

European Investigation Order as Instrument for the Fight Against Organised Crime

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According to Art. 1 of Directive 2014/41/EC (hereinafter: DEIO) of the European Parliament and of the Council of the 3 April 2014 (OJ No. L 130 of 1 May 2014)² a European Investigation Order (hereinafter: EIO), “is a judicial decision which has been issued or validated by a judicial authority of a Member. State (‘OG the issuing State’) to have one or several specific investigative measure(s) carried out in another Member. State (‘the executing State’) to obtain evidence in accordance with this Directive”³. An instrument that is working well as reveals the recent Report published by EUROJUST in November 2020 which in two years has registered 1529 cases, most of them defined with success.

In this area, two interesting judgments of the ECJ have been detected:

The judgment related to the Case (C-324/17) criminal proceedings against Ivan Gavanozov, that concerns peculiarities of the Bulgarian criminal proce-

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- ² Published in G.U. C. E., May 1, 2014, n. 130, pp. 1-37. The deadline provided for in Art. 36 par. 1 was set up the 22 May 2017. In this regard, BACHMAIER WINTER, Lorena, “Prueba transnacional penal en Europa: la Directiva 2014/41/CE relativa a la orden europea de investigación”, *Revista General de Derecho Europeo* 2015, n. 36, available at <http://www.iustel.com> (Last accessed: December 4, 2020).
- ³ In accordance with MANGIARACINA Annalisa, “A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order”, *Utrecht Law Review* 2014, n.1, available at <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.260/> (Last accessed: December 4, 2020).

dure. An interpretation was requested as regards Art. 14 DEIO, which provides that the Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO (Art. 14 (1)).

The substantive reasons for issuing the European Investigation Order may be challenged only in an action brought in the issuing State, without prejudice, to the guarantees of fundamental rights in the executing State (Art. 14 (2)).

The second judgment of the Court (Grand Chamber), of 8 December 2020, reveals that the EIO is not purely a mutual recognition instrument. It is demonstrated by the checks requested on both States –requesting and executing, especially on fundamental rights.

The reference for a preliminary ruling concerns the interpretation of Articles 1(1) and Article 2 (c) of the Directive on the EIO in criminal matters. That application was made in the context of a request for execution, in Austria, of a European order for criminal investigation issued by the public prosecutor's office of Hamburg against an individual and other unknown persons suspected of having falsified bank transfer orders.

The intent of the research is to analyse the principle of mutual recognition of judicial decisions with the aim of testing how it has been applied in the content of the Directive of the European Investigation Order, moreover, to examine how the Directive has been implemented in Italy and Spain.

In the era of globalization, one of the most alarming offences is that related to organised crime. For this reason, another purpose of my research is to verify whether some specific investigative instruments provided for by the EIO can represent an added value in the fight against transnational organised crime. Interpretative/qualitative considerations inspired by the recent process of globalization, which imply the gradual weakening of the barriers, have been done. This has developed a great impact in the interconnections between the economies and criminals of different countries, highlighting the systematic aspects of relationships between societies and States.

From the European perspective, in relation to organised crime, the contribution of the European Union has been particularly significant in substantive and procedural law under the enactment of specific rules, but also in the establishment of *ad hoc* bodies in order to promote a better coordination between the judicial and police authorities of each Member State. The Eurojust, in par-

ticular, although not expressly mentioned in the content of DEIO, is playing an important role in the context of this instrument: it intervenes at all the stages of proceedings, sometimes before the issuing of an EIO.⁴ In addition, the Eurojust, the European judicial network and the liaison magistrates in relation with judicial authorities as well as OLAF and Europol in relation with police authorities are the milestones made by the European institutions since the Tampere European Council of 15 and 16 October 1999, which has led to considerable results.

The two implemented methods have been the deductive and the inductive method.

For what concerns the deductive method, the consultation of literature, case-law and legislation from the European and national law, has been carried out according to the analysis of the data obtained. At the same time, discussions with experts and academics on different topics related to the European Investigation Order, through attendance to seminars and/or conferences took place.

On the other hand, the Inductive method has been developed addressing questionnaires online, as well as face-to-face or remote interviews held with judges, prosecutors, police officers, lawyers, and other legal professionals. Adequate visits to EU and national institutions and other bodies have taken place such as Courts of Justice, Prosecution Offices, Police Offices in Italy and Spain.⁵

The instrument is working well, also in the context of pandemic⁶. The Eurojust and European Judicial Network collected information from Member

⁴ On the regulatory plan, first the framework decisions and, with the entry into force of the Treaty of Lisbon of 13 December 2007, Directives are the European Union's privileged source of legislation in the field of judicial cooperation in civil and criminal matters. Member States have a specific obligation to implement these instruments.

⁵ For instance, I visited Eurojust last November (2019) where I had the opportunity to interview face-to-face a Spanish Member of Eurojust, Francisco Jiménez-Villarejo, as well as Filippo Spiezia Vice President of Eurojust. Moreover, I had the opportunity to interview Davide Spina a public prosecutor's office.

⁶ In this regard, JIMENO BULNES, Mar "Emergencia judicial ante la crisis sanitaria originada por el COVID-19" Blog Rights International Spain 2020, available at <http://rightsinternationalspain.org/es/blog/165/emergencia-judicial-ante-la-crisis-sanitaria-originada-por-el-covid-19> (Last accessed: December 4, 2020).

States on the: “The Impact of COVID-19 on Judicial Cooperation in Criminal Matters”. In some States, the instrument is being issued and translated, but its transmission to the executing State is being affected, suspended or postponed, except when it is urgent. Where this prioritisation applies, the main criteria used besides urgency are, for instance, the seriousness of the offence, the risk that evidence will be lost and the stage of the proceedings in which the evidence is to be gathered. A case-by-case evaluation in principle applies. The majority of the States recommend electronic transmission of requests (i.e., e-mail) as the most effective means in the current situation. The Eurojust and European Judicial Network can help with the transmission of the instrument, facilitating exchange of information and identification of the competent executing authority.

The European Investigation order is a hybrid instrument: it is a consequence of the lack of previous harmonisation of rules related to the law of evidence. A concrete example could be the temporary transfer to the issuing State (Article 22 DEIO). There are different opinions on the basis of national laws in relation to the provision that “The transferred person shall remain in custody in the territory of the issuing State” (Article 22(6) DEIO).

Another example could be given by the Interception of telecommunications. However, we must distinguish between the Interception of telecommunications with technical assistance and the Interception of telecommunications without technical assistance.

For what concerns those with technical assistance (Article 30 DEIO), different opinions prevail concerning whether or not this provision could be applied to a request to install a covert listening device (e.g., bugging of a car).

While different opinions exist on whether this provision also applies in the case of a covert listening device (e.g., bugging of a car) according to the Interception of telecommunications without technical assistance (Article 31 DEIO).

To conclude, the application of EIO with its double check by the issuing as well as by the executing State on the principle of legality, proportionality, on the grounds for refusal, risks to put in crisis the principle of mutual recognition which is based on mutual trust.

According to the Eurojust in practice, in some States, the control is more pervasive than it should be: without reinforcing mutual trust among States

there is a risk that cooperation might become ineffective., with consequences on the field of the fight against organised crimes that have a transnational dimension.

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