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Transnational evidence-gathering and the extraterritorial application of criminal procedure

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1.1. Principle *locus regit actum*. The *locus regit actum* principle conventionally governs the execution of mutual assistance requests whom the judicial authorities of a State refer when they need to collect evidence in the territory of another State.

1.2. Formulation. In Europe, this principle is formulated by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. Article 3 provides that “the requested Party shall execute, in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party (...)”.

Where the requested act consists of the hearing of a witness or an expert, the 1959 Convention, however, allows the requesting Party to ask the requested Party that the witness or expert file under oath. In this case, the requested Party must comply with the request if the law of its country does not prohibit it. This rule can then lead to extraterritorial application of a criminal procedure : the requested State may have to apply a rule which is not provided by its domestic law, but which is imposed by the criminal procedure of the requesting State. However, this derogation from the *locus regit actum* principle has a very limited scope of application. The oath, like the hearing, must then be administered in accordance with the rules of the requested Party.

1.3. Justifications. Respect for the criminal sovereignty of States is the main justification given to the *locus regit actum* principle. But practical considerations also justify it, in connection with another principle of execution of requests for mutual assistance. It is a matter of principle that the acts requested in this context may be executed only by the competent authorities of the requested State. Police authorities and the judicial authorities of one State can't indeed perform acts in the territory of another State.

However, this second principle of execution by local authorities reinforces, in a certain way, the *locus regis actum* principle. The competent authorities of the requested State are in a better position to apply their own criminal procedure – a criminal procedure which they know – than the one applicable in the requesting State – a criminal procedure which they are not used to.

1.4. Disadvantages. The execution of a request for assistance by the competent authorities of the requested State and according to the law of that State presents, however, disadvantages.

1.4.1. Relevance of investigations. The execution of a request for assistance by the competent authorities of the requested State may affect the relevance of the investigations requested. For example, when a request for assistance is for the purpose of hearing a person, the authorities of the requested State do not know the file and therefore may not ask all the questions that would be useful to the judicial authority of the requesting State.

To avoid such disadvantages, article 4 of the 1959 Convention allows the authorities of the requesting State to be present at the execution of the request. Such presence implies, however, an express request in this sense and remains subject to the goodwill of the authorities of the requested State. If the requested State consents to the presence of the authorities of the requesting State, it must be seen, moreover, that these authorities may only to be present at the execution of the request, because only the local authorities can perform the requested act. This presence may nevertheless be particularly useful in making investigations relevant. In our example of a request for hearing, it can be imagined that the authorities of the requesting State may then inform the authorities of the requested State the questions to be asked to the auditioned person.

1.4.2. Value of investigations. The execution of a request for assistance in accordance with the procedural rules of the requested State may also have disadvantages. It is quite possible that a mutual assistance act carried out in accordance with the law of the requested State has a limited probative value or even is inadmissible in the requesting State, from the time when that act was not carried out in accordance with the procedural rules under the law of that State. This is why modern instruments on mutual legal assistance in criminal matters tend to question the *locus regit actum* principle, particularly within the European Union.

2.1. Forum regit actum. In order to give investigations carried out in the territory of another State than the State of prosecution a full probative value in that State, the European Union has indeed wanted to make the rule *forum regit actum* the principle of execution of requests for mutual assistance within the Union.

2.2. Formulation. This rule was originally formulated by the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union. Article 4 of the Convention provides that “Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State”. In the 2000 Convention, the requested State must therefore apply the law of the Forum and not its own law, in order to, indicates its explanatory report, “facilitate the use of the information gathered by mutual assistance as evidence in the subsequent proceedings in the requesting Member State”. A report which further states that compliance with the formalities and procedures indicated by the requesting Member State also implies for the requested Member State to authorise a representative of the judicial authorities of the requesting State or a representative of the defence to attend the testimony of a witness, in order to ensure the relevance of the investigations carried out.

Today, the rule *forum regit actum* is formulated by the directive of 3 April 2014 regarding the European Investigation Order in criminal matters. The European Investigation Order is the instrument to which the judicial authorities of a Member State of the European Union must now resort to, when they want to carry out an investigative measure in another Member State to obtain evidence. However, in order to guarantee the value of the evidence thus collected, article 9 (2) of that directive provides that “the executing authority [of a European

Investigation Ordre must] comply with the formalities and procedures expressly indicated by the issuing authority". And, in order to ensure the relevance of the investigations carried out, the same article allows, in paragraph 4, the authorities of the issuing State to be present during the execution of the European Investigation Order.

3.1. Refusal of application. The application of the law of the forum by the executing authorities of a European Investigation Order may, however, be refused in certain cases. Article 9, paragraph 2, of the 2014 directive specifies that "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority (...) provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". Fundamental principles may also lead the executing authority to refuse to allow a representative of the issuing authority to attend the execution of the investigation order, as pointed out in paragraph 4 of this article 9.

3.2. Difficulties. The application of these provisions is not without problems. The main question is when the executing authority of a European Investigation Order may refuse to apply the formalities and procedures indicated by the issuing authority, on behalf of the fundamental principles of its State.

3.2.1. Determination of the fundamental principles of the executing State. Article 9 of the 2014 Directive, as previously Article 4 of the 2000 Convention, refers to the fundamental principles of the law of the executing State, without further precision. An imprecision may lead an executing authority, unwilling to cooperate, to refuse to apply the formalities and procedures indicated by the issuing authority when they are not requested by its own law.

The French transposition provisions of the European Investigation Order are more specific on this point. Article 694-36 of the Code of Criminal Procedure allows the French authorities to refuse to carry out the formalities and procedures indicated by the issuing authority if these rules reduce "the rights of the parties and the procedural safeguards applying the fundamental principles provided for in the preliminary article" of the same Code. In the context of a European Investigation Order, the French authorities may therefore refuse to apply the procedural rules of the issuing State only if they infringe the rights of the parties and the procedural safeguards resulting from the fundamental principles laid down in this preliminary article. Which is however wide. The preliminary article of the Code of Criminal Procedure makes very numerous principles, such as the fairness and adversarial nature of the proceedings or the observance of the presumption of innocence. So many principles that are roughly those formulated by article 6 of the European Convention on Human Rights. Thus, by allowing the French authorities to refuse to execute the procedural rules of the issuing State which would be contrary to the fundamental principles formulated by the preliminary article of its Code of Criminal Procedure, article 694-36 allows the French authorities to refuse to apply a criminal proceedings which would be contrary to the European Convention on Human Rights.

3.2.2. Assessment of the quality of the criminal procedure of the issuing State. The provisions of the directive of 2014 on the application of the law of the Forum therefore raise another difficulty, which can lead the authorities of the executing state of a European Investigation Order to assess the quality of the criminal procedure of another State. One can indeed ask whether it is for the executing authority of a European Investigation Order to make such an assessment. If the criminal procedure of the issuing State does not conform to the fundamental principles of the European Convention on Human Rights, it may not be for a foreign judicial authority to say so, even implicitly by refusing to execute a European Investigation Order. Such an assessment could even lead to paradoxical situations where an executing authority would refuse the application of a procedural rule validated by the European Court of Human Rights in the name of the fundamental principles laid down by the European Convention on Human Rights.

4.1. Solutions. It may therefore be asked whether the *forum regit actum* rule is the solution to the difficulties of gathering evidence in the territory of another State that the prosecuting State. This rule is based on the assumption that there are significant divergences between the criminal procedures of States. In order to prevent these divergences rendering inadmissible or reducing the value of the evidence collected in the territory of another State, the authorities of that State are asked to apply another procedure than his own. Such an application may appear more appropriate if the criminal procedure of the executing State is similar to that of the issuing State or, at the very least, respects common principles.

It is to such a rapprochement that we have been witnessing in the European Union since the entry into force of the Lisbon Treaty. In order to facilitate mutual recognition of judgments and judicial decisions – the principle on which the European Investigation Order is based – article 82 (2) Treaty on the Functioning of the European Union allows the Union to establish minimum rules concerning the rights of individuals in criminal procedure. And several directives have been adopted since by the European Union – on the right to interpretation and translation (2010), on the right to information (2012), on the right of access to a lawyer (2013), or on the presumption of innocence (2016) – which participate in the establishment of a common base of procedural rights and safeguards within the European Union. A common base which may therefore render moot the provisions which allow the executing authority of a European Investigation Order to refuse to apply the formalities and procedures indicated by the issuing authority in the name of its fundamental principles. A common base which may also render unnecessary the execution of a European Investigation Order in application of the procedural rules of the issuing State, in other words to render unnecessary the extraterritorial application of the criminal procedure in transnational evidence-gathering.