The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations

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ABSTRACT

The piece examines how the European Investigation Order (Directive 2014/41/EU) seeks speedy, mutual-recognition-based cross-border evidence gathering while still respecting fundamental rights. It notes explicit safeguards (Art. 1(4); refusal ground via Charter, Art. 11(1)(f); validation by a judicial authority; special rules for privacy-intrusive measures like telecoms interception and bank data) but flags gaps: an overemphasis on privacy versus scant mention of other defence rights; vague refusal criteria; and the optional nature of using less intrusive alternatives (Art. 10). The author expects friction where executing states balance mutual trust with rights protection and urges clearer guidance to avoid divergent transpositions. On remedies (Art. 14), challenges in the issuing state cover substance, while executing-state remedies chiefly safeguard fundamental rights and generally don't suspend execution—all under the Charter's effective-remedy guarantee. Protection for third parties (witnesses/experts) is left to national law, a missed harmonisation opportunity.

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I. Introduction

Directive 2014/41/EU regarding the European Investigation Order in criminal matters[1] was approved in April 2014 and regulates a new instrument for the obtaining of evidence. The main features of the European Investigation Order (hereinafter EIO) are:

- It covers all types of evidence;
- It contains time limits for the enforcement of mutual legal assistance requests;
- It limits the grounds for refusal;
- It can be used either to carry out investigatory measures in the executing state or to obtain evidence that is already in the state's possession.[2]

The obtaining of evidence in criminal proceedings is a highly sensitive matter from the point of view of fundamental rights, since the courts, prosecution services, and other law enforcement authorities must often limit the suspect's rights in order to get information in the criminal investigation.

The conflict between the necessary respect for fundamental rights and the importance of achieving swiftness and effectiveness in criminal investigations is readily apparent in Directive 2014/41/EU. Striking the right balance between both interests is, however, not an easy task: the different standards in the protection of fundamental rights among the Member States are the major obstacle when dealing with judicial cooperation in the framework of international relations.[3] In the EU context, this opposition is even more apparent: on the one hand, the European Council of 1999 in Tampere claims the fundamental importance of the principle of mutual recognition not only for final judgements but also for every decision of judicial authorities.[4] On the other hand, EU law imposes the duty of due respect for fundamental rights in the Member States. Paradoxically and despite this rule, one of the main fears of Member States in the application of the Directive is to achieve this due respect for fundamental rights.[5]

The aim of this article is to analyse the position of Directive 2014/41/EU in relation to fundamental rights protection in criminal investigations: first, it gives an overview of the references in the Directive regarding the necessary respect for fundamental rights in the obtaining of transnational evidence. It then further analyses which possibilities the executing state has to intervene in case of fundamental rights violations and which legal remedies the Directive provides for reaction against an investigation that is not in line with fundamental rights.

II. The Respect for Fundamental Rights in the Directive

The duty to respect fundamental rights in the application of Directive 2014/41/EU is explicitly recognized in its Art. 1 para. 4.[6] Art. 11 para. 1 lit. f) of Directive 2014/41/EU which refers to the Charter of Fundamental Rights of the European Union (hereinafter CFR) as a possible ground for refusing the execution of an investigative measure indicated in the EIO.[7] Apart from these references to fundamental rights, recital 15 provides that Member States should take into account the Directives that were adopted in conjunction with the 2009 Roadmap on strengthening procedural safeguards in criminal proceedings when implementing Directive 2014/41/EU.[8] Even though Directive 2014/41/EU does not allude to all the instruments that were going to be approved after 2014, national legislation should take them into account.[9]

Apart from these references in recital 15 of Directive 2014/41/EU – a non-binding part of the legal instrument – no further allusions to defence rights and other procedural guarantees can be found. In the preparatory phase of the EIO, authors already criticised that the European legislator showed a "chronic indifference of the Union for defence rights and procedural rights,"[10] which seems to be continued in the Directive to some extent.

What can be observed is that Directive 2014/41/EU features a special sensitivity vis-à-vis violation of the right to private life; there are actually some special provisions in Directive 2014/41/EU that explicitly regulate the obtaining of information by means that may threaten the right to private life – also referred to in the Spanish legal order as the "right to intimacy" *(derecho a la intimidad)* – such as the interception of telecommunications (Arts. 30 and 31) or information on bank and financial accounts or financial operations (Arts. 26 and 27). Undoubtedly, the right to privacy/intimacy is particularly vulnerable in a case of criminal investigation, because the suspect is usually reluctant to cooperate with the investigatory bodies, and this attitude may require decisions that restrict his/her right to private life in order to get information. Nonetheless, the attention paid to this fundamental right in Directive 2014/41/EU is disproportionate.[11] The EU legislator seems to be less concerned about other fundamental rights such as the rights to liberty, security, or defence, since there is no reference in the Directive, for example, to the importance of avoiding overly long interrogations that may exhaust the suspected person or to the right of access to a lawyer when necessary.

The respect for fundamental rights affects all judicial authorities intervening in the criminal proceedings either in the executing state or in the issuing state. However, Directive 2014/41/EU puts special emphasis on the control of any violation of fundamental rights by the executing state: procedures and safeguards for the executing state have a broader and more detailed regulation. This peculiarity can be easily understood given that the control in the issuing state should already have been exercised in accordance with the Directive: if the issuing authority assumes any infringement of fundamental rights, the consequence should be that the EIO is not issued in the first place.[12]

In the context of control of fundamental rights infringements in the issuing state, another feature of the EIO is worth mentioning: In some Member States, policemen, custom agents, or officers of administrative bodies are allowed to order investigative measures in criminal proceedings. In these cases, however, Directive 2014/41/EU requires that a judge, court, investigative judge, or public prosecutor validate the EIO (Art. 2 lit. c) ii)). Art. 2 lit. c) ii) explicitly refers to an examination of conformity with the conditions set out in Art. 6 para. 1 of the Directive. This means that the judicial authority must examine, in particular, whether the issuing of the EIO is necessary and proportionate for the purpose of the criminal proceedings, "taking into account the rights of the suspected or accused person." This intervention by the judicial authority enables the safeguarding of fundamental rights in the issuing state. Such validation can also solve in advance possible reservations on the part of the executing state. However, there is, as *Armada* cautions, the danger that the validation exercise may revert to a mere "rubber stamping." [13] It must therefore strongly be advocated that the analysis of the EIO as requested by the non-judicial authorities be thoroughly carried out by the judicial bodies of the issuing state.[14]

1. The executing state's intervention in case of a violation of fundamental rights

a) Lack of respect for fundamental rights as a ground for refusal

The executing state is the main actor in the EIO regime because it has to accomplish the task of obtaining the evidence required by the issuing state. One of the main differences between the EIO and the European

Evidence Warrant (hereinafter EEW) is that the latter excludes the executing state's possibility to perform any activity in order to obtain evidence.[15] In comparison, the EIO allows investigative measures to be carried out in the executing state. This feature of the EIO is considered an important step forward compared to the EEW in legal literature.[16] Certainly, the potential effectiveness of the EIO in comparison with the EEW is without question and opens up wider possibilities in the criminal investigation.

The executing state may, however, show a certain reluctance to carry out the requested investigative measure. The most severe reaction from the executing state is non-execution of the requested measure because certain fundamental rights standards are not upheld in the issuing state. This possibility is recognized in Art. 11 para. 1 lit. f) Directive 2014/41/EU, which states that execution of an EIO can be refused if "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations in accordance with Article 6 TEU and the Charter."

The CFR is the point of reference for the refusal ground: according to *Armada* this refusal reflects the aim of the legislator to prevent Member States from adopting standards of protection of fundamental rights according to domestic law,[17] as the European Court of Justice expressly bans in the *Melloni* judgement.[18] Even though the executing state may have a legitimate interest in guaranteeing that the gathering of evidence was respectful of fundamental rights, it is not allowed to adjust the EIO to domestic fundamental rights standards.

Another point of discussion in this context is whether the system of mutual recognition as a maxim of Directive 2014/41/EU is convenient and suitable. *Zimmermann, Glaser and Motz* expressed that "the principle of mutual recognition works as follows: if the judicial authorities of one Member State (issuing State) issue a particular decision with regard to a criminal proceeding, the authorities of the Member State to which this decision is directed (executing State) are obliged to execute it without further examination. Thus the admissibility of the respective measure can only be established by the issuing authority on the basis of its domestic law, whereas the implementation of the decision is governed by the executing State's Law. As a consequence, the executing authority must comply with the issuing authority's decision, no matter if a comparable measure would be admissible under its own law."[19] Mutual recognition thus implies that control of the legality and proportionality of the investigative measure has to be performed by the issuing state, and the executing state must trust this decision.[20] Directive 2014/41/EU aims to foster effectiveness and expedience in the gathering of evidence in criminal proceedings. The main fear as regards the prospect of a mutual recognition system for the Member States is to "lower down European and national standards of procedural safeguards and thus to reduce the protection of human rights."[21]According to *Jimeno Bulnes*, the option for mutual recognition in the regulation of the EIO implies a choice in favour of security and at the expense of justice, even though both objectives are part of the "Area of Freedom, Security and Justice" as stipulated in the Lisbon Treaty.[22] And although the new system should not be detrimental to fundamental rights, a right outweighed by the interests of effectiveness is difficult to achieve in practice.[23]

The reluctance towards the mutual recognition principle, in conjunction with the vagueness of the text of Directive 2014/41/EU in its description of the refusal ground of Art. 11 para. 1 lit. f), may lead to different approaches in the Member States when transposing the Directive. Therefore, both the effectiveness in the obtaining of evidence and the protection of fundamental rights risk being compromised.[24] In my view, there is a high probability that whenever the executing state has to choose between mutual recognition and respect for fundamental rights, the dilemma will probably be solved with that option which guarantees a more extensive protection of fundamental rights. Member States might have no difficulty in accepting an EIO coming from a country with a similar or higher level of protection of fundamental rights; a good bilateral judicial cooperation relationship will probably be favourable for the success of the EIO as well. However the

judicial authorities might not be as willing to execute the EIO when it comes from a Member State in which the guarantees of fundamental rights are not as clearly protected.

To avoid misinterpretation, the text of Directive 2014/41/EU should have been more explicit about the grounds that would allow a refusal decision by the executing state.[25] *Jiménez* argues in a similar way that Directive 2014/41/EU should have included a more detailed regulation of the grounds of Art. 11 para 1 lit. f), and he suggests including different categories of investigative measures according to their potential interference with fundamental rights, such that Member States could get a clearer idea of which kind of measure might be intrusive enough to justify a non-execution decision.[26]

b) Recourse to an alternative investigative measure

Another important provision that ensures the respect for fundamental rights is Art. 10 of Directive 2014/41/EU, which enables the executing state – under certain circumstances – to resort to a different measure than the one requested. Two parts of this provision have a close link with the protection of fundamental rights: Art. 10 para. 2 allows the executing state to turn to a different investigative measure defined as non-coercive in the executing state, and Art. 10 para. 3 allows the executing state to resort to an investigative measure other than that requested "where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO."

Indeed, the recourse to a different measure as provided for in Art. 10 para. 3 is optional for the executing state. The application of this rule could, however, be highly advisable from the point of view of the protection of fundamental rights. If there is a less intrusive measure in the executing state that is as effective as the measure requested, the choice of the less intrusive measure should be mandatory for the executing state. *Aguilera* stands for this interpretation in relation to the EEW; she remarks that the Framework Decision on the EEW included a similar rule in Art. 10 para. 3 and, even if the optional character of this norm is seen critically, Directive 2014/41/EU has preferred to retain this recourse rule.[27]

2. Remedies

In order to ensure the fulfilment of fundamental rights in the execution of the EIO, Directive 2014/41/EU provided means not only to the judicial authorities of the Member States but also to the parties who are involved in the criminal proceeding: the suspected person and the victim. Thus, an important issue when addressing the protection of fundamental rights within the framework of the EIO is that of legal remedies. Directive 2014/41/EU ensures that the use of legal remedies should be guaranteed in the transposition of the Directive both at the issuing and executing states.

There are two significant issues concerning the regulation of remedies in Directive 2014/41/UE. The first of them is the importance of balancing the right of the parties to use the legal remedies and, at the same time, the commitment of the Directive to achieve efficiency in the execution of the EIO; the second one is the necessity to guarantee the rights of the suspected person, the victim, and even third parties in the criminal proceedings and to determine whether the Directive achieves this purpose.

Directive 2014/41/EU maintains the procedural guarantees of the parties as to legal remedies ensuring their availability but, at the same time, establishes some limits in order to prevent the parties from slowing down the execution of the EIO by means of a wrongful use of these remedies.

One of the means by which to achieve this purpose is to limit the subject matter of the remedies. The wording of Art. 14 para. 2 Directive 2014/41/EU suggests a difference between the available remedies in the issuing and in the executing states. Accordingly, the "substantive reasons" for issuing the EIO may be challenged only by an action brought by the issuing state, but Art. 14 para. 2 continues that this is "without

prejudice to the guarantees of fundamental rights in the executing State." This means, in my view, that any action is possible in the proceedings in the issuing state, whereas remedies in the executing state are confined to only guaranteeing fundamental rights.[28]

Another means of preventing the parties from using remedies such as delaying strategy is also regulated in Art. 14 para. 6 Directive 2014/14/UE, which establishes, as a general rule, that the legal remedy will not suspend the execution of the EIO.

Of course, remedies are available not only to the suspected person, whose fundamental rights can be easily jeopardized in a criminal proceeding, but also to the victim of the criminal offence. In this sense, the framework of the Charter of Fundamental Rights (CFR) cannot be ignored as regards the available remedies in the executing state. Although Directive 2014/41/EU stresses, in general terms, the importance of due respect for the suspect's fundamental rights, the victims' rights have to be respected as well;[29] in particular, the "right to an effective remedy before a tribunal" recognised in Art. 47 CFR must be considered, according to which the remedy shall be provided "within a reasonable time." This requirement applies to both parties in the proceedings. For the Member States, the requirement of this right implies that any undue delay in the execution of an EIO could be an infringement of the rights of both the suspect and the defendant.

Directive 2014/41/EU lacks a reference to the advisability of setting up means of providing security to third parties involved in investigative measures if requested by the EIO in domestic legislation, such as witnesses, experts, etc. In spite of the silence of the Directive on this point, the means for witness protection should be provided by the executing state according to the same terms as those in domestic law. The fundamental rights of third parties may be at risk due to their cooperation with judicial authorities in the criminal proceedings; even though Directive 2014/41/EU refers mainly to the rights of the suspected or accused, the Directive should have provided obligations for the protection of the fundamental rights of witnesses and experts.

III. Concluding Remarks

On the one hand, the commitment of Directive 2014/41/UE to the protection of fundamental rights in criminal investigations is expressly recognised. On the other, the purpose of achieving the effectiveness of the EIO is also recognised. This paradox between the protection of individual rights and the effectiveness of investigations becomes readily apparent in the EIO Directive. The Directive acknowledges the duty to respect fundamental rights in the obtaining of evidence in criminal proceedings. This duty affects all the authorities intervening in the proceedins, either in the issuing or in the executing state. The necessary validation of the EIO by a judge, a court, or a public prosecutor in the issuing state must be regarded as an important safeguard. The infringement of fundamental rights as a refusal ground according to the CFR, as provided in the Directive, is a sharp sword for the protection of fundamental rights. However, it is argued here that the lack of clarity in the definition of this refusal ground for non-execution as well as the optional nature of the provision that allows the recourse to a different type of measure, may turn out to be an obstacle to effective fundamental rights protection. The control of compliance with fundamental rights by the executing state is likely to be one of the most serious difficulties in the application of the EIO. This difficulty is aggravated by the fact that the EIO is based on the principle of mutual recognition, which is supposed to imply an effective and swift system for the obtaining of evidence abroad. It has been argued here that the orientation of this system towards effectiveness and swiftness may certainly challenge the appropriate protection of fundamental rights, but the Directive leaves enough options for the executing state to solve a conflict of interest in favour of fundamental rights protection.

Regarding the rights of the suspected person and the victim, they are ensured by access to the legal remedies recognised in Directive 2014/41/EU. The Directive, however, has not properly safeguarded procedural guarantees for third parties, such as the protection of witnesses or experts; their safety must be guaranteed by the domestic law of the executing Member State. A more homogenous approach could have been achieved by inserting respective duties for the protection of third parties and would have been a further asset of the Directive on the European Investigation Order.

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1. O.J. L 130, 1.5.2014, 1.↩
2. See also recitals 6 and 7 Directive 2014/41/EU, which emphasise that the EIO has established a comprehensive system of evidence gathering in a single instrument. It repeals Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (O.J. L 350, 30.12.2008, 72), which focused on obtaining evidence in the possession of the executing authorities.↩
3. G. Illuminati, "Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees", in: S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2013, 15, 24.↩
4. Tampere European Council, Presidency conclusions, VI.33.↩
5. S. Allegreza, "Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility", (2010) 5 *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 569, 575.↩
6. Art. 1. para. 4: "This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings and any obligations incumbent on judicial authorities in this respect shall remain unaffected."↩
7. Art. 11 para. 1: "Without prejudice to Article 1 (4) recognition or execution of an EIO may be refused in the executing State where: (…) (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter."↩
8. The Directives mentioned in recital 15 are: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (O.J. L 280, 26.10.2010, 1), Directive 2012/13/EU on the right to information in criminal proceedings (O.J. L 142, 1.6.2012, 1) and Directive 2013/48/EU on the right of access to a lawyer (O.J. L 294, 6.11.2013, 1).↩
9. Directive 2016/343/EU on presumption of innocence, Directive 2016/800/EU on children rights and Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings.↩
10. See S. Allegrezza (2010) 5 ZIS, *op. cit.* (n. 5), 569, 576↩
11. I. Armada, "The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights Based Refusal the Solution?", (2015) 6 *New Journal of European Criminal Law (NJECL)*, 8, 29.↩
12. L. Bachmaier, "The role of the proportionality principle in the cross-border investigations involving fundamental rights", in: S. Ruggeri (ed.), *op. cit.* (n. 3), 86, 99 remarks that Art. 6 "reminds that every EIO should only be issued once the issuing authority has checked that such measure is necessary and proportionate (…). In order to avoid excessive or unnecessary evidence requests the issuing State shall limit the EIO only to those measures that are strictly needed and proportionate".↩
13. I. Armada (2016) 6 NJECL, *op. cit.* (n. 11), 8, 12.↩
14. However, Directive 2014/41/UE does not solve a problem that may arise in those countries (such as England, Italy or Spain) in which there is a distinction between two phases in the criminal proceedings: investigation and trial; in these countries, the information obtained during the investigation cannot, as a general rule, be used as evidence in the trial. See S. Allegrezza (2010) 5 ZIS, *op. cit.* (n. 5), 569, 579.↩
15. Art. 4 Framework Decision 2008/978/JHA (*op. cit.* n. 2).↩
16. S. Allegreza, (2010) 5 *ZIS*, *op. cit.* (n. 5), 569, 571; M. Jimeno Bulnes, "Orden europea de investigación en material penal", in: M. Jimeno Bulnes (dir.) *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinary*, 2016, p. 191; E. Martínez García, *La orden europea de investigación*, 2016, p. 52.↩
17. According to I. Armada (2016) 6 *NJECL*, op. cit. (n. 11), 8, 15, Directive 2014/41/EU is "codifying the controversial Melloni judgement".↩
18. ECJ, 26 February 2013, case C-399/11, *Stefano Melloni*, in particular para. 63.↩
19. F. Zimmermann and S. Glaser and A. Motz, "Mutual recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order", (2011) 1 *European Criminal Law Review (EuCLR)*, 56, 60. Regarding the underlying principle of mutual trust in the EIO, see also L. Bachmaier, "Towards the Transposition of Directive 2014/41 regarding the European Investigation Order in Criminal Matters", (2015) *eucrim*, 47.↩
20. L. Bachmaier, "European investigation order for obtaining evidence in criminal proceedings" (2010) 5 *Zeitschrift für Interntionale Strafrechtsdogmatik (ZIS),* 580, 581.↩
21. S. Allegrezza, (2010) 5 *ZIS*, op. cit. (n. 5), 569, 575.↩
22. M. Jimeno Bulnes, *Un proceso europeo para el siglo XXI*, 2011, pp. 130-131.↩
23. I. Armada (2016) 6 *NJECL*, op. cit. (n. 11), 8. The opinion of Advocate General Bot in *Melloni* purports that both interests are somehow incompatible when he states "even though the objective is to trend towards a high level of protection for fundamental rights, the specific nature of European Union law means that the level of protection deriving from the interpretation of a national constitution cannot be automatically transposed to the European Union level nor can it be relied upon as an argument in the context of the application of European Union law." (AG Bot, 2 October 2012,case C-399/11, *Stefano Melloni*, para. 111).↩
24. Opinion of the European Union Agency of Fundamental Rights on the draft Directive regarding the European Investigation Order, 2011, p. 11.↩
25. The European Union Agency of Fundamental Rights also considers that "any establishment of the fundamental rights-based refusal ground in the Directive should ideally be complemented by explicit parameters"; see Opinion, ibid.↩

26. F. Jiménez-Villarejo Fernández, "Orden europea de investigación ¿adiós a las comisiones rogatorias?", in C. Arangüena Fanego (Coord), *Cooperación judicial civil y penal en el nuevo escenario de Lisboa*, 2011, pp. 201–202.↩
27. M. Aguilera Morales, "El exhorto europeo de investigación: a la búsqueda de la eficacia y la protección de los derechos fundamentales en las relaciones humanas transfronterizas", (2012) 2145 *Boletín de Información del Ministerio de Justicia*, 17. See also in this context I. Armada (2016) 6 *NJECL*, op. cit. (n. 11), 8, 16–17.↩
28. See also L. Bachmaier, (2015) eucrim, op. cit. (n. 20), 47, 55.↩
29. Opinion of the European Union Agency of Fundamental Rights on the draft Directive regarding the European Investigation Order, 2011, p. 3 and 6.↩

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