

ECBA Spring Conference on The European Public Prosecutor and the role of the Defence - 12 september 2020

1. Greetings and thanks

I bring to all of you the greetings of the Ministry of Justice and appreciation for the initiative of the European Criminal Bar Association that addresses the issue of the imminent entry into operation of the office of the European Public Prosecutor in the perspective of the role and rights of defense.

I consider it important in itself that the issues of the internationalization of criminal justice are addressed in this perspective, as until now the perspective of the efficiency of the investigation and trial has been largely prevailing in this area, in view of the necessary adaptation of law enforcement to the challenges of transnational crime.

I think that the imminent experience of vertical internationalization of the investigation and the role of the prosecution in the criminal trial, which the departure of EPPO is about to determine, requires a reflection on the potential of fertilization and dissemination of guarantees and their implementation techniques in the European context.

2. From this point of view, I consider particularly happy the choice of the theme of videoconferences and the way it is declined in the document of September 6, 2020 that I read with great attention.

The topicality of the theme and its connection with the pandemic emergency are evident. Between March and April 2020, almost all countries in the world took exceptional measures to safeguard public health. These emergency measures necessarily also concerned the functioning and organization of judicial systems and the places where jurisdiction is exercised.

Some of the models used have proved to be indispensable in this emergency phase for the containment of the pandemic, such as remote hearings; the participation in the remote hearing of the arrested and the accused; the possibility to remotely hold council chambers and hearings that do not provide for the participation of witnesses and subjects other than the parties involved; the extension of telematic notifications; the possibility of carrying out preliminary investigation acts (e.g. interrogations), through remote connection. The Covid-19 emergency has, among other things, given a boost to the telematic criminal trial in Italy, as it has been experimented the possibility of filing some written acts (briefs, interrogation requests, documentary allegations related to the final phase of the investigation) electronically.

3. I agree with the appropriate distinctions drawn from the document on the different repercussions and on the different safeguards for the use of videoconferencing, depending on whether it is: a) to ensure the participation (even silent) of the accused in the trial that concerns him (participatory videoconferencing); b) to make possible the hearing (interrogation or examination); c) to relocate the excussion of a source of declarative evidence (tele-examination); d) to propitiate the continuation of an internal investigation or, instead, to acquire a cross border evidence.

In the latter area, for example, concerned in the light of the principle of proportionality (intended as a necessary minimum sacrifice of rights, with respect to the needs of the investigation and procedural verification), videoconferencing may represent a preferable alternative to the limitation of freedom achieved through the issuance of a measure of capture of the suspect/defendant not based on the danger of flight or repetition of the crime, but only on the purpose of ensuring the physical presence in the courtroom, as properly highlighted by your document (§16).

But videoconferencing is also preferable to the traditional method of gathering declarative evidence abroad focused on the delegation of powers from the requesting State to the requested State, which culminates in the use of evidence gathered by the delegated authority without the parties and the trial judge being able to participate in its formation.

Transnational videoconferencing neutralizes the physical distance between the source of evidence and the place of the investigation or judgment, but above all it shortens the legal distance between the acquisition forms.

The international rules governing the conduct of videoconferencing distribute the tasks among the cooperating countries, so as to ensure the conduct, or at least the direction, of the act to the requesting State and the widest possible application of the *lex fori*, with indisputable advantage for the effectiveness of the cooperation, which will be able to rely on evidence that can be used in the proceedings where it is needed, but also for the guarantees: guarantees of the witness who is a victim or exposed to risks in the case of physical appearance in the proceedings and in any case subject to protection measures entrusted to the shared responsibility of the cooperating countries; but also guarantees of the person subject to the proceedings, only if one thinks of the principle of immediacy and the possibility offered by the video-linking conducted by the Italian judicial authorities to carry out the contradictory examination for the evidence according to the strong meaning required by the article 111 of the Italian Constitution, which does not find necessary correspondence in other systems and is not even imposed by the CEDU.

The recourse to transnational videoconferencing can only be favourably evaluated by those who are dissatisfied with the jurisprudential structures which, with regard to the unusability of declaratory evidence taken abroad, give prominence only to those cases in which the acquisition methods practiced by the foreign authority are in contrast with "mandatory rules of public order and morality" which, however, "do not necessarily identify with the set of rules dictated by the procedural code, and in particular, with those relating to the exercise of the rights of the defense.

4. The second aspect to which I would like to draw your attention, also addressed in the document of September 6 and in the principles set out therein, is that of the quality of the technologies through which videolink is implemented.

The supranational rules (MAP Convention of 2000, Council of Europe Additional Protocol, EU Directive 2014/41 on the European Investigation Order) identify a practical limit in case the requested State does not have the necessary technical tools to carry out the videoconference. The impediment is configured as relative, i.e. it can be overcome by the offer by the requesting State (or the State that issued the EIO) of the lacking equipment in the executing State.

I believe it is necessary to give a more current meaning to the limit in question: a rudimentary videoconferencing technology should by now be available in any country in the world.

It is reasonable to believe that the technological data should be declined as a claim of technical tools suitable to realize the link between the remote seat and the courtroom in terms appropriate to the warrant requirements.

In the Italian system, this means that the technologies must be able to ensure different standards of guarantee, depending on whether it is to ensure the participation of the defendant in the trial or, instead, the assumption of a declarative evidence.

When it comes to the defendant's participation, it must ensure, among other things, the contextual, effective and reciprocal visibility of the persons present in both places (and) the possibility of hearing what is said to you: an effect that is achieved through the so-called two-way connection that ensures "the maximum level of subjective interaction allowed by the remote mode, in order not to undermine the relational dynamics essential to corroborate or discredit the deposition";

When it comes to the tele-examination of the witness, it is sufficient to guarantee the "contextual visibility of the persons present in the place where the person under examination is located" (art. 147-bis, paragraph 2, disp. c.p.p.): an effect that is achieved through the so-called one-way connection, through partial or total coverage of the declarant's visual capacity.

4.1. The quality of the connection is a requirement of legitimation of its use in criminal proceedings, it is a condition of its promotion in the international arena, it is an essential reason for its approval by constitutional and supranational courts.

Our Constitutional Court emphasizes the need for the video-connection to guarantee a participatory realism. Italian scholar interpretation (S. Allegrezza, *Le videoconferenze transnazionali*, in *Proc. pen e giust.*, 2017, 2, p. 332 ff.) even leads to lexical consequences, preferring the term delocalized proof, in order to avoid the misleading effect produced by other nomenclatures, such as the one that speaks of virtual proof.

An effective parallelism is established between the risks of relocation in economics and in the criminal justice sector: "The idea of relocation, in economics, brings with it a serious danger that should not be kept hidden (...): convenience often plays (...) to the detriment of labor rights. Translated into the language of criminal justice, (...) the efficiency of relocated hiring should not disproportionately affect procedural guarantees".

The updating of equipment, its security "in proportion to the sensitivity of the case" and its ability to ensure a "sufficient level of audio and video quality" are indicated, in a Recommendation of the EU Council of July 2015, as essential conditions for videoconferencing to ensure "respect for the principles of immediacy, equality of arms and adversarial". To this end, the same Recommendation (point 22) systematically promotes practical evidence between pairs of Member States to document the working parameters to be reused to "ensure greater reliability of videoconferencing between Member States".

Meanwhile, the dynamic of relocated taking of evidence may be a reasonable alternative to face-to-face hearing, as the practical quality of its implementation ensures that "audio and video are accurately aligned and reproduced, without perceptible delay" and that "the external appearance, facial expressions and gestures of the persons involved are clearly visible".

The progress of technology is, moreover, at the basis of the lower distrust of the EIO Directive of 2014, compared to the MAP Convention of 2000, which left to a discretionary assessment of the States required to carry out the request for hearing the defendant by videoconference.

In this direction, the efforts of technological updating put in place by the Ministry of Justice to ensure other quality standards for procedural videoconferencing go in this direction.

5. It seems to me that the principles set forth in your document are in line with the structure that I have randomly outlined and that the additional guarantees desired (for example, in terms of video recording of the incumbent instructors delegated to the foreign authority, publicity of the hearing, etc.) represent important incentives for the best balance of interests in the field.

I believe that your work can help us to discern the margins of stabilization of the measures adopted in the context of the pandemic emergency, that is, that they can guide us in the selection of those measures that deserve to enter into force, as measures designed to ensure the reasonable duration of the process, without making a disproportionate sacrifice of the contradictory and of the due process of law of which the principle of immediacy is part (never miss a good crisis); and those, however, that can find legitimacy only in the exceptional context that we have experienced and that we hope not to have to relive.

Thank you all for your attention!

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