Third Study Commission Questionnaire 2023 Taiwan

ITALY

For 2023, the Third Study Commission, which focuses on Criminal Law, decided to study "Mutual cooperation in the investigation of criminal cases and in the presentation of evidence".
In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.

In the Italian legal system, the relationship of judicial assistance can be established either based on a ratified and enforceable convention or through established practice with the country requesting or to which a judicial act is requested, as often occurred with common law countries.
Outside of these cases, the relationship of assistance can always be established based on the so-called principle of non-conventional reciprocity, which allows requests to be made based on the specific situation and according to international practice, with the intention of regulating future requests made by the requested State in a similar manner.

The main instrument used for requesting assistance is the international letter rogatory, which may involve communications, notifications, and evidence gathering activities.
The term "evidence gathering" should be understood broadly, as it includes both the acquisition of evidence in a strict sense and the transmission of investigative acts by the Prosecutor.
In some cases, it is also possible to carry out activities not aimed at criminal proceedings but aimed at establishing a fact sanctioned only from an administrative point of view (Article 49 of the Schengen Agreement).

As for the relevant sources, some conventions have been concluded outside Europe, such as the Italy-Switzerland Agreement of 1998 and the Treaty on Mutual Legal Assistance between Italy and the USA of 1982.

There are numerous sources of EU or ECHR law in the field of judicial assistance and cooperation in criminal matters. Among these, the following deserve to be mentioned:

- European Convention on Mutual Assistance in Criminal Matters signed in Strasbourg on April 20, 1959.
- Schengen Agreement signed by the Italian State on November 27, 1990, and ratified by Law No. 388 of September 30, 1993.
- Implementation Convention for the Schengen Agreement of October 7, 1997.
- Council Framework Decision 2002/584/JHA of June 13, 2002, on the European Arrest Warrant implemented in Italy by Law No. 69 of April 22, 2005.

- Council Framework Decision 2002/187/JHA of February 28, 2002, establishing Eurojust.
- Europol Convention of the Council of Europe of July 26, 1995, ratified in Italy by Law No. 93 of March 23, 1998.
- Community Decision of April 28, 1999, establishing OLAF.
- Common Action adopted by the Council of Europe on April 22, 1996, establishing liaison magistrates.
- Common Action of June 29, 1998, adopted by the Council of Europe based on Article K.3 of the Treaty on European Union (98/428/JHA) establishing the European Judicial Network.
- Council Framework Decision of June 13, 2002 (2002/465/JHA) on joint investigation teams.
- Agreement between the European Union and the United States of America signed in Washington on June 25, 2003.
- Directive 2014/41/EU of the European Parliament and of the Council of April 4, 2014, on the European Investigation Order, implemented by Legislative Decree No. 108 of June 21, 2017.
- Council Regulation (EU) 2017/1939 of October 12, 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).
- Directive 2017/1371 of the European Parliament and of the Council of July 5, 2017, on the fight against fraud to the Union's financial interests by means of criminal law, implemented by Legislative Decree No. 75 of July 14, 2020.

Policies regarding judicial cooperation in criminal matters are still under development, particularly to intensify the fight against transnational crimes.

The regulations provided by the Code of Criminal Procedure (Articles 696 et seq. CCP) are subsidiary and residual compared to international conventional or European Union regulations (the latter being particularly significant and having significantly increased in recent years due to the creation of a common area of freedom, security, and justice within the EU).

2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

The form of a letter rogatory depends on the country to which it is addressed and the assistance sought. Some countries have statutory guidelines for granting assistance.

The requesting or requested Judicial Authority can play a prominent role in transmitting requests related to the needs of investigative and/or evidentiary acquisition or in transmitting requested information from the Judicial Authority of another State.

Regarding international letters rogatory, there are three communication channels with the foreign State: the diplomatic channel (the traditional mode of transmission, which involves sending the request to the Ministry of Foreign Affairs, which, upon the invitation of the Minister of Justice, sends the request and provides directives and instructions to the diplomatic representation in the foreign State); correspondence between Ministers of Justice; direct transmission, provided for by numerous conventions, between the relevant Judicial Authorities.

For countries adhering to the Schengen Agreement, however, direct communication between Judicial Authorities is provided, with only information being provided to the Minister of Justice.

Article 53, paragraph 1, of Law No. 388 of September 30, 1993, which ratified the Schengen Agreement, expressly provides that requests for judicial assistance can be made directly between magistrates, and responses can be sent in the same manner.

Within EU law, the European Investigation Order (EIO) is particularly significant as a judicial decision issued or validated by the judicial authority of an EU country to obtain investigative acts carried out in another EU country to gather evidence in criminal matters.
The EIO, regulated in the Directive of April 3, 2014, is based on the principle of mutual recognition: the executing authority is required to recognize and ensure the execution of the request made by the other country. The execution must be carried out using the same methods that would be followed if the investigative act were ordered by an authority of the executing State. An EIO can also be issued to obtain existing evidence. It must be necessary, proportionate, and permitted in similar national cases.

3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

In general, according to international conventions, for international letters of request, the principle of *lex loci* applies, which implies the application of procedural rules of the state in which the act is performed, constituting a typical exercise of the sovereignty of the requested state.
However, evidence cannot be obtained in violation of the fundamental principles of the Italian legal system, including the right to defense.
The most contentious issue, therefore, concerns the identification of the essential core of defense rights that must be respected for the act to be admissible.

The concrete modalities of the right to defense are governed by the law of the state in which the act is performed, which can modulate the right to defense variably depending on procedural aspects, even considering it guaranteed by the mere assistance and representation of the defense counsel. For example, the Italian Court of Cassation has deemed valid acts performed in the absence of the victim, as the participation of the interested party in the collection of evidence in a foreign country, even in the presence of an express request from the Italian judge, does not entail any nullity or inadmissibility.
In other words, inadmissibility cannot arise solely from the non-observance of the internal rules of the requesting country.

Furthermore, international sources allow for the supplementation of the procedural modalities of the requested state with other necessary forms according to the law of the requesting state, provided that these additional modalities do not conflict with the fundamental principles of the law of the requested state. In any case, our code of criminal procedure - whose rules apply, as previously mentioned, subsidiarily in the absence of other governing sources - expressly establishes in Article 729, paragraph 2, that if the foreign state executes the request for assistance differently from what is indicated by the judicial authority, the acts performed are inadmissible only in cases where inadmissibility is provided for by Italian law.

It is also possible for certain acts and documents to be spontaneously and autonomously handed over by a foreign authority to the Italian authority. In such cases, transmission does not necessarily have to occur through a letter rogatory, as cooperation between different police forces is provided for by international legislation.

4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.

Letters rogatory can concern the citation of witnesses and experts residing or staying abroad.

The appearance of the witness or expert is generally not coercible, even when the persons to be heard or confronted are detained in the requested state.

It should be clarified that in the Italian legal system, testimony refers only to statements given in the adversarial process between the parties. Statements made during the investigation phase - which can also be requested by the Public Prosecutor through a letter rogatory or a European Investigation Order (EIO) - must be confirmed during the trial phase.

For this purpose, the person heard may either appear directly or be heard by the foreign authority, which will transmit the minutes of the statements to the Italian judicial authority.

As mentioned earlier, the *lex loci* applies, meaning the set of procedural rules of the state where the act is carried out. Exceptions regarding non-compliance with internal procedural rules, therefore, must be rejected in cases where the essential rights of the party concerned are guaranteed and any additional procedural requirements imposed by the requesting state are met.

It is possible to derive evidence from statements made during the investigation by a person residing abroad in cases of absolute impossibility of repetition (for example, the death of the declarant).

According to case law, the acquisition of minutes of statements made during the investigation by a person residing abroad should be considered as an "*extrema ratio*," deviating from the general principles regarding inadmissible evidence, and requires the judge to conduct a rigorous preliminary examination: verifying the correct citation of the person residing abroad, the existence of a cause of absolute and objective impossibility to obtain the testimony itself, as well as the impossibility of examining the witness through an international letter rogatory.

The death of the declarant or their serious health condition allows for the admissibility of pre-trial statements as evidence, acquired under Article 512 of the Code of Criminal Procedure, without violating Article 6 of the European Convention on Human Rights (ECHR), provided that a conviction verdict is based exclusively or significantly on them, as neither the subsequent death nor the serious health condition of the declarant can be linked to an intent to evade cross-examination during the trial.

5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.

For the judge, it is important to verify the legal conditions of the request and the specific manner of carrying out the act.

It is essential to respect the fundamental rights of the party concerned, as recognized by the Constitution, the Code of Criminal Procedure, and supranational sources.

Regarding the so-called natural law, it has been partially incorporated by the legislator, so it can be affirmed that natural law should be considered, provided it is supported by positive legal sources or general principles, even if unwritten, of the legal system.

Similarly, the concept of equity, in a broad sense as procedural fairness, can be affirmed.

Our legal system recognizes rights such as the right to dignity and freedom of self-determination, so the gathering of evidence must take place without violating modesty and should be free, uncoerced, and not unduly influenced.

The entire procedural system is permeated by the right to a fair trial governed by the law (Articles 25, 111 of the Constitution; Article 6 of the European Convention on Human Rights), in its various aspects: respect for adversarial proceedings, equality of arms, impartiality and neutrality of the judge, reasonable duration, right to understand the proceedings, right to be promptly informed of the charges, right to have sufficient time and conditions to prepare the defense, right to question or

have questions posed to individuals making accusatory statements, and the right to be heard under the same conditions as the prosecution. The "same conditions" may not always correspond exactly to the procedural conditions provided in the state where the act takes place, as there is a general obligation to apply the *lex loci* for evidentiary acts carried out abroad.

6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

In the scope of my personal experience, I have had the opportunity to deal with requests concerning individuals subject to a European Arrest Warrant or extradition and detained in Italy for reasons unrelated to the conviction being sought for extradition by the foreign state.
In these cases, the foreign judicial authority requests the Italian judicial authority to hear the detained individual. The request is transmitted by the competent Public Prosecutor's Office to the supervisory magistrate, who must set the date and time of the hearing – which can take place either in person or via video link with the prison facility – through a decree containing the notice of summons to be notified to the party and their defense counsel.
The appointment of an interpreter may be necessary in cases where the detained individual does not understand or sufficiently speak the Italian language. Indeed, even in the enforcement phase, the rules set out in Articles 143 et seq. of the Code of Criminal Procedure apply, as amended following the transposition of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.

It is important to explain to the convicted person the reason why a foreign judicial authority requests consent for the extension of extradition or the waiver of the principle of specialty. Often, regardless of language issues, the cultural level of the convicted individuals is not sufficient to fully comprehend the stakes involved.

Another area of international criminal judicial cooperation that I have explored involves the possibility of serving a sentence abroad. This possibility arises from the broader principle of mutual recognition of judgments of conviction.
With the approval of the Strasbourg Convention of 21 March 1983 on the Transfer of Sentenced Persons, ratified by Italy with Law No. 334 of 25 July 1988, the Council of Europe established a transfer procedure applicable to all states, for the execution of a sentence in the convict's country of origin, where their emotional and work interests are based, and where the purposes of rehabilitation and reintegration into their social environment can be better pursued.

The conditions for transfer are : the sentenced person is a citizen of the executing state; the judgment is final; the remaining duration of the sentence is at least six months at the time of receiving the transfer request; the offense for which the sentence was imposed is punishable both in the issuing and executing states (principle of double criminality); consent to the transfer is required from the sentenced person or their legal representative; the sentencing state and the executing state must agree on the transfer.

The Convention provides that transfer requests must be made in writing and addressed by the requesting state's Ministry of Justice to the requested state's Ministry of Justice, and the responses must be communicated through the same channels. However, the Convention also allows each Party

to indicate, by a declaration addressed to the Secretary General of the Council of Europe, that it will use other means of communication.

Within the EU member states, the sentence can also be served in a foreign state through so-called alternative forms. According to consistent case law, the only permissible measure is "*affidamento in prova al servizio sociale*" (a sort of probation), as it is the only measure considered compatible with the European framework.
Relevant sources include Framework Decision 947/2008/JHA of 27 November 2008 and the related implementing legislative decree (Legislative Decree 15 February 2016, No. 38), as well as the Circular of the Ministry of Justice - Department of Juvenile and Community Justice, dated 15 April 2021, which provides detailed regulations.

The freedom of movement within the EU member states should not hinder the execution of a sentence in cases where the convicted person has a permanent residence and stable employment in another member state.

The legislation provides that once the decision granting the alternative measure has been issued, in the form of an order from the supervisory court, it is transmitted to the Public Prosecutor's Office at the competent enforcement court. The Public Prosecutor must issue a certificate, the minimum contents of which are indicated by law (Annex I of Legislative Decree 38/2016), which must be transmitted to the Ministry of Justice. The Ministry, in turn, must transmit the documents to the executing state, which must give consent to the so-called transfer of supervision.
Therefore, the authorities of the foreign state will ensure compliance with the prescriptions imposed by the Italian judicial authority, which remains competent to declare the sentence extinguished in the event of a successful benefit outcome or to revoke it in the event of poor progress.