

MEIOR Meeting  
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**The executing phase:  
Main issues in Italian case law**

Anna Caligaris  
anna.caligaris@unipd.it

# Opposition *ex art. 13 trasp. law*

- ▶ Art. 13 of the Italian Transposition Act of EIO directive (legislative decree no. 108/2017) provides for a general right to challenge the recognition of an EIO by means of an opposition in front of the preliminary investigation judge
- ▶ The right is granted to **the accused** and his **lawyer**. Additionally, in the case of seizure, the opposition against the recognition decree may also be submitted by the **person from whom the property has been seized** and by **the person who would be entitled to restitution**
- ▶ If, as a result of the opposition, the recognition decree is annulled, the execution of the EIO cannot be carried out, and if it has begun, it must cease

# Re-examination *ex art. 257 c.p.p.*

- ▶ art. 257 of the Italian code of criminal procedure entitles the **accused**, the **person from whom objects have been seized** and the **person who would be entitled to their restitution** the right to submit to the competent Tribunal a request for the re-examination of the seizure decree, also on the merits of the case

# Case law

- ▶ In some decisions, the Court of cassation claimed the existence of a **double protection system**: the opposition against the decision on the recognition and the domestic legal remedy against the investigative measures indicated in the EIO.
- ▶ Article 14(1) EIO Directive requires legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO
- ▶ Cass., sez. VI, 7 February 2019, n. 14413; Cass., sez. VI, 31 January 2019, n. 8320; Cass., sez. III, 29 November 2018, n. 4244.

# Case law

- ▶ In other decisions the Court stated that in the passive cooperation system, only the recognition decree can be challenged and not the investigation act autonomously and directly
- ▶ Article 14(2) of the EIO Directive delimits the judicial control of the executing authorities: the substantive reasons for issuing the EIO can only be challenged in an action brought in the issuing State, subject to the guarantees of fundamental rights in the executing State
- ▶ Cass., sez. VI, 24 September 2020, n. 30885; Cass., sez. VI, 14 February 2019, n. 11491; Cass., sez. III, 11 October 2018, n. 5940.

# Questions:

- ▶ How far can scrutiny be extended in opposition?
- ▶ Can it be considered an effective remedy?
- ▶ Is opposition sufficient to provide equivalent protection to that available in similar domestic cases?

# Opposition vs re-examination

- ▶ The **opposition** should in theory involve an ex ante control, prior to the execution of the act requested with the EIO, on:
  - possible grounds for refusal of recognition or execution
  - proportionality of the investigative measure requested
  - respect fundamental rights
- ▶ **Re-examination** of the seizure decree is intended to control the order directing a seizure, even on the merit, and could establish an ex post control on the correct execution of the acts of investigation

# Critical issues

- ▶ Necessity to provide for legal remedies equivalent to those available in a similar domestic case
- ▶ Since the substantive reasons for issuing the EIO can only be challenged in the issuing State, the primary purpose of the review would seem to be lost
- ▶ admitting both opposition and re-examination could have repercussions on the economy of the proceedings and could potentially lead to conflicting decisions
- ▶ only for the active procedure the transposition law expressly refers to review for challenging the EIO concerning a seizure, but not for the passive procedure, in relation to which precisely the opposition is provided for



# Conclusions

Not only it is problematic, according to the Court of Justice, to have a system that does not provide any legal remedies against investigative measures requested through an EIO: even when national law provides for a surplus of remedies, if these are not perfectly coordinated with each other, problematic issues of practical implementation may also arise

# Communication of the decree of recognition

- ▶ Art. 4 transposition law: the recognition of the EIO must be communicated by the Public Prosecutor to the defence lawyer within the deadline established by Italian law for the notice of the performance of the related investigative act
- ▶ If the defence only has the right to be present at the execution of the act without prior notice, the communication of the recognition is due at the time the act is performed or immediately thereafter
- ▶ Art. 13 transp. Law: the time limit for submitting an opposition starts from the moment the recognition decree is communicated

# Case law

- ▶ According to some decisions, the failure or delay in communicating the recognition decree would constitute a clear violation of the defence rights, resulting in the nullity of the decree itself
- ▶ Impossibility for the defence to promptly submitting an opposition and to timely prevent the transmission of the acquired evidence
- ▶ Cass., sez. VI, 7 February 2019, n. 14413; Cass., sez. VI, 31 January 2019, n. 8320.

# Case law

- ▶ More recently, however, another decision has argued that in such cases there would be no nullity but a mere irregularity
- ▶ the only effect of the delay in communicating the recognition would be postponing the deadline to challenge the recognition.
- ▶ no violation of the defence rights since the issuing State is obliged to take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law (art. 14(7) Directive)
- ▶ Cass., sez. VI, 24 September 2020, n. 30885.

# Critical issues

- ▶ What if the decree of recognition is never communicated or is absent at all?  
↓
- ▶ The recognition decree cannot be validly "incorporated" into the search and seizure decree for the communication to the defence, since the two acts have "entirely different conditions, functions, purposes and legal remedies"
- ▶ Cass., sez. VI, 31 January 2019, n. 8320.

# Conclusions

- ▶ The legislative provision of a legal remedy is not sufficient for it to be effective: it is of no use to provide for an opposition against the recognition decree if then, in practice, the defence is not actually able to exercise that right

*Thank you for your attention!*