Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues

Stefano Ruggeri

Abstract The draft Directive on a European Investigation Order, launched by eight Member States in 2010, constitutes the last step in a long path towards the creation of a European regulation on the collection of evidence abroad. The complex structure of the proposed instrument, aimed both at conducting investigations overseas and obtaining evidence which is already in the possession of the executing State, reveals a new way of providing mutual recognition, combined with the flexibility of the MLA system. Despite its ambitious goals and the announced innovations, this instrument provides a complicated combination of fairly old solutions, which does not allow a proper balance to be achieved between the efficiency of transnational prosecution and the protection of human rights, and therefore does not satisfy the need for a fair investigative procedure in transnational cases. This introductory study provides a critical view of the main general and specific issues of the draft proposal, focusing on some due process concerns and unresolved issues of the new instrument.

Keywords Cross-border investigations • European investigation order • Transnational evidence

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S. Ruggeri (✉)
Department of Law, University of Messina, Piazza Pugliatti No. 1, Messina, Italy
e-mail: steruggeri@unime.it

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1 Introductory Remarks. The Long Path Towards a European Transnational Investigative Procedure

The topic of free movement and the admissibility of transnational evidence has been among the most debated issues of EU cross-border cooperation in criminal matters over almost the last two decades.[1] A close look at its development in academic discussions and EU initiatives since the *Corpus iuris* project[2] shows, however, that the issue of obtaining evidence in and from other Member States not only has been of varying importance, with through periods of intensive discussions and phases of relative stasis, but has also shown a extraordinary, chameleon-like adaptability to the evolution in EU legislation in criminal matters.

Thus, the 2001 Green Paper on the establishment of a European Prosecutor established, following the approach of the Tampere Council,[3] the duty of any Member State to admit unconditionally the evidence gathered in other Member States.[4] This rigid approach, which was in line with the vertical perspective of the European Prosecutor initiative, was rapidly abandoned, and therefore in the EEW proposal of 2003—launched by the Commission with the aim of applying the strict mutual recognition logic of the FD EAW to the field of evidence gathering[5]—there was no trace of any duty of admission by national authorities of evidence collected in other Member States. It is, however, well known that this legislative proposal had to face so many hurdles and criticisms that adoption of the new instrument was delayed by over 5 years. The issue of the admissibility of evidence re-emerged in the Green Paper of 2009 on obtaining evidence in criminal matters from one

[1] Amongst the many researches and studies conducted in this field, see Vervaele (2005), Gleß (2006), and Illuminati (2009).

[2] For the first version of the project, see Delmas-Marty (1997), *passim*. The project was then revised and published in 2000 in Delmas-Marty and Vervaele (2000), *passim*.

[3] Tampere Conclusions, point 36.

[4] COM (2001) 715 final, point 6.3.4.1. On this topic see Allegrezza, Part II, Sect. 3.1.

[5] Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters [COM/2003/0688 final].

Member State to another and securing its admissibility.[6] Moreover, the introduction by the Lisbon Treaty of a new general framework allowing for legal approximation in the field of admissibility of evidence in criminal matters with cross-border dimensions [Art. 82(2)(a) TFEU] led to the immediate launching of new initiatives aimed to replace in the EU area most instruments both of judicial assistance and mutual recognition with a new instrument of evidence gathering based on the principle of mutual recognition and potentially related to *all* types of evidence. These initiatives were also promoted by the Stockholm Programme of 11 December 2009,[7] which underlined the need for a new approach to bring order to the fragmentary system of the existing instruments.

Thus, in its Action Plan Implementing the Stockholm Programme,[8] the European Commission—following the approach expressed in the Green Paper of 2009—announced two (at first sight separate) legislative proposals aimed respectively (a) at introducing a comprehensive system for obtaining evidence in criminal matters based on the principle of mutual recognition and covering all types of evidence and (b) at laying down common standards for gathering evidence in criminal matters in order to ensure its admissibility. At the same time, eight Member States launched a proposal for a Directive with the scope of introducing into the EU area a new means of executing investigative measures aimed at taking evidence in other Member States.[9] Neither of these initiatives has been completed yet. The Commission's proposals did not even lead to any legislative initiative and were dropped after the PD EIO was launched, whilst the PD EIO—after more than 3 years of legislative works—has not yet led to a binding legislative act. Moreover, over the course of more than 1 year, the draft text was intensively discussed in the Council, which established a general approach in December 2011.[10] After the orientation vote of May 2012 by the European Parliament, the Conference of Presidents decided in June 2012 that the European Parliament would suspend its cooperation with the Council, *inter alia*, on the EIO dossier until a satisfactory outcome is achieved on Schengen governance.[11] Meanwhile, in November 2012 the Presidency of the Council drew up a document containing responses to some controversial issues and some suggestions on technical questions.[12]

A brief look at the main steps of this uncompleted path shows, however, a different approach. Once the perspective, expressed in the Green Paper of 2001, of mutually binding Member States to the admissibility of foreign evidence, had

[6] COM (2009) 624 final.

[7] The Stockholm Programme—an open and secure Europe serving and protecting citizens (2010/C 115/01).

[8] COM (2010) 171 final.

[9] Interinstitutional File: 2010/0817 (COD), COPEN 115 EJN 12 CODEC 363 EUROJUST 47.

[10] See doc. 18918/11, COPEN 369 EJN 185 CODEC 2509 EUROJUST 217.

[11] See http://www.europarl.europa.eu/news/en/pressroom/content/20120614IPR46824/html/EP-suspends-cooperation-with-Council-on-five-justice-and-home-affairs-dossiers.

[12] Interinstitutional File: 2010/0817 (COD), COPEN 245 EJN 83 CODEC 2643 EUROJUST 100.

been abandoned, the focus of EU legislation shifted to allowing free movement of evidence to *facilitate* its admissibility. The 2008 FD EEW is a clear example of this approach, and its limited scope of application (objects, documents and data) demonstrates that priority attention was then given to those types of evidence to which real movement applies. Despite the ambiguous wording of Article 82(2)(a) TFEU and the strong criticism raised against the legitimacy of a EU legislative intervention on the admissibility of transnational evidence,[13] the PD EIO has launched the even more ambitious proposal of an almost comprehensive tool of evidence gathering. Moreover, the proposed extension of the scope of EU intervention from documental evidence (or evidence already existing) to dynamic evidence has marked a clear change of approach, thus shifting the focus of EU intervention from the movement of evidence amongst Member States to the collection of evidence through investigative activities conducted in a State other than that of the relevant proceedings. Such an approach involves attaching priority importance to the procedures of taking evidence rather than to the limits of admissibility of evidence collected abroad.

Against this background, the EIO proposal raises many questions, which have been addressed in detail in the analysis of my distinguished colleagues and the short statements of my chair assistants, listed below. Both the articles and the short statements have been elaborated in response to a *Questionnaire*, which is published as an Annex of this book. The present paper aims to provide an introductory view of the issues and the unanswered questions regarding the proposed new tool as they emerge from the proposed format. For the sake of clarity I shall deal with the general and the specific issues separately.

2 The European Investigation Order. General Issues

2.1 Subject of the Proposed Directive: A New Legislative Action Aimed at Providing a Single Instrument for Gathering Evidence in Other EU Member States

The Directive proposal has been presented as a new legislative action aimed to provide a single instrument of gathering evidence overseas within the EU. This starting point raises two main questions.

A) The first question concerns the approach of the proposed instrument, i.e., the *replacement of all the existing instruments with an EIO with a global scope*. At first glance, the draft Directive is fully in line with the Commission's proposal of introducing a new comprehensive instrument of obtaining evidence based on the principle of mutual recognition. Furthermore, of the four possible policy options for

[13] See, among others, Spencer (2010), p. 604.

the EU—i.e., (1) no new action in the EU, (2) non-legislative action, (3) abrogation of the FD EEA with a return to the system of mutual legal assistance, (4) new legislative action—the PD EIO opts for a new legislative action. This should not, however, constitute an EEW II, i.e., a new instrument aimed at extending the EEW I *with its logic* to all types of evidence. In several passages the Accompanying Document to the PD EIO stresses the inadequacy of the EEW mainly due to the rigidity of this instrument,[14] thus proposing a new approach focused on the measure to be executed rather than on the evidence to be collected.

I shall address this point below, under Sect. 2.2. Now it is noteworthy that the original draft was not entirely in line with the announced goal, since some measures—i.e., the setting up of JITs and the gathering of evidence within a JIT, as well as some forms of interception of communications (interception with immediate transmission and interception of satellite telecommunications)—were excluded from the sphere of application of the EIO [Art. 3(2) of the original proposal]. During the discussions in the Council,[15] however, this area was considerably reduced by including all forms of interceptions of telecommunications within the scope of the Directive proposal. Moreover, despite the announced approach of the proposal, the collection of evidence already in possession of the executing State appeared in the text agreed in December 2011 amongst the main goals of the new instrument [Art. 1(1) PD EIO], which encompassed also the evidence gathered before (and independently from) the order being issued. On the other hand, any form of supranational gathering of evidence has always been left outside the scope of application of the EIO proposal, which in its most recent versions remains concerned with the horizontal level. This regards the collection of evidence through the future EPPO as well as—taking into account the wide scope of application of the EIO proposal, extended to administrative proceedings—through supranational bodies or agencies such as OLAF.

Against this framework, the coherence of the new instrument should be assessed on two levels. On a first level, it should be ascertained whether the proposed model applies properly to *all* the different forms of investigative activities covered by the draft Directive, which at the present encompasses at least three models of obtaining evidence overseas: (a) ordering an investigative activity overseas, (b) obtaining the results of investigative activities already in possession of the executing authority, and (c) conducting extraterritorial investigations. On a second level, the analysis of the legislative initiative should address the relationship between the collection of evidence following the proposed tool and what has been left out of the scope of the draft proposal, i.e., the models of extraterritorial investigations, joint inquiries and supranational investigations.

[14] Accompanying Document to the Proposal for a Council Directive regarding an European Investigation Order in criminal matters, Detailed Statement, 9288/10 ADD 2, COPEN 117 EJN 185 CODEC 384 EUROJUST 217, § 3.1.2.

[15] See already doc. 8474/11, COPEN 67 EJN 13 CODEC 550 EUROJUST 49 PARLNAT 13.

B) The second question concerns the need for replacing all the existing instruments with an EIO with a global scope, i.e., the *practical and theoretical justification of the new legal action*. There is no doubt that the co-existence of tools of evidence gathering inspired by different approaches can lead to confusion and difficulties in law enforcement, since the competent authorities—in absence of "one channel" for the obtaining of evidence—will have to avail themselves of different instruments to obtain legal assistance.[16] This does not, however, imply that the introduction of a new instrument—applicable to all types of evidence and based on the principle of mutual recognition or a new method of mutual recognition—is the best way to prevent inefficiency in international cooperation. Indeed, affirming the *need* to replace all existing instruments with a new single one should presuppose the ascertainment of the causes of the current inefficiencies in the MLA system. In the Stockholm Programme the European Council pursued a similar approach, by stressing that the adoption of a comprehensive means of obtaining evidence in criminal cases with a cross-border dimension had to follow an *impact assessment* of the existing instruments in this area.[17]

The rapidity both of the Commission's and the Member States' intervention did not, however, permit such analysis. At the time of the Commission's Green Paper, many Member States had not yet transposed the FD OFPE, and the deadline for incorporating the FD EEW not only had not yet expired, but had been transposed only by one Member State (Denmark).[18] Moreover, at the time of the Commission's and the Member States' intervention (respectively, 2009 and 2010), there were neither sufficient scholarly studies nor, most importantly, empirical research supporting its arguments.[19] Furthermore, some studies conducted on a factual basis[20] have pointed out that, among the various causes of the inefficiency of the system of mutual legal assistance, linguistic barriers and defects in the execution of requests (delays, even disappearance of requests, etc.) are a frequently recurring problem in cross-border cooperation.[21] Taking into account the prime importance attached to language issues in the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings,[22] it would have been wise to wait for EU intervention in this field. And after the Directive 2010/64/EU, the impact of EU harmonization of the right to interpretation and translation in criminal proceedings on the MLA system would have merited careful assessment.

[16] Bachmaier Winter (2010), p. 583.

[17] The Stockholm Programme (footnote 7), § 3.1.1.

[18] Gleß (2011b), p. 599.

[19] Allegrezza (2010), p. 570.

[20] Amongst them, cf. the Preliminary Report by Wade (2011) on the Euroneeds-Project, undertaken by the Max Planck Institute for Foreign and International Criminal Law.

[21] Bachmaier Winter (2010), p. 589.

[22] Resolution of the Council of 30th November 2009 (2009/295/01).

2.2 Approach and Goals of the Draft Proposal Instrument: A New Way of Providing Mutual Recognition

It has been noted that the draft Directive aims to provide a new approach in the field of transnational inquiries, an approach consisting, above all, of an unprecedented way of providing mutual recognition. The complex nature of the proposed Directive shows a significant shift from a conception of the MR model *as an alternative of the MLA system* to a view of the MR model *combined with* the MLA system. What is sought in the draft proposal is, in other words, a virtuous combination of the efficiency of the *order model* (MR system) with the flexibility of the request model (MLA system). This was not, however, entirely consistent with the approach of the original proposal. On the one hand, the provision that granted the issuing authority unprecedented power to choose the investigative measure—i.e., the subject of the order—led to the not less innovative move to allow the executing authority (provided for in Article 13 of the Framework Decision 2009/829/JHA) to choose an investigative measure other than that requested (Art. 9 of the original proposal). On the other hand, the grounds for refusal were drastically reduced and no room was even left for grounds reflecting fundamental rights of the defendant, such as the *ne bis in idem* principle [Art. 10(1) of the original proposal]. Moreover, insufficient guarantees were provided in the field of legal remedies, which were granted to the extent provided by domestic law.

In its most recent versions, however, the draft proposal has led to more adequate balances between efficiency and flexibility, as shown by the complex structure of the provision on the grounds for refusal [Art. 10(1) PD EIO]. To be sure, the combination of the MR and the MLA system does not constitute a novelty in itself: on the one hand, many legislative instruments of the intermediate and recent phases of MLA, such as the CISA and the EUCMACM had already anticipated some features of the MR system and, on the other hand, the developments in the MR system show that it has gradually been smoothened by re-incorporating typical elements of the MLA. In the context of this draft proposal, furthermore, such a combination is aimed to achieve further goals. Alongside with the purpose of improving and speeding up the EU cross-border cooperation, the new instrument should ensure the admissibility of evidence, while maintaining a high level of protection of fundamental rights (especially procedural rights), reducing the financial costs, increasing mutual trust and cooperation between the Member States, and preserving the specificities of the national systems and their legal culture.[23] It must be assessed whether the proposed combination of MR and MLA allows for the achievement of such ambitious objectives.

To start with, it is worth observing that amongst these goals, the admissibility of evidence may seem to be out of place, since the PD EIO—unlike the Commission's proposals—does not aim at securing the admissibility of evidence. This does not,

[23] Accompanying Document (footnote 14), § 1.

however, lead us to conclude that the admissibility issue has not been addressed at all. Indeed, like the FD EEW, the PD EIO imposes upon the issuing authority the duty of checking the availability of the investigative measure before issuing the order, and allows the issuing authority to require certain procedural formalities of *lex fori* to be complied with in the execution of the order. In light of this, it might be said that the issue of admissibility has been addressed in an indirect way, i.e., by setting up the conditions to facilitate the admissibility of the evidence collected in the proceedings pending in the issuing State—an issue that remains, however, a business of the competent authority of *this* State. The analysis of the draft proposal contained in this study will have to ascertain whether this approach—i.e., targeting international cooperation on facilitating the *national* admissibility of the evidence gathered overseas—is consistent with the provision of Article 82(2)(a) TFUE.[24]

On the other hand, it should, however, be stressed that the principle of mutual recognition, even if combined with the MLA model, still constitutes the basis of the new order [Art. 1(1) PD EIO], although some special measures contained in Chapter IV of the draft Directive reproduce literally the corresponding provisions of the 2000 EUCMACM, which are inspired by the pure assistance model (*e.g.*, covert investigations). There is no doubt that both the eight Member States which have launched this legislative proposal and the EU institutions still trust the potential of the order model and the adequacy of the MR system. Nevertheless, the developments in the European scenario towards a European territoriality principle, as well as the proposals launched, albeit in different ways, in this direction (especially the proposal of the transnational procedural unity[25]), should lead to a re-thinking of the worth of the prevailing approach in the AFSJ, an approach strongly based on the system—typical of the assistance models—of evidence taken by competent authorities in their territory upon the request/order of the authorities responsible for the relevant proceedings.

3 The European Investigation Order. Specific Issues

3.1 Defining the Investigative Activity to Be Conducted

The first specific issue to be addressed should, in my view, be the subject of the investigation order, i.e., the definition of the investigative activity to be carried out in other Member States. It has been observed that the fact that, unlike any previous EU legislative instrument in the field of transnational criminal inquiries, the PD EIO empowers the issuing authority to choose the measure to be executed constitutes one of the most innovative mechanisms of the draft Directive. This novelty,

[24] This topic has been discussed in detail by Belfiore, Part III, Sect. 4.

[25] Cf. Schünemann, Part IV, Sect. 5.

which implies the shift of the focus from the evidence to be collected to the measure to be executed, is in line with the main goal of the proposal to extend the MR principle to the collection of dynamic evidence—a goal that still maintains priority importance in the context of the draft Directive, even if the developments in the legislative text have led to introducing the gathering of documental evidence into its scope of application. This confirms that the issue of movement of evidence becomes a matter of secondary importance compared with the question concerning the *forms* of conducting investigative activities in other Member States.

It has, moreover, been noted that the provision of a strict duty of execution, concerned not only with the evidential result but also with the specific measure chosen by the issuing authority, has led to introducing an unprecedented compensation mechanism, consisting of the power of the executing authority the enforce another measure aimed at achieving the same investigative goal. This solution was unavoidable to prevent the risk that individuals might be limited in their fundamental rights through investigative means which either are not provided for in the executing State or are subject to specific limits other than those provided for in the issuing State. In such cases the provision of an unconditioned duty of execution would have caused unbearable discriminations in a common area of freedom security and justice, depending on the fact that people are subject to investigative means in the context of a domestic or a transnational criminal procedure.

On the other hand, the compensation mechanism is strictly linked to the possibility of the new instrument being adopted to collect evidence abroad by coercive means, to which those limitations apply. Significantly, pursuant to the FD EEW the executing authority was entitled not only to choose what measure should be carried out in its territory but furthermore to decide whether it is necessary to use measures of coercion [Art. 11(1) and (2) FD EEW]. This guarantee was, however, blurred by the duty of the executing authority to make any measure available (even search and seizure) in the event of any of the offences listed under Article 14 to which the dual criminality requirement does not apply [Art. 11(3)(ii) FD EEW]—a rather questionable exception from a human rights perspective. The link between the possibility to have recourse to another measure and possible use of coercive investigative means was not clearly expressed in the original text of the EIO proposal, which moreover allowed (without obliging) the use of a different measure in cases of non-compliance with the requirement set forth in Article 9. The consequence of this approach was that the executing authority was given considerable leeway to enforce a measure that possibly interfered with the individual rights even of third parties in cases that under domestic law would never allow the adoption of the requested investigative means.

Doubtless, the draft agreed in December 2011 addresses this issue more effectively, in that it obliges, as far as this is possible, the executing authority to adopt another measure where the requested one does not fit the requirements of procedural lawfulness (legal provision and the respect for legal limits) under *lex loci*. However, also the current draft leaves room for human rights concerns. The main concern relates to the fact that, whilst Article 9 aims to ensure the respect for the principle of lawfulness from the perspective of the executing State, no provision

prevents the risk of the EIO being misused to obtain the adoption of a measure that does not comply with the requirements of lawfulness under the law of the issuing State. This would expose the defendant to a criminal judgment on the basis of evidence gathered overseas by investigative means not allowed (*e.g.*, online search) or allowed under certain conditions by domestic law (*e.g.*, wiretaps). From an inter-state, bi-dimensional perspective it can, to a certain extent, be accepted that each of the cooperating authorities absolves itself of its responsibility as to the ascertainment of requirements which pertain to the other legal system. But from a tri-dimensional perspective, the focus on the individual[26] makes *both* the cooperating authorities responsible for the respect of human rights.[27] Therefore, mechanisms should be structured to ensure the respect for the principle "*nulla prosecutio transnationalis sine lege*"[28] in relation to the *whole transnational procedure* in order to avoid legal limitations being eluded in either of the cooperating countries.

3.2 Proportionality and Admissibility of the Investigation Abroad

Surprisingly, in the original draft the new approach of the proposed instrument—i.e., the decision to make the issuing authority responsible for the choice of the measure to be executed—had not been accompanied by any provision requiring this authority to check beforehand the necessity and proportionality of the measure and the admissibility of the requested measure from the viewpoint of its own law. To be sure, the original proposal did not completely ignore the importance of a previous test both of the proportionality and the admissibility of the investigative measure. Such assessments were, however, imposed upon the executing authority in line with its aforementioned power to change the measure to be executed. Indeed, the possibility of having recourse to another measure if the requested one did not fit the requirements of lawfulness and especially where the same result could be reached by less intrusive means [Art. 9(1)(c) of the original proposal] clearly pertained to the sphere of proportionality. Outside these cases, no provision gave the executing authority and private parties any opportunity to check the proportionality and admissibility of the measure to be executed under its own law. Nor was there any possibility to challenge under *lex loci* the necessity and admissibility of the procedures requested for the collection of evidence, with the sole exception of Article 8(2), which charged the executing authority with the task of assessing

[26] On the cultural shift from a interstate, bi-dimensional to a tri-dimensional, human rights-oriented conception of international cooperation, see Schomburg et al. (2012), pp. 2ff.

[27] On the joint responsibility for the respect of human rights in transnational procedures, cf. Vogel (2012), Vor § 1, pp. 54ff.

[28] Cf., on this topic, Gropp (2012), pp. 41ff.

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