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The right to legal remedies in cross-border investigations

Focus on the French regulation



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Introduction: French regulation on the EIO

- EU level: Directive 2014/41/UE (April 3rd)
- French Government Order n°2016-1636 (December 1st)
 - In Spain, transposition only in 2018 (transposition period ended in May, 2017)
- No statistics found, but we can say that a lot of evidence is collected through EIOs in France or in order to be presented into French proceedings
- Existence of effective legal remedies in the French regulation ?

Structure of my presentation

- I. General approach on the right to legal remedies
- II. Focus on the French regulation: presentation and shortcomings
- III. Conclusion: how to improve?

I. General approach on the right to legal remedies

- Essential to assert the existence of an irregularity during the proceedings
- Fundamental right at a European level
 - Article 47 of the Charter
 - Article 19 of the TEU
- Fundamental right at a French level
 - No constitutional value until 1999
 - *Conseil constitutionnel*, 1999: link with Article 16 of the Declaration of 1789
 - Confirmation in 2013, in the *Jeremy F.* case
- EU level: *Gavanozov* cases (esp. 2021) → obligation of Member States to offer legal remedies

II. Focus on the French regulation

- How does French law sanction procedural irregularities? Through nullities, invalidities → cancelation of the tainted measure or evidence, as well as all the measures and evidence pieces which have a causality link with this first one
- Duality of investigation authorities: investigating judges (6% of the cases ; most complex and severe ones) and prosecutors
- Legal remedies change:
 - If there is an investigating judge or not
 - If France is the issuing or the executing State

II. Focus on the French regulation

When France is the executing State

- *Cour de cassation*, Crim., June, 24th, n°96-85.581: a measure carried out in France by **an investigating judge** in the framework of international mutual legal assistance can be controlled by a higher court (*chambre de l'instruction*).
- No new ruling regarding mutual recognition, and especially EIO, but we can transpose this case-law (Art. 173 Crim. Proc. Code)
- Measure carried out in France by a **prosecutor**: legal remedies can only be exercised during the sentencing phase (Art. 385 Crim. Proc. Code) → sentencing phase in the issuing State...

II. Focus on the French regulation

When France is the issuing State

- EIO issued by **an investigating judge**: can be challenged, especially the substantial reasons for issuing
- EIO issued by **a prosecutor**: no legal remedies provided for by Crim. Proc. Code
 - Criticized by Prof. Juliette Lelieur in « Country Report - France », in M. BÖSE, M. BRÖCKER, et al. (ed.), *Judicial protection in transnational criminal proceedings*, coll. Legal studies in international, European and comparative criminal law, Vol. 5, Springer, 2021

II. Focus on the French regulation

Art. 694-24 Crim. Proc. Code

- (2): “non-compliance with execution time limits cannot cause nullity of the measures carried out in application of the EIO”
- (1): “the fact that the measure carried out in the executing State has been successfully challenged there does not cause nullity of the evidence transferred to the French authorities, although this evidence cannot be the sole basis to convict the accused person”
 - Does not respect defence rights, nor fairness of the proceedings
 - Does not comply with Art. 14(7) EIO Dir.: “the issuing State **shall take into account** a successful challenge against the recognition or execution of an EIO”

III. Conclusion

- Main difficulty: division of legal remedies between the States
 - How to identify the competent State to challenge the EIO?
 - No general overview of the proceedings for the controlling judge
 - Legal remedies apply in different procedural phases

III. Conclusion

- Proposal of solution: « transnational procedural unity »
 - Bernd SCHÜNEMANN, « Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU », in S. RUGGERI (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer, 2014, p. 161-180
- Other problems
 - *Lex loci* or *lex fori*?
 - How can the judge control the regularity of a foreign law?

→ To apply the principle of “transnational procedural unity” + to homogenise, even uniformise, the criminal procedure rules from all the European Union Member States



Thank you
so much