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MOVEMENT OF EVIDENCE IN THE EUROPEAN UNION: CHALLENGES FOR THE EUROPEAN INVESTIGATION ORDER

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ABSTRACT

The issue of international cooperation in criminal matters has interested legal theorists and practitioners for decades. In this area of law there are certain challenges that can only be tackled by using the joint efforts of the States, which is different from the national law of the States. For this reason, certain principles of law are specific for international cooperation, and on the basis of these principles States provide legal assistance requests to each other or else create preconditions to ensure the efficient and unimpeded criminal proceedings. It is true that the principles of mutual legal assistance and recognition, and the influence of their

alternation are not identical to all segments of international cooperation, including the development of the evidence law in the European Union.

With regard to the evidence and their admissibility in Member States of the European Union, it should be noted that this issue is still relevant, because the biggest concern of some Member States is the admissibility of evidence, when evidence is collected in one State and the admissibility of them is assessed in the other State. It would seem like a more formalized "concern", but basically it is a quite significant impulse for searching of new legal instruments in the European Union, which would be able not only ensure the acceptability (admissibility) of evidence that was collected in the foreign State in accordance with the relevant procedural form, and in the court of the State which obtained this evidence, but also the sovereignty of the State, the authenticity of the national law, and the respect for the legal culture and traditions of this State.

The authors discuss the development of the law of evidence, the separate legal segments of this law, and their strengths and weaknesses in the article. Despite the fact that the effective mechanisms of evidence movement among Member States appear in modern European Union criminal justice, the latest legal instruments lack the clarity and certainty of certain procedural legal guarantees in the context of human rights protection.

KEYWORDS

Criminal proceedings, evidence law, investigation order, admissibility

INTRODUCTION

The various legal assistance requests of one country to the other are inevitably faced in the criminal matters with the international element in order that the administered criminal proceedings would not lead to a dead end in which the process expedition and the approach to objective truth would be impossible. For this reason, the international cooperation in criminal matters has been gradually developed and nurtured since the middle of the twentieth century. This area is actually relevant for the international community in the fight against crime because the criminal justice gains cross-border nature over the years. Such area is determined by a change of social relations, which determines the dynamics of factors of negative nature, because the crime wave often goes beyond the territory of any State alone. For this reason, the issue of the presence of legal instruments in international cooperation is not so typical, but the issue of effective use of these instruments becomes relevant. Especially high attention is paid to this issue in the European Union.

There is one area of international cooperation in criminal proceedings to which adequate attention is paid; however, there are more questions than answers here - it is the problem of evidence admissibility in the EU Member States. The fact that the subsidiary efforts of not only Member States, but also the efforts of the EU are used for finding a solution to this issue, shows that this area of application of the law faces considerable difficulties - ones which usually depend on the attitude of the specific State to the solidarity and trust level of international cooperation. J. Bentham has said about this issue that "evidence is the basis of justice: exclude evidence, you exclude justice"¹. This could be seen as the fundamental reason why the permanent search of the answer to the question has been conducted more for than ten years - how to act in order that the Member States inter-relationships for collection, receipt and transmission of evidence from one State to another State processes would conform to values and traditions of the national law of the cooperating States.

For this reason, two segments of international cooperation can be considered such search prospects - first, the ratio and change of principles of mutual legal assistance and mutual recognition and, second, the objective that the evidence collected in one State (for instance, State "A"), after transmission of these evidence to the other State (for instance State "B"), would be found admissible in the same

¹ Libor Klimek, "Free Movement of Evidence in Criminal Matters in the EU," *The Lawyer Quarterly* 4 (2012): 250.

way as the evidence collected according to the provisions of the national law of the State (State "B") which obtained this evidence.

Based on analysis of provisions of the EU law and scientific sources² while investigating the issue of evidence and its admissibility in the EU in the context of international cooperation in criminal matters in this article, the purpose here is to determine what optimal mechanism(s) of legal cooperation of the EU Member States would be suitable while collecting and transmitting to each other the evidence, in order that this evidence would correspond the requirements, which are determined for the evidence in the national law of the State that obtained the evidence. Also, considerable attention is given to the ensuring of procedural legal guarantees, in particular the right of defence of the persons that participate in the criminal proceedings. This article is intended to show how the evidence law evolved in Europe starting from procedures of mutual legal assistance in order to achieve the level of mutual recognition. This is achieved using the methods of systemic, documentary analysis, reviews, criticism and deduction.

1. PRECONDITIONS OF THE FORMATION OF EUROPEAN LAW OF EVIDENCE: FROM THE IDEA TO REALITY

The current issues of cooperation of the EU Member States in the area of evidence law in criminal matters are related to these matters: what legal instruments regulate these relations, to what extent they are applied, where the

² John Vervaele, "The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU," *Review of European Administrative Law* 1 (2013): 54; John Vervaele, "Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?," *Utrecht Law Review* 9 (2013): 215; Libor Klimek, *supra* note 1: 250; Cian C. Murphy, "The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust?," *Social Science Research Network* 3 (2010): 6-7; Valsamis Mitsilegas, *EU Criminal Law* (Oxford: Oxford Hart Publishing, 2009), 115; Rosanna Belfiore, "Movement of Evidence in the EU: The Present Scenario and Possible Future Developments," *European Journal of Crime, Criminal Law and Criminal Justice* 17 (2009): 2, 3; Joaquín González-Herrero González and Maria Madalina Butincu, "The Collection of Evidence by OLAF and Its Transmission to the National Judicial Authorities," *The European Criminal Law Association's Forum (EUCRIM)* 3 (2009): 91; Sabine Gless, "Free Movement of Evidence in Europe," *El derecho procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro* // http://ius.unibas.ch/uploads/publics/5868/20100913144618_4c8e1d1af2837.pdf; Mireille Hildebrandt, "European Criminal Law and European Identity," *Criminal Law and Philosophy* 1 (2007): 65-67, 75; Michal Tomášek, "Human Rights as Means of Europeanisation of Criminal Law," *Czech Yearbook of International Law* 1 (2010): 175, 177, 178; Krisztina Karsai, "The Principle of Mutual Recognition in the International Cooperation in Criminal Matters," *Zbornik radova Pravnog fakulteta u Novom Sadu* 1-2 (2008): 951; Arkadiusz Lach, "Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda," *The European Criminal Law Association's Forum (EUCRIM)* 3 (2009): 108-109; Wolfgang Hetzer, "National Criminal Prosecution and European Tendering of Evidence. Perspectives of the European Anti-Fraud Office (OLAF)," *European Journal of Crime, Criminal Law and Criminal Justice* 12/2 (2004): 170, 173, 175; Christopher Murray, "The Impact of the Proposed European Evidence Warrant on the Rights of Suspects, Defendants and Innocent third Parties": 50; in: Marisa Leaf, ed., *Cross-Border Crime. Defence Rights in a New Era of International Judicial Co-operation* (London: Justice, 2006); Stefano Ruggeri, "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues": 4; in: *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases* (Springer International Publishing, 2014); Lorena Bachmaier Winter, "European Investigation Order for obtaining evidence in the criminal proceedings. Study of the proposal for European Directive," *Zeitschrift für Internationale Strafrechtsdogmatik – www.zis-online.com* (2010): 586.

limits of internal legal competence of the Member States are, where the Member States have the obligations to recognize and enforce judicial decisions that were made by the court of the other Member State, what the basics of binding and non-binding refusal to recognize and enforce such decisions are, etc. The answers to these questions usually begin from the preconditions of formation of the European law of evidence.

The appearance of so-called European law of evidence is related to the European Convention on Mutual Assistance in Criminal Matters of 20th April 1959 of the Council of Europe and the additional protocols of this convention of 1978 and 2001³. It is specified in these documents in which cases approval is not required for the evidence, how the parties of the treaty exchange them, etc. Historically significant predecessors of the European evidence law segments can be found in many sources of law, in which considerations about the evidence concept, peculiarities of proof in criminal proceedings, etc.,⁴ are presented. However, the viewpoint of cross-border nature to the European evidence law showed only on the eve of the twenty-first century, when the foundations, eventually supporting more difficult and persistent searches, are ultimately laid because of the efforts of Member States.

The agreement took place for the new and ambitious programme – the measures which should be implemented until 2004 in order to transform the Union into “a genuine area of freedom, security and justice” in the European Council⁵ – in Tampere on 15-16 October 1999. One of the main objectives was to ensure that international cooperation in the fight against crime among the EU Member States would be based using the mutual recognition principle, which would be the “cornerstone”⁶, “the engine of European integration in criminal matters”⁷ while implementing the interests of the Community and the Member States. It is emphasized that:

The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the

³ *European Convention on Mutual Assistance in Criminal Matters of 20 April 1959* // <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800656ce>.

⁴ Cian C. Murphy, *supra* note 2: 6–7.

⁵ *Presidency Conclusions, Tampere European Council of 15-16 October 1999* // http://www.europarl.europa.eu/summits/tam_en.htm.

⁶ Actually, it is specified in the legal literature, that the “author” of mutual recognition principle is the United Kingdom, which was the first State that proposed to use this principle for basing the entire process of cooperation in criminal matters in the European Union during its presidency of the Community, i.e. in 1998 (Cian C. Murphy, *supra* note 2: 2).

⁷ Valsamis Mitsilegas, *supra* note 2, 115.

courts of other Member States, taking into account the standards that apply there.⁸

During the implementing of the aforementioned conclusions of the European Council in 2001 the Council adopted the Programme of measures to implement the principle of mutual recognition in criminal matters⁹, the main objective was to bring together all the EU Member States for taking adequate measures, such that the mutual recognition principle would make steps in practical activities of the law enforcement agencies while recognizing and enforcing decisions made in criminal proceedings. It was stated in the programme that the aim, in relation to orders for the purpose of obtaining evidence, is to ensure that the evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.¹⁰

The first document, which implements the aforementioned targets of the program, i.e. in which real vital signs are ensured to the mutual recognition principle is the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,¹¹ afterwards the legal act, which implemented the second priority, was issued – the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU¹² of orders freezing property or evidence. This decision was made in order to secure evidence and to seize property which was easily movable, and also to transfer the evidence to the other States Members urgently. The Council presented the first proposal for Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters in the same year – in 2003.¹³ The aim was to evolve and develop the judicial cooperation in the area of the law of evidence of Europe. The above Framework Decisions 2002/584/JHA and 2003/577/JHA can be considered predecessors of European evidence warrant (EEW)¹⁴, which was adopted only on 18th December 2008 or in other words *consideranda*, which means that the

⁸ *Presidency Conclusions, Tampere European Council of 15-16 October 1999, supra note 5.*

⁹ *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* // [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0115\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0115(02)).

¹⁰ *Ibid.*

¹¹ *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002F0584>.

¹² *Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence* // [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0115\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0115(02)).

¹³ *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM(2003) 688 // <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-688-EN-F1-1.Pdf>.

¹⁴ *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* // <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:en:PDF>.

provisions of the above decisions, although integrated, are reflected in the mechanism of the EEW, as a legal instrument¹⁵.

The efforts to develop the law of evidence are not limited to the above legislative ideas and legislation. It was stated in subsequent EU documents, in particular, in the Hague Programme¹⁶, 2005, that it is required to improve judicial cooperation in criminal matters further in order to ensure proper activities of Member States' law enforcement agencies and further investigation activities of Europol; the detailed programme of measures, which were intended for implementation of the principle of mutual recognition in the judicial decisions in criminal matters, would include the judicial decisions in all stages of the criminal proceedings related to the evidence gathering and admissibility and that the attention was needed to be further paid to additional proposals of this area. The action plan implementing the Hague Programme¹⁷ also has foreseen a proposal on minimum standards relating to the taking of evidence with a view to admissibility.

Subsequently, the Commission Communication¹⁸ "An Area of Freedom, Security and Justice Serving the Citizen" of 2009 has set out the objective to create *inter alia* the establishment of a comprehensive system for obtaining evidence in cross-border cases. According to the Communication, it was foreseen to change existing legal instruments of this area using one new instrument, which would be recognized in itself and applied in all EU and would contribute to prompt and flexible cooperation of the Member States. According to the Communication, this instrument could include rules on electronic evidence and the European order for bringing persons to court that takes account of the opportunities offered by videoconferences. In addition, the minimum principles to facilitate the mutual admissibility of evidence between Member States, including scientific evidence, could be provided for.

The mutual recognition principle remained the most important aspect in the judicial cooperation law on evidence area in later stages. The objective to improve the application of the principle of mutual recognition, exchanging the information from ECRIS and in the area of recognition of evidence in criminal matters was set out in the priorities of Spain, Belgium and Hungary forming a presidency "trio"

¹⁵ Rosanna Belfiore, *supra* note 2: 3.

¹⁶ *The Hague programme: strengthening freedom, security and justice in the European Union* // [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005XG0303\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005XG0303(01)).

¹⁷ *Communication from the Commission to the Council and the European Parliament – Implementing The Hague Programme: the way forward*, COM/2006/0331 final // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0331>.

¹⁸ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme* // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0171>.

(16771/09; 5008/10)¹⁹, and in addition the possibility to agree on joint measures to replace the EEW is considered.

Therefore, the formation and the further development of the law of evidence of Europe depended (-s) in the dimension of alternation which characterized EU law in general. This meant that the natural and existing changes of social relations, the need for greater harmonization and improvement of cohesion of the EU law and national laws were focused on convergence of these legal systems. All this is related to the discussion about the issue: i.e. what method and what forms the EU Member States should use for cooperation in the area of the law of evidence for achievement of the united objectives. Obviously, it is difficult to construct foundations of the law of evidence of Europe regarding different and various procedures, applied in criminal proceedings of the Member States²⁰. However, mutual recognition enables the Member States to rely on the instrumentation of the internal law of the other State, its legal culture, exclude the rule of so-called "verification of double criminality", i.e. to "contribute" the part of the sovereignty for implementation of the objectives of Community interests.

Although currently it has been accepted in EU law that mutual recognition principle is the cornerstone and there are no doubts in respect to it; however, the content of this principle is highly individual, depending on the legislation to be implemented. It is important in relation to issues of evidence and their admissibility in the EU law because the penetration of the aforementioned principle to the relations of the Member States in the area of the criminal justice determines the perspective of the attitude to the law of evidence in Europe. However, further analysis of this article will confirm that even the mutual recognition principle that prevails at this time may have a slightly different legal connotation²¹, which leads to changes of the dynamics of the international cooperation in criminal proceedings.

2. THE VISION OF EVIDENCE ADMISSIBILITY: THE EUROPEAN EVIDENCE WARRANT

The settling of the mutual recognition principle in EU law determined (determines) searches, which are intended for optimization and improvement of one or the other elements of international cooperation in criminal matters. Much work is done regarding the issue of evidence and its admissibility in the EU Member States. Is it sufficient? It will be possible to answer this question when it will be

¹⁹ JHA Trio Presidency Programme (January 2010-June 2011) Council Doc. No 5008/10, of 4 January 2010 // <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205008%202010%20INIT>.

²⁰ Wolfgang Hetzer, *supra* note 2: 167.

²¹ John Vervaele, "The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU," *supra* note 2: 54; John Vervaele, "Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?," *supra* note 2: 215.

clear what modern legal instruments for the evidence admissibility exist in the EU law currently, and if these instruments are sufficient, whether the results of their action outcomes are satisfactory for national legal authorities or if they are not. It is also necessary to talk about searches in the EU law and discovered ideas, creating preconditions for ensuring (guaranteeing) the admissibility of evidence in internal confidence of the "national judge".

One of the mechanisms of judicial cooperation applied in the area of the law of evidence of Europe is the Framework Decision on the European Evidence Warrant for which praise and criticism have been expressed. It is provided in Part 1 of Article 1 of the Framework Decision for the EEW, that the EEW is the judicial decision issued by the competent authority of the Member States with a view to obtaining of the objects, documents, and data from the other Member State in order for use in the criminal proceedings. Article 4 of the Decision defines the areas of application of the EEW according to which the EEW can be issued with a view to obtaining in the executing State (which received the issued order) objects, documents, or data needed in the issuing State for the purpose of criminal proceedings, which take place in it. The EEW covers the objects, documents, and data specified therein, which means that it is defined in advance in this judicial decision the data that is required. The EEW cannot be issued in order to require from the authorities of the executing State that it, *firstly*, would conduct interrogations, would receive applications or initiate other types of meetings, in which suspects, witnesses, experts or any other party would participate, *secondly*, would carry out bodily examinations or would obtain biological material or biometric data from the body of any person, including DNA samples or fingerprints directly, *thirdly*, would obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts, *fourthly*, would conduct analysis of existing objects, documents, or data, and *fifthly*, would obtain communications data retained by providers of a publicly available electronic communications service or a public communications network. For the limited scope of application the EEW cannot be issued in order to interrogate suspects or witnesses or to obtain the other information in real time because though the evidence could be obtained directly but it does not exist or the evidence of certain types already exists, for example, DNA profiles, fingerprints but they cannot be obtained directly without further investigation or examination²². So the EEW is issued to get already pre-existing evidence collected, which is in the executing

²² *Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility* (COM/2009/0624 final) // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2009:0624:FIN>.

State. This warrant cannot be used to collect new evidence, which, as such, does not exist in the executing State.

With regard to the procedural aspects of transfer of the judicial decision, it should be noted that recognizing and implementing the EEW in the context of the mutual recognition principle, the executing authority shall recognize the transferred EEW waiving additional formalities and shall immediately take the necessary measures so that the EEW would be implemented in the same way as these objects, documents, or data would be obtained by the authority of the executing State, except in cases when that authority decides to apply one of the determined grounds for non-recognition or non-execution or one of the grounds for postponement. Moreover, the executing State shall take measures that are needed for execution of the EEW according to procedural rules, which are determined in its national law. In order that this legal aid would be based on mutual trust, the executing authority must follow the formalities and procedures specified by the issuing authority, except in cases, when such formalities and procedures are not contrary to fundamental principles of law of the executing State.

It is provided in the Green Paper "On obtaining evidence in criminal matters from one Member State to another and securing its admissibility"²³ that the existing instruments on obtaining evidence in criminal matters already contain rules aimed at ensuring the admissibility of evidence obtained in another Member State in order to avoid evidence being considered inadmissible or of a reduced probative value in the criminal proceedings in one Member State because of the manner in which it has been gathered in another Member State. However, these rules only approach the issue of admissibility of evidence in an indirect manner as they do not set any common standards for gathering evidence. There is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence.²⁴ J. González-Herrero and M. M. Butincu confirm these concerns that the evidence transfer from one country to another will justify the international significance of international cooperation; however, when viewed from the other side, nationally it will cause considerable problems for national courts while tackling the question of admissibility of such evidence.²⁵ According to S. Gless, it gives cause for consideration regarding the category of evidence in criminal proceedings as the legal construct, which is an integral part of a fair trial. The free movement of

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Joaquín González-Herrero González and Maria Madalina Butincu, *supra* note 2: 91.

evidence in the EU, as the objective, is important, because such "movement" must ensure the specific balance between not identical national legal systems²⁶.

The essential indicator of discussions on the Framework Decision on the adequacy of the EEW during the development of evidence law in the EU is the evidence admissibility when the evidence which is gathered in one State and transferred to the other State and the State, which obtained the evidence, must assess, if such evidence in its national law comply to one of the requirements, that are raised to evidence – the admissibility. The main and the most fundamental reason of these doubts is that the EEW is issued in order to obtain the evidence which is collected in advance. The positions set out in the legal literature confirm the fact that these doubts are justified. M. Hildebrandt, while raising concerns about the implementation of the EU legal instruments, respectively including the EEW mechanism in the systems of national law of the Member States, questions the European criminal justice and Europe identity. The author, referring the level of competence of the EU Member States in the implementation of criminal policy, asks if we want (can) rely on the decisions taken by another State, which we must accept in our national law bearing in mind that the competent authorities of the foreign State adopted such decisions exclusively in accordance with the local law, which is caused by the local legal tradition, customs, social and other factors²⁷. The author, skeptically assessing the implementation of the mutual recognition principle as the "cornerstone"²⁸ among the Member States in the EU law, suggests that the mechanism of implementation of the EEW forces States to "lose" their identity, and refuse the full sovereignty in the area of the criminal justice. Asserting that the criminal justice should be the local justice, the author also asks if we want to receive and acknowledge such data obtained in the other State with the other jurisdiction as the evidence in our criminal proceedings.²⁹ This results in considering whether the mutual recognition principle in the relations of the EU Member States in criminal matters just simply "cosmetically hides" these doubts showing that they do not exist. The author A. H. Klip does not contradict this position; he states that the main base of the problem of cooperation in the criminal matters is the lack of psychological acceptability of new developments and challenges, the failure to understand competence of the EU and Member States and multicultural differences. The harmonization process of criminal justice in Europe would be much simpler without them.³⁰ The above authors, especially M.

²⁶ Sabine Gless, *supra* note 2.

²⁷ Mireille Hildebrandt, *supra* note 2: 65–67, 75.

²⁸ *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, *supra* note 9.

²⁹ Mireille Hildebrandt, *supra* note 2: 65–67, 74.

³⁰ André Klip, *Criminal Law in the European Union* (Deventer, Kluwer, 2004), 61–62.

Hildebrandt, relate the inadmissibility of the mechanism of the EEW with the complexity of the identity of Europe and separate Member States, and the threat of loss of the State sovereignty in the context of the criminal justice.

The author M. Tomášek suggests that unification of criminal laws in European countries is not in itself a bad thing; on the contrary, preconditions are created in this way to harmonize minimum procedural safeguards of protection of human rights. Throughout this process international legal assistance (cooperation) in the European Community level is just such a form of cooperation in which the Member States act as an intermediary and not their judicial or other competent authorities (for example, the executive power). As a result, quite a paradoxical situation is pushed through, when the attempts are made to unify the system of the criminal justice of the particular State, which is the exclusive competence of that State, with the traditions of the criminal justice of other States, and in such way assigning the part of own provisions and taking the part of provisions of other States. So, in agreement with the positions of other authors (G. Conso, V. Greve), we ask whether the exclusive competence of the State *ius puniendi* can be "limited" regarding development of protection of human rights in the Community?³¹ The process of protection of human rights is related to constraint of other human rights (keeping balance of protection of the legitimate interests) limitation. Thus, M. Tomášek notes that the international legal aid in the EU is implemented also using criminal procedural measures; part of them is the emerging European law of evidence. Thus, the international cooperation among the EU Member States, when one State asks the other State that the last-mentioned State would transfer the available evidence to the other State, is based on the mutual recognition principle, which means that the Member States must rely on other State's measures and methods that are applied while collecting, recording and inspecting the evidence. Trust is the foundation which allows dealing with offences speedily and efficiently. Regrettably, we have little faith in this trust because procedural legal standards and forms, applied methods and even procedural coercive measures, which are used for searching, collecting, fixing and inspecting of relevant evidence, are different. Although the mutual recognition principle should be valid there, the author envisages the events, which have fiction features that leave traces in the real criminal case. The author doubts whether a State, which has obtained the collected evidence from the other State, can accept this evidence and consider this evidence as corresponding to the requirements of admissibility and reliability because it is possible that the obtained evidence has been gathered using such methods, which are not allowed in this country. A paradoxical situation arises which raises the

³¹ Michal Tomášek, *supra* note 2: 175, 177, 178.

question of whether the requirement of the mutual recognition legitimizes different methods or even ones contrary to the legal order, which are used in different States³². Presumably, the unease of M. Tomášek may be regarded as justified in reality in terms of criminal justice “nationalism” or not justified when talking about “internationalisation” of the mechanism of human rights protection.

K. Karsai, talking about the problems of admissibility of evidence in the national law of the EU Member States, suggests the theory of “free movement of evidence”; however, she questions this theory later. According to the author, this theory is actually viable and promising in the context of the mutual recognition principle. After applying this theory in practice, this “promising” theory has been disappointing. The author discusses whether the situation in the national law of the Member State is currently sufficient and acceptable, when this State obtains the required evidence which is necessary for the quick and detailed implementation of specific criminal proceedings. The issues of the evidence concept are related not only to the facts but also to the law. Such objects as, for example, the blood or the signature are factual data which can be used for proving of certain circumstances. This data can be real, meeting the requirements of coherence and sufficiency. However, whether they are admissible in the specific Member State and acceptable from a legal standpoint remains an open question. In order to answer this question it is important to find out the other answer to the question of how such data was collected in the other State, i.e. how it was researched, recorded, what legal form was used for it, whether it meets the same, at least minimum legal requirements that are raised in the Member State in which such data will be assessed by the court³³. So, all these questions are still unanswered even today.

The German Bundestag expressed certain doubts about the adequacy and viability of the EEW mechanism in the internal State law, for example, in the law of criminal proceedings of Germany, adopting the recommendation³⁴ for this issue on 6th October 2010. According to the Lower House of Parliament, although the mentioned mutual recognition principle, providing a flexible cooperation of the Member States, is implemented on the base of the EEW, the procedures of the evidence collection, its transfer and recognition in the international criminal proceedings, raise some doubts. The main reservation is that the EEW is applied for evidence (data) that has already been collected. The Evidence Warrant cannot be issued for searching, recording and collection of the data. Also, the German

³² *Ibid.*

³³ Krisztina Karsai, *supra* note 2: 951.

³⁴ *German Bundestag, 17th electoral term. Recommendation for a decision and report of the Committee on Legal Affairs (6th Committee) on the communication of the Federal Government – Printed Paper 17/2071, No. A.7 – Initiative for a Directive of the European Parliament and the Council regarding a European Investigation Order in criminal matters, Council Document 9145/10, Printed Paper 17/3234.*

Parliament envisaged the issues to be considered for control of dual criminality cases and uncontrolled cases during implementation of the EEW procedures. For example, it is provided in Part 1 of Article 14 of the Framework Decision that in the case of recognition or implementation of the EEW, it is not needed to check dual criminality, except cases when it is necessary to carry out the search or the seizure. It is not clear without the other provisions, which would supplement the last-mentioned provision, how it is possible to talk about the implementation of the mutual recognition principle, when the issue of the EEW implementation depends on what procedural actions would be necessary for collection of one or the other evidence (data). It can be seen that all these concerns really raise question about the optimality of the EEW mechanism.

The disadvantage of the EEW mechanism is the problem that the extent of the warrant implementation is limited. It is usually possible to request for presenting of the existing collected evidence in the EEW, and the search of the new evidence on the base of this order is not possible. However, no one can deny that it is often necessary to obtain the evidence within the State and from the foreign States while administering justice in criminal matters. It is possible to accept the position of A. Lach that only the form of indirect collection of evidence is created using the EEW; this form allows the obtaining of only the existing collected evidence. The author, in principle not denying the necessity of the EEW mechanism, acknowledges that such segment of the law of evidence in Europe is indispensable, allowing the ensuring of the possibility of the direct evidence collection in foreign countries³⁵. The author mentions as the example the Council Regulation of 28th May 2001 (EC) No 1206/2001 "On cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters"³⁶. The legal instruments that can allow one EU Member State to collect evidence directly in another EU Member State, asking the executing State that it would perform the relevant investigation activities, during which the obtained evidence would be transferred to the requesting State, would ensure not only the guarantee of the process within the shortest time but also would prevent understatement of evidential value of the obtained data, when these data will be assessed in the national court of the requesting State³⁷. It is clear that the author supports the new initiative of legislation, which allows not only to ensure economy of the criminal proceedings talking about time and financial costs but at the same time to guarantee, that the evidence, which was collected and obtained from the foreign State, comparing them

³⁵ Arkadiusz Lach, *supra* note 2:108–109.

³⁶ *Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, OJ L 174 (2001): 1.

³⁷ Arkadiusz Lach, *supra* note 2.

to the evidence, which was collected in the State where the criminal proceedings take place, would not be discriminated or found admissible separately.

W. Hetzer argues that the existing weaknesses of these legal instruments are, firstly, that the provisions of national law in the area of criminal proceedings are implemented applying different forms of the State coercion. Secondly, the provisions of the law of the Member States for the admissibility of evidence, which was collected using illegal means and methods, differ. Thirdly, the biggest concern arises because not the same procedural form of the evidence collection in the different Member States dominates. The evidence which has been collected applying certain rules, after transferring it to the other State, cannot be found admissible in the last-mentioned State because the rules of their collection do not meet the requirements of the national law. In this situation, the author suggests that in order to avoid the above-mentioned difficulties, it is necessary not to harmonise the provisions of the national law of the Member States, not to simplify the requirements of the national law in this area but to pursue strengthening of the mutual recognition of evidence in cross-border relations. W. Hetzer further argues that such mutual recognition of the evidence among the Member States is assessed and will be assessed as the rule, that functions on the base of fiction and allows to achieve the desired result – the admissibility of evidence in criminal proceedings of any EU Member State in case it is not possible to do it using other legal norms³⁸. Based on the above, the subsidiary nature is specific for this rule.

These alarming signals of insufficiency of the EEW mechanism resulted in further searches and discoveries in the law of evidence of Europe – the European Investigation Order (EIO).

The Stockholm Programme was adopted on December 11th, 2009. The European Council adopted a decision in this Programme, that it is necessary to continue the creation of the detailed system, intended for collection of the evidence in cross-border cases and based on the mutual recognition principle. The European Council encouraged the creation of a comprehensive system, which would replace the current legislation, including the Framework Decision on EEW, the system would be applied for the evidence of all types and according to this system the deadlines of execution would be determined and, so far as possible, the foundations of refusal to execute the EIO would be limited³⁹. On 21st May 2010 the group of the EU Member States (Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden) presented the initiative to the European Council for the Directive of the European

³⁸ Wolfgang Hetzer, *supra* note 2: 170, 173, 175.

³⁹ *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 ... regarding the European Investigation Order in criminal matters*, OJ, C (2010): 22–39.

Parliament and of the Council regarding the European Investigation Order in criminal matters, the objective of the Directive was the improvement of search of the truth in cases with the international element and, at the same time, development of the area of freedom, security and justice.

The main idea of the mechanism of the European Investigation Order was intended not only for obtaining of the evidence, which was collected in advance in other Member States, but for performing the actions in finding, collecting and obtaining evidence. According to C. Murray, the evidence for which the EEW is issued, is "historically defined", because is found, there is no need to look for it in "real time"⁴⁰. As for the EEW, it must be assumed that the judicial body, which issues the EEW of the EU Member State, knows what evidence is sought. Meanwhile, the executing authority of the Member State that received the order decides what procedural investigation actions should be taken. Thus, such method of evidence search, recording, collection and transfer to the other State is problematical due to the fact that it does not quite meet mutual recognition principle because the national legal decision (of the State, which received the EEW for execution), which must be implemented, is related to procedural investigative actions but not with some evidence. In other words, the objective of the European Investigation Order is not only to collect the existing evidence, which is known in advance, but to ask the other EU Member State, that it would start legal proceedings in order to collect the relevant evidence, which the Member State, that issued such request, needs. Thus, the State which requests another State to search for and collect the necessary evidence, specifies what investigative activities should be used in order that later, after collection and obtaining of such evidence, the problems of assurance of admissibility would not arise because procedural requirements (procedural forms) of the evidence admissibility and collection in the requesting State and in the executive State often vary. These are essential EEW and the EIO features and differences, and they allow for clearly understanding why in the conclusions of the European Council there is a need to look for more efficient perspectives on the development of the law of evidence in Europe, and why the existing legal instruments are insufficient and unacceptable.

⁴⁰ Christopher Murray, *supra* note 2: 50.

3. EUROPEAN INVESTIGATION ORDER: FROM VISION TO MISSION

According to the Directive 2014/41/EU of the European Parliament and of the Council on the European Investigation Order in criminal matters⁴¹ a mechanism has been created that allows for conducting actions which have not been possible or especially complicated in the law of evidence of Europe, actions which are related to the evidence that is nonexistent in the executing State, and the evidence which has already been collected and with the right of the participants in the process (suspect, defendant or their representatives) to ask for issuance of the EIO regarding the implementation of the right of defence. In other words, the aforementioned legal instrument allows not only the obtaining of evidence which is collected in advance and which is in the other State, this instrument also allows asking for collection of the relevant evidence according to such procedural order and requirements, that would be applied in the requesting State in accordance with *lex fori* principle and it was not possible practically until now⁴². So, the nature of this legal mechanism, as it is correctly stated in literature sources, is close to the development of the European Union law in the criminal justice in accordance with the "chameleon principle"⁴³. Also, the provision of the author S. Ruggeri can be accepted that the discussed legal instrument creates the integrated format of international cooperation in criminal proceedings in the EU Member States because the complex nature of this Directive shows a significant shift from a conception of the mutual recognition model as an alternative of the mutual legal assistance system to a view of the mutual recognition model, that is combined with the mutual legal assistance system. It is a virtuous combination of the efficiency of the order model (in the mutual recognition model) with the flexibility of the request model (i.e. mutual legal assistance system).⁴⁴ The method of the new procedural format of international cooperation in criminal proceedings is created according to this Directive, and this method not only allows to expect the good will of the executing State in the course of fulfilling a request for legal assistance, it allows us to expect the proper performance of the duty, when the executing State relies on the national law of the requesting State (the legitimacy of the issued Order). This method of cooperation makes the "route" of the movement of the evidence in the EU significantly more

⁴¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0041>.

⁴² "The *lex fori* is a specific concept of private international law and refers to the law of the court in which the action is brought. Where an action is brought in a court and has an international dimension, the court must consider the law applicable to the case. In certain circumstances, the *lex fori* will apply. Traditionally the *lex fori* governs questions of procedure, regardless of the *lex causae*" (see http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#LexFori).

⁴³ Stefano Ruggeri, *supra* note 2: 4.

⁴⁴ *Ibid.*: 9.

flexible and simpler. Together, as it is specified in the scientific sources, this legal mechanism creates preconditions “for clear laws, which are easily understandable and comprehensive so as to lessen the opportunity for a suspect to escape liability by arguing an unmeritorious technicality; effective tools to effect cross border investigations within a short time period; procedures whereby challenges to the issue of a request or to execution are determined promptly according to a clear set of criteria.”⁴⁵

The so-called rule of mechanism of “compensation”⁴⁶ of the evidence collection, which is laid down in the Directive symbolizes the flexibility and simplicity together and allows the executing State that is collecting evidence to apply other methods of collection of the evidence than the methods asked by the State that issued the order but even in this case, the executing State should seek, that the achieved result would be the same as the result, which would be achieved by applying the procedures, which were required by the State that submitted the order. It is provided in Part 2 of Article 9 of the Directive “that the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State”. The cases are provided in Part 1 of Article 10 of the Directive, when “the executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where: (a) the investigative measure indicated in the EIO does not exist under the law of the executing State; or (b) the investigative measure indicated in the EIO would not be available in a similar domestic case”. The application of this rule is particularly relevant in such cases when in order to collect the required evidence, it is necessary to apply actions that have the procedural coercion features or if the principles of law of the executing State require that according to the national law *lex loci* (Item *d* of Part 2 of Article 10).

However, the problem of the practical applicability of this “compensation” rule, which is programmed in the Directive, is noticeable, whatever would happen in the practical implementation of the Directive. Although the cases allowing for the application of alternative (compensatory) investigation measures other than the requesting State asks, are specified in Items *a* and *b* of Part 1 of Article 10 of the Directive, the meaning of the provision “the investigative measure indicated in the EIO does not exist under the law of the executing State” is not clear. It would seem that, according to this provision, attempts are made to create assumptions and

⁴⁵ Anthony Farries, “The European Investigation Order: stepping forward with care,” *New Journal of European Criminal Law* 1 (2010): 426.

⁴⁶ Stefano Ruggeri, *supra* note 2: 9.

foundations of smooth cross-border cooperation; however, its abstract qualities, ambiguity and, finally, too liberal application in the executing State can cause adverse effects in the State, which EIO stated during assessment of admissibility of the evidence performed by the national court, obtained in the executing State, applying the "foreign body" procedural evidence collection form for the issuing State. In this way, the question of security of the mutual admissibility of the evidence is raised at the practical level. As previously mentioned, the principle of mutual recognition associated with the best pragmatic aspirations not always performs the function improving mutual trust. The executing State, choosing other investigation measure than it is provided in the EIO for the foundation of the compensation mechanism, will create a legal conflict in the national court of the State, which issued the EIO and assesses, if the evidence was obtained according to "abnormal order" in the contrary to the national laws. To resolve this dilemma of regulatory framework and for non-violation of the principles of cross-border trust, it is offered to use provisions, regulating certain procedural guarantees, the provisions, which could ensure mutual acceptance of other order of collection of the evidence than it is provided in the executing State. In this case, it is sufficient to use additional rights of defence of the suspected or accused person or the additional function of judicial control. As regards the first case, the executing State, before implementation of the investigation measure other than it is provided in the EIO, when there is the reason provided in Item *a* of Part 1 of Article 10 of the Directive, consults the competent authority of the issuing State in order to obtain the approval or non-objection or other "tolerance" for implementation of the other investigation measure than it is provided in the EIO. As regards the second case, the executing State, before implementation of the investigation measure other than it is provided in the EIO, when there is the reason provided in Item *a* of Part 1 of Article 10 of the Directive, consults the competent authority of the issuing State in order that it would take additional measures, for example, to obtain non-objection of the national court to execute the other measure in the executing State than it is provided in the EIO. The application of these additional procedural guarantees would comply with the provision of Part 3 Article 1 of the Directive, which provides "that the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure".

So, the possibility of recourse to a different type of investigative measure creates the false appearance for the imperative of Part 1 of Article 9 of the Directive, which provides "that the executing authority shall recognise an EIO, transmitted in accordance with this Directive, without any further formality being

required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive". Another question arises in this respect: why is the Directive not so liberal while giving to the cooperating States the possibility during mutual consultations for non-coercive investigation actions or actions, which are provided in both States, to choose such investigation action, which the executing State would implement in a more economic and more efficient manner (Part 1 of Article 9 of the Directive)? It is possible to agree with the insight of some authors, for example, L. B. Winter, that essentially relations between the requesting State and the executing State in the Directive are based on "blind recognition", founded on the identical trust of the States without any possibility to "contradict" the selection of the procedural form of collection of the evidence according to discretion of the executing State⁴⁷. In fact, it appears that the provision of Part 1 of Article 9 of the Directive is reasonably authoritative but Part 1 of Article 10 of the Directive, which consolidates the dispositive model of behaviour of the executing State, creates the particular conglomerate shade of this legislative act of the European Union. It does not contribute to the effective and rapid development of international cooperation. Although the Directive does not provide the single ideal formula how to deal with these regulatory differences, it is obvious that it is necessary to turn to one of the forms of the international cooperation – reciprocal (mutual) legal aid, the expression of which is laid down in Part 3 of Article 6 of the Directive. Where the executing authority has reason to believe that the conditions referred to in paragraph 1 of Article 6 have not been met, it may consult the issuing authority on the importance of executing the EIO. "After that consultation the issuing authority may decide to withdraw the EIO" (Part 3 of Article 6 of the Directive). This form, contrary to the mutual recognition, will allow for more cooperating countries to understand the objectives pursued, the admissibility of measures for achievement of these objectives and the admissibility requirements of the evidence, obtained in the executing State, according to the aspect of appropriateness of the procedural form in the issuing state.

The other question that is related to international cooperation relations in criminal matters, which are regulated by the Directive, is the topic of implementation of the right of defence in the context of equality of rights. The author L. B. Winter states, that:

⁴⁷ Lorena Bachmaier Winter, *supra* note 2: 586.

A general criticism has been that the EU, when pursuing the creation of European space of justice, is mainly concerned only about reinforcing the efficiency of criminal prosecution and endowing judicial cooperation with more speedy mechanisms, but there is no parallel effort to increase and refine procedural guarantees for the accused. This criticism is not without fundament. Certainly, if the aim is not to put supranational measures at the disposal of the public prosecution, it is logical to think that one of the priorities should be facilitating the articulation of the defence at the same level – at least, a similar degree of efficiency or the cross border level should be sought. Reality, however, is far from it. Except for a minimal number of defendants with sufficient resources to organize and pay for a transnational defence, it is normally very difficult for the defendant to have access to elements of evidence available in other member State or to verify how the evidence gathered by the prosecution has been obtained.⁴⁸

According to this author, the Directive, the objective of which is to pursue more pragmatism, will be criticized for restriction of procedural guarantees. A. Mangiaracina supports that idea, stating that “in such a case the presence of a body called ‘Eurodefensor’, charged with supervising the legality of the measures, could counterbalance the need to ensure an effective investigation.”⁴⁹

In order that the rights of the defence to participate during collection of the evidence would not be restricted, it is offered to discuss about the recording using audio and/or visual means of the evidence-gathering activities (except covert investigation actions) performed in the executing state. Relations which are regulated by the Directive are intended only for the preliminary investigation processes that are not generally open to the public or in other words – the process and the data of this investigation shall not be published. Therefore the proportionate restriction of the rights of defence is justified. However, it must be remembered that one of the criteria of the modern criminal procedure is the possibility for the defence to participate in the procedural action, which is intended for the collection of the evidence in a situation when this procedural action is performed according to the request or the initiative of the defence. The suspect and his/her defence usually have the right to participate in the procedural action, which is performed according to the request of the defence and especially, if it is related to the search and the collection of the vindicating data. Unfortunately, we miss this procedural right, or at least the possibility in the Directive. So despite the fact that the issuing of an EIO may be requested by a suspected or accused person, or by a

⁴⁸ *Ibid.*: 587.

⁴⁹ Annalisa Mangiaracina, “A New and Controversial Scenario in the Gathering of Evidence at the European Level. The Proposal for a Directive on the European Investigation Order,” *Utrecht Law Review* 10 (2014): 124.

lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure, the Directive leaves the open question for cooperating States to deal with such issue of defence and the participation of defence performing the actions according to the EIO. The authors suggest that the provision regulating the right of the defence to participate during performance of the procedural action in the executing State, would be directly laid down in the Directive in a case when the EIO is issued according to the initiative of the defence and especially in such cases, when the executing State applies alternative measures of investigation than it is provided in the EIO according to Part 1 of Article 10 of the Directive. The possibility of participation of the defence during performance of such actions of data gathering should be provided and this would strengthen the admissibility of the evidence, gathered according to Part 1 of Article 10 of the Directive, which is assessed by the national court of the issuing state.

Increase of efficiency of the procedural defence function in the context of application of the Directive together would help to avoid the interpretation of the law, talking about the application of Article 11 of the Directive. In Article 11 of the Directive, which regulates the foundations of non-recognition or non-execution of the EIO, we cannot find one of the possible foundations regulating the international cooperation in criminal matters, that is provided in other EU legislation, related to the foundation of non-recognition or non-execution of the request of the issuing State in case if it is related to presumptions of essential constraint of human rights. D. Sayers and D. Staes properly emphasize that in case of absence of such foundation of non-recognition or non-execution in this Directive, the State issuing the request, and the State that received the request, find themselves in the pre-programmed situation, in which both States will be forced to violate the person's rights.⁵⁰ For example, the procedures of the interrogation using the videoconference or other audio-visual means of transmission are regulated in detail in Article 24 of the Directive but there is a lack of measures of assurance of the rights of defence in them. In concrete terms, the Directive does not regulate any possibility for the suspect or the defendant to participate in the interrogation, during which the witness of defence or prosecution is questioned in the executing state according to the request of the State, which the European Investigation Order issued.

⁵⁰ Debbie Sayers, "The European Investigation Order. Travelling without a 'roadmap'," *CEPS Liberty and Security in Europe* (2011): 12 // <https://www.ceps.eu/publications/european-investigation-order-travelling-without-%E2%80%98roadmap%E2%80%99>; Dorothea Staes, "The Interrogation of Witnesses abroad in Execution of a European Investigation Order. An Examination from the Eyes of the Defence," *EIUC European Inter-University Center for Human Rights and Democratisation* (2011): 55-56 // http://run.unl.pt/bitstream/10362/6214/1/Staes_2011.PDF.

The participation of the defence applying some provisions of the Directive, as discussed above, is related to another action of the data collection that is provided in Articles 22 and 23 of the Directive. It is stated in these provisions that "an EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State" (Part 1 of Article 22 of the Directive). "An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the executing State is required" (Part 1 of Article 23 of the Directive). D. Sayers asks for this aspect whether, for example, Articles 22 and 23 of the Directive, which regulate temporary transfer to the issuing State or to the executing State of persons held in custody for the purpose of carrying out an investigative measure, ensure procedural rights of the extradited arrested person, which are provided by traditional mechanisms of extradition and the European Arrest Warrant. Is this procedure similar to the so-called "backdoor extradition"⁵¹, when transfer of the arrested person to the issuing or executing State for investigation purposes bypasses the procedural form of judicial control?

Unlike the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA⁵², in which independent procedural guarantees to the right of defence of the person to be transferred are regulated, we cannot find such provisions in the EIO mechanism. It would seem that application of the measures provided in the EIO temporarily transferring the suspect from one state to another is not related to execution of criminal justice for the person to be transferred in the State that issued the European arrest warrant. However, according to a functional approach, this situation is similar to the situation of prosecution of the temporarily transferred person in the executing State. Furthermore, the provisions of Articles 22 and 23 of the Directive are not very relevant to other EU legal guarantees during the criminal proceedings. For example, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 On the right of access to a lawyer in criminal

⁵¹ Debbie Sayers, *supra* note 50: 13.

⁵² 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002F0584>.

proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty provisions consistently consolidate rights and freedoms of the suspect in the State, where the criminal proceedings take place; however, these provisions of the Directives cannot influence the mechanism of the European Investigation Order, which, as a rule, is implemented not in the State of criminal proceeding of the temporarily transferred person. It therefore follows that in order to transfer properly and implement in practice Articles 22 and 23 of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, it is necessary to explain them systematically with already applied legislation, which implements rights and freedoms of suspects and defendants in the EU Member States.

CONCLUSIONS

With the development of international legal cooperation in criminal proceedings the challenges are being faced that determine searches of effective and appropriate cooperation. This includes areas of international legal assistance which seemed distant and irrelevant for the international community in the fight against crime, until recently. The question often arises in the cases with the international element about how to ensure finding of the evidence in the other countries, their receiving and transfer to the State that implements the criminal proceedings in order that such evidence would meet requirements of the national law of this State. New opportunities are sought which would help to develop the law of evidence in the process of Europeanisation, and which would ensure receiving and transfer of the evidence and, finally, its admissibility in the national courts.

The development of the law of evidence cannot be imagined without legal instruments, which are based on mutual legal assistance and mutual recognition principles. The consistency of these principles shows that currently mutual legal assistance does not satisfy needs of the international community for effective and fast cooperation while ensuring receiving and transfer of the evidence among the States and the unhindered admissibility of evidence. The gradual transition to the relations based on mutual recognition of the competent authorities of the States is implemented, which creates preconditions to pursue high trust in each other in the area of the law of evidence. Although several legal instruments exist that help to ensure mutual trust of the Member States, they are insufficient, and new methods are sought which would ensure not only the direct collection of the evidence in the

other foreign State but also the admissibility of the evidence collected in this State and transferred to the other State, in the national law.

The most recent instrument of the law of evidence of Europe, the European Investigation Order meets expectations of legislation and law application. The current mechanism of functioning of the European Investigation Order is more flexible than its predecessors but it is not faultless. The features of flexibility and alternativity that are typical for this legal instrument do not ensure guarantees, which are recognised as fundamental, the guarantees of equality, the right to defence and the right to participate directly while performing the actions of collection of the evidence in the other Member State. Although by using this instrumentation the conditions are created for Member States to consult directly while implementing the appropriate measures of mutual legal assistance, still the impossibility to ensure the defence function, and performing the actions of collection of the evidence in the other State, raise corresponding doubts. These doubts not only cannot gain the full trust of the analyzed legal mechanism, but they create additional legal thresholds for the assessment of admissibility of the evidence obtained in the other Member State and in the State which issued the European Investigation Order.

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