romanian judicial enforcement authorities may refuse to recognize and execute a decision if the certificate was not provided in annex no. 3, if the certificate concerned is incomplete or is manifestly inadequate with the decision.

3)- *Grounds for non-recognition and non-execution.* Article 7 of the Framework Decision exhaustively identifies the situations for which the competent authority of the executing State refuses to recognize and implicitly executes a decision regarding the financial sanctions arranged in a criminal case. In particular, we note:

- the decision was pronounced against the person convicted for the same acts in the executing state or in any other state than the issuing or executing state and, in the latter case, the decision was enforced. This provision takes into account the principle "non bis in idem". It refers to the fact that the same crime cannot be accused and punished twice¹⁴.
- when the decision refers to facts that would not constitute an offense under the law of the executing State.

¹³ Similarly, it also has 187⁴⁰ art (1) of Law no. 222/2008 amending and supplementing Law no. 302/2004 regarding international judicial cooperation in criminal matters

¹⁴This principle is set out in Article 54 of the Shengen Agreement of 14.06.1984

- the financial sanction is below EUR 70 or the equivalent of this amount.
- the execution of the decision is prescribed in accordance with the legislation of the executing state and the decision refers to facts of the competence of this state under its own legislation;
- there is immunity under the law of the executing state, which makes it impossible to execute the decision;
- the decision was imposed against a natural person who, under the law of the executing State, due to his age, could not yet be held criminally liable for the facts for which the decision was pronounced;
- the person concerned, was not informed personally or by a representative, about his right to appeal and the term of exercise or did not appear in person, unless from the mentions inserted in the certificate it appears, as the case may be, either that the person was informed personally or by a representative or that the person indicated that they do not contest the case.

4) *Regarding the establishment and execution of "the amount that represents the financial sanction in a criminal case"* we identify two situations:

(i) If the decision refers to facts that have been committed on the territory of the issuing state, the executing state cannot reduce the level of the sanction applied, the amount being executed in its entirety as inserted in the decision given in the issuing state.

(ii) If the decision refers to acts that have not been committed in the territory of the issuing State, being within the competence of the executing State, the latter may decide to reduce the level of the sanction applied to the maximum amount provided for acts of the same nature under this national law of the latter state.

For both situations, the executing authority may, if appropriate, change the penalty from the currency of the issuing state into the currency of the executing state, at the exchange rate from the date of the sentence.

The text of article 8 of the framework decision can be found transposed into the national legislation; Law no. 302/2004, in article 187⁴³ states that "(1) If it is established that the decision refers to facts that were not committed in the territory of the issuing state, the judicial authority Romanian enforcement may decide to reduce the amount of the punishment executed to the maximum amount provided for similar acts by Romanian law, when the facts fall within the jurisdiction of the Romanian courts. (2) The Romanian executing judicial authority changes, if appropriate, the penalty in the currency of the executing state, at the exchange rate from the date of the sentence being delivered." We can remark from the study of the national text that paragraph 1 identifies the situation presented in point (ii), that in which the Romanian state can intervene in modifying the amount of the pecuniary penalty, that is, the criminal fine.

5) *Law governing the execution* According to article 9 of the framework decision, in the situation in which the issuing State transmits the decision together with the certificate of the executing state, the competence for execution rests with the latter, meaning that both the execution and the exercise of the remedies will be governed by the law of this state and the issuing state is obliged to respect the procedural decisions of the executing state. Any part of the sanction recovered in any way in any state is deducted entirely from the value of the sanction which is the subject of enforcement in the executing State.

Article 187⁴⁴ of the transposition rule stipulates that when Romania is an "executing state", the execution of the decision is governed by the Romanian law in the same way as in the case of a pecuniary punishment applied by a Romanian court. Only the Romanian authorities have the power to decide on the execution procedures and to establish all the measures related to it, including the reasons for the cessation of the execution."

In Article 9 paragraph (3), the framework decision makes an exception from the principle of double criminality checking for legal persons, so that a financial sanction issued against a legal person is enforced even if the executing state does not recognize the principle of criminal liability of legal persons. The Romanian legislator did not apply this exception. Checking Law 302/2004, it is not clear whether the legislator gave the competent authority the possibility to execute the sanctions issued against legal persons.

6) Imprisonment penalty or other alternative substitution penalty for non-recovery of financial sanction

The application of the alternative sanctions measure by the substitution of the financial sanction by the deprivation of liberty penalties is provided for in Article 12 of the framework decision, and is required when it is not possible to execute a decision, in whole or in part.

Such substitution is possible only if there is the agreement of the issuing State which allows the application of these alternative sanctions by inserting this mention in the certificate. The severity of the alternative sanction is established in accordance with the law of the executing State, but does not exceed a maximum level provided in the certificate transmitted by the issuing State.

Law no. 222/2008 amending and supplementing Law no. 302/2004 provides for the possibility of replacing the pecuniary punishment in the sense that "If the execution of a decision is not possible, either totally or partially, the Romanian judicial authority of execution may order the replacement of the fine, under the conditions of art. 63¹ of the Criminal Code"¹⁵. The alternative sanction does not exceed a maximum level provided in the certificate issued by the issuing State.

7) Allocation of the amounts obtained from the execution of the decisions

According to Article 13 of the Framework Decision, the sums obtained from the execution of the decisions are the responsibility of the executing State, which does not mean that the member states cannot otherwise establish this by conventions concluded between them.

What happens to the funds obtained by executing the rulings and the expenses incurred with these executions when Romania is the executing state? The text of article 187⁴⁷ of the internal transposition norm brings clarifications in the sense that: "(1) The funds obtained from the execution of the decisions by the Romanian judicial enforcement authorities are made to the state budget, unless otherwise agreed with the issuing state and the Romanian state again (2) The expenses incurred by the Romanian authorities in the application of this section remain the responsibility of the Romanian state ”.

CONCLUSIONS

Policies for judicial cooperation in criminal matters continue to develop, with particular emphasis on improving the exchange of information between the Union states.

Judicial cooperation in criminal matters is based on the principle of mutual recognition

¹⁵ art. 187⁴⁵ of Law no. 222/2008 amending and supplementing Law no. 302/2004 regarding international judicial cooperation in criminal matters

of judicial rulings and decisions and includes the legislative package on common minimum standards for criminal procedures in order to bring the laws of the Member States of the European Union closer.

Council Framework Decision 2005/214 / JHA of 24 February 2005 on the application of the principle of mutual recognition of pecuniary sanctions is part of this legislative package together with Regulation (EU) 2018/1805 of the European Parliament and of the

Council of 14 November 2018 on mutual recognition of the unavailability and confiscation orders as well as the Council Framework Decision 2006/783 / JHA of 6 October 2006 on the application of the principle of mutual recognition for confiscation decisions, etc.

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2. Law no. 302/2004 regarding international judicial cooperation in criminal matters, amended and supplemented by Law no. 222/2008, Section 4 - Provisions regarding cooperation with the Member States of the European Union in the application of the Council Framework Decision 2005/214 / JHA of 24 February 2005 on the application of the principle of mutual recognition of pecuniary sanctions