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Fostering mutual understanding in order to strengthen mutual trust between the judicial authorities of Member States

Handbook

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Chapter 1.

European Arrest Warrant

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1.1. Introduction

The European arrest warrant (hereinafter EAW) is the first legal instrument adopted in the application of the principle of mutual recognition of decisions in criminal matters, the cornerstone of judicial cooperation, as it was asserted in the Tampere Council.

The EAW was introduced by the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between the Member States of the European Union (hereinafter the EAW Framework Decision).

Recital (5) of the EAW Framework Decision states that „The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice”.

The EAW aimed to replace the basic and the most largely used instrument of international judicial cooperation, namely extradition.

Before the adoption of the Framework Decision 2002/584/JHA, the most frequently used legal instruments applicable for extradition were the following:

- The European Convention on Extradition (13 December 1957) and the additional protocols thereof;

- The Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;
- The Convention on 27 September 1996 relating to extradition between the Member States of the European Union;
- The Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

The advantages brought by the newly adopted instrument are numerous, the most important being the following:

- Shifting the decision making process from political to judicial authorities
- Allowing for the surrender of nationals. If in the traditional system of extradition the rule was that nationals were not extradited (the exceptions having to be clearly indicated), the EAW reversed the case: the surrender of nationals became the rule and, if a state did not intend to surrender its own nationals, it had to expressly state so.
- Setting clear time limits;
- Limiting the grounds for refusal;
- Instituting direct contact between the judicial authorities, therefore reducing the role of the Ministries of Justice only to facilitators of communication.

At the adoption of the EAW Framework Decision, there were states that availed of the possibility offered by the text and chose to maintain the extradition procedure be applicable in certain cases. A few examples below:

- Austria and Italy – for acts committed before 7 August 2002;
- Czech Republic – for acts committed by Czech nationals before 1 November 2004;
- France – for acts committed before 1 November 1993.

On 28 June 2006, a surrender agreement between Norway and Iceland and The European Union was signed, extending (with some modifications), the surrender mechanism instituted by the EAW to Norway and Iceland. The agreement has not yet entered into force.

The EAW Framework Decision 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, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (the *in absentia* Framework Decision).

The Framework Decision 2009/299/JHA acknowledged that the various Framework Decisions implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and

hamper judicial cooperation.¹ In order to safeguard the right to a fair trial, enshrined in the European Convention on Human Right (including the right of the person concerned to appear in person at the trial), this Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence².

The approach of the chapter aims to follow the structure of the EAW Framework Decision and to briefly analyse some of the issues and challenges that might be encountered.

1.2. Instruments and case law

1.2.1. Instruments – Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between the Member States of the European Union

1.2.1.1. *Definition, scope and issuing of a EAW*

The EAW Framework Decision qualifies the EAW, from the very beginning, as a judicial decision, issued either in the investigation stage, or for the purpose of the enforcement of a final decision.

The Framework Decision emphasizes the judicial nature of the EAW, indicating, from the first article, that we are talking about a judicial decision, so it is obvious that the issuing authority will always be a judicial one.

A warrant may be issued for purposes of prosecution in relation to acts punishable under the national law of the issuing state by a custodial sentence or detention order for a maximum period of at least 12 months or, for the purposes of enforcement of a sentence or detention order of at least 4 months.

In order to issue an EAW, a national authority should first have a domestic arrest warrant.

The format in which an EAW is presented is a standardized one, namely the form in Annex I of the FD. The form may not be altered or added to. By creating this form, a common standard was created for EAWs, so each executing authority knows more or less what to expect. The adoption of the form intended to shorten the procedure and to make information easily to transmit and accessible. The information from the form was deemed sufficient

¹ Recital (2) of the Framework Decision.

² Recital (4) of the Framework Decision.

for any executing authority from each Member State, in order to render a decision on the surrender of the requested person.

The standardized form of the EAW proved to be a success, the best proof being the subsequent instruments adopted in the application of the mutual recognition principle – all of them including a form in which the request should be presented.

If it is correctly and completely filled in, the EAW form should, in most cases, be sufficient to allow the surrender of the requested person.

In order to facilitate the issuing of an EAW, the website of the European Judicial Network³ developed a tool, named Compendium⁴. This is a very user-friendly tool, going through the EAW form step by step.

One of the innovations brought by the European arrest warrant was the introduction of the list of 32 offences for which the double criminality check is not mandatory (unlike extradition, where double criminality was a *sine qua non* requirement in all cases).

The issuing authority, when deciding whether or not to check one of the offences from the list, should be flexible and should not seek a correspondence of denomination and definition with the ones in its domestic law.

Proportionality is a much debated issue when issuing an EAW. It was raised mainly in the perspective of arresting and surrendering a person for what it was deemed a minor offence; involving costs in cases where prejudice was much inferior.

This issue was very clearly explained in the European handbook on how to issue a European Arrest Warrant⁵, which offered some criteria that can be observed, *inter alia*, by the issuing authority: an assessment of the seriousness of the offence, the possibility of the suspect being detained, the likely penalty imposed if the person requested is found guilty, ensuring the effective protection of the public and the interests of the victims of the offence.

The handbook suggests that the EAW should be chosen where the coercive measure seems proportionate, adequate and applicable to the case in hand, also advising practitioners to consider alternatives to an EAW, such as, for example:

- Using less coercive instruments of mutual legal assistance where possible;

³ www.ejn-crimjust.europa.eu

⁴ http://www.ejn-crimjust.europa.eu/ejn/EJN_EAWWizard.aspx

⁵ Revised version of the European handbook on how to issue a European Arrest Warrant (Council of the European Union, 17 December 2010)

- Using videoconferencing for suspects;
- Using the Schengen Information System to establish the place of residence of a suspect.

The issue of proportionality was also tackled in the report of the European Commission on the implementation of the Framework Decision⁶, stating that confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons requested in respect of often very minor offences. In this context, [...] a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of article 2 (1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires. The European Commission is of the opinion that an overload of such requests may be costly of the executing Member State, which might feel inclined to apply a proportionality test, thus introducing a new ground for refusal.

The report of EUROJUST on its casework in the field of the European Arrest Warrant⁷ also identified proportionality as an issue for executing Member States, especially linked with mandatory prosecution in the issuing Member State, giving rise to excessive issuance of EAWs, with increased difficulties in cases where the dual criminality is not met.

The final report on the fourth round of mutual evaluation concerning the EAW⁸ also included references to a proportionality check. The report proposed that an analysis of the appropriateness of issuing an EAW observes criteria such as the seriousness of the offence in connection with the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective requested by less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.

1.2.1.2. Translation and transmission of the European arrest warrant

According to article 9 of the EAW Framework Decision, when the location of the requested person is known, the issuing judicial authority may transmit the EAW directly to the executing judicial authority. This article institutes the direct contact between judicial authorities, one of the basic features of the EAW, a

⁶ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (13 April 2011)

⁷ Report on Eurojust's casework in the field on the European Arrest Warrant, 26 May 2014

⁸ Final Report on the fourth round of mutual evaluations – The practical application of the EAW and corresponding surrender procedures between Member States

principle which was imported in almost all subsequent legal instruments adopted in the application of the principle of mutual recognition.

Article 8 of the Framework Decision allows each Member State to state a declaration (either at the adoption or later on) indicating that it will accept a translation in one or more other official languages of the Institutions of the European Communities. In this context, before translating the EAW, the issuing authority should consult the statements of each Member State in order to identify their declarations on the accepted languages. Special attention must be paid to the quality of the translations, considering that a poor or inaccurate translation may considerably hamper the understanding and consequently the execution of the EAW.

The website of the European Judicial Network proves again to be extremely helpful, identifying not only the language in which the EAW should be translated, but also the competent executing authority in each Member State. If the authority which receives an EAW is not competent to act upon it, it shall automatically forward the EAW to the competent authority in its Member State and shall inform the issuing judicial authority accordingly⁹.

In cases when the issuing authority does not know the competent authority for the execution of the EAW, it has several options:

- To require the assistance of the contact points of the European Judicial Network;
- To ask for the assistance of the central authorities (in most cases, the Ministries of Justice).

Following the adoption of the EAW, the roles of the central authorities were basically reduced to administrative assistance in sending and receiving EAWs and facilitating contact between judicial authorities.

As mentioned before, the main channel of communication is direct contact between the issuing and the executing authority. However, alternative channels of communication are available, such as:

- The secure telecommunication system of the European Judicial Network;
- Using the Schengen Information System, or, if it is not possible to call on the services of the SIS, to call on Interpol¹⁰;
- The central authorities¹¹

Besides the initial communication between authorities (sending/receiving) an EAW, the executing authority, in order to decide whether to surrender the

⁹ Article 10 paragraph (6) of the EAW Framework Decision.

¹⁰ Article 10 of the EAW Framework Decision

¹¹ Article 7 (2) of the EAW Framework Decision

person or not and on the conditions of the surrender, might need additional information and/or guarantees to be provided by the executing authorities.

In any case, the EAW must be transmitted by and means capable of producing a written record.

These difficulties may be solved either directly, or with the involvement of the central authorities and, in some cases, requesting assistance from EUROJUST.

The role of EUROJUST in this field is a wider one, considering that article 3 (1) b) of the EUROJUST Council Decision¹² „the objectives of EUROJUST shall be to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of the requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition”.

Quoting again from the Report of EUROJUST's casework in the field of the EAW¹³, the main directions in which EUROJUST provided assistance are the following:

- Facilitating the execution of EAWs and exchange of information;
- Clarifying legal requirements;
- Advising on drafting/redrafting of EAWs;
- Assistance in urgent cases (in the margins of a College plenary meeting or through the On Call Coordination);
- Developing guidelines in order to assist practitioners.

1.2.1.3. The SIS alert

Article 9 of the EAW Framework Decision allows the issuing authority to issue an alert for the requested person in the Schengen Information System, in accordance with the provisions of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders, such an alert being equivalent to an EAW.

If the location of the requested person is unknown, the EAW should be sent to the national SIRENE National Office in order to be distributed.

¹² Council Decision 2002/187/JHA OF 28 February 2002 setting up Eurojust with a view to facilitating the fight against serious crime, as amended by Council Decision 2003/659/JHA OF 18 June 2003, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.

¹³ See footnote 7

1.2.1.4. Execution of the European arrest warrant

1.2.1.4.1. Tasks of the executing authority

After receiving an EAW, a judicial authority will start by examining its competence. In case there is another authority competent to execute the EAW, it will forward the EAW *ex officio*, properly informing the issuing authority.

The executing authority verifies if the conditions for the surrender are met, *without examining the substance of the case*. The facts of the case are of course subject to verifications, but only in order to decide whether the requested person can be surrendered or not.

The time-limits for the receipt of the EAW are distinctly regulated in the domestic implementing law of each Member State. The deadlines and the linguistic regime are indicated by each Member State in a declaration, which must be observed by the issuing authority.

Failure to comply with the language requirements or to observe the deadlines set for the receipt of the EAW and/or additional information might result into various consequences, such as the release of the requested person or even the refusal to execute the EAW.

Special attention must be paid to the issue of deadlines, since they are very different from one Member State to another. Compliance with those deadlines was identified as a practical difficulty in the application of the EAW.

The Framework Decision provides deadlines for the execution of the EAW: 10 days if the requested person consents to the surrender or 60 days from the arrest of the requested person, if he/she does not consent. The deadlines may be extended, by a further 30 days, the executing authority being obliged to inform the issuing authority¹⁴.

If, under exceptional circumstances, an executing authority cannot comply with the abovementioned deadlines, it must inform EUROJUST accordingly.

Based upon recommendation 16 of the Final Report on the fourth round of mutual evaluations, the Spanish Presidency of the Council of the European Union proposed a draft form for communicating the final decision on the EAW to the issuing authority¹⁵.

1.2.1.4.2. Rights of the requested person

- To be informed of the EAW and of its contents;

¹⁴ Article 17 of the Framework Decision.

¹⁵ Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the EAW, during the Spanish Presidency of the Council of the European Union (23 March 2010).

- To be informed of the possibility of consenting to surrender;
- To be informed on the principle of specialty and its consequences;
- The right to legal counsel and to be assisted by an interpreter;
- The right to be heard by the executing authority, when the requested person is arrested and does not consent to the surrender;
- In case the EAW is issued for the purpose of executing a custodial sentence or detention order and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the EAW, request to receive a copy of the judgment before being surrendered.

1.2.1.4.3. Grounds for refusal of the execution of the EAW

Article 3 of the Framework Decision lists the mandatory grounds for refusal, the optional grounds for refusal being provided in articles 4 and 4a. Further, the most relevant issues related to the refusal of the execution of the EAW will be analysed.

Article 4a is a recent addition to the EAW Framework Decision, following its amendment by Framework Decision 2009/299/JHA. It allows the executing authority to decide to refuse the execution of the EAW if the person was tried in absentia and the issuing authority did not provide information and guarantees concerning the possibility of the person concerned to be aware of the criminal proceedings, to have legal representation appointed (by his/her own choosing or *ex officio*), to be informed of the verdict, to apply for an appeal or a retrial.

One of the main grounds for refusal of the EAW is the infringement of the *ne bis in idem* principle¹⁶. In relation to this aspect, the CJEU ruled in several cases, the most relevant for the assessment of the incidence of *ne bis in idem* in the field of the EAW being the Mantello decision¹⁷, (see section B).

Referring to the right to take part in the hearing, the ECHR stated that it is not an absolute right, and that it had to be reconciled with the public interest and the interests of justice. When domestic law permits a trial in absentia, the person concerned should be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge¹⁸.

¹⁶ Article 3 (2)

¹⁷ Case C-261/09

¹⁸ Council of Europe – European Committee on Crime Problems, Committee of Experts in the Operation of European Conventions in the Penal Field – Judgments in Absentia – Secretariat Memorandum prepared by the Directorate of Legal Affairs – Strasbourg, 3 March 1998. The document quoted the ruling in the case of Colozza and Rubinat, judgment of 12.02.85, series A, no. 89

1.2.1.4.4. Surrender of nationals

In the traditional system of extradition, refusal to surrender a national of the requested state was the general rule, exceptions needing to be expressly provided. The EAW has somehow reversed that rule, the surrender of nationals being an optional ground for refusal or subject to certain guarantees.

Article 4(6) deals with the surrender of nationals or residents of the executing state for the enforcement of a final conviction, provided that the executing Member State undertakes to execute the sentence or detention order in accordance with its own law.

In case the national or resident of the executing state is requested for the purpose of investigation, the executing authority might impose the condition that, should the requested person be convicted, to be returned to the executing member state in order to serve the custodial sentence or detention order passed against him in the issuing member state (the guarantee of return, provided in article 5 paragraph 3).

The provisions on surrender of nationals find their correspondence in Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

Article 25 of the Framework Decision 2008/909/JHA provides that, without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.

1.2.1.4.5. Temporary transfer and temporary surrender – differences

The Framework Decision has also covered situations when the requested person is urgently needed in person in the issuing state and, in the executing state, either a decision was not yet taken in respect of the EAW, or his/her surrender was postponed.

The temporary transfer may be ordered while pending the decision, in case the EAW was issued for conducting a criminal prosecution.

The temporary surrender is a measure that may be taken after the execution of the EAW was approved, instead of postponing the surrender, when a case described in article 24 paragraph (1) is incident¹⁹.

In both cases, the conditions and duration of the transfer will be agreed between the issuing and the executing authority.

1.2.1.4.6. Postponed surrender

If the surrender of the requested person was approved, the Framework Decision provides for two cases when it may be postponed:

- When the requested person is prosecuted in the executing Member State or, if he or she has already been sentenced (article 24);
- For humanitarian reasons (article 23 paragraph 3). The text of the Framework Decision only does not offer examples, referring only to „substantial grounds for believing that it would manifestly endanger the requested person's life or health". This wording leaves the appreciation to the executing authority, which will decide on a case by case basis.

1.2.1.4.7. Conditional surrender

The execution of the EAW may be subject to conditions and guarantees, such as:

- The guarantee of return, where the EAW concerns a national of the executing Member State, sought for purposes of prosecution (article 5 (3));
- The re-trial guarantee, in cases of judgments rendered in absentia (article 4a (d));
- If the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the execution may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.

¹⁹ If the requested person is prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the EAW.

1.2.1.4.8. Principle of speciality

The surrender of the requested person is subject to the principle of speciality, as provided in article 27 of the Framework Decision.

As a general definition of this principle (which is also incident in extradition), a state wishing to prosecute a surrendered person for offences committed before his or her surrender, must, subject to certain exceptions, obtain the permission of the executing authority. Such a request is made in the same form as an EAW, and granted or refused using the same rules which determine whether surrender would be granted or refused in regular cases.

By default this principle applies to all persons surrendered pursuant to an EAW, unless the executing authority indicates otherwise. However, this position may be reversed where both the issuing and the executing authority have made declarations to that effect. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

Derogations (article 27 paragraph 2):

- (a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;
- (b) the offence is not punishable by a custodial sentence or detention order;
- (c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;
- (d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;
- (e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;
- (f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the

person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent.

1.2.1.4.9. Deduction of provisional arrest

It is mandatory for the issuing authority to deduct the provisional arrest in the executing state from the sentence imposed upon the requested person.

In this respect, the executing authority is under obligation to provide all necessary information. In the absence of information on the arrest, they will be requested directly by the issuing authority.

1.2.2. CASE LAW

1.2.2.1. Case law of the Court of Justice of the European Union

1.2.2.1.1. Article 2 of the Framework Decision – the list of 32 offences - Case C-303/05 (Advocaten voor de Wereld)

This issue was raised before the Court of Justice of the European Union, where the introduction of the list was criticized on the grounds of being an infringement to the principles of legality, equality and non-discrimination.

Advocaten voor de Wereld submits that Article 2(2) of the Framework Decision infringes the principle of equality and non-discrimination for 2 reasons:

- There is a derogation, without objective and reasonable justification, from the requirement of double criminality, whereas that requirement is maintained for other offences.
- The absence of a clear and precise definition of the offences referred to in that provision, it contends, leads to a disparate application of that Law by the various authorities

According to Advocaten voor de Wereld, the list of more than 30 offences is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. The offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct.

According to the ruling of the CJEU in this case, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation,

the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'.

Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.

Furthermore, the Court acknowledged that, with regard, first, to the choice of the 32 categories of offences listed in Article 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.

Consequently, even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.

1.2.2.1.2. Article 4 paragraph 6 of the Framework Decision – the issue of nationals and residents

The CJEU interpreted the concept of residence and resident in the decision in the **Szymon Kozłowski Case**²⁰, stating that Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, is to be interpreted to the effect that a requested person is 'resident' in the executing Member State when he has established his actual place of residence there and he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterizing the situation of that person, including, in particular, the length,

²⁰ Case C 66 08

nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.

Furthermore, in the **Dominic Wolzenburg case**²¹, the CJEU, in the interpretation of article 4 (6), stated that article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional nonexecution of a European arrest warrant laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

1.2.2.1.3. Speciality principle - Case C-388/08 PPU-Criminal proceedings against Artur Leymann, Aleksei Pustovarov. Interpretation of art. 27

In order to establish whether the offence under consideration is an 'offence other' than that for which the person was surrendered within the meaning of Article 27(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, requiring the implementation of the consent procedure referred to in Article 27(3)(g) and 27(4) of that Framework Decision, it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document.

Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.

The exception provided for in Article 27(3)(c) of Framework Decision 2002/584 must be interpreted as meaning that, where there is an 'offence other' than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed.

The person surrendered can be prosecuted and sentenced for such an

²¹ Case C 123/08

offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the European arrest warrant.

1.2.2.1.4. Subsequent surrender - Chain of surrenders - Melvin West - Case C-192/12

This case deals with the application of article 28 of the Framework Decision, which regulates subsequent surrender/extradition. According to the relevant legal text, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may be surrendered to a Member State other than the executing Member State (pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender) with the consent of the executing state.

Article 28(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where a person has been subject to more than one surrender between Member States pursuant to successive European arrest warrants, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender.

For instance, if state A surrenders the person to state B, then state A must give its consent in case state B intends to surrender the person to state C. however, if, after the person is in state C and state D requests his/her surrender, then it is state B which is required to consent.

1.2.2.1.5. Case C - 396/11 – Ciprian Vasile Radu

The question brought before the court in this case is essentially whether Framework Decision 2002/584, read in the light of Articles 47 and 48 of the Charter and of Article 6 of the ECHR, must be interpreted as meaning that the executing judicial authorities can refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before that arrest warrant was issued.

Firstly, the court recalled that, as is apparent in particular from Article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition.

Under Article 1(2) of Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant.

As the Court has already held, according to the provisions of Framework Decision 2002/584, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a.

Admittedly, under Article 4a of Framework Decision 2002/584, the infringement of the rights of the defence during a trial which has led to the imposition of a criminal sentence *in absentia* may, under certain conditions, constitute a ground for non-execution of a European arrest warrant issued for the purposes of giving effect to a custodial sentence.

By contrast, in the Court's opinion, the fact that the European arrest warrant has been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, does not feature among the grounds for non-execution of such a warrant as provided for by the provisions of Framework Decision 2002/584.

It must be stated that an obligation for the issuing judicial authorities to hear the requested person before such a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight.

Furthermore, the Court indicated that it is apparent from Articles 8 and 15 of Framework Decision 2002/584 that, before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the European arrest warrant to a degree of scrutiny. In addition, Article 13 of that framework decision provides that the requested person has the right to legal counsel in the case where he consents to his surrender and, where appropriate, renounces his entitlement to the specialty rule. Furthermore, under Articles 14 and 19 of Framework Decision 2002/584, the requested person, where he does not consent to his surrender and is the subject of a European arrest warrant issued for the purposes of conducting a criminal prosecution, is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities.

As a conclusion, the Court ruled that Framework Decision 2002/584 must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

1.2.2.1.6. Ne bis in idem – case C-261/09 Gaetano Mantello

This case raised before the Court the issue of ne bis in idem, as a ground for refusal of the execution of the EAW and the interpretation of the notion „finally judged for the same acts”.

The Court notes that a requested person is considered to have been finally judged in respect of the same acts where, following criminal proceedings, further prosecution is definitively barred or the person is finally acquitted. Whether a person has been ‘finally’ judged is determined by the law of the Member State in which judgment was delivered. Consequently, a decision which, under the law of the Member State which instituted criminal proceedings, does not definitively bar further prosecution at national level in respect of certain acts does not constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in one of the Member States of the European Union.

When, in response to a request for information made by the executing judicial authority, the authority that issued the arrest warrant has expressly stated on the basis of its national law that the earlier judgment delivered under its legal system is not a final judgment covering the acts referred to in the arrest warrant issued by it, the executing judicial authority cannot as a general rule refuse to execute the European arrest warrant.

1.2.2.2. Case law of the Romanian courts

Below, some decisions of the Romanian courts will be quoted, with relevance to the various issues encountered in practice.

1.2.2.2.1. European arrest warrant – postponed surrender – Court of Appeal Braşov, judgment 220/R from September 22, 2013

As executing authority for an EAW issued by the Court of Campobasso, Italy, the Court of Appeal Braşov approved the surrender of the Romanian national SMC, postponing the surrender until his judicial affairs, pending in Romania, will be solved. The EAW was issued by the Italian authorities in the prosecution stage.

After his judicial affairs in Romania were finalized, since the grounds for postponement of the surrender no longer existed, the executing authority

contacted the Italian authorities in order to achieve the surrender of the sought person. In response to the request of the Romanian court, the Italian court indicated that, in the meantime, the requested person was convicted to a 3 years sentence, but the execution of the sentence was suspended.

Under these circumstances, the Romanian court found that the surrender would involve a deprivation of liberty which cannot be ordered, and it was no longer necessary.

1.2.2.2.2. European arrest warrant – grounds for refusal – acts committed on Romanian territory – High Court of Cassation and Justice, decision 4055/12 November 2010

The court of Appeal Alba Iulia was invested with the execution of an EAW issued by the Italian authorities, in respect of the Romanian national SI, for the offence of taking part in a criminal organization. The court approved the surrender of the requested person, who filed an appeal before the High Court of Cassation and Justice, stating that he could not be surrendered, because some of the acts committed within the criminal organization were committed in Romania and thus his surrender could be refused.

The High Court of Cassation and Justice after analyzing the facts of the case, the court found that the acts committed in Romania were only preparatory acts, which did not fall under the jurisdiction of the Romanian courts. Although the planning and the preparation of the offences committed by the requested person took place in Romania, this cannot lead to the conclusion that such facts could attract the jurisdiction of a Romanian court, and therefore the optional ground for refusal was not incident.

1.2.2.2.3. European arrest warrant concerning a Romanian national – recognition of the foreign judgment and subsequent measures - High Court of Cassation and Justice – decision 217/22 January 2014

The court of Appeal Târgu Mureş refused the execution of an EAW issued by the Hungarian authorities, concerning the Romanian national G.P., who refused to be surrendered in order to serve the sentence imposed by the Hungarian court. The Court recognized the conviction judgment underlying the EAW and ordered that the sentence passed in Hungary to be executed in Romania.

The court took into consideration the following facts: G.P. is a Romanian national who lives in Romania together with her family and her connections to Romania are significant. Therefore, serving the sentence in Hungary would seem like a disproportionate measure in this case. Furthermore, serving the

sentence in Romania would significantly improve the prospects of rehabilitation of the convicted person.

G.P. filed an appeal against this decision, asking for a reduction of the sentence.

The High Court of Cassation and Justice dismissed the appeal, ruling that, within the procedure for the recognition and enforcement of a foreign decision, the Romanian court cannot change the sentence and cannot rule on the merits of the case.

Chapter 2.

Mutual Legal Assistance in Criminal Matters between the Member States of the European Union

Mihaela VASIESCU

2.1. Concepts

Traditionally the concept of mutual legal assistance in criminal matters covers a series of specific acts and measures ordered by the legal authorities of a state –called requested State, in support of the initiation or conduct of criminal proceedings before the legal authorities of another state, called requesting State²².

Thus, as a rule, the mutual legal assistance reveals the relationship that arises between at least two states. Hence two consequences²³:

- it is excluded the mutual legal assistance between international or European organizations or institutions (that do not have the legal meaning of "State ") or between them and a certain state;

- mutual legal assistance is not available to individuals. Therefore, a request for legal assistance cannot be generated directly by a natural or legal person involved in a criminal proceeding. However, individuals can gain access to this form of cooperation, but indirectly, when they request it to the

²² See among others: R. Zimmermann, *La coopération judiciaire internationale en matière pénale*, 2^e édition, Stämpfli Editions SA Berne, 2004, p. 5; L. Moreillon, *Coopération et entraide judiciaire internationale civile, administrative et pénale: un état des lieux*, in R. Gani, „Récents développements en matière d’entraide civile, pénale et administrative”, Centre du droit de l’entreprise de l’Université de Lausanne, 2004, p. 16; L. Moreillon, *Entraide internationale en matière pénale*, Editions Helbing&Lichtenhahn, Bâle, 2004, p. 8; A. Weyembergh, *L’harmonisation des législations: condition de l’espace pénal européen et révélateur de ses tensions*, Editions de l’Université de Bruxelles, 2004, p. 10; P. Schmid, L. Frei, R. Wyss, J. D. Schouwey, *L’entraide judiciaire internationale en matière pénale*, in „Revue de droit suisse” no. 3/1981, p. 258 ; R. Koering-Joulien, *Structures et méthodes de la coopération répressive internationale et régionale –Rapports nationaux, France*, in „Revue internationale de droit pénal” nr. 1-2/1984, p. 147; R. Koering -Joulien, *L’entraide judiciaire répressive au sein de l’Union Européene*, in M. Delmos, „Qelle politique pénale pour l’Europe”, Editions Economica, Paris, 1993, p. 175 ; B. Aubert, *Les recours en matière d’entraide judiciaire pénale*, in „Apprendre à douter. Questions de droit, questions sur le droit. Etudes offertes à Claude Lombois”, Editions Pulim, Limoges, 2004, p. 621; L. Moreillon, A. Willi-Jayet, *Coopération judiciaire pénale dans l’Union européenne*, Editions Helbing&Lichtenhahn, Bruylant, Librairie Générale de Droit et Jurisprudence, 2005, p. 176.

²³ See: G. Vermeulen, T. Vander Beken, C. Van den Wyngaert, G. Stessens, A. Masset, C. Meunier, E. De Busser, *Une nouvelle législation belge d’entraide judiciaire internationale en matière pénale*, Editions Maklu-Uitgevers, Academia-Bruylant, 2003, p. 91.

legal authorities investigating the case, and when such a request is accepted and the legal assistance request is promoted.

Typically, the concept of mutual legal assistance in criminal matters is used in two ways:

- *in a broad sense* it overlaps the international legal cooperation and marks all rules that allow legal cooperation between at least two states. This sense is, in fact, improperly used because due to its rapid and ingenious transformations, the international legal cooperation has recently surpassed the area of the mutual legal assistance, it has ceased to be treated as a simple aid and it has acquired new dimensions that challenge collaboration and the coordination between the authorities involved;

- *in a narrow sense*, it refers only to minor or secondary legal assistance which designates the set of procedures likely to address the inherent difficulties of a case with foreign elements.

In the same time, lately the notions of Mutual Legal Assistance (MLA) and Mutual Legal Recognition (MLR) are commonly used. Although in certain situations, the two concepts cover the same range of acts, the two are not similar. MLA is based on treaties concluded between states, whereas the MLR is based on principle of mutual recognition of judgments and judicial decisions whose origins and application are limited at the territory of European Union. Even if the two concepts do not exclude each other in certain particular situations, they still involve conditions, procedures and different effects. But, I will refer to this further on my presentation.

In the next part, I will focus on: sources of MLA; the relationship of the 2000 Convention with the 1959 Convention and the Schengen Convention; distinctive features of 2000 Convention; routes of transmission of requests for MLA; letters rogatory; hearing by videoconference; European Investigation Order (EIO); information on accounts and banking transactions and monitoring banking transactions.

2.2. Sources

The mutual legal assistance in criminal matters has a double source: the rules of international and European law and the rules of domestic law.

Regarding international law two categories of sources are of interest:

- a) instruments adopted under the auspices of the United Nations: model treaty on mutual assistance in criminal matters adopted on 14 December 1990 together with the Optional Protocol thereto and the international conventions on certain matters that in the areas concerned contain provisions meant to facilitate the mutual assistance.

- b) regional multilateral treaties adopted within the European Council and then in the European Union, and bilateral treaties.

In the absence of an international instrument or when an international treaty is incomplete, the mutual legal assistance is granted on the basis of reciprocity which is provided by the requesting state to the requested state. In fact, on the way of reciprocity, the requesting state promises in turn to grant assistance when requested in the same terms and conditions.

The first European multilateral instrument, devoted entirely to mutual legal assistance in criminal matters, is the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on 20 April 1959, effective as of 12 June 1962. The Convention is the framework of reference, an indicator of rules both for subsequent instruments that digressively address the issue of mutual assistance in criminal matters, and for the domestic national laws adopted by States in this regard.

The 1959 Convention was supplemented and amended by two additional protocols: the first signed on 17 March 1978 and the second signed on 8 November 2001.

An important step towards the modernization of mutual assistance in criminal matters was made between the Schengen states. The Convention implementing the Schengen Agreement complementing the 1959 Convention, provides the rule of *direct transmission* of requests for mutual assistance in criminal matters and flexible rules for carrying out searches and seizures and it establishes in new forms a more extensive mutual assistance.

In the European Union the 1959 Convention and the Schengen Convention were complemented by the Convention drawn up in the Council under art. 34 of the former TEU on Mutual Assistance in Criminal Matters between the Member States of the European Union, entered on 29 May 2000.

The 2000 Convention elaborates the existing provisions in the matter of mutual assistance at the level of the Council of Europe, especially the cases when the assistance may be requested and it facilitates through a series of measures, the actual operation of the assistance, so that it will be faster, more flexible and more effective.

2.2.1. The relationship of the 2000 Convention with the 1959 Convention and the Schengen Convention.

In relation to the 1959 Convention and the First Additional Protocol thereto, as well as to the Schengen Convention according to art. 1 in 2000 Convention, the latter one complements and facilitates the application between Member States of these instruments. Thus, to all situations not covered by the 2000 Convention, the initial 1959 Convention and the first Protocol thereto, are applicable, or the Schengen Convention, as appropriate. However, owing to its complementing characteristics, the 2000 Convention no longer regulates the basic issues of legal assistance, such as the letters rogatory, the minimum content of the request or the language used in the request. Therefore, the 2000 Convention cannot be used by itself as the sole basis of a request for assistance.

2.2.2. Territorial application.

The 2000 Convention applies to the relationships between EU Member States who have adopted it or, as appropriate, who have acceded to it (in the case of new Member States) as well as in the relationships between these states and Gibraltar, Island and Norway. For these two latter ones, its application is limited to certain articles of the Convention stated in the EU agreement with these two states. Currently, the Convention has not yet been adopted by three Member States: Greece, Italy and Ireland and it is not yet effective in Croatia.

Thus, in the relationship amongst the four states and in the relationship between either of them and the other Member States, the provisions of the 1959 Convention, the First Protocol thereto and in some cases (in relation with Croatia and Ireland), the Second Protocol thereto are applicable, or bilateral treaties, when these contain more favorable provisions than the 1959 Convention.

In the same way, when determining the applicable international instruments, it is important to identify also the reservations made by States both to the 1959 Convention and the additional Protocols thereto, and to the 2000 Convention. If, for the purpose of a good collaboration, in the case of one or the other form of mutual assistance, the reservations to the Second Protocol to the 1959 Convention, inspired by the 2000 Convention and the Schengen Convention, are more favorable, then, the conventional basis of the request should be this protocol (obviously if it has been ratified by the states in the relationship) and not the 2000 Convention, even if the States concerned are parties to this Convention.

The status of ratifications and declarations and that of reservations to the 1959 Convention can be found on the website <http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>. The States that are parties to the 2000 Convention and their reservations can be found on the website <http://www.ejn-crimjust.europa.eu/ejn/>.

For example, Poland's reservations about art. 10 paragraph 9 of the 2000 Convention are firm in that the state does not request and does not provide legal assistance in matters covering a pursued person's hearing by video-conference. Instead, the statements of the same State with regard to art. 9, paragraph 8 in the Second Additional Protocol to the 1959 Convention are more indulgent and give the impression that Poland, as requested state, is willing to provide assistance in the case of a pursued person's hearing by video-conference. In such circumstances, in the relationship between a state that did make similar statements and Poland, a request for mutual assistance aimed at the hearing of an accused person in Poland by video-conference should rely on the Second additional Protocol to the 1959 Convention.

2.2.3. Distinctive features.

The 2000 Convention has these essential features:

- it expands the mutual assistance also to offences prosecuted in administrative proceedings, if the decision can be challenged before a court having jurisdiction in particular in criminal matters. From this point of view, the Convention brings no innovations compared to the 1959 Convention, as amended by the First Additional Protocol thereto and to the Schengen Convention;

- it simplifies the conditions of the temporary transfer of detainees and initiates the procedure of temporary transfer of detainees to the requested State;

- it sets into motion the *rule of direct transmission* of requests for mutual assistance, horizontally, from the requesting legal authority to the requested legal authority by any electronic means that leaves a written mark;

- it initiates the rule of *forum regit actum* - considered as one of the most important innovations introduced by the 2000 Convention;

- it ensures the protection of personal data and

- it brings innovative provisions, with regard to the extension of mutual assistance to new, modern and sophisticated forms, such as hearings by video conference and teleconference, spontaneous transmission of information, cross-border monitoring, controlled delivery, undercover investigations, joint investigation teams (JIT) and interception of telecommunications, some of them taken over from the Schengen Convention and from Police cooperation.

The 2000 Convention was reconstructed as a regulatory unit with an Additional Protocol adopted on 16 October 2001, in order to develop international mutual assistance in the fight against financial crime.

The Protocol:

- provides the mutual assistance measures on the information on accounts and banking operations and monitoring of banking transactions;

- includes the conditions how the information on accounts and banking operations and monitoring of banking transactions are requested and granted;

- stipulates that banks shall ensure the confidentiality of the transmission of information to the requesting authority as well as the confidentiality of the criminal investigation, without revealing data to the client or to any other person.

2.3. Form conditions of MLA

Except for the transmission of information, the set in motion of the mechanisms of mutual legal assistance follows the traditional model, upon request of the requesting state.

The process that initiates this form of cooperation allows the distinction between legal aid *at request* and *spontaneous* legal assistance.

The first is the rule, being found whenever a state competent in reprimanding an offence calls on the support of at least another state so as the latter to perform certain acts and take the measures indicated in the request, needed at a certain time for the prosecution and punishment of that offence.

Spontaneous assistance involves the provision by a State on its own initiative, when there is no prior request:

- either of information obtained in an investigation carried out in that State, when they could assist the receiving State to initiate criminal proceedings, or when they might lead to a request for legal assistance,
- or information concerning criminal judgments and subsequent measures relating to nationals of the recipient State, which are on the criminal record.

In the field of requested legal assistance the request, the responses and the accompanying documents must be *in writing*. Essentially, the request for mutual legal assistance shall include the following items, imported from art.14 of the 1959 Convention:

- the name of the requesting judicial authority and the name of the requested judicial authority;
- the purpose and the grounds of the request;
- legal qualification of the facts;
- identification, where applicable, of the accused, defendant or convicted person or of the witness or the expert;
- the statement of the facts.

These terms are general and should be included, as a rule, into any request for mutual legal assistance. In particular cases, depending on the purpose of the assistance, they will be filled or have an exempting content, depending on the requirements imposed by the applicable rules (e.g. hearings by video conference -art . 10, JIT -art . 13, interception of telecommunications -art . 18; the information on accounts and banking operations and monitoring of banking transactions -2001 Protocol thereto).

The request and the related documents must be submitted in the original. The 2000 Convention does not stipulate anything about the translation of the request for mutual legal assistance. The absence of such a provision in the 2000 Convention on translations should not lead to the interpretation that, in all cases, the request and the annexes do not have to be accompanied by translations into the language of the requested State. On the contrary, since the 2000 Convention is closely related to the 1959 Convention for the areas covered by both instruments, the rules on

translations provided by the latter instrument shall be applicable. Thus, in 1959 Convention the translation is mandatory, as a rule, only if the signing States have submitted such a statement to the Secretary General of the Council under art. 16 paragraph 2 of the Convention. This exemption is useful because it is possible that the judicial authorities responding to request do not speak languages other than their own. Moreover, a State that has not made reservations to art. 16, paragraph 2 may oppose to another state that has used these statements, the reciprocity rule provided in the last sentence of the said article.

The situation is not similar in the case of procedural notifications sent directly by post. Usually they are sent in the language or languages in which they were produced. This could be contrary to the interest of the person concerned in the proceedings, who may thus be unaware of their content. Therefore, the drafters of 2000 Convention provided for in art.5 paragraphs 3 and 4 some refinement:

- it was estimated that by sending the document directly by post, the State where the addressee person lives will see no major interest in gaining access to their content. So, it would be enough to send a brief summary to accompany them translated into the language or one of the languages of the state where the addressee lives.

- a higher priority was given to the interest of the person, so that, under a broad interpretation of art. 6 par 3 letter a of the European Convention for the Protection of Human Rights and Fundamental Freedoms, they have provided the obligation of the sender State to submit a translation of the documents or at least of their essential parts, into a language familiar to the addressee, when there are reasons to believe that he does not know the language in which the documents were prepared.

2.4. Routes of transmission of requests for mutual legal assistance

The drafters of the 2000 Convention overturned the rule of transmission of requests through central authorities, as established by the 1959 Convention and they replaced it with the rule of *direct* transmission from the requesting judicial authority to the requested judicial authority. This change was aimed at simplifying the judicial cooperation and it acknowledged as well that mutual assistance is a matter that primarily concerns the judicial authorities.

The identification of the competent authority in the requested State can be done on the EJM web page: <http://www.ejm-crimjust.europa.eu/ejm/ejm/>, the national contact points of the EJM or, where appropriate, the liaison magistrates.

The direct transmission of requests is, however, a competence and not an obligation. Thus, it is up to the judicial authorities to choose either the direct path of communication or the mediated one - by means of the

Ministries of Justice of the Partner States or via the Ministry of Justice of the requested State.

When the request claims an emergency, this can be made via Interpol or the EJN contact points or EUROJUST -this latter only in the stage of research and investigation, after the Lisbon Treaty.

The rule of direct transmission of requests for mutual legal assistance established by the 2000 Convention has two exceptions, when it is mandatory that the submission of requests or information shall be made via the central authorities of Member States:

- when the assistance covers a temporary transfer or the transit of detainees, and

- when the request is aimed at notifying information on the criminal convictions and subsequent measures in respect of nationals of that party, information that has been entered on the criminal record.

In addition to these two cases, art. 6 par. 3 in the 2000 Convention recognizes to the United Kingdom and Ireland the possibility to declare that requests for mutual legal assistance may be directed to their central authorities, declaration that can be, however, called back. Any Member State may use the principle of reciprocity in regard to these statements.

As far as it concerns the service of documents, the rule is to send them to the addressee directly by post.

Article 5 par. 2, however, allows four alternative exceptions:

- the address of the person to whom the document is intended, is unknown or uncertain; or

- the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post; or

- it has not been possible to serve the document by post; or

- the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

As for the means of transmission, the text of art. 6 par. 1 in the 2000 Convention contains novelties in respect of the possibility to send requests for legal assistance and procedural documents not only by traditional post but also through modern means such as e-mail or fax, or any other means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity.

2.5. Specific forms of mutual legal assistance

Legal assistance is characterized by a variety of forms and it includes:

a) *typical forms*, based on the request system:

- **traditional :**

- letters rogatory,
- appearance in the Requesting State of witnesses or experts,
- temporary transfer of detained persons,
- Service of documents prepared or filed in a criminal trial,
- Criminal Record and

- **modern:**

- Audition by video-conference and by teleconference
- Monitored deliveries,
- Undercover investigations,
- Joint investigation teams,
- Cross-border monitoring,
- Information on accounts and banking transactions, and monitoring banking transactions;

b) *atypical forms*, which outline an asymmetrical relationship between states without involving, in principle, obligations for the recipient state, but, as appropriate, only the option or obligation for the providing state:

- spontaneous transmission of information and
- transmission of information about criminal decisions and subsequent measures about nationals of a foreign state, entered on the criminal record.

2.5.1. Letters rogatory

2.5.1.1. Concepts.

The international letters rogatory is a formal request whereby the judicial authority of a state calls upon the judicial authority of another State to fulfil in its name and on its behalf certain judicial activities required in a criminal trial started before the requesting judicial authority. In other words, by "letters rogatory" is meant a mandate given by a judicial authority of one

state to a foreign judicial authority to perform in its place one or more specified actions.

The domain of letters rogatory is governed by art. 3 to art. 6 in the 1959 Convention, with the particulars provided under art. 3 to art. 6 in the 2000 Convention (the latter ones being applicable in fact to all forms of legal assistance).

2.5.1.2. The object of letters rogatory covers a very wide range of acts and measures specific to investigation or trial, especially:

- procuring evidence, consisting essentially in hearing the parties, witnesses and experts, confrontations, re-enactments, examination by experts, house searches, seizures, locating and identifying persons and objects, supplying information required in a particular process, interceptions and audio and video recording, examination of archival documents and specialized files.
- transmission of material evidence and service of documents or folders.

2.5.1.3. Procedure of letters rogatory.

Initiation of legal assistance, concerning a letter rogatory shall be accomplished according to conditions and procedure provided in the law of the requesting State, certainly observing the priority of international law.

Regarding the execution of the letters rogatory, art. 3 paragraph 1 in the 1959 Convention establishes the rule *locus regit actum*, under which requests for international letters rogatory are carried out under the law of the requested State, provided that it conforms to the rules of the applicable treaty. This rule is a consequence of the principle of sovereignty and of the common sense idea, that the authorities of the requested state know best their own rules of law²⁴.

Lately, however, the principle of *locus regit actum* has lost importance and significant improvements have been brought to it. These attenuations are meant to prevent certain problems concerning the validity of the act or of the measure ordered by the requested state, that may arise in the requesting state, particularly because of the differences between their legal systems.

In this context, there are two important ideas:

a) First, the 1959 Convention itself in art. 3, paragraph 2 provides the exceptional possibility of hearing witnesses and experts under the law of the requesting State, at latter's request. In contrast, the 2000 Convention instates

²⁴ See: D. Vandermeersch, L'entraide judiciaire internationale au stade de l'instruction préparatoire, in F. Tulkens, H.D. Bosly, „La justice pénale et l'Europe”, p. 414; H.D. Bosly, D. Vandermeersch, Droit de la procédure pénale, 5^e édition, La Charte, Brugge, 2008, p. 1146; G. Vermeulen, T. Vander Beken, C. Van den Wyngaert, G. Stessens, A. Masset, C. Meunier, E. De Busser, Une nouvelle législation belge d'entraide judiciaire internationale en matière pénale, p. 119-120.

as principle the *forum regit actum*, that has gained ground against the traditional principle of *locus regit actum*. Under the principle of *forum regit actum* the requests for legal assistance can be carried out according to formalities or procedures of the requesting State, obviously under certain conditions.

Hence, art. 4 in the 2000 Convention practically overturns the rule of *locus regit actum* provided by the 1959 Convention and replaces it by *forum regit actum* which thus acquires a general applicability in all forms of mutual assistance, not only in letters rogatory. From this point of view, art. 4 is considered the most innovative text of 2000 Convention.

However, the new rule is not mandatory and is subject to certain conditions:

-the existence of a request from the requesting judicial authority for implementation of its own legislation when completing the requested measure. Such a request may be incorporated into the request for mutual assistance or it can be made later –prior to or during the execution of the act or of the prescribed measure.

-Compatibility with the basic principles of the law of the requested state. This is a key requirement on which the extension to the provisions of Article 4 depends.

In judging compatibility, the executing legal authority will:

- Observe the principle of proportionality referred to in the Convention itself in the prior Declaration;
- Avoid confusion between incompatibility with the basic principles of law and minor differences in ordinary legislation;
- while waiting for pronouncements in this regard from the Court of Justice of the European Union, to identify such basic principles with those that govern due process, using Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, referred to by Article 6 of the Treaty on European Union, as a point of reference;
- Inform the authority of the requesting state without delay in the event that a specific incompatibility is finally discovered, in what terms and following what procedures it will be possible to execute the request for assistance (article 4 par. 3). This means the validating of the principle of “negotiation between authorities” in the scope of application of the 2000 Convention.

b) Secondly, even the 1959 Convention allows judicial authorities of the requested State to grant, upon request, the participation to the execution of the letters rogatory of the agents indicated by the requesting State as well as of the parties or their lawyers or their representatives. To this effect, the requested judicial authorities will inform the requesting authorities about the date and the location of the letters rogatory.

The reason of this participation is twofold:

-from the perspective of the requesting judicial authorities, their presence is indicated since they know best the pieces of the file and thus they contribute to an effective implementation of the request. Furthermore, their presence is an additional guarantee of a proper completion of the request, and thus incompatibilities between the performed act and the law of the requesting state can be avoided. In this way, the execution of the letters rogatory will not become a purely administrative act²⁵;

- from the perspective of the parties, their participation in the execution of the letters rogatory is justified by the need to ensure the right to a full defence, especially where their presence is mandatory in carrying out the proceedings, according to the law of the requesting State.

The participation of foreign judicial authorities in carrying out the act may happen in two forms: assistance and collaboration.

Regarding assistance, it does not raise particular difficulties because it does not require an active involvement of foreign authorities in the case. As a rule, it may consist of the support of the requesting authorities, by their advice, clarification, communication of information considered by the requested judicial authorities as necessary in the performance of the letters rogatory.

In exchange, collaboration for the performance of the letters rogatory, which often goes hand in hand with the use of the rule *forum regit actum*, may generate problems. This may happen because the requesting judicial authorities provide an active contribution, being able to contribute effectively to the achievement of the act or measure that is the subject of the letters rogatory. In this case, in order not to prejudice the sovereignty of the requested State, its judicial authorities shall state expressly the rights of the requesting authorities during the proceedings and they are obliged to comply.

The parties, their lawyers or their representatives present during the proceedings in the requested State are granted the same rights that they would enjoy in criminal proceedings under the law of the requested State, limited however to the subject of the letters rogatory. Since judgment is characterized in democratic states by orality and contradictoriness, their involvement in the execution of the letters rogatory does not result in discussions. However, their presence -especially of lawyers- is more sensitive in the requested State in carrying out an act in the pre-trial stage, in inquisitorial type trials, where, according to domestic law, they cannot participate in the carrying out instruction acts.

²⁵ See: D. Vandermeersch, L'entraide judiciaire internationale au stade de l'instruction préparatoire, p. 415; S. Brammertz, La coopération judiciaire internationale, p. 132 ; F. Thomas, C. Stenmans, Développer les bases légales de l'entraide judiciaire dite mineure: entreprise indispensable ou superflue ?, in F. Tulkens, H.D. Bosly, „La justice pénale et l'Europe”, Editions Bruylant, Bruxelles, 1996, p. 403 ; H.D. Bosly, D. Vandermeersch, Droit de la procédure pénale, p. 1148 and 1151.

In such cases, a paradox appears, because unlike defendants in requested State, during the passive letters rogatory, the persons accused abroad enjoy additional guarantees regarding to the exercise of their defense rights²⁶.

2.5.1.4. Effects on the requesting state of an act accomplished via a letter rogatory.

The act performed or measure taken abroad by way of a letter rogatory may be used, according to the *speciality rule* only for the purpose for which it was requested under this form of legal assistance. However, as a rule, that act or measure enforced by the requested judicial authorities has, in the criminal trial conducted in the requesting State, the same value as the act or measure taken by the judicial authorities of that State, even when the performance of the letter rogatory followed the conditions and proceedings imposed by the law of the requested State.

In any case, taking advantage of acts and measures obtained through letter rogatory abroad in the criminal proceedings conducted in the requesting State emphasizes both the supposition of harmony between their formal lawfulness and the actual observation by the requested authorities of form and condition requirements imposed by their own laws, and at the same time a considerable confidence in the quality of the legal system of the foreign state and in the manner how law is enforced by its judicial authorities.

The control of the requesting judicial authorities of acts or measures obtained through letters rogatory is safe from problems when in the requested State the rule *forum regit actum* was applied.

The situation is different when the foreign authorities apply their own rules of law and when the principles of sovereignty and territoriality prevent the requesting judicial authorities to conduct a full control on the lawfulness of the act or measure. Theoretically, the control in such cases is limited to the formal lawfulness of the act or measure. This basically means checking the compatibility with the relevant treaty and with the fundamental rights and freedoms, the manner how the rules on jurisdiction of the requested State were observed. The requesting authorities seem, thus, to be unable to control and invalidate acts or measures on the grounds that they are contrary to the rules of procedure in the requested State. Such a contradictoriness may be invoked only before the requested authorities in the performance of the letter rogatory, according to rules and remedies provided in law of the related state, obviously in the states that have established such formal guarantees in the domain of passive legal assistance.

²⁶ See: D. Vandermeersch, *L'entraide judiciaire internationale au stade de l'instruction préparatoire*, p. 416; H.D. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, p. 1148.

In Belgium for instance, the situation is different²⁷. Although initially the domestic law did not expressly authorize the requesting judicial authorities to verify the consistence of the performed act or measure taken abroad by letter rogatory the case law imposed the rule according to which the judge called upon to assess the consistence of evidence obtained abroad is held to consider the following three aspects:

a) whether the law of the requested State provides for the used evidence;

b) whether the evidence is not contrary to the rules of international law which are directly applicable in the national legal order of Belgium; and

c) whether the evidence was obtained according to legal rules of the requested State.

Considering such case law, the Belgian Law of 9 December 2004 on international legal assistance in criminal matters and in order to amend art. 90 in the Code of Criminal Instructions gave up the importance granted to sovereignty and territoriality against lawfulness and thus turned to law the practice previously held by Belgian judicial authorities²⁸.

French case law is partly similar in this matter²⁹. The French courts, less explicit than the Belgian ones, however, accept the possibility of exercising in the requesting State a control over the lawfulness of acts performed by international letter rogatory, although they agree with this idea that such a control should be carried out by the authorities of the requested State, according to the latter's own legislation.

2.5.1.5. Special Rules. Searches. Seizing objects or documents. Seizures

2.5.1.5.1. Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

EEW covers in part the subject of the letter rogatory and it can be used to obtain any objects, documents and data for use in proceedings in criminal matters for which it was issued. These may include, for example:

-objects, documents or data from a third party, resulting from a search, including the suspect's residence;

²⁷ See: Cour de Cassation de Belgique –2e Chambre, arrêt no. P.95.0119.N/25.04.1996; Cour de Cassation de Belgique –Chambres reunies, arrêt nr. A.94.001 F/23.12.1998 and Cour de Cassation de Belgique –2e Chambre, arrêt no. P.00.0377.N/23.05.2000, www.cass.be.

²⁸ See: Cour de Cassation de Belgique –2e Chambre, arrêt nr. P.05.0218 F/6.04.2005, www.cass.be

²⁹ See: Cour de Cassation Française –Chambre criminelle, arrêt no. 282/26.11.1996, www.courdecassation.fr; Cour de Cassation Française –Chambre criminelle, arrêt no. 1233/24.06.1997, www.courdecassation.fr; M. Frédéric Desportes, Coopération judiciaire en matière pénale panorama de la jurisprudence de la chambre criminelle, http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/frederic_desportes_5791.html

- prior data on the use of any services including financial transactions;
- statements, inquiries and hearings, historical records and
- other documents, including the results of special investigation techniques.

EEW does not cover, however: hearing of suspects, witnesses, experts or any other persons; physical examination, collection of biological material or biometric data directly from the body of a person, including DNA samples and fingerprints; obtaining information in real time via techniques such as interception of communications, undercover investigations or monitoring of bank accounts; examination of existing objects and data; obtaining data kept by public electronic communication services or by public communication networks.

EEW is applicable only to evidence already existing in the requested State at the time when it is issued and it covers, as shown above, only a small part of legal assistance, which is still included in the other international instruments successfully implemented in the European Union. Further, the grounds for non-execution are more burdensome for the issuing state than the causes which exclude the legal assistance based on conventions.

In this context, the Framework Decision 2008/978/JHA was a major failure, since only Denmark and Finland have adopted so far the internal measures of transposition, so EEW seems to be already a dead project.

2.5.1.5.2. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

Belgium, Bulgaria, Spain, Austria, Slovenia and Sweden submitted on April 2010 an initiative for adoption by the European Parliament and the Council of a Directive on the European Investigation Order. This order is designed to achieve one or more specific investigative measures in the executing State in view of identifying and collecting evidence or submitting evidence already existing in the executing State. Except for the spontaneous transmission of information and joint investigation teams, the EIO covers an important area of legal assistance that documentation of evidence in criminal proceedings and the directive recommended efficient and reliable measures for the achievement of this objective.

The goal of the directive is to allow member states to carry out investigative measures at the request of another member state on the basis of mutual recognition³⁰. The investigative measures would, for example, include interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications, and information on and monitoring of bank accounts.

³⁰ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141495.pdf

Particularly, the new rules would replace the current patchwork of legal provisions in this area with a single new instrument aiming to make judicial cooperation on investigations faster and more efficient. It will introduce automatic mutual recognition of investigation orders and limit the grounds for refusal by another EU state to execute the order, while at the same time providing legal remedies to protect the defense rights of concerned persons. Finally, it sets deadlines for carrying out the investigative measures and requires that the recognition or execution should be carried out with the same priority and speed as for a similar domestic case.

Member states will have 3 years after the entry into force of the directive to adopt the necessary national provisions.

The United Kingdom decided to participate in the EIO by using the opt-in option provided for in Protocol 21 of the Lisbon Treaty. Ireland and Denmark are not taking part.

2.5.1.5.2.1. Distinctive features.

The EIO is a judicial decision, which has been issued or validated by a judicial authority of a member state, to have one or more specific investigative measure(s) carried out in another member state to obtain evidence in accordance with the directive. The EIO may also be issued to obtain evidence that is already in the possession of the competent authorities of the executing state.

The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his/her behalf, within the framework of applicable defense rights in conformity with national criminal procedure.

a) *Conditions for issuing and transmitting an EIO:* the issuing authority may only issue an EIO when it is necessary and proportionate for the purpose of the proceedings (taking into account the rights of the suspected or accused person) and when the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

b) *Scope:* The EIO can be used in criminal proceedings, but also in those brought by administrative authorities, in particular when there is a criminal dimension.

c) *Grounds for non-recognition or non-execution:* A number of safeguards ensure that an EIO will not be executed if it could harm essential national security interests or immunities established in the executing state, for instance rules limiting criminal liability relating to freedom of the press.

d) *Legal remedies:* Member states must ensure that interested parties are entitled to legal remedies equivalent to those available in a similar domestic case and that they are properly informed of these possibilities. Legal remedies may be sought in both the issuing and the executing state.

e) *Deadlines for the execution*: Member states must acknowledge receipt of an EIO within 30 days and carry out the investigation measure within 90 days.

f) *Costs*: Save in exceptional circumstances, the executing state bears the costs of the measures carried out in its territory.

2.5.1.5.3. Special conditions of searches, seizing objects or documents and seizures.

Letters rogatory targeting searches or seizing of objects and documents and seizures are governed, in principle, by the general rules on international legal assistance in criminal matters, however with some peculiarities.

Thus, in the case of searches, seizing of objects and of seizures, the 2000 Convention does not provide special rules, but its dispositions are complemented with art. 5 in the 1959 Convention when the actual interim measures are regulated in the 1959 Convention. In this case, they are subject to a generous scope of reservation by the States. The States could reserve the possibility of subjecting the request for search and seizure of property to one or more of the following conditions:

- dual criminality;
- offence eligible for extradition in the requested state;
- enforcement compatible with the law of the requested state.

Under Schengen, there are similar, but not identical, possibilities of reservation, leaving assistance subject to the conditions provided by art. 51 in the Schengen Convention.

According to art. 51 of the Schengen Convention "the Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following:

- the act giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities , and where the decision may give rise to proceedings before the court having jurisdiction in particular in criminal matters;

- execution of the letters rogatory is consistent with the law of the Requested Contracting Party.

2.5.1.5.4. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

The framework decision does not replace legal assistance regulated by treaties, so that the authorities in the requesting/issuing member state are free to choose between either a request for legal assistance or a mutual recognition, weighing the advantages and disadvantages revealed by one or the other of these judicial cooperation mechanisms.

The advantages of the classical letters rogatory are:

- in relation to the certificate provided under art. 9 of the framework decision, the request for legal assistance has a much restricted and less sophisticated content,
- there is no need to attach to the request the freezing decision,
- the grounds for refusal laid down in the framework decision may be classified as burdensome for the issuing Member State .

The disadvantages of the classical letters rogatory are:

- since the contracting states have largely used the reservations under art. 5 in the 1959 Convention, a classical letter rogatory covering property seizing or seizure of material evidence may be doomed to failure because the condition of double criminality has not been accomplished, although the offence that is referred to is part of the 32 offences for which the framework decision has abandoned the control of double criminality.
- in the absence of a maximum term to solve the request, as set in the 1959 Convention, the requested State procedures can be difficult and time consuming, which is contrary to the nature of the required measure.
- taking advantage of the condition of compatibility of the measure with the law of the requested State, the judicial authority requested to carry out the letters rogatory may easily refuse to take the measure on grounds that the requesting legal authority had not anticipated.
- the regime of freezing assets is not covered by the 1959 Convention nor by the 2000 Convention, which implies consultations between the Member States and an agreement, which may be difficult to reach because of the differences between their legal systems. Moreover, the completion of this agreement is time-consuming which unnecessarily delays the procedure.

The advantages of the framework decision are:

- it abandons double criminality in the case of 32 categories of offences
- it establishes extremely short deadlines for execution of the order, if any, just 24 hours from receiving the order to freeze.

- it approaches in detail the regime of frozen assets and the states had to consider these dispositions while transposing them, thus creating the premises of new harmonized laws in this matter and therefore of expected effects .

Disadvantages of the framework decision are:

- the identification of the executing authorities may be difficult due to the fact that the website of EJM does not have an Atlas for the freezing orders. Thus, the issuing authorities have frequently to access the statements of the Member States as well as to request support from the contact points of EJM.

- the framework decision imposes the transmission together with the freezing order of the certificate whose standard content is set out in the Annex and has to be filled out properly by the issuing authority, otherwise risking the refusal of the executing judicial authority.

- the framework decision includes four grounds to refuse and three grounds to postpone the execution of the order. But, this is not in itself a disadvantage, since the grounds for refusal are clearly and exhaustively provided and there is no risk for the authority issuing the order to be surprised by a refusal based on other causes.

However, beyond these advantages and disadvantages of the two mechanisms for legal cooperation, between states that have not implemented the framework decision (Greece, Italy, Luxembourg and the UK) or between them and those who have taken measures to transpose it into domestic law, only the rules on letters rogatory targeting seizure remain applicable, while before the judicial authorities of the states who have not complied with the obligation to transpose the certificate issued may be interpreted as a letter rogatory, if it contains all the information necessary for a request for mutual legal assistance.

2.5.1.5.5. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Similar to the freezing order, the framework decision 2006/783/JHA does not exclude the recourse to the classical forms of legal assistance between Member States that have transposed it into their legal systems. Thus, the competent legal authorities of the requesting/issuing Member State can choose between mutual recognition and traditional letters rogatory, as, at some point, one or the other of these instruments of cooperation may be appropriate.

The foregoing considerations on the advantages and disadvantages of each of these mechanisms of cooperation remain accordingly valid in the case seizures, too.

In any case, given the fact that the framework decision has not been implemented in all Member States, between the EU states who have not transposed it (Estonia, Greece, Ireland, Italy, Lithuania, Luxembourg, Slovakia, United Kingdom) or between a Member State that has transposed the framework decision and another who has not, the confiscation request is governed by the relevant treaties on legal assistance.

In what concerns the relation between the freezing order and confiscation order, issuing the first is commonly followed by issuing the latter, but, due to the specifics of a particular case, this sequence is not absolutely necessary. However, confiscation order can be issued without being preceded by a freezing order. In the same time, a freezing order does not have to be followed by a confiscation order.

2.5.2. Hearing by videoconference

The international frame commonly used by the European Members States for hearings conducted through videoconference are 2000 Convention (art. 10) and The Second Additional Protocol to the 1959 Convention (art. 9).

2.5.2.1. Concepts

The audition by videoconference involves a direct audio-visual connection, in different places between the requesting authorities and the heard person or between this authorities and the persons subjected to confrontation.

Thus, if a person who lives on the territory of a state is requested by the judicial authorities of another state to come for hearing as witness, expert, suspect or defender, these authorities may request that the hearing take place by videoconference, when it is not desirable or it is impossible for the person to appear physically in its territory.

The physical presence of a person on the territory of a state is not desirable in certain cases, for example: the early or old age, or the health condition of the person.

The presence of the individual is impossible when the summoned person is detained on the territory of a different state, or if it were exposed to a serious danger in the requesting state (for instance: the situation of vulnerable or threatened victims or/and witnesses).

2.5.2.2. *The relationship between the hearings by videoconference and traditional letters rogatory*

The hearings through videoconference have obvious advantages when compared to the classic letters rogatory. Thus, audition by videoconference:

-accelerates procedures, taking much shorter time than a regular letter rogatory;

-it allows the hearing to be performed according to the rules and procedure of the requesting state, with fewer reservations than in the case of letters rogatory. Therefore, it counteracts the possible irregularities of the declaration given in conformity with the law of the requested state;

-it avoids in many cases multiple translations which significantly dilutes the message;

-moreover, it ensures the direct hearing by the requesting authority. So, a direct contact between the judicial authority and the heard person becomes possible by means of an interactive communication system, even if they are not physically in the same space. In this way, the competent authority can sense the behavior of the heard person during the hearing and it can draw conclusions regarding his credibility. In the same time, during the trial, the judge, the prosecutor and the involved parts can ask the heard person questions in order to complete, to check and to clarify the statements, whereas in the case of latter rogatory this would be impossible.

However, the audition by videoconference, besides possible technical problems, runs the risk of violating the rights of defence. Particularly, the right of defence involves the right of the accused to communicate with their lawyer out of hearing of a third person. This guarantee can not be provided when the defender and their lawyer are in different places and the only connection between them in the videoconference system used by the judicial authorities³¹.

Thus, in cases *Marcello Viola vs Italy*, *Shulepov vs Russia* and *Sakhnovskiy vs Russia*³², the European Court of Human Rights has decided that the defendant's participation in the proceedings by videoconference is not as such contrary to the European Convention on Human Rights, if this measure in any given case serves a legitimate aim if the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.

So, there is no risk of violating art. 6 if the following three conditions are met cumulatively:

-the hearing by videoconference is necessary to defend the public order, to prevent crimes, to protection of life, freedom and safety of witness and victims of crime, as well as for respecting the reasonable time of the criminal proceedings;

-the defender benefits of an adequate audio-visual connecting with the court, being able to see and hear the persons present during the meeting;

³¹ Just to guarantee the right of defense, Denmark, France, Great Britain, Holland and Poland stated that they would not extend the hearing by videoconference to suspects and defendants.

³² <http://hudoc.echr.coe.int>

-the defender has the possibility to discuss with their lawyer confidentially even by means of a secure phone line.

Not the same conclusion can be drawn if the defender does not have the assistance of a lawyer during the videoconference or if the judicial authorities do not take the required measures to ensure a direct and confidential contact between the defender and his lawyer.

It is true that, up until now, the European Court of Human Rights was required to analyze the compatibility of internal videoconferences regarding the hearing of a defender with art. 6 of the European Convention. However, the Court's reasoning on this issue is equally valid in the case of hearing the defender by international videoconference.

2.5.2.3. Conditions of hearing by videoconference

The conditions regarding the audition by videoconference are the ones found in international legal assistance, with certain particularities:

a) the content of the request is significantly different, since it has to include, besides the usual information, the reason why it is not recommendable or it is impossible for the witness or the expert to be personally present at the hearing, as well as the name of the judicial authority and the names of the persons which will lead the hearing.

Although it is not clearly mentioned, the cooperation procedures proved that the request should include the technical data of the videoconference system of the requesting judicial authority as well as any detail, regarding the procedure and hearing forms, which are considered relevant by the requesting judicial authority (for example: the rights that the suspect will be inform about prior to the statement; the consequences of the defender's statement; the rights of the witnesses and the experts; the relation of the witness and the expert with certain parts involved). These details have to be offered to the requested part to solve, if necessary, by the further consultations, any incompatibility which might occur between the procedure of the requesting state and the low principles of the judicial order of the requested state.

b) the request must meet the fundamental law principles of the requested state –condition deriving from art. 2 of 1959 Convention.

The concept used in 2000 Convention is vague and it may create various interpretations, being easily called upon when motivation the denial of judicial assistance.

However, by fundamental law principles it is meant fundamental principals of the judicial system of the requested state. The absence of the mechanism of hearing by videoconference in the law of the requested state as well as the unfulfilled conditions regarding the audition by videoconference are not, for example, included in the fundamental law principles.

c) *the requested state must have available the technical means to allow the hearing procedure by videoconference.* This does not actually represent a real condition, but rather a technical detail that should be solved between the partner authorities. Thus, the technical assistance could be offered by the requesting state.

In case of states which accept the hearing of the suspect or defendant by videoconference, there are two further conditions:

(i) the agreement of the suspect or defendant which is on additional guarantee of the right defense and right to silence;

(ii) the existence of an agreement between the requesting and requested judicial authorities regarding of the suspect or defendant by videoconference. This agreement is necessary so that the parts agree on the creation of the most appropriate setting in which the suspect or defendant may use the fundamental rights.

2.5.2.4. Procedure of hearing by videoconference.

With reference to hearing by videoconference, the following rules shall apply:

a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;

b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;

c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws;

d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State.

Without prejudice to any measures agreed for the protection of the persons, the judicial authority of the requested Member State shall on the

conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Member State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place.

The document shall be forwarded by the competent authority of the requested Member State to the competent authority of the requesting Member State.

The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.

Each Member State shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.

2.6. Information on accounts and banking transactions. Monitoring banking transactions

This area is governed by the Protocol of 16 October 2001 supplementing the 2000 Convention. The Protocol was signed on French initiative in response to certain deficiencies in cooperation practices. Thus, in the absence of specific provisions in the relevant treaties, the general requests for information from banks, which normally preceded the initial request for seizure, were usually rejected as insufficiently justified.

The Protocol targets three types of activities that can be included into the request for legal assistance: information on bank accounts, information on banking transactions and monitoring of banking transactions.

2.6.1. Information on bank accounts

Information on bank accounts is a method of investigation by which a competent authority of a Member State obtains from the authorities of another state information to identify bank accounts, regardless of their nature, which are controlled or owned by a natural or legal person that is under criminal investigations.

The use of the phrase "owned or controlled" allowed the extension of the investigation not only to bank accounts whose owner is the requested

person, but also to bank accounts where the person acts as proxy or over which the person may claim a certain right.

To this effect, the requested authorities will provide, upon request, to the requesting authority the bank account numbers and any other useful details.

The request for information on bank accounts must contain, in addition to the common aspects, the following items too:

a) the reasons why the requested information is considered to be of substantial importance in the investigation of an offence ;

b) the fundamental elements that served to establish that banks in requesting member state own or control bank accounts and, when having such data, which are the banks involved;

c) any other available data that could facilitate the carry out of the request.

The requested information will be provided only if the conditions for granting legal assistance are met and only to the extent the information is available to the bank who holds the bank accounts.

The carry out of the request for information on bank accounts is subject to the following fundamental conditions:

a) double criminality;

b) accomplishment of compatibility of the request with the law of the requested State;

c) the limits of punishment and the nature of the offence. The particularity of this specific forms of mutual legal assistance is given by the fact that assistance may not be granted for just any offence but only to crimes of a certain severity. Article 1 in the Protocol uses alternative criteria to determine which are the crimes whose investigation can substantiate the request for transmission of information on bank accounts. These are:

-an offence punishable by a penalty involving deprivation of liberty or a Detention order of a maximum period of at least four years in the requesting State and at least two years in the Requested State or

-an offence referred to in article 2 of the Convention of 1995 on the Establishment of a European Police Office (Europol Convention), or in the Annex to that Convention, as amended, or

-to the extents that it may not be covered by the Europol Convention, year offence referred to in the Convention of 1995 on the Protection of the European Communities' Financial Interests, the 1996 Protocol thereto, or the 1997 Second Protocol thereto.

d) the existence of pending criminal proceedings in the requesting State against a natural or legal person for any of the foregoing offences.

2.6.2. Information on banking transactions

Information on banking transactions is an investigative method by which a competent authority of a State obtains from the authorities of another state details on the bank accounts indicated and on banking operations carried out in a certain period of time via one or more bank accounts as shown in the request, including details of any account sender or recipient.

This information is given at the request of the requesting foreign authorities, stating the reasons why the requested information is considered to be of substantial importance to the investigation of the offence.

In this case, double criminality and the conformity of the request with the law of the requested State are the only grounds for refusal of legal assistance.

2.6.3. Monitoring banking transactions

Monitoring banking transactions is the measure that enables the authorities of a Member state to obtain, on request, the monitoring by the requested judicial authorities monitoring for a specified period, of banking operations that are carried out through one or more bank accounts specified by the requesting authorities.

The request shall include, in addition to the common aspects, the reasons why the requested information is considered to be of substantial importance to the investigation of the offence.

The decision to monitor shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that Member State.

The practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and requested Member States.

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Chapter 3.

Tracing, seizing and confiscation of assets in cooperation between the EU Member States

Světлана KLOUČKOVÁ

3.1. Introduction

All social structures, to which the compliance with the fundamental moral and legal democratic principles is inherent, acknowledge that criminal activity cannot be a source of enrichment. This postulate exists not only in the form of a moral rule, but it is also projected into the law. No modern civil code acknowledges crime as a title for acquiring ownership rights.

Proceeds of organized crime worldwide are estimated in hundreds of billions of US dollars. It is doubtless that a huge part of organized crime remains undetected and proceeds therefrom are completely untouched. However, even more alarming is the fact that even in case of uncovered and proven crime the criminal profit is not always successfully seized and returned either to the aggrieved parties or to the state treasury. Therefore the need of effective international cooperation in the area of searching for proceeds and other assets associated with criminal activity, their seizure and confiscation, grows more and more exigent.

For the purpose of this handbook I would divide this topic as follows:

- searching for proceeds of crime and other assets in criminal proceedings,
- seizure thereof,
- administration thereof,
- confiscation thereof, including returning to the aggrieved parties and their right for compensation.

3.2. Legal Instruments for Tracing, Seizing and Confiscation

3.2.1. Tracing

Cooperation between law enforcement authorities and prosecutors is important at any time. However, it is absolutely essential in the area of seizure and confiscation of proceeds of crime, since tracing of assets is usually the task of law enforcement authorities. On the other hand, seizure and confiscation are decisions made by judicial authorities.

Financial investigation conducted by police authorities should comprise searching for and documentation of proceeds of crime and property of the accused person derived therefrom, establishing his property profile for the purposes of any eventual securing of execution of penalty or protective measure imposed or securing the claim of the aggrieved person in criminal proceedings.

Searching of property may be realized on three levels:

- **searching in open sources on the Internet** (CARIN has elaborated an overview of websites concerning assets)
- **searching in databases or other sources of information that are not open to public but that are open to law enforcement authorities without a permission of judicial authorities** (i.e. registry of motor vehicles, ...). The cooperation on this law enforcement level is carried out on the basis of the Council Framework Decision (hereinafter FD) 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union³³. It is also possible to use cooperation between agencies specialised on assets tracing this purpose, which should exist in all EU Member States - see the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime³⁴ - hereinafter ARO.

The question for judicial authorities is whether it is possible to use information gained in such a way as evidence in a court trial. The answer is in Art 1(4) of the said FD 2006/960/JHA – it depends on the law of the Member State that provided the information or intelligence, if it is necessary to obtain consent with using it as evidence via judicial cooperation instruments in force between the Member States. Such an example could be Section 20 of the Act n. 104/2013 Coll. on International Judicial Cooperation in Criminal Matters of the Czech

³³ OJ L 386 of 29. 12. 2006, p. 89

³⁴ OJ L 332 of 18. 12. 2007, p. 103

Republic (hereinafter the IJCCM Act), according to which granting the consent lies within the competence of the Regional Court, and in case of pre-trial proceeding that is being conducted in a foreign state, the Regional Public Prosecutor's Office, in the jurisdiction of which is the police authority that provided the information stationed. In other words, the Czech law enforcement forces may provide information and intelligence abroad while noting that consent of prosecutor or court at the regional level is necessary for using the information or intelligence provided as evidence in criminal proceedings. Further rules concerning the information or evidence provided can be found in Art 23 of the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union – hereinafter the 2000 Convention.³⁵ It is not yet ratified by Croatia, Greece, Italy and Ireland (as of 1 October 2014).

- Searching and providing information concerning assets that are available to law enforcement authorities only with an approval of a judicial authority (i.e. banking information, ...) – in such a case it is necessary to issue a mutual legal assistance (hereinafter MLA) request and use the channels of judicial cooperation - there are direct contacts between judicial authorities based on the Council Act of 29 May 2000 establishing in accordance with Article 34 of the 2000 Convention or based on Article 53 of the Schengen Implementing Convention³⁶ (hereinafter the SIC) or based on Article 4 of the 2001 Second Additional Protocol.³⁷

3.2.1.1. Request for banking information

Generally, banking secrecy should not be a reason for refusing any cooperation regarding an MLA request among the EU Member States. However, any MLA request is executed according to the law of the requested state (Article 4 of the 2000 Convention makes it possible to respect only formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law of the requested Member State). The question is if the legal framework of the requested state gives grounds also for determination whether a person has a bank account in the territory of such state, for monitoring of transactions, etc.

Legal framework for MLA concerning banking information in the EU

³⁵ OJ C 197 of 12. 7. 2000, p. 1

³⁶ Convention Implementing the Schengen Agreement of 14 June 1985 (OJ L 239 of 22. 9. 2000, p. 1)

³⁷ Second Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8.XI.2001

The Member States can use a wide scope of international treaties enacted within the UN, Council of Europe, OECD and bilateral treaties.

„Simple“ banking information (who holds or controls the known bank account, what is the account balance) can be asked according Art 1 and 3 of the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 20.4.1959 (hereinafter the 1959 Convention). However, there is also a legal framework for asking for **„advanced“ banking information** - the Protocol of 16 October 2001 to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the EU³⁸ (it is not yet ratified by Croatia, Greece, Estonia, Ireland, Italy – as of 1 October 2014). This legal framework does not provide exceptions for fiscal and political cases (Art 8 and 9 of the Protocol).

Request for information on bank accounts – Art. 1 of the Protocol

The provision stipulates the obligation to provide assistance in determination whether a natural or legal person *who is the subject of criminal investigation* holds or controls one or more accounts of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts. This obligation means that if there is no central register of banking accounts, the requested authority has to address all banks located on its territory. Given the demanding nature of executing such request, the Protocol sets further conditions for providing of such assistance.

Such an obligation concerns only the listed crimes:

- an offence punishable by a penalty of at least four years of imprisonment in the requesting State and at least two years in the requested State, or
- an offence referred to in Article 2 of the Europol Convention or in the Annex to that Convention, or
- an offence referred to in the 1995 Convention on the Protection of the European Communities' Financial Interests, and its protocols from 1996 and 1997

Content of MLA request concerning Art. 1 of the Protocol:

³⁸ OJ C 326 of 21. 11. 2001, p. 2 – 8

Apart from general requirements stipulated in Art 14 of the 1959 Convention, it is necessary to describe:

- why is the requested information considered to likely be of substantial value for the purpose of the investigation into the offence,
- on what grounds is it presumed that banks in the requested Member State hold the account and, to the extent available, which banks may be involved,
- any information available which may facilitate the execution of the request.

Member States may make **the execution of a request according to this Article** dependent on the same conditions as they apply in respect of requests for search and seizure (dual criminality, extradition offence, execution is consistent with the law of the requested Party).

Information on banking operations

It is possible to ask according to this Protocol for information about:

- **banking operations in the past** – Art 2 (a necessity to indicate why is the requested information considered relevant for the purpose of the investigation into the offence and a requested state has a possibility to set the conditions of dual criminality, execution is consistent with the law of the requested Party).
- **monitoring of banking operations in the future** – Art 3 (a necessity to indicate why is the requested information considered relevant for the purpose of the investigation into the offence and a requested state has a possibility to proceed according to the national law of that Member State)

Confidentiality

Each Member State has an obligation according to Art 4 of the Protocol to take necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons the information that has been transmitted to the requesting State in accordance with Articles 1, 2 or 3, or the information that an investigation is being carried out. Breaching this obligation can hamper the effectiveness of possible subsequent seizure of money on a bank account.

Spontaneous information

Art 5 of the Protocol sets an obligation of the competent authority of the requested Member State to immediately inform the requesting authority accordingly about facts that may initiate further investigations, which were not initially foreseen when the request was made, in order to allow it to take further actions. Such an obligation can substantially speed up mutual assistance among the Member States.

Additional requests for mutual assistance

Any additional MLA request can only make a reference to the initial MLA request and contain only new information and new requirements. Such an additional request can be made directly to the competent authority of the requested Member State while the requesting authority is present in that State. The competent authority means the authority responsible for issuing the MLA request.

Practicalities

Effective and speedy cooperation in this area requires also organisational and technical background. The key question is what the technical possibilities to identify if a person has a bank account in the requested state are. There are two approaches that can be witnessed in the EU Member States:

- central register of bank accounts,
- use of services of private companies in order to identify if a person has a bank account in your country.

3.2.1.2. Searching for movable items in the EU

The possibilities to use the Schengen information system (hereinafter the SIS) to search assets are very limited. The SIS may only be used for searching for the following categories of objects (Art 100(3) of the SIC):

- (a) motor vehicles with a cylinder capacity exceeding 50 cc which have been stolen, misappropriated or lost;
- (b) trailers and caravans with an unladen weight exceeding 750 kg which have been stolen, misappropriated or lost;

- (c) firearms which have been stolen, misappropriated or lost;
- (d) blank official documents which have been stolen, misappropriated or lost;
- (e) issued identity papers (passports, identity cards, driving licences) which have been stolen, misappropriated or lost;
- (f) banknotes (suspect notes).

It means that it is not possible to use the SIS i.e. for cars and other items that are proceeds of crime.

Another point is that it is not possible to use the flagging system similar to such system in case of the European Arrest Warrant – hereinafter the EAW (if the person cannot be arrested in a Member State based on the EAW – i.e. a person under the age of criminal responsibility in the requested state, the SIRENE office can mark the person in the SIS with a flag so that other Member States knew that this state will not search for the person). If a car was stolen in the Member State A and a third bona fide party in the Member State B legally became the owner of the car, the SIRENE in the Member State B cannot mark the information in the SIS about the stolen car with a flag and thus prevent a search for such a car even on its own territory. The only possibility how to stop searching for such a car is to inform the SIRENE office in the Member State A about the situation and ask it to remove the report about the stolen car from the SIS.

3.2.2. Seizure

3.2.2.1. *Preliminary seizure prior to delivery of an MLA request*

There is a question how to improve the effectiveness of seizure of assets in criminal proceedings in the situation when there is no control on internal borders in the Schengen area and in time of electronic banking. Are there any possibilities of preliminary seizure before a delivery of a formal MLA request?

3.2.2.1.1. Preliminary seizure of money on a bank account

The Financial Intelligence Unit (FIU) in the Czech Republic has a power to postpone execution of a client's order on its own initiative (it is not necessary to wait for a notice from the bank) for up to 72 h (the period can be prolonged for up to further 3 days if the FIU submits a complaint to the Police) based on Section 20 (3) and (7) of the anti-money laundering Act no. 253/2008 Coll.). If the police authority starts criminal proceedings, the

prosecutor can decide on the seizure of money on an account in criminal proceedings – the seizure can last as long as it is necessary for the purposes of criminal proceedings. Such coordination between powers of the FIU, police and a prosecutor may be used also in favour of international cooperation.

If there is a suspicion that a sum – proceeds of crime, was transferred to a bank account in the Czech Republic, it is possible to make a notice to the Czech FIU. Such a notice has to contain information that:

- a criminal proceeding is carried out in a particular criminal matter,
- there is a suspicion that the suspect gained assets from a crime,
- there is a suspicion that assets are being legalized since it was found that the sum of money was transferred to a bank account in the Czech Republic,
- a judicial authority writes an MLA request concerning a request for seizure of the sum, respectively for banking information concerning a bank account in the Czech Republic.

If such a notice with a working translation into English (or Czech) is submitted to the Czech FIU, the FIU can use its power to postpone the client's order for maximum 6 days. It creates a possibility for a competent judicial authority in a requesting state to write an MLA request, translate it into the Czech language and deliver it by fax to one of the Regional Prosecutor's Office that are responsible for execution of MLA requests in criminal proceedings.

The main topic of the CARIN Annual General Meeting in Prague, on 15 - 17 September 2010 was to gather information about these possibilities of preliminary seizure of property prior to delivery of an MLA request or a freezing order (FO) in order to enhance the effectiveness of international cooperation in the area of seizure of proceeds of crime and other assets in criminal proceedings. 44 states provided answers to the CARIN questionnaire concerning this topic (the following information is from 2010).

As far as the FIU powers of preliminary freezing are concerned:

- 11 states answered that their FIUs have no power to make a blockage of suspicious transactions (Australia, Canada, Germany, Hungary, Israel, Italy, the Netherlands, Portugal, Sweden, Switzerland, US),
- 9 states answered that their FIUs can make such a blockage based on a report of a bank (Austria, France, Iceland, Lichtenstein, Malta, Norway, Romania, Russia, UK),
- 24 states answered that their FIUs can make a blockage on their own initiative – however, there are substantial differences in the number of conditions of such a blockage.

The time limit for postponing of the client's order is following:

- for 12 hours: Monaco
- for 24 hours: Denmark, Poland
- for 48 hours: Belgium, Slovakia (+ add. 24hours if the case is submitted to the Police)
- for 72 hours: Albania, Croatia, the Czech Republic (+ add. 3 days if the case is handed over to the Police), Slovenia
- for 5 days: Finland (+1 week based on coercive measures act), Lithuania, South Africa, Italy
- for 14 days: Spain (but limited to financing terrorism only)
- for 30 days (+ 60 days): Estonia
- for 45 days: Latvia
- for 3 months: Luxembourg
- for indefinite time period: Cyprus, Gibraltar, Guernsey (however, it is regularly reviewed), Ireland (reasonable time), Isle of Man, Jersey, Moldova

Also the scope of crimes in the 24 states where their FIUs can apply such a power is not the same. This FIUs' power to postpone the client's order can be used in case of:

- all crimes in Albania, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Gibraltar, Guernsey, Ireland, Isle of Man, Italy, Lithuania, Latvia, Moldova, Poland, Slovakia, Slovenia, South Africa
- all crime but tax ones in Monaco
- only serious crimes in Belgium, Jersey (more than 1 year)
- listed crimes in Luxembourg
- financing terrorism only in Spain

There are also differences as far as the holders of an account are concerned in these 24 states. The FIUs' power to postpone the client's order can be applied only against a bank account of a suspect in Cyprus, Denmark, Finland, Guernsey, Latvia.

One thing that is absolutely crucial for the effectiveness of such preliminary seizure of money on a bank account is the possibility of police authorities, judicial authorities and FIU to share information. The police or judicial authorities have to have a possibility to inform the FIU about suspicious transactions and on the other hand the FIU has to have a possibility to report a suspicion of a crime to the police or judicial authorities. The police in all the

above mentioned 24 states can inform FIUs in their own states about a suspicious transaction. 23 states answered that their FIUs can inform police about a suspicion of a crime. Only the FIU in Belgium can disclose information collected in the exercise of its functions if its members will testify in court or have an obligation to inform international institutions.

Coordination of procedure of three authorities in both the requesting and requested state is not an easy task. However, such a communication is possible. The key issue is a possibility to share information and consistency in exercising of the powers of all authorities involved in the process. The Czech Republic has already had several successful cases where only due to right and timely cooperation with FIUs in the involved states we succeeded to block further transactions and seized several hundred millions of CZK both in favour of criminal proceedings in the Czech Republic and in other Member States.

Austria and Germany reported another possibility of preliminary seizure of bank accounts - judicial authorities are entitled to decide about preliminary seizure based on reliable information and working translation according their criminal procedural codes and laws on international cooperation in criminal matters. After that, it is necessary to send a formal MLA request as soon as possible.

3.2.2.1.2. Preliminary seizure of items

As it is mentioned above, there is a possibility to search for stolen cars and several other items via the SIS. Once information about i.e. a stolen car is inserted in the SIS, policemen in the states which use the SIS can have such information into two minutes. On the other hand, judicial authorities can issue an MLA request only in the moment when it receives information that the wanted item has been found in another state. It is the reason why the police should have the power to preliminary seize the item based solely on the record in the SIS. I.e. the police authority in the Czech Republic has a power of such preliminary seizure for 60 days (according to Section 34a of the Act No. 273/2008 Coll., on the Police of the Czech Republic). It means that it is necessary to deliver an MLA request to a prosecutor of one of the Regional Prosecutor's Offices in the Czech Republic asking for a seizure in criminal proceedings within 60 days after the Czech police authority had decided about this preliminary seizure.

3.2.2.2. Seizure in criminal proceeding in an international cooperation

3.2.2.2.1. Cooperation based on international treaties

There is a number of international treaties that can be used in this area of international cooperation:

- European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959, including Additional Protocol, from 17.III.1978
- Art. 51 of the SIC,
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.XI.1990
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005
- Criminal Law Convention on Corruption, Strasbourg, 27.I.1999
- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20.XII.1988
- UN Convention against Transnational Organised Crime, 15.XI.2000
- UN Convention against Corruption, 11.XII.2003
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17.XII.1997
- International Convention for the Suppression of Counterfeiting Currency, 20.IV.1929

The above mentioned UN conventions define this scope of assets that a contracting state has to be able to seize:

- a) instrumentalities
- b) proceeds or
- c) property, the value of which corresponds to such proceeds (equivalent value)
- d) property, which the proceeds have been transformed or converted into
- e) property, which the proceeds have been intermingled with
- f) income or other benefits derived from b), d) and e)

The reasons why the requesting authority believes that assets mentioned in an MLA request have a connection with a crime that is being investigated have to be described in the MLA request.

The general rule is that any MLA request is executed according to the law of the requested state, that usually conditions this cooperation by the principle of dual criminality. International treaties also provide quite a broad scope of possibilities for refusing assistance.

3.2.2.2.2. Cooperation based on freezing order

There is an obligation for all Member States to implement the Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence of 22 July 2003³⁹. The framework decision has not been implemented by Greece, Italy and Luxembourg yet (at the date 1 October 2014).

The freezing order **can be used only** for:

- securing evidence, and
- seizure of the proceeds of crime listed in Art 3 of the FD or equivalent value for purposes of subsequent confiscation.

It means that the freezing order cannot be used for cases of seizure of i.e. stolen cars that should be returned to the rightful owner.

Requesting – issuing state issues a domestic order that has to be supplemented by the unified certificate. Official translation of the certificate form is available in all EU languages, which reduces the costs of translation.

Substantial differences in execution of freezing orders are following:

- dual criminality is evaluated only for crimes that are not listed in the FD,
- there is an obligation to execute the freezing order, with the exception of the grounds listed in the FD,
- complaints against the merits of the freezing are decided by the authority that has issued the freezing order. It means that the responsibility for intrusion into human rights via freezing of assets is shifted to the Member State that carries out the criminal proceeding. The situation is, however, more difficult for a person affected by a freezing order who has to find a lawyer in the issuing state and very often also needs to find and pay an interpreter in order to secure his/her rights.

At any time, the requesting authority has to be aware of **the purpose of seizure in another Member State**, since the purpose of the seizure has an influence on legal framework of cooperation!

a) Seizure of proceeds of crime and equivalent value in the EU

³⁹ OJ L 196 of 2. 8. 2003, p. 45

If the purpose of seizure is subsequent confiscation of proceedings of crime or an equivalent value, it is possible to use both ways of cooperation – an MLA request or a freezing order. The above mentioned framework decision does not prefer freezing order to MLA request. It depends on the implementation of the framework decision into the national law, whether such a preference is stipulated or not. Usually, it is up to the requesting authority to choose whether it uses an MLA request or a freezing order.

If the requesting authority requires to seize proceeds of crime or an equivalent value for purposes of subsequent confiscation, it is recommended to use a freezing order. On the other hand, if it is necessary to secure evidence, it is more probable that the requesting judicial authority will issue an MLA request:

- 1) there is no requirement of dual criminality if it is not necessary to perform a search,
- 2) the requesting authority usually needs more than just written or material evidence.

b) Extended confiscation in criminal proceedings

All Member States have some possibility to seize and confiscate property that is not directly linked with proceeds of crime. However, the systems differs a lot, which prevents an effective cooperation.

The first attempt to approximate these systems was the Council FD 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property⁴⁰ that sets 3 models of extended confiscations for the limited scope of criminality. It was the obligation of Member States to choose at least one of them.

The first two models created a system that a court can decide on extended confiscation of offender's property, if it is fully proven based on specific facts that the property in question was derived from:

- a) criminal activities of the convicted person
- b) similar criminal activities of the convicted person

during a period prior to the conviction for the offence referred to in Art 3 paragraph 1 of the mentioned FD, which is deemed reasonable by the court in the circumstances of the particular case.

⁴⁰ OJ L 68 of 5. 3. 2005, p. 49

The third model stipulates that a court can decide about extended confiscation of offender's property where it is established that the value of the property is disproportionate to the lawful income of the convicted person

and

a national court is fully convinced based on specific facts that the property in question was derived from criminal activity of that convicted person.

All models above do not mean that it is necessary to prove that the property originates from a particular crime (this would be a direct confiscation). A court has to be "only" fully convinced - based on specific facts – that the property originates from any criminal activity.

In this way it is possible to confiscate, either wholly or in part, property belonging to a person convicted of an offence

(a) committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union⁴¹, when the offence is covered by:

- Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro,⁴²
- Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime,⁴³
- Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings,⁴⁴
- Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence,⁴⁵
- Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography,⁴⁶

⁴¹ OJ L 351 of 29. 12. 1998, p. 1.

⁴² OJ L 140 of 14. 6. 2000, p. 1.

⁴³ OJ L 182 of 5. 7. 2001, p. 1.

⁴⁴ OJ L 203 of 1. 8. 2002, p. 1.

⁴⁵ OJ L 328 of 5. 12. 2002, p. 1.

⁴⁶ OJ L 13 of 20. 1. 2004, p. 44.

- Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking,⁴⁷

(b) which is covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,⁴⁸ provided that the offence according to the Framework Decisions referred to above

- regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment,
- regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment,

and the offence is of such a nature that it can generate financial gain.

Even the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders⁴⁹ sets the condition to recognise all these three systems of extended confiscation, the choice of different systems by Member States caused the obstacle of effective cooperation. Why? According Art 8 (2) (g) of this FD, the competent judicial authority of the executing State **may refuse** to recognise and execute the confiscation order if it is established that the confiscation order, in the view of that authority, was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2 (d) (iv).⁵⁰ According Art 8 (3) of this FD, if it appears to the competent authority of the executing State that:

- the confiscation order was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2(d)(iii),⁵¹

and

- the confiscation order falls outside the scope of the option adopted by the executing State under Article 3 (2) of Framework Decision 2005/212/JHA,

it will execute the confiscation order at least to the extent provided for in similar domestic cases under national law.

⁴⁷ OJ L 335 of 11. 11. 2004, p. 8.

⁴⁸ OJ L 164 of 22. 6. 2002, p. 3.

⁴⁹ OJ L 328 of 24. 11. 2006, p. 59 - 78

⁵⁰ Property, which the court in the issuing State has decided is liable to confiscation under any other provisions relating to extended powers of confiscation under the law of the issuing State.

⁵¹ Property, which the court in the issuing State has decided is liable to confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA.

To sum up, there is no guarantee of cooperation if the issuing state issues a confiscation order under the extended powers of confiscation that are not covered by the Framework Decision 2005/212/JHA or chooses another model of extended confiscation according to this FD than an executing state.

A further attempt to approximate possibilities of extended confiscations in the EU Member States is the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union⁵² (hereinafter the 2014 Directive), which sets only 1 model of extended confiscation in Art 5.

This provision stipulates the obligation to confiscate, either in whole or in part:

- **property belonging to a person** convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit
- a court **is satisfied** that the property in question is derived from **criminal conduct**

The satisfaction of court must be based on the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person. For further remarks see point 5.

3.2.3. Management of seized assets

Another aspect that influences the effectiveness of seizure and confiscation is the right management of seized assets. In order to provide an adequate management of property seized with a view to possible subsequent confiscation, several Member States have established centralised or specialised offices called Assets Management Offices (AMO).

The management of certain assets (i.e. cars, planes, animals) can be extremely expensive. So, it is reasonable to have a possibility in the legal system to sell the seized assets, where necessary, before a final decision is made.

Generally, seized assets in the Czech Republic can only be sold before any confiscation order is made, if the accused person agrees. However, there are three exceptions, when the seized assets can be sold without agreement consent of the accused (see Section 12 par 2 of the Act 279/2003 Coll., on execution of decision concerning seizure of assets):

- a) there is a risk of destruction of assets or other damage that is not easily averted,
- b) assets are considerably losing value despite of due care,

⁵² OJ L 127 of 29. 4. 2014, p. 39

c) the accused escaped or went to hiding.

There are also other countries that have similar possibilities to sell seized assets before a final decision in criminal proceedings is made without a consent of the accused person: Australia, Austria, Belgium, Canada, Estonia, Finland, France, Germany, Hungary, Ireland, Portugal, Slovenia, South Africa, Sweden, the US (data is based on the CARIN research in 2010).

Costs of management

Cooperation in assets seizing may also be very costly. Art 5 of the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters stipulates that parties shall not claim from each other the refund of any costs resulting from the application of the 1959 Convention or its Protocols, but there are certain exceptions:

- a) costs incurred by the attendance of experts in the territory of the requested Party;
- b) costs incurred by the transfer of a person in custody carried out under Articles 13 or 14 of the Second Additional Protocol to this Convention, or Article 11 of this Convention;
- c) costs of a substantial or extraordinary nature.

Parties shall consult each other with a view to making arrangements for the payment of costs claimable under the rules above.

If the requesting party is not bound by the Second Additional Protocol and costs for execution of an MLA request concerning seizure of assets are extremely high and it is not possible for whatever reason to sell the seized assets in the requested state before a final decision is made without an approval of the accused, it is reasonable to consult the judicial authorities in the requesting state at any time and negotiate the way how to at least share costs for management of the seized assets.

3.2.4. Confiscation

The 1990 Strasbourg Convention and the 2005 Warsaw Convention stipulate basically two ways of procedure of providing cooperation in the area of confiscation of assets in criminal proceedings. The requested authority can

- a) enforce a confiscation order issued by a court of the requesting state;

or

- b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

There is also the obligation for Member States to implement the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders⁵³ that simplify the cooperation in this area. Unfortunately, the framework decision has not yet been implemented by Estonia, Greece, Ireland, Italy, Lithuania, Luxembourg, Slovakia, Sweden and UK (as of 1 October 2014). The cooperation according to the FD is based on the same principle of mutual recognition as the freezing order (the obligation to recognise unless grounds stipulated in the FD, ...). The FD also sets clear rules for sharing confiscated assets (Art 16).

Unfortunately, many EU Member States have a system where a court in fact decides on confiscation only as far as assets that police succeeded to find and that were seized in pre-trial proceedings. However, there are cases where it is clear that the offender gained more benefit than the judicial authorities succeeded to seize. The crucial questions are:

- do the EU Member States have a possibility to issue a confiscation order even if they are not able to find the offender's assets at the moment of the final verdict in criminal proceedings,
- do the EU Member States have a legal framework for tracing and seizure of assets after the final verdict in criminal proceedings is made.

If not, they will have the obligation to do so as of 4 October 2016, which is the deadline for implementation of the 2014 Directive (see Art 9 of the Directive).

3.3. Victim's Rights

3.3.1. Returning a particular thing to the victim

If judicial authorities have a situation when a particular item (i.e. a stolen car) is to be returned to the victim, they cannot use an EU freezing order for this purpose (it can be used only for the purpose of subsequent confiscation). The only possibility is to issue an MLA request and ask the foreign country to seize and return the item to the victim according to:

⁵³ OJ L 328 of 24. 11. 2006, p. 59 – 78

- Art 8 of the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union or
- Art 12 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 8 November 2001.

3.3.2. Decision on damages

If a victim suffered from damage caused by a crime, the question is if he/she can join criminal proceedings with his/her claims for compensation. Victims in the following countries can ask for damages within criminal proceedings (according to findings of the 2010 CARIN conference) - Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Spain, Sweden, UK (only interest losses, justified costs in connection to a crime). Victims in other EU Member States can ask for damages only in civil proceedings.

If a Member State applying the SIC asks for MLA in criminal proceedings concerning a civil claim for compensation, its judicial authority can refer to Art. 49 (d) of the SIC ("Mutual assistance shall also be afforded in civil proceedings joined to criminal proceedings, as long as the criminal court has not yet given a final ruling in the criminal proceedings").

Another question is if a Member State, where a victim can ask for compensation in criminal proceeding, can seize assets in order to secure the victim's claim for damages. The seizure for this purpose is possible in Belgium, Bulgaria (only damage claims of the state), Croatia, Denmark, Estonia, Finland, France (in the case of organised crime or many victims), Hungary (based on a motion of the victim), Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain. The difficulty of the process is that cooperation concerning seizure in criminal proceedings can be done according to international treaties on MLA in criminal proceedings. On the other hand, cooperation in case of execution of a court decision in criminal proceedings on damages for a victim can be performed according to the EU civil law (see the Council Regulation (EC) No 44/2001 of December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁵⁴).

⁵⁴ OJ L 012 of 16. 1. 2001, p. 1

3.4. Judicial practice

Assets recovery in criminal proceeding is a very complex area even in domestic proceedings. There are many specific tasks that require specialised experts to deal with and that should not be done by judicial authorities directly. There should be in practice:

- an agency or at least specialists for asset tracing (there is the obligation for Member States to establish ARO)
- an agency or at least specialists for asset management (there will be the obligation to establish it according to the 2014 Directive),
- an authority that enters agreements about assets sharing.

One thing that can improve the practice and enhance effectiveness of seizure and confiscation of assets is **the central statistic** established in several Member States, dealing with actions performed within the framework of financial investigation connected with criminal proceedings, in particular as far as seized assets or values are concerned and which also continually shows the volume of seized values.

International cooperation in criminal matters concerning assets recovery is one of the most difficult areas of cooperation. Many specific problems have to be solved and it is necessary to coordinate activities of more than just judicial authorities on the international level in order to reach successful cooperation. The question is, who can help practitioners in this area?

As far as tracing of assets is concerned, it is more than recommendable to use services of ARO in Member States that are interconnected in the ARO network. The AROs should not only provide support to investigators and prosecutors via creating suspects' and other persons' financial profile, but they also create a methodology in asset tracing and gather the best practices and experience in order to share it with other law enforcements units.

It is also very reasonable to contact the CARIN⁵⁵ - the network of specialists for tracing and seizure of proceeds of crime. The CARIN's aim is to increase the effectiveness of members' efforts in depriving criminals of their illegally obtained profits. The is unique at this network it unifies both policemen and prosecutors specialised in this area of cooperation – not only form the EU member states but also from Albania, Australia, Bosnia & Hercegovina, Canada, Georgia, Gibraltar, Guernsey, Iceland, Isle of Man, Israel, Jersey, Kosovo (observer status), Liechtenstein, Macedonia, Mexico, Moldova,

⁵⁵ Camden Asset Recovery Inter-Agency Network

Monaco, Montenegro, Norway, Russia, Serbia, South Africa and USA. CARIN network comprises 62 jurisdictions between its members and observers. The CARIN also initiated the creation of CARIN style network in other regions of the world – the South Africa region, the South and Latin America region, the Asia and Pacific region. The contacts of these regions are accessible via the CARIN secretariat.

As far as judicial cooperation in seizing and confiscation of assets is concerned, great help could be provided by **EUROJUST** (<http://EUROJUST.europa.eu/>). The tool of a particular value are coordination meetings that can be organised and funded by EUROJUST and that allow practitioners directly involved in cases to discuss the practicalities on one spot. It is also possible to refer to the EUROJUST Report on non-conviction-based confiscation (General Case 751/NMSK – 2012) that provides detailed overview of this topic.

Great support could be found also in **the European Judicial Network** (<http://www.ejn-crimjust.europa.eu/>) that unites experts in MLA in criminal matters.

3.5. Near future in the area of seizure and confiscation of assets

The 2014 Directive was enacted and should be implemented by Member states as of 4 October 2016. The legal framework for this Directive is Article 82 (2) and Article 83 (1) of the Treaty on the Functioning of the European Union, that regulates judicial cooperation in **criminal** matters. The aim of the Directive is “the adoption of **minimum rules** will approximate the MSs’ freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.”

Art 5 of this Directive that stipulates rules for extended confiscation seems to be the most difficult article for implementation. It sets the obligation to confiscate, either in whole or in part:

- **property belonging to a person** convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit and
- a court **is satisfied** that the property in question is derived from **criminal conduct** (satisfaction of a court must be based on the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person).

The satisfaction of court does not mean that it must be established that the property in question is derived from particular criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct rather than from other activities.

This article brings particular difficulty especially to Member States that have to prove anything in criminal proceedings beyond reasonable doubt. However, Art 5 that should be implemented within criminal proceedings suddenly brings a burden of proof that is more typical for civil proceedings.

Certain guidelines how to implement this article could be found in some decisions of the European Court of Human Rights (the ECHR). An example can be the judgment *Geerings v. the Netherlands* from 1 March 2007 (No. 30810/03), where we can read in paragraph 43: "... the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new charge...". The same finding can be found in the other ECHR decision, i.e. *Phillips v. the United Kingdom* (No. 41087/98, § 35, ECHR 2001-VII) or *Van Offeren v. the Netherlands* (No. 19581/04, 5 July 2005).

Chapter 4.

Recognition of foreign decisions

Dana Maria ROMAN

4.1. Introductory remarks

The recognition of a foreign judgment takes place when a competent authority in one state accepts a judicial decision made by the courts of another country or jurisdiction, without re-examining the substance of the original lawsuit.

Although countries worldwide recognize and enforce foreign judgments under some conditions, differences are vast.

Some countries do not enforce foreign judgments in the absence of a treaty. By contrast, some legal systems recognize foreign judgments more or less to the same degree as domestic judgments. According to Romanian law (Law 302/2004 on international judicial cooperation in criminal matters), for instance, a judgment may be recognized in the absence of a treaty, on the basis of reciprocity.

Globalisation and mobility have multiple advantages and one major disadvantage: increased cross-border criminality. In this context, judicial authorities are more often confronted with cases that have an international dimension and the need for a recourse to judicial cooperation in criminal matters. Therefore, a truly effective cooperation in criminal matters cannot be envisaged without the possibility for the authorities of one state to recognize a decision rendered in a foreign state.

4.2. Legal instruments

4.2.1. Council of Europe legal instruments

One of the earliest and most important legal instruments in this field was adopted at the level of the Council of Europe - the European Convention on the International Validity of Criminal Judgments (Hague, 1970). As stated in the explanatory report of the Convention, it is a further step towards the ultimate goal of ensuring full international co-operation in criminal matters, after the CoE regulated the first two methods of legal co-operation by opening for signature the European Convention on Extradition (1957) and the European Convention on Mutual Assistance in Criminal Matters (1959). The Convention was inspired by pre-existing regional arrangements, such were the ones between the Nordic states and the Benelux states, with the same aim (enforcement of criminal judgments)⁵⁶.

But recognition under the 1970 Convention can only be requested in a limited number of cases⁵⁷.

Other Conventions of the Council of Europe adopted in the field of recognition of decisions in criminal matters:

European Convention of Extradition – contains the application of the principle *aut dedere, aut judicare/punire*, allowing for the requested state to take over proceedings/enforce decisions, in case the extradition of a national is refused:

- European convention on the punishment of road traffic offences (Strasbourg, 30 November 1964);
- Convention on the Transfer of Sentenced Persons (Strasbourg, 21 March 1983) and the Additional Protocol thereof (18 December 1997);
- European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964).

4.2.2. Recognition of foreign judgments in the EU – instruments and evolution

When one refers to judicial cooperation in criminal matters in the EU, the principle of mutual recognition is the most valuable, actually the very basis of

⁵⁶ <http://conventions.coe.int/Treaty/en/Reports/Html/070.htm#FN1>

⁵⁷ if the person sentenced is ordinarily resident in the other State;

if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced;

if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State;

if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction;

if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.

most legal instruments, the cornerstone of judicial cooperation, as it was asserted by the Tampere Council. In the context of the free movement of persons, the incidence of cross border offences is very high, so an effective cooperation could not be envisaged in the absence of legal means to recognize and enforce foreign decisions.

The Communication from the Commission to the Council and the European Parliament on mutual recognition of final decisions in criminal matters first acknowledges that traditional judicial cooperation in criminal matters was based on a variety of international legal instruments, which are overwhelmingly characterised by what one might call the "request"-principle: One sovereign state makes a request to another sovereign state, who then determines whether it will or will not comply with this request. Borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure --in so far as it has extra national implications - would automatically be accepted in all other Member States, and have the same or at least similar effects there⁵⁸.

The European Arrest Warrant is the first legal instrument based upon mutual recognition of decisions in criminal matters and the prototype of all the subsequent EU legal acts in the field of judicial cooperation in criminal matters. The Framework Decision reflects a philosophy of integration in a common judicial area and involves a new pattern of cooperation based upon mutual trust between Member States⁵⁹.

Apart from the surrender procedure, the EAW Framework decision allows for the executing state to recognize and enforce a custodial sentence passed in the issuing state, under the conditions set out in article 4 paragraph 6: if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

Subsequent legal instruments adopted at the EU level took a step forward and extended the application of the principle of mutual recognition to various forms of cooperation in criminal matters (illustrative list below):

1. *Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence;*
2. *Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties;*

⁵⁸ **Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters** /* COM/2000/0495 final */

⁵⁹ Revised version of the European handbook on how to issue a European Arrest Warrant

3. *Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;*
4. *Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;*
5. *Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;*
6. *Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order;*
7. *Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters;*
8. *COUNCIL FRAMEWORK DECISION 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.*

A first aspect that arises from the reading of this enumeration is a change in vocabulary: the phrase request (typical for the traditional system of cooperation in criminal matters) was replaced, in many cases, by the word order, implying a higher degree of compulsoriness for the executing authority, which translates in a limitation of the grounds for the refusal of recognition and enforcement. We also witness a standardization of the requests, a form being provided for each situation, in order to simplify procedures and facilitate communication.

Furthermore, we notice a diversity of the fields in which the principle of mutual recognition is applied, covering practically all measures taken in the course of the penal proceedings, including the enforcement stage (freezing property or evidence, confiscation, supervision orders, transfer of sentenced persons, investigation measures and probation decisions).

Since all the legal instruments quoted above follow more or less the same pattern, they include, as a common trait, the indication that a foreign decision should be recognised with as few formalities as possible. Nevertheless, this does not mean that the recognition and enforcement becomes automatic and that executing state must not perform certain checks, in order to determine whether all the legal conditions are met, whether or not a ground for refusal is incident.

Recognition of a judgment was very much facilitated and the double criminality check, although remaining a constant, was not compulsory anymore.

4.3. Practical considerations

When a case requires that a foreign decision is to be recognized, a clear distinction must be made between the initiator of the request.

In most cases, the recognition of a decision is made upon the request made by another state, in the form of an MLA request/form/order, depending on the case.

There also are cases when the necessity to recognize a foreign decision arises during the prosecution/trial, in order for the case to be properly solved and assessed in all its merits. In this latter case, the question whether the foreign decision can or cannot be recognized is raised by the judicial authority handling the case.

According to Romanian law, recognition of foreign decisions may take place either upon the request from the authorities of a foreign state, or *ex officio*, by a judicial authority who finds the foreign decision might have an impact on the case in hand, or upon the request of a person who wants to benefit from the effects of a decision rendered in another state (most frequently, to have the arrest served in another state deduced from a sentence he is currently serving in Romania). This is possible if the offences (the one committed abroad and the other one committed in Romania are concurrent.

In each of the above mentioned cases, the authorities invested with the recognition are different: the courts of appeal in the first case, the judicial authority (prosecutor or court) handling the case in the second situation and the courts of first instance in the third case.

A second aspect that must be taken into consideration is the purpose of the recognition process: a foreign decision will always have to be recognized in order to produce legal effects. Recognition might either help building a criminal case or even stop it (if it reveals that continuing criminal proceedings would infringe the *ne bis in idem* principle).

In order for a decision to be recognized by a Romanian court, it is imperative that the decision is final and that the offence is also incriminated by Romanian law.

Furthermore, Romanian law has a few impediments to the recognition of a foreign judgment, such as: *ne bis in idem*, infringement of fundamental rights and rule of law, if the offence is a political one or considered as such, if the conviction is based upon criteria such as race, religion, gender, nationality, language, opinions or social origin, the territoriality principle.

Specific conditions were added depending on the purpose of the recognition: transfer of sentenced persons, confiscation, enforcement of financial penalties etc.

Special attention must be given to the effects of the recognition process. If recognition aims to enforce a criminal sanction *lato sensu*, it is necessary that the state where the decision was rendered to make a request in this respect, to express its will to "transfer" its jurisdiction in a certain case. It is only up to the state where the criminal decision was rendered to decide the manner and the conditions in which it will enforce a criminal sanction, even if that means to relinquish the enforcement to another jurisdiction.

In the practice of Romanian courts, a judgment or any other kind of judicial decision rendered in another state can be recognized (of course, if the legal prerequisites are met) for other purposes other than enforcing a penal sanction (for example, as stated before, in order for the arrest to be deduced, or in order to determine a possible concurrence of offence or relapse). This recognition does not have the effect of enforcing a sanction (irrespective of the nature of the sanction – detention, a fine, confiscation and so on), it only aims to give effect to other legal consequences that a sanction might have, besides that. In order for this kind of recognition to take place, it was not deemed necessary for the issuing state to make a request, because this process does not seek to "replace" jurisdiction or to have any effect whatsoever on the enforcement of the sanction *lato sensu* (including any incapacities or other consequences of the conviction – such as for example confiscations, fines, expulsion). The jurisdiction still fully belongs to the state where the decision was rendered. The authorities of the state where the decision was recognized only intend to take it into account in order to solve a criminal case correctly and giving consideration to any aspect that might clarify either the circumstances of the case or to help individualise the punishment.

However, recognition must not alter in any case alter or modify the ruling of the court or the enforcement of the sentence imposed in another state.

One of the issues that was frequently raised in practice was whether recognition of a foreign decision is admissible if it was rendered by an authority other than a court.

The Romanian law refers to the recognition and enforcement of decisions and judicial acts in criminal matters. The law refers to judicial decisions and *ordonances penales* (as indicated in art. 1 paragraph g of the European Convention on the International Validity of Criminal Judgments). Furthermore, it indicates that, by judicial act, one should understand an act emanating from a competent judicial authority.

4.4. Jurisprudence of the CJEU

Referring to the issues arising when facing a case where recognition is required, the principle of *ne bis in idem* is one of the most important issues and an obstacle for the enforcement of any judicial decision, also enshrined in article 4 of the Protocol n° 7 to the European Convention on Human Rights.

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 states that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

This provision gave rise to multiple interpretations, concerning especially the concept of “finally disposed of” the concept, legal nature and contents of a judicial decision, the notion of “same acts”.

The most extensive interpretation of the principle was given by the Court of Justice of the European Union, and, after examining the Court's case law, a few guiding principles can be extracted:

a) **In respect of the nature of the judicial decisions**, the principle applies not only to the ones imposing convictions, but also to judgments by which the accused is finally acquitted, not only on the merits of the case (for example for lack of evidence⁶⁰) but also on procedural grounds (for example the accused is acquitted finally because prosecution of the offence is time-barred⁶¹).

⁶⁰ Case C – 150/05, reference for a preliminary ruling from the Rechtbank 's-Hertogenbosch (Netherlands), in the criminal proceedings against **Jean Leon Van Straaten**)

⁶¹ Case C-467/04, reference for a preliminary ruling from the Audiencia Provincial de Málaga (Spain), in criminal proceedings brought against **Giuseppe Francesco Gasparini**

It should be noted that the principle does not apply to decisions imposing temporary measures that do not affect the outcome of the case, such as the ones by which an authority, after examining the merits of the case brought before it, makes an order suspending the criminal proceedings. Such an order does not bar further prosecution and does not preclude new criminal proceedings⁶².

In case of decisions imposing a sanction, it is not necessary for the penalty to have been actually enforced. The principle is applicable even though the sentence could not have been directly enforced⁶³.

For the purposes of Article 54 of the CISA, a penalty imposed by a court 'has been enforced' or is 'actually in the process of being enforced' including if the sentence is conditionally suspended. This does not apply to the provisional detention pending criminal prosecution or trial⁶⁴.

b) When assessing the incidence of the *ne bis in idem* principle and the identity of the facts, the authority which examines the case must pay particular attention to the acts committed or alleged to have been committed. This examination must be carried in respect of the actual material acts, irrespective of their legal qualification in different law systems.

The CJUE stated that Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
- different acts [...] should not be regarded as 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement merely because the competent national court finds that those acts are linked together by the same criminal intention;⁶⁵

⁶² **Case C-491/07**, reference for a preliminary ruling from the Landesgericht für Strafsachen Wien (Austria), in the case against **Vladimir Turanský**

⁶³ **case C – 297/07, reference for a preliminary ruling from the** Landgericht Regensburg (Germany), in criminal proceedings against Klaus **Bourquain**

⁶⁴ Case C-288/05, Reference for a preliminary ruling from the Bundesgerichtshof (Germany) in the criminal proceedings against **Jürgen Kretzinger**

⁶⁵ case C-367/05 reference for a preliminary ruling in the criminal proceedings against **Norma Kraaijenbrink**

4.5. Jurisprudence of Romanian courts:

4.5.1. Case 1 – recognition of foreign judgments - conditions

The Romanian national GRC, currently serving a custodial sentence in France, filed a petition before the court of first instance of Iași, requesting that his detention in France to be deduced from a 6 years sentence passed against him in Romania. When assessing the facts, the Romanian court invested with the request refused to perform the recognition of the judgment passed in France, on account that the French authorities are invested with the enforcement of the request and the recognition of the judgment could not be able to produce legal effects. (court of First Instance Iași, judgment 417/February 12, 2013)

4.5.2. Case 2 – computation of detention, relapse

The Romanian national ISL was convicted to a 56 months sentence in the USA. The sentence was fully served and he was returned (expelled) to Romania. Upon arrival, he was arrested on the foot of an incarceration warrant issued by the District Court of Bucharest, for previous and different offences. After an assessment of the case, the Court found that the offences in the USA were committed after he had been finally convicted in Romania, therefore it was a case of relapse. As a consequence, the sentence rendered by the Romanian court needed to be modified according to the newly found facts. The Romanian law is mandatory in this respect, imposing that any conviction rendered in a case of relapse takes this fact into consideration as a reason for aggravating the punishment. In this case, the court re-individualised the sentence, by adding another 1 year and 6 months, as a consequence of his re-offending. Furthermore, the arrest served in the USA was deduced from the sentence. In this case, the purpose of recognition was to have a better view of the case, without making any changes to what the US authorities decided.

Furthermore, in respect of the arrest to be deduced, the quoted judgment, in accordance with the practice of Romanian courts, deduced from the sentence only the detention imposed by a judicial authority (a court). This benefit does not apply to administrative detention (for example, in this case, the detention ordered by the Immigration authorities in order to insure and achieve the expulsion).

(District Court of Bucharest, judgment 71/30 December 2012)

4.5.3. Judgment of the High Court of Cassation and Justice – recourse in the interest of law

The Romanian law, in the chapter regarding incidental recognition (upon the request of a person or *ex officio*), speaks of the recognition of judgments “during a pending trial”. Considering that such requests are made at various moments during the proceedings, it was necessary for this notion to have a unitary and consistent interpretation.

Therefore, by decision 9/15 November 2010, the High Court of Cassation and Justice ruled that the wording needed an extensive interpretation, and that the legal provisions referring to incidental recognition can be applied not only during prosecution or judicial proceedings before the court (before a final decision), but also in the enforcement stage (after a final decision). The main reason is the fact that any request or incident in the course of the enforcement of the decision gives rise to a procedure before a court (which must solve the request or the incident). Therefore, if incidental recognition is necessary for a correct enforcement of a final decision, it can be included in the scope of the law concerning incidental recognition

Chapter 5.

Transfer of convicted persons

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The framework of cooperation in the field of transfer of convicted persons had been fairly advanced even before the EU acquis was adopted in this field. It was based on the following international instruments:

- (Council of Europe) Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 21 March 1983
- (Council of Europe) Additional Protocol to the Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 18 December 1997
- Convention implementing the Schengen Agreement of 14 June 1985⁶⁶
- Bilateral agreements

The system of cooperation set up in the 1983 Council of Europe Convention was rooted in a traditional mutual legal assistance model, where contacts between authorities of state parties took place via so-called central authorities (Ministries of Justice). The core of this model lied in the cumulative consent which was a condition for a transfer of a convicted person. The trilateral consent had to be given by:

- a sentencing state,
- an administering state,
- a convicted person.

Moreover, the following conditions have to be met to allow a transfer under this instrument:

- the judgment is final,
- at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate,
- the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the

⁶⁶ OJ L 239, 22.09.2000, p. 19.

administering State or would constitute a criminal offence if committed on its territory (double criminality).

The 1997 Protocol did away with a condition of a consent made by a convicted person in 2 cases, where he or she:

- has fled from a sentencing state,
- was subject to expulsion or deportation order in the sentencing state

In turn, the 1990 implementing Convention also allowed a transfer of a sentenced person without his or her consent if they fled from a sentencing state. Yet, the practical experience under this act is not ample and concerns only these state parties which are not at the same time parties to the 1997 Protocol.

The above-mentioned instruments were replaced by in the EU by Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union⁶⁷.

This instrument introduced fundamental modifications in the old system of transfer of convicted persons. The main shift concerned the role of a central authority, which is basically excluded (except for administrative matters) so that the cooperation should take place directly between judicial authorities. This is closely related to the method of cooperation which was no longer rooted in a traditional mutual legal assistance model, but rather based on the mutual recognition principle, where a Member State is obliged to recognize and execute a sentence, except a (limited) number of grounds of refusal. In case of this framework decision a possibility to refuse to recognize a sentence concerns the following situations:

- the certificate is defective,
- the enforcement would violate the *ne bis in idem* principle,
- the judgment is statute-barred in the executing state,
- there is an immunity in the executing Member State,
- the sentenced person would not have been liable under the executing state's law on the age of criminal responsibility,
- the trial took place in absentia (under framework decision 2009/299/JHA),
- less than six months of the sentence remain to be served,

⁶⁷ OJ L 327, 5.12.2008, p.27.

- the judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory.

Compared to the model based on the Council of Europe system, this framework decision provides for a more flexible system when it comes to the state where a convicted person can be transferred. Contrary to previous instruments, the transfer is not limited solely to the country of nationality of this person. This is related to realities of the European Union, in particular the free movement of persons, which implies, the center of interest of a national of an EU Member State is not necessarily the same as his or her country of citizenship.

One of the underlying principles of this framework decision is an abandonment of a condition of a consent of the executing state for a transfer. Its consent would only be required where a transfer is made to a state other than the Member State of nationality of the sentenced person in which he or she lives or to which he or she will be deported.

A significant limitation is also introduced with regard to a condition of consent of a sentenced person. In principle, a consent would not be required where a transfer is made to the Member State of nationality of the sentenced person in which he or she lives or to which he or she will be deported on the basis of an expulsion or deportation order.

Concerning this particular condition, a derogation has been made with regard to Poland under which a condition of a consent of the sentenced person to the transfer to the state of nationality where he or she lives will remain binding in the course of five years following the required implementation date (that is until 5 December 2016)⁶⁸. In line with the preamble, Poland needs more time than the other Member States to face the practical and material consequences of transfer of Polish citizens convicted in other Member States, especially in the light of an increased mobility of Polish citizens within the Union.

It is worth noting that this framework decision uses a term 'lives' (rather than e.g. a more formal 'resides') when determining a criterion of a transfer. The preamble explains that where in this Framework Decision reference is

⁶⁸ Article 6(5).

made to the State in which the sentenced person 'lives', this indicates the place to which that person is attached based on habitual residence and on elements such as family, social or professional ties. This is related to the fact that the enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. Consequently, in the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

This framework decision introduced a specific solution concerning double criminality principle. Similarly to the framework decision on the European Arrest Warrant, it foresees 32 categories of offences where examination of double criminality is basically excluded. However, contrary to framework decision on the European Arrest Warrant, this instrument makes it possible for each Member State to make a declaration stating that it will always verify a double criminality before recognition and execution of a sentence.

The executing state cannot aggravate the issuing state's sentence in terms of its nature and duration. However, it may reduce the duration of a sentence, where it is above the minimum that could be imposed in that state for the same offence. Where the issuing state's sentence is incompatible with the executing state's sentence in terms of its nature, the latter state may adapt the sentence in a way that corresponds as closely as possible to the original sentence and cannot entail a conversion of a prison sentence into a fine.

The enforcement of a sentence is governed by the law of the executing State, including the grounds for early or conditional release. The drafters decided not to harmonize periods of early release in the Member States. However, to avoid too extreme divergences in the course of execution of a sentence, the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may then agree to the application of such provisions or withdraw the certificate.

One of the challenges which turned up in the process of negotiations of this framework decision was designing a smooth passage in time between the old system of a transfer of convicted persons and the scheme created by this framework decision, also in light of financial consequences of its entry into force (especially for those Member States which tend to be „exporters” of

own convicts). An important transitional solution is included in Article 28. In line with this provision, requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, on the adoption of this Framework Decision, make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. Four Member States (Ireland, Malta, the Netherlands and Poland) have made such a declaration.

The implementation deadline for this framework decision passed on 5 December 2011. According to the latest update of EJM website 18 September 2014, Germany, Greece, Ireland, Lithuania, Portugal, Spain and Sweden have not implemented the Framework Decision, while in Bulgaria it is an ongoing process.

The execution of the penalty in the nationality state is also possible if a European arrest warrant has been issued for the purpose of execution of a custodial sentence and the request has been denied on the optional ground provided by art. 4 § 6 of the Framework Decision 2002/584/JHA, in which situation the requested state will undertake to execute the sentence in accordance with its own domestic law. If the European arrest warrant has been issued for the purpose of prosecution, the request can be admitted and the requested person will be surrendered under the condition of being returned to the executing Member state in order to serve there the custodial sentence (art. 5 § 3 of the Framework Decision 2002/584/JHA).

5.1. CJEU case law

So far no judgment of CJEU has been issued based on this framework decision.

5.2. ECHR case law⁶⁹

5.2.1. Drozd and Janousek v. France and Spain, No.: 12747/87, Judgment of 26 June 1992

Circumstances: Serving a sentence of imprisonment, imposed in Andorra, in France or Spain.

Relevant complaint: The applicants claimed that their detention was contrary to French public policy (*ordre public*), of which the Convention formed part; the French courts had not carried out any review of the judgments of an Andorran court whose composition and procedure had not complied with the requirements of Article 6 of the Convention.

Court's conclusion: As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 of the Convention would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice. [para. 110]

5.2.2. Selmouni v. France, No.: 25803/94, Judgment of 28 July 1999

Circumstances: A Netherlands and Moroccan national serving a sentence of imprisonment in France.

Relevant complaint: As part of his complaint concerning ill-treatment in the French prison, the applicant requested to be transferred to the Netherlands to serve the remainder by the sentence there.

Court's conclusions: The Court reiterated that Article 41 of the Convention does not give it jurisdiction to make an order for transfer against a Contracting State. [para. 126]

5.2.3. Veermäe v. Finland, No.: 38704/03, Decision of 15 March 2005

Circumstances: Transfer of an Estonian national from Finland to Estonia under Article 3 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons.

Relevant complaint: The applicant argued that in Finland, it would be possible to be released on parole after serving half his sentence, while in Estonia release on parole would only be possible after serving two-thirds of the sentence.

⁶⁹ See: Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters PC-OC (2011) 21 REV 7.

Court's conclusions: The Court examined of its on motion whether the application raises an issue under Article 6 of the Convention, as the relevant question is whether the transfer, with the risk of a de facto longer sentence, violates Article 5 of the Convention and whether the transfer arrangements require a procedure offering the guarantees of Article 6 of the Convention. The possibility of a longer period of imprisonment in the administering State does not in itself render the deprivation of liberty arbitrary as long as the sentence to be served does not exceed the sentence imposed in the criminal proceedings. A flagrantly longer de facto sentence in the administering State could nevertheless give rise to an issue under Article 5 of the Convention. However, in view of the information concerning the Estonian practice in converting sentences, according to which a penalty imposed in Estonia would be likely to be less severe than a penalty imposed in Finland, the Court considered that there were no substantial grounds for believing that the sentence to be served would be flagrantly disproportionate, if disproportionate at all. As the conversion of the sentence will be determined by a Finnish court, no issue arises under Article 6 of the Convention. [pages 13 and 14]

5.2.4. Csozászki v. Sweden, No.: 22318/02, Decision of 27 June 2006

Circumstances: Transfer of a Hungarian national from Sweden to Hungary under Article 3 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons. After the transfer, the Budapest Regional Court converted the sentence into 10 years of imprisonment to be served in a strict prison regime (eligible for early release after 4/5 of the sentence).

Relevant complaint: The transfer to Hungary resulted in a de facto increase in the term of imprisonment by sixteen-months.

Court's conclusions: The likely additional period of detention of sixteen months in Hungary (corresponding to an increase of 20% but still well within the sentence imposed) is not so disproportionate that it will involve a breach of Article 5 of the Convention. While the applicant's transfer is likely to delay the date of his conditional release and may, as claimed by the applicant, subject him to harsher prison conditions, the Convention does not confer the right to such release or the right to serve a prison sentence in accordance with a particular regime. Nor does it require that parole decisions be taken by a court. Furthermore, questions of conditional release relate to the manner of implementation of a prison sentence. As a transfer is seen as a measure of execution of a sentence and the Convention on the Transfer of Sentenced Persons provides that the administering State may decide on the enforcement of the sentence in accordance with its own laws, Article 6 of the Convention is not applicable to transfer decisions. Even if the Additional Protocol to the Transfer Convention was not in force in Sweden at the time of the commission of the offence, under the terms of Article 7 of the Additional Protocol it was still applicable to any enforcement of the sentence taking place after its entry into force. Furthermore, transfer decisions cannot be considered as amounting to a "penalty" within the meaning of Article 7 of the Convention. [pages 9, 11, 12 and 13]

5.2.5. Smith v. Germany, No.: 27801/05, Judgment of 1 April 2010

Circumstances: The applicant, a Dutch national, was convicted by the Lübeck Regional Court of drug offences and sentenced to three and a half years of imprisonment. He had voluntarily returned from the Netherlands to stand trial in Germany after the Lübeck Public Prosecutor gave the applicant an assurance that the prosecution service would institute proceedings under Article 11 of the Convention on the Transfer of Sentenced Persons. However, the German Ministry of Justice refrained from lodging a formal application with the Netherlands.

Relevant complaint: The applicant complained under Article 6§1 of the Convention about the domestic authorities' refusal to institute transfer proceedings under Article 11 of the Transfer Convention, contrary to the previous assurance given by the Public Prosecutor.

Court's conclusions: Article 6§1 of the Convention under its criminal head is, under the specific circumstances of the present case, applicable to the proceedings concerning the applicant's transfer request in so far as they relate to the assurance given by the public prosecution during the criminal proceedings. The decision taken by the Justice Ministry on the transfer request does not solely depend on the public prosecutor's recommendations and on considerations regarding the execution of sentence, but also on considerations of foreign policy which fall within the core area of public law. It is therefore acceptable if this part of the decision is not subject to judicial review. However, it has not been shown that there was a possibility of instituting an effective action for review of the refusal to institute proceedings after a relevant assurance. The applicant has been denied access to a court with regard to the part of the decision on his transfer request which did not concern considerations of public policy. [paras. 43, 42, 61 and 62]

5.2.6. Müller v. Czech Republic No.: 48058/09, Decision of 6 September 2011

Circumstances: Transfer of a Czech national from Germany to the Czech Republic under Article 3 of the Additional Protocol.

Relevant complaints:

1. Czech courts ordered the applicant to serve a sentence that was not envisioned in the Czech law for the crime he had committed. He argued that this penalty was not foreseeable for him because at the time he committed his offence transfer from Germany had not been possible without his consent as the Additional Protocol to the Transfer Convention had been concluded only after his acts.
2. The conditions of imprisonment of prisoners sentenced to life are harsher in the Czech Republic than in Germany.
3. Different rules on the possibility of release on parole.

Court's conclusions:

1. A distinction is drawn between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of a "penalty"; Article 7 of the Convention applies only to the former. The applicant was tried and convicted in Germany to life imprisonment. The

Czech courts only validated his conviction by the German courts and the High Court decided that the sentence could be enforced in the Czech Republic. Therefore, the Court does not consider that the Czech courts decided on a “criminal offence” committed by the applicant or that their decisions could be considered as measures imposed following conviction for a “criminal offence”. The decision to enforce the judgment in the Czech Republic only concerns the place of the execution of the applicant's sentence. Consequently, the applicant's arguments that the application of the Additional Protocol to the Convention on the Transfer of Sentenced Persons was retroactive are not relevant. [pages 6 and 7]

2. The issue lies solely in the alleged differences in the conditions of detention in a prison. The penalty itself remains the same – that is a deprivation of liberty in a prison for a set term. The Court, therefore, considers that these alleged differences fall within the sphere of execution of a penalty and thus no issue arises under Article 7 of the Convention. [page 8]

3. A change in the conditions for release relates to the execution of sentence and Article 7 of the Convention is not applicable. [page 7]

5.2.7. Willcox and Hurford v. United Kingdom, No.: 43759/10 and 43771/12, Decision of 18 January 2013

Circumstances: Transfer of two sentenced persons from the Thailand to the United Kingdom.

Relevant complaints:

1. Continuing enforcement of the sentence, as imposed in Thailand, in the United Kingdom grossly disproportionate sentence and, therefore, capable of violating Article 3 of the Convention. Their sentences imposed in Thailand and enforced in the United Kingdom were four to five times as long as the sentences which they would likely have received had they been convicted of the same offences in the United Kingdom. Their continued detention no longer served a legitimate penological purpose, having regard to the time that they had already spent in detention.

2. The applicants complained that their continued detention was arbitrary as, had they pleaded not guilty, they would have ended up serving less time in prison.

3. The first applicant also argued that an “irrefutable presumption” was applied in his case which rendered his trial flagrantly unfair, such that his continued detention in the United Kingdom was arbitrary.

Court's conclusions:

1. Different considerations arise in cases in which a Contracting State is asked to refuse extradition to a jurisdiction where a grossly disproportionate sentence might be imposed; and in cases where that same State is confronted with a request by a prisoner for transfer to serve a sentence imposed by a foreign court that might have been considered grossly disproportionate had it been assessed in the context of a prior extradition

request. In the former case, it is within the State's power to prevent the offending sentence being imposed. In the latter, the sentence has been imposed and might have to be served in harsh and degrading conditions, subject to limited early release provisions. When considering the degree of humiliation or suffering inherent in the impugned acts, it is necessary to have regard to the degree of humiliation or suffering inherent in the alternative option. It would in the Court's view be paradoxical, and anathema to its obligation to interpret and apply the Convention rights in a manner that renders the guarantees practical and effective and not theoretical and illusory, if the protection afforded by Article 3 operated to prevent prisoners being transferred to serve their sentences in more humane conditions. A sentence cannot be deemed grossly disproportionate simply because it is more severe than the sentence which would be imposed in another State. It is clear that both applicants expressly consented to the transfer, having been advised of the consequences of doing so in terms of length of the sentences that they would have to serve and their inability to challenge the convictions or sentences imposed. *[paras. 75, 78 and 79]*

2. In the present case it seems likely that had life sentences been imposed on the applicants in Thailand and not been converted to determinate sentences by royal amnesty prior to their transfers, the applicants would have benefited from a significantly reduced period of detention after transfer to the United Kingdom because the High Court would have fixed a relatively short minimum term. However, the difference in outcome does not arise from the arbitrary application of different rules to different prisoners. Clear rules, set out in the applicable prisoner transfer agreement and in the 1984 and 2003 Acts, are applied prisoner transfer cases, and were applied in the applicants' cases. That different outcomes may occur is the result of the interaction between the law of the transferring State on sentencing and the practice of the receiving State on transfer.

Such differences are inherent in any prison transfer arrangements, which are essentially based on the principle that the sentence imposed by the transferring State will be enforced by the receiving State. The Court reiterates that the applicants consented to their transfers, in the knowledge of what that entailed in terms of the time they would be required to serve in detention, doubtless to enjoy the many benefits attached to the enforcement of their sentences in the United Kingdom, including more favourable rules on early release and better conditions of detention. *[para. 91]*

As the Convention does not require Contracting States to impose its standards on third countries, the requirement of Article 5§1(a) that a person be lawfully detained after "conviction by a competent court" does not imply that the Court has to subject proceedings in third countries leading to that conviction to a comprehensive scrutiny and verify whether they have fully

complied with all the requirements of Article 6 of the Convention. while the applicant's defence rights were restricted by the operation of the "irrebuttable presumption" in his case, it cannot be said that the very essence of his right to a fair trial was destroyed. Having regard to all the circumstances of the case, the Court considers that the applicant has failed to demonstrate that there has been a flagrant denial of justice in his case. The question in the present case is whether the "irrebuttable presumption" in Thai law led to a breach of Article 6 of the Convention which was so fundamental as to amount to a nullification, or destruction of the very essence, of the applicant's right to a fair trial. In this regard, the Court observes that presumptions of fact or of law operate in every legal system and that the Convention does not prohibit such presumptions in principle. [paras. 94, 96 and 98]

5.3. National case law- ROMANIA

The Framework Decision 2008/909/JHA was implemented in the national Romanian legislation through law no.300/2013, amending law no 302/2004 regarding the international judiciary cooperation in criminal matters. Until December 2013, the legal instrument applicable in this case was the European Convention on the Transfer of Sentenced Persons and the only competent courts were Bucharest Court of Appeal (as first instance court of law) and High Court of Cassation and Justice (as an appeal court). Starting 2013, there are two different procedures between Romania and Member States that have also implemented the Framework Decision on one hand and another with those Member States who have not implemented it or with third states, in relation with which the European Convention on the transfer of convicted persons is still applicable.

5.3.1. CONSTITUTIONAL COURT

5.3.1.1. Case no. 346D/2011, decision no 285/27 March 2012

Art. 146 of the law no 302/2004 – Conversion of the sentence

Arguments: equality of citizens is breached since it imposes a different treatment to the Romanian citizens convicted by national courts than the one applied to the Romanian citizens convicted by foreign courts on the basis of a different system of individualisation of penalty applied for several offences.

Court's conclusions:

The article does not rise privileges nor discriminations on arbitrary considerations as long as the Romanian citizens convicted in a Member State

for an offence committed on its territory do not have the same juridical situation as the Romanian citizens convicted for an offence committed on Romanian territory, thus the juridical treatment cannot be identical; the different situation is an objective and reasonable justification for applying a different treatment.

The variety of custodial sentences as regulated by the legislations of the conviction states demanded a possibility for the executing state to adapt the sentence in order to have it executed on its territory. This must be interpreted only as regarding the duration of the resulting penalty that is incompatible with the Romanian legislation and not the incompatibility of the systems applied for multiple offences. Considering these arguments, if the conviction court has established a resulting penalty cumulating each of the penalties applied for each of the several offences, according to the legislation of the conviction state, the executing authority cannot replace this system with the one imposed by the Romanian Criminal Code of 1969 (the most severe penalty with a possible increase of up to 5 years imprisonment)

5.3.2. HIGH COURT OF CASSATION AND JUSTICE

5.3.2.1. DECISION OF INTERPRETATION no. 23/13.10.2009, request no. 13/2009

Court's conclusions:

The executing court, analysing the request to recognize the foreign decision in order to transfer the convicted person in a Romanian penitentiary must observe whether the nature of the penalty applied for several offences or its duration is incompatible with the Romanian legislation, without substituting the system applied to establish the resulting penalty by the conviction court with the Romanian system.

Arguments: In case the penalty applied by the conviction court does not correspond entirely to the denomination or regime as stated in the Romanian system, this penalty is incompatible with the Romanian legislation. Thus, if the penalty is not provided by the Romanian criminal law (as the case of reclusion or unlimited detention) it is incompatible with the Romanian legislation and the executing authority will have to adapt it as much as possible to one penalty provided by the internal legislation (the Romanian court will not decide the execution of reclusion or undetermined detention but execution of limited detention).

There is incompatibility between the penalty applied by the conviction court and the Romanian legislation if the duration is higher than the maximum provided by the internal legislation: general maximum of 30 years imprisonment, the special maximum provided for the offence for which the person was convicted, the limit of all penalties added if several penalties were applied for several offences.

The conversion of the sentence is only applicable when the duration of the resulting penalty is higher than the limits imposed in the Romanian legislation and not when the systems applicable in the case of several offences are different.

5.3.2.2. DECISION OF INTERPRETATION no 3/12.03.2012, request no. 2/2012

Court's conclusions:

If the conviction court has applied a custodial sentence and a financial penalty (fine), the executing court requested to recognize the entire foreign decision in order to transfer the convicted person will not only decide on the custodial sentence, but on the financial penalty as well.

Arguments: In the hypothesis of the recognition and execution of the criminal fine if applied by the foreign state next to the custodial penalty, the executing courts will apply art. 9 § 1 letter a of the European Convention on the transfer of convicted persons without having the possibility to change the penalty applied. This possibility is given only when the nature or duration of the penalty is incompatible with the national legislation.

If the executing state chooses to continue executing the penalty applied by the conviction state, it must respect the nature and duration of the sentence considering that the foreign decisions recognized in Romania will have the same effects as the ones issued by the Romanian courts and once the enforcement of the sentence has begun in the executing state, the issuing state shall no longer proceed with the execution, except when the convicted person has escaped from custody.

Note: This decision is no longer applicable because starting December 2013, the law no 302/2004 regarding the international judiciary cooperation in criminal matters is imposing the partial recognition of the foreign decision in this case (only regarding the custodial sentence) unless there is an express request from the issuing state regarding the enforcement of the financial penalty and the request has the certificate provided by the Framework Decision 2005/214/JHA.

5.3.2.3. DECISION OF INTERPRETATION no 13/05.06.2014, request no. 14/1/2014/HP/P

Court's conclusions:

Art. 6 § 1 of the new Criminal Code (applicable starting 1 February 2014), regarding the application of the most favorable law after the final judgment of the case is applicable in cases of the foreign decisions that were recognized and enforced on the basis of the procedure provided by the law

no 302/2004 regarding the international judiciary cooperation in criminal matters.

Arguments: According to art. 6 §1 of the new criminal Code, if, after the conviction decision is final until the imprisonment is executed a new law is entering into force, imposing a lighter penalty, the applied penalty will be reduced to the maximum provided by the new law. For this purpose, the court will compare the applied penalty to the new maximum.

The article does not make any difference between the sentences of Romanian courts and those of foreign courts, recognized on our territory.

The possibility to convert the custodial sentence applied by the issuing court is an expression of the principle of legality and the penalty applied by a foreign court will be executed on the territory of the requested state only if it corresponds to the nature and the limits imposed by its national law. The principle of legality of the penalty supposes that the penalty must be provided by the law not only at the time when the court decides to apply it, but all during the period of execution. If the new law lowers the maximum penalty, the convicted person will have to execute the difference above this limit, although is no longer provided by law.

The persons transferred in Romania to execute the sentence imposed in a foreign state on the basis of a decision recognized by the Romanian courts have the same rights as the persons convicted by the Romanian courts. Applying a different treatment would have no objective justification, discriminating against the Romanian citizens only because they have been convicted by foreign courts.

Since as part of the procedure to recognize the foreign decision, the executing Romanian court have the obligation to lower the penalty imposed to the maximum limit provided by the Romanian legislation, for the same reasons, will have the obligation to proceed in the same manner if a new law, during the execution of the custodial sentence imposed, lowers further the maximum penalty.

5.3.3. BUCHAREST COURT OF APPEAL

5.3.3.1. Case no 3783/2/2012, decision no. 480/2012

Object: request from Spanish authorities to transfer a Romanian citizen to continue executing the safety measure of confinement for 15 years in a judiciary psychiatric hospital in Romania, applied for attempted murder. The medical expertise concluded that the convicted person was suffering of serious psychical disorders.

Court's conclusion:

The court recognized the foreign decision and decided the transfer of the convicted person in a Romanian penitentiary in order to execute the medical confinement in a hospital.

Note: According to the Romanian legislation, the safety measure of medical confinement can be imposed to a person who has committed an unjustified criminal deed if he is psychically ill, addicted consumer of psychoactive substances or has a contagious disease. The measure can be executed either during imprisonment (in a penitentiary hospital) or separately, in a civil hospital if the conditions to apply imprisonment are not met.

5.3.3.2. Case no 3008/2/2013, decision no. 275/2013

Object: request from Italian authorities to transfer Romanian citizen to continue executing the penalty of 4 years and 4 months and a fine of 950 euro. The person was convicted for several offences: accessory after fact, theft and detaining instruments that can be used to break and entry.

Court's conclusion:

The court denied the request considering that though the first two offences were also incriminated by the Romanian legislation, detaining instruments that can be used to break and entry is not a criminal offence under the national legislation.

Note: According to the law no 302/2004 regarding the international judiciary cooperation in criminal matters, amended in December 2013, if the conditions are met only for a part of the offences, the executing court can decide to partially recognize the foreign decision; to this purpose, the court will consult the issuing state through the Ministry of Justice.

1. Case no 10735/2/2011* , decision no. 180/2013

Object: request from German authorities to transfer Romanian citizen to continue executing the penalty in a Romanian penitentiary. The convicted person has left Romania in 1996, married in France in 1997, his wife and 12 year child are French citizens, has a good financial situation in France and has refused to give his consent to be transferred in Romania because he has no connections with the state of origin. Germany decided the expulsion of the convicted person to Romania.

Court's conclusion:

The court denied the request considering that the evidence suggest that the convicted person has almost no connection with the state of origin, but with France where he was legally residing and where the social reinsertion after the execution of the sentence would be facilitated by his family.

The differences in the legal systems of the Member States and the way each of them chose to implement the European legislation regarding the transfer of convicted persons generated a variety of case-law, which is yet to be unified by the High Court of Cassation and Justice (the supreme court has analyzed

several issues in this field on case to case decisions that are not mandatory for the courts).

Here are some **practical challenges** that generated different solutions from the courts.

a. accessory penalty (banning the exercise of civil rights while the convicted person is executing the principal penalty of imprisonment)

If the issuing state has applied the accessory penalty consisting in banning the exercise of several rights while the convicted person is executing the principal penalty (imprisonment) the national courts ruled differently:

- decided the transfer in order to continue the execution of the imprisonment in a Romanian penitentiary, without adding the accessory penalty (cases no. 8571/2/2011, 9400/2/2011, 8983/2/2011, 305/0/2/2012 of Bucharest Court of Appeal)

- decided the transfer in order to continue the execution of the imprisonment in a Romanian penitentiary, adding the national accessory penalty even when the issuing court did not apply an accessory penalty since according to the previous Criminal Code the accessory penalty was automatically applied while executing the imprisonment (cases no. 8571/2/2011, 9400/2/2011, 8983/2/2011, 3050/2/2012 of Bucharest Court of Appeal)

- decided the transfer in order to continue the execution of the imprisonment in a Romanian penitentiary and the accessory penalty as was applied in the recognized decision, even if that specific penalty was not provided by the Romanian legislation: (case no. 10960/2/2011 of Bucharest Court of Appeal – banning the exercise of the right to hold a public office, to serve in the popular commissions of representatives and to accept any function in NGOs, public bodies and public foundations, while the national similar penalty consisted in the banning of the right to be elected in any public functions and occupy any public function involving the exercise of the state's authority);

- decided the transfer in order to continue the execution of the imprisonment in a Romanian penitentiary and the accessory penalty adapted according to the national legislation (art. 72, 64 former Criminal Code, art. 65, 66 of the new Criminal Code):

- case no. 8569/2/2011 of Bucharest Court of Appeal - banning only the passive elective rights for the banning of all civil rights applied by the issuing court for committing a rape;
- case no. 8867/2/2011 of Bucharest Court of Appeal - banning the right to be elected in public authorities or in elective public functions and the parental rights for the

banning to exercise a profession in a public institution and the parental rights applied by the issuing court)

- case no.10161/2/2011 of Bucharest Court of Appeal - banning the right to be elected in any public function for banning the electoral rights applied by the issuing court)

The High Court of Cassation and Justice ruled on this issue in several cases by non-mandatory decisions (decisions no. 2764/11.09/2012 issued in case no. 10960/2/2011, decisions no. 4053/07.12.2012 issued in case no. 3050/2/2012) stating that not only the principal custodial penalty must be adapted to the national legal provisions, but also the accessory penalty.

The court opted finally for this point of view considering that the accessory penalty was automatically applied as a direct mandatory consequence of the principal penalty of imprisonment, penalty to be executed in a Romanian penitentiary, according to the national legislation. So, the judge must adapt the accessory penalty choosing the closest one to the one imposed by the issuing court, but only if applied by this court and without the possibility to remove or add rights that the issuing court has already ruled upon (in an affirmative or negative way).

b. complementary penalty (supplementary penalty to be executed after executing the imprisonment)

If the issuing court has also applied the complementary penalty of banning the exercise of the civil rights, the national courts ruled differently:

- recognized and imposed the perpetual complementary penalty (case no. 2135/2/2012 of Bucharest Court of Appeal - perpetual banning of the right to profess in a public institution, case no. 3600/2/2012 of Bucharest Court of Appeal - perpetual banning of the right to hold public functions, case no. 6632/2/2012 of Bucharest Court of Appeal - perpetual banning of the right to be elected in a public body) or the undetermined complementary penalty (case no. 3781/2/2012 of Bucharest Court of Appeal - banning of the right to be elected in a public function and to hold a public function without establishing a delay), while the national legal provisions would only allow a maximum period of ten years in the previous Criminal Code and of five years in the new Criminal Code

- recognized and imposed the complementary penalty adapting it according to the content and the delay provided by the national legislation (case no. 10961/2/2011 of Bucharest Court of Appeal - banning the right to be a guardian or a curator for a period of 10 years after completing the execution of the imprisonment corresponding the definitive banning of the right applied by the conviction state, case no. 2579/2/2012 of Bucharest Court of Appeal - banning the right to be elected in a public function and to occupy a function involving the exercise of the state authority for a period of 5 years, corresponding to banning the right to occupy public functions for the same period applied by the issuing state);

- recognized and imposed only the imprisonment with the argument that the complementary penalty does not enter the domain of the European Convention on the transfer of convicted persons (case no. 7634/2/2012 of Bucharest Court of Appeal, where the conviction court had applied the permanent banning of the right to occupy public functions). According to art. 2 pct. 2 din of the European Convention on the transfer of convicted persons, Strasbourg 1983, a person sentenced in the territory of a Party may be transferred to the territory of another Party in order to serve the sentence imposed on him, while the conviction is defined as punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence.

The same terminology is used in 2008/909 FD in art. 1: 'sentence' shall mean any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings

Considering these limitations, as established in the international legal instruments, the executing state should not recognize and impose the complementary penalties since they do not involve any type of deprivation of liberty. It should also be taken into consideration that the conviction state has an interest in having this penalty executed on its own territory, respecting the content and the period initially established (if, for example, the penalty is perpetual and the executing state will impose it only for a period of ten years, the convicted person would be able to exercise the banned rights on the territory of the conviction state after the 10 years period).

c. safety measures (measure applied to the person who has committed an unjustified criminal deed for eliminating a dangerous situation and preventing new criminal acts)

If the issuing court has also applied safety measures, the national courts ruled differently:

- decided to recognize the safety measures with the content and the period applied by the issuing court, even if the measure was not regulated by the national legislation (case no. 8981/2/2011 of Bucharest Court of Appeal - interdiction to be near the victim, her home or work place less than 500 meters and interdiction to communicate with her through any means for a period of 16 years)

- decided not to recognize the safety measure since it does not exist in the national legal system (case no. 9290/2/2011 of Bucharest Court of Appeal - confinement to work house for a minimum period of 1 year)

- decided to recognize the entire decision, including the safety measure of medical confinement since it was a measure involving deprivation of liberty (case no 3783/2/2012 of Bucharest Court of Appeal)

For the same arguments as presented in the case of the complementary penalties, the executing state can only recognize and impose on its territory the safety measures involving deprivation of liberty for as long as the

applicable international legal instrument is either the European Convention on the transfer of convicted persons or the Framework Decision 2008/909/JHA (both of which allow the states to extend their cooperation in this matter through bilateral agreements).

d. The final character of the consent of the transferred person

If the convicted person who initially gave his consent to the transfer has withdrawn it before the decision on the transfer becoming final, the courts either decided that the transfer will still be granted because the national legal provision were not providing the possibility for the convicted person to withdraw his consent (decision no 507/2010 of High Court of Cassation and Justice) or denied the request considering that the conditions of the transfer are not met and there is no case of applying the Additional Protocol (decision no 305/2013, no 72/2013 of Bucharest Court of Appeal).

Bibliography:

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2. **Rethinking International Cooperation in Criminal Matters in the EU**, Gert Vermeulen, Wendy De Bondt, Charlotte Ryckman, at www.ejtn.eu
3. **Handbook on the International Transfer of Sentenced Persons**, UNODC at www.unodc.org
4. **EU Justice and Home Affairs Law**, Steve Peers, Oxford University Press 2011
5. Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM (2014)57 final.

Chapter 6.

Application of the principle of mutual recognition on financial penalties (Framework Decision No 2005/214/JHA)

Florentino-Gregorio RUIZ YAMUZA

6.1. Introduction

Within the series of the scheduled activities, the project Fostering mutual understanding in order to strengthen mutual trust between the judicial authorities of Member States provided for the drafting of a Handbook on application of the principle of mutual recognition on financial penalties.

This Manual consists of three parts – General Provisions, Issuing a request for recognition and enforcement of a Financial Penalty and Executing a request for recognition of a Financial Penalty.

In the Manual is provided a filled in certificate under the Council Framework Decision 2005/214, of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (hereinafter, Framework Decision) as well as explained practical problems that may appear when issuing and executing a request under the Framework Decision.

6.2. General Provisions

The Framework Decision regulates that the principle of mutual recognition should apply to financial penalties imposed by judicial or administrative authorities for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties are imposed. As well it should also cover financial penalties imposed in respect of road traffic offences.

All the Member States of the European Union except Italy (implementation process ongoing), Ireland and Greece have implemented the Framework Decision. Information about implementation status is available on the European Judicial Network in Criminal matters (hereinafter, EJN) web page:

http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=25

and information about the competent authorities, languages is available on the EJM web page:

<http://www.ejm-crimjust.europa.eu/ejmunload/InfoAbout/implementation%20FP%20may%2014.pdf>

According to Article 1(1) of the Framework Decision a decision means a final decision requiring a financial penalty to be paid by a natural or legal person where the decision was made by a court of the issuing State in respect of a criminal offence under the law of the issuing State or an authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing State and at the same time person was able to attend a court hearing and was informed about the trial.

Meanwhile financial penalty means the obligation to pay:

- a) a sum of money on conviction of an offence imposed in a decision;
- b) compensation imposed in the same decision for the benefit of victims, where the victim may not be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction;
- c) a sum of money in respect of the costs of court or administrative proceedings leading to the decision;
- d) a sum of money to a public fund or a victim support organization, imposed in the same decision.

Article 5 of the Framework Decision provides number of offences which, if according to this Framework Decision are punishable in the issuing State and as they are defined by the law of the issuing State, must be without verification of the double criminality recognized and enforced in the Executing State.

6.3. Issuing of Decision of Financial Penalties

Article 4 of the Framework Decision on application of the principle of mutual recognition on financial penalties, and the Romanian Act on International Judicial Co-operation in Criminal Matters (hereinafter AIJC) regulate the grounds for transmission of decision to the Executing State and also regulates the competent authorities who can issue a decision on financial penalties and who can issue the certificate mentioned in the Framework Decision.

6.3.1. Transmission of decision to the Executing State

According to Article 13 of the AIJC, the domestic authorities competent to issue decisions to be enforced via judicial cooperation are laid down by the Act, in the following terms:

"The competence of the Romanian authorities to make a request in the fields regulated by this Law or to execute such a request shall be established by the provisions of the following titles of this Law, as well as by other relevant statutory instruments."

Accordingly, Articles 233 and 234 of the AIJC. establish the pertinent definitions for

1.- Judgment; final judgment rendered by a criminal prosecution body, a court, as well as any other authorities which, by law, are considered as being judicial authorities or by an administrative authority, by which a natural or legal person has been ordered to pay a financial penalty, when the judgment was given by:

a) a judicial authority as a result of committing an act which, under the law of the issuing State, is an offence;

b) an authority, other than a judicial authority, in relation to an act that, under the legislation of the issuing State, the offence, if the punishable natural person or the legal person was able to request the retrial of the case by a judicial authority also competent in criminal matters;

c) an authority, other than a judicial authority, in relation to an act which, under the law of the issuing State, constitutes an infringement of the legal rules, if the punishable natural or legal person was able to request that the case is heard by a judicial authority also competent in criminal matters;

d) a judicial authority competent in criminal matters, where the judgment was given in relation to a judgment provided in letter c).

2.- Competent authorities

In case of judgments rendered by the Romanian judicial or administrative authorities, the certificate shall be filled in by the authority that has applied the financial penalty applied and shall be transmitted, in the Romanian and foreign language, together with the judgment that has applied that sanction, to the competent authority from the executing State.

Taking into account the national provisions of Romanian AJC and the Framework Decision, it is highly important to remember that the Courts mentioned above can issue a decision which could be recognized in the Executing State if following circumstances are reached if natural or legal person against whom a decision has been passed:

- a) has property;
- b) has income;
- c) is normally resident;
- d) in the case of a legal person, has its registered seat.

Amount of 70 euros

A fine which should be enforced in the Executing State must be at least 70 euro (Article 7(2)(h) of the Framework Decision).

Sending a decision (its copy) and certificate to one Executing State

Issuing State must bear in mind that a decision or a clarified copy of it with accompanied certificate can be sent only to one Executing State at any one time (Article 4(4) of the Framework Decision). According to regular practice a decision (or its clarified copy) with a certificate is sent to the Executing State where a natural person has his residence or in case of legal person to the Executing State where is company's legal address/ registered seat.

6.3.2. Issuing the certificate

In the Certificate which is issued according to Article 4 of the Framework Decision:

- 1) in the point (a) must provide information about the issuing and executing State (name of the country).
- 2) in the point (b) must provide information about the authority who issued a decision and its contact details;
- 3) in the point (c) must provide information about the authority who can issue imposed decision and its contact details;
- 4) in the point (d) information about central/transmitting authority must be provided;
- 5) in the point (e) must provide information about authority which should contact Executing State if additional information or assistance is required;
- 6) in the point (f) must be provided information about natural or legal person on which the financial penalty has been imposed:
 - a) in case of natural person the point 1 must be filled in: his/her date of birth, last known address, ID no etc). In this point, must be filled in one of following sub-points: in case if the Certificate is issued because of person having regular residence must be filled in the point 1(a), if having property in Executing State must be filled in the point 1(b) or if having income must be filled in the point 1(c).
 - b) if fine is imposed upon legal person – the point 2 must be filled in. One of following points 2(a) or 2(b) must be filled in: information about property or income.
- 7) in the point (g):
 - a) must be provided information about nature of the decision (ticking one of boxes which are mentioned in the Certificate), also issuing State must provide date when the decision was made, when it entered into the force (became final), how big and grounds why sum of money should be paid (one of the points (i); (ii); (iii); (iv) – up to the grounds why fine was issued);

- b) in the point 2 -a summary of facts and a description of the circumstances in which the offence(s) has(have) been committed, including time and place plus also nature and legal classification of the offence(s) and the applicable statutory provision/code on basis of which the decision was made.
 - c) in the point 3 must be provided information (by ticking into a box) information about the nature of the crime.
 - d) the point 4 must be filled in only if information about crime is not available in point 3.
- 8) in point (h) must be provided status of the decision imposing the financial penalty:
 - a) in the point 1 must provide information if decision is final decision;
 - b) in the point 2 must provide information if case was examined in written procedure;
 - c) in the point 3 must provide information if person was informed about the proceedings;
 - d) in the point 4 must provide information only if partial payment of the penalty is made;
- 9) in the point (i) is required to provide information about possibility to replace fine with alternative sanctions - with sub-points 1 and 2.
- 10) in the point (j) could be provided additional information (optional) which is relevant to the case;
- 11) the point (k) is final provisions of the Certificate where must be provided information about court, judge who signed this certificate.

6.3.3. Filled in Certificate

CERTIFICATE

Referred to in Article 4 of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties

(a)	Issuing State: CROATIA Executing State: LATVIA
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(b)	The authority which issued the decision imposing the financial penalty: Official name: County Court of Zagreb Address: Trg Nikole Šubića Zrinskog 5, 10000, Zagreb, Croatia File reference: 123456
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	<p>Tel. No: (country code) (area/city code): 00 385 4801 069</p> <p>Fax No (country code) (area/city code): 00 385 4920 260</p> <p>E-mail (when available): sud@sud.hr</p> <p>Languages in which it is possible to communicate with the issuing authority: Croatian, English</p> <p>Contact details for person(s) to contact to obtain additional information for the purpose of the enforcement of the decision or, where applicable, for the purpose of the transfer to the issuing State of monies obtained from the enforcement (name, title/grade, tel. No., fax No., and, when available, E-mail) Ms Ivana Ivanova, tel. No.00 385 4801 000; fax No. 00 385 4920 260; iivanova@sud.hr</p>
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(c)	<p>The authority competent for the enforcement of the decision imposing the financial penalty in the issuing State (if the authority is different from the authority under point (b)):</p> <p>Official name: Enforcement Division of the Municipal Court of Zagreb</p> <p>Address: Ulica Nova 1, Zagreb, 10000, Croatia</p> <p>Tel. No: (country code) (area/city code): 00 385 4801 500</p> <p>Fax No (country code) (area/city code): 00 385 4920 266</p> <p>E-mail (when available): zagreb.sud@sud.hr</p> <p>Languages in which it is possible to communicate with the authority competent for the enforcement: Croatian</p> <p>Contact details for person(s) to contact to obtain additional information for the purpose of the enforcement of the decision or, where applicable, for the purpose of the transfer to the issuing State of monies obtained from the enforcement (name, title/grade, tel. No., fax No., and, when available, E-mail): Mr Ivan Ivanov, tel. No.00 385 4801 210; fax No. 00 385 4920 266; iivanov@sud.hr</p>
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(d)	<p>Where a central authority has been made responsible for the administrative transmission of decisions imposing financial penalties in the</p>
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issuing State:
Name of the central authority:
Contact person, if applicable (title/grade and name):
Address:
File reference
Tel. No: (country code) (area/city code)
Fax No: (country code) (area/city code)
E-mail (when available):

(e)	<p>The authority or authorities which may be contacted (in the case where point (c) and/or (d) has been filled):</p> <p><input type="checkbox"/> Authority mentioned under point (b) Can be contacted for questions concerning: decision, national regulation and legal facts</p> <p><input type="checkbox"/> Authority mentioned under point (c) Can be contacted for questions concerning: enforcement of decision, collected fine</p> <p><input type="checkbox"/> Authority mentioned under point (d) Can be contacted for questions concerning:</p>
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(f)	<p>Information regarding the natural or legal person on which the financial penalty has been imposed:</p> <p>1. In case of a natural person</p> <p>Name: Maija</p> <p>Forename(s): Bērziņa</p> <p>Maiden name, where applicable: -</p> <p>Aliases, where applicable: -</p> <p>Sex: Female</p> <p>Nationality: Latvian</p> <p>Identity number or social security number (when available): 230182-11564</p> <p>Date of birth: 23.01.1982.</p> <p>Place of birth: Riga, Latvia</p> <p>Last known address: Bauskas street 2-14, Riga, LV-1004</p> <p>Language(s) which the person understands (if known): Latvian, English</p> <p>(a) If the decision is transmitted to the executing State because the person</p>
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	<p>against whom the decision has been passed is normally resident, add the following information: Normal residence in the executing State: Bauskas street 2-14, Riga, LV-1004.</p> <p>(b) If the decision is transmitted to the executing State because the person against whom the decision has been passed has property in the executing State, add the following information: Description of the property of the person: Location of the property of the person:</p> <p>(c) If the decision is transmitted to the executing State because the person against whom the decision has been passed has income in the executing State, add the following information: Description of the source(s) of income of the person: Location of the source(s) of income of the person:</p> <p>2. In case of a legal person: Name: Form of legal person: Registration number (if available) (1): Registered seat (if available) (1): Address of the legal person:</p> <p>(a) If the decision is transmitted to the executing State because the legal person against whom the decision has been passed has property in the executing State, add the following information: Description of the property of the legal person: Location of the property of the legal person:</p> <p>(b) If the decision is transmitted to the executing State because the legal person against whom the decision has been passed has income in the executing State, add the following information: Description of the source(s) of income of the legal person: Location of the source(s) of income of the legal person:</p>
(g)	<p>The decision imposing a financial penalty:</p> <p>1. The nature of the decision imposing the financial penalty (tick the relevant box):</p> <p><input checked="" type="checkbox"/> Decision of a court of the issuing State in respect of a criminal offence</p> <p>(i) under the law of the issuing State</p> <p><input type="checkbox"/> Decision of an authority of the issuing State other than a court in</p> <p>(ii) respect of a criminal offence under the law of the issuing State. It is confirmed that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.</p>

σ Decision of an authority of the issuing State other than a court in (iii) respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law. It is confirmed that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.

σ Decision of a court having jurisdiction in particular in criminal matters (iv) regarding a decision as referred to in point iii.

The decision was made on (date): 02.05.2014

The decision became final on (date): 01.06.2014

Reference number of the decision (if available): 123456

The financial penalty constitutes an obligation to pay (tick the relevant box(es) and indicate the amount(s) with indication of currency):

σ (i) A sum of money on conviction of an offence imposed in a decision.

Amount: 2500 HRK

σ Compensation imposed in the same decision for the benefit of (ii) victims, where the victim may not be a civil party to the proceedings and the court is acting in its exercise of its criminal jurisdiction.

Amount:

σ A sum of money in respect of the costs of court or administrative (iii) proceedings leading to the decision.

Amount: 250 HRK

σ A sum of money to a public fund or a victim support organisation, (iv) imposed in the same decision.

Amount:

The total amount of the financial penalty with indication of currency: 2750 HRK

2. A summary of facts and a description of the circumstances in which the offence(s) has(have) been committed, including time and place:
Ms Maija Bērziņa did a criminal offence – on May 1, 2014 stole goods from the Spar supermarket at Zagreb, Vlačka ulica 44 in amount of 10000 HRK.

Nature and legal classification of the offence(s) and the applicable statutory provision/code on basis of which the decision was made:
Criminal Law of Croatia, Section 123, Part 1

3. To the extent that the offence(s) identified under point 2 above

	<p>constitute(s) one or more of the following offences, confirm that by ticking the relevant box(es):</p> <p><input type="checkbox"/> participation in a criminal organisation;</p> <p><input type="checkbox"/> terrorism;</p> <p><input type="checkbox"/> trafficking in human beings;</p> <p><input type="checkbox"/> sexual exploitation of children and child pornography;</p> <p><input type="checkbox"/> illicit trafficking in narcotic drugs and psychotropic substances;</p> <p><input type="checkbox"/> illicit trafficking in weapons, munitions and explosives;</p> <p><input type="checkbox"/> corruption;</p> <p><input type="checkbox"/> fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests;</p> <p><input type="checkbox"/> laundering of the proceeds of crime;</p> <p><input type="checkbox"/> counterfeiting currency, including of the euro;</p> <p><input type="checkbox"/> computer-related crime;</p> <p><input type="checkbox"/> environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;</p> <p><input type="checkbox"/> facilitation of unauthorised entry and residence;</p> <p><input type="checkbox"/> murder, grievous bodily injury;</p> <p><input type="checkbox"/> Illicit trade in human organs and tissue;</p> <p><input type="checkbox"/> kidnapping, illegal restraint and hostage-taking;</p> <p><input type="checkbox"/> racism and xenophobia;</p>
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<ul style="list-style-type: none"> σ organised or armed robbery; σ illicit trafficking in cultural goods, including antiques and works of art; σ swindling; σ racketeering and extortion; σ counterfeiting and piracy of products; σ forgery of administrative documents and trafficking therein; σ forgery of means of payment; σ illicit trafficking in hormonal substances and other growth promoters; σ illicit trafficking in nuclear or radioactive materials; σ trafficking in stolen vehicles; σ rape; σ arson; σ crimes within the jurisdiction of the International Criminal Court; σ unlawful seizure of aircraft/ships; σ sabotage; σ conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods; σ smuggling of goods;

	<p><input type="checkbox"/> infringements of intellectual property rights;</p> <p><input type="checkbox"/> threats and acts of violence against persons, including violence during sport events;</p> <p><input type="checkbox"/> criminal damage;</p> <p><input checked="" type="checkbox"/> theft;</p> <p><input type="checkbox"/> offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty. If this box is ticked, indicate the exact provisions of the instrument adopted on the basis of the EC Treaty or the EU Treaty that the offence relates to:</p> <p>4. To the extent that the offence(s) identified under point 2 above are not covered by point 3, give a full description of the offence(s) concerned:</p>
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(h)	<p>Status of the decision imposing the financial penalty</p> <p>1. Confirm that (tick the boxes):</p> <p><input checked="" type="checkbox"/> (a) the decision is a final decision</p> <p><input type="checkbox"/> to the knowledge of the authority issuing the Certificate, a decision (b) against the same person in respect of the same acts has not been delivered in the executing State and that no such decision delivered in any State other than the issuing State or the executing State has been executed.</p> <p>2. Indicate if the case been subject to a written procedure:</p> <p><input checked="" type="checkbox"/> (a) No, it has not.</p> <p><input type="checkbox"/> Yes, it has. It is confirmed that the person concerned was, in (b) accordance with the law of the issuing State, informed personally or via a representative competent according to national law of his right to contest the case and of time limits of such a legal remedy</p> <p>3. Indicate if the person concerned appeared personally in the proceedings:</p> <p><input checked="" type="checkbox"/> (a) Yes, he or she did.</p>
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	<p><input type="checkbox"/> (b) No, he or she did not. It is confirmed:</p> <p><input type="checkbox"/> that the person was informed personally, or via a representative competent according to national law, of the proceedings in accordance with the law of the issuing State,</p> <p style="padding-left: 40px;">or</p> <p><input type="checkbox"/> that the person has indicated that he or she does not contest the case</p> <p>4. Partial payment of the penalty no</p> <p>If any part of the penalty has already been paid to the issuing State, or, to the knowledge of the authority issuing the Certificate, to any other State, indicate the amount which has been paid:</p>
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(i)	<p>Alternative sanctions, including custodial sanctions</p> <p>1. State whether the issuing State allows for the application by the executing State of alternative sanctions in case it is not possible to enforce the decision imposing a penalty, either totally or in part:</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p>2. If yes, state which sanctions may be applied (nature of the sanctions, maximum level of the sanctions):</p> <p><input checked="" type="checkbox"/> Custody. Maximum period: 50 days</p> <p><input type="checkbox"/> Community service (or equivalent). Maximum period: 5 month</p> <p><input type="checkbox"/> Other sanctions. Description:</p>
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	(j) Other circumstances relevant to the case (optional information): -
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(k)	<p>The text of the decision imposing the financial penalty is attached to the certificate.</p> <p>Signature of the authority issuing the certificate and/or its representative certifying the content of the certificate as accurate:</p> <p>Name: County Court of Zagreb</p> <p>Post held (title/grade): judge I. Ivanova</p> <p>Date: 02.10.2014</p> <p>Official stamp (if available)</p>
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(1) Where a decision is transmitted to the executing State because the legal person against whom the decision has been passed has its registered seat in that State, Registration number and Registered seat must be completed.

6.4. Execution of Decision of Financial Penalties

There are two levels of applicable legislation as for the matter of execution of decisions on financial penalties; the European and the National ones.

6.4.1. Applicable Law

6.4.1.1. European Instruments

At European Union level the Council Framework Decision 2005/214/JHA of 24 February 2005

(<http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32005F0214&from=EN>).

Article 18 of the Framework Decision stipulates that it shall not preclude the application of bilateral or multilateral agreements or arrangements between MS in so far as such agreements or arrangements allow its prescriptions to be exceeded and help to simplify or facilitate further the procedures for the enforcement of financial penalties.

It should be noted Framework Decision has been amended by the 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, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition of decisions rendered in the absence of the person concerned at the trial (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF>).

This Framework Decision sets up a standard that should have been implemented by the 28th of March 2011, focusing on the incidence of judgments rendered in absentia on the rules of mutual recognition; and as for the financial penalties, the certificate that must be used when issuing a request has been amended establishing the consolidated version.

6.4.1.2. National Acts

At National level, in Romania, the pertinent legislation has been enacted for implementing the aforementioned FD's; the Act on International Judicial Cooperation in criminal matters.

According to Article 7 AIJC “ ...the requests addressed to the Romanian authorities in the fields regulated by this Law shall be fulfilled according to the Romanian rules of criminal procedural law, unless this Law provides otherwise for the cases not covered by the provisions of the Act. “

Therefore we must regard all those instruments, along with the principles of international courtesy and reciprocity (Articles 5 and 6 AIJC) and the observance of the limits of international cooperation, as applicable as well, where appropriate.

6.4.2. General Provisions

Before going to the details ruling the execution in Romania of a decision on financial penalties, we need to review some basic notions that may apply from both an active and passive perspective (being Romania the issuing Member State of the decision on financial penalties and when Romania is the executing Member State, respectively) but focusing on the passive point of view of the executing Member State.

6.4.2.1. Concept of Financial Penalties

Pursuant Article 1(b) of the Framework Decision, ‘financial penalty’ is an obligation to pay:

- a) a sum of money on conviction of an offence imposed in a decision;
- b) a compensation imposed in the same decision for the benefit of victims, where they cannot be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction;
- c) a sum of money in respect of the costs of court or administrative proceedings leading to the decision;
- d) a sum of money to a public fund or a victim support organisation, imposed in the same decision.

And shall not include:

- orders for the confiscation of instrumentalities or proceeds of crime, (that are regulated by Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property), nor
- orders that have a civil nature and arise out of a claim for damages and restitution (which are enforceable in accordance with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

The AIJC follows this scheme in Article 234¹ but it presents a slight difference with the text of Framework Decision since Article 234¹ (1) b) refers to a compensation representing damages to the injured party instead of

victim, which are terms not exactly equivalent being in our view broader in this sense the Framework Decision provisions.

On the other hand, the AIJC does completely follow the Framework Decision about what concepts shall not be taken as financial penalty, transposing almost literally Article 1(b) in fine of Framework Decision.

6.4.2.2. Competent Authorities

Following Article 2(1) of Framework Decision, Article 234(1) AIJC regulates:

“ In case of judgments rendered in another Member State, the Ministry of Justice, through the specialized directorate, shall be competent to receive the judgment and transmit it, in view of enforcement, to the court in the district of which the person against whom the penalty has been applied has the domicile or the head office, unless the sum of money it has to pay is less than EUR 70 or the ROL equivalent of this sum, in which case it shall return the documents transmitted by the issuing State by providing reasons.”

We need to bear in mind that the term “ Judicial Authorities “ must be construed taking into account the possibility of the financial penalties have been imposed by Authorities other than the Judiciary, so “competent Authorities” is a more comprehensive concept, we recommend to use in relation not only to financial penalties but also to other instruments of cooperation covered by the Act according to pertinent Framework Decision's.

Pursuant Article 234(1) AIJC, the competent Authorities for receiving decisions imposing a financial penalty, are the Courts in the pertinent district according to the location where the natural person has his or her domicile and where a legal person has its registered headquarters.

This Article, which doesn't distinguish between permanent or temporary residence, solves the problem of what to do when in principle there could be different competent Courts. There are situations where the natural or legal person concerned by the decision has his or her residence or a registered seat, being his properties placed in a different location, or in the case of incomes they are paid in the place where the person works, not being the place where he or she lives.

Coherently with all these situation Article 4(1) Framework Decision offers a range of competent authorities. Since that norm established different alternatives without prioritising amongst them determining the competent court could be confusing; but with the current regulation we may find as well the non-desirable situation of a court executing the order being the properties or incomes of the person in the territory of a different court.

Additionally, some issues may arise in relation to determinate the competent Authority to execute foreign decisions on financial penalties in case the competence of an specific court cannot be established (for

example the person has incomes or properties in Romania but his residence is not here). In principle, according to the Framework Decision a request could be sent to Romania, but there are no grounds on the AIJC to allocate such a request in a particular Court, since the only criterion is the residence.

Another problem that may appear here could be what to do when a particular Court has already taken over the execution of a decision on the grounds of Article 234(1), and later on a new competent Court can be established (the person changes his/her residence, for instance). In that case is entitled the Court that got the request to forward the case to the pertinent Court, immediately and directly informing the issuing Authority, according to Article 4(6) Framework Decision and Article 5(4) and Article 240(2) AIJC?

We would suggest, as a general rule, that once the execution of a decision has been allocated to one Court according to the AIJC its competence shall be maintained disregarding a late determination of the competent Court, the disclosure of a mistake when allocating the case or a when circumstances may vary (ie the person moves house or seat); but we could even make a distinction here depending on whether or not the execution activities have actually started or the request has been merely registered at the court, being in the latter even be possible to argue in favour of transferring the case to the competent Authority.

As Authorities other than the already mentioned, pursuant Articles 10(1) and 234(1) AIJC, we shall refer to the Ministry of Justice competent for judicial matters as central body providing assistance to domestic competent authorities and authorities from others Member States.

Furthermore, according to Article of 235(5) AIJC Courts can resort to contact points of the European Judicial Network; when it comes to send the order to the pertinent Authority abroad (when there are difficulties to determine it). Therefore we are from the view that European Judicial Network contact points may help during the whole process of issuing and executing the requests, and the same happens with the National member in EUROJUST, when their aid might be needed.

6.4.2.3. Documents to be received

Article 4 of the Framework Decision considers two different kinds of documents making up the request for cooperation; the decision and the certificate. And both must be transmitted by the issuing Authority, and therefore received by the executing one. 'Decision' is defined by Article 1(a) of the Framework Decision and shall mean a final decision requiring a financial penalty to be paid by a natural or legal person, made by either judicial or administrative authorities mentioned in paragraphs (i) to (iv); while 'certificate' is described in Article 4 of the Framework Decision as the standard form which is given in the Annex of the Framework Decision.

Article 233(1) AIJC defines 'judgment', which may be understood as 'decision', whereas the certificate is mentioned in Article 235(2), although it is not defined in it.

Both types of documents, decision and certificate, must be received together, directly transmitted by the issuing Authority State by any means which leaves a written record under conditions allowing the executing county court to establish its authenticity (Article 4(3) of the Framework Decision).

The original decision, or a certified copy of it, must be received; and the certificate received must be signed, and its contents certified as accurate, by the competent Authority from the Member State. This implies that the request can be received via fax for instance, and later the original documents sent via mail, with the possibility of starting to work in the execution of the decision before having the original documentation but having established its authenticity, especially in urgent cases (Article 235(3) AIJC)

6.4.2.4. Language

Pursuant Article 14(1) AIJC, the requests of cooperation addressed to Romania and the documents enclosed must be accompanied by a translation into Romanian or into English or French. If the documents mentioned are translated into a language other than Romanian, the central authority competent, or the competent judicial authority, in the case of direct transmission, shall take measures for their translation as a matter of emergency.

In this, the Romanian law goes beyond Article 16(1) of the Framework Decision, it decrees that only the certificate (therefore not the rest of the documentation) shall be compulsory translated into the official language or one of the official languages of the executing Member State, or into one or more other official languages of the Institutions of the Union accepted by the executing Member State. As for the decision Article 16(2) of the Framework Decision establishes that "The execution of the decision may be suspended for the time necessary to obtain its translation at the expense of the executing State."

We consider that some problems may arise if a court, applying this article, decides not to execute the decision. That solution wouldn't be correct because neither the FD 2005/214 nor the AIJC provide for this ground of non execution.

Anyhow we must note here that several MS laid down additional grounds for refusal (see Report from the Commission based on Article 20 of the Framework Decision. Brussels, 22.12.2008. COM (2008)888 final), being them mainly related to fundamental rights and jurisdictional guarantees).

6.4.2.5. Financial Penalties imposed before the implementation of the Framework Decision in Romania.

Such financial penalties should also be executed, disregarding the date they were imposed and even being the decisions passed before the implementation of the Framework Decision by Romanian national Law.

Since the AIJC does not prohibit its application in relation with decisions on financial penalties made before it came into force, nothing hampers their execution.

This is the solution adopted by a majority of countries although there are some exceptions like the case of Germany, whose Act The implementing the Framework Decision contains a provision (§98 IRG) according to which court decisions may only be recognized and executed if they have become final and unappealable after 27 October 2010 (date of promulgation of the implementing Act). In the case of other decisions, they may only be recognized and executed if the decision at stake was made after 27 October 2010.

6.4.2.6. Law governing the execution

Pursuant Article 7 AIJC, the requests addressed to the Romanian authorities in the fields regulated by the Act shall be fulfilled according to the Romanian rules of criminal procedural law, unless this Law provides otherwise. Therefore Courts shall execute a decision on financial penalty according to domestic law in the same way as a financial penalty imposed by a internal National Court.

Connecting this Article to Article 243 AIJC foresees that the enforcement of the judgment shall be governed by the Romanian law in the same way as in case of a financial penalty applied by a Romanian court. Only the Romanian authorities shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for termination of enforcement. There are several Acts that might be applied for cases not covered by, or completing the provisions of, AICJ (mainly Criminal Procedure Code, and Criminal Code, Juvenile Law or others)

Thus, all the provisions of the AIJC shall apply firstly as for the execution of the decisions on financial penalties, and only when the AIJC hasn't foreseen a particular situation, or does not cover one specific case, the aforementioned Acts shall apply in a subsidiary manner.

6.4.2.7. Threshold

Article 7(2)(h) of the Framework Decision lays down as an optional ground for refusal the circumstance of being the financial penalty below 70 euros or the equivalent to that amount.

This ground has been transposed as optional in Romania as well, unlike another countries that implemented it as mandatory, through Article 241(2) g) AIJC, according to what the Court may refuse to recognize and execute a decision on financial penalty if the financial penalty is below EUR 70.00. or the ROL equivalent of this sum.

What the Article of AIJC does not specify, is how to obtain the rate of exchange on the date the decision on financial penalty was brought. We need to know the exchange rate on the date at the time when the penalty was imposed, not when it became final or enforceable given that this is probably the most coherent interpretation of Article 242(2) AIJC and Article 8 of the Framework Decision.

The threshold provided for by the Framework Decision is usually facultative within the Member States, however a number of them have converted the threshold as a mandatory ground for refusal. Some experts have pointed out that this threshold could be too high in comparison with the fines usually imposed for traffic/road safety offences. However it was also mentioned that the threshold seems well balanced taken into account the considerable administrative burden put on the competent authorities in the executing States.

6.4.2.8. Time frame

The AIJC does not prescribe a time limit within which the competent court shall recognize and enforce the decision. In its Article 247 the Act stipulates (following Article 14 of the Framework Decision) the obligation to inform without delay the competent Authority of the issuing country of any decision refusing recognition and enforcement of decisions, together with an explanation, on execution of the decision, the suspension of enforcement proceedings decisions. In so doing a secure channel capable of producing a written record must be used.

Some problems may arise regarding the extension of the period of time to have the decision executed. We may face two scenarios: one, the issuing Member State hasn't established time limits, i.e., the decision shall be enforced without delay; and two, the decisions stipulates, for instance, that the fine have to be paid within three or six months, etc.

As for the first situation neither the Framework Decision nor the Romanian AIJC, provide any grounds for the postponement or suspension of the execution, therefore can be said that the decision must be enforced immediately. However some practical or humanitarian reasons may appear (serious illness of the sentenced person, redundancy, lack of any incomes or revenues) in which the person concerned by the decision has no means to pay the financial penalty at the present day, but is capable offer a guarantee to the court that he or she will be able to do so within a short period of time (e.g. in two months time starts to work again, presenting an employment contract). In such cases could be reasonable,(balancing the seriousness of the offence committed, the amount of the fine, the previous

records of the person, etc...) granting an small extension provided the court is satisfied about the accuracy of the circumstances presented and the truthfulness of the statements made. Otherwise, the execution process may start carrying a disproportionate amount of prejudices that may involve freezing and selling of properties, even imprisonment, that could be avoided. As for the second situation, if the decision set up a time limit (for instance two months), it has become final some months ago and the person was duly notified of the decision and was aware of its enforceable status in the terms referred to by Article 7(g) of the Framework Decision, we don't think a new period of two months should be conceded since the relevant period has already elapsed.

A different has often appeared in practice, cases when the persons concerned were not found on the territory of the executing Member State (though being search with the assistance of the Police); further when the persons concerned got the know or were aware of the possible procedure under the Framework Decision they immediately paid voluntarily the respective sum of money (as a consequence the procedure under the Framework Decision did not even started and the sum of money was paid to the account of the authority of the Issuing State after having issuing the request which is scarcely compatible with Art. 15.1 of the Framework Decision).

6.4.2.9. Costs

Following Article 17 of the Framework Decision and Article 16 AIJC, all the costs of the execution of the decision on financial penalties incurred on the territory of the Republic of Romania, shall burden the state budget of the Republic of Croatia, without possibility of claiming their refund from the issuing Member State.

The general provision, according to Article 16(1) AIJC is the expenses occasioned by the execution of a request regulated by this Law shall be borne, as a rule and with the exception laid down in para (2) and (3), by the requested State.

In the same sense, Article 246(2) AIJC "The costs made by the Romanian authorities pursuant to this Section shall remain the responsibility of the Romanian State".

6.4.2.10. Statistics

According to the Follow up Report on the implementation of the Framework Decision, Council of the European Union, December 2010, in general, Member States indicated that they had no or had only not very reliable statistical data available so far on the application of the Framework Decision. However, setting up an accurate and reliable statistics scheme, transferring the data obtained on a monthly or quarterly basis to the Ministry of Justice for its later treatment and dissemination should be beneficial.

6.4.3. Proceedings

The procedure for recognition and enforcement of decisions on financial penalties is established by Article 239 AIJC and onwards, pursuant to general principles set up by the Framework Decision.

In the execution of a financial penalty the provisions are applied which are valid when executing financial penalties imposed according to domestic law. This means that once the certificate and decision are received and recognized; the request shall be executed the same way as if they were a National decision.

Article 240(1) AIJC states that "...Romanian executing judicial authorities shall recognize a judgment with any further formalities and shall immediately take all necessary measures for its enforcement, except where they find that one of the reasons for non-recognition or non-execution provided for in Article 241 are applicable."

6.4.3.1. Forwarding decisions

Pursuant Article 240(2) AIJC, and coherently with Article 4(6) of the Framework Decision, if a Court receives a decision, having no jurisdiction to recognise and execute; such a Court shall, ex officio, transmit the decision to the competent Court and immediately and directly inform the pertinent Authority from the issuing State.

6.4.3.2. Grounds for refusal

6.4.3.2.1. Justification.

Despite mutual recognition means that a Member State accepts the decision of another Member State without any further formalities, thus giving it the status of a domestic decision, in reality some validation procedure may appear as necessary. It happens when the executing Member State have to make sure that the measure concerned falls under the mutual recognition field, there are no reasons hampering the execution, the request has been issued by a competent Authority, etcetera.

6.4.3.2.2. Non-recognition and non-execution grounds.

Framework Decision contains a number of grounds that in a broad sense can be denominated grounds for refusal, but more technically we need to split into grounds for non-recognition and grounds for non-execution.

Non recognition grounds are those mostly related to formalities or practical aspects preventing the request to be accepted due to formalities and procedural reasons, whereas non execution grounds have mainly to do with substantive reasons preventing the execution to be carried out, once is admitted that the decisions could have been or actually has been recognized.

6.4.3.2.3. Framework Decision's grounds.

All grounds of non-recognition and non-execution provided for by Article 7 of the Framework Decision are optional, there are no mandatory grounds of refusal, and can be systematized as follows:

- Imperfect or incomplete certificate
- Ne bis in idem-related
- Double criminality-related, for categories other than those included in Article 5 of the Framework Decision,
- Time limitation provided by the Law of the executing state,
- Territoriality exceptions, for acts committed in whole or in part in the territory of the executing Member State according to its own law,
- Immunity provided by the Law of the executing Member State,
- Age limit, i.e. the decision concerns a person who is under the age of criminal responsibility according to the law of the executing state,
- Violation of the right of the accused to be informed,
- In absentia procedures
- Penalties below the 70-euro threshold.

Besides these grounds, para 5 of the Preamble stresses that the Framework Decision respects fundamental rights and observes the principles recognised in Article 6 of the Treaty of the European Union (TEU); and in the same sense, Article 3 of the Framework Decision, according to the latter, the Framework Decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

TEU recognizes the freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, and states that the EU accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms which along with constitutional traditions common to the Member State, shall constitute general principles of the Union's law.

In the view of several Member States Article 3 of the Framework Decision does not require transposition (DK, FR, NL). AT and HU implemented it as an obligatory ground for refusal of execution. Some Member States have invoked national legislation in this regard (LT, SI). FI transposed this provision by laying down a ground for refusal to execute a decision if there are reasonable grounds to suspect that the guarantees of due process were violated in the proceedings leading to the decision.

Lastly, the Framework Decision does not prevent Member States from applying their constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression.

6.4.3.2.4. AIJC grounds.

Like Article 7 of the Framework Decision, Article 241 AIJC, using almost the same wording to cover the different hypothesis, contemplates no compulsory ground for refusal of the recognition and execution of decisions on financial penalties (with the two solely exceptions we're going to mention

below), which may be refused by executing judicial authorities in the following circumstances:

1. The certificate provided in Annex No 3 has not been submitted, if the certificate is incomplete or is manifestly inconsistent with the judgment (Article 241(1) AIJC).

2. That for the same offence the same person has already been convicted and sentenced by a domestic court or the court in another Member State and such a decision has been executed (Article 241(2) a) AIJC).

3. The execution is statute-barred according to domestic law and the decision relates to an offence which falls within the jurisdiction of the Republic of Romania under its own law (Article 241(2) b) AIJC).

4. The decision relates to an offence which:

- has been committed wholly or partly in Romania; or
- committed outside Romania and outside the issuing Member State, Romanian Law does not allow its prosecution for those offences when committed outside Romania. (Article 241(2) c) AIJC).

5. There is immunity under Romanian Law (Article 241(2) d) AIJC).

6. The decision has been imposed on a person not accountable in Romania due to his or her age (Article 241(2) e) AIJC).

7. According to the certificate, the person concerned:

- was not informed personally or via a representative competent of his or her right to contest the case and of the time limits of such a legal remedy;
- did not appear personally in the proceedings resulting in the decision, unless was informed personally of the time and place of the proceedings, or received official notification;
- was duly represented in the proceedings;
- after being served personally with the decision on financial penalty rendered in his or her absence, along with an instruction about the challenging and retrial possibilities, stating expressly that he or she does not dispute the decision rendered in his or her absence, or has not requested a retrial or submitted an appeal (Article 241(2) f) AIJC).

8.- The penalty is below 70 euro or the equivalent to that amount at the rate of exchange on the date the decision was brought (Article 241(2) g) AIJC)

In the cases of imperfect, incomplete or incoherent certificate, time limitations and in absentia-related procedural guarantees the court shall, where appropriate, before deciding not to recognise or to execute a decision, either totally or in part, contact the competent authority in the issuing Member States asking for supplementary information that ought to be

without delays. Following Article 7(3) of the Framework Decision no specific period is laid down by AIJC for the information to be completed, whereas other countries do set up such a limit.

As we said above there is a single circumstance that could be construed as a mandatory ground for refusal. According to the text of Article 241(2) AIJC: " Except for the case provided for in Article 239 (2), the Romanian executing judicial authority may refuse to recognize and enforce the judgment, also if it is established that:...". This Article regulates all the situations we have just analysed, determining the use of the word "may" that all of them are optional grounds for refusal. Article 239(2) AIJC stipulates: " For other acts than those provided in paragraph (1), the execution of the financial penalty shall be subject to the condition that the act provided in the judgment of the judicial authority or the decision of the administrative authority be also provided by the Romanian law." This means, in our view, that unless we are facing those cases where double criminality test does not apply (and the decision refers to acts not excluded from the double criminality test which does not constitute an offence under Romanian Law) actual double criminality might be seen as a mandatory ground.

Another problem may appear regarding the 70 euro threshold because the circumstance of the imposed penalty not reaching this amount is seen as an optional ground for refusal in Article 241(2) g) AIJC, by using in this Article the expression " may refuse ". But Article 234 AIJC establishes that the Ministry of Justice shall be competent to receive the foreign decision and transmit it for enforcement to the court in the district of which the person against whom the penalty has been applied has the domicile or the head office, unless the sum of money it has to pay is less than EUR 70 or the ROL equivalent of this sum, in which case it shall return the documents transmitted by the issuing State by providing reasons. The usage of the expression "shall return" implies a mandatory ground for refusal.

We think the provision of Article 233 AIJC shall prevail construing the cause for returning the certificate as a action to be taken prior in tempore to the decision of whether to recognize and execute it, being the wording of the Act is categorical for these cases.

6.4.3.3. Double criminality test

Article 5 of the Framework Decision includes a list of offences that give rise to recognition and enforcement of decisions without verification of dual criminality if they are punishable in the issuing Member State. On the other hand all other offences may be subject to such verification by the executing Member State.

The list encompasses the 32 offences already listed in other Framework Decisions (e.g. the European Arrest Warrant) and a few more, namely:

- conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods,
- smuggling of goods,
- infringements of intellectual property rights,
- threats and acts of violence against persons, including violence during sport events,
- criminal damage,
- theft,
- offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.

Article 239(1) AIJC sets up the same list of offences, reading: "...the decisions related to the offences this paragraph contemplates, if they are punishable in the issuing State, as defined by the law of the issuing State, shall give rise, according to the provisions of the Framework Decision and without being necessary to verify of the double criminality of the act, to the recognition and enforcement of judgments..."

6.4.3.4. Determination of the amount to be paid

Financial penalties shall be recognized and executed regardless of the amount of fines foreseen for the same offences by Romanian Law. Nevertheless, Article 242 AIJC, following Article 8 of the Framework Decision, states that in case the facts fall within the Romanian jurisdiction, the executing Romanian judicial authority may reduce the amount of the fine imposed in accordance with the maximum fine prescribed for the same offense under domestic law. Furthermore in case the sentenced person can prove that total or partial payment has been made in any state, the Romanian executing judicial authority shall confirm this with the competent authority of the issuing State, deducting it from the amount to be executed in Romania (Article 243(2) AIJC).

As it has been said above, the Court shall determine the amount of fines in ROL at the exchange rate on the day the decision was brought (Article 242(2) AIJC).

The monies obtained from enforcement of decisions shall accrue to Romania, unless otherwise agreed with the issuing Member State (Article 13 Framework Decision and Article 246 AIJC).

May be worthwhile to point out that specially when it comes to compensations established in the benefit of victims or an organization supporting victims, sums should go in any case to the them because otherwise the aim and purpose of the financial penalty imposed would not be satisfied.

The conversion of the penalty presents important technical aspects and it is necessary to distinguish different hypothesis:

- a) The sum imposed by the decision is defined in a currency different from that of the executing Member State. In such cases the executing Member State converts the penalty into its own currency at the rate of exchange at the time when the penalty was imposed.
- b) The amount of the financial penalty cannot be recovered totally or partially from the convicted person, and the non-recovered part is then converted into imprisonment or other alternative sanction.
- c) Besides mere conversion, Article 8(1) of the Framework Decision and Article 242(1) AIJC also allow the executing Romanian judicial authorities under certain conditions to only partially enforce a given decision. In such cases the amount of the penalty may be reduced to be enforced to the maximum amount provided for acts of the same kind under Romanian Law.

6.4.3.5. Alternative sanctions

Article 10 of the Framework Decision and Article 244 AIJC allow the imposing of such alternative sanctions, including imprisonment, Romanian executing judicial authority may resort to them in accordance with Romanian Law (Articles 63 and 64 of the Criminal Code), provided the issuing Member State permits their application. For those cases, the severity of the alternative sanctions shall not exceed the highest level specified in the certificate submitted by the issuing Authority.

6.4.3.6. Remedies

Unlike others framework decisions (those related to European evidence warrant, confiscation or freezing orders, for instance), Framework Decision has no special provisions as for the remedies or ways to challenge the executing decision or to appeal against any court ruling in this field.

Consequently, Romanian AIJC, doesn't not specifically foresee legal remedies for any interested party, including bona fide third parties, who may have certain title to properties for which any of the orders has been issued. But according to Article 243 AIJC the enforcement of the decision shall be governed by the Romanian Law in the same way as in case of a financial penalty applied by a Romanian court. That implies the possibility to resort to any legal remedies or appellations provided by National Romanian Law for internal cases.

We are in the view that Framework Decision does not prevent Member States to set out a legal remedies' scheme as for the execution of decisions,

to the contrary its Article 9.1 affords Member States to do that since its states that domestic legislation shall rule the execution procedure.

In that sense, we consider that, as it happens in Spain and other Member States, the decisions taken by executing authorities when enforcing foreign financial penalties, should be challenged exactly in the same way as they would be if domestic decisions were at stake. Therefore, applying the Criminal Procedure Act or any other relevant Act according to Article 243 AIJC, we need to check whether or not there is an available remedy for the parties and what its effects are in relation to the postponement or suspension of the execution.

6.4.3.7. *Amnesty, pardon and review of decisions*

Article 245 AIJC sets out that decisions on financial penalties which are transmitted to the Republic of Romania for the purpose of execution may be covered by Amnesty and pardon be granted either by the issuing State or by the Romanian State.

Thus person against whom a decision on financial penalty may be granted pardon in accordance with domestic law.

We need to bear in mind that the issuing Member State is entitled to grant these benefits, being such a measure a reason for the termination of enforcement.

6.4.3.8. *Termination of enforcement*

Article 12 of the Framework Decision establishes that the issuing Authority shall forthwith inform the executing Authority of any measure or decision as a result of which the decision ceases to be enforceable or is withdrawn. And as soon as the executing Authority is informed about those circumstances by the competent issuing Authority the enforcement shall terminate. In this sense, Article 245(2) AIJC foresees that any review – which may even include the anticipated termination - of the judgment shall fall under the exclusive competence of the issuing State.

6.4.3.9. *Information from the executing Authority*

Pursuant Article 14 of the Framework Decision, Article 247 AIJC sets out that Romanian executing judicial authority shall immediately inform the competent issuing Authority through a secure channel capable of producing a written record:

1. of the transmission of the decision to the competent court for execution;

2. of any decision not to recognise and execute the decision, along with the reasons for the decision;
3. about the total or partial non-execution of the judgment and the reasons for its ruling;
4. of termination of the execution of the decision;
5. of the application of the alternative sanctions referred and replacement of the financial penalty with another punishment.