University of Ferrara | Department of Law

MEIOR Conference

Judicial scrutiny in EIO proceedings

25—26 March 2024, Leuven

Department of Law

Judicial oversight in EIO procedures for the transfer of communication data: assessing legality and proportionality of the exchange of information in the digital era

The problem of transnational exchange of intercepted decrypted communications in the Italian case-law: Cass., sez. un., 29th February 2024.

One of the main issues addressed by the Court of cassation precisely concerns **the need and the features of *ex ante*/*ex post* judicial scrutiny in EIO procedures.**

Not a brand-new topic of transnational judicial cooperation, but in this case undoubtedly influenced by the particular nature of the evidence at stake.

Mutual trust and fundamental rights

As it usually happens when it comes to transnational judicial cooperation, the starting point of the analysis is represented by the inherent tension between the **principle of mutual trust** and the protection of **fundamental rights**.

Let alone purely national provisions, I will try to higlight some key and critical passages regarding the procedure for the transnational acquisition of digital personal data already collected abroad by foreign investigative authorities.

The issuing authority of the EIO

The discussion in the recent Sky ECC/Enrochat cases was mainly focused on the problem of determining the authority empowered to issue the EIO for the collection of intercepted digital comunications → judge or public prosecutor?

It might be acceptable that the public prosecutor shall have the power to issue such EIO, provided that the original measure was duly authorised in the foreign State by an indipendent authority according to the findings of the ECtHR's and CoJ case law.

H.K. Prokuratur, C-746/18, § 51: «*it is essential that access of the competent national authorities to retained data be subject to a prior review carried out either by a court or by an independent administrative body*».

Judicial oversight and proportionality (I)

The transfer of evidences obtained in breach of the right to respect for private life because collected without prior judicial authorisation would determine a violation of artt. 8 ECHR, 7 and 8 CFREU.

ECtHR, Big brother watch and others v. U.K., 25° May 2021, §497: «*the protection afforded by the Convention would be rendered nugatory if States could circumvent their Convention obligations by requesting either the interception of communications by, or the conveyance of intercepted communications from, non-Contracting States*», or from Contracting States which did not respect the minimum safeguards imposed by art. 8 of the Convention.

Actually, one may say that even when the original measure has been authorised by a judge in the executing State the EIO shall be issued by a judge (or by an independent authority): the transnational exchange of personal data itself amount to a new and autonomous interference.

Judicial oversight and proportionality (II)

In the lack of judicial authorisation, the issuing State should of course refrain from requesting the transfer in view of art. 6 of the EIO directive, since the EIO must always be «necessary and *proportionate*».

At least in theory, the executing State itself might refuse the execution according to art. 11 lett. f) of the EIO directive: «*Article 11(1)(f) of that directive permits [to refuse the execution of the EIO] where there are substantial grounds to believe that the execution of an EIO would be incompatible with the fundamental rights guaranteed, in particular, by the Charter*» (C-852/19, Gazanov II).

Judicial oversight and proportionality (III)

According to the principle of mutual trust, the legitimacy of the original measure ordered by the authority of the issuing State might be presumed; **however this does not mean that the issuing authority should not control the respect of fundamental rights considering the procedure adopted by foreign authorities.**

With specific reference to Sky ECC cases, the measures were authorised by the *juge d'instruction* according to art. 706-95-12 of the French code of criminal procedure. Is the *juge d'instruction* sufficiently autonomous and indipendent in the light of the latest development of European case law?

In the *Prokurator* case cited above the CoJ stressed that the public prosecutor might not in principle authorise intrusive investigative measures since, although formally indipendent, it is the authority «which directs the investigation procedure».

Judicial oversight and proportionality (IV)

Judicial review might be ensured at a later stage, tipically in the phase of admission of the evidence collected abroad → «*the ex ante authorisation of such a measure is not an absolute requirement per se, because where there is extensive post factum judicial oversight, this may counterbalance the shortcomings of the authorisation*» (Szabò and Vissy v. Hungary, 12th January 2016).

However:

a) At the moment of the admission of the evidence the judge shall carefully examine the procedure through which the original investigative measure was ordered;

b) Such a scrutiny is only potential since the transferred material might not be subject to any decision on its ammissibility as evidence (e.g. if the accused pleads guilty).

The elephant in the room: rule of law and investigative intrusions in private life

Should the authorities of the issuing/executing States also assess the respect of the rule of law for EIOs aimed at collecting personal data stored abroad? Yes, since every interference in the right of respect for private life must be prescribed by law (art. 8 § 2 ECHR, art. 52 CFREU)

This is of course true for the executing State where the activities are materially performed, but also considering the *lex* fori→ art. 6 lett. b) EIO directive: «the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case».

Such requisite recalls not only proportionality but even before legality: if there is no national law permitting intrusion in private life the measure could not be ordered in a domestic case.

With specific reference to Sky ECC and Encrochat cases similar measured were not possibile in Italy, since malware hacking is only permitted for the interception of in real time dialogues.

Conclusions

Any different solution would raise problem of «investigative *forum shopping*»: if domestic provisions do not authorise the collection of digital personal data authorities might simply ask to perform the measure to foreign investigative bodies → this is what the «theory of hypotethical recollection» by the BVerGE wants to avoid.

According to art. 10 of the EIO directive the executing State might not refuse the execution of the EIO regarding the obtaining of information or evidence which is already in its possession → however, art. 10 itself states that art. 11 regarding grounds for non execution still applies. This means that where the exchange of evidence determines a breach of fundamental rights (as it happens when the limitation of the right of respect for private life is not in accordance with the law) the EIO shall not be executed.

<u>Digital data are often accessible from eveywhere in the AFSJ: the lack of procedural harmonisation might impair the efficiency of judicial cooperation but the principle of the rule of law must always be observed.</u>

Thanks for your attention!

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