

## The European Investigation Order - an instrument of cooperation for a stronger European Union

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### Abstract

*The paper starts with an introduction of previous European instruments concerning cooperation in criminal matters, moving towards the presentation of European Investigation Order as regulated by the 2014/41/EU Directive. It then analysis the implementation of this instrument in Romania by Law 302/2004 on international judicial cooperation in criminal matters using a comparative method with reference to Austria, Latvia and Sweden. The paper gives some examples from Romanian jurisprudence involving European Investigation Orders. In the end, after presenting some of the disadvantages that may arise from executing an European Investigation Order, such as the costs that may burden the executing state, the paper ends in an optimistic tone concluding that the EIO seems to be a very useful tool for practitioners as it sets time limits and permits direct transmission of requests being faster and easier to execute.*

**Keywords:** European Investigation Order, cooperation in criminal matters, Romania

### Introduction

According to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions. Ten years after Tampere, the European Council, adopted the Stockholm Programme, which called for a comprehensive system for obtaining evidence in cases with a cross-border dimension, noting that the existing instruments in this area represented a fragmentary regime. Consequently, the idea of a new instrument to replace all the existing instruments in the matter, to cover as far as possible all types of evidence, containing time-limits for enforcement and limiting as far as possible the grounds for refusal, was born.

Thus, the Directive 2014/41/EU referring to a single instrument called the European Investigation Order (EIO) was adopted. From the very beginning, it becomes clear, as one reads the preamble of the Directive, that the instrument cannot be used as a unique tool, though. The preamble explains the necessity of EIO, an instrument which comes to complete the Council Framework

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Decision 2003/577/JHA (Council of the European Union, 2003) which is restricted to the freezing phase and also Council Framework Decision 2008/978/JHA (Council of the European Union, 2008) which was limited (and later on repealed in January 2016). Though the EIO establishes a single regime for obtaining evidence, additional rules are sometimes necessary for certain types of investigative measures, as for example the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions, controlled deliveries or covert investigations. Furthermore, the preamble notices that since the EIO Directive, by virtue of its scope, deals with provisional measures only with a view to gathering evidence, it might be the case, that some other provisional measures referring to other scope than gathering evidence (as for example with a view to confiscation), to occur during the criminal proceedings. Therefore, it is very important to maintain a smooth relationship between the various instruments applicable in this field. The coexistence of EIO with other instruments is possible taking into account the flexibility of the traditional system of mutual legal assistance established by Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocols. After the Convention, more mutual recognition-based instruments were adopted (Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of exchange of information extracted from the criminal record between Member States, Council Framework Decision 2009/829/JHA of 23 October 2009 for supervision measures, Council Framework Decision 2009/948/JHA of 30 November 2009 for conflicts of jurisdiction, or Directive 2011/99/EU of 13 December 2011 on the European Protection Order).

We observe that by the time the EIO Directive was issued, a significant number of instruments already existed in the area of cooperation in criminal matters.

## 1. The European Investigation Order

The definition of the EIO is foreseen by the very first article of the Directive, according to which it is a judicial decision issued or validated by a judicial authority of a Member State (MS) to have one or several specific investigative measure(s) carried out in another MS to obtain evidence (European Parliament, 2014 - Directive 2014/41/EU, Article 1, para 1). The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing state. The order may be requested by the authorities ex officio or at the request of the suspected or accused person, personally or by a lawyer in his behalf.

According to Article 2 of the Directive, the `issuing State` means the MS in which the EIO is issued, while the `executing State` means the MS executing the EIO, in which the investigative measure is to be carried out. Furthermore, the `issuing authority` means a judge, a court or a public prosecutor or any other competent authority in criminal proceedings, while the `executing authority` means an authority having competence to recognise an EIO and ensure its execution.

The scope of the EIO is to obtain any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team, as the latter is regulated by Council Framework Decision 2002/465/JHA. The measures may be obtained in criminal proceedings or in proceedings brought by administrative bodies in particular in criminal matters, or in any other proceedings brought by judicial authorities for infringements of the rule of law for which a legal person may be held liable or punished in the issuing state.

Necessity and proportionality are two of the conditions to be met in order for an EIO to be issued. They have to be balanced taking into account the rights of the suspected or accused person. Another condition is that the investigative measure could have been ordered under the same conditions in a similar domestic case.

The request for an EIO must be made in a written form and transmitted directly to the executing authority by the issuing authority or through a central authority. It may be transmitted also via the telecommunication system of the European Judicial Network.<sup>1</sup>

Unless the executing authority invokes a ground for non-recognition or non-execution or one of the grounds for postponement, it must recognise the EIO without any other formality, and execute the investigative measure. The EIO must be transmitted in accordance with the EIO Directive, though.

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<sup>1</sup> As set up by Council Joint Action 98/428/JHA of 29 June 1998.

In some cases, the executing authority may have recourse to an investigative measure, other than that provided for in the EIO. Article 11 of the Directive provides for the grounds for non-recognition or non-execution. For example, an EIO may be refused if there is an immunity or a privilege under the law of the executing state which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media (Art. 11 (1)(a)). Another ground of refusal is the infringement of the *ne bis in idem* principle (Art. 11 (1)(d)) or if the execution of the EIO would harm essential national security interests (Art. 11 (1)(b)). Other situations are taken into account by Article 11, as well. The execution of the EIO may be postponed if its execution might prejudice an on-going criminal investigation or prosecution or if the objects, documents or data concerned are already being used in other proceedings (Article 15).

The Directive foresees a time limit of 30 days to decide on the recognition or execution of the EIO but in some cases, the deadline might be shorter, depending on the circumstances. The investigative measure must be executed no later than 90 days after the decision of execution. In case the deadline cannot be respected, the issuing authority must be informed.

After the EIO is executed, the executing authority must transfer the obtained evidence to the issuing authority. According to Article 14 of the Directive, the substantial reasons for issuing an EIO may be challenged only in an action brought in the issuing State.

The costs involved by the execution of an EIO are to be beard by the executing State, unless they are extremely high, in which case, the issuing State may bear a part of the costs, or may decide to withdraw the request for the EIO.

The EIO Directive further provides for specific provisions for certain investigative measures, as for example temporary transfer to the issuing or executing state of persons held in custody, hearing by videoconference or other audio-visual transmission or by telephone conference, information on bank and other financial accounts or operations, covert investigations or investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time. A chapter is dedicated to the interception of telecommunications.

In some cases, an EIO may be used for provisional measures, to prevent the destruction, transformation, removal, transfer or disposal of an object that may be used as evidence. In such cases the decision on executing the request has to be issued in 24 hours.

## **2. The implementation of the European Investigation Order in Romania. Some comparative aspects concerning Austria, Latvia and Sweden<sup>2</sup>**

In Romania, Law 302/2004 (Romanian Parliament, 2011) on international judicial cooperation in criminal matters was amended and supplemented by Law 236/2017 (Official Journal of Romania, 2017) in order to transpose the EIO Directive. When acting as an issuing State, only Romanian judicial authorities have competence, namely the competent Prosecutor's Office during the investigation phase or the competent court in the trial phase. No administrative authority has competence, as it is not considered investigating authority in criminal proceedings. Some investigative measures such as, surveillance methods including wire-tapping of communications or of any type of remote communications, accessing a computer system, obtaining data regarding the financial transactions of persons, use of undercover investigators and informants, controlled deliveries, etc., cannot be decided by a prosecutor, but only by a Judge of rights and liberties during the investigative phase or a Judge during the trial phase.

In Sweden and Austria, the issuing authorities are public prosecutors and courts while in Latvia, at the pre-trial stage, the competent authority is represented by the person who directs the proceedings. If the case is under investigation, the issuing authority is an investigator and only in exceptional cases, a public prosecutor. If the case is already under criminal prosecution, then the public prosecutor is the issuing authority. If the case is in the trial stage, the judge who leads the trial acts as an issuing authority (European Judicial Network, 2018). The same rules apply when these countries are executing states. In Romania and Sweden the executing authorities are the competent Prosecutors (during pre-trial phase) and courts (during trial phase). In Latvia, during pre-trial phase, the executing authority is the Prosecutor General's Office but also Latvian State Police, if there is no prosecution yet. If the case is under the trial phase, the first instance courts depending on jurisdiction are executing authorities.

In Sweden, only prosecutors and courts are receiving authorities, while in Romania, also the direct contact is the rule, sometimes, the Central Authority may also receive an EIO. During the pre-trial phase the Central Authority is the Public Ministry. Depending on the crimes involved, there might be two special divisions (National Anti-Corruption Directorate - NACD, International Judicial Cooperation Unit – for serious corruption offences, or Directorate for Investigation of Organized Crime and Terrorism - DIOCT, International Judicial Cooperation Unit – for organized crime and

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<sup>2</sup> The choice of comparing the implementation of the EIO in Romania with Austria, Latvia, and Sweden comes from the opportunity which the author had to participate in an international event organized by the Academy of European Law, in Riga, Latvia on 21-22 February 2019. The event, called 'Applying the European Investigation Order', had speakers from the selected Member States.

terrorism offences) or the Prosecutor's Office attached to the High Court of Cassation and Justice – POHCCJ - , International Judicial Cooperation Unit – for other crimes. During the trial-phase the Central Authority is the Ministry of Justice, Directorate for International Law and Judicial Cooperation, Division for International Judicial Cooperation in criminal matters.

In Latvia, during the trial phase, the Central Authority is the Ministry of Justice, while during the pre-trial phase, the Central Authority is either Prosecutor General's Office, either the Latvian State Police, depending on the stage of the investigation. Unlike Romania or Latvia, Sweden has not appointed a Central Authority. In Austria, the direct transmission of requests is the rule but in cases of serious economic crime or corruption, a Central/Specific Authority (WKStA) is involved (Kmetec, 2019).

In urgent cases all the three states may decide to receive EIO requests by e-mail. English might be accepted, though the executing authorities might ask for a translation into the national language. In regular matters, the accepted language is Latvian in Latvia, Romanian, English or French in Romania and Swedish in Sweden.

Some other particularity concerning Romanian or Austrian legislation involving an EIO is that it does not foresee for a telephone conference, but only for videoconference in specific cases. Also, an interesting situation might arise when Romania acts as an issuing state. If the evidence is obtained during the pre-trial phase and transferred to Romania, another judge will analyse the evidence, namely the Judge of the Preliminary Chamber if the case is sent to trial. The Preliminary Chamber is a middle phase between the pre-trial and the trial phase. The keyword during this phase is `legality` of acts, measures and evidence which took place or were administrated until that moment. In our opinion, we believe that in some cases we might have a double or even a triple control of the evidence. For example, if during the pre-trial phase the Romanian prosecutor needs a house search in another country, the measure has to be requested to a Judge of Rights and Liberties. If the judge gives the authorization, the request for an EIO involving the house search may be made. If in the executing country the house search needs to be authorized by a judge, then we have the second control. If after the house search the evidence obtained is transferred to Romania and the case is sent to trial, then the obtained evidence is to be analysed by the Judge of the Preliminary Chamber, which leads to the third control.

### **3. Romanian Jurisprudence concerning European Investigation Order**

Only one year after the entrance into force of the EIO Directive in Romania, and the order seems to be a very useful tool in the matter. According to the Report of the Prosecutor's Office attached to the High Court of Cassation and Justice for 2018, the cooperation was faster due to the



EIO (Ministerul Public, 2018a, p.70). In 2018 there were 434 EIO cases (Ministerul Public, 2018a, p.76) that the POHCCJ dealt with, while DIOCT acted in 165 cases as an executing authority and in 514 cases as an issuing authority (Ministerul Public, 2018b, p.86). The investigative measures were diverse, from interception of communications until obtaining of financial data, house search, witness interrogation or transfer of documents (p. 77, 82). The NACD dealt also with EIOs, in 45 cases as an issuing authority and in 9 cases as an executing authority (p. 81).

For the purpose of this paper, we looked into the jurisprudence which is open to the public and also into the press releases issued by the DIOCT. Even though according to the cited Reports, Romania acted in more situations as an issuing state than executing state, the information we could rely the research on, was more about executing an EIO than issuing it. The identified executing requests were granted or sent to the competent authorities. We did not identify any rejected requests.

For example, in one situation, The Court of First Instance of Cluj Napoca declined its competence and sent the request of the Dutch prosecution for the hearing of one person who was investigated in The Netherlands, to the Office of the Prosecutor near the Court of First Instance of Cluj Napoca. It based its decision on the arguments that since the case was in the pre-trial phase in the issuing state, then the measure should be executed by a prosecutor and not by a court (Court of First Instance of Cluj Napoca, 2018). In another case, the Court of Appeal of Timisoara declined its competence to a lower court, the Tribunal of Caras-Severin, based on the fact that the crimes involved were not of its competence according to Romanian law. In this specific case, the issuing authority was the Jury Court of Napoli which requested the Romanian Court to hold a videoconference with more persons, who were accused of human trafficking and constitution of an organized group, or were witnesses of these crimes as well as victims of the crimes. All of these persons were located in Romania (Court of appeals of Timisoara, 2018).

In another case, The Court of Appeal of Targu-Mures sent the request to the Ministry of Justice because after the exchange of communications with the issuing authority, the Court of First Instance Avenida, Spain, it clarified that the case was not a criminal but a civil one. At first, the Romanian Court did not understand the nature of the request and it engaged in further communication with the Court in Spain to better understand. After an exchange of information, the judge understood that there was a criminal investigation in Spain concerning a Romanian citizen, who ended. As his hearing was necessary for a claim of damages, the Court sent the request to the Ministry of Justice which was the Central Authority according to the rules concerning international cooperation in civil matters (Court of Appeals of Targu-Mures, 2019).

An EIO was granted by the DIOCT at the request of the Prosecutor's Office of Napoli and more documents concerning a Romanian citizen investigated for human trafficking and participation to an

organized crime group, were translated from Romanian to Italian and sent to the issuing state (Suceava Tribunal, 2019). In another case, the Court of First Instance of Satu Mare granted an EIO at the request of the Office of the Prosecutor from Budapest, and provided the issuing state with more data concerning the economic activity of a Romanian firm (Court of First Instance of Satu Mare, 2018).

Based on the DIOCT`s press releases we identified more situations when Romania acted as an executing state and one situation as an issuing state. When acting as an executing state, Romanian authorities cooperated with other states` authorities in particular for house searches (DIOCT, 2018/2019).<sup>3</sup> As an issuing state, Romania asked the Italian authorities for information concerning bank accounts, incomes, real estates transactions, the history of a particular firm and data concerning its employees (DIOCT, 2019).<sup>4</sup>

## Conclusions

The EIO seems to be a very useful tool for practitioners as it sets time limits and permits direct transmission of requests. Still, even if it was meant as a single evidence gathering instrument, in reality it provides for more fragmentation. The MLA instruments continue to apply in parallel with the EIO as it is not clear what are `the corresponding` articles of other instruments that the EIO Directive replaces (Vermeulen, 2019).

It was also criticized for placing unrealistic burden upon executing Member State because all the measures are obligatory, appealing to self-restraint only or because the costs are borne by the executing state, as a general rule. Indeed, the costs might be a problem. As one of the Prosecutor mentioned in an interview (Ene Dogioiu, 2019), sometimes because of the lack of funds, the foreign authorities are informed that the EIO cannot be executed. According to the EIO Directive, the issuing state may have to bear the costs only if they are extremely high (the EIO Directive Para. 23, Article 21), otherwise, the executing state should bear the costs. In such case, there should be negotiations between the two authorities which might lead to withdrawal of the request or to keeping it but on the issuing state`s expense. The Directive does not foresee a solution for the situation when even if the costs are not extremely high, the executing state has no budget for them, or the budget is too low and cannot afford to execute the order.

Nevertheless, in Romania, after only one year of implementation of the EIO Directive, the number of joint investigation teams decreased from 24 in 2017 to 15 in 2018. According to the

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<sup>3</sup> DIOCT press releases from 12.08.2018, 14.06.2018, 19.04.2019, 12.06.2019, <https://www.diicot.ro/cautare?searchword=ordin%20european%20ancheta&searchphrase=all&limit=20>

<sup>4</sup> DIOCT press release from 06.09.2019, <https://www.diicot.ro/mass-media/2452-comunicat-de-presa2-06-09-2019>



POHCCJ one of the reasons is the use of EIOS which are faster and easier to execute. The same conclusion appears in the DIOCT Report for year 2018.

Only the future work of the judges and prosecutors is to show the real advantages or disadvantages, if any, of the EIOS and what is their impact on the substantive and procedural rights of the persons involved in the investigative process.

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