

THE ISSUANCE AND TRANSMISSION OF THE EUROPEAN INVESTIGATION ORDER IN THE EUROPEAN UNION

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Abstract: In this paper we have examined the Directive 2014/41 / EU of the European Parliament and of the Council concerning the European investigation order in criminal matters, with direct reference to the adopted definitions, the scope, procedure types, content and form and the conditions to be fulfilled for issuing and transmitting a European investigation order. We have also considered the formulation of critical opinions, which in our opinion could cause numerous malfunctions in the practice of the authorities involved in issuing and transmission process of such legal instrument for judicial cooperation in criminal matters. Given that up to May 22, 2017 the European legal instrument must be transposed into the national law, we proceeded in formulating some opinions meant to be brought into the attention of the Romanian legislator. The innovations that we bring to this study refer to the conducted examination and the formulated critical opinions and the proposals of de lege ferenda. Through this work we continue previous research conducted in the field of judicial cooperation in criminal matters. The work can be useful to academics and practitioners in the field of criminal and European law.

Keywords: Judicial decision; types of procedures; content and form.

1. Introduction

As it was pointed out recently in the doctrine, throughout time, the cooperation of the states was achieved under bilateral or multilateral legal instruments, resulting in agreements, conventions, treaties, etc.

These legal instruments have a zonal, regional or global character, related to the interests of the signatories and the magnitude and importance of the addressed domain (1).

In the bilateral or multilateral international relations, the world states have conducted cooperation activities in a variety of areas, focusing on the economic, cultural, environmental, political, military and legal domains (2).

On the other hand, the scientific and technical progress in recent years and the expansion of the democratization process across several states of the world, created the possibility of movement

easily of people and goods from one State to another or from one continent to another. The unquestionable beneficial effect for the whole world has created some advantages in terms of crime proliferation at global level (3).

In this context particularly complex, crime, particularly the organized one, has exceeded the boundaries of a single state, manifesting itself in an increasingly complex form and difficult to prevent in several states.

Against this background, the increased danger determined by increased transnational crime, the need to prevent and combat more effectively in a worldwide organized framework have led to the adoption of several international, zonal, regional or global legal instruments, to unify the efforts of states of the world (4).

In the recent doctrine it was emphasized that the most important and dangerous manifestation of the organized crime is represented at the moment, but also in perspective, by terrorism.

In the current international context, we can say that the most serious threat to human existence is the resurgence of international terrorism, which has reached to an unprecedented scale, often affecting the safety of states, destabilizing national economies, organizations and institutions, its effects affecting implicitly the civilian population, panicked, scared and outraged by the cruel and despicable means used by terrorists (1).

The recent terrorist acts in the month of March 2016 in Brussels that have left more than 30 dead people and over 300 injured confirm the severity of such acts, specific to the recent years.

Against this background, the European Union in the recent years have been adopted numerous legal instruments aimed at the improvement of judicial cooperation in criminal matters, the ultimate aim being to reduce crime of all kinds and ensure an area of freedom, security and justice.

As time passes, the new mutations occurred in the crime structure and mode of action of Member States have led to the need to improve the existing legislation.

Thus, in the judicial practice it was found that some legal instruments previously issued, respectively Framework Decision 2003/577 / JHA (5) and Council Framework Decision 2008/978 / JHA (6) no longer correspond to the requirements imposed by the developments in transnational crime, for which it was imposed the adoption of a new law respectively Council Directive 2014/41 / JHA of April 3, 2014 on the European investigation order in criminal matters (7).

Given the importance of this European legal instrument in terms of judicial cooperation between Member States, we proceed to examine its preliminary provisions with some critical comments.

2. The European investigation order; the obligation to execute and definitions

According to the European legislator, *the European investigation order* represents a *judicial decision issued or validated by a judicial authority of a Member State to implement one or more investigation measures specific in another Member State in order to obtain certain evidence.*

According to the depositions of the European framework legislative act, a European investigation order may be issued for obtaining evidence that is already available to the competent judicial authorities of the executing State.

In the case of executing the order of investigation in criminal matters, the Member States shall take into account the principle of mutual recognition of judgments and documents issued by a competent authority of another Member State.

Also issuing the European investigation order can be requested by a suspect or accused person or by a lawyer on behalf of the suspect or accused person whom he defends in accordance with the national law of the requesting State.

We note that in the view of the European legislator, the European investigation order is a judicial decision, which means that it can be issued only by a judicial authority.

On the other hand, we note that a European investigation order may be issued for obtaining evidence that is already in the possession of a judicial authority of the executing State, which implies that the judicial authority concerned will hand in that evidence to the issuing judicial authority, subject to certain conditions including the interest of both judicial authorities involved in solving a criminal case.

Another element that needs to be considered is that of the compulsory execution of the European investigation order, subject to certain requirements, on the basis of recognition and enforcement of judgments and foreign judicial acts.

Lastly we note that the European investigation order may be issued by a competent judicial authority and at the request of the suspect or accused person or his lawyer. No doubt that the suspect or accused person will make use of this possibility only in the defense.

We note, however, that the European legislative act does not require for the judicial authorities to issue such an order at the request of the suspect or accused person or his lawyer nor the proper appeal.

In order to avoid some interpretations which are not in accordance with the will of the European legislator, in the examined legislative act there has been defined a series of phrases, as follows: the issuing State - the Member State which has issued a European Investigation Order in criminal matters;

the executing State - the Member State which executes the European Investigation Order in criminal matters, in the state where it is implemented (executed) the investigation measure; the issuing authority may be:

A judge, a court, a judge or a public prosecutor competent in the case concerned; or

Any other competent authority, as defined by the issuing State, acting in the case, as investigative authority in criminal proceedings which has the competence to order the gathering of evidence in accordance with the national law.

Also, according to the examined European legislative act, the European investigation order will be confirmed after examining its compliance with the conditions for issuing a European investigation order under the legal European framework instrument, by a judge, a court, an instruction judge or public prosecutor in the issuing State; the examination will take into account the particular conditions of art. 6, par. (1) from the European legal instrument.

In the event that, under the law of the issuing State, the European investigation order has been validated by a judicial authority, that authority may be considered as being the issuing authority for the purposes of transmitting a European investigation order.

- *The executing authority* means an authority having competence to recognize a European investigation order and ensure its compliance with the current Directive and the procedures applicable in a similar national case. Such procedures may require authorization from a court in the executing State, in the case where its national law provides so (art. 1 and art. 2 of European legal instrument).

Transposing the provisions of the European legal act into the Romanian law will involve and establish the competent authority to issue a European investigation order and the authority which will validate this document.

Having regard to the Romanian law, we appreciate that the European investigation order can be issued only by a judicial authority, both in the prosecution and trial stage.

We appreciate that in the prosecution stage it can only be issued at the request of the prosecutor by the judge of rights and freedoms from the competent court to judge at first instance and during the trial by the court before which the case is pending.

Regarding the recognition and enforcement of such an order, we specify that for transposing the European legislative act within the national law, the Romanian legislator should consider that the recognition and enforcement are two distinct steps, which are executed by various judicial bodies. Thus, most often the recognition shall be the attribute of the court, whereas the execution will belong to the public prosecutor or judicial police.

3. The Scope. Types of procedures for which a European investigation order can be issued

The European investigation order includes any investigation other than the imposition of a joint investigation team and the gathering of evidence within a Joint Investigation Team established pursuant to art. 13 of the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union [8] and Council Framework Decision 2002/465 / JHA of 13 July 2002 on joint investigation teams [9] unless the goal is the application of art. 13, par. (8) of the Convention, and that of art. 1, par. (8) of the Framework Decision.

The exception mentioned in article 1, par. (8) of Council Framework Decision 2002/465 / JHA arise where the joint investigation team needs assistance from a Member State other than the one that founded it or from a third country, in which case the request for assistance may be addressed by the competent authorities of the State in which it is conducted the investigation of their counterparts in the other State concerned, according to the legal instruments in force.

In accordance with the depositions of the European legal instrument, the criminal investigation order may be issued:

- a) in criminal proceedings initiated by a judicial authority or which may be brought before a judicial authority with respect to an offense under the national law of the issuing State;
 - b) in the proceedings initiated by the administrative bodies or judicial authorities in relation to the act in breach of rules of law which are punishable under the national law of the issuing State and where the decision may give rise to proceedings before a competent court especially in criminal matters;
 - c) in the proceedings brought by judicial authorities in respect of acts which constitute violations of the law and that are punishable under the national law of the issuing State and where the decision may give rise to proceedings before a competent court especially in criminal matters;
- and
- d) in relation to the aforementioned procedures relating to offenses or violations that may engage the liability of legal persons or that may lead to the application of punishment of a legal person in the issuing State.

So if we refer only to the possibilities of the Romanian judicial authorities to issue an European investigation order in criminal matters, we can say that in relation to the subject matter of a criminal case, its importance and damage, it can be issued according to the provisions of the European legislative act without requiring compliance with other provisions of the domestic Romanian law.

It has no relevance whether the active subject of the crime is a legal or a physical entity, being important only the compliance of the provisions of the European legal instrument that we have mentioned above.

4. The Content and form of the European investigation order

In order to avoid the possibility of dysfunctions in terms of content and form of the European investigation order, the European legislator in Annex A to Directive 2014/41 / EU of 3 April 2014, a form that must be completed and signed by the issuing authority.

Mainly the European investigation order contains the following information:

- data concerning the issuing authority and, where appropriate, the validating authority;
- object and reasons of the European investigation order;
- necessary information available on the person or persons concerned;
- a description of the offense under investigation or proceedings, as well as the provisions of criminal law applicable in the issuing State;
- a description of the required investigative measure or measures and evidence that will be obtained.

Each Member State shall specify the language (s) which may be used for completing or translating the European investigation order; it will take into account both official language of the State concerned and the official languages of the European Union.

The competent authority of the issuing State will translate the European investigation order into an official language of the executing State or any language indicated by the executing State.

If we refer to the provisions of the Romanian law, we mention that with the implementation of this European legislative act in the national law, it is required to be provided some derogatory rules of criminal procedure, without which a European investigation order cannot be executed.

First it is necessary to specify in the law that it is the document issued by the Romanian issuing judicial authority ordering the issuance and transmission of such an order (completion, sentence, etc.).

Also, the law should provide which is the judicial body which based on the adopted decision is obliged to complete the form set out in European legal instrument.

5. Conditions for issuing and transmitting a European investigation order

5.1. Issuing the European investigation order

The European Investigation Order in criminal matters can be issued only if the following conditions are met:

- The issue is necessary and proportionate to the purpose of the above mentioned procedures (art. 4 of European legal instrument), taking into account the rights of the suspected or accused person; and
- Investigative measure or measures indicated in the European investigation order would be ordered under the same conditions in a similar national case.

The cumulative fulfillment of the above conditions is examined every time, in each case, by the issuing authority.

Assuming that the executing authority has reasons to believe that the issuing authority has not considered the cumulative fulfillment of the conditions listed above, it may consult the issuing authority on the importance of the execution of the European investigation order. After consultation in relation to the result, the issuing authority may withdraw the European investigation order.

5.2. Transmission of the European investigation order

After completion, the European Investigation Order in criminal matters will be transmitted by the issuing authority to the executing authority by any means which leaves a written record under the conditions of allowing the executing State to establish its authenticity.

If it is required to do so, all subsequent official communication will take place directly between the issuing and executing authority.

Under the European legislative act, each Member State may designate a central authority or, where its legal system so provides, more central authorities to assist the competent authorities.

Meanwhile, a Member State may, if it is required by the organization of its internal judicial system, entrust its central authority or authorities responsible for sending and receiving administrative European investigation order, as well as any other official correspondence relating thereto.

If the identity is not known to the executing authority, the issuing judicial authority will carry out all necessary inquiries, including via the contact points of the European Judicial Network.

Where necessary, the issuing judicial authority may transmit the European investigation order via the communication system of the European Judicial Network created by the Council Joint Action 98/428 / JHA (10).

If after the receipt of the European investigation order, the executing State authority finds that it has no jurisdiction to recognize it and to put it into execution, the order will be forwarded ex officio to the competent authority, and the issuing authority will be informed about this procedure.

In the event that within the process of transmitting and executing a European investigation order difficulties arise, they will be solved through direct contacts between the two (issuing and executing) authorities or the involvement of the central authorities.

If the issuing authority issues a European investigation order which supplements an order earlier issued, this authority will specify this in European investigation order Section D of the form set out in Annex A.

In the case of assisting in the execution of the European investigation order in the executing state, the issuing authority may address an European investigation order which supplements an earlier European investigation order directly to the executing authority, during its presence on the territory of the state concerned.

6. Conclusions and Critical Opinions

Intensifying the complex work of judicial cooperation in criminal matters in the European Union requires in addition to the improvement of the organizational framework of the institutions responsible in the field and improving the legal system, amending and supplementing it in relation to the changes occurred in the structure of cross-border crime and especially terrorism.

Thus, due to these mutations, as well as some imperfections occurred in practice it was imposed the completion of both documents to which we referred in the introduction, by adopting a new European legal instrument.

No doubt that the adoption of the examined European legal instrument was imposed by necessity, which is expected to prove its effectiveness over time, with the implementation of the national laws of all Member States.

The preliminary examination of the provisions of this important European legal instrument allows us to formulate critical opinions aimed at improving the legislation on judicial cooperation in criminal matters in the European Union.

A first critical remark which we formulate regards the possibility for the suspect or accused person or his lawyer to request the issuing of a European Investigation Order in criminal matters.

No doubt that this provision is very good in terms of ensuring the rights of defense of the suspected or accused person, but the European legislator remained only in the phase of the

possibility for requesting the issuance of such an order without giving the possibility of appealing a decision for rejecting the application in the issuing State. We appreciate that in terms of transposition into the national law, the Romanian state must provide an appeal against the rejection of such a request; also we consider that the European legislative act must be amended in this regard.

Another critical opinion addresses the need for, besides the two mandatory conditions laid down for issuing the European investigation order, adding another mandatory condition, i.e. the issuance of an European investigation order to be imposed by the impossibility of taking another decision and by the importance of the case.

Also, in terms of transposition into the national law of the examined instruments, the Romanian legislator will have to establish some rules derogating from the general procedure.

As a general conclusion we consider that the adoption of such a European legal instrument represents an important means of combating cross-border organized crime with particular emphasis on terrorism.

7. Bibliography

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