

**Recognition and enforcement of the European protection  
order in the Romanian law. Some critical opinions.  
*De lege ferenda* proposals**

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***Abstract***

*The current study examines the provisions of Law no. 151/2016 regarding the competences and concrete actions of the Romanian judicial authorities for the recognition and enforcement of a European protection order, sent for execution by a competent authority of another Member State. The novelty is the conducted examination, the critical opinions and de lege ferenda proposals. The paper is a continuation of other papers that relate to the complex activity of international judicial cooperation in criminal matters and the involvement of the Romanian legislator in transposing into the national law of the European legal instruments in the field. Given its structure and the way in which it has been designed, the paper can be useful to academics, practitioners in the field and to the Romanian legislator in terms of completion and modification of the legislative act under examination.*

***Keywords:*** *the competent Romanian authorities; recognition procedure; reasons for rejecting the request; the duration of the measure.*

***JEL Classification:*** K14, K33

## **1. Introductory considerations**

In response to the increased crime of all kinds and especially the organized one, the crime victims' protection was and still is a major objective assumed by the competent authorities of the European Union Member States.

In order to achieve this requirement, it was imposed the need to adopt a coherent legislative framework intended to lead to a real insurance of the protection of persons involved in criminal proceedings which are threatened by the perpetrators of criminal acts.

No doubt that the protection of some people remains a specific activity, being responsible the country in which such measure is enforced.

If on the territory of each Member State there is a clear legislation with concrete powers of the State concerned, at the EU level, it is a different situation as it should be considered the position of the European citizen, who is free to move in another Member State, or, even to establish domicile or residence in another Member State, other than his home.

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For regulating the possibility to ensure the protection and the conditions under which a citizen leaves the territory of a Member State, at the European Union level, it has been adopted Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order<sup>2</sup>.

The mentioned European legislative act comes to ensure a greater protection of victims of crime in the European Union, according to the Stockholm Programme – an open and secure Europe serving and protecting the citizens.<sup>3</sup>

Although according to art. 21 of the mentioned European legislative act its transposition into the national laws of the Member States and the effective implementation of its provisions had to be made by 11 January 2015; for reasons that are rather some failure in the organization and functioning of the Ministry of Justice, it was transposed into the Romanian law and effectively implemented with the adoption of Law no. 151/2016 on the European protection order, amending and supplementing certain legislative acts<sup>4</sup>.

Within the current study we have examined the provisions of the Romanian law transposing the European legislative act into the national law, on the procedure adopted by the Romanian judicial authorities for recognition and enforcement of a European protection order issued by a competent authority from another Member State, provided that the protected person shall establish domicile or residence in Romania, or lives for a period of time on the Romanian territory.

Also, given the fact that the legislative act was adopted and entered into force recently, we proceeded to a critical examination of its provisions with *de lege ferenda* proposals which aim at improving the Romanian legal system.

## **2. Recognition and enforcement of a European protection order**

### **2.1 The verification of the competence**

We mention that according to the Romanian law, the competent authority for the recognition of the European protection order, ordering measures for their execution and deciding the replacement or termination of these measures is the court in whose jurisdiction the protected person resides or will dwell on for a period of time, established or will establish domicile or residence.

After receiving from a competent authority of another Member State a European protection order for its recognition and enforcement, the Romanian judicial authority will first check whether it has jurisdiction to solve it according to the Romanian law.

If after verification, it is found that the receiving authority has no jurisdiction, it shall transmit without delay the European protection order to the competent court, by any means that has awritten record, informing the issuing authority (art. 12 of Law no. 151/2016)

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<sup>2</sup> Published in the Official Journal of the European Union, series L no. 338/2 of 21.12.2011.

<sup>3</sup> Published in OJ C 115 of 04.05.2010, p. 1.

<sup>4</sup> Published in the Official Monitor of Romania, Part I, no. 545 of July 20, 2016.

In the judicial practice there will be situations where the European protection order can be sent to another court that it has no jurisdiction hierarchically (High Court of Cassation and Justice, court of appeal, or a court) or a court that has no jurisdiction from territorial point of view.

In both cases, the competence of the tribunal will be established in relation to territorial constituency and municipality where the protected person resides or dwells, he has established or will establish domicile or residence.

We note that the Romanian law does not provide however provisions to be followed in the case where after the recognition and enforcement of a European protection order, the protected person shall establish domicile or residence in another town located in another county.

## **2.2. Recognition procedure on the European protection order**

After receiving the European protection order and it finds that it has jurisdiction, the court shall:

– verify that the order is translated into Romanian, and if it finds that it is not translated, it will require to the competent authority of the issuing State (usually the issuing authority) to transmit the translation within a period that does not exceed five days;

– verify that the European protection order is complete, otherwise they might reject the request or require the competent authority of the issuing State to transmit the data required in a period which may not exceed 10 days, depending on the circumstances of the case. If the requested additions are not received by the deadline set by the court, the court may refuse recognition and implicitly the enforcement of the European protection order;

– verify if the European protection order has been issued under one or more of the protective measures under article 1, letter b), if it is not incident one of the grounds for refusal provided at art. 14.

We should mention that the provisions of art. 1, letter b) of the legislative act under examination, the Romanian legislator defines the protection measure within the meaning of the Romanian criminal law and their actual nomination, namely:

- a prohibition from entering into certain localities, places or defined areas where the protected person resides or visits;
- a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronically, by mail, fax or any other means;
- a prohibition or regulation on approaching the protected person within a certain distance.

At the art. 14 of the Romanian law there are provided a number of reasons for rejecting the request for recognition and enforcement of a European protection order, which will be later examined.

If the court finds that the conditions laid down by the Romanian law recognize the European protection order, whether the competent authority of the issuing State is, according to its national law, a judicial or an equivalent thereof.

The emergency judgment is passed in closed session by a panel of one judge, summoning the protected person, the person causing danger and the prosecutor. The absence of the legally summoned persons does not prevent the resolution of the case.

The court will rule by decree in compliance with art. 401-404 of the Criminal Procedure Code, being included also the consequences of non-respecting the ordered measure or measures.

We should mention that within the provisions of art. 401-404 of the Criminal Procedure Code, there are mentioned: the judgment, the introductory content, the content of the presentation and content device.

With the recognition of the European protection order, the court shall require the person causing danger one or more of the following prohibitions:

- prohibition of the right to stay in some places or localities determined by the court;
- prohibition of the right to communicate with the protected person or to approach it;
- a prohibition on approaching the home, workplace, school or other places where the protected person has social activities, as determined by the court.

The court also has the competence to order a similar interdiction or with the content nearest to the prohibition contained in the European protection order, as listed above.

The recognition decision of the European protection order is communicated to the protected person, to the person causing danger, the General Directorate of Bucharest Police, or, where appropriate, the county police inspectorate within the range where the protected resides, lives or intends to reside or to have residence, where appropriate, in whose constituency resides or intends to reside or to reside the person causing danger or places or in whose constituency is the concerned forbidden places and the issuing authorities. The judgment is not translated.

The judgment communicated to the person causing danger does not include contact details of the protected person, unless they are necessary for the execution of the measure.

In case of rejection of the request for recognition of the European protection order, the court decision shall be communicated forthwith to the issuing authority and to the protected person. The device will include informing the protected person of the provisions of Law no. 217/2003 on preventing and combating domestic violence in the family, republished, as amended and supplemented<sup>5</sup>, regarding the protection order.

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<sup>5</sup> Published in the Official Monitor of Romania, Part I, no. 367 of 29 May 2003 republished in the Official Monitor of Romania, Part I, no. 205 of 24 March 2014.

In order to establish in terms of judgment and the proceedings, the court will take into account the specific circumstances of the case and urgency, time of arrival of the protected person on the territory of Romania, the degree of risk for the protected person, if it can be determined.

The sentence may be appealed within 48 hours of notification. The appeal does not suspend the execution.

If the court has no information on the foreign authority competent to issue a European protection order, its identification is performed using the contact points of the European Judicial Network, the National Member of Eurojust or the National System of Coordination Eurojust (art. 13 of Law no. 151/2016).

We note that the Romanian law does not provide for those who can appeal such a sentence, which, in our opinion, will result into some new issues in the legal practice.

Also, in the Romanian law it does not provide the Romanian court competence regarding the verification of the legality of issuing the European protection order by the competent court of the issuing Member State (the applicant).

### **2.3 The reasons for rejecting the request for recognition and enforcement of a European protection order**

Under the Romanian law the provisions of art. 14, the request for recognition and implicitly the enforcement of a European protection order may be rejected by the Romanian judicial authority in the following situations:

a) the European protection order is not complete or was not completed within the deadline set by the court according to art. 13, para. (1), letter b); we specify that the period prescribed by law shall not be more than 10 days;

b) the European protection order has been issued on the basis of a protection measure within the meaning of art. 1, letter b);

c) the protection measure relates to an act which is not a crime under the laws of Romania;

d) the protection derives from the execution of a sentence or a measure that is applicable to the Romanian jurisdiction and covered by an amnesty in Romania;

e) the person causing danger enjoys immunity in Romania, making it impossible the arrangement of protective measures based on the European protection order;

f) the act on which it was ordered the measure of protection which was the base for the issuance of the European protection order also falls under the jurisdiction of Romania and it has intervened the criminal liability limitation period for it;

g) recognition of the European protection order would contravene the *ne bis in idem* principle;

h) the person causing danger is not criminally responsible under art. 113 of Law no. 286/2009 on the Criminal Code, as amended and supplemented;

i) the protection measure which was the base for the issuance of the European protection order is an offense falling under the incidence of art. 8 of Law no. 286/2009, as amended and supplemented (art. 14 of Law no. 151/2016).

From the interpretation of the above provisions, it results that the Romanian legislator has opted to regulate certain optional grounds for rejecting the request for recognition and implicitly the execution of a European protection order.

This means that in the judicial practice the competent court of Romania, during the trial of such cases, will first check whether one of the cases mentioned above is or not incident.

If the court finds the incidence of one single case, it will determine whether or not it admits the Member State's request.

In other words, it remains at the sole discretion of the court whether to grant the request or not, it may for example decide the recognition and enforcement of such an order even if it is found the incidence of one of the grounds expressly provided in the Romanian law.

Undoubtedly, in the judicial cooperation in criminal matters between Member States, it will always start from the mutual trust that must be amongst the judicial bodies of the Member States, so the general rule will be that of recognition and enforcement of such order.

However, we believe that the Romanian legislator should have considered some reasons for mandatory non-recognition and non-compliance, to which we will return in a separate section of the examination.

#### **2.4 The duration of the measure for executing the European protection order**

The competent court in Romania has decided the prohibition or prohibitions on the period established in the European protection order, but it may not exceed the maximum prescribed by the Romanian law for measures similar in nature and content, which were the basis for issuing a European protection order.

In the event that the European protection order issued by the competent authority of the issuing Member State does not provide a duration, the term ordered by the competent Romanian court will be the one provided in the Romanian law (art. 15 of the Law no. 151/2016).

#### **2.5 The breach of the obligations set by the court**

In the event that the Romanian judicial authorities established that the person causing danger has violated the imposed obligations, it will inform the court of enforcement which, in turn, shall immediately inform the competent authority of the issuing State or from the supervisory State.

The information shall be in the form prescribed in annex 2 of Law no. 151/2016 (art. 16 of the examined legislative act).

## **2.6 Changes in the performance of the European protection order**

If the issuing state notifies the amendment of the European protection, the competent court in order to recognize and execute the European protection order can:

- amend the protective measures properly, if there are met the conditions provided for by art. 13, par. (1) the special law; we specify that in art. 13, par. (1) of the law there are provided for compulsory verifications to be carried out by the Romanian court on receipt of a European protection order;
- reject the recognition of the modified protection order, if there are incident the grounds for refusal provided by the law (art. 17 of the examined legislative act).

## **2.7 The cessation of the European protection order execution**

The Romanian court may terminate the measure ordered for the execution of the European protection order in the following cases:

- there is clear evidence that the protected person does not reside or does not live in Romania or has definitively left the territory;
- the maximum duration for which it has been recognized the European protection order has expired;
- after the recognition and enforcement of a European protection order it has been recognized by Romania a supervisory measure, a measure of probation or an alternative sanction, on the person causing danger, in connection with which it was issued the European protection order, for the purposes of art. 170<sup>1</sup>, par. (2), letter a) and art. 170<sup>20</sup> of Law no 302/2004 on international judicial cooperation in criminal matters, republished, as amended and supplemented.<sup>6</sup>

As the first two situations do not present difficulties of interpretation, we will not dwell on their explanation, however we will insist on making certain clarifications about the latest situation.

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<sup>6</sup> Published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, as amended and supplemented, republished in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011; After republishing, the enactment framework has been amended and supplemented by two other normative acts: Law no. 318 of 11 December 2015 on the establishment, organization and functioning of the National Administration of seized Goods, amending and supplementing certain acts, published in the Official Monitor of Romania, Part I, no. 961 of 24 December 2015 and Emergency Ordinance no. 18/2016 amending and supplementing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, supplementing art. 31, par. (1) of Law no. 304/2004 on judicial organization, published in the Official Monitor of Romania, Part I, no. 389 of May 23, 2016.

Thus, in the provisions of art. 170<sup>1</sup>, par. (2), letter a) of Law no. 302/2004 it is provided the legal interpretation of the expression supervisory measure within the meaning of Chapter of the law, regulating the transposition of the Romanian law for the Framework Decision 2009/829/JHA of 23 October 2009 on mutual recognition to decisions on supervision measures as an alternative to detention.<sup>7</sup> Thus, the supervisory measure means any of the obligations under par. (1) or notified by the executing State of the Council General Secretariat, pursuant to art. 8, par. (2) of Council Framework Decision 2009/829 / JHA of 23 October 2009 on the application, between *Member States of the European Union, the principle of mutual recognition to decisions on legal supervision measure as an alternative to detention, which were arranged within a criminal trial as alternatives to the measures of deprivation of liberty.*

We should specify that paragraph. (1) to which we refer there are provided surveillance measures, and in letter f) it provides *the obligation to avoid contact with specific persons in connection with the offense alleged to have been committed.*

So in the event that against the person causing danger and against him a European protection order is executed and it was subsequently ordered against the same person the execution of a supervisory measure as described above, the European Protection Order will terminate.

In art.170<sup>20</sup> of Law no. 302/2004 it provides that foreign judgments may be recognized and enforced in Romania, if the probation measures or alternative sanction established by the judgment in question or in its base it falls within certain categories designated by the law. We do not insist on their actual nomination, we only specify that only in letter f) it provides for the obligation to avoid contact with certain people.

We also point out that the probation measures and alternative sanctions are interpreted in the context of their transposition into the national law of the Council Framework Decision 2008/947/JHA of 27 November 2008 on the principle of mutual recognition in the case of judgments and probation decisions in order to supervise the probation measures and alternative sanctions.<sup>8</sup>

Thus, according to the depositions to which we referred above, whenever, in the cases where against the person causing danger and against him it is executed a European protection order and subsequently it was ordered against the same person the execution of the surveillance measures in the sense mentioned above, the European protection order will terminate.

Also, the court of Romania will order the cease of the measure for the execution of the European protection order, also in the case where it was received a notification on the revocation or withdrawal of the European protection order by the issuing state.

The General Directorate of Bucharest Police or, where appropriate, County Police Inspectorate in whose jurisdiction the protected person resides or intends to

<sup>7</sup> Published in the Official Journal of the European Union, series L, no. 294 of 11 November 2009.

<sup>8</sup> Published in the Official Journal of the European Union, series L no. 337 of 16 December 2008.



reside, is obliged to inform the competent court to terminate the measure if according to the data the protected person has definitively left the country.

When in one of three cases it was decided the discontinuation of the measure for the execution of the European protection order, the court shall immediately inform the competent authority both of the issuing State and the protected person (if possible).

Before deciding the discontinuation of the measures for the execution of the European protection order referred to in art. 18, par. (1), letter b) the examined enactment (when it comes to the situation of termination in the case where it expired the maximum duration for which it was recognized the European Protection Order), the competent court may request the competent authority of the issuing State to provide information on the need to continue the protection provided by the European protection order in the case concerned (art. 18 of Law no. 151/2016).

In the situation where, before or after the transmission of the European protection order, the competent authority of the issuing State has submitted a certificate on a supervisory measure, a measure of probation or an alternative sanction, both being recognized and enforced, the competence to take subsequent decisions rests, as appropriate, to issuing State or the State of supervision. As for Romania, we specify that the provisions of art. 170<sup>3</sup> concerning the use, modification, replacement or termination of surveillance measures, of art. 170<sup>9</sup> which refer to the effects of abuse of surveillance measures, of art. 170<sup>15</sup> concerning the supervision of the Romanian authorities for the supervised person to respect his obligations, art. 170<sup>31</sup> refers to the execution of probation measures or alternative sanction assuming subsequent decision, art. 170<sup>32</sup> concerning the execution of probation measures or alternative sanction without taking consequential decisions, art. 170<sup>41</sup> refers to the execution of probation measures assuming subsequent decision by the executing State, of the art. 170<sup>42</sup> which refers to the execution of probation measures without taking subsequent decision by the executing State, and art. 170<sup>43</sup> refers to regain competence of supervising the execution of probation measures.

The competent court may consult with the competent authorities of the issuing state, or, where appropriate, of the executing State, whenever necessary, in order to issue and execute a European protection order.

In the situation where Romania is the executing State, the European Protection Order will be translated into Romanian.

In terms of expenditure involved in the examined procedure, they will be borne by Romania, only in terms of the activities performed on the Romanian territory.

### 3. Some critical opinions

The examination of the law provisions allows us to formulate some critical opinions and *de lege ferenda* proposals designed to contribute to the correct transposition into the national law of the European legal instrument.

Thus, from the study of the provisions of art. 12 it can be noticed that according to the Romanian law there is no provision to follow in the case where after the recognition and enforcement of a European protection order, the protected person shall establish domicile or residence in another town, located in another county in Romania.

Given this situation, we believe that it is necessary to supplement the provisions of art. 12 with a new paragraph, i.e. par. (3) where it provides the express stipulation that if the protected person after the recognition and enforcement of a European protection order establishes his domicile or residence in the territory of another county, the order will be sent to the competent territorialjudicial bodies, which will proceed to the recognition and enforcement thereof without proceeding to a new recognition by the competent court.

Another at least debatable issue regards the provisions of art. 13, par. (7) according to which the recognition decision is not translated. We believe that these provisions should be abolished, and the competent judicial authorities (the court) must carry out translating the judgment recognition and enforcement of a European protection order.

Under art. 13, par. (11) the sentence can be appealed within 48 hours of notification.

We notice that the Romanian legislator did not specify which are the individuals or institutions which can also appeal such sentence.

In our view, the text must be completed with the categories of persons and bodies that can appeal such a judgment, respectively, the protected person, the person causing danger and the prosecutor.

A final critical opinion regards the way in which the Romanian legislator provided the reasons for rejecting the request for recognition and enforcement of a European protection order in art. 14.

Thus, the legislator has left it to the court, even if it sets the incidence of one of the reasons for non-recognition.

We believe that these reasons would have to be divided into two categories, namely, mandatory grounds and optional grounds for the non-recognition of a European protection order.

Thus, among the mandatory grounds for non-recognition it should be found the following:

- the recognition of the European protection order would contravene the *ne bis in idem* principle;
- the person causing danger is not criminally liable under the Romanian law; such a provision is among the reasons for rejecting the request in the Romanian law;

- the person causing danger enjoys immunity in Romania; and,
- the protection derives from the execution of a penalty or measure that is applicable to the Romanian jurisdiction and covered by an amnesty in Romania.

We appreciate that these critical opinions and *de lege ferenda* proposals are likely to help improve the Romanian legal system in this area.

#### 4. Conclusion

The establishment of the institution of the European protection at EU level is an important step in the activity of protecting the crime victims or persons requiring special protection measures.

Romania has transposed into its national law the provisions of European legal instrument, something that gives concrete responsibilities that fall under the jurisdiction of the courts and the police.

In the examination we have highlighted the recognition and enforcement procedure of one European protection order by the Romanian judicial authorities, with some critical opinions.

Although we have shown that the Romanian legislative act should suffer some changes and additions, we appreciate its usefulness in the complex work of preventing and combating cross-border crime, where there are circumscribed also concrete activities for the protection of victims of crime.

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