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Editor

Transnational Evidence and Multicultural Inquiries in Europe

Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases

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Stefano Ruggeri

The EIO Proposal for a Directive and Mafia Trials: Striving for Balance Between Efficiency and Procedural Guarantees

Paola Maggio

Abstract PD EIO could mark a turning point in the development of "European criminal procedure."

The Proposal will obtain evidence in cross-border cases and is particularly suitable for investigations on the subject of international organized crime. From the long gestation period and the contents of the Proposal emerges, however, the difficulty of making a balance between the investigation of crimes and the guarantees of the individuals involved.

The use of collected of evidence from different legal systems is often an overly neglected aspect. Doubt surrounds the regulation of banking instruments, the rules on wiretapping, and all provisions for undercover investigations.

Keywords Balances • Efficiency • Mafia cases • PD EIO • Procedural guarantees

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1 The PD EIO in a Broader Framework

The proposal for a Directive on a European Investigation Order (PD EIO) aims at introducing a more unified and general legal regulation for obtaining evidence in cross-border cases than the current MLA instruments.

In this context, investigation into transnational "Mafia cases" deserves particular attention. Especially the delicate balance between efficiency and effectiveness of judicial cooperation and human right's protection imposed by minimum standards in evidence gathering.

With this objective, the PD EIO has to set-up "a framework" that considers recent legislative European measures and the most efficient implementation of existing instruments (for example EEW) to maintain the highest level of respect for human rights.

The underlying backdrop for this approach focuses on the freezing of assets, concrete issues of proportionality, respect for the Roadmap for Strengthening Procedural Safeguards, and the Directive on Interpretation and Translation. The Directive on the right to access to a lawyer, and the directive on confiscation of the proceeds of crime have also great importance.[1]

International expansion of organized crime has mainly been directed towards all European Countries. We need to pay constant attention to all the various aspects inherent to a multi-dimensional perspective. This objective cannot be pursued abstractly, but focusing intently on each individual standard or institution, with full respect for human rights and for the trial guarantees of the suspected. For this reason, we should place EIO in a broader framework.

In this context, it is noteworthy that in September 2011 the European Commission emphasized that the criminal law of the European Union, flanked by principles of subsidiarity and proportionality, must be oriented towards maximum respect for human rights,[2] including interventions in organized crime.

A new Resolution[3] tries to combat organised crime, and to encourage Member States to strengthen their judicial authorities and police forces on the basis of the best experiential outcomes, including comparing the legislation and resources designed to support their activities, and to assign adequate human and financial resources to that purpose. It calls on the Member States to pursue a proactive approach to investigation, draw up national plans to fight organised crime, and provide for central coordination of activities through appropriate specific structures, taking their cue from the most successful experiences of some Member States. The Resolution of 25 October 2011 specifies that all measures to counter organised crime have to fully respect fundamental rights, and to be proportionate to the pursued objectives. The achievement of these objectives is of essential importance

[1] COM/2012/085 final—2012/0036 (COD) (12 March 2012). See Maugeri (2012), pp. 180ff.

[2] COM(2011) 573 final (20 September 2011).

[3] European Parliament Resolution (25 October 2011) on organized crime in the European Union (2010/2309 INI); Alfano and Varrica (2012), p. 4.

in a democratic society, in accordance with Article 52 EU FRCh, without unduly restricting the freedom of individuals, as enshrined in the ECHR, the EU FRCh, and the constitutional principles common to the Member States.

In short, Europe has suggested the following needs: a greater public awareness towards this type of phenomena[4]; the autonomous treatment of organized crime to terrorism; the offense of participation in a "criminal organization"; the provision of a crime of Mafia association with particular attention to the crimes in the environmental sector. Behind these indications, there is a widespread dissemination of criminological knowledge of organized crime in the European context, and of the economic interests of mobsters to such an extent that the future regulations will aim to prevent companies, linked to organized crime or "Mafia," to participate in public tenders or contracts.[5]

The repression of the authors is accompanied by "understanding" the damage suffered by the "victims" with a financial support for their business (paragraph 43), and with considerable interest to the witnesses and their families. This approach includes the creation of a European fund aimed at the protection and assistance of victims and witnesses of Justice (paragraph 12).

It is a more functionalist approach that aims at countering illegal wealth; the discovery and repression of these serious crimes is a clear goal of the European Union. The massacre of Duisburg, in 2007,[6] demonstrates the ability of "branching" of the 'Ndrangheta, and the need to conduct investigations in other European countries. The phenomenon of criminal globalization, inspired by the "lex maxima of profit."[7]

Since the expansion of organized crime has mainly been directed towards European countries, we have to pay attention to all the various aspects inherent to a multi-dimensional perspective.

[4] Institution of a special committee on the dissemination of criminal organisations which operate across borders, including mafias, one of whose aims will be to investigate the extent of the phenomenon and the negative social and economic impact it has throughout the EU, including the issue of the misappropriation of public funds by criminal organisations and mafias and their infiltration into the public sector; commission carefully to monitor the transposition by the Member States of the EU directive on the protection of the environment through criminal law, to ensure that it is done promptly and effectively; the establishment of an EU forum of associations of victims' families; eradicating entrenched mafia-style organised crime in the EU strengthen both the role of civil society and partnerships between civil society and the judicial system and the police.

[5] One Commission, in cooperation with Europol and Eurojust, conducted a study by June 2013 to assess the negative impact of transnational organised crime in the European Union; calls on Europol to draw upon a thematic OCTA on the threat posed by the presence of mafia-type criminal organisations in the EU by 2012 (point 16).

[6] On 15 August 2007, six men belonging to the 'Ndrangheta clan were shot dead in their cars near the train station of Duirsburg in western Germany. Italian court, July 2011, sentenced the ringleader of the massacre Giovanni Strangio and other seven people to life terms for their role in the violent mob feud that culminated in the Duirsburg slayings. It was important collaboration between the Italian and German authorities during the investigation.

[7] Pisani (1998), p. 703.

I therefore consider it necessary to include this proposal for a directive in line with the European criminal policies contrasting the organized crime, as I believe it is essential to track consistency (inconsistency?) with respect to such sources.

It is also interesting to validate the compatibility of the PD EIO with the powers of the European Public Prosecutor.[8] Article 86 TFEU needs a "codification" of a European criminal procedure. The regulations shall determine the

> general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.[9]

It is, therefore, a regulatory approach that goes far beyond the realm of mere harmonization, since it is not limited to ensuring compatibility between heterogeneous acts, but it embodies the elaboration of common rules for investigative measures of the European Public Prosecutor available in all European countries.

PD EIO extends "horizontally." It can, in fact, be applied during the investigative stage of the case, and during trials and hearings. For this specific reason, it is necessary to assess its impact and compatibility within different criminal procedure models present in the EU. This implies the possibility for diverse regulatory strategies to manoeuvre with obvious respect for the underlying principles of the system, without altering the framework of the procedures. At its core, the flexibility of certain rights and certain guarantees has been justified in balancing conflicting calls for security and efficiency.[10]

Within this ideal frame, my analysis will focus on: data protection, most appropriate definition of "investigative measures," judicial control and legal remedies, grounds for refusal to execute, immunity, transfer of persons in custody, and finally, costs and resources.

2 EIO and Absence of Trust

The PD EIO represents a further bold departure from the norms of traditional, mutual legal assistance. It also goes further than the mutual recognition initiatives in existence.

The mutual recognition model in the criminal justice field has encountered problems. First of all total absence of trust. For example, the European Arrest

[8] See Allegrezza (2008), pp. 3882–3883; Balsamo and Recchione (2010), p. 3620.

[9] Ruggieri (2007), p. 551; Bargis (2004), p. 745; Lanzi et al. (2002), p. 3.

[10] Sayers (2011) p. 3: "unfortunately, the PD EIO appears to be a myopic measure lacking in foresight or perspective. In detaching itself from the lessons learnt from the mutual recognition journey to date, and by ignoring the move to strengthen procedural protections"; Daraio (2013), p. 579.

Warrant (EAW) and the mutual recognition instruments for freezing of evidence and assets, for confiscation orders, for financial penalties, and for evidence warrants, for custodial penalties, and for alternative sentences, as well as decisions on pre-trial bail demonstrate this situation. It is a schizophrenic situation: there is a great interest in requests for cooperation, because they guarantee independence of the countries; instead, when switching to the plane of harmonization, European states show a great "fear" of losing power and autonomy in these areas.

The creation of structures and devices with uniform legal rules is not easy.[11] The practice shows an intervention of EU law on the procedural level too narrow in the areas of the judicial cooperation and of the basic principle of mutual recognition. There are practical difficulties of investigative coordination and exchanges of acts contained in evidence. In absence of trust, it is very important to establish minimum procedural standards of individual protection,[12] save for the belated return to the procedural safeguards agenda with the Swedish Presidency's Roadmap published in 2009.[13] The Stockholm Programme confirmed its commitment to developing such standards.[14] The question is: has PD EIO produced real safeguards for these instances? A genuine area of mutual trust for such mechanisms of cooperation requires the understanding of the varied context in which such instruments will operate, and awareness that mutual legal-assistance protections exist for the main purpose to protect sovereignty and to regulate the effects of diversity among systems.

The Directive is suffering from an original defect. It focuses on research and training of evidence and disregards terms of admission (or exclusion) of the evidence gathered in the different European legal proceedings. Schemes usability evidence are often very different from each other. The proposal is not interested in following the logical procedural rules for the implementation of the measures and does not take into account the minimum characters that testing must possess in order to be usable and be able to move freely within Europe.[15]

3 Lights and Shadows of the Proposal

European bodies greeted positively[16] the simplification of the procedure using standard forms, which are valid at all stages of the proceedings. Similarly, it is worth emphasizing the enhancement of the principle of mutual recognition of

[11] Melillo (2006), p. 272, hops some type of vertical cooperation; Moscarini (2011), pp. 635ff.

[12] Sayers (2011), pp. 12ff.; Marchetti (2011), pp. 164–165.

[13] Council of the European Union, Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1, 4.12.2009.

[14] During European Council, Stockholm Programme, Italian government officially suggested to introduce a true "principle of availability" of evidence open to procedural rights of the defense.

[15] Pisani (2011), p. 935.

[16] Eurojust opinion on EIO of 4 March 2011, pp. 1 f.

judicial decisions of the authorities of the Member States, in place of the "political" nature of the traditional request for assistance. Finally, it is praiseworthy that the shorter timeframes for the implementation of the measures allow significant acceleration of procedures. In my opinion, it is very important that the improvement of the Proposal will be in accordance to the EU FRCh and the constitutional principles of the individual Member States.

The right to a fair trial can include pre-trial measures, so that Article 6 protections should be factored into the PD EIO. This incorporates being notified of criminal charges, and having access to an interpreter free of charge in certain circumstances, with this respect explicit reference should be made to the Directive on Interpretation and Translation. The EU FRA has commented on the relevance and importance of such protections of the right to a fair trial and has also noted the need to ensure access to a lawyer, and if necessary, legal aid during an investigation. The PD EIO set out in the form provided for in Annex shall be translated by the competent authority of the issuing State into the official language or one of the official languages of the executing State.

The progress of the PD EIO should be tied to the development of the Roadmap; there should be specific protections in relation to video and telephone conferencing, including access to a lawyer, the recording of proceedings and the right to challenge the evidence and equivalent protections for the presumption of innocence.

In particular, the Italian legislation (Art. 147 and 147bis of the Rules Implementing the CCP) established the protection for witnesses, the presence of the lawyer, and the visibility of the person. In this direction, it is important to safeguard the rights that the hearings of witnesses, "crown witnesses," or other people benefiting from special protection measures. Picture or likeness image of themselves should not be shown during the trial.[17]

If witnesses or suspects are interviewed, they should be tape-recorded, have access to legal advice, and there should be provisions on the retention of this evidence.

Evidences gathered should be used for a defined purpose and should be subject to clear data protection and confidentiality protections.

I believe that the term "investigative measure" should be defined by reference to what it includes as well as what it excludes. It is inadmissible to use criminal investigative measures in administrative, civil, taxation and other cases. Criminal investigative measures can affect human rights to a large extent, businesses, and citizens legitimate interests, and therefore, they are appropriate only for most serious offences—crimes. These measures should be specifically limited to investigations with a cross-border element, with this term being clearly defined.[18]

[17] Amendment nr. 169 to Article 21 by Rosario Crocetta (AM Com Leg Report).

[18] The EU FRA confirms that data protection with unlimited discretion leads to legal uncertainty. Thus, it is essential that the term "investigative measure" be defined, because the purpose for using the data needs to be clearly stipulated to ensure it is being used appropriately. See Opinion of the European Union's Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm.

However, the freezing of instruments and proceeds of crime seems to be excluded as, in accordance with Article 29(2), the Directive (only) applies among the Member States to the freezing of items of evidence in substitution to the corresponding provisions of Framework Decision 2003/577/JHA, on the execution in the European Union of orders freezing property or evidence. Whereas there may be a justification for excluding confiscation of assets from the purport of the Directive, the exclusion of the freezing of assets could entail negative consequences[19]: bank information (*e.g.*, information on the amount of money on a bank account) would be covered by the Directive. Freezing of the amount of money on that bank account would be exclusively covered by Framework Decision 2003/577/JHA. Hence, it would be necessary to issue two different forms (under two different legal regimes) to achieve the desired result. One could argue that this approach—in two steps—has the advantage of allowing the issuing authority to assess the material gathered before issuing a freezing order.

This method may not be appropriate in organized crime cases, where there is a high risk of dispersion of assets derived from crime. Furthermore, the issuing of a separate form—in addition to MLA request—to obtain the freezing of assets appears to be one of the reasons why practitioners show little interest in applying Framework Decision of orders freezing property or evidence.

Moreover, it might be difficult in practice, at least at the beginning of an investigation, to distinguish among evidence, instruments and proceeds of crime, as the same asset could be classed under all these heads. Thus, as far as freezing orders are concerned, the new instrument offers an opportunity to replace Framework Decision 2003/577/JHA and to set up a unique, coherent, and comprehensive legal regime in this field which would apply to both evidence and assets.

With respect to judicial control and legal remedies, the proportionality[20] test should be linked to what would be issued in the issuing state and not what could be issued. In the proposal the control of the proportionality requirement for the issuing and the executing state is in accordance in particular with Article 48 and 52 of the EU FRCh. Furthermore, where an executing authority has reasons to believe that the conditions in Article 5a(1) have not been met, it may consult the issuing authority if an explanation has not been given in the PD EIO. Following the consultation, the issuing authority may decide to withdraw the PD EIO or to maintain the PD EIO, which will then be executed according to this Directive.

Legal assistance, with legal aid where necessary in the interests of justice, should be available for challenges.

In my opinion legal remedies ensure an effective right by any interested party, but at the same time also ensure that they will not be used as purely a delaying mechanism, or as a way to hamper the effectiveness of the investigations that

[19] Eurojust Opinion on EIO, 4 March 2011, p. 6.

[20] Bachmaier Winter, Part III, Sect. 4, considers that the wording and systematic of the PD EIO can be further improved, especially with regard to the possible grounds of non-recognition and non-execution of the European Investigation Order.

justified the request. Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the PD EIO can be challenged in an action brought before a court of the issuing or executing State.

The grounds for refusal to execute should be more clearly and consistently set out. It is not a simple reference to the invasive acts.

Many doubts are raised about the concept of immunity. In fact, there is no common definition of what constitutes an immunity or privilege in the European Union, and the precise definition of these terms is therefore left to national law, which may include protections for medical and legal professions, but should not be interpreted against the obligation to abolish certain grounds for refusal in Article 7 of the 2001 Protocol to the ECMACM between the Member States of the European Union. This may include as well, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media.

Regarding the transfer of persons in custody, the term "custody" should better be defined. Prisoners in provisional detention generally have greater rights. There is a need to guarantee consistency of treatment from one country to another.

An absence of consent would not necessarily block a transfer, so explicit protections should be created and factored into refusal grounds, *e.g.* owing to proportionality, human rights grounds, or the protection of vulnerable suspects. On the one hand, this clause could in fact block the effectiveness, on the other hand it could seriously jeopardize the rights of the suspect.

Before executing the PD EIO, the person concerned shall be given the opportunity to state their opinion to the executing authority on the temporary transfer. Where the executing State considers it necessary, in view of the person's age or physical or mental conditions, he shall be given access to legal representation. The opinion of the person shall be taken into account when deciding to execute a PD EIO. I consider it necessary to reach a better definition of this point.

The proposal includes the possibility of interception. This choice will determine serious problems of jurisdiction[21] and probably engage Eurojust in the settlement of disputes between States. The invasive activity will have to take into account the discipline of the requested State.

It must also be considered the injury of privacy and freedom of communication and correspondence with the guarantees ready Article 8 ECHR, as interpreted by the ECtHR.[22]

Some problems arise in maintaining the position of undercover investigations (covert investigations) in the text of the Directive, in order to replicate the Convention on mutual assistance between the EU Member States of May 2000, which, however, dictated a discipline geared to cooperation between states and not based

[21] Ruggeri (2013), pp. 305–306.

[22] ECtHR, Decision of 7 June 2007, *Dupuis v Francia*, Application no. 1914/02, § 49; ECtHR, Decision of 17 July 2003, *Craxi v Italia*, Application no. 25337/94, §§ 80 f.

on the principle of mutual recognition of judicial decisions. In fact, this is a typical activity of police.

A comprehensive data protection directive is required, covering all aspects of criminal and police investigations.[23] The FRA confirms that data protection with unlimited discretion leads to legal uncertainty.[24] The Stockholm Programme referred to the protection of personal data as a "political priority." There is a need for specific work to set standards to be implemented. Personal data processed when implementing this Directive should be protected in accordance with Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, and with the principles laid down in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

We need a balancing between two conflicting interests: the investigation on criminal offences and the protection of the individual. Clear commitment to protecting privacy rights should be articulated based on the requirements of the ECtHR case law. However, specific safeguards are required to protect professional or investigative secrecy.

Cost is a very complex issue. At present, the executing state will bear the cost of execution, save for explicit provisions that enable costs to be shared. This may invite overuse and abuse, as states may be less careful about applying for measures if there are no cost implications. Had better than all expenses arising from an investigation request, with a view of obtaining evidence, will be shared in equal parts between the issuing and the executing States, unless, in concrete cases, they have previously agreed on a different distribution of costs. In opinion of Eurojust,[25] the transfer to the issuing State of part or all the costs arising from the execution of the PD EIO should be limited to "extraordinary" costs, i.e., not those resulting from the execution of investigative measures that are usually requested (hearings, house searches, bank information, etc.).

Obtaining information from banks presents many critical aspects. Some amendments are required when an offence is punishable by a penalty involving deprivation of liberty, or a detention order of a maximum period of at least 2 years in the issuing State, or if the execution of such a measure would contravene the European Charter of Fundamental Rights or the constitutional principles of the executing State.[26]

[23] The recommendations of the EDPS should be adopted. These include guaranteeing the accuracy of evidence (*e.g.*, in relation to translations), the security of data and investigative security with electronic systems. The EDPS also recommends the creation of consistent professional standards and internal procedures to ensure the protection of individuals with regard to the processing of personal data and accountability systems. These recommendations require the application of adequate resources.

[24] See EU FRA Opinion, above, fn. 18.

[25] Eurojust Opinion on EIO, 4 March 2011, p. 12.

[26] *Amendment nr. 55 by Rosario Crocetta (Am Com Leg Report).*

At the same time, many European countries have pointed out that limiting the requests for information from banks only against persons (legal or natural) subjected to a process or a criminal investigation is not convincing.[27] This choice, in fact, excludes the area—wide and relevant—of information on the ownership of reports when the coordinates are known but not the holders; prominent investigative reports entertained by people not investigated/charged; investigations to be carried out in proceedings against unknown persons.

The sector of economic activity is just that in which the Mafia shows its "criminal abilities."

4 Past and Future

The current slow pace in the final stages of approval of the Proposal for a Directive demonstrates how the extraordinary Potential of this tool are still important to many European countries. The fear of losing sovereignty and independence in criminal investigations is the background in which the instrument took its first steps.

European legislation will strike a fair balance between society's need for protection against crime and the interests of suspected and accused persons, a balance based on thorough investigation of facts and consideration of the views of all parts of the spectrum. Granted that such a proposal would not be enacted immediately or universally, and ought not to be enacted uniformly, they would nevertheless set workable standards for the police and afford useful guidelines for judges.

My final impression is that Europe is still looking for a balance between the fight against organized crime and respect for human rights. Acting as a guide in this complex situation is the requirement of the ECHR regarding the criminal trials. The manner in which they are applied in practice will determine whether or not the requirements of the ECHR are actually observed. Having regard to the way in which the ECtHR interprets and applies the ECHR in specific circumstances[28] may thus provide a useful guide when it comes to interpreting and applying the new Proposal. The relevance of the ECHR on criminal justice should not be overlooked since the rights and freedoms which it guarantees, and also sets limits on, is the main scope of criminal law and criminal procedure.

[27] Observations of Italian delegation about the Proposal 13.12.2011.

[28] For example, about confiscation, ECtHR, Decision of 10 Mai 2012, *Soc. Sud Fondi v Italy*, Application no. 75909/01, § 61 f., Italy has to restore the situation as a total elimination of the consequences of the measure.

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