WS1

"Common methodology" in order to compile legislation, jurisprudence and references

First of all the research should focus on national legislation that has implemented European normative instruments on the gathering of evidence abroad such as: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (to quote as FD 2003/577/JHA on OFPE); Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (to quote as FD 2008/978/JHA on EEW). A reference is also useful to the implementation of Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (to quote as D 2014/41/EU on FCI).

Thus premise, the research should analyse national legislation or ongoing projects aimed at implementing Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (to quote as D 2014/41/EU on EIO) in Spain, Italy and Poland. It should be investigated if these projects contain transitional provisions (concerning, for instance, the application of 2000 Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union (to quote as 2000 EUMCMACM). It is important to know how your country will be dealing with Art. 34.1 DEIO, as by 22.5.2017 this Directive "replaces" the Convention on MLA of 1959 and its additional Protocols, the Convention implementing the Schengen Agreement, as well as the MLA Convention of the EU of 2000. The wording of this provision (different to the one included, for example, under FD EAW), does not say that these conventions will be replaced by the national laws implementing the Directive, but it goes further: as of 22.5.2017, the Directive – transposed or not – replaces the existing Conventions among the EU Member States. It would be thus be interesting to know how this provision has been transposed into the national legal system, and if not timely transposed, what is the practice to be expected.

The possible risk, where it exists, of overlapping with other instruments, such as Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (to quote as FD 2002/465/JHA on JIT), the FD EAW (transfer of a person to be interrogated is provided in both the FD EAW and the EIO), and the above mentioned FD on OFPE should also be addressed.

Concerning the implementation of Directive on EIO in national system the analysis should be limited to specific issues.

1) SUBJECTS

Subjects who may request the issuing of an EIO (art. 1): in particular, how it is implemented § 3 regarding the "suspect or accused person": narrow or broad interpretation? It should be answered how can the defendant request evidence abroad, what has been the practice up to now and if the EIO broadens such possibilities, or rather the situation will not change at all.

Furthermore, under this chapter, should be analysed who are other possible "subjects" that can request the issuing of an EIO. For instance, in Italy in the text of the draft on a Legislative Decree aimed at implementing the Directive, among subjects, are included a victim, a person under the application of a "prevention measure" (*misure di prevenzione*), such as confiscation of assets, and private parties. Should be analysed remedies against the refusal to issue an EIO requested by a suspect or accused person. Does national legislation provides the right of defence to participate to the gathering of evidence abroad? Compatibility of different solution in the light of Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (to quote as D 2012/13/EU on the right to information) as well as of Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings (to quote as D 2013/48/EU on right to a lawyer).

2) TYPES OF PROCEEDINGS

Types of proceedings for which the EIO can be issued (art. 4): what is the national notion of criminal proceedings" in respect of a "criminal offence"?; what types of administrative proceedings can be included in the scope of application of the EIO? Under this chapter, among other issues, it should be analysed what kind of administrative proceedings with possible remedies before criminal jurisdiction are foreseen, and if in practice in those proceedings request for cross-border evidence play a

role. Attention should be paid to proceedings related to customs and tax proceedings, road traffic offences as well as penal orders, if they exist. For instance, as said before, in Italy are included proceedings for the application of "prevention measures". These measures are implemented as an independent action and regardless of outcomes of the criminal proceedings against the accused. What about tax proceedings? This assessment is crucial also in relation to the application of grounds for refusal. Indeed, art. 11 § 1 lett. c) provides as a ground for refusal that the EIO "has been issued in proceedings referred to in Article 4 (b) and (c) and the investigative measure would not be authorised under the law of the executing State in a similar domestic case".

3) CONCEPT OF COERCIVE MEASURE

Check if the meaning of Art. 10 DEIO: Definition of coercive investigative measure complies with the concept in the national law.

4) GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

Grounds for non-recognition or non-execution (art. 11). The first issue is the nature of these grounds within national systems: mandatory or optional? In the analysis of grounds for refusal it can be useful a reference to national case-law elaborated within Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (to quote as FD 2002/584/JHA on EAW), where these grounds are the same. In particular, under this chapter it is relevant to answer:

1. Definition of immunity or privilege according to national legislation and jurisprudence. How is the lawyer-client privilege protected? Which witnesses are exempted to testify (professionals, relatives and other confidentiality relationship?).

It should be analysed also, even if not strictly an immunity, how would the request for questioning a protected witness be carried out, as well as, if the EIO requires to interrogate a person who requests protection measures, who will decide on the witness protection status, the requesting authority or the executing?

2. *Ne bis in idem* principle (regarding this ground it is necessary to refer to European case law). How does the *ne bis in idem* apply between administrative sanctioning proceedings and criminal proceedings? Bonda and Akeberg Fransson are followed? It this regulated in statutes or in courts case-law? What has been the practice

up to now in providing mutual legal assistance in the gathering of evidence regarding to the *ne bis in idem* principle? Any significance or rather not? Does your system object to provide evidence in execution of an MLA request or, in the future, of an EIO, on the basis of *ne bis in idem*? If the defendant is not heard in the process of issuing the EIO, how will be it possible to know that there is *ne bis in idem* before executing the EIO?

3. Principle of territoriality. How has this principle been applied up to now in the realm of MLA? Is there any case law? Does it pose any specific problems/questions?

4. Human rights clause (reference to art. 6 TUE and the Charter): which rights, at national level, could legitimate the refusal? On this regard there is not concordance between ECHR and ECJ case law. The risk to undermine the protection of fundamental rights is given by the ECJ judgment on the Melloni case (ECJ, 26 February 2013, C-399/11). It is interesting to determine if under this clause there might be a kind of *ordre public* ground for refusal.

5) LEGAL REMEDIES AT NATIONAL LEVEL

Art. 14 DEIO Legal remedies at national level. Who can challenge the issuance of the EIO? Upon which grounds? And the execution? Is there any way to exclude the evidence obtained by the EIO? What is the moment, time limits? How will the defence deal with such remedies if the pre-trial investigation is kept secret? Can evidence that was finally not included in the accusatory file, or where the PP does not intend to use it at trial, be challenged anyway? Has the PP the obligation to disclose all the evidence obtained through an EIO?

6) SPECIFIC INVESTIGATIVE MEASURES

Concerning specific investigative measures the research should point out on measures such as:

1) Information on bank account (Art. 26). Does your system have a centralized bank account registry? What kind of data are requested in your country for executing a request regarding a bank account or the freezing of a bank account?

2) Interception of telecommunications: “reasons” why the issuing authority considers the indicated investigative measure relevant for the purpose of the criminal proceedings concerned; specific provision on the exclusionary rule; validation procedure if the EIO has not been issued by a judge and executing country requires a judicial warrant; how is the necessity and proportionality of interception of

telecommunications assessed in your country; do the same criteria apply for the interception of communications of legal persons and physical persons; the duration of interception of communications and its prolongation; what is the regulation on data retention in your system; and what is the obligation of the service providers to cooperate with the judicial authorities in the execution of an EIO. Would it be possible for a service providers located in your country to provide data requested by a foreign judicial authority directly?

Further, as the exchange of electronic evidence has increasing importance in modern criminal proceedings, it is necessary to clarify how the transfer of the data recorded is done in practice. What is the application of Article 30.6 DEIO: direct transmission of data or recording and subsequent transmission? Who does the filtering of the data intercepted? How does your State proceed if the technical assistance of the foreign State is not necessary for the interception of communications (Art. 31.1 DEIO)?

Is in your system remote search of computers regulated? If yes, how is it executed abroad? Is the use of drones authorized in the criminal investigation? What is the regulation of the interception of direct communications in your country? (between private persons, in the working place, by undercover agent, through bugging devices in private places).

A topic strictly connected is data protection referred to case file: transfer to another country involved in criminal proceedings; different kinds of data (more or less sensitive). Transfer of data obtained in administrative proceedings can be transferred in execution of an EIO to a foreign authority?

The DEIO does not establish rules on the admissibility of evidence gathered abroad; problems in each country. Duty for the executing State to respect modalities which are necessary for the use of evidence in the requesting State. What would be the grounds for inadmissibility of evidence obtained through an EIO in your country? Are there special rules of *lex fori* that have to be complied with in any event in your legal system for ensuring the admissibility of evidence obtained abroad? Please give examples of the practice.

The above outline tries to point out those questions that would be interesting/crucial to be addressed at the national level in order to have information useful for carrying out a comparative analysis, as well as for identifying certain trends, shortcomings, problems, or improvements. Nevertheless, if there are other issues,

beyond those that have been identified here that are important in the national practice and should also be mentioned – because they will have an impact on the implementation of the EIO – please refer to them.

Style and format

Content of National Reports: 50-75 (maximum) pages; style: Times New Roman 12; footnotes: Times New Roman 10.

Numbering of paragraphs:

1. FIRST LEVEL

1.1 Second level

1.1.1 Third level

a) Fourth level

Please try not to use more than four levels.

More frequently used abbreviations

AFSJ Area of Freedom, Security and Justice

CPC Criminal Procedure Code

EAW European Arrest Warrant

ECHR European Convention Human Rights

ECtHR European Court on Human Rights

EEW European Evidence Warrant

EIO European Investigation Order, DEIO (Directive European Investigation Order)

ECJ European Court of Justice

EU European Union

EU FRCh Charter of Fundamental Rights of the European Union

FD Framework Decision

JIT Joint Investigation Team

PD Proposal Directive

TEU Treaty on the European Union

TFEU Treaty on the Functioning of the European Union

References

For journal articles: Author name (s), title of publication, year, source, page number;

M. CAIANIELLO, 'La nuova Direttiva UE sull'ordine europeo di indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove', 2014 *Proc. pen. giust*., p. 1 ff.;

L. BACHMAIER, 'Towards the transposition of Directive 2014/41 regarding the European Investigation Order', 2015 (2) *Eucrim*, p. 47 ff.;

For electronic journal: Author name (s), title of publication, source, year;

G. DE AMICIS, 'Limiti e prospettive del mandato europeo di ricerca della prova', *www.penalecontemporaneo.it*, 5 April 2011;

For book chapters: Author name (s), title of publication, source, publisher, year, page number;

G.DARAIO, 'La circolazione della prova nello spazio giudiziario europeo', in L.Kalb (ed.), *Spazio europeo di giustizia e procedimento penale italiano*, Giappichelli, 2012, p. 580 ff.;

For books: Author name (s), title of publication, publisher, year;

M.R.MARCHETTI, *L'assistenza giudiziaria internazionale*, Giuffrè, 2005.

For European case law:

ECJ: ECJ, 26 February 2013, *Melloni*, C-399/11

ECtHR: ECtHR, GC, 20 October 2015, *Dvorski v. Croatia*, appl. no. 25703/11

Concerning national jurisprudence the analysis should be limited to case law of Constitutional Courts and Supreme Courts:

C. cost., 7 May 2008, n. 143

Cass., Sez. un., 30 January 2007, Ramoci, n. 4614, Rv. 235351

Cass., 13 September 2005, Hussain, n. 33642, Rv. 232118