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THE PROBLEM OF OBTAINING EVIDENCE FROM EU COUNTRIES WHILE ACHIEVING THE “CRIME DOES NOT PAY” GOAL

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ABSTRACT

As the European Union has implemented the free movement of persons, goods, services and capital, borders for crime have also often disappeared, making cross-border evidence a decades-old issue in European criminal justice. This article identifies today's opportunities, legal tools, and their obstacles and challenges in obtaining evidence at an early stage of an investigation located in another Member State. The article focuses on the identification of problems in the practical application of the European Investigation Order, European Public Prosecutor's cross-border investigation tools and seeks to answer whether these problems will be resolved by the application of

Regulation (EU) 2023/1543 (*The e-evidence package*) in 2026. In the context of the European Union's efforts to fight crime in a comprehensive manner and in line with the European Commission's Communication of 2008, that confiscation and recovery of proceeds are a powerful means for fighting organized crime effectively and its commitment to support the development of confiscation-related legislative and non-legislative measures¹, alternative legal instruments to achieve the "crime does not pay" objective are also being developed, where obtaining evidence from other Member States is also a key issue. In response, the second part of this article analyses the present-day possibilities of collecting evidence in one of these alternative processes, the civil asset confiscation process, which has its origins in the criminal process analyzed in the first part of this article.

KEYWORDS

Criminal procedure law, E-evidence, European investigation order, European Public Prosecutor's Office, Civil asset confiscation.

INTRODUCTION

Economic benefits are one of the factors that encourage crime. States make significant efforts to reduce the economic attractiveness of crime, improving the application of existing ones and creating new legal instruments. The successful implementation of the goal "crime does not pay" largely depends on the effective collection of evidence. The theory of evidence is one of the most important parts of criminal procedure science, covering both the law of evidence and its application in criminal proceedings. It is the use of evidence at all stages of the criminal process, and it is on the basis of evidence that a court finds a person guilty or acquits them. It is therefore entirely agreeable with the English philosopher Bentham's view that evidence is "the basis of justice, removing evidence removes justice."² However, it is probably not wrong to say that it is the obtaining of all the necessary evidence during the pre-trial investigation³ that is the primary criterion for the success of the subsequent court proceedings. The free movement of people, goods, services, and capital within the European Union has blurred the boundaries between criminal offences, increasingly requiring cross-border investigations. This necessitates obtaining evidence from other Member States. Traditionally, evidence collection and criminal procedural law have been the domain of national legal systems, with little EU influence. Consequently, there is no unified standard for evidence across Member States. Furthermore, evolving criminal trends and the impact of digitization underscore the need for efficient, fair, and harmonized methods of evidence collection in cross-border criminal cases. The European Investigation Order (hereinafter - EIO) was supposed to be that comprehensive solution, but the study shows that the establishment of the European Public Prosecutor's Office (hereinafter – EPPO) and the

¹ Communication from the Commission to the European Parliament and the Council of 20 November 2008 – Proceeds of organised crime: ensuring that "crime does not pay" COM(2008) 766 final // <https://eur-lex.europa.eu/EN/legal-content/summary/crime-does-not-pay.html>

² Libor Klimek, "Free Movement of Evidence in Criminal Matters in the EU," *The Lawyer Quarterly* 4 (2012): 250 [accessed on 10/06/2024] // <https://tlq.ilaw.cas.cz/index.php/tlq/article/download/49/40>

³ As regards the pre-trial investigation, it should be noted that although Article 20 (2) of the Criminal Procedure Code of the Republic of Lithuania (hereinafter - CPC) states that it is for the court to decide in each case whether the data obtained are to be regarded as evidence and that information gathered during the pre-trial investigation may be regarded as evidence only, the EU legislator does not take such a strict position, e.g. The EIO, as an investigative tool, can be used both at the pre-trial stage and at the trial stage in order to obtain evidence, so for the purposes of this article, evidence and data will be considered synonymous.

new legislation adopted as a result of digitalization, which regulates the rules for the obtaining of digital evidence, are forcing the EU legislature to look for more and more different ways to obtain evidence that is in the possession of another Member State.

2008 Communication from the European Commission⁴ highlighted the need for legal instruments not only for effective prosecutions, which require the obtaining of evidence, but also to achieve the goal of making crime not pay. This idea is echoed in the European Commission's 2020 report on asset recovery and confiscation⁵, and the figures presented are impressive, with estimates of the proceeds of organised crime within the EU are currently estimated at about €110 billion per year.⁶ Europol estimates that only around 2% of the proceeds of crime are frozen in the EU, while only around 1% are confiscated, making it easier for organised crime groups to invest in the expansion of their criminal activities and to penetrate the legal economy.⁷ This is why alternative processes (to prosecution) for unjustified enrichment are used in a number of countries and have been shown to be effective in recovering criminal assets, according to a European Commission report⁸. Not surprisingly, such proceedings also require the obtaining of evidence to establish the assets held by the persons under investigation and the challenges posed by the element of transnationality are also relevant in these proceedings, therefore, by way of illustration, the authors of the article will compare the possibilities of the civil asset confiscation (hereinafter - CAC) proceedings in the Republic of Lithuania, which have entered into force in the Republic of Lithuania in 2021, to obtain evidence located in another Member State.

The main aim of the article is to determine what challenges international cooperation faces in processes aimed to achieve the goal "crime does not pay". To achieve the aim, the following objectives have been set: to identify what problems are encountered in the application of the currently existing legal instruments for obtaining evidence from foreign countries, and to provide prognosis of what challenges lie ahead for a new instruments in this field, and also to present proposals on how alternative processes, implementing the goal "crime does not pay", could be improved. Given the limitations of the scope of the article, this research will be limited to the analysis of the problematic aspects of pre-trial proceedings only.

1. NEW/DELAYED TOOL – EUROPEAN INVESTIGATION ORDER

Historically, EU Member States have cooperated for decades in obtaining of evidence in criminal prosecutions, but this cooperation has been completely unrelated to the EU's common position and objectives in criminal law, and has been governed by soft law conventions and their additional protocols, and perhaps the last that fell short of expectations were the Framework Decisions adopted in 2003 and 2008 (1) on the

⁴ Commission Communication, *supra* note 1.

⁵ "Report from the Commission to the European Parliament and the Council Asset recovery and confiscation: Ensuring that crime does not pay," COM (2020): 217 final // https://eulex.europa.eu/resource.html?uri=cellar:5776f170-a4b5-11ea-bb7a-01aa75ed71a1.0001.02/DOC_1&format=PDF

⁶ Ernesto U. Savona, Michele Riccardi, *Transcrime, From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*, (2015) // <http://www.transcrime.it/wp-content/uploads/2015/03/OCP-Full-Report.pdf>

⁷ EUROPOL, *Europol, Does crime still pay? Criminal Asset Recovery in the EU – Survey of statistical information 2010–2014*, (2016) // https://www.europol.europa.eu/cms/sites/default/files/documents/criminal_asset_recovery_in_the_eu_web_version.pdf

⁸ "Report from the Commission to the European Parliament and the Council "Asset recovery and confiscation: Ensuring that crime does not pay," COM (2020): 217 final // https://eur-lex.europa.eu/resource.html?uri=cellar:5776f170-a4b5-11ea-bb7a-01aa75ed71a1.0001.02/DOC_1&format=PDF

execution of orders freezing property or evidence in the European Union⁹, on the European Evidence warrant.¹⁰ However, even this combination of measures was inevitably cumbersome and impractical, and a number of Member States have not implemented the Framework Decision on the European Evidence Warrant at all.¹¹ 2007 was a major turning point, The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed. This Treaty extended the EU's hitherto rather limited competence in the field of criminal law, thus enabling the EU to defend the values common to all States through criminal law.¹² It is Article 82(2) of the Treaty on the Functioning of the European Union that establishes the EU's influence not only on substantive criminal law but also on procedural criminal law, and Article 82(1) of the same Treaty introduces the framework of the principle of mutual recognition¹³, the basis of which was the adoption of the first instrument to be analysed in this article: the EIO, which was adopted by the European Parliament and by the Council in its directive of 3 April 2014, *on the European Investigation Order in criminal matters*¹⁴, and the development of the EIO, which was designed for the purpose of collection of evidence in the possession of another Member State.

The EIO is the most basic and versatile instrument available today. However, the adoption of the instrument itself has taken years, despite such examples as: the Stockholm Programme, adopted by the European Council in 2009, which pointed out the need for the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued;¹⁵ and, in its Green Paper of the same year, the European Commission (hereafter referred to as the Commission) proposed a new approach. This approach replaced the existing legal framework for obtaining evidence in criminal proceedings with a single instrument based on the principle of mutual recognition, which would apply to all types of evidence (legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence).¹⁶

The purpose of the EIO was to obtain evidence located in another Member State by means of a single instrument¹⁷ (based on a simpler and more efficient system based

⁹ Council framework decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003F0577>

¹⁰ Council framework decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matter // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008F0978>

¹¹ Stanisław Tosza, "All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European investigation order and the European Production order," *NJECL* Vol. 11(2) (2020): 161.

¹² Samuli Miettinen, *Criminal law and policy in the European Union* (Routledge, 2013); Valsamis Mitsilegas et al. *Research handbook on EU criminal law* (Cheltenham, 2016); Nicholas Ryder, *Financial Crime in the 21 st century* (Cheltenham, 2011).

¹³ The Treaty on the Functioning of the European Union // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

¹⁴ Directive 2014/41/EU on the European Investigation Order in criminal matters // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041>

¹⁵ The Stockholm programme – an open and secure Europe serving and protecting citizens // https://www.consilium.europa.eu/media/52166/celex_52010xg0504-01-en_txt.pdf

¹⁶ "Commission of the European Communities Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11 November 2009," COM (2009): 624 final // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52009DC0624>

¹⁷ It should be noted that the EIO has an exception – it applies to all investigative measures except the collection of evidence by the Joint Investigation Teams (JITs). A JIT is an instrument of international cooperation between competent authorities, based on an agreement between two or more States, created for a limited period of time and for a specific purpose, to carry out investigative actions. The coordination of the activities of such a group is carried out through Eurojust and (compared to the EIO discussed above) allows for the direct obtaining of evidence between these States and for the participation in the investigative

on the principle of mutual recognition) to obtain evidence located in another Member State¹⁸. The EIO itself is based on a dual system of obtaining evidence. It is capable of collecting data already available in the other Member State, as well as in real time (e.g. during the control of information transmitted over electronic communication networks), and the main condition is that it should only be used when it seems proportionate, and necessary, to carry out the investigative measure in the specific case. The mutual recognition regime in principle leaves the criteria of necessity and proportionality to be checked by the requesting State, but provides safeguards by leaving the Member States free to consult in the execution of an EIO or to opt for a less intrusive measure in the obtaining of evidence if such a measure is considered likely to achieve the necessary result. The mutual recognition referred to in the Directive can indeed be understood as meaning that the lawfulness and control of the investigative measure is to be exercised by the issuing State, and that the executing State should ideally rely on and enforce the decision (subject to a few envisaged exceptions).¹⁹ But this effectively deprives the executing State of any real control over the necessity and proportionality of the requested investigative measure²⁰, even though it is precisely these components that must be established before the EIO is issued. The criteria for the necessity and proportionality of an investigative measure are not the same between the different legal systems of the Member States. We agree with Stefano Ruggeri, who pointed out that even before the adoption of the EIO Directive, it does not elaborate on the criteria of necessity and proportionality²¹. Therefore, the basis for the principle of mutual recognition is quite vague. The situation appears even more complicated when one reads Article 5 of the Treaty on the Functioning of the European Union, which defines proportionality only in abstract terms, that under "the principle of proportionality, the content and form of Union action does not go beyond what is necessary in order to achieve the objectives of the Treaties,"²² and does not define necessity at all. It is acceptable that the principles are not very clearly defined by their nature and that is the essence of any principle. However, when it comes to the basis for issuing EIOs, the decision of evaluation through the prism of principles, leaves the possibilities of unified effective international cooperation quite doubtful.

An important innovation introduced by the EIO is that this investigative measure collects evidence in accordance with the principle of *forum regit actum*, i.e. the obtaining of evidence is carried out in accordance with the formalities and procedures expressly laid down by the requesting Member State. This principle replaced the principle of *locum regit actum*, which had been in force in the Conventions, which meant that the decisive factor in determining the right to take evidence in another Member State was

action itself. For more information on JITs, see *Council framework decision 2002/465/JHA on joint investigation teams* // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002F0465>

¹⁸ It should be noted that this Directive does not apply to Denmark and Ireland, as well as to the United Kingdom following its withdrawal from the European Union, which is why cooperation with these countries is still based on the Conventions or bilateral agreements. Considering that only two Member States are concerned, which are not covered by Directive 2014/41/EU in the European Union, cooperation with these countries will not be examined in detail due to the limitation of the scope of the article.

¹⁹ Regina Garcimartin Montero, "The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations," *Eu crim*, 1 (2017): 45.

²⁰ Ines Armada, "The European investigation order and the lack of European standards for gathering standards," *New Journal of European Criminal Law* 6, 1 (2015): 8 // <https://heinonline-org.skaitykla.mruni.eu/HOL/LuceneSearch?terms=ines+armada+european+investigation+order+&collection=all&search-type=advanced&typea=text&tabfrom=&submit=Go&sendit=&all=true>

²¹ Stefano Ruggeri, "Introduction to the Proposal of a European Investigation order: Due Process Concerns and Open Issues": in: Stefano Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (Springer, 2014).

²² The Treaty on the Functioning of the European Union, *supra* note 13.

the location of the evidence²³, and raised questions as to the admissibility of the evidence thus taken in the requesting State's criminal proceedings. However, the authors of this article argue that the relatively small number of cases before the CJEU undermines this conclusion. The principle of *forum regit actum* has been questioned regarding evidence admissibility. During the Directive's adoption, the need for minimum standards for evidence was highlighted, as the lack of common admissibility rules leaves such decisions to the domestic laws of Member States, which can vary significantly.²⁴ However, the authors of this article argue that the relatively small number of cases before the CJEU undermines this conclusion.²⁵ Additionally, Article 9(2) of the Directive states: "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority." Considering that the judicial or equivalent authority is involved in both the issuing and the execution of the EIO, the EIO execution process is subject to a 120-day time limit, i.e. 30 days for the Member State that received the EIO to assess and reply whether it will be executed, and a 90-day time limit for the execution of the EIO, with the possibility of extending the deadline by a further 30 days if necessary. Criticism has also been levelled at the Directive's time limits, which are far too long in the present day context, and at the legal definition of the Directive itself, which provides for time limits for execution but does not mention what to do when the executing Member State fails to execute the EIO or, at the time of case prioritization, sets the wrong priorities for the execution of the EIO, for example due to a shortage of human resources, and the delay becomes unjustifiably lengthy.

This year marks the 10th anniversary of the adoption of the Directive, and it is therefore possible to take stock of the advantages and disadvantages of this tool in a number of ways. The Council of Europe is carrying out mutual evaluations of the Member States using the EIO for this purpose. The aim of such evaluations is to account for not only the legal aspects but also the practical aspects, identifying areas for improvement and best practices in the Member States. Some Member States have already been evaluated, including Lithuania²⁶, and a final report summarizing all the Member States is due by the end of 2024. But the general position of the Member States whose evaluations have been carried out²⁷ on the functioning of the EIO is positive, the trend in the use of the EIO is upwards, and the main drawback of this instrument identified by the Member States is that the lengthy periods of time for the execution of the EIO are unsatisfactory.

Since the final report is not available at the moment of writing this article, practitioners from EU member states were questioned for their opinion about EIO and dealing with this instrument. The following question was presented for colleagues from law enforcement agencies to collect the needed information "What are the main challenges that can be defined while dealing with EIO?"²⁸ Considering the answers of the represen-

²³ Martyna Kusak, "Mutual admissibility of evidence and the European investigation order: aspirations lost in reality," *ERA forum* (2019): 391.

²⁴ Martyna Kusak Martyna, "Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters," *European Journal on Criminal Policy and Research* (2017): 337.

²⁵ 11 CJEU decisions until June 2024. It should be noted, that most of these cases are related to economic crimes (fraud C-324/17, C-852/19c, C-584/19, C-16/22, money laundering C-724/19, C-255/23 and etc.), but the main issue examined in these cases was: who is the authorized authority to issue an EIO, thus negating the objections regarding the admissibility of the evidence gathered with EIO.

²⁶ *Evaluation report on the tenth round of mutual evaluations. On the implementation of the European investigation order (EIO) Report of Lithuania* // <https://data.consilium.europa.eu/doc/document/ST-16308-2023-REV-1/en/pdf>

²⁷ The evaluation reports are publicly available for Lithuania, Finland, Belgium, Romania and Slovakia.

²⁸ The authors of the article in the period from 02/01/2024 to 04/10/2024 addressed practitioners (prosecutors and investigators) from different EU Member States with the request to evaluate EIO with one particular question.

tatives of the law enforcement institutions of Spain, France, Portugal, Cyprus, Belgium, Greece, France and Romania, apart from minor procedural differences between those EU Member States, an analogous conclusion can be drawn: it is much too slow under the influence of today's digitization.

While the EIO was supposed to be the comprehensive solution for the collection of evidence in criminal cases, criminal law regulation at supranational level often takes time, and Member States equate criminal law with national security and it is not easy to find a compromise that works well for all Member States. Therefore, already at the time of the adoption of the Directive, it was questioned whether this new instrument was not overdue due to global digitalization, which, in the context of the obtaining of evidence on the basis of the EIO, has highlighted the main problem of cross-border data transmission: how to ensure the speed of evidence transmission.

2. NEW EU EFFORTS TO ENSURE EVIDENCE BETWEEN MEMBER STATES

In response, the EU legislator is now introducing several new exceptions to the traditional EIO. Two new laws adopted in 2017 introduced the first possible exception in the context of the EIO. **Directive** (EU) 2017/1371 on combating fraud against the financial interests of the Union by means of criminal laws²⁹ and **Regulation** (EU) 2017/1939 "implementing enhanced cooperation in establishing a European Public Prosecutor's Office."³⁰

On the basis of these instruments, Article 31 of the Regulation (Cross-border investigations) established on 2021, empowers the European Public Prosecutor, who controls and organizes the pre-trial investigation, to decide on the adoption of the necessary measures and to delegate them to the EPPO of the Member State in which they are to be carried out. This article allows the analogy of the EIO to be applied in such pre-trial investigations, as the actions listed in Article 30 of the Regulation are equivalent to those listed in the EIO Directive³¹. The peculiarity of this supranational regulation is that the EDPs remains independent within the framework of the national judiciary and prosecutors' offices, but has at least the same powers as national prosecutors in the Member States, and that the prosecutions themselves are conducted both at the pre-trial stage and subsequently at the trial stage, in accordance with the national criminal procedure. Ina Raluca Tomescu identifies as one of the strengths of the EPPO the fact that fraud affecting the EU's financial interests often involves several Member States and is transnational in nature, and therefore requires a rapid and coordinated approach and centralized information management for effective investigation.³²

The negotiations on the provisions of Article 31 had been the most difficult during the adoption of the Regulation, but result in "a system of cross-border cooperation adopted in the Regulation seem to go one step further in the implementation of the principle of mutual recognition in the execution of cross-border evidence gathering: a request ... will no longer be sent, but rather the handling EDP will simply assign the

²⁹ Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32017L1371>

³⁰ Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) // <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>

³¹ For example, if necessary and in accordance with Article 31 of Regulation 2017/1939, the European delegated prosecutor may delegate seizure or search of documents and other data to the delegated prosecutor located in another Member State, where the necessary data and evidence for such seizures or searches are available.

³² Ina Raluca Tomescu, "General Considerations regarding the European Public Prosecutor's Office," *Annals of the Constantin Brancusi University of Targu Jiu-Letters & Social Sciences Series* (2023): 7–13.

investigation measure.”³³ The main question heavily debated at the time was whether a required judicial authorization of an investigation measure in a cross-border setting should be obtained from a court/judge in the Member State in which the investigation is being conducted or in the Member State in which the requested investigation measure is to be undertaken. The question of the legality of such necessary measures has already been examined in the first European Court of Justice case.³⁴ The court stated there that the review conducted in the Member State of the assisting EDP, where an assigned investigation measure requires judicial authorization in accordance with the law of that Member State, may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure; the latter matters must be subject to prior judicial review in the Member State of the handling EDP in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union.³⁵

The court clarified that the justification and adoption of that necessary measures must be subject to prior judicial review in the Member State in which the investigation is being conducted, thus keeping the power on the side of the Member State in which the investigation is being conducted.

The regulation does not impose deadlines for the execution of such mandates either, leaving it to the agreement of the EDPs, but Article 31(7) provides for a 7-working day buffer and the delegation of the dispute resolution to the competent standing panel, which is probably logical given that all EDPs work for the same institution (the EPPO). While all this regulation creates the vision of an attractive cooperation (at least in 24 countries that have joined EPPO) in the obtaining of evidence, only investigations under the control of the EPPO are eligible for this type of evidence obtaining, and that this area relates exclusively to criminal offences detrimental to the budget of the European Union.³⁶

Responding to changing crime trends, two further new pieces of legislation adopted in 2023 introduced a second possible exception in the context of the application of the EIO. The Electronic Evidence Package, which consists of Regulation (EU) 2023/1543 on the use of the European Production Orders and the European Preservation Orders for the purpose of electronic evidence in criminal proceedings and the post-conviction execution of custodial sentences³⁷ and Directive (EU) 2023/1544, which lays down harmonized rules for the appointment of designated firms and legal representatives to collect electronic evidence in criminal proceedings.³⁸

³³ Lorena Bachmaier Winter, “Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance”: 121; in: Lorena Bachmaier Winter (ed.), *The European Public Prosecutor’s Office. The Challenges Ahead* (Springer, 2018).

³⁴ G. K. and Others (*Parquet européen*), Court of Justice Judgment of 21 December 2023, C-281/22.

³⁵ *Ibid.*

³⁶ The authors also point out that this method of obtaining data is only valid in Member States that have joined the EPPO, so in a situation where the evidence to be obtained is located in an EU Member State that is not part of the EPPO, the obtaining of the evidence is carried out by means of an EIO. For more information on the Member States that have joined the EPPO // <https://www.eppo.europa.eu/en/about/members>

³⁷ *Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings* // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1543>

³⁸ *Directive (EU) 2023/1544 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings* // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023L1544>

According to a European Commission analysis, electronic evidence is needed in around 85% of criminal investigations, and 2/3 of the evidence needed in these investigations belongs to service providers based in other jurisdictions.³⁹ Although the adoption of this e-evidence package itself has taken seven years and we do not yet have a working practice to date (the deadline for its implementation is 2026), expectations are high due to the specificities of the implementation and the deadlines set.

As regards Production and Preservation Orders, these orders can be issued and submitted by the issuing authority to a specific service provider in order to obtain data in their possession, but the mechanism for the execution of these orders does not allow the service provider, unlike in the case of the EIO, to collect data that is not yet available at the time the order is submitted. In contrast, the EIO is designed not only to collect, record and transmit evidence already existing in other EU Member States, but also to search for, obtain, receive and transmit evidence to the issuing State.

In principle, the electronic evidence package does not replace the EIO Directive, but rather introduces an additional, much faster investigative tool available to national law enforcement authorities in the Member States to obtain electronic evidence. The specificity of this evidence is its liquidity in time and place, which is very specific and makes the traditional EIO far too slow and its execution times too long.

Another important focus is on enforcement timeframes and sanctions. Whereas a traditional EIO can extend without prejudice to the time limits set out in the Directive (Article 12) up to 120 days, for electronic evidence the Directive (Article 10) sets the time limit at just 10 days, and in urgent cases at 8 hours. As regards the severity of the time limit, there is another safeguard: if, in the case of EIOs, we are talking about the principle of cooperation in good faith between Member States, and the delay in executing the EIO does not in principle have any repercussions for the executing State, then, in the case of electronic evidence, the service provider may, in accordance with Article 15 of the Directive, be liable to a fine amounting to 2% of the service provider's annual worldwide turnover in the preceding financial year. This is probably a strength of the Regulation, since it opts for such an enforcement mechanism for service providers, until you try to imagine the situation in practice. For example, if we model a case where the service provider is a large company that provides the bulk of its services on the market, it is reasonable to expect that such a company will also receive hundreds of such orders on a daily basis. But in such a case, would a time limit of 8 hours or up to 10 days be a realistic timeframe for it to execute such orders? And if hundreds of new start-ups with only a few buyers in a country are providing such services, will Member States be able to ensure that the legal representatives of such companies are controlled and that they themselves are connected to the eEDES data provision system? While comparing these two examples another question could be raised: would two percent of annual worldwide turnover sanction be adequate and equally effective sanction for both service providers?

Another contentious innovation regarding electronic evidence is the shift in the cooperation framework. Under the European Investigation Order (EIO), the issuing State transmits a request to the executing State, which then gathers the required

³⁹ COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT *Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters and Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings* // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2018%3A118%3AFIN>

evidence from the entities holding it. In contrast, the European Public Prosecutor's Office (EPPO) introduces a model where a delegated prosecutor in one Member State directly contacts their counterpart in another Member State to issue the necessary order. In the case of electronic evidence, a direct link is established, and the issuing State contacts directly the entity of the service provider which holds the evidence. Only an additional safeguard is introduced, i.e. cases where not only the subject but also the enforcing authority has to be notified.⁴⁰ It should be noted that while the EIO is a classic instrument based on the principle of mutual recognition, this new regulation is quite contradictory to this principle, because the question arises whether there is any recognition since there is no authority to actively recognize the order?⁴¹ Thus it could be agreed with Teresa Magno that "European production and preservation orders as new cooperation instruments are based on a high level of mutual trust and cannot be considered as mutual recognition instruments per se,"⁴² although the prospects for full confidence are not clear when Member States' legal systems differ.⁴³

Another questionable aspect is that the Regulation on electronic evidence does not refer to the procedures for recording, storing and transmitting that data by the service provider to whom the order was issued, unlike the EIO. "In case of electronic evidence, the reliability of information is obviously of fundamental importance,"⁴⁴ because this digital data is particularly sensitive to any intervention and its metadata changes with respect to any action (storage, copying, transfer), so that such digital data requires specific knowledge.⁴⁵ Shifting the responsibility for providing data to private individuals, without a regulated standard for exchanging electronic evidence, raises significant concerns. Why are the requirements for obtaining and transmitting digital data less stringent than those for a traditional EIO? Moreover, what implications does this have for the admissibility of evidence obtained through such means?

In summary: there are still many uncertainties in the regulation of electronic evidence;⁴⁶ however, in assessing the methods of obtaining data at the pre-trial stage of the investigation, it should probably be acknowledged that the EU legislator's initiatives

⁴⁰ It should be underlined that in the case of an e-evidence request for access to traffic data, other than data requested solely for the identification of the user or for the content of the data, the issuing law enforcement authority of the Member State shall notify not only the service provider or its representative but also the executing authority (the authority of the executing State), which is competent under the national law of that State to obtain the European evidence protection order or the European evidence preservation order transmitted by the issuing authority for notification or enforcement under this Regulation), but only the service provider shall be contacted when subscription, identification data are required.

⁴¹ Martin Bose, *An assessment of the Commission's proposals on electronic evidence* // [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604989/IPOL_STU\(2018\)604989_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604989/IPOL_STU(2018)604989_EN.pdf); Elodie Sellier, Anne Weyembergh, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation* // [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU\(2018\)604977_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf); Stanisław Tosza, "All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European investigation order and the European Production order," *NJECL* Vol. 11(2) (2020): 161.

⁴² Teresa Magno, "The Challenging Path Towards the Establishment of the EU Legal Framework Regulating Cross-Border Access to Digital Evidence": in: Maria Angela Biasiotti, Fabrizio Turchi (eds.), *European Investigation Order* (Springer, 2023).

⁴³ Fabrizio Siracusano, "The European Investigation Order for evidence gathering abroad": in: Rafaraci, Tommaso and Belfiore, Rosanna (eds.), *EU Criminal Justice. Fundamental rights, Transnational proceedings and the European public prosecutor's office* (Springer, 2019).

⁴⁴ Marcin Rojszczak, "e-Evidence cooperation in criminal matters from an EU perspective. *Modern Law Review* 85, 4 (2022): 997.

⁴⁵ Fabrizio Turchi, "Evidence Exchange Under the EIO: Technological Challenges": in: Maria Angela Biasiotti, Fabrizio Turchi (eds.), *European Investigation Order* (Springer, 2023).

⁴⁶ Especially what impact will this regulation have on the admissibility of evidence obtained in this direct cooperation manner.

to respond to the changing trends in criminal offences by ensuring the obtaining of evidence from other Member States are evident.

3. ALTERNATIVE PROCESS (CAC) AND ALTERNATIVE OPTIONS FOR OBTAINING EVIDENCE

The comprehensive fight against crime, including the realization of the goal "crime does not pay", is not limited to the means of the criminal process. The experience of some of the EU States has already shown that the above-mentioned goal cannot always be achieved only by classical criminal justice measures.⁴⁷ For this reason, alternative legal instruments have been and are being developed to achieve the aforementioned goal, in which it is also necessary to obtain evidence located in other Member States.

In Lithuania, in order to reduce the economic attractiveness of crime, in 2010 the standard confiscation of assets was supplemented by extended confiscation of assets and the criminal law criminalized a new criminal act: illegal enrichment. However, within a decade, these punitive measures did not produce the results that were expected.⁴⁸ In the face of the evident disfunction of the criminalization of illicit enrichment, the political decision was finally made in June 2018 to make a rapid further step in the evolution of the illegal asset confiscation measures and join other European countries (e.g. Italy, Bulgaria, Slovenia, Ireland, Slovakia, Ukraine etc.) that have already introduced laws on civil confiscation. Despite the fact that the new legislation has been strongly criticized in legal doctrine, due to the issues of presumption of innocence, the burden of proof, the opinion on double punishment, etc.,⁴⁹ the law was finally passed in March 2020 and entered into force on 1st July 2020.⁵⁰ This is a completely different type of legal instrument than the ones mentioned before. Since it is non-conviction confiscation, it is enough just to suspect that property was gained unlawfully.⁵¹

Unlike, for example, in Germany, civil asset confiscation relations in Lithuania are not regulated by criminal laws, but by independent legal acts (Law on the Civil Asset Confiscation (hereinafter - CACL)⁵² and Description of the procedure for conducting and organizing an asset investigation during civil asset confiscation (hereinafter – Description)⁵³ and legal norms of civil procedure⁵⁴. Although many hopes were placed on the new legal instrument, the beginning of its practical application is rather passive and complicated. From 2020 to 2023, only 20 CAC processes were initiated in Lithuania and only 3 reached the court hearing.⁵⁵ Such a situation is caused by a wide complex

⁴⁷ Skirmantas Bikelis, "Modeling the patterns of civil confiscation: balancing effectiveness, proportionality and the right to be presumed innocent," *Baltic Journal of Law & Politics* (2021): 26.

⁴⁸ Read more about the reasons why the criminalization of illegal enrichment did not achieve its goals: Skirmantas Bikelis, *supra* note 47, 27–28.

⁴⁹ Laura Martinaitytė, *Civil asset confiscation law - new criminal policy or restrictions out bounding criminal procedure?* (Vilnius University, 2021), 76.

⁵⁰ Skirmantas Bikelis, *supra* note 47, 28.

⁵¹ Laura Martinaitytė, *supra* note 49, 76.

⁵² *Law on the Civil Asset Confiscation of the Republic of Lithuania*, Register of Legal Acts (2020, No. 2020-06992).

⁵³ *Description of the procedure for conducting and organizing an asset investigation during civil asset confiscation*, approved by the Prosecutor General of the Republic of Lithuania 2020 June 26 order No. I-173, Register of Legal Acts (2020, No. 2020-14215).

⁵⁴ *Code of Civil Procedure of the Republic of Lithuania*, Official Gazette (2002, No. 36-1340).

⁵⁵ *Report of the activities of the Prosecutor's Office of the Republic of Lithuania in 2023* (2024, No. 17.9.-2177) // <https://prokuraturos.lt/data/public/uploads/2024/03/2023-m.-ataskaita-galutine.pdf>; *Report of the activities of the Prosecutor's Office of the Republic of Lithuania in 2022* (2023, No. 17.9.-1974) // <https://prokuraturos.lt/data/public/uploads/2023/03/2022-m.-ataskaita-2023-03-01-nr.-17.9.-1974.pdf>; *Report of the activities of the Prosecutor's Office of the Republic of Lithuania in 2021* (2022, No. 17.9.-2228) // <https://prokuraturos.lt/data/public/uploads/2022/03/2021-m.-ataskaita-2022-03-01-nr.-17.9.-222803.21.pdf>

of problems of legal regulation and its practical application. One of the problems is the lack of procedural measures for gathering evidence. Legal acts regulating CAC do not provide for such procedural actions as are usual for criminal proceedings, such as searches, non-public procedural actions, etc. Issues of international cooperation are also related to this problem. There is no question that there are no national borders for today's crime. Therefore, it is quite natural that assets acquired from illegal income are invested in foreign countries. In view of this, obtaining data on assets held in a foreign country, the acquisition of which cannot be justified by legal income, is a particularly important factor that determines the effectiveness and comprehensiveness of CAC. Article 12 (1) of the CACL stipulates that: "cases regarding the civil asset confiscation shall be examined in accordance with the procedure established by the Code of Civil Procedure (hereinafter - CCP) in accordance with the prosecutor's claim for the protection of public interest." However, this provision applies only to judicial proceedings, i.e. when, after conducting an asset investigation (quasi-pre-trial investigation), the prosecutor, having determined that there are grounds and conditions for the CAC, applies to the court. There are many legal instruments for the search of assets abroad and the subsequent confiscation of such assets (e.g. 2020 November 25 Regulation 2020/1783 (hereinafter – Regulation 2020/1783)⁵⁶; 2012 December 12 Regulation 1215/2012⁵⁷; 2019 July 2 Hague Convention⁵⁸ etc.). As mentioned, all these legal instruments can be used only when the civil case is already being examined in court or in the execution of the decision made by the court. However, in order to prepare a claim for CAC that meets the requirements of legal acts, the aforementioned data must be obtained at the pre-trial stage.

The legal acts regulating the pre-trial stage of the CAC (CACL and Description) contain only a few norms related to international cooperation. Article 6(5) of the CACL states, that:

when it is necessary to receive information from the competent authorities of other states in order to conduct an asset investigation in accordance with CACL, the authorities conducting the asset investigation or the prosecutor, based on an international agreement or the basis of information sharing, apply to the competent authorities of other states for information.

Unfortunately, Lithuania does not have such international agreements or information sharing agreements in the field of CAC. The Description also contains only a few norms about the possibilities of searching for assets in foreign countries, i.e. that the Lithuanian Criminal Police Office and the Financial Crimes Investigation Service through the "Egmont Group" could conduct such a search. The analysis of the legal acts regulating the activities of the mentioned channels allows us to conclude that it is not possible to ensure effective international cooperation in the CAC process through these channels, since: 1) these channels have limited search capabilities; 2) the execution of the search is not based on mandatory legal norms, but on the benevolence of the foreign state; 3) all information received from foreign financial intelligence units (*through the*

⁵⁶ Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) // <https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX:32020R1783>

⁵⁷ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>

⁵⁸ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters // <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>

Financial Crimes Investigation Service through the "Egmont Group") cannot be used in the CAC procedure without the separate consent of the information provider; and 4) there are no legal instruments to apply the freezing of assets located in a foreign country through the aforementioned channels.

Thus, the research shows that the current legal regulation of Lithuania does not provide for real opportunities to obtain evidence from a foreign country about the assets acquired from illegal activities in the pre-trial stage of the CAC process (asset investigation). In the absence of such opportunities, the prosecutor has no way to prepare a claim for the confiscation of property located in a foreign country that meets the requirements of the CPC. And this undoubtedly has a negative impact on achieving the goal "crime does not pay". However, in authors' opinion, there are certain ways out of the above-mentioned situation.

First, it should be considering the possibility of relying on Regulation 2020/1783. Article 31 (3) of the Regulation 2020/1783 provides that:

each Member State shall communicate to the Commission details of the other authorities that are competent to take evidence for the purposes of judicial proceedings in civil or commercial matters. Member States shall inform the Commission of any subsequent changes to those details.

The Republic of Lithuania has informed the European Commission that according to the national law of the Republic of Lithuania, only the courts of the Republic of Lithuania are competent to collect evidence for the purposes of court proceedings in civil or commercial cases.⁵⁹ Moreover, the Law on Implementation of the European Union and International Law on Civil Procedure of the Republic of Lithuania provides that all courts (judges) of the Republic of Lithuania have the right to collect evidence in a Member State of the EU in accordance with the procedure laid down in Regulation No 2020/1783.⁶⁰ Most EU states have done the same. However, it should be noted that some countries have notified the European Commission that other entities can also collect evidence based on the Regulation. For example, in Hungary, Slovakia and Estonia, notaries are competent to collect evidence for the purposes of court proceedings in civil or commercial cases (e.g. in inheritance cases). However, it should be noted that none of the European countries have notified the European Commission that according to Regulation 2020/1783 the prosecutor is a competent entity to collect evidence for the purposes of court proceedings in civil or commercial cases.⁶¹

Thus, in order for the prosecutor in the pre-trial stage of the CAC process to acquire the right to participate in the evidence about the assets located in a foreign country collection process, the aforementioned Law on the Implementation of European Union and international Legal Acts in Civil Process should be amended and the European Commission should be informed that prosecutors are also competent to collect (*participate in process of the collection*) evidence in accordance with Regulation 2020/1783. However, would this comply with Regulation 2020/1783 provisions? According to the authors' opinion - yes. And there are at least several arguments to support such a position.

⁵⁹ European e-justice portal, Section "Country-specific information and electronic forms related to Regulation 2020/1783" // https://e-justice.europa.eu/38581/LT/taking_evidence_recast

⁶⁰ Law on Implementation of the European Union and International Law on Civil Procedure of the Republic of Lithuania, Official Gazette (2008, No. 137-5366), Art. 5.

⁶¹ European e-justice portal, *supra* note 59.

First of all, it should be noted that the recast of Regulation 2020/1783 expands the concept of “court” by providing that:

“court” means courts and other authorities in Member States as communicated to the Commission under Article 31(3), that exercise judicial functions, that act pursuant to a delegation of power by a judicial authority or that act under the control of a judicial authority, and which are competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters.⁶²

Considering the place of the prosecutor in the Lithuanian legal system, we can hardly consider the prosecutor as an entity performing judicial functions or acting according to the powers of a judicial institution. Nevertheless, it can be assumed that in accordance with Regulation 2020/1783 evidence in the pre-trial stage of the CAC process could be collected by the prosecutor acting under the control of the judicial authority.

The Constitution of the Republic of Lithuania⁶³, the Law on the Prosecutor’s Office⁶⁴ and other legal acts provide that “[i]n the event of a violation of the public interest, the prosecutor has the duty to take measures to protect the public interest in accordance with the procedure established by the civil or administrative process”.⁶⁵ In accordance with Article 12(1) of the CACL, the prosecutor’s claim to the court regarding the confiscation of civil assets is precisely filed in defence of the public interest. Thus, the prosecutor in Lithuania is competent to collect evidence with the aim of initiating a civil case in which the public interest would be defended. In summary we can conclude that, in order to bring the public prosecutor within the scope of Regulation 2020/1783 (as an entity under the control of the judicial authority), it would be possible to create a legal mechanism providing for the right of the prosecutor to apply to the court in the pre-trial stage of the CAC process, requesting to receive evidence from a foreign state.

In addition, Articles 1 and 3 of the Regulation 2020/1783 provide that, in accordance with this Regulation, evidence can be collected with the aim of using it not only in the already started but also in the planned court process. In the pre-trial stage of the CAC process, evidence is collected with the aim of initiating civil court proceedings.

Another alternative of how evidence could be collected in the pre-trial stage of CAC is the already analysed EIO. It is unquestionable that the EIO is mainly intended for international cooperation in criminal cases.⁶⁶ However, Article 4 of Directive 2014/41/EU specifies that an EIO can be issued in 3 types of proceedings:

(a) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; (b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and (c) in proceedings brought by judicial authorities in

⁶² Regulation 2020/1783, *supra* note 56, Art. 2(1).

⁶³ *The Constitution of the Republic of Lithuania*, Official Gazette (1992, No. 33-1014).

⁶⁴ *Law on the Prosecutor’s Office of the Republic of Lithuania*, Official Gazette (1994, No. 81-1514).

⁶⁵ Marijus Šalčius, *Neteisėtai baudžiamojo proceso veiksmis padarytos žalos atlyginimo problematika: mokslo daktaro disertacija* [Problems of compensation of damages inflicted by unlawful actions in the course of the criminal proceedings: doctoral dissertation] (Vytautas Magnus University, 2021), 93.

⁶⁶ Ion Rusu, “European investigation order in criminal matters in the European Union. General considerations. Some critical opinions,” *Tribuna Juridică* 6.11 (2016): 56.

respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.

When deciding whether the EIO can be used in the pre-trial stage of the CAC process, the fundamental question we have to answer is whether we can assign the pre-trial stage of the CAC process to at least one of the processes provided in the Article 4 of the Directive 2014/41/EU.

Court proceedings of CAC are conducted under the CPC. In the pre-trial stage of the CAC, the Lithuanian legal acts do not specifically name according to which rules – civil or criminal proceedings – the investigation should be conducted.

The starting point for the issue here could be found in the grounds of the CAC process. All of them in one way or another are related to the criminal context, i.e. civil asset confiscation proceedings cannot be initiated without first taking one or another decision in the criminal proceedings.⁶⁷ Thus, CAC is a process that has both criminal and civil features. Even in the ECtHR there has been serious consideration as to whether certain non-conviction base recovery regimes constitute “civil” or “criminal” proceedings.⁶⁸ The practice of the ECtHR states that the confiscation measure in question was not penal but preventive in nature in accordance with the Convention’s autonomous concept of a penalty.⁶⁹ However, the position that currently dominates in the practice of the ECtHR is that non-conviction based confiscation proceedings are more in civil nature.⁷⁰ Such a position is also supported in the legal doctrine, stating that non-conviction based confiscation measures are civil actions, directed against proceeds of crime, which facilitate the forfeiture of suspected criminal proceeds, even when it has not been possible to achieve a criminal conviction. Non-conviction based confiscation emphasizes the unlawful provenance of the property, rather than the guilt of the property holder, and is generally considered to be preventive, rather than punitive, in nature.⁷¹ However, it is worth noting that this position has been criticized.⁷² It has been argued that *in rem* forfeiture cannot be “anything but punitive”.⁷³ Indeed, in the case of *Air Canada v UK*⁶¹

⁶⁷ Article 2 of the CAFL states, that: The property and the property benefit received from it may be confiscated on the grounds and in accordance with the procedure established by this Law, when there is reason to believe that the property was not obtained lawfully and the total value of the property does not correspond to the person or persons referred to in Article 2 legal income and this difference exceed the amount of 2,000 basic fines and penalties (100 000 Eur). It is presumed that the property was not obtained in a legal way when it is owned and cannot be substantiated with legal income by persons who meet at least one of the following conditions: 1) who have been suspected, accused or convicted of certain very serious, serious or aggravated crimes, provided for in CAFL (for example: bribery, fraud, smuggling, extortion, crimes related to the illegal possession of narcotic substances, etc.); 2) for whom the initiation of criminal proceedings for the crimes specified in point 1 was refused. 3) exempt from criminal liability for the crimes specified in point 1 in accordance with the procedure established by the Criminal Code; 4) who are included in the Lists of Members of Organized Criminal Groups identified by the Police Department under the Ministry of Internal Affairs of the Republic of Lithuania, drawn up in accordance with the criteria established by law; 5) who are the spouse of the person referred to in point 1, 2, 3 or 4 or a person with whom the person referred to in point 1, 2, 3 or 4 manages the household jointly.

⁶⁸ Council of Europe, *The Use of Non-Conviction Based Seizure and Confiscation*, (2020): 21 // <https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3>

⁶⁹ Also, *Webb v. the United Kingdom*, application No. 56054/00, Decision of 10 February 2004.

⁷⁰ *M v Italy*, European Court of Human Rights (1991, application No. 12386/86); *Butler v UK*, European Court of Human Rights (2002, application No. 41661/98) etc.

⁷¹ Johan Boucht, “Civil Asset Forfeiture and the Presumption of Innocence under Art. 6(2) ECHR”: 245; in: Jon Petter Rui and Ulrich Sieber (eds.), *Non-conviction-based confiscation in Europe. Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, 2015).

⁷² Colin King, “Civil Forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland,” *Legal Studies* 34(3) (2014): 371.

⁷³ Tom R. Naylor, “Wash-out: A critique of follow-the-money methods in crime control policy,” *Crime, L & Soc’l Change* 1 (1999).

the ECtHR decided by only five votes to four that seizure and then release of an airplane (upon payment of a penalty) did not constitute a fine. Judge Walsh, dissenting, pointed out that “[w]hile the condemnation is termed a decision *in rem* the penalty was levied *in personam*.”⁷⁴ In the Lithuanian legal doctrine, analyzing the relationship between the institutes of extended asset confiscation (*as an instrument of criminal justice*) and CAC, it is even stated that these institutes are considered analogous legal instruments by their nature and purpose.⁷⁵

In the context of the ongoing debate, both in jurisprudence and legal doctrine, on the legal nature of CAC, we cannot categorically state that we could not try to obtain evidence from foreign countries with the help of EIO at the pre-trial stage of this process.

The analysis shows that non-conviction based confiscation is regulated very differently in European countries. In the case of Lithuania, the fact that the initiation of the CAC process is directly determined by the procedural decisions made in the criminal process only strengthens the opinion of the authors that the application of the EIO in this process may be debatable.

In this context, it is also worth mentioning that the European Commission has submitted a consultative position to the Ministry of Justice of the Republic of Lithuania so that the EIO could be applied in the CAC process. The European Commission interpreted this position due to the autonomous concept of EU law.⁷⁶ Of course, this is not a mandatory clarification, but it does stimulate discussion on the possibility of applying the EIO.

However, in the context of ongoing disagreements as to whether civil confiscation is of a civil or criminal nature, there is a possibility that a foreign state that has received an EIO issued by Lithuania (e.g. to find assets to be confiscated) will also rise a question about the applicability of Directive 2014/41/EU in the given situation. Taking this into account, it can be assumed that a more rational way in Lithuania would be to create a legal mechanism that provides prosecutor’s right to apply to the court, asking court to obtain evidence from a foreign country, according to the procedure established in Regulation 2020/1783.

CONCLUSIONS

High-quality collection of evidence at the pre-trial stage of the investigation is the primary criterion that ensures the successful trial of the case at the judicial stage as well. Analysis of legal acts shows that the main legal tool used to collect evidence in the EU is the EIO. The tool is based on the principle of mutual recognition and a dual system of obtaining evidence. It is capable of collecting data already available in the other Member State, as well as collecting in real time. The principle of forum *regit actum*, questioned by critics, can be considered as compensated in Article 9 (part 2) that states “the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority,” as well as refuted with the relatively small number of ECJ cases, while the number of issued EIOs clearly shows its growing need and existing functioning.

⁷⁴ *Air Canada v United Kingdom*, European Court of Human Rights (1995, application No. 18465/91).

⁷⁵ Skirmantas Bikelis, “Pakartotinis įtartinio turto kilmės vertinimas – pateisinama viešojo intereso apsaugos priemonė ar žmogaus teisių pažeidimas?” (Re-evaluation of the suspicious origin of assets – a justified measure to protect the public interest or a violation of human rights?), *Kriminologijos studijos* 8 (2020): 54.

⁷⁶ Explanation of the Ministry of Justice of the Republic of Lithuania of 2024-05-14 No. (1.13 E) 7R-1626.

With the establishment of EPPO, the first possible exception is introduced in the context of the application of the EIO. EDPs have the opportunity to collect evidence (at least between 24 joined Member States) in accordance with Article 31 of the Regulation, which, in the opinion of the authors of the article, is possibly more effective than the EIO when assessing the immediate communication between EDPs both the requesting and the executing state. Nevertheless, this method of evidence collection is applied exclusively in investigations controlled by the EPPO, what means for criminal acts affecting the financial interests of the EU.

In response to changing crime trends, further new legislation (adopted in 2023) introduced a second possible exception in the context of the application of the EIO: the Electronic Evidence Package. A new tool dedicated to obtaining electronic evidence was adopted, introducing European preservation order and European production order. Introducing ambitious deadlines for the execution of such orders, but not replacing the ETO, as the new regulation allows the collection of evidence only that is already in the possession of another Member State at the time of the request. However, questioning the principle of mutual recognition as well as not establishing any kind of rules for the collection or transmission of that kind of evidence.

As in most EU countries, the Lithuanian CAC process is an important alternative legal instrument that realizes the goal that "crime does not pay". The research revealed that at the stage of judicial examination, Lithuanian legal acts provide for a wide range of legal measures that can be used to collect evidence about assets that may have been acquired from illegal activities in foreign countries. However, in order for the CAC process to reach the stage of judicial examination, evidence must be collected at the pre-trial stage of the CAC process. The analysis of legal acts showed that there are no legal means in Lithuania to obtain evidence from foreign countries in the pre-trial stage of the CAC. Two alternatives are proposed to solve this problem: 1) To change the existing legal regulation, providing for the possibility for the prosecutor to apply to the court, requesting to receive evidence from a foreign country in accordance with Regulation 2020/1783; and 2) try to obtain evidence from a foreign country using the EIO. Bearing in mind the ongoing disputes in legal doctrine and practice regarding the legal nature of CAC (civil or criminal), the first alternative is more rational. Taking into account the possible risks of questioning the applicability of the EIO in the executing state, the alternative of applying Regulation 2020/1783 would ensure uniform and imperative receipt of evidence about assets from any EU state.

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