

# European Investigation Order's Issuance Procedure for Smuggling Crime Investigation

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## Abstract

*Applying the European Investigation Order to solve smuggling crime cases improves the process of obtaining evidence to prosecute people involved in illegal activities.*

*Those people try to do things in such a way that they are not caught, usually one of the desideratum of those who commit criminal acts, acting in such a way as to make it difficult to identify and prove criminal actions, that is why, in this paper, we will try to identify investigative measures used in European Investigation Order's issuance procedure for smuggling crime investigation.*

**Key words:** issuance procedure, investigation order, smuggling

**J.E.L classification:** K140

## 1. Introduction

Criminal activity at Member State level has intensified by applying persons's and goods 's free movement principle across Europe, and to combat it Member States's judicial cooperation in criminal matters needed to be improved and efficient.

Smuggling is such a criminal activity, as the illicit trade in excise goods (the products subject to excise duty are: alcohol and alcoholic beverages, energy products and electricity, as well as tobacco products - [https://europa.eu/youreurope/business/taxation/excise-duties-eu/product-excise-duties/index\\_en.htm](https://europa.eu/youreurope/business/taxation/excise-duties-eu/product-excise-duties/index_en.htm), consulted on 27.09.2021), namely tobacco, has generated substantial losses for public revenues, causing billions of euros in losses to the European Union and Member States' budgets each year.

Cigarette smuggling is a source of income for criminal groups in Europe and elsewhere, and there are indications that in some cases it is also linked to the financing of terrorism, and the fight against the illicit tobacco trade is therefore essential to protect the security of the European Union, becoming a major concern for Europe.

People involved in smuggling activities try to do things in such a way that they are not caught, this is usually one of the desideratum of those who commit criminal acts, acting in such a way as to make it difficult to identify and prove criminal actions.

This instrument's use to investigate smuggling crime improves the process of obtaining evidence from collection, retention until transfer.

In this paper, we will analyse the issuance procedure for smuggling crime investigation by identifying the investigative measures used for it.

## 2. Theoretical background

The European Investigation Order is the newest instrument used between european states. Its implementation in the Romanian legislation determines a new paradigm in the procedure for obtaining evidence abroad.

Using the European Investigation Order to investigate smuggling crime it is an improvement in the process of obtaining evidence from collection, retention until transfer, because it is applied directly between European states in order to implement one or more specific investigative measures to obtain evidence or to transmit evidence already in the possession of the competent authority.

### **3. Research methodology**

The objectives were achieved by using this research methods:

- Analysing national, European legislation and European jurisprudence in order to apply the obtained allegations in Romanian court case;
- Synthesising the normative acts and relevant judicial practice on this topic - quantitative method;
- Forming my own opinion about all data and information from national and European laws, as well as of the judicial practice - secondary analysis.

### **4. Findings**

#### **4.1. General considerations on the European Investigation Order**

The European Investigation Order represents from the perspective of art. 1 para. (1) of the Directive Directive 2014/41 / 3.04.2014 as well as in the light of art. 328 para. 2 lit. of Law no. 302/2004 republished, a judicial decision issued or validated by a European judicial authority to implement one or more specific investigative measures in another state to obtain evidence that the executing state's competent authority has.

As we can see, both European and Romanian legislation keep the same terms as “issuing state” or “executing state” which are also used in the matter of the European evidence warrant, or in the mandate European arrest warrant. We consider this to be a good decision, so an identity is provided common to legal texts at European level. We consider that the reasoning behind this choice results from the fact that all the acts listed above are subject to enforcement on the basis of the principle of mutual recognition. As we can see from the definition, it is emphasized that the European order of inquiry is member state authority's judicial decision, and once the terms “issuing judicial authority” have been defined, discussions on this notion have ended in the light of other instruments of judicial cooperation in criminal matters based on mutual recognition, as this concept may include not only a judge or the courts of a Member State, but the judicial authority is represented by a judge, a court, an investigating judge or a prosecutor competent for the case in question, as well as any other competent authority as defined by the issuing state, acting in that case as the investigating authority in criminal proceedings, which has the power to order the taking of evidence in criminal proceedings in accordance with national law ( Article 2 lit. c) point i) of the Directive, as well as art. 328 para.2 lit. d of Law no. 302/2004).

In national law, European Investigation Order is issued by the prosecutor the prosecutor handling the criminal investigation or the competent judge, according to the procedural phase, ex officio or at the request of the parties or main procedural subjects (Article 330 para. (1) of Law no. 302/2004).

When Romania is a executing state, European Investigation Order's recognition and execution are within the competence of the prosecutor's office or the court materially competent and according to the quality of the person and to Romanian law. Territorial jurisdiction is determined by the place where the investigative measure is to be carried out. European Investigation Orders concerning facts which, according to the law, are within the competence of the Directorate for the Investigation of Organized Crime and Terrorism or of the National Anticorruption Directorate are recognized and executed by them.

The mandatory content of the European Investigation Order is found in art. 5 of the Framework Decision which is reflected in art. 331 para. (2) of Law no. 302/2004 (the European Investigation Order shall include in particular the following information: a) data on the issuing authority; b) the object and reasons for issuing the European investigation order; c) the necessary information available on the person; d) the description of the deed that is the object of the criminal trial, as well

as the applicable legal provisions; e) investigative measure and requested evidence details) and is developed in the form annexed to both normative acts. Therefore, from a formal point of view, the European Investigation Order is a single form available to the judicial authorities of the Member States, intended to compensate for the differences between its judicial systems.

European Investigation Order's purpose is the execution of the investigative measures and the obtaining of evidence from the executing authority in a Member State.

Therefore, the European Investigation Order excludes other forms of assistance which are not aimed at obtaining evidence or for which there is a simpler procedure for transmission or enforcement, such as the notification of procedural documents.

#### **4.2. Types of procedures in which the European Investigation Order may be issued**

Before analyzing the types of proceedings in which a European Investigation Order can be issued, it would be appropriate to determine what measures may be the subject of a procedure in which it is used.

Article 1 of the Directive, which contains provisions defining the European Investigation order, refers to the term "investigative measures", which does not have a correspondent in Art. 2, the instrument covers a very wide range of procedures, including, surprisingly, "proceedings initiated by administrative authorities" which have a criminal dimension (Article 4 of Framework Decision 2014/41 / EU).

Instead, the this term is used in Romanian legislation, which is synonymous from an institutional point of view, providing a definition (Art.328 para. 1 lit. of Law no. 302/2004).

Such a vague term could lead to the inclusion of so-called coercive measures in the scope, the author listing a number of measures that cannot be used in this purpose (Steve PEERS - TheproposedEuropeanInvestigationOrder: Assault on human rights and national sovereignty, may 2010, p. 4,5 - <https://www.statewatch.org/media/documents/analyses/no-96-european-investigation-order.pdf>, accessed at 20.09.2021).

So, practically, we are in a situation where we cannot know exactly what falls and what does not fall within the scope of this term, apart from those listed in Chapter IV entitled specific measures for certain investigative measures, and without a general definition valid at European level of the term "investigative measures" we may find ourselves in a situation where the issuing State considers that a certain measure is covered by the legal term and wants to execute it for the purpose of obtaining evidence, and the legal system of the executing State does not recognize a such a measure.

In conclusion, it is necessary to standardize the law, by establishing which investigation can be apply with an European Investigation Order.

We return to the procedures in which can be issued and we specify that art. 4 of the Directive contains the provisions, which were also taken over by the romanian legislator at art. 329 of Law no. 302/2004 and which include not only criminal proceedings, but also certain administrative or civil proceedings.

In relation to these provisions and taking into account the romanian judicial practice, we consider that the issuance for gathering evidence in a criminal case aimed at investigating smuggling crime was a judicial procedure initiated by a judicial authority or which may be initiated before a judicial authority.

Until now, only defendant's and witness's hearing has been requested through an European Investigation Order (Criminal sentence no. 75 of 11/08/2021 - Vrancea Tribunal, as well as the Criminal Conclusion no. 1599 of June 25, 2020, Timișoara Court, [www.lege5.ro](http://www.lege5.ro), accessed on 15.09.2021) and the hearing by videoconference of a witness (Criminal decision no. 430 / A of 28/05/2020 - Bucharest Court of Appeal; [www.lege5.ro](http://www.lege5.ro), accessed on 15.09.2021).

In essence, the European Investigation Order has as object any investigative measure used in a criminal trial, in order to gather the evidence necessary to solve the case, including the unavailability of goods, meaning for romanian authorities the administration and preservation of evidence, the application of special surveillance measures or research or conducting evidentiary proceedings.

### 4.3. Competent authorities

In terms of jurisdiction, we specify that, as a rule, the materially competent to try in the first instance smuggling crime is the court, and if smuggling crime is retained in competition with the crime of organized criminal group, and most often is, taking into account of the mode of action of the persons involved, the materially competent to resolve the cause is the appeal court.

At the same time, we have the situation in which a prosecutor's office from a higher court takes over the criminal case from a lower court in order to carry out the criminal investigation, having the materially competent to resolve the cause can be any court.

According with Law no. 302/2004 - 330 para. 2, on criminal investigation phase, prosecutor's office attached to the competent court is sending or executing the order.

Thus, art. 285 para. 1 from Criminal Procedure Code stipulates that the criminal investigation's purpose is to gather the any evidence to prove that a crimes exist, to identify the persons who committed it and to establish their guilt, to determine whether or not it is necessary to press charge against them.

Art. 299 from the same law stipulates that the prosecutor supervises police investigator's activity, so that any crime is discovered and any person who has committed a crime is prosecuted and prosecutor supervises police investigator's activity so that no suspect or defendant to be detained only in the cases and under the conditions provided by law, investigators being obliged to carry out his orders (art. 303, art. 349 in conjunction with art. 327 and art. 328 Criminal Procedure Code).

Instead, the court settles the case brought before the court following the issuance of the indictment (the court notification act), guaranteeing procedural subjects's rights by ensuring the evidence administration for the complete clarification of the case's facts, in full compliance with the law.

In conclusion, after dealing with general issues relating to the European Criminal Investigation Order aimed at providing an analysis of the regulations in the Directive and in national law on the latest instrument of evidence in criminal proceedings, that a European Investigation Order works, starting from the origins of the Directive and presenting some novelties for the instruments of cooperation in criminal matters under the umbrella of the principle of mutual recognition.

Next, we will perform an analysis of the procedure for issuing and transmitting the European Investigation Order combining theoretical aspects with examples from judicial practice.

### 4.4. European Investigation Order's issuance procedure

According with art. 330 of Law no. 302/2004 provisions, romanian issuing authorities of the European Investigation Order are the prosecutor who carries out or supervises the criminal investigation or the competent judge, according to the procedural phase, automatically or at the request of the main parties or procedural subjects. However, we specify that the issuing authorities must comply with the conditions imposed in art. 6 para. (1) of the Directive such as the necessity, proportionality and condition of the possibility of taking identical measures in a similar internal case, conditions that have been regulated and are found, almost identically, in art. 331 paragraph 1 of Law no. 302/2004. In Romanian criminal law, the authority that has the competence to analyze such conditions is the judge of rights and freedoms, who analyzes the condition of proportionality in taking preventive measures or special methods of supervision or investigation.

Thus, **during the prosecution**, the prosecutor has the competence to issue a European Investigation Order, but also the judge of rights and freedoms, including when he is called to approve a request made by the prosecutor for obtaining evidence.

During the trial in the first instance, in order to clarify the circumstances regarding the participation of a defendant in the commission of the smuggling offense, after another defendant declared, during the criminal investigation, that she participated in the criminal activity, at the request of the two defendants it was carried out by european order a request for hearing the defendant whose participation is uncertain, the questions being sent to the British authorities, and the rights he may enjoy as a defendant, including the right not to testify, being also communicated (Criminal sentence no. 75 of 11/08/2021 - Vrancea Tribunal).

On this occasion, the defendant showed that his mother was not involved in any way in the criminal activity and that he stated otherwise in the criminal investigation because he was under threat of the prosecution service, it was not her will, they wrote in their favor to she enlarged the group, her mother having no involvement in her activities. While she was leaving the country, her mother was and only took the money without knowing where the money came from, she never stored cigarettes at home, she never sold cigarettes, and when she left, she just went to get the money, without knowing where the money came from. He also showed that he never met his partner in the group until the trial, and that everything was under pressure and the threat of criminal prosecution, she only met the person who supplied her with cigarettes, they did not know about others. people, ie other people participating in their activity and that he did not always know to whom he was carrying cigarettes.

The court finds that, having been heard by a European Investigation Order, it did not give any explanation as to why it was under threat from the prosecution service, most likely referring to the judicial bodies during the criminal investigation, nor what these threats consisted of.

The court finds that it is not identified what would have been the gain of the criminal investigation bodies to write in documents something specific "to expand the group", they perform and prepare the documents in the file according to what resulted from the investigation, and the investigation resulted given and from the statements of the defendants in question.

**During the trial**, the European Investigation Order may be issued ex officio or at the request of the prosecutor by the court seized of the case.

Opinions on the competence of the judge of the preliminary chamber in the legal doctrine are divided on his quality of authority issuing the european order.

The first author claims that the judge of the preliminary chamber will never be able to be the issuing authority of a European investigation order taking into account the provisions of art. 54 para. (1) lit. b) C. proc. pen., since it is only the competent body in establishing the legality of the evidence by the prosecutor, not being able to administer evidence, in relation to the rigors imposed by art. 100 C. proc. (Mircea SALOMIR - European Investigation Order, Premium Legal Universe no. 9/2018, Bucharest, p.6) and the second author considers that the pre-trial judge may issue a European investigation order, stating that such an order may be issued during the criminal proceedings by the prosecutor conducting or supervising the criminal investigation or by the competent judge, according to the procedural phase, ex officio or at the request of the main parties or procedural subjects (Mihaela PĂTRĂUȘ - Reflections on the transposition of the European Investigation Order (EIO) into national legislation, Legal Universe, 09.02.2021, p. 5).

Compared to the two opinions in the doctrine, we agree with the second one in the sense that the judge of the preliminary chamber can also be the judicial authority issuing a European Investigation Order, in relation to the provisions of art. 330 para. (1) of Law no. 302/2004, according to which when Romania is the issuing state, it may be issued by a competent judge, according to the procedural phase in which the case is.

## 5. Conclusions

In this research I pointed out that the institution of the European order offers procedural guarantees and speed in obtaining evidence to be used in criminal proceedings for smuggling offence.

We believe that, until a somewhat constant practice is reached in the application of the institution of the European Investigation Order, the use of this mechanism will not be common in the investigation of smuggling crime.

In conclusion, when Romania is the issuing state, the European Investigation Order is issued by the judicial authority which has the file assigned: the prosecutor in the criminal investigation phase, or the courts the trial phase, ex officio or at the request of the parties or the main procedural subjects, no other formalities than filling out a form.

Summarizing, we appreciate that the aspects of the judicial practice, are the clear proof that the romanian judicial authorities are reluctant to use this form of judicial cooperation in criminal matters to investigate smuggling crime considering that they made only parties or procedural subjects hearing.

Following this reluctant use, we believe that over time the European Investigation Order will nevertheless succeed in imposing itself in cooperation practices as an appropriate, rapid and effective tool for the cooperation and coordination between the European judicial authorities for a good administration of criminal justice in European Union smuggling crime investigation.

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