

COMPARISON OF THE TRANSFER OF CRIMINAL PROCEEDING WITH OTHER FORMS OF INTERNATIONAL LEGAL COOPERATION IN CRIMINAL MATTERS

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Abstract: *The article examines the current regulations of the transfer of criminal proceeding in the European legislation, indicating the differences from other forms of International legal cooperation in criminal matters, such as: transfer of sentenced persons and mutual recognition of judgments. The study highlights the importance of the transfer of criminal proceeding for the International legal cooperation in criminal matters between the European countries. Its main objective is by preventing the conflicts of jurisdiction between the States concerned to ensure a more efficient, procedural economical and lawful prosecution of crimes.*

Keywords: International legal cooperation, transfer, criminal proceeding, jurisdiction, judgments.

1. Introductory remarks

In recent decades the growing mobility of people, goods and services has led to an increased criminality, which more and more often is extending beyond national borders. The European States constantly take different measures to improve the criminal and criminal procedural legislation not only nationally, but also internationally. As a result, international organizations have developed and adopted numerous substantive acts and procedural instruments for jointly addressing and dealing with the consequences of criminal activity. Progressively have developed various forms of international legal cooperation in criminal matters, which have been successfully implemented in combating crime.

Nowadays commonly used are several basic forms of international legal assistance in criminal matters, such as: judicial and investigation order, extradition, European Arrest Warrant, transfer of sentenced persons, transfer of criminal proceeding, recognition

and enforcement of foreign judgments.

The present study aims to reveal the general and specific characteristics of the transfer of criminal proceeding in comparison with other two forms of international legal assistance in criminal matters, namely the transfer of sentenced persons and recognition and enforcement of foreign judgments /sentences/.

2. Comparison of transfer of criminal proceeding with transfer of sentenced persons and recognition and enforcement of foreign judgments /sentences/.

2.1. General characteristic

European practice in the field of criminal justice shows that States are often faced with situations, in which two or more of them have the competence to investigate and bring prosecutions for the same or related crimes. Each state has adopted a procedural mechanism for transferring criminal proceedings from its own criminal jurisdiction into that of another state, when this is in the interest of good administration of justice [1].

This mechanism for "*reassignment of jurisdiction*"[2] in contemporary legislation is called *transfer of criminal proceeding*.

Transfer of criminal competence is performed by mutual agreement of the states, when the circumstances of the criminal case suggest that the proceeding would be more efficiently conducted in the requested State, than in the State, where it was initially instituted. There are different reasons why the conduct of criminal proceedings will be more successful in another country than the country, in which the proceeding have started, therefore it should be transferred. For example: when the offender is on the territory of the requested State; when the crime is committed in whole or in part on the territory of the other country; if there are difficulties in securing evidence in the requesting State; if the suspect is already serving a sentence of imprisonment in the requested State and others.

The *transfer of sentenced persons*, in turn, is a transfer of sentenced by a foreign court person in his own State, in order to serve his sentence of imprisonment in a more favorable environment, with a view to a more efficiently achieving the objectives of the punishment [3]. Even though this requirement is not legally attached, it is assumed that if the convicted person is serving his sentence in a familiar social and cultural environment, where opportunities for contact with the society, in particular with his relatives are facilitated, this would increase the chances of its social rehabilitation, respectively for its correction and reeducation.

Unlike the transfer of a sentenced person, the possibility of re-socialization of the convicted in the execution of possible future penalty is one of the alternative conditions, laid down at the transfer of criminal proceedings under Art.478, para.2, item 9 of the CCP of the Republic of Bulgaria, in conjunction with Art.8, para.1, item "f" of the *European Convention on the Transfer of Proceedings in Criminal Matters of the Council of Europe* [4].

The object of the transfer in the first form of international legal assistance in criminal matters is pending criminal proceedings, and in the second - a sentenced person. Both types of transfer represent two interrelated stages of the criminal process, one of which includes criminal prosecution, judgment and punishment of a particular person for a particular criminal offense, and the other one - the realization of the criminal liability regarding the convicted in his Fatherland country. In this sense, the link between the two types of transfer is the other form of international legal assistance in criminal matters - *recognition and enforcement of foreign judgments*, which is the transfer of enforcement procedure from the sentencing State to another State, which commits to execute with the sentence imposed punishment.

Taken together the listed forms of international legal assistance provide conducting the main stages of the criminal process, in terms of legal cooperation and interaction between the States concerned, namely the institution of criminal proceedings, conducting a criminal prosecution, its completion with final verdict and enforcing the penalty imposed.

2.2. Basic preconditions for implementation of the listed forms of international legal assistance in criminal matters

The existence of preconditions, respectively the lack of obstacles for implementing the transfer of criminal proceedings, are not defined at the moment, in which the offense was committed, but at the moment, in which the competent authority decides whether to allow the claim for transferring to the requesting State. The transfer of criminal proceedings is a procedural and not of substantive nature. It does not consider the substantive matters, related to the offense and the relevant penalty, as they are a subject to the criminal proceedings itself. For the procedure to transfer of criminal proceedings is relevant only if there are the necessary preconditions for its conducting.

Procedural is also the character of the other two forms of international legal assistance in criminal matters, where the time of committing the criminal act, and the time of issuance of the conviction are not relevant to their implementation. The competent authorities of the requesting and the requested State are obliged to consider whether there are conditions for transfer of a sentenced person, respectively for recognition and enforcement of a foreign judgment, at the time, when the request for their implementation was made.

A. The main prerequisite for relevancy of each one of the considered forms of international legal assistance is the existence of an agreement /bilateral or multilateral/ between the countries concerned.

The primary legal framework for the transfer of criminal proceedings contains in the *European Convention on the Transfer of Proceedings in Criminal Matters of the Council of Europe*, whose provisions have been transposed in some of the European States, which have ratified the Convention [5].

With regard to the States, which have joined the European Convention on the Transfer of Proceedings in Criminal Matters, it is of a primary consideration, with argument from Article 43, paragraph 2: “The Contracting States may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it.”

As a form of international legal assistance in criminal matters specific provisions on transfer of criminal proceedings are also included in the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe [6]; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [7]; United Nations Convention against Transnational Organized Crime /Art.21/ [8]; United Nations Convention

against Corruption /Art.47/ [9]; United Nations Convention against illegal trafficking of narcotic and Psychotropic Substances /Art.8/ [10]; Framework Decision 2009/948/JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings between the European states of the EU Council of November 30, 2009 [11].

Similarly, the recognition and enforcement of foreign judgments is a subject to the *European Convention on the International Validity of Criminal Judgments* [12], whose legal framework, by argument of its Art.64, Para.2, also has a primary importance compared to the bilateral agreements, regulating the same subject matter among European States.

The transfer of sentenced persons is regulated in the *Convention on the Transfer of Sentenced Persons* [13], that according to its Art.22, Para.2 does not have the paramount importance. On the contrary - it is subsidiary compared to the other bilateral or multilateral agreements among the Member States on issues of the transfer.

Nevertheless practice shows that most European countries rely primarily on the bilateral agreements in implementing the international legal assistance in criminal matters.

It should be noted that in the absence of a special agreement for legal assistance between the States concerned, it is possible to apply the *principle of mutuality*, which is also established practice in the international cooperation in criminal matters between the continental European States [14]. The relations of mutuality between states are not sufficient grounds for relevancy only to the institute of recognition and enforcement of foreign judgments. This limitation stems from the principle of the independence and sovereignty of every State, which has the obligation to recognize and enforce judgments, issued only by its national authorities, unless the otherwise is provided in an international treaty to which the State is a party.

B. The next absolute prerequisites for the

implementation of the considered forms of international legal assistance in criminal matters is dual criminality of the crime and his subject.

In accordance to the provisions of Art. 478, para. 2, items 1 and 2 of the CCP, in order to be accepted transfer of criminal proceedings in the Republic of Bulgaria, the offense, for which the request is made, must constitute a crime and the perpetrator has to be criminally responsible according to Bulgarian law. Identical are the provisions of Art. 463, items 1 and 2 of the CCP, regarding the admissibility of the institute of recognition and enforcement of a foreign judgment by the authorities of the Republic of Bulgaria. That means that the act should be criminalized and its perpetrator needs to be criminally responsible under the criminal law of the requesting and the requested State.

The same applies to other form of international legal assistance in criminal matters - the transfer of sentenced persons. At the Bulgarian PPC there is no explicit provision on dual criminality of the crime and sentenced person, but such a condition is determined by the provisions of Art.3, para.1, item "e" from Convention on the Transfer of Sentenced Persons "if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory".

In this context, the states concerned should have a criminal jurisdiction to prosecute the offense, which is subject of the transferred criminal proceedings, respectively to judge and punish the perpetrator of the relevant act.

The legal regulation of the transfer of criminal proceedings in European Convention on the Transfer of Proceedings in Criminal Matters governs two types of criminal jurisdiction - *primary /initial/ and subsidiary /additional/*. Under primary jurisdiction laid down in the provisions of Art.3 - two or more Member States have

their own competence to prosecute a particular offense, but in the interest of a good administration of justice one of them renounces its jurisdiction in favor of the other Member State. According to Art. 2 the subsidiary competence of the requested State arises by a request from the requesting State to initiate, respectively to continue the criminal proceedings with the result that the state, which in the specific case does not have jurisdiction, acquires such jurisdiction from the transferring state with an initial jurisdiction. In both criminal jurisdictions the offense, whose prosecution and punishment is requested, must contain the features of a criminal formulation according to the criminal law of both - the transmitting and the receiving state, and also the supposed perpetrator of the crime must have a criminal liability under the laws of both Contracting States [15].

Unlike the transfer of criminal proceedings, for the transfer of sentenced persons and the recognition and enforcement of foreign judgments is not necessary for a state to renounces its jurisdiction in favor of the other state. It is because the sentencing state already has exercised its criminal jurisdiction to judge, since it gave the final verdict. Here, the transferring state renounces only the competence to execute its final procedural act on its territory, as it subcontract this duty to other country.

Namely this is the most substantial difference between the considered forms of international legal assistance - at the transfer of criminal proceedings is transferred criminal jurisdiction for prosecution, trial and punishment of a particular person for a particular criminal act, whereas at the recognition and enforcement of foreign judgments is transferred only the result of judicial proceedings in the form a final verdict, respectively it transfers the jurisdiction for enforcing the penalty imposed. For the transfer of sentenced persons - along with the transfer of a guilty verdict is done a factual transfer of the sentenced person to his Fatherland State.

On the other hand, the common between the three forms of international legal assistance is that each of them performed a peculiar *transfer of competence*, but with a different volume, depending on the intended objective.

At the transfer of sentenced persons the Fatherland State always is a country with a primary jurisdiction over its nationals, convicted abroad for crimes they committed, but its criminal jurisdiction is concluded just to recognize and execute the sentence, issued by the foreign judicial authorities. While at the transfer of criminal proceedings, the receiving State can possess both a primary and subsidiary jurisdiction to prosecute, judge and punish, depending on the grounds for the applicability of the principles of extraterritorial effect of the criminal law [16]. The latter is valid also for the recognition and enforcement of foreign judgments, in which the receiving State, executing the penalty, could be any State, including Fatherland, if this is in the interest of justice.

It should be noted that in implementing of the considered forms of international legal assistance are used both the criminal law of the requesting State and the criminal law of the requested State. The principle stemming from national sovereignty is that *each country applies its domestic legislation*, when the criminal case is under its jurisdiction, regardless whether it is a primary or subsidiary jurisdiction.

Until the moment of its transfer the criminal proceedings is conducted under the criminal law of the requesting State. After granting the request for transfer, to the criminal proceedings applies the national legislation of the requested State. The requesting State, in turn, is obliged to terminate any investigation proceedings of the crime, that is a subject of the transferred proceedings. Determinant is the time of granting the request for transfer, respectively the moment, when the competent authority of the requested State notifies the relevant authority of the requesting State of its decision – to adopt or not the criminal

proceedings.

Until the moment of receiving the reply, the requesting State is obliged to stop its criminal proceedings concerned, pursuant to Art.21, para.1 of European Convention on the Transfer of Proceedings in Criminal Matters: “When the requesting State has requested proceedings, it can no longer prosecute the suspected person for the offence in respect of which the proceedings have been requested or enforce a judgment which has been pronounced previously in that State against him for that offence. Until the requested State's decision on the request for proceedings has been received, the requesting State shall, however, retain its right to take all steps in respect of prosecution, short of bringing the case to trial, or, as the case may be, allowing the competent administrative authority to decide on the case.” If the requested State rejects the request for transfer, the requesting State shall recover the right to prosecute and penalize the suspected person for the relevant criminal act, respectively to the criminal proceedings will again be applicable the penal law of the requesting State [17].

At transfer of a sentenced person the criminal law of the requesting State is applicable to the convicted until the moment of the legal recognition of the sentence by the judicial authorities of the Fatherland State, i.e. the factual surrender of the person is not a sufficient basis for termination of the criminal jurisdiction of the sentencing State. It is required an explicit legal act to justify the implementing competences of the requested State, which in this case is not the State that issued the guilty verdict. From the moment of legal recognition of the sentence the Fatherland State applies its national legislation in the execution of penalty against the convict. The same is valid to the institute of recognition and enforcement of a foreign judgment. From the moment of its validation, respectively adaptation to the criminal law of the receiving State, the verdict is considered to be issued by the

authorities of the requested State, which are responsible for its execution according to the rules of the Penal Enforcement law of that State.

As in the transfer of criminal proceedings, under Article 11, paragraph 2 of European Convention on the International Validity of Criminal Judgments, the sentencing State shall recover the right to execute the guilty verdict, if it withdraws its request before the requested State has informed it of its intention to undertake action on the request; if the requested State refuses the execution of the penalty or if it becomes impossible to be executed on its territory. Possibility to recover the right of enforcement of the verdict exists for the sentencing State in transfer of a sentenced person, if his fatherland State refuses to recognize the judgment or does not take action on enforcement of the penalty. According to the provision of Art.13 of Convention on the Transfer of Sentenced Persons, only the person sentencing State has the right to reconsider the judgment, respectively to pardon, grant amnesty or reduce the penalty imposed. It is extremely important that the legislator, according to Article 26, paragraph 1 of European Convention on the Transfer of Proceedings in Criminal Matters, allows all committed until the transfer of proceedings procedural and investigative activities by the authority of the requesting State to retain its evidential value, as if they are committed of a competent authority of the requested State, provided that these investigative activities have been committed by the foreign authority in accordance with their national legislation. Thus is ensured the continuity and procedural economy in the criminal process, as there is no need the procedural investigative activities to start from the beginning, which would undoubtedly take up lots of time and means of the receiving State.

Similar authorization is not provided for the other two forms of legal cooperation, but such is not necessary by the fact that they are implemented after the closing phase of

the penal process, respectively after the entry into force of the judgment and not during the pending proceedings. Moreover, the act of recognition of the foreign judicial decision by the competent authorities of the requested State validates the investigative procedural actions, conducted by the legal authorities of the requesting State during the criminal proceedings.

C. Other major prerequisite for the implementation of the considered forms of international legal assistance in criminal matters is the existence of a legal and/or factual connection between the subject of the crime and the State, of which is transferred criminal jurisdiction.

This connection occurs, at first, by the *citizenship* of the perpetrator of the criminal act. According to Art. 478, para.2, items 3 and 4 of the CCP of the Republic of Bulgaria, in relation to Art.8, para.1, item "b" of European Convention on the Transfer of Proceedings in Criminal Matters, in order to be transferred criminal proceedings it is required the supposed perpetrator of the act to be a national of the requested State or that State to be the country of his origin. Under item "a" of the same paragraph - the suspect must be a *permanent resident* in the requested State, which is the other alternative condition for transfer. So the legislator provides two alternative conditions for the transfer of criminal proceedings, as the presence of any of them is sufficient for its realization - if the suspect is not a citizen of the requested State, at least he must permanently reside in the territory of the requested State. Otherwise, the transfer of criminal proceedings in the requested State becomes meaningless.

The legal connection between the receiving State and the convicted is a mandatory condition for the transfer of a sentenced person too. Unlike the transfer of proceedings, however, the subject of transfer could only be citizens of the receiving State. This requirement stems from the legal nature of the considered institute, which unlike the transfer of

criminal proceedings does not apply mainly in the interest of justice, but mostly in the interest of the sentenced person. Originally, there is no obstacle for the sentencing State to execute the verdict, but it provides this obligation the Fatherland State of the convicted, which is most responsible for its citizens. Thus, the sentencing State is released from the expenses to execute the sentence and of the convicted person is given the opportunity to serve his sentence in a familiar environment, favoring his successful reintegration into society.

In order to be recognized and implemented a foreign judgment is sufficient the sentenced person to permanently reside in the territory of the requested State, despite the fact that he is not a national. It is because the recognition and enforcement of foreign judgments serves primarily the interest of justice and not the interest of the convicted person, in opposite to the transfer of a sentenced person and similar to the transfer of criminal proceedings. In this case, the verdict is transferred for execution in the State, in whose territory is the residence of the convicted person. The verdict and the convicted are gathered in the same place to implement the respective criminal consequences of condemnation, namely: effective enforcement the imposed penalty and the consequent conviction status.

D. The next absolutely necessary prerequisite for the admissibility of the considered forms of international legal assistance in criminal matters is the real possibility of enforcement of the sentence, respectively its legal feasibility and factual enforceability in the requested State.

In the opposite argument */Per argumentum a contrario/*, if the receiving State is unable to fulfill the imposed sentence, the applicability of any of the considered forms of international legal assistance in criminal matters would be unfounded.

The assessment on the legal feasibility of a possible future penalty in transfer of criminal proceedings, as explained above, is done in accordance to the criminal law of

the receiving State, because after compliance with the request for transfer the issues of the criminal proceedings shall be authorized by the competent judicial authorities according to the national legislation of the requested State. Analogously the assessment on the feasibility of a sentence imposed at the transfer of a sentenced person and at the recognition and enforcement of a foreign judgment shall be made by the competent authorities of the requested State in accordance with their domestic law.

The legislator in Art. 457 of the CCP of the Republic of Bulgaria, in conjunction with Art. 9-11 of Convention on the Transfer of Sentenced Persons, requires the foreign judgment to be recognized and implemented in accordance with the criminal law of the requested State, before the sentence is enforced. In this respect, if it appears that the foreign judgment cannot be enforced on the territory of the requested State, for legal and practical considerations, the transfer of the sentenced person will not be admitted, respectively the foreign judgment will not be recognized and executed. By the same considerations the request for transfer of criminal proceedings should be rejected, if the possible future judgment could not be enforced in the requested State, in the argument of Art.12, para.2, item "a" of European Convention on the Transfer of Proceedings in Criminal Matters.

The considered forms of international legal assistance will not be admissible also at factual non-enforcement of the sentence. For example, the transfer of the sentenced will be hindered, due to the fact that in the meantime the person has escaped from the territory of the sentencing State. In this case, the procedure for transfer of the sentenced person should be stopped, in order to be implemented operational and research activities for ascertaining his residence. But, if the sentenced person has escaped into his Fatherland State, then instead of transfer procedure could be performed another form of international

legal assistance in criminal matters - recognition and enforcement of a foreign judgment. The latter hypothesis is being covered by Art.2 of the *Additional Protocol to the Convention on the Transfer of Sentenced Persons* [18] and stems from the fact that the requirement for a factual transfer of the sentenced on the territory of his fatherland has already been accomplished. Remains to be fulfilled the other prerequisite for the enforcement of a final judgment, in particular its legal recognition by the judicial authorities of the Fatherland State of the sentenced person.

In the same case, when the residence of suspected person cannot be identified or he has been found, but he is not on the territory of the requested State, then the procedure for transfer of criminal proceedings should be terminated, since the nationality or the permanent residence of the suspect in the requested State, as was made clear, are absolutely essential preconditions for the transfer of proceedings. On the other hand, the possibility to ensure the personal attendance of the perpetrator of crime during the trial in the requested State, according to Art.8, para.1, item "g" of European Convention on the Transfer of Proceedings in Criminal Matters, is one of the conditions for acceptance the request for transfer of proceedings. If the transfer is requested only on this ground, it has to be rejected. Moreover, the absence of the accused during the criminal process will certainly complicate the criminal prosecution against him and will create obstacles for the future implementation of the verdict in the requested State.

In the last hypothesis, the procedure for transfer of criminal proceedings could still be continued, if the requesting State sent a request for extradition of the suspected

person from the State, in which he resides. Once the extradition of the suspected into the requesting State is accomplished, the transferring procedure may continue. These procedural mechanisms will inevitably delay the conduction of the criminal proceedings, but they are a procedural possibility, when the Contracting States has agreed that the requested State is the one, where the criminal proceedings will be conducted in the best possible manner and in the interest of justice.

3. Conclusion

Each of the considered forms of international cooperation in criminal matters is used depending on the particular facts of the criminal case, as some of them are interchangeable, and another - mutually complementary methods for legal assistance. Undoubtedly, each one of them has specific characteristics, which make it an indispensable mechanism in the implementation of criminal justice beyond national jurisdiction.

The transfer of criminal proceedings is one of the mechanisms for legal cooperation, which prevents the conflict of jurisdictions between the States concerned, in the name of a more efficient, procedural economic and lawful prosecution, judgment and punishment of the criminal acts internationally. The particular importance of this form of international legal assistance consists in the fact that it enables the criminal proceedings to be conducted fully - from its institution until its completion with a final procedural act and enforcement of the penalty - in the State, which has the competence to ensure the conditions favorable for revealing the objective truth about the criminal case and furthermore to guarantee achievement of the objectives of criminal justice.

References

- [1] Cf. Chapter 36, Section IV (Art. 478-480) of the Criminal Procedure Code /CCP/ of Republic of Bulgaria; Chapter 54 /Art. 478-479/ of Code of Criminal Procedure of Republic of Armenia; Chapter 30/Art. 519/ of Code of Criminal Procedure of Republic of Slovenia.
- [2] Cf. Girginov, A. "International Legal Assistance in Criminal Matters" C: Sophie-R, 2012, p. 209-210.
- [3] Cf. Art.2, paragraph 2 of the Convention on the Transfer of Sentenced Persons in relation to Art. 453, paragraph 1 of the CCP of Republic of Bulgaria.
- [4] Signed in Strasbourg on 15.05.1972.
- [5] The full list of Member States, which have ratified the European Convention on the Transfer of Proceedings in Criminal Matters is available in <http://www.conventions.coe.int>
- [6] Signed in Strasbourg on 20.04.1959.
- [7] Signed in Strasbourg on 29.05.2000.
- [8] Signed in New York on 15.11. 2000.
- [9] Signed in New York on 31.10.2003.
- [10] Signed at Vienna on 20.12.1988.
- [11] Signed in Brussels on 30.11.2009, Prom. OJ L № 328/ 15.12.2009.
- [12] Signed at Hague on 28.05.1970.
- [13] Signed in Strasbourg on 21.03.1983.
- [14] Cf. Girginov, A. "Transfer of Sentenced Persons - essence and legal framework", Legal journal of the NBU in Bulgaria. Issue 3/2014, p. 8-9.
- [15] Cf. International Criminal Law. Vol.2, Multilateral and Bilateral Enforcement Mechanisms, 3-rd edition, editor- M. Cherif Bassiouni, Leiden, 2009, p.515-516.
- [16] Cf. Girginov, A. "Extraterritorial effect of the Criminal Code - problems of the legal regulation", Journal "Law Review", issue 8/2010, p.10-26.
- [17] The preconditions for restoring of the right to prosecute of the requesting State are explicitly listed in Art. 21, para 2 of European Convention on the Transfer of Proceedings in Criminal Matters.
- [18] Signed in Strasbourg on 18.12.1997.

Bibliography

Cf. Girginov, A. "International Legal Assistance in Criminal Matters" C: Sophie-R, 2012.

Girginov, A. "Transfer of Sentenced Persons - essence and legal framework", Legal journal of the NBU in Bulgaria. Issue 3/2014.

International Criminal Law. Vol.2, Multilateral and Bilateral Enforcement Mechanisms, 3-rd edition, editor - M. Cherif Bassiouni, Leiden, 2009.

Girginov, A. "Extraterritorial effect of the Criminal Code - problems of the legal regulation", Journal "Law Review", issue 8/2010.