Dagna Knytel[*]

Evidence Gathering in the European Union: The Transposition of Directive 2014/41/EU into French and German Legislation

Abstract

The cross-border gathering of evidence within the European Union raises a vast amount of practical questions. With adoption of the Directive 2014/41/EU on 3 April 2014, the European Parliament and the Council of the European Union try to respond to these questions by introducing the European Investigation Order in criminal matters based on the principle of mutual recognition. This article explores whether the Directive will guarantee a more performant gathering of evidence and whether the rights of the suspect are satisfyingly protected during this procedure. The author analyses these questions with the example of mutual cooperation between French and German authorities and identifies several legal and practical issues due to the heterogeneity of the national criminal procedures. This leads to the conclusion that the introduction of the principle of mutual recognition may enforce cross-border gathering of evidence but isn't a guarantor for the protection of fundamental rights and has therefore to be accompanied by the establishment of common rules concerning, especially, the execution of evidence gathering measures and the admissibility of transnational evidence.

I. Introduction

The cross-border gathering of evidence is an important aspect of the fight of certain forms of crime such as organised crime, cyber-crime, as well as terrorism[1], which increased exponentially since the founding of the European Union and the opening of the borders. Therefore, a Member State which, in the context of ongoing national criminal proceedings, is dependent on evidence located abroad (such as a hearing of witnesses or a house search) will have an interest in effective cooperation with the other Member States. The need for effective legal cooperation is also demonstrated by Eu-

* PhD student at the Albert-Ludwigs-Universität Freiburg (Germany) and the University of Strasbourg (France).

1 *C. Ghica-Lemarchand*, La commission rogatoire internationale en droit pénal, Revue de science criminelle et de droit pénal comparé (RSC), 2003, p. 33; *B. Hecker*, Europäisches Strafrecht, 2015, p. 170.

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rojust's Annual Report of 2018[2]. It is clear from the report that requests concerning evidence gathering between Member States are multiplying steadily every year.

At the same time, the transnational gathering of evidence raises specific questions. Should a Member State be obliged to execute an investigation measure contrary to the fundamental principles of its own national law? Which law is applicable during the execution of the measure, and will the transnational evidence be admissible in the requesting Member State? And what's more, the rights of the suspect: are they sufficiently safeguarded during such a multi-layered procedure?

In the middle of the 20th century, the first steps towards regulation were taken in the form of multilateral treaties regarding mutual legal assistance. The European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959[3] is an important milestone. Further agreements followed, such as the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union[4] and additional legal acts. However, the multitude of legal instruments that have been adopted in recent decades have left behind a patchwork of regulations that hampered efficient handling and enforcement[5]. It was therefore a matter of concern to the European lawmakers to remedy this state of affairs and to ensure a performant cooperation by introducing the principal of mutual recognition also for evidence gathering in criminal matters.

This is the historical background of the Directive 2014/41/EU regarding the European Investigation Order in criminal matters[6] (hereafter: the Directive), which was adopted by the European Parliament and the Council of the European Union on 3 April 2014. For the most part, it replaces requests based on previous multilateral treaties regarding mutual legal assistance by introducing a one stand-alone legal instrument covering all types of investigative measures, the European Investigation Order (hereafter: EIO). An EIO is a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence[7]. The Member States are obliged to recognise an EIO without any further formal requirement and ensure its execution under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State and within strict deadlines[8]. Nevertheless, the recognition does not apply automatically. The Directive foresees a limited catalogue with grounds for non-recognition or non-execution of an EIO[9].

2 http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202018/AR2018_EN.pdf.
3 European Treaty Series – no 30.
4 OJ 2000 C 197/1.
5 Directive 2014/41/EU, OJ 2014 L 130/1, preamble para 5.
6 OJ 2014 L 130/1.
7 Directive 2014/41/EU, article 2(1).
8 Directive 2014/41/EU, articles 9(1) and 12.
9 *Ibid*, article 11.

However, the introduction of the Directive based on the principle of mutual recognition was received with reservations in some Member States[10] as well as by practitioners and several authors[11]. On the one hand, the development of the European criminal law is always marked by a tug-of-war with the sovereignty and territoriality concerns of the Member States[12]. On the other hand, the question was raised as to whether the rights of the participants to the proceedings were sufficiently taken into account during the execution of an EIO. In particular, the danger was seen in the fact that the national criminal procedures were not yet sufficiently harmonised, so that the implementation of the Directive based on the principle of mutual recognition would lead to a "race to the bottom" in regard to the protection of fundamental rights[13].Whether these concerns are justified, will be examined in the present article on the basis of a French-German legal comparison.

As a first step, the extent to which the Directive reforms traditional mutual legal assistance will be analysed. It is at the same time important to examine the French and German transposition laws, since the success of such a European legal act always depends on the will of the Member States to transpose it. In a second step, an attempt is then made to anticipate the implementation difficulties of an EIO during a French-German cooperation. In this section, particular attention is paid to the protection of the fundamental rights of the participants to the proceedings in the course of an EIO execution.

II. The reform effected by the Directive

The Directive introduces the EIO as the new instrument for transnational evidence gathering. In the following, the characteristics related to the four main phases of the lifecycle of an EIO – the issuing phase, the transmission phase, the recognition phase and the execution phase – as well as issues related to the scope of the Directive, the

10 E. g. Germany, s. the response of the German Federal Government ("Antwort der Bundesregierung") from 19 May 2014, printout ("Drucksacke") 18/439, p. 3.

11 *C. Claverie-Rousset*, The admissibility of evidence in criminal proceedings between European Union Member States, European Criminal Law Review (EuCLR), 2013, p. 155 *et seq*.; *J. Leblois-Happe*, La Cour de Justice de l'Union européenne et la protection des droits fondamentaux dans la mise en œuvre de la reconnaissance mutuelle en matière pénale, Actualité Juridique Pénal (AJP), 2019, p. 302 *et seq*.; *J. Lelieur*, L'application de la reconnaissance mutuelle à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise?, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS), 2010, p. 590 *et seq*.; *P. Rackow*, Überlegungen zu dem Gesetz zur Änderung des IRG vom 5.1.2017, Kriminalpolitische Zeitschrift (KriPoz), 2017, p. 79 *et seq*.; *F. P. Schuster*, Die Europäische Ermittlungsanordnung – Möglichkeiten einer gesetzlichen Realisierung, Strafverteidiger (StV), 2015, p. 393 *et seq*.

12 *H. Satzger*, Die Europäisierung des Strafrechts – Eine Untersuchung zum Einfluss des Europäischen Gemeinschaftsrechts auf das deutsche Strafrecht, 2001, p. 5.

13 *S. Gless*, Grenzüberschreitende Beweissammlung, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW), 2013, p. 573 *et seq*.; *C. Janssens*, The Principle of Mutual Recognition in EU Law, 2013, p. 232.

competent authorities, the content, form and language of the EIO will be briefly presented.

1. Scope of the Directive

The EIO may be issued with respect to criminal proceedings as well as in proceedings brought by administrative authorities when the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters[14]. This provision was supported in particular by the German authorities in order to give their national administrative authorities the opportunity to issue an EIO during an administrative offence proceeding ("Ordnungswidrigkeitenverfahren")[15]. The scope of the EIO refers to any investigation measure, with the exception of the setting out of a joint investigation team[16].

2. Competent authorities

In relation to the issuing phase, the Directive defines "issuing authority" as a judge, a court, an investigative judge or a Public Prosecutor competent in the case concerned[17]. An administrative authority as well can be referred as an issuing authority whereby such an EIO needs validation by a judge, a court, an investigative judge or a Public Prosecutor[18].

This explicit definition of a competent authority is a reaction to the problems that have arisen in the context of the Framework Decision on the European arrest warrant[19]. The Framework Decision refers to a "judicial authority", so that it was uncertain whether the police, the Ministry of Justice and, most recently, the Public Prosecutor can issue a European arrest warrant. In the following, the Court of Justice of the European Union (hereafter: ECJ) interpreted the concept of a "judicial authority" by requiring a certain level of independence. The decision of the ECJ on 27 May 2019[20] regarding the Public Prosecutor's ability to issue a European arrest warrant is particu-

14 Directive 2014/41/EU, article 4.

15 Circular of the French Ministry of Justice of 16 May 2017 ("Circulaire du 16 mai 2017 présentant les dispositions de l'ordonnance n°2016–1636 du 1er décembre 2016 et du décret n°2017–511 du 7 avril 2017, portant transposition de la directive 2014/41/UE du Parlement européen et du Conseil du 3 avril 2014 relative à la décision d'enquête européenne en matière pénale"), Official Bulletin of the French Ministry of Justice ("BOMJ") no 2017–06 of 30 June 2017.

16 Directive 2014/41/EU, article 3.

17 *Ibid*, article 2(c)(i).

18 *Ibid*, article 2(1)(c)(ii).

19 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1.

20 *European Court of Justice* (ECJ) 27.5.2019, cases C-508/18 and C-82/19 PPU (OG and PI – Public Prosecutor's Office in Lübeck and in Zwickau), [2019] published in the electronic Reports of Cases.

larly relevant for the German legal system, as the Court denies the quality of the German Public Prosecutor ("Staatsanwalt") as a "judicial authority" with regard to the exposition to the risk of being subject to directions or instructions from the executive, such as the German Ministry of Justice. As a result, the German lawmaker will have to adjust its national legislation as its Public Prosecutor was previously the main issuing authority of a European arrest warrant.

The decision of the ECJ is also interesting with regard to the Directive. Doesn't the fact that a (German) Public Prosecutor is authorised to order an EIO regarding coercive measures, e. g. interception of telecommunication, without a certain level of independence from executive instructions or a judge's reservation being required and at the same time not being authorised to issue a European arrest warrant, represent a contradiction in terms?

In relation to the executing phase, the Directive defines "executing authority" as an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law[21]. As a result, national judge's reservation provided by the executing State were taken into account during the elaboration of the Directive.

3. Form, content and language of the EIO

The EIO must be issued using the form in Annex A to the Directive. This formal criteria was either welcomed or critically received by practitioners[22]. Supporters see the advantage in simplifying formalities and reducing paperwork due to brevity and conciseness of the Annex A form. Critics, on the other hand, find the forms unwieldy. Compared to a European arrest warrant, the EIO form contains a large number of investigative measures and information that make the documents difficult to read. There are also efforts to simplify the forms and, for example, to create bilingual versions, as the cooperation between the Public Prosecutor's offices in Strasbourg (France) and Offenburg (Germany) has shown[23].

In relation to the filling of the Annex A form, Eurojust suggests beyond the required content as set out in article 5 of the Directive, to include the name of the suspects even though the measure does not apply to them to avoid potential *ne bis in idem* situations, to light up the requested measures and to include the list of questions to be addressed to a witness, victim or suspect.

Furthermore, the Directive invites the Member States to indicate the languages which, among the official languages of the institutions of the Union and in addition to

21 Directive 2014/41/EU, article 2(d).

22 Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order of June 2019, p. 4 (www.eurojust.europa.eu).

23 *D. Knytel*, Die Europäische Ermittlungsanordnung und ihre Umsetzung in die deutsche und französische Rechtsordnung, 2020 (expected print date), p. 77.

the official languages of the Member State concerned, may be used for completing or translating the EIO. Practitioners agree that a widespread use of the English language could facilitate exchange between the Member States. Nevertheless, some Member States like Germany did not follow this request. As a result, only incoming EIO translated into German are accepted.

4. Issuing and transmission of the EIO

In relation to the issuing of an EIO, one concern was not to disproportionately extend the investigative powers of the issuing authority. It is therefore prohibited to order an investigation measure by means of an EIO if such a measure would not be available in a comparable national case (prohibition of a "forum shopping")[24].

In addition, the European lawmaker sets further limits. The Directive foresees a proportionality check by the issuing authority (inter alia)[25]. This is also a reaction to the handling of the Framework Decision on the European Arrest Warrant and its disproportionate use, as criticised by some Member States[26]. However, it remains to be observed whether the Member States have a common understanding as to the proportionality of an investigation measure, especially in the case of particularly fundamental rights-relevant measures such as a house search. Furthermore, the European lawmaker also underlines the obligation of the investigating authorities to comply with the fundamental rights obligations under Article 6 TEU[27].

The EIO should be transmitted directly between the competent authorities or via national contact points. For the identification of the competent executing authority, the European Judicial Network Atlas is a very useful tool. If the wrong authority has been contacted, it should, if possible, be forwarded to the right investigation team. The Directive makes clear that a strong communication and willingness to cooperate on the part of the authorities is required in order to make the Directive effective. Practitioners as well underline the need of a flexible and pragmatical approach of the regulation[28].

24 Directive 2014/41/EU, article 6(1)(b).
25 Directive 2014/41/EU, article 6(1)(a).
26 Report from the European Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 11 April 2011, Com(2011) 175 final, p. 7; *K. Ambos*, Transnationale Beweiserhebung – 10 Thesen zum Grünbuch der Kommission "Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat, ZIS, 2010, p. 557 *et seq*.
27 Directive 2014/41/EU, article 1(4).
28 EUROCOORD, Code of Best Practices, Proposal for 100 Best Practices, Best Practices for European Coordination on investigative measures and evidence gathering, March 2019, EU's Justice programme EU Horizon 2020 – Contract no 723198, D.4.3, p. 10.

5. Recognition and execution of an EIO

The Directive states that the executing authority shall recognise an EIO 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[29]. Thus, it implements the principle of mutual recognition in the field of transnational evidence gathering in the EU.

However, the Directive sets limits to the application of this principle. First, the executing authority is now explicitly enabled to examine the proportionality of an incoming EIO[30]. If the executing authority considers the decision as unproportionate, it has two possibilities: either, it can trigger the consultation mechanism when it has reasons to believe that the proportionality requirement has not been met[31]. This consultation mechanism can be used to provide relevant information and as a result, to avoid the risk that the execution is refused. Or, the executing authority can resort to the possibility provided by article 10 of the Directive and make use of a less coercive investigation measure if possible.

Thus, it is questionable as to what extent an effective proportionality control is possible. This question is even more important in regard to the national judges' reservations by incoming EIO. The EIO forms only contain a summary description of the facts of the case; further elements of the file are no longer transmitted. It is possible that some Member States, such as German authorities, show a general mistrust with regard to foreign EIOs and refuse the execution when they doubt its proportionality as it was the case for incoming European arrest warrants[32].

Second, the European lawmaker also underlines the obligation of the executing authority to respect fundamental rights[33]. As a result, the authority concerned has to make sure that neither the recognition nor the execution of an incoming EIO violates the rights and principles as enshrined in Article 6 TEU.

If the proportionality of the measure or fundamental rights issues do not interfere, the executing authority has then only isolated possibilities to refuse the recognition or execution of an EIO. The catalogue of grounds for refusal in article 11(1) of the Directive includes, inter alia, the protection of an immunity or a privilege under the law of the executing State (a), the principle of *ne bis in idem* (d), a European *ordre public*[34] (f) and a double criminality-check except for some categories of offences lined out in Annex D (g).

29 Directive 2014/41/EU, article 9(1).
30 Directive 2014/41/EU, article 6(3).
31 *Ibid*.
32 *K. M. Böhm*, Aktuelle Entwicklungen im Auslieferungsrecht, Neue Zeitschrift für Strafrecht (NStZ), 2018, p. 197 *et seq*.
33 Directive 2014/41/EU, articles 1(4) and 14(2).
34 *J. Vogel/J. Eisele*, in: E. Grabitz/M. Hilf/M. Nettesheim (eds.), Das Recht der Europäischen Union, loose-leaf collection, 2019, Article 82 AEUV, margin no 72.

In particular, the European *ordre public* reservation is very much welcomed in the literature, as it sets necessary ultimate limits to the principle of mutual recognition[35]. The executing State has therefore the possibility to deny enforcement of an EIO which contradicts its essential interests and thus to protect the most sensible area of its national law (e. g. the privilege against self-incrimination[36], the right to an effective remedy and to a fair trial[37], etc.). This provision of the Directive is also a reaction to the ambiguities of the Framework Decision on the European arrest warrant, which did not provide for such a reservation. This led to contradictory handling of the Framework Decision, and to conflicting rulings by the ECJ and the national courts[38].

However, it will have to be observed whether this *ordre public* reservation is applied extensively or restrictively by the Member States. In the case of extensive application, there would be a risk that the Directive's objective of providing effective and far-reaching legal cooperation would be reversed. Another argument in favour of a restrictive application is that questions concerning the proportionality of a measure should primarily not be part of the *ordre public* – scope of application, as demonstrated by articles 6(3) and 10 of the Directive.

After recognition of the EIO follows its execution. The Directive does not harmonise the national criminal procedures with regard to the execution modalities of an investigative measure. Only regulations relating to the applicable law are adopted which do not diverge from the former traditional system of mutual legal assistance. Thus, mutual cooperation acts are governed by the law of the executing state, but the issuing authority can specify procedural and formal requirements concerning the execution of the investigation measure concerned[39]. This so-called *forum regit actum* principle is an acknowledgement of the heterogeneity of national criminal procedural systems. The aim is to create a bridge-maker and to help the issuing State to obtain admissible evidence for the current national procedure[40].

As for today, the reform carried out by the Directive has so far been welcomed by practitioners[41]. In particular, the introduction of the EIO, the uniform forms, the strict deadlines and further formal streamlining should guarantee efficient cooperation be-

35 *Leblois-Happe*, AJP 2019, p. 307, *H. Satzger*, Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant, EuCLR, 2018, p. 317 *et seq*.

36 To cite an example: according to French law, it is forbidden to hear a person against whom there are serious and compelling indications of guilt (article 105 of the French Code of Criminal Procedure). The execution of a German EIO requiring for such a measure would therefore probably be refused.

37 To give another example: The fact that the French criminal procedure does not provide for remedies in the context of an "enquête" could lead to German authorities refusing to execute a corresponding French EIO. This will be discussed in more detail further below.

38 *German Federal Constitutional Court* ("*Bundesverfassungsgericht*"), decision of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317; *Satzger*, EuCLR 2018, p. 317 *et seq*.

39 Directive 2014/41/EU, article 9(2).

40 *M. Böse*, Europäisches Strafrecht mit polizeilicher Zusammenarbeit, 2013, p. 615.

41 Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order of June 2019, p. 4 (fn 23).

tween the Member States. However, the Directive entered into force recently (in course of 2018) as some Member States did not transpose the Directive in due time, so that questions remain as to its concrete application and new problem constellations will probably only emerge over time.

In any case, the effectiveness of the Directive and its improved modalities can only take place once it has been satisfactorily transposed into the national legal systems. A look at the French and German transposition laws was therefore indispensable.

III. The French and German transposition laws

France and Germany have both transposed the Directive on time. However, the attitude of the respective lawmakers towards the reform of mutual legal assistance and the actual transposition into national legal systems reveals significant differences.

1. The French transposition of the Directive

The French lawmaker transposed the Directive into Articles 694–14 *et seq*. of the French Code of Criminal Procedure ("Code de procédure pénale", hereafter: CPP) and for the most part proceeded in the spirit of a copy-paste procedure[42]. This approach reveals that the French lawmaker has confidence in an effective protection of fundamental rights in the other Member States.

The so expressed trust in the fairness of the Member States' procedural systems can also be seen in the fact that, by issuing a French EIO, the national reserve of the judge of freedoms and detention ("juge des libertés et de la détention") is transferred to the executing State[43]. However, it is questionable whether a judge of the executing State will be able to exercise a fully valid control of the content of such an EIO. He only gets a summary of the facts and thus of the reasons for the decision.

Furthermore, the French transposition law enforces significantly the *forum regit actum* principle[44]. As a consequence, the application of the national procedural regulation remains subsidiary.

The French transposition law also asserts the judicialization of the mutual cooperation and cross-border evidence gathering. Thus, the execution of coercive measures indicated in an incoming EIO remains reserved to the investigative judge ("juge d'instruction")[45], whereas an EIO providing for the execution of a non-coercive measure is executed by the French Public Prosecutor[46]. As a result, the French transposition law revives the classic concept of the French pre-trial procedure, which was blurred in

42 *F.-X. Roux-Demare*, La décision d'enquête européenne ou l'adoption d'un instrument inédit de l'Europe pénale, AJP, 2017, p. 115 *et seq*.
43 Article 694–20(3) CPP.
44 Article 694–36 CPP.
45 Article 694–30(2) CPP.
46 Article 694–30(3) CPP.

purely national proceedings in the course of various legal reforms[47]. This national pre-trial procedure knows basically two phases: a police investigation procedure ("enquête préliminaire")[48] and a judicial investigation procedure ("information"). The police investigation procedure, under the direction of a Public Prosecutor, was meant to be a non-invasive procedure to establish whether a suspicion can be determined and a suspect identified[49]. Therefore, and until today, no legal remedies exist during this phase[50]. The execution of invasive investigation measures was reserved to the so-called "information", a procedure under the direction of an investigative judge ("juge d'instruction")[51]. However, the authorities were more and more entitled to also execute invasive measures during the police investigation procedure and almost replaced the "information". As for today, only 3–5 % of pre-trial procedures are under the direction of an investigative judge[52].

The fact that during a mutual cooperation, the French classical dual system revives, benefits the persons affected by an EIO to the extent that they are granted strong procedural rights when coercive measures are enforced, about which they are now also informed[53]. In the case of the enforcement of non-coercive measures by a French Public Prosecutor, however, they remain basically without legal remedies during this pretrial phase of the procedure. Whether the French transposition law thus corresponds to the requirements of the Directive is problematic. This question which is closely related to the first request for a preliminary ruling introduced before the ECJ by a Bulgarian court will be discussed in detail further below.

In summary, the French transposition law makes it clear that the French lawmaker had the will to implement the Directive globally. The problems that can arise during the concrete implementation of the Directive in regard to the fundamental rights are rather conditioned by the conception inherent to the French criminal procedure. The German transposition law is very different in this respect from its French homologue.

47 In particular by the so called "Loi Perben" ("Loi n° 2004–204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité (1)", Official Journal of the French Republic ("JORF") no 59 of 10 March 2004, p. 4567, text no 1; *E. Bonis-Garçon*, La Cour européenne des droits de l'Homme et la juridictionnalisation de l'enquête, in: O. Décima (ed.), La juridictionnalisation de l'enquête pénale, 2015, p. 19 *et seq*.

48 It isn't referred to special regimes, e. g. investigations in urgent matters ("enquête de flagrance").

49 Article 75 *et seq.* CPP.

50 *J.-Y. Maréchal*, Les droits de la défense durant l'enquête de police, A propos de l'avis de la Commission nationale consultative des droits de l'homme, La Semaine Juridique, Edition G, 2014, overview 605.

51 Article 79 *et seq.* CPP.

52 *J. Pradel*, Procédure pénale, 2017, p. 704.

53 Article 694–41(1) CPP.

2. The German transposition of the Directive

At the beginning of the draft directive, the German Federal Government ("Bundesregierung") was already very sceptical about the reform of mutual legal assistance and considered it unnecessary[54]. The scepticism especially regarding the introduction of the principle of mutual recognition could not be overcome during the drafting phase of the Directive, as can be seen from its implementation into German law in the so-called International Mutual Legal Assistance Act ("Internationales Rechtshilfegesetz", hereafter: IRG)[55], a law that regulates mutual legal assistance with the Member States and third countries in general.

Thus, the wording of the transposition law already makes clear that the traditional and less binding concept of mutual legal assistance continues to be adhered to when the term "request" ("Ersuchen") is still used instead of "(European Investigation) order" ("Anordnung"). Furthermore, a two-part review of incoming EIO is maintained. Thus, there are either mandatory or optional grounds to refuse the recognition or the execution. In addition, the understanding of the IRG is made considerably more difficult by references to other legal regulations.

Even in the implementation of non-coercive measures, hesitation on the part of the German lawmaker becomes noticeable if, for example, a hearing of a witness by videoconference needs higher requirements than those provided for by the Directive[56]: the witness has to agree to such a hearing[57]. Furthermore, the German criminal law was not adjusted in regard to the Directive[58] and thus does not take the necessary measures to ensure that, where a person is being heard within German territory and refuses to testify or does not testify the truth, the German law applies in the same way as if the hearing took place in a national procedure. As a consequence, the offences of false testimony and false oath are not punishable under German Law in the context of an EIO execution.

The German law also rejects the provisions of the Directive which are intended to benefit the parties to the proceedings. As a result, the concerned person is not informed of the existing domestic legal remedies, contrary to Article 14(3) of the Directive. This is very regrettable in view of the fact that in cross-border investigation proceedings the persons concerned will have difficulties in claiming effective legal protection[59].

The transposition of the Directive certifies that the German lawmaker does not trust in the criminal law systems of other Member States and especially, their fairness. This could harm the effectiveness of the principle of mutual recognition as mutual trust is

54 (fn 10).
55 § 91a *et seq*. IRG.
56 Directive 2014/41/EU, article 24(2).
57 § 91c(1) IRG.
58 Directive 2014/41/EU, article 24(7).
59 *M. Böse*, Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?, ZIS, 2014, p. 152 *et seq*.

its *raison d'être*[60]. However, despite the restrained implementation of the Directive, the IRG is not a guarantor for the protection of the rights of the parties to the proceedings, as will be demonstrated on the example of a French-German cooperation.

IV. The execution of an EIO in France and Germany

In the following, the execution of an EIO through the prism of a French-German mutual judicial cooperation will be analysed. As seen before, the Directive leaves the questions of the execution modalities of an EIO largely unaffected. Consequently, at least two national criminal procedural systems, which have only been harmonised selectively by European initiatives, meet in the context of such a cooperation. These must then be coordinated pragmatically and flexibly in order to ensure that admissible evidence is gathered, inter alia, by means of the *forum regit actum* principle. The juxtaposition of the French and German criminal procedure has shown that the execution modalities of investigation measures can differ widely. As a consequence, the heterogeneity of the national proceedings can have a negative impact on a mutual judicial cooperation and in some cases even lead to the violation of national fundamental rights of the suspect and other participants to the procedure.

1. The effects of the heterogeneity of the French and German criminal procedures

Both, the French and the German legal system have a pre-trial investigation procedure, which mainly serves the purpose of gathering evidence and creating the basis for the main trial. This phase of the proceedings in France and Germany is therefore predestined for the issuing of an EIO.

During this phase of the procedure, both legal systems pursue a common goal: in the event of suspicion of a criminal offence being committed, to guarantee a fair trial by balancing the governmental interest to do justice and to find the truth while taking into account the fundamental rights of the suspect[61].

Due to their geographical, historical and cultural proximity, one is inclined to assume a proximity of the criminal procedure concepts and structures of these two legal systems, too. However, it could be established that despite a common socle of procedural maxims (such as the presumption of innocence or the right of access to a lawyer), the concrete proceedings can diverge greatly. The comparison of the French and German legal systems has once again shown that criminal proceedings correspond to very specific national concepts which have evolved over time[62]. The German criminal law, for example, was influenced by Napoléon's Code pénal of 1810, but has since gone its

60 *ECJ* 5.4.2016, cases C-404/15 and C-659/15 PPU (*Aranyosi and Căldăraru*), ECLI:EU:C:2016:198.

61 *Knytel* (fn 23), p. 101 *et seq*.

62 *A. Eser*, Geleitwort, in: W. Perron (ed.), Die Beweisaufnahme im Strafverfahrensrecht des Auslands, 1995, p. 3; *A. Klip*, European Criminal Law: an integrative approach, 2016, p. 40;

own way[63]. In the view of the criminal procedure, the German pre-trial phase is today a procedure led by the Public Prosecutor with selective judges' reservations, characterised by the principle of legality, regulated in the German Code of Criminal Procedure ("Strafprozessordnung", hereafter: StPO). On the other hand, there is the French criminal procedure, which in its traditional concept knows a dualism: either a police preliminary procedure ("phase d'enquête") or a judicial preliminary procedure ("information"), whereby the principle of opportunity determines the result of the proceedings.

At first glance, differences can also be recognised with regard to the status of the suspect: if German law knows only one status ("Beschuldigter"[64]), French law provides for a different status of the suspect depending on the stage of the proceedings ("suspect"/"témoin assisté"/"personne mise en examen"[65]). During the "phase d'enquête" one speaks of a suspect ("suspect") to whom basically few rights are granted[66]. During "information" one can be "témoin assisté"[67] or "personne mise en examen"[68], whereby the procedural rights also increase.

These first examples show that, despite their common history, the national criminal procedural systems have undergone their own developments and that in Europe different national procedural systems exist. Recently these have been selectively harmonised by European initiatives, so that in certain areas a rapprochement can be observed[69]. However, the remaining heterogeneity of the national criminal procedures has an impact on the effective transposition of the Directive as can be shown on the example of a French-German mutual cooperation.

2. Specific grounds for non-recognition or non-execution

The heterogeneity of the criminal procedural rules can lead to the refusal to recognise or to execute an EIO. Both, the French[70] and the German criminal procedure[71] preserve certain absolute limits, given their understanding of the essence of a fair trial. Absolute limits are understood to mean the impossibility of issuing an investigative measure, whereas such limits are exceptional in both legislations.

W. Perron, Perspektiven der Europäischen Strafrechtsintegration, in: M. Hettinger/T. Hillenkamp (eds.), Festschrift für Wilfried Küper zum 70. Geburtstag, 2007, p. 429 *et seq*.

63 *C. Roxin/B. Schünemann*, Strafverfahrensrecht, Ein Studienbuch, 2017, p. 11.

64 § 157 StPO.

65 *E. Vergès*, Le statut juridique du suspect : un premier défi pour la transposition du droit de l'Union européenne en procédure pénale, Droit pénal (D.), 2015, study no 15.

66 Article 75 *et seq*. CPP.

67 Article 113–1 *et seq.* CPP.

68 Article 116 *et seq*. CPP.

69 E. g. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1.

70 Article 694–31 CPP.

71 §§ 91b, 91e IRG.

In this respect, it was particularly noticeable in the comparative analysis that the protection of professional secrecy plays an important role during this *a priori* control. The German legal system declares certain investigative measures concerning professional secrecies to be inadmissible[72], or states a prohibition on confiscation[73]. The French legal system postulates the inability of certain persons subject to professional secrecy to testify and also provides for an absolute prohibition of confiscation of correspondence between suspects and their lawyers. The Directive guarantees the effective safeguard of such national barriers. On the part of the issuing authority, the prohibition of "forum shopping" applies, according to which no measure can be issued that would be prohibited under national law of the issuing State[74]. On the part of the executing authority, specific grounds for refusal are provided[75]. However, the comparison showed that professional secrecy varies in scope and can affect different professional groups. Before the execution of an EIO, an increased vigilance of the executing authorities is therefore required when examining the admissibility of measure concerning potentially professional secrecy by taking into account the respective national grounds for refusal[76]. To avoid violation of professional secrecies in the context of transnational evidence gathering, some authors suggest the establishment of common rules in the EU[77].

3. Obstacles during the execution of an EIO

The problems encountered in transposing the Directive are particularly apparent in relation to the execution of an EIO, especially because the national criminal procedures know different execution modalities of an investigative measure. Except for the abovementioned absolute limits, the investigating authorities have to bring into line the execution of a measure with the rights of the parties in every single case. Evidence of differences in the conception of the French and German legal systems show up here. As mentioned above, the Directive does not provide for common rules concerning the execution of an investigative measure. It states the *forum regit actum* principle. However, this principle can, on the one hand, reach its limits during its application in praxis and cannot guarantee the gathering of an admissible evidence in the issuing State in every single case. On the other hand, the application of this principle is not capable at all times to protect the rights of the suspect and other participants during the transnational evidence gathering. In the following, we will outline some examples.

72 § 160a StPO.
73 § 97 StPO.
74 Directive 2014/41/EU, article 6(1)(b).
75 *Ibid*, article 11(1) (a), (f).
76 *Knytel* (fn 23), p. 358.
77 *M. Böse*, in: H. Grützner/P.-G. Pötz/C. Kreß /N. Gazeas (eds.), Internationaler Rechtshilfeverkehr in Strafsachen, loose-leaf collection, 2019, RL EEA margin no 20; *U. Sieber/H. Satzger/B. v. Heintschel-Heinegg*, Europäisches Strafrecht, 2014, p. 693.

a) The protection of the presumption of innocence

The presumption of innocence is a fundamental maxim of criminal proceedings in the European Union. In France, in order to guarantee the presumption of innocence, special emphasis is placed on the rights of the suspect when opening the so called "information".

An "information" is engaged obligatorily in the case of suspicion of a crime and optionally in the case of suspicion of a serious or complex offence. The suspect has either the status of an assisted witness ("témoin assisté") or indicted person ("personne mise en examen"). An indictment ("mise en examen") is only indicated if, firstly, there are serious, compelling reasons to believe that the person concerned has committed the infraction in question, and secondly, the status as "témoin assisté" does not seem opportune. The indictment ("mise en examen") is regarded as a particularly strong encroachment on the presumption of innocence, so that the person concerned benefits from special procedural rights[78]. These conflicting interests are vividly illustrated in the case of the pre-hearing of the person concerned, the so-called "première comparution". The hearing takes place in order to decide whether an indictment ("mise en examen") should be initiated or not. The course of this hearing is strongly regulated[79]. For example, strict summons deadlines apply to the person concerned and his lawyer. The lawyer must have been given sufficient time to inspect the files and records beforehand. His presence during the hearing which is led only by the investigative judge ("juge d'instruction") is obligatory. The hearing must be recorded verbatim in a protocol. Following the hearing, the judge has to decide whether an indictment ("mise en examen") is appropriate, in particular whether the suspicions are sufficiently strong within the meaning of the French law and whether the status as "témoin assisté" does not appear opportune.

If the French authorities wish to execute such a hearing abroad by means of an EIO, the specific procedural and formal requirements must be indicated on the Annex A form of the Directive. The execution authority must in principle apply these rules in the sense of the *forum regit actum* principle. If the foreign authority does not know such a procedural status of the suspect and the restrictions resulting of it, as is the case for the German legal system, the application of the *forum regit actum* principle is particularly prone to error. On the one hand, the application of a foreign legal system is not always evident. The executing authority should know the meaning and purpose of the specific measure and its essential significance for the procedural rights of the suspect, which cannot usually be assumed. On the other hand, the correct execution can require factual knowledge of the specific case. However, the executing authority of an EIO only gets a summary of the circumstances of the case in question. At last, the obstacles of a correct application of the foreign law arise when a measure finally asks for a discretionary decision, as in the case of a "première comparution". In regard to these

78 *E. Dreyer/O. Mouysset*, Procédure Pénale, 2016, margin no 300.
79 Article 116 CPP.

circumstances, it can be doubted that a (German) executing authority will be able to apply the French law correctly. As a result, the *forum regit actum* principle can reach its limits in practice.

If the French rules have been applied incorrectly by the executing authority, the question arises whether the protocol of the hearing is nevertheless admissible in the French proceeding. The question of the admissibility of transnational evidence is not regulated by European law. It is therefore up to the national courts to decide whether the evidence can be used.

The French courts are tolerant when it comes to admissibility of transnational evidence. They do not expect a perfect application of French legal provisions from foreign executing authorities. Consequently, evidence is admissible if its gathering is not contrary to the fundamental rights of the person concerned, which are provided for at European level[80]. It should also be noted that, with regard to French law, the principle of the judicial freedom of evidence ("liberté des preuves") plays an important role in questions of the admissibility of evidence[81]. The judge should be as free as possible in the assessment of the evidence and should not be hindered in this assessment in advance by statutory prohibitions. This principle can be restricted only to a very limited extent.

On the basis of these premises, the protocol of a "première comparution" executed by a Polish tribunal was declared admissible despite non-compliance with some of the procedural rules in the French proceedings. As an example, the Polish Law does not provide for an investigative judge comparable to a French "juge d'instruction", so the executing authorities organised a public hearing in front of a Polish tribunal. Furthermore, the Polish authorities ignored the fact that the less coercive status of a "témoin assisté" exists under French law and used the former term of "inculpé" instead of "mise en examen". The French authorities confirmed nevertheless the admissibility of the hearing by considering that all essential rights (in particular the assistance of a lawyer and the right to information in criminal proceedings) of the suspect were granted and that the latter is allowed to challenge the decision of the Polish tribunal in France.

In this respect, it can be assumed that France extends in some way the principle of mutual recognition to the admissibility of foreign evidence. For the persons concerned, however, the heterogeneity of the criminal procedural systems means that they lose a part of the rights to which they would be entitled during a national French procedure, especially the requirements resulting of the presumption of innocence.

80 *Cour de cassation*, chambre criminelle, decision of 7.6.2017, no 16–87.114, unpublished (www.legifrance.fr).

81 *S. Gless*, Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung, 2007, p. 64.

b) The right to be assisted by a lawyer and the right of attendance

National legal systems have been partially harmonised as regards the right to be assisted by a lawyer by Directive 2012/13/EU[82]. The implementation in France has led to the suspect now also being informed of this right during a police investigation procedure ("enquête"), irrespective of the circumstances of the hearing[83]. However, if the suspected offence provides for less than one-year imprisonment, the suspect will not be informed of this right. Furthermore, this right can be limited, e. g. during a police custody ("garde à vue")[84] and during a pursuit for organised crime[85].

Contrary to the French law, the German legal system knows an absolute right to be assisted by a lawyer and a corresponding information of the suspect[86]. As a consequence, a French hearing of a suspect, which took place lawfully without such an information, runs the risk of not being admissible in Germany. This example shows that, despite European harmonisation initiatives, the national criminal procedures may still differ. For an outgoing German EIO, this means that the German issuing authority has special duties to provide information concerning the particularities of its national law. These information duties also result from the case-law of the German Federal Court of Justice ("Bundesgerichtshof", hereafter: BGH) with regard to the admissibility of foreign evidence. A clear difference to the French approach can be discerned. The German court establish inadmissibility either on the basis of a violation of provisions of international law or on the basis of a violation of the German provisions whereby, according to the BGH, there is no final theory of the admissibility of foreign evidence[87]. Thus, the foreign investigation measure has to respect the national and European procedural rules in order to be admissible and so there is no mutual recognition of transnational evidence.

The decision of the BGH of 3 November 1987[88] underlines the German case-law very well regarding the admissibility of the judicial hearing of a witness which took place in the Netherlands. The German authorities requested a judicial hearing of a witness. However, they omitted to inform the executing authorities of the particularities of the domestic law. As a consequence, contrary to German law[89], the judicial hearing took place without prior notification of the suspect or his lawyer of the date of the judicial hearing. German law principally provides for such a notification in order to preserve the right of the suspect to ask questions. This right has to be safeguarded during the pretrial in regard to the possibility to read the protocols of the hearing in the main

82 (fn 69).
83 *X. Salvat*, Audition d'une personne entendue en enquête préliminaire sans être placée en garde à vue, RSC, 2013, study no 15.
84 Article 63–4–2 CPP.
85 Article 706–88 CPP.
86 § 136(1) StPO.
87 *BGH*, decision of 21.11.2012, 1 StR 310/12, BGHSt 58, 32.
88 BGHSt, 35, 82.
89 § 168c(2) StPO.

proceeding[90]. The BGH considered the interrogation record to be inadmissible in view of international provisions, since the German investigating authorities were authorised (at that time article 4 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union[91] still applied) to refer to the German provisions in the rogatory request. In addition, the inadmissibility resulted from a violation of German law too.

As a consequence, the German authorities must pay particular attention to inform about the German provisions in the EIO Annex A form. This also applies to mutual cooperation with France, whose law does not provide for a comparable notification obligation. For the national issuing authorities, this results in the difficulty of anticipating the possible execution modalities of an investigative measure abroad.

c) The right to avoid self-incrimination

The right to avoid self-incrimination is a further legal principle which guarantees any individual the right to refuse to answer self-incriminating questions. Not only the formal suspect has an interest to be informed of this right, but also a person heard as a witness. However, with regard to a witness, the national concepts in France and Germany differ greatly.

Under German law, witnesses are always informed about their right to refuse information on particular questions with which they could incriminate themselves[92]. Thus, they do not have the "full" right to silence. This information is particularly relevant as during a German criminal procedure, the Public Prosecutor is allowed to separate proceedings with the aim of hearing a former co-suspect as a witness in the split procedures[93]. During the hearing of a witness, it is up to the interrogator to ensure that the right to refuse answers on particular questions is lawfully applied.

The French law, in contrast, does not provide for such information. Depending on the procedural phase, the witness is either completely free to testify ("enquête") or is obliged to testify truthfully (under oath), whereby an infringement is punishable by law ("information"). Moreover, in France, the separation of proceedings is not a common measure. Even more, the French legislation provides, in respect to the right to not contribute to its own incrimination, an absolute prohibition to hear a suspect against whom there are serious, compelling reasons to believe that the person concerned has committed a crime or a complex offence ("personne mise en examen")[94]. A German EIO with the aim to hear such a suspect as a witness would be probably refused by the French executing authorities[95]. In the other cases and in the event that French authori-

90 § 251 StPO.
91 (fn 4).
92 § 55 StPO.
93 *BGH*, decision of 25.2.1964, 1 StR 13/64, Neue Juristische Wochenschrift (NJW) 1964, p. 1034.
94 Article 105 CPP.
95 Article 694–31(1) no 7.

ties accept the execution of a hearing of a witness under German law according to the principle of *forum regit actum*, it is questionable whether they will be able to apply the German law correctly.

Correct application requires again, that the interrogator has knowledge of the facts concerning the suspect and the witness to decide if the witness refuses its right to silence appropriately. In addition, the interrogator must be aware of the German legal framework and, in particular, of the breadth of the right to refuse to provide information. Whether foreign executing authorities satisfy these prerequisites is, however, more than questionable, especially as they only have the EIO form with a summary of the facts concerning the suspect. As a result, the weak points of the principle of *forum regit actum* are once again lit up. The German authorities should therefore draw up a list of questions in order to try to avoid sources of error.

d) The right to respect for private and family life

The obligation to testify, which applies during a French "information"[96], also stands in contrast to the family protection of the relatives of the suspect, which applies in Germany. Accordingly, relatives can assert a right to refuse to testify[97]. If they waive this right, they can revoke the waiver at the trial. The revocation leads to the inability to use and read the statement during the trial[98], with the exception of a judicial hearing. In this case, however, the judge must inform the witness during pre-trail about the extended readability of the interrogation report[99]. The French investigation procedure does not know such a family privilege at all. Whether the French legal system is in accordance with article 8 of the European Convention on Human Rights is extremely doubtful.

In view of these circumstances, when an EIO is issued, the German authority must inform about the right to refuse to testify. The right to refuse to testify is also granted to the witness during the execution of a French EIO on German territory[100]. In the last constellation, however, the witness should also be informed of the fact that the revocation of the waiver of the right to refuse to testify will have no effect in the upcoming main French trial, since French law simply does not provide for comparable protection of family members. Only when witnesses have been informed of this fact can they freely decide to testimony. However, the information has not yet been provided by the German authorities. The witnesses therefore run the risk of forfeiting their rights under German law in the further course of the French criminal proceedings. The differences of the national criminal procedures during pre-trial can thus have an impact on

96 Article 101 *et seq.* CPP.
97 § 52 StPO.
98 § 252 StPO.
99 *BGH*, decision of 4.6.2014, 2 StR 656/13, NStZ 2014, p. 596.
100 § 91b(1) no 2a) IRG.

the main trial. As a consequence, errors committed during a transnational evidence gathering in the executing State perpetuate during the main trial.

Considering the same respect of private and family life, the German legislation forbids the seizure of correspondences between a suspect and a relative when it comes to a house search of the latter[101]. Therefore, the execution of an EIO issued by a French authority in order to realise a house search by e. g. the (ex-) wife or husband of the suspect to seizure correspondences exchanged between them would be refused by the German authorities[102]. These differences of the national procedures also impact on the effectiveness of a mutual judicial cooperation.

e) The safeguard of professional secrets

The national differences regarding professional secrets as shown above can also play a role in the execution of searches and seizures. French law provides for special protection mechanisms during the execution of such an investigation measure, for example in the case of searches of a law firm[103]. In this case, the representative of the bar association ("bâtonnier") must be present and ensure that the seizure respects for professional secrecy ("respect du secret professionnel"). He can object to the seizure of certain documents so that a judge ("juge des libertés et de la détention") has five days to decide on the legality of the measure. An effective balance to the encroachment on professional freedom and privacy of the persons concerned is to be established.

German law does not recognise such special executing modalities. Rather, the protection of professional secrets is *a priori* shaped by high prerequisites on the justification of the search and seizure order as well as on the proportionality of the measure[104]. In the context of French-German cooperation, it is unlikely that the French protection provisions can be complied with in accordance to the principle of *forum regit actum*. In particular, the control of a French judge in a short period of five days is unrealistic. On the one hand, there are no time limits for the handing over of evidence by the executing State foreseen by the Directive. On the other hand, depending on the extent of the seizure (e. g. mass data storage with considerable data volume) and due to the language of the documents, a judge cannot offer effective legal protection without translation. Furthermore, it is unlikely that representatives of the German bar association could fulfil the same level of protection as their French homologues, especially because of the lack of legal expertise with regard to the French law.

This example again shows that the principle of *forum regit actum* can reach very practical limits and does not always guarantee the protection of the rights of the parties to the proceeding.

101 § 97 StPO.
102 § 91b IRG.
103 Article 56–1 CPP.
104 *BVerfG*, decision of 20.2.2001, 2 BvR 1444/00, BVerfGE 103, 142.

In conclusion, these selected examples underline that the heterogeneity of criminal procedural systems can have a negative impact on the rights of the parties during a transnational gathering of evidence. The question then arises as to whether the violation of those procedural rights can be rectified by the legal remedies provided for by the Directive.

4. Legal remedies

Article 14(1) of the Directive stipulates that the Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO. This regulation raises many questions.

The first question is: What consequences arise when a national law does not provide for legal remedies even in a similar domestic case, as it is the case during the police investigation procedure ("enquête") in France?

The first preliminary ruling, which was submitted to the ECJ in 2017 with regard to the interpretation of the Directive[105], also revolves around this problem. A Bulgarian court asked (inter alia) the question "whether national legislation and case-law are consistent with Article 14 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters, in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness".

The facts of the questions referred for a preliminary ruling are as follows: In an ongoing criminal procedural, the Bulgarian judicial authorities accuse Ivan Gavanozov of having led a criminal organization, with the aim of avoiding the assessment and payment of value added tax (VAT). In particular, Mr. Gavanozov is accused of having used shell companies to import sugar into Bulgaria from other Member States, including from a supplier in the Czech Republic, represented by a witness. He subsequently sold the sugar without documents on the internal market, without assessing or paying tax. According to documents in the possession of the judicial authorities, Mr. Gavanozov exported sugar into Romania. In the pre-trial phase of the proceedings, no investigative measures to gather evidence relating to the Czech company or witness were carried out. The referring court decided to gather evidence with a view to establishing the nature of the relationship between Mr. Gavanozov and this witness. The referring court therefore decided to order a search and seizure at the office of the Czech company. It likewise decided to conduct a search and seizure at the home of the witness and to examine him through videoconference since he refused to appear for an examination in Bulgaria. Since the office of the company and the home of the witness were located in the Czech Republic, the referring court decided to issue an EIO requesting the Czech judicial authorities to carry out those investigative measures. However, it en-

105 *ECJ* 31.5.2017, case C-324/17 (*Gavanozov*) (www.curia.europa.eu).

countered difficulties in completing Section J of the EIO Annex A form of the Directive, which deals with legal remedies. In that respect, the referring court explains that Bulgarian law does not make any legal remedy available against those investigative measures. It also states the view that as a result, the Bulgarian legislation does not comply with article 14 of the Directive and does not satisfy the principle of effectiveness in so far as persons concerned by measures to collect evidence have no recourse against decisions ordering such measures. In those circumstances, it decided to stay proceedings and refer its question to the ECJ for a preliminary ruling[106].

Advocate General *Yves Bot*, after approving the admissibility of the request in his Opinion of April 2019, assumes that Bulgarian law is not consistent with article 14 of the Directive insofar as it does not provide for legal protection with regard to the investigative measure ordered in an EIO or claims for damages[107]. He initially bases his argumentation on the fact that the Directive often points out, e. g. in articles 13 and 14, that such remedies must exist. In addition, the European lawmaker had assumed that remedies against investigative measures were available in domestic cases of every Member State and that there would therefore be no gaps within the framework of an EIO.

Furthermore, this interpretation of the Directive is, in the view of the Advocate General, also appropriate in the light of the respect for fundamental rights – recognised, inter alia, by the Charter – of the persons concerned. The need for effective judicial review to ensure respect for fundamental rights by national courts is especially important in the context of judicial cooperation in criminal matters, and the ability to challenge the substantive reasons for an EIO is therefore particularly necessary.

As a consequence, the Advocate General considers further, that article 14, read in the light of fundamental rights, precludes an authority from issuing an EIO in case of missing legal remedies. This opinion is based firstly on an interpretation of the Directive and its Section J in particular[108]. If no remedies exist in the issuing State, the Annex A form cannot be completed, the full context for an EIO cannot be provided and an EIO may not be issued, still less executed.

Secondly, the Advocate General considers that the Bulgarian legislation and the resulting lack of protection of fundamental rights prevent the mutual recognition mechanism, essential to an EIO, from operating[109]. Mutual recognition is based on the assumption that mutual trust exists between Member States, understood as '*the certainty that all European citizens have access to a judicial system meeting high standards of quality*'[110]. It therefore obliges Member States, save in exceptional circumstances, to consider all the other Member States to be complying with the fundamental rights recognised by EU law, implying the Charter. In the present case, he considers that the

106 The facts of the dispute and all questions referred for a preliminary ruling are summed up in the opinion of Advocate General *Yves Bot*, delivered on 11 April 2019 (fn 34 *et seq*.) (www.curia.europa.eu).
107 Opinion of Advocate General *Yves Bot* (fn 51 *et seq*.).
108 *Ibid* (fn 71 *et seq*.).
109 *Ibid* (fn 78 *et seq*.).
110 *Ibid* (fn 79).

inability in Bulgaria of a party subject to investigative measures such as searches or seizures, which inherently affect the right to a private life, to challenge the substantive reasons behind those measures is an important lack of effective protection of that right. In consequence, if it cannot be assumed that a Member State respects fundamental rights, mutual trust cannot be required from other Member States, with the result that mutual recognition cannot be implemented or taken advantage of by that Member State. Furthermore, this leads the Advocate General to admit the possibility for the executing authorities to apply grounds for non-recognition or non-execution according to article 11 of the Directive, even if this possibility is not sufficient to safeguard fundamental rights and would lead to an extensive interpretation of this article jeopardising the practical relevance of an EIO[111].

Such a wide interpretation of the Directive could have had a significant impact on the French legislation. In France, during an "enquête", there is basically no legal remedy available for a person subject to investigative measures, to challenge the substantive reasons behind those measures. Only during an "information", which is obligatory for crimes and optional for serious, complex offences, do wide legal protection possibilities exist[112]. In national proceedings in France, however, only 3–5 % of the proceedings are conducted as "information". As a result, during the French pre-trail proceedings legal remedies barely exist. This also applies to the issuing of a French EIO by a French Public Prosecutor during an "enquête"[113]. If one follows the conclusions of Advocate General *Yves Bot*, it results that a French Public Prosecutor would be basically precluded from issuing an EIO. If an EIO is issued, it would be possible that the executing authorities apply article 11 of the Directive and refuse the recognition or execution of the French EIO.

Furthermore, the lack of legal remedies also affects the execution of an EIO on French soil. The person subject to the investigative measures only benefits from legal protection if the measure is executed by the investigative judge in accordance with the provisions of an "information". This will always be the case if a coercive measure is issued[114]. However, if a non-coercive measure, e. g. the hearing of a witness, is executed by French authorities, which means a French Public Prosecutor[115], the person concerned has no legal remedies. As a result, the French legislation could be not consistent with article 14 of Directive.

However, the ECJ did not follow the arguments of the Advocate General *Yves Bot*. In the decision of 24 October 2019, the preliminary questions are reformulated and considered that the referring court is asking, in essence, whether article 5(1) of the Directive, read in conjunction with Section J of the form referred to in Annex A of that Directive, must be interpreted as meaning that the judicial authority of a Member State must, when issuing an EIO, include, in that section, a description of the legal remedies,

111 Opinion of Advocate General *Yves Bot* (fn 84 *et seq*.).
112 Article 170 *et seq*. CPP.
113 Article 694–20(1) CPP.
114 Article 694–30(2) CPP.
115 Article 694–30(3) CPP.

if any, which are provided for in its Member State against the issuing of such an order[116].

The ECJ states that the Directive does not oblige the issuing authority to include in Section J of the Annex A form such a description of the legal remedies, if any, which are provided for in its Member State against the issuing of an EIO. As a result, the Court reduces the preliminary questions to a very formal approach and thus, does not give its view on the substantial question whether the lack of national remedies is consistent with article 14 of Directive or has an impact on the principle of mutual recognition and mutual trust, as put forward in detail by Advocate General *Yves Bot*. It is possible that future preliminary ruling will evoke these topics and questions again in view to the relevance for fundamental rights of the person concerned.

Finally, the second and third questions regarding the interpretation of article 14 of Directive are: What effect does the successful challenging of the substantive grounds of an EIO in the executing State provide during the ongoing main procedure in the issuing State – and *vice versa*?

Article 14(7) states that the issuing State "shall take into account" a successful challenge against the recognition or execution of an EIO in accordance with its own national law. However, the scope of this provision and the interpretation of the wording "take into account" remains uncertain. Thus, a successful challenge in the executing States always leads to an inadmissibility of the evidence in the issuing State?

This question is answered in the affirmative by some authors[117] arguing that mutual trust, the fundament of the principle of mutual recognition, can only emerge if a successful challenge in one Member State also leads to an inadmissibility of the evidence in another. However, this is not a unanimous opinion, as the French transposition law proves. Article 694–41 CPP explicitly provides that an effective challenge does not automatically entail inadmissibility. The content of this provision can be understood with regard to the broad principle of the judicial freedom of evidence ("liberté des preuves") in France. It has to be observed in which cases the French judges will disregard the successful challenge against the recognition or execution of an EIO in the executing State.

The same question can be asked *vice versa*: Does the inadmissibility of evidence have an effect on future proceedings? If an evidence is considered inadmissible in the ongoing procedure in the issuing State, it remains uncertain if this evidence can be used – with respect to the *ne bis in idem* principle – in a possible, subsequent procedure in the executing State. This would lead to a perpetuation of the infringement and is conceivable in view of the unclear regulation in article 14(7) of the Directive.

The legal remedies proposed by the Directive are thus not satisfactory. In this respect, it is regrettable that the European lawmaker did not provide for uniform legal remedy to challenge the issuing and execution of an EIO instead of referring to the na-

116 *ECJ*, (*Gavanozov*) (fn 105).

117 *K. Böhm*, Die Umsetzung der Europäischen Ermittlungsanordnung – Strafprozessualer Beweistransfer auf neuer Grundlage, NJW, 2017, p. 1512 *et seq*.

tional legal systems of the Member States. If the European lawmaker has in fact assumed that all national legal systems provide for effective legal protection, Bulgarian and French legislations prove the opposite. This raises the question whether the lack of information concerning the real extent of the differences between national legal systems does not prove a naïve and blue-eyed introduction of the principle of mutual recognition into criminal law.

The German law, for its part foresees legal remedies during pre-trial. However, the German lawmakers omitted to transpose article 14(3) of the Directive according to information about the possibilities for seeking the legal remedies has to be provided.

To sum up, the effectiveness of the principle of mutual recognition always goes hand in hand with a sufficient harmonisation of national criminal procedural systems[118]. The exemplary remarks on the French and German legal systems have shown that such harmonisation has not yet made sufficient progress, particularly with regard to the concrete execution modalities of investigative measures. The principle of *forum regit actum* alone is not able to bridge these obstacles, since in practice it can reach its limits. These circumstances ultimately lead to reduced rights of the parties to the proceeding, as provided for by national legal systems.

V. Outlook

The Directive establishing the EIO has set itself the noble goal of making mutual legal cooperation more effective. The efforts that have been made in this respect have been welcomed by both practitioners and authors. In practical terms, the formal changes in particular are welcome and can make an important contribution to faster and more efficient mutual cooperation. In substantive terms, the fact that issuing as well as executing States can now verify the proportionality of a measure certainly makes sense in order to strengthen mutual trust between Member States. The same applies to the fact that the Directive often underlines the legal binding of fundamental rights obligations, which are also reflected in the European *ordre public* set out in article 11(f) of the Directive. These improvements take place during the issuing, transmission and recognition of an EIO.

In regard to the execution phase, no major differences can be discerned in comparison with former legal assistance. The Directive lays down the principle of *forum regit actum*. However, it does not provide any procedural rules for the execution of an EIO abroad. This phase of the procedure is characterised by a conflicting situation of at least two national legal systems and, in the worst case, can lead to a reduction in the rights of the participants to the proceeding. The long-standing calls from several au-

118 *Leblois-Happe*, AJP 2019, p. 302 *et seq*.

thors to establish common standards for the gathering and the admissibility of transnational evidence[119] have been still ignored.

In order to find a proportional balance between the interests of an effective investigation on the one hand, and the rights of the parties involved in cross-border proceedings on the other, the creation of a common European criminal procedure can be a satisfying answer. Such transnational procedures could be led by a unique European institution by using a uniform procedure to avoid conflicts of jurisdiction in order to safely gather cross-border evidence. This creates admittedly a parallel procedure to the national criminal procedures. In view of the special nature of cross-border situations, however, a peculiar European criminal procedure is preferable. On the one hand, the suspects find themselves exposed in particular to several investigating authorities, whose language they do not always speak, so that an effective assertion of their rights is not only insignificantly impaired. The fragmentation of the possibilities for seeking legal remedies, to which the Directive does not provide a satisfactory answer, also constitutes a particular danger for the person concerned.

On the other hand, there is already a difference in treatment between national procedures and cross-border procedures. The latter attempts to find a solution by means of a flexible and pragmatic approach, based on the principle of mutual recognition, which, as the above examples have shown, can lead to a blurring of the boundaries of the national rule of law.

In addition, selective harmonisation of national legislations cannot always achieve a satisfactory result. The harmonisation initiatives provide for only *de minima* adjustments, so that differences can still arise by implementing the legal acts. Furthermore, there is a risk that the harmonisation measures will interfere with the national concepts of the Member States. For example, from the point of view of French law, the provision of rigid prohibitions on the admissibility of evidence would be an encroachment on the broad principle of judicial freedom to assess and use evidence.

At last, the danger of fragmentation of the European legal situation still exists. A uniform procedure in cross-border cases could also be applied by the European Public Prosecutor, which was established in 2017[120], so that frictions between the Directive and the Regulation[121] could be lifted. In addition, there is currently also the danger that new proposals by the Commission, e. g. according to the European Production and Preservation Orders for electronic evidence in criminal matters[122], could contra-

119 *Böse* (fn 40), p. 679; *M. Delmas-Marty*, Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, 1997; *Gless*, ZStW 2013, p. 573 *et seq*.; *H. Satzger*, Internationales und europäisches Strafrecht, p. 229.

120 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283/1.

121 *I. Zerbes*, Fragmentiertes Strafverfahren, Beweiserhebung und Beweisverwertung nach dem Verordnungsentwurf zur Europäischen Staatsanwaltschaft, ZIS, 2015, p. 145 *et seq*.

122 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, 17.4.2018, COM(2018) 225 final.

dict the dispositions of the Directive. In particular, the principle of mutual recognition is limited to subsequent control, so that a remarkable difference to an EIO already arises in this respect. In order not to create another patchwork of different regulations, a uniform European procedural regulation would be helpful.