



## The Recognition of Legal Surveillance Measures as an Alternative to Detention on Remand in European Union

Ion RUSU<sup>1</sup>

**Abstract:** The objectives of the research aim at examining the deposition of the European legislative act in terms of their implementation by the Romanian judicial authorities, of the national legislative act, a comparative examination, critical comments and proposals *de lege ferenda*. This paper is the continuation of others made in the field of judicial cooperation in criminal matters in the European Union, especially in the activity of recognition and enforcement of judicial decisions emanating from another Member State. The Results of the study focuses in particular on the possibility of executing the provisions of European legislative act by the Romanian judicial authorities, the identification of flaws in the Romanian and European legislation. The paper is useful for teachers, master students, practitioners and all those who wish to improve their knowledge in this area particularly important and sensitive at the same time. The scientific contribution of the work results from the critical examination of the depositions of both normative acts and the formulated proposals *de lege ferenda*.

**Keywords:** European legislative act; offence; Romanian judicial authorities

### 1. Introduction

The most important form of international judicial cooperation in criminal matters is in our opinion the recognition and enforcement of court judgments and judicial documents emanating from another state. The activity itself is very complex and it is now being achieved based on mutual trust, reciprocity, treaties or the ratified conventions of different states or the national law.

At EU level this form of judicial cooperation in criminal matters was regulated by adopting several normative acts designed to ensure the harmonization of the legislation in the field.

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<sup>1</sup> Senior Lecturer PhD., Faculty of Law, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: ionrusu@univ-danubius.ro.

Among the adopted normative acts we mention two that seem to be of paramount importance for perfecting the cooperation activities of Member States and even the European Union evolution, namely the Council Framework Decision 2008/909/JHA of 27 November 2008 on the principle of mutual recognition in the case of court judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union<sup>1</sup> and Council Framework Decision 2008/947/JHA of 27 November 2008 on the principle of mutual recognition in the case of court judgments and probation decisions for the supervision of probation measures and alternative sanctions.<sup>2</sup> Amid the formulation of critical comments, especially by the European Court of Human Rights, the two European regulations were subsequently amended and supplemented by the adoption of Council Framework Decision 2009/299/JAI of 26 February 2009.<sup>3</sup> This new modifying normative act makes a number of additions regarding the possibility of case retrial in which the person was not present at the trial where the person was condemned.

Given the stages of criminal proceedings and based on the conclusions of the Tampere European Council of 15 and 16 October 1999, it was established that the principle of mutual recognition should apply in the prosecution phase as well, i.e. pre-trial phase.

In applying this principle, a person who is resident in a Member State, but subject to criminal proceedings in another Member State, must be supervised by competent judicial authorities of the State in which he resides, until the starting of the trial.

The application of the mentioned principle must include strengthening the right to liberty and the presumption of innocence in the European Union as a whole and ensuring cooperation between Member States where a person is submitted to some obligations or is subject to supervision until the trial and the adoption of a decision by the competent court. In this way, it promotes the use of non-custodial measures as an alternative to detention on remand, even if, in accordance with the laws of the Member State concerned, it could not be imposed the *ab initio* to a detention on remand.

Also, according to the wording of the preamble to the European legislative act, regarding detention of persons subject to criminal proceedings, there is the risk of a

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<sup>2</sup> Published in the European Union Official Journal no. L 337/122 of 12. 16.2008.

<sup>3</sup> Published in the European Union Official Journal no. L 81/24 of 03.27.2009.

different treatment for those resident in the State where the trial takes place and the non-resident, in the sense that a non-resident suspect risks to be placed in state custody during the trial, although, in similar circumstances, a resident would not risk such treatment. Thus, in a common European area of justice, without internal borders, it is necessary to act to ensure that a person subject to criminal proceedings, non-resident in the State where the trial takes place, is not treated differently from a person subject to criminal proceedings, who is resident in that State.

The above provisions are strictly topical, because often, the courts, where it is judged a case involving a non-resident citizen of that State, proceed in taking the measure of detention on remand in order to avoid absconding the accused from the court or execution of sentence. Moreover, such a provision is provided as a reason for detention on remand in the Romanian law.

In these circumstances, the competent judicial authority of the issuing State has the power to take all subsequent decisions on the person in question, including detention on remand, a measure which may be taken, in particular, due to a violation of legal surveillance measures or a breach of summons in any hearing or any other activity that takes place during criminal proceedings. If required, it is also necessary, as to avoid travel expenses to allow the hearing by teleconference or videoconference. When the person in question does not return voluntarily in the issuing State, it will be turned in by the resident state under the European arrest warrant.

## **2. The Examination of the European Legislative Act**

### **2.1. Objectives, Definitions, Competent Authorities**

According to the European legislative act its objectives are:

- ensuring proper course of justice and, in particular, bringing to justice the person concerned;
- promoting, when appropriate, during criminal proceedings, the use of non-custodial measures for persons who are not residents of the Member State in question where the proceedings are carried out;

- improve protection of victims and the general public.<sup>1</sup>

In order to avoid unilateral interpretations of the judicial bodies of the Member States and ensuring a uniform interpretation, which is consistent with the will of the European legislator, there were defined the following legal phrases:

- *decision on legal surveillance measures* means an enforceable decision taken during criminal proceedings by a competent authority of the issuer State in accordance with its national laws and procedures during criminal proceedings and impose to a physical entity, as an alternative to detention on remand, one or more measures of legal supervision;
- *legal surveillance measures* means obligations and instructions imposed on physical entity, in accordance with national laws and procedures of the issuing State;
- *issuing State* is the Member State which issued a decision on legal surveillance measures;
- *executing State* is the Member State where there are monitored the legal surveillance measures.

In order to transpose into the national law the provisions of the European legislative act, each Member State must inform the General Secretariat of the Council on the judicial authorities which, under its national law, are competent to act, when the Member State is the State of conviction or execution.

Furthermore, the Member States, without prejudice to the above mentioned depositions, may designate other authorities, other than the judicial ones as competent authorities for making these decisions, under the condition that these authorities have the power to make decisions of the same nature according to the national laws. At the same time, each Member State may designate a central authority, or, in case the legal system allows it, more authorities in order to assist the competent authorities.

According to provisions of the examined European legislative act, when necessary, for reasons of organizing its judicial system, a Member State may entrust authority or its central authorities to manage the transmission and receipt of decision on legal surveillance measures, together with certificates and any other correspondence on the subject, which means that all communications, consultations, information

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<sup>1</sup> Framework Decision 2009/829/JHA, article 2 paragraph (1).

exchange, research and notifications between the competent authorities may be achieved with the support or direct involvement of designated central authorities.

## **2.2. Supervision Measures and Criteria for Submission**

According to provisions of the European legislative act, the measures of legal surveillance are:

- the obligation of the person to inform the competent authority of the executing State of any change of residence, in particular in the purpose of receiving summons on the attendance of a hearing or a trial during criminal proceedings;
- the obligation of not entering in certain localities, places or areas defined in the issuing or enforcement state;
- the obligation to remain in a certain place, where appropriate, in certain intervals;
- the requirement that imply limitations on leaving the territory of the executing State;
- the obligation to present itself at established dates to a specific authority;
- the obligation to avoid contact with certain persons in connection with the offense (s) alleged to be committed.

Given the differences between national laws of Member States, the European legislator has left it up to these states also the possibility to provide in their national legislation other types of probation measures, exemplifying the following:

- the obligation of not engaging in certain activities in connection with the offense (s) alleged to be committed which may include the involvement in a particular profession or field of activity;
- the obligation of not driving a vehicle;
- the obligation to deposit a certain amount or give another type of guarantee, which may be provided either in a number of installments or only once;
- the obligation to seek medical treatment or rehabilitation;

- the obligation to avoid contact with certain objects in connection with the offense (s) alleged to have been committed.

Regarding the Member State criteria to which it is sent the decision on legal surveillance measures, note that usually the request and the decision will be sent, with priority to the competent authority of the Member State where the person resides lawfully and ordinarily, when the person consents to return to the state in question.

Also, at the request of the person concerned, the competent authority of the issuing Member State, can transmit the decision on surveillance measures of surveillance authority of another Member State other than the one where the person lawfully and ordinarily resides, under the condition that the State in question agrees to it. Of course in such a case, the issuing Member State shall require beforehand the approval of the executing Member State.

### **2.3. The Transmission Procedure and Monitoring Competence**

With the transmission of a decision on legal surveillance measures will send also a certificate as required by the European legislative act.

In this respect, the decision on legal surveillance measures or a certified copy thereof, together with the certificate, shall be forwarded by the competent authority of the issuing State directly to the competent authority of the executing State by any means which allows a written record, under the conditions which allow the executing State to establish authenticity of these documents. Every time these documents are transmitted to the executing State on its request.<sup>1</sup>

In addition to indicating the type of legal surveillance measure provided by the European legislative act, the certificate shall state, if necessary the type of legal surveillance measure adopted by the State in question. It will also specify the following:

- the duration for which the decision is applied and if possible its extension;
- for guidance, the provisional period for which it is likely to be necessary to monitor the legal surveillance measure, taking into account all the

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<sup>1</sup> Framework Decision 2009/829/JHA, article 10, paragraph (1).

circumstances of the case which are known at the moment of decision transmission.

Monitoring powers will always return to the competent authority of the issuing state, if the competent authority of the executing State has not recognized the decision on legal surveillance measures that was sent and it did not inform the competent authority from the issuing of such a recognition. Meanwhile, the competence on monitoring the legal surveillance measures transferred to the competent authority of the executing State is assigned to the issuing State in the following situations:

- when that person in question has established lawfully and ordinarily the residency in a Member State other than the executing State;
- as soon as the competent authority of the issuing State has notified, according to European legislative act, the competent authority of the executing State, the withdrawal of the certificate;
- where the competent authority of the issuing State has amended the legal surveillance measures and the competent authority of the executing State refused to monitor the modified legal surveillance measures because they do not fall within the types of legal surveillance measures mentioned in the European legislative act or those that can be complemented by some states, according to their national laws;
- upon the expiry term of decision implementation;
- where the competent authority of the executing State has decided to cease monitoring the legal surveillance measures and it has informed the competent authority of the issuing state.

## **2.4. Execution of the Executing State's Decision**

### **2.4.1. Terms**

According to the regulations of the European legislative act<sup>1</sup>, within the shortest term, but not less than 20 working days from the receipt of the decision on legal surveillance measures and a certificate, the competent authority of the executing State will recognize this decision and immediately take all measures for monitoring

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<sup>1</sup> Framework Decision 2009/829/JHA, article 12, paragraph (1).

legal surveillance measures, unless it decides to invoke one of the grounds for non-recognition under the European legislative act. This period of 20 days may be extended by 20 days in case it was introduced a way to appeal. If due to exceptional circumstances the competent authority of the executing State is unable to meet the specified deadlines, it shall immediately inform the competent authority of the executing State by any means, motivating the delay and indicating the time it considers that it is necessary to issue a final decision. Also, the competent authority may postpone the decision on the recognition of the decision and if the certificate is incomplete or it obviously does not correspond to the decision on the legal surveillance measure (s), until it is established a reasonable time that it would allow the completion or correction of the certificate.

#### **2.4.2. *The Re-individualization of Legal Surveillance Measures***

If the nature of legal surveillance measures is inconsistent with the law of the executing state, the competent authority in that Member State may re-individualize them (the term used by the European legislator is to *adapt*) in the sense of legal surveillance measures that are applied in accordance with its law, for similar offenses. This new measure of legal surveillance must meet as far as possible the requirements of the issuing state and it should not be more severe than initially required measure.

The competent authority of the issuing State may decide to withdraw the certificate as long as the executing State has not yet begun monitoring, in the shortest time, within 10 days of receiving the notification from the state of execution.

#### **2.4.3. *Double Incrimination***

According to provisions of the European legislative act, the following offenses, if they are punishable in the issuing State with imprisonment or a deprivation of liberty measure, with a maximum duration of at least three years, as defined by the law of the issuing state, lead, in terms of European legislative act and without verifying the double incrimination of the act, the recognition of the decision on legal surveillance measures: participation to an organized criminal group; terrorism; human trafficking; sexual exploitation and child pornography; illicit trafficking in drugs and psychotropic substances; illicit trafficking in weapons, ammunition and explosives; corruption; 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 financial interests of European Communities; laundering crimes; counterfeiting currency, including euro counterfeiting;



computer crime; environmental crime, including illicit trafficking in endangered animal species and illegal trafficking of species and varieties of endangered plants; facilitating illegal entry and settling; murder; bodily injury; illicit trafficking in human organs and tissues; kidnapping, confinement and hostage-taking; racism and xenophobia; organized or armed robbery; illicit trafficking in cultural goods; including antiques and works of art; deception; racketeering and extortion; counterfeiting and piracy of products; falsification of official documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth factors, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles; rape, arson with intent; crimes within the jurisdiction of International Criminal Court; unlawful seizure of ships or aircraft and sabotage.

For offenses other than those mentioned above, the executing State may condition the decision recognition on legal surveillance measures on the fact that the decision must relate to facts that would constitute to an offense under the law of the executing State, whatever the constituent elements are and however it would be described.

#### **2.4.4. Grounds for Non-recognition**

In accordance with the examined Framework Decision, the competent authority of the executing State may refuse to recognize the decision on legal surveillance measures in the following cases:

- the certificate is incomplete or it obviously does not correspond to the decision on legal surveillance measures and it has not been completed or corrected within a reasonable time determined by the competent authority of the executing State;
- the criteria established by the European legislative act are not fulfilled and they were not mentioned previously [those of article 9 paragraph (1) and (2) or article 10 paragraph (4)];
- the recognition of the decision would be contrary to the principle of *non bis in idem*;
- the decision refers to a fact which would not constitute an offense under the law of the executing state, in the circumstances mentioned above (double incrimination) and, if the executing State has made a declaration under article 14 paragraph (4) of the European legislative act in the circumstances mentioned in article 14 paragraph (1); however, in fiscal,

customs and monetary matters the execution of the decision cannot be refused on the grounds that the law of the executing state does not impose taxes of the same kind or that it does not contain the same type of provisions on fiscal, customs and monetary matters as the legislation of the issuing State;

- prosecution is hindered by the intervention of prescription under the law of the executing State and it relates to an act which is the responsibility of the State concerned, under its national legislation;
- there is immunity under the law of the executing State, which makes it impossible to monitor the legal surveillance measures;
- if, under the law of the executing state, the person may not be criminally liable for the act representing the basis of the decision, due to age;
- for breach of legal surveillance measures, the authority should refuse to surrender the person concerned in accordance with the Framework Decision on European Arrest Warrant.<sup>1</sup>

In the first three cases mentioned above, before deciding not to recognize the decision, the competent authority of the executing State shall communicate, by appropriate means, with the competent authority of the issuer and, if appropriate, it shall provide immediately all necessary additional information.

If the competent authority of the executing State believes that the decision recognition may be refused under the European legislative act provisions [article 15 paragraph (1). h)], but nevertheless wishes to recognize the decision and monitor the legal surveillance measures which it provides, it informs the competent authority of the issuing State, providing the reasons for a possible refusal. In such situations, the competent authority of the issuing State may decide to withdraw the certificate. If the competent authority of the issuing State does not withdraw the certificate, the competent authority of the executing State can recognize and monitor decision on legal surveillance measures contained therein, being understood that the person in question cannot be turned in under a European arrest warrant.

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<sup>1</sup> Framework Decision 2009/829/JHA, article 15, paragraph (1).

### **2.5. The Competence for all Subsequent Decisions, the Applicable Legislation and the Obligations of the Involved Authorities**

When the period of surveillance measures is approaching to their expiration, it is necessary to extend them; the authority of the issuing State may request the competent authorities of the executing State to extend their monitoring, given the circumstances of the case and the apparent impact on the person. The competent authority of the issuing state provides the period of time that such an extension might be require. Under these circumstances, the competent authority of the executing State shall decide on this request in accordance with the national law, indicating, where applicable, the maximum extension.

Notwithstanding other provisions of the European legislative act, the competent authority of the issuing State has the competence to take all subsequent decisions relating to a decision on legal surveillance measures. Among such decisions, we must mention in particular the following:

- a) renewal, review and withdrawal of the decision on legal surveillance measures;
- b) modification of legal surveillance measures;
- c) issuing an arrest warrant or any other enforceable judicial decision having the same effect.

According to provisions of the European legislative act, the law of the issuing state applies the above mentioned decisions.

Where necessary under the national law, a competent authority of the executing State may decide to use the recognition procedure in order to respect the decisions referred to in the mentioned above paragraph (1), letter a) and b), within its national legal system. The recognition of this kind will not lead to a new examination on the grounds of non-recognition.

Where the competent authority of the issuing State has modified the legal surveillance measures, the competent authority of the executing State may:

- adapt these changed measures, if the nature of the changed legal surveillance measures is inconsistent with the law of the executing state;
- refuse to monitor the modified legal surveillance measures, if such measures do not fall within the types of surveillance measures specified in the European legislative act [article 8, paragraph (1), where there are

mentioned those types of legal surveillance measures, or those of paragraph (2), where there are mentioned with example title also other such measures].

At the same time, the authority competence of the issuing state shall not affect the proceedings that may be initiated in the executing state against the person concerned in connection to criminal acts committed by that person in question, other than those underlying at the basis of the decision on legal surveillance measures.

During monitoring of the surveillance measures, at any time, the competent authority of the executing State may invite the competent authority of the issuing state to inform whether the monitoring of the measures is still necessary; the authority will have to respond without delay, if necessary by adopting further decisions (one of the above). After the expiry of supervisory authority of the issuing State shall, ex officio or at the request of the competent authority of the executing State, where appropriate, estimated the additional time that needs to monitor the measures.

The competent authority of the executing State shall, without delay, notify the competent authority in the issuing state of any breach of the legal surveillance measures and any other finding which could lead to making any further decisions.

In order to hearing the person in question, the procedure and conditions of the instruments of international law and European Union providing the possibility for the use of teleconferencing and videoconferencing systems for hearing persons may be used *mutatis mutandis*, especially if the issuing State law requires a judicial hearing before adopting the decisions referred to in the legislative act framework.

The competent authority of the issuing State shall immediately inform the competent authority in the executing state of all decisions mentioned in the European legislative act and of the fact that it was brought a legal action against a decision on legal surveillance measures. When the certificate has been withdrawn, the competent authority of the executing State shall terminate the taken measures as soon as it was duly notified by the competent authority of the issuing State.

## **2.6. Information Provided by the Execution State, Surrender the Person, Consultations between the Two States**

In case the decision on legal surveillance measures together with the certificate is received by an authority of the executing State which is not competent to recognize them, this authority will send the referred to documents to the competent authority, after which it will inform the issuing State.

Also, the competent authority of the executing State shall immediately inform the competent authority of the issuing State by any means which leave a written record of:

- any change of residence of the person concerned;
- the maximum duration for which legal surveillance measures can be monitored in the executing state, if the executing State provides such maximum duration;
- practical impossibility to monitor legal surveillance measures, out of the reason that, after the transmission of the decision on legal surveillance measures and the certificate to the executing State, the person cannot be found in the territory of the executing State, in which case the executing State has no obligation to monitor the legal surveillance measures;
- the fact that it was submitted an appeal against the decision of recognizing the decision on legal surveillance measures;
- the final decision to recognize the decision on legal surveillance measures and take all necessary measures to monitor the legal surveillance measures;
- any other decision to adapt the legal surveillance measures;
- the decision of not recognizing the decision on legal surveillance measures and assuming the responsibility of monitoring legal surveillance measures and the invoked reasons as well.

In the case where the competent authority of the issuing State has issued an arrest warrant or any other enforceable judicial decision having the same effect, the person is surrendered in accordance with the Framework Decision on European Arrest Warrant.

In this context, the article 2, paragraph (1) of the Framework Decision on European arrest warrant cannot be invoked by the competent authority of the executing State

to refuse to surrender the person.<sup>1</sup> We find that this time is governed by an exception, meaning that a European arrest warrant will be executed even if the penalty limits do not correspond to those established in the European legislative act.

According to the provisions of the European legislative act, each Member State may notify the General Secretariat of the Council, when transposing the enactment of the examined legislative act; it will also apply article 2 paragraph (1) of the Framework Decision on European Arrest Warrant to decide on the the surrender of the person in question to the issuing State.

Unless this is not possible for various reasons, the competent authorities of the two countries shall consult each other in reference to:

- during training or at least before transmitting a decision on legal surveillance measures together with the certificate referred to;
- to facilitate effective and in good conditions monitoring of the legal surveillance measures;
- in case the person has seriously violated the imposed legal surveillance measures.

Also, the competent authority of the issuing State shall consider any guidelines provided by the competent authority of the executing state on the risk that the person in question may represent for the victim and the general public. In order to implement this provision, the competent authorities of the two states deliver relevant information, including:

- information allowing verification of identity and place of residence of the person concerned;
- relevant information extracted from criminal records in accordance with the applicable legislative instruments.

In the case where the competent authority of the executing State has sent several notices on violations of legal surveillance measures or other data, by the person concerned, the competent authority of the issuing State without having adopted a

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<sup>1</sup> Article 2, paragraph (1) of Council Framework Decision 2002/884/JAI of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, provides that a European arrest warrant may be issued for acts punishable by the law of the issuing member state with a custodial sentence or a measure involving the deprivation of liberty which has as maximum period of at least twelve months or when ordering a sentence of a punishment or it has not been passed a safety measure, for detentions ordered with a period of at least four months.

final decision, and the competent authority of the executing State may invite the competent authority of the issuing State to take such a decision, giving a reasonable time.

Where the competent authority of the issuing State does not act within the time specified by the competent authority of the executing State, the latter may terminate the legal surveillance measures. In such a case, it shall inform the competent authority of the issuing State of that decision and the monitoring competence of the legal surveillance measures belongs to the competent authority of the issuing State.

In case the law of the executing state requires regular confirmation of the need to extend monitoring of legal surveillance measures, the competent authority of the executing State may request the competent authority of the issuing State to provide such confirmation, giving a reasonable time to answer to such a request. Where the competent authority of the issuing State does not respond within that period, the competent authority of the executing State may send a new request to the competent authority of the issuing State, giving it a reasonable time to respond to such a request and indicating that it may decide the termination of monitoring the surveillance measures. If any of the authorities in the executing State does not receive any response, it will decide to terminate the legal surveillance measures.

The certificates shall be translated into the official language of the executing state or if there is such declaration, in one of the official languages of the European Union Institutions.

To the extent that different Member States have agreements or arrangements that allow expansion or enlargement of the examined European legislative act objectives and it helps simplify and facilitate the mutual recognition of decisions on the legal surveillance measures, the Member states can:

- continue the implementation of agreements or the current bilateral or multilateral agreements, at the time of their entering into force of the European legislative act;
- Conclude bilateral or multilateral agreements or arrangements after entering into force of the European legislative act.

Finally we mention that all Member States shall take measures to comply with the depositions of the examined European legislative act by 1 December 2012.

### 3. Dispositions of Romanian Law. Comparative Examination

Currently in the Romanian law there are no special provisions governing the recognition of decisions on legal surveillance measures as an alternative to detention on remand, given in another Member State, as the European legislative act has not been transposed into national law. The current Code of Criminal Procedure provides no such provisions, referring to the special law or the the international conventions to which Romania is a party (article 513 of article 513 Code of Criminal Procedure) and as regards strictly to the recognition of criminal judgments or foreign judicial decisions it is referred only to the civil decisions and not to the criminal ones (article 522 Code of Criminal Procedure).

In these circumstances, we consider that the recognition of the decisions on legal surveillance measures as an alternative to detention on remand it can be achieved under the provisions of Law no. 302/2004 on international judicial cooperation in criminal matters, republished<sup>1</sup> or under an international convention ratified by Romania.

According to the special law (article 130 paragraph (1) and (2), *foreign criminal decision* means a decision issued by the competent court of another state, and *foreign judicial act* means a judicial act emanating from a competent foreign judicial authority.

We note that by the above mentioned provisions, the Romanian legislator makes a clear distinction between *criminal decision* and *judicial act*, in the sense that a criminal decision can only emanate from a court while the judicial act may emanate from another foreign judicial authority. In order to recognize a foreign criminal decision or a foreign criminal act, the following conditions must be met:

- the judicial decision or act emanate from a competent authority of that State; this condition can be verified only by the Ministry of Justice;
- the Romanian state has assumed such an obligation by an international treaty to which it is party;
- it was respected the right to a fair trial within the meaning of article 6 of the Convention on Defending the Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950;
- it has not been imposed for a political offense or for a military offense that is not an offense of common law;

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<sup>1</sup> Published in the Official Monitor, Part I, no. 377 of May 31, 2011.



- it respects the public policy of the Romanian state;
- the judicial decision or act can produce legal effects in Romania, according to the Romanian criminal law;
- it was not ruled a conviction for the same offense against the same person in the country, or in another state, recognized by Romania.

The special law provides two exceptions, namely: first, whenever the Romanian state has not assumed such an obligation by an international treaty, the recognition and enforcement of criminal decision or a foreign legal act can be done on a reciprocal basis, the fulfillment of the reciprocity conditions represents an activity that falls within the exclusive jurisdiction of the Ministry of Justice, the second exception referring to the situation when a Romanian citizen is involved, whose extradition has been previously granted by the Romanian State, the State where the decision was passed.

According to the Romanian law, the recognition and enforcement of foreign criminal judgment or foreign judicial act can be achieved by the Romanian judicial authorities through three distinct procedures namely: recognition procedure at the request of a foreign state, the special procedure for recognizing on the principal way and recognition procedure on incidental way. We will proceed to examine the procedure for recognition at the request of a foreign state, as this procedure refers to the scope of this study.

According to the law, the application for recognition of foreign criminal judgments will be transmitted to the Ministry of Justice, which in its turn will be forwarded to the General Prosecutors of the Court of Appeal in the district where the convict lives or resides. The sentenced shall be summoned and with the citation he will be informed with foreign decision with accompanying documents. The convict is entitled to a chosen lawyer and, where applicable, to an interpreter.

The competent court, that is the court of appeal informed by the designated prosecutor, hearing the prosecutor's conclusions and convict's declaration, if it finds that the legal conditions have been respected, he recognizes the foreign criminal decision or foreign judicial act, and in case the penalty imposed by that decision has not been performed or was performed only in part, it shall replace the unexecuted sentence or the rest of unexecuted punishment, an appropriate punishment according to the Romanian criminal law.

In case the foreign criminal decision relates to an immovable asset, the request shall be sent forward to the General Prosecutor's Office by the Court of Appeal in

whose district the asset is situated, and the Court of Appeal will decide by the passed decision in the council chamber that can be appealed.

After examining the above mentioned legal standards set out in the Romanian legislation, it results that there are no provisions in our law on recognition and enforcement of criminal judgments on some decisions on legal surveillance measures as an alternative to detention on remand in the European Union.

Also the provisions of internal legal norms govern only the recognition of judicial decisions emanating from any country in the world, without any reference to those issued by a competent authority of the Member States of the European Union. At the same time, these legal norms concern only conviction decisions, and no other criminal judgments. Regarding the comparison examination, we consider that it cannot be addressed in a comprehensive manner, because the legal rules contained in the European legislative act have no correlation in our national legislation.

Of course there can be taken into account the provisions of article 131 paragraph (2) of the special law, which states that foreign criminal judgments are implicitly recognized and executed in terms of reciprocity. We argue this opinion on the facts of the current situation between the Romanian and other European Union member states, where outside the European norms, the judicial cooperation in criminal matters between Member States can be made on a reciprocal basis, but only for the purposes of expanding opportunities for cooperation, not vice versa. Judicial cooperation in criminal matters in the European Union requires, in accordance with European legislative acts, the mutual trust and under this goal, the recognition and enforcement of judicial decisions and acts emanating from a competent authority of another Member State. At the same time, we must consider also the obligations assumed by Romania during the accession process to the European Union and the depositions of basic treaties, practically obliging the Member States to apply the developed legal rules.

#### **4. Critical Remarks**

Analyzing and observing the provisions of the European legislative act framework, of those from the Romanian special law and the conducted comparative examination, all lead to the formulation of some critical remarks aiming at the improvement of national and EU legislation in the domain of recognition and

enforcement of some decisions relating to legal surveillance measures as an alternative to detention on remand in the Member States of the European Union.

In practice, all is based on mutual trust that should exist between judicial authorities with tasks in the Member States domain, a trust that lies at the basis of the recognition and enforcement of these categories of judicial decisions.

In the Romanian special law, the institution of recognition and enforcement of criminal judgments and judicial acts given in another state, by the Romanian judicial authorities is governed by the provisions of article 130-136 of Law no. 302/2004, republished.

These provisions do not relate strictly to legal cooperation activity in criminal matters with EU Member States, but to all countries with which Romania cooperates in this area particularly important and sensitive at the same time. Also the provisions of special law concern all types of legal acts or foreign judicial decisions, without making any reference to their nature (final judgments of conviction, detention on remand, etc.)

In this context, for our special law to be consistent with the EU legislation, we believe that it is necessary to supplement the current provisions with norms specifically aiming at cooperation in this area with EU Member States.

Another issue that will certainly bring important prejudice to the recognition and enforcement of a decision activity emanating from a court in another Member State is bound by the definition of the European legislator of the types of legal surveillance measures, as alternatives to detention on remand, with direct reporting to the Romanian criminal law provisions. Thus, according to the Romanian law, preventive measures are: detention, the obligation of not leaving the town, the obligation of not leaving the country and detention on remand [article 136 paragraph (1) of Code of Criminal Procedure]. We note that the Romanian law provides for only two types of legal surveillance measures as an alternative to detention on remand, which is the obligation of not leaving the city and the obligation of not leaving the country. Meanwhile, the European legislator explicitly defines six such measures and five other possible measures that may be established by the Member States.

The two measures of our law are provided in the European legislative act article 8 paragraph (1), letter (c) and (d). The other four measures of the European

legislation provided as legal surveillance measures considered an alternative to detention on remand, are not mentioned in our legislation as preventive measures.

Thus, the legal surveillance measure that requires the person to inform the competent authority of the executing State on any change of residence, provided in the European legislative act article 8 paragraph (1), letter a) is similar to the obligation imposed on the defendant during the measure of obligation of not leaving the country or locality [art. 145 paragraph (11) points c) from Code of Criminal Procedure] and that of not changing residence without the consent of the judicial body that ordered the measure; the extent of legal surveillance measure that requires the person not to enter into certain localities, places or areas defined by the issuing or executing State, provided for by the European legislative act article 8 paragraph (1) letter b) is similar to the on remand measure called the obligation of not leaving the city, with the obligations that came with for the person concerned; the legal surveillance measure which requires to appear at specified times to a specific authority provided for in article 8 paragraph (1) letter e) is similar to the obligation of the defendant, during the obligation of not leaving the city or country, provided for at article 145 paragraph (11) letter b), where it is mentioned the obligation to appear to the police body designated for surveillance appointed by the legal authority that disposed the measure; finally, the legal surveillance measure that incumbents the obligation of the person to avoid contact with certain persons in connection with the offense alleged to be committed, according to article 8 paragraph (1) letter f) is similar to the obligation that may be imposed by the judicial body of the defendant during the obligation of not leaving the city or country measure in which he must not approach the injured person, family members, the person with whom he committed the offense, witnesses, experts or other persons determined by the judicial body, and not to communicate with them directly or indirectly [article 145 paragraph (12) letter c) from Code of Criminal Procedure].

Meanwhile, the European legislative act, leaving a certain independence of Member States in the possibility of identifying other surveillance measures, provides an example of such similar measures [article 8 paragraph (2)], some of which are mentioned by the Romanian internal law as obligations that can be imposed on the defendant by the judicial body that ordered the measure, namely: article 145 paragraph (1<sup>2</sup>) letter f) and d). Also this time, others do not have correspondence in the Romanian legislation, such as the obligation to seek medical

treatment or rehabilitation, that in the Romanian legislation is a safety measure provided by the provisions of article 112 letter a) Penal Code.

From the above mentioned information, it results that while the Romanian legislation provides for only two possible alternatives to detention, the European legislative act provides six such possibilities plus five more different exemplary possibilities that can be enacted at any time by the Member States. Of course almost all other measures are set out in our criminal procedure or law, or the requirements that need to be met by the accused or defendant during the measure of the obligation of not leaving the country or locality, or the obligations imposed by the judicial authority that ordered the measure. This situation will have important implications in terms of recognition and enforcement of judicial decisions as an alternative to detention on remand by the Romanian judicial authorities.

The necessary solution is to find an opportunity to harmonize the national legislation with the European depositions. European legislative act referred to in article 17 paragraph 1 that at the approach of the term where the legal surveillance expires, the issuer may request the competent authority of the executing Member State the extension of monitoring the surveillance measure, indicating the period of time. We believe that such a provision must be supplemented by an order of the issuing State to issue a new decision in question, to be sent in due time to the executing State.

In article 18 of the European legislative act there are mentioned the competences of the issuing Member State on all subsequent decisions, and in paragraph (1) letter c) issuing an arrest warrant or any other enforceable judicial decision having the same effect. We believe that the European legislative act should be completed with the possibility of issuing a European arrest warrant, which is the judicial act under which the judicial authorities of the executing State may arrest the person in question.

The provisions of article 21 paragraph (1) of the European legislative act provide that when issuing an arrest warrant, the person will be surrendered in accordance with the Framework Decision on European Arrest Warrant. We appreciate that these measures are incomplete, since the provisions of the said legislative act can only be executed for the enforcement of the European arrest warrant.

## **5. Conclusions**

Enhancing and improving the specific activity of judicial cooperation in criminal matters between the member States of the European Union should be achieved primarily through the adoption of a coherent legal framework, anchored in the realities of crime evolution. The adoption of the analyzed European legislative act represents in our opinion another step towards recognition and enforcement of judgments in criminal matters based on mutual trust between Member States.

Recognition and supervision of legal surveillance measures as an alternative to detention on remand represent, in fact, another concrete form of cooperation in criminal matters between Member States meant to ensure better management of the interests of European justice.

In this paper, in addition to the examination of the European legislative act and the Romanian law, there were considered a comparative examination and a series of critical remarks under the purpose of improving some provisions. Although the European legislative act is in force and it has not been transposed into the national legislation of Romania, it should though have legal effects until the set deadline, that is 1<sup>st</sup> December 2012.

## **6. References**

Framework Decision 2008/909/JHA of 27 November 2008 on 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.

Framework Decision 2008/947/JHA of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions for supervision of probation measures and alternative sanctions.

2009/299/JAI Framework Decision of 26 February 2009.

Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, the principle of mutual recognition of judicial decisions on legal surveillance measures as an alternative to detention on remand.

Law no. 302/2004 on international judicial cooperation in criminal matters, republished, published in the Official Monitor, Part I, no. 377 of May 21<sup>st</sup>, 2011.

\*\*\*The Current Romanian Criminal Code.

\*\*\*The Current Romanian Code of Criminal Procedure