



The practice of “direct videoconferences” for the taking of testimonial evidence in cross-border cases

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Abstract

During the COVID-19 pandemic, European States developed a practice of conducting cross-border videoconference hearings concerning individuals located abroad without the involvement of the judicial authority of the State in which they were present. These so-called “direct videoconferences” allow the trial State to contact the defendant, expert or witness in the absence of an EIO or MLA request, relying solely on their consent. The practice was discussed in the European Judicial Network and referred to the Court of Justice of the European Union in cases C-255/23 and C-285/23. It was later addressed by the Council of the European Union in evaluating Member States’ implementation of the EIO Directive. Legislative initiatives within the broader European legal framework have also raised questions regarding its legitimacy. This article examines the compatibility of direct videoconferences with the principle of territorial sovereignty and fundamental rights, arguing that procedural forms governing cross-border evidence gathering are essential safeguards of fairness and procedural integrity, rather than mere formalities.

Key words

Direct videoconferences, judicial cooperation, European Investigation Order.

Resumen

Durante la pandemia de COVID-19, los Estados europeos desarrollaron la práctica de celebrar vistas transfronterizas por videoconferencia con personas que se encontraban en el extranjero sin la participación de la autoridad judicial del Estado en el que se encontraban. Estas denominadas “videoconferencias directas” permiten al Estado en el que se celebra el juicio ponerse en contacto con el acusado, el perito o el testigo sin necesidad de una orden de investigación europea (EIO) o una solicitud de asistencia

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judicial mutua (MLA), basándose únicamente en su consentimiento. Esta práctica se debatió en la Red Judicial Europea y se remitió al Tribunal de Justicia de la Unión Europea en los asuntos C-255/23 y C-285/23. Posteriormente, fue abordada por el Consejo de la Unión Europea al evaluar la aplicación de la Directiva sobre la orden de investigación europea por parte de los Estados miembros. Las iniciativas legislativas en el marco jurídico europeo más amplio también han suscitado dudas sobre su legitimidad. Este artículo examina la compatibilidad de las videoconferencias directas con el principio de soberanía territorial y los derechos fundamentales, y sostiene que las formas procesales que rigen la obtención transfronteriza de pruebas son garantías esenciales de equidad e integridad procesal, y no meras formalidades.

Palabras clave

Videoconferencias directas, cooperación judicial, orden europea de investigación.

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1. Introduction

In the context of the COVID-19 pandemic, several European States developed a questionable practice concerning the use of audiovisual links, whereby individuals located abroad were heard without involving the judicial authority of the State in which they were present. This practice has been referred to as “direct videoconferences”, namely videoconference hearings in which the person to be examined is contacted directly via a link sent by the judicial authority of the State where the proceedings are pending². Such hearings take place remotely through any device capable of transmitting audio and video, without issuing a European Investigation Order (EIO) or a request for Mutual Legal Assistance (MLA). The procedure is therefore considered completed on the basis of the sole consent of the person giving evidence.

Despite its significant practical implications, this phenomenon has received limited attention in legal scholarship. This article seeks to fill that gap by examining it from a strictly legal-dogmatic perspective grounded in criminal procedural law.

From a methodological standpoint, the analysis follows the chronological development of direct videoconferences, assessing each stage of their evolution in light of the relevant case law, legislative sources, and academic debate. The initial focus is confined to the legal framework of the European Union, ranging from the outcome of the 57th plenary meeting of the European Judicial Network (§ 2) to the references for a preliminary ruling made to the Court of Justice of the European Union (CJEU) in cases C-255/23 (*AVVA and Others*) and C-285/23 (*Linte*) (§ 3). Subsequently, a dedicated section reviews the evaluations carried out by the Council of the European Union on the implementation of the European Investigation Order Directive by Member States, an aspect that has so far remained largely unexplored in the existing literature (§ 4). The inquiry then broadens to encompass the most recent legislative initiatives undertaken within the Council of Europe framework (§ 5), with the aim of providing as comprehensive an account of the phenomenon as possible.

Against this background, the paper explores the compatibility of direct videoconferencing with the safeguards surrounding the gathering of testimonial evidence abroad, encompassing both respect for the principle of territorial sovereignty and the protection of fair trial rights. It argues that these safeguards constitute non-derogable limits on the exercise of judicial authority outside the trial State. Their binding nature cannot be affected by the consent to the hearing obtained from the person concerned, by any notification of the ongoing investigative measure to the executing State, or by considerations of efficiency invoked in support of direct videoconferences.

The ultimate purpose is to reaffirm the centrality of the procedural rules governing judicial cooperation, which should not be reduced to a matter of mere formalities (§ 6), as they serve to protect the fundamental values underpinning the judicial taking of evidence in cross-border cases.

The article concludes with a brief summary of the main findings of the research (§ 7).

² It should be noted from the outset that, from a terminological perspective, the terms “direct videoconferences” and “direct videoconferencing” will be used interchangeably throughout this article.

2. Initial doubts as to the legitimacy of the practice: The position of the European Judicial Network

The phenomenon of direct videoconferences became sufficiently widespread to be discussed during the 57th plenary meeting of the European Judicial Network, held in Slovenia on 18-19 October 2021, which resulted in the document entitled *Hearing by videoconference without the involvement of the executing Member State* (14448/21) (Council of the European Union 2021). On that occasion, attention was drawn to the growing popularity of direct videoconferences in the wake of the public health emergency, when many States permitted individuals to be heard in domestic proceedings by simply sending a link allowing them to join the hearing remotely without intermediaries.

This raised the question whether such a mechanism could be transposed to the field of judicial cooperation, particularly where the remote participant — be it a defendant, victim, witness or expert — had consented to the videoconference. Three main reasons were therefore identified as justifying the involvement of the executing State in the organisation of the audiovisual connection:

1. ensuring the technical means necessary for the videoconference to function;
2. summoning the person to appear at the videoconference and, where necessary, resorting to coercive measures should they fail to attend;
3. respecting the territorial sovereignty of the State in whose territory the individual is located.

It is striking that the main task incumbent upon the executing authority in the implementation of a European Investigation Order — to verify compliance with the fundamental principles of its legal system pursuant to Article 24(5)(b) of Directive 2014/41/EU — is not even mentioned. Yet the presence of representatives of the foreign State at the remote site constitutes an important safeguard for key guarantees of a fair trial. Among these are the interviewee's freedom of self-determination, the right to silence and the rights of defence (Daniele 2012, Kostoris 2018a, Bolognari 2022). It also contributes to ensuring the regularity and reliability of procedural activities carried out via videoconference. In this respect, as observed by Kostoris (2018b), the fundamental principles of *lex loci*³ operate as a sort of “counter-limit”, which the executing State may invoke against the issuing State to protect a non-derogable sphere of its own sovereignty.

However, this central aspect is overlooked in the document, which proposes a solution aimed at circumventing the three conditions that would otherwise make the involvement of the executing State indispensable. According to this view:

1. technical assistance provided by the executing State would rarely be necessary, since individuals almost everywhere now possess a device enabling them to participate remotely in proceedings;
2. there would be no need to exercise coercive powers over a person who consents to the use of the video link and the intervention of a foreign authority might even prove disproportionate and inefficient;

³ *Lex loci* is a legal expression used to designate the law of the State in which the evidence to be acquired is located, as opposed to *lex fori*, which denotes the law of the trial State.

3. the sovereignty of the executing State would not be infringed, since it could simply be notified that a videoconference hearing is taking place on its territory at the initiative of the issuing State. This would follow a mechanism already provided for in Article 31 of Directive 2014/41/EU in relation to the interception of communications carried out without the cooperation of the State where the investigative measure takes place.

It was further argued that organising an audiovisual link is not comparable to conducting a search, seizure or even an interception requiring the cooperation of another Member State. Finally, at least within the European Union, the principles of mutual trust and mutual recognition were invoked as an additional justification for endorsing the practice of direct videoconferences.

It is paradoxical that the document relies on these principles to justify an exception to the rules governing videoconference hearings laid down in the EIO Directive, which itself is founded — albeit not in absolute terms — on the principles of mutual trust and mutual recognition (Bachmaier Winter 2025).

Far from reinforcing mutual trust, this approach appears to undermine it by depriving the executing authority of any role in an investigative measure carried out within its own territory by the judicial authority of the trial State. Rather, the principle of sincere cooperation between Member States is rooted in the shared observance and mutual respect for the procedural framework established by secondary EU legislation harmonising national legal systems, not in departing from it. As will be discussed in greater detail below, compliance with these conventionally established requirements cannot be reduced to a mere question of the technical adequacy of videoconferencing equipment (§5), nor can it be overcome through the consent of the person to be heard (§6).

Furthermore, under the position set out in the document, notification of the direct videoconference to the foreign authority should precede the hearing of the person concerned, pursuant to Article 31(1)(a) of Directive 2014/41/EU. Indeed, at the moment the measure is executed, the issuing State is likely to be aware that the person to be examined is located in the territory of another Member State. Under Article 31(3), the notified State would retain the power to oppose the taking of the evidence or to make its use subject to conditions if it has already been obtained. This could occur either in the light of the national rules implementing the Directive or for the protection of the fundamental principles of the legal order of the notified State. That margin of opposition should be extended beyond the 96-hour limit laid down for interceptions, since that time limit is calibrated to the particular nature of covert surveillance and cannot be applied by analogy to videoconferences. Unlike interceptions, the notified State should also be able to object to the remote hearing being conducted as a direct videoconference and request that it instead follow the “ordinary” model of videoconferencing envisaged by the European legislator. In such a scenario, the distorted practice of direct

videoconferences would risk producing nothing more than an unnecessary procedural burden.⁴

Despite these rather bold premises, the conclusion reached at the end of the meeting of the European Judicial Network was fortunately that “the absolute majority of the Member States do not approve the possibility to interview a person from abroad directly through a video link without sending a European Investigation Order or MLA request to the country in question. Even Member States that generally have a more liberal position admit that such a possibility would be very advanced and therefore further in-depth analysis would be needed”.

Although the European Judicial Network continues to encourage the development of a more modern framework for transnational videoconferencing, it remains aware of the risks associated with it. For the time being, its use therefore remains subject to the issuance of a European Investigation Order or a request for Mutual Legal Assistance.

3. The preliminary references to the Court of Justice of the European Union in the joined cases C-255/23 (*AVVA and Others*) and C-285/23 (*Linte*)

The practice of direct videoconferences did not cease despite the recommendations of the European Judicial Network. Instead, it eventually came before the Court of Justice of the European Union through the Economic Affairs Court of Latvia (*Ekonomisko lietu tiesa*) in the joined cases C-255/23 (*AVVA and Others*) and C-285/23 (*Linte*).

In both cases, the Latvian court sought not so much to examine a defendant residing abroad remotely as to allow that person to participate in their trial by videoconference. Such instances nevertheless reveal a certain reluctance among national courts to accept rules limiting State powers in cross-border situations, which require the involvement of the judicial authorities of the executing State in the holding of videoconferences.

More specifically, in the earlier case C-255/23 (*AVVA and Others*), the Court is called upon to assess whether national legislation allowing a defendant residing abroad to participate in the trial by videoconference is compatible with EU law. The issue arises where such participation occurs without the adoption of a European Investigation Order and in the absence of any questioning of the accused (Articles 1(1), 6(1)(a) and 24(1) of Directive 2014/41/EU). The remote hearing could be held only if it is ensured that the authority conducting the proceedings in the trial State can, through technical means, verify the identity of the accused abroad and guarantee the rights of defence and the assistance of an interpreter.

If the answer to that question were affirmative, the next issue would concern the role of the defendant’s consent to virtual participation: namely whether the expression of consent constitutes an undefined “independent or supplementary criterion” or rather an equally uncertain “prerequisite” for allowing the defendant to attend the proceedings remotely (§ 21(2)).

⁴ Conversely, if the information step just described, together with its consequences, were omitted, notification to the Member State would lose its essential function of safeguarding State sovereignty, as recalled by the German *Bundesgerichtshof* in its decision of 2.3.2022. See also Wahl 2022.

By contrast, in the reference for a preliminary ruling in case C-285/23 (*Linte*), the Court raised the question of the necessity for such participation to be carried out through the competent authorities of the other Member State, once it is accepted that the right of the accused to be present at their trial under Article 8 of Directive 2016/343/EU includes the possibility of participating via videoconference.

In line with the approach described above, the State conducting the proceedings could otherwise communicate directly with the accused located in another country and simply send them a link enabling participation in the videoconference. At the very least, the Latvian court expressed doubts as to the consistency of excluding the State of residence of the accused from the organisation of the videoconference with the Area of Freedom, Security and Justice.

Unfortunately, the Luxembourg Court did not rule on the merits of the issues referred to it for purely procedural reasons. The Court ultimately held that there was no need to give an answer to the questions submitted to it, since the national courts had not stayed the proceedings in either case but had instead gone ahead with the hearings. As the evidence examined by the referring courts constituted the basis of the charges against the accused, the Court found that the procedural steps already taken had deprived the questions concerning the defendant's participation in the proceedings of both their purpose and relevance. This meant that the Economic Affairs Court of Latvia could have continued the proceedings without awaiting the outcome of the preliminary ruling procedure and potentially even reached a different conclusion from that eventually adopted by the Court. The judgment therefore emphasised that the Court of Justice cannot issue decisions of a purely advisory nature and concluded that there was no need to address the requests.

Some commentators (Brodowski and Szabó 2024) have nevertheless argued that it would have been preferable for the Court to reject the practice of direct videoconferencing on the merits. Consistent with the argument advanced in this article, they emphasise that such a method of taking evidence risks undermining both the principle of territorial sovereignty and the principle of mutual recognition on which the EIO Directive is founded. At the same time, however, they point out that the Latvian requests for a preliminary ruling do not even appear to envisage notification of the direct videoconference to the executing Member State. In their opinion, this leaves open the possibility that the practice might be considered lawful where, hypothetically, the person to be heard is a national of the trial State. For the reasons already set out in the previous section (§2), mere notification of the investigative measure cannot be regarded as a valid basis for legitimising direct videoconferences, irrespective of the nationality of the person to be examined.

Taken together, these references to the Court of Justice highlight the clear risk that direct videoconferences may continue even beyond the end of the pandemic.

4. The Council of the European Union's evaluation on the implementation of Directive 2014/41/EU in national legal systems

Against this background, the debate on the issue resurfaced with considerable intensity during the evaluations conducted by the Council of the European Union regarding the

transposition of the Directive on the European Investigation Order into national legal systems.

Particularly noteworthy are two statements made by national delegations in the final report issued by the Council of the European Union (15834/24). According to one delegation, the judicial authority ordering the videoconference might not even be aware that the person giving evidence is connecting from the territory of another Member State where they are temporarily located. Another delegation observed that direct videoconferencing would constitute a voluntary and conscious form of cooperation by the individual, comparable to a case in which a witness or suspect abroad simply sends documents by e-mail to the investigating authority.

The first scenario, for instance, appears to be precluded under Italian law. Italy was among the first Member States to introduce videoconferencing into criminal proceedings (1992) and, more recently, one of the European jurisdictions to undertake a comprehensive reform of the rules governing remote procedural acts and hearings (2022). This makes the Italian legal framework a particularly valuable point of comparison for assessing the extent to which direct videoconferences may — whether intentionally or inadvertently — become established in domestic legal systems.

Pursuant to Article 133-ter(8) of the Italian Code of Criminal Procedure, the clerk assisting the judge or the public prosecutor “*dà atto [...] delle cautele adottate per assicurare la regolarità dell’esame con riferimento al luogo in cui la persona si trova*”.⁵ Such verification must also be carried out where the person is authorised to connect from a place other than a judicial or police office, unless the judicial authority provides otherwise under paragraphs 6 and 8 of the same provision. The risk of inadvertently establishing a transnational videoconference must therefore be carefully considered when determining the location from which the person connects, particularly in light of the options made available by recent legislative reforms in Italy, notably Legislative Decree No. 150 of 10 October 2022⁶. A certain degree of imprudence could lead not only to a violation of the territorial sovereignty of another State but also to legitimate objections concerning the legality of evidence gathered abroad in an irregular manner.⁷

The second justification mentioned by one of the national delegations raises fewer difficulties. It essentially conflates the taking of evidence with the production of evidence already in existence, suggesting an unwarranted overlap between sending documents

⁵ I.e., the prosecutor must record the precautions adopted to ensure the regular conduct of the examination with regard to the place where the person is located.

⁶ Livi (2025, 218) calls for greater limitation of judicial discretion in authorising connections from places other than a judicial or police office; direct videoconferences intensify the concerns expressed by Di Bitonto and Cascone (2024), regarding the physical separation of participants in criminal proceedings through audiovisual links and its impact on the judge’s ability to safeguard the freedom of self-determination of the person providing evidence; moreover, given the intrinsic limitations of camera framing, the recording of a direct videoconference would not in itself be sufficient to dispel doubts about the absence of pressure on the witness: see also Bolognari (2023).

⁷ However, there are reasons to fear that Italian case law might revive an earlier judicial approach in order to neutralise the provision requiring the presence of a clerk assisting the judge at the remote site, where authorisation to carry out the act in a place other than a judicial or police office under Article 133-ter(6) and (8) of the Italian Code of Criminal Procedure has been granted erroneously: see, in this regard, Cass. pen., Section I, 1.7.2002, no. 25053; Cass. pen., Section I, 8.6.2004, no. 25662; more recently, Cass. pen., Section VI, 2.7.2025, no. 24338, concerning a direct videoconference conducted from Romania.

to a judicial authority and giving testimony before it. Nor should it be overlooked that the spontaneous transmission of documents is not equivalent to voluntarily submitting to a transnational virtual hearing, which — even in its “direct” form — presupposes a prior request from the investigating authority that may or may not subsequently be accepted by the person concerned.

In addition, the violation of the principle of territorial sovereignty arises only in the case of a direct remote hearing, not in the case of the production of documents. The latter does not entail the exercise of judicial powers within the territory of another Member State, but merely the disclosure of material already in the possession of the person who decides to provide it to the authority.

In its final assessment, the Council acknowledged the practical advantages of direct videoconferences. However, it considered them to be “not in line” with the provisions of the Directive on the European Investigation Order and capable of infringing the principle of State sovereignty, as several national delegations emphasised. In light of this, and given the silence of the Court of Justice on the matter, the evaluators “recommended that the Member States concerned reconsider the practice of hearing persons located in another Member State via videoconference without issuing an EIO” (§ 12.3.3).

The foregoing considerations apply *a fortiori* to direct teleconferences, which follow the same pattern as direct videoconferences, the only difference being that the examination is conducted exclusively by telephone. As noted in its evaluation report, Lithuania has made frequent use of this technique.⁸

A similar practice has been reported in Spain, which has received numerous requests from Sweden for witnesses located in Spanish territory to be heard by telephone. Sweden often resorts to this method of taking evidence — even without issuing a request for international judicial assistance — provided that both the State where the person is located and the person concerned consent. In such cases, the Swedish authority merely seeks the permission of the Spanish authority to place the call and obtain the witness’s statement. It has nevertheless been correctly observed that the Spanish authorities cannot comply with requests to hear a witness by telephone, since this type of measure is not provided for under domestic law. Instead, they must inform the issuing authority of this circumstance and indicate the possibility of converting the request into a videoconference hearing (Morán Martínez 2021).

Criticism has also been directed at the practice followed by Finland and Sweden of organising videoconference hearings through simple e-mail contact, without the prior issuance of a European Investigation Order (see Council of the European Union, *Evaluation report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO) — Report on Finland*).

⁸ See Council of the European Union, *Evaluation report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO) — Report on Lithuania*; the *Explanatory Report* to the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union had already taken care not to affect “the existing practice in certain Member States whereby a person is heard by telephone from abroad as a witness, if necessary at consular premises, without the assistance of the Member State in which he or she is present”.

In broader terms, north-eastern European and Scandinavian States appear more inclined towards direct videoconferencing. Estonia, for example, justifies this position on the ground that the hearing should be regarded as having taken place in Estonian territory, since the Estonian judicial authority never leaves the territory of its own State. The evaluators of the Council of the European Union rightly observed that “if that reasoning had to be followed, a large part of the Directive would become obsolete given the technological possibilities that are at our disposal”. The report also reveals a further questionable practice adopted by Estonia, namely requesting from the foreign authority, during the execution of a duly issued EIO, the contact details of the person giving evidence (i.e. telephone number and e-mail address). In this way, an “official” videoconference may later be followed by a direct videoconference.⁹

The fact that the initial videoconference is conducted in compliance with the applicable legal requirements cannot, by itself, remedy the unlawfulness of the subsequent examination carried out in the form of a direct videoconference. Rather, this strategy seeks to circumvent the principle of legality or, more precisely, to conceal its infringement behind the performance of an investigative measure that is — at least initially — lawful.

5. Recent legislative developments within the Council of Europe framework: Towards the formalisation of direct videoconferences

Despite the concerns expressed by EU institutions, attempts have nevertheless been made to formalise direct videoconferencing within the broader European legal framework. These efforts have taken the form of recent legislative instruments introduced under the auspices of the Council of Europe dealing with audiovisual connections in cross-border criminal cases.

In particular, reference should be made to the Second Additional Protocol to the Budapest Convention on Cybercrime and the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

Although the analysis has thus far been confined to the European Union’s Area of Freedom, Security and Justice, it is now appropriate to extend the discussion to the measures adopted within the framework of the Council of Europe for at least two reasons:

1. these instruments represent the first attempt to provide a legal basis for direct videoconferences, previously limited to inter-State practice;
2. the European Union has already authorised, or intends to authorise, its Member States to ratify these Council of Europe instruments, thus endorsing the rules they contain, including those governing direct videoconferences.

Accordingly, the discussion turns to Article 11 of the Second Additional Protocol to the Budapest Convention on Cybercrime. This provision grants States broad discretion in determining the conditions under which remote hearings are to be conducted (Tognazzi 2021, Murro 2022, Galgani 2024). As stated in the *Explanatory Report* (CETS no. 224,

⁹ For an overview of the practices currently followed in Estonia, see Council of the European Union, *Evaluation report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO) — Report on Estonia*.

Strasbourg, 12.5.2022), these conditions could include whether or not a judicial officer of the requested State must be present during the hearing. The supranational legislator therefore seems to open the way for a form of direct videoconferencing lacking the supervision of the requested judicial authority, albeit preceded by a formal request for assistance from the trial State.

The Council of the European Union authorised the Member States to ratify the Second Additional Protocol by means of Decision (EU) 2023/436 of 14 February 2023.

Likewise, Article 10(9) of the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters establishes a similar mechanism, based on the possibility for States to agree on the modalities for conducting remote hearings through arrangements binding only on the parties.

The *Explanatory Report* (PC-OC(2024)07rec, Strasbourg, 14 November 2024) clarifies how such agreements may operate. It explains, for example, that the requested State may propose dispensing with the presence of its judicial authorities during a remote hearing, subject to certain conditions and with the consent of the requesting State. This is intended to reduce the burden otherwise placed on the courts of the requested State.

The Report also refers to situations in which a witness or expert agrees or volunteers to give evidence and no particular concerns arise regarding the protection of their rights. In such circumstances, and in order to reduce the burden on the requested State, the hearing would probably take place at the witness's private residence or another location different from the offices of a foreign judicial authority. These settings may be ill-suited to guaranteeing the judicial nature of the act and compliance with procedural safeguards.

Indeed, it is further provided in the Report that the term "competent authorities" used in the provision should not be interpreted restrictively as referring solely to "central authorities", but could extend to "other authorities and agencies involved in the organisation of hearings by video conference" (§ 22). Not surprisingly, it has been observed that in practice some States have conducted direct videoconferences from the premises of their own embassies or consulates abroad (Morán Martínez 2021).¹⁰

This does not, however, appear to pose a problem for those who consider the place from which the statement is made to be legally irrelevant. Their focus instead lies on the technical means used for the videoconference, which must ensure compliance with all procedural principles and safeguards (Bueno Benedí 2023). Although the adequacy of the technology is undoubtedly crucial for the full exercise of the parties' rights in a "hybrid" hearing (Tronchin 2024), it cannot be considered in isolation. In light of the reasons advanced thus far, as well as those discussed below, technological adequacy

¹⁰ In this connection, objections were raised within the Spanish legal system by the Dirección de Asuntos Consulares del Ministerio de Asuntos Exteriores, Cooperación y Unión Europea (MAECEU) in 2013 and 2015. In a more recent case, the Fiscalía Anticorrupción lodged an appeal against a decision of a juzgado central de instrucción seeking to obtain the testimony of a witness connected remotely from a Spanish embassy in the State of residence, following a prior arrangement with the witness and without any request for judicial assistance. Upon that appeal, the investigating judge declared the decision ineffective and replaced it with the issuance of a European Investigation Order. See also Consejo General del Poder Judicial (2020, § 44), which states: "*Para la intervención telemática de personas que se encuentren fuera de España, es aconsejable recabar el auxilio judicial internacional*".

must go hand in hand with the hearing being held in a location that is physically subject to judicial control.

As already mentioned above, the European Commission has recently proposed a Council Decision that would authorise the Member States to ratify the Third Additional Protocol in the interest of the European Union (*Proposal for a Council decision*, COM(2025) 510 final).

6. The forms of judicial cooperation are not mere formalities

Allowing videoconferences beyond national borders to take place without judicial supervision ultimately means denying the importance of procedural forms and even of the trial itself, suggesting that its procedural safeguards should give way to the relentless development of technological tools. On the contrary, the forms governing judicial cooperation are not mere formalities. They exist in order to protect the essential guarantees of a fair trial, the authenticity and admissibility of the evidence collected, and even the strictly judicial nature of the proceedings.

All these aspects may be compromised by the use of videoconferencing and, for this reason, the legislator embodied them in specific legal obligations incumbent upon the various judicial authorities involved in cross-border acts pursuant to Article 24 of Directive 2014/41/EU (Morán Martínez 2021, Žukovaitė 2024). In light of this provision, particularly persuasive is the argument that a formal act of judicial cooperation is indispensable for the conduct of hearings by audiovisual means, given the division of responsibilities between judicial authorities and the duty of the executing State to ensure compliance with the fundamental principles of its law (Laro González 2025a).

As regards the issue of consent to videoconferencing, it should first be observed that consent is often given not by a party to the proceedings but by a third party, namely the witness or the expert. Accordingly, the witness's willingness to be heard remotely should not determine the scope of the safeguards designed to protect both the defendant and the integrity of the fact-finding process.

In any event, even where consent is given by the defendant, it should not be regarded as capable of curing a violation of the principle of territorial sovereignty of the State whose judicial authorities have been bypassed. This is irrespective of the well-documented difficulties — also highlighted in the literature — concerning the nature of such consent, the manner in which it must be expressed, and its possible revocability (Dei-Cas 2023, Negri 2023, La Rocca 2024). The territorial sovereignty of the executing State remains a value that is not at the disposal of either the individual (Maurer and Leitner 2025) or the trial State with which that individual may reach an agreement. Both are bound to comply with the procedural requirements expressly laid down by law for the conduct of videoconference hearings in cross-border cases, which cannot be set aside on the basis of convenience or mutual consent.

International law likewise confirms the centrality of coordination between public authorities in the gathering of evidence. Indeed, the principle of the territorial application of procedural law requires the consent of the State where judicial acts are performed in the context of criminal proceedings pending before the authorities of

another State. This requirement is frequently formalised through bilateral or multilateral agreements on international judicial cooperation (Salerno 2024).

Furthermore, the right of European Union citizens to freedom of movement must be reconciled with the procedures governing judicial cooperation between States. After all, Article 21(1) TFEU expressly provides that this freedom is “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”. Interpreted systematically, those measures may be understood to include the European Investigation Order Directive itself, which was adopted on the basis of Article 82 TFEU.

It should also be recalled that EU law recognises the possibility of restricting the free movement of persons on grounds of public policy, public security, and public health pursuant to Articles 45, 52, and 62 TFEU (Adam and Tizzano 2024). In this respect, even if the operation of the EIO Directive¹¹ were regarded as affecting freedom of movement, such a limitation would nevertheless satisfy the proportionality requirements established in the case law of the Court of Justice of the European Union. The CJEU has consistently held that any restriction on a fundamental freedom must comply with the principle of proportionality, meaning that it “must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it” (CJEU, *Oteiza Olazaval*, § 43). The objective, in this case, would be to obtain testimonial evidence that is admissible in the proceedings through the strict application of the rules laid down in the EIO Directive. Accordingly, the witness could even be compelled to appear before the competent authority of the executing State, which, pursuant to Article 24(3), would serve the summons and enforce the obligation to appear in much the same way as in purely domestic proceedings.¹²

For their part, the newly adopted provisions within the broader European legal framework seek to align direct videoconferences with the principle of territorial sovereignty of the requested State through the mechanism of prior agreements between judicial authorities. Nevertheless, the problem of safeguarding the fundamental rights of the person heard remotely and ensuring the reliability of their testimony remains unresolved. This is particularly evident in light of the difficulties involved in prosecuting possible instances of perjury, which may affect both the legality of the act carried out abroad and the overall quality of the evidentiary process.¹³

According to Pascucci (2026), the participation of the requested State in the examination cannot be regarded as a merely formal requirement. This conclusion is supported not only by the need to verify compliance with fundamental principles and to establish the identity of the witness, but also by Article 9(5)(a) of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001), which expressly provides for the appointment of an interpreter. It is precisely in the cross-

¹¹ Which applies to all Member States except Denmark and Ireland.

¹² See Court of Justice of the European Union, 18.5.1982, Joined Cases C-115/81 (*Adoui*) and C-116/81 (*Cornuaille*), § 9, ECLI:EU:C:1982:183, according to which: “Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State’s own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct”.

¹³ On this topic, see Demenko 2026.

border situations considered here that the need for linguistic mediation by an interpreter is likely to be considered particularly significant. This demonstrates that the procedural safeguards to be ensured during the examination extend well beyond the warnings or information to be provided to the person being heard. By contrast, some commentators (Bueno Benedí 2023) have focused on the possibility that those warnings may be given directly by the judicial authority of the trial State. In doing so, they rely on practices already developed in the broader use of audiovisual links to justify direct videoconferences, despite the absence of a specific legal basis governing them.¹⁴

Against this backdrop, the requested State, traditionally the guardian of the values underpinning a fair trial, now appears encouraged to relinquish its role as guarantor in order to save human and material resources, often in alignment with the interests of the requesting State.

The legislative developments undertaken within the Council of Europe framework once again bring the issue of efficiency to the forefront, especially in terms of reducing the time and costs associated with obtaining witness testimony abroad by videoconference. After all, the European Court of Human Rights has itself acknowledged “compliance with the “reasonable time” requirements in proceedings” as one of the “legitimate aims” capable of justifying the use of audiovisual links under the Convention.¹⁵ Leading scholarship has nevertheless levelled strong and well-founded criticism against the balancing of interests carried out by the European Court of Human Rights (Negri 2018). From this perspective, the guarantees of a fair trial cannot be sacrificed in pursuit of mere objectives of procedural expediency. The prosecution, the defence, and, where applicable, the victim all have a legitimate interest in ensuring that videoconference hearings are conducted in accordance with the legal framework designed to safeguard both the admissibility and the reliability of the evidence obtained. Overriding those safeguards solely for reasons of convenience on the part of the person giving evidence or to reduce the administrative burden on the States involved in the cooperation procedure is difficult to reconcile with a proper understanding of the principle of proportionality.

Ultimately, the very possibility of using audiovisual links — often justified simply by the fact that the witness resides abroad — is intended to provide a more efficient means of obtaining testimonial evidence than an in-person examination. It is therefore essential that, at least within the European Union, such examinations always take place under the supervision of the executing authority. For this reason, the argument in favor of an expansion of the legal basis for conducting direct videoconferences within the EU area of judicial cooperation, relying on the “pragmatic approach” reportedly adopted by many practitioners, is unconvincing. The very authors advancing this proposal (Maurer and Leitner 2025) caution against the use of direct videoconferences in “sensitive cases”, yet this notion is excessively broad and liable to generate unequal treatment as well as considerable interpretative uncertainty. In cases falling within this uncertain category, the primary concern would be the identification of the witness, which, under the

¹⁴ More precisely, Bueno Benedí 2023.

¹⁵ European Court of Human Rights, 5.10.2006, *Viola v. Italy*, § 72; see also, to the same effect, European Court of Human Rights, 27.11.2007, *Asciutto v. Italy*; European Court of Human Rights, 2.11.2010, *Sakniovskiy v. Russia*.

authors' proposal, should be carried out through a court or another authority of the requested State. Significantly, even those advocating the introduction of an expedited procedure for videoconference hearings recognise that recourse to it must remain conditional upon a formal act of judicial cooperation between the States involved (Laro González 2025b).

The question thus remains as to how statements obtained by videoconference without the involvement of the State in which the person giving evidence is located should be treated. In the absence of a harmonised European rule providing for the inadmissibility of evidence, applicable across all national legal systems, it is to the law of the trial State to determine the specific procedural consequence attaching to statements obtained through a direct videoconference. This may take the form either of the nullity of the procedural act or of the inadmissibility of the statements obtained.¹⁶ It may nevertheless be confidently maintained that the outcome of such an examination cannot be relied upon for the purposes of the final decision, irrespective of how the procedural defect is characterised under the law of the trial State. To conclude otherwise would mean disregarding the very limits that the Member States have chosen to impose upon themselves through the adoption of the European Investigation Order Directive.

While this article was in the process of publication, the European Commission presented a Proposal for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters and the European Remote Participation Order (European Commission, COM(2026) 313 final). It is worth noting that the new European Remote Participation Order (ERPO) — designed to facilitate the participation via videoconference of suspects, accused persons, and victims located in another Member State — also provides for the active involvement of the executing authority throughout the cooperation procedure. As previously argued (Tronchin 2026), it would nevertheless be preferable for the legal framework of this new instrument to include an explicit prohibition on the conduct of any direct videoconference.

7. Conclusions

Direct videoconferences, which gained prominence during the pandemic, are incompatible both with the principle of territorial sovereignty of the State in whose territory the examination is conducted without its involvement and with the fundamental fair trial guarantees that such State is required to protect. This breach cannot be remedied merely through an agreement between the person to be heard and the State where the proceedings are pending, nor through a notification to the executing State concerning the performance of the investigative measure.

The remote examination of a person located abroad therefore remains a formal judicial act: for Member States of the European Union, it must be carried out in accordance with the framework established by Directive 2014/41/EU on the European Investigation Order, which is based on the principles of sincere cooperation, mutual trust, and mutual recognition. Only full compliance with the provisions laid down therein can ensure that the evidence obtained is both reliable and admissible in the proceedings. Efficiency-

¹⁶ For a broader discussion of the admissibility of statements obtained by videoconference under the EIO, with specific reference to the Italian legal system, see Pascucci (2025, 153 ff).

driven pressures concerning the collection of testimonial evidence cannot justify a derogation from this scheme when they rest on an inadequate balancing of interests that fails to recognise the importance of the values at stake.

Forms of judicial cooperation in criminal matters define the limits of a State's exercise of its authority beyond its borders in the field of evidence gathering. Accepting that informal arrangements may overcome those limits would ultimately entail relinquishing the very values that these forms of cooperation — as expressions of the principle of procedural legality (Nobili 1974) — are intended to safeguard.

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