



INTERNATIONAL JUDICIAL COOPERATION IN THE FIELD OF SPECIAL INVESTIGATION TECHNIQUES

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Abstract:

The alarming growth of cross border crime and the need to prevent and combat more effectively and in an organized approach, both at European and international level, resulted in the adoption of some international and regional instruments meant to unify the efforts of all states. In this regard the competent authorities use special investigation techniques in order to apprehend the suspects and to gather information about illegal activities. The creation of a space of freedom, security and justice, an objective stated and assumed by the EU can be achieved only in the context of improving judicial cooperation in criminal matters.

Key words: cooperation, investigation, organized crime, judicial assistance.

International judicial cooperation in criminal matters is only a specific area of cooperation between world states, a vitally important area that has become a necessity since the beginning of last century.

The unprecedented development of international relations in contemporary society has been accompanied by an increase, also unprecedented, in international crime, through the proliferation of certain forms of organized crime in several states¹.

The growing threat caused by the increase of cross-border crime, the need to prevent and fight more effectively in a global and organized context, led to the adoption of international and regional instruments meant to unify the efforts of the states.

Aware of the imminent danger posed by organized actions like this, countries of the world have perfected methods of combating this phenomenon, particularly dangerous to the very existence of mankind, acting on three main components:

- improvement and harmonization of the legal framework with the current needs, focusing on the criminalization of acts which occurred recently in the architecture of cross-border crime;
- improvement of bilateral cooperation, regional or global by signing treaties, agreements, conventions;
- organizing at institutional level and ensuring efficient logistics for the institutions responsible for preventing and combating cross-border crime.

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The creation of an area of freedom, security and justice can be achieved only in the context of improving judicial cooperation in criminal matters between the Member Statesⁱⁱ.

In the current Romanian legislation international judicial cooperation is provided in Law no. 302/2004ⁱⁱⁱ: extradition, surrender under the European Arrest Warrant, transfer of criminal procedures, recognition and enforcement of the decisions, transfer of the sentenced individuals, judicial assistance and other forms of cooperation.

The enforcement of this law is done according to the interests of sovereignty, security, public order and other interests that Romania has and which are defined in the Constitution. This law applies for the norms concerning judicial cooperation in criminal matters, included in international instruments to which Romania is part of and completes in cases where there are no provisions.

According to art. 5 of this law, in the absence of international agreements, judicial cooperation is achieved through diplomatic channels by the requesting State with written assurance of reciprocity from the competent authority of that State. In this case the law represents the common law in the field for the Romanian judicial authorities.

From a more general perspective, the international judicial assistance means assistance in general in the fight against crime and in this sense it includes judicial police cooperation, international rogatory commissions in criminal matters, recognition of decisions, extradition etc.

In the narrow sense, international judicial assistance refers to legal assistance of judicial nature which means the judiciary assistance from a state during criminal proceedings which involves performing, teaching and communication of procedural acts necessary to solve the case^{iv}. Among these measures there are agreements for legal aid concluded between individual Member States.

For example our country has signed mutual legal assistance agreements with all neighboring countries and a number of third countries^v.

In the absence of international conventions legal aid can be delivered according to the general rules of reciprocity, which are very common in international relations.

For transnational cases that involve serious crime and where Romania and more than a Member State are involved, the Romanian magistrates may ask help from Eurojust, a European institution that coordinates judicial cooperation activities in such cases.

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Romania has a national representative at Eurojust starting from January 1st 2007, according to the cooperation agreement signed with Eurojust in Bruxelles on December 2nd 2005. Also, there are several representatives from the Prosecutor's Office attached to the High Court of Casation and Justice at Eurojust.

According to Law no. 302/2004 international judicial assistance includes the following:

- international rogatory commissions;
- hearings by videoconferences;
- spontaneous exchange of information;
- controlled deliveries;
- undercover investigation;
- cross border surveillance;
- interception of telecommunication.

Romania signed in 2006 the Police Cooperation Convention for SE Europe^{vi} which includes the procedures for special techniques of cross border crime investigation, including controlled deliveries and the use of undercover investigators that carry out crime investigation activities^{vii}.

In this regard, under the Convention, during investigation of criminal offenses, a contracting party may, upon a prior request to consent to sending officers on mission of requesting contracting party, under its law that can

perform the role of an agent or a person who may perform controlled transactions (further referred to as undercover investigator)^{viii}.

The requesting contracting party shall make such a request only if the crime investigation would otherwise be impossible or would be more difficult. The real identity of the officer shall not be revealed in the request.

Undercover investigations taking place on the territory of the contracting party shall be limited to single and temporary operations. These operations will be planned through coordination between the officers of the contracting parties involved. Sending an undercover investigator on mission and carrying out actions by an undercover investigator will be led by the requested contracting party.

The requested contracting party is responsible for the actions of the undercover investigator of the requesting contracting party may at any time request termination of the operation. In extremely urgent cases where there is a serious danger that the identity of the undercover investigator is to be disclosed its activity on the territory of the other contracting party shall be allowed with prior consent of the country.

In these cases the conditions prior to sending the undercover investigator to the other contracting party have to be met.



The activities of the undercover investigator must be limited to what is absolutely essential for maintaining security. The requested contracting party shall be notified immediately and at any time may request termination of the operation.

In the *Official Journal of the European Union* (JOUE) no. L 307 of 24 November 2007 was published by the Council Decision no. 2007/63/CE of 8 November 2007 regarding the adhering of Bulgaria and Romania at the Convention on mutual judicial assistance in criminal matters, adopted by the Council according to article 34 from the EU Treaty.

According with the dispositions of art. 1 from the Decision, starting from 1 December 2007, the Convention from 29 May 2000 on mutual judicial assistance in criminal matters between the EU Member States and the additional Protocol from 16 October 2001 started to take effect for Romania. This represented a new step for a full accession in the common European judicial space.

As a rule, the Convention from 29 May 2000 stipulates direct contact between judicial authorities of the Member States in sending requests for judicial assistance and sending by mail directly to the recipient the procedural documents.

At the same time the Convention from 29 May 2000 regulates modern ways

of judicial assistance, like hearings through videoconferences, undercover investigations, controlled deliveries and interception of telecommunication.

The Protocol from 2001 extends the area of the Convention to information regarding bank accounts^{ix}.

The EU Convention^x on mutual assistance in criminal matters is entirely translated in Title VII of the Law 302/2004 on international judicial cooperation in criminal matters as it was annotated by Law no. 224/2006.

The Convention on legal assistance was enforced in the EU on 23 August 2005 and applies in Romania and all the Member States that ratified it.

The dispositions of this new convention on judicial assistance in criminal matters aim at achieving a rapid, effective and complete legal assistance in order to fight better against crime.

In the following we will make a short presentation of the new forms of juridical assistance introduced in the legislations of the EU Member States.

- Undercover investigation or infiltration (article 14 of the Convention)

The requested state allows on its territory the presence of an agent of the requesting state to carry out an infiltration operation under a fake identity. The

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dispositions introduced by art. 14 of the Convention are not binding. Romania has introduced this way of assistance by art. 168 of the Law no. 302/2004. By contrast with controlled deliveries, undercover investigations are not limited to crimes for which extradition may be requested; however, in practice it will be limited to the most serious crimes. According to the principles of legality, subsidiarity and proportionality, undercover investigation should be an exception.

The growth of organized crime and illicit trafficking in drugs and the cross border character of these crimes made the law maker adopt a series of procedural measures because the classic methods of investigation were overtaken by the closed character of these crimes. As a consequence it was necessary that agents be infiltrated among traffickers and organized crime groups so as to gather information and evidence for the judicial procedure.

Undercover investigations shall be performed according to the laws and national procedures of the Member States where the undercover investigation is carried out^{xi}.

The Member States involved shall cooperate to ensure that the undercover investigation is planned and supervised to secure the officers acting under covert or false identity.

This form of judicial assistance in criminal matters is also mentioned in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, which shows that the requesting and requested Parties may agree to assist one another in the conduct of criminal investigations by undercover agents or under a fictitious identity^{xii}.

- Controlled deliveries (article 12 of the Convention)

Article 73 of the Convention implementing the Schengen agreements which restricts controlled deliveries for crimes related to drug trafficking was repealed and replaced by Article 12 of the Convention of 29 May 2000, which requires States Parties to provide in their national law the possibility to proceed to controlled deliveries for any offense that leads to extradition.

Romania enforced this through art. 167 of Law no. 302/2004. Article 168 of Law no. 302/2004 amended, provides the possibility for undercover investigations: Romania and a foreign state may agree to assist each other in case of an investigation conducted by undercover officers (Article 168.1 of Law. no. 302/2004 as amended). The Romanian competent authorities shall take their decision in each individual case in accordance with the Romanian

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legislation (Article 168.2 of Law no. 302/2004 as amended).

Under the Romanian law, Romania and foreign judicial authorities have to agree upon the concrete ways of investigation and the legal status of the officers involved (Article 168.3 of Law. 302/2004 as amended). The requested State is the one which decides whether or not a controlled delivery shall take place on its territory in accordance with the internal procedures.

The Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union provides the opportunity to conduct such activities at the request of a Member State. Each Member State undertakes to ensure that at the request of a Member State, controlled deliveries are allowed on its territory for criminal investigations related to extraditable offenses.

The decision to perform controlled deliveries shall be made by the competent authorities of the requested Member State, in accordance to the national law of that Member State. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. The right to act, to lead and to control the operations will belong to the competent authorities of that Member State.

Controlled deliveries shall meet the following conditions:

- the existence of a request from specialized institutions or bodies. According to the law the institutions and bodies that can formulate a request are the specialized structures within the Prosecutor’s Office attached to the High Court of Cassation and Justice, General Inspectorate of Romanian Police, General Inspectorate of Border Police, National Customs Authority;
- the authorization of the prosecutor. The controlled deliveries may be authorized by the prosecutor from the Directorate for investigation crimes related to organized crime and terrorism. This is a structure with legal statute, specialized in combating organized crime and acts of terrorism, that functions within the Prosecutor’s Office attached to the High Court of Cassation and Justice.

For the authorization the following are necessary:

- the request to perform a controlled delivery coming from a foreign competent authority, General Directorate of Customs or Police, which wants a controlled delivery on drugs;
- information regarding the type and the quantity of drugs subjected to this measure;
- the date when the delivery enters Romania and the border crossing point;

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Observers may carry their service weapons during the surveillance and unless the other party decides otherwise they are not allowed to enter private homes or other places not accessible to the public, or they shall not retain or arrest the person under surveillance.

Offenses for which cross-border surveillance may be performed are: murder, rape, counterfeiting of currency, embezzlement, trafficking in human beings, illegal trafficking in narcotics and psychotropic substances, offenses relating to the laws on weapons and ammunition, illegal transport of toxic waste, smuggling of migrants etc. Request for international judicial assistance in criminal matters shall be addressed to the Prosecutor's Office attached to the High Court of Cassation and Justice and shall include all relevant information, in accordance with the applicable convention. Surveillance shall be closed by the party on whose territory a request was asked for if approval is not obtained within 5 hours since crossing the border^{xiii}.

To encourage international judicial cooperation in this matter, the Council of Europe adopted **Recommendation Rec (2005) 10 of the Committee of Ministers to Member States on "special investigation techniques" in relation to serious crimes including acts of terrorism^{xiv}** which states in Chapter III -

International Cooperation that Member States should use at the largest possible extent the existing international criminal police measures and cooperation in the use of special investigation techniques. Where appropriate, Member States must also identify and develop additional methods for such cooperation.

Member States are encouraged to sign, ratify and implement existing conventions or instruments of international cooperation in criminal matters in areas such as information exchange, controlled deliveries, undercover investigations, joint investigation teams, cross-border operations.

Member States should promote compliance of technical equipment internationally with agreed standards to overcome technical barriers in the use of special investigation techniques in an international context, including those related to mobile telecommunications interceptions.

Member States are encouraged to take appropriate measures to promote trust between their competent authorities responsible for taking the decision to use surveillance equipment or the use of special investigative techniques to improve their effectiveness in an international context, while ensuring full compliance with human rights.



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Law no. 565/2002^{xv} stipulates in Article 20 that if the fundamental principles of its domestic legal system allow, each State individually, taking into account its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow proper use of controlled deliveries and, where appropriate, other special investigative techniques such as electronic surveillance or other forms of surveillance and undercover operations, by its competent authorities on its territory for effectively combating organized crime.

For the purpose of investigations for the offenses covered by this Convention, State Parties are encouraged to conclude, where necessary, bilateral or multilateral agreements or arrangements for the use of special investigative techniques in international cooperation. These agreements or arrangements shall be concluded and implemented in full respect of the principle of sovereign equality of States and shall be implemented in strict compliance with the provisions contained therein. In the absence of an agreement or

arrangement referred to in paragraph 2 of this article, decisions to use special investigative techniques at international level are taken on a case by case basis and may, if necessary, take into account agreements and financial arrangements in the exercise of jurisdiction by the State Parties concerned.

Controlled deliveries that were agreed upon to be used internationally may, with the consent of the State Parties, include methods of interception of goods or authorization to track them after they have been totally or partially replaced.

Conclusions

The objective of maintaining and developing an area of freedom, security and justice cannot be achieved unless there is a specific cooperation activity in criminal matters between the Member States, having regard of the new trends in crime.

Special investigation techniques are a necessity that must be in accordance with the general interest of combating crime in compliance with the rights and liberties of citizens.

References:

1. Alexandru Boroi, Ion Rusu, Cooperare judiciară internațională în materie penală, C.H.Beck Publishing, Bucharest, 2008
2. Aurel Ciobanu Dordea – Legislația Comunitară privind cooperarea judiciară în materie civilă și penală, C.H.Beck Publishing, Bucharest, 2007
3. Hărăstășanu, O. Predescu, Investigatorul sub acoperire. Rolul instanțelor de judecată privind activitatea acestuia, Law Journal, no. 5/2004
4. Gh. Mateuț, Investigatorii sub acoperire. Utilizarea lor în faza actelor premergătoare, Dreptul, nr.1/2005



5. Theodor Mrejeru, Bogdan Mrejeru, Cooperarea judiciară internațională în materie penală. Asistența judiciară – Extradare. Doctrină și jurisprudență, Universitară Publishing, Bucharest, 2008

6. Jean Pradel, G. Cortens, Droit Penal europeen, Edition Dalloz, Paris, 1999

7. Radu Florin Răzvan; Legea nr. 302/2004 privind cooperarea judiciară în materie penală, un pas important spre integrarea României în spațiul de

libertate, securitate și justiție al Uniunii Europene și un răspuns ferm la noile provocări ale criminalității transnaționale, in Law Journal, no.2/2005

8. M.Udroiu, R.Slăvoiu, O.Predescu, Tehnici speciale de investigare în justiția penală, C.H.Beck Publishing, Bucharest, 2009

9. Zimmermann R., La cooperation judiciaire internationale en matiere penale, Staemplifi Edition, Berna, 1999.

ⁱ Alexandru Boroi, Ion Rusu, Cooperare judiciară internațională în materie penală, C.H.Beck Publishing, Bucharest, 2008, pp.16

ⁱⁱ Alexandru Boroi, Ion Rusu, pp.16

ⁱⁱⁱ Published in the Official Gazette no. 594 from 1 July 2004. The Law was amended by the Law no. 224/2006 and Government Decision no. 103/2006

^{iv} Theodor Mrejeru, Bogdan Mrejeru, Cooperarea judiciară internațională în materie penală. Asistența judiciară – Extradare. Doctrină și jurisprudență, Universitară Publishing, Bucharest, 2008, pp. 10.

^v For example in the agreement between the Romanian government and the one of Hungary some concepts have been defined:

1. authorities to fight against crime – they have competencies in preventing, detecting and combating organized crime, according to the domestic law of the signing parties; 2. Central contact authority: a. for the Romanian contracting party in the field of international police cooperation: Centre for International Police Cooperation within the Ministry of Home Affairs; b. for the Hungarian contracting party: Centre for International Criminal Cooperation within the National Police Headquarters;

3. undercover investigator – a person working in the operational field, member of the authorities for combating crime, with competencies in this field, who acts in the cases and under the conditions stipulated by the domestic legislations of the contracting parties, without declaring his identity or the fact that he is working for the above mentioned authorities;

4. controlled delivery – the undercover activity of the bodies for combating crime during which it is allowed to introduce, under a permanent surveillance, on the territory of a contracting state, the object that is under surveillance or the object in the possession of the person under surveillance;

^{vi} Convention signed with Albania, Bosnia și Hertzeogovina, Macedonia, Serbia and Muntenegru- published in the Official Gazette no. 475 of 16 July 2007

^{vii} Radu Florin Răzvan; Law no. 302/2004 on judicial cooperation in criminal matters, an important step towards Romania's integration in the space of freedom, security and justice and a firm answer to the new challenges of cross border crime in Law, no.2/2005, pp.25

^{viii} M.Udroiu, R.Slăvoiu, O.Predescu, Tehnici speciale de investigare în justiția penală, C.H.Beck Publishing, Bucharest, 2009, pp.96

^{ix} Zimmermann R., La cooperation judiciaire internationale en matiere penale, Staemplifi Edition, Berna, 1999, pp. 182

^x Aurel Ciobanu Dordea – Legislația Comunitară privind cooperarea judiciară în materie civilă și penală, C.H.Beck Publishing, Bucharest, 2007

^{xi} Jean Pradel, G. Cortens, Droit Penal europeen, Edition Dalloz, Paris, 1999, pp.135

^{xii} Gh. Mateuț, Investigatorii sub acoperire. Utilizarea lor în faza actelor premergătoare, Law Journal, no.1/2005; A Hărăstășanu, O. Predescu, Investigatorul sub acoperire. Rolul instanțelor de judecată privind activitatea acestuia, Law Journal, no. 5/2004, pp.14

^{xiii} Alexandru Boroi, Ion Rusu, pp. 464-467

^{xiv} Adopted by the Council of Ministers on 20 April 2005

^{xv} Law no. 565/2002 for the ratification of the UN Convention against transnational organized crime and the Protocol for against smuggling of persons, especially women and children, adopted in New York on 15 November 2000, published in the Official Gazette no. 813 from 8 November 2002.

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