



**„NICOLAE TITULESCU” UNIVERSITY
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DOCTORAL THESIS

**Recognition and enforcement in Romania of foreign judgments issued
in the EU by which custodial sentences were imposed**

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Summary

As long as transnational organized crime has acquired an even greater dimension as a result of the recognition of increased freedom of movement within the member states of the European Union and correlatively, the number of foreign citizens incarcerated in other states than those of their citizenship has increased, an in-depth study of the procedure of mutual recognition of judicial decisions in criminal matters is meant to contribute to a better understanding, especially by practitioners, of the instruments specific to international judicial cooperation and to their more effective application.

The novelty of the research topic is determined, on the one hand, by the fact that Romania joined the European Union relatively recently with respect to the delays necessary for the consolidation of rule of law which must adapt to a legal paradigm that the European community outlines for a long time, and, on the other hand, by the continuous evolution of the European law and the principles derived from the case law of international courts. Very often, national courts have to interpret EU law, and a systematization of the main provisions applicable to the recognition and enforcement of foreign judgments, with reference to the rulings issued by the Court of Justice of the European Union, can be of real use to practitioners.

The usefulness of the researched topic is given by the fact that the transposition of a part of the EU legislation was not carried out accurately, and the provisions of the national legislation do not provide basis for interpreting such regulations in order to solve all the issues which may arise in the cases referring to the recognition of foreign judgments by which custodial sentences were imposed.

In this context, without pretending to have produced an exhaustive approach, the thesis aims to provide answers to the main problems that may occur in determining the central element of the recognition of foreign judgments by which custodial sentences were applied (Part I) and to those regarding the procedure for their recognition and enforcement on the territory of Romania (Part II). The thesis is therefore divided into two parts, one with a pronounced theoretical emphasis and the second, focusing on the case law of national jurisdictions, which tries to provide answers to rather practical problems. The explanation of this approach lies in the distinction between the central element of recognition – i.e. the custodial sentence itself and which thus implies an analysis of the concept both from the perspective of the legislative evolution and legal literature in the matter - and the object of the recognition procedure - which, as it is defined by the law,

refers to the examination of the fulfillment of the conditions provided by the law for the recognition and enforcement of the judicial decisions sent by the issuing state.

In Part I, Section I, the thesis aims to clarify the concept of "punishment", both by referring to doctrinal approaches and legislative evolution, as well as by a foray into the theories of the foundation of punishment, concluding that as long as "social rehabilitation" is the purpose of the Framework Decision 2008/909, the European legislator seems to embrace the utilitarian theories of the foundation of punishment.

Section II aims, over the course of two chapters, to explore the nature and types of custodial sentences provided by the legislation of most of the member states of the European Union, highlighting the possible differences between those provided by the Romanian Criminal Code, in order to offer some benchmarks for the adaptation of these sanctions within the recognition procedure. We concluded that the nature or type of custodial sentences provided by the legislation of the member states is quasi-uniform, the differences being rather given by the terminology used or by their enforcement regime.

Section III wishes to systematize the criteria used in the case law of the European Court of Human Rights and the Court of Justice of the European Union for the qualification of certain sanctions as penalties, as these are indispensable in analyzing the compatibility of punishments of different nature or having different names provided by the national legislation of the member states of the European Union. We have shown that, in the context of the sovereignty of the member states and their autonomy recognized in the legislative process in relation to the socio-political particularities and their own criminal policies, it became necessary to develop a set of specific criteria that could serve to harmonize the sanctions and to ensure the achievement of their purpose and functions. These criteria were first created in the case law of the European Court of Human Rights and were "borrowed" without objections by the Court of Justice of the European Union, so that, at present, any judicial authority of the member states has the possibility to assess the nature of a sanction provided by national legislation and to decide whether or not it falls within the scope of the procedure for the recognition of foreign judgments.

Section IV includes the actual analysis of the central element of the recognition – the penalty - and the exceptions to the provisions which can be recognized from the perspective of Law no. 302/2004 on international judicial cooperation in criminal matters, strictly in terms of custodial sentences, therefore not including other measures which could have a similar effect. Equally, the peculiarities of the recognition of penalties applied in the case of multiple offences were addressed, actually being the ones which generate the most problems of interpretation of the applicable legal provisions and subsequently, the non-unitary case law at the level of the courts. We have shown that, unfortunately, as a result of an imperfect transposition of the provisions of the Framework Decision 2008/909, the Romanian legislator regulated in an unclear manner the possibility of adapting the

penalties applied for different forms of multiple offences, which led to some questionable and non-unitary judgements, although the High Court of Cassation and Justice intervened through the available mechanisms in order to unify judicial practice. Consequently, we concluded that *de lege ferenda*, it would be necessary and appropriate to include in the provisions of art. 166 para. (8) lit. b) of Law no. 302/2004 after the "penalty applied for multiple offences" the rule of comparison the penalty with the general maximum provided by Romanian law or with the sum of the individual penalties applied in all the hypotheses that multiple offences would include, along with the establishment of the mandatory recognition and the foreign judgment which would constitute the first term of the recidivism.

The analysis of the central element of the recognition could not ignore the exceptions to the provisions which could be recognized, but above all, the recognition in order to produce legal effects other than the enforcement of the custodial sentence, which generates many problems in the Romanian case law. However, having as a starting point the case law of the Court of Justice of the European Union, we tried to clarify, at least partially, the issues related to the meaning of the term "other legal effects" and the limits in which such effects can influence the recognized foreign judgment with respect to the provisions of the Framework Decision 2008/675 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Section V aims to offer a synthesis of the main problems related to the conditions for the enforcement of custodial sentences in different states of the European Union, the structural problems found by the international courts being able to represent, under certain conditions, genuine limitations or exceptions to the application of the principle of mutual recognition. We have shown that, although unlikely, if the judicial authorities of the executing state would find that their own state does not ensure the minimum standards to avoid the conclusion of a risk of violation of art. 3 of the European Convention on Human Rights and Fundamental Freedoms, they would have the possibility, considering the case law of the Court of Justice of the European Union and the exceptional situations which allow derogations from the principle of mutual trust, to reject the request for recognition and transfer for the purpose of enforcement of the custodial sentence. The second part of the thesis tries to find answers to the problems regarding the procedure of the recognition and enforcement of judgments in Romania, being structured in two sections. We have shown that although, apparently, the phrase "recognition procedure" suggests a strong lien with the provisions of the Criminal Procedure Code and, generally, of criminal procedural law, it actually refers to the verification of the fulfillment of the conditions provided by Law no. 302/2004, which often find their legal counterpart in the substantial criminal law or in the provisions related to the enforcement of criminal sanctions.

Section I follows, over the course of two chapters, a presentation of the European legislation in the matter, trying to clarify the applicability of the legal instruments of

European law *ratione materiae* and *ratione temporis* and, respectively, of the national legislative framework, by referring to the evolution of international legal instruments meant to ensure a more effective international judicial cooperation. The section tries to present the entire evolution of the European legislation which resulted in the adoption of the Framework Decision 2008/909 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 European Union and which has been transposed by all member states.

With regard to the national legislative framework, looking at Law no. 302/2004 in a critical manner, a first observation was that taking over *ad literam* the provisions contained in international legal instruments does not seem to be the most inspired choice for the Romanian legislator, since the expressions, the terms used or the sequence of approach of the various legal institutions are not familiar to legal professionals. The phrases used in the texts of the law are sometimes too long, contain many parahrappghs or include exceptions next to and immediately after the rule, which makes it particularly difficult to follow the reasoning of such norms and also raise multiple problems of interpretation.

Consequently, we proposed, first of all, a different approach of those norms, a veritable "map" of the legal provisions, following the checks imposed by the procedure for the recognition of foreign judgments by which custodial sentences were applied.

A second observation was that beyond the principles of loyal cooperation of the member states and the supremacy of European law, which require that the interpretation of national law should be made according to the regulations of this one, sometimes the transposition is limited by the specific language of international regulations, including differences in terminology or inaccurate translations. For this reason, we tried to propose a systematization of the rules and interpretations based on the case law of the Court of Justice of the European Union or offered by foreign legal literature in order to ensure a better understanding of the principles enshrined by the Framework Decision.

Section II offers an analysis of the procedure and the conditions under which the recognition of foreign judgments by which custodial sentences were applied can be made, being structured in three chapters.

In Chapter I, the general and special conditions for recognition are analyzed, especially the aspects related to the requirement of double criminality or the requirement that the convicted person lives in Romania and have a continuous and legal residence in Romania for a period of at least 5 years. We tried to explain these conditions by referring to the case law of the Court of Justice of the European Union. Also, a more thorough analysis concerns the negative condition of the non-existence of a ground for non-recognition and non-enforcement, which (at least the mandatory ones) could equally

represent special conditions for the recognition of the foreign judgment. From the perspective of the *ne bis in idem* principle, we have shown that, since the Romanian law does not explicitly cover the hypothesis in which a final judgment of acquittal was pronounced in Romania for the same facts, Law no. 302/2004 made a flawed transposition of the provisions of the Framework Decision 2008/909, which provides as grounds for non-recognition the hypothesis in which "the enforcement of the sentence would contravene the non bis in idem principle", without making a distinction with respect to the decision to be issued. Similarly, the Romanian legislator, at the time of the transposition of the Framework Decision 2008/909, acknowledged the exceptions which allow the recognition of the judgment of conviction of the person was rendered *in absentia*, trying to adapt them to the national legislation. Unfortunately, however, the explicit transposition of the requirement which refers to the unequivocal establishment of the fact that the said person was aware of the scheduled trial was omitted, which generated numerous difficulties in practice. Also from the perspective of the grounds for non-recognition, Law no. 302/2004 made an inaccurate transposition of the provisions of art. 9 lit. g) of the Framework Decision 2008/909, according to which the grounds which would allow the refusal of the recognition and enforcement of the foreign judgment are the situations when "the punishment was imposed on a person who, under the law of the executing state, owing to his or her age, could not have been held criminally liable for the acts in respect of which the judgement was issued", since the Romanian legislator did not specify the grounds for refusing the recognition in this case. Or, the generic mention of the ground for refusal that the person is not criminally liable according to the Romanian criminal law risks to lead to the examination of other cases, such as those of non-imputability, which could mean the disrespect of the *res judicata* of the foreign judgment. We have thus tried to convert these observations into *de lege ferenda* proposals and we believe that the national law should transpose exactly the expression used in the framework decision, which requires the "effective receipt" of an official information of the scheduled date and place of the trial by the accused person in such manner that it is unequivocally established that he or she was aware of the scheduled trial, as well as to limitate the ground for non - recognition in the national legislation to the age of the person for which he or she is not criminally liable.

In Chapter II, we showed that the procedure referred to by the judicial cooperation mechanism involves going through two stages: first the initiation of the procedure, which has rather the role of a filter procedure, aiming to ensure the sustainability of the request for recognition of the foreign judgment and thus avoiding cases of refusal which would generate the appearance of a lack of consistency of the principle of trust and mutual recognition, and second one, the recognition itself, in which the attributions of the authorities involved have a jurisdictional character.

Continuing on a critical note with respect to the national legislative framework, we showed that the initiation of the procedure involves carrying out activities by non-judicial

bodies, having rather an administrative character. In this context, once again we pointed out the deficient way of drafting Law no. 302/2004, on the one hand regarding the powers of the competent authorities, which are regulated in the content of some disparate articles in the body of the law, as well as the inclusion in the category of checks carried out by the administrative authorities of few conditions relating to the grounds of the request for recognition and enforcement of the foreign judgment and which it normally goes beyond this non-jurisdictional stage.

In the context of the judicial procedure, special attention was given to the decisions on admitting the requests for the recognition of foreign judgments which also involve an adaptation of the applied penalties, procedure which is closely related to the aspects analyzed in Part I of the thesis regarding the central element of recognition. In fact, most of the problems that occurred in case law are limited to the issue of adapting the punishments applied for the perpetration of multiple types of offences, problems which still exist despite the mandatory decisions of the High Court of Cassation and Justice within the mechanisms of unification of judicial practice. We have shown that the failure to fulfill the conditions related to the first stage will not prevent a reiteration of the request for recognition, while in the second stage, as a principle, the decisions issued by the courts will acquire *res judicata*, so if the request is rejected, the request for recognition cannot be repeated.

Finally, in Chapter III we analyzed the procedures associated with the enforcement of the sentence after the recognition decision has become final, which are subject exclusively to Romanian law. Once the foreign judgment is recognized, it is integrated into the domestic legal order of the executing state and considered to have similar effects to those issued by the latter's courts. Consequently, it seems natural that the execution of the custodial sentence is subject to the law of the executing state in all its components, however, considering the purpose of the Framework-Decision 2008/909, there is an obligation to adapt the national legislation to the European standards regarding detention conditions and, generally, the conditions for serving the punishment to ensure the effectiveness of the desired reintegration into society of convicted persons.

The analysis tries to highlight the fact that, within the European Union, a unique space of freedom and security in which fundamental human rights and freedoms are of primary importance, the legislation of the member states tends to harmonize under the influence of the European legislator, and traditional internal borders begin to disappear. The natural consequence, in our opinion, is that in the future this space will also be marked by legal uniqueness, and there is a concern for the harmonization of criminal legislation and criminal procedure, at least in the matter of procedures which involve a transnational character and which will lead to a genuine European criminal law.

Consequently, the national courts of the executing states must show a flexible approach in examining the conditions under which the recognition and enforcement of

foreign judgments where custodial sentences have been applied can be achieved, ensuring the effectiveness of the principle of mutual recognition, balancing the respect for fundamental human rights and freedoms.