European investigation order in criminal matters in the European Union. General considerations. Some critical opinions

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Abstract

Throughout this paper we have conducted a general examination of the principles under which it is regulated the newest form of European judicial assistance in criminal matters, namely, the European Investigation Order in criminal matters. The examination is focused in particular on the necessity and importance of establishing this new form of legal assistance in criminal matters between the Member States, given that it will override the order of freezing property or evidence in the European Union. When examining the general principles of this form of assistance we have noticed some imperfections of the European law, therefore we have formulated some critical opinions, supplemented by proposals of de lege ferenda. At the same time, given that up to May 22, 2017 the European legal instrument will have to be transposed into the Romanian law, we have formulated some proposals of de lege ferenda aiming at the improvement of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, as amended and supplemented. The innovations of the work regard the examination of the general principles set out in the Preamble of the European legal instrument, the importance and the necessity for adopting this regulation, as well as formulating critical opinions supplemented by appropriate proposals de lege ferenda. The current study follows other works in the international and European judicial cooperation in criminal matters domain, published in some national and foreign publishing houses and in the volumes of international or national scientific conferences. The work can be useful to academics, practitioners in the field and to the Romanian legislator from the perspective of transposing the provisions into the national law of the European legal instrument.

Keywords: *Judicial cooperation in criminal matters; offense; judicial assistance, issuing authority.*

JEL Classification*:* K14; K33

1. Introduction

Insisting on the need to intensify the international judicial cooperation in criminal matters and the improvement of the legal framework, the recent doctrine in the field has highlighted that the ultimate goal of this initiative is that of achieving a reduction to acceptable limits of crime and hence ensuring more safety of its citizens.[2]

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[2] Al. Boroi, I. 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.

At the same time, it was insisted on the fact that under the new circumstances, the international judicial cooperation in criminal matters was imposed by necessity, being the only way to prevent and combat more effectively the transnational crime and also of catching the offender and assuming criminal liability of persons committing various offenses and hiding in other states.[3]

In order to achieve this goal it was necessary to improve the legislative framework aiming at incriminating some new acts committed in different member states.

The incrimination harmonization of danger acts and the discovery procedures, investigation and trial in the Member States, will allow the achievement of the best conditions of the civic safety climate.

The most important aspect in preventing and fighting crime activity is represented by the intensification and improvement of specific activities of identification, catching and prosecuting the perpetrators of criminal acts. Besides this very important aspect, we should also mention the one regarding simplifying the turning in activities of persons who have committed criminal acts in other Member States.[4]

Sensing the imminent danger, the European Union has established for one of the objectives of major importance in the evolution of the Union to maintain and develop an area of freedom, security and justice throughout its territory.

The identification and establishment of this objective was imposed by necessity amid major challenges generally determined by the structure and organization of institutions with concrete attributions in this very complex but at the same time sensitive and the general evolution of crime.

The concept of an area of freedom, security and justice turned by the European Union over time and with the new challenges into a fundamental goal, may remain just a dream considering that to its performance not all Member States contribute, by enhancing the complex activity of judicial cooperation in criminal matters.

Amid the increases in crime and especially the organized one, focusing on terrorism, human trafficking, drug trafficking, the forms of international judicial cooperation in criminal matters between the Member States have diversified and improved, appearing new ones with a particular efficiency in the recent years.

Meanwhile, in order to improve the institution of judicial cooperation in criminal matters at the level of the Member States, the European Union has adopted numerous laws, and it requires for the Member States to ensure the enforcement of their provisions.

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[3] Rusu, M.-I. & Balan-Rusu, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*, LAP LAMBERT Academic Publishing, Deutschland/Germany, Danubius University, 2013, p. 15.

[4] Al. Boroi, I. Rusu, M.-I. Balan-Rusu, *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation*, LAP LAMBERT Academic Publishing, Deutschland/Germany, Danubius University, 2012, p. 18.

Among the new forms of cooperation in the recent years there have emerged *the European arrest warrant and the recognition and enforcement of judgments of deprivation and non-deprivation of liberty adopted in another Member State and the transfer of the sentenced persons for the enforcement of the penalty of deprivation of liberty in a State other than the one where the sentence was passed.*

Also, since the end of last century *the judicial assistance in criminal matters* within the EU space gained new dimensions, in the sense that this form of judicial cooperation in criminal matters has become a priority by including in the complex activity of assistance new ways (ways of achievement), such as: *hearing by videoconference, assistance in matters of taxes, cross-border surveillance, sharing information on bank accounts or transactions, recognition and enforcement of orders of freezing property and evidence, recognition and enforcement of financial penalties, etc*.

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

This new legislative act, Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European criminal investigation[5] is meant to complement other two acts previously issued, respectively the Framework Decision 2003/577/JHA Council of 22 July 2003 on the execution in the European Union of the freezing orders of property or evidence[6] and the Council framework Decision 2008/978/JHA of 18 December 2008 on the European evidence for the purpose of obtaining objects, documents and data for their use in the criminal matters proceedings.[7]

Regarding the way in which Romania has agreed to actively participate in the general effort of the European states to achieve the established objective, even if at that time it was not a member of the European Union it has adopted the Law no. 302/2004 on international judicial cooperation in criminal matters, republished, as amended and supplemented.[8]

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[5] Published in the Official Journal of the European Union, no. L 130/1 of 05.01.2014.

[6] Published in the Official Journal no. L 196 of 08.02.2003.

[7] Published in the Official Journal no. L 350 of 30.12.2008.

[8] 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; the last modification intervened by amending and supplementing 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.

As argued in the recent doctrine, "the successive additions and amendments of the special law were determined by the developments in the legal system of the European Union, something which has resulted in the adoption of new laws regulating the complex activity of international judicial cooperation in criminal matters between Member States".[9]

Therefore, the successive amendments of the Romanian special law, were determined by the developments in the legal system of the European judicial cooperation in criminal matters, an evolution dictated virtually by the new manifestation forms of the organized crime and the need to prevent and fight them more effectively through legislative measures in an organized institutional framework.

Since the second half of the last year, the European Union is facing a new challenge due to entering in its territory of a large number of people leaving the armed conflict area from the Arab world.

This new challenge was not anticipated on time by the European specialized institutions which was about to provoke an unprecedented crisis, given, on the one hand, the different views of the Member States regarding the number of immigrants that can be received on the territory of each Member State and on the other hand other economic, social effects and the safety of the European citizens.

In this context, we consider that in the future, the most important problem will not be focused only around the number of persons who can be accepted by a Member State or another, but rather the possibility of entering on the EU territory of some elements belonging to active global terrorist groups whose actions are hardly known or prevented and countered.

On the other hand, this situation will require a new approach in the judicial cooperation in criminal matters domain, which would proceed from the need to intensify and improve the system of judicial cooperation in criminal matters between the EU and the states on whose territory these categories of people belong to.

Lastly, the European Union should consider the possibility of enhancing the international judicial cooperation in criminal matters within its external borders, with other countries in order to identify and dismantling the organized crime groups that ensure the movement of these large groups of people within the Union Europe.

No doubt that very soon it will require a new legislative regulation of immigration and asylum, amended by the establishment of European institutions designed to successfully face this new challenge.

In addition to a coherent legislative regulation at EU level, the Member States will need to intensify their efforts for legislative regulation, for creating new institutions or to improve the existing ones, which would be able to meet the current and especially future needs.

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[9] Minodora-Ioana Rusu, *Asistența judiciară în materie penală la nivel European/Judicial assistance in criminal matters at European level*, Ed. Universul Juridic, Bucharest, 2015, p. 34.

In this context, the conducted examination is an absolute novelty in the Romanian doctrine, aiming at critical analyzing the principles underlying this new form of judicial assistance in criminal matters between the Member States of the European Union, with concrete proposals *de lege ferenda* for the Romanian and European legislator.

2. The importance and necessity of adopting the European Investigation Order in criminal matters

So, amid the need to ensure an area of freedom, security and justice in the Member States, the European Union has adopted numerous legislative acts meant to contribute directly to the improvement of the activity of judicial cooperation in criminal matters between the Member States or between them and third countries.

Regarding the judicial assistance in criminal matters in the Member States, focusing on the need to obtain and freezing the evidence in criminal proceedings, we highlight just two of these European legal instruments, namely Framework Decision 2003/577/JHA which regulated mutual recognition of orders by judicial bodies of a Member State in order to prevent the destruction, transformation, moving, transfer or disposal of evidence and the Council framework Decision 2008/978/JHA on the European evidence, which aimed the application of the principle of mutual recognition in order to obtain objects, documents and data for their use in criminal matters proceedings.

Once the amendments were applied to the provisions of Law no. 302/2004 by Law no. 300/2013, the Romanian state only transposed into its national law the Framework Decision 2003/577/JHA of the Council of 22 July 2003 and not the Framework Decision 2008/978/JHA of the Council of 18 December 2008.

After the adoption of the two acts, the doctrine and practice have revealed a series of malfunctions concerning their application and hence their effectiveness.

Thus, if we refer strictly to the Framework Decision 2003/577/JHA, we note that this is restricted to the freezing phase, since the freezing order should be accompanied by a separate request for the transfer of the evidence to the issuing state of the order.

Such concrete procedure is divided into two phases, something which brings a number of adverse impacts on the efficiency of this European legal instrument, especially in terms of efficiency.

On the other hand, it is taken into account also that this procedure overlaps with other procedures in matters of judicial assistance in criminal matters.

These arguments have led to a rare usage of this European legal instrument, which lead to the conclusion of its improvement or even the adoption of another legislative act which aimed at improving the cooperation in this domain.

The Framework Decision 2008/978/JHA of the Council adopted for applying the principle of mutual recognition in order to obtain evidences that can materialize in objects, documents and data for their use in criminal matters proceedings, is also limited, as it is applicable only in the cases of the existing

evidence in the requested State. Due to these shortcomings, regarding the limited scope, the judicial authorities of the Member States had to use mutual judicial assistance procedures, which do not fall into the scope of the European evidence warrant.

Incidentally, within the Stockholm Programme adopted by the European Council on 10-11 December 2009, it stressed the need to establish an appropriate system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition; in this context it was called for an appropriate system designed to replace all existing instruments in this area, including the Framework Decision 2008/978/JHA of the Council with a new European legal instrument including as much as possible all types of evidence and containing deadlines for enforcement, limiting the grounds for refusing the execution of such an order.

Against this background there was the need for a new legal instrument that would eliminate these malfunctions and would lead to more efficient activity of concrete identification and preservation of evidence required in the criminal trials in specific phases of deployment.

Under these circumstances, the European Investigation Order in criminal matters governed by Directive 2014/41/EU of the European Parliament and the Council will be issued for the purpose of having one or several investigative measures specific to the executing State, for identification and preservation of evidence and their use in criminal proceedings.

3. General rules that need to be respected on the issuing and execution of the order by the issuing and executing state

The examination of the provisions of the European legislative act by which it is regulated this institution highlights the need to respect the general rules by the issuing state of the European Investigation Order.

Thus, a first aspect concerns the need to implement the investigation measures of the European Investigation Order for gathering evidence, but with some restrictions. A first restriction aims at joint investigation teams that will execute further specific activities for gathering evidence under the provisions governing this institution, without interfering with the European Investigation Order. Also, these provisions will not apply to cross-border supervision governed by the Convention implementing the Schengen Agreement.[10]

Each time, the order of inquiry should focus on the investigative measure that needs to be implemented, in which case, the issuing authority is the one who will decide what investigative measures to be used in the report with the details resulted in the case. However, in the case where in the executing State the measure in question cannot be executed due to some restrictions imposed by its law, it is authorized to use a different type of investigative measure under its own law. In the

[10] The Convention implementing the Schengen Agreement of 14 June 1985, published in the *Official Journal* no. L 239 of 22.09. 2000.

same context, the executing judicial authority may use a different type of investigative measure when it would lead to the same result as a measure of direct investigation into the European investigation order by means which affect less the fundamental human rights of the person in question.[11]

Regarding the opportunity of issuing the European investigation order, we specify that each time the issuing authority should take into account the need for the measure required by the order to be proportionate, appropriate and applicable in this case. Consequently, the issuing authority must determine whether the required evidence is necessary and proportionate to the purpose of the proceedings, whether the required measure of investigation is necessary and proportionate, and if another Member State must be involved in gathering evidence with the issuing of the European investigation order. This type of evaluation should be considered also by the competent judicial institution performing the validation procedure of the order when this is required. On the executing authority, we note that it will be able to use another type of investigative measure less intrusive than the one requested by the order, given that this type of measure can lead to similar results.

A particular problem that should be considered by the issuing authority of the investigation order in criminal matters is the one regarding the enforcement of the presumption of innocence and the right of defense as they are established in article 48 of the Charter of Fundamental Rights of the European Union.[12]

In this respect, regarding Romania, we specify that the presumption of innocence and the right to defense in criminal proceedings represent the fundamental principles of Romanian criminal procedure law and any limitations on them by an investigative measure imposed by a European investigation order should circumscribe to the provisions of article 52 of the Charter regarding the need and the objectives of general interest which should follow, particularly protecting the rights and freedoms of others.

As for the transmission of such an order, the issuing authority may use all the means at its disposal, including secured telecommunications system of the European Judicial Network, Eurojust or other channels used by the judicial authorities or others of law enforcement.

In all circumstances, the implementation of the European investigation order, based on the European legal framework instrument, will be achieved with the compliance with the procedural rights provided for in the provisions of the following European legal instruments:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in the criminal proceedings[13];
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[14] and

[11] Preamble of the European legislative act, paragraph 10.
[12] Published in the Official Journal of the European Union C 326/391 of 26.10.2012 (2012/C326/02).
[13] Published in the Official Journal of the European Union, no. L 280 of 26.10.2010.
[14] Published in the Official Journal of the European Union, no. L 142 of 01.06.2012.

- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to a lawyer in criminal proceedings and proceedings on the European arrest warrant, and the right to a third person to be informed in case of deprivation freedom and the right to communicate with consular authorities and to third parties during the deprivation of liberty.[15]

Undoubtedly, these rights must be given under the conditions where the execution of a European investigation order may directly affect them.

The general rule established with the adoption of this European legal instrument is that of being executed by the Member State to which it is addressed.

However, in the Preamble of the European legislative act there are provided also some cases in which the execution of a European Investigation Order in criminal matters may be refused.

A first case of this kind will be incident where the executing Member State, through its competent bodies, finds that by executing the order it violates the principle of *non bis in idem*. However, under the provisions mentioned in the Preamble of the European legislative act, given the preliminary nature of the proceedings underlying the execution of an European investigation order (within the criminal proceedings), its implementation should not be subject to a refusal when it is intended to establish the existence of a possible conflict with the principle of *ne bis in idem* or when the issuing authority has provided assurances that the evidence transferred from the execution of the European investigation order will not be used for prosecution or for applying any sanction to a person in whose case it was ruled a final judgment in another Member State for the same acts.[16]

The execution of a European investigation order in criminal matters must be refused also when the execution of an indicated investigative measure would lead to a violation of a fundamental right of a physical or legal entity and consequently the executing State does not comply with its obligations regarding the protection of the fundamental rights recognized by the Charter.[17]

The execution of such an order will be refused and if it violates an immunity or privilege in the executing State, as they are defined in the executing State.[18]

4. Other provisions provided for in the Preamble of the European legal instrument

Ensuring compliance with the provisions of internal law involves also the possibility that in the executing State the appeal against the European investigation order should be at least equivalent to those specific to internal causes. In this

[15] Published in the Official Journal of the European Union, no. L 294 of 06.11.2013.
[16] Preamble of the European legislative act, paragraph 17.
[17] *Idem*, paragraph 19.
[18] *Idem*, paragraph 20.

regard, according to their national law, the executing Member States should ensure the enforcement of appeals in all situations in which it is requested, including informing the interested parties in a timely manner on exercising them.

In the case where, the objections against the European investigation order concerns the substantive grounds of issuing the order, they will be sent by the issuing State and the contesting Party will be informed.[19]

Although as we have seen through the European criminal investigation order it is established a single regime for obtaining evidence, however, for some types of investigative measures there are needed additional rules; this applies to rules on the temporary transfer of persons of deprivation of liberty, hearings by video or telephone conference, obtaining information related to bank accounts or banking transactions, deliveries and undercover investigations.

At the same time, according to the provisions of the European legislative act, the investigative measures, which imply gathering evidence in real time, continuously and in a certain time period, should be included in the European investigation order, but, when necessary, between the two states involved it should be agreed on the practical way of addressing the disparities in the intern law of the states concerned.[20]

By the provisions of the European legislative act there have been established judicial norms for the implementation of investigative measures at all stages of criminal proceedings (including criminal proceedings).

These measures will not be incident in the case where the person is transferred to a Member State for prosecution or presentation in front of the court; in these situations there will be applied the provisions of Framework Decision 2002/584/JHA of the Council on the European arrest warrant and the turning in procedures between Member States.[21]

Given some elements of similarity between the regulation of both institutions (the European Arrest Warrant and the European Investigation Order in criminal matters) in all circumstances the Member States must carry out a proper analysis in order to determine specifically which of the two institutions will be used; this analysis should cover in particular the possibility of issuing an European investigation order for the hearing by videoconference of a suspect or accused person, at the expense of using other forms of judicial assistance.

Also, a European investigation order may be issued in order to obtain evidence on the accounts of any kind, held in any bank or any non-banking financial institution by a physical or legal entity is subject to criminal proceedings.

Under the European legislative act[22], the possibility mentioned above generally refers to suspected or accused persons but also any other person in respect of such information are considered necessary by the competent authorities during criminal proceedings. These provisions are at least questionable, if not

[19] *Idem*, paragraph 22.
[20] *Idem*, paragraph 24.
[21] Published in the Official Journal no. L 190 of 18.07.2002.
[22] Preamble of the European legislative act, paragraph 27.

contrary to the Romanian law, as according to the Romanian law the request of such data can only be achieved against a suspect, not to any person as required by the European legislative act. In this situation it could raise the issue of revising these provisions, in the purpose of mentioning the clear provisions by which it ensures the compliance of the rights of the individual or entity subject to criminal investigation activities based on an order of investigation in criminal matters issued by the judicial authorities of another Member State.

In the case where a Member State issues an European investigation order to get "details" on an account, the term being as such, it should be understood as including at least the name and address of the account holder, the prospective authorized associates to that account and any details or documents provided by the account holder when opening the account, which is in possession of the required bank.[23]

Regarding the interception of communications, through this activity is necessary to go beyond the actual content thereof and to consider the collection of traffic data and location that may be associated with these communications, which should enable the competent authorities issuing a European investigation order in order to obtain data less intrusive in terms of telecommunications. Under the depositions of the European legislative act, a European investigation order issued in order to obtain historical data traffic and location in relation to telecommunications should be treated under the general regime on the execution of the European investigation order and it may be considered, depending on the internal law of the executing State as a measure of coercive investigation.

Given the particularities of the file, it is required to provide technical assistance to several states, the European investigation order should be addressed to only one of them, notably the state on whose territory the person is subject to interception. In these circumstances, the Member States on whose territory the subject of the interceptions moves, which does not provide technical assistance, it is necessary to be informed. In the event that technical assistance is not received by one of the state (like the State on whose territory the person concerned resides), the European investigation order can be sent to all Member States involved.[24]

With the issuance of the European investigation order in criminal matters the issuing judicial authority shall provide the executing authority of another Member State with information such as those relating to the investigated offense, the aim being that of allowing the executing authority to assess whether the requested measure would be authorized as being a domestic issue and therefore to decide accordingly.

Regarding the provisional measures, we should mention that the European legislative act covers only those concerning gathering evidence. Regarding the financial assets (but not only), they may be subject to various provisional measures in the criminal proceedings, not only for gathering evidence but also confiscation. Under the European legislative act, the distinction between the two objectives of

[23] *Idem*, paragraph 30.
[24] *Idem*, paragraph 31.

the provisional measures is not always obvious and the purpose of the provisional measure can change during the investigation. For this reason, it is essential to maintain an easy connection between the various instruments applicable in this domain.[25]

5. Some critical opinions

Although we have not examined the European legal instrument entirely, but only the examination of the provisions in its preamble, we can formulate some critical opinions of some provisions which in our opinion are at least questionable, if not inappropriate, something that leads inevitably to the amendment of the Romanian special law or even of the European legal instrument.

We should mention that Ireland and Denmark did not participate in the European legislative act, and therefore they have no obligations regarding its application on their territory. At the same time the United Kingdom notified its intention to participate in the adoption and application of European legal instrument.

In this context, we specify that at the adoption of this legislative act, or subsequently, Romania did not raise any objection.

The notification of malfunctions is all the more important as according to art. 36 para. (1) of the legislative act concerned, the Member States should take measures to transpose its provisions into their national laws by 22 May 2017.

In this context, we underline that Romania will not be able to implement it in its internal law, any provisions that violate certain rights and freedoms in the conduct of investigations that aim at identifying, collecting, preserving and turning in evidence to the judicial authorities of another state Member in order to use them in criminal proceedings in another Member State of the European Union.

A first critical opinion that we can formulate regards the questionable way in which, in our opinion, the European legislator understood to nominate the categories of people for whom it is issued a European warrant investigation in criminal matters, among them being stipulated a person other than the suspect or the accused, in the case of evidence of the bank accounts held in any bank or non-banking financial institution (paragraph 26 of the Preamble of the European legal instrument).

As it is drafted this provision enters into a contradiction with the Romanian law, namely those contained in article 153 Criminal Procedure Code.

Thus, according to article 138 of the Criminal Procedure Code, obtaining data on a person's financial transactions represent a special method of surveillance or investigation available to the prosecuting authorities or Romanian courts.

These categories of data may be requested by the prosecutor, with the judge's prior approval of rights and freedoms, in the case where there are solid clues about an offense and there are grounds for believing that the requested information represents evidence.

[25] *Idem*, paragraph 34.

Also, this measure has its own motion or at the request of the criminal investigation body by ordinance it shall contain, besides the terms stipulated by the law also the following information: the institution which is in possession or having under control the data, the name of the suspect or defendant, motivating the conditions mentioned above, the obligation of the institution concerned to communicate immediately, in private, the requested data.

So, in a total contradiction with the provisions of the European legislative act, the Romanian law entitles the prosecuting authorities to request and obtain such data from banking institutions, only if the person in question is a suspect or defendant.

Under those circumstances, we consider that in order to execute an European investigation order aimed at obtaining information on banking transactions made in Romania by a person against whom no prosecution proceeding was ordered or the initiation of prosecution, it is necessary for the requesting judicial authorities to prove that that person against whom is performed prosecution or begins prosecution. Given that the issuing judicial authority of the European investigation order cannot prove it, the order shall not be executed.

Another critical opinion concerns the regulation of the European investigation order that covers the interception of communications, which, according to the depositions of the European legislative act, should be treated under the general regime on the execution of the European investigation order and it may be considered, depending on national law of each performing state, as a measure of coercive investigation.

Under the Romanian law, the interception of communications is one of the special surveillance or investigation methods, and it can be ordered only under certain conditions provided by law. This measure consists in the interception, access, monitoring, collection or recording communications by telephone, computer system or by any means of communication.

The interception of communications is achieved through technical surveillance, which is ordered by the judge's rights and freedoms, where the following conditions are met:

- There is reasonable suspicion about the preparation or commission of an offense out of those provided in paragraph (2)[26];
- The measure is proportionate to 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;

[26] At paragraph (2) art. 139 of the Criminal Procedure Code, it provides the following offenses and groups of offenses for which it may be requested technical supervision, namely: crimes against national security provided for in the Criminal Code and special laws, offenses of drug trafficking, arms trafficking, trafficking in persons, terrorism, money laundering, counterfeiting of currency or other values, counterfeiting of electronic payment instruments, offenses against property, extortion, rape, unlawfully deprivation of liberty, tax evasion, corruption offenses and offenses assimilated to corruption offenses, offenses against the financial interests of the European Union, offenses that are committed through computer systems or means of electronic communications and other offenses for which the law provides imprisonment of five years or more.

- The evidence could not be obtained otherwise or would involve particular difficulties obtaining it which would endanger the investigation or there is a threat to the safety of persons or property value (art. 139 par. (1) Criminal Procedure Code).

Having regard to the Romanian law and relating to the obligation of the execution of a European investigation order which has as object the interception of telecommunications, we see that Romanian law provisions are insufficient.

Thus, currently, a European Investigation Order in criminal matters concerning the interception of telecommunications, can only be performed under the conditions provided by the Romanian law (which we mentioned above); as it can easily be seen that in the case of the European order these conditions are not met, we will not insist with any other argument.

In these circumstances, we consider that until the deadline for transposition into national law of the European legal instrument (May 22, 2017), it should be amended and supplemented the provisions of the Romanian special law (Law no. 302/2004) so that, technical supervision in the execution of an European investigation order, which concerns interception of telecommunications, could be applied in compliance with the Romanian law.

A final critical opinion addresses the need to complete and modify the Romanian special law (Law no. 302/2004), and in particular those concerning the procedure on the execution of orders on freezing property or evidence.

Specifically, we consider it necessary to repeal the depositions of Section 3 (Provisions on cooperation with Member States of the European Union in applying the Framework Decision 2003/577/JHA of the Council of 22 July 2003 on the execution in the European Union of the orders of freezing property or evidence) in Chapter II (Provisions on judicial assistance applicable in the relation to the Member States of the European Union), Title VII (Judicial assistance in criminal matters).

In the current context, instead of the section concerned (from article 219 to article 232), it is required to be provided concrete provisions aiming the compilation, transmission and execution of a European Investigation Order in criminal matters, which concretely would mean the transposition into the national Romanian law of the provisions of Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European investigation order in criminal matters.

6. Conclusions

As mentioned previously, the adoption of a European legal instrument, that would regulate distinctly the complex task of identifying and gathering evidence in a state other than the one where the criminal proceedings are taking place, continues to be a priority of the European Union.

Initially in order to achieve this goal it was adopted the Framework Decision 2003/577/JHA of the Council of 22 July 2003 on the execution in the

European Union of orders on freezing property or evidence, the institution is interpreted as being a form of judicial assistance in criminal matters between the Member States of the European Union, both in European law and in the Romanian law.[27]

Recent Romanian doctrine revealed that the provisions of the European legislative act have been transposed into Romanian law by art. 219-232 of Law no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented.[28]

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 to cause 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.

Against this background, it was adopted the Directive 2014/41/EU of the European Parliament and of the Council, a legal instrument designed to replace starting with May 22, 2017 the provisions of the following conventions:

- the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, the two additional protocols and the bilateral agreements concluded pursuant to article 26 of the Convention;
- The Convention implementing the Schengen Agreement;
- The Convention on Mutual Assistance in Criminal Matters between Member States of the European Union.

Also, the Framework Decision 2008/978/JHA is replaced for all Member States that are bound by the European legal instrument and the provisions of the Framework Decision 2003/577/JHA are replaced for the Member States that are bound by this European legal instrument in relation to freezing the evidence.

Accordingly, Romania will have until the deadline imposed by the law (May 22, 2017) to transpose into its national legislation the provisions of this legal instrument.

Since issuance, especially the execution of a European Investigation Order in criminal matters it requires the execution of some activities which in some cases exceed the provisions of the Romanian Law of Criminal Procedure, respecting the rights and liberties of the citizens, Romania will have to transpose into its internal law these provisions, involving some exemptions to the law of criminal procedure. In this context, we believe that these new provisions should be provided in the special law (Law no. 302/2004) and not in the Criminal Procedure Code.

As a general conclusion, we consider that the conducted examination highlights the importance and necessity of adopting this new European legal instrument in the context of new changes and transformations occurring within the international judicial cooperation in criminal matters.

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[27] Minodora-Ioana Rusu, *Asistența judiciară în materie penală la nivel European (Judicial assistance in criminal matters at European level),* Ed. Universul Juridic, Bucharest, 2015, pp. 197-210.

[28] *Idem*, p. 197.

The examination also highlights the attention that needs to be paid by the Romanian legislator when implementing this law into the national law, who must take into account the critical opinions and proposals formulated *de lege ferenda*.

Bibliography

1. Al. Boroi, I. Rusu, *Cooperarea judiciară internațională în materie penală, Curs master/ International judicial cooperation in criminal matters. Master course*, Ed. C.H.Beck, Bucharest, 2008.
2. I. Rusu, M.-I. Balan-Rusu, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*, LAP LAMBERT Academic Publishing, Deutschland/Germany, Danubius University, 2013.
3. Al. Boroi, I. Rusu, M.-I. Balan-Rusu, *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation*, LAP LAMBERT Academic Publishing, Deutschland/Germany, Danubius University, 2012
4. Minodora-Ioana Rusu, *Asistența judiciară în materie penală la nivel European/Judicial assistance in criminal matters at European level*, Ed. Universul Juridic, Bucharest, 2015.
5. Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European Investigation Order in criminal matters, published in the Official Journal of the European Union no. L 130 of 05.01.2014.
6. Framework Decision 2008/978/JHA of the Council of 18 December 2008 on the European Evidence warrant for the purpose of obtaining objects, documents and data for their use in proceedings in criminal matters, published in the Official Journal no. L 350 of 30.12.2008.
7. Framework Decision 2003/577/JHA of the Council of 22 July 2003 on the execution in the European Union of orders on freezing property or evidence, published in the Official Journal no. L 196 of 08.02.2003.
8. European Convention on Mutual Judicial Assistance in Criminal Matters of the Council of Europe of 20 April 1959, the two additional protocols and concluded bilateral agreements pursuant to article 26 of the Convention.
9. Convention implementing the Schengen Agreement.
10. Convention on Mutual Judicial Assistance in Criminal Matters between Member States of the EU and its protocol.
11. Law no. 302/2004 on international judicial cooperation in criminal matters, 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; the last modification intervened by amending and supplementing 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.
12. Romanian Criminal Procedure Code.