THEORETICAL AND PRACTICAL ASPECTS REGARDING THE ISSUANCE OF EUROPEAN INVESTIGATION ORDER

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Abstract

The chosen topic, through its novelty in the field of international judicial cooperation in criminal matters, presents both theoretical and practical importance through the procedural-criminal implications it determines.

The author analyzes both synthetically and analytically the functionality of the institution of the European investigation order, determining its content, application limits and subjects involved in the criminal trial report, highlighting the aspects of non-correlation of the objective with the intended purpose.

The conclusions materialized in proposals to complete and improve the existing legislative framework, represented by Law no. 236/2017.

Keywords: *international judicial cooperation in criminal matters, the European Investigation Order, Law no. 302/2004 on international judicial cooperation in criminal matters.*

1. Introduction

The European Investigation Order, which is an expression of the existing international judicial cooperation at European level, is part of the set of judicial procedural acts, representing an effective judicial instrument whose purpose is the swift administration of evidence in criminal proceedings.

Although the European Parliament has adopted the European Investigation Order since March 2014[1], in Romania, despite being a member of the European Union, the Directive no. 2014/41 was implemented only at the end of 2017[2].

From a procedural point of view, the reason and purpose envisaged by the European Parliament when adopting the European Investigation Order are based on the need to make judicial proceedings more flexible / efficient between Member States as part of investigative measures in order to achieve the standard of procedural speed which is necessary in the administration of justice.

Both in relation to the other legal rules governing judicial proceedings for international judicial cooperation and in relation to domestic judicial rules, the procedure for issuing and enforcing the European Investigation Order is of a special nature and is a matter of priority and strict execution[3].

From an objective point of view, the European Investigation Order is based on the realities and needs of judicial practice which are based on the principles of finding out the truth and legality of the entire criminal process.

In this sense, all European states, through their own criminal procedural legislation, acknowledge that *the activity of probation of criminal acts* occupies a central place, decisive for finding out the truth and for carrying out the act of justice.

Judicial proof is a decision-making body which includes the means of proof and the evidence obtained, the latter having an essentially deductive component, derived from the means of proof.

2. Procedural aspects of the European Investigation Order

A) The European Investigation Order is the decision-making procedural act by which *evidentiary activities* are requested to be performed or *the evidence* in the possession of the requesting state or *obtained* by the latter on the basis of a previous request *is transferred* as a form of judicial cooperation.

According to provisions of art. 268[25] para. (1) of Law no. 236/2017, the object requested through the European Investigation Order may also consist of, taking any necessary measures to conceal, destroy, alienate, transform or move items that may be used as evidence", thus as a means and measure of protection / preservation of evidence.

Given the strictly restrictive object of the European Investigation Order, from which results its

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[1] At the level of the European Union, the European Investigation Order in criminal matters was adopted by Directive no. 2014/41/EU of 03.04.2014 of the European Parliament and of the Council, published in the Official Journal of the European Union.

[2] Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993 dated 14.12.2017.

[3] In this sense, see the conclusion decision no. 431 of 19th July 2018, delivered by the HCCJ, having as object the resolution of the conflict of competence.

special character, through which it is not possible to request, for example, the communication of judgments given by the courts of the requested State in other criminal cases or acts concerning the duration of the execution of criminal punishments in the execution procedure [4].

In order to carry out these activities, the requesting judicial bodies have at their disposal other judicial instruments regulated by the international legal assistance provided by art. 228 letter b) combined with the provisions of art. 254 para. (2) of Law no. 302/2004[5], as amended, which have as their object the communication of procedural documents between Member States.

The European Investigation Order has a double procedural-criminal significance, it includes both a decision-making component, in the sense of a firm measure, expressed by the judicial body of the requesting State, and a component of clear and predictable determination of the means of evidence to be administered and the factual aspects to be clarified.

The practical function of the European Investigation Order is to request and carry out investigative measures by the execution of means and evidentiary procedures regulated by law (part of the judicial investigation) and to obtain and transmit evidence by the requested State (third party within the judicial proceedings initiated / invigorated by the requesting state).

In relation to the judicial role of the European Investigation Order it is obvious that the *evaluation and determination of the probative value*, *i.e.* the logical-rational activity of analysing the facts established after performing the requested activity, is the attribute of the judicial body in the requesting state.

This is an intrinsic limitation of the European Investigation Order related to the analytical side of the evidence, while the explicit limitation is the impossibility of establishing a joint investigation team and the joint gathering of evidence by such a team, explicit prohibition established by art. 2681 para. (1), letter a), the second thesis of Law no. 236/2017[6].

The ban on the establishment of joint investigation teams by the European investigation order itself is due to the following reasons:

- the establishment, activities and functional competences of joint teams, including officials from two or more Member States, can only be arranged on the basis of normative provisions, and not on the basis of a procedural act;
- the investigative activity, materialized in judicial acts, can only be carried out by judicial bodies, materially and territorially competent in relation to the object and place of carrying out the requested judicial activity;
- the requested investigative activity must be carried out in compliance with the principle of sovereignty / independence of the requested State, that is why procedural acts must be issued only by the judicial authorities of the requested State.

B) The analysis of the subjects involved in the issuance of the request and in the execution of the European Investigation Order involves some discussions, on the one hand determined by the bilateral nature of the obligations recognized between the states parties from which the concerned judicial bodies come, and on the other hand, the scope and competence of the bodies empowered to issue and execute the European Investigation Order.

Thus, while *the issuing authority* within the requesting / issuing State may be represented by both a judicial body and an administrative body competent in gathering evidence for the purpose of referral to judicial bodies (in which case, the request must be validated by the competent judicial body prior to its transmission), the executor, within the requested State, can only be *a judicial authority*.

C) The substantial, substantive conditions underlying the issuance of the European Investigation Order (opportunity, proportionality of the procedural measure and similarity with the conditions of the internal letters rogatory) are mandatory criteria, the analysis of which falls within the competence of the issuing State, while the judicial authority of the requested State, at the time of recognition of the European order, verifies the *formal criteria* of the procedural act.

The component of recognition of the validity of judicial acts issued by judicial bodies is regulated in the legislation of both states involved (issuing state and

[4] In national judicial practice, there have been situations in which, contrary to the special provisions of the European Investigation Order, a Romanian court, using the European Investigation Order, has requested a Correctional Court in France to provide information on the length of detention of a convicted person, see in this regard, the conclusion of 13.12.2019 pronounced by the Oradea Court of Appeal, crim. s. and cases with minors, in the criminal case no. 1479/177/2018, published on www.portal.just.ro.

[5] Law no. 302/2004 on international judicial cooperation in criminal matters, was republished in the Official Gazette of Romania, Part I, no. 411 dated 27.05.2019.

[6] It is true that, both through art. 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Framework Decision 2002/465/JHA of the Council of the European Union, the establishment of joint investigation teams was regulated, but the purpose and activity of these teams is to ensure a high level of protection of individual liberty in a specific area within the European Union where members can move freely, consisting of police forces and customs authorities.

Consequently, the primary purpose of setting up joint teams comprising police officers and customs bodies from different countries of the European Union is to ensure a climate of order and social freedom between the Member States and, only in the alternative, to carry out legal acts in order to obtain evidence, only if it has arisen as a result of incidents related to the activity of monitoring the climate of order.

executing state) belonging exclusively to judicial bodies.

In this respect, the requested State, through its own judicial bodies, by virtue of its own authority, has the power to recognize a European Investigation Order and to ensure its execution by direct reference to its own judicial rules capable of providing procedural guarantees related to the essence of the principle of legality and fairness.

D) The substantial, substantive conditions to be met in order to issue or validate the European Investigation Order shall be based on a set of objective criteria which, in particular, justify the measure taken.

The Romanian legislator provided these criteria in art. 268^4 para. (1), letter a) and b) of Law no. 236/2017 respectively, *the necessity and proportionality* of the measure in relation to the purpose of the criminal proceedings, taking into account the rights of the suspect or defendant and the measure or measures ordered / indicated by means of the European Investigation Order may be decided, under the same conditions, in a similar internal case.

a) The criteria provided by the Romanian legislator include a series of criticisms that appear, in excess, in the activity of validating a European Investigation Order requested by an administrative body with responsibilities for verifying factual situations and gathering evidence or clues necessary in order to notify the judicial bodies.

In this respect, since in the procedure for issuing the European Investigation Order, the legislator imposes the condition that the rights of the suspect or defendant be respected, it would be inferred that this act can only be issued against passive procedural subjects, therefore only in a criminal case in which the initiation of the criminal investigation was ordered or in which the initiation of the criminal action was ordered.

However, this condition contradicts the attributes of preliminary control and the quality of administrative body with investigative role (in the broad sense of the term, for example NAFA, Court of Accounts, Environmental Guard, Customs Authority), which, pursuant to art. 4 of Directive no. 2014/41, has attributions and can carry out preliminary activities to gather evidence in order to notify the judicial bodies.

Also, art. 4 letter b) of the European Directive 2014/41, which is the seat of the matter of the European Investigation Order, according to which “the order may also be issued / requested by an administrative authority”, therefore in civil / administrative procedures”, seems to justify the reason for reintroducing in the Romanian legislation *the procedural documents prior to* the beginning of the criminal investigation, an institution previously regulated by art. 224 of the Code of Criminal Procedure of 1969.

The establishment of such a condition in the Romanian legislation seems to limit the bodies and the circumstances in which one can appeal to the judicial instrument represented by the European Investigation Order, therefore to restrict their scope regulated by Directive no. 2014/41.

These aspects produce direct legal effects within the judicial procedures based on the issuance and especially the capitalization of the European Investigation Order and, especially, within the criminal process, since, in art. 20 para. (2) of the Romanian Constitution, priority is given to the application of national law if national laws contain more favorable provisions (real exception of the principle of priority of application in domestic law of international legal norms in case of discrepancies between domestic law and that of the international treaties to which Romania has acceded).

Consequently, since our criminal procedure legislation no longer recognizes the validity of the procedures carried out with the title of “preliminary acts” and, through the provisions of art. 268^4 para. (1), letter a) of Law no. 236/2017, includes passive criminal proceedings among the conditions to be met at the time of issuing the European investigation order, it is clear that acts issued or recognized by administrative and judicial authorities outside the criminal proceedings are null and void.

In the same key of reasoning, considering that the object of the investigation order requires the administration of evidence, on the basis of art. 102 para. (3) of Code of Criminal Procedure, the interested procedural subjects could invoke the nullity of the act by which the administration of a trial was ordered, therefore of the European order itself.

De lege ferenda, we propose the modification of art. 268^4 para. (1), letter a) of Law no. 236/2017, in the sense of replacing the terms “suspect” and “defendant”, which, in our law, are qualified as subjects or procedural parties with the terms “suspected person”, the equivalent of the term “suspect” (perpetrator / author of an action or omissions), that is, a person suspected of having engaged in a particular conduct, activity capable of producing certain criminal legal consequences, or "accused person", *i.e.* a person in whose name there is a complaint or a denunciation, but in respect of whom no criminal proceedings have been issued.

The proposed solution is supported even by the text of Directive 2014/41 in which, at art. 6 - marginally called “the conditions for issuing and transmitting a European Investigation Order”, at para. (1), leter a) speaks of “suspects or accused”, terms that confer a wider scope of coverage than those used in art. 268^4 para. (1), letter a) of Law no. 236/2017, making

efficient and applicable art. 4, letter b) of Directive 2014/41.

Unfortunately, in the case of Romania, at the time of transposition of the content of Directive 2014/41 into national law, either due to a translation error (which is unlikely, given that the Directive was prior to the adoption of the law translated on the official website of the Journal of the Union), or with the intention of limiting / diminishing the effectiveness of the European Investigation Order, the terms "suspect and accused person" have been translated / transposed as "suspect and defendant", which, of course, seems unfortunate, especially since, in order to transpose, it took the Romanian state more than 3 years.

Moreover, art. 268[4] para. (1), letter a) generates confusion, considering that, at annex 11 of Law no. 236/2017, where the legislator described the content of the form of the European Investigation Order, the text refers to the "suspected or accused person", an inconsistency that needs to be corrected as soon as possible.

b) regarding the criteria *of the necessity* and *proportionality* of the issuance of the European Investigation Order, these are objective, substantial conditions specific to restrictive measures of subjective rights or freedoms.

The criterion *of necessity* must be analysed in the light of a democratic society based on the principles of the rule of law.

The need to request evidence by means of a European Investigation Order must contain an objective statement of reasons, *i.e.* the only way in which evidence can be obtained (for example, it is only on the territory of the requested State and can only be obtained on that state territory).

Also, in order to analyse the *proportionality* of the measure ordered, the European Investigation Order must contain an enumeration of the rights and freedoms affected or the risks related to them (for example, indication of imprisonment and all existing criminal consequences in the present case).

E) With regard to the fairness of the procedures for obtaining evidence by means of the European Investigation Order, there are multiple criticisms in the judicial practice related to the exercise of the right of defence as part of legal aid and the right of the defence to question at the time of obtaining evidence.

Although Law no. 236/2017 does not provide anything regarding the procedural guarantees granted to interested parties, we believe that the issuing body, at the time of the hearing or at their express request, has the obligation to notify them, especially in cases where they have the quality of parties in the criminal proceedings, regarding the issuance and object of the European Investigation Order, as well as about the possibility of participation / assistance of their lawyer at the time of carrying out the evidentiary activity.

We believe that this activity is an implicit obligation of the judicial bodies to inform and present evidence, activities inherent in ensuring the exercise of the right of defence of the procedural subjects.

The effectiveness and exercise of the right of defence, provided by art. 92 para. (1) of Code of criminal procedure, in the composition of the legal assistance occasioned by the execution of the European Investigation Order - right provided by art. 6, points 1 and 3, letter b) The European Convention on Human Rights and art. 24 para. (2) of the Romanian Constitution - seem to conflict with the provisions of art. 268[14] of Law no. 236/2017, marginally called „confidentiality", which stipulates that "both in case Romania is an issuing state and in case it is an executing state, the Romanian authorities will respect the confidential nature of the investigation, according to Romanian law, to the extent necessary for the execution of the investigation measure. This obligation takes into account both the existence and the content of a European Investigation Order".

Unfortunately, the legislator, at the time of the implementation of the Directive, limited its regulatory activity only when taking over the art. 19 of Directive 2014/41, without describing concrete ways to ensure confidentiality, without indicating the gradual and proportionality of the restriction of the right of subjects to "know", which will generate contradictory judicial practices at national level, which will lead to a decrease in public confidence in the act of justice.

During the criminal investigation, such a restriction of the rights of the defense lawyer to consult the documents of the case, may be ordered, according to art. 94 para. (4) of Code of criminal procedure, for the entire period in which the client has the status of suspect, but, after the moment of initiating the criminal action, the restriction may not exceed 10 days.

However, we believe that, at the time of the judicial activity, the object of the European Investigation Order, its content and purpose cannot be hidden from the person to whom it refers, all the more so if the activity directly involves him/her (*e.g.*, hearing, confrontation, recognition from photographs, etc.), all these activities, must be carried out in compliance with procedural guarantees and the principle of loyalty under the sanction of nullity and exclusion of evidence.

In our opinion, confidentiality would be easier to achieve if the European Investigation Order targeted the *suspected* or *accused* persons, in the meanings indicated above, which further strengthens the idea of amending art. 268[4], letter a) of Law no. 236/2017.

F) The remedies against the European Investigation Order issued by the Romanian authorities

are provided, succinctly, in art. 268[11] of Law no. 236/2017, within the same article being regulated the procedure of contesting the European Investigation Order within which Romania has the quality of requested executor state.

This overlap of normative hypotheses creates some confusion in judicial practice, the text attracting some confusion regarding the possibility and admissibility of challenging the European Investigation Order issued by the Romanian state before the judge of rights and freedoms. The analysis is of both theoretical and practical importance, given that, in essence, the challenge and the remedies relate to the substance of the right of access to justice, a defining component of the right to a fair trial.

Thus, in para. (2) within art. 268[11] of Law no. 236/2017, it was provided that "the substantive reasons for the European Investigation Order may be challenged only before the issuing authority". We deduce that the contestation of the formal reasons (for example, the lack of form provided by the annex of the law or the lack of the issuer's signature) would be inadmissible, which has as immediate purpose the violation of the right of access to justice in Romania, the issuing country.

Also, imposing the contestation of the substantive conditions only before the issuing authority, seems to be a preliminary judicial procedure, similar to the one regulated by art. 336-339 of Code of criminal procedure, which brings the European Investigation Order closer to the order issued by the prosecutor, in terms of the legal regime.

For identity reason, we believe that this appeal must also be filed with the Prosecutor's Office even if the order was issued by an administrative body of investigation and was validated by a prosecutor. In the latter case, the appeal will be filed in the criminal case filed as a result of the validation report issued by the administrative body.

The legislator did not stipulate the procedural act for settling the appeal issued by the issuing body. We believe that this act can only be the order, if the issuer is the prosecutor, or the closing of the hearing, if the requesting issuer is the judge.

Against the solution issued by the Romanian judicial authority, as the issuing / requesting state, as a result of the exercise of the appeal, the legislator failed to clarify, explicitly, whether the given solution can be challenged before the judge of rights and freedoms, which also represents a form of violation / limitation of the right of access to justice provided by art. 21 para. (1) of the Romanian Constitution. In these circumstances, obviously, the appeal against the solution given by the issuing body becomes inadmissible.

3. Conclusions

De lege ferenda, it is necessary to adopt a much clearer and more effective procedure, which should also include the possibility to challenge the order of the prosecutor by which the appeal was settled, component part of the right of access to justice.

Also, *de lege ferenda*, it is necessary to regulate the possibility of contesting the European Investigation Order issued by the Romanian judicial authorities and for non-fulfilment of its formal conditions, because, for these reasons, it is absurd to challenge, the order before the judicial authorities in the requested country, when this right is restricted in the issuing country whose nationality is usually held by interested parties.

From the content of para. (5) of art. 268[11] of Law no. 236/2017, there is obviously a different legal treatment in terms of the legal-criminal effects deriving from the admission of the appeal or the remedy of the European Investigation Order.

Thus, without exposing objective reasoning, the Romanian legislator gave efficiency to the sanction of excluding the evidence based on art. 102 of the Code of criminal procedure only for the situations in which the appeal has been admitted in the executing state failing to provide the sanction or the applicable procedural remedy, in case the contestation by the issuing state of the order would be admitted.

For the fairness of the solution, *de lege ferenda*, we believe that it is necessary to regulate the sanction of nullity of the criminal procedural act in case the appeal against the European Investigation Order was admitted.

References

- 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;
- Law no. 302/2004 concerning international judicial cooperation in criminal matters republished in the Official Gazette of Romania, Part I, no. 377 from 31 May 2011, completed through Law no. 236 from 5 December 2017, published in the Official Gazette of Romania no. 993 from 14 December 2017;
- Council Framework Decision 2002/465/JHA on joint investigation teams.