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The European Investigation Order in Criminal Matters (selected issues)

Europejski Nakaz Dowodowy w sprawach karnych
(zagadnienia wybrane)

The following remarks concerning the Directive regarding the European Investigation Order in Criminal Matters[2] were presented as part of an international Criminal Law Seminar[3] at the Jagiellonian University in Kraków.

1. Introduction and background of the EIO

In order to investigate crimes with cross-border dimensions, prosecutors and judges have to cooperate across borders. Therefore, it is required that investigative measures may be carried out in another Member State. However, cross-border criminal proceedings also issue many challenges for all involved parties – accused, defendants and law enforcement authorities. In this context, the Directive on the EIO, which regulates the cross-border execution of investigative measures, plays an important role. It aims at obtaining evidence and facilitating its gathering

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[2] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130 of 1.5.2014, p. 1-36, hereafter: EIO.

[3] New Trends in Criminal Law, Seminar for doctorate candidates in Krakow, 4–7th April 2019. The article is based on a presentation which was held during this seminar. In particular, I would like to thank Prof. dr. hab. Włodzimierz Wróbel and his assistants for the organisation of this absorbing seminar and express my gratitude for their generous hospitality.

in criminal matters in the EU. The Directive is based on the principle of mutual recognition, but also includes elements from the mutual legal assistance regime. It entered into force in May 2014 and had to be implemented into the respective national law by the Member States until May 2017. The Directive is intended to be a central element in the framework of criminal law cooperation in the EU[4].

Before examining the details of the EIO, the path followed until the adoption of the Directive should briefly be recalled, as this will help to understand why the Directive had been issued. The regime of mutual legal assistance is mostly treaty-based. The main instrument is the European Convention on mutual assistance in criminal matters[5] from 1959, but there are many other different multilateral and bilateral instruments, including the Schengen Agreement[6] and the European Convention on Mutual Assistance in Criminal Matters[7] from 2000. The system of mutual legal assistance has several weak points; it is criticised as being too slow and inefficient[8]. It is based on a very few general rules, providing a lot of flexibility, but also uncertainty regarding the efficiency of the procedure and the respect of fundamental rights[9]. There is also a complete lack of time limits and uncertainty about legal remedies[10]. Most practitioners with experience in mutual legal assistance have had cases where they simply never received any reaction following the sending of a request for legal assistance or were confronted with a lack of cooperation[11].

Therefore, the European institutions decided to improve the judicial cooperation within the EU by replacing the existing international rules on mutual legal assistance with new instruments based on the principle

4 F. Zimmermann, *Die Europäische*..., p. 143.

5 European Convention on Mutual Assistance in Criminal Matters of 1959, ETS No. 30.

6 Convention implementing the Schengen Agreement of 14th June 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 checks at their common borders, OJ L 239 of 22.9.2000, p. 19–62.

7 Convention of 29th May 2002 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197 of 12.7.2000, p. 1–2.

8 Council Doc. 9288/10 ADD 2 of 23rd June 2010, p. 9–10; for further critical remarks, see e.g. L. Bachmaier Winter, *European*..., p. 582; J. Blackstock, *The European*..., p. 484; A. Mangiaracina, *A New*..., p. 113; F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 57.

9 For example F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 57.

10 Council Doc. 9288/10 ADD 2 of 23rd June 2010, p. 18 ff.

11 For instance C. Heard, D. Mansell, *The European*..., p. 366.

of mutual recognition. This led to the implementation of the European Evidence Warrant[12] in 2008. Practitioners have strongly criticised this instrument, in particular for its fragmented approach and its limited scope as it only applies to obtaining pieces of evidence that already exist[13]. Therefore, it was not implemented in many Member States and hence not used in practice. The Stockholm Programme[14] 2009 called for the replacement of all the existing instruments with a comprehensive system covering all types of evidence, including deadlines for enforcement and limiting grounds for refusal[15]. As a result, seven Member States issued an initiative[16] for the Directive on the EIO in 2010. The Directive seeks to substitute these just mentioned fragmented regulations with a comprehensive instrument applicable to almost all investigative measures, including specific rules on certain types of measures, like the information related to bank accounts.

2. Purpose of an EIO and most important provisions of the Directive

According to Article 1 of the Directive, an EIO is a judicial decision issued by a competent authority of a Member State (= issuing state) for carrying out a specific investigative measure in another Member State (= executing state) for the purpose of obtaining evidence. Therefore, if a law enforcement authority considers it necessary to have evidence collected in another Member State, it may issue an EIO. A simple example: if an Austrian prosecutor requires evidence in a domestic procedure that may be obtained by means of a search warrant in Poland, he has to issue an EIO aimed at carrying out this search in Poland and to transmit

[12] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008, p. 72–92.

[13] For example L. Bachmaier Winter, *European*..., p. 583; F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 66; J. Blackstock, *The European*..., p. 482, 484.

[14] The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010, p. 1–38.

[15] The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010, p. 12.

[16] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of the European Union regarding the European Investigation Order in criminal matters, OJ C 165 of 24.6.2010, p. 22–39.

it to the competent Polish authorities. The Polish authorities have to recognize the investigation order without any further formalities and execute the measure in the same way and under the same conditions as a national measure, as long as recognition or execution is not precluded by a ground for refusal. The evidence found in the course of the search will then be collected and transmitted to Austria.

Furthermore, the question arises which authorities are competent to issue an EIO. Article 2 defines two types of issuing authorities: These can either be judges, courts, investigating judges and public prosecutors, or any other competent authority defined by the issuing state and acting in its capacity as an investigating authority in criminal proceedings. If the second type of authority issues an EIO, it has to be validated by a judge, a court, an investigating judge or a public prosecutor.

Moreover, an EIO should only be launched if the issuing authority is, according to Article 6 of the Directive, convinced that the EIO is necessary and proportionate, and that the investigative measure could have been ordered under the same conditions in a similar national case. This should prevent a so-called „forum shopping". This means that prosecutors only use the EIO to order measures that would not be possible in the issuing state and therefore gain an unfair advantage[17]. For that reason, the provision makes sense in order to remind the issuing authority that it has no wider powers than in national procedures.

According to Article 3, the Directive covers all investigative measures except setting up a joint investigation team and the gathering of evidence within such a team. A second restriction is found somewhat hidden in recital 9, according to which cross-border surveillances are still governed by the Schengen Agreement. The Directive, therefore, covers a wide range of measures of very different nature, such as collecting data, the identification of the owner of a telephone number or a bank account, the hearing of an expert or a witness, house search, the seizure of evidence, the monitoring of banking transactions, the interception of telecommunications and counting.

Pursuant to Article 4 of the Directive, an EIO may be issued with respect to criminal proceedings that are brought by a judicial authority

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[17] See, e.g. F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 73; I. Armada, *The European*..., p. 18; C. Heard, D. Mansell, *The European*..., p. 357.

regarding a criminal offence under the national law of the issuing state. In addition, the Directive also applies to investigations into infringements in administrative and judicial proceedings. However, this is only possible in cases where the decision may give rise to proceedings before a court having jurisdiction in criminal matters. Moreover, an EIO may also be issued if a legal person, such as a company, is to be held responsible for an offence or infringement.

Furthermore, the Directives introduces deadlines for recognition and execution of the EIO and the investigative measure. The decision on the execution of the EIO has to be taken, and the investigative measure carried out, with „the same celerity and priority as for a similar national case". The deadlines set out in Article 12 require the executing state to make a decision on the recognition or execution of the EIO no later than 30 days after the receipt of the EIO. The deadline may be extended by a maximum of 30 days. The investigative measure itself has to be carried out no later than 90 days from the decision on execution. However, a problem could be that the Directive does not provide consequences if an executing authority does not comply with the time limits. Moreover, national legislation is not allowed to establish provisions, which would impose a penalty against the non-complying executing authority, because this would clearly exceed the guidelines of the European legislator.

3. The „forum regit actum" principle

According to Article 9 of the Directive, the EIO has to be recognised and executed without any further formalities. Therefore, the „forum regit actum" principle applies. This means that the issuing state may inform the executing state that certain formalities and procedures have to be taken into account. The executing authority has to comply with the formalities and procedures unless this would be contrary to its fundamental principles of law.

However, the provision does not regulate important questions. First of all, it should be specified that the issuing state can only demand execution procedures that are permissible under its own law too[18]. Therefore, it cannot be allowed to abuse the gathering of evidence abroad in order

[18] See F. Zimmermann, *Die Europäische*..., p. 150; H. Ahlbrecht, *Europäische*..., p. 604.

to avoid the own rules of procedure, for example by ordering the execution of a measure without the presence of a defence counsel, although this is inadmissible under the own national law[19]. In addition, the question arises as for which purpose the issuing state may request the observance of certain formalities. The „forum regit actum" principle was originally intended to ensure that evidence obtained abroad was gathered as close as possible to the requirements of the issuing state and could therefore be used in criminal proceedings without weakening the defendant's rights[20]. However, neither Article 9 nor the recitals do provide such a restriction ensuring admissibility of evidence. Therefore, it would be possible that the issuing authority orders a specific procedure only to increase the chances of success of the measure[21]. If, for instance, the attendance of a lawyer is not mandatory in the issuing state, may the executing state be ordered to carry out the measure in his absence?[22] Another example: may Austrian authorities be forced to carry out house searches beyond the limits of special provisions in the criminal code of procedure? That would not only involve a serious interference in the sovereignty of the executing state, but also implicate a considerable disadvantage for the accused, because he will trust that his rights can only be intervened under the democratically legitimized conditions of his home country[23]. I agree with Zimmermann[24] that the provision has therefore to be interpreted in a way that ordered formalities and procedures of the issuing state regarding execution are only admissible in so far as they are intended to ensure the admissibility of evidence or the rights of the accused.

Provided that the issuing authority takes this restriction into account, the formalities specified in the EIO should be met by the executing authority[25]. Therefore, Austrian authorities should not claim a con-

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19 F. Zimmermann, *Die Europäische*..., p. 150.

20 Recital 14 of the Council Framework Decision 2008/978/JHA of 18th December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008, p. 73; F. Zimmermann, *Die Europäische*..., p. 150; L. Bachmaier Winter, *European*..., p. 587; H. Ahlbrecht, *Europäische*..., p. 603; M. Böse, *Die Europäische*..., p. 153 ff.

21 F. Zimmermann, *Die Europäische*..., p. 151.

22 F. Zimmermann, *Die Europäische*..., p. 151.

23 F. Zimmermann, *Die Europäische*..., p. 151.

24 F. Zimmermann, *Die Europäische*..., p. 151; see also A. Leonhardt, *Ermittlungsanordnung*..., p. 40; P. Rackow, *Überlegungen*..., p. 86.

25 F. Zimmermann, *Die Europäische*..., p. 151.

tradiction to fundamental principles whenever a detailed issue of the Code of Criminal Procedure is regulated in another way than in the law of the issuing state. On the other hand, a contradiction should be obvious if the ordered formalities conflict with the rights of the accused and jeopardize the fairness of procedure[26].

4. Grounds for refusal

The next point of particular interest is the question in which cases the execution of an EIO can be refused. For this purpose, Article 11 provides a catalogue of eight optional grounds for refusal. Six of these grounds apply to all types of investigative measures. By contrast, the two others are not applicable to a number of measures.

As the grounds for refusal are just optional, each Member State is free to decide to what extent it wishes to make use of them. This is inadequate, at least for the grounds for refusal which protect the rights of accused or third parties[27]. If, for example, the execution of the EIO infringes the principle of *ne bis in idem* or violates fundamental rights, it is incomprehensible why the executing state should have any discretion in that regard; it should have been mandatory for the Member States to implement these grounds of refusals[28].

The general grounds for refusal are the following. First, Article 11 § 1 (a) allows the executing state to refuse a measure that is contrary to „immunities or privileges" provided for in its law. A specifically mentioned case group is freedom of the press and freedom of expression. Recital 20 clarifies that it is up to the Member States to decide what is meant by immunities or privileges, because there is no EU definition for these terms.

The next ground for refusal is state security. Article 11 § 1 (b) provides the possibility to refuse a measure in case it harms essential national security interests, jeopardizes the source of information or requires the use of classified documents.

Another ground for refusal is the inadmissibility of the measure in case of mere infringements. As already mentioned, the issuing of an EIO

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[26] F. Zimmermann, *Die Europäische*..., p. 151; S. Gleß, *Grenzüberschreitende*..., p. 597 ff.
[27] For example F. Zimmermann, *Die Europäische*..., p. 153.
[28] F. Zimmermann, *Die Europäische*..., p. 153.

is not only possible for the investigation of criminal offences, but also for the prosecution of infringements pursued by administrative or judicial authorities. For this case, Article 11 § 1 (c) provides a far-reaching ground for refusal. It shall apply if the „investigative measure would not be authorised under the law of the executing state in a similar domestic case". Therefore, the executing authority is entitled to examine all the conditions of the measure in accordance with its own legal system[29]. However, one significant limitation remains to be considered in this context. Article 4 (b) and (c) refer to the case where the underlying act constitutes a mere infringement under the law of the issuing state[30]. How the infringement is classified in the executing state is of no relevance in this matter[31]. If, for example, the prohibited practice of prostitution is an administrate offence in Austria and its authorities send an EIO based on it to Poland, where the act is classified in another way (e.g. as a criminal offence), it cannot rely on this ground for refusal if the investigative measure is applicable for this act under the law of the executing state. Therefore, this ground for refusal should not prevent investigations that only concern trivialities, as considered from the point of view of the executing state[32]. The categorisation of the offence has always to be evaluated from the point of view of the issuing state.

The next ground for refusal is *ne bis in idem.* Article 11 § 1 (d) allows refusal of execution if it would be contrary to the principle of *ne bis in idem*. The wording of the provision is a bit fuzzy and does not clarify in which cases the obtaining of evidence could conflict with the *ne bis in idem* principle. Nonetheless, it represents a significant step forward from the first draft directive, where this ground for refusal was completely missing[33].

As the fifth ground for refusal, Article 11 § 1 (e) includes a limited territorial reservation. The execution of an EIO may be refused if three conditions are fulfilled: the offence has been committed outside the territory of the issuing state; and wholly or partially on the territory

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29 F. Zimmermann, *Die Europäische*..., p. 154; K. Böhm, *Die Umsetzung*..., p. 1513.
30 F. Zimmermann, *Die Europäische*..., p. 155.
31 F. Zimmermann, *Die Europäische*..., p. 155.
32 F. Zimmermann, *Die Europäische*..., p. 155.
33 F. Zimmermann, *Die Europäische*..., p. 155; F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 79 ff.

of the executing state; and the conduct is not an offence in the executing state.

Furthermore, Article 11 § 1 (f) provides a ground for refusal in case that the execution of the EIO would not be compatible with obligations under Article 6 TEU[34] and with the EU-Charter of Fundamental Rights[35]. This provision, which is a novelty in the area of mutual recognition, has added considerable value compared to the standard public-policy reservations[36]. However, there are some limitations. First, the refusal ground only takes European fundamental rights into account. Therefore, a refusal cannot be based on the fact that a fundamental standard of law beyond this is undermined in the executing State[37]. Moreover, the execution has to be incompatible with the obligations of the executing state under Article 6 TEU and the Charter. Therefore, the focus is on the act of execution[38]. Whether the order for the measure was unlawful itself or the issuing state has violated the charter is not to be reviewed by the executing state[39]. Instead, the provision intends to cover the case where specific circumstances of execution give rise to the fear that European fundamental rights are infringed. This would be imaginable, for example, if a physical examination entails serious risks because of the person's constitution, or if a room to be intercepted turned out to be a room for confession[40].

Moreover, there are two limited refusal grounds. If the underlying act is not punishable in the executing state or if the ordered measure is only admissible for certain offences in the executing state, Article 11 § 1 (g) and (h) provide two more grounds for refusal. In this context, the Directive differentiates between various types of investigative measures. The two grounds for refusal cannot be invoked in the case of certain

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34 Consolidated version of the Treaty on European Union, OJ C 202 of 7.6.2016, p. 13–388.

35 Charter of Fundamental Rights of the European Union, OJ C 326 of 26.10.2012, p. 391–407.

36 F. Zimmermann, *Die Europäische*..., p. 157; K. Böhm, *Die Umsetzung*..., p. 1513.

37 F. Zimmermann, *Die Europäische*..., p. 157.

38 F. Zimmermann, *Die Europäische*..., p. 158; H. Ahlbrecht, *Europäische*..., p. 606; P. Rackow, *Überlegungen*..., p. 81.

39 F. Zimmermann, *Die Europäische*..., p. 158; H. Ahlbrecht, *Europäische*..., p. 606; whereas M. Böse, *Die Europäische*..., p. 158 ff, opts for a more detailed examination of proportionality conditions.

40 F. Zimmermann, *Die Europäische*..., p. 158; H. Ahlbrecht, *Europäische*..., p. 605.

measures which, according to Article 11 § 2 in conjunction with Article 10 § 2, are non-coercive and therefore always have to be available in the executing state. These are the following: obtaining of information or evidence which is already in the possession of the executing authority, obtaining of information contained in databases available for criminal proceedings, interrogation on the territory of the executing State and identification of the holder of a telephone connection or an IP address.

The first limited ground for refusal is the absence of double criminality. For all measures not mentioned in Article 10 § 2, the Directive allows the executing state to check double criminality. However, this possibility is severely restricted by the so-called „positive list" already known from other mutual recognition instruments. If the act in question belongs to one of the 32 categories of offences listed in the Annex and is punishable in the issuing state by a custodial sentence for a maximum period of at least three years, the impunity in the executing state is irrelevant.

Furthermore, Article 11 § 1 (h) allows the executing state to refuse to carry out the requested measure if it is limited to a particular type or catalogue of offences, which does not include the offence covered by the EIO. Before execution is refused in these cases, however, it should be checked whether the executing state could have recourse to a different type of measure according to Article 10.

5. Recourse to a different type of investigative measure and relation to the grounds of refusal

That leads to the next and last point: the provision of Article 10 offers the possibility of having recourse to a different type of investigative measure. It allows the executing state to replace one specific measure requested in the EIO by another. This is a genuine novelty, but it turns out to be quite difficult to draw a distinction between the two regulatory complexes of grounds for refusal and recourse. Article 10 is structured in a highly complex way.

First, Article 10 § 1 takes up the situation that the investigative measure asked for in the EIO does not exist in the executing state or would not be available in a similar domestic case. If one of these two cases applies, the executing state is authorized to choose another measure. The first variant is less problematic: it clearly recognizes the situation

that the investigative measure is inadmissible under the law of the executing state. The interpretation of the second variant („would not be available in a similar domestic case") is more difficult. According to recital 10, it should be relevant if the measure is only permissible in certain situations. Examples include a restriction to selected offences, the requirement for a special degree of suspicion or the consent of the person concerned. Therefore, it is a matter of admissibility of the measure in the specific case[41]. The exact scope of the provision, however, raises considerable problems in conjunction with Article 10 § 5 (see immediately below).

The possibility of substitution is then again limited by Article 10 § 2 – as mentioned above (pt 4), particular investigative measures always have to be available under the law of the executing state (for example, the interrogation on the territory of the executing state). Recourse to a different measure is excluded in these cases.

By contrast, according to Article 10 § 3, the executing authority may have recourse to a different investigative measure if it will achieve the same result by less intrusive means. Therefore, the provision also seems to require the executing state to do some kind of proportionality test, assessing the intrusiveness of the measure requested and looking at other measures with different degrees of intrusiveness[42]. For the first time, the fact that the executing state is in a better position to assess some aspects of the proportionality test, such as the circumstances at its place, is taken into account[43]. It might also be that the executing state has technical or legal possibilities, which are unknown in the issuing state and therefore could not have been taken into consideration when issuing the EIO[44]. However, that may additionally introduce a certain amount of complexity, because the executing authority has much less information than the issuing authority and may therefore not be able to assess the situation to its full extent. Anyway, there is a kind of consultation mechanism that

41 F. Zimmermann, *Die Europäische*..., p. 163; B. Roger, *Grund*..., p. 274.

42 C. Heard, D. Mansell, *The European*..., p. 359; M. Böse, *Die Europäische*..., p. 158; R. Belfiore, *The European*..., p. 318; A. Mangiaracina, *A New*..., p. 127 ff; A. Leonhardt, *Ermittlungsanordnung*..., p. 51; M. Wortmann, *Die Europäische*..., p. 135; A. Mosna, *Europäische*..., p. 818.

43 F. Zimmermann, *Die Europäische*..., p. 164; F. Zimmermann, S. Glaser, A. Motz, *Mutual*..., p. 69.

44 F. Zimmermann, *Die Europäische*..., p. 164.

can be triggered by the executing authority if it has reasons to believe that the proportionality requirements have not been met.

In this context, Article 10 § 5 raises the most difficult questions. This provision stipulates that if one of the conditions of § 1 is fulfilled and there is no other investigative measure available which would have the same result, the executing authority shall notify the issuing authority that it has not been possible to provide the assistance requested. The relation of this rule to the grounds for refusal according to Article 11 is highly unclear. It raises the question whether Article 10 § 5 is an additional ground for refusal[45] or if the provision can be interpreted in another way.

On the one hand, if the measure is restricted to certain offences in the executing state and is therefore at the same time **unavailable** within the meaning of Article 10 § 5, it is anyway possible to refer to the ground for refusal of Article 11 § 1 (h)[46]. In that regard, Article 10 § 5 does not have its own meaning. On the other hand, the **availability** of a measure could also be understood in a much broader sense, so that it would always be denied if any condition of the measure was not fulfilled under the law of the executing state[47]. Therefore, a very comprehensive additional ground for refusal could be constructed. The question that arises in this context is whether the execution of an investigation order may be refused only because of availability/proportionality considerations according to Article 10 § 1 in conjunction with § 5?

First, we have to note that **availability** of the measure within the meaning of Article 10 § 1 (b), according to recital 10, should refer to occasions where the indicated investigative measure **exists** under the law of the executing state but is only **lawfully available in certain situations**. That may be situations where the measure can only be carried out for offences of a certain degree of seriousness, if there is already a certain level of suspicion or if the consent of the person concerned is needed. Before the executing state claims that the ordered investigative measure is not available in a similar domestic case, he has to exhaust all possibilities to

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45 Approving C. Heard, D. Mansell *The European*..., p. 359, without detailed explanation; A. Mangiaracina, *A New*..., p. 127; P. Rackow, *Überlegungen*..., p. 82; R. Belfiore, *The European*..., p. 324; in favour of a possibility for proportionality refusals H. Ahlbrecht, *Die Europäische*..., p. 119; M. Böse, *Die Europäische*..., p. 155.

46 F. Zimmermann, *Die Europäische*..., p. 164.

47 F. Zimmermann, *Die Europäische*..., p. 164; M. Böse, *Die Europäische*..., p. 155 ff, 159; H. Ahlbrecht, *Europäische*..., p. 604 and H. Ahlbrecht, *Die Europäische*..., p. 117.

make the measure **available**. That means if a judicial order is necessary, the executing state has to ensure to get one[48]; the same applies to the consent of the person concerned. **Unavailability** has to be assumed in cases of a required degree of seriousness, a certain level of suspicion or with the risk of repetition or danger of collusion[49] because these aspects cannot be changed. Therefore, the executing state has to check if the ordered measure can be **made available** or if another measure, which would have the same result as the measure requested, could be selected. Only under these conditions, it is possible to refuse the execution of the ordered measure due to **reasons of availability** according to Article 10 § 1 in conjunction with § 5. Considering all described aspects, it may be concluded that the abovementioned question has to be approved to a limited extent. Only in the small segment, where it is neither possible to make the ordered measure available nor to choose another measure with the same result, Article 10 provides another hidden ground for refusal apart from the grounds in Article 11.

6. Conclusion

The Directive on the EIO is intended to mark an important step towards the realisation of a comprehensive system for evidence gathering in cross-border cases. Indeed, the Directive shows some promising tendencies, for example, the „forum regit actum" principle or the possibility to choose a less coercive measure than the one covered by the EIO. Nevertheless, dealing with the abovementioned issues showed that the Directive still suffers from some shortcomings. The right to apply another measure, for example, can be assessed as positive for the involved defendants; however, it is questionable if the executing authority has enough knowledge and information to do this kind of proportionality test. The fact that the principle of proportionality is a concept which is not harmonised at the European level leads to the risk that there will be different treatments of defendants, especially in the case of coercive measures[50]. Therefore, it is up to the national legislators of the Member States to address these problems in an adequate manner and

48 F. Zimmermann, *Die Europäische*..., p. 167.
49 F. Zimmermann, *Die Europäische*..., p. 167.
50 A. Mangiaracina, *A New*..., p. 132.

to implement the provisions of the Directive in a way that takes into account the need to strike the right balance between law enforcement purposes and the protection of fundamental rights.

Summary

The article gives an overview of selected issues concerning the provisions of the Directive regarding the European Investigation Order in Criminal Matters. First, it starts with an introduction to the topic and takes a brief look at the background of the EIO (pt 1). The reader is then provided with an abstract of the most important provisions of the Directive (pt 2) and an overview of the grounds for refusal (pt 3). These topics are followed by two special issues: the „forum regit actum" principle in Article 9 (pt 4) and the relation between the grounds of refusal and the possibility to have recourse to a different type of investigative measure (pt 5).

Keywords

European Investigation Order, evidence gathering, forum regit actum, recourse, investigative measures

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