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## INVESTIGATIVE POWERS AFFECTING FUNDAMENTAL RIGHTS AND PRINCIPLES FOR A FAIR TRANSNATIONAL PROCEDURE IN CRIMINAL MATTERS. A PROPOSAL OF MUTUAL INTEGRATION IN THE MULTICULTURAL EU AREA

**Abstract:** The present paper deals with the use of investigative powers affecting fundamental rights in criminal procedures. The analysis provides firstly a historical reconstruction of the solutions to coercive means embodied in the most relevant international and supranational texts in Europe. The present study offers, furthermore, a proposal for setting a fair transnational procedure, based on the idea of mutual integration of national laws. This proposal, which aims at offering an alternative to the prevailing project of harmonising the rules of evidence in cross-border cases, focuses on the creation of an ad hoc procedure reflecting a new balance between the state-related needs and the protection of the fundamental rights of the individuals affected by investigative measures.

**Keywords:** Transnational inquiries, criminal evidence, measures of coercion, human rights.

### 1. INTRODUCTORY REMARKS

Over the last few decades, the significant increase of transnational crime has strengthened the need for more efficient forms of cross-border prosecution than in the past time. This pragmatic approach has led to the enhancement of traditionally distrusted methods of conducting transnational inquiries, such as extraterritorial investigations, as well as to the introduction of unprecedented models of transnational prosecution. At EU level, this has led to posing the principle of mutual recognition as cornerstone of almost the entire area of judicial cooperation, regardless of the very different nature of the judicial products concerned.

This phenomenon has consequently been accompanied by a significant raise of investigative measures impinging, albeit in different fashions, on the sphere of the rights of the individuals involved in transnational procedures (suspects, victims, witnesses, etc.). At EU level, the Lisbon Treaty has allowed for legislative initiatives to

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be launched with the purpose of protecting the rights of individuals in criminal procedures, which of course encompass *transnational* criminal procedures [Art. 82(2) (b) Treaty on the Functioning of the European Union, hereinafter TFEU]. More specifically, the protection of the defendant's rights must be indirectly granted through a legislative intervention in the field of admissibility of transnational evidence [Art. 82(2)(a) TFEU]. Whatever the meaning of these provisions is, the introduction of minimum rules to the extent strictly necessary to facilitate mutual recognition calls for a minimalist approach. It is questionable that such methodology is in line with the “unique vulnerability of defendants,” and in general terms of individuals, “facing international investigations,” which requires standards of protection “surely *exceed*[ing] those currently available in domestic proceedings.”<sup>1</sup>

Doubtless, one of the main grounds for this vulnerability is the difference of languages and procedural laws, a situation that paradoxically raises many human rights concerns in the EU Area of Freedom, Security and Justice (hereinafter AFSJ), where 23 official languages co-exist. However, in the framework of the present paper, it will not be dealt with multilingualism as a barrier for harmonisation. Significantly, the existence of the EU AFSJ can be predicted *insofar as* fundamental rights are respected and the differences between the legal orders and traditions of the Member States are preserved [Art. 67(1) TFEU]. More specifically, it is worth noting that the need to respect the legal orders and traditions of the Member States appears as condition for setting common rules in the aforementioned areas [Art. 82(2) TFEU]. In this light, multilingualism, far from representing an obstacle to the approximation of legal systems, becomes a factor of promotion of *mutual integration* between procedural cultures and therefore a value that cannot be waived in the European scenario. Multiculturalism is strictly linked to the *interaction* of different legal levels and this suggests adopting a methodological approach aimed at analysing their mutual relationships. In light of the fundamental rights protection required at primary level for the constitution of a common AFSJ, the present analysis will therefore move from a *multilevel* towards an *inter-level* approach.<sup>2</sup>

## 2. OBJECT OF THE ANALYSIS AND TERMINOLOGICAL PREMISES

The present paper deals with measures of coercion in the field of transnational inquiries. Due to the polysemy of both expressions, the definition of the object of the present analysis requires some terminological premises to be clarified in advance. What is meant by “transnational inquiries”? And what is meant by “coercive means” in transnational inquiries?

1 R.K. Vogler /2012/: Transnational inquiries and the protection of human rights in the case-law of the European Court of Human Rights, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina, Springer, Heidelberg (forthcoming), § 1.

2 On this methodological approach see, in the Italian constitutional literature, L. D'Andrea /2009/: *Diritto costituzionale e processi interculturali*. [www.forumcostituzionale.it](http://www.forumcostituzionale.it), accessed: 29<sup>th</sup> April 2009.

First of all, the present study deals with cross-border investigations in the field of *horizontal cooperation* between two or more States. Any form of vertical cooperation falls outside the scope of this study. It is well-known that horizontal cooperation shows very different forms of transnational inquiries and various models have been drawn by different scholars.<sup>3</sup> Although some traditional differences tend to blur in the context of recent legislative initiatives, the present paper moves from the distinction of two systems of cross-border investigations, depending on whether investigations are carried out by foreign authorities in response to a request for judicial assistance or domestic authorities allow foreign authorities to carry out investigations on their own territory. Within the scope of the present paper, the former system will be referred to as “*judicial assistance*,” whilst the latter as “*extraterritorial investigations*.” This distinction does not coincide with the usual distinction between the *request model*, typical of mutual legal assistance, and the *order model*, typical of mutual recognition model.<sup>4</sup> On the one hand, also mutual recognition-based instruments aim, in a great part, to obtain an investigative activity being carried out overseas and therefore to obtain judicial assistance from abroad.<sup>5</sup> The only difference is that here assistance is not asked but ordered to foreign authorities. On the other hand, notwithstanding new instruments inspired by the mutual recognition logic, such as the proposed European Investigation Order (hereinafter EIO), have incorporated some forms of extraterritorial investigations (controlled deliveries, covert investigations), these remain in great part linked to the classic request model.<sup>6</sup> Following this approach, I will focus in this paper only on transnational inquiries in a wide sense, reconstructing the development of the *system* of judicial assistance through the analysis of the two main *models* of conducting investigations abroad, i.e., Mutual Legal Assistance (hereinafter MLA) and Mutual Recognition (hereinafter MR).

Against this background, the expression “measures of coercion,” albeit deeply rooted in most legal systems, has very different meanings and, above all, relates to procedural means having very different scopes of application. This applies to the European scenario, where, despite its increasing use in EU legislation, it still remains one of the most undefined notions. The present analysis requires therefore a research notion of “coercion,” which will be adapted to the different modes of cross-border

3 Cf., among others, A. van Hoek/M. Luchtman /2006/: The European Convention on Human Rights and transnational cooperation in criminal matters, -in: van Hoek et al. (eds), *Multilevel Governance in Enforcement and Adjudication*, p. 62; A. Klip /2012/: *European Criminal Law*, 2nd edition, Intertentia, Antwerp-Oxford, pp. 342 ff.

4 See A. Klip /2012/, *ibid.*, pp. 342 ff.

5 This is explicitly laid down in many MR instruments. For instance, the FD OFPE includes among the grounds for refusal the risk of infringement of the *ne bis in idem* principle arising from the *judicial assistance* rendered through the treatment of the frozen property [Art. 7(1)(c)]. Similarly, in the FD EEW the execution of the evidence warrant is aimed at providing *assistance* to the issuing Member State [Art. 11(2)]. Also the PD EIO shares this approach by laid down, for instance, that in case of impossibility of finding an investigative measure other than that provided for in the EIO, the executing authority will have to notify the issuing authority that it has not been possible to provide the “*assistance requested*” [Art. 9(3) PD EIO c.v.].

6 See Article 27a PD EIO, according to which an EIO may be issued with the purpose of *requesting* foreign authorities to assist the issuing State in conducting covert investigations.

investigations under examination in this study. Furthermore, in the framework of this research, the expression “compulsory measures” will be considered as synonym of that of “coercive measures,”<sup>7</sup> since both share the common feature that they presuppose the use of coercion. However, it is noteworthy that the system of judicial assistance has progressively incorporated investigative means that are not perceived by the affected individuals as coercive (e.g., interception of communications, covert investigations). The increasing use of such measures, which is the result of the adjustment of criminal inquiries to the development of science and technology, has led the criminal law science to adopting, instead of the concept of “measures of coercion,” the notion of “means affecting fundamental rights” (*Grundrechtseingriffe*).<sup>8</sup> This terminological choice reflects, *inter alia*, the need to cover a wider range of investigative means than that limited to the measures entailing no use of coercion, as well as the need to cover those investigative powers implying coercion only for their practical implementation.<sup>9</sup> I will conduct my analysis starting from the doctrine of *Grundrechtseingriffe* with the purpose of ascertaining the need to extend the theoretical basis of fundamental rights’ protection.

### 3. JUDICIAL ASSISTANCE AND INVESTIGATIVE MEANS IMPINGING ON FUNDAMENTAL RIGHTS

#### 3.1. *The development of the MLA-based system*

##### 3.1.1. *The MLA-based system*

In this Section, I will examine the development occurred in the system of judicial assistance based on the MLA principle in the way of dealing with investigative means affecting fundamental rights. For the sake of clarity, I will distinguish three phases. I will show that the last one already anticipated some of the typical features of the models based on the logic of mutual recognition.

A) The traditional system of letters rogatory. The traditional MLA system did not address the issue of coercive means in general terms. The European Convention on Mutual Legal Assistance in Criminal Matters (hereinafter ECMACM), which has for many decades constituted the main multilateral instrument in Europe, contained no general clause specifically aimed at regulating the use of coercive means in the context

7 Significantly, the former expression – contained, as we will see below, in the UN MTMACM – appears in some linguistic versions in the same terms of coercive measures. For instance, the German version relates to “*Zwangmaßnahmen*”, whilst other linguistic versions (e.g., the Spanish one) refer to different and wide concepts, such as “*medidas de cumplimiento obligatorio*.”

8 Cf., among others, K. Amelung /1976/: *Rechtsschutz gegen strafprozessuale Grundrechtseingriffe*, Duncker & Humblot, Berlin.

9 On the latter phenomenon, and on the problems concerned with the so-called *Annexkompetenz*, see in the German literature, among others, H.-H. Kühne /2010/: *Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts*, C.F. Müller, Heidelberg, pp. 248 ff.

of legal assistance. Since *lex loci* applied, as a rule, to *any* letters rogatory [Art. 3(1)], the protection of the rights of the individuals involved in the proceedings in the home State was entirely left to the standards laid down in the host State and this rendered the participation of the defence of private parties, already allowed by Article 4 EC-MACM, a purely formal guarantee. To compensate somewhat the rigid application of the *locus regit actum* rule, the case-law of many countries has elaborated general clauses of consistency with their own legal orders, such as the compatibility with the *Rechtsstaatsprinzip* in Germany<sup>10</sup> and the consistency with the fundamental rights of the domestic legal system in Italy.<sup>11</sup> However, the experience of some of these countries shows that these clauses have been interpreted very widely and have not succeeded in limiting the use at trial of evidence gathered overseas in ways rarely compatible with the domestic rules of the home State.<sup>12</sup>

Since the 50s, however, special regulations have been laid down in respect of sensitive investigative measures with the purpose of enhancing the protection of both the national sovereignty and individual rights. The main example offered by EC-MACM related to search and seizure of property: the EC-MACM allowed for the requested State to make its assistance dependent on the respect of the dual criminality requirement [Art. 5(1)(a)], although this did not constitute a general requirement of letters rogatory. This phase was thus characterised by a classic notion of *Grundrechtseingriffe* as measures restricting, by means of coercion, certain fundamental rights (*e.g.*, property).

B) The intermediate phase of MLA. This phase was characterised by radical changes in the way MLA is provided. The main change was the introduction of a new way of providing assistance to foreign authorities, in that the requesting State was allowed to require the fulfilment of specific formalities of its own law. This reform coincided chronologically with the introduction, within the Schengen area, of the possibility of direct contacts between the domestic judicial authorities while sending and receiving requests for assistance [Art. 53(1) CISA].

This combination of *lex loci* and *lex fori*, already experimented in some bilateral agreements in the 80s,<sup>13</sup> was laid down, in general terms, by the United Nations Model Treaty on Mutual Legal Assistance in Criminal Matters (hereinafter UN MTMACM), which made it dependent on the demanding condition of consistency with the law and practice of the host country (Art. 6). This allowed an unprecedented integration *in concreto* of procedural laws to take place, an approach that gave new significance to old mechanisms but raised new legal problems

10 BGH 11 November 1982 – 1 StR 489/81 = NStZ 1983, 181.

11 See, among others, Court of Cassation, 8 March 2002, Pozzi, in *CED Cass.* 222025.

12 See, in relation to Italy, F. Caprioli /2012/: Report on Italy, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina, Springer, Heidelberg (forthcoming), § 3.

13 See M. R. Marchetti /2011/: Dalla Convenzione di assistenza giudiziaria in materia penale dell'Unione europea al mandato europeo di ricerca delle prove e all'ordine europeo di indagine penale, -in: T. Rafaraci (ed), *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona*, Giuffrè, Milano, pp. 137.

for both the cooperating authorities. In particular, as the requested authority was required to apply foreign law, it is no doubt that the possibility for officials and private parties of the relevant proceedings to be present in the execution of letters rogatory gained an important role by helping the requested authority to carry out such a difficult task.<sup>14</sup> However, the complete realisation of this procedural integration presupposed an additional condition to those traditionally required, i.e., the knowledge of foreign law by each of the cooperating authorities. This required an additional effort by both of them: the requesting authority had to learn the law and practice in the choice of the formalities to be followed in the gathering of evidence overseas, whilst the requested authority had to learn *lex loci* to apply them properly. This marked a huge cultural change in the field of judicial assistance. The traditional MLA system, due to the strict application of *lex loci*, allowed both authorities to ignore foreign law and it is no surprise that even those countries that continue relying on that system renounce to control whether *lex loci* has been fulfilled, thus acknowledging a presumption of compliance with *lex loci*.<sup>15</sup>

This cultural reform was accompanied by general clauses concerned with coercive measures showing up in international texts. This phase did not lead to a substantial change in the way of conceiving coercive means as investigative measures implying the use of coercion. However, it is noteworthy that the UN MTMACM included the consistency with law and practice of the host country among the grounds for refusal of judicial assistance requested with the aim of carrying out “compulsory measures” [Art. 4(1)(e)]. Consequently, only those coercive measures that would have been admissible in a similar domestic case in the host country could be executed. This ensured the individuals restricted through coercive means the same standards of protection laid down by *lex loci*, a guarantee that did not of course rule out that a *higher* level of protection could be achieved through the formalities of *lex fori* required by the requesting authority in light of the principle of the most favoured treatment.<sup>16</sup> In the same years, outside Europe, the Inter-American Convention on Mutual Assistance in Criminal Matters (hereinafter IACMACM) drew special attention to the protection of the rights of third parties under *lex loci* in regard to sensitive investigative means [Art. 13(2)].

14 Significantly, outside Europe, the IACMACM strengthened this possibility allowing officials and private parties of the home State not only to be present but furthermore to take part in the execution of letters rogatory (Art. 16).

15 See, in Spain, Supreme Tribunal, judgement of 5 May 2003 (ROJ 3023/2003). On this topic cf. F. Gascón Inchausti /2012/: Report on Spain, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina, Springer, Heidelberg (forthcoming), § 3.1.2.

16 Criticism against the application of the clause of the most favoured treatment of the individual in transnational procedures has been raised by M. Böse /2002/: Die Verwertung im Ausland gewonnener Beweismittel im deutschen Strafverfahren, *ZStW* 114, pp. 152 ff.; M. Böse /2003/: Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU – Die “Verkehrsfähigkeit” strafgerichtlicher Entscheidungen, -in: C. Momsen, R. Bloy, P. Rackow (eds), *Fragmentarisches Strafrecht*. Beiträge zum Strafrecht, Strafprozeßrecht und zur Strafrechtsvergleichung. Für Manfred Maiwald aus Anlaß seiner Emeritierung, Verfaßt von seinen Schülern, Mitarbeitern und Freunden, 1<sup>st</sup> edn. Peter Lang, Frankfurt a.M., pp. 238 ff.

C) The improved MLA. The third phase of MLA inherited methodologically, in line with the suggestions of a great part of the criminal law literature,<sup>17</sup> the combination of *lex loci* and *lex fori*. The analysis of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter EUCMACM) and the Second Additional Protocol to European Convention on Mutual Legal Assistance in Criminal Matters (hereinafter SAP ECMLACM) shows, however, that this approach was adopted with the remarkable difference that the formalities and procedures of *lex fori* must be consistent not with the entire legal order of the host country but only with its fundamental principles.<sup>18</sup> This mechanism obliged the domestic authorities of the host State to comply with procedural forms that can be fully unfamiliar and rarely compatible with its own legal system, provided they do not infringe the fundamental principles thereof. This created, while jeopardizing the procedural integration of the laws of the cooperating authorities, a tangled web for the requested authority whose only exit was through the ascertainment of infringement of the fundamental principles of its own legal order.<sup>19</sup>

But what raised even more concerns was that the application of the procedural rules of foreign law could encroach on the fundamental rights sphere.<sup>20</sup> From a human rights perspective, one of the most significant changes occurred in this third phase was the disappearance of general clauses concerned with the use of coercive means. However, this phase of MLA launched a new approach in the conception of coercive means. On the one hand, the combination of *lex loci* and *lex fori* was deemed as insufficient in relation to new investigative means, which can, albeit not necessarily, impinge on the sphere of fundamental rights. This led to establishing further rules that must apply regardless of what has been requested in the concrete case. One of the most significant examples is the hearing by videoconference at least for two reasons: a) no matter what the requesting State has required, the person to be heard must be assisted by an interpreter, if necessary, at his or her request,<sup>21</sup> b) the person to be heard may claim the right not to testify which would accrue to him or her – in light of the most favoured treatment – under the law of either the host or the home country.<sup>22</sup> On the other hand, the EUCMACM introduced for the first time a specific regulation on cross-border wiretapping aimed at intercepting

17 See, among others, J. Vogel /1998/: Tagungsbericht: Internationale Kooperation in Strafsachen, ZStW 110, p. 977; D. Spinellis /1999/: Securing Evidence Abroad: A European Perspective, -in: M.C. Bassiouni (ed), *International Criminal Law. Procedural Enforcement Mechanisms*, 2<sup>nd</sup> edn. Transnational Publishers, Ardsley New York, p. 372; W. Perron /2000/: Auf dem Weg zu einem europäischen Ermittlungsverfahren?, ZStW 112, pp. 207 f.

18 See respectively Art. 4 EUCMACM and Art. 8 SAP ECMLACM.

19 In this sense see, more in detail, S. Ruggeri /2012/: Transnational inquiries and the protection of fundamental rights in comparative law. Models of gathering overseas evidence in criminal matters, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings. A study in memory of Vittorio Grevi and Giovanni Tranchina*, Springer, Heidelberg (forthcoming), § 3.1.2.

20 See S. Gleß /2008/: Beweisverbote in Fällen mit Auslandsbezug, *Juristische Rundschau*, p. 619.

21 See respectively Art. 10(5)(d) EUCMACM and 9(5)(d) SAP ECMLACM.

22 See respectively Art. 10(5)(e) EUCMACM and 9(5)(e) SAP ECMLACM. On this case see S. Gleß /2006/: *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Nomos, Baden-Baden, pp. 117 f.

the telecommunications of individuals present either in the requesting or in the requested and even in a third State [Art. 18(2)]. However, this regulation – closely tied to *lex fori* [Art. 18(1)], regardless of the territory in which the person to be wiretapped – did not contain any rule aimed at ensuring a proper balance between colliding interests and values with the purpose of achieving a fair procedure of obtaining evidence at transnational level.<sup>23</sup>

### 3.1.2. Interim result

The analysis of the development of the system of judicial assistance by foreign authorities based on the MLA system has shown significant changes in the way of dealing with measures of coercion, which can synthetically be underlined as follows:

- The transition from the first to the second phase of MLA, although the conception of coercive means in terms of investigative measures entailing the use of coercion remained unchanged, led to a significant enhancement of the human rights protection. Thus, the possibility for the requested authority to reserve the right to make the execution of specific coercive measures (search and seizure) dependent on conditions, such as the respect for dual criminality and the consistency with the law of the requested state, became a general rule allowing the requested state to refuse any compulsory measure inconsistent not only with the law but also with the practice of its own country in a similar national case. Besides, the introduction of the obligation for the requested State to fulfil specific formalities requested by the home State, albeit aimed at reducing the risk of inadmissibility at trial of overseas evidence, produced the positive result of allowing the requirements of *lex fori* on the use of coercion to be respected in the host country.
- The third phase of MLA provided, following the development of science and technology, a specific regulation for new investigative measures relevant, albeit to different extent, to the sphere of fundamental rights (e.g., interception of telecommunications), measures that remarkably changed the traditional way of viewing coercive measures. On the other hand, two quite opposite novelties have had a strong impact on the way of dealing with coercive means: 1) the disappearance of general clauses allowing the requested State to refuse the adoption of coercive measures incompatible with its own law and b) the introduction of a new general rule on execution of investigations abroad requiring the requested authority to combine *lex loci* with the specific requirements of *lex fori* set by the requesting authority provided they are not contrary to the fundamental principles of its own law. The combination of these two novelties significantly impinged both on individual rights and the national sovereignty of the host country by reducing the discretion of the requested authority while receiving not only requests for assistance aimed at obtaining coercive means but also requests for compliance with coercive methods allowed by *lex fori*.

23 In this sense S. Gleß /2006/, *ibid.*, pp. 118 f.



## 3.2. The MR-based system

### 3.2.1. The development of the MR-based system

In the following sub-paragraph I will analyse how the system of judicial assistance based on the MR model has dealt with the issue of coercive measures. The purpose of this analysis is to show the development occurred in this problem area also in the context of mutual recognition, which appears today in very different terms than in the first years of the last decade. Also here, I will distinguish three phases, although the conclusions concerned with the last one, while focusing on a legislative proposal, are inevitably provisional.

A) The first phase of MR. A close look into the Framework Decision on the Execution in the EU of Orders Freezing Property or Evidence (hereinafter FD OFPE) shows that the first legislative phase was characterised by a strict application of the principle of MR. The executing authority was required to recognize and proceed to the *immediate* execution of the freezing, unless grounds for refusal or postponement existed [Art. 5(1)]. Moreover, these were drastically reduced, which led to the disappearance of some of the classic sovereignty-based clauses (*e.g.*, the prejudice of essential national security interests), and some of the remaining grounds for refusal were construed in such a way that they constituted a dangerous backward step in the human rights protection.<sup>24</sup>

As to the modes of securing evidence, the FD OFPE inherited from the last phase of MLA the combination of *lex loci* and *lex fori* with the same limit of consistency with the fundamental principles of the legal order of the host country being reproduced. Nevertheless, the integration with foreign law was remarkably reduced: the possibility for the issuing authority to require the fulfilment of procedural forms of its own law was allowed only to the extent necessary to ensure the validity of evidence in the relevant proceedings [Art. 5(2)]. Furthermore, the improved MLA, the first legislative phase of MR contained no general clause regarding the use of coercive means. The reason for this approach is self-evident in the FD OFPE, since the freezing order directly restricts the right to property. This explains why *additional* coercive measures, rendered necessary for the execution of the freezing order, can be taken and it is noteworthy that the applicable law in this case is the sole *lex loci* [Art. 5(2)]. Certainly, the tendency to return to *lex loci*, confirmed also by the reduction of the combination with *lex fori* to a strict minimum, was the result of the most rigorous application in this first legislative phase of the MR principle, which was rooted on a forced trust in the law of other Member States. One of the most significant consequences of this approach was the failure to provide, unlike the MLA instruments, for any form of joint participation of officials and mostly private parties in the execution of the freezing procedure, which constituted another significant backward step both in the protection of national sovereignty and individual rights.

B) The intermediate phase of MR. The analysis of the Framework Decision on the European Evidence Warrant (hereinafter FD EEW) shows a significant development of the MR logic. The rigorous order model was remarkably smoothed through the

24 For instance, the infringement of the *ne bis in idem* rule became a facultative ground for refusal [Art. 7(1)(c) FD OFPE].

re-introduction of some of the classic sovereignty-based clauses (*e.g.*, the prejudice of essential national security interests) and, in general terms, thought the re-expansion of the list of the grounds for refusal. This led also to the introduction of a validation procedure aimed at strengthening the basic guarantee of jurisdictionality provided for in many Member States in the field of measures impinging on the sphere of fundamental rights [Art. 11(4) and (5)].

More generally, the FD EEW has drawn particular attention to the issue of *Grundrechtseingriffe* through the introduction of a general clause leaving, as a rule,<sup>25</sup> to the executing authority the full responsibility of choosing whether and which coercive means can be used in the execution of the evidence warrant [Art. 11(2)]. This clause was flanked by a further provision, according to which the fulfilment of the formalities and procedures of *lex fori* in the execution of the evidence warrant could not create any obligation for the executing State to use coercive measures.<sup>26</sup> This provision – while offering an unprecedented solution, both in the MLA and MR systems, to the use of *lex fori* – raises some interpretative doubts due to the fact that Article 11(2) already bans the imposition of coercive means. Thus, since the aim of the provision is to avoid that the procedural requirements of *lex fori* lead to a coercive result, its scope of application should relate to the risk of applying non-coercive measures through coercive methods (*e.g.*, narcoanalysis).<sup>27</sup> This double protective shield against the imposition of coercion upon the executing State explains why the tests of proportionality, necessity and availability under Article 7 have been left *only* to the issuing authority.<sup>28</sup> As a consequence, even the choice of the least intrusive means to obtain documents, objects and data by the executing authority<sup>29</sup> presupposes that the same authority deemed the use of intrusive means as necessary.

C) New perspectives for the horizontal cooperation based on the MR principle. The analysis of the Proposal for a Directive on a European Investigation Order (hereinafter PD EIO) cannot but lead to provisional conclusions yet. A careful comparison of the original text of 2010 with the draft proposal on which a general agreement was

25 The only exception relates to the use of measures, including search and seizure, in case of the offences listed under Article 14(2), to which the dual criminality requirement does not apply [Art. 11(3) (ii)]. This provision raises many human rights concerns. What is the nature of the measures that must be (always) available in case of those offences? If *any* measure, even of coercive nature, must be available, what is the relationship between the type of the offence (and the severity of its punishment) and the duty to fulfil an evidence order imposing upon the use of coercion? The consequence of this approach is that the issuing authority, while determining the threshold of punishment of the offence under prosecution within the list of Article 14(2), establishes also the necessity of using a means of coercion in the concrete case. This result proves unsatisfactory taking also into account that also the FD EEW has failed to provide for any possibility of joint participation in the execution of the evidence warrant in the host country.

26 The proposal of 2003 provided for some fundamental procedural guarantees to be followed in order to ensure full respect especially for the subsidiarity and the *nemo tenetur* principles [Art. 12(1) (a) and (c) PFD EEW, COM(2003) 688 final]. See S. Gleß /2011/: Europäische Beweisordnung, -in: U. Sieber, F.H. Brüner, H. Satzger, B. von Heintschell-Heinegg (eds), *Europäisches Strafrecht*, Nomos, Baden-Baden, p. 606.

27 S. Ruggeri /2012/, *op.cit.*, § 3.2.2.

28 Instead, this provision raises further human rights problems in the case of Article 11(3)(ii).

29 See point 10 of the *Consideranda*.

reach in the Council in December 2011<sup>30</sup> reveals significant changes being occurred, but does not make it easy to understand fully the new perspectives opened up in the field of horizontal cooperation by this legislative proposal.

The main purpose of the PD EIO was to present a new way of providing mutual recognition, through combining the traditional mutual recognition logic with the flexibility of the traditional MLA system. At least for two reasons, however, the original proposal was not fully consistent with this approach. On the one hand, the original draft revealed a drastic reduction of the grounds for refusal, which significantly restricted the margins of discretion of the executing authority while dangerously affecting both national sovereignty and the human rights sphere.<sup>31</sup> On the other hand, the PD EIO proposed the innovative solution of focusing on the investigative measure to be taken rather than on the evidential result to be achieved.<sup>32</sup> Thus, unlike any previous legislative instrument, the PD EIO left the choice of the investigative measure exclusively to the issuing authority [Art. 1(1)]. To be sure, as noted above, the original draft proposal had already enabled the executing authority to choose, under specific conditions, a different measure than that requested (Art. 9). In this case, however, the issuing authority was only empowered to withdraw the order, which offloaded onto this authority the responsibility to choose whether to renounce the evidential result useful to its inquiry or accept an investigative activity even incompatible with the requirements of its own law being carried out. This happens because, as we will see below, in the cases laid down in Article 9 PD EIO the cooperating authorities are not required to interact as to the choice of the most appropriate investigative measure. All this rendered, in sum, the transnational procedure more rigid, and not more flexible, than in the traditional MLA.

As noted above, however, many changes have occurred from the original proposal, whose contents have been integrated and considerably enriched during the examinations in the Council. I will focus on two issues, which in my view gain particular significance from the perspective of this study: a) the increasing rise of the grounds for refusal and b) the inclusion of the availability model into the goals of the new instrument. These two partially overlapping<sup>33</sup> points deserve careful examination.

To start with, the last text of the draft proposal not only adds new grounds for refusal, re-introducing clauses belonging to most MR instruments (*e.g.*, the principle of *ne bis in idem*), but furthermore provides a two-level list of grounds for refusal. Thus, in addition to the grounds for refusal applicable to any investigative measure pursuant to Article 10(1), the execution of some investigative measures abroad presupposes two further requirements being fulfilled, *i.e.*, dual criminality and the respect for

30 See respectively Interinstitutional File 2010/0817 (COD), COPEN 115 EJM 12 CODEC 363 EUROJUST 47 and doc. 18918/11, COPEN 369 EJM 185 CODEC 2509 EUROJUST 217. In the present analysis I will relate to the two texts, respectively, as to “PD EIO o.v.” and “PD EIO c.v.”

31 S. Peers /2010/: *The proposed European Investigation Order. Assault on human rights and national sovereignty*, pp. 1 ff. Surprisingly, the original draft proposal reproduced instead a typical sovereignist ground for refusal, *i.e.*, the prejudice to essential national security interests [Art. 10(1)(b) PD EIO o.v.].

32 Point 10 of the *Consideranda*.

33 Indeed, the issue of an EIO with the aim of obtaining evidence already in possession of the executing authority appears among the first list of the grounds for refusal [Art. 10(1a)(c) PD EIO c.v.].

specific limitations to the adoption of the ordered measure in the executing country, limitations concerned with specific categories or lists of offences and thresholds of punishment [Article 10(1b)]. The importance of this approach in the context of this analysis lies with the fact that the distinction between the two levels have been drawn on the basis of the coerciveness of the measures.<sup>34</sup> This confirms that, unlike the FD EEW, the PD EIO allows both the adoption of coercive means overseas and the execution of non-coercive measures following coercive forms or methods.

However, the expression laid down in Article 10(1b) (measures “other than those” referred to in paragraph 1a) can lead to confusion and contradictory interpretations of this legal construction. To be sure, the only provision explicitly relating to “coercive means” in the context of Article 10 is laid down in paragraph 1(f), which states that assistance can be refused where the EIO was issued for obtaining a coercive measure in respect of an act allegedly committed outside the home state and wholly or partially in the territory of the host state, but this act does not constitute a criminal offence under *lex loci*. Instead, paragraph 1a contains a generic reference to “any non-coercive investigative measure” (lit. b). But what is meant by non-coercive measures? There is no doubt that the measures under paragraph 1b are of coercive nature and this justifies the compliance with further requirements. This applies especially to the dual criminality requirement, since it is certainly “inconsistent that a State might be obliged to restrict the fundamental rights of its own citizens in its own territory to investigate an act that is not punishable under its own laws.”<sup>35</sup> The main problem relates, however, to the other measures mentioned in paragraph 1a. How should they be considered? Their autonomous position in the context of paragraph 1a might lead to concluding that their execution can entail the use of coercion, otherwise they would fall into the field of application of paragraph 1a(b), which contain a comprehensive clause relating to *any* non-coercive measure. This interpretation raises, however, further doubts as to the meaning of paragraph 1b: what should be meant by measures other than both non-coercive and coercive measures?

An alternative interpretation could be to deem all the measures provide for by paragraph 1a as always non-coercive, as the reference to hearings of victims, suspects and third parties (letter a) would bring to believe. Such an interpretation, apart from the aforementioned incongruence in respect of lit. b, would, however, run counter to the clear nature of search and seizure, which cannot of course change for the simple fact that in the home state the proceedings were initiated for an offence belonging to the list of thirty-two offences for which dual criminality is not required. Moreover, given that the measures are subject only to the grounds for refusal laid down in paragraph 1, how could the provision under paragraph 1a(f) apply to non-coercive measures where the territoriality exception presupposes the use of coercive means?

Also this interpretation cannot, therefore, be shared, since some of the measures listed in paragraph 1a may entail the use of coercion. Such a conclusion certainly applies

34 See doc. 10749/11 REV 2, COPEN 130 EJM 70 CODEC 914 EUROJUST 85, p. 3.

35 L. Bachmaier Winter /2010/: European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal of a European directive, *Zeitschrift für internationale Strafrechtsdogmatik*, p. 585.

firstly to search and seizure, which raises further human rights concerns. Why should these measures not be subject to the dual criminality requirement within the area of the thirty-two offences of Annex X, following the approach of the FD EEW? Certainly the waiver of dual criminality plays a very different role where the execution of the judicial order contributes to strengthening the right to freedom through the adoption of alternatives to remand detention<sup>36</sup> and in the cases in which the judicial order is aimed to carry out in the executing state a measure that impinge on the fundamental rights of the parties.<sup>37</sup>

On the other hand, the analysis of the FD EEW has shown that coercion can be used as a mean of carrying out even non-coercive measures. This applies to the hearings of Article 10(1a)(a), insofar as in some criminal justice systems such hearings may be conducted coercively or through investigative means that are forbidden in some Member States (e.g., lie detection). But also here, why should victims or witnesses be obliged to submit to an interview, with the additional risk of exposing themselves to criminal liability for an act that does not constitute an offence in that State or an act that anyway does not authorize the use of the requested measure?

Against this background, special attention must be paid to the case in which the EIO aims at obtaining evidence already in possession of the executing authority, a case that has been incorporated into the PD EIO during the examinations in the Council and appears today among the main goals of the new instrument [Art. 1(1)]. This mode of obtaining evidence, which aims at the real movement of evidence since the investigative activities were conducted in the host country prior to the issue of the EIO, has become increasingly widespread in countries still strongly based on the traditional MLA system such as Italy,<sup>38</sup> proving very problematic from a human rights perspective.<sup>39</sup> From the viewpoint of this analysis, the inclusion of this case into the basic list of grounds for refusal reveals that it has been dealt with in the same terms of non-coercive measure. This systematic choice is highly questionable taking into account that case-law often uses exchange of information to obtain the evidential results of coercive activities, if not even to achieve the collection of evidence by coercive means (e.g., wiretaps) bypassing the classic MLA instruments.<sup>40</sup> Therefore, the non-application of both the requirements of paragraph 1b cannot be shared.

### 3.2.2. Interim result

The analysis of the development of the model of judicial assistance by foreign authorities based on the MR system has shows a parabolic trend in the way of dealing with the human rights protection concerned with the use of investigative measures of coercion, leading thus to the following findings:

36 See the Framework Decision 2009/829/JHA on the application of the mutual recognition principle to supervision measures as an alternative to provisional detention.

37 In this sense S. Ruggeri /2012/, *op.cit.* § 323.

38 See F. Caprioli /2012/, *op.cit.* § 3.

39 Cf. S. Ruggeri /2012/(b), *op. cit.* § 3.3.

40 On this use of such mode of obtaining evidence from abroad see, with regard to Italy, F. Caprioli /2012/: *op. cit.*, § 3.

- The first phase, albeit aimed not at collecting but at securing evidence,<sup>41</sup> inherited from the last phase of MLA the obligation for the executing State to comply with requests for assistance implying the use of coercive means. As to the modes of executing such measures, however, the risks arising from the duty of fulfilling with requirements of foreign law was reduced to what was strictly necessary to ensure the validity of evidence in the relevant proceedings.
- Compared with this phase, the second one was marked by a greater attention for the issue of coercive means. The FD EEW, albeit not reproducing many of the relevant proposals of 2003, left to the executing authority the full responsibility of choosing whether and which coercive means can be used in the execution of the evidence warrant. Moreover, although the requirement of necessity while complying the formalities set by foreign authorities was dropped, the executing authority was left free to decide whether to follow coercive procedures.
- The third phase has remarkably decreased the protection of individual rights against coercive means. The PD EIO has, until now, reproduced none of the general limitations set by the FD EEW on the use of coercion, which is allowed in general terms. Moreover, the distinction between the grounds for refusal set by Article 10 does not enable to understand clearly what is meant by coercive means in the framework of this legislative initiative, while allowing even results achieved through coercive means to be obtained without the respect for fundamental requirements, such as dual criminality.

#### 4. MULTICULTURALISM AND HUMAN RIGHTS PROTECTION

The analysis of these models raises questions of great importance from the perspective of the present research. Doubtless, multilingualism does not solely relate to the use of different linguistic codes but also, in a deeper sense, to the different theoretical background of common concepts already rooted in the cultural heritage of the procedural law of the Member States. This conclusion applies to the notion of “coercive measures,” as a comparative analysis at domestic level would clearly show. The aforementioned observations raise the question of what should be meant by “coercion” at EU level. We have seen that the expression “coercive means” has for many years belonged to EU legislation, without its meaning being sufficiently clarified until now. Moreover, a comparative analysis of the last phase of both the MLA and MR system confirms the outdatedness of the concept of “coercion,” which no longer constitutes an appropriate referring point for EU legislation. As noted above, the notion of *Grundrechtseingriffe* certainly proves more appropriate for investigative measures, covered also by the PD EIO, that are not perceived by the concerned individuals in terms of coercion (e.g., interception of telecommunications, covert

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41 F. Gascón Inchausti /2007/: *El decomiso transfronterizo de bienes*, Colex, Madrid, pp. 137 f.

investigations). In general terms, this legal concept offers a better theoretical basis to new investigative means emerged following the development of science and technology. A further merit of this legal concept is that it focuses on the impact on the fundamental rights sphere, thus revealing both the constitutional<sup>42</sup> and supranational justification thereof, much clearly than what the notion of coercive means does.

Despite these uncontested merits, however, the concept of *Grundrechtseingriffe* relates only to interventions *affecting*, in terms of restriction or deprivation, individual rights, no matter whether or not by means of coercion. Thus, it does not cover those investigative activities or means (e.g., such hearings by videoconference), which, albeit not restricting individual freedoms, involve anyway the protection of specific fundamental rights (e.g., the right to silence). To be sure, these investigative activities interfere with the sphere of fundamental rights in another way, in that the conduction of such measures presupposes the fulfilment of specific requirements for preserving the respect for basic guarantees (the right to an interpreter or translator, the right to a defence, etc.). In respect of these measures I will use the notion of investigative measures relevant to fundamental rights, thus using a legal concept deeply rooted in the German criminal law doctrine (*grundrechtsrelevante Ermittlungsmaßnahmen*),<sup>43</sup> albeit widely used as synonym of *Grundrechtseingriffe*. However, in light of these observations I prefer to distinguish between investigative measures *affecting* and investigative means *relevant* to fundamental rights. The common feature of both measures is their potentiality to impinge on the sphere of fundamental rights. Besides, both of them are referential notions, which requires the ascertainment of what system of human rights protection is at stake. Since transnational procedures involve, at horizontal level, at least two procedural and constitutional systems, the first interaction consequently involve two or more domestic systems of protection of fundamental rights. In this light, therefore, multilingualism poses new challenges of multiculturalism.

A significant enhancement of the perspectives of the two domestic legal orders involved in the judicial cooperation has been achieved through the introduction of a general test of necessity and proportionality in the second phase of MR.<sup>44</sup> The reproduction of this requirement by the PD EIO during the Council examinations [Art. 5a(1)(a) PD EIO c.v.], taking into account the wide range of measures which can be carried out through the new instrument, is thus to be welcomed. Unlike the FD EEW, however, it is worth observing that the PD EIO does not require this test to be conducted *only* by the issuing authority. This omission is in line with the strengthening in the current proposal of the admissibility powers of the executing authority while ascertaining the recognition of the requested measure. As noted

42 This merit of the notion of *Grundrechtseingriff* had already been underlined in the 80s by K. Amelung /1987/: Zur dogmatischen Einordnung strafprozessualer Grundrechtseingriffe, *Juristenzeitung*, pp. 738 ff. In the same sense H.H. Kühne /2010/, *op. cit.*, p. 248.

43 See, among others, W. Beulke /2010/: *Strafprozessrecht*, 11th edn. C.F. Müller, Heidelberg, p. 67.

44 On this topic see recently L. Bachmaier Winter /2012/: The role of the proportionality principle in cross-border investigations involving fundamental rights, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina, Springer, Heidelberg (forthcoming).

above, the original proposal had already enabled the executing authority to use a different measure where, *inter alia*, the same evidential result can be achieved by less intrusive means [Art. 9(1)(c) PD EIO o.v.]. This mechanism, while not necessarily sufficing to reach a proper balancing from a human rights perspective,<sup>45</sup> confirmed the potentiality of the new proposed instrument to impinge on fundamental freedoms. The current text of the draft proposal, while confirming the possibility to choose another measure, requires two further conditions to be assessed by the executing authority: a) the availability of the requested measure in a similar national case under *lex loci* and b) the respect for the limits concerned with lists or categories of offences and punishment thresholds as established under *lex loci*. These tests can lead to different results, i.e., respectively the use of another measure [Art. 9(1)(b) and (1a) PD EIO c.v.] and the refusal of assistance [Art. 10(1b)(b) PD EIO c.v.]. It is worth observing that all the three requirements – minor intrusiveness, availability and respect for the limits imposed by domestic law – share the common aim of avoiding negative repercussions on the sphere of proportionality from the perspective of the law of the country where the investigative measure has to be carried out, since the execution of a measure outside the conditions, limits, etc. of *lex loci* would clearly result in being disproportionate. Against the background of the whole transnational procedure, this approach shows the awareness of the need to enhance the respect for the procedural requirements of *lex loci* with the purpose of a higher protection of fundamental rights.

Instead, what is still lacking in EU legislation is a virtuous *interaction* of the domestic systems of human rights protection, which are involved in the transnational procedure. This conclusion applies also to the PD EIO. A first example of this conclusion relates, as noted above, to the case of choice of a different measure than that requested due to the failure to require a new test of proportionality, necessity and availability by the issuing authority of the different measure chosen by the executing authority.<sup>46</sup> However, the most controversial context lacking a complete interaction between domestic laws is the execution of the requested measure. This is a common shortcoming of the last phase of MLA and all the phases of MR. In my view, the solution of combining *lex loci* and *lex fori* upon the condition of consistency with the fundamental principles of the host country cannot ensure a proper interaction of the two procedural laws, in that it can seriously alter the balances of interests carried out by the domestic laws. This applies firstly to *lex loci*, due to the obligation for the executing authority to comply with foreign requirements that can be even “unfamiliar”<sup>47</sup> to its own law. Nor does this solution, which clearly aims at fulfilling the needs of *lex fori* with the purpose of facilitating the admissibility at trial of evidence in the

45 This can happen because of the lack of any participation of officials and private parties of the relevant proceedings in the choice of different measure to be adopted. Moreover, in cases of *Grundrechtseingriffe* it would be preferable to adopt a provision such as that proposed by the EU FRA in its Opinion of 14th February 2011 on this legislative proposal, whereby the executing authority should adopt the *least* intrusive measure. 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](http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm), p. 12.

46 On this point S. Ruggeri /2012/(a), *op.cit.* § 5.1.2.1.

47 This eventuality was explicitly foreseen by Article 8 SAP ECMACM.



relevant proceedings,<sup>48</sup> ensure a proper application of *lex fori*. Both the FD EEW and the PD EIO have failed to provide for any form of participation of private parties of the relevant proceedings in the execution of the requested measure, a vacuum which does not only impinge on the defence rights but also shows the unawareness of the contribution of the defence to a correct application of its own law.

In a deeper sense, the potentiality of certain investigative means to impinge on the sphere of fundamental rights should require a multilevel interaction in the European context, where EU Member States are in the network of domestic, bilateral, global (UN) and European cooperation in criminal matters.<sup>49</sup> From a human rights perspective, basically two main systems of individual rights protection should interact with each other, i.e., the domestic constitutional systems and the supranational Charters of human rights. From this viewpoint, however, all the existing MR instruments as well as the PD EIO undergo a methodological backwardness, in that they, while fully ignoring the constitutional requirements of evidence of the domestic systems of the cooperating authorities, provide only the traditional clause of non-modification of the obligation to respect the fundamental rights enshrined in Article 6 of the Treaty on the European Union (hereinafter TEU). And although this reference has today a different significance than in the past due to the legal force gained by the Charter of Fundamental Rights of the European Union (hereinafter EU FRCh) through the Lisbon Treaty, the risk of infringement of the fundamental rights enshrined in this Charter through the investigative measure cannot lead to refusing, in general terms, the requested assistance. But what raises even more concerns is the fact that neither in EU legislation nor in this legislative proposal there is any trace of interaction between these two levels.

## 5. PROPOSALS OF RECONSTRUCTION AND CONCLUSIVE REMARKS

In light of the above, the setting of a virtuous transnational procedure aimed at obtaining evidence overseas requires methodologically an inter-level approach, whichever system one adopts, i.e., either mutual recognition or mutual legal assistance. This methodological approach is, in my view, the most proper solution to ensure realisation of the AFSJ as construed in the terms of Article 67(1) TFEU, which can be considered as “common” *insofar as* the adoption of shared standards can also ensure a proper protection of individual rights and national legal cultures.

This approach should encompass:

A) The introduction of sunset clauses aimed at avoiding infringement of fundamental rights (*fundamental rights clauses*). Due to the complex nature of human rights, such clauses should be introduced at different levels and in respect of various stages of the transnational evidential procedure.

48 Compared with the international instruments of the third phase of MLA and the FD OFPE, the PD EIO, like the FD EEW, does not limit the duty of compliance with the formalities of *lex fori* to the sole requirements which are necessary under this law.

49 B. Hecker /2010/: *Europäisches Strafrecht*, 3rd edn., Springer, Heidelberg, pp. 159 ff.

- As to both the admissibility stage and the phase of obtaining evidence, the need for ensuring the widest protection of fundamental rights from the combined perspective of Article 67(1) TFEU, which calls for protection both of the supranational human rights systems and of the national constitutional systems, suggests adopting two different clauses, such as those proposed in the Legislative Resolution of the European Parliament on the proposal for an FD EEW. These clauses should contain: 1) a general ground for refusal where the requested measure would prevent a Member State from applying its *constitutional rules* relating to due process, privacy and the protection of personal data, freedom of association, freedom of the press, etc.; 2) a general ground for refusal where the requested measure would undermine the obligation to respect the fundamental rights enshrined in the *ECHR* and the *EU FRCh*. As to the latter clause, in order to ensure consistency in the protection of fundamental rights, a general duty of referral to the ECJ for a preliminary ruling might be introduced.<sup>50</sup>
- As to the phase of admissibility at trial in the home state, a closure clause should be introduced, following again the proposals of the Legislative Resolution of the European Parliament on the proposal for an FD EEW, to avoid that the use of overseas evidence jeopardize the rights of defence applying to domestic criminal proceedings.

B) Setting up a transnational multilevel procedure. This result should be pursued both at *legislative* and *procedural* level. Such integration could follow two possible schemes.

The first solution consists of combining *lex loci* with specific procedural requirements of *lex fori*, thus aiming at a bilateral horizontal integration. Following this scheme, to achieve the goal of a proper integration of domestic procedures, the requested authority should, like in the second phase of MLA, be obliged to comply only with those procedural forms that are fully consistent with its own law and practice, not with those that do not infringe the fundamental principles of its own law. This approach does not, however, necessarily suffice to ensure full respect for individual rights. The French Code of Criminal Procedure (hereinafter CCP) offers an interesting solution, according to which the formalities of *lex fori* can be complied with provided they do not lower the level of protection of the rights of the parties involved in cross-border activities [Art. 694-3].<sup>51</sup> At any rate, such solutions cannot be adequately realised without the contribution of the defence both to counterbalance the presence of officials of the home state in the investigations overseas and contribute to the correct application of *lex fori* by the authorities of the host country.

A limitation of the first solution derives from its way of rendering *lex fori* compatible with *lex loci*, which is combining specific formalities of the former with the latter. This produces a rather unbalanced relationship between the two laws, since it achieves a partial application of *lex fori* with the full application of *lex loci*. In sum,

50 B. Hecker /2010/, *ibid.*, p. 452.

51 See J. Lelieur /2012/: Report on France, -in: S. Ruggeri (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina, Springer, Heidelberg (forthcoming), § 2.1.

whatever is the mode of such combination, this model remains essentially based on *lex loci*. Depending on how deeply integration is realised, *lex loci* will not necessarily remain unaffected by the requirements of foreign law, and the same applies to *lex fori*. However, this model does not aim at reaching a homogeneous integration of both laws, but only at preserving the needs of each of them, i.e., respectively the identity of the legal order of the host country and the formalities required to ensure the admissibility of evidence in the home country. Thus, in my view, the greatest shortcoming of this model is treating the requirements of the two laws concerned with the requested investigative activity as parts of their domestic laws rather than as sources for developing an integrated procedure rooted on a common basis. This is what makes it difficult for the requested authority to apply properly procedures that remain part of *foreign* law.

An alternative solution would be to set an *ad hoc* procedure of gathering evidence on a balanced basis. This approach starts from the premise that each of the domestic laws ceases to be part of its own law when involved in a transnational procedure.<sup>52</sup> This applies also to *lex loci*, which is applied on its territory with the purpose of providing assistance to another country. But how this integration could be realised? Since integration must be sought in relation to the requested assistance, a *new* procedure must be set up and a *new* balance of interests must be achieved to ensure full respect for the domestic balances between the interest of efficient prosecution and the need to protect individual rights. In other words, a request for assistance will always give rise to an atypical procedure, whose modes must be established in the *concrete* case. The biggest shortcoming of the traditional approach is that it attempts to combine *single* procedures of both laws, as if they could be dealt with outside the legal context they belong to. But any provision is part of its own law and reflects specific balances between often-conflicting interests against a constitutional framework. A mixture of single procedural forms can alter this scheme and lead to different constitutional balances colliding with each other. The requirement of coherence is of great importance where the use of measures restricting fundamental rights is at stake.

Such *ad hoc* procedure would certainly run counter to the project of harmonising the rules of evidence, especially where coercive powers are at stake. On the other hand, the awareness has grown today that human rights requirements must be assessed in the *concrete* case.<sup>53</sup> Neither can this approach raise concerns as to the legal basis of the combined procedure, since the new balance should firstly be sought on the basis of the *legislative* requirements predetermined by both national laws. This does not rule out that also supranational or international requirements can play an important role,<sup>54</sup> providing a *higher* level of protection than that provided by either of the domestic laws. However, it would be very useful that at supranational or international level specific criteria for the solution of conflicting situations could be laid down *in advance*. Significantly many countries have

52 From a similar perspective, A. Klip /2012/, *op. cit.*, p. 393, points out that domestic judicial products are no longer products once they go across the border, where different requirements apply.

53 A. Sanders et al. /2012/: *Criminal Justice*, 4th edn. Oxford University Press, New York, pp. 29 f.

54 In this light, the introduction, at supranational or international level, of specific guarantees in cases of investigative activities impinging on fundamental rights, such as those provided for by Article 12(1)(a) and (b) laid down in the proposal of 2003 on a FD EEW, would be welcomed.

incorporated – additionally to the combination rule between *lex loci* and *lex fori* – a general criterion, according to which the requested assistance cannot cause substantial disadvantages for the people involved in transnational procedures, a criterion that is usually independent from the constitutional requirements of *lex loci*.<sup>55</sup> Starting from this basic requirement, which shall be deemed as “emergency brake,” concrete criteria should be elaborated in relation to specific state-related interests (e.g., investigation secrecy) and specific individual rights (e.g., the right to information). In my view, any hierarchisation of such criteria should be avoided, as it would jeopardize the flexibility of the mechanism, which aims at reaching a new balance of interests in the concrete case. An acceptable solution on an individual basis for a *fair* evidential procedure cannot, therefore, start from imperative sentences, but from the assessment of specific value-based decisions. A fruitful approach derives from the so-called “*Qualitätsprinzip*” proposed in the field of conflict of jurisdiction, a principle which aims at the most proper balancing between the values at stake in the concrete case.

This solution cannot be completely realised without combine the *legislative* with a *procedural* integration. In this light, moreover, not only both the cooperating authorities, as provided for by Article 8(4) PD EIO, but also private parties should play an essential role in reaching an agreement on such modes. The contribution of the defence(s) could, in my view, be waived only in cases of investigative measures not requiring, according to both laws, the information of the individuals concerned. Where a proper agreement on a new balance of interests relating to the specific investigation requested is impossible, assistance should not, in my view, be provided. Any different solution would lead to contradictory conclusions, i.e., either obliging the requested authorities to carry out an investigative activity reflecting a balance of interests unadapted to its own law or leaving to the requesting authority the decision on whether to accept and use at trial a piece of evidence obtained without respecting the balances of interests of *lex loci* or to declare the inadmissibility of the results of the transnational procedure.

## REFERENCE LIST

- Amelung K. /1976/: *Rechtsschutz gegen strafprozessuale Grundrechtseingriffe*, Duncker & Humblot, Berlin
- Amelung K. /1987/: Zur dogmatischen Einordnung strafprozessualer Grundrechtseingriffe, *Juristenzeitung*
- Bachmaier Winter L. /9/2010/: European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal of a European directive, *Zeitschrift für die internationale Strafrechtsdogmatik*

55 See Art. 146(2) der portugiesischen *Lei da cooperação judiciária internacional em matéria penal* (144/1999). This conclusion does not, however, apply to the French CCP, which states that „*si la demande d'entraide le précise, elle est exécutée selon les règles de procédure expressément indiquées par les autorités compétentes de l'Etat requérant, à condition, sous peine de nullité, que ces règles ne réduisent pas les droits des parties ou les garanties procédurales prévus par le présent code*“ (Art. 694-3).

- Bachmaier Winter L. /2012/: The role of the proportionality principle in cross-border investigations involving fundamental rights, -in: Ruggeri S (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- Beulke W. /2010/: *Strafprozessrecht*, 11th edn. C.F. Müller, Heidelberg
- Böse M. /2002/: Die Verwertung im Ausland gewonnener Beweismittel im deutschen Strafverfahren, *Zeitschrift für die gesamte Strafrechtswissenschaft* 114
- Böse M. /2003/: Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU – Die “Verkehrsfähigkeit” strafgerichtlicher Entscheidungen, -in: Momsen C., Bloy R., Rackow P. (eds), *Fragmentarisches Strafrecht*. Beiträge zum Strafrecht, Strafprozeßrecht und zur Strafrechtsvergleichun. Für Manfred Maiwald aus Anlaß seiner Emeritierung, verfaßt von seinen Schülern, Mitarbeitern und Freunden. 1st edn. Peter Lang, Frankfurt a.M.
- Caprioli F. /2012/: Report on Italy, -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- D’Andrea L. /2009/: *Diritto costituzionale e processi interculturali*. [www.forumcostituzionale.it](http://www.forumcostituzionale.it)
- Gascón Inchausti F. /2007/: *El decomiso transfronterizo de bienes*, Colex, Madrid
- Gascón Inchausti F. /2012/: Report on Spain, -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- Gleß S. /2006/: *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Nomos, Baden-Baden
- Gleß S. /2008/: Beweisverbote in Fällen mit Auslandsbezug, *Juristische Rundschau*
- Gleß S. /2011/: Europäische Beweisanordnung, -in: Sieber U., Brüner F. H., Satzger H., von Heintschell-Heinegg B. (eds), *Europäisches Strafrecht*, Nomos, Baden Baden
- Hecker B. /2010/: *Europäisches Strafrecht*. 3rd edn. Springer, Heidelberg
- Klip A. /2012/: *European Criminal Law*. 2nd edn. Intersentia, Anwerp-Oxford
- Kühne H.-H. /2010/: *Strafprozessrecht*. Eine Systematische Darstellung des deutschen und europäischen Strafverfahrensrechts. C.F. Müller, Heidelberg
- Lelieur J. /2012/: Report on France, -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- Marchetti M. R. /2011/: Dalla Convenzione di assistenza giudiziaria in material penale dell’Unione europea al mandato europeo di ricerca delle prove e all’ordine europeo di indagine penale, -in: Rafaraci T. (ed), *La cooperazione di polizia e giudiziaria in material penale nell’Unione europea dopo il Trattato di Lisbona*. Giuffrè, Milano
- Peers S. /2010/: *The proposed European Investigation Order. Assault on human rights and national sovereignty*, [www.statewatch.org](http://www.statewatch.org)
- Perron W. /2000/: Auf dem Weg zu einem europäischen Ermittlungsverfahren? *Zeitschrift für die gesamte Strafrechtswissenschaft* 112
- Reimann M. /2002/: The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century. 50 *American Journal of Comparative Law*

- Ruggeri S. /2012/: (a) Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU? -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- Ruggeri S. /2012/: (b) Transnational inquiries and the protection of fundamental rights in comparative law. Models of gathering overseas evidence in criminal matters, -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)
- Sanders A., Young R., Burton M. /2012/: *Criminal Justice*, 4th edn. Oxford University Press, New York
- Spinellis D. /1999/: Securing Evidence Abroad: A European Perspective, -in: Bassiouni M. C. (ed), *International Criminal Law. Procedural and Enforcement Mechanisms*. 2nd edn. Transnational Publishers, Ardsley New York
- Vogel J. /1998/: Tagungsbericht: Internationale Kooperation in Strafsachen, *Zeitschrift für die gesamte Strafrechtswissenschaft* 110
- van Hoek A., Luchtman M. /2006/: The European Convention on Human Rights and transnational cooperation in criminal matters, -in: van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication*
- Vogler R. K. /2012/: Transnational inquiries and the protection of human rights in the case-law of the European Court of Human Rights, -in: Ruggeri S. (ed), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*. A study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg (forthcoming)

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## ISTRAŽNA OVLAŠĆENJA KOJA UTIČU NA OSNOVNA PRAVA I NAČELA PRAVIČNOG MEĐUNARODNOG POSTUPKA U KRIVIČNIM STVARIMA. PREDLOG ZA MEĐUSOBNU INTEGRACIJU U MULTIKULTURALNOJ EVROPSKOJ UNIJI

### REZIME

Autor se u ovom radu bavi istražnim ovlašćenjima u krivičnim predmetima, koja utiču na osnovna prava ljudi. Analiza započinje istorijskom rekonstrukcijom rešenja prinudnih mera, sadržanih u najrelevantnijim međunarodnim i supranacionalnim tekstovima u Evropi. U radu se, dalje, prikazuje predlog za uspostavljanje jednog pravičnog transnacionalnog postupka, zasnovanog na ideji međusobne integracije nacionalnih prava. Ovaj predlog, kojim se name-rava pružiti alternativa većinski prihvaćenoj harmonizaciji dokaznih pravila u prekograničnim slučajevima, koncentriše se na stvaranje jedne *ad hoc* procedure koja bi reflektovala novu ravnotežu između potreba države i zaštite osnovnih prava pojedinaca.

Poslednjih nekoliko decenija, značajni porast transnacionalnog kriminaliteta pojačao je potrebu za efikasnijim oblicima prekogranične saradnje, što se na nivou Evropske unije pretočilo u načelo međusobnog priznanja odluka kao vodećeg principa skoro celokupne pravosudne saradnje. U skladu s tim, učestala primena istražnih mera dovela je u pitanje opravdanost „minimalističkog pristupa“ u pogledu prava odbrane.

Nakon bližeg terminološkog određenja predmeta rada – međunarodne istrage i prinudnih mera, autor u trećem delu analizira razvoj dva sistema; međunarodne pravne pomoći i međusobnog priznanja odluka.

Kao međurezultat razvoja sistema međunarodne pravne pomoći, prikazanog kroz tri faze, autor zaključuje da je na prelazu iz prve u drugu fazu, premda je koncepcija prinudnih mera ostala neizmenjena, došlo do značajno veće zaštite ljudskih prava. Tako je mogućnost koju poseduje zamoljena država, a to je da izvršenje određenih prinudnih mera učini zavisnim od ispunjenja pojedinih uslova, poput dvostruke kažnjivosti i usaglašenosti sa svojim pravom, postalo opšte pravilo, koje omogućava zamoljenoj državi da odbije izvršenje mere koja nije usaglašena ne samo sa pravom, već i sa praksom svoje države u nekom sličnom (domaćem) slučaju. Pored toga, obaveza zamoljene države da ispuni određene formalnosti, u cilju smanjenja rizika neprihvatljivosti dokaza, imala je kao pozitivnu posledicu to da su poštovani zahtevi *lex fori*. U trećoj fazi, koja je pratila razvoj nauke i tehnologije, došlo je do posebnog regulisanja novih istražnih mera; mera koje su znatno izmenile ustaljeni pogled na prinudne mere. S druge strane, unete su i dve značajne, ujedno protivrečne novine; brisanje generalne klauzule, prema kojoj je zamoljena država mogla da odbije meru koja nije bila kompatibilna sa njenim pravom, te uvođenje novog opšteg pravila o vršenju istražnih radnji u inostranstvu sa obavezom za zamoljenu državu da kombinuje *lex loci* sa specifičnim zahtevima *lex fori* države molilje.

Sistem međusobnog priznanja odluka se takođe razvio u tri faze. U prvoj fazi „nasleđena“ je obaveza iz poslednje faze međunarodne pravne pomoći da zemlja izvršilac ispuni zahtev za pomoći, uključujući primenu prinudnih mera, s tim što postoji obaveza da se ispuni samo ono što je neophodno da bi se obezbedila validnost dokaza u postupku. U drugoj fazi je zemlji izvršiocu ostavljeno da slobodno odluči da li će da primeni prinudne mere. Trećom fazom je značajno umanjena zaštita prava pojedinaca. Predlog direktive za Evropski nalog za istragu u krivičnim stvarima do sada nije obuhvatio nijedan od opštih ograničenja u pogledu prinudnih mera, sadržanih u Okvirnoj odluci o Evropskom dokaznom nalogu. Štaviše, razlikovanje osnova za odbijanje iz čl. 10. ne pojašnjava šta se smatra prinudnim merama, dok čak rezultati ostvareni kroz prinudne mere ostvaruju dejstvo, bez obzira da li su poštovani osnovni zahtevi, poput dvostruke kažnjivosti.

Četvrti deo rada nosi podnaslov „Multikulturalnost i zaštita ljudskih prava“, i u njemu se ističe da se multijezičnost vezuje ne samo za različit lingvistički kod, već i za različitu teorijsku pozadinu, ukorenjenu u kulturnom nasleđu procesnog prava država članica. Autor kritikuje zastarelost reči „prinudno“, te ukazuje da je nemački izraz *Grundrechtseingriffe* („zadiranje u osnovna prava“) prikladniji, posebno kada se govori o merama koje pojedinci ne doživljavaju kao prinudne, kao i da taj pravni koncept objašnjava njihov uticaj na osnovna prava, čime se jasnije vidi njihovo ustavnopravno i supranacionalno opravdanje. Nakon pojašnjenja pojma *Grundrechtseingriffe* i kritika na račun kombinovanja *lex loci* i *lex fori*, a u vezi sa uslovom usklađenosti sa osnovnim načelima zemlje u kojoj treba izvršiti mere, autor obrazlaže potrebu za saradnjom na više nivoa u evropskom kontekstu.

U poslednjem delu rada, autor, pored zaključnih napomena, predstavlja svoj predlog rekonstrukcije sistema, sačinjen od uvođenja klauzule o (zaštiti) osnovnih prava i postavljanja transnacionalnog postupka na više nivoa.

**Ključne reči:** međunarodna istraga, dokaz, prinudne mere, ljudska prava.