

# Agreement on Extradition between the European Union and the United States of America; Bilateral Extradition Treaty between the United States of America and Romania. Practical Aspects

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**ABSTRACT:** When interpreting and implementing the agreement concluded between the European Union and the United States of America, the Parties shall ensure that its provisions apply to existing bilateral extradition treaties concluded with the Member States and shall fill any gaps in these treaties, with the aim of making international judicial cooperation more effective and avoiding the risk of impunity. This article emphasizes the commitment to uphold the principles of the rule of law and safeguard the procedural rights of extraditable persons, both by central authorities and courts. Furthermore, it acknowledges the challenges posed by differences in legal systems involved in these processes, and highlights the promotion of an international system grounded in clear, precise rules and procedures, as well as the fundamental values of democracy and human rights.

**KEYWORDS:** International judicial cooperation, extradition, EU-US extradition agreement, bilateral extradition treaties, respect for the rights of the extraditable person, risk of impunity, judicial practice

## 1. Introduction

Recent decades have seen an exponential increase in the cross-border nature of crime, particularly transnational organized crime, which is likely to create practical problems in investigating and prosecuting offenders and in enforcing custodial pre-trial orders and convictions, as suspects, accused or convicted persons often seek to escape criminal liability.

The new freedom of movement, together with the development of science and the use of the latest technological developments, particularly in the online field, have led to an exponential increase in crime and are making it increasingly difficult to detect, prosecute and try offenders, including the enforcement of sentences imposed or preventive measures, so that a comprehensive approach is needed, in which facilitating international judicial cooperation is a necessity in the fight against crime and the protection of democratic societies and their common values (The Preamble to the US-EU Extradition Agreement, published in the Official Journal of the EU L 181/27 on 19 July 2003). All forms of cooperation are based on the principle of mutual trust in judgments and the principle of loyal cooperation and aim to remove the differences between the different legal systems, so that international judicial cooperation has become a genuine branch of law (for more details see Corlățean 2011 and Corlățean 2015).

In order to ensure efficient and effective investigative activity and the smooth running of criminal proceedings, including at the enforcement stage, international treaties and agreements have been concluded and various bodies and agencies specialising in international cooperation have been set up at international level as mechanisms and instruments designed to provide support to the judicial authorities involved in executing requests for cooperation. However, a number of problems arise in judicial practice, particularly where the legal systems

involved are different, one being common law and the other continental law, given the lack of a unified strategic approach.

## **2. Agreement on extradition between the European Union and the United States of America signed on June 25, 2003 in Washington (published in JO L 181/34 on July 19, 2003, entry into force on February 1, 2010). General terms and conditions**

Independently of the nature of the legal system involved in the execution of requests for judicial cooperation, in view of the massive increase in the number of such requests, the Agreement on Extradition between the European Union and the United States of America was negotiated and concluded for the purpose of facilitating judicial cooperation between the Member States of the European Union and the United States of America, further cooperation between them (The Preamble to the US-EU Extradition Agreement, published in the Official Journal of the EU L 181/27 on July 19, 2003) in order to combat crime effectively, while respecting the rights of the individual and the rule of law and taking into account “the safeguards provided for in their respective legal systems, which provide for the right of the extradited person to a fair trial, including the right to be tried by an impartial tribunal established by law” (Ibidem).

It should be stressed that the achievement of this objective depends on the “convergence and compatibility of the justice systems” (Bitanga, Franguloiu and Sanchez-Hermosilla 2018, 7) involved and aims at building a homogeneous system for international judicial cooperation and, in particular, extradition. In essence, “the Contracting Parties undertake, in accordance with the provisions of this Agreement, to strengthen their cooperation in the context of the relations applicable between the Member States and the United States of America as regards the extradition of offenders”, as stated in Article 1 of the Agreement defining the subject matter. This means that the Agreement complements (<https://eur-lex.europa.eu/RO/legal-content/summary/agreement-with-the-united-states-on-extradition.html>) the provisions of the bilateral extradition treaties concluded by the United States of America with the Member States of the European Union, is designed to strengthen and facilitate cooperation in extradition procedures and sets out the conditions for extradition of accused or convicted persons between the Contracting Parties in order to reducing and eliminating the risk of impunity.

Article 3 also provides that the provisions of the Agreement shall apply to existing bilateral extradition treaties concluded by Member States with the United States of America, and a number of conditions are laid down. Thus, extradition is only granted on the basis of a list of specified offences (Article 3 para. 1 lit. (a) of the Agreement) and supplements the absence of provisions in the bilateral treaties.

## **3. Agreement on extradition between the European Union and the United States of America. Specific conditions**

### *Offences that are extraditable*

Article 4 provides that an offence is extraditable “if, under the laws of the requesting and requested States, it carries a custodial sentence of a maximum of more than one year or a more severe penalty. An extraditable offence is also considered extraditable if it consists of attempting, aiding or abetting or participating in the commission of an extraditable offence. If the request concerns the enforcement of the sentence imposed on a person convicted of an extraditable offence, the remaining period of imprisonment must be at least four months.”

Thus, this concerns offences for which a custodial sentence of a maximum term of imprisonment (of more than one year) or more severe may be imposed and any form of criminal attempt or participation in the commission of such offences.

Article 4(2) lays down a condition which is subject to the principle of specialty, namely: “if extradition is granted for an extraditable offence, it shall also be granted for any other

offence specified in the request if the second offence is subject to a custodial sentence of one year or less and provided that all the other conditions for extradition are met". In fact, this provision tends to cover also less serious offences for which extradition could not be granted, as the applicable penalty requirement is not met, but which is subject to the requirement that the other conditions for extradition are met.

In our opinion, the reason for this regulation was practical and pragmatic, in order to avoid repetitive extradition requests for the same requested person for offences committed at the same time as or in connection with the main extraditable offence, and to narrow the scope of the political exemption.

#### **4. Mandatory and optional grounds for refusal**

Given that any extradition request is dealt with according to the bilateral Treaty (The Extradition Treaty between Romania and the United States of America, signed in Bucharest on September 10, 2007, ratified by Law no. 115 of 2008, published in the Official Gazette of Romania no. 387 of May 21, 2008, is applicable to the processing of cooperation requests between the United States of America and Romania) and national procedural provisions, we will deal with some mandatory and optional grounds for refusal provided by Romanian law, namely Law No 302 of 2004 on international judicial cooperation (republished in the Official Journal of Romania No 1.110 of November 17, 2022). Article 21 of the aforementioned law provides for mandatory grounds for refusal ((1) Extradition shall be refused if: (a) the right to a fair trial within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, or any other relevant international instrument in this field ratified by Romania, has not been respected; b) there are serious grounds for believing that extradition is requested for the purpose of prosecuting or punishing a person on account of race, religion, sex, nationality, language, political or ideological opinion or membership of a particular social group; c) the person's situation is likely to deteriorate for one of the reasons set out in point (a) above; (d) the request is made in a case pending before extraordinary courts or tribunals other than those established by the relevant international instruments, or for the enforcement of a sentence imposed by such a court or tribunal; (e) it concerns a political offence or an offence connected with a political offence; (f) it concerns a military offence which does not constitute a non-political offence. (2) The following shall not be considered crimes of a political nature: a) attempts on the life of a Head of State or a member of his family; b) crimes against humanity provided for in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 by the General Assembly of the United Nations; c) crimes provided for in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, in Art. 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field, Art. 129 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Art. 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; d) any similar violations of the laws of war which are not covered by the provisions of the Geneva Conventions referred to in sub-paragraphs (a) and (b) above; (e) offences referred to in Article 1 of the European Convention on the Suppression of Terrorism, adopted at Strasbourg on January 27, 1997, and other relevant international instruments; (f) offences referred to in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 17 December 1984 by the United Nations General Assembly; (g) any other offence the political character of which has been removed by international treaties, conventions or agreements to which Romania is a party), while Article 22 provides for two optional grounds for refusal ((1) Extradition may be refused where the offence on which the request is based is the subject of an ongoing criminal trial or where the offence may be the subject of a criminal trial in Romania. (2) Extradition of

a person may be refused or postponed if surrender is likely to have particularly serious consequences for that person, in particular on account of his/her age or state of health. In the event of refusal of extradition, the provisions of Article 23 (1) shall apply accordingly), the most important and frequently invoked in practice being the violation of the right to a fair trial and the existence of criminal proceedings pending in Romania for the same offence or for an offence related to that for which extradition is requested.

It should be pointed out that there are other situations in which extradition cannot be granted, provided for by the Romanian law on international judicial cooperation and which take into account:

- the possibility of the death penalty (Article 27 of Law 302 of 2004: “If the offence for which extradition is requested is punishable by death under the law of the requesting State, extradition may be granted only on condition that the State concerned gives assurances considered satisfactory by the Romanian State that the death penalty will not be carried out and will be commuted”. It should be pointed out that there is no death penalty in any Member State of the European Union, but only in certain US states, respecting the diversity of cultures and traditions, so that state must give assurances that any death penalty will not be carried out or, if carried out, will not be executed. This impediment to extradition could raise multiple legal problems, given that there is no such penalty in the European Union, and the Charter of Fundamental Rights of the European Union, which is equal in value to the founding Treaties (Treaty on the Functioning of the European Union and the Treaty on European Union prohibits the death penalty by Article 2(2) of the Treaty on the Functioning of the European Union and the Treaty on the European Union): “No one shall be condemned to the death penalty or executed” and requires absolute respect for the rights and freedoms of the individual, including the right to a fair trial in all aspects of the criminal justice process, which are enshrined as fundamental principles.) being imposed (a hypothesis also covered by the Agreement in Article 13);

- the absence of a prior complaint (Article 30 of Law 302 of 2004) where, in both the requesting and requested States, criminal proceedings can only be instituted on the basis of a prior complaint by the injured person and the injured person opposes extradition;

- if the extraditable person would be tried in the requesting State by a court which does not guarantee fundamental procedural safeguards and protection of the rights of the defence or by a national court established specifically for the case in question or if extradition is requested for the purpose of enforcing a sentence imposed by that court (Article 31 of Law 302 of 2004);

- where the person to be extradited has been tried in absentia, if it is considered that the proceedings have disregarded the rights of the defence afforded to any person suspected or accused of having committed a criminal offence (Article 32 of Law 302 of 2004), unless assurances are given which are deemed sufficient to guarantee the person whose extradition is requested the right to a retrial in order to safeguard his rights of defence;

- whether the statute of limitations for criminal liability or the execution of the sentence is applicable, either under Romanian law or under the law of the requesting State (Article 33 of Law 302 of 2004);

- if the offence for which extradition is requested is covered by an amnesty in Romania (Article 34 of Law 302 of 2004), if the Romanian State had jurisdiction to prosecute this offence under national law, and in the event of a pardon (Article 35 of Law 302 of 2004), since the act of pardon renders the extradition request inoperative, even if the other conditions are met (Article 36 of Law 302 of 2004).

#### *4.1. Opposition to extradition*

Article 49 of the Romanian Judicial Cooperation Act provides that opposition to extradition may be based only on the fact that the person arrested is not the person sought or that the

conditions for extradition are not met. In this regard, it was found that the opposition of the extraditable person to the extradition request made by the United States of America under the bilateral treaty between the two States was unfounded and extradition was ordered (Criminal judgment no. 194 of 13.12.2011 delivered by the Craiova Court of Appeal, [www.rolii.ro](http://www.rolii.ro)). The requested person has defended his opposition on the grounds that he has never been to the territory of the United States of America, that he is not a citizen or resident of that State, and that he has a case pending before a Romanian court, thus the provisions of Article 14(2) of the bilateral treaty being applicable. In addition, the person concerned also claimed that he had been charged in the United States in absentia, the criminal proceedings having been carried out in his absence and without the assistance of a lawyer, thus violating his right to a fair trial, and requested that, by way of a request for additional information, the American authorities transmit to the Romanian judicial authority the data and evidence gathered against him so that he could be tried in Romania for the offences in question. He also claimed that the requesting State had not given any assurance that if he was convicted in the USA he would be transferred to serve his sentence in Romania, in accordance with Article 20(2) of the Romanian International Judicial Cooperation Act.

The court found, in essence, that an arrest warrant had been issued against the requested person by the US judicial authorities for the offences of: conspiracy to commit bank fraud, conspiracy to commit bank fraud in connection with access devices, and aggravated identity theft, under 18 U.S.C. § 1349, 18 U.S.C. § 1028A, consisting of the extraditable person, along with 12 other co-defendants, engaging in “phishing” schemes in which they sent fraudulent messages via email that appeared to be from banks and other legitimate companies to deceive people into revealing private information, such as: name, address, date of birth, social security account numbers, credit or debit card numbers, and bank card numbers. A person accessing the links in the fraudulent e-mails was redirected to one or more Internet sites that falsely appeared to originate from a legitimate company, with the illegally obtained information being used to obtain goods and services to which the defendant was not entitled.

With regard to the grounds invoked by the requested person, it was found that they have no basis, since some of them are not found either in the bilateral treaty or in the Romanian law on judicial cooperation (relating to the fact that he has never been on American territory) and that according to Article 2(4) of the Extradition Treaty and Article 20(3) of the Romanian Law, the requested person has never been on American territory. Romanian citizens can be extradited to the USA, even for crimes that were not committed on the territory of this state. It was also held that extradition may not be refused on the grounds of the nationality of the person requested and that it is not necessary to provide an additional guarantee that if he is convicted in the USA he will be transferred to serve his sentence in Romania.

With regard to the alleged violation of the right to a fair trial within the meaning of Article 6 para. 3(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court found that that fact must be analyzed in the light of the case-law of the European Court of Human Rights, in that it is necessary to consider all the proceedings in the case (Imbrioscia, pp. 13-14, § 38 and Murray, pp. 54-55, § 63). Thus, the criminal proceedings against the extraditable person “are still pending before the United States District Court - Hartford, Connecticut in case no. ..., to which the case has been referred for trial, so that it cannot be considered, at this stage of the proceedings, that there has been a violation of Article 6 of the Convention, since the person concerned has the right and opportunity to exercise his rights of defense and to submit evidence, including the right to engage a lawyer of his own choosing or to have one appointed”.

With reference to the fact that there is a case pending before the Romanian courts, the judge found that the requested person is an appellant in the case in question and that this is an optional ground for refusing extradition, not a mandatory one, so he ordered that the surrender of the requested person to the American judicial authorities be postponed until the judgment

in the criminal case in question has become final or, in the case of a sentence of imprisonment with custodial sentences, until the extradited person is released from the enforcement warrant to be issued.

In another case (Criminal judgment no. 240/F of 11.12.2020 rendered by the Bucharest Court of Appeal, 2nd Criminal Division, *apud* Pătrăuș 2021, 53 et seq.), the national court found that the opposition lodged by the extraditable person through his lawyer was unfounded and ordered his extradition. The defendant was indicted for conspiracy to commit RICO crimes - Racketeer Influenced and Corrupt Organizations, in violation of 18 U.S.C. § 1962(d); conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1349 and 1343; and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and the case is pending in the U.S. District Court. The U.S. District Court for the Eastern District of Kentucky issued a warrant for his arrest on charges that he and others defrauded U.S. citizens by conducting online auctions, i.e., posted fake ads on online and retail sales sites offering for sale luxury items, such as cars, asking interested persons to pay online, which they used to purchase bitcoins or were transferred out of U.S. space.

The person sought, through his lawyer, argued that he had made a request, sent via the embassy, which is not on file and there are no documents showing "assurances deemed sufficient" that he would be transferred to Romania to serve any sentence if found guilty of the charges against him. In support of this part of the opposition, European case-law was relied on, according to which the requested State must verify whether the enforcement of the sentence in the requesting State, in the light of the convicted person's links with his or her national State, would be likely to promote the social reintegration of that person, in that it must apply all the instruments of international cooperation in criminal matters available to it in respect of the requesting non-member State in order to obtain the latter's consent to the enforcement of the sentence in question in its territory, where appropriate after adapting it to the penalty provided for by its criminal law for an offence of the same nature. It was also alleged that the extraditable person did not know until 3 December 2020 about the existence of a criminal case in the U.S., even though the criminal proceedings against him were conducted in 2013-2014, and the arrest warrant was issued in absentia, without his summons.

The Court rejected the defense's request for an address to the US judicial authorities as it did not constitute evidence under Article 49(2) of Law No 302/2004, considering that it was not necessary to obtain additional information. The Court also found that the provisions of Article 5 of Law No 302/2004, which constitutes the common law on the matter for the Romanian judicial authorities, are applicable to the case, as supplemented by the provisions of Law No 111/2008 on the ratification of the Extradition Treaty between Romania and the United States of America. At the same time, the court held that where the law on international judicial cooperation does not provide otherwise, the requests in the matter are executed in accordance with the Romanian rules of criminal procedural law, pursuant to Article 7 of the framework law. As regards the plea of absence of the guarantees provided for by Article 20(2) in conjunction with Article 20 para. 1(a) and (c) of the Framework Law, the court found that those provisions did not apply, since the person sought was not domiciled in the territory of the requesting State at the time of the extradition request and had not committed an act against a citizen of an EU Member State. The court found that the right to a defense had not been infringed, since extradition was requested precisely in order to ensure that the person to be extradited could exercise that right, and that it did not fall within its jurisdiction to examine the legality and necessity of the arrest warrant issued by the US authorities.

Also, in another case (*Ibidem*, Criminal judgment no. 86/F of 08.5.2020 rendered by the Bucharest Court of Appeal, 1st Criminal Division), U.S. judicial authorities have issued an extradition request against a Mexican national for whom a warrant has been issued by the U.S. District Court for the Southern District of Texas for his arrest on January 23, 2020, for the Title 21 offense of conspiracy to possess for the purpose of distribution a controlled

substance, Sections 841(a)(1) and 841(b)(1)(A) of the United States Code committed by the extraditable person, as a high-level member of the Cartel de Jalisco Nueva Generation in Guadalajara, Mexico, between August 2016 and January 2020, in the international trafficking of drugs (amphetamine and cocaine) from Mexico to the United States, New Zealand, and several EU countries. The contents of the request also state that the surrender of property or any documents in the extraditable person's possession is requested.

The Court admitted the request on the grounds that the conditions for extradition set out in Articles 18-35 of Law 302/2004 are met, there being no grounds for refusal, given the provisions of Articles 1-23 of the Extradition Treaty between Romania and the United States, ratified by Law 111/2008.

Whereas, according to the provisions of Article 16 of the Treaty, the handing over of property, documents and evidence in the possession of the extraditable person, on the basis of Article 17(1) and (4) in conjunction with Article 52(1) and (4) of the Treaty, is not subject to the provisions of the Treaty 6 of the Framework Law, the confiscation and handing over of the goods seized from the requested person at the time of detection on the territory of Romania was ordered, according to the report of 9 March 2020 drawn up by the police officers of the General Inspectorate of the Romanian Police - Criminal Investigation Department.

#### 4.2. *Ne bis in idem* principle

According to this principle, provided for in the provisions of Article 8 (1) of Law No 302/2004, republished, no one may be summoned to court again or punished in another criminal action for the same criminal offence for which he has already been convicted or acquitted under the criminal law and procedure of a State. In legal relations with a third State, the provisions of international treaties are applicable, so national rules on the *ne bis in idem* principle cannot be used.

In one judgment (Criminal judgment no. 272/F of 14.6.2013 rendered by the Bucharest Court of Appeal, 2nd Criminal Division, [www.rolii.ro](http://www.rolii.ro)), the extraditable person argued that he is facing another criminal trial on similar charges, calling into question the need to request additional information on the case for which the criminal trial is being conducted in the US in order to be able to compare the two criminal activities for which he is being investigated. The requested person also pointed out that the extradition request gives five examples of victims, the facts are described in a way that allows them to be classified according to the Romanian definition: organized criminal group, computer theft, fraud and money laundering; thus, there is no doubt as to the identity of the facts and even if certain material acts are not captured in the Romanian documents, it is a continuous offence and the principle of *non bis in idem* is applicable, invoking also the principle of the personality of the criminal law. The court found that the extraditable person is wanted internationally for the offences of conspiracy to participate in an organized criminal group, conspiracy to commit wire fraud, conspiracy to commit money laundering, conspiracy to traffic in counterfeit services, for the execution of an arrest warrant issued on September 16, 2010, by the United States District Court for the Northern District of Ohio. In effect, he and his accomplices ran a complex fraudulent scheme in the Internet marketplace by posting fictitious ads for high-value items on e-commerce platforms such as AutoTrader, where buyers were directed to transfer money even though they were not in possession of the goods for sale. The invoices were forged to appear identical to legitimate payment services containing eBay service marks. He and his accomplices also illegally accessed bank accounts in the United States, fraudulently obtained usernames and passwords to accounts belonging to U.S. companies, and arranged for unauthorized wire transfers to the accounts of accomplices recruited to help launder the funds they controlled, so the indictment contains four counts: conspiracy to commit racketeering, conspiracy to commit wire fraud, conspiracy to launder money, and conspiracy to traffic in counterfeit service marks.

The court found that there was no exact overlap between the facts for which the requested person is being tried in Romania and the facts described in the indictment in the United States. Before analyzing the comparative nature of the charges brought in the two States, it is necessary to specify what needs to be compared in order to clarify the incidence of the *non bis in idem* principle, i.e. to clarify the content of the concept of 'criminal act'. In assessing this question, it is essential to bear in mind that national laws define the concept of 'offence' differently, so that it is clear that any comparison must take account of the 'criminal act' as an objective reality, regardless of the legal framework or the social relationships protected. In that regard, the judge in the case found that the assessment of compliance with the principle of *non bis in idem* between States precluded reference to the national legislation on the continuing offence, in the context in which its uniqueness represents a criminal policy option, a legislative creation by means of which several actions of criminal relevance by a single person are brought together in a single offence.

Consequently, the crucial point is the actual factual situation, namely an event that took place in the past, which has led or will lead to a relevant criminal law result. The criteria to be taken into account are: the place of the act, the time of the act, the object of the act, the course of the action, the perpetrators, the victim, the result produced or which could have been produced, and it was noted that extradition was requested for acts other than those being tried in Romania.

## Conclusions

The institution of extradition has been and remains the cornerstone of international judicial cooperation in criminal matters, but it no longer meets the new aspirations of States, particularly as regards preventing and combating crime of all kinds more effectively, but also as regards the speed with which extradition requests are executed. In dealing with extradition requests, the courts take into account the provisions of the bilateral extradition treaties, since under the Agreement concluded between the European Union and the United States of America, the parties ensure that its provisions are applied to the bilateral extradition treaties in force and that any shortcomings in those treaties are remedied. At a time when organized crime is taking on a profound cross-border character and unprecedented mobility, States must ensure that the judicial response is appropriate, regardless of physical and geographical distance, and that international judicial cooperation instruments are primarily designed to avoid the risk of impunity, of course, while respecting all the values and principles of the rule of law and consistent application of the law. Clearly, both contracting parties have the highest values in all areas, including the dispensation of justice, which must be carried out with respect for democratic values, specific to the rule of law and the rule of law, respect for the procedural rights and freedoms of all parties to the proceedings, in order to protect common values, within the limits of respect for jurisdictional competencies. Overall, this article provided a comprehensive examination of the practical implications and challenges related to international extradition agreements, emphasizing the importance of strengthening cooperation in the fight against transnational crime while safeguarding individual rights and legal principles.

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