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Prospects on the European Investigation Order in Relation to Joint Methods Deficiencies

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ABSTRACT: We emphasize in the present study that, in the context of cross-border crime evolution, it was developed an instrument based on mutual recognition of judicial decisions by member states authorities from the European Union, entitled the European Investigation Order, which, although was intended as a unitary approach in the procurement of evidence process, compared to the old fragmentary system, this purpose could not be achieved. We also point out the dangers of violating the protective guarantees of the persons rights, for those individuals that are targeted by the investigative measures, in relation to particularities of various national penal systems regarding the procurement by the executing State of evidence to be used in judicial procedures by the issuing State.

KEYWORDS: European Investigation Order, human rights infringement, transnational evidence procurement

Introduction: Understanding the normative context

In view of the ease with which the borders of the Member States of the European Union can be crossed, as well as the ability to transfer valuable goods, including money, which have determined the criminal phenomenon to obtain international validity, the judicial bodies are put in a position to constitute the evidence ensemble by corroborating the information found outside the state jurisdictional boundaries.

In the fight with cross-border crime, it is of particular importance the ability of law enforcement to exchange evidence in a timely manner and at minimum costs, this being the case of the EU (Lach 2009, 109), where the increasingly permissive national borders have intensified the danger of dodging criminal liability, strengthening the cooperative efforts to collect evidence, placing itself in agreement with the supreme interest of ensuring a space of freedom and security for European citizens (Heard and Mansell 2011, 353).

Precisely considering the accelerated evolution of the cross-border crime means, cooperation instruments such as Rogatoire Commission become redundant in criminal investigations (Austria, Belgium, Bulgaria, Estonia, Slovenia, Spain 2010, 6), which determined the conformity of the state authorities to the concept of *mutual recognition* (Court of Justice of the European Communities 1978, eur-lex.europa.eu) as a basis in most areas of judicial cooperation (Ruggeri 2015, 149), thus delimiting a unique working instrument, the *European Investigation Order* (College of Policing 2018, 1), based on the recognition of judicial decisions reciprocity, on mutual trust between the Member States, on the direct communication between the authorities involved, as well as on the partial removal of the imperative of double indictment (Klimek 2017, 104).

Thus, in order to adopt common standards for the collection of evidence in criminal proceedings in the Member States (Commission of the European Communities 2009, 5), so as to guarantee respecting the right to defense (European Commission 2005), as well as to ensure their admissibility before the court (European Parliament 2010, 18), the European Investigation Order (EIO) appears as an operational tool more effective in the context of European cooperation (Camaldo 2014, 206) and, despite the fact that judicial decisions in criminal matters are not *commercial products* (Klimek 2017, 84), applying the principle of movement of goods freedom, mutual recognition intends to compel each Member State to validate the judicial decisions of

another Member State, even if they were deliberated under a different legislative system (Janssens 2013, 11).

Departuring from the objective of mutual acknowledgment of the decisions taken in order to obtain evidence in cases with a cross-border dimension (Paragraph (6) of the Directive 2014/41/EU Preamble), in order to appropriate the methods of finding the truth in the transnational criminal cases (Council of the EU 2010, 21), the applicability of the EIO parameters have been established, understood as a decision issued or validated by a judicial authority in a criminal proceeding, including in the trial phase, consisting of cross-border investigation measures, instituted for the collection of evidence, applicable only between subscribing states (Ramos 2019, 54), but without covering police-to-police cooperation (EJN 2019, 3).

If only certain investigative measures are regulated in Chapter IV of Directive 2014/41/EU, of which we mention the temporary transfer of persons held in custody, hearing by videoconference or teleconference, covert investigations, interception of telecommunications, the introductory part of the Directive emphasizes the horizontal applicability of the EIO for *any investigative measures* (Article 3 of the Directive 2014/41/EU), except for joint investigation teams, hence also applicable for those yet unregulated investigative measures, which could be legislated only by one of the parties.

In the latter hypothesis, the normative framework offers two solutions, on the one hand, if the measure proposed in the EIO does not exist under the law of the executing State or would not be available in a similar internal case, the executing authority will resort to another investigative measure than the one provided in the order (Article 10 paragraph (1) of the Directive 2014/41/EU), and on the other hand, in the absence of an equivalent investigative measure, the executing authority will notify the issuer regarding the impossibility of providing the requested assistance (Article 10 paragraph (5) of the Directive 2014/41/EU), which indicates that the executing authority lacks the attribute of verifying its legality or proportionality which could have led to the refusal of executing the order (Rafaraci 2014, 40), this type of control being assumed only by the issuing authority (Article 6 paragraph (1) letter a) of the Directive 2014/41/EU).

Violation of human rights in the EIO enforcement procedure

Thus, in spite of the fact that the promoters of this instrument have shown a declarative concern on respecting the human rights, such as the right to dignity, to life, to physical and mental integrity (Council of the EU 2010, 41), reaffirming the importance of fundamental rights as is the case with other mutual recognition tools in criminal matters (Council of the EU 2010, 3), the content of the normative text creates the premises of violating fundamental human rights.

It has been discussed in this regard that, due to differences in national criminal systems, which often lead to the search for feasible compromises for the execution of EIOs (Eurojust 2018, 15), there is a danger that national prohibitions in obtaining and using evidence or other procedural provisions may be circumvented (German Bundestag 2010).

Moreover, it was argued that the transfer and use under the EIO of pre-existing evidence, obtained illegally by the executing State, violates the procedural rights of the suspect / defendant (Austrian Bundesrat 2010), this being the case of recordings *resulting from carrying out specific activities for collecting information* by the Romanian Intelligence Service *which naturally involves restricting the exercise of fundamental human rights or freedoms, but which do not contain information in the field of national security*, whose normative framework has been declared unconstitutional under the Romanian legislative system (Romanian Constitutional Court 2020). In support of this argument, it is brought the notion that the particularity of the regulations in criminal matters developed in the structure of the EU law suggesting interferences in the self-determination capacity of the Member States, obliges to a restrictive interpretation of the European criminal norms, not to an extended one, their use requiring a sound justification (BVerfG 2009, paragraph 358).

Considering the exceptional and interpretative nature of the recourse to reasons of non-execution or non-recognition, likewise to other means of judicial cooperation, such as the European Arrest Warrant (Court of Justice of the EU 2018, C-268/17 paragraph 52, C-367/16 paragraph 48), in order to overturn the assumption of respect for fundamental rights, it is required a concrete analysis on each case separately (Bot 2019, C-324/17 paragraph 85), through which the protective guarantees of the persons rights to be seeked (Bot 2019, C-324/17 paragraph 89).

Thus, situations may arise where, due to differences between national criminal procedures, evidence obtained in one state becomes inadmissible in another, which leads to the erosion of the mutual recognition system (Kusak 2019, 394), although the promoters of the EIO advocated for common standards in the field (European Communities Commission 2009, 5).

In this regard, even if the Member States benefit from a certain margin of appreciation for selecting the means to fulfill the legitimate aims of protecting national security and to fight crime (ECHR 2020, paragraph 108), balancing this national interest with the rights of the individual to privacy, it is necessary to establish effective guarantees against the abuses that can derive from the use of such surveillance systems (ECHR 2006, paragraph 106).

To this end, a measure of inquiry can be considered useless if it excessively affects the privacy of the person (Depauw 2016, 89), the intrusion in this case requiring to reach a certain gravity and be undertaken in such a way that does not harm the right to respect one's privacy (ECHR 2020, paragraph 109).

At the same time, it was grounded for the EIO that the executing authority is not offered the opportunity to challenge the reasoning of the proportionality of the investigative measure adopted by the issuing authority (European Parliament 2019, 2), even in the case of pre-existing evidence that could not be subjected to a strict control by the executing State (Gless 2006, 124), due to the fact that the evidence in question were considered to another type of procedure according to national law, causing either the inadmissibility of the evidence, which makes the EIO unnecessary, or if admissible, causing the violation of the subject's procedural rights (Zimmermann 2011, 72).

Thus, are relevant the European Court of Human Rights judgments showing that the right to privacy is violated if the investigative measures regarding the interception of telephone calls by the intelligence service are not susceptible to *a priori* or *a posteriori* control by a judge or an independent authority (ECHR 2007, paragraphs 73-74) or when law enforcement agencies can identify a perpetrator of an online activity by simply requesting relevant information from the Internet Service Provider, without independent oversight of these prerogatives that allow the authorities to connect an online activity to the identity of a particular person, without his agreement (ECHR 2018, paragraph 130), as well as when it is authorized to intercept a telephone call made by a client to his lawyer, for no serious reasons based on a reasonable suspicion that the person is involved in a serious criminal activity (ECHR 2009, paragraph 51).

Furthermore, the European Court of Human Rights finds an interference in the private life, but not a violation of the fundamental rights, when the GPS surveillance of a person has led to an extensive analysis of his behavior, given that the same person was monitored by two distinct investigative authorities, being simultaneously under video surveillance, having his telecommunications intercepted, as well as mail correspondence, all these measures being justified convincingly by national security and public safety interest (ECHR 2010, paragraphs 77-80).

Whereas we notice Member States tolerance and flexibility over foreign judicial elements (Kusak 2016, 174), the acceptance of external procedures and evidence without further scrutiny, on the basis of the *non-inquiry* principle presumably leading towards an involution of human rights guarantor (Vogler 2013, 38-39), the experience of the European Arrest Warrant might be useful. Thus, it becomes an asset the reasoning of the EU Court of Justice by which were issued the premises of the refusal by the executing State in relation to the proportionality of the measure, when there are elements that prove deficiencies, the executing authority being entitled to examine *whether there are substantial grounds to believe that the individual concerned by a EAW, issued for the purposes of conducting a criminal prosecution will be exposed to a real risk of inhuman*

or degrading treatment in the event of his surrender to that Member State (Court of Justice of the EU 2016, C-404/15; C-659/15). Therefore EIO could be rejected if there is a suspicion that the evidence preconstituted in the executing State in cases involving offenses within the scope of national security protection, could be used in the issuing State in criminal cases of reduced severity or which are not related to national security.

EIO in relation to new investigative models

The variety of socio-economic relations have revealed the need to enhance new action models regarding obtaining specific evidence for certain criminal activities, this being the case of *Proposal for a Regulation (...) on European Production and Preservation Orders for electronic evidence in criminal matters* (eur-lex.europa.eu), set from the idea that judicial cooperation mechanisms are actually obstacles that complicate the access to electronic evidence (European Commission 2017), noticing that the EIO does not reflect the specific features of electronic evidence and does not take into account the current technological leap (Slovenian National Assembly 2018), despite that the mentioned instrument is the main mechanism for obtaining evidence, including electronic ones, within the EU (UK House of Commons 2018).

Also, taking into account the fact that criminal groups use financial assets in their cross-border activities (European Commission 2018), the European organizations have adopted a tool that allows immediate and direct access to the information held in the centralized bank account registers, indispensable for the success of a criminal investigation (Paragraph 8 of the Directive (EU) 2019/1153 Preamble), the purpose of which is to establish evidence-gathering in cases on crimes in the field of money laundering or associated, terrorist financing, as well as other serious offenses, although the EIO may be issued for obtaining information on banking and other financial operations.

Even if in theory, the idea that the EIO has the attribute of verifying the suspect's or defendant's bank accounts and financial operations, as well as facilitating the access of the judicial authorities to e-evidence (European Commission 2017) and that judicial instruments such the ones highlighted above are competent to complete within the Union the area of mutual recognition in criminal matters (Council of the EU 2019, 3), remain without an echo the mainstream regarding the establishment of a standard for obtaining evidence in cases with a cross-border dimension, which should cover as many types of evidence as possible, and which should have the strength to depart from the old fragmentary regime (European Council 2010, point 3.1.1), whose characteristic presumes that the implementation of such instruments should be carried out only for certain tests or through step-by-step procedures (Allegrezza 2014, 52).

Conclusions

Therefore, we pointed out in the present paper that the evolution of the European investigation order as the main instrument of mutual recognition in cross-border criminal cases in the EU, may lead to the area of freedom, security and justice erosion, but in order to avoid such a scenario, we propose the possibility to refuse the execution of an EIO when there is a suspicion that preconceived evidence in cases from the spectrum of national security protection could be used in criminal cases of another nature.

Furthermore, we also pointed out that the directions regarding the establishment of a standard in the field of obtaining cross-border evidence remain doubtful as long as simultaneously with the development of the EIO arises new evidence-gathering tools based on *mutual recognition* principle.

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