

Monitoring the Probation Measures and Alternative Penalties in the European Union. Critical Remarks

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Abstract: In the context of EU extension, the main way to prevent and fight against crime of all kinds is represented by the intensification in the specific activities of judicial cooperation in criminal matters in all member states, based on a legislation anchored in the present realities. The most important form of judicial cooperation in criminal matters, based on mutual confidence in the decision taken by the competent judicial organisms is, in our opinion, the recognition and execution of foreign criminal decisions and judicial acts. One of the ways in which this type of cooperation is accomplished is represented by the mutual recognition and monitoring of suspended sentences, sentences with postponement of execution of the conviction, alternative penalties and decisions on probation, that have the purpose of increasing the chances for social reintegration of the convicted person. Recognizing and executing such an injunction in another member state than the one in which the conviction was established imposes, for the executing member state, the necessity of taking the most efficient measures for each singular case. The critical examination of the dispositions of the Council’s Decision Frame 2008/947/JAI, that regulates this procedure, as well as the special internal law leads to the conclusion of the existence of provisions that are at least debatable and the necessity of urgent transposition of the European normative act’s provisions in our internal legislation.

Keywords: judicial cooperation, recognition, execution, probation measures, alternative penalties

1. Introductory Considerations

The recognition and execution of foreign criminal decisions and judicial acts represent, in our opinion, the most important form of international judicial cooperation in criminal matters. When analyzing the complex institution of recognition of foreign criminal decisions and judicial acts, we have to take into account both the criminal decisions that come from the Romanian judicial

authorities, as well as those that come from the competent judicial authorities of other states (Boroi & Rusu, 2008, p. 347).

At the Europe's Council level, the first normative act that regulated the institution of recognition and execution repressive criminal decisions was the European Convention on the international value of repressive decisions, adopted at Hague on May 28, 1970.¹ Accomplishing the purpose assumed by the European Union, that is to create a space of freedom, security and justice entails, in what concerns the member states, an understanding of these concepts that are based on the principles of freedom, democracy, respecting the human rights and fundamental liberties as well as lawful state.

One of the essential elements of police and judicial cooperation within the European Union is represented by the mutual recognition of injunctions, principle that is consecrated in the conclusions of the European Council's reunion in Tampere, October 15-16, 1999 and was reaffirmed in The Hague Program, on November 4-5, 2004 on consolidating liberty, security and justice within the European Union. Also, within the measures program on November 29, 2000, adopted with the purpose of applying this principle, the Council has decided in favor of cooperation between member states as regards the execution of suspended convictions and conditional release in another member state than in the judicial decision was rendered.

In this context, mutual recognition and supervision of suspended convictions, convictions with postponement of execution, alternative penalties and decisions regarding probation aim at increasing the opportunities for social reintegration of the convicted person, allowing the person to maintain his/her family connections, the linguistic, cultural and other type of connections, as well as improving the monitoring of respecting the probation measures and alternative penalties, in order to prevent recidivism and offering proper attention to victims and citizens in general.

The European normative act that regulates cooperation between member states in this field is the Council's Decision Frame 2008/947/JAI on October 27, 2008 on the application of the principle of mutual recognition of injunctions and probation

¹ The European convention on the international value of the repressive criminal decisions, adopted at Hague on May 28, 1970, was ratified by Romania through Government Ordinance no. 90/1999 for the ratification of the European Convention on the international value of repressive criminal decisions, Adopted in The Hague, on May 28, 1970, published in the Official Monitor no. 421 on August 31, 1999, approved by law no. 35/2000 on the approval of Government Ordinance no. 90/1999, published in the Official Monitor no. 158 on April 17, 2000.

decisions in order to monitor the probation measures and alternative penalties¹, amended and completed by the Council's Decision Frame 2009/299/JAI on February 26, 2009 to modify Decision Frame 202/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/947/JAI, to consolidate human procedural rights and encourage the application of the principle of mutual recognition regarding the decisions taken in absence of the person in question from the trial².

Thus, according to the provisions of the European normative act mentioned above, the probation measures and alternative penalties that have to be monitored also comprise dispositions regarding:

- the behavior (ex. the obligation to stop drinking alcohol);
- residence (ex. the obligation to change residence caused by domestic violence);
- education and training (ex. the obligation to attend "safe driving" classes);
- leisure activities (ex. obligation to stop practicing a certain sport or participating at it);
- limitations on the ways to deploy a professional activity (ex. the obligation to seek a professional activity in another working environment; this obligation does not include monitoring the compliance with losing the right to exert a profession that derives from the specific penalty).

Of course that the probation measures and alternative penalties can be completed with others, this aspect depending on each member state.

Consequent to its aspirations for European integration and wanting to actively participate to the general effort of the world's states in what concerns the effectively prevention and fighting against crime, Romania adopted Law no. 302/2004 on international judicial cooperation in criminal matters³, that also comprises

¹ Published in the Official Monitor of the European Union no. L337/12 on 16.12.2008.

² Published in the Official Monitor of the European Union no. L81/24 on 27.03.2009.

³ Law no. 302/2004 on international judicial cooperation in criminal matters was published in the Official Monitor no.594 on June 1st, 2004 and was successively modified and completed by Law no. 224/2006 published in the Official Monitor no. 534 on June 21, 2006, Government Ordinance no. 103/206 on some measures to facilitate international police cooperation, published in the Official Monitor no. 1019 on December 21, 2006 approve through Law no. 104/2007, published in the Official Monitor no. 275 on April 25 and Law no. 222/2008 to modify and complete Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official monitor no. 75 on November 1, 2008.

dispositions regarding the recognition and execution of foreign criminal decisions and judicial acts, including those whose stemming from a judicial authority of a EU member state.

2. Objectives, Scope and Definition of Terms

The European normative act aims at three objectives, namely:

- facilitate the social rehabilitation of convicted individuals;
- improving victims and citizens protection;
- facilitate the application of adequate probation measures and alternative penalties in case of criminals that have the residence outside the issuing state;

The provisions of this community instrument are applied only in what concerns:

- the recognition of injunctions and, if necessary, probation decisions;
- the transfer of the responsibility to monitor the probation measures and alternative penalties;
- other community instruments that refer to the abovementioned.

In order to eliminate the unilateral interpretations of some terms by the member states' institutions in the cooperation activity, a series of definitions have been included in the European normative act, that will be taken into account in the specific judicial cooperation activities I criminal matters, in order to recognize and execute criminal decisions, namely:

1. "injunction" - any definitive injunction or order issued by a judicial instance of the issuing state, establishing that a private person committed a crime and is applied:
 - a) an imprisonment punishment or any other custodial measure, in case a decision of probation was given based on the injunction or a subsequent probation decision;
 - b) a suspended conviction;
 - c) sentences with the postponement of execution of the conviction;
 - d) an alternative penalty.

2. “suspended conviction” - refers to an imprisonment punishment or a custodial measure, the execution of which is conditionally suspended, totally or partially, when the sentence is given, by imposing one or more probation measures. This type of measures can be included in the injunction or established through a separate probation decision adopted by a competent authority;
3. “sentences with the postponement of execution of the conviction” – injunction according to which the application of a punishment was conditionally postponed, by imposing one or more probation measures, or one in which several probation measures are imposed instead of an imprisonment punishment or a custodial measure. This type of probation measures can be included in the injunction or can be established in a separate decision adopted by a competent authority;
4. “alternative penalty” - a penalty that does not consist in an imprisonment punishment, a custodial measure or a financial penalty and that entails an obligation or a measure of constraint;
5. “probation decision” - injunction or definitive decision of a competent authority of the issuing state, taken based on an injunction that:
 - a) grants probation;
 - b) entails probation measures.
6. “release on probation”- definitive decision taken by a competent authority or that derives from the internal legal norms on the release of a convicted person after the partial execution of an imprisonment punishment or a custodial measure, by imposing one or several probation measures;
7. “probation measures”- obligations and measures of constraint imposed by a competent authority to a private person, according to the national legislation of the issuing state, regarding a suspended sentence, a sentence with the postponement of execution of the conviction or a release on probation;
8. “issuing state”- member state in which the injunction is pronounced;
9. “executing state” member state in which the probation measures and alternative penalties that follow a decision according to article 8 are monitored.¹

¹ Council’s Decision Frame 2008/947/JAI on November 27, 2008 on the application of the principle of mutual recognition of injunctions and probation decisions to monitor probation measures and alternative penalties.

Analyzing these definitions, in relation to the dispositions of our internal normative acts in this field, we observe that most of them have a correspondent in the Romanian legislation, having practically the same meaning. Nevertheless, we have to mention the fact that there are, in the European normative act, definitions that are not found in our legislation, such as “probation measures” and “probation decision”.

3. Competent Authorities, Types of Probation Measures and Alternative Penalties

According to the provisions of the European normative act, each member state will have to appoint the competent authorities for the recognition and execution of such injunctions, both as issuing state as well as executing state and to inform the Council’s General Secretariat. The Romanian special law stipulates that the competent Romania judicial authority that can recognize and execute an injunction issued by the judicial authority of another state is the court of appeal whose circumscription comprises the residence of the person convicted.

We have to mention that the special Romanian law has granted the competence to the court of appeal whose circumscription comprises the foreign residence of the convicted person for the recognition and execution of all categories of criminal penalties, including the custodial measures.

The Decision Frame stipulates the following probation measures and alternative penalties:

- a) the obligation of the convicted person to inform a certain authority regarding any change of residence or working place;
- b) the obligation not to enter in certain cities, places or specific areas in the issuing state or executing state;
- c) the obligation that contains limitations in what concerns leaving the territory of the executing state;
- d) the dispositions on the behavior, residence, education and training, leisure activities or dispositions that contain limitations on the types of deploying professional activities;
- e) the obligation to be present, at set dates, in front of a certain authority;

- f) the obligation to avoid contact with some persons;
- g) the obligation to avoid contact with certain objects, that have been used or could be used by the convicted person to commit a criminal act;
- h) the obligation to repair, from a financial point of view, the prejudice caused by crime and /or the obligation to provide proof of fulfilling this obligation;
- i) the obligation to provide community work;
- j) the obligation to cooperate with a monitoring agent (probation advisor) or a representative of a social service with responsibilities in what concerns convicted persons;
- k) the obligation to follow a therapy treatment or detoxification. (7)¹.

The European normative act stipulates the member states' possibility to establish other measures besides the ones mentioned above that they can monitor, with each one's obligation to inform the Council's General Secretariat. In what concerns the provisions of the special Romanian law, as well as other criminal laws, we mention that besides the abovementioned, there are some differences. Thus, the special law, as mentioned, does not refer to probation measures or alternative penalties, as the specified normative act mentions only the conditions and the procedures for recognition of criminal decisions taken by competent judicial authorities belonging to another state. Given the differences between Romanian and European legislation regarding the definition of probation measures and alternative sanctions, we appreciate that require some additional explanation.

3.1. First point out that the term of probation as is provided by our criminal law. Proceeding to the interpretation of that phrase used in the European legislative act, in relation to our law, we consider that it may be interpreted as representing some safety measures, or measures of surveillance or other obligations imposed by the court during the suspension of penalty under supervision.

3.2. Both the obligation to inform the person convicted of a certain authority of any change of residence and the obligation to inform change jobs not covered by our law as criminal sanctions. However, the two measures mentioned in the Penal Code as obligations of the convicted person, suspend execution of the sentence under supervision, the supervisory measures. According to Article 86³ points b) of Penal

¹ Art. 4 of Council's Decision Frame 2008/947/JAI on November 27, 2008 on the application of the principle of mutual recognition of injunctions and probation decisions to monitor probation measures and alternative penalties.

Code, during probation, among other obligations, the prisoner must give notice in advance of any change of domicile, residence or dwelling and any travel exceeding 8 days, and return. The second obligation mentioned the European legislative act is required by our legislation, all the surveillance measure in article 86³ let. c), which indicates that the person is required to communicate and justify change jobs.

3.3. The obligation not to go certain places, places or areas defined in the issuing or enforcement, said the European legislative act is referred to differently in our legislation. Thus, the prohibition to be in certain localities is a criminal penalty, namely, a measure of safety provided by article 112 let. D) and Article 116 let. C). The obligation to be in certain places is a measure which can be ordered by a court sentenced during suspend execution of the sentence under supervision, as provided in Article 86³ al. (2) c).

3.4. The obligation of limitations on state enforcement of expulsion is provided in our legislation in Law 248/2005¹, with amendments and additions, the regime of free movement of Romanian citizens abroad.

Under the provisions of the normative document referred to restrict the exercise of right of free movement of Romanian citizens abroad may be ordered for a period not exceeding 3 years, only to conditions and the following persons:

- those which have been returned from a State under a readmission agreement between Romania and that State, this measure will be decided by the court in whose territorial area of residence of the person, or if domiciled abroad the Bucharest Tribunal, at the request of the General Directorate of Passports;
- persons whose presence in a State through a place or activity they would perform, would seriously damage the interests of Romania and, where appropriate, bilateral relations between Romania and that State, as it has to request the institution which holds data or information of this kind, the court in whose territorial area of residence of such person, and when it is domiciled abroad, the Bucharest Tribunal.

We observe that the special law provides for the situation in which such person has decided against a final court decision, prohibiting the presence in a State on a limited term.

¹ Published in the Official Monitor no. 682 of July 29, 2005.

3.5. The provisions relating to conduct, residence, education and training, leisure activities or containing limitations on how to conduct professional, are set differently in our legislation. Thus, measures of education, training and how to conduct a professional activity are provided in Article 86³ al. (3), a) of Penal Code and those relating to residence are provided in article 86³ al. (3), b) both the obligations imposed by the court (optional) during the suspension of penalty under supervision.

3.6. Obligation to appear in the data set before a certain authority is in our law, a measure of supervision required for suspension of penalty under supervision. This supervisory position is provided in article 86³ al. (1), a) of let. C).

3.7. Duty to avoid contact with certain persons is provided in our legislation in article 86³ al. (3). d), the obligation may be imposed voluntarily by the court during the suspension of penalty under supervision.

3.8. Duty to avoid contact with certain objects, which were used or could be used by the convicted person in order to commit a criminal offense, is provided in our law as a measure of safety in the article 112 let. f), let. C), and in article 86³ al. (3). e) C. criminal, that obligation on the court during the suspension of penalty under supervision.

3.9. Obligation to compensate in terms of financial damage caused by crime and / or required to provide proof of meeting this obligation is provided in our legislation as a measure to revoke the conditional suspension of penalty execution for non-performance of established civil court. Also, damage caused by crime, can also be a mitigating factor that may be considered by the court, the judicial individualization of criminal sanction to be imposed.

3.10. The obligation to provide activities for the community not provided for criminal sanction in our law to the major people, than the educational measure that can be taken from minor to which an educational measure referred to in Article 103 Penal Code.

3.11. The obligation to cooperate with a surveillance officer (probation officer) or a representative of a social service with responsibilities in relation to persons convicted is provided in our legislation in article 83³ al. (1). a) monitoring is considered as the court ordered the suspension of penalty under supervision.

3.12. The obligation to undergo therapeutic treatment or rehab is considered in our law as a safety measure provided for in article Of 112 let.) of Penal Code. And

sentenced to a requirement imposed by the court during the suspension of penalty under surveillance [article 86³ al. (3). f)].

From the examination of the way that our law provides types of probation and alternative measures mentioned in European legislative act, we see some significant differences. Thus, we find that some types of probation and alternative measures are defined in our laws that safeguard measures can be taken independently or together with the main sanction against a person who has committed an offense under the criminal law. Also, another part of them is in our law or surveillance measures or other requirements imposed by a court sentenced during suspend execution of the sentence under supervision. A final category is the educational measures that may be applied juvenile offenders.

However, whatever is called in the sentencing State, and even if the European regulatory framework has been transposed into our domestic law, these measures of probation or alternative (known as the European legislative act), provided that judicial decision that has been recognized by the Romanian courts, will be implemented in Romania.

4. Crimes that Require the Application of this Principle. Double Criminality

The general rule is that the issuing State will require the recognition and enforcement of judgments and probation decisions for the supervision of probation measures and alternative sanctions in another Member State, where there is double criminality.

Given the great social danger, the European normative act provides and other groups of crimes that do not require verification of double criminality, provided that the maximum penalty under the law of the conviction to be at least three years¹.

According to the European normative act, the Council may decide at any time to add more categories of offenses than those mentioned above, in consultation with Parliament, as provided in the Treaty on European Union.

¹ These crimes are referred to in Article 10 (1) of Framework Decision 2008/947/JAI.

5. Grounds to Refuse the Recognition and Monitoring

The competent authority in the executing state can refuse the recognition of the injunction or the probation decision and implicitly the execution of monitoring probation measures or alternative penalties, in the following cases:

- a) The certificate is incomplete or does not correspond with the injunction or the decision of suspending the execution of the punishment and was not correctly filled in or corrected in due time established by the competent authority of the executing state;
- b) The criteria mentioned in the European normative act are not fulfilled;¹
- c) The recognition of the injunction and assuming the responsibility to monitor the probation measures and the alternative penalties would contravene with the *ne bis in idem* principle;
- d) In one of the cases mentioned in article 10, al.(3) and in case the executing state made a statement based on article 10, al.(4) in one on the cases mentioned in article 10, al.(1), the injunction refers to actions that would not represent crimes according to the law of the executing state. Nevertheless, in fiscal, custom and currency exchange matters, the execution of the injunction or the probation decision cannot be denied based on the fact that the law of the executing state does not impose the same type of taxes or duties or does not contain the same dispositions in fiscal, customs or currency exchange matters as the law in the issuing state;²
- e) The execution of the punishment is prescribed according to the law of the executing state and refers to an action regarding the competence of that state, under its national legislation;
- f) The immunity conferred by the executing state does not allow the monitoring of probation measures or alternative penalties;

¹ The criteria mentioned in article 5 (1) and (2) and article 6 (4) of the European normative act.

² Article 10, al.(3) stipulates the necessity of double incrimination and article 10, al.(4) stipulates that once the European normative act was adopted and even after that, any member state can notify a declaration to the Council's General Secretariat in which it declares that it will not apply the dispositions of al.(1), declaration that can be withdrawn later on.

- g) According to the law of the executing state, the convicted person is not criminally responsible due to the age in relation to the crime related to the injunction;
- h) According to the certificate provisioned in article 6, the person in question wasn't present at the trial that led to the decision, except for the care in which the certificate mentions that, according to other procedural requests defined in the national legislation of the issuing state, the individual:

In due time

- i. was either personally summoned and thus informed about the set date and place of the trial, undoubtedly establishing that the private person was acquainted with the trial;
 - ii. being acquainted with the trial, mandated a lawyer that was appointed by the private person in question, or by the state to defend the person at the trial and was really defended by that lawyer at the trial
- or
- iii. after being presented the decision, was expressly informed regarding the right to retrial or the appeal, case in which it has the right to be present and that allows the cause and the evidence to be re-examined, fact that could lead to the annulment of the initial decision:
 - declared that he/she does not contest the decision
- or
- didn't solicit a retrial of the cause or promoted an appeal in due time.¹

The provisions mentioned in lit. (h) were presented as they were introduced through article 6 in the Decision Frame 2009/299/JAI ob February 26, 2009.

In what concerns the case in which one of the possible reasons for non recognizing such a decision is that it refers to crimes that, according to the laws in the executing state, are considered to be totally committed or in a significant proportion on that territory or in a place that is equivalent to its territory, the decision for the non recognition will be taken only in exceptional cases, after taking into consideration all the specific circumstances of the case, especially the degree in which the actions were committed or not in the issuing state.

¹ Council's Decision Frame 2008/947/JAI on November 27, 2008, article 11.

The general rule established through the dispositions of the European normative act is that in all the situations in which the executing state intends to proceed to the non recognition and implicitly non execution of such a decision, that state, through its competent judicial authority, will communicate with the competent authority in the issuer state, soliciting the provision of additional information.

In case the competent authority from the executing state decides to invoke one of the reasons mentioned above for not recognizing such an injunction, the authority can still decide, by mutual agreement with the competent authority from the issuing state, to monitor the probation measures or the alternative penalties and, if necessary, the probation decision that has been transmitted, without taking responsibility for taking any decision on the competence regarding the subsequent decisions and the applicable law.

In what concerns the period of time in which the competent authority has to make a decision regarding the recognition and execution of an injunction or a probation decision is 60 fays from receiving the specified documents. The competent authority of the executing state will proceed, within the period of time mentioned above, to inform the competent authorities of the issuing state on its decision. In case this period of time cannot be respected by the executing state, the latter will inform the competent authority in the issuing state, by any means, motivating the delay and mentioning the estimated necessary time to take a definitive decision.

The monitoring and taking the probation measures and alternative measures will be made in accordance with the laws of the executing state.

6. Recognition and Execution of Injunctions in the Present Romanian Legislation

As we mentioned before, the frame internal normative act that regulates the principle of recognition and execution of foreign injunctions or judicial acts is Law 302/2004 on international judicial cooperation in criminal matters, with the subsequent amendments and completions.

According to the provisions of the internal normative act, the collocation foreign criminal decision describes *a decision taken by a competent instance belonging to another state*, and the foreign judicial act is *a judicial act that stems from a competent foreign judicial authority*.

In order to recognize and execute at the same time a foreign criminal decision or a judicial act by the competent authorities of the Romanian state, a series of conditions have to be fulfilled:

- a) Romania must have assumed such an obligation through an international treaty to which it is signatory;
- b) The right to fair trial was respected, according to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950.
- c) The decision wasn't taken for a political crime or a military crime that is not a common law crime;
- d) Respects the public order of the Romanian state;
- e) The decision or the judicial act can have judicial effects in Romania according to the Romanian criminal law;
- f) The same person did not receive the same decision before in Romania;
- g) There wasn't a decision related to the same actions that the same person committed in other states other than Romanian, that hasn't been recognized by Romania.

A foreign criminal decision or a judicial act can be internally recognized based also on the reciprocity, even if the condition regarding the closure of a treaty signed also by Romania was not fulfilled.

Also, a final situation provisioned by the internal law, in which a foreign injunction or judicial act can be recognized, refers to the fact that the decision refers to a Romanian citizen, that was extradited in the foreign state in which the decision was taken.

The Romanian special law provisions three general procedures of recognition, namely:

- Recognition at the request of a foreign state;
- Special procedure of recognition on main path;
- Recognition procedure on incidental path.

The special law stipulates that, before taking a decision on the recognition of a foreign criminal decision, the competent instance can, at the request of a foreign

transmitted through the Ministry of Justice and Civil Liberties, proceed to the arrest of the person in question or another preventive measure that will prevent the person to leave the Romanian territory.

In what concerns the recognition and execution of the criminal decisions and judicial acts that derive from a Romanian competent authority in another state, we have to mention the fact that this procedure will apply only in the situations in which one of these conclusions is fulfilled:

- the convicted person is a citizen of the solicited state or a third one, or is stateless and resides on the territory of that state, and according to the solicited state's law, the extradition of the convicted person in Romania in order to execute the punishment is not admissible or the foreign state refuses to grant the extradition;
- the convicted person is a Romanian citizen residing on the territory of the solicited state or has the citizenship of the solicited state and the foreign state refuses to grant his/her extradition.

The dispositions mentioned above are not applied if the circumstances of the cause imply it, based on a treaty concluded with the foreign state, when the safety measure of extradition is applied.

The Romanian state will formulate such a request even in the cases when the convicted person is executing a punishment in the solicited state for a punishment other than the one that determined the conviction in Romania.

The general condition that has to be fulfilled in all cases is the one that the duration of the punishment has to be bigger than one year.

The recognition is solicited based on the condition of non aggravation, in the foreign state, of the punishment applied by the decision taken in Romania. Also, the recognition of foreign judicial acts issued by competent Romanian authorities is accomplished under the conditions of the applicable international treaty.

When examining the legal norms presented above, we conclude that they have a general character, being applicable only in the relations of this kind between Romania and the world's states. Thus these do not provision any disposition that refers to the recognition and execution of injunctions and probation decisions for monitoring the probation measures and alternative penalties in an EU member state.

7. Conclusions and Critical Remarks

Following the preamble of the European normative act, the mutual recognition and monitoring of the suspended convictions, convictions with postponement of the sentence, alternative penalties and decisions regarding the release on probation aim at increasing the opportunities for social reintegration of the convicted person, allowing the individual to maintain the family, linguistic, cultural and other connections, but also improving the monitoring of probation measures and alternative penalties, with the purpose of preventing recidivism and offering the due attention to protecting the victims and the citizens in general.

We have to mention the fact that until the release of this European instrument, the European Council's Convention on November 30, 1964 on the supervision of convicted persons or those released on probation.

Thus, the European normative act establishes the application of the principle of mutual recognition of injunctions and probation decisions regarding the monitoring of probation measures and alternative actions in another EU state than the one in which they have been taken.

In order to recognize these categories of injunctions, it is necessary to fulfill some conditions expressly provisioned in the European normative act.

When together with the injunction other measures have been disposed, they will be executed based in the Decision Frame that regulates their way of execution.

According to the provisions of article 25, the member states will adopt the necessary measures in order to comply with the European normative act until December 6, 2011, the Decision Frame entering into force on the day of its publication in the European Union's Official Journal, on December 16, 2008.

Taking into consideration the fact that the European normative act hasn't been transposed into our internal legislation, we assert that it is necessary to make some specifications.

The Lisbon Treaty¹ brought a series of modifications and completions to the two main treaties of the EU, the Treaty on the European Union and the Treaty

¹ The Lisbon Treaty was signed on December 13, 2007 and brought a series of completions and modifications to the existing treaties. The consolidated version of the Treaty on the European Union and the Treaty on the functioning of the European Union was published in the Official Journal of the

establishing the European Communities. Thus, according to article 2, al. (1), the denomination Treaty establishing the European Communities is replaced with “Treaty on the functioning of the European Union”.

According to the provisions of article 82¹, “*judicial cooperation within the European Union is based on the principle of mutual recognition or injunctions and includes the approximation of lawful acts and administrative norms of the member states in the fields mentioned in al. (2) and article 83*”.

In the same line, for the exertion of the Union’s competencies, the institutions adopt regulations, directives, decisions, recommendations and notices.² In what concerns the decisions, they are mandatory “in all their content”³.

On the other side, regarding the execution of the obligations stemming from the international treaties Romania is part of, the Romanian Constitution stipulates that “*the Romanian state commits to fulfill in good faith the obligations stemming from the treaties it participated to*”.⁴

In the same time, regarding the obligation to execute the provisions of the European normative acts and their precedence in relation to the internal normative acts (in some cases), the same Romanian Constitution stipulates that: “*following the adherence, the provisions of the European Union’s constituent treaties, as well as the other community regulations that are mandatory have precedence over the contrary dispositions in the internal laws, respecting the provisions in the adherence act.*”⁵

Whereas the dispositions mentioned above, we can conclude that the provisions of the Decision Frame in question, even if they haven’t been transposed in our internal

European Union C 115/1 on 9.05.2008. The Lisbon Treaty was ratified by Romania through Law no. 13 on February 7, 2007 for the ratification of the Lisbon Treaty, modifying and completing the Treaty on the European Union and the Treaty establishing the European Communities, signed in Lisbon on December 13, 2007, published in the Official Monitor no. 107 on February 12, 2008.

¹ As presented in the consolidated version of the two treaties.

² Article 288, par.1 of the consolidated version of the two treaties.

³ *ibidem*, art.288, par.4.

⁴ The Romanian Constitution, published in the Official Monitor no.233 on November 21, 1991, reviewed through Law429/2003, law that was approved by national referendum on October 18-19 2003 and entered in force on October 29, 2003, the publication date in the Official Monitor no.758 on October 29 2003 of the Constitutional Court’s decision no.3 on October 22 2003 confirming the result of the national referendum from October 18-19, 2003 on the Law for reviewing the Romanian Constitution. Following the reviewing, the Constitution was republished by the Legislative Council, according to art.152 of the Constitution, changing the denominations and offering the texts a new regulation, in the Official Monitor no.767 on October 31st, 2003. See art.11, al. (1).

⁵ See art.148, al. (2).

legislation, are applicable for Romania. In other words, now the Decision Frame in question is in force and produces juridical effects, the application of its provisions being mandatory both for Romania as well as for the other member states. In these conditions, the Romanian state, through its competent judicial organisms, will have to apply the provisions of this European normative act, in the cases that necessitate the recognition and execution of a injunction or a probation decision to monitor the probation measures and alternative penalties on its territory or the territory of any other member state.

In what concerns the special law (Law no. 302/204 on international judicial cooperation in criminal matters, with the subsequent modifications and completions) as mentioned before, we mention that in its content there is no disposition referring to the recognition of injunctions and probation decisions to monitor probation measures and alternative penalties, the existent dispositions regulating the general frame, applicable in the relations between Romania and any state of the world.

In these conditions, we assert that the completion of the special law with a new chapter (section) is imposed, completion that will stipulate the specific norms of applying the provisions of the abovementioned European normative act.

Another aspect that has to be regulated in our special law is the one referring to the document through which the member states solicit the recognition and execution of such a decision. Thus, while in the special law the request to recognize a foreign criminal decision is mentioned, the European normative act mentions the certificate as accompanying document for the definitive injunction.¹ Other fundamental differences between the dispositions of the European normative act and the special law appear in what concerns the recognition procedure of such a decision.

Examining the European normative act highlights some dispositions that are at least debatable in our opinion.

Thus, the text of article no.11 named “*Grounds for refusing recognition and monitoring*” mentions in al. (1) that “*the competent authority of the executing state can refuse to recognize the injunction or, if necessary, the probation decision or alternative penalties...*”

When interpreting the dispositions mentioned above, we notice that although the denomination of the article lead to the conclusion that there are some mandatory grounds for non recognition and on execution of such decisions, subsequently,

¹ The example for drafting is presented in annex 1 of the Decision Frame.

within al. (1), the term “may” appears, leading to the conclusion that the recognition and execution of such a decision is still optional for the executing state.

Thus, the grounds for non recognition and non execution of such decisions, mentioned in the European normative act are just optional and not mandatory.

Another observation we have to mention is related to some reasons that can be optional as we mentioned before, provisioned in article 11.

Thus, among other optional reasons that can determine the refusal of such an injunction, the following are included:

- a) the execution of the punishment is prescribed according to the legislation of the executing state and refers to an action that is the competence of that state, according to its national legislation;
- b) the immunity conferred by the executing state’s law deters the monitoring of probation measures or alternative penalties;
- c) according to the legislation of the executing state, the convicted person is not criminally responsible for the action that led to the injunction;
- d) the injunction refers to crimes that are considered to have been committed entirely or in a significant proportion on the territory of the state or in an area equivalent to its territory, according to the legislation of the executing state.

There is no doubt that according to our legislation, the recognition and execution of an injunction referring to a prescribed crime or the person in question benefits from immunity or is younger than 14 years old or the crime wasn’t committed in Romania or in another area representing the territory of Romania, is not possible.

Thus, when examining these four reasons, we observe that each one of them, according to our legislation, will inevitably lead to the refusal of executing the injunction in question. Thus, this time we cannot be talking about a facultative option of the Romanian competent judicial authorities to recognize this decision or not and the solution to be pronounced will be not to recognize the injunction. So the four reasons for not recognizing and not executing mentioned above cannot have other character than mandatory. We assert that, like the Romanian state, no other member state will recognize this type of injunctions.

In these conditions, we assert that the European normative act will have to be completed and modified, so that a clear difference between the optional refuse

reasons and the mandatory ones regarding the recognition and execution of such injunctions is made.

We also mention the fact that a judicial cooperation between the involved states is necessary, starting with the criminal prosecution or until the definitive injunction is pronounced, avoiding thus the possibility to refuse the execution of an injunction by the executing state.

Another observation refers to the situation in which the convicted person disappeared from the issuing state, case in which the measure to be taken is the prosecution of the person in question within the European Union, with the immediate information of the possible executing state, taking into consideration the citizenship or the residence of the convicted person. We have to state that the European normative act does not comprise any dispositions regarding this situation that is very frequent in the judicial practice. Based on the abovementioned, we mention that the European normative act should provide these aspects or they should be regulated by another European normative act.

Also, the European normative act does not stipulate any disposition regarding the involved states' obligation to create a record of the persons that have received such convictions.

In what concerns the transfer of the convicted persons in order to execute the punishment in another state than the issuing one, we assert that the internal normative act, as mentioned before, previsions dispositions that have a general character, applicable in the relations of this kind that Romania has with any other state, including the EU member states. Thus our special law does not provision any other disposition that is applicable only in what concerns the relations with the EU member states.

Proceeding to a more detailed comparative analysis of the special law's provisions regarding the two types of international judicial cooperation in criminal matters (recognition and execution of foreign injunctions and judicial acts and the transfer of convicted persons) and the provisions of the European normative act, we observed that a great part of the dispositions in the Decision Frame in question are mentioned in the special Romanian law.

On the other hand, we mention the fact that the European normative act in question does not provision measures regarding the procedure of transferring the convicted persons, for monitoring the probation measures and alternative penalties in another

state than the issuing one. In this context, we mention that the institution of transferring the convicted persons, for monitoring the probation measures and alternative penalties in another state than the one in which the penalty was given, no longer represents a way to fulfill the decision of recognizing and executing an injunction to monitor probation measures and alternative penalties.

Of course that the transfer of convicted persons is still a form of international judicial cooperation in criminal matters, but only in the case in which the transfer is solicited in order to execute other judicial measures other than the recognition and execution of such an injunction by another state than the issuing one.

Finally, a final critical observation aims at some terms used in the European normative act, namely probation decision and probation measures. We mention the fact that neither of these two terms has any correspondent in the Romanian legislation and this might cause confusion in the general activity of judicial cooperation in criminal matters between the Romanian competent authorities and another member state.

In conclusion, we mention the fact that mutual recognition of injunctions and probation decisions to monitor probation measures and alternative penalties will prove to be useful in time, imposing a basic principle in the judicial cooperation in criminal matters between the EU member states. We assert as well that the modification and completion of the European normative act is necessary, following the above mentioned guidelines, as well as our special internal law.

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