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# MODERN INSTRUMENTS FOR EVIDENCE-GATHERING IN CRIMINAL MATTERS ACROSS EU

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***Abstract:*** *Subjects of analysis in this paper are the latest instruments for investigation and collection of evidence in criminal cases applicable to the legal cooperation between the EU Member States. Emphasis is placed on the European Investigation Order (EIO) - the newest EU measure for legal assistance in criminal matters. Based on a comparison with existing tools in the same field there are highlighted the advantages of EIO for affirmation of the principle of mutual recognition of judgments in the European area of criminal justice.*

**Keywords: evidence-gathering, investigative measures, mutual recognition of judicial decisions, EIO, cross-border crime**

## 1. Introduction

During the last decades the international legal cooperation in criminal matters between European countries has evolved significantly. This process is stimulated mostly by the increased criminality, which is a consequence of various factors such as financial and social crises, political instability, migratory and refugee waves. The latter "are factors, which challenge the countries with the choice to protect the rights, freedoms and interests of persons, involved in the formation of migratory pressure or to protect the rights, freedoms and interests of its citizens." [1] In this context, issues related to the preservation of national identity, which underpins the existence and sovereignty of each country and the maintenance of integration process at the same time, are gaining more popularity. [2]

The old continent was and currently still faces many challenges in the process of strengthening the social and political equilibrium, economic growth and peaceful coexistence between nations. Even the European Union, despite its numerous achievements in various areas of public life, as an organization promoting close cooperation, mutual legal assistance and integrity not only among its Member States but also with third countries, repeatedly has experienced serious disturbances that raised some doubts about its future successful existence. It is true that "the political interaction and achieving internal consistency in the EU is a challenge that clearly stands out from the presence of multidirectional trends and issues relating to both current and future functioning of the EU and its response to a number of potential internal and external threats. Some of these threats are significant even for the content and values of the European integration and the further architecture and legal personality of the European Union." [3]

Now more than ever it is important for EU countries to cooperate effectively on all matters concerning the establishment of an Area of freedom, security and justice. The

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fair administration of justice could be secured by promptly and comprehensive prosecution, an essential part of which the effective collection of evidence, allowing the competent authorities in different countries to work together in solving a common serious problem such as the negative results of the growing cross-border crime.

## 2. The process of improvement of the legal framework for mutual legal assistance in criminal matters in Europe

The first regulations governing criminal justice cooperation between European countries are established with the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 [4] and the Additional Protocols thereto. The 1959 Convention specifies the requirements for execution of requests for legal assistance between countries that agree to apply to each other the widest measure of mutual assistance with a view to gathering evidence. [5] It also stipulates that letters rogatory must be executed in compliance with the law of the requested State, which undoubtedly gives priority to the principle of national sovereignty.

Next, the main focus of the European Convention on the Implementation of the Schengen Agreement of 14 June 1985 (hereinafter "the Schengen Convention") [6] and the Additional Protocols thereto, was to remove the formal boundaries and to expand the police cooperation between European countries. The Schengen Convention proclaimed the great importance of the principle *Ne bis in idem* for the fair administration of justice, while the requirements of dual criminality and grounds for refusal of requests for legal assistance were restricted. [7]

Later on, in accordance with Article 34 of the Treaty on European Union the Council of EU established the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (hereinafter "the 2000 EU Convention") [8] in order to supplement and facilitate the application of the abovementioned conventions. The 2000 EU Convention is the most commonly used evidence-gathering instrument among EU Member States which includes taking statements from suspects and witnesses, the use of search and seizure, the use of video conferencing, teleconferencing and interception of telecommunications to obtain evidence from abroad. It was supplemented in 2001 by a Protocol which focuses on a mutual legal assistance concerning information on bank accounts or banking transactions. The general rule stated in the 2000 EU Convention is that requests for legal assistance should be made directly between judicial authorities with territorial competence for initiating and executing them and the results of the investigation should be returned through the same channels.

It should be noted that the bilateral agreements between countries are also essential instruments for mutual assistance, especially when one of the contracting parties has not accepted or joined to the primary sources of legal cooperation, i.e. the international treaties. The bilateral and multilateral agreements are very useful for the legal cooperation with third countries. Since 2001 the EU has adopted a number of instruments aimed to strengthen the application of the principle of mutual recognition of judicial decisions, which is recognized as an EU cornerstone of the judicial cooperation in civil and criminal matters. [9] In contemporary context, the mutual recognition means that the judicial authorities of one Member State will recognise the decisions of judicial authorities in another Member State as being equivalent (with the same legal effect) to those taken by themselves, by using minimal formalities and limited grounds for refusal. [10] The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant (EAW) [11] was the first concrete measure

implementing the principle of mutual recognition of judgments in criminal law procedure within EU Member States. After that, the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [12] addresses the need for immediate mutual recognition of orders to prevent the destruction, transformation, transfer or disposal of evidence. Nevertheless, these instruments regulate only a small part of the judicial cooperation process in criminal matters, excluding the subsequent transfer of the evidence collected.

Specific rules for gathering evidence among EU Member States were implemented with the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. [13] However, its inefficiency sustained in the fact that EEW was applicable only to evidence already existing and available in the executing State. [14] Because of its limited scope and after the adoption of *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters* [15], the Framework Decision 2008/978/JHA was repealed by Regulation 2016/95 of 20 January 2016.

## 3. European Investigation Order (EIO) - the latest legal instrument for evidence-gathering within EU

From 22 May 2017 – the date of its final transposition by the EU Member States, the evidence-gathering in the EU is governed primarily by the Directive on the European Investigative Order, which replaces the corresponding measures in the abovementioned legal instruments (Art. 34-35). Directive 2014/41/EU applies to all EU countries [16] except Denmark and Ireland, which refused to implement it. Its leading purpose is to continue the application of the principle of mutual recognition of judicial decisions while respecting the state's sovereignty, national security and fundamental rights and freedoms of citizens. [17]

The main priority of Directive 2014/41/EU is developing a comprehensive new system allowing EU countries to obtain evidence in other EU countries for criminal cases that involve more than one country. Thus, the existing fragmented legal framework for evidence-gathering is superseded by creating a single overall mechanism for investigation which covers the entire process of inquiry - from securing the evidence in the executing State next to the moment of transferring them to the State concerned. [18]

According to Art.1 (1) of Directive 2014/41/EU, the EIO is a judicial decision issued or validated by the competent judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State to obtain evidence. This includes obtaining of evidence that is already in the possession of the competent authorities of the executing State. The EIO covers all investigative measures besides setting up a joint investigation team (Art. 3). However, this exclusion does not affect the objective of comprehensiveness, as joint investigation teams (JIT) generally operate outside the area of mutual recognition. The recognition of evidence collected by JIT is not needed because the evidence is at the disposal of all Parties, through their representatives in the team, unless the representative of some Party has not attended the execution of the respective investigative action. Another difference from the EIO mechanism is that JIT may gather evidence not only on the territories of the participating in JIT countries but on the territories of third countries as well.

In particular, the investigative measures which could be subject to the issuance of European Investigative Order are: temporary transfer of persons held in

custody for the purpose of carrying out an investigative measure (Art. 22-23); hearing by videoconference or other audiovisual transmission (Art. 24); hearing by telephone conference (Art. 25); information on bank and other financial accounts and operations of suspects or accused persons (Art. 26-27); covert investigations (Art. 29); interception of telecommunications with technical assistance of another Member State (Art. 30); provisional measures preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence (Art. 32).

Another opportunity provided in Directive 2014/41/EU is the issuing of the EIO to be requested by the suspected or accused person or his/her legal representative in accordance with the right of defence and the national criminal procedure. However, many authors agree that it must also be provided the possibility of personal participation of the defence during the investigative actions as it would strengthen the admissibility of the evidence which is assessed by the national court of the issuing State. In this regard „it is offered to discuss about the recording using audio and/or visual means of the evidence-gathering activities (except covert investigation actions) performed in the executing state." [19] This possibility will add a further procedural guarantee to the defendant's right to fair trial by ensuring that the investigation will be conducted objectively and comprehensively.

A special requirement is that in the execution process of EIO the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing Member State (Art. 9, para. 2). Undoubtedly „this is a provision of great importance since it ensures a high level of compatibility between the investigative measure to be carried out in the executing Member State and the law of the criminal proceedings in the issuing Member State. Not to mention that this gradual shift from the rule founded on the *lex loci* to the rule based on the *lex fori* results in a concurrent application of laws of different Member States that is likely to overcome the issue of differences in a non-harmonised context, while increasing awareness and mutual knowledge of national procedures among judicial authorities across the EU." [20] In addition, the issuing State may request its competent authorities to assist the executing authorities in the implementation of the EIO unless such assistance is contrary to the fundamental principles of law of the executing State or may interfere with its essential national security interests. In such cases, though, the competent authorities of the issuing State shall comply with the national law of the executing State during the execution of the EIO. The same opportunity exists when a letter rogatory is send, with the difference that, the criminal procedure law of the requesting country may also be applied if there is an explicit request and the requested country agrees (Art. 8 of the Second Additional Protocol to 1959 European Convention on Mutual Assistance in Criminal Matters).

The EIO is expected to simplify cross-border criminal investigations as it makes possible the collection of all types of evidence, wherever they are located in the EU, in short terms. In this regard Directive 2014/41/EU sets up specific deadlines for gathering the required evidence, according to which the Member States have a maximum of 30 days to accept or reject the request. If EIO is accepted, the requested investigative actions must be carried out within 90 days and any delay should be reported to the issuing Member States (Art. 12). Moreover, in accordance with Article 12 (2) the Directive allows the issuing State to indicate a shorter implementation period for the investigative measure or even a specific execution date in the EIO when this is necessary due to procedural deadlines, the seriousness of the offence or other

particularly urgent circumstances. Undoubtedly shorter deadlines are in favor of preserving the substantial evidence of the objective truth. Nevertheless, the specifics of the particular case, with a view of its factual and legal complexity, may require a more in-depth investigation. In this respect, it would be reasonable the initially set terms for conducting investigative actions to be extended based on an additional request.

Indisputable advantage of the EIO is that it reduces the administrative formalities by introducing a unified standard form which must be translated into the official language or any other language indicated by the executing country. Directive 2014/41/EU sets up several official forms - for the issuance of EIO by the issuing Member States (Annex A) and for the confirmation of its receipt by the executing Member States (Annex B). There is also a standard form (Annex C) for notification of a Member State about the interception of telecommunication that will be, is or has been carried out on its territory without its technical assistance. In compliance with the mechanism of implementation of the principle of mutual assistance, all required documents should be transmitted directly between the judicial authorities of the contracting parties.

It is important to be noted that with Directive 2014/41/EU are limited the grounds for refusal of such requests as the receiving authority may refuse to execute the EIO only under certain circumstances specified in Art. 11, e.g. if the request is contrary to the fundamental principles of law; if it threatens the interests of national security of the executing Member States or there is an immunity or a privilege under the law of the executing Member States which makes it impossible to execute the EIO. In the same context the Directive 2014/41/EU includes categories of offences listed in Annex D, in respect of which the execution of EIO cannot be refused, if the respective offence is punishable in the issuing Member States by a custodial sentence or a detention order for a maximum period of at least three years. These are the same 32 categories of offences listed in the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant, which exclude the double criminality requirement because of their extremely dangerous nature that affects universal values of great importance for people's security.

## 4. Some practical issues related to the implementation of EIO

In the period from the adoption of Directive 2014/41/EU and almost a year after its entry into force, the European Judicial Network (EJN) has discussed the first results of the practical implementation of EIO during its 48th Plenary meeting (Malta, June 2017) and 49th Plenary meeting (Tallinn, November 2017). A serious remark is that EJN Contact Points have different opinions whether the rule of specialty is applicable to the EIO, since it is not expressly mentioned in Directive 2014/41/EU. It is argued that EIO is issued with respect to specific proceedings and therefor using the evidence in other proceedings should not be automatically possible as other grounds for refusal might occur in the latter. This means that, in order the collected evidence to be used in other criminal proceedings, there should be an additional application with such a request.

Next, it is pointed out that Directive 2014/41/EU does not regulate the need for taking provisional measures before an EIO is issued. In urgent cases, some EU Member States use e-mail or even phone requests before receiving the actual EIO. The conclusion made is that Art.7 of 2000 EU Convention, regulating the spontaneous exchange of information, could be an appropriate solution in such situations.

A distinctive element of Directive 2014/41/EU is that it requires from the issuing authorities to assess the necessity and proportionality of the requested investigative measure in order to protect the

fundamental human rights and freedoms of citizens. All EJN Contact Points agree that if the requirement for proportionality and necessity are not respected, it objectively could not be viewed as a ground for refusal. In case of doubt, the executing authority should ask for an explanation and additional information from the issuing authority in order to guarantee that the requested measure is relevant.

An issue of practical importance is the interpretation of Article 35 (1) of Directive 2014/41/EU that regulates situation where both cooperating Member States have already transposed the Directive, but they have an ongoing criminal case that started before both or one of them to transpose the Directive and therefore have been used another requests for mutual legal assistance. It is stated that the appropriate decision here is the issuance of a supplemental EIO. Moreover, if the executing Member State has not yet transposed the Directive 2014/41/EU, it is recommended their competent authorities to consider the EIO, sent from a Member State already transposed the Directive, as a letter rogatory.

## 5. Conclusion

Regardless if its imperfections it should be recognised that a positive development has been achieved with the Directive 2014/41/ EU on the EIO in the area of evidence-gathering in criminal matters across EU countries. Obviously, the new mechanism for collection of evidence using EIO is more operative than the previous ones, as it eliminates multiple limitations. However, there are still gaps and unresolved issues that prevent the conduct of an effective cross-border investigation ensuring the fair justice. In order to be accomplished more successful results, further legal studies and discussions are required.

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