

N<sup>o</sup> 252/2023

**To the International Association of Judges – IAJ-UIM**

**The Romanian Magistrates' Association (AMR)**, professional and national, apolitical, non-governmental organization, stated to be of „public utility” through the Government Decision no. 530/2008 – with the headquarter in Bucharest, Regina Elisabeta Boulevard no. 53, District 5, e-mail amr@asociatia-magistratilor.ro, tax registration code 11760036 – legally represented by Judge dr. Andreea Ciucă - President, sends the following

**ANSWERS TO THE THIRD STUDY COMMISSION QUESTIONNAIRE**  
**"Mutual cooperation in the investigation of criminal cases and**  
**in the presentation of evidence"**

**1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.**

Law No 302/2004 on international judicial cooperation in criminal matters is the common law applicable exclusively in the field of international judicial cooperation in criminal matters.

This law contains general rules applicable to the mechanisms and forms of cooperation it provides for: extradition, the European Arrest Warrant (EAW), transfer of proceedings in criminal matters, recognition and enforcement of foreign criminal judgments, international judicial assistance and the European Investigation Order (EIO).

Law No 302/2004 applies on the basis of and for the enforcement of the rules on judicial cooperation in criminal matters contained in the international treaties to which Romania is a party, which it supplements if there are situations not provided for in those treaties.

At the same time, the law contains special provisions applicable in the field of international judicial cooperation in criminal matters for the following situations:

- ◆ when there is no treaty to which Romania is a party;
- ◆ when the treaties to which Romania is a party do not contain provisions contrary to those of Law 302/2004;



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- ◆ when the treaties are vague on the procedure to be followed.

There is a chapter in the Code of Criminal Procedure entitled "Provisions on international legal assistance". However, the main provision relevant to international judicial cooperation in criminal matters is the following: *"International judicial cooperation shall be requested or granted in compliance with the stipulations of the legal acts of the European Union, the international treaties for international judicial cooperation that Romania is a party to, and with the stipulations of the special law and this Chapter, unless the international treaties stipulate otherwise"* (art. 548 Code of Criminal Procedure).

Therefore, the general procedural law establishes the applicability, in this matter, of the rules contained in Law No 302/2004, unless the international treaties provide otherwise.

Article 548 of the Code of Criminal Procedure contains a special provision on acts carried out by joint teams in the framework of international judicial cooperation: *"Acts performed by seconded foreign members of a joint investigative team on the basis of and in compliance with the orders of the team leader shall carry similar value to those performed by the Romanian criminal investigation bodies"*.

Where bilateral, multilateral or regional treaties exist with other states in relation to a particular international judicial cooperation mechanism, which contain special provisions compared to Law No 302/2004, the provisions of the treaties shall apply with priority. For example, in the field of extradition, in relation to the United States of America, there is the Extradition Treaty between Romania and the United States of America, signed on 10 September 2007 and ratified by Law No 111/2008. The Romanian judge will therefore apply this law.

However, it should be noted that the bilateral treaties signed for certain mechanisms of international judicial cooperation, in relation to certain countries, contain mainly substantive provisions on those mechanisms. Therefore, as regards the procedure to be actually followed, the provisions of Law No 302/2004 will still apply, of course insofar as they are not contrary to the treaty and the ratifying law.

As a positive and important aspect, we would like to mention that in Romania all the instruments of international judicial cooperation in criminal matters are grouped together in Law No 302/2004 on international judicial cooperation in criminal matters, which we have referred to. It contains 335 articles and 14 annexes. Such an approach by the legislator provides the judge with a coherent, complete and easily understandable tool on the procedures applicable to international judicial cooperation. The grouping of all the instruments in this area in a single law also provides the basis for the consistency of jurisprudence.

**2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state? 3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?**

The principle of finding the truth, as a fundamental principle of criminal proceedings, is laid down in Article 5 of the Code of Criminal Procedure. According to this principle, the judicial bodies are under an obligation to ensure the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant.

In order to ensure the finding of the truth about the facts and circumstances of the case, on the basis of evidence, the judge has the possibility to use the forms and mechanisms of cooperation regulated by Law 302/2004. The judge can therefore request information from foreign states.

The legal mechanisms the judge can use for this purpose are as follows:

- ☐ In relation to EU Member States, with the exception of Denmark and Ireland, the judge applies the provisions of the European Investigation Order - Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014. This Directive has been transposed into national law, with an entire section of Law No 302/2004 devoted to this transposition, under the title "Provisions on cooperation with EU Member States in the application of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters". The judge can request information from an EU Member State only in relation to international judicial cooperation activities expressly provided for in the Directive.
- ☐ In relation to non-EU Member States, as well as Denmark and Ireland, the judge applies for international legal assistance in criminal matters on the basis of bilateral, multilateral or regional treaties. According to Article 228 of Law 302/2004, international legal assistance includes in particular the following activities: a) international letters rogatory; b) hearings by videoconference; c) appearance in the requesting State of witnesses, experts and persons sought; d) service of procedural documents to be drawn up or lodged in criminal proceedings; e) criminal records; f) other forms of legal assistance.
- ☐ In relation to states that do not have treaties with Romania, the judge shall refer to the rules of international comity, ensuring reciprocity. The activities of international judicial cooperation are those indicated above.

The same mechanisms are also applied by the judge when Romania is requested to provide information in criminal proceedings.



**4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios. necessary,**

- proportionate and
- permissible in the requested State in similar national proceedings.

Investigative measures must be carried out by the requested EU Member State with the same promptness and priority as in similar national proceedings.

Specifically, upon receipt of an EIO for the hearing of a witness, the judge fills in and sends the form in Annex B to Directive 2014/41 (corresponding to Annex 12 to Law 302/2004 on international judicial cooperation in criminal matters) on informing the issuing authority of the receipt of the EIO. The judge then carries out a formal analysis of the conditions for the execution of the EIO in order to verify whether any ground for non-recognition and non-execution applies to the case.

EU Member States may refuse an application on certain grounds. In the case of all measures, and therefore including the request to hear a witness, the following general grounds for refusal apply:

- ❖ the existence of an immunity or privilege or of rules limiting criminal liability in relation to freedom of the press;
- ❖ harm to fundamental national security interests;
- ❖ proceedings that are not of a criminal nature;
- ❖ the *ne bis in idem* principle;
- ❖ extraterritoriality linked to double criminality;
- ❖ incompatibility with fundamental rights obligations.

Additional grounds for refusal apply to certain measures, including the request to hear a witness:

- no double criminality (except for a list of serious offences);
- impossibility to execute the measure (investigative measure does not exist or cannot be used in similar national cases and there is no alternative).

If the judge finds that there are no such grounds, he or she shall recognise the EIO issued and take the necessary measures for its execution.

Within a maximum of 30 days of receipt of the request, the requested authority must take a decision on the recognition and execution of the request. The actual execution of the request must take place within 90 days of that decision.



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The hearing of the witness is conducted primarily according to the rules of the State issuing the EIO.

The same procedure must be followed by the judge when Romania is the requesting State. The grounds for refusal by the judge in the requested country are the same as those listed above.

In the case of non-EU Member States, as well as in the case of Denmark and Ireland, the request addressed to the Romanian court for the hearing of a witness must contain general information on the name of the requesting judicial authority, the subject matter and grounds of the request, a summary of the facts, the legal qualification and legal classification of the facts and the identification data of the witness. Any documents necessary or relevant to the taking of the evidence requested must be attached to the request.

As in the case of the EIO, on receipt of the request, the judge will proceed to a summary check to see whether there are any grounds for non-execution. This analysis is essentially aimed at compliance with the fundamental principles of Romanian law.

Investigative measures must be carried out by the Romanian judge with the same promptness and priority as in similar national proceedings. Or, if a time limit is mentioned in the request it must be respected as far as possible. As a rule, the time limits mentioned in the request are respected given the short average time taken by Romanian courts to deal with cases. For example, at the level of the courts of appeal, in 2021, the average duration of criminal cases was 3.5 months.

The same procedure must be followed by the judge when Romania is the requesting State.

According to Law 302/2004, both in the case of requests sent by an EU Member State and in the case of requests sent by a non-EU Member State, the Romanian judge has the possibility to consult with the requesting authority whenever he / she deems necessary in order to produce the evidence requested.

**5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.**

Please note that the Romanian judge does not have the power to prosecute. It is the public prosecutor who has this competence. At the prosecution stage, the judge only has the power to verify the legality of certain prosecution acts, according to the procedures laid down in the Code of Criminal Procedure. The judge also has the power to order custodial measures and measures

restricting the rights of persons. And, of course, the judge has the power to review the legality of the entire prosecution after the defendant has been brought to trial.

As we have stated before, regardless of the object of the request for international cooperation in criminal matters that it receives, the Romanian judge must verify whether there are grounds for non-recognition and non-execution. In this legal context, respect for fundamental human rights and procedural fairness are of particular importance.

Thus, the recognition and execution of a EIO is refused if the EIO was issued in the context of certain types of proceedings provided for by law and the investigative measure would not have been authorised under Romanian law in a similar case. Or if the execution of the EIO would be contrary to the *ne bis in idem* principle. The Romanian judge may also refuse execution if the EIO relates to an offence which is presumed to have been committed outside the territory of the issuing State and wholly or partly on Romanian territory, and the act in relation to which the EIO was issued is not criminalised under Romanian law. Or if there are reasonable grounds to consider that the execution of an investigative measure would be incompatible with Romania's obligations under Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union.

At the same time, the judge shall refuse extradition if the right to a fair trial within the meaning of the ECHR or any other relevant international instrument ratified by Romania has not been respected. Similarly, the judge shall refuse extradition if there are substantial grounds for believing that extradition is requested for the purpose of prosecuting or punishing a person on grounds of race, religion, sex, nationality, language, political or ideological opinion or membership of a particular social group, or if the person's situation is likely to deteriorate for any of these reasons. If it concerns a crime of a political nature or a crime related to a political crime, extradition will also be refused.

Respect for fundamental human rights and rules of procedural fairness is also important in the case of the EAW. Thus, the Romanian judge refuses enforcement if, for example:

- ◆ the person concerned has been finally judged for the same acts by a Member State other than the issuing State, provided that, in the case of conviction, the penalty has been executed or is currently being executed or execution is statute-barred, the penalty has been pardoned or the offence has been amnestied or another cause preventing execution has occurred, according to the law of the sentencing State;
- ◆ the offence on which the EAW is based is covered by an amnesty in Romania, if the Romanian authorities have, under Romanian law, jurisdiction to prosecute that offence;
- ◆ when the person who is the subject of the EAW is not criminally liable, by reason of his age, for the acts on which the arrest warrant is based under Romanian law;





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- ◆ the person who is the subject of the EAW is subject to criminal proceedings in Romania for the same act on which the EAW is based;
- ◆ the sentenced person did not appear in person at the trial, unless the issuing judicial authority informs the person that, under the law of the issuing State: the person was informed in due time by a written summons delivered in person or by telephone, fax, e-mail or other means, of the date, month, year and place of the trial and that a decision may be handed down if he or she does not appear for the trial; or after having been personally served with the judgment of conviction and having been informed that, according to the law, the case may be retried or that the judgment is subject to appeal and may be reviewed, including on the basis of fresh evidence, and, if the appeal is admissible, may be quashed, the convicted person has either expressly waived the retrial or the appeal or has not requested a retrial or lodged an appeal within the time limit prescribed by law; or the sentenced person has not been personally served with the judgment of conviction but, immediately after surrender, the sentenced person will be personally served with the judgment of conviction and informed that the judgment of conviction is subject to appeal within a specified time limit, at which time the competent court may review the judgment under appeal, including on the basis of fresh evidence, and the judgment of conviction may be quashed following the outcome of the appeal, in which the sentenced person may participate in person.

The Romanian judge will not recognise and enforce a foreign judgment if, for example: the recognition and enforcement on the Romanian territory of the foreign judgment would be contrary to the fundamental principles of the Romanian legal order; the judgment concerns a political crime or a crime related to a political crime or a military crime which is not a common crime; there are objective indications that the judgment was given in violation of fundamental rights and freedoms, in particular that the punishment was imposed in order to punish the convicted person on grounds of sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation, and the convicted person had no opportunity to challenge these circumstances before the European Court of Human Rights or another international court.

**6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive**

According to information provided by fellow judges, they had to deal with all categories of requests for international judicial cooperation in criminal matters resulting from Law No 302/2004 which includes all cooperation mechanisms (e.g. passive extradition, European Arrest Warrant, European Investigation Order, recognition of foreign criminal judgments, requests for legal assistance, etc.).

As a positive aspect, we can point out that the method of consultation of the Romanian judge with the courts of the requesting states works very well. In this respect, by way of example, we note very good cooperation with EU Member States: Germany, Austria, France, Hungary, Spain, Belgium, Slovenia. As regards non-EU Member States, we note, also by way of example, very good cooperation with the USA and Canada.

Of the many situations Romanian judges have had to deal with, we refer to two cases in which, having been seized with requests for the execution of a EAW, judges resorted to alternative measures. In both cases, the requesting states requested the surrender of the defendants to be heard in those countries in criminal proceedings pending before the courts.

In both cases, the defendants were suffering from illnesses that required special conditions of surrender to avoid a worsening of the illness, more precisely to protect their right to health protection. These special means had to be provided, from the Romanian border to the State of destination, by the requesting authority.

In view of the right to the protection of health, provided for in Article 25 of the Universal Declaration of Human Rights and Article 35 of the Charter of Fundamental Rights of the European Union, the Romanian judges informed the judges of the requesting States (Austria and Hungary) of the state of illness of the defendants. Following effective consultations, the judges in the requesting States agreed to resort to alternative measures, i.e. hearings by videoconference, with the assistance of the Romanian courts. After using the alternative method of hearing, the judges in the requesting States withdrew their EAW.

On the other hand, we also have an example where the Romanian judge justifiably refused to execute the EAW issued by a judge in an EU Member State. Specifically, the Romanian judge received a European Arrest Warrant for the surrender of the convicted (requested) person to serve a prison sentence, issued by the court of the requesting State. After carrying out a legality check on the referral, the Romanian judge found that it was missing a number of data and information which are mandatory under Framework Decision 2002/584/JHA.

The Romanian judge therefore entered into consultations with the judge in the requesting State, asking him to complete the European Investigation Warrant. However, the judge did not provide the mandatory information requested by the Romanian judge. Instead, 2 days after the requested person was detained on Romanian territory, the judge of the requesting State chose to transmit the certificate provided for in Article 4(4) of the European Evidence Warrant. (1) of the



Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU. According to the Framework Decision, this certificate was issued for the recognition and enforcement, in the territory of Romania, of a custodial sentence imposed in the requesting State. By means of the certificate, the judge in the requesting State again requested the arrest of the sentenced person.

Therefore, on the one hand, the EAW was not lawfully issued, as the deficiencies were not corrected within the time allowed. On the other hand, the issuing State has duplicated the cooperation mechanisms by having recourse simultaneously to both the issuing and transmission of the EAW and the issuing and transmission of the certificate, in respect of the same person, for the same acts and for the purpose of executing the same custodial sentence. From the manner in which the authorities of the issuing State acted, together with the failure to complete the EAW, as requested by the Romanian executing court, it was concluded that the EAW was not issued for the purpose set out in Article 1(1) of Framework Decision 2002/584/JHA, but rather for the purpose of locating and arresting the sentenced person, in order then to transmit the certificate for the recognition and enforcement in Romania of the sentence passed in the requesting European State.

Consequently, the Romanian judge refused to execute the EAW for the reasons given. As the Romanian judge held in his judgment, the procedure for recognition of the conviction following the certificate transmitted by the judge of the requesting State, followed its own course, separate and independent of the EAW.

Judge Andreea Ciucă, PhD

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