

THE EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS - GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

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Abstract

The European Investigation Order (EIO) is the newest mechanism for judicial cooperation in criminal matters. This instrument was laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 and was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004 concerning international judicial cooperation in criminal matters. The main goal was the introduction of a single instrument for the gathering of evidence between EU Member States in cases with a cross-border dimension. Also, the European Investigation Order is the most recent application of the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council the cornerstone of judicial cooperation in criminal matters within the Union. Starting with an analysis of the principle of mutual recognition, this paper presents the grounds for non-recognition or non-execution provided both by the Directive regarding the European Investigation Order and Romanian national legislation. Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency.

Keywords: *European investigation order, principle of mutual recognition, judicial cooperation in criminal matters, mutual legal assistance.*

1. Introduction

The European Investigation Order (EIO) is the newest cooperation mechanism in criminal matters between the EU Member States. Laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014¹, (following – “EIO Directive”), the order was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004

concerning international judicial cooperation in criminal matters² (following- “The Law”), its purpose being that of facilitating and speeding up the obtaining and transfer of evidences between member states, but also offering harmonized procedures for obtaining these. The order replaces both the classic procedures of cooperation set up by the Convention concerning judicial assistance in criminal matters between the EU Member States³, but

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¹ O.J. L130/1 of 1.5.2014.

² Republished in the Official Romanian Journal, Part I, no. 377 from 31 May 2011, completed through Law no. 236 from 5 December 2017, published in the Official Romanian Journal no. 993 from 14 December 2017.

³ Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ, C 197/1 of 12.07.2000.

also the European Evidence Warrant⁴. The paper aims to analyse the non-recognition and non-execution grounds foreseen by the Romanian legislation, to identify the differences concerning their regulation into the EIO Directive, and also stating the reason for these, but also emphasizing the difficulties that can appear in a concrete applying when executing such an order.

2. Principle of mutual recognition - the cornerstone of judicial cooperation in criminal matters

By European Investigation Order we understand a judicial decision issued or validated by a judicial authority of a member state, in order to accomplish one or more investigation measures specific in another member state, in order to obtain evidences or transmitting the evidences that are already in the possession of the competent authority of the executing state⁵. The European Investigation Order can be issued for any investigation measure, with the exception of the setting up of a joint investigation team and of gathering evidence within such a team.

The fundament of the European Investigation Order is represented by the principle of mutual recognition and trust⁶ that starting with the works of the Tampere Council in 1999, was confirmed as being the ‘cornerstone of judicial cooperation in

criminal matters’⁷, having as purpose the removal of the cooperation difficulties linked to the differences of the legal systems between the member states⁸. According to this principle, a judicial sentence issued by a judicial authority of an EU Member State is acknowledged and/or executed by another member state, having the same value as a sentence emitted by the previous. In the same time, the mutual recognition implies the fact that a judicial sentence of a member state produces effects in all the member states without having to be subordinated to some extra conditions in accordance to the judicial order of the executing member state⁹.

In the light of this principle, a European Investigation Order issued in one of the EU Member States has to be acknowledged and executed by the judicial authorities from the other member states in concordance with the foresights of the Directive, so that the result is obtaining the evidence in order to use them in criminal trials.

3. Grounds for non-recognition or non-execution

However, the mutual recognition is not absolute, the Directive stipulating refusal grounds for executing the European Investigation Orders specific to all the cooperation instruments. In this case, the

⁴ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ, C 115/13 of 09.05.2008.

⁵ Art. 268¹ alin. 2) let. a) from the Law.

⁶ Art. 1 pct. 2) from EIO Directive.

⁷ See Tampere Council Conclusions, Finland, 15-16 October 1999. The measure programme adopted with this occasion was published in the Official Journal of the European Communities no. C 12 E from 15 January 2010.

⁸ According to pct. 36 in Conclusions, „the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there”.

⁹ Gisèle Vernimmen, *A propos de la reconnaissance mutuelle des décisions judiciaires pénales en général*, in Gilles de Herchove, Anne Weyembergh (coord.), *La reconnaissance mutuelle des décisions judiciaires pénales dans l’Union européenne*, Bruxelles, Université de Bruxelles, 2001, p. 148.

non-recognition and non-execution grounds can be included into three categories: explicit and general reasons, regulated by the 11th article from the Directive, taken in the article 268⁸ from the national law; recurring to alternative investigation measures (art. 10 from the Directive and art. 268⁷ from the law); reasons that make the execution impossible, for example the case of a videoconference hearing without the consent of the suspect (art. 24 pt. 2 from the Directive and 268¹⁸ from the law).

By the present paper, we will analyse only the general non-recognition and non-execution reasons (applicable to all measure categories requested through the European Investigation Orders) and explicitly regulated in the art. 268⁸ from the Law and art. 11 from the Directive.

3.1. Immunities and privileges, the principle of speciality and the freedom of the press

The article 2688 let. a) from the Law: „there exists immunity or a privilege, as diplomatic immunity, or the principle of speciality or any other circumstances stipulated by the Romanian law or there are norms concerning the determination or limitation to criminal charges connected to the freedom of the press and of freedom of expression in other media information methods that make the execution of the European Investigation Order impossible”.

Grounds of refusal based on the existence of „immunity” or a „privilege” are stipulated by the majority of mutual recognition instruments, the only exception being the European Arrest Warrant. Nevertheless, none of these tools doesn't define the two notions. The German doctrine, for example, also includes in the

category of “privilege” the witness right of not declaring in the cases that concern relatives or the privilege of the client-advocate relationship¹⁰. In order to avoid this kind of interpretations, the Romanian legislative hasn't proceeded in defining these, but has exemplified their nature: „for example diplomatic immunity”.

However this refusal ground is not absolute, align. 5 of art. 2688 from the Law stipulating that in this case and if the competence of revoking the privilege or the immunity reverts to an authority of the Romanian state, the Romanian execution authority files a petition in this matter with no delay. If the competence to revoke the privilege or immunity reverts to an authority of another state or an international organization, the Issuing Foreign Authority files a petition in this matter to the acting authority.

Moreover, concerning the foresights of the Directive, in the Romanian law there has also been inserted as a non-executing reason the “principle of speciality”. In our opinion this regulation can only be linked to other judicial cooperation instruments, as extradition or surrender on the basis of an European Arrest Warrant, ulterior, for other deeds than the ones these have operated for, not being able to initiate a criminal investigation, including by issuing an European Investigation Order, than with respecting the principle of speciality. In the light of these considerations, we appreciate that the option of the Romanian legislative is redundant as the two shown mechanism already contain specific protection instruments through the speciality rule.

The Romanian law has also taken the ground referring to the determining or limiting the criminal responsibility connected to the freedom of the press or

¹⁰ Lorena Bachmaier Winter, *The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment*, in Stefano Ruggeri (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer International Publishing Switzerland, 2014, p. 78.

other mass media information methods, aspect that marks the expansion of the notion of immunity or privilege.

3.2. National security, jeopardising the information source, classified information

The article 2688 let. b) from the Law: „executing the European Investigation Order, in a specific case, would bring damage to the fundamental interests concerning the national security, would jeopardise the information source or would involve using classified information regarding specific activities of the secret services.’

The refusal ground identically implemented in the Romanian legislation is not recent, being found since the Judicial European Convention in 1959 that was also enumerating in addition grounds that concern suzerainty, public order, or other essential interests of the executing authority. Meanwhile, the Directive lets go the suzerainty and public order¹¹ clauses, aspect that doesn't come to restrain, but, on the contrary to considerably expand the refusal ground, covering this way the hypothesis where the execution risked to jeopardize the information source, aspect that could have an important impact in the organised crime domain where there are often necessary investigation measures whose source has to be protected¹².

3.3. The existence of a non-criminal procedure in the issuing state's legislation

The article 2688 let. c) from the Law: „the European Investigation Order was issued within the procedures stipulated in art. 2682 let. b) or c) and the investigation measure wouldn't have been authorised, according to the Romanian law, in a similar cause”.

The procedures that this refusal ground is referring to concern the issued orders within the procedures initiated by the administrative authorities concerning deeds that represent the violation of the rightful law and that are punished in the national legislation of the issuing state, and where the decision can create an action in front of a competent court, especially criminal matters; or in case of the initiated procedures by the judicial authorities concerning deeds that represent braking the rightful laws and that are punished in the national legislation of the issuing state, if the decision of the mentioned authorities can create an action in front of a competent court, especially criminal matters¹³.

Some judicial systems of the member states have regulated the so called „administrative offences”. For example the German law knows such a category of offences called „Ordnungswidrigkeiten” that are not punished by the criminal courts, but by an administrative group, but after the decision taken by the administrative court there can be released a procedure for the criminal courts¹⁴. This is the reason why the Directive has created the possibility of issuing a European Investigation Order referring to this category of offences.

¹¹ See Lorena Bachmaier, Transnational Evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters, in *Eucrim*, no. 2/2015, p.47-60.

¹² Daniel Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne, 2nd edition*, Larcier, Bruxelles, p. 607.

¹³ Art 4 lit.b si c of the Directive.

¹⁴ Lorena Bachmaier Winter, *The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment*, in Stefano Ruggeri (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer International Publishing Switzerland, 2014, p. 80

However in the case when for the offence for which the European Investigation Order was issued the requested measure cannot be authorised in the legislation of the executing authority, it is incident the analysed refused ground.

3.4. Ne bis in idem principle

The article 2688 let. d) from the Law: „executing the European Investigation Order would be contrary to the ne bis in idem principle”.

Ne bis in idem principle is recognised at a supranational level inside EU, being regulated by art. 50 from the Charter of Fundamental Rights of the European Union. At the same time, ever since the Directive Preamble, it is emphasised that the ne bis in idem principle represents a fundamental principle in the Union’s right, as it was recognised by the Charter and expanded by the jurisprudence of the European Justice Court¹⁵. This way the executant authority should have the right to refuse executing a European Investigation Order if its execution would be contrary to this principle. However, the Directive recognises the preliminary character of the procedures that stand at the ground of a European Investigation Order, so that the execution of this shouldn’t have the role of a refusal when it wants to establish the existence of a possible conflict with ne bis in idem principle or when the issuing authority has provided insurances that the transferred evidences after the execution of the European Investigation Order won’t be used with the purpose of prosecution or applying a sanction to a person for whose cause was pronounced a definitive sentence in another member state for the same offences.

In practice, we appreciate that for the execution authority it is difficult to identify the incidence of the ne bis in idem rule reported to the short description of the offences in the form where the European Investigation Order is manifested and at the low probability that an eventual procedure carried for the person in cause by the investigative measure to be known by the execution judicial authority, especially when this took place in another member state.

3.5. The place where the offence have been committed

The article 2688 let. e) from the Law: „the European Investigation Order refers to a offence that is presumed to have been committed outside the issuing state’s territory and partially or totally on Romanian territory, and the deed for which the European International Order was issued in not incriminated in the Romanian law”.

The ground identically adopted by the local legislation can be synthetized in completing three conditions: the offence was not committed on the territory of the issuing state; the offence has been committed partially or integrally on Romanian territory; the offence is not an offence in the Romanian legislation. This way it is noticed that the refusal ground has a double valence that derives from the principle of the territory, and also of double incrimination.

The main justifying of this ground concerns the avoidance of abusive using of the extraterritorial jurisdiction and avoiding the jurisdiction conflicts. However the refusal ground is not protected from critics because it is considered that the solution of the jurisdiction conflicts can be found

¹⁵ Considerent 17 from Preamble.

through other methods, not being mandatory to stop obtaining the evidences¹⁶.

3.6. Respecting the fundamental rights

The article 2688 let. f) from the Law: „there are strong grounds to consider that executing an investigation measure would be incompatible with the obligations assumed by the Romanian state according to art. 6 TEU and the Charter of Fundamental Rights of the European Union”.

The directive represents the first instrument of cooperation based on the principle of mutual recognition that introduces a refusal ground based on protecting the fundamental rights¹⁷. The reason of non-existing of such a refusal ground can be taken from the jurisprudence of the CJUE according to whom the mutual recognition principle that represents the base of the European Investigation Order has as a fundament mutual trust between the member states regarding the fact that their national juridical orders are capable to provide an effective and equivalent protection of the fundamental rights accepted by the Union, especially in the Charter¹⁸.

However in the recent jurisprudence of the Luxembourg Court there has been admitted that not respecting the fundamental

rights in the issuing state can lead to the postponing of executing an European warrant until information are obtained regarding the detention conditions in the issuing state and in the end to the refusal of executing the warrant in case the non-respecting of the fundamental rights issued in art. 4 from the Charter¹⁹ is established.

The regulation of the refusal ground in the Directive is quite large, evidences concerning the violation of the fundamental rights not being necessary, but ‘strong reasons’ that the execution of a European Investigation Order would be qualified to produce such a violation²⁰.

There has to be emphasized that the referring point in the appreciation of the incidence of this refusal ground is art. 6 from TEU and the stipulations of the Charter, aspect that is meant to stop the member states from imposing their own fundamental right standards²¹.

3.7. Lack of double incrimination

The article 2688 let. g) from the Law: „the deed for whom the European Investigation Order was issued is not incriminated in the Romanian law, with the exception of the case where there are

¹⁶ Lorena Bachmaier Winter, The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assesment, in Stefano Ruggeri (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer International Publishing Switzerland, 2014, p. 84.

¹⁷ The refusal ground has represented a particular request of the European Parliament within the negotiations of the Directive. What is noticeable is that the Directive is the first instrument that is situated in the repressive sphere where the European Parliament is co-legislator. See D. Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne*, 2nd edition, Larcier, Bruxelles, p. 607.

¹⁸ See ECJ, C-168/13, Jeremy F., Judgment of 3 May 2013, ECLI:EU:C:2013:358, pct. 50.

¹⁹ ECJ, C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment from 5 April 2016, ECLI:EU:C:2016:198.

²⁰ Lorena Bachmaier, *Transnational Evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters*, in *Eu crim*, no. 2/2015, p. 54.

²¹ Regina Garcimartin Montero, *The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations*, in *Eu crim*, no. 1/2017, p.47. See, also ECJ, C-399/11, *Stefano Melloni*, Judgment from 26 february 2013, ECLI:EU:C:2013:107.

references to the crimes from annex nr. 14²², this being indicated by the issuing authority, if the deed is punishable in the issuing state with an arrest sentence or with a freedom privative measure for a period of maximum three years²³.

In matters of international cooperation, the double incrimination means that the deed that is in cause to be an offence both in the requiring state and the solicited one. Starting with the mechanism of the European Arrest Warrant, the cooperation instruments that have at their grounds the mutual recognition principle have marked an easing of the double incrimination rule that represents a useless distrust signal not compatible with the postulate of mutual recognition²³.

From the economy of the dispositions that regulate the refusal ground, it is concluded that for executing a European Investigation Order the rule is the existence of the double incrimination for the offence.

As an exception, the execution cannot be refused if the offence is included in the list of the 32 crimes mentioned in the directive and adopted by the Romanian law, if these are punished by the issuing state legislation with a maximum of three years of incarceration. Concerning the regulation of the positive list of crimes, doctrinarian discussions about the European Arrest Warrant are maintained, this way being emphasized that these rather represent criminological categories than

independent offences, aspect that is meant to offer a big manoeuvring range to the issuing state. But we also appreciate that it maintains the actuality the orientation given by ECJ in the *Advocaten voor de Wereld* cause. In this cause, concerning the legality of the incrimination principle, ECJ has ruled that, in the process of applying a frame-decision even though the member states textually take over the counting of the categories of infractions from the list of 32, the real definition of these crimes and the applicable sentences are the ones stipulated by the issuing member state's right, and this because the frame-Decision is not following the harmonising of the crimes regarding their constitutive elements or the sentences stipulated for these²⁴. At the same time referring to the mutual recognition principle and considering the high level of solidarity and trust between the member states, that, through their nature, or the maximum sentence of minimum three years, the categories of that crime are part of the ones where the gravity of the damage brought to public order and security justifies the elimination of checking the double incrimination²⁵.

A second exception from the double incrimination is aimed at, by the non-intrusive and non-coercive measures, obtaining information or evidences already in possession of the Romanian execution authority and information that could be

²² Participation in a criminal organization, terrorism, trafficking in human beings sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives corruption, fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests laundering of the proceeds of crime counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

²³ D. Flore, p. 584.

²⁴ ECJ, C-303/05, *Advocaten voor de Wereld*, Judgment from 2 May 2007, ECLI:EU:C:2007:261, para. 52.

²⁵ *Ibidem*, para. 57.

obtained in accordance to the Romanian Law within some crime procedures or for the purposes of the evidences that could be European Investigation Order; obtaining information contained in data bases owned by the police or judicial authorities that are direct accessible to the execution authority within some crime procedures; hearing a witness, an expert, a victim, suspect or accused or a third part on Romanian territory; any measure of investigation without a coercive character as it is defined in the Romanian law; identifying abandoned people by a phone number or IP address within the conditions of the Romanian Law.

Expressly, art. 268⁸ align 3 takes from the Directive the fact that in case of the European Investigation Order is referring to a offence of custom matters, of taxes of the exchange rate, the executing authority cannot reuse the acknowledgment or execution using the reason that the Romanian legislation doesn't claim the same type of taxes or the same regulations concerning customs, of duties, taxes or currency as the right of the issuing state.

3.8. The impossibility of applying the measure according to the Romanian legislation for the offence referred in the European Investigation Order

The article 2688 let. h) from the Law: „the indicated measure in the European Investigation Order is not stipulated in the Romanian law only for some offences or sentence limits, that don't include the offence that the European Investigation Order refers to”.

For example, in case of the soliciting of communications and calls interceptions, the offence where the measure can be displayed has to be found among the ones stipulated in the from the Criminal Procedure Code.

As in the referring situation to the double incrimination, the refusal ground is not incident but for the following measures: obtaining information or evidence already in the possession of the executing Romanian authority and information or evidences that could be acquired, in conformity to the Romanian law, within some crime procedures or in European Investigation Order purposes; obtaining information from data bases owned by the police or judicial authorities that are direct accessible to the execution authority among some crime procedures; hearing a witness, an expert, a victim, a suspect or accused or a third part on the Romanian territory; any investigation measure without coercive character, as the Romanian law is defined; identifying people subscribed to a phone number or an IP address, within the conditions of the Romanian law.

4. Conclusions

Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency. However all these grounds are optional, the executing authority having only the possibility to refuse the recognition and execution the European Investigation Order and not an obligation.

But, in most of the cases, before deciding the non-recognition or non-executing of a European International Order for the execution judicial authority it is established the obligation of consulting with the eminent authority through any means that permit a written recording, and require the eminent authority to provide with no delay any necessary information by case.

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