

## THE EUROPEAN INVESTIGATION ORDER: ACHIEVEMENTS AND CHALLENGES

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### Abstract

**Purpose** – to analyze a new legal measure for international cooperation, i.e. the European Investigation Order, and the prospects.

**Design/methodology/approach** – the document analysis, comparative and critical approach.

**Finding** – regulation of the European Investigation Order and possible interferences, which hinder to cooperate efficiently and smoothly when applying this measure, are disclosed by reviewing them.

**Research limitations/implications** – the review provides a comprehensive view of the European Investigation Order, the perspective of boundaries in its practical application. Thus, it is easier to single out its advantages and disadvantages.

**Practical implications** – it is expected that insights, provided by research, will be useful for the adoption of Directive 2014/41 / EU (European Investigation Order).

**Originality/Value** – Although Directive 2014/41 / EU is already approved, it raises many questions regarding the European Investigation Order application<sup>1</sup>. Thus, this research is original on its insights and observations.

**Keywords:** European Investigation Order, international cooperation, mutual recognition.

**Research type:** general review.

### Introduction

When the Member States of the European Union (hereinafter referred to as the "EU") opened their borders, the dimension of criminal activities considerably intensified and expanded. When keeping an eye on such tendencies, the EU had been gradually implementing the "tools"<sup>2</sup>, which would help to cooperate efficiently and

<sup>1</sup> Peters, A., Drewes, C., Rosenstock, R. A. Free movement of evidence in the European Union. *Themis Competition 2015*. Retrieved from [http://www.ejtn.eu/Documents/THEMIS%202015/Written\\_Paper\\_Germany\\_1.pdf](http://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Germany_1.pdf); Bachmaier Winter L. Transnational Evidence. The European criminal law associations' forum 2015 (pp. 47-59); Rugeri, S. (2013) Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues. *Transnational Evidence and Multicultural Inquiries in Europe* (pp. 3-25). Retrieved from [http://link.springer.com/chapter/10.1007%2F978-3-319-02570-4\\_1](http://link.springer.com/chapter/10.1007%2F978-3-319-02570-4_1).

<sup>2</sup> The mutual recognition principle, which was generally acknowledged at the summit of the European Leaders Council, held on 15-16 of October of the year 1999 in Tampere, as the basis for the Union's judicial cooperation in criminal matters; execution of acts on freezing property or evidence, which is consolidated in Council's Framework Decision 2003/577/TVR, dated the 22<sup>nd</sup> of July of the year 2003, regarding execution of the acts on freezing of property or evidence in the European Union (OLL 196, 2003 8 2, p. 45); the European Evidence Warrant, consolidated in the Council's Framework Decision 2008-978/TVR, dated the 18<sup>th</sup> of

effectively, seeking for successful investigation of criminal offences, which transcend one of EU Member States national borders. Eventually, the implemented measures proved to be too formal and fragmented in practice. Thus, the European Leaders Council adopted the Stockholm Programme<sup>1</sup> on the 11th of December of the year 2009, wherein they expressed their opinion about the necessity to continue development of the comprehensive system, assigned for gathering the evidence in the interstate matters, which would be based on the principle of mutual recognition. Therein, the European Leaders Council stated inter

alia that the legal acts, existing in this sphere, do not form an integral and flexible system; thus, an attempt was made to encourage development of a new comprehensive system, which would substitute the existing legal acts.

Soon, i.e. on the 23rd of June of the year 2010, a group of the EU Member States, including Austria, Belgium, Bulgaria, Estonia, Spain, Slovenia and Sweden, presented an initiative to the European Council regarding the European Parliament and Council Directive on the European Investigation Order in criminal matters<sup>2</sup> (hereinafter referred to as the "Initiative"). The innovative provisions were foreseen in this initiative; for example, not only the previously collected evidence, available with the other Member States, can be obtained, but also the actions, aimed at searching, collecting and obtaining the new evidence, can be carried out by means of the European Investigation Order (hereinafter referred to as the "EIO"). However, the entirety of the text of the initiative caused broad debates<sup>3</sup> on several issues; firstly, on ensuring the fundamental rights; secondly, on its impact upon the national sovereignty. The Member States<sup>4</sup>, EU institutions<sup>5</sup> and the other interested entities<sup>1</sup>

December of the year 2008, regarding the European Evidence Warrant on the European Evidence Warrant, assigned for obtaining objects and documents to be used in the criminal proceedings (OLL 350, 2008 12 30, p. 72).

<sup>1</sup> The Stockholm Programme – An open secure Europe serving and protecting citizens. [http://eur-lex.europa.eu/legal-content/LT/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/LT/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN).

<sup>2</sup> Detailed statement of the proposal on the Council's Directive regarding the European Investigation Order in criminal matters. [http://www.tm.lt/dok/Issamus\\_pareiskimas\\_20100623.pdf](http://www.tm.lt/dok/Issamus_pareiskimas_20100623.pdf).

<sup>3</sup> Peers, S. (2010) The proposed European Investigation Order: Assault on human rights and national sovereignty. Retrieved from <http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf>; Winter, L. B. European investigation order for obtaining evidence in the criminal proceedings Study of the proposal for a European directive. Retrieved from [http://www.zis-online.com/dat/artikel/2010\\_9\\_490.pdf](http://www.zis-online.com/dat/artikel/2010_9_490.pdf); Sayers, D. (2011) The European Investigation Order Travelling without a 'roadmap'. *Ceps Liberty and Security in Europe*. Retrieved from <https://www.ceps.eu/system/files/book/2011/06/No%2042%20Sayers%20on%20European%20Investigation%20Order.pdf>.

<sup>4</sup> Opinion of the Italian Senate on the application by the EIO initiative of the Principles of Subsidiarity and Proportionality, 22 March 2011. Retrieved from <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208055%202011%20INIT>; United Kingdom House of Commons European Scrutiny Committee on the European Investigation Order. United Kingdom Parliament Publications, 2013. Retrieved from <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xx/8310.htm>; Note from the French authorities on the European Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. Retrieved from [http://ec.europa.eu/justice/news/consulting\\_public/0004/national\\_governments/france\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/france_en.pdf);

Recommendation for a decision and report of the Committee on legal affairs. German Bundestag, 6 October 2010. Retrieved from <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc531fab0b60132431282aa1d32.dof>

<sup>5</sup> Opinion of the European Commission on the European Investigation Order, D(2010)6815, 24 August 2010. Retrieved from [http://ec.europa.eu/justice/news/intro/doc/comment\\_2010\\_08\\_24\\_en.pdf](http://ec.europa.eu/justice/news/intro/doc/comment_2010_08_24_en.pdf); Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order. Fundamental Rights Agency, Vienna, 2011, pp.15. Retrieved from <http://194.30.12.221/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf>; Opinion of the European Data Protection Supervisor on the initiatives on the European Protection Order and on the

expressed their opinion about the text of the initiative. And finally, with taking into consideration the comments, submitted by the mentioned entities, on the 03rd of April of the year 2014 the European Parliament and Council adopted Directive 2014/41 / EU on the European Investigation Order in criminal matters<sup>2</sup> (hereinafter referred to as "Directive 2014/41/EU"). Despite the fact that Directive 2014/41/EU is already adopted, the discussions are going on not only on the mentioned issues, related to ensuring the human rights and to the impact upon the Member States' sovereignty, but also on the dilemma, spontaneously arising from these issues, on the proper implementation of the Directive in the national legislations. Thus, this article is aimed at reviewing the EIO in the three-dimensional plane, i.e. in the plane of the national sovereignty, fundamental rights and perspectives of the EIO implementation.

### **Parallel between 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. It remains very different up to now; therefore, regulation of the international cooperation in this area at the EU level is extremely complicated and requires a lot of effort. All the more so, the negative attitude of the EU Member States towards the unconditional cooperation in criminal matters is still envisaged. And it is indeed 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. Of course, on the one hand, 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 law<sup>3</sup>.

It seems that such apprehension is reasonable. Here, the European Court of Justice (hereinafter referred to as the "ECJ") had an opportunity to speak out on Council Framework Decision 2002/584/JHA, dated the 13nd of June of the year 2002

European Evidence Order, OJ C 355, 29 December 2010, pp. 1-9. Retrieved from [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010XX1229\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010XX1229(01)).

- <sup>1</sup> Statement on the Member State initiative regarding the European Investigation Order in criminal matters. European Criminal Bar Association, London, October 2010. Retrieved from [http://www.ecba.org/extdocserv/2010\\_ECBA\\_statem\\_EIO.pdf](http://www.ecba.org/extdocserv/2010_ECBA_statem_EIO.pdf); European Investigation Order: Frequently Asked Questions. Fair Trials International, July 2010. Retrieved from [https://www.fairtrials.org/documents/European\\_Investigation\\_OrderFAQs\\_12.pdf](https://www.fairtrials.org/documents/European_Investigation_OrderFAQs_12.pdf); Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order. Fair Trials International, 26 October 2010. Retrieved from [https://www.fairtrials.org/documents/FTI\\_Submission\\_on\\_the\\_European\\_Investigation\\_Order\\_1.pdf](https://www.fairtrials.org/documents/FTI_Submission_on_the_European_Investigation_Order_1.pdf); Italian Criminal Law Association's response to the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. Italian Criminal Law Association, Rome, 17 February 2009. Retrieved from [http://ec.europa.eu/justice/news/consulting\\_public/0004/civil\\_society/italian\\_criminal\\_law\\_association\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/italian_criminal_law_association_en.pdf); Comments from the CCBE on the proposal for a European Investigation Order. Council of Bars and Law Societies of Europe (CCBE), 22 October 2010. Retrieved from [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_221010\\_Comments\\_f1\\_1288172534.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_221010_Comments_f1_1288172534.pdf).
- <sup>2</sup> European Parliament and Council Directive 2014/41/ES, dated the 03<sup>rd</sup> of April of the year 2014, on the European Investigation Order in criminal matters. Retrieved from <http://eur-lex.europa.eu/legal-content/LT/TXT/?qid=1408184536208&uri=CELEX:32014L0041>.
- <sup>3</sup> Murphy, C.C. The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust? *Social Science Research Network*. 2010, Vol. 3, p. 14.

on the European arrest warrant and the surrender procedures between Member States, which is practically related to the EIO.

The talk is about the *Radu*<sup>1</sup> case and about the *Melloni*<sup>2</sup> case, which was examined immediately after it; the both cases are discussed in the context of fundamental rights and mutual recognition<sup>3</sup>. Thus, without going deep into the circumstances of the examined cases, the essential moments, stated by the ECJ when commenting the ratio between the Member State's constitutional provisions and international obligations, must be noted. Namely, *first of all*, 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. Thus, the ECJ points to the supremacy of the European Union's law against the national legislation. The ECJ adds in this context that article 53 of the European Union's Charter on Fundamental Rights (hereinafter referred to as the "Charter") in this regard does not formulate the principle of the favourable law. *Secondly*, the ECJ states that the legislation, underlying the European Arrest Warrant, was (and still is) the framework decision, which is not attributed to the supranational lawmaking. Also the ECJ notes that the Framework Decision, as the instrument of the former European Union's third pillar, in the intergovernmental cooperation in the fields of police and judicial cooperation, in essence, is being implemented via the obligation, based on the international law, which is accepted by the Member States themselves. *Thirdly*, the ECJ, when construing the European Arrest Warrant in the context of the executing State's refusal to surrender a person, emphasized the need for efficiency and simplification of prosecution in the EU space; this is what the Member States sought when adopting this Framework Decision. Moreover, the ECJ made it clear that the list, foreseen in the Framework Decision, i.e. when the Member States must or can refuse to execute the Arrest Warrant, in principle, is finite. As a consequence, a Member State, when making the decision on the handover, can not rely on the other aspects of fundamental rights.

It must be held that the mentioned ECJ rulings became the inspiration for correction of the text of the initiative in order to increase the value of the Member States' national rights, particularly of the constitutional provisions, when applying the EIO. All the more so, the EIO is applied in the criminal matters, which undoubtedly constrain the legal situation of individuals involved. Thus, the long-lasting debates resulted in the explicit consolidation of significance of the national legislation in the text of Directive 2014/41/ES. Namely, as is consolidated in paragraph 39 of the preamble, "*This Directive respects the fundamental rights and observes the principles, recognized by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application. <...>*". This provision allows stating that, if a conflict between the constitutional provisions of the issuing State (the one, which is applying for the investigative measure) and of the executing State (the one, which is executing the investigative measure) arises, the executing State could invoke the

<sup>1</sup> Decision, dated the 29<sup>th</sup> of January of the year 2013 – case C-396/11 Radu.

<sup>2</sup> Decision, dated the 26<sup>th</sup> of February of the year 2013 – case C-399/11 Melloni.

<sup>3</sup> Namavičius, J. European Union's fundamental rights in the context of criminal justice. *Teisės problemos*. 2015. No 3 (89), p. 5-32.

constitutional values of the national law when executing or refusing to execute the EIO. Thus, this must be considered the reasoned motive for refusal.

It must be noted that, in addition to the above-mentioned reference to the Member States' national constitutions, Directive 2014/41/ES is full of provisions, allowing the Parties themselves to evaluate on the basis of their national regulation, whether they are to apply the measure of the requested type or the other investigative measure; besides there are a lot of provisions therein, stating that the executing State can refuse to execute the EIO. Some of them are discussed further.

Behold, it is stated in paragraph 10 of the preamble of Directive 2014/41/ES that "*<...> However, the executing authority should, wherever possible, use another type of investigative measure, if the indicated measure does not exist under its national law or would not be available in a similar domestic case. <...>*". Thus, in such a case, the issuing State can choose, at its sole discretion, what type of investigation to choose in a particular case (article 9 of Directive 2014/41/ES). However, the problem arises herein, i.e. one of the problems, which had to be solved by Directive 2014/41/ES, – the issue on admissibility of evidence. After all, as is foreseen in paragraph e of part 1 of article 5 of Directive 2014/41/ES, inter alia the description of the requested investigative measure(s) and the evidence to be obtained must be stated in the EIO. Thus, it goes without saying that the issuing State specifies such measures and methods for searching or collecting the evidence, which will ensure that such evidence will be considered admissible. Whereas when the executing authority self-dependently takes to perform the corresponding investigative actions under its own legal regulation, then the obtained evidence will lose sense for the issuing State, if it is not acknowledged as the admissible one under the national law. Certainly, the executing State is obligated to inform the issuing State about the made decisions; also formalities of execution of the other investigative measure must be discussed, seeking for resolving the differences in the national law. However, this would require the initiative and goodwill from the both Parties.

Also attention must be drawn towards the grounds for refusal to execute the EIO. Eight of them are stated in article 11 of Directive 2014/41/ES; moreover, two grounds are stated in article 10, when it is possible to apply the alternative investigative measure. Some of the grounds, stated in these articles, are sufficiently ambiguous, leaving a considerable space for the subjective assessment. Here, for example, the grounds for application of the alternative investigative measure – "*The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where: <...> (b) the investigative measure, indicated in the EIO, would not be available in a similar domestic case.*" It follows from this provision that, if the executing State itself does not apply the investigative measure, which is requested, in this case, it is empowered to apply the alternative measure at its sole discretion. Moreover, if the alternative measure, which is requested, is not available with the executing State, then it may refuse to provide the assistance, which is requested (part 5 of article 10 of Directive 2014/41/ES). Certainly, in both cases, the executing State must inform the issuing State about its decision and must allow it to decide whether to cancel or to supplement the EIO (part 4 of article 10 of Directive 2014/41/ES).

It is true that this confrontation, as if, settled by references to the principle of mutual recognition; however, it is also not absolute. Because, in accordance of article 19 of the preamble of Directive 2014/41/ES, it is rebuttable, 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 refused. Thus, even the principle of mutual recognition will not solve the situation, if the executing Member State discerns the committed or non-committed violations of fundamental rights.

After having reviewed the text of Directive 2014/41/ES and having found therein a number of the provisions that can be manipulated, it must be noted that this fact causes sufficiently many doubts about the smooth and effective cooperation, which was a cornerstone of this Directive. However, this issue needs to be separately and more broadly investigated. Meanwhile, when generalising the discussed issue on sovereignty of the Member States, insofar as it relates to independence, and when evaluating and making the decision on execution of the issued EIO, the conclusion is to be drawn that Directive 2014/41/ES contains a sufficient number of provisions, ensuring availability of the tools with the Member States for making an adequate decision in the particular situation.

### **Protection of fundamental rights by applying the European investigation order**

EIO is aimed at ensuring fast, effective and consistent cooperation between the Member States in criminal matters. This objective, as if, presupposes the importance to foresee the appropriate procedure (when regulating application of the EIO) for issuing the EIO, collecting and transferring the data (evidence), seeking for the prompt disclose of offenses and for punishment of the guilty persons. However, the issue on the appropriate ensuring of fundamental rights naturally arises in this context.

No matter how important it would be to cherish and to improve the efficiency of international cooperation, probably, in this situation we should not follow the adage "the objective justifies all means". Thus, it is necessary to draw attention to the extent, to which human rights are protected, i.e. the rights not only of the individuals under investigation, but also of the other individuals, who will be included into this process (for example, witnesses). There is a lot of anxiety about the insufficient ensuring of the procedural rights of individuals<sup>1</sup>. All the more so, nothing is directly said about the aggrieved parties in Directive 2014/41/ES. Thus, still it is important to look at the safeguards for protection of human rights, which are consolidated in Directive 2014/41/ES itself.

The provisions for protection of human rights are notable in the preamble of the Directive under consideration; they can be grouped according to the principle, i.e. what measures for protection of human rights must be taken by the issuing State and what measures — by the executing State. When talking about the necessary preliminary steps to be taken by the issuing State so as to ensure the prevention of abuse of this

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<sup>1</sup> Winter, L. B. European investigation order for obtaining evidence in the criminal proceedings. *Study of the proposal for a European directive*. p. 580-589. Retrieved from [http://www.zis-online.com/dat/artikel/2010\\_9\\_490.pdf](http://www.zis-online.com/dat/artikel/2010_9_490.pdf); Heard, C., Mansell, D. The European Investigation Order: Changing the face of evidence-gathering in EU cross-border cases. Retrieved from [https://www.fairtrials.org/documents/NJECL\\_article\\_on\\_EIO.pdf](https://www.fairtrials.org/documents/NJECL_article_on_EIO.pdf); Peters, A., Drewes, C., Rosenstock, R. A. Free movement of evidence in the European Union. *Themis Competition 2015*. Retrieved from [http://www.ejtn.eu/Documents/THEMIS%202015/Written\\_Paper\\_Germany\\_1.pdf](http://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Germany_1.pdf).

measure and, at the same time, so as to avoid violation of the fundamental right, it is stated that "*The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. <...>*". Among other things, the issuing State is obliged to ensure the EIO full compliance with the rights, laid down in article 48 of the Charter: the presumption of innocence and the right towards defence in the criminal proceedings must be ensured because they are acknowledged, under the Charter, as fundamental rights in the sphere of criminal justice. It means that the State must objectively evaluate whether the issue of the EIO in this case is necessary, justifiable by goals of the general interest and complies with the principle of proportionality. As follows from the text of Directive 2014/41/ES, the EIO in the context of the mentioned principles must be accepted or approved namely by the judicial authorities. It must be agreed that in this case objectivity would be ensured, when evaluating the need for issuing the EIO. However, the other provision of Directive 2014/41/ES looks a bit unusual; it is therein consolidated that the prosecutor himself/herself can approve the EIO (paragraph c of article 2 of Directive 2014/41/ES). It goes without saying that thereby the longer procedure is avoided, alerts when the prosecutor issues the EIO and approves it. However, there is a serious doubt that such procedure would sufficiently ensure protection of fundamental rights. All the more so, it is exactly the issuing State, which has to evaluate whether the EIO complies with two compulsory conditions, i.e. whether issuance of the EIO is necessary and proportionate to the purpose of execution of the investigation, with taking into consideration the suspected or accused person's rights, and whether it would be possible to execute the measure, stated in the EIO, under the same conditions in the similar national case.

When assessing the executing State's role in the EIO context, it is no less significant. Though the issuing State should recognize the EIO, transferred under this Directive, and should not insist on any additional formalities, but, as is already mentioned above, it retained the right to rebut the presumption, i.e. that the issuing State kept to the fundamental rights, acknowledged in the Directive under consideration, including the *ne bis in idem* principle, foreseen therein. Thus, if doubts arise in the mentioned scope, it has all the legal preconditions for refuse to satisfy the EIO submitted request for investigative actions. An important role of the executing State is being revealed, when evaluating, inter alia, whether to execute the requested actions or still to apply the alternative investigative actions; no doubt, it is based not only on the formal discrepancies of procedural actions, but also on the aspiration to ensure the smaller restriction of fundamental rights. Moreover, the executing State, as if, itself becomes naturally liable for ensuring procedural rights of the persons by executing one or other actions. It is exactly this aspect, to which much more attention is devoted.

The definite provisions, ensuring the appropriate implementation of the measure, are foreseen for separate investigative measures. There, the executing State can reject the application on handover of the temporarily detained person to the issuing State for the purpose of execution of the investigative measure not only on the grounds, foreseen in article 11 of Directive 2014/41/ES under consideration, but also in case when the detainee does not agree to it or the time for detention of the detainee may lengthen through such handover. In such a situation, it becomes clear that it will be impossible to execute the requested investigation because the detainee's consent is necessary for this. It must be noted that the Directive does not foresee any form for

the consent to be expressed; however, it is to be considered that still it must be expressed in writing in order to avoid further irregularities in the process.

The situation with the interrogation by video-conference or by applying the other audio and video communication means is similar. Namely, if the suspect or the accused person does not agree and if execution of the investigative measure in a particular case is contrary to the fundamental principles of the executing State's law. Besides, when applying the mentioned investigative measure, the executing State is liable for the appropriate notification of the witness or of the expert about the interrogation, for the appropriate delivery of the summons to the suspect or to the accused person by giving him/her time for the appropriate preparation for his/her defence as well as for the proper identification of the identity of interrogated persons. It is not defined what is included in the term "appropriate"; therefore, it is to be assumed that the conditions of delivery should be discussed in advance. However, the issuing State conducts the interrogation in accordance with the rules of its national law; unless, as is noted above, the executing State would notice that the fundamental principles of its law are infringed in the course of interrogation. In such a case, the executing State should take steps so that its fundamental principles would be respected. It is also important to note that, if a person refuses to testify when he must testify or gives the false evidence, so, according to the right of the State, in which the interrogation is held, the national law must be applied, as if, the interrogation would be held in accordance with the national law.

When talking about the other investigative measures, such as the information about the bank accounts and the other financial information, the information about the banking and other financial transactions, two aspects must be investigated. Firstly, these investigative measures can be taken not only against suspects or accused persons, but also against the persons, whose data are necessary when carrying out the criminal proceedings. Secondly, the executing State must be provided with the exclusively detailed and clear information, related to the desired investigative action to be performed; the reasons, justifying that the requested information is important for the respective criminal proceedings, must be stated. These provisions, as if, allow feeling a bit stricter tone and provide the executing State with the right to insist on the more precise information so that it could evaluate the adequacy of requested actions. The analogous provisions are also applied towards the investigative measures, according to which the evidence must be collected in real time, continuously and within a certain period of time.

The exclusive regulation of the covert investigation is observed. The executing State may refuse to execute these actions only on the grounds, foreseen in article 11 of Directive 2014/41/EU, which were more than once mentioned, as well as the assumption that it would not be allowed to carry out the covert investigation in the similar national case. The failure to agree on the procedure, applicable towards the covert investigation, could serve as one more ground for refusal, as the covert investigative actions must be executed in accordance with the national law and procedures of the Member State, on the territory of which they are being executed. Thus, the problem of differences in the national laws also arises in this context; the problem may cause an essential barrier for the Member States to cooperate when executing the investigative measure under consideration due to the different treatment of mentioned actions and their regulations.

It must be added to the foregoing statements that both the issuing and the executing States must ensure that the legal remedies, which can be applied when rebutting the EIO, must be at least equivalent to the legal remedies, which can be applied in the national case, when rebutting the corresponding investigative measure. The Member States together must provide the opportunity to make use of these defensive measures properly by providing such information. In such a case, though execution of the investigative measure will not be stopped, transfer of the evidence may be stopped unless the important reasons, why it is necessary to hand over the evidence immediately, would be stated in the EIO. Attention is to be drawn exclusively to the fact that the suspect or the accused person (or a lawyer on their behalf), making use of the rights, applicable to the defence under the national criminal proceedings, may apply for issuance of the EIO. It is an important provision, which allows talking about the equal rights in the proceedings. Attention is to be drawn to one more provision, which guarantees the right to rebut the EIO material basis and simultaneously limits it. Namely, the material grounds for issuing the EIO can be rebutted only after having brought an action in the issuing State, without affecting the guarantees of fundamental rights in the executing State. Thus, the implementation of such right would require an extra effort and resources from the person, when defending his/her interests.

However, it mustn't be forgotten that one of the key provisions, guaranteeing fundamental rights, is inclusion of the earlier adopted Directives into the text of Directive 2014/41/EU as the basis, ensuring fundamental rights. Namely - Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13 / EU on the right to information in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer and the right to communicate when deprived of liberty.

As is apparent from the review of the rights, foreseen in Directive 2014/41/EU, the close mutual cooperation between the Member States is absolutely necessary, seeking for ensuring fundamental rights, when issuing and executing the investigative measures and when afterwards using them in criminal proceedings. The issuing State, when issuing the investigation order, must state how the investigative actions must be executed so as to comply with the provisions of the national law. Meanwhile, the executing State, after having detected the discrepancies with the national law, should take steps, seeking for adapting it to the legal regulation of the issuing State, so that the harm, which may be caused to protection of fundamental rights, would be avoided.

### **Implementation of the European investigation order**

As the Directive under consideration must be moved into the national laws until the 22nd of May of the year 2017, it is difficult to determine how the provisions, foreseen in Directive 2014/41/EU under consideration, will be settled. However, it can be stated with certainty that the Directive contains sufficiently flexible provisions, which, unfortunately, may be interpreted by the Member States differently and, certainly, transferred.

As is stated in the Directive, one evidence obtaining system is determined under the EIO, but, despite this, it is necessary to foresee additional rules for certain types of investigative measures, such as the temporary transfer of detainees, the interrogation via the video or telephone conference.

The situation with the investigation measures, which are applied in the EIO for gathering the evidence in real time, continuously and within a certain period of time, is similar. Practical arrangements, which must be coordinated with the differences, existing between the issuing and the executing States, are inevitably necessary for such investigative measure. Particular attention must be devoted to definitions of the definite concepts because the further stage of cooperation regarding the EIO will depend exactly on their content. For example, it should be clearly defined what is considered to be "the account data" in the national law, what the scope of "the data" is. Though the content of this concept in Directive 2014/41/EU is recommendatory, they must be precisely defined in the national law.

However, attention is to be drawn to the grounds for non-recognition or non-enforcement of the EIO, which are foreseen in article 11 of Directive 2014/41/EU; actually, the Member States themselves must envisage them. Namely, the use of the investigative measure, indicated in the EIO, is restricted under the law of the executing State to a list or category of offences or to the offences, punishable by a certain threshold, which does not include the offence, covered by the EIO. It should be noted that this provision is not in conflict with Directive 2014/41/EU in Annex D, which indicates the category of offenses for which the issued EIO is to be executed. It should be noted that this provision must not be in conflict with the Annex D to Directive 2014/41/EU, in which the categories of offenses, for which the issued EIO should be executed, are stated. Despite this, the Member States themselves have the possibility to foresee the circle of offenses, for which the EIO can be issued. This, in a certain sense, allows the Member States to preserve their independence and to make the decision on what offences it is still possible to cooperate under the EIO. However, apparently, the future will show whether this will not become a formal obstacle in cooperation under the EIO.

Besides, Directive 2014/41/EU obliges the Member States to appoint a competent institution(s) that would be responsible for issuing or executing the EIO as well as the central authority that would assist the competent institution and at the same time would be the body to which the EIO could be forwarded in case the issuing State wishes to make use of exactly this method of transfer. Besides, each Member State must state the language, in which the EIO would be acceptable.

Finally, the Member States should foresee what costs for execution of the EIO are considered to be extremely high. This requirement follows from the fact that each executing State bears all the costs of execution of the EIO. However, if the costs are extremely high, the executing State must inform the issuing State about it and must align the issue of coverage of the costs. Thus, the proper implementation of this rule is also significant.

It is obvious that the Member States have to lay a lot of effort in order to implement the text of Directive 2014/41/EU properly. All the more so, efficiency and effectiveness of this new form of cooperation, i.e. of the EIO, will depend exactly on this.

## Conclusions

The European Investigation Order is undoubtedly an advanced international cooperation tool that provides extensive possibilities for searching, collecting and transferring the evidence, which is significant when investigating the criminal matter,

involving an international element. However, after having got familiar with the text of Directive 2014/41/ EU, still the interference, which, probably, will not allow achieving the set objectives, i.e. to cooperate efficiently and effectively without formal restrictions, is discerned in application of the European Investigation Order.

The text of Directive 2014/41/EU clearly shows what provisions have caused anxiety of the Member States about the excessive limitation of the national law’s value because a wider possibility for independent assessing of these provisions is left for the Member States. Of course, the sufficiently drastic statements of the ECJ in the mentioned Radu and Milloni cases on application of the EU law, despite more favourable regulation of fundamental rights, which exists in the Member States, produced a considerable impact upon consolidation of such provisions. This proves that the criminal justice remains an extremely sensitive sphere for the Member States.

The similar situation is also discerned with ensuring fundamental rights. Still the possibility to evaluate, whether the EIO serves as a proportionate measure and whether the issuing State has not violated the fundamental rights, is left for the executing State. Meanwhile, when taking one or another measure, the State reserves the right for itself to take measures so as not to violate its own principles when realising the investigative action. Thus, on the one hand, the investigative actions, as if, should be executed according to the rules of the issuing State, on the other hand, the taken measures will inevitably have to be adapted to the executing State’s law regulation. So, the issue, whether the sufficient protection of fundamental rights will be preserved as a result of such adaptation, remains open.

Despite the above mentioned concerns, it is necessary to adapt precisely the provisions of Directive 2014/41/EU in the national legal systems by foreseeing the precise and clear EIO regulation. It must be noted in this context that, probably, the Member States must foresee at the EU level at least the recommendatory provisions, acceptable for the Parties, which would help to avoid the problems due to differences in the national legal systems, when cooperating under the EIO.

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