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EUROPEAN INVESTIGATION ORDER DIRECTIVE - APPLICABILITY

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Annotation.

The relevance of the study: Aims proceed with the survey of issues related to validity of evidence in the context of the new evidence-taking instrument in the EU, the Directive 2014/41 / EU on the European Investigation Order in criminal matters and its transposition into the Portuguese legal system, resulting from Law no. 88/2017, of August 21. **The problem of the research** For this purpose, we approach the concept of proof, the principles, theories and rules governing the taking of evidence in a transnational context, we indicate which instruments and norms are relevant in the matter, we analyze the Directive and national legislation from the perspective of the theme and we conclude with relevant ECHR and national jurisprudence. In any case, the Member States and their enforcers will have a decisive role, since the admissibility and validity of the evidence in the EIO continues to be a main task of these, seeking the desirable construction of a system of "checks and balances", that is, based on the necessary balance between the power of investigation or prosecution and the rights of the defense.

The object of the research- validity of evidence in the context of the new evidence-taking instrument in the EU, the Directive 2014/41 / EU on the European Investigation Order in criminal matters.

The aim of the research to survey of issues related to validity of evidence in the context of the new evidence-taking instrument in the EU, the Directive 2014/41 / EU on the European Investigation Order in criminal matters

Methods - analysis and synthesis, abstraction, logical and historical, comparative analysis.

Results.

From 22 May 2017, the collection of evidence in the European Union (EU) will be regulated by the European Investigation Order.

This is a new diploma based on mutual recognition and replacing the corresponding measures provided for in the abovementioned conventions.

It will be applicable in the EU countries, but Denmark and Ireland chose not to participate.

Following the adoption of this directive, other diplomas were revoked, for example, the Framework Decision European Evidence Warrant from 2008 (which had a narrower scope of application) was replaced by Regulation 2016/95 of 20 January 2016.

Conclusion. The EIO Directive and its transposition into Portugal with Law No. 88/2017, of 21 August, constitutes a major advance in judicial cooperation in criminal matters, as there is now only one legal instrument for obtaining evidence in the EU thus achieving, and this being its main objective, overcome the slowness and inefficiency of the system based on the issuance of rogatory letters transmitted in accordance with international conventions, as well as with the inefficient European warrant for obtaining evidence. Outside the EU, the multilateral and bilateral international treaties to which the Portuguese State is bound continue to prevail.

The Court of Justice of EU, in reference for a preliminary ruling, will (as has recently happened in the area of judicial cooperation in criminal matters) have a fundamental role to play in the interpretation of the EIO and national laws and particularly the transpositions, in the context of a preliminary ruling.

Keywords: *investigation, evidence, national legislation.*

INTRODUCTION

The relevance of the study: The problem of the research Aims proceed with the survey of issues related to validity of evidence in the context of the new evidence-taking instrument in the EU, the Directive 2014/41 / EU on the European Investigation Order in criminal matters and its transposition into the Portuguese legal system, resulting from Law no. 88/2017, of August 21. For this purpose, we approach the concept of proof, the principles, theories and rules governing the taking of evidence in a transnational context, we indicate which instruments and norms are relevant in the matter, we analyze the Directive and national legislation from the perspective of the theme and we conclude with relevant ECHR and national jurisprudence. In any case, the Member States and their enforcers will have a decisive role, since the admissibility and validity of the evidence in the EIO continues to be a main task of these, seeking the desirable construction of a system of "checks and balances", that is, based on the necessary balance between the power of investigation or prosecution and the rights of the defense.

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Framework, applicability and admissibility

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According to Costa Andrade, "the criminal process, and particularly the production and valuation of evidence, is increasingly the result of a division of labor between instances of persecution and control by different States".

Directive 2014/41/EU on the European Investigation Order in criminal matters (hereinafter EIO), have as main objective to facilitate and speed up the collection and transfer of evidence between EU Member States and to harmonize existing procedural procedures in States. The taking of evidence in a transnational context reappears as a central EU priority.

Relating to this issue there are some authors and I tend to agree, that for real cooperation and harmonization of procedures in criminal matters in the EU it should be chosen to adopt a European Regulation and not a Directive, since the transpositions that the Member States had made, had created obstacles to its success. Nevertheless, it is a substantial advance in the development of harmonization of legal and criminal procedures within the scope of the EU.

Until today, Member States have used three ways of transposing the IEO Directive:

i) adding new provisions to the national code of criminal procedure, as in the case of France and the Netherlands,

ii) adding new provisions to the national law of cooperation international judiciary in criminal matters, as is the case in Germany or

iii) proceed with new legislation, as was the case in Portugal.

The aim of the directive is to introduce the principle of mutual recognition,

• maintaining the flexibility of mutual legal assistance, and

• protecting fundamental rights.

In the words of Germano Marques da Silva: "The probationary activity is entirely intended to convince the

existence or not of the facts that are presupposed of the statutory provision". The judge is the addressee of the evidence, as this is intended to convince you about the accuracy of the facts alleged by the parties. Hence its extreme importance for the criminal process, because the object of the evidence is the “legally relevant fact”, according to the words of Paulo Pinto de Albuquerque.

In the context of the EIO, the requesting authority may contact the issuing authority directly.

Unless there is reason to reject the request, the competent authority must execute the request as soon as possible and in any case, if possible, within the time limit indicated by the requesting authority.

In order to guarantee the admissibility of the evidence obtained, the authorities of the executing country must comply with the formalities indicated by the authorities of the requesting country, provided that they are not contrary to the fundamental principles of the law of the executing country.

EIO covers all investigative measures (except the creation of joint investigation teams).

It can be issued in criminal, administrative or civil proceedings, if the sentence can justify the initiation of criminal action.

Issuing authorities can only appeal to the European Investigative Order if the investigative measure is:

• required,

• proportionate, and

• allowed in similar national cases.

Under the new directive, investigative measures must be carried out by the requested EU country with the same speed and the same degree of priority that apply in similar national cases. Investigative measures must also be carried out "as soon as possible". The directive sets deadlines.

As we mentioned, the fact that we are facing a Directive, in the Portuguese case, there were some changes in its transposition.

EU countries may refuse applications in some circumstances. General grounds for refusal applicable to all measures:

1. immunity, privilege or rules that reduce criminal liability in the field of press freedom

2. request likely to harm essential national security interests

3. non-criminal proceedings

4. ne bis in idem principle

5. extraterritoriality associated with double criminality

6. incompatibility with duties arising from fundamental rights.

There are additional reasons for refusing certain measures:

1. absence of double criminality (except a list of serious crimes)

2. inability to carry out the measure (investigation measure that does not exist or is unavailable in similar national cases, with no alternative).

Principles

With regard to the admissibility and validity of evidence and in particular in obtaining evidence in a transnational context, the following principles are particularly relevant, with the following division:

a) Classic principles of international judicial cooperation in criminal matters

• Favor cooperationis - judicial cooperation in criminal matters between States must be as broad as possible (within the (exceptional) limits that must be observed).

• Reciprocity - the requested State is only obliged to comply with the requesting State's request if it grants an identical and corresponding counterpart to the request made by each of the States involved.

b) Principles of taking classic evidence

• Locus Regit Actum - the Respondent State executes the request in accordance with its State's substantive and procedural criminal law.

• Forum Regit Actum - the Respondent State executes the request in accordance with the substantive and procedural criminal law of the requesting State.

c) Principles for obtaining evidence after mutual recognition. Mutual recognition - reciprocal recognition of judicial decisions in criminal matters.

• Proportionality, adequacy and necessity - in any request, it must be ensured that it is proportional, adequate and necessary for the intended purposes - art 11 of the EIO.

• Prohibition of fraud by law - only proof can be requested from another State whose obtaining in the requesting State would be admissible.

• Formality - in all requests, formalities essential to the admissibility and validity of the evidence must be requested.

• Inadmissibility of prohibited evidence (admissibility and validity) - the evidence obtained, on request or spontaneously, can only be used if it does not violate constitutional proof prohibitions of the legal order of the requesting State or the requested State, or supranational - art 124.º,125.º and 126.º of the Portuguese Processual Code.

• Equal diligence - obliges the executing judicial authority to execute the investigative measure with the same speed and priority as similar national procedures and, in any case, within the time limits provided (inherent to the EIO Directive, enshrining Article 12.º).

• Availability - the requested State must provide the information requested by law enforcement officers from other Member States and Europol, for the purpose of preventing, detecting and investigating criminal offenses.

• Digital proof - requesting and requested states must respect:

i) data integrity;

ii) preservation of data integrity;

iii) specialized assistance;

iv) training;

v) legality.

Rules on taking evidence in a transnational context

With regard to the admissibility and validity of evidence and in particular in obtaining evidence in a transnational context, the following rules are particularly relevant:

Intrinsic exclusion rules and Extrinsic exclusion rules, which are divided into two types:

a) supranational prohibitions - are verified regardless of whether the evidence is collected transnationally;

b) prohibitions resulting from transnationality.

The supranational prohibitions are essentially the result of the Portuguese State's obligations to comply with the European Convention on Human Rights (ECHR), and, with the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union is now obligatorily observed and taken into account. The ECHR has devoted itself more to this issue and in the main of its jurisprudence results an observation and an obligation:

i) the task of assessing the admissibility and validity of evidence lies with the legislation and courts of each State,

ii) the forum court must always assess the validity of the evidence in the face of ECHR prohibitions, regardless of where it was collected and who collected it.

Regarding the prohibitions resulting from transnationality, according to the status quo, I would say that the following exist:

- EIO (art. 14 no. 7, 19 and 20 of the Directive and arts. 8, 16 and 45, no. 7, of Law no. 88 / 2017 - personal data, confidentiality and appeal effects).

- Convention 2000 - article 13; 145-A (7) - International Judicial Cooperation Law in Criminal Matters.

Situations where EIO can not be use

- Submission and notification of procedural documents

- Spontaneous exchange of information

- Transfer of criminal proceedings

- Return of objects including seizure for this specific purpose;

- Exchange of information related to criminal records, with the exception referring to obtaining criminal records for the purposes of evidence, that can be done by the Directive;

- Request for consent to use as evidence information already received by police cooperation channels

- Cross-border police cooperation measures such as, for example, surveillance and harassment. Regarding these measures, recital 9 of the Preamble to the Directive clearly states that "This Directive should not apply to cross-border surveillance referred to in the Convention implementing the Schengen Agreement".

- Freezing measures and / or confiscation of instruments and proceeds of crime. The Portuguese authorities must continue to issue their freezing or confiscation orders. If further investigative measures covered by the EIO are required, they must be submitted on a separate EIO form.

Type of measures - articles. 32 to 43:

- Temporary data transfer for research purposes

- Hearings by videoconference or conference call;

- Controlled deliveries;

- Covert investigations;

- Interception of telecommunications (see Annex III);

- Information and control over accounts and financial operations;

- Witness protection;

- Provisional measures - see Section B of Annex I List is not

exhaustive - as long as the measure is provided for in national law, it can be requested. Member States are only obliged to provide and implement the measures included in article 10, no. 2 Directive.

Jurisprudence

The Europen Court of Human Rights (ECHU) has several decisions on this subject because there are many cases that reach this Court. It is important to analyze one of those that seem to us to be the most paradigmatic. One such case is Jalloh, from 1993, in which four plainclothes policemen saw the defendant, in two different circumstances, take a bag out of his mouth and hand it over to another person in exchange for money. Believing that they were drugs, the police detained the defendant, but found no drugs. Thinking that if they did not act immediately, they would frustrate the investigation, they took the defendant to a hospital to take a substance that made him vomit. As the defendant did not voluntarily take the substance, he was immobilized by the four policemen and the doctor forced him to take it through a tube connected to his stomach. In addition, the doctor injected him with a substance derived from morphine. As a result of these actions, the defendant regurgitated cocaine. The defendant stated that for three days he only ate soup and that for two weeks he bled through his nose. Taking into account the facts, the defendant considered that he had been subjected to inhuman treatment, which constitutes a violation of art. 3rd of the ECHR. The ECHR gave reason to the defendant and we totally agree with it.

Conclusions

The EIO Directive and its transposition into Portugal with Law No. 88/2017, of 21 August, constitutes a major advance in judicial cooperation in criminal matters, as there is now only one legal instrument for obtaining evidence in the EU thus achieving, and this being its main objective, overcome the slowness and inefficiency of the system based on the issuance of rogatory letters transmitted in accordance with international conventions, as well as with the inefficient European warrant for obtaining evidence. Outside the EU, the multilateral and bilateral international treaties to which the Portuguese State is bound continue to prevail. The Court of Justice of EU, in reference for a preliminary ruling, will (as has recently happened in the area of judicial cooperation in criminal matters) have a fundamental role to play in the interpretation of the EIO and national laws and particularly the transpositions, in the context of a preliminary ruling.

In the same measure, national courts will play a fundamental role in this area, when they are called upon to take a position on the application of national law, especially in the admissibility and validity of the evidence collected with that instrument. In any case, the Member States and their enforcers will have a decisive role, since the admissibility and validity of the evidence in the EIO continues to be a main task of these, seeking the desirable construction of a system of "checks

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ЕВРОПЕЙСКИЙ ЗАКАЗ ИССЛЕДОВАНИЯ «ДИРЕКТИВА – ПРИМЕНИМОСТЬ»

Аннотация. Актуальность исследования. Цели - провести обзор вопросов, связанных с достоверностью доказательств в контексте нового инструмента сбора доказательств в ЕС, Директивы 2014/41 / EU о Европейском приказе о расследовании по уголовным делам и его переносе в португальскую правовую систему, вытекающую из Закона №. 88/2017 от 21 августа. Задачи исследования Для этой цели мы подходим к концепции доказательства, принципам, теориям и правилам, регулирующим получение доказательств в транснациональном контексте, указываем, какие инструменты и нормы актуальны в вопросе, который мы анализируем,- Директиву и национальное законодательство с точки зрения темы и заключаем с соответствующей ЕСПЧ и национальной юриспруденцией. В любом случае государства-члены и их судебные исполнители будут играть решающую роль, поскольку допустимость и обоснованность доказательств в EIO по-прежнему является их главной задачей, стремясь к желательному построению системы «сдержек и противовесов», то есть на основе необходимого баланса между полномочиями по расследованию или судебному преследованию и правами защиты. Объект исследования - обоснованность доказательств в контексте нового инструмента сбора доказательств в ЕС, Директива 2014/41 / EU о Европейском приказе о расследовании по уголовным делам. Цель исследования - изучить вопросы, связанные с достоверностью доказательств в контексте нового инструмента сбора доказательств в ЕС, Директивы 2014/41 / EU о Европейском приказе о расследовании по уголовным делам. Методы - анализ и обобщение, абстракция, логический и исторический, сравнительный анализ. Полученные результаты. С 22 мая 2017 года сбор доказательств в Европейском Союзе (ЕС) будут регулироваться Европейским приказом о расследовании. Это новый документ, основанный на взаимном признании и заменяющий соответствующие меры,

предусмотренные в вышеупомянутых конвенциях. Это будет применимо в странах ЕС, однако Дания и Ирландия решили не участвовать. После принятия этой директивы другие документы были отозваны, например, Европейский документ о доказательстве на основании Рамочного решения от 2008 года (который имел более узкую сферу применения) был заменен Постановлением 2016/95 от 20 января 2016 года. Вывод. Директива ЕІО и ее перенос в Португалию с Законом № 88/2017 от 21 августа являются важным шагом вперед о судебном сотрудничестве по уголовным делам, поскольку в настоящее время в ЕС существует только один правовой инструмент для получения доказательств, будучи при этом главной целью, чтобы преодолеть медлительность и неэффективность системы, основываясь на выдаче писем о запрете, передаваемых в соответствии с международными конвенциями, а также неэффективным европейским ордером на получение доказательств. За пределами ЕС продолжают преобладать многосторонние и двусторонние международные договоры, с которыми связано португальское государство. Суд ЕС, ссылаясь на предварительное решение, будет (как это недавно произошло в области судебного сотрудничества по уголовным делам) сыграть основополагающую роль в толковании ЕИО и национальных законов, в частности транспонирования, в контексте предварительного решения.

Ключевые слова: расследование, доказательства, национальное законодательство.

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ЄВРОПЕЙСЬКЕ ЗАМОВЛЕННЯ ДОСЛІДЖЕННЯ «ДИРЕКТИВА – ЗАСТОСОВНІСТЬ»

Анотація Актуальність дослідження. Цілі виходять з огляду питань, пов'язаних з обгрунтованістю доказів у контексті нового інструменту збору доказів у ЄС, Директиви 2014/41 / ЄС про Європейський наказ про розслідування у кримінальних справах та його перенесення у португальську правову систему, що випливає із Закону № 88/2017, 21 серпня. Проблема дослідження. Для цього ми підходимо до концепції доказів, принципів, теорій та правил, що регулюють отримання доказів у транснаціональному контексті, вказуємо, які інструменти та норми мають значення у цьому питанні, аналізуємо Директиву та національне законодавство з точки зору теми, і закінчуємо відповідною ЄСПЛ та національною юриспруденцією. У будь-якому випадку, держави-члени та їхні виконавці матимуть вирішальну роль, оскільки прийнятність та обґрунтованість доказів у ЕЗВ продовжує залишатися головним завданням, відшукуючи бажану побудову системи "стримувань і противаг", тобто виходячи з необхідного балансу між владою розслідування чи обвинувачення та правами на захист. **Об'єкт дослідження** - обґрунтованість доказів у контексті нового інструменту збору доказів у ЄС, Директиви 2014/41 / ЄС про Європейський наказ про розслідування у кримінальних

справах. **Мета дослідження** - дослідити питання, пов’язані з обґрунтованістю доказів у контексті нового інструменту збору доказів у ЄС, Директиви 2014/41 / ЄС про Європейський наказ про розслідування у кримінальних справах. Методи - аналіз та синтез, абстрагування, логічний та історичний, порівняльний аналіз. **Результати.** З 22 травня 2017 року збір доказів в Європейському Союзі (ЄС) буде регулюватися Європейським розпорядженням про розслідування. Це нове розпорядженням про розслідування, засноване на взаємному визнанні та заміні відповідних заходів, передбачених вищезазначеними конвенціями. Нове розпорядження буде застосовуватися у країнах ЄС, але Данія та Ірландія вирішили не брати участь. Після прийняття цієї директиви інші розпорядження були відкликані, наприклад, Рамкове рішення Європейський доказ про докази від 2008 року (який мав вузьку сферу застосування) було замінено Положенням 2016/95 від 20 січня 2016 року. **Висновок.** Директива про ЗНО та його перенесення до Португалії із Законом № 88/2017 від 21 серпня є значним прогресом у сфері судового співробітництва у кримінальних справах, оскільки в ЄС існує лише один правовий інструмент для отримання доказів, і це як його головна мета, подолати повільність та неефективність системи, заснованої на видачі запитувальних листів, що передаються відповідно до міжнародних конвенцій, а також з неефективним європейським ордером на отримання доказів. Поза межами ЄС продовжують панувати багатосторонні та двосторонні міжнародні договори, до яких пов'язує португальська держава. Суд Європейського Союзу, посилаючись на попереднє рішення, буде (як це було нещодавно у сфері судового співробітництва у кримінальних справах) відігравати фундаментальну роль у тлумаченні ЕЗВ та національних законів, зокрема, транспозицій, у контексті попереднього рішення.

Ключові слова: розслідування, докази, національне законодавство.

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