Admissibility of Evidence in Criminal Proceedings in the EU

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ABSTRACT

With the increase in volume and importance of cross-border investigations in the EU, ensuring the admissibility of evidence gathered in another Member State at trial is crucial – both for efficient law enforcement and for the protection of fundamental rights. At present, the rules on the collection, use, and admissibility of evidence are left to the laws of national criminal procedure of the Member States. These differ extensively as to the collection, use, admissibility, and nullity of evidence and thereby act as an obstacle to the use of cross-border evidence. In order to overcome the present difficulties, this article argues in favour of a new legislative proposal based on Art. 82(2) subsection 2 TFEU laying down common rules for the admissibility and exclusion of evidence in criminal proceedings. The article starts with a short description of the problem and a summary of the current legal framework before turning to the analysis of the legal basis for EU action and the policy options available to the EU legislator.

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I. The Problems of Cross-Border Evidence and EU Initiatives to Resolve them

With the increase in volume and importance of cross-border investigations in the EU, ensuring the admissibility of evidence gathered in another Member State at trial has become crucial, both for efficient law enforcement and for the protection of fundamental rights. National prosecution authorities often investigate offences where a part of the evidence is located abroad (the witness is abroad, the offence was committed by passing through foreign territory, the offender moved across borders, or the offence was committed in a digital environment, etc). In accordance with Art. 6 of the European Convention on Human Rights (ECHR) and Arts. 47 and 48 Charter of Fundamental Rights of the European Union (CFR), it must be ensured that evidence gathered in cross-border investigations does not lead to its unlawful or unfair use. Providing for both efficiency and fundamental rights protection in transnational cases is demanding, however, since each Member State has its own rules on investigative measures and the exclusion of evidence. To illustrate the case, it is useful to refer to the following **example** from daily practice:

> The Czech prosecution service asks the Hungarian authorities to carry out a search of a private home in Hungary. Although the search of a private home requires a court order according to Czech law,[1] such a search does not require any judicial permission in Hungary – the investigating authority can decide on it alone. In order to ensure that the evidence collected during the search in Hungary can be admitted at trial in the Czech court, the Hungarian executing authority could ask for a court warrant from a Hungarian judge – in accordance with the forum regit actum principle.[2] In practice, this does not happen, as the otherwise overburdened Hungarian judges do not see any reason to issue a warrant for a search.[3] Consequently, the Hungarian authorities carry out the search without a court order and transmit the evidence to the Czech authorities. It is up to the Czech court to decide on the admissibility of the evidence that was lawfully obtained in Hungary but in violation of the Czech rules of criminal procedure.

With a view to the potential repercussions of divergent national rules on the admissibility of evidence in cross-border cases, the EU already proclaimed in the Tampere Programme that ensuring the admissibility of evidence is fundamental to the creation of an Area of Freedom, Security and Justice (AFSJ). The Tampere Programme states accordingly:

> "The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there."[4]

In response to the EU's policy agenda, both academic studies[5] and practitioners[6] have examined to which extent the divergent national rules on admissibility and exclusion of evidence pose a problem as to whether or not to use evidence obtained through legal assistance at trial. All these studies acknowledge that the national laws of criminal procedure of the Member States attach differing consequence as to the unlawful gathering and/or use of evidence and that several national laws do not contain any specific rules at all as to where the evidence was obtained (i.e., no special rules for evidence obtained abroad).

The resulting problems and the appropriate measures to resolve them, however, are assessed differently. Starting from the idea of mutual trust and adequate protection of fundamental rights across the EU, some argue in favour of using the *lex loci* for the collection of evidence requested by another Member State in com-

bination with a harmonised set of rules on exclusion. The exclusionary rules are a logical corollary of the EU directives on the rights of the defendants: in order to make these rights effective, they should be accompanied by a rule that evidence obtained in breach of them is inadmissible. Conversely, other authors argue that the lack of national rules on admissibility of foreign evidence attest to the fact that Member States attach the same value to evidence obtained "domestically" as to that obtained via legal assistance, making the free movement of evidence possible in the future. Instead of common EU rules on exclusion, the rules governing exclusion according to the law of the Member State in which the evidence was obtained (*lex loci*) should be sufficient. Accordingly, instead of imposing exclusionary rules, some authors make the case for imposing inclusionary ones. Yet again, instead of exclusionary or inclusionary rules, others claim that a future EU instrument on evidence gathering should prescribe a set of "standard packages" for help in evidence-gathering, setting out the measures that national authorities and/or the defence could require the authorities in other Member States to carry out for them.[7]

This short – and non-exhaustive – panorama already reveals that the EU could theoretically choose between a more ambitious agenda of harmonisation of national rules on investigative measures, on the one hand, and prescribing either a rule of inclusion or a rule of exclusion for evidence obtained in another Member State, on the other. The exact design of any of the two options and their respective impact on national criminal procedure depends on the concrete choices that the EU legislator takes (whether a narrower or larger set of investigative measures would apply in case of approximation; whether they would be available to the prosecution only or also to the defence and, in case of inclusion or exclusionary rules, whether they apply to cross-border cases only or also to domestic cases; whether exclusion is linked to violation of the EU defence rights *acquis*, etc.).

The Lisbon Treaty gave new impetus for launching EU legislation on the admissibility of evidence. Art. 82(2) TFEU explicitly refers to the possibility to propose legislation on the mutual admissibility of evidence. The Stockholm Programme implementing the Lisbon Treaty confirmed the view of the European Council

> "that 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. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned."[8]

The Council invited the Commission to propose a new legal instrument. In response, the Commission published a Green Paper in 2009[9] outlining its aim to adopt an instrument that would (i) set up a scheme of mutual recognition to govern cross-border evidence-gathering[10] and (ii) create a regime of mutual admissibility of evidence. As the Commission stated in the Green Paper, there is "a risk that the existing rules on obtaining evidence in criminal matters [can] only function effectively between Member States with similar national standards for gathering evidence. [… Therefore,] the best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters."[11] Shortly afterwards, the text for a Proposal for a Directive regarding the European Investigation Order in criminal matters was tabled,[12] albeit seeking to implement only the first aim specified in the Green Paper and leaving untouched the more controversial issue of common rules on admissibility of evidence in the EU.[13] This reflected the view of the majority of Member States, according to which proposing common rules for the admissibility of evidence would violate the principles of subsidiarity and proportionality.[14]

The rather reserved view of the Member States was once again confirmed during negotiations on the defence rights directives. In particular, the Commission's original proposal for a directive on the presumption of

innocence[15] stipulated in Art. 6(4) that any evidence obtained in breach of the right not to incriminate oneself and not to cooperate shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings. This exclusionary rule disappeared, however, during the negotiations and did not find its way back into the final text of the directive.

All this leads to a situation in which the rules on the collection, use, and admissibility of evidence are still left to the laws of national criminal procedure only. The resistance of the Member States is certainly the main reason why the Commission has not yet made use of the competence provided for in Art. 82(2) TFEU.[16] The recent negotiations on the Regulation on the European Public Prosecutor's Office (EPPO) unequivocally demonstrated how far Member States are ready to go when it comes to the approximation of criminal procedure. Member States clearly refused to agree on rules for the gathering and admissibility of evidence in EPPO investigations.[17] For a future proposal based on Art. 82(2) TFEU, the Commission has to convince not only the Member States, but it must ensure that any proposal on this matter is compliant with the principles of subsidiarity (Art. 5(3) TEU) and proportionality (Art. 5(4) TEU). The Proposal for the EPPO Regulation is a recent example of challenging the Commission's competence based on subsidiarity.[18] In this case, even if the subsidiarity challenge was not successful in legal terms (i.e., the Commission decided to maintain its proposal in its entirety), it came with a high political price and paved the way for more national control over the future text of the Regulation.

Even if the Commission will need to overcome the high hurdles that Member States may raise against EU harmonisation of evidence law, the reiterated request of the defence lawyer community for EU legislation on the matter cannot be overheard. Whereas law enforcement authorities are mainly concerned with the trial court's refusal of evidence gathered lawfully according to the *lex loci*, defence lawyers are worried about the unlawful or unfair use of evidence obtained in cross-border investigations. They rightly point out that the rights of the suspect are more important than ever, due to the frequency of cross-border evidence collection. Equally, the impact of cross-border law enforcement on complainants and witnesses should not be underestimated. Defence lawyers therefore advocate granting the right to the defence to challenge evidence obtained in cross-border investigations[19] and for common EU rules on exclusion.

In addition, one cannot disregard the increasing relevance of evidence transfer and linked questions of admissibility and exclusion beyond classical cross-border situations (i.e., evidence gathered in EU Member State A and assessed as to its admissibility in Member State B). With the EPPO taking up operations, there will be paramount questions linked to evidence transfer and subsequent admissibility/nullity of evidence between national authorities and supranational bodies (evidence gathered by Member State A and used by a European enforcement agency or gathered by a European enforcement agency and used by a national enforcement authority[20]). Moreover, the enforcement of EU law and resulting questions of evidence transfer are not limited to criminal procedures *stricto sensu* but has to take into account the larger sphere of punitive enforcement, raising questions as to the collection and use of evidence at the crossroads between administrative and criminal proceedings.[21]

This article therefore argues in favour of a new legislative proposal based on Art. 82(2), Subsection 2 TFEU laying down common rules for admissibility of evidence in criminal proceedings. Such a proposal needs to acknowledge the case law of the CJEU as to the independence of judicial authorities[22] and as to respect for the rule of law,[23] as this jurisprudence has important consequences for the implementation of the principle of mutual recognition and the underlying concept of mutual trust. Many of the academic studies on the admissibility of evidence are almost a decade old, and the solutions and approaches outlined need to be reassessed in light of new developments. A fresh academic study on the admissibility of evidence is

therefore necessary in order to give further guidance on the conceptual and technical choices that a future EU legislation would need to take. Such choices must include:

- The scope of EU intervention, answering the question of whether a future instrument should be restricted to cross-border situations or whether it also applies to purely domestic cases;
- The applicable safeguards (and how to deal with potentially higher standards of protection provided for by national law);
- The principles and rules to be included in a draft directive, tackling the question of whether the instrument should include only rules on admissibility or rules on admissibility and exclusion.

II. National Approaches on Admissibility and Exclusion of Evidence: From Non-Inquiry to Judicial Balancing

Several comparative law studies[24] have revealed that rules of national criminal procedure on the collection and use of evidence differ extensively from one Member State to another, and this difference is not limited to the common law-civil law divide. First of all, no Member State provides for a pure system of free admissibility of evidence, in the sense that every piece of evidence gathered during the investigation would be admitted at trial, regardless of the respect for established procedures. This is not very surprising, given the increasing relevance of the case law of the ECtHR requiring states to scrutinise evidence that might impair the overall fairness of the proceedings.[25]

With this caveat in mind, two approaches adopted by the Member States have emerged. On the one hand, some legal systems give discretion to the judge as to whether or not to admit illegally obtained evidence: In this case, the inadmissibility is not an automatic procedural sanction for a previous violation. Thus, the judge is not obliged to exclude the "tainted" piece of evidence; instead, he/she can decide whether or not to disregard that element by assessing various factors, such as the seriousness of the breach, its intentional nature, the relevance of the information (including the fact that the evidence would have been discovered anyway by other means), the overall fairness of the proceedings, the gravity of the charge, etc. On the other hand, several Member States provide for the inadmissibility of evidence as a (non-discretionary but) automatic consequence for a violation of procedural rules.[26]

Another important difference between national systems concerns the modalities for not admitting the improperly obtained evidence. In some countries, the court is prohibited from basing a decision on that evidence (e.g., Germany); in other countries, the evidence is physically excluded from the file examined by the court (e.g., Italy). The rationale of the latter option is that only removal of the evidence from the file ensures that the deciding authority is not biased by the information that should have been gathered differently.

In conclusion, a twofold approach in Europe can be observed, namely legal systems strictly filtering the information to be admitted at trial (so-called "controlled systems") and legal systems leaving it to the judge to assess whether it is appropriate to disregard illegal evidence ("free proof systems").

Beyond this general difference, the details of evidence law vary considerably. So do the rules on the collection and admissibility of the various types of evidence (witnesses, interceptions, etc.). For instance, in Germany the examination of witnesses at trial cannot, in principle, be replaced by reading reports from a pre-trial interview (although there are some limited exceptions to this rule). In the Netherlands, on the contrary,

the Supreme Court accepted several decades ago that a written statement obtained during pre-trial investigations can be used as evidence at trial, so that witnesses no longer have to come to court to give evidence – an official report containing their statements collected during the pre-trial phase is, in principle, sufficient. Further differences are linked to requirements and conditions involving "new" means of taking evidence, e.g., video-conferencing or other technical solutions to bridge the gap between the required presence of, for instance, a witness and the judge. Likewise, Member States have different approaches to parties' possibility to challenge before competent courts the admissibility of a given piece of evidence. Most national systems provide for rules on the "nullity" (or invalidity) of evidence, but these rules vary from country to country.[27]

Considerable differences can also be observed as to the applicability of the "fruit of the poisonous tree" doctrine, whereby illegally obtained evidence is not only excluded from trial but also any further evidence derived from the illegal conduct of the authority conducting the investigations. A classic example relates to objects seized during a search conducted on premises mentioned by the suspect during an illegal arrest. From comparative studies[28] on the topic, groups of countries can be defined according to their rationale for the protective measure. Countries like France, Italy, and Spain aim to protect the rights of suspects. Thus, exclusion or nullity of evidence is strictly related to the infringement of fundamental rights (the vindication of rights approach). Countries like Canada, the UK, and Germany use a so-called systemic integrity model. They only apply the exclusion of evidence to significant violations of important rights and only in cases in which the dismissal of the charges would not significantly undermine the state's interest in convicting those who have committed serious crimes.

Since, in most Member States, evidence gathered abroad is treated the same way as evidence obtained by national authorities, the above-described, considerable differences between the national approaches to the gathering and use of evidence lead to divergent treatment of evidence obtained in cross-border investigations.[29]

1. EU rules on mutual legal assistance: balancing *lex loci* and *lex fori*

In order to facilitate the admissibility of evidence obtained in cross-border situations, the EU instruments on mutual legal assistance have gradually moved away from the principle of *locus regit actum,* according to which the law of the country where the evidence is gathered applies for the collection of evidence. Instead, they proclaim the principle of *forum regit actum*, whereby the requested authorities should follow the rules indicated by the requesting country for evidence gathering, i.e., the rules of the *forum* in which the trial will take place. By using the law of the *forum*, the admissibility of evidence should be guaranteed. Art. 4 of the 2000 EU MLA Convention[30] stipulates in this vein that "the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention." The *forum regit actum* principle does not, however, provide for the general application of foreign law (*lex fori*). Under the 2000 EU MLA Convention, national investigative authorities are still allowed to use their national procedural laws (*lex loci*) when performing the measure asked and to use *lex fori* only upon request and within the possibilities provided by national law.

Although the shift to the *forum regit actum* principle shows the awareness of the EU legislator of the cross-border dimension of crime in the AFSJ, it does not solve the problems resulting from the current divergent national approaches.[31] In particular, Member States can retain their freedom to refuse assistance based on grounds linked to national law. As *Spencer* rightly pointed out, the requested State "has in principle an open-ended discretion to refuse, and an equally wide discretion as to how, in any given case, it will carry out the task."[32] Even if Member States do not exercise such discretion, further practical problems may arise. It could happen, for instance, that information is gathered before the official request of another authority arrives indicating the rules to be followed. Furthermore, proceedings may be transferred from one Member State to

another. In both cases, information already gathered according to the procedure in one Member State may need to be used in another *forum*.

Despite the shortcomings of the *forum regit actum* principle, Directive 2014/41 on the European Investigation Order (EIO), which replaces the 2000 EU MLA Convention, does reaffirm the principle in its Art. 9(2).[33] Accordingly, the executing authority must comply with the formalities requested by the issuing authority, save that such formalities were to violate the fundamental principles of the legal system of the executing State. Although the strong language of the EIO Directive suggests that the executing state of the EIO will mostly apply the *lex fori*, practice seems to be different. Several practitioners report that, in many cases, the issuing Member State does not specify formalities for the execution of the EIO. Therefore, investigative authorities often use the *lex loci* when executing the EIO.

The EIO Directive does not include rules on admissibility of evidence or evidentiary exclusionary rules.[34] Nor does the latest Commission proposal regarding European Production and Preservation Orders for electronic evidence in criminal matters (draft e-evidence Regulation).[35] This proposal also maintains the present status quo and touches upon the admissibility of certain types of electronic evidence only in the specific context of immunities or privileges (in Art. 18 of the draft Regulation).

By simply restating the *forum regit actum* principle, the EU legislator has not resolved the problems referred to in the example given at the beginning of this article.[36] Practice shows that many reservations still exist towards applying the *lex fori*. The non-application of the *lex fori* in combination with the potentially wide discretion of the judge to decide on admitting unlawfully obtained evidence are significant in practice and can lead to a situation in which the defendant cannot anticipate the use of this evidence at trial.

2. European human rights law and exclusionary rules

Considering the lack of legislative standards in the EU for the gathering, use, and exclusion of evidence, the question arises as to the extent to which common standards can be derived from the human rights jurisprudence of the two European courts (the ECtHR and the CJEU) and whether these standards can be used as input for future legislative harmonisation.

The ECHR does not contain specific rules on the admissibility/exclusion of evidence. In relation to the protection offered in Art. 6, however, the ECtHR obliges countries to scrutinize the way evidence was obtained or is used in order to prevent unlawful evidence from impairing the overall fairness of the proceedings. Such scrutiny does not mean that evidence obtained in breach of the ECHR (for example, breach of privacy or protection of the private home) is automatically excluded from the criminal proceedings. In the Court's own words:

> "While the [ECHR] guarantees, under Article 6, the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for national law. The Court therefore cannot exclude that evidence gathered in breach of national law may be admissible ... The Court also recalls that it has already had occasion to find that the use of an illegal recording, moreover as the only item of evidence, does not, in itself, conflict with the principles of fairness laid down in Article 6[(1) of the ECHR], even where that evidence was obtained in breach of the requirements of the [ECHR], particularly those set out in Article 8 ..."[37]

At the same time, it emerges from ECtHR case law that evidence, the use of which could violate the integrity of the trial or the rule of law, must be excluded.[38] Cases fulfilling this high threshold refer to evidence collected in breach of absolute human rights (like the prohibition of torture and inhuman treatment laid down in Art. 3 ECHR). In addition, in relation to evidence collected in breach of certain relative human rights, the

ECtHR found that their use at trial would amount to a flagrant denial of justice. Such cases involve evidence obtained by means of entrapment and incitement and for which there is no indication that the offence would have been committed without the intervention of law enforcement authorities,[39] evidence based on confessions that have been made without the assistance of a lawyer and which are used as key evidence without further legal assistance being given to the accused,[40] and serious violations of the right to remain silent[41] or of the right to cross-examination.[42] The scrutiny that the evolving ECtHR case law requires of states when it comes to the use of evidence at trial, however, cannot include detailed specifications as to the way evidence should have been gathered. The ECtHR instead assesses the overall fairness of the proceedings and looks into the concrete facts of the case, e.g., whether the restrictions in Art. 6 ECHR had been counterbalanced in the given case.

Although European human rights jurisprudence has not developed common standards for the gathering/admissibility/exclusion/nullity of evidence, certain forms of evidence gathering do infringe upon human rights to the extent that they automatically lead to the exclusion of evidence. These human rights standards could certainly be used as guidance for formulating exclusionary EU rules in the future.

III. Future EU Rules on Cross-Border Evidence

Art. 82(2) Subsection 2 TFEU stipulates:

> "To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States […]".

Thus, the competence of the EU covers the adoption of a directive containing minimum rules to facilitate mutual recognition respecting the principles of subsidiarity and proportionality.

The first question for any future EU instrument on the admissibility of evidence concerns its scope of application. This raises manifold questions: Should a future directive be limited to stipulating a rule of inclusion and/or exclusion? Or should it provide for the approximation of rules on the gathering and use of evidence? Should it be limited to cross-border investigations or could it also cover purely domestic situations?

One could read the competence laid down in Art. 82(2) TFEU as being limited to providing for a mandatory inclusion rule[43] obliging the national authorities of a Member State to admit evidence collected by the judicial authority of another Member State pursuant to a mutual recognition instrument.[44] Such a mandatory rule of inclusion could then be flanked by rules of exclusion derived from European human rights law. Taking into account the instruments adopted so far on the basis of Art. 82 TFEU, there is room to argue that the EU has the competence to cover not only transnational but also domestic cases. As *Vervaele* rightly pointed out:

> "Although the approximation is in theory limited to minimum rules in order to facilitate the mutual recognition of judicial decisions, it has become clear from the use of Article 82(2)(b-c) TFEU by the legislator that this approximation is in fact the harmonisation of domestic criminal procedure (so not limited to mutual recognition instruments) in order to facilitate potential mutual recognition. The harmonisation is not strictly limited to minimum harmonisation but to minimum rules, meaning that which is necessary for facilitating and enhancing mutual recognition between the Member States".[45]

Accordingly, the future instrument could cover both cross-border and domestic cases. This would help avoid different evidentiary standards, depending on whether the evidence is used in domestic or foreign proceedings. That carries the risk of unequal treatment of defendants and unnecessary practical complications (national authorities would be required to apply different standards in national proceedings and in proceedings carried out in execution of a mutual recognition request).

In the same vein, the minimum rules mentioned in Art. 82(2) TFEU could be used to approximate rules on the gathering of evidence and thereby going beyond a mere rule of inclusion. However, recent negotiations on the EPPO reveal that Member States may fiercely fight a harmonisation of investigative measures.

If the Commission were to take the more viable approach of suggesting a rule of inclusion, the next important question for a future EU directive would be to define the safeguards that would lead to the exclusion of the evidence if violated. As pointed out above (II.2.), European human rights case law already gives a number of hints as to where the use of evidence would violate the fairness of the proceedings. However, the existing case law is by far not exhaustive and restating it would not contribute to added value for the defendant. In particular, existing case law focuses on domestic situations only (the same legal regime applies to the collection of evidence and to the trial) and does not address transnational cases. The EU legislator should consider going beyond the fair trial jurisprudence of the ECtHR and sanction certain violations of the rights laid down in the EU *acquis* (non-admissibility or nullity).

Ulitmately, the EU legislator should consider the need for rules on specific types of evidence. A recent research project[46] on digital forensics rightly acknowledges the following:

> "The current EU legal framework […] whilst insisting on the need to exchange digital evidence, through cooperation mechanisms based on the principle of mutual recognition (not last in the EC Proposal for the European Production Order), does not provide for common rules establishing how digital investigations should be carried out."[47]

IV. Conclusions

The relevance of evidence transfer in the day-to-day practice of law enforcement in the Member States necessitates the adoption of EU rules on the admissibility of evidence. The relatively broad EU competence laid down in Art. 82(2) TFEU is, however, in stark contrast to the lack of willingness on the part of Member States to accept harmonisation of the national rules on gathering evidence in criminal proceedings. A viable approach could be to propose a mandatory EU rule of inclusion of evidence obtained in another Member State, accompanied by a number of enumerated grounds allowing the exclusion of foreign evidence. Such exclusionary rules could be based on the already existing human rights law jurisprudence (as described in section II..2.) but should contain further rules addressing the cross-border nature of the investigation. By the same token, a future directive on obtaining and admitting evidence in the EU could also address other aspects of evidence law, e.g., the defence right to gather or request evidence.

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1. According to the Czech law of criminal procedure, permission from a judge is required to search a private home. Based on the judge's permission, the prosecutor will give the order to carry out the search.↩
2. See section II.1.↩
3. Practitioners confirm that their authorities often refuse to follow the formality indicated by the issuing authority due to the mere lack of corresponding national provisions in the executing state (see the intervention by *Jorge Espina Ramos* at the workshop on Admissibility of E-Evidence in Criminal Proceedings in the EU organised by the European Law Institute on 17 September 2020, available at <https://www.europeanlawinstitute.eu/about-eli/bodies/membership/mm-2020/conference-recordings>). Practitioners primarily look at the national code of criminal procedure when it comes to the legal basis for an invesitgative measure. Laws on international cooperation or transposition of EU instruments are still often not regarded as having a sufficient legal basis. Such problems in practice can be best resolved, however, by judicial training.↩
4. Conclusions of the Presidency, SN 200/99, point 36.↩

5. See G. Vermeulen, W. De Bondt and Y. Van Damme, *EU cross-border gathering and use of evidence in criminal matters. towards mutual recognition of investigative measures and free movement of evidence?*, Vol 37 IRCP-series, 2010; K. Ligeti (ed.), *Toward a Prosecutor for the European Union, Volume 1: A Comparative Analysis*, 2013; S. C. Thaman (ed.), *Exclusionary Rules in Comparative Law,* 2013; F. Giuffrida and K. Ligeti (eds.), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, University of Luxembourg, June 2019, available at: <http://hdl.handle.net/10993/40141>.↩
6. See, e.g., CCBE's submission on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at: <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_Position_papers>.↩
7. J. Spencer, "The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer", (2010) *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 602, 604-605; J.A.E. Vervaele, "Lawful and fair use of evidence from a European human rights perspective", in F. Giuffrida and K. Ligeti (eds.), *op. cit*. (n. 5), p. 56, pp. 59–62.↩
8. See Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009, Council doc. 17024/09, point 3.1.1.↩
9. Green Paper on obtaining evidence in criminal matters and transferring it from one Member State to another with the aim of securing its admissibility, COM(2009) 624 final, 11 November 2009.↩
10. Pursuant to the Tampere Programme, the Council adopted Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters,*O.J.* L 350, 30.12.2008, 72. The Framework Decision was ultimately repealed on 21 February 2016 by Regulation (EU) 2016/95,*O.J.* L 26, 2.2.2016, 9. Both academics and practitioners criticized the Framework Decision for its limited scope and for the fact that it co-exisited with other instruments on mutual legal assistance, thereby contributing to a piecemeal approach with a multiplicity of instruments.↩
11. COM(2009) 624 final, 11 November 2009, p. 7.↩
12. Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters, *O.J.* C 165, 24.6.2010, 22.↩
13. The only exception is Art. 31 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters (*O.J.* L 130, 1.5.2014, 1), which specifies rules in relation to findings involving interception of telecommunication carried out without technical assistance of the notified Member States: these "may not be used, or may only be used under conditions which it shall specify, in case where the interception would not be authorised in a similar domestic case."↩
14. Some Member States went even farther to argue that EU intervention in this field would call into question the national system of checks and balances inherent to criminal procedure. See Summary of the replies to the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, document with the author.↩
15. Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, 27 November 2013.↩
16. See L. Bachmaier Winter, "European investigation order for obtaining evidence in the criminal proceedings – Study of the proposal for a European directive, (2010) *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 580, 581.↩
17. The Commission's Proposal for the EPPO (COM(2013) 534 final) stipulated an inclusionary rule but made two exceptions: the respect for the rights of the defence and the fairness of the procedure. Accordingly, the trial court can refuse to admit evidence if it would adversely affect the right of the defence as enshrined in Arts. 47 and 48 CFR or the fairness of the procedure. (Art. 30.) This approach was, however, refused by the Member States as attested by Art. 37 of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] *O.J.* L 283, 31 October 2017, 1). See K. Ligeti, "The European Public Prosecutor's Office", in: V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, 2016, p. 480.↩
18. See the Communication on "the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2", COM(2013) 851 final, 27 November 2013.↩
19. See ECBA Initiative 2017/2018 "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" available at: <http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf>.↩
20. In the larger sphere of punitive enforcement, evidence transfer can take place not only from the EPPO but also from national investigative authorities to, e.g., ECB, DG COMP, etc. See, in this context, *inter alia*, S. Allegrezza, "Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies", https://doi.org/10.30709/eucrim-2020-024.↩
21. J.A.E. Vervaele, , *op cit*. (n. 7), pp. 56 et. seq..↩
22. CJEU, 12 December 2019, Joined Cases C-566/19 PPU and C-626/19 PPU, *JR and YC*; Case C-625/19 PPU, *XD*; Case C-627/19 PPU, *ZB*. See also T. Wahl, "CJEU Clarifies its Case Law on Concept of 'Judicial Authority' Entitled to Issue EAW, (2019) *eucrim*, 242.↩
23. CJEU, 25 July 2018, Case C-216/18 PPU, *LM* (cf. T. Wahl, (2018) *eucrim*, 104-105); CJEU, 24 June 2019, Case C-619/18 and CJEU, 17 December 2018, Case C-619/18 R, *Commission v Poland* (cf. T. Wahl (2018) *eucrim*, 191 and (2019) *eucrim*, 80).↩
24. See note 5.↩
25. For a recent summary of the respective ECtHR case law, see Council of Europe, Guide on Article 6 of the European Convention on Human Rights, updated on 31 August 2020, pp. 40-42, available at: <https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf>.↩
26. For a description of national systems, see K. Ligeti, *Toward a Prosecutor for the European Union, op. cit.* (n. 5).↩
27. See details at J.A.E. Vervaele, *op. cit.* (n. 7), pp. 59–62.↩
28. S. C. Thaman, "Fruits of the Poisonous Tree in Comparative Law", (2010) 16 *Southwestern Journal of International Law,* 333; C. Slobogin, "A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases" Vanderbilt Public Law Research Paper No. 13–21 (9 April 2013) <https://ssrn.com/abstract=2247746>.↩
29. As Vermeulen, De Bondt, and Van Damme (*op. cit.* n. 5) point out (p. 19): "Even though the results indicate that the member states are inclined to accept the validity of lawfully obtained evidence, member states still want to be able to refuse admissibility if the gathering of the evidence, was contrary to their fundamental principles of law. Furthermore, a distinction needs to be made, between the acceptability to introduce foreign evidence in criminal proceedings and the actual evaluation thereof which remains at the discretion of the judiciary."↩

30. Convention on mutual assistance in criminal matters between the Member States of the European Union of 29 May 2000, *O.J.* C 197, 12.7.2000, 1.↩
31. For a recent analysis of the problems raised by these two principles, see M. Kusak, "Mutual admissibility of evidence and the European investigation order: aspirations lost in reality" (2019) 19 *ERA Forum*, 391.↩
32. J. R. Spencer, , *op. cit.* (n. 7), 602.↩
33. Directive 2014/41/EU, 1.5.2014, *O.J.* L 130, 1. The first mutual recognition instruments related to mutual legal assistance provided for a stricter application of the *lex fori*. So did the meanwhile repealed Framework Decision 2003/577/JHA on freezing orders (*O.J.* L 196 , 02.08.2003, 45), stipulating in its Art. 5(1): "The competent judicial authorities of the executing State shall recognise a freezing order […] without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State […]." In fact, this provision implied that the executing authority carries out the freezing as ordered by the foreign issuing judicial authority based on the *lex fori*. The judicial decision of the foreign authority was thus directly executed using the same logic as that of the European Arrest Warrant. This ambitious application of the mutual recognition principle to the domain of legal assistance was later rejected, however, by the Member States. The EIO Directive therefore includes a new set of checks and balances in both the issuing the executing Member States.↩
34. L. Bachmaier, "Mutual Recognition and Cross-Border Interception of Communications: The Way Ahead for the European Investigation Order", in: C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future*, 2018, p. 313, p. 324. Given all the checks in both the issuing and the executing states (including respect for proportionality (Art. 6(1) lit. a) EIO Directive), fundamental rights, and the rights of the defence (Art. 1(4) EIO Directive), however, one could argue that evidence that has been obtained by complying with all these conditions should be admissible. Practitioners report that this largely corresponds to today's practice, but rules on admissibility have nevertheless not been stipulated in the Directive.↩
35. COM(2018) 225 final, 17 April 2018 (for a summary, see T. Wahl, (2018) eucrim, 35-36).↩
36. For examples of refusal to admit evidence obtained via an EIO, see the report on Eurojust's casework in the field of the European Investigation Order, November 2020, p. 27, available at: <https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf>.↩
37. ECtHR, 26 April 2007, *Popescu v Romania,* Appl. nos. 49234/99 and 71525/01 , para 106.↩
38. ECtHR, 1 June 2010, *Gäfgen v Germany,* Appl. no. 22978/05, paras 98–99.↩
39. ECtHR, 9 June 1998, *Teixeira de Castro v Portugal,* Appl. no. 25829/94, paras 38–39.↩
40. ECtHR, 27 November 2008, *Salduz v Turkey,* Appl. no. 36391/02 .↩
41. ECtHR, 5 November 2002, *Allan v the United Kingdom,* Appl. no. 48539/99.↩
42. ECtHR, 10 July 2012, *Vidgen v the Netherlands,* Appl. no. 29353/06.↩
43. Such a mandatory rule of inclusion is contained in Art. 11(2) of the recently revised OLAF Regulation (EU, Euratom) No 883/2013 according to which "(r)eports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports." See also the new version of Art. 11(2) of Regulation 883/2013 by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, *O.J.* L 437, 28.12.2020, 49 (Art. 1(11)). For a summary of the amendments, see T. Wahl at: <https://eucrim.eu/news/olafs-new-amended-legal-framework/>.↩
44. Limiting future EU legislation to evidence obtained through a mutual recognition instrument seems to be overly narrow, however, as it would exclude Ireland and Denmark from the scope of the instrument; these two countries are not part of the EIO. Therefore, extending the scope to at least evidence from mutual legal assistance from another Member State seems to be more appropriate.↩
45. J.A.E. Vervaele, *op. cit.* (n. 7), p 66.↩
46. The research project headed by the University of Bologna (Digital forensic EVIdence: towards Common European Standards in antifraud administrative and criminal investigations – 'DEVICES') developed recommendations and common standards for antifraud administrative and criminal digital investigations throughout the EU. See M. Caianiello and A. Camon (eds.), Digital Forensic Evidence. Towards Common European Standards in Antifraud Administrative and Criminal Investigations, Kluwer CEDAM 2021.↩
47. L. Bartoli, R. Brighi, and G. Lasagni, "Working Paper – DEVICES Research Project Funded by Hercule III – 2018 Legal Training and Studies" (2019), pp. 1–2.↩

* Authors statement

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