

**The enforcement of investigative measures based on  
the European investigation order in criminal matters.  
Comparative examination relating to the Romanian law.  
Critical opinions and *de lege ferenda* proposals**

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***Abstract***

*In the present study we have examined the specific provisions for certain investigative measures that may be subject to a European investigation warrant in criminal matters provided for in Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European criminal investigation order. Thus, we have examined each investigative measures provided in the European legal instrument through the national legislation of Romania, as in the terms of transposition of this legislative act into the Romanian law. The examination of the European legislative act allowed us to identify some dysfunctions in the settlement of some provisions, malfunctions which in the judicial practice of Member States' competent institutions will cause numerous problems, both of interpretation and application. Among these we only highlight the lack of concrete provisions that oblige the judicial authorities of the countries involved in the issuance and execution of a European investigation order in criminal matters, to provide legal assistance to the persons who are conducting such procedures. In this context, we have formulated a series of critical opinions, complemented by appropriate *de lege ferenda* proposals, which may be useful to the European legislator from the perspective of amending and supplementing this legislative act. We have also stressed on the need of transposing the European legislative act into the Romanian law by adopting a special law and not by amending some provisions of the Criminal Procedure Code. The innovations in the paper refer to the examination of the investigative measures that can be arranged by issuing a European investigation order in criminal matters, formulating some critical opinions and appropriate *de lege ferenda* proposals. The paper can be useful to the academics, practitioners in the field, especially to the European legislator from the perspective of amending and supplementing the European legal instrument and also to the Romanian legislator that will have to transpose this legislative act into the national law.*

**Keywords:** *investigative measures; crime; cooperation; European Union member states.*

**JEL Classification:** K14; K33

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## 1. Introduction

Into the recent Romanian doctrine it was shown that the development of human society as a whole and of the countries of the world was possible due to the development and continuous improvement of cooperation relations in many fields that were established and settled in over time.<sup>2</sup>

In the bilateral or multilateral international relations, the countries have conducted cooperation activities in a variety of domains, focusing on the economic, cultural, environmental, political, military and legal ones<sup>3</sup>.

Against this background it was found an unprecedented growth of the cross-border crime of all kinds, with a specific focus on the most serious forms of manifestations of crime.

Thus, “among the serious committed crimes, since the second half of the last century by the organized crime groups, we can include terrorism, trafficking in weapons, ammunition, explosives, radioactive substances, human trafficking, trafficking drugs, forgery of currency, murders, kidnappings, etc. Also, in the recent years it has gained new dimensions also cybercrime, sometimes with negative consequences in terms of monetary or banking safety of some states. In this context, extremely complex, the governments of world countries, especially those with recognized democratic regimes, were put in the position to identify new ways to prevent and combat transnational crime, which focused primarily on improving their national laws and reorganizing the state structures with attributions in the domain, and thirdly intensifying the specific activities of cooperation in criminal matters”<sup>4</sup>.

In recent doctrine it has been emphasized the need to intensify specific activities of international judicial cooperation in criminal matters, for the stated purpose of reducing crime in certain acceptable limits, that would ensure greater safety to its citizens.<sup>5</sup>

However, in the doctrine it was insisted on the fact that under the present conditions concerning the unprecedented increase in crime of all kinds, the improvement of judicial cooperation in criminal matters imposed itself as an objective necessity, representing the only concrete way to prevent and combat more effectively this kind of crime, also catching and prosecuting persons who have committed various offenses and are hiding in other states.<sup>6</sup>

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<sup>2</sup> Alexandru Boroi (coord.), Ion Rusu, Minodora-Ioana Rusu, *Tratat de cooperare judiciară internațională în materie penală/The Treaty of judicial cooperation in criminal matters*, Ed. C.H. Beck, Bucharest, 2016, p. 3.

<sup>3</sup> Alexandru Boroi, Ion Rusu, Minodora-Ioana Balan-Rusu, *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation*, LAP LAMBERT Academic Publishing, Saarbrücken, Deutschland/Germany, Danubius University, 2012.

<sup>4</sup> Minodora-Ioana Rusu, *Asistența judiciară în materie penală în Uniunea Europeană/Judicial Assistance in Criminal Matters in the European Union*, Editura Universul Juridic, Bucharest, 2015, p. 22.

<sup>5</sup> Alexandru Boroi, Ion Rusu, *Cooperarea judiciară internațională în materie penală, Curs master/International judicial cooperation in criminal matters, Master Course*, Ed. C.H. Beck, Bucharest, 2008, p. 5.

<sup>6</sup> Ion Rusu, Minodora-Ioana Balan-Rusu, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*, LAP LAMBERT Academic Publishing, Deutschland/Germany, DANUBIUS University, 2013, p. 15.

Against this background, starting from one of the fundamental objectives set by the EU, namely providing an area of freedom, security and justice, the Union has taken a number of concrete measures, including that of providing an institutional and legislative framework capable of bringing success in the fight against organized crime.

Thus, at the level of the Union there were instituted and enacted new forms of judicial cooperation in criminal matters such as the European Arrest Warrant, the recognition and enforcement of judgments involving deprivation of liberty imposed in another Member State, transfer of proceedings in criminal matters, transfer of sentenced person, etc.

In this context, the European Union adopted a new legislative act which aimed at improving the activity of judicial cooperation in criminal matters between the Member States and implicitly the assurance of an area of freedom, security and justice, a legislative act by which it is established a new form of judicial cooperation in criminal matters in the European Union.

The European legislative act to which we referred above is Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European criminal investigation order into criminal matters<sup>7</sup> which was adopted to supplement the provisions or repeal others in two acts previously issued, respectively the framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders on freezing property or evidence<sup>8</sup> and the Council framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant, the purpose of obtaining objects, documents and data for their use within the proceedings in criminal matters.<sup>9</sup>

Regarding the way in which Romania has agreed to actively participate in the general effort of the European states to achieve the objective, even if at that time it was not a member of the European Union, it adopted the Law no. 302/2004 on international judicial cooperation in criminal matters, republished, as amended and supplemented.<sup>10</sup>

As argued in the recent doctrine, “the successive additions and amendments of special law were determined by the developments in the legal system of the European Union, an aspect which resulted in the adoption of new

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<sup>7</sup> Published in the Official Journal of the European Union, no. L 130/1 of 01.05.2014.

<sup>8</sup> Published in the Official Journal no. L 196 of 08.02.2003.

<sup>9</sup> Published in the Official Journal no. L 350 of 30.12.2008.

<sup>10</sup> Published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, amended by Law no. 224/2006 published in the Official Monitor of Romania, Part I, no. 534 of 21 June 2006; E.G.O. no. 103/2006 on some measures facilitating international police cooperation, published in the Official Monitor of Romania, Part I, no. 1019 of 21 December 2006, approved by Law no. 104/2007 published in the Official Monitor of Romania, Part I, no. 275 of 25 April 2007; Law no. 222/2008 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters published in the Official Monitor of Romania, Part I, no. 758 of 10 November 2008; the special law was subsequently republished in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011 and Law no. 300/2013 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

legislative acts regulating the complex activity of international judicial cooperation in criminal matters between Member States”.<sup>11</sup>

Therefore, the successive amendments of the Romanian special law were determined by the developments in the legal system in the domain of the European judicial cooperation in criminal matters, an evolution guided virtually by new manifestations of the organized crime and the need to prevent and fight against them more effectively through legislative measures and promoting an organized institutional framework.<sup>12</sup>

As it will be noted, even since last year, Europe and especially the European Union is facing a new challenge which can destabilize the very existence of the Union, namely the one determined by the phenomenon of immigration of significant groups of people who leave the armed conflicting area.

With all its internal problems, notably the attempted *coup d'état*, few days ago, Turkey threatened the European Union again if not granted visas for the EU citizens to the Turkish citizens, the government allowing the movement towards the European Union of large groups of refugees that were stopped in Turkey.

We consider that under the conditions in which it will not be properly managed, this new challenge will gradually turn into a major crisis with serious consequences in terms of developments in the European Union and even its existence.

As appreciated in a previous study, in addition to some issues of disagreement between Member States in relation to the number of immigrants that needs to be accepted by each on their territory, the economic, political etc. issues, in the near future we envision other and more serious problems, namely entering on the Union of terrorists and even terrorist groups followers of various criminal groups, including ISIS.

Under these conditions, the entry of terrorist elements in the territory of Member States will be difficult or almost impossible to prevent, primarily due to the lack of information with operative value in this domain<sup>13</sup>.

So, the increase of cross-border crime and the new challenge on entering a large number of immigrants into the European Union, present new challenges that cannot be undone, only by enhancing specific activities for judicial cooperation in criminal matters.

In this registry it adds also the adoption of European legislative act to which we referred earlier, the legislative act establishes a number of special procedures to cooperate in achieving the objectives of criminal investigation on the territory of a Member State.

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<sup>11</sup> Minodora-Ioana Rusu, *Asistența judiciară în materie penală în Uniunea Europeană/Judicial Assistance in Criminal Matters in the European Union*, Editura Universul Juridic, Bucharest, 2015, p. 22.

<sup>12</sup> Ion Rusu, *European investigation order in criminal matters in the European Union. General considerations. Some critical opinions*, Juridical Tribune, Volume 6, Issue 1, June 2016, pp. 58-59.

<sup>13</sup> See the same approach, in I. Rusu, *op. cit.*, pp. 58-59.

Within the study we have examined the investigative measures that can be arranged under a European Investigation Order in criminal matters, formulating critical opinions in relation to how to regulate them and *de lege ferenda* proposals intended to contribute to improving the system of European legislation in the field.

We have also considered the relation to the Romanian law, given the need to transpose the European legal instrument into the Romanian law.

We appreciate that a particular problem will be the implementation of the European legislative act into the Romanian law, where the Romanian legislator will be able to choose between two alternatives, namely: either amend certain provisions of the Romanian Code of Criminal Procedure or adopt a special law of transposing the European legislative act into the Romanian law.

As far as we are concerned, under the current conditions, we believe that the best option seems to be that of transposing it by a special law.

## **2. Specific provisions for certain investigative measures set out in the European Legislative Act**

In accordance with the European legal instrument under consideration, the *European Investigation Order in criminal matters* is a judicial decision issued or validated by a judicial authority of a Member State to implement one or more measures specific to investigative measure into another Member State in order to obtain evidence.<sup>14</sup>

Extremely important is the fact that within the course of probation activity in a criminal trial, the European legislative act allows the request of the issuance of a European investigation warrant by the suspect or accused or by his lawyer, within the rights of defense.<sup>15</sup>

A European investigation order may include any investigative measure with the exception of establishing a joint investigation team and gathering evidence within a Joint Investigation Team established pursuant to art. 13 of the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union and the Council Framework Decision 2002/465/JHA, unless the purpose is the application of art. 13, para. (8) of the Convention the art. 1, para. (8) of the Framework Decision.

A European investigation order may include any investigative measure with the exception of establishing a joint investigation team and gathering of evidence within an established Joint Investigation Team pursuant to art. 13 of the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union<sup>16</sup> and the Council Framework Decision 2002/465/JHA, unless

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<sup>14</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters, art.1, para. (1).

<sup>15</sup> *Idem*, art.1, par. (3)

<sup>16</sup> The Convention was drawn up by the Council under Article 34 of the Treaty on European Union on mutual assistance in criminal matters between Member States of the European Union, published in OJ C 197 of 12.7.2000, p. 3.

the purpose is the application of art. 13 para. (8) of the Convention the art. 1 para. (8) of the Framework Decision.<sup>17</sup>

At the same time, we mention that at the level of European Union, the European Investigation Order is executed based on the principle of mutual recognition, a fundamental principle underpinning the judicial cooperation in criminal matters in the European Union.

Under the depositions of the European legislative act, the investigative measures provided for in the European legislative act are the following<sup>18</sup>:

- the temporary transfer to the issuing State of detainees for the purposes of applying an investigative measure;
- the temporary transfer to the executing State of persons under custodial measures for the purposes of investigative measures;
- hearing by videoconference or other means of audiovisual transmission;
- hearing by teleconference;
- information on bank accounts and other financial accounts;
- information on banking and other financial operations;
- investigative measures which involve the collection of evidence in real time, continuously and in a certain period of time;
- undercover investigations.

Given the importance of these investigation measures seen in the light of the provisions of the Romanian law, we undertake a brief examination, with reference to the corresponding provisions in the Romanian law.

### **2.1 Temporary transfer to the issuing State of persons deprived of liberty for the purposes of applying an investigative measure**

In order to gather evidence, a person who is executing a measure or a sanction of deprivation of liberty on the territory of a Member State may be transferred temporarily to another Member State, provided that it is returned within the deadline set by the executing State, based on a European investigation order.

Given the particularities of the transfer of sentenced persons, in addition to the non-recognition motives provided for in article 11 of the legislative act under examination, the execution of a European investigation order may be refused by the executing State if:

- the person subject to a measure of deprivation of liberty does not consent it; or
- the transfer extends the detention of the person subject to the measures of deprivation of liberty.

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<sup>17</sup> Art. 3 of Directive 2014/41/EU.

<sup>18</sup> Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, published in OJ L 162, 20.6.2002, p. 1.

When the executing State deems it necessary, taking into account age or physical or mental condition of the sought person, it enables the legal representative of that person to express their opinion in connection with transferring him to the requesting State.<sup>19</sup>

As for the transit of the person in question in a third Member State, it is granted upon request, with the obligation to provide all necessary documents.

On the practical ways relating to the temporary transfer of the person concerned, including some details regarding detention conditions in the issuing State (applicant), and the dates by which he must be transferred and returned to the executing State (requested), they will be established between the competent judicial authorities of the two countries, taking into consideration physical and mental state of the person concerned and the level of security required in the issuing State.

The transferred person shall remain into custody in the territory of the issuing State or in the territory of the transit Member State, according to the judgment adopted in the executing State, except the situation where during the proceedings in the issuing State, the competent judicial authorities of the executing State request its release.

The period of detention in the territory of the issuing State shall be deducted from the period of detention which the temporarily transferred person is or will be obliged to execute in the executing State under a final court ruling.<sup>20</sup>

Temporarily transferred person will not be prosecuted, detained or subjected to any other restriction on his liberty in the issuing State or convicted for acts committed prior to the departure from the executing State and which are not specified in the European investigation order.

The immunity referred to above will cease if the transferee was set free by the decision of a judicial body empowered by the executing State and the person concerned has had an opportunity to leave the Requesting State within 15 consecutive days from the date when his presence was no longer required by the issuing authorities, and he remained in that State or he later returned.<sup>21</sup>

The above provisions will be incident only if, while the person concerned is on the territory of the issuing State (applicant) in relation to this being the ongoing judicial proceedings for which it was requested, in the executing State (State in which the person is serving a criminal measure of deprivation of liberty, which we call the requested State) adopted a final decision by which the person is released.

It has no legal relevance who issued that decision, being important only that the decision is final, of not being subjected to any ordinary means of attack.

With reference to the Romanian law, we undertake an examination of the two possible situations in which Romania may be in, namely the issuing state (the State requesting temporary transfer of a person serving a measure of deprivation of

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<sup>19</sup> Art. 22, par. (2) and (3) of Directive 2014/41/EU.

<sup>20</sup> Art. 22, par. (4) - (7) of Directive 2014/41/EU.

<sup>21</sup> Art. 22 par. (8) and par. (9) of Directive 2014/41/EU.

liberty in another Member State) and the enforcement State, i.e. the State in which the requested person is serving a measure of deprivation of liberty.

If we refer to the first hypothesis, namely that the Romania through its judicial authorities, calls for temporary transfer of a person who is serving a measure of deprivation of liberty in another Member State, in the judicial practice we will have a situation where the Romanian judiciary bodies request the transfer of a person under prosecution in Romania, for an act other than the one for which the person executes the deprivation of liberty measure in the requested State.

In this situation requesting the transfer of the person in question will be made by the prosecution unit that performs or supervises the criminal prosecution, regardless of its level.

We appreciate that in terms of the prosecution hierarchy, this request may be conducted by any unit of prosecutor's office, including a prosecutor's office attached to a court.

In terms of the quality that a requested person in the criminal tracking file in the country may have, we consider that it may be only a suspect or defendant, which is serving a measure of deprivation of liberty in the executing State for an act, other than that for which he is requested in Romania.

In the second situation, the Romanian judicial authorities are called upon to approve the transfer of a person in another Member State for the purposes of an investigative measure, a person who is serving a deprivation of liberty measure in Romania, the recognition and approval of the transfer differ, in relation to the specific of deprivation of liberty measure which it executes the person concerned.

Thus, for the prosecution stage, the approval and recognition must be given by the prosecutor conducting or supervising the prosecution, with the approval of the competent judge of rights and freedoms, in the procedure of Preliminary Chamber, the recognition must be ensured by the judge for preliminary chamber, and in the judgment stage by the court before which the case is pending.

## **2.2 The temporary transfer by the executing State of person's subject to deprivation of liberty measures for the purposes of an investigative measure**

Under the depositions of the European legislative act, an European investigation order may be issued for the temporary transfer of a person subject to a deprivation of liberty measure in the issuing State for the purposes of a measure of inquiry in order to gather evidence requiring his presence on the territory of the executing state.

This implies that after the transfer of the requested person in the issuing State, against its competent judicial authorities of that State it has been decided the enforcement of a deprivation of liberty measure. In those circumstances, if it is necessary the presence of that person on the territory of the executing State, that

State may issue a European investigation order under the same conditions as those mentioned above.<sup>22</sup>

### **2.3 Hearing by videoconference or other means of audiovisual transmission**

Regarding the witness or expert, when it is in the executing State, they can be heard, according to a European investigation order, on the territory of the executing State by video conference or other means of audiovisual transmission.

Also, the same measure it can be ordered for the hearing of a suspected or accused person, when the competent judicial authorities will consider such a measure necessary.

Given the particularities which has raised the execution of such activities, the competent judicial authorities of the executing State, in addition to the grounds for non-recognition or non-enforcement provided in art. 11 of European legal instrument, it may refuse to execute a European investigation order if the suspect or accused person does not consent it or if the execution of such investigative measures in a particular case would be contrary to the fundamental principles of the executing State's law.

We see therefore that the European legal instrument leaves it to the decision of the executing State the execution of the European investigation order, and if the suspect or accused person does not consent it, it leaves it to the State concerned if it does or not recognize and execute such an order, as this is the optional reason and not compulsory for non-recognition and non-enforcement.

We believe that under the provisions of the Romanian law, given that the suspect or accused person does not consent to be interviewed by videoconference, it is incident a mandatory reason for non-recognition and non-enforcement.

Assuming that the competent judicial authorities of the executing State recognize and agree to execute such an order, it will take measures to:

- convening the witness or expert, indicating the time and place of the hearing;
- convening the suspect or accused person to appear in court in accordance with the rules laid down in the law of the executing State and inform the person concerned about his rights, including granting time necessary to allow actual exercise of the right to defense;
- ensuring the identity of the person to be interviewed.

At the end of the hearing, the executing judicial authority shall draw up a report recording the date and place of the hearing, the identity of the person heard, the identity and status of all other persons in the executing State who attended the hearing, any oaths taken and the technical conditions under which the hearing took place. This document will be sent to the issuing judicial authority.

A provision which is at least questionable in par. (7) of art. 24 of the European legislative act, which stipulates that each Member State shall take all

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<sup>22</sup> Art. 23 of Directive 2014/41/EU.

necessary measures, in order to ensure that when a person who is heard on his territory refuses to testify when he is obliged to do so or giving false testimony, it is applied its laws in the same way in which it would have been applied, if the hearing would have been held within a proceeding at internal level.

In the event that a witness testifies falsely, we believe that the issuing State is the one who will have to prepare for perjury in the criminal case, as the witness had committed the offense in connection with a case dealt with by that state, and not the executing State.<sup>23</sup>

We note that the European legislative act does not establish the obligation of insuring the defense of the suspect or accused person.

#### **2.4 Hearing by teleconference**

In the circumstances where a person is in the territory of a Member State and the need to be heard as a witness or expert by the competent authorities of another Member State, the issuing authority of that State (which has the interest in the case, in the meaning of hearing person) may issue an European investigation order, so as to hear such a person by teleconference, it is not appropriate or possible for the concerned person to appear in the State, being examined also by other appropriate means.

Regarding the procedure of the hearing, in the event that there are no contrary provisions in some international legal instruments, this procedure is identical to the hearing by videoconference.

The expressed critical opinions regarding the provisions governing the hearing institution by videoconference are still relevant also in the case of hearing by telephone conference.<sup>24</sup>

#### **2.5 Information on bank accounts and other financial accounts**

A European investigation order may be issued also to determine whether a physical or legal entity subject to criminal proceedings holding or controlling one or more accounts, of whatever nature, in any bank located in the territory of the executing State and also to obtain all the details of the identified accounts.

In the event that it is requested in the European investigation order, the above mentioned information will include accounts for which the person subject to criminal proceedings in question has jurisdiction.

As a feature of the execution of an European investigation order regarding the bank accounts and other financial accounts therein, the issuing authority shall indicate among other things, the reasons why it considers that the requested information can have substantial value within the framework of criminal proceedings in question and the reasons it presumes that the banks in the executing

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<sup>23</sup> Art. 24 of Directive 2014/41/EU.

<sup>24</sup> Art. 25 of Directive 2014/41/EU.

State hold the accounts and, to the possible extent, their names and any other information available which may facilitate its execution.

Also, a European investigation order may be issued in order to determine whether a natural person or legal entity subject to criminal proceedings in question holds one or more accounts in any non-banking financial institution, located in the executing State.

In these situations, the execution of the European investigation order may be refused also in the case where the investigative measure would not be authorized in a similar national case.

We note that in these situations, the European legislative act requires the execution of the European investigation order on the same terms as if the measure in question would be ordered by an internal judicial authority of the executing State.<sup>25</sup>

## **2.6 Information on banking and other financial operations**

A European investigation order may be issued by competent judicial authorities of each Member State in order to obtain details of specific bank accounts and banking operations which have been carried out during a certain period of time in one or more accounts specified in the order, including details of any sending or recipient account.

Each Member State shall take all necessary measures to be able to provide such information, this requirement will apply only under the conditions in which the bank, where the account is held, possess such information.

However, the issuing authority shall indicate in the European investigation order why it considers the requested information as being relevant for the criminal proceedings in question.

Meanwhile, a European investigation order may be issued, relating to the above mentioned information to the financial transactions conducted by non-banking financial institutions. In these situations, in addition to the grounds for non-recognition and non-execution mentioned at art. 11 of the European legal instrument, the execution of the European investigation order may also be refused if the enforcement of the investigative measure would not be authorized in a similar national case.<sup>26</sup>

## **2.7 Investigative measures which involve the collection of evidence in real time, continuously and in a certain period of time**

In the situation where it is delivered a European investigation order, for the purpose of executing a investigative measure requiring the collection of evidence in real time, continuously and over a certain period of time, as it could be: monitoring banking or other financial operations carried out in one or more

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<sup>25</sup> Art. 26 of Directive 2014/41/EU.

<sup>26</sup> Art. 27 of Directive 2014/41/EU.

specified accounts or the supervised deliveries conducted on the territory of the enforcement state, the execution may be refused, in addition to the grounds for non-recognition and non-execution referred to in art. 11, where the enforcement of the investigative measure would not be authorized in a similar national case.

As for the precise method of execution of the supervision measure which refers to supervised deliveries carried out in the executing State, it shall be determined by the competent authorities of the two countries, respecting the right to act, to direct and control the operations on the execution of the European investigation order belonging to the competent authorities of the executing State.

Also, the issuing authority for European investigation order will specify in its content, while preparing it, the reasons why it is considered that the requested information are relevant for the achievement of the concerned criminal proceedings.<sup>27</sup>

No doubt that this category of investigative measures has certain features which relate in particular both to the legal procedures of enforcement in each state and appropriateness of their enforcement in the given circumstances, given that their enforcement leads implicitly also to undermining certain individual rights and freedoms.

Therefore, if we refer to the Romanian law and hence the execution of such measures in Romania, we will have to consider the special conditions to be met especially for supervised deliveries, but also for monitoring banking or other financial operations.

Thus, it will start from the principle that in the Romanian law, to obtain data on financial transactions of the natural or legal entities and the supervised delivery are considered as being special surveillance or investigative measures with various approval procedures.

In all circumstances it is necessary to strictly observe the provisions of art. 146<sup>1</sup> of Criminal Procedure Code and art.151 of the Criminal Procedure Code.

Specifically, obtaining data on financial transactions of a natural or legal person can only be achieved by the decision of the judge on rights and freedoms of the competent court to hear the case at first instance or from the appropriate court in whose constituency is situated the prosecution office to which it belongs the prosecutor who drew up the proposal.

Under the law, in order to establish such a measure, the case prosecutor must justify if:

- there is reasonable suspicion on the preparation or commission of an offense;
- the measure is necessary and proportionate with the restriction of fundamental rights and freedoms, given the particular circumstances, the importance of information or evidence to be obtained or the gravity of the offense;
- the evidence could not be obtained otherwise or obtaining them would involve particular difficulties that would bring prejudice to the

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<sup>27</sup> Art. 28 of Directive 2014/41/EU.

investigation or there is a threat to the safety of persons or property value [art. 146<sup>1</sup> par. (1) of Criminal Procedure Code].

Regarding the supervised delivery in Romania we mention that in accordance with art. 151, par. (1) of the Criminal Procedure Code, the activity itself is approved by the case prosecutor by ordinance.

## 2.8 Undercover investigations

Under the European legislative act, a European investigation order may be issued and with the purpose of requesting the executing State to assist the issuing State in carrying out criminal investigations by the agents with false identity or undercover.

For the achievement of this activity, the issuing authority shall indicate in the European investigation order the reasons why it considers that an undercover investigation may be relevant for purposes of the criminal proceedings. The decision for recognition and enforcement of such an order is taken for each case, respecting the law and the proceedings in the requested State.

Given some specific features of this procedure, in addition to the grounds for non-execution and non-recognition referred to in article 11, the executing authority may refuse to execute such an order, if:

- the execution of the undercover investigation would not be authorized in a similar national case; or
- it has not been possible to reach to an agreement on the necessary arrangements for the covert investigations under the provisions of the European legislative act [i.e. the provisions of par. (4)].

Regarding the concrete procedure for execution, we mention that the undercover investigations are conducted in accordance with the laws and procedures of the Member State in which such a procedure is executed.

In this context, the right to act and to direct and control operations related to the undercover investigation belongs exclusively to the competent authorities of the executing State. Regarding the time duration covert investigation, the detailed conditions and legal status of the agents concerned during covert investigation, they are agreed between the two involved states, in compliance with their national law and procedures.<sup>28</sup>

In the Romanian law the institution of undercover investigator and collaborator is a special method of surveillance expressly provided for in article 138, par. (1) g) of the Criminal Procedure Code.

The approval procedure and the use of undercover investigators or collaborators is expressly provided for in art. 148-150 of the Criminal Procedure Code.

Without proceeding to examining the provisions of the Romanian law, we only mention the authorization for using the undercover investigators is established

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<sup>28</sup> Art. 29 of Directive 2014/41/EU.

by the order of the prosecutor supervising or conducting the criminal investigation, for a maximum period of 60 days if:

- there is a reasonable suspicion on the preparation or commission of an offense against national security, and other serious crimes, such as: drug trafficking, illegal transactions with precursors or other products likely to have psychoactive effects, offenses concerning failure to respect the regime of weapons, ammunition, explosives and nuclear materials, trafficking and exploitation of vulnerable persons etc., or for other crimes for which the law prescribes imprisonment of seven years or more, or there is reasonable suspicion that a person is involved in criminal activities which relate to offenses expressly provided by the law;
- the measure is necessary and proportionate with the restriction of fundamental rights and freedoms, given the particular circumstances, the importance of information or evidence to be obtained or the gravity of the offense;
- the Evidence or locating and identifying the perpetrator, the suspect or defendant could not be obtained otherwise or would involve particular difficulties, which would prejudice the investigation or there is a threat to the safety of persons or property value.

So even under the condition where the execution of this measure is required under a European investigation order, the competent prosecutor will have to examine the specific case and to determine whether they meet the three conditions mentioned above; if it does not meet them, it decide the refuse for recognition and enforcement of such an order, under the provisions of Romanian law and art. 29, par. (3) letter a) of Directive 2014/41/EU.

### **3. Interception of telecommunications**

Another measure that can be applied via a European investigation order is the interception of telecommunications. The European legal instrument also provides for two ways, namely: the interception of communications with technical assistance from another Member State and notification of the Member States which are subject to interception and to which it is not required technical assistance.

### **4. Some critical opinions and *de lege ferenda* proposals**

Adopting the European legislative act partially examined in this study was necessarily imposed amid major changes and transformations occurring in the complex activity of judicial cooperation in criminal matters in the European Union.

This European legal instrument allows the Member States to have a more effective correlation of efforts in preventing and combating crime of all kinds throughout the European Union's territory.

Meanwhile, with the adoption of this legal instrument, the Member States may issue and / or execute a European investigation order by which it is granted mutual effective support in the criminal prosecution.

However, the European legal instrument also has some incomplete provisions that can cause failure in judicial practice starting from 22 May 2017.

Thus, according to the provisions of art. 24, the persons can be heard by videoconference under a European investigation order are named as being suspects or accused persons, witnesses and experts.

We believe it is absolutely necessary to provide the possibility of issuing a European investigation order for the hearing by video conference or other means of audiovisual transmission or hearing by telephone conference of the injured party.

This measure is necessary, as in the judicial practice there was and will be situations where victims of crime are tourists in another Member State, subsequently moving in the States where they live.

These drawbacks can be overcome by supplementing the provisions of art. 24, par. (1) of the European legislative act providing the possibility of hearing the injured person according to the provisions which relate to the examination of the witness or expert.

Another critical opinion regards the formulation of the provisions in art. 24, par. (5), letter a) from the European legal instrument, according to which, if the executing authority considers that the fundamental principles of the executing State are violated during the hearing, it shall immediately take the necessary measures to ensure that the hearing is conducted in accordance with those principles.

From the interpretation of the provisions mentioned above it results that when, at the hearing of a person (regardless of its quality) by videoconference, the judicial authority of the executing State attending the hearing establishes that it infringes a fundamental principle of the law of the executing State, it shall take measures to ensure that the hearing is conducted in accordance with these principles.

However, the legislative act does not indicate what will be the next actions of the judicial body that assists the hearing. In our opinion, it may discontinue, suspend or postpone the hearing, during which the two judicial authorities shall agree, in the sense that the judicial authority of the executing State will present to the judicial authority conducting the hearing the provisions of its law and the need to respect them.

We believe that addressing these drawbacks is necessary to supplement the provisions of art. 24, par. (5), letter a) with a new paragraph to provide the above mentioned elements, namely: the judicial authority of the executing State attending the hearing may, if it finds the violation of a fundamental principle of its national law, terminate, suspend or postpone the hearing, during which it will present its comments to the judicial body of the requesting State performing hearing, and together will solve the problem, for the hearing to take place according to the principles of the executing State's law.

Another critical opinion relates to the provisions of art. 24, par. (7) of the European legislative act which stipulates that each Member State shall take all necessary measures to ensure that when the person is heard on his territory in accordance with the examined provisions and he refuses to testify when obliged to do so or commits perjury, it is applied its laws in the same way they would have been applied as if the hearing took place in a procedure at national level.

The interpretation of these provisions leads to the conclusion that in the case where the perjury offense is committed, he bears the consequences of the law of the executing State.

We appreciate that this provision is incomplete and it is virtually impossible to implement in the judicial practice, as the executing State has to firstly notify about committing this act by the competent judicial authority of the requesting state; with the referral, it is required to send also the existing evidence, which is not based on only statements.

We believe that the purpose of the above, the provisions of art. 24, par. (7) of the European legislative act must be completed with a new paragraph where there are provided the above.

A final critical opinion regards the lack of provisions that aims at establishing the obligation of the judicial authorities in the executing State to provide legal assistance to the person heard, even more so as among these categories it includes the “suspected or accused person”.

We believe that the European legal instrument must be completed with provisions that oblige the judicial authorities of the two countries, as in the proceedings for the execution of a European investigation order, to provide legal assistance to persons concerned.

Moreover, we believe that providing judicial assistance should be mandatory for all measures of investigation carried out under a European Investigation Order in criminal matters.

Also, in order to transpose the European legal instrument into the Romanian law, given its particularities, we believe that the Romanian legislator will have to consider two possibilities.

Thus, the first one is to translate this European legal act into the Romanian law by a special law, as it was the case with the transposition of the European protection order<sup>29</sup>, and the second one is to amend and supplement certain provisions of the Romanian Criminal Procedure Code.

We appreciate that given the conditions at this time the first variant may be more useful, given of course the perspective of changing and completing the

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<sup>29</sup> European protection order regulated by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, published in the Official Journal of the European Union, series L no. 388 of 21 December 2011, has been transposed into Romanian law by Law no. 151/2016 on the European protection order and amending and supplementing certain acts, published in the Official Monitor of Romania, Part I, no. 545 of July 20, 2016. See Ioana-Minodora Rusu, *Issuance and transmission of the European protection order in the European Union. Critical opinions. De lege ferenda proposals*, „Perspectives of Business Law Journal”, vol. 5, issue 1, 2016, pp. 214-219.

framework law, including all forms of international judicial cooperation in criminal matters, including the procedure, which normally it should provide for some derogations from the common law.

## 5. Conclusion

As noted previously, the adoption of the European legal instrument governing distinctly the complex activity of identifying and gathering evidence in a state, other than the one where the criminal proceedings are conducted, represented a necessity, aiming at contributing to the improvement of the complex activity of judicial cooperation in criminal matters within the European Union.

The specialized literature revealed that, initially in order to improve the activity of judicial cooperation in criminal matters it was adopted Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of freezing property or evidence orders, the institution being interpreted as a form of judicial assistance in criminal matters between the Member States of the European Union, both in European and Romanian law.<sup>30</sup>

In this sense, the recent Romanian doctrine highlighted that the provisions of the European legislative act have been transposed into the Romanian law by art. 219-232 of Law no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented.<sup>31</sup>

Although initially this legal instrument seemed to be an important form of judicial assistance in criminal matters between Member States, over time, in the judicial practice it has been shown that it has caused some malfunctions, something that ultimately led to the avoidance of applying its provisions by the Member States or the application of these provisions in a rather small number of cases.<sup>32</sup>

Against this background it has been imposed the adoption of the European legal instrument, by which there were replaced Framework Decision 2008/978/JHA and Council Framework Decision 2003/577/JHA on the freezing of evidence.

The study aimed at examining the measures of investigation that can be arranged through a European investigation warrant in criminal matters, some critical opinions and *de lege ferenda* proposals that we wish to remain in the focus of the European legislator.

Also in the introduction we have stressed upon the need to transpose into the national law the European legal instrument, by choosing the most efficient variant for the Romanian state, a variant that does not cause failure in the enforcement of the Romanian criminal law.

In this regard, we believe that the best way to transpose it is to adopt a special law, with derogation from the common law, thus avoiding some substantial changes and additions to the Code of Criminal Procedure.

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<sup>30</sup> Minodora-Ioana Rusu, *op. cit.*, pp. 197-210.

<sup>31</sup> *Idem*, p. 197.

<sup>32</sup> Ion Rusu, *op. cit.*, pp. 68-70.

As a general conclusion we appreciate the usefulness of this new European legal instrument, which establishes an accelerated procedure for granting support in criminal proceedings required by another Member State, under the European investigation order in criminal matters.

We equally emphasize the need of operating changes in the structure of the European legal instrument and opinions on the possibility of transposing this legislative act within the Romanian law.

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