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## CONSIDERATIONS REGARDING THE LIMITS AND EFFECTS OF THE RECOGNITION OF A FOREIGN JUDGMENT

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### ***Abstract***

*In this article we aimed to analyze from a theoretical and practical point of view the limits and effects of the recognition of a foreign court decision in criminal matters, in relation to the existing regulations in European and national legislation.*

*The establishment at European level of an area of freedom, security and justice through the provisions of art. 67 of the Treaty on the Functioning of the European Union (TFEU), imposed a new approach to the entire issue of judicial cooperation in criminal matters.*

*The research undertaken aims to highlight the interest of the European legislator, but also the national one in this segment, as well as the existing regulatory limits, with consequences in judicial practice, but also the need for the intervention of the Union legislator to give full and complete efficiency to the principle of mutual recognition of decisions foreign judicial orders pronounced by the judicial authorities of the member states.*

**Key words:** *member states, judicial cooperation, appropriate legal mechanisms, the principle of mutual recognition of court judgments and judicial decisions, fundamental principles of human rights.*

### **INTRODUCTION**

Title V of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>, with the marginal name "Area of freedom, security and justice", contains provisions relating to the integration of the entire area of freedom, security and justice in the general framework applicable to all European Union policies and mentions express that the basis of judicial cooperation in criminal matters is the

principle of mutual recognition of judicial and extrajudicial decisions (art.82 para.1 TFEU).

According to art. 82-83 TFEU, the creation and application of appropriate legal mechanisms, based on the principle of mutual recognition of court judgments and judicial decisions, as well as the establishment of an institutional framework designed to support the development of judicial cooperation between member states are objectives of the European Union (*M. Pătrăuș, 2021, p.186*).

Among the lines of action in the matter of judicial cooperation in the criminal sphere are: mutual recognition of decisions; establishing minimum standards for the harmonization of criminal procedural legislation; approximating the substantive criminal law in certain areas with an element of flexibility so that the list inserted in art. 83 para. 1 TFEU can be expanded in relation to the evolution of crime, etc.

In art. 83 para. 2 TFEU provides that in the situation where harmonization in the criminal field "proves to be indispensable to ensure the effective implementation of a Union policy in an area that has been the subject of harmonization measures, directives may establish minimum rules regarding to the definition of crimes and sanctions in the field in question". Through this regulation, an explicit competence was conferred on the European Union to adopt material and procedural criminal law measures in the segment of international judicial cooperation in criminal matters.

In this sense, the Council, as an institution with legislative powers, has adopted a series of normative acts that capitalize on the principle of mutual recognition of judicial decisions in criminal matters, including Framework Decision 2008/909/JAI, amended, regarding the application of the principle of mutual recognition in criminal matters that impose penalties or custodial measures for the purpose of their execution in the European Union.

The mutual recognition of judicial decisions handed down in the Member States involves, in the first phase, an examination of the foreign conviction to verify whether fundamental rights have been respected in the judicial proceedings in the sentencing state (See recital 5 of the Framework Decision 2008/909/JAI).

The European legislator has shown a sustained concern for respecting the rights of accused or suspected persons in criminal trials, and the Luxembourg Court of Justice has developed the general principles of European Union law, a body of legal principles, including in the field of human rights, which derives from national constitutional traditions, from the ECHR, as well as from international treaties signed by member states, to ensure that human rights are respected according to the EU Charter of Fundamental Rights, which acquired binding legal force in 2009 (*P.Craig, G. de Burca, 2017, p.426 -431*).

Considering the complexity and particularities of the mutual recognition of court decisions, of judicial acts issued by a competent authority of a member state, we propose to briefly examine this form of cooperation and reveal within the

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limits of the European normative act and the consequences it has in practice judicial.

### **1. BRIEF CONSIDERATIONS ON THE LIMITS AND EFFECTS OF THE MUTUAL RECOGNITION OF JUDICIAL DOCUMENTS AND JUDICIAL ACTS ISSUED BY THE JUDICIAL AUTHORITIES OF THE MEMBER STATES**

The principle of mutual recognition, which is the cornerstone of international judicial cooperation in criminal matters (The Council adopted in Tampere, 15-16 October 1999 a program of measures to implement the principle of mutual recognition of judicial decisions in criminal matters) required the establishment of modern mechanisms for the mutual recognition of judicial decisions handed down in the member states, including the Framework Decision 2008/909/JAI.

The scope of the framework decision is the recognition of a foreign court decision and the execution of the sentence in order to facilitate the social rehabilitation of the convict (*Flore, D., și Bosly, S., 2014, p. 580*). Therefore, the Union instrument has a field of applicability only when we are in the presence of a court decision pronounced in a member state that must be recognized in another member state in order to execute the sentence by the convicted person, located in the territory of the executing state.

In order to recognize and enforce the foreign court decision, the sentencing state must transmit the judgment rendered and the certificate provided for in Annex 1 of the framework decision to the executing state, whose citizen or resident is the convicted person, or to another state that agrees to the transmission the decision and the certificate.

The executing state may refuse the recognition and execution of the judgment or foreign judicial decisions under the conditions provided by art. 9 of the framework decision or can partially recognize it, according to art.10, or can order the postponement of the recognition of the judicial decision pronounced in the state of conviction.

Framework decision 2008/909/JAI, amended, in art. 25 provides that the normative provisions that include them must apply *mutatis mutandis* to the execution of sentences in cases where art. 4 paragraph 6 and art. 5 para.3 of the Council's Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and surrender procedures between member states, which implies, including, that the executing state can verify the existence of reasons for non-recognition and non-execution , as provided for in art. 9. declaration pursuant to art. 7 paragraph 4 of the Framework Decision 2008/909/JAI.

Regarding the limits of the recognition of foreign judicial decisions, it should be noted that, from the economy of the legal text, it follows that jurisdiction is acquired when the execution of the judgment actually begins, and

the execution of the sentence is regulated by the law of the executing state (*art. 10 of the Framework Decision 2008/909/JAI*).

With regard to the effects of recognition, it must be emphasized that they essentially reside in the execution on the territory of the executing state of the sanction applied by the issuing state through a final judicial decision, in whole or in part<sup>2</sup>, as the case may be, after the punishment has been adapted (*art. 8 and art. 12 of the Framework Decision 2008/909/JAI*).

## **2. JURISPRUDENTIAL ASPECTS. NATIONAL JURISPRUDENCE**

Our theoretical approach started from a case (*Timiș Court, Criminal Section, sent. pen no. 429/PI pronounced in file no. 8818/30/2011, unpublished*) in which the European arrest warrant no. 4 issued by the Timiș Court on March 6, 2014, the surrender of the Austrian citizen W.H was requested for the execution of a custodial sentence of 5 years and 6 months in prison, based on the criminal sentence in no. 429/PI pronounced by the Timiș Court, final by decision criminal case no. 27/A/6.02.2014 of the Timișoara Court of Appeal, for the crimes provided for and punished by art. 29 letter a of Law no. 656/2002 (money laundering, act committed in 2007, consisting in the fact that , repeatedly introduced into the recycling system sums derived from tax evasion caused by the sale of SC. G. I. SRL Timișoara) and tax evasion, provided for and punished by art. 9 letter b with reference to art. 9 paragraph 3 of Law no. 241/2005 (fact consisting in that on June 25, 2007 as a shareholder of SC G. I. SRL Timișoara together with the general director and shareholder J.F sold the assets worth 43,060,550 euros to SC P. SPV SRL Bucharest, without recording this transaction in the accounting logs of the company and the declaration of sales to the tax authority, causing a damage to the state in the amount of 22 million RON, the equivalent of 4.9 million euros).

After the arrest of the person requested by the Austrian judicial authorities, the request for extradition to Romania was rejected by the decision of September 15, 2014, since the person in question did not agree to the extradition and did not renounce the benefit of non-extradition of Austrian citizens (*art. 39 -44 of the Law on judicial cooperation in criminal matters with the member states of the European Union*).

After the transmission of the court decision by the judicial authorities in Romania, the Prosecutor's Office in Vienna expressed its acceptance of the partial execution of the prison sentence in connection with the conviction for tax evasion with the corresponding reduction of the sentence, according to art. 41 b paragraph 3 of the Law on judicial cooperation in criminal matter with the member states of the European Union. Regarding the crime of money laundering, the Vienna Prosecutor's Office revealed that it was not punished in Austria.

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On March 7, 2016, the Romanian judicial authorities requested to be notified if a request to take over the execution was submitted, and by the decision of August 12, 2016, the Criminal Court of Vienna rejected the takeover of the execution of the sentence on the grounds that the Romanian authorities did not communicate in the deadline set by the Austrian court if they will agree to take over the execution even for only part of the imposed prison sentence. This judgment remained definitive by the decision of the Higher Regional Court in Vienna on September 30, 2016.

On July 13, 2020, the Romanian judicial authorities filed a new request for partial takeover of the execution of the sentence regarding the conviction of the requested person W.H for the crime of tax evasion.

The judicial authority in Austria, in accordance with the provisions of art. 40 Z6 of the Law on judicial cooperation in criminal matters with the member states of the European Union, which has a correspondent in the provisions of art. 9 paragraph 1 letter e of the Framework Decision 2008/909/ The JAI rejected as inadmissible the request to take over the execution of the penalty for tax evasion, as the statute of limitations had expired in accordance with Austrian law, the statute of limitations being 5 years from the entry into force of the decision by which the penalty to be executed was recognized, according to art. 32 paragraph 1 of the Austrian Criminal Tax Law. According to Austrian law, the statute of limitations for enforcement expired on February 6, 2019.

To clarify the legal issues in the case, we must start from the fact that art. 8 paragraph 1 letter c of the Framework Decision 2002/584/JAI must be interpreted in the sense that a decision to sentence to a custodial sentence pursuant to which a European arrest warrant was issued refused pursuant to art. 4 points 1 and 4, with the recognition of the decision, but with the refusal to take over the execution, as a result of the prescription of the execution of the sentence according to the law of the executing state, it loses its enforceable nature.

For the recognition of a judgment in a procedure for the execution of a European arrest warrant, refused pursuant to art. 4 points 1 and 6 of the Framework Decision 2002/584/JAI, the consent of the sentencing state is required pursuant to art. 25 and of art. 4 paragraph 1 and 2 of the Framework Decision 2008/909/JAI. Such a procedure, in this case, was carried out in compliance with these provisions, since the judicial authorities in Romania, even if late, compared to the date of the request, namely on July 13, 2020 (after almost 4 years from the first request), agreed for Austria to partially take over the execution of the tax evasion sentence. The Austrian judicial authorities applied the provisions of art. 32 paragraph 1 of the Fiscal Criminal Law, according to which the statute of limitations for enforcement in relation to financial crimes is 5 years from the entry into force of the judgment in which the penalty to be executed was recognized, noting that in this case, the statute of limitations for execution expired on February 6, 2019. Due to these circumstances, the request to take over the

execution of the sentence of 5 years and 6 months in prison imposed by the Timiș Court for the crime of tax evasion was rejected by the Austrian judicial authorities.

From a regulatory perspective, if the takeover request had been granted, this decision should have been able to have legal effects with respect to the decision issued by the Austrian judicial authorities. However, as long as the start of the execution of the custodial sentence by incarceration of the convicted person has not been announced, since the statute of limitations has run out in Austria for the crime of tax evasion, the sentencing state (Romania) fully retains the right to enforce the judgment pronounced on the territory his, in relation to the provisions of art. 22 para. 1 of the Framework Decision 2008/909/JAI.

However, considering the given situation, since the judicial authorities in Austria recognized the decision from Romania, it can be interpreted as a "conviction decision for the same facts".

A contrary interpretation would generate an apparent conflict between the manner of interpretation by the courts involved in this procedure - Romania and Austria, of the correlation norms of the two framework decisions and the legal effects that the violation of these provisions may produce.

In such a situation, we find it useful to refer the Luxembourg Court to clarify the way of interpretation of the European norms, so that the provisions are interpreted and applied uniformly in the member states.

In relation to this case, we must specify that the enforcement of the criminal provisions of the court decision handed down by a court in Romania can only be carried out if the Austrian criminal law provides for the application of such a measure for the offense committed. We consider this regulation to be natural, since enforcement is subject to the domestic law of each requested state, according to art. 17 of the framework decision.

Considering the existing situation, the convicted person benefits from the effects of prescription on the territory of the state of which he is a citizen, but on the territory of the other member states the European arrest warrant issued by the Romanian judicial authorities remains active, until the expiration of the prescription period according to the Romanian criminal legislation.

The statute of limitations, a case that removes the execution of the sentence on the territory of the Austrian state, does not produce effects regarding the sentence to be executed on the territory of Romania, if the requested person were arrested on the basis of the European arrest warrant issued by the Romanian judicial authorities in another member state or even on the territory of the sentencing state.

According to the data of the complaint, in Romania the requested person would benefit from the cause of removal of the punishment only on February 5, 2024, which means that until the expiration of this limitation period the European arrest warrant remains active.

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In this case, we are in an exceptional situation from the rule according to which when the person in question has the citizenship of a member state, the procedure provided for in the content of Framework Decision 2008/909/JHA on the application of the principle of mutual recognition in the case of judicial decisions in criminal matters that impose penalties or custodial measures for the purpose of their execution in the European Union, since the Austrian state has declared that it does not want to take over the execution of the sentence imposed on the convicted person, due to the intervention of the statute of limitations according to internal regulations. The judicial authorities in Austria, recognizing the judgment handed down in the state of sentencing, noting at the same time the intervention of the statute of limitations, we find ourselves in the situation of the existence of two judgments for the same crime.

For such a hypothesis, from the perspective of internal regulation, it is necessary to distinguish the following aspects:

According to the provisions of art. 160-163 Penal Code. Romanian, pardon and prescription are causes that remove or modify the execution of the sentence.

The current Penal Code has reorganized Title VII of the Penal Code from 1969, placing the pardon within the cases that remove or modify the execution of the penalty, alongside the prescription of the execution of the penalty, this option being justified by the legal nature of the personal pardon for removing or modifying the execution of the penalty (*G.Bodoroncea, V.Cioclei, I.Kuglay, L.V.Lefterache, T.Manea, I.Nedelcu, F.M.Vasile, G.Zlati, 2020, p.616*).

The sentence that is executed represents the sentence established by the court taking into account the subsequent causes for its modification. Therefore, as the case may be, subsequent causes of change must also be taken into account, such as, for example, the intervention of the pardon.

By means of an appeal to the execution, the statute of limitations for the execution of the sentence can be invoked exclusively.

Art. 142 paragraph 2 letter e of Law no. 302/2004, provides that the foreign court decision will not be recognized and enforced on the territory of the Romanian state, among other things, if the person was convicted in Romania for the same acts.

In this case, the requested person, as I have shown previously, had been convicted in Romania, and in Austria, for the same act, the statute of limitations for the execution of the sentence was ordered. Consequently, there would apparently be a legal impediment to the recognition of this foreign judgment, but the Vienna Regional Court for Criminal Cases, in file no. 181 NS9/14 p, recognized the court judgment pronounced by the Timiș Court, but as a result of the state's inaction sentence of about 4 years, refused to take over the execution, reasoning that on the date of the judgment, in the absence of double incrimination for the crime of money laundering and the intervention of the statute of limitations

for the crime of tax evasion, the request for takeover made by Romania cannot be accepted.

According to the national regulation, art. 156 par. 2 and 3 of Law no. 302/2004 on international judicial cooperation in criminal matters, through which the provisions of art. 19 paragraph 1 of the Framework Decision 2008/909/JAI were transposed, the amnesty or pardon can be applied both by the Romanian state and by the issuing state, and in the hypothesis in which Romania is the issuing state and the executing state communicates its decision not to execute or has stopped the execution of the sentence as a result of the application of the amnesty or pardon, the competent court is obliged to make mention of this in the Register of records and execution in execution of criminal decisions.

Consequently, by analogy, in the hypothesis in which the executing state communicates to Romania, as the sentencing state, its decision not to enforce a sentence established by a final court decision by the Romanian judicial authorities, since the statute of limitations has intervened, for to give extended effectiveness to the principle of mutual recognition of foreign judicial decisions, but also to respect the rights enjoyed by any convicted person, it would be necessary to extend the procedure for the recognition of foreign judicial decisions in order to produce effects other than that of execution under privative regime of freedom of punishment and other judicial documents issued by foreign authorities and on the case of prescription.

A contrary solution leads to an unjustified difference in treatment between the persons who were the subject of a European arrest warrant and for whom, for example, a pardon was applied and those who in the executing state found the incidence of a cause to remove the execution of the sentence.

A judicial decision emanating from the foreign judicial authority should be recognized, in a special procedure, by the court in all situations where it is necessary to solve a criminal case (for example, deduction of the period of preventive detention executed in another state member) or when it can contribute to improving the situation of the convicted person or to his reintegration.

This special procedure of recognition and execution in order to produce effects other than that of the execution in detention of the sentence as well as other judicial documents issued by foreign authorities, carried out principally or incidentally, must be available to any interested person, for to produce other effects, than that of executing the sentence in detention, as long as it is likely to produce legal effects.

### **3. JURISPRUDENTIAL ASPECTS. CJEU JURISPRUDENCE**

The Court of Luxembourg has been called on numerous occasions to rule on the interpretation of the provisions of Framework Decision 2008/909/JHA.

In our theoretical approach, we propose to briefly present the interpretations given by the CJEU in two relevant cases.



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Regarding the obligation imposed on the executing state, according to the provisions of art. 4 point 6 of the Framework Decision 2002/584, that in the event that it decides to refuse the execution of the European arrest warrant, to proceed with the actual taking over of the custodial sentence, the CJEU ruled that "this obligation implies a genuine commitment of this state to execute the custodial sentence pronounced against the wanted person".

Therefore, the Court emphasized that, before refusing to execute a European arrest warrant, the executing member state must verify the possibility of actually executing the sentence imposed in the sentencing state, in accordance with its domestic law (*Judgment of 29 June 2017, Poplawski, C-5 79/15, EU:C:2017:503, point 22*).

In this case, the CJEU showed that the executing state must ensure the application of Framework Decision 2002/584, and, consequently, the Kingdom of the Netherlands has the obligation to execute the European arrest warrant, and in case of refusal, it has the obligation to guarantee the effective execution of the sentence pronounced in Poland against Mr. Poplawski.

In another case (*Judgment of 13 December 2018, Sut, C-514/17, EU:C:2018:1016, point 37*), the Court of Justice of the EU (CJEU), in relation to the provisions of art. 4 point 6 of the above-mentioned framework decision, ruled that, prior to the decision of the judicial enforcement authority's refusal to hand over the requested person, it should proceed with the verification, if "this person remains in the member state of enforcement, is a national or its resident" and, if "the custodial sentence pronounced by the issuing Member State against this person can effectively be executed in the executing Member State". At the same time, it is required that the executing Member State observes "that there is a legitimate interest that justifies the non-execution of the penalty applied in the issuing Member State, but on the territory of the executing Member State".

In relation to a situation similar to the one in the analyzed case, the CJEU did not pronounce judgments.

### CONCLUSIONS

*If the judicial authorities in the executing state issue a recognition decision, this could be interpreted as a "conviction decision for the same acts".*

*We believe that, a contrary interpretation, generates an apparent conflict between the manner of interpretation by the courts involved in this procedure, the correlation norms of the two framework decisions and the legal effects that the violation of these provisions can produce.*

*Therefore, in order to clarify these aspects related to the way of interpretation of European norms, it would be necessary to refer the Court of Luxembourg (CJEU), so that the provisions are interpreted and applied uniformly in the member states.*

*Through a congruence of the doctrinal aspects and the practice of the European court, with an emphasis on the protection standards provided by the Charter of Fundamental Rights of the European Union, the examination of the rights of the persons who are the subject of procedures, such as those revealed, would be required in the judicial proceedings in this paper, and the result would find its concreteness in the unitary application of the instruments of international judicial cooperation in criminal matters.*

*At the same time, in order to cover situations of this kind, the intervention of the European legislator would be required in order to extend the effects of the special recognition and enforcement procedures, in order to produce other effects than those of the execution of the sentence in detention. If the amnesty or pardon ordered by foreign judicial acts can be recognized in the main or incidental way, it would be necessary to be able to recognize by the Romanian judicial authorities also a foreign decision ordering the termination of the criminal process due to the prescription, when it appears necessary solving a criminal case or could contribute to improving the situation of the convicted or to his reintegration.*

*Not as a last resort, it would be necessary to standardize the national legislation of the European states in the field of criminal law and criminal procedural law, which limits the reluctance of the judicial authorities in the member states and would give due importance to the mutual recognition of judicial decisions, a principle which infuses the entire space with freedom, security and justice.*

*If we refer to the concrete case analyzed, in relation to the previously presented elements, it would be required that these procedures take place with speed, in order to prevent situations in which the prescription of the execution of the sentence intervenes on the territory of the executing state.*

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