The right of the European Union person who is deprived of liberty to communicate with the consular authorities, under the new regulations

Professor Alexandru BOROI, Ph.D
"Danubius" University, Galati, Romania
alexandruboroi@yahoo.com

Abstract**:** *The provisions set out by the European regulatory document are being analyzed in this work in relation to the compliance with the right to communicate with the consular authorities in the case of a person who is suspected or accused and deprived of liberty in a Member State other than the one whose citizen he/she is. The first element of novelty refers both to the mentioned examination and to the analysis of the cases when this right may be temporarily restricted. Moreover, another novelty refers to the critical views and the proposals made for the improvement of this complex activity especially in the case of the underage and of the people with no financial means to hire an attorney. This work may be useful to the academic environment as well as to certain structures with duties in the criminal prosecution activity or trials.*

Keywords**:** *crime; minor; recognition of criminal decisions enacted in another Member State*;

Introduction

A major element at the base of the appearance and future development of the international cooperation and without which it could not exist has been the mutual trust in a well organized institutional framework [1].

The international judicial cooperation in the criminal field was defined in the doctrine as being a specific method with which the world governments act by helping each other through the forms set out by the laws, agreements, treaties, conventions so that the criminal activity is identified and proven and so that the authors of various criminal actions are punished and the criminality is minimized as a consequence thereof [1].

At the moment there are numerous such conventions for the repression of crimes, which prejudice or jeopardize the common interests of the states and which have been already ratified or accepted by Romania, a country that inserted the proper provisions in the criminal law [2].

In time, forms of judicial cooperation in the criminal field have appeared and later developed between the states, starting with the extradition and continuing with the judicial support, the transfer of convicted people, the transfer of proceedings in the criminal field, etc.

Taken individually, each of the forms of judicial cooperation in the criminal field enacted at EU level has its significance and - at first sight - it is pretty difficult to establish a hierarchy of their importance [3].

In our opinion - which is generally common to the European and Romanian doctrine - in the judicial cooperation in the criminal field between the EU Member States, the recognition and execution of the court orders and of other judicial documents issued by a relevant institution in another Member State represent the most important form of cooperation [4].

This form of international judicial cooperation - although not explicitly recognized in the beginning - has been the base of the entire cooperation activity between the world states since ancient times and the most significant example being comprised of the treaties, bilateral or regional conventions regulating the institution of extradition. Specifically, the extradition has always been based on the recognition and execution of a foreign criminal decision [5].

For the promotion of a coherent legislative framework meant to contribute to the improvement of the specific cooperation activities based on the mutual recognition principle, the Council Framework Decision 2008/909/JHA of November 27th, 2008 [6], the Council Framework Decision 2008/947/JHA of November 27th, 2008 [7], and then the Council Framework Decision 2009/299/JHA of February 26th, 2009 have been enacted at EU level [8].

Through the Council-Framework Decision 2009/299/JHA of February 26th, 2009, some of the previously enacted regulatory documents were amended; the two documents mentioned above are some of them; the changes were focused on the convicted people's right to be informed on the trial during which they had been convicted, the right to defense, the right to retrial, etc.

The experience achieved in this field as well as several decisions made by the European Court of Human Rights have highlighted certain gaps in the enacted regulatory documents in relation to the compliance with certain rights granted to the people who are deprived of liberty in a Member State other than the one he/she is a citizen of.

Based on these grounds, the Directive 2013/48/EU of the European Parliament and of the Council was enacted on October 22nd, 2013 [9].

1. The need to enact European normative act

Starting from the objective assumed by the Union, i.e. to maintain and develop a space of freedom, security and justice and taking into account the conclusions reached by the President of the European Council in Tampere - October 15th and 16th, 1999 - especially paragraph 33, *the mutual recognition of the court orders and of other decisions made by the judicial authorities should become the foundation stone for the civil and criminal judicial cooperation throughout the European Union.*

The achievement of this desideratum involving the consolidation of the mutual recognition and the closeness between legislations would facilitate the cooperation between the relevant authorities and the judicial protection of the individual rights.

Besides, this principle is expressly set out by the provisions in Article 82, paragraph (1) in the Treaty on the functioning of the European Union (TFEU), "*the judicial cooperation in the criminal field within the Union is based on the principle of mutual recognition of court orders and judicial decisions* [...]".

The application of this principle means that each state trusts the judicial systems of the other Member States.

At the same time, the level of mutual recognition mainly depends on certain parameters including mechanisms for the protection of people suspected or accused and the minimum common standards necessary for the application of the principle of mutual recognition.

Within this context, besides the right to hire an attorney or to notify a relative or a third party on his/her situation involving the deprivation of liberty, the person in question has to be granted the right to consular assistance.

The right to consular assistance, is set out by Article 36 in the Viena Convention of 1963 regarding the consular relations, being considered a right of the states to have access to its nationals.

The European regulatory document grants an analogue right to the suspected or accused people who are deprived of liberty, and the consular protection can be exercised by the diplomatic authorities when they act as consular authorities.

Regarding the derogation from this right, the Member States have the obligation to clearly state - in their internal law - the reasons and criteria for any temporary derogation that has to be proportional, strictly limited in time, it should not be exclusively based on the type or seriousness of the alleged crime and it should not prejudice the general fair characteristic of the proceedings. For meeting these requirements, the Member States have to make

sure that when a judicial authority - not a judge or a court - authorizes a temporary derogation, the decision to authorize the temporary derogation may be assessed by a court, at least in the proceedings before the court.

The people who are suspected or accused may give up this right (the right to consular assistance), provided that they receive information on the contents of this right and the possible consequences they might have to face.

When they receive such pieces of information, the specific situation of such people who are suspected or accused has to be taken into account, including their age and their mental and physical condition.

The renunciation and its circumstances have to be recorded based on the registration procedure in accordance with the legislation in force in the relevant Member State.

In conclusion, we may consider that the European regulatory document grants the people deprived of liberty on the territory of another Member State - besides the right to an attorney or to communicate with a relative or a third party - the right to consular assistance too.

2. The right to communicate with the consular authorities

According to the provisions set out by the European regulatory document [9], the Member States shall take domestic legislative actions making sure that the consular authorities in the state the suspected or accused people who are foreign nationals deprived of their liberty belong to are informed on their deprivation of liberty without any unjustified delays and that these people communicate with such authorities if they want to.

A special situation arises when the suspected or accused people against whose liberty is restricted, have two or more citizenships. In such a case, these people may choose - if they want to - which of the consular authorities to be informed in relation to the deprivation of liberty and to communicate with them.

Besides the need to assure the communication between the suspected or accused people deprived of liberty and the representatives of the consular authorities, these people should be granted the right to be visited by such authorities, to talk to them, to send / receive correspondence as well as the right to benefit from legal representation provided by the consular authorities, provided that the said authorities agree and that the suspected or accused people in question want it.

In all of the circumstances, the exercising of the rights mentioned above may be regulated by the internal law or proceedings, provided that the said law and proceedings provide full effects to the goals for which these rights are being granted.

3. Derogations and general conditions for their application

Several temporary derogations shall apply to the general rule providing the right of the suspected or accused people in another Member State to be assisted by an attorney, to get in touch and to communicate with a relative or a third party.

Hence, any temporary derogation regarding the right to an attorney - based on Article 3, paragraph (5) or (6) and on Article 5, paragraph (3) in the European regulatory document [9] - has to meet the following conditions:

- it should be proportional and cannot exceed the necessary level;
- it should be fie strictly limited in time;
- it should not be exclusively based on the seriousness of the alleged crime; and,
- it should not prejudice the general fair characteristic of the proceedings;

Regarding the right to an attorney, the temporary derogations may be authorized through a justified decision made based on an assessment of each individual case, either by a judicial authority or by another relevant authority, provided that its decision may be verified by courts.

In order to decide on the temporary derogation of the right to inform a third party on the deprivation of liberty, including in the case when the person in question is a child, the following conditions should be met:

- there is an urgent necessity to prevent serious negative consequences to the life, freedom or physical integrity of a person;

- there is an urgent necessity to prevent a situation when the criminal proceedings might be significantly prejudiced;

If the person deprived of liberty is a child, the Member States shall make sure that the authority in charge with the child's protection and wellbeing is notified without any unjustified delay on his/her deprivation of liberty.

The temporary derogations regarding the right to inform a third party on the deprivation of liberty (including when the person deprived of liberty is a child) may be authorized depending on each individual case either by a judicial authority or by a relevant authority, provided that the decision may be verified by the courts.

The examination of the provisions set out by the European regulatory document indicates that such derogations might be granted in special cases; an exception to this rule is only the information of the relevant authority liable for the child's wellbeing and protection when the person who is deprived of liberty is a child.

Moreover, we find that - in relation to the right of the suspected or accused person to communicate with the consular authorities - it cannot be restricted not even temporarily, irrespective of the situation that person is in.

Conclusions and critical observations

According to the provisions set out by the European regulatory document [9], the mutual recognition of the decisions in the criminal field may function properly only in a climate of trust in which not only the judicial authorities as well as the participants in the criminal process believe that the decisions made by the judicial authorities in other Member States are equivalent to those made by their own authorities, assuming the trust not only in the fairness of the standards in other Member States but also in the fact that they are applied.

Besides, such provisions are also set out by Article 82, paragraph (2) in the Treaty on the functioning of the European Union (TFEU), which sets out the necessity to establish minimum standards applicable in the Member States for the mutual recognition of the court orders and of the judicial decisions as well as the judicial and police cooperation in the cross-border criminal field.

The minimum common standards have to ultimately lead to a higher level of trust in the criminal justice systems in all the Member States, which should determine – in their turn – to a more effective judicial cooperation, a climate of mutual rust and the promotion of a culture in the field of fundamental rights throughout the Union. Such common standards have to and are established in relation to:

- the right to an attorney for criminal proceedings;

- the right to inform a third party on the deprivation of liberty; and,

- the right to communicate with third parties and with consular authorities during deprivation of liberty;

Hence, the provisions set out by the European regulatory document include a series of minimum standards providing the compliance with the rights mentioned above if a decision is made for the accused or suspected person to be deprived of liberty for a certain period of time.

On the other hand, some of these rights may be affected through a temporary derogation issued for the execution of the criminal justice act under special circumstances.

If the right to an attorney, the right for a third party to be informed and the right to communicate with third parties may be restricted following a temporary derogation, *the right to communicate with the representatives of the consular authority cannot make the object of such derogation*.

Without denying the importance and the necessary of enacting this regulatory document, we still note that it also contains some imperfections that are meant to generate certain difficulties while transposing its provisions into the judicial practice.

The first critical observation we highlight is focused on the status of the suspected or accused people who are subject to a decision for their deprived of liberty, who do not have the financial means to hire an attorney or to take any other action in order to prove their innocence.

We believe that - in such a case - the consular authorities should be authorized to hire an attorney, to pay for such an attorney, and then to recover the costs from the person in question after the legal situation he/she is in is clarified. Such obligations should be included in the provisions set out by the European regulatory document, being known that the resolution of such situations involves certain expenses and financial efforts that are sometimes quite significant.

Another observation refers to the cases when contact to other people is restricted, including to the chosen attorney; such cases should be carefully analyzed so that the criminal investigation bodies make no abuse.

These temporary derogations - as they are defined by the European legislator - should strictly and punctually refer to certain types of crimes, such as the more serious ones.

This category may include terrorism actions, human trafficking, drug dealing, guns, ammunition, radioactive or explosive materials, and generally any crime committed by organized crime groups.

The final critical observation we formulate is focused on the enactment of special orders for underage criminals who should enjoy a separate judicial treatment, even preferential compared to those who are over 18.

References

[1] A. Boroi, I. Rusu, *Cooperarea judiciara internationala in materie penala, Curs master,* C. H. Beck Publishing House, Bucharest, 2008, p. 1;

[2] A. Boroi, *Drept penal, Partea generala,* C. H. Beck Publishing House, Bucharest, 2011, p. 19;

[3] I. Rusu, Minodora-Ioana Balan-Rusu, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurispridence,* LAP LAMBERT Academic Publishing (Germany), DANUBIUS University, 2013, p. 83;

[4] I. Rusu, *Individualizarea sanctiunilor de drept penal, Curs master,* Universul Juridic Publishing House, Bucharest, 2011, p. 554;

[5] A. Boroi, I. Rusu, M.-I. Balan-Rusu, *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation,* LAP LAMBERT Academic Publishing (Germany), DANUBIUS University, 2012, p. 158;

[6] The Council Framework-Decision 2008/909/JHA of November 27th, 2008 on the application of the principle of mutual recognition in the case of court orders in the criminal field ordering sanctions or deprivation of liberty for their execution in the European Union was published in the Official Journal of the European Union no. L 327/27 dated December 5th, 2008;

[7] The Council Framework-Decision 2008/947/JHA of November 27th, 2008 on the application of the principle of mutual recognition in the case of court orders and of the probation decisions or the supervision of the probation actions and the alternative sanctions, published in the Official Journal of the European Union no. L 337/102 dated December 16th, 2008;

[8] The Council Framework-Decision 2009/299/JHA of February 26th, 2009 for the amendment of the Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, for the consolidation of the people's procedural rights and for the encouragement of the application of the mutual recognition principle in relation to the decisions made in the absence of the person in question from the trial, published in the Official Journal of the European Union no. L 81/24 dated March 27th, 2009;

[9] The Directive 2013/48/EU of the European Parliament and of the Council, dated October 22nd, 2013, on the right to an attorney during the criminal proceedings and during the proceedings on the European arrest warrant, as well as the right to inform a third party on the deprivation of liberty and the right to communicate with third parties and with consular

authorities during the deprivation of liberty, published in the Official Journal of the European Union no. L 294/1 dated November 6th, 2013;