International cooperation and legal assistance in criminal matters.
The confiscation order

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Abstract: The unprecedented development of international relations in the contemporary society has been accompanied by a similar unprecedented rise in international crimes by the proliferation of certain forms of organised crimes on the territory of several states. In our contemporary world, whose main characteristic is the extraordinary cross-border mobility, the problem mentioned above acquires a new dimension that is of essence for the performance of justice.

Keywords: precedent; proliferation; territory; states; contemporary world.

Introduction

The ever higher danger caused by the increase in the number of transnational crimes, the need of preventing and fighting against such crimes more effectively within an organised framework worldwide have led to the adoption of regional or global instruments that should unite the efforts of the world countries in stopping the proliferation of transnational criminality [1].

Gradually, another need has arisen, that of inter-state cooperation for the surrendering or acceptance of people having committed offences on the territory of a state and taking refuge in another state in order to avoid prosecution, trial or serving a punishment. In order to be able to fairly solve a case containing elements of foreign origin, other cooperation methods are needed, such as:
- freezing or confiscation of property being used when the offence was committed or of its proceeds, property that located on the territory of another state;
- transmission of objects that constitute means of evidence;
- hearing of witnesses or experts located in a state other than that of the criminal trial;
- establishment of joint investigating teams for the solving of transnational cases [2];

The international legal assistance in criminal matters shall be requested by the competent judicial authorities from the requesting state and shall be granted by the judicial authorities from the requested state, based on international treaties or, in absence thereof, based on reciprocity.

The most widely known multilateral convention and also the most widely used convention by Romania is the European Convention of Mutual Assistance in Criminal Matters, adopted in Strasbourg on 20 April 1959. This old convention of the Council of Europe is applied by Romania in its relations with the other 45 member states of the Council of Europe, as well as with non-member states who have ratified such convention. The Convention is supplemented by the Additional Protocol of 17 March 1978 and the Second Additional Protocol of 8 November 2001. The Second Additional Protocol, which is very similar to the EU Convention of 29 May 2000 came into force for Romania on 1 March 2005 and, as the First Additional Protocol, applies in the relations with the signatory states of the Convention, which ratified it as well. This European legal instrument allows that the proceedings documents be communicated by mail and regulates modern methods of assistance: a. hearings via videoconference and telephone; b. controlled deliveries; c. cross-border monitoring; d. spontaneous transmission of information, etc.

The judicial cooperation in criminal matters within the European Union is grounded on European instruments, which have been lately based on the principle of mutual recognition. If initially such cooperation was mainly based on Conventions, lately it has been preferred to adopt framework-decisions and decisions of the Council, which have the advantage that they do not need ratification by the member states - (for example, The EU Convention of Judicial Cooperation in Criminal Matters of 29 May 2000 came into force no sooner than August 2005, as it was only then that the condition of the 8 ratifications was fulfilled) - and they facilitate the harmonisation of legislations.
The EU Convention of Judicial Assistance in Criminal Matters was taken over in its entirety in Title VII of Law no. 302/2004 on the international judicial cooperation in criminal matters, as it was amended and supplemented by Law no. 224/2006. What is significant is that, in most cases, the Convention permits the direct contact between authorities. Its main objective is to facilitate the cooperation between the judicial authorities of the member states [3].

According to art. 4 of Law no. 302/2004, it applies on the grounds of and for the enforcement of norms related to the judicial cooperation in criminal matters, which are included in the international legal instruments that Romania is part thereto, which they supplement for non-regulated circumstances.

At the same time, according to art. 5 of the same law, in the absence of an international convention, judicial cooperation may take place by virtue of international courtesy, upon the written request of the requesting state, sent at diplomatic level, and upon the written confirmation of reciprocity issued by the competent authority of the relevant state. In such case, Law no. 302/2004 constitutes the common law in the matter for the Romanian judicial authorities.


1. General considerations on international confiscation and confiscation in the European Union

The confiscation of property from criminal activities has been considered for a long time in the European Union as the most effective means of fighting against organised crime. The confiscation is aimed at the main grounds for the existence of organised crime, namely the increase of proceeds by illicit means. The confiscation requires a definitive court decision which eventually leads to deprivation of property.

1.1. International confiscation. At the international level there are several instruments promoting the confiscation of proceeds originating in the committing of crimes. The most important stage in the promotion of the confiscation of the assets coming from crimes is the Convention of Strasbourg of 1990, which was ratified by all the 28 EU Member States. The Convention is aimed at promoting international cooperation for the identification, tracking, freezing and confiscation of proceeds arising from crimes. The Convention was supplemented and updated by the Second Convention of Strasbourg.

1.2. Confiscation in the European Union. The European Union has emphasised the significance of the confiscation of products coming from crimes. The European Union strategy for the beginning of the new millennium stated that: „the European Council is determined to ensure the adoption of concrete measures for the search, freezing, seizure and confiscation of crime-related products” [5].

In order to ensure a joint confiscation approach in the EU, over the last few years the EU has adopted several legal instruments. Currently, the EU is focused on the appropriate implementation of these instruments at national level by means of:

- the Framework-Decision no. 2001/500/JAI, contains provisions on money laundering, search, tracking, freezing, seizure and confiscation of crime instruments and proceeds. This Decision binds the member states to take all necessary measures in order to guarantee that their laws and procedures on the confiscation of property from crimes allow for, at least when such property cannot be seized, the confiscation of the value of ownership of such property, both in internal procedures and in procedures established upon the request of another member state, including requests for the enforcement of foreign confiscation orders;
- the Framework-Decision no. 2005/212/JAI on confiscation, as of 24 February 2005, is aimed at ensuring an additional harmonisation of the member state legislation concerning the confiscation of assets acquired from crimes;
- the Framework-Decision no. 2006/783/JAI on the mutual recognition of confiscation court decisions, sets forth the norms by virtue of which the judicial authorities from one member state recognise and enforce on their territory a confiscation order issued by the competent judicial authorities of another member state. The value of confiscated property is equally divided between the state issuing the order and the state enforcing such order;
2. General considerations on the confiscation order

The mutual recognition concerning the confiscation orders is a new form of international judicial cooperation in criminal matters in the European Union which requires that the member states recognise the confiscation orders issued by a competent criminal court of a member state and enforce it on its territory.

The source of this form of international cooperation in criminal matters is the Convention of the Council of Europe on money laundering, search, seizure and confiscation of proceeds from crimes [8].

This international instrument binds its signatory parties to enforce the confiscation order issued by one party or to submit to their competent authorities a request to obtain such order and to have it enforced should such order be approved.

The mutual recognition of confiscation orders is regulated in the European Union by the Framework Decision of the Council of the European Union - The Framework Decision no. 2006/783/JAI of 6 October 2006 [9]. The purpose of this framework-decision is to facilitate the cooperation between the member states for the recognition and enforcement of confiscation orders, by providing regulations according to which a member state must recognise and enforce on its territory of a confiscation order issued by a competent criminal court of another member state.

This means that the confiscation orders should refer to a punishment or other measure adjudicated by a definitive court decision following the trial of one or more criminal acts, which leads to permanent deprivation of proceeds, related to which the court of the issuing state decides that they are the result of criminal activity or the equivalent of such proceeds or they are the means by which the trialled criminal act was committed.

In the Romanian legislation, this framework-decision was regulated by Law no.302/2004 on the international cooperation in criminal matters [10], Title VII - Legal Assistance in Criminal Matters - Chapter II - Provisions on the legal assistance applying to the relation with the European Union member states - Section 5 - Provisions on the cooperation with the EU member states for the enforcement of the Framework Decision no. 2006/783/JAI of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

References

[6] Camden Asset Recovery Interagency Network - CARIN - created in Hague on 23 September 2004 by Austria, Belgium, Germany, Ireland, The United Kingdom and The Netherlands, has become a global network of practitioners and experts whose objective is to reinforce mutual knowledge of the methods and techniques in the area of cross-border search, freezing, seizure and confiscation of proceeds from crimes or of other assets relating to crimes. Currently it has 53 members, including the EU member states and 9 international organisations;
[8] Convention on money laundering, search, seizure and confiscation of proceeds from crimes of 8 November 1990, adopted by the Council of Europe;

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