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Los textos originales que forman parte de esta obra colectiva han sido seleccionados siguiendo un exhaustivo proceso de revisión en dos fases. En la primera fase, los autores de las mejores comunicaciones defendidas oral y públicamente en el I Congreso de Noveles Juristas fueron invitados a participar en esta obra con un capítulo de libro sobre el tema objeto de su investigación. Tras la revisión formal y material de los manuscritos presentados, se concedió a los autores un plazo para la subsanación de los errores advertidos y/o la inclusión de los cambios propuestos para alcanzar el estándar de calidad de la obra. Todos los capítulos de libro finalmente calificados como aptos para su publicación cumplen así con los requisitos de calidad exigidos, mostrando los autores los resultados de sus investigaciones de forma adecuada, clara y coherente.



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TOWARDS NEW FORMS OF COOPERATION IN CRIMINAL MATTERS

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In the last twenty years, judicial cooperation in criminal matters in the European Union changed radically and it is still changing. In the field of evidence-gathering and investigations, the old rogatorial system has been replaced by new, simplified forms of cooperation which do not need the intermediation of the political power (*i.e.*, Governments) and grant mutual trust.

Indeed, free circulation of people entails free circulation of crimes and evidence in the EU. Moreover, from a society ever smarter and more high-tech follows new forms of criminality (such as e-crimes) which go beyond the traditional territoriality principle and need for fast cross-border evidence gathering.

Consequently, the purpose of this essay is to briefly analyse the tools that the EU adopted, and hopefully will adopt, to face the aforementioned challenges of the last years: the European Evidence Warrant (EEW), the European Investigation Order (EIO), the European Public Prosecutor's Office (EPPO) and the European Production and Preservation Order (EPO). In doing so, the hope is to highlight both their strength and importance in the EU judicial cooperation and the need to make people aware of these instruments, which are very little known by many practitioners. Therefore, it would be useful to disseminate them as much as possible, in order to spread their use and discover the actual problems in practice: there is, indeed, much space to improve these new tools.

1. JUDICIAL COOPERATION IN THE EU: TOWARDS NEW FORMS IN THE FUTURE

A first, unsuccessful attempt was made by the Council Framework Decision 2008/978/JHA on the European Evidence Warrant, which allowed Member States to ask for objects, documents and data for use in proceedings in criminal matters without the political filter. The FD, which hadn't been implemented by certain Member State,

has been repealed because «the scope of the EEW was too limited»¹ (and the tool unknown in practice).

After the entry into force of the Lisbon Treaty, Article 82 of the Treaty on the Functioning of the European Union (TFEU) stated that «judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions». On this ground, the EU boosted the process of improving cooperation in criminal matters among Member States by adopting the Directive 2014/41/EU on the European Investigation Order and by proposing a Regulation concerning European Production and Preservation Orders. Moreover, because of Article 86 TFEU, which provides for that «in order to combat crimes affecting the financial interests of the Union, the Council [...] may establish a European Public Prosecutor's Office», the Regulation 2017/1939/EU was adopted.

All three new instruments present huge novelties compared to the traditional system based on the principle of mutual recognition: one can affirm that the more we approach to nowadays the more the principle of mutual recognition and trust is strengthened. Indeed, the EIO is characterised by an order issued by the judicial authority of the requesting State to the judicial authority of executing State direct to obtain pieces of evidence; the EPPO is the European Public Prosecutor Office aimed at protecting the financial interests of the EU in cases in which two or more Countries are involved; the EPO is an order issued by a judicial authority of the requesting Member States directly to the service provider of another one, aimed at freezing or obtaining e-evidence.

As one can see at first reading, the instruments have their own characteristics and present huge, fundamental innovations in criminal cooperation. The EIO is a horizontal tool of cooperation which involves on the same level the judicial authorities of two (at least) Member States. The EPPO is an instrument of vertical ascending cooperation through which each Member State involved in a cross-border EU financial crime leaves the investigations and the prosecution to the EPPO. The EPO consists in a vertical descending cooperation, in which the mutual trust is at its maximum levels, given that the judicial authority of the issuing Member State can order the freeze or the production of e-data directly to a service provider established in another Member State and without the intervention of this latter (except for specific cases).

A deeper (for the purpose of this essay) analysis of each instrument may be useful to highlight the need for a harmonized European Criminal Procedure for cross-border cases.

¹ See considerando 11 of the Regulation 2016/95/EU, published on the Official Journal of the European Union the 2nd February 2016, L.26/9.

Firstly, the EIO, entered into force in 2017, is at the moment the most trained cooperation tool in the field of evidence-gathering. It consents, unless the presence of ground for refusal and non-recognition, the automatic recognition in the executing Member State of the order issued by the requesting authority. Moreover, it obliges Member States to provide for specific investigative measures² and to waive to the principle of double criminality for a list of 32 serious criminal offences³.

On this topic, some European Justice Projects, such as the EIO-LAPD (European Investigation Order-Last Application and Practical Dilemmas)⁴ to which the University of Turin takes part, have been financed by the European Commission.

The outcomes of EIO-LAPD stressed the attention on the suitable improvement of the instrument, but everyone (academics and practitioners) agreed on the fundamental need for the EIO.

Such project has highlighted the need for a complete fill-in of the form with as many information as possible, for better translations and the use of English for urgent cases, for a uniform (or at least secure) transmission channel (e.g. “gmail” accounts are not adequate), for informal contacts between authorities before either refusing an EIO or using another investigative measure. All these aspects could be in practice improved by following the guidelines which have been drawn up by Eurojust and the ones that will be soon published as a result of the EIO-LAPD Project.

² Temporary transfer to the issuing or executing State of persons held in custody for the purpose of carrying out an investigative measure (Articles 22-23); Hearing by videoconference or other audiovisual transmission or by telephone conference (Articles 24-25); Information on bank, other financial accounts, banking and other financial operations (Articles 26-27); Investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (Article 28); Covert investigations (Article 29); interception of telecommunications with and without the assistance of the executing Member State (Articles 30-31).

³ Participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering of the proceeds of crime; counterfeiting currency; computer-related crime; environmental crime; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; sabotage.

⁴ EIO-LAPD (European Investigation Order – Last Application and Practical Dilemmas), financed by the European Union’s Justice Programme (2014-2020), available at www.eio.lapd.eu.

Moreover, the main problem of the EIO is that it is unknown to many practitioners, particularly to lawyers. Indeed, throughout the project, in Italy we had incredible difficulties to find out lawyers who encountered an EIO: barely no one had actual experience with such instrument and very few knew it (at least they heard about it).

Secondly, the EPPO became operative in June 2021, therefore we still not have feedbacks on its application. Anyway, it allows a strong cooperation for those financial crimes involving EU interest: it is, in some way, the watchdog of the financial interest of the EU. EPPO has legal personality, has a capillary structure with the Chief Prosecutor at the top and use European Delegated Prosecutors, stated in each Member State, to conduct investigations. At the end of them, the European Delegated Prosecutor in charge of the investigations proposes to the supervising European Prosecutor to prosecute or to dismiss the case. The latter has to forward the documents to the Permanent Chamber which will take the final decision. If, eventually, a charge is held, the process will take place in the State in which the investigations have been conducted and the Public Prosecutor is represented by the European Delegated Prosecutor in charge of the case.

Finally, the EPO Regulation has not been approved yet. However, the need for fast e-evidence gathering – due to the volatility of e-data – led to a round table in which the European Commission, the Council and the Parliament will have the goal of drafting a definitive text. The hard task of the negotiation will be to balance the individual rights involved with the need of prosecuting crimes: in any case, maintaining the direct interlocution between the judicial authority of the issuing Member State with the service provider of another one is mandatory. On the contrary, the Regulation would be a sort of duplication of the EIO, which wouldn't add any element of novelty and would create huge confusion.

2. CONCLUSIONS

In sum, the three mentioned tools should be only the starting point of a judicial cooperation in criminal matters (and in (e-)evidence-gathering in particular). The more we proceed on the process of integration of the EU, the more we need mutual trust and mutual recognition of judicial decisions between Member States. To do so, the first point is to continue harmonizing more and more the internal national criminal procedure legislations, with a specific focus on investigations, such as just happened with

many directives on procedural rights⁵. With a harmonized background, the grounds for refusal or non-recognition⁶ of an EIO (and hopefully future EPO) would be restrained and the cooperation would be much improved.

Moreover, the EPPO should be empowered also to prosecute the most serious criminal offences provided for by the list of 32 crimes attached to the EIO directive (and to most of the mutual recognition instruments of the EU, such as the framework decisions on the European Arrest Warrant⁷, on the mutual recognition of judgments involving deprivation of liberty⁸ and probation decisions⁹). In fact, the watchdog task of the EU financial interests is too narrow, especially if one considers that crimes such as, for example, terrorism and organized crime have nowadays a cross-border dimension. Article 86 TFEU allows the extension of the EPPO, providing for that the Council may «extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension».

The hope is to find out the courage to look forward, towards a harmonized EU both in the fight against crime and in the safeguard of people's (procedural) rights.

Anyway, to fully reach these objectives, we need a better knowledge and understating of the instruments in judicial criminal cooperation. Indeed, the topic is quite recent, it is evolving quickly, and many practitioners aren't keen to European criminal procedure/cooperation, even if in the future cross-border investigations will be ever more common. To do so, training and dissemination sessions among practitioners are mandatory and the University should form and develop new generations of students who know at least the main criminal cooperation tools.

⁵ In particular, directive 2010/64/EU of 20th October 2010 on the right to interpretation and translation in criminal proceedings; directive 2012/13/EU of 22nd May 2011 on the right to information in criminal proceedings; directive 2012/29/EU of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime; directive 2013/48/EU of 22nd October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; directive 2016/343/EU of 9th March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

⁶ In particular, but not limited to, those referring to the violation of fundamental rights provided for by Article 6 TEU and to investigative measures that would not be authorised under the law of the executing State in a similar domestic case.

⁷ Council Framework Decision 2002/584/JHA of 13th June 2002

⁸ Council Framework Decision 2008/909/JHA of 27th November 2008

⁹ Council Framework Decision 2008/947/JHA of 27th November 2008

BIBLIOGRAFÍA

- Aguilera Morales, Marien (2012), «*El exhorto europeo de investigación: a la búsqueda de la eficacia y la protección de los derechos fundamentales en las investigaciones penales transfronterizas*», Boletín del Ministerio de Justicia n. 2145.
- Anagnostaras, Georgios (2017), «*Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldaru*», *Common Market Law Review*, pp. 1675-1704.
- Armada, Ines (2015), «*The European Investigation Order and the Lack of European Standards for Gathering Evidence*», *New Journal of European Criminal Law*, 6, pp. 8-31
- Bachmaier Winter, Lorena (ed.) (2018), «*The European Public Prosecutor's Office: The Challenges Ahead*», Berlin, Springer.
- Barrocu, Giovanni, (2017), «*La cooperazione investigativa in ambito europeo. Da Eurojust all'ordine di indagine*», Padova, Cedam.
- Bargis Marta, Selvaggi Eugenio (ed.) (2005), «*Mandato d'arresto europeo. Dall'extradizione alle procedure di consegna*», Torino, Giappichelli.
- Bene Teresa, Luparia Luca, Marafioti Luca (ed.) (2016), «*L'ordine europeo di indagine penale. Criticità e prospettive*», Torino, Giappichelli.
- Biasiotti, Maria Angela (2020), «*A Proposed Electronic Evidence Exchange across the European Union*», *Digital Evidence and Electronic Signature Law Review*, 14, pp. 1-12.
- Daniele, Marcello (2015), «*Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles*», *New Journal of European Criminal Law*, 6, pp. 179-194.
- Daniele Marcello, Kostoris Roberto (ed.) (2018), «*L'ordine europeo di indagine penale*», Torino, Giappichelli.
- De Hert Paul, Weis Karen, Cloosen Nathalie (2009), «*The Framework Decision 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 – A Critical Assessment*», *New Journal of European Criminal Law*, pp. 55-78.
- Dicker, Sandro, «*Die Europäische Ermittlungsanordnung*», pp. 417-432, disponible en <http://www.jstor.com/stable/43265055>.
- Jerman-Blažič Borka, Klobučar Tomaž (2019), «*A New Legal Framework for Cross-Border Data*», *International Journal of Cyber Criminology*, 13, pp. 270-289.
- Zeljko Karas, Pejakovic Dipic Silvija (2019), «*Evaluation of the Results of the European Investigation Order*», *EU and Comparative Law Issues and Challenges Series*, pp. 492-506.
- Klimek, Libor, (2015), «*European Arrest Warrant*», Berlin, Springer.
- Kostoris, Roberto (ed.) (2019), «*Handbook of European Criminal Procedure*, Milano, Giuffrè.
- La Greca Giuseppe, Marchetti Maria Riccarda (ed.) (2003), «*Rogatorie penali e cooperazione giudiziaria internazionale*», Torino, Giappichelli.

- Laro-Gonzales, Elena , «*El Reglamento E-evidence: instrumento adicional a la Orden europea de investigación*», *Diario La Ley*.
- Marchetti Maria Riccarda, Selvaggi Eugenio (ed.) (2019), «*La nuova cooperazione giudiziaria penale*», Padova, Cedam.
- Marin, Luisa (2014), «*Effective and Legitimate?: Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant*», *New Journal of European Criminal Law*, pp. 237-348.
- Murphy, Cian (2010), «*The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust?*», disponibile en https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701956
- Nowak, Celina, (ed.) (2016), «*The European Public Prosecutor's Office and National Authorities*», Padova, Cedam.
- Pamfil, Mihaela Laura (2009), «*Judicial Cooperation Based On a European Evidence Warrant Lect. dr. Mihaela Laura Pamfil*», disponibile en https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412332.
- Rosanò, Alessandro (2020), «*Il nuovo mondo della cooperazione giudiziaria in materia penale nell'unione europea: le proposte della commissione europea sugli ordini di produzione e conservazione di prove elettroniche (e-evidence)*», *La legislazione penale*, pp. 1-18.
- Ruggeri, Stefano (ed.) (2013), «*Transnational Evidence and Multicultural Inquiries in Europe*», Berlin, Springer.
- Rusu, Ion (2016), «*European Investigation Order in Criminal Matters in the European Union: General Considerations. Some Critical Opinions*», *Juridical Tribune*, 6, pp. 56-70
- Sieber Ulrich, Neubert Carl-Wendelin (2016), «*Transnational Criminal Investigations in Cyberspace: Challenges to National Sovereignty*», *Max Planck Yearbook of United Nations Law*, pp. 241-321.
- Van der Mei, Anne Pieter (2018), «*The European Arrest Warrant system: Recent developments in the case law of the Court of Justice*», *Maastricht Journal of European and Comparative Law*, 9, pp. 882-904.