

International legal assistance in criminal matters

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Abstract

International legal cooperation between states, international organizations and institutions of international character today is a very complicated and diverse process, because it arises from very complex, delicate and varied relationships. In their relationships often comes to the commencement of judicial and other proceedings, whose solving, requires a mutual judicial cooperation between domestic and foreign courts and other judicial authorities, which impose the need of the establishment of a legal mechanism that allows a legal protection for all participants in the proceedings.

International legal assistance in criminal matters has a new dimension with significantly increased requirements for mutual cooperation between states in the last decade. The reason for this is the expansion of the criminal acts with a foreign element, which imposes the need of reformation of the Criminal law in the Republic of Macedonia. These reforms confirm the intention to adopt the process of unification with the *acquis communautaire*.

Starting from these conditions, and to further the interest of citizens and other legal entities, this paper aims to review the most current issues in international legal assistance in terms of national, bilateral and multilateral legislation, detecting the weaknesses in its functioning and finding compatible solutions that shall be most efficient for achieving an international legal unification.

Keywords: letters oratory, international legal assistance, international legal cooperation, criminal legal assistance.

Introduction

Most authors dealing with international legal assistance in criminal matters, define the term legal assistance, such as:

Cooperation between countries in the area of criminal law traditionally occurs within the legal assistance. Cases in the field of criminal law are processes which are being led by the state due to actual or alleged committed criminal acts or violation of law, which are punishable by monetary sanction or aim to punish or prescribing criminal legal sanction against a perpetrator of crime (Hanker, Schomburg, 2009, 1).

Legal aid in criminal cases means any kind of support that foreign country could provide after receiving the letter of rogatory. This applies regardless of whether the foreign proceedings are conducted by a court or a body, or whether legal aid is offered by a court or a body.

In its essence, International legal assistance is a process of acting of authority of a state on the request for legal aid to the authority of another country in the manner determined by international agreement concluded between these countries. This assistance may be given on the basis of factual reciprocity if in the national law is not expressly prohibited this kind of legal aid (Sladoje, 2012, 15).

International criminal legal aid is a set of actions and measures taken by the

authorities of criminal proceedings from one state, at the request of another country due to criminal investigation, trial or execution of sentence in a penal case (Krapac, 2006, 3). Ministry of Justice of the Republic of Macedonia under its legal authority is competent to proceed in the area of international legal assistance in most bilateral¹ and multilateral² agreements and is defined as the central authority in the field of international legal assistance.

International legal assistance in criminal matters consists in delivering written acts (act of indictment, invitations, decisions), and other materials and objects in the performance of certain procedural or investigative actions (acquisition of documents, examination of witnesses or expert witnesses, performing inspection, search of premises and persons, seizure of items), actions taken after receiving the rogatory letter by a foreign court, and includes extradition, transmission (transfer) of the criminal procedure, and international transfer of sentenced persons (Todorovic, 2005, 93).

Legal sources

Legal sources and basis for international legal assistance in criminal matters are contained in bilateral and multilateral international agreements, national legislation, the Law on International Cooperation in Criminal Matters.³

Draft Law for international legal assistance in criminal matters was submitted for expertise by the project TAIEX to the Council of Europe, and thus the Directorate of Cooperation (Directorate General of Human Rights and Legal Affairs) supported by the network of prosecutors in South Eastern Europe – PROSECO, perform checks of the provisions of the draft law on international legal assistance in criminal matters with the comments made by the experts. One of the more significant reviews of the experts is the change of the name of the Law so that the Law on International Legal Assistance was renamed into the Law on International Legal Cooperation. The term "mutual legal assistance" may be used exclusively for the part of the Act relating to international legal assistance in accordance with the Convention on Mutual Assistance of 1959. For other types of assistance referred to in the Act, direct names such as extradition, taking and relinquishing of prosecution and transfer of sentenced persons are used. Although all these represent the types of assistance, the use of the term "mutual legal assistance" as general term, leads to confusion, and also as a term for a special type of assistance.

The Law prescribes four types of international cooperation: mutual legal assistance;

¹ Agreement between Republic of Macedonia and Republic of Slovenia on legal assistance in civil and criminal cases. Ratified by the Law on May 7, 1996, "SVMP" - International treaties 1996/24, entered into force on 23-d of May 1996.

² Convention for delivery abroad of judicial and extrajudicial acts in Civil or Commercial Matters ("The Official Gazette of the Republic of Macedonia" no.107/2008); In Article 2 of the Convention, each State Party shall appoint a central authority, which is responsible for reception of rogatory letter for further delivery of other Contracting States. In Article 4, "Republic of Macedonia declares that the Ministry of Justice, Department for International Legal Assistance is a central authority that conducts the delivery of the documents to the other Contracting States".

³ Law on International Cooperation in Criminal Matters ("Official Gazette" no. 12/4/2010) entered into force on 1-st December 2013.

taking and relinquishing of criminal prosecution; extradition and enforcement of criminal judgments and the transfer of sentenced persons.⁴

The extent of international judicial cooperation in the penalty field in the last decade takes on new dimensions, which have long since exceeded the framework governed by the provisions of the previous Code of Criminal Procedure,⁵ so that there was a need to enact a new law that would regulate international legal assistance. The adoption of the proposed law is a consequence of the commitment of the Republic of Macedonia towards integration in the EU.

Alongside the development of the integration of European countries and mutual cooperation with the rise of European criminal law and the establishment of international criminal courts, on the one hand, and the expansion of crimes involving foreign elements, there was a significant increase in the number of requests for mutual cooperation between states and the regulation of the right of international cooperation as a separate branch under international criminal law, which is at once the reason for the adoption of this law.

International legal assistance in the narrower sense consists in the performance of certain procedural actions in criminal proceedings as well as submission and receipt of written legal acts, which govern numerous bilateral international agreements.

Some of these contracts are agreements taken as national regulations in accordance with Article 5 of the Law on the Implementation of the Constitution of Republic of Macedonia and all the bilateral agreements concluded since Macedonia's declaration of independence.

Multilateral and regional international agreements within the Council of Europe, regulating this area are the European Convention on Mutual legal aid in criminal cases from April 20, 1959 with is supplemented by its additional Protocols of 18 March 1978 and 8 November 2001, accepted by all member states of the Council of Europe.

The state Parties to this Convention are mutually committed to fully share legal assistance in all criminal justice proceedings in particular, those relating to the submission of procedural acts and judicial decisions and, as a rule, with direct delivery to the recipient, calling witnesses to court, judicial experts and persons against whom criminal proceedings are taken, exchange of information from criminal records, submission and execution of formal requests, the exchange of notifications of convictions etc. The Convention does not apply to the enforcement of decisions for arresting also for the enforcement of criminal judgments, but also any kind of legal assistance in connection with war crimes. According to this Convention, the legal assistance may be refused if the request relates to political criminal offenses or offenses related to those crimes or fiscal criminal offenses. Additional Protocol of 1978, includes the fiscal criminal offenses provided that Member States shall not refuse the provision of legal aid under the Convention only because the request relates to an offense of a fiscal nature. Based upon the Additional Protocol of 17 March 1978, the Convention shall apply upon delivery of acts that aim: the pursuit of penalty, payment of a fine or the payment of costs of proceedings, as well as measures relating to:

⁴ Article 4 of Law on International Cooperation in Criminal Matters ("Official Gazette" no. 12/4/2010).

⁵ Law on Criminal Procedure ("Official Gazette" No. 150. / 10) came into force on December 1, 2013.

the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement (Article 3 of the Protocol). Second Additional Protocol of 2001 carried out extensive revision of the Convention of 1959 envisaging broader, technological new and modern forms and methods of legal aid in criminal cases: temporary transfer of detained person on territory of the requesting Party, hearing of a witness or expert by videoconference, hearing by telephone conference call, tracking suspect outside the territory of the Member States, cooperation in conducting investigations, establishment of joint investigation teams, measures to protect the witnesses, delivery and protection of personal data, etc.⁶

The Convention is complemented by the Protocol of 2001 which aims to undertake additional measures in the field of mutual assistance in criminal matters with the aim of opposing, primarily to the growing terrorism, organized crime, money laundering and financial crime.⁷

Cooperation of the European countries in criminal - legal field has been improved with international regional arrangements and other documents for the suppression of cross-border crime, organized crime and corruption, concluded within the Initiative for Cooperation in Southeastern Europe (SECI), within the Group of States that fight corruption (GRECO) etc.

On a worldwide basis there are no conventions on legal assistance in criminal cases, but the United Nations in 1990 offered a model of a bilateral agreement on legal assistance in criminal matters with the aim that it can be used in the preparation of regional international conventions.⁸

In many countries international legal assistance in criminal matters is governed by a special law, as is the case in Austria, Switzerland, Germany, Argentina, Hungary and since 2004 in the Republic of Croatia.

Subject and scope of criminal legal aid

Legal assistance in criminal matters includes⁹ the performance of certain procedural steps in the procedure and submitting of records and documents relating to criminal proceedings. The first activity covers investigative and other procedural actions: interrogation of the accused, hearing of witnesses and experts, inventory items,

⁶ European Convention on Mutual Assistance in Criminal Matters– CETS No. 030 (European Convention on Mutual Assistance in Criminal Matters), enter in force on 20 April 1959 year.

⁷ With special legal act - Joint Action of June 20, 1998 ("Official Journal" L 191, 07/07/1998), Council of the European Union established the European Network of Courts – „European Judicial Network“ due to international cooperation, primarily in the area of the fight against serious crime, particularly organized crime, corruption, drug trafficking and terrorism.

⁸ United Nations Resolution number 45/117 of 14 December 1990 adopted a model of agreement on mutual assistance in criminal matters, resulting from the so-called Milan plan of action adopted at the Seventh Congress of the United Nations for Crime Prevention and treatment of Offenders, held in Milan from 26 August to 6 September 1985. At the same time adopted a model of extradition treaties and model agreement for the transfer of proceedings in criminal cases.

⁹ Article 15 of the law on international cooperation in criminal matters, "Official Gazette" no. 12/4/2010.

insight, finding evidence, in particular, search of premises and persons, confiscation of objects, transit through the national territory and others. The second activity is about delivery of written documents and evidence, exchange of abstracts of register for penalties, giving notifications and other personal data for domestic citizens who are participants in criminal proceedings in the State that request legal assistance. The International agreements provide for an opportunity for the presence of the authorities of the requesting State, upon its request in the execution of certain procedural actions before the court of the requested state with the tendency to satisfy such requests in order to increase efficiency and cost of the procedure. The Additional Protocol to the European Convention on mutual provision of legal assistance in criminal matters from November 8, 2001 provides "request for the presence of such officials or interested persons, where that presence is likely to render the execution of the request for assistance more responsive to the needs of the requesting Party and therefore, likely to avoid the need for supplementary request for assistance" (Article 2).

Provision for the presence of officials in taking actions is provided with the Law on International Cooperation in Criminal Matters.¹⁰

Some bilateral agreements govern the conditions for voluntary departure of persons in the State requesting Party for questioning as witnesses or expert witnesses, with a guarantee of personal freedom and reimbursement of travel expenses, and the cost of downtime and fair compensation of the burden of that country.¹¹

International criminal - legal protection of individual goods between countries is established with multilateral conventions by which contracting States undertake to mutually provide legal assistance. Thus the above mentioned Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 obliges Member States to "give one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings" (Article 9). Contemporary international agreements to prevent terrorism and organized crime bring into focus a criminal - legal assistance, despite the direct perpetrators of such crimes and their accomplices, and all that in any way facilitate, develop or encourages such criminal activity, such as suspicious financial transactions, flows of money, working for companies owned by potential financiers of criminal activity, information on social entities that recruit potential terrorists and other criminals and so on (Todorovic, 2005, 102).

The most recent multilateral conventions, acknowledging the opportunities of modern technology, are expanding the methodology, scope and diversity of criminal legal aid. Thus the Convention on mutual assistance in criminal matters between the Member States of the European Union from 29 May 2000 stipulates the process of surveillance of telecommunications, as well as introducing interception of telecommunications such as letters sent by fax, electronic mail and other internet content (Article 17-20).

Additional Protocol to the European Convention on mutual provision of legal

¹⁰ Article 22 of the law on international cooperation in criminal matters, "Official Gazette" no. 12/4/2010.

¹¹ Article 20-30 of the Convention with Belgium, Art. 11-13 of the Convention with France, Article 36 of the Convention on mutual legal relations with Greece, Article 7 of the Treaty on mutual legal assistance in criminal matters with Germany and others.

assistance in criminal matters (2001) provides new types of questioning of witness or expert: hearing by videoconference (Article 9) and hearing by telephone conference call (Article 10) that enable taking of legally relevant statement by a person who is not present in the court room, but located on a territory of another state. This Protocol tends to counter with the unpredictable and devastating crime of modern time, wanting to encourage efficiency in the detection and prosecution of perpetrators of crimes and to give protection to abused people, also provides temporary delivery to another state, without prior request, to submit the obtained information within the framework of their own investigations or other independent judicial proceedings (article 11), then prescribe returning the objects used for committing the crime of their legal owners in another country (Article 12), removes the formal procedure regarding the submission of written judicial acts and enables directly address, by post, to the person who is in the territory of another State, provides police monitoring of suspicious person outside the territory of the home country (Article 17), control the delivery of goods, services and business transactions, conducting covert investigations in which the investigator is protected by a secret or false identity (Article 19), and the formation of joint investigation teams for conducting investigation on the territory of several states (Article 20) .

Conclusions

The purpose of international legal norms regarding the acceleration of legal cooperation, indicates a need for speeding the process of providing international legal assistance. Prior to sending a formal request and giving a requested mutual legal assistance, there must be a legal basis laid down in many multilateral instruments through the international legal assistance. Primary importance in this area is that the participants in the process should have a quick access to the information on international conventions, in fact, when they are concluded, if ratified, when entered into force, in order to avoid serious harm to the parties.

Republic of Macedonia has ratified all the conventions of the Council of Europe in the field of international cooperation in criminal matters, in order to be in compliance with the challenges of modern society and globalization, circumstances where international cooperation in criminal matters are gaining higher importance.

In the field of bilateral cooperation, we can conclude that the Republic of Macedonia leads a very active policy. Some of these agreements contain provisions that enable direct communication between the competent authorities involved in international legal cooperation, in practice proved as very effective provision to expedite the proceedings

Bilateral agreements are only a way for adding and precisely defining of certain issues in international cooperation.

Perceptions from this research, findings and conclusions could contribute to improving international legal assistance in order to achieve fast, efficient, high-quality international cooperation, which will provide greater legal protection for nationals anywhere in the world, and foreign nationals in the Republic of Macedonia.

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