„ N I C O L A E T I T U L E S C U” UNIVERSITY
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EUROPEAN INVESTIGATION ORDER

- SUMMARY -

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SUMMARY

Freedom of movement within the geographical area of the European Union as well as the multiple possibilities for rapid transfer of goods and values have been seen as opportunities by criminals, who, in most cases, expand their criminal activity across borders, inventing new and increasingly ingenious modes of operation or resorting to diversified methods of "laundering" the proceeds of crime or hiding evidence.

Under these conditions, the task of national judicial bodies in discovering and managing the evidence necessary to identify perpetrators and document their criminal activity becomes increasingly difficult, requiring specialized judicial cooperation in the collection and management of evidence.

The criminal activity extended to the European Union level affects both the legal order of the states directly affected, but also the European Investigation Order, which is why the European legislator has the duty to permanently improve European law by adopting new forms of judicial investigation in criminal matters that meet current needs, aspects that have been signaled since the Tampere European Council of 15-16 October 1999, in which the mutual recognition between EU Member States of court judgments and judicial decisions was seen as representing the "cornerstone" of the European Investigation Order.

The formalism specific to the classic procedure of legal assistance in criminal matters, which involved a series of fragmentations of judicial decisions incident to the performance of judicial activity, inevitably generated a series of shortcomings in transnational investigative activity.

In order to improve the specific regulatory framework, within the Stockholm Programme held on 10-11 December 2009, the European Council concluded that, in the matter of the administration of evidence by the Member States of the Union, a unitary evidentiary system must be regulated at European level, flexible and containing a wide range of means of evidence that can be requested and administered by states within specific judicial procedures, based on the principle of mutual recognition of judicial decisions.

In the view of the European legislator, the judicial decision represents the manifestation of will materialized within a procedural act belonging to a judicial body in a Member State which orders the obtaining and transfer of certain means of evidence, a decision which is recognized and executed within a communication on a horizontal homologous system by the judicial body of another Member State.

In this regard, the European legislator concluded that the combination of the judicial decision issued by the issuing state with its recognition and execution by the executing state must be carried out within the same procedural act, having a standardized pre-established content called a European Investigation Order.

The rules and operating limits of the European Investigation Order were adopted by Directive 2014/41/EU on the European Investigation Order in criminal matters, a European

regulatory act transposed by the vast majority of Member States by mid-2017, according to the provisions of art. 36 para. (1) of this directive.

Although Directive 2014/41/EU on the European Investigation Order in criminal matters has been transposed by most Member States, except Denmark, and the European Investigation Order is functional and even enjoys wide applicability at Member State level, this judicial instrument for collecting evidence has been little studied by specialized doctrine[1].

In this context, the object of study and the content of the research presented in this thesis, in addition to the added novelty it brings to the sphere of legal research, come to clarify the nature and legal content of the European Investigation Order.

Analytically relating the regulated object to the title of the European normative act, as we argued in the content of the paper[2], we believe that the Directive is better suited to the name of "unique system for the collection and management of evidence in criminal matters", considering both the specificity of the regulated object and the novelty value brought to the international judicial plan at the level of the European Union. The concept of "European investigation order", as it appears defined in the content of Directive 2014/41/EU, represents only the procedural and procedural form through which the activity of identifying, collecting and transmitting evidence is carried out from a judicial point of view within the framework of judicial procedures carried out by the judicial bodies belonging to the EU member states.

In the absence of in-depth legal studies analyzing the legal nature and particularities of the European Investigation Order, in many cases aimed at recognizing the European Investigation Order for execution, the Romanian judicial authorities confused the European Investigation Order and the procedure applicable to it with the request for an international letter of request, applying the latter's procedure.

Thus, although the object and functioning of the European investigation order are well defined within the principles set out in the introductory part of Directive 2014/41/EU, although its content has been transposed into our legal system since mid-2017, at the level of judicial practice there have been situations in which courts confuse or mix the special procedure applicable to the European investigation order with the international letter of request, resolving criminal cases that have as their object the recognition and execution of European investigation orders from the perspective of the procedural rules specific to the

[1] For example, at the level of European states that have transposed Directive 2014/41/EU, the European investigation order has been analyzed only in a few monographs, the studies mainly focusing only on the implementation and systemic functioning of the order, while in our country the European investigation order is analyzed in the context of international judicial cooperation in criminal matters, within the chapter assigned to legal assistance in criminal matters, being presented as a judicial instrument regulated by secondary Union legislation, along with the recognition of pecuniary sanctions, in this regard, see Chapter X, of International Judicial Cooperation in Criminal Matters, by M. Pătrăuș, Universul Juridic Publishing House, Bucharest, 2021, pp. 546 - 598; a sequential analysis of the European investigation order within the analysis of international judicial cooperation in criminal matters is also carried out by Messrs. N. Neagu and D. Dediu, in Chapter VI of the work International Judicial Cooperation in Criminal Matters, ed. Second revised and added, Universul Juridic Publishing House, Bucharest, 2021, pp. 287 - 306.

[2] See below, page 83

international letter of request[3]. However, such confusions are likely to unnecessarily prolong the time required for recognition, generate repeated declinations of material jurisdiction between courts, affecting the very purpose for which the European legislator ordered the application of recognition and enforcement procedures between states horizontally, the speed of the procedures being related to the nature of the European investigation order.

Within the work, the research on the European Investigation Order is presented in Chapter VII.

Chapter I, entitled "Modernism and postmodernism in the European regulation of the evidentiary system", analyses the practical needs and legal criteria that underpinned the adoption at European level of a single evidence management system, analysing the evolution of the European legal framework regarding the system of evidence collection in criminal matters at European Union level. The modern vision includes obtaining certain evidence, in a limited systemic manner, which corresponds to legal assistance in criminal matters, while the postmodern vision gives judicial partners the possibility of requesting and transferring all necessary evidence, within a comprehensive system.

In this context, we have captured the evolutionary side of the conventional evidentiary system, starting from the classic system of collecting evidence in criminal matters at European level through legal assistance in criminal matters, going through and analyzing all its stages, concluding the necessity and need to establish a single system of evidence management at European level, in a postmodern vision, based on the principles of the uniqueness of the judicial decision, its horizontal communication, the mutual recognition of procedural documents drawn up by the judicial authorities involved and the execution of investigative measures ordered by the judicial decision in a horizontal homologous system.

Regarding the speed of execution of investigative measures and the communication of the result obtained, the novelty of the European Investigation Order operating system consists in regulating deadlines for execution and communication of the evidence obtained, necessary to be used in the criminal trial conducted on the territory of the requesting state.

Chapter II analyzes the method of transposing Directive 2014/41/EU on the European Investigation Order into our legislation, on which occasion we expressed some proposals de lege ferenda regarding art. 45 of Law no. 24/2000 on the rules of legislative technique for the elaboration of normative acts in order to achieve quality standards relevant to the procedure and the limits of the transposition of secondary Union legislation.

In this chapter, using the comparative method, we analyzed the content of positive law in France, Italy, Spain and Germany that regulates the procedure for transposing secondary EU legislation into their own legislative systems and highlighted the deficiencies of our legislation, expressing and arguing a set of legislative solutions that our legislator could adopt.

[3] In this regard, see the example and argumentation expressed by us on pages 81 and 82.

Another problem that has been identified in the case of the transposition into the domestic law of each state of the normative content regulating the European investigation order is represented by the place and type of law through which the transposition is carried out. Thus, while some states have transposed the Directive regulating the European investigation order through an autonomous ordinary or organic law, other states, such as France, have preferred to introduce the European investigation order into the content of the Code of Criminal Procedure, in the space granted to judicial procedures of legal assistance in criminal matters.

Given that, for the recipients, the Criminal Procedure Code is the law in which the main judicial mechanisms involving the evidentiary system or investigative forms involving the highest degrees of intrusion into the private life of those concerned should be based, by virtue of the principle of predictability of criminal procedure rules, we also opined that, at the level of the Romanian Criminal Procedure Code, even if it did not regulate the entire procedure of the European investigation order, it should at least, in the content of articles 97 and 100 thereof, refer to the special legal rules of Law no. 302/2004 in which the situations in which this instrument can be used are described and the issuing subjects are indicated.

In **Chapter III**, we analyzed the legal nature and elements of the European Investigation Order. The analysis of the European Investigation Order was carried out both from the perspective of a specialized instrument of judicial cooperation in criminal matters, granted to EU member states for the purpose of collecting and transferring evidence, and from the perspective of a procedural act with international implications regarding the management of evidence in criminal trials.

Although the European Investigation Order involves judicial activities carried out by judicial authorities belonging to different states, the judicial decision of disposition is unique, belonging to the issuing judicial body.

The judicial activity aimed at "recognition of the European Investigation Order", even if it is completed by a procedural act specific to the criminal procedural framework of the executing State, does not change the content of the judicial decision transmitted by means of the European Investigation Order. In exceptional situations, in which the judicial body of the executing State, when verifying the conditions of legality for recognition, finds that the evidentiary procedures requested by the judicial decision violate the domestic law of the executing State or have no equivalent in its legislation, this fact is communicated to the issuing authority in order to identify, by mutual agreement, alternative judicial methods and procedures, capable of achieving the intended evidentiary result, with the result of the consensus being communicated in writing by the issuing judicial body to its counterpart in the executing State. However, this situation of safeguarding the European Investigation Order does not represent a modification of the content and limits of the investigative activities ordered by the judicial decision of the judicial body of the executing State. execution, but represents an adaptation of the expressed decision, admissible by virtue of the principle of flexibility of the European Investigation Order.

From this report we deduce that the judicial decision, which represents the cause of the European investigation order, will be expressed on the basis of and in compliance with the criminal procedural law of the issuing state, while the execution of the judicial investigation, which constitutes the object of the decision, will be carried out according to the legal rules of criminal procedure in force belonging to the executing state.

The activity of recognition of the European Investigation Order by the judicial bodies of the executing State has as its object the legal comparison, within which the specific legal content of the positive right incident to obtaining the requested evidence is analyzed and the procedural guarantees granted to the subjects targeted by the investigative measure existing in the executing State are applied. Consequently, in the situation where the legislation of the executing State conditions the performance of certain evidentiary procedures or the application of certain special investigative methods to the prior authorization of a judge, the recognition for the purpose of executing the European Investigation Order must be carried out by the judge of rights and freedoms, on which occasion he must also issue the warrant necessary to trigger the evidentiary procedures specific to the requested investigative measures.

Regarding the standards involved in the judicial activity of recognizing the European Investigation Order, our research was not limited to the formal aspect, but we analyzed the rationality of this activity involving the mechanism and objective criteria based on which the proportionality between the level of intrusion into the private life of the person under investigation and the judicial interest pursued must be established, then, depending on this result, we indicated the forms of execution of the judicial decision ordered through alternative evidentiary procedures.

By comparing the criminal procedural institutions regarding evidence with similar criminal procedural institutions in the main European states, for example, Germany, Italy and France, we observed that our legislator, in the matter of obtaining evidence, has not regulated the principle of proportionality nor has it established criteria based on which judicial bodies may resort, alternatively, to less intrusive evidentiary procedures, which of course disadvantages our state in cases where it is the issuing state of the European investigation order. Failure to regulate the principle of proportionality and subsidiarity in the matter of evidence may generate some excesses in cases where we are the issuing state of the European investigation order, which could lead to the rejection of the request by the European state in whose legislation these principles, essential in obtaining evidence, are well regulated. Moreover, as I argued in the section devoted to the procedural guarantees applicable to the European investigation order, both the procedural rights attributed to the judicial bodies and the restrictions on the freedoms and rights of those targeted by the investigative measures must be based on and disposed of in compliance with certain delimitation criteria that must be enshrined in the normative plan. I also emphasized that, from a substantive point of view, the interest of finding the truth cannot be achieved by violating procedural guarantees and harming fundamental values, the standards of compliance with which represent earned European values.

For these reasons, we have formulated proposals to improve the national legislative framework relevant to evidence, given the need to align our legislation with the standards and quality of evidence collection methods existing in the criminal procedures of European states and applied for many years by their judicial authorities.

Another problem identified in Romanian criminal procedural legislation following the analysis of procedural guarantees is the lack of recognition of a general remedy against the manner of execution of investigative measures open to the person(s) whose substantive or procedural rights would be harmed by the intrusion into private life. However, in those cases where the person investigated feels an unjustified degree of intrusion into private life, the lack of a clear and predictable regulation for the recipients is equivalent to restricting access to justice, which violates the set of guarantees regulated by art. 47 of the Charter of Fundamental Rights of the European Union.

Chapters IV and V describe and analyze the functional structure of the European evidentiary system represented by the European Investigation Order.

As we have summarized above in the vision of the European legislator, the unitary connection within the system of evidence at European level is given by the issuance and transmission of the judicial decision and its recognition and execution.

The European Investigation Order, being a specialized judicial instrument, has a special regime. It can be issued only in a criminal case or in an administrative case in which repressive sanctions with effects similar to criminal ones are incident.

When issuing the order, the issuing judicial body has the obligation to analyze the usefulness and relevance of the desired evidence, verifying whether the factual situation that is the object of the evidence is not already proven by evidence existing in the case file.

The issuing body, indicating the desired evidence, also specifies the evidentiary procedures for obtaining the evidence.

The set of evidentiary procedures indicated for obtaining the evidence are analyzed from the perspective of the proportionality between the intended purpose and the level of intrusion into private life, this activity being within the exclusive functional competence of the issuing body. On this occasion, it will be verified whether there is a possibility that the desired evidence can be obtained by applying less intrusive evidentiary procedures.

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The analysis of compliance with the conditions of utility and proportionality is the responsibility of the courts of the requesting state, the analysis of these conditions taking place either incidentally, in the event of a complaint being made by the person concerned by the evidentiary procedures, or ex officio, by the court, at the time of judging the merits of the case in the proof of which the evidence was obtained by resorting to the European Investigation Order.

In the new European evidence system, the recognition and enforcement of the judicial decision contained in the order transmitted is the rule, the grounds for rejection or non-execution of the decision being drastically limited by the European legislator, a context that excludes, ab initio, the refusal to execute or the rejection of the European order based on subjective reasons found by the executing authority.

The systemic organization of the evidence circuit, based on the principle of flexibility, encourages the cross-border partners involved, prior to any measure to reject or restrict the order, to communicate any aspect of syncope and to find procedural alternatives that help preserve and execute the order.

The execution of evidentiary procedures will be carried out by the judicial bodies of the executing State in compliance with the principle of territorial and material jurisdiction, respecting the parties and subjects of the proceedings all the procedural guarantees provided for by the law of the executing State, to the extent that the entire proceedings are carried out in an identical manner to that exercised in a domestic case.

The symmetry of the observance of the procedures carried out during the execution of evidentiary procedures may be analyzed by the competent courts of the executing State, but in this case the analysis takes place only on the basis of a complaint exercised within the framework of the mechanisms of procedural guarantees by the persons affected by the evidentiary procedures.

After obtaining the evidence by the executing authority, it is, as soon as possible, preserved appropriately and transmitted to the judicial authority of the issuing State, which is obliged to use it only in the judicial case in which it was requested.

In **Chapter VI**, we analyzed the special investigative measures that may be the subject of a European Investigation Order and we exposed the influence of the CJEU case law in cases where the Court of Justice in Luxembourg was referred preliminary questions regarding the application of the European Investigation Order.

The CJEU judgments, representing a source of law for the EU Member States, are immediately applicable to the judicial bodies of the states involved in the procedure for issuing and executing the European Investigation Order.

In relation to the practice of the Court of Justice, the specific national regulatory framework represents a matter of fact, judging in relation to the fundamental principles and European legal norms within the T.F.U.E..

At the European level, the case law of the C.J.U.E. attests to the level of objective compatibility between the concrete norms within the national systems and Union law, and, indirectly, the level of perception/understanding of European law by the authorities of the Member States with a role in the application of European laws within the internal jurisdiction systems.

Chapter VII was reserved for the comparative method regarding the impact of the transposition of the European Investigation Order into the criminal procedural legislation of the main European states, emphasizing that referential of placing the normative content

in the existing legislative context, thus providing a model of orientation for our legislator, in the perspective of a legislative reform.

The accession of the majority of the EU member states to an evidentiary system regulated in a unitary manner, following the transposition into national legislation of Directive 2014/41/EU. generated a unitary normative framework, an essential premise for the creation of a single circuit of evidence at European level. From this point, the implementation of a single interstate computer database is only one step away, such a database being able to facilitate the valorization of existing evidence, as well as the communication of criminal procedure documents through such a system.

At the end of the paper, we presented some of our proposals for improving national legislation regarding the evidentiary system, especially as a result of the assimilation of the principles expressed by the European legislator, thus aiming to align our criminal procedural legal norms with European standards.

The standard of the legal norm indicates what conduct is expected of the recipients and under what conditions it must be adopted, an orientation that expresses and directs the level of knowledge of the branch of law in which that legal norm is adopted.