Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 4 October 2024 [1]

Case C-583/23 [Delda] [i]

AK
v
Ministère public

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order in criminal matters – Material scope – Concept of an 'investigative measure' – Service of an indictment which also includes an order that the person concerned be remanded in custody pending trial and an order requiring a bail payment – Hearing of the accused person)

Introduction

1. This request for a preliminary ruling from the Cour de cassation (Court of Cassation, France) concerns the interpretation of Articles 1 and 3 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. [2] That request has been made in the context of an appeal on a point of law lodged by a Spanish national, who was being held in custody in France, against a judgment of the chambre de l'instruction (Indictment Division) of the cour d'appel de Paris (Court of Appeal, Paris, France) rejecting her request to declare invalid the official record of her hearing by a French investigating judge executing a European Investigation Order issued by the Spanish judicial authorities.

2. This case will allow the Court to clarify the material scope of the European Investigation Order and, specifically, the ambit of the concept of 'investigative measures', within the meaning of the abovementioned provisions of Directive 2014/41, which an authority may be asked to carry out in the context of such an order.

[1] Original language: French.

[i] The name of the present case is fictitious. It does not correspond to the real name of any party to the proceedings.

[2] OJ 2014 L 130, p. 1.

Legal context

European Union law

The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

3. Under Article 5 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [3] ('the Convention of 29 May 2000'), entitled 'Sending and service of procedural documents':

'1. Each Member State shall send procedural documents intended for persons who are in the territory of another Member State to them directly by post.

2. Procedural documents may be sent via the competent authorities of the requested Member State only if:

(a) the address of the person for whom the document is intended is unknown or uncertain; or

(b) the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post; or

(c) it has not been possible to serve the document by post; or

(d) the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

3. Where there is reason to believe that the addressee does not understand the language in which the document is drawn up, the document, or at least the important passages thereof, must be translated into (one of) the language(s) of the Member State in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document, or at least the important passages thereof, must be translated into that other language.

4. All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document. Paragraph 3 shall also apply to that report.

…'

[3] Convention established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2000 C 197, p. 1).

Directive 2014/41

4. Article 1 of Directive 2014/41, entitled 'The European Investigation Order and obligation to execute it', states, in paragraph 1 thereof:

'A European Investigation Order (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 in accordance with this Directive.

The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.'

5. Article 3 of that directive, entitled 'Scope of the EIO', reads as follows:

'The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention [of 29 May 2000] and in Council Framework Decision 2002/465/JHA [of 13 June 2002 on joint investigation teams (OJ 2002 L 162, p. 1)], other than for the purposes of applying, respectively, Article 13(8) of [that convention] and Article 1(8) of [that framework decision].'

6. Article 9 of the directive, entitled 'Recognition and execution', provides, in paragraphs 1 and 2 thereof:

'1. The executing authority shall recognise an EIO, transmitted in accordance with this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive.

2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.'

7. Article 10 of that directive, entitled 'Recourse to a different type of investigative measure', provides:

'1. The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where:

(a) the investigative measure indicated in the EIO does not exist under the law of the executing State; or

(b) the investigative measure indicated in the EIO would not be available in a similar domestic case.

2. Without prejudice to Article 11, paragraph 1 does not apply to the following investigative measures, which always have to be available under the law of the executing State:

…

(c) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State;

…'

8. Article 24 of Directive 2014/41, entitled 'Hearing by videoconference or other audiovisual transmission', provides, in paragraph 1 thereof:

'Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audiovisual transmission in accordance with paragraphs 5 to 7.

The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.'

9. Article 34 of that directive, entitled 'Relations to other legal instruments, agreements and arrangements', provides, in paragraph 1 thereof:

'Without prejudice to their application between Member States and third States and their temporary application by virtue of Article 35, this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions applicable between the Member States bound by this Directive:

…

(c) Convention [of 29 May 2000] and its protocol.'

French law

10. Article 694-16 of the code de procédure pénale (Code of Criminal Procedure, France; 'the Code of Criminal Procedure')[4] provides:

'A European Investigation Order is a judicial decision issued by a Member State, "the issuing State", requesting that another Member State, "the executing State", through the use of forms common to all States, carry out investigations on its territory and within a certain time frame in order to obtain evidence relating to a criminal offence or to communicate evidence already in its possession.

The purpose of the investigation order may also be to prevent, temporarily, in the territory of the executing State, any act to destroy, alter, move, transfer or dispose of information which may be used as evidence.

[4] The referring court states that Directive 2014/41 was transposed into French law by Article 694-15 et seq. of the Code of Criminal Procedure.

Its purpose may likewise be the temporary transfer to the issuing State of a person held in custody in the executing State, to allow procedural measures to be carried out which require the presence of that person in the issuing State, or the temporary transfer to the executing State of a person held in custody in the issuing State for the purpose of participating in the investigations requested in the territory of that State.

The evidence referred to in the first two subparagraphs may also relate to the breach by a person of the obligations arising from a criminal conviction, even where that breach does not constitute an offence.'

Facts at the origin of the dispute in the main proceedings, question referred for a preliminary ruling and procedure before the Court

11. On 1 March 2021, the Spanish judicial authorities issued a European Investigation Order ('the European Investigation Order at issue') addressed to the French authorities requesting them to serve on AK, who was serving a custodial sentence in France, an indictment issued on 30 September 2009 by the Juzgado Central de Instrucción nº 4 de la Audiencia Nacional (Central Court of Preliminary Investigation No 4, National High Court, Spain).[5] That indictment also included an order that AK be remanded in custody pending trial and an order requiring a bail payment. By that European Investigation Order, the Spanish judicial authorities also asked that AK be allowed, in the presence of her lawyer, 'to state her case as to the matters in question'.

12. On 19 July 2021, an investigating judge at the tribunal judiciaire de Paris (Court of Paris, France) served AK with that indictment in the presence of her lawyer, gave her and her lawyer a copy of it in Spanish and took statements from her, all of which was minuted in the official record.[6]

13. The following day, AK lodged an application with the Indictment Division of the cour d'appel de Paris (Court of Appeal, Paris) for that hearing to be declared invalid, arguing, in essence, that the service of an indictment which includes an order that an accused person be remanded in custody pending trial and an order requiring a bail payment, cannot be sought in the context of a European Investigation Order.

14. By a judgment of 20 April 2022, the Indictment Division of the cour d'appel de Paris (Court of Appeal, Paris) dismissed that application. It found inter alia that the Spanish judicial authorities had requested not only that the indictment be served on AK but also that AK be allowed 'to state her case as to the matters in question'. It also noted, first, that the European Investigation Order at issue stated that the measures were requested 'to verify whether offences had been committed and all the circumstances that may affect the classification and the guilt of the offenders' and, second, that, even though those authorities did not tick the box next to 'Hearing [of a] suspected or accused person' on the relevant form, they had clearly asked the French investigating judge to obtain and to enter into the official record statements by AK in relation to the offences which she was suspected of having committed. The Indictment Division of the cour d'appel de Paris (Court

[5] AK was indicted for terrorism offences.

[6] It is apparent from the minutes entered into the official record of 19 July 2021 that the referring court provided, further to a request for information from the Court, that AK made the following statement in relation to the facts referred to in the indictment: 'I refute all these charges. These charges are based on statements which I was forced to make under torture 20 years ago. I have said this repeatedly for years and I restated that fact again in the context of a European [arrest] warrant procedure. Evidence was even produced and the cour d'appel de Paris [(Court of Appeal, Paris)] refused to execute the European arrest warrant. I do not understand how you can serve me with an indictment in a matter in connection with which the French justice system has refused to execute a European arrest warrant.'

of Appeal, Paris) therefore concluded that, in requesting that AK explain her position in relation to the facts in the presence of her lawyer and in accordance with the rights of the defence, the Spanish authorities had asked for 'investigations' to be carried out 'in order to obtain evidence relating to a criminal offence' within the meaning of Article 694-16 of the Code of Criminal Procedure.

15. AK lodged an appeal on a point of law against that judgment before the referring court.

16. The referring court observes that AK claims that, by judgment of 20 April 2022, the Indictment Division of the cour d'appel de Paris (Court of Appeal, Paris) infringed Article 1 of Directive 2014/41 and Article 694-16 of the Code of Criminal Procedure. In AK's view, a European Investigation Order cannot be issued in order to 'announce the criminal charges being brought and the referral of the matter to a trial court', since such measures come within the scope of other instruments of judicial cooperation, specifically Article 696-44 of the Code of Criminal Procedure.[7]

17. The Advocate General at the referring court nevertheless takes the view that the purpose of the European Investigation Order at issue, which contains 'investigative measures inextricably linked to the service of the indictment on [AK] and to the gathering of her comments by a judge in the presence of a lawyer so as to ensure respect for the rights of the defence', is to carry out investigations to obtain evidence relating to a criminal offence.

18. The referring court points out that the Court has yet to rule on the material scope of the European Investigation Order and, specifically, on whether or not it includes service of an indictment which contains an incarceration order and an order requiring a bail payment. It asserts that the correct application of EU law does not appear to be so obvious as to leave no room for reasonable doubt. In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 1 and 3 of Directive 2014/41 be interpreted as allowing the judicial authorities of a Member State to issue or to validate a European Investigation Order the purpose of which is, first, to serve on the person concerned an indictment, which also includes an incarceration order and an order to make a bail payment and, second, to hear that person so that he or she may, in the presence of his or her lawyer, make any relevant observations on the matters set out in the indictment?'

19. AK, the French and Netherlands Governments and the European Commission submitted written observations.

20. In response to a request for information from the Court, the referring court stated that, on 9 September 2022, AK had been surrendered to the Spanish judicial authorities pursuant to three judgments of the Indictment Division of the cour d'appel de Paris (Court of Appeal, Paris).[8] It added that the official record of AK's hearing on 19 July 2021 had been sent to those authorities.

[7] That article reads as follows: 'Where, in criminal proceedings taking place abroad, a foreign government deems it necessary for a procedural document or a judgment to be served on an individual residing in France, the document shall be communicated in accordance with the formal requirements laid down in Articles 696-8 and 696-9, accompanied, where appropriate, by a translation in French. Service shall be made in person, at the request of the ministère public [(Public Prosecutor's Office)]. The original record of the service shall be returned to the requesting government via the same channel.'

[8] Namely, two judgments delivered on 26 September 2018 and one delivered on 9 October 2019.

Analysis

21. The question that arises in the present case is whether the judicial authorities of a Member State can, by availing themselves of a European Investigation Order, request that the authorities of another Member State, first, serve on the person concerned an indictment that also includes an order that that person be remanded in custody pending trial and an order requiring a bail payment and, second, proceed with the hearing of the person in order to allow him or her, in the presence of his or her lawyer, to make any observations which he or she considers relevant on the matters set out in that indictment. In order to answer that question, it is necessary, first, to define the material scope of the European Investigation Order and, second, to determine whether the abovementioned measures can fall within that scope.

Material scope of the European Investigation Order

22. Article 1(1) of Directive 2014/41 defines the 'European Investigation Order' as a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific 'investigative measures' carried out in another Member State 'to obtain evidence' in accordance with that directive, including evidence that is already in the possession of the competent authorities of the latter Member State.

23. Article 3 of Directive 2014/41, which concerns the scope of the European Investigation Order, provides, in general terms, that that order 'shall cover any investigative measure'. The same article explicitly excludes from that scope only the setting up of a joint investigation team and the gathering of evidence by that team, those measures being governed by special rules contained in Article 13 of the Convention of 29 May 2000 and Framework Decision 2002/465. [9]

24. As recital 8 of Directive 2014/41 thus indicates, the EU legislature intended that the European Investigation Order should have a 'horizontal scope' and apply to 'all investigative measures aimed at gathering evidence'.

25. Directive 2014/41 does not contain a definition of the concept of an 'investigative measure' or provide for a list of measures that an authority may request be carried out by means of a European Investigation Order. It is true that, in Article 10(2) and Articles 24 to 31 thereof, Directive 2014/41 refers to a series of investigative measures. There is, however, no basis for regarding those references as constituting an exhaustive list of the investigative measures that can be made the subject of such an order. The first of those provisions sets out the investigative measures which must, in principle, always be available under the law of the executing State. [10] As for Articles 24 to 31 of Directive 2014/41, they lay down special provisions for certain investigative measures the implementation of which involves special arrangements, in particular as regards the grounds for refusal. [11]

[9] See also recital 9 of Directive 2014/41, which states that '[that directive] should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement …'.

[10] The measures in question are obtaining information or evidence already in the possession of the executing authority, obtaining information contained in databases held by police or judicial authorities, hearing of a witness, expert, victim, suspect or accused person or third party in the territory of the executing State, any non-coercive investigative measures as defined under the law of the executing State and the identification of persons holding a subscription of a specified phone number or IP address.

[11] The measures in question are hearing a witness, expert or suspect or accused person by videoconference or other audiovisual transmission, obtaining banking or financial information, investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (such as the monitoring of banking or other financial operations carried out through one or more specified accounts or controlled deliveries on the territory of the executing State), conducting covert investigations and the interception of telecommunications.

26. I also observe that the European Investigation Order is an instrument based on the principles of mutual trust and mutual recognition, [12] which in principle allows the issuing authority to have investigative measures which it deems necessary carried out in the territory of another Member State. The system established by Directive 2014/41 is based inter alia on the idea that that authority is best placed to decide, on the basis of its knowledge of the details of the investigation in question, which investigative measures should be used, subject to the possibility of the executing authority adopting another type of investigative measure if that indicated in the European Investigation Order does not exist under its national law or would be unavailable in a similar domestic case. [13]

27. In the light of the foregoing, I concur with the French Government's view that the European Investigation Order is an instrument with a very broad material scope, as the concept of an 'investigative measure' covers a 'significant gamut of acts'. The fact nevertheless remains that, as all the parties to these proceedings before the Court argue, including the French Government, the sole purpose of the execution of investigative measures provided for in a European Investigation Order is to obtain evidence [14] and, if the necessary conditions in that regard are met, to transmit that evidence to the issuing authority. [15]

28. Several provisions of Directive 2014/41 bear out that assessment. The definition of the concept of the 'European Investigation Order' in Article 1(1) thereof emphasises, for instance, that the objective pursued is to allow the issuing Member State to 'obtain evidence'. Recitals 7 ('with a view to gathering evidence'), 8 ('aimed at gathering evidence'), 11 ('for the gathering of the evidence concerned'), 24 ('for obtaining evidence') and 38 ('to obtain evidence') of that directive are expressed in the same vein. Article 13 of that directive furthermore states that evidence the authorities of the executing State obtain as a result of implementing a European Investigation Order is intended for transfer to the issuing State. [16] Paragraph 4 of that article identifies that evidence as 'objects, documents, or data'. [17] It may also be observed that the purpose of the different investigative measures set out in Article 10(2) and Articles 24 to 31 of Directive 2014/41 [18] is to gather evidence intended to establish, for example, the existence of a fact or an act, the circumstances in which a fact occurred or an act was carried out and the identity or the condition of the perpetrator of an act.

[12] Article 1(2) of Directive 2014/41. See also judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 64).

[13] Article 10(1) and recital 10 of Directive 2014/41. Under Article 10(3) of that directive, the executing authority may also have recourse to an investigative measure other than that indicated in the European Investigation Order if that measure would achieve the same result by 'less intrusive' means.

[14] I agree with the French Government's observation that, 'although there is no general definition of the concept of "evidence" in EU law, it refers, in the broad sense, to the means that contribute to demonstrating a fact or an act in the forms permitted by law'.

[15] Judgment of 2 September 2021, *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster* (C-66/20, EU:C:2021:670, paragraph 41).

[16] The first subparagraph of Article 13(1) of Directive 2014/41 reads as follows: 'the executing authority shall, without undue delay, transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State'.

[17] See also Article 15(1)(b) of Directive 2014/41.

[18] See footnotes 10 and 11 to the present Opinion.

29. In line with the foregoing, I agree with the French and Netherlands Governments where they point out that recital 34 of Directive 2014/41 states that 'any item, including financial assets, may be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence but also with a view to confiscation', but that only measures that pursue the first of those objectives come within the scope of that directive. [19]

30. A further decisive factor can be found in Article 22(1) and Article 23(1) of Directive 2014/41, from which it is apparent that a European Investigation Order can be issued for the temporary transfer of a person held in custody to the issuing State or the executing State, respectively, but only 'with a view to gathering evidence for which the presence' of that person on the territory of the State to which his or her transfer is requested. In that connection, recital 25 of that directive states that, 'where [the person concerned] is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA [of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1)]'. In its judgment in *Staatsanwaltschaft Wien (Falsified transfer orders)*, [20] the Court thus observed that the European Investigation Order pursues, in the context of criminal proceedings, an object distinct from the European arrest warrant, in that while the latter seeks, in accordance with Article 1(1) of Framework Decision 2002/584, the arrest and surrender of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of the former, under Article 1(1) of Directive 2014/41, is to have one or several specific investigative measures carried out in order to obtain evidence.

31. The Court has, furthermore, held on several occasions that the purpose of Directive 2014/41 is to replace the fragmented and complicated existing framework for gathering evidence in criminal cases with a cross-border dimension. By the establishment of a simplified and more effective system based on a single instrument called the European Investigation Order, it seeks to facilitate and to accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, which has as its basis the high level of trust that must exist between the Member States. [21] In the same vein, I would add that the Stockholm Programme, adopted by the European Council on 10 and 11 December 2009, to which recital 6 of Directive 2014/41 refers, states that the 'new model' sought in terms of gathering evidence, which would later become the European Investigation Order, had inter alia to take into account 'the flexibility of the traditional system of mutual legal assistance', 'could have a broader scope' and 'should cover as many types of evidence as possible, taking account of the measures concerned'. [22]

32. Lastly, it is apparent from Article 34(1) of Directive 2014/41 that that directive simply replaces the 'corresponding provisions' of the three conventions to which that provision refers, including the Convention of 29 May 2000. That provision concerns only those provisions of those conventions that govern the same subject matter as that governed by Directive 2014/41. As the

[19] The Court has held that, 'as stated in recital 34 [of Directive 2014/41], that directive deals with provisional measures only with a view to gathering evidence' (judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 71)).

[20] Judgment of 8 December 2020 (C-584/19, EU:C:2020:1002, paragraph 72).

[21] Judgment of 30 April 2024, *M.N. (EncroChat)* (C-670/22, EU:C:2024:372, paragraph 86 and the case-law cited).

[22] European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ 2010 C 115, p. 1), Chapter 3.1.1.

Netherlands Government submits, this shows that the directive does not cover all possible requests for mutual legal assistance and that other provisions of the said conventions continue to apply as between the Member States.

Whether a European Investigation Order can request measures such as those at issue in the main proceedings

33. With regard to the first component of the European Investigation Order at issue, I take the view, like AK, the Netherlands Government and the Commission, that such an order cannot request the service of an indictment. The purpose of such a measure is clearly not to gather evidence or, in the words of the Netherlands Government, to obtain an object, document or data with a view to their use in criminal proceedings. Such a measure is a procedural formality following the completion of the investigative procedure that is intended to give an accused person official notice of his or her indictment, the charges levied against him or her and that he or she is to be brought before a trial court.

34. The service of an indictment in another Member State is therefore not governed by Directive 2014/41, but rather comes under the scope of a different instrument in the field of mutual legal assistance in criminal matters, namely the Convention of 29 May 2000,[23] and specifically Article 5 thereof. As the French Government observes, the explanatory report on that convention[24] indicates that the term 'procedural documents', which the Convention does not define, is to be interpreted 'in a broad sense' and as covering, for example, 'summonses and court decisions'. Since Directive 2014/41 does not contain a provision on the service of procedural documents that corresponds to Article 5 of the Convention of 29 May 2000, the latter article remains fully applicable in accordance with Article 34(1) of that directive.

35. It is true that, as both AK and the French Government argue, it is permissible for a procedural document to be served in the context of a European Investigation Order if its service is part of the procedural implementation of an investigative measure aimed at gathering evidence to which that order relates and is essential for the purpose of carrying out that investigative measure. Such a solution is consistent with the need for flexibility advocated in relation to the system of mutual legal assistance. It means that the competent authorities are not required to deal with two separate requests, one based on Directive 2014/41 and another on Article 5 of the Convention of 29 May 2000, which would run counter to the objective of efficiency the directive pursues. It is for this reason that, in its conclusions on the European Investigation Order, published on 7 December 2018, the European Judicial Network states that there is a 'common understanding' that the scope of Directive 2014/41 does not cover, inter alia, the 'service and sending of procedural documents (unless if part of the investigative measure in [a European Investigation Order])'.[25] Similarly, it is apparent from a Eurojust report of November 2020 on the European Investigation Order that the service and sending of a procedural document should be the subject of a separate letter of request, unless 'the delivery of that document was instrumental to the

[23] This is also apparent from a Joint Note of the European Union Agency for Criminal Justice Cooperation (Eurojust) and the European Judicial Network on the practical application of the European Investigation Order of June 2019 (p. 6), cited by AK and available at the following address: https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_FR.pdf.

[24] Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2000 C 379, p. 7).

[25] See page 2 of that document, available at the following address: https://www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3096/83/0.

investigative measure requested in the [European Investigation Order]'.[26] In that same vein, the Joint Note of Eurojust and the European Judicial Network cited in footnote 23 to the present Opinion states that 'a common understanding is that [Directive 2014/41] does not cover … [the] service and sending of procedural documents unless the delivery of a document is instrumental to the investigative measure that is the object of the [European Investigation Order]'. In the view of that agency and that network, 'in that case, a flexible approach should be followed to its inclusion in the [European Investigation Order] in line with Article 9(2) of [Directive 2014/41]'.[27]

36. Nevertheless, I – like AK – am of the view that the situation described in point 35 of the present Opinion must be regarded as an exception to the rule that the service of procedural documents falls outside the scope of the European Investigation Order. It must therefore be interpreted strictly, so as to allow the various instruments in the field of European mutual assistance in criminal matters to coexist, without one encroaching upon the scope of another and upon the specific procedures, guarantees and conditions contained therein. That scenario could cover, for example, a situation where, in order to carry out an investigative measure, such as a search of the residence of a person concerned, an order from a judicial authority to authorise that measure must be obtained and be notified to that person in advance.

37. It seems to me, however, that, as AK submits, that scenario cannot apply in the case of the service of an indictment. The purpose of that criminal procedural document, which follows the completion of the investigative procedure,[28] is to set out the acts of which the person concerned is accused and their legal classification and to declare that sufficient evidence now exists for that person to be indicted and brought before a trial court.[29] As AK and the Netherlands Government rightly observe, an indictment is, as a general rule, an autonomous document in a criminal prosecution which can have serious consequences for the person concerned. I do not see how the service of such a procedural document on that person could be a tool to implement an investigative measure for the gathering of evidence or be essential to such a measure. To return to the context of the question referred, it appears to me, as AK claims, that a hearing of the accused person in order to gather evidence, without prejudice to whether that was genuinely the object of the request for a hearing in the case in the main proceedings,[30] is not conditional on the service of an indictment.

38. The fact that an indictment also includes an order requiring a bail payment in no way alters, in my view, the conclusion that the service of an indictment cannot be requested in the context of a European Investigation Order. Such an order, which is moreover of a purely incidental nature, is quite clearly not an investigative measure for the gathering of evidence within the meaning of Directive 2014/41.[31]

[26] See page 20 of that document, available at the following address: https://www.eurojust.europa.eu/publication/report-eurojust-casework-european-investigation-order.

[27] See page 6 of that document.

[28] The French Government thus states that 'an indictment … is usually evidence of the completion of the investigations carried out by the investigation services and, as the case may be, the investigating judge'.

[29] In the present case, the first part of the indictment of 30 September 2009 contains a summary of the acts of which AK is accused, the second part provides a criminal classification of those acts, states the evidence relied on against her and sets out the reasons why it is appropriate to order her to make a bail payment and for her to be remanded in custody pending trial, and the third, operative, part of the document, declares that AK is thereby indicted, orders that she is remanded in custody pending trial and that she make a bail payment of EUR 30 000.

[30] See point 41 of the present Opinion.

[31] It is apparent from the indictment of 30 September 2009 that the purpose of making a bail payment is to cover 'the financial liabilities which [AK could] face in the future' if, in addition to being found criminally liable, she were to be declared civilly liable.

39. Nor is that conclusion called into question by the fact that an indictment includes a pre-trial remand order such as that at issue in the main proceedings. Except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure, as provided for in Articles 22 and 23 of Directive 2014/41, a European Investigation Order cannot contain a request for a person to be taken into or to be held in custody. [32] The temporary transfer scenario does not cover a situation such as that in the present case, where holding the person concerned in custody pending trial serves no evidentiary purpose, but is requested solely with a view to enabling that person's appearance, further to his or her indictment, before the trial court with jurisdiction in the issuing State.

40. As for the second component of the European Investigation Order at issue, namely the request to hear the accused person so that she may make any relevant observations on the matters set out in the indictment served on her, I have already observed that, in Article 10(2)(c) and in the second subparagraph of Article 24(1), Directive 2014/41 expressly provides that the hearing of a suspected or accused person is one of the investigative measures which such an order may request.

41. As the Commission rightly observes, however, such a request for a hearing could come within the scope of a European Investigation Order only if its purpose was in fact to gather evidence. That would not be the case if the purpose of that request was, in reality, simply to allow the accused person to exercise her rights of defence by making comments on the indictment laid against her. In that regard, AK and the French Government appear to disagree as to the purpose of the request for a hearing sought in the context of the European Investigation Order at issue. Whilst the French Government takes the view that it is unquestionably clear from that order that the objective that request pursued was to gather evidence, AK asserts that the sole purpose of the hearing was to guarantee her rights of defence vis-à-vis the indictment. [33]

42. It is for the referring court to determine the precise object of the request for a hearing at issue in the case in the main proceedings. If it were to find that the purpose of that request is not to obtain evidence, it should conclude that both that request and the request for the service of indictment fall outside the scope of the European Investigation Order. However, if it were to find that the purpose of the request for a hearing was indeed to gather evidence, it could, in my view, approve that component of the European Investigation Order, subject, of course, to compliance with the conditions relating to the content and form of such an order laid down in Directive 2014/41 as well as the other formal requirements provided for therein. [34] In my view, a complete refusal to execute the European Investigation Order on the ground that it cannot cover a request for service of an indictment would be excessive and run counter to the objective of efficiency that directive pursues.

[32] See, to that effect, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 73).

[33] In that connection, AK observes that the right of an accused person to make observations on his or her indictment in the presence of his or her lawyer is provided for in the Spanish Code of Criminal Procedure as part of the procedure for the service of an indictment.

[34] See, inter alia, Articles 5 to 7 and 9 of Directive 2014/41.

Conclusion

43. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Cour de cassation (Court of Cassation, France) as follows:

Articles 1 and 3 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

must be interpreted as not allowing the judicial authorities of a Member State to issue or to validate a European Investigation Order, the purpose of which is, first, to serve on the person concerned an indictment, which also includes an incarceration order and an order to make a bail payment, and, second, to hear that person so that he or she may, in the presence of his or her lawyer, make any relevant observations on the matters set out in the indictment, if the purpose of that hearing is not in fact to obtain evidence, which is for the national court to determine.