LEGAL NATURE AND FORM OF THE EUROPEAN INVESTIGATION ORDER

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Abstract

The study exposes, in a structured way, the essential aspects that sum up and define the set of procedural documents composing the European Investigation Order (EIO). In addition to the dynamics of the procedural document requesting the administration of some evidence, the legal nature of the procedural documents issued by the judicial body from the structures of the requested state is also analyzed, in order to highlight the complexity of the principles of legality and finding the truth at the European level.

The content of the study shows the intrinsic and extrinsic elements of an effective judicial instrument in the activity of procedural administration of the evidence necessary to find out the objective truth, in the spirit of art. 5 para. (1) CPP. The contribution of the study in the study and clarification of the researched object is decisive, original, adding an extra step to the act of knowledge of the legal nature and form of the EIO.

Keywords: *international judicial cooperation in criminal matters, EIO, Law no. 302/2004 on international judicial cooperation in criminal matters.*

1. Introduction

In a synthetic way, both the inter-war[1] and the post-war doctrine[2] define the criminal process as a procedural (judicial) activity, having a progressive character, taking place over time, in a coordinated manner, based on the set of procedural acts and procedures ordered/issued by the participants in the criminal process, with the aim of achieving criminal justice[3].

In the view of the classic procedural-penal doctrine, the determining feature of the qualification of the criminal process seems to be represented by relationism and the interdetermination of procedural acts (in the sense of *instrumentum*), escaping analysis precisely the object of the criminal process, in both its components the object of the material, represented by the concrete act committed (the substantial positive aspect) and the legal object, represented by the legal conflict report from substantive law[4].

The legal object of the criminal process generates the criminal procedural legal report, in which the active subject is the Statute, which acts through its judicial bodies (qualified participants), and the passive subject is accused.

In the framework of the criminal procedural legal report, on the one hand, the Statute seeks to prove the existence of the crime, the committee by the accused (suspect or defendant) with the guilt required by the norm of incrimination from the material law (accountability) and the criminal liability of the perpetrator of the crime (punishment of the guilty) and, on the other hand, the accused can maintain a passive position throughout the trial, enjoying the presumption of innocence, in which sense he can avail himself of the right not to make statements[5], or he has the possibility, through the defenses exercised, to prove the opposite of the accusations,

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[1] V. Dongoroz, *Treatise on Law and Criminal Procedure*, 2nd ed. of Ioan Tanoviceanu's Law and Criminal Procedure Course from 1912-1913, revised and supplemented by V. Dongoroz, C. Chiseliță, Șt. Laday, E. Decuseară, vol. V, Curierul Judiciar, Bucharest, 1927, pp. 2, 4, (comments on points 532^1 and 532^3).

[2] Tr. Pop, *Criminal procedural law*, *vol. III - General part*, Cluj, 1946, p. 1.

[3] „Realization of criminal justice" appears as the goal in the qualification given to the criminal process by Prof. T. Pop, in *Criminal procedural law*, p. 1, while Professor Gh. Mateuț no longer mentions the purpose within the definition of the criminal process, in this sense, see Gh. Mateuț, *Treatise on criminal procedure - General part*, vol. II, C.H. Beck Publishing House, Bucharest, 2012, p. 753; from our point of view, the *purpose of the criminal process* should not be seen as an extrinsic element to it, but as a component of it, considering that the execution of the criminal decision represents a phase within the process, and not an autonomous, subsequent and independent „entity" the criminal process.

[4] Regarding the bivalence of the *object of the criminal process*, see V. Dongoroz, *Introductory explanations*, from *Theoretical explanations of the Romanian Criminal Procedure Code - General Part*, vol. I, by V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, R.S.R. Academy Publishing House, Bucharest, 1975, p. 11.

[5] Art. 78 CPP called the *rights of the suspect*, in which it is stipulated that „the suspect has the rights provided by law for the defendant", and art. 83 para. (1) letter a) CPP, in which it is mentioned that „during the criminal trial, he has the right not to give any statement (...)".

namely the non-existence of the act or the lack of elements of objective or subjective typicality of the concrete facts, or to present an alibi from which it would result that he did not commit the criminal act, or highlight the lack of conclusion/value evidence of the evidence administered in his accusation, or to invoke any situation that would lead to the termination of the criminal process[6].

From a procedural point of view, the material object of the criminal process, represented by the crime specifically investigated[7], determines the competence of the judicial bodies, the incidence of certain procedural rules that prescribe the conduct of procedural activities (for example, the obligation to provide legal assistance), the application of special methods of supervision or research that offers a certain regime to the obtained evidence or the issuance of procedural documents for requesting and obtaining evidence located on the territory of a foreign state, but also for the application of preventive or preventive procedural measures.

Taking into account all these aspects, we believe that the criminal process represents the judicial activity, regulated by law, in which the main procedural subjects (the suspect and the injured person) and the parties (the defendant, the civil party and the civilly responsible party), exercise their procedural rights directly and adversarial for the purpose of finding out the truth about the existence or non-existence of a crime, so that no guilty person goes unpunished and no innocent person is prosecuted/punished[8].

2. National law

According to the legal orientation adopted by the Romanian legislator in 2014, although all the procedural rights of the parties are exercised through the competent bodies[9], the State is neither a party nor the main procedural subject in the criminal process. The rationale considered by the legislator was that of including in the category of main procedural subjects or parties only those participants who have patrimonial or non-patrimonial, direct and indirect interests that they can exercise within the criminal process, the State, through its organs, having only the role of managing the exercise of those rights by the main procedural parties or subjects. The reasoning seems to be contradicted by the way in which the parts were defined in the content of art. 32 para. (1) CPP, respectively procedural subjects exercising or against whom a judicial action is exercised, after which, in art. 33 para. (1) CPP, it is stipulated that the injured person and the suspect are part of the scope of the procedural subjects.

If the criterion for the exercise of the judicial action is the determining component of the quality of party, it is obvious that the injured person does not have the right to exercise the criminal action, this right being, in the current regulation of criminal procedure, the exclusive attribute of the State (state monopoly), the public action being exercised through his representatives, respectively through the competent judicial bodies.

It could be argued, as the criminal procedural doctrine also does, that the State exercises the criminal action in the name and procedural interest of the injured person. But this claim does not cover the legal scope of its exercise since the criminal action represents an attribute and right of the state, *sui generis*, which exercises the public action as the direct holder, the exercise being done in its name, and not as a right of to the injured person, justified only by the rationale of restoring/confirming the legal order affected by the commission of the crime.

However, the definition of the criminal process offered by the classical Romanian doctrine, otherwise taken over by the majority of the contemporary doctrine, has the merit of highlighting the legal structure of the criminal process, represented by the procedural and procedural acts, expression of the principles of legality and officiality of the criminal process, through which the dynamism of judicial activity takes place.

Starting from these premises, the general cause of the adoption by the participants in the criminal process of a certain act or certain procedural acts must be analyzed, depending on the cause, they may reach a scientific qualification.

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[6] The cases from art. 16 para. (1) letters a)-d) CPP, which would attract the classification/acquittal, depending on the procedural phase in which one or more of the listed situations was proven, or the cases listed under letters e)-i) of art. 16 para. (1) CPP, which would lead to the termination of the criminal process, according to art. 396 para. (5), (6) CPP.

[7] We have in mind the concrete application, from a procedural point of view, of the personality principles of the criminal law - provided by art. 9 CP, the reality of the criminal law - provided by art. 10 CP, and that of the universality of the criminal law - provided by art. 11 CP, in the case of which the Romanian criminal law applies to offenses committed outside the territory of the country.

[8] In a sense close to the given definition, the criminal procedural doctrine was also expressed, in this sense, see I. Neagu, M. Damaschin, *Criminal Procedure Treaty - General Part,* IVth ed., revised and added, Universul Juridic Publishing House, Bucharest, 2022, pp. 37-38.

[9] The specialized bodies of the State that carry out judicial activity are listed in art. 30 CPP.

Of course, the issuance of procedural documents[10] cannot be without reason, but must be based on the procedural rights and interests (formal or substantial) of the participants[11].

The exercise of the procedural right, as an external form of manifestation of the will, includes the procedural interest of the owner participating in the process (procedural act), most often materializing on a certain support (procedural act) in a form and according to a content standard provided by law. Such a procedural act generates legal consequences, dynamizes and procedurally guides the case under judicial investigation towards a concrete finality, the process and incident procedures thus gaining objectivity, coherence, providing a level and a standard of predictability, necessary for the participants in the criminal process.

From a positivist perspective, in the criminal process, the procedural interests of the participants are neither identical nor do they pursue the same procedural finality. Most of the time they are placed in opposition, they are antagonistic, a fact for which the legislator recognized and legislated adversariality as a natural procedural conduct both in the criminal investigation phase and in the trial phase.

3. European legislation

The freedom of movement of the citizens of the EU and the movement of goods and capital in the Union space, corresponds to the guarantee of security and the protection of rights at its level. The guarantees provided to citizens and legal entities represent the obligations and contribution of the member states. „Security and justice" can only be ensured through an effective, flexible and fast collaboration of the judicial bodies belonging to the member states. The pillar of justice generates a single European judicial space, within which judicial cooperation in order to bring criminal responsibility is a common goal of the member states.

In order to achieve this common goal, the states, through the European Institutions, must build from a legal point of view levers, color of legal communication, so that the legal force (obligatory and enforceable nature) of the judicial acts issued by the competent authorities of any member state EU to be recognized and to produce their effects on the territory of any of the member states. In this sense, by art. 87 of the Consolidated Version of TEU and TFEU (2010/C83/01), a cooperation was established involving all the competent judicial authorities within the member states whose main objective is the collection, storage, processing and analysis information in the judicial field, as well as the exchange of information between the authorities of the member states, the use of common investigative techniques regarding the detection and documentation/investigation of serious forms of organized crime.

The realization of this partnership, whose main purpose is European judicial cooperation in a common space of the member states, is facilitated by: common European values, among which finding the truth and carrying out criminal justice occupy a central role; the existence of well-organized judicial institutions, which have well-trained officials; compliance with the territorial competence criteria of the judicial bodies within the member states, so that the principle of state independence is not violated; the adoption and application of a single normative framework at the European level, through which all judicial procedures are regulated.

The last of the functional facilities represents an area of legal construction, to which all the responsible representatives of the member states must contribute, the aim being the adoption of a unique and efficient regulatory framework, with very close standards of clarity and predictability, in order to ensure the bodies judiciary within the partner states, the quality of procedural documents.

Considering the European legislation mechanisms, the Framework Decisions and, later, the European Directives are the normative acts able to ensure the unitary normative framework, all the more so since, at the

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[10] By „procedural act", meaning the manifestation of will with criminal judicial value, expressed by the participants in the criminal process, listed in art. 29 CPP, in order to defend certain procedural rights or interests.

[11] From the perspective of legal effects, the objectification of the procedural interest of the State, although it is not defined in the rules of criminal procedure, is provided by art. 314 para. (1) letter b) CPP, representing a reason for abandoning the criminal prosecution (non-prosecution), when there is no public interest in continuing the criminal prosecution. The state's interest in applying or not applying a penalty (substantial interest) is regulated in substantive law, meaning that, for the first time in Romanian positive law, in art. 80 CP, the conditions for waiving the application of the penalty are described. Although the expression is close (paronymous appearance), however, in order to eliminate confusion, it must be emphasized that the public procedural interest refers to the costs of the procedures and the duration of the procedures, which are far too high in relation to the lack of importance and social damage generated by the crime committed, in time that the state's interest in punishing the perpetrator is a substantial one and refers to the inappropriateness of the punishment given the small legal limits of punishment, the reduced damage to the legal object damaged and the person of the perpetrator and the conduct before and after the commission of the act from which it can be deduced that, in the future, it his conduct can be corrected without the application of a criminal penalty.

level of the EU, the trend is towards the adoption of unique criminal procedures that will it is part of the structure of a future European Criminal Procedure Code.

4. Definition, principles and structure of the EIO. Obstacles and new visions

One of the European judicial instruments that has gained its effectiveness is the European Investigation Order[12] (EIO), initiated and adopted at the European level by the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Republic of Bulgaria, the Republic of Estonia, the Republic of Austria and the Republic of Slovenia.

Unfortunately, although the EIO represents a judicial instrument that Romania needed so much, our State, through its distinguished representatives in the European Parliament, did not initiate and did not agree at the European level to the draft Directive 2014/41/EU. All with regret, we have to admit that, in the case of Romania, the adoption/implementation of the Directive in the domestic legislation[13] was done late and only after the member states requested this. At the EU level, EIO has experienced an upward evolution, based on the experiences gained from the judicial collaborations carried out on the basis of previous European Directives.

The EIO is a form of judicial cooperation in criminal matters, regarding the manner of issuing and executing a judicial decision, in which the issuing and executing judicial bodies belong to different states within the EU, in order to obtain or transfer of evidence between member states.

In our opinion, the definition of the EIO, provided by art. 268^1 para. (1) letter a) from Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters[14], is criticizable, because the phrase „specific investigative measures" that are desired „to be carried out", in addition to the fact that it does not know a concrete definition and delimitation in the legislation and doctrine Romanian criminal procedure, also induces some confusion, given the fact that, in our country, the term „procedural measures" refers to restrictions on the exercise of certain rights (for example, preventive measures or protective measures). We believe that, in order to improve the legislation, but also to clarify the normative content given by the objectivity of the actual activity that wants to be qualified/defined in the law, the phrase „investigative measures" should be replaced with „administration of evidence in order to obtain evidence requested" or „the transfer of existing evidence in the possession of the competent authority to the executing state (requested state)".

The EIO is based on the *principle of mutual recognition of judicial decisions*, Directive 2014/41/EU having its cause in the provisions of art. 82 para. (1) TFEU.

In the European view, the judicial decision from the composition of the EIO has a complex, bivalent *structure*, which involves synalagmatic judicial obligations[15] belonging to the will and reason of the judicial bodies from different states, its content includes both the procedural act - as a manifestation of will expressed by the body judiciary within the issuing state for the purpose of revitalizing the criminal process - as well as the procedural act - as a form of materialization (objectification) and delimitation (regularization) of the expressed judicial will of the same judicial body of the issuing state.

The reciprocal nature of the judicial obligation within the EIO belongs to the judicial bodies of the executing state (requested state), consisting in issuing procedural documents in order to recognize the EIO and then issuing procedural documents in order to administer means of evidence within the judicial investigative activity, necessary and incidental to obtaining and transferring the evidence that is the subject of the EIO.

For the first time at the European level, the goal of mutual recognition of judicial decisions was achieved through the order of non-disposal of goods or evidence, which appears characterized in the Council's Framework Decision 2003/577/JHA[16], consisting in preventing destroying, changing, moving, transferring/ moving or disposing of the evidence.

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[12] At the EU level, the EIO in criminal matters was adopted by Directive no. 2014/41/EU of 04/03/2014 of the European Parliament and of the Council, published in the Official Journal of the EU.

[13] Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993/14.12.2017.

[14] *Ibidem*.

[15] By „synalagmatic judicial obligations" we mean those judicial duties that can be found in the content of procedural and procedural documents drawn up by judicial bodies, both in the case of those of the issuing state and of the judicial bodies of the executing state.

[16] Council Framework Decision 2003/577/JHA/22.07.2003 on the execution in the European Union of orders to freeze assets or evidence (OJ L 196, 02.08.2003, p. 45).

Of course, the European legislator had in mind the prevention of the alteration of evidence, constituting the factual elements that provide, through the use of the deductive method, data and information necessary to establish the existence or non-existence of the objective (factual) elements that are part of the legal content of the investigated crime.

The deficiency of the Framework Decision 2003/577/JHA consisted precisely in the limited regulatory limits, its object being limited only to the unavailability of evidence (their unalteredness and preservation) located on the territory of another (requested) member state than the one in which the investigation was conducted effective (issuing/requesting state), based on a special request in this regard.

In judicial practice, the criticisms of the procedure regulated by this Framework Decision referred to the cumbersome procedure, which contained two stages (recognition of the request for preservation of evidence and approval of the transfer request), but also to the fact that the working method did not differ in the form of judicial assistance in criminal matters existing before this Decision.

The fragmentation and bureaucratization of the evidence management activity between the cooperating states affected the quality of the justice act, reducing the chances of finding out the truth completely, in a reasonable time.

Consequently, based on the experience gained, the involved states adopted the Council's Framework Decision 2008/978/JHA on the European mandate to obtain evidence[17], through which a significant contribution was made in achieving and ensuring the principle of speed.

Although the new framework decision made the modalities for requesting and transferring evidence between member states more flexible, this new decision also had a number of shortcomings considering that the object of the request and transfer could only be represented by objects, documents and existing data at the time of the request.

Or, the judicial practice felt this limitation as a serious obstacle to finding the truth, so that the European judicial authorities changed the approach, improving and expanding the judicial powers of the requested states in the sense of assigning the functional powers regarding the exploitation, capitalization and transfer of both the means of sample, as well as the samples obtained.

Finding new strategies for judicial cooperation with a view to the preservation, transfer and utilization of evidence were the object of the Stockholm Program adopted by the European Council on December 10-11, 2009, within which the new approach to the problem of preservation and transfer of evidence between the interested states had to be based on: the flexibility of traditional mutual legal assistance systems; the inclusion in the preservation and transfer procedures of all types of evidence; regulating the deadlines for the execution of the requested measures; limiting the reasons for refusing the transfer of evidence by the requested state.

The novelty brought by this vision consisted in the possibility of carrying out one or more specific investigative measures by the requested state at the request of the requesting issuer, which entailed the carrying out of criminal investigation activities, including the issuing of procedural and procedural documents by it, the evidentiary results following be utilized by the requested state.

In the new vision, the judicial investigation could be carried out by referring to the entire set of evidence existing in the legislation of the requested state, by using all evidentiary procedures, the evidence thus obtained being transferred directly to the requesting judicial body (field of application and administration on a horizontal system), without there is still a need for the recognition of documents and investigative activities by the ministries of justice within the cooperating states. This new vision was the basis for the adoption of Directive 2014/41/EU, which currently represents the general normative framework applicable to cross-border judicial investigations, but without involving the cross-border surveillance mentioned in the Convention implementing the Schengen Agreement[18].

[17] Framework Decision 2008/978/JHA of the Council of 18.12.2008 on the European mandate to obtain evidence for the purpose of obtaining objects, documents and data for their use in criminal proceedings (OJ L 350, 30.12.2008, p. 72).

[18] Convention implementing the Schengen Agreement of 14.06.1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders (OJ L 239, 22.09.2000, p. 19).

Within the framework of the EIO, the issuing judicial authority within the requesting state is the one that decides and requests the investigative level and limits to be used considering that they hold the details of the aspects that constitute the subject of the probation[19].

By the investigative measures that can be requested by the issuing judicial authority, we mean all the means of evidence obtained through the legal modalities of the evidentiary procedures.

However, with regard to the defense/compliance with the principle of legality of procedural activities, it must be emphasized that both the evidence and the evidentiary procedures used by the judicial bodies of the requested state must fall within the evidence and evidentiary procedures regulated by the domestic legislation of the requested state.

Also, regarding the conditions of validity and legality of the procedural acts carried out by the judicial bodies of the requested state, they must be carried out in accordance with all the guarantees and conditions imposed by the legislation of the requested state.

In this sense, the European legislator recommends, in point 10 of the rational substantiation of Directive 2014/41/EU, that, in situations where the requesting judicial body requests the performance of a certain type of investigation that is not regulated by the legislation of the state of which it is a part the requested judicial body, the latter to proceed to obtain the evidence/evidence with the help of evidence and by resorting to evidentiary procedures similar to those requested, but provided for in the legislation of the requested state.

As the importance or necessity of the evidence does not justify the violation of the principle of legality, neither the procedural documents issued in order to obtain or administer the evidence can be ordered or executed in violation of the conditions and procedural guarantees regulated by the requested state.

For example, art. 101 CPP, which regulates the substance and limits of the principle of loyalty in the evidence management activity, provides for the prohibition of resorting to violence, threats or other means or methods of coercion and also prohibits promises or exhortations exercised in order to obtain evidence. At the same time, it is forbidden to use listening methods or techniques that affect the person's ability to remember and relate, consciously and voluntarily, the facts that represent the object of the evidence, without producing any kind of legal effect the possible consent of the person questioned in order to appeal to such techniques or methods. Also, art. 102 CPP, provides that „evidence obtained illegally cannot be used in the criminal process", and „nullity of the act by which the taking of evidence was ordered or authorized, as well as nullity of the procedural act by which the taking of the evidence was carried out determines its exclusion". Such legal provisions for the imposition of procedural sanctions in relation to evidence obtained illegally or on the basis of acts issued or applied in violation of special legal provisions exist in most member states' legislation.

Thus, in the *French Criminal Procedure Code* there are textual nullities, particularly concerning searches and telephone interceptions between the accused and his lawyer (art. 59 and art. 100.7 final paragraphs), there are also substantial nullities regarding „disregarding a substantial formality provided for by a provision of the Criminal Procedure Code or any other provision of criminal procedure" (art. 171 Criminal Procedure Code)[20].

In the *German Criminal Procedure Code* (*Straffprozessordnung*), at art. 136 para. 3, it is expressly forbidden to use consecutive statements, obtained during an interrogation conducted according to incorrect methods, such as: subjecting the accused to excessive fatigue and hearing him in a state of physical or mental exhaustion, using promises or exhortations in exchange for obtaining statements or for the suspect to waive certain procedural rights or guarantees. In German Criminal procedural law, the „prohibition of evidence" (*Beweisverbote*) is divided into two categories: obstacles generated by the methods of obtaining evidence, and includes evidence obtained by threat, trickery, manipulation/compromise of the procedural interests of the subject of the trial, and derivative obstacles from the illegal way of administration/presentation of evidence in court (*Beweisverwertungsverbot*), the matter being left to jurisprudence [21], the active role of the judge being decisive.

[19] By *object of probation* we mean those elements of fact that serve to prove the objective activity (the material element within the objective side of the deed) of which a person is accused and to establish the link between the action or inaction taken and their author.

[20] See S. Guinchard, J. Buisson, *Procédure pénale,* Éditions Litec, Paris, 2000, p. 758.

[21] See H.-H. Kuhne, *Strafprozessrecht, Eine systematische Darstellung des deutschen und europaischen Straf-verfahrensrechts,* C.F. Muller Verlag, Heidelberg, 2003, pp. 396 et seq.

The *Italian Criminal Procedure Code* regulates the unusability of evidence[22], meaning that the invalidity of evidence as a result of non-compliance with the legal framework is a general rule. Italian doctrine[23] created the concept of invalidity, which includes, on the one hand, relative or absolute nullities and, on the other hand, unusability („l'inutilizzabilità della prova"), a notion specific to evidence (art. 191 para. 1) and whose regime it is the same as in the case of absolute nullities. The unusability can be lifted *ex officio* by the judge, even for the first time, in cassation and without the need to cause any damage to any of the parties. According to the art. 191 Italian Criminal Procedure Code, „evidence obtained in violation of the prohibitions established by law cannot be used", and according to art. 526, „the judge cannot use evidence other than those that were obtained, legitimately, following the debates".

In the *Spanish Criminal Procedure Code*, the institution of the exclusion of evidence is regulated in a similar way to the European normative framework (given that the Anglo-Saxon legal system is the primary source of inspiration in both European legislations, the similarities are not surprising in this respect). In advance, we note that fundamental rights enjoy protection at the constitutional level and in the Spanish legal system, as expected. Thus, according to art. 24 para. (2) of the Spanish Constitution[24], all persons have the right, among other things, to the use of evidence appropriate to their defense. Thus, in art. 11 para. (1) from Organic Law no. 6/1985 of the judicial organization[25] in Spain provides that evidence obtained directly or indirectly from the violation of fundamental rights or freedoms has no effect. Therefore, in this definition, the notions of legality and fairness in the administration of evidence seem to merge. The phrase "obtained evidence" has, according to the Spanish Constitutional Court, the meaning of evidence obtained by violating any fundamental right, and the activity of obtaining refers either to the search and investigation of the source of evidence (interception of communications, searches and seizures), or to the task of to obtain results from an evidentiary source inadmissible in the Spanish legal system, as it violates fundamental rights (for example, obtaining statements through hypnosis, torture) [26].

In the *Belgian judicial system*[27], expressed by the jurisprudential order of the Court of Cassation, the absolute prohibition of the use, directly or indirectly, of evidence obtained irregularly has been accredited. Through a ruling of principle issued by this court on October 14, 2003, in the Antigone case, it was established that such evidence cannot be taken into account by the judge, either directly or indirectly, in the following situations: when compliance with certain conditions formal is provided under the penalty of nullity; when the irregularity committed affected the reliability of the evidence; when the use of evidence contravenes the right to a fair trial. As such, to the extent that none of these assumptions is incidental, such an irregularity can serve as a solution to the conviction.

The *Finnish Criminal Procedure Code* prohibits the use of evidence obtained through torture and the evidence obtained in violation of the right to a fair trial. Also, there are certain restrictive rules regarding the administration of verbal statements. It is interesting to note that until 2016 the domestic law did not contain any provisions regarding the administration standards.

According to the *Dutch Criminal Procedure Code*, illegally obtained evidence is subject to the evaluation of the court, which decides on its exclusion, based on a plurality of criteria. These criteria include the interest protected by the violated norm, the seriousness of the violation and the harm caused by that violation. In general, evidence obtained illegally can be excluded when, in the process of collecting it, the principles of criminal procedure were seriously violated. The Dutch system is a complex one, and the admissibility of evidence seems to be decided on a case-by-case basis, taking into account a number of criteria prescribed by the Criminal Procedure Code, but also the method of investigation used. Violation of a rule involves the failure to observe a written or unwritten rule of evidence-gathering, no distinction being made as to the content of those rules.

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[22] See P. Corso, rapport italien, in *La preuve en procédure pénale comparée*, p. 233; D. Siracusano, A. Galati, G. Tranchina și E. Zappala, *Diritto processuale penale,* volume primo, terza edizione, Giuffre editore, Milano, 2001, pp. 333-335.

[23] See P. Tonini, *Lineamenti di diritto processuale penale, Seconda edizione,* Giuffre editore, Milano, 2004, p. 106; D. Siracusano, A. Galati, G. Tranchina și E. Zappala, *op. cit.,* pp. 334-335.

[24] *La Constitucion Espanola de 1978*, available online at *http://boe.es/*.

[25] *Ley Organica 6/1985, de 1 julio, del Poder Judicial,* updated until July 25, 2019, available online *at http://boe.es/*.

[26] Decision 64/86 of May 21, *Materiales docentes en Ingles – The Spanish criminal Process,* available online at *https://rua.ua.es/dspace/bitstream/10045/34555/2Materiales*, p. 79.

[27] See J. Pradel, *Limitation des effets de la nullité d'un acte de procédure la seule personne «concernée», La semaine juridique*. Édition Generale nr. 16. Cour de cassation crim., 14.04.2002, nr. 11-84.694, Juris Data nr. 2012-002124, Juris Classeur périodique (semaine juridique), G 2012, art. 242, obs. J.-Y. Maréchal: JCPG 2012, doctr. 341, nr. 27, obs. A. Maro. pp. 333-334.

According to the jurisprudence of the Dutch Supreme Court[28], a direct link must be established between the infringement and the evidence-gathering activity, which requires the infringement to be the sole result of the illegal evidence-gathering actions[29].

Regarding *the types of procedures in which the EIO can be used*, as well as regarding its content, the appropriateness and proportionality of the use of this judicial instrument, the European legislator has regulated a set of conditions for the judicial bodies in the state applicant, as follows:

- a) the existence of ongoing criminal cases/judicial investigation, especially in the criminal investigation or trial phase;
- b) in the framework of investigations of an administrative nature regarding violations of the legal order, but which can be completed with the notification of some crimes;
- c) in the framework of judicial investigations that can be completed with the application of criminal sanctions.

Regarding *the content and form of the EIO*, it is characterized by certain elements in its composition, as follows:

- the data necessary to determine the issuing judicial authority and the validating one belonging to the executing state.

These data prove the legitimacy component of the EIO, according to which, at least in the case of judicial validation bodies, determine the aspects of material and territorial competence necessary to be respected within the complementary procedure[30], generated at the time of receiving the request for validation of the EIO.

- *the object and reasons of the EIO*, which indicates, in concrete terms, the nature of the case in the course of which it is necessary to carry out the investigations, respectively the administration of the evidence, specifying the object of the probation (the elements of fact that serve to prove the objective elements that make up the objective side - material of the investigated offense or necessary to clarify the factual circumstances on which the execution of criminal justice depends) or the transfer of evidence.

The reasons for the EIO must contain a detail of the reasons for which the investigation order procedure was used. In this sense, the data or indications on the basis of which the conclusion was reached that certain evidence can be obtained or procured or transferred from the territory of the executing state must be exposed, for example, it is desired to hear the injured person or some witnesses about whom knows that they are effectively located or live permanently on the territory of the executing state, or the sending of documents in the custody or possession of public or private institutions from the territory of the requested state is requested, or the transfer/communication of biometric data or the taking of biological samples of two persons (alive or even deceased) located on the territory of the requested state.

- *the necessary information available regarding the person or persons in question*, on which occasion the identification attributes of natural or legal persons who have the capacity of main passive procedural participants, such as the parties (main procedural subjects in the judicial case) must be indicated), the data known by the judicial bodies of the issuing state regarding their domicile, residence or headquarters, the identification data of the secondary procedural subjects involved in the judicial proceedings, such as witness data, as well as the factual aspects that wish to be clarified by him;
- *a description of the criminal act that is the subject of the investigation or the proceedings, as well as the applicable criminal law provisions of the issuing state*, meaning that a chronological exposition of the facts that are the subject of the investigation carried out on the territory of the requesting state, of the persons involved, of their procedural interests, of the legal framework attributed to the fact under investigation in relation to the own legal norms of the issuing state, with the indication of the procedural phase and the procedural stage of the investigation necessary to be carried out in order to find out the truth and bring the person/s found to criminal responsibility guilty, of the procedural and procedural documents issued in the case until that moment and other necessary and useful aspects to determine the validation of the EIO by the competent judicial body within the executing state, but also to edify, after the validation, the positioning and guiding the investigations carried out

[28] For an analysis on this topic, see M.J. Borgers, L. Stevens, *The use of illegally gathered evidence in the Duch criminl trial,* in Electronic Journal of Comparative Law, vol. 14.3, 2010, available online at *https://www.ejcl.org/143/art143-4.pdf*.

[29] HR 24 February 2004, Dutch Law Reports 2004, 226, *apud* M.J. Borgers, L. Stevens, *loc. cit.,* p. 7.

[30] For a pertinent doctrinal analysis of the content and differentiation of the compelent procedures within which we find the complementary competence of the judicial bodies, see V. Rămureanu, *Criminal competence of the judicial bodies*, Scientific and Pedagogical Publishing House, Bucharest, 1980, pp. 180-181.

by the judicial bodies within the executing state, investigative activities that are subject to the EIO.

- *a description of the investigative measure or measures requested and of the evidence to be obtained*

meaning that the nature of the evidence will be indicated and the determination of the means of evidence necessary to be administered in order to obtain it, the object of the evidence will be established, by describing the factual aspects what must be clarified/found out/known through the evidence. On this occasion, the procedural guarantees can also be indicated to guarantee the legality and loyalty of the administration of the evidence provided for by the criminal procedural legislation of the issuing state (for example, the hearing of the main procedural subject only in the presence of the lawyer or of the vulnerable witness in the presence of the psychologist, lawyer or of the representative of the guardianship authority etc.).

Regarding the appropriateness and proportionality of resorting to issuing and requesting the administration of evidence or the transfer of evidence through the EIO, *criteria* listed explicitly in art. 6 of the content of Directive 2014/41/EU, reasons must be presented regarding: the scope and sanctions provided by law for the deed that is the subject of the judicial investigation; the damaging consequences of the actions that make up the objective side of the investigated crime; the uniqueness of the way of solving the evidentiary problem by means of the EIO; the need to clarify the case as soon as possible, in order to remove the wrong accusation of a person or to find out the truth in order to bring the author to criminal responsibility; the fact that the investigative measure or measures indicated in the EIO could be ordered under the same conditions in a similar internal case.

All these criteria, as a whole, will be analyzed by the validation authority within the executing state, which, in order to clarify the aspects of grounds, proportionality and timeliness of the expressed request, may ask for clarifications and additional details from the issuing state, following that the validation or rejection of the requests within the EIO or even the EIO in its entirety to be decided after the critical analysis of the communicated data. Of course, in situations where the issuing state finds that the issued EIO is not timely or proportionate compared to the alternative situations of obtaining evidence or does not concern any of the situations in which it can be issued, it can withdraw the request regarding the EIO, notifying the revocation of the executing state, according to art. 6 para. (3) from Directive 2014/41/EU.

- the conditions of formal validity of the EIO represent materializations of the embedded procedural act and of the drawn up procedural act. In this sense, the procedural document must be clear, determined and objective, expressed in writing, in compliance with the conditions of material and functional competence of the judicial body in relation to the criminal procedural legislation in force in the issuing state at the time of issuing the EIO.

The procedural act, represented by the document of the EIO, must contain the elements that certify its authenticity, in order to guarantee the principle of procedural formality. It must be sent to the executing state by any means that allow a written record to ensure the receiving state the possibility of verifying the authenticity of the communicated procedural document[31]. The verification of the fulfillment of the formal conditions of the EIO is carried out by the materially competent judicial bodies on the occasion of its validation or denial.

In this sense, in the case of Romania, when we are the executing state, the verification and validation of the EIO is carried out by the Prosecutor's Office unit, in the case of files in the criminal investigation phase, and by the court, in the case of files in the trial phase.

In the case of both institutions indicated above, given the existence of the differentiation of hierarchical material and functional powers, we believe that, if the judicial investigation carried out by the requesting state is in the criminal prosecution phase, the authorization and validation of the EIO will be carried out by the competent Prosecutor's Office material in carrying out criminal investigations in relation to the exposed crime that is the object of the criminal investigation from the content of the EIO (for example, in the case of the crime of murder, the authorization must be given by the Public Prosecutor's Office attached to the Court), and if the authorization or validation of the EIO refers in a case approved in the trial phase, they can be ordered by the competent court to try the crime that is the subject of the EIO.

The need to respect material, territorial and functional competences is the reason why, in art. 2686 para. 2) from Law no. 236/2017, provides for the obligation to decline jurisdiction in cases where the judicial authority notified by the requesting state is not competent in the execution of judicial activities that are the subject of the

[31] In this sense, in art. 7 para. (4) of Directive 2014/41/EU it is stipulated that „the issuing authority can transmit the EIO through the telecommunications system of the European Judicial Network established by the Council's Joint Action 98/428/JHA." Reference is made to joint action 98/428/JHA/29.06.1998, adopted by the Council on the basis of art. K.3 TEU, creating a European Judicial Network (OJ L 191, 07.07.1998, p. 4).

received EIO, meaning that it will send the order to the competent authority/judicial body, after which will inform the issuing judicial authority, following that the latter will keep in touch not the judicial authority vested on the basis of the decline of the institutional competence on the territory of the executing state.

It should also be remembered that, in accordance with the provisions of art. 2686 para. (1), sentence II of Law no. 236/2017, if the EIO, „issued during the criminal investigation phase, has as its object the taking of measures which, according to Romanian law, are within the competence of the judge of rights and freedoms, the competent prosecutor will notify the judge of rights and liberties from the appropriate court in the degree in whose territorial constituency the prosecutor's office is based, in order to recognize the EIO". For example, if the evidence sought to be obtained can only be procured by the judicial bodies of the executing state following a search of the home of the legal person or the headquarters of the legal person, the case prosecutor will request the authorization of the activity and the issuance of the search warrant from the competent judge of rights and liberties in relation to the accusation given by the crime investigated by the issuing (requesting) state.

In order to eliminate bureaucratic aspects, as well as to prevent blockages like those that appeared in the execution of the previous Framework Decisions that regulated the preservation and transfer of evidence, in art. 9 point 1 of Directive 2014/41/EU it was provided that „the executing authority recognizes the EIO that meets the conditions of substance and form without the need for any other formality, and ensures its execution in the same way and with the same means as in the situation where the investigation measure in question would has been ordered by an authority of the executing state, unless this authority decides to invoke one of the reasons for non-recognition or non-execution or one of the reasons for postponement provided for in this directive".

5. Conclusions

Summarizing the above, the EIO respects a complex judicial instrument, which bilaterally combines procedural acts of judicial bodies from different countries within the EU, in order to collect, preserve and administer evidence in criminal trials, eliminating any syncope.

The EIO is part of the European system of judicial cooperation and aims to create, develop and strengthen mechanisms for communication and management of the judicial act to ensure its speedy execution.

All the judicial cooperation mechanisms applicable at the level of the EIO will form the basis of the construction of the future unique criminal procedural institutions having a direct applicability throughout the Union space, a fact that would ensure a better and unitary implementation of the act of justice, as well as the implementation of sets of procedural guarantees.

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