

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE EUROPEAN INVESTIGATION ORDER

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Abstract

The European Investigation Order (EIO) is the newest instrument of international judicial cooperation in criminal matters between the Member States of the European Union. The purpose of this paper is to analyse this new European initiative regarding an European Investigation Order (EIO) based on the principle of mutual recognition which shall facilitate the gathering and transmission of evidence in criminal matters between Member States. The author present the necessity of an EIO and analyse if it provides enough safeguards for the protection of the fundamental rights of the defendant and the differences between this proposed instrument and the European Evidence Warrant with shows the ECJ jurisprudence tendency. In the end, after presenting some relevant aspect regarding EIO, including the UK's post-transition relationship with the EU, the paper ends with proposals for the ferenda law concerning the accomplishment of an adequate juridical framework and the application of the legal stipulation referring to international judicial cooperation in criminal matters.

Keywords: *the European Investigation Order, international judicial cooperation in criminal matters, mutual recognition.*

1. Introduction

At the same time with the opening of the frontiers, international criminality has achieved a bigger and bigger importance.

The new dimension of organized crime in the European space, the need for prevention and effective combating of this phenomenon at the regional level has required the improvement of judicial mechanisms cooperation and the development of instruments based on the principle of mutual recognition at European Union level and on the part of the Member States, stepping up their efforts to harmonize the legislation in the Union.

The founding treaties of the European Communities did not explicitly include criminal law in the mechanism of protection of economic integration.

According to the relevant European Union's primary and secondary sources – including Directive 2014/41/EU – all Member States must provide for a minimum level of guarantees connected to the right of defence, irrespective of the specific judicial system in force in each country. In particular, in December 2009, following the entry into force of the Lisbon Treaty, The European Council adopts the Stockholm Programme, which aimed at reforming the “current patchwork of rules” and providing a single.

Article 82 of the Treaty on the Functioning of the European Union (TFUE) underlines the importance of the approximation of law and regulation, including those relating to such procedural rights, among Member States. This position is reiterated in Directive 2014/41/EU that explicitly refers to Article 82 TFEU and to the main pillars of Judicial Cooperation in Criminal Matters, namely the principle of mutual

recognition of judgments and that of mutual confidence between Member States. Accordingly, from Article 82 TFEU, and subsequently Directive 41, derives the necessity to provide minimum common rules in relation to the rights of individuals in criminal procedure.

According to Article 82 (1) TFEU, judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions.

Article 82 (2) of TFUE provides: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States [...]”

With the intensification of European integration and the increase of mobility of people, goods, services and capital in the EC internal market, with the growing importance of the external dimension of the internal market, the growing need for a legal regime for judicial cooperation in criminal matters appropriate to the countries involved in the European integration process has become increasingly clear.

The purpose of judicial cooperation in criminal matters is to establish a common European space of freedom, security and justice responding to the mutual trust between the systems of criminal justice in the member states, being supported by the principles of freedom and of democracy of the legal state and respecting the basic rights guaranteed by the European

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Convention for Protecting the Basic Human Rights and Freedoms.

The European Investigation Order repeals the Framework Decision establishing the European Evidence Warrant (EEW) and replaces the corresponding provisions of the Council of Europe mutual assistance Convention and its two protocols (Framework Decision on the Evidence Warrant and Stockholm Programme) as well as the EU Mutual Assistance Convention and its protocol and the relevant provisions of the Schengen Convention.

2. The European Investigation Order and its application

In 2009, when the Stockholm Programme was adopted by the European Council, the existing legal framework was fragmented and too complicated. Directive 2014/41/EU of the European Parliament and of the Council set up a new European judicial decision instrument, called the European Investigation Order¹.

An EIO aims to make legal cooperation between EU Member States easier; it sets up a comprehensive system for obtaining evidence in cases with cross-border dimensions.

It is to be issued for the purpose of having one or several specific investigative measures carried out in the state executing the EIO with a view on gathering evidence.

The instrument applies to all investigative measures aimed at gathering of evidence², as well as at obtaining evidence that is already in the possession of the executing authority (Article 1(1) of the EIO Directive).

The EIO Directive came into force on May 22, 2017, with the EU having allowed time for Member States, with the exception of Ireland and Denmark³, to implement it into their national legislation.

An EIO is a judicial decision, issued or validated by a judicial authority of a Member State (the issuing state) for the purpose of having one or several specific investigative measures carried out in another Member State (the executing state) to obtain evidence. An EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing state. The issuing of an EIO may be requested by prosecutors or judges, but also by the suspected or accused person as well as by lawyers on their behalf (within the framework of defence rights).

The EIO can be used in criminal proceedings, but also in those brought by administrative authorities, with judicial validation, when there is a criminal dimension.

The Directive 2014/41/EU on the European Investigation Order in Criminal matters obviously covers any other investigation measure except⁴: setting up of Joint Investigation Teams and gathering of evidence with such teams, expressly excluded from the EIO scope in according to Article 3 of the directive and - the freezing with a view of confiscation and the confiscation itself, taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the directive.

Also, it does not apply to: service and notification of documents, on the one hand because this is not an investigation measure per se, and, on the other hand, the “service by post” rule established in Article 5 (1) of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union.

In some situations an EIO might be issued for questioning the suspect via video link in order to determine whether or not to issue an EAW for the purposes of prosecuting him⁵.

In Romania, the High Court of Cassation and Justice has decided that the European Investigation Order which has as object the hearing by video conference during the trial is executed by the Court of Appeal⁶.

For instance, the order was transposed into the Romanian legislation, through the most recent changes of the Law no. 302/2004 concerning international judicial cooperation in criminal matters (following-“The Law”)⁷.

When acting as an issuing State, only Romanian judicial authorities have competence, namely the competent Prosecutor’s Office during the investigation phase or the competent court in the trial phase. No administrative authority has competence, as it is not considered investigating authority in criminal proceedings. Some investigative measures such as, surveillance methods including wire-tapping of communications or of any type of remote communications, accessing a computer system, obtaining data regarding the financial transactions of persons, use of undercover investigators and informants, controlled deliveries, etc., cannot be decided by a prosecutor, but only by a Judge of rights and liberties during the investigative phase or a Judge during the trial phase.

¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 (hereafter the EIO Directive).

² Art. 3 from EIO Directive.

³ Preamble paras. 43-45 and art 3 from EIO Directive.

⁴ Note on the meaning of „corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive, disponibil on-line la: <http://data.consilium.europa.eu/doc/document/ST-9936-2017-INIT/en/pdf>.

⁵ JO L c335/1, 06.10.2017, p. 16.

⁶ HCCJ, decision no. 432 of 19.p07.2018, www.scj.ro.

⁷ Republished in the Official Romanian Journal, Part I, nr. 377 from 31 May 2011, completed through Law nr. 236 from 5 December 2017, published in the Official Romanian Journal nr. 993 from 14 December 2017.

When our country is the state of execution, recognition and execution of a European Investigation Order are within the competence of the prosecutor's office or the court competent materially and according to the quality of the person according to Romanian law.

Territorial competence is determined according to the place where the measure is to be fulfilled the investigation⁸.

The Law no. 302/2004 concerning international judicial cooperation in criminal matters does not stipulate which is the competent court in the situation, that have appeared in practice, hence the measures requested to be performed are within the competence of different prosecutor's offices or courts.

It is necessary to complete the law indicated in the sense of specification the prosecutor's office or the court that in these causes will rule on the EIO.

EIO's concerning facts within the competence of Directorate for Investigation of Organized Crime and Terrorism (DIOCT) or National Anti-Corruption Directorate (NACD) is recognized and executed by them.

In the sphere of central authorities it is included the Ministry of Justice which receives a EIO referring to the judicial activity or execution of judgement as well as the Public Ministry through the specialized structures in the case of European Investigation Orders that refer to the criminal investigation and investigation activity⁹.

3. The European Arrest Warrant and the European Investigation Order

The EIO contained several innovations over existing procedures prior to its appearance. The EIO focuses on the investigative measure to be executed, rather than on the type of evidence to be gathered. The EIO has a broad scope – all investigative measures are covered, except those explicitly excluded. In principle, the issuing authority decides on the type of investigative measure to be used. However, flexibility is introduced by allowing, in a limited number of cases, the executing authority to decide to have recourse to an investigative measure other than that provided for in the EIO. Clear time limits are provided for the recognition and, with more flexibility, for the execution of the EIO. The proposal also innovates by providing the legal obligation to execute the EIO with the same celerity and priority as for a similar national case.

The Court of Justice, clarified that public prosecutors can adopt European Investigation Order pursuant to Directive 2014/41, even if there is a risk of the prosecutors being subject to individual instruction from executive branch. The Court has distinguished the role of prosecutors in the course of an EIO to the

European arrest warrant, which reassures prosecutors, in line with the Court's more recent case-law, to ensure standards of independence.

The cause stems from a criminal investigation for fraud initiated in Germany. Under Austrian law, a public prosecutor may not order investigative measures without prior court authorization, which was granted in the specific case at hand.

In decision¹⁰ of the Court of Justice has decided the role of the prosecutor's in the context of an EIO and a European Arrest Warrant by relaying on an interpretation of Directive 2014/41, which explicitly refers to public prosecutors as issuing authorities, but in the same time on the guarantees, including guarantees of judicial review ensured by Directive 2014/41. Court of Justice concludes that the EAW does not apply to a public prosecutor acting in the context of an EIO.

The Court of Justice held that „it follows from Article 2(d) of Directive 2014/41 that the procedure for executing a European investigation order may require a court authorization in the executing State where that is provided for by its national law. As is apparent from the order for reference, that is the case under Austrian law, which makes the execution of certain investigative measures, such as a request for disclosure of information relating to a bank account, subject to court authorization.

The EIO governed by Directive 2014/41 pursues, in the context of criminal proceedings, a distinct objective from the European arrest warrant governed by Framework Decision 2002/584. While the European Arrest Warrant seeks, in accordance with Article 1(1) of Framework Decision 2002/584, the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European Investigation Order, under Article 1(1) of Directive 2014/41, is to have one or several specific investigative measures carried out to obtain evidence.

Except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure, which is the subject of specific guarantees in Articles 22 and 23 of Directive 2014/41, the European investigation order, unlike a European arrest warrant, is not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter”.

The issue was raised into national judicial practice to what extent data generated or processed by Facebook by a public prosecutor without the court authorization.

There are several opinions regarding this issue, but the majority one was in the sense that the use of the EIO mechanism presupposes the fulfillment of the

⁸ Article 330 paragraph 2 from the amended Law no. 302/2004.

⁹ Article 330 paragraph 3 from the amended Law no. 302/2004.

¹⁰ ECJ, C-584/19, A and Others, Judgement of 8 December 2020, ECLI:EU:C:2020:1002.

procedures provided by the law of the requesting states for obtaining the evidentiary instrument, respectively the judge's authorization.

As well, in judicial doctrine¹¹ it was appreciated that when the EIO is issued by any other authority, and not by a judicial authority, could be capitalized principle developed by the Court of Justice of the European Union in a number of recent decision related to the European Arrest Warrant, in which denied the possibility that the Ministry of Justice of a Member State or prosecutor's offices that are exposed to the risk of being subjected to orders from the executives power to be included in the scope of the notion of issuing judicial authority. Therefore, it was considering that it is for the executing judicial authorities to identify whether the issuing authority falls within those compatible with the meaning of the notion, as it is recognized by the Directive.

For the purpose of this paper, I looked into the jurisprudence of High Court of Cassation and Justice¹² which addresses issues related to both instruments of cooperation.

In the decision was retained that, in the procedure of execution of the European Arrest Warrant, the prosecutor to the Office of the Prosecutor near the Court of Appel has the competence to attend the court hearing, hether in the procedure for the execution of EIO concerning the facts contained in the European Arrest Warrant was attended by a prosecutor from the Directorate of Investigation of Crimes of Organized Crime and Terrorism.

It was also mentioned that execution of a EIO issued by the authorities of a Member State of the European Union, concerning the facts contained in the EAW issued by the authorities of the same Member State of the European Union not it determines the incidence of optional refusal of execution, regarding the hypothesis in which the request person is subject to a criminal procedure in Romania for the deed that motivated the European Arrest Warrant.

4. The national sovereignty of the States and supremacy of the European Union's law

Criminal justice is a specific and unique field of law in each State. The negative attitude of the EU Member States towards the unconditional cooperation in criminal matters is still provided. It is an understandable position because the States, protecting their sovereignty, authenticity and independence, avoid

unambiguous supporting of the aspiration, declared by the EU, on mutual recognition of the evidence, on which the EIO is also based. The Member States are aware of the significance of recognition of the mutual principle of international cooperation; on the other hand, some EU Member States perceive this principle in a certain sense as the dictatorship, which limited the autonomy of the domestic law¹³.

It is important to note that the European Court of Justice (hereinafter referred to as the "ECJ") had an opportunity to pronounce on Council Framework Decision 2002/584/JHA, dated the 13nd of June of the year 2002 on the European arrest warrant and the surrender procedures between Member States, which is practically related to the EIO.

There are two causes, the Radu¹⁴ and the Melloni¹⁵ in which was examined the fundamental right and the mutual recognition¹⁶.

The ECJ stated that the guarantees, foreseen in the national Constitutions of the Member States, have no influence upon the definite case though they foresee a softer regulation towards the convicted person. In this context, the ECJ stated that the guarantees, foreseen in the national Constitutions of the Member States, have no influence upon the definite case though they foresee a softer regulation towards the convicted person. The ECJ points to the supremacy of the European Union's law against the national legislation.

So, if there are the substantial grounds for believing that execution of the investigative measure, indicated in the EIO, would result in a breach of the fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights, recognized in the Charter, the execution of the EIO should be refused¹⁷.

5. Brexit and its consequence for cooperation in criminal matters

5.1. The regime applicable during the transition period

With the UK's withdrawal from the EU, the modalities of its cooperation with other EU Member States in criminal matters are bound to change.

On 23 June 2016 the United Kingdom voted to leave the EU and on 29 March 2017 the United Kingdom triggered Article 50 of the Treaty on European Union, the withdrawal clause. From that moment on, the EU and the United Kingdom carried

¹¹ D. Dediu, European Investigation Order. Theoretical and practical aspects regarding the issuance procedure and execution., Pro Law Magazine, no. 3/2018, p. 36.

¹² High Court of Cassation and Justice, Decision no. 253 of 13 may 2019, www.scj.ro.

¹³ Murphy, C. Cian, The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust? Social Science Research Network, 2010, Vol. 3, p. 14.

¹⁴ Decision, dated the 29th of January of the year 2013 – case C-396/11 Radu.

¹⁵ Decision, dated the 26th of February of the year 2013 – case C-399/11 Melloni.

¹⁶ Namavičius, J. European Union's fundamental rights in the context of criminal justice. Teisės problemos. 2015. No 3, p. 5-32.

¹⁷ Navickaitė S., The European Investigation Order: Achievements and Challenges, "Social Transformations in Contemporary Society", 2016 (4), ISSN 2345-0126 (online).

out negotiations on a withdrawal agreement (WA), which was agreed upon on 17 October 2019, delaying the date for the United Kingdom to leave the EU until 31 January 2020.

From 1 February 2020 until 31 December 2020 the United Kingdom was in a transition period, as agreed in the WA. During this period the United Kingdom was no longer an EU Member State but remained a member of the single market and the customs union¹⁸. On 30 December 2020, the EU and the United Kingdom signed a trade and cooperation agreement (TCA)¹⁹, which became provisionally applicable as of 1 January 2021.

In same areas of criminal justice cooperation, the UK's withdrawal has a limited impact, provided that the requests for cooperation are made before the end of the transition period. This is for instance the case regarding ongoing judicial cooperation proceedings. According to Article 63 of the Withdrawal Agreement, only a series of instruments of judicial cooperation, continue to apply. As the UK had previously tailored its participation in pre-and post-Lisbon EU criminal law instruments, these instruments represent the main ones for judicial cooperation in criminal matters and are for instance included the Framework Decision on the EAW - or the EIO Directive. The same can be said regarding instruments on law enforcement cooperation and exchange of information, as the main ones will remain applicable (Art. 63). The UK authorities also retain the possibility to continue their participation in joint investigation teams, and to share and request information from Eurojust. The main change concerns the participation in new EU criminal law measures, in respect of which two options apply. For proposals amending, replacing or building upon measures in which the UK previously opted in, the UK has the possibility to opt in. However, for new proposals, the UK does not have the right to opt in, and it may only be invited to cooperate with the EU Member States under the modalities foreseen for third countries²⁰.

There are some Member States decided to make use of the possibility provided for in Article 185 of the Withdrawal Agreement. This provision allows Member States, due to reasons related to fundamental principles of their national law, to declare that, during the transition period, their national executing judicial authorities may refuse to surrender its nationals to the United Kingdom pursuant to an EAW. This refers to the constitutional limits regarding the extradition to nationals outside the EU, which is for instance foreseen in Germany, where the Constitution limits the extradition of nationals to situations in which the request comes from an EU Member State and/or an

international court. Only three Member States, namely Germany, Austria and Slovenia, made such notification by January 28th and the United Kingdom has now one month to notify whether its executing judicial authorities may refuse to surrender its nationals to those Members States²¹.

5.2. Modalities of cooperation between the UK and the EU after transition period

After the end of the transition period on 31 December 2020, the following no longer apply to the UK are the European Investigation Order (EIO) and the 2000 Convention and related Protocol on Mutual Assistance in Criminal Matters.

Therefore, an EIO can no longer be issued to obtain evidence located in the UK or to obtain evidence located in EU member states for use in UK criminal investigations or proceedings.

However, in line with the terms of the Withdrawal Agreement, EIOs received before 11 pm on 31 December 2020 will be processed as EIO's. Any EIO received after this time will be processed as a mutual legal assistance (MLA) request, unless the requesting state objects.

Requests for MLA between the member states of the EU and the UK are now based on cooperation through the Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters and its two additional protocols, as supplemented by provisions agreed in Title VIII of the EU-UK Trade and Cooperation Agreement²².

An European Investigation Order received after the end of the transition period will be processed as an MLA request and the requesting state will be advised of the same, unless they object.

6. Conclusions

Lately, in addition to the possibility of gathering evidence with the help of instruments of judicial cooperation in criminal matters, which represents horizontal cooperation that is in a continuous development, there have been new forms of vertical cooperation in criminal matters. These are new institution of the European Union, such as the European Anti-Fraud Office and Eurojust, which have a role in gathering evidence without them being considered authentic legal authorities, and last but not least the European Public Prosecutor's Office.

According to article 12 of the Law no. 6/2021²³, the European Public Prosecutor's Office is a judicial authority within the meaning of the provision of article

¹⁸ Article 126 from WA.

¹⁹ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, p. 14–1462).

²⁰ Chloe Briere, Brexit and its consequence for cooperation in criminal matters, europeanlawblog.eu.

²¹ Idem.

²² Guidance, European Investigation Order, www.gov.uk/guidance/european-investigation-orders-requests.

²³ Law no. 6 of February 18, 2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of enhanced cooperation on the establishment European Public Prosecutor's Office (EPPO).

2 paragraph d of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, and will be notified as such as at international legal instrument relevant in the field of international judicial assistance in criminal matters which Romania is a party, as well as in case where, according to the EPPO Regulation, delegates European prosecutors may carry out international judicial cooperation activities under the applicable treaties.

The criminal legislation of the Member States of the European Union, including our country, is in a continuous adaption in relation to the directives of the European Union and the needs of the times.

Therefore, I consider that it is necessary to give great importance to the harmonization of European legislation in general and criminal law in particular.

This desideratum can be achieved by elaborating a European procedural code that includes common rules for all member states on the one hand, and on the other hand for the situation in which are involved the third states.

Also, in the same order of ideas, the new institution of the European Union must be taken into account, respectively the European Prosecutor's Office with specific competencies.

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