Any effort to gather evidence may prove pointless without ensuring its admissibility. Nevertheless, the EU, while developing instruments for smooth gathering of evidence in criminal matters, is not taking much effort to enhance its admissibility. Due to the lack of common rules in this matter, gathering and use of evidence in the EU cross-border context is still governed by the domestic law of the member states concerned. This may lead to situations where, given the differences between legal systems across the EU, evidence collected in one member state will not be admissible in other member states. Due to the fact that the Lisbon Treaty opened the possibility to adopt minimum rules concerning, among other things, the mutual admissibility of evidence, this research investigates the concept of minimum standards designed to enhance mutual admissibility of evidence in the EU. Through a study of two investigative measures, telephone tapping and house search, the author examines whether coming to various common minimum standards is feasible and whether compliance with these standards would finally shape the as yet nonexistent concept of the free movement and mutual recognition of evidence in criminal matters in the EU.

Essential reading for both national and EU policy makers, scholars and practitioners involved in cross-border gathering of evidence in the EU.

Dr Martyna Kusak is a doctor of law and post-doctoral researcher at Chair of Criminal Procedure, Adam Mickiewicz University in Poznań (Poland) and in the Institute for International Research on Criminal Policy, Ghent University (Belgium). She holds a double doctoral degree from Adam Mickiewicz University and Ghent University. In the academic year 2015/2016 she was awarded a scholarship by the Adam Mickiewicz Foundation in Poznań. This publication is the result of her research, carried out upon a co-tutelle doctoral programme and within project no. 2014/15/N/HS5/02686 granted by the National Science Center, Poland.
Mutual admissibility of evidence in criminal matters in the EU
Mutual admissibility of evidence in criminal matters in the EU

A study of telephone tapping and house search

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Volume 53

Martyna Kusak
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<td>European Convention on Mutual Assistance in Criminal Matters</td>
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<td>2000 EU MLA Convention</td>
<td>Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union</td>
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<td>2010 Stockholm Programme</td>
<td>The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens</td>
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<tr>
<td>CCP</td>
<td>Code de Procédure Penale</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<td>EAW</td>
<td>European Arrest Warrant</td>
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<td>Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>The Court of Justice of the European Union</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EIO</td>
<td>European Investigation Order</td>
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<td>European Evidence Warrant</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>EU Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>Description</td>
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<td>EPPO Proposal</td>
<td>Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office</td>
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<td>FD</td>
<td>Framework Decision</td>
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<td>FD EAW</td>
<td>Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 18.7.2002, OJ L 190/1</td>
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<td>Freezing Order</td>
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<td>FO Proposal</td>
<td>Initiative of the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence</td>
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<tr>
<td>FRA</td>
<td>Forum regit actum</td>
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<tr>
<td>KPK</td>
<td>Kodeks Postępowania Karnego</td>
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<tr>
<td>LECrim</td>
<td>Ley de Enjuiciamiento Criminal</td>
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<tr>
<td>LOPJ</td>
<td>Ley Orgánica del Poder Judicial</td>
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<td>MLA</td>
<td>Mutual Legal Assistance</td>
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<td>MR</td>
<td>Mutual Recognition</td>
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<td>PACE</td>
<td>Police and Criminal Evidence Act 1984</td>
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<td>Recommendation No. R (85) 10</td>
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<td>SIC</td>
<td>Schengen Implementation Convention</td>
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<td>Sv</td>
<td>Strafvordering</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>US</td>
<td>United States</td>
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Executive summary

Background to the study

Any effort to gather evidence may prove pointless without ensuring its admissibility. Despite this fact, the EU, while developing instruments for smooth evidence-gathering in criminal matters, is not taking much effort to enhance its admissibility. Thus far, the EU has been operating under the assumption that the differences between national procedures can be accommodated by the forum regit actum principle, originally developed in the framework of traditional mutual legal assistance. However, the simple copying and pasting of the forum regit actum principle from mutual legal assistance to mutual recognition instruments raises numerous doubts in terms of its efficiency and its compliance with the philosophy of mutual recognition. Moreover, the forum regit actum principle is not capable of overcoming problems related to existing evidence. At the same time the lack of common rules on admissibility leaves the decision whether or not to recognise a piece of evidence gathered in an EU cross-border context to the domestic law of the member states concerned. This may lead to situations when, given the differences between national procedures, evidence gathered in one member state will not be per se admissible in another member state because the way the information was obtained does not fit the latter’s procedural requirements.

The Lisbon Treaty offers an alternative for the forum regit actum principle, opening the possibility to adopt minimum rules concerning, among other things, the mutual admissibility of evidence. Adoption of these rules would mean that, in the context of EU cooperation in criminal matters, evidence would have to be gathered according to commonly agreed minimum standards, complemented with per se admissibility of evidence gathered accordingly. Hence, the main goal of this research is to verify whether it is feasible to achieve common EU minimum standards for evidence-gathering, and whether compliance with these standards could finally shape the as yet nonexistent concept of the mutual recognition of evidence in criminal matters in the EU.

Scope of the study

This research deals with two distinct measures: telephone tapping and house search. This limitation of the scope of the study follows from the fact that different investigative measures, given their diverse nature and the different potential violations of human rights that they may cause, will potentially require different, measure-specific standards. The choice of telephone tapping and house search is dictated by two reasons. First, both measures are of a highly
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intrusive character which means they deserve special focus, including at the EU level, in order to minimise the risk of abuses following from cross-border cooperation. Second, the potentially harmful nature of both measures allows one to ask comparable research questions and to carry out a joint investigation according to the same research method.

Methodology

In order to overcome evidentiary issues in the EU it is necessary to combine various methodological techniques, in view of the need to take into account diversities between legal systems across the EU, the current instruments which have been introduced for the purposes of cross-border cooperation in criminal matters, and human rights. Therefore, three different techniques are combined in this research: a comparative study, an investigation of Council of Europe and EU legislation and policy documents, and an analysis of the jurisprudence of the ECHR. The comparative study consists of an analysis of domestic norms concerning telephone tapping and house search in six selected member states: England and Wales, France, Ireland, the Netherlands, Poland and Spain. The member states were selected with regard to variety of legal systems and different approaches to evidentiary issues, in order to illustrate the potential problems that may occur in the field of mutual admissibility of evidence. The second methodological technique comprises an analysis of legislation and policy documents regarding cross-border cooperation in criminal matters, developed both within the EU and with the Council of Europe’s cooperation. The outcomes of this analysis help in understanding the extent to which member states are willing to establish rules for the purposes of EU cross-border cooperation. Finally, due to the fact that all EU member states are signatories of the ECHR, any common EU minimum standards should be based on or, at least, drafted in line with, the common fundamental rights and norms developed by the ECHR. Consequently, this research also investigates the relevant case-law of the Court. This combination of methodological techniques proved useful firstly in reporting the current state of play and secondly in reporting how far we can move towards deriving common EU minimum standards to enhance mutual admissibility of evidence.

Diversity between the member states

Significant differences still exist between member states in the field of evidence-gathering. These differences, which follow from their various legal systems and approaches to evidentiary issues, may have a negative impact on mutual trust between member states, raise questions as to the status of evidence
gathered in EU cross-border cooperation, and hamper mutual admissibility of evidence across the EU. The most striking differences which may cause obstacles and, therefore, require coming to common minimum rules, were identified in the following fields:

- rules governing evidence-gathering related to *ratione auctoritatis*, *ratione materiae*, *ratione loci*, *ratione temporis* and *ratione personae*;
- the procedural rights related to the respective measures, namely, the right to be notified of them and the right to legal remedies against their application;
- approaches to admissibility of evidence gathered irregularly.

Moreover, member states do not tend to rule on the admissibility of evidence gathered in the EU cross-border context. Together with a lack of any common rules in this matter, this leaves it completely unclear how to assess the lawfulness of the way that evidence was gathered abroad and, therefore, the possibility of its use in criminal proceedings.

**Minimum standards to enhance *per se* admissibility of evidence**

**Minimum standards with regard to rules governing telephone tapping and house search**

*Ratione auctoritatis*

Both telephone tapping and house search may seriously affect the right to respect for private life. Thus, it is necessary to ensure that these measures are taken in accordance with principles of necessity and proportionality, and with adequate protection against abuses of power. One of the guarantees thereof is a designated authority responsible for granting permission for both measures. The lack of common EU standards in this matter may cause obstacles in the field of mutual admissibility of evidence, since different member states empower different authorities to order the measures. Consequently, evidence gathered in a house search where the warrant was issued by a prosecutor may be questioned in member states which require a search warrant to be issued by a judge etc. That obstacle could be overcome by adopting common requirements for competences of authorities designated to issue the measures, and their capability of ensuring protection against abuses of power. In other words, operating under the same level of protection against arbitrary interferences has the potential to enhance mutual trust and, consequently, mutual admissibility of evidence gathered from both measures. This common level could be achieved by ensuring that both measures are reviewed *a priori* or *a posteriori* by a judicial authority or an authority independent of the issuing body’s activity. In this scenario, member
states would be safe to assume per se that, irrespective of how the foreign issuing authority is named, it ensures commonly agreed, minimum standards against the risk of abuses of power. That could help member states to accept evidence gathered by diverse authorities.

**Ratione materiae**

Currently each member state itself sets the grounds for ordering investigative measures in accordance with its domestic law. This results in a variety of provisions which, consequently, may hamper smooth evidence-gathering at the EU level. Dilemmas arise especially when the requested measure would not be available in a similar domestic case in the executing state, due to the fact that, for example, the use of the investigative measure is restricted to certain preconditions and the foreign order does not fit these national requirements. The *materiae* issues could be tackled by applying the concept of ‘alternative use of the 32 MR offences list’, originally developed under the framework decision on the European evidence warrant. Introduction of this approach would ensure the mutual admissibility of both measures in cases where the offence being investigated relates to one of the so-called ‘Euro crimes’. Operating under an exhaustive list of offences would free member states from context-sensitive double availability of the measures and contribute to the smooth gathering and use of evidence. For other offences, which are not included in the MR offences list, the general provisions would still apply. In other words, in cases not concerning the MR offences, the member states might still subject the execution to the domestic admissibility requirement.

**Ratione loci**

Inconsistencies of *locus* may arise when execution of an investigative measure indicated by another member state surpasses the *ratione loci* scope of the executing state because the locations or places where the measure can be taken or ordered are more limited in the domestic context. Consequently, for telephone tapping, it may be the case when the location of the telephone is a determining factor, e.g. home, office or publicly available telephones. In all these cases the key factor is the location of the telephone, and member states have different measures regarding the availability of this measure to investigative agencies. Therefore, with the aim of overcoming diversity as to the legitimacy of the measure, it is recommended that member states clearly permit telephone tapping targeted by location, if it is necessary for the purposes of EU cross-border cooperation. That would do away with discussions as to the legitimacy of the measure and the admissibility of any evidence gathered therein. With regard to house search it is necessary to consider what constitutes a ‘house’ in the context of EU cross-border evidence-gathering. After cross-referencing domestic approaches with the EU norms and the case-law of the EChHR, it transpires that
the common understanding of ‘house’ in this context is based on a reasonable expectation of privacy and on the inaccessibility of the place to the public. This means that ‘house’ can encompass, *inter alia*, business offices, including those premises located within public authorities, as well as vehicles.

*Ratione temporis*

Differences between member states as to *temporis* concerns may also hamper mutual admissibility of evidence gathered from telephone tapping and house search in an EU cross-border context. In cases of telephone tapping it may be problematic if the period of time for which permission is issued surpasses the *ratione temporis* scope of the executing state because the time limits in the executing state are shorter or because the measure is subject to intermediate renewal where it lasts for the duration ordered. With regard to house search, problems may arise from the time of the search, especially searches conducted at night and at ‘unreasonable hours’. It thus appears that, with regard to telephone tapping, mutual trust could be enhanced by member states adopting straightforward rules regarding the time limits of the measure, namely, maximum duration and conditions for its renewal. That could allow member states to execute orders with various durations of the measures, even if different from those that would apply in a similar domestic case. With regard to house search, mutual trust could be taken to a higher level by member states ensuring that searches can be conducted at night or at unreasonable hours only in exceptional cases and if necessary due to the particular circumstances of the case. In this scenario member states would *per se* trust that, irrespective of *temporis* incompatibilities between their respective domestic laws, the measure would be carried out according to commonly agreed minimum standards, and would not carry a risk of abuses of power.

*Ratione personae*

The *ratione personae* issues in EU cross-border cooperation may arise when evidentiary measures can only be taken in member states for a limited category of persons and when these categories vary depending on the member state concerned, or when domestic provisions provide special rules relating to the gathering of evidence from specific persons or professions. This may relate, for example, to persons covered by immunities, persons obliged not to disclose information classified as ‘privileged’ or ‘confidential’, or confidentiality related to some professions or functions, such as lawyers, journalists and doctors. Extra dilemmas may arise with regard to the targeting of third persons by the measures, as well as the status of third persons affected by chance, and with regard to the liability of legal persons to be subject to the measure.
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The issues concerning *ratione personae* cannot be fully overcome without common understanding of privileges and immunities which constitute grounds for refusal under the MR instrument and represent one of the biggest obstacles when it comes to EU cross-border cooperation. However, given the fact that the EIO Directive explicitly refers to legal, journalistic and medical privileges, it is necessary to consider whether common EU minimum standards is feasible, at least with regard to these privileges, especially in light of the domestic provisions which also give special consideration to the professions concerned. Accordingly, with regard to lawyers, mutual trust between member states could be enhanced by introducing clear rules regarding the inviolability of client-lawyer confidentiality and, consequently, the inadmissibility of evidence gained *via* the tapping of lawyers’ telephones and searches of law firms in pursuit of information which falls within the scope of the right of defence. The mutual admissibility of evidence obtained from journalists and medical specialists could be taken to a higher level if member states were to ensure that the measures are carried out only if necessary in the circumstances of the case and are proportionate to the aim being pursued and, moreover, that the disclosure of protected sources is limited to an unavoidable minimum. It would be left to the member states how they effectuate these requirements. Mutual trust between member states could also be enhanced with regard to the third parties who may be affected by the measures by providing clear rules as to the gathering, examination, storage and use of the data concerning third parties and ‘necessary participants’. Finally, *per se* admissibility of evidence could also be facilitated if member states uniformly permit the targeting of legal persons with the measures. However, as in the case of third parties, it would be necessary for the measures to be accompanied by clear rules for examining, screening and sorting data gathered by chance.

Minimum standards with regard to the procedural rights associated with telephone tapping and house search

It is safe to say the mutual recognition of evidence gathered through such harmful measures as telephone tapping and house search can only work if member states trust *per se* that evidence obtained abroad has not violated the fundamental rights of the persons concerned. Consequently, it is necessary to ensure that the cross-border context of evidence-gathering neither deprives individuals of their rights nor reduces the accessibility and effectiveness of those rights.

Among fundamental rights enshrined at the EU level, both telephone tapping and house search strongly affect the right to respect for private life. Therefore, in order to minimise the risk of violations of this right, the use of both measures is strictly limited and may apply only, *inter alia*, if necessary in a democratic society in the interests of national security, for the prevention of disorder or crime, for the protection of the rights and freedoms of others etc.
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Moreover, both the ECHR and the EU Charter grant to persons whose rights guaranteed therein are violated the right to an effective remedy in order to protect and pursue these rights. In the case of the right to respect for private life, these remedies aim at verifying the use of measures which carry a risk of violations of this fundamental right. In this light it stands out that ensuring that the cross-border context does not deprive the person whose privacy was infringed of the possibility to challenge the measure effectively could significantly contribute to enhancing mutual trust and mutual admissibility of evidence across the EU.

Right to legal remedies

The mutual trust between member states and, consequently, the mutual admissibility of evidence, could be enhanced by ensuring that member states provide effective legal remedies against telephone tapping and house search for the persons whose right to privacy was affected by the measures carried out in a cross-border context. This effective apparatus would give any person whose right to respect for privacy was infringed a legal remedy to challenge:

- the substantive reasons underlying the decision to obtain evidence, including whether the measures are necessary and proportionate;
- the manner in which the measure was issued and exercised.

Accordingly, depending on the circumstances of the case and person concerned, these remedies may vary significantly between member states and apply, inter alia, in criminal, civil or administrative proceedings. However, it should be noted that if the legal remedy is granted to the entitled person and it is effective, the available procedure is of secondary importance. Operating under this standard would significantly enhance mutual trust between member states, even though effective remedies may differ between member states, apply in different proceedings and entail different consequences. What is of utmost importance is that persons who believe their fundamental rights have been infringed are granted an effective measure to enforce their rights, and that the cross-border context of proceedings does not hamper them. The key here is the ‘effectiveness’ of the right to remedy, which can be ensured differently within the legal systems across the EU.

Right to notification

The right to notification of the measures plays an important role in enhancing mutual trust between member states, complementing the right to legal remedies by enabling their enforcement. Consequently, to tackle procedural rights in cross-border gathering of evidence fully and completely, it is also necessary to come to common minimum standards with regard to the right to be notified of telephone tapping and house search. This goal can be
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achieved by member states ensuring that persons entitled to legal remedies against the measures carried out in a cross-border context are also effectively informed about the fact the measure was carried out and that a legal remedy against its exercise is available. In the case of both measures it would be up to member states to ensure the effective performance of such notification. In cases concerning telephone tapping, it could be effectuated as a separate decision, or through access to the case files, depending on the legal system and way of conducting proceedings. With regard to house search, the right to be notified of the measure could consist of delivering notification (preferably written) of the search, which explains the reason for the search, the objects, documents or data seized, and the legal remedies available. However, member states could provide other ways of providing the notification, as long as it ensures detailed information explaining the principles and scope of the search, sufficient for effective questioning of the measure.

Minimum standards for admissibility of irregularly obtained evidence

Even if all member states have developed complex and protective domestic approaches to irregularly obtained evidence, these domestic rules are not scrupulously applied when it comes to evidence gathered abroad. First, this follows from the fact that member states usually lack domestic rules regarding the admissibility of evidence collected abroad. Second, it is safe to say that domestic courts are usually more tolerant and flexible in their approaches to foreign items of evidence. The lack of transparent rules concerning admissibility of irregular evidence may lead to evidentiary-laundering and violations of fundamental rights, and intensify mutual distrust between member states. Therefore, if mutual admissibility of evidence in criminal matters in the EU is the goal, then progress towards minimum standards on the basis of which it can be decided when evidence gathered irregularly in a cross-border context from telephone tapping and house search will be per se inadmissible or non per se admissible is also required. Operating under minimum standards for admissibility of evidence gathered irregularly could consist of breaking with both locus and forum standards for admissibility of irregular evidence, if gathered in the EU cross-border context, and basing the use of irregular evidence on commonly agreed standards relating to fundamental rights enshrined in the ECHR and the EU Charter. In other words, the decision whether or not to recognise irregular evidence would be determined by the consequences of violation of a particular fundamental right. Due to the fact that telephone tapping and house search are linked to the right to respect for private life, these minimum rules should correspond with the consequences of violations of this fundamental right, which entail per se inadmissibility or non per se admissibility of evidence.
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**Per se inadmissibility**

Thus far, neither the EU nor the ECtHR has developed any exclusionary rule of absolute character other than that relating to evidence gathered through torture. The case-law of the Court makes it clear that violations of Art. 8 ECHR, to which telephone tapping and house search belong, do not entail *per se* inadmissibility of evidence gathered by such means. None of the existing EU instruments gives cause to conclude otherwise. Moreover, any abuses or breaches committed in the course of telephone tapping or house search would not have such a significant impact on their probative value, as would, for instance, torture or interrogation in the absence of a lawyer. Therefore, one may conclude there is a lack of common standards on *per se* inadmissibility of evidence in cases concerning telephone tapping and house search.

**Non per se admissibility**

Due to the lack of minimum standards for *per se* inadmissibility the next step involves the determination of the standards on the basis of which it can be decided when irregular evidence will be admissible after all. Following the ECtHR, this can be determined by using a balancing test to verify:

- whether the right to defence was preserved, in particular, whether the defendant has been presented with adequate opportunity to invoke defence rights in challenging the manner in which the evidence was obtained, as well as its use in the proceedings; and
- whether the conviction was not based solely on the irregularly obtained evidence.

This examination will aim at verifying the fairness of the procedure, and the potentially negative impact of the use of irregular evidence on other fundamental rights, in particular, the right to defence. Depending on the result of this test, evidence will be recognised as admissible after all, or inadmissible. Operating under these standards would ensure the preservation of EU fundamental rights in any event, and the mutual effect of the balancing test due to the fact that fundamental rights are the same elsewhere.
I. Introduction

1. Background to the study

Discussions on the free movement and use of evidence throughout the European Union (hereafter: EU) are far from being new. The concept of mutual admissibility of evidence, set up in the Tampere conclusions1, has already been addressed both by the EU institutions2 and by academic scholars3. However,

1 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, European Council, Presidency Conclusions, Tampere, 15 and 16 October 1999, p. 36.
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despite the fact that the concept of the mutual recognition of evidence in the Area of Freedom, Security and Justice is one of the top demands coming from Brussels, the EU still lacks rules which directly address admissibility of evidence gathered or transferred in the EU cross-border context. Recent steps in the evidentiary field, such as the framework decision on freezing order (hereafter: FD FO), the framework decision on the European evidence warrant (hereafter: FD EEW), or the Directive regarding the European Investigation Order (hereafter: EIO Directive), are aimed at facilitating evidence-gathering in the EU, and do not make much of an effort to enhance its admissibility.

Given the absence of common EU rules, evidence in the EU cross-border context is still gathered in accordance with the domestic regulations of the member states concerned, which may significantly differ from one system to another. As a result of the incompatibilities between national procedures, in some cases evidence gathered in one member state cannot be used in another member state because the way the information was obtained does not fit the national procedural requirements. These incompatibilities may relate, inter alia, to the authorities involved in evidentiary proceedings, the allowance of certain investigative techniques, the specific requirements for evidence-taking, the scope of targeted persons, procedural rights associated with evidentiary measures etc. Extra dilemmas may rise with regard to the mutual admissibility of evidence gathered irregularly. Due to the fact that this issue is regulated differently across the domestic legislation of member states, the lack of a common approach in this matter may lead to evidential ‘process-laundering’ or forum shopping within


5 Save for the Convention on mutual assistance and cooperation between customs administrations, 23.01.1998, OJ C 24/2. Its art. 14 reads: Findings, certificates, information, documents, certified true copies and other papers obtained in accordance with their national law by officers of the requested authority and transmitted to the applicant authority in the cases of assistance provided for in Articles 10 to 12 may be used as evidence in accordance with national law by the competent bodies of the Member State where the applicant authority is based. Accordingly, the instrument provides an opening towards per se admissibility of gathered items.


7 G. VERMEULEN, Free gathering..., p. 41-42.

8 This terms refers to the situation where evidence which is illegally obtained in one member state is ‘laundered’ through the admissibility rules of a foreign jurisdiction, where the standard
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the EU. The issues listed above, together with the lack of common EU rules, carry a risk that the entire effort towards the free gathering of evidence, without rules enhancing its admissibility, may be rendered superfluous\(^\text{10}\). Therefore, this research is dedicated to the question of how to enhance the mutual admissibility of evidence that travels across the borders within the EU.

2. The state of play: Criticism of the FRA principle

Thus far, the EU still operates under the assumption that domestic incompatibilities between national rules for evidence-taking may be accommodated by the forum regit actum principle (hereafter: FRA), which has governed EU cooperation for evidence-gathering since the entry into force of the 2000 EU MLA Convention\(^\text{11}\). According to this principle, the member state receiving a mutual legal assistance request must in principle comply with the formalities and procedures expressly indicated by the requesting member state, unless they cause incompatibilities with the fundamental principles of the law of the executing member state\(^\text{12}\). This principle has been subsequently incorporated from mutual legal assistance (hereafter: MLA) to mutual recognition (hereafter: MR) instruments, and the EU cross-border system of gathering of evidence still relies on its provisions\(^\text{13}\).

\(^{10}\) G. VERMEULEN, Free gathering…, p. 41.

\(^{11}\) See art. 4.1 of the 2000 EU MLA Convention: Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State; and the explanatory comments associated thereto: Paragraph 1 lays down the general principle that a requested Member State which is executing a request must comply with the formalities and procedures expressly indicated by the requesting Member State. The reason for this provision is to facilitate the use of the information gathered by mutual assistance as evidence in the subsequent proceedings in the requesting Member State. The words ‘formalities and procedures’ should be interpreted in a broad sense and may include, for example, the situation where a request indicates that a representative of the judicial authorities of the requesting Member State or defence representative must be permitted to attend the taking of evidence from a witness. On account of the burden this might place on the requested Member State, the requesting Member State should set out only those formalities and procedures which are indispensable for its investigations; 2000 EU MLA Convention Explanatory Report, p. 11. See also: G. VERMEULEN, EU Conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters, Revue Internationale de Droit Pénal, 2006/1, Vol. 77, p. 82-83.

\(^{12}\) G. VERMEULEN, Free gathering…, p. 42. It is noteworthy, that the FRA principle replaced the locus regit actum principle, which provides that the location where the investigative measure takes place is a decisive element in determining the applicable law.

\(^{13}\) Art. 5.1 FD FO; art. 12 FD EEW; art. 9.2 EIO Directive. See in more detail: G. VERMEULEN, The European Union Convention on mutual assistance in criminal matters [in:] Vers un espace
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However, the simple copying and pasting of the FRA principle from MLA to MR instruments raises doubts about its compliance with the philosophy of mutual recognition and capability of accommodating admissibility concerns in the EU. In the academic literature the following conceptual flaws and weaknesses of FRA have been reported:

- FRA does not commit to accepting the admissibility of evidence gathered accordingly, which means that a request to take certain formalities or procedures into account does not ensure that the effort applied in gathering evidence will be rewarded with admissibility;
- it has very limited effect on the level of admissibility due to the fact that it applies only in a one-on-one relationship and has no potential to ensure admissibility within the entirety of the EU;
- it lacks transparent rules in terms of the lawfulness of the way evidence is gathered;
- the principle of FRA may apply only in the case of gathered evidence, meaning that already existing evidence cannot fall within its scope.

All the above mentioned weaknesses prove that the FRA principle is not capable of maximising the chances of admissibility of evidence gathered in the EU cross-border context. This pessimistic conclusion gives rise to the question whether there are other means to facilitate mutual admissibility of evidence in criminal matters in the EU.

3. Alternative: Common EU minimum standards for evidence-gathering

TFEU offers an alternative to the FRA principle, opening the possibility to adopt minimum rules concerning, among other things, the mutual admissibility of evidence-gathering judiciaire péital européen, G. DE KERCKHOVE, A. WEMYMERGH, E. GUIGOU, M. VERWILGHEN, A. VITORINO (eds.), Brussels 2000, p. 186.

14 From an academic perspective, allowing the issuing or requesting member state to order formalities to be taken into account, is highly controversial in a pure mutual recognition philosophy (…) After all, mutual recognition should not only be looked at from the perspective of the executing member state and its obligation to execute an order, but also from the perspective of the issuing member state to accept (i.e. mutually recognise) the way the request is being executed in the other member state, W. DE BONDT, G. VERMEULEN, Free movement of scientific expert evidence in criminal matters [in:] EU Criminal Justice, Financial and Economic Crime: new perspectives, M. COOLS et al., Maklu 2011, p. 71-72; see also: G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering…, p. 11; I. ARMADA, The European Investigation Order …, p. 20; M. DANIELE, Evidence Gathering … p. 182.

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of evidence\textsuperscript{16}. It means that, using art. 82.2 TFEU as a legal basis, there can be adopted minimum standards for the gathering of evidence complemented with \textit{per se} admissibility of evidence gathered accordingly, as well as minimum standards for admissibility of evidence obtained irregularly.

It is noteworthy that the concept of common minimum standards for evidence-gathering has been already adverted to both by the EU institutions\textsuperscript{17} and in the academic literature\textsuperscript{18}. Thus far, progress towards common standards has been made with regard to the following measures: expert evidence\textsuperscript{19} and forensic evidence\textsuperscript{20}.

Undoubtedly, coming to these standards will be challenging. Firstly, it would require balancing of the search for common standards to overcome national diversities, on the one hand, and accepting the fact of international diversity on the other. Secondly, it would require that member states introduce these standards into domestic legislation and use them for the purposes of EU

\textsuperscript{16} Art. 82.2 TFEU: \textit{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 (…).}


\textsuperscript{19} W. DE BONDT, G. VERMEULEN, \textit{Free movement of scientific…}, p. 69-79.

\textsuperscript{20} S. DEPAUW, \textit{A European Evidence (Air)Space…}, p. 82-98.
cooperation in criminal matters. Thirdly, it would mean breaking with the FRA principle and relying on a new system of admissibility of evidence gathered in the EU cross-border context, which may be difficult for practitioners to accept. Despite these difficulties, the idea of common EU minimum standards is worth exploring for the following reasons.

First of all, the concept of common EU minimum standards fully corresponds with the pure mutual recognition philosophy. Operating under commonly agreed standards could significantly contribute to mutual recognition of evidence by enhancing mutual trust between member states as to the way of evidence-gathering. Secondly, it would make it easier for an issuing state to accept the way that the evidence is being taken in the executing state, and that could finally result in mutual recognition of evidence. Moreover, minimum standards have the potential to accommodate the weaknesses of FRA reported in the preceding paragraph:

- gathering of evidence under commonly agreed minimum standards would be complemented with per se admissibility, which resolves the problem of uncertainty of FRA and facilitates cooperation since the rules would not be variable depending on the member states concerned;
- due to the fact that the common standards would be applicable within the entirety of the EU, the evidence gathered accordingly would enjoy per se admissibility status in all member states, not only in one-to-one relations as in the case of FRA;
- minimum standards would consist of transparent rules as to the way the evidence is gathered, which can do away with dilemmas as to the lawfulness of the evidence-taking and eliminate evidentiary-laundering;
- if applicable also in a merely domestic situation, minimum standards could also resolve the issue of evidence gathered in a domestic context and transferred upon cross-border cooperation. Art. 82.2 TFEU permits the introduction of minimum standards where such standards are necessary to facilitate EU cross-border cooperation, which means that evidence gathered in a merely domestic context falls outside this scope.

However, the current adoption of a number of instruments in criminal procedure shows that member states are not too strict in interpreting Art. 82.2 TFEU and adopt minimum rules that are applicable also in a merely domestic context. Applying minimum standards to evidentiary measures in the domestic context would also facilitate the use of the EIO Directive, which regulates the transfer of already existing evidence. Otherwise, there would be a frustrating distinction in the admissibility of evidence gathered and transferred in the EU cross-border context.

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22 See art. 1 of the EIO Directive: The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
Another added value of adopting common minimum standards is the fact that operating under these standards could also maximise procedural guarantees for persons involved in evidentiary measures. Hence, besides the impact on admissibility issues, minimum standards could also contribute to a higher level of protection for individuals.

When appreciating the concept of minimum standards for evidence-taking it is also necessary to verify its political feasibility. As the current practice shows, member states are willing to adopt rules concerning the major procedural issues associated with trans-border cooperation. Thus far, the EU has adopted several directives introducing common standards on various aspects of the criminal process and still carries out other projects in this matter. These initiatives provide for numerous rules on procedure, containing guidelines on how certain acts, parts or phases of criminal proceedings shall be conducted. It is noteworthy that, with regard to common EU minimum standards for evidence-gathering, the research on cross-border gathering of evidence within the EU shows that many member states are in favour of this concept.

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23 These issues were stirred up after the adoption of the EIO Directive, see inter alia: EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, Vienna 2011; D. SAYERS, The European Investigation Order-travelling without a ’roadmap’, CEPS Liberty and Security in Europe, Brussels 2011.
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Having appreciated the idea of common minimum standards, the next steps undertaken in this research involve an in-depth study on the content of these standards. Therefore, the main objective of this research is to find out whether, in view of enhancing mutual admissibility of evidence, it is feasible to devise various types of common EU minimum standards.

4. Scope of the study and limitations

The study deals with two distinct measures: telephone tapping and house search. This limitation of the scope of the study follows from the fact that different investigative measures, given their diverse nature and the potential abuses that they may cause, will therefore also require different, measure-specific minimum standards. Consequently, separate studies were carried out with regard to various types of evidence.

It is not the objective of this study to deal with all varieties of evidentiary measures. Telephone tapping and house search were selected as subjects for this research for the following reasons. Firstly, both measures are of a highly intrusive character which means they deserve special focus, including at the EU level, in order to minimise the risk of abuses following from cross-border cooperation. Secondly, the potentially harmful nature of the measures allows one to assume that an analysis of minimum standards will be conducted in a similar fashion and might result in identical conclusions.

It is worth highlighting that the analysis focuses on classic forms of both measures and does not refer to the interception of Internet communications, online searches of computers or any electronic methods of investigation. That is a deliberate choice, because dealing with these concerns – even if linked to the main focus of this research – at many points may require separate investigation and, potentially, a technical background. Moreover, it is still not clear whether “e-gathering” of evidence should be governed by means of already existing measures, or whether it deserves modified versions of investigative measures accompanied by certain procedural requirements and guarantees.

It is also necessary to delineate that this research refers to evidence gathered with respect to criminal proceedings by judicial authorities, and does not cover the aspects of evidence gathered by intelligence actors from surveillance acts. This limitation follows from the fact that the gathering and use in criminal proceedings of evidence gathered by intelligence is controversial not only in the EU, but also in member states. Therefore, due to the complexity of the issue and legal acts regulating it, it deserves a separate analysis that falls outside the scope of this research.
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5. Goal of the study

The main objective of the study is to find out whether, in view of enhancing mutual admissibility of evidence gathered from telephone tapping and house search, it is feasible to arrive at various types of common EU minimum standards:

- minimum standards to enhance the per se admissibility of evidence. To that end, it is examined whether it is feasible to come to minimum rules for telephone tapping and house search, in particular,
  a) as far as the scope of both measures is concerned ratione auctoritatis, ratione materiae, ratione loci, ratione temporis and ratione personae; and
  b) as far as the procedural rights related to the respective measures are concerned, namely, the right to be notified of them and the right to legal remedies against the exercise of them.

- minimum standards with regard to the admissibility of evidence obtained irregularly, in casu collected through telephone tapping or house search respectively, divided into:
  a) common minimum standards for non per se admissibility;
  b) common minimum standards for per se inadmissibility.

Therefore, through a double case study of telephone tapping and house search, this study examines whether the adoption of the standards reported above is feasible and whether compliance with these minimum standards would finally shape the so far nonexistent concept of the free movement and mutual recognition of evidence in criminal matters in the EU.

6. Central research questions

The study was conducted in order to find answers to three central research questions:

- Is it feasible to come to common EU minimum standards in view of enhancing per se admissibility of evidence gathered from telephone tapping and house search (per se admissibility)?
- Is it feasible to come to common EU minimum standards on the basis of which it can be decided when irregular evidence collected through telephone tapping or house search respectively, which obviously cannot constitute per se admissible evidence, will be admissible after all (non per se admissibility)?
- Is it feasible to come to common EU minimum standards on the basis of which it can be decided when irregular evidence collected through telephone tapping or house search will be inadmissible in any event (per se inadmissibility)?
INTRODUCTION

These central questions give rise to a series of secondary research questions, subsequently listed in the introductions to particular chapters.

7. Methodology and structure of the study

7.1. Methodology levels

Due to the fact that the goal of this research is to investigate common EU minimum standards to overcome evidentiary differences throughout the EU and result in mutual recognition of evidence, it is necessary to combine various methodologies in order to take into account differences between legal systems across the EU, the current instruments which have been introduced for the purposes of cross-border cooperation in criminal matters, and human rights. Therefore, three different techniques were combined in this research: a comparative study, an investigation of Council of Europe and EU legislation and policy documents, and an analysis of the jurisprudence of the ECtHR. This combination of methodologies helps, firstly, in reporting the current state of play and, secondly, in reporting how far we can move towards deriving common EU minimum standards to enhance mutual admissibility of evidence.

- Member state level analysis

The goal of this methodology is to report the most striking differences between member states, which may hamper mutual trust in evidentiary matters and raise doubts as to admissibility of evidence gathered abroad. Therefore, this level consists of an analysis of domestic norms concerning telephone tapping and house search in six selected member states, as follows:

a) England and Wales,
b) France,
c) Ireland,
d) The Netherlands,
e) Poland,
f) Spain.

These member states were selected to represent a variety of legal systems and different approaches to evidentiary issues, in order to illustrate the potential problems which may occur in the field of mutual recognition of evidence in the EU. Hence, in order to enhance the results and report various categories of domestic approaches, the research also includes two common law systems. Accordingly, the research reports the differences between member states and selects those characteristics that may negatively affect mutual recognition of evidence and, therefore, deserve to be mitigated by means of common standards. In other words, on the basis of six various jurisdictions, the research shows which dots should be joined up if mutual admissibility in the EU is the goal.

The objective of this research is not to investigate the legislation of member states in detail, to compare criminal justice systems in total or to propose
concrete solutions for selected jurisdictions. Consequently, the comparative study solely encompasses concrete pieces of law or jurisprudence, relevant for the purposes of this research (brief overviews of the investigated legal systems are annexed to this book). It should be stressed that searching for answers to detailed questions in foreign regulations is not always feasible for one researcher herself. That is why the methodology used in this section combines a classic study based on foreign legal acts and literature, as well as scientific consultations with the representatives of four member states (France, Ireland, the Netherlands and Spain) carried out at Eurojust in November 2015. These research meetings helped significantly in filling legal information gaps, clarified the interpretation of some provisions, showed some at first sight invisible links, provided a personal explanation of issues which are not explicitly expressed in the law, and also provided references to adequate jurisprudence. The consultations were held with templates prepared individually for each desk. The list of the issues discussed with the experts varied in scope and detail, depending on the member state concerned and information sought. It is also important to stress that the member states investigated in this research, save Poland, do not explicitly regulate the admissibility of evidence gathered abroad\textsuperscript{28}. Therefore, the research does not provide a comparative overview in this respect.

- **EU/CoE level analysis**

The second methodological technique comprises an analysis of legislation and policy documents regarding cross-border cooperation in criminal matters, developed both within the European Union and with the Council of Europe’s cooperation. The outcomes of this analysis help in understanding to what extent member states are willing to establish rules for the purposes of EU cross-border cooperation. This method consists of compiling an overview of existing legal frameworks of the MLA and MR, which address concerns crucial for the purposes of this research. The added value of this methodological technique is that the minimum standards derived in this research are not disconnected from current frameworks and correspond to EU policy in criminal matters. Due to the fact that particular stages of the research tackle different research questions, the analysis of legislation and policy documents may vary in scope and detail depending on the issue concerned. In order to facilitate the study, the following chapters, where possible, provide separate analysis for MLA and MR instruments.

INTRODUCTION

- **The ECtHR level analysis**

Finally, due to the fact that all EU member states are party to the ECHR, any common EU minimum standards shall be based on or, at least, drafted in line with the common fundamental rights and norms developed by the ECtHR. Therefore, at each stage of the research the relevant case-law of the Court is reported and analysed. It should be highlighted that analysis of the ECtHR’s standards that refer to the admissibility of evidence is challenging, since the Court does not attempt to provide the rules in this area, but rather determines whether the procedure applied in each case was fair as a whole. Therefore, at any stage of the study it was necessary to detect and analyse the case-law relevant for the minimum standard being examined, in order to provide the ECtHR’s approach to various aspects of both measures which could constitute a basis for certain common standards.

7.2. **Twofold structure**

The research is divided into two main parts. In the first part, common EU minimum standards to enhance *per se* admissibility of evidence are investigated. This part of the study is divided into two steps:
- minimum standards with regard to rules governing telephone tapping and house search;
- minimum standards with regard to the procedural rights associated with telephone tapping and house search.

In the second part the focus is centred on common standards for evidence gathered irregularly. This part also consists of two steps:
- standards for non *per se* admissibility of evidence gathered irregularly, and
- standards for *per se* inadmissibility of evidence gathered irregularly.

Each of the standards is elaborated on and examined in the separate chapters, structured in the same fashion:
- introduction and research questions – a prelude to the issue being investigated in the chapter and its relevance in the field of mutual admissibility of evidence, accompanied with research questions that will be explored;
- member states level analysis – an overview of domestic provisions with regard to the standard being investigated;
- MLA/MR level analysis – an analysis of existing legislation and policy documents regulating or referring to the standard being investigated;
- ECtHR case-law analysis – an analysis of the case-law related to the standard being investigated;
- deriving of the minimum standard – conclusions and proposal for certain minimum standards.
II. Common EU minimum standards to enhance per se admissibility of evidence

1. Minimum standards with regard to rules governing telephone tapping and house search

This part of the study examines the feasibility of coming to common minimum standards with regard to the way that the evidence is collected, which encompass: ratione auctoritatis, ratione materiae, ratione loci, ratione temporis and ratione personae. The reason for selection of these particular standards is that both measures seriously affect the right to respect for private life and, therefore, require certain criteria for issue and execution, in order to provide an adequate level of protection against abuses. The above reported factors are frequently analysed by the ECtHR with respect to both measures and, moreover, most of the differences that hamper mutual admissibility of evidence across member states are apparent. That allows one to assume that there is a high impact of these factors on mutual admissibility of evidence. Therefore, the goal of this part of the research is to investigate how to take the mutual trust with regard to these elements to a higher level by coming to common minimum standards, in view of per se admissibility of evidence gathered therein.

1.1. Ratione auctoritatis

The lack of common standards for ratione auctoritatis can lead to many dilemmas concerning the admissibility of evidence gathered from telephone tapping and house search. These dilemmas may follow from the fact that different member states may empower different authorities to order the measures, such as judges, investigative judges, prosecutors, police etc. Due to the fact that an issuing authority is one of the guarantees that the measure is not conducted haphazardly, domestic incompatibilities in this matter may lead to deep mutual distrust. Hence, evidence gathered within a house search issued by a prosecutor may be questioned in member states which require a search warrant issued by a judge. Therefore, questions as to the authorities designated to issue the measures are of crucial importance for this research. Consequently, this part of the research deals with the following core question:

Which authorities should be designated to issue the permission to carry out telephone tapping and house search in an EU cross-border context, in order to enhance the mutual admissibility of evidence gathered therein?

Given the intrusive nature of telephone tapping and house search, it is necessary to examine the obligatory involvement of the judicial authorities in granting both measures. However, what may cause significant problems at the EU level are the various classifications of the ‘judicial’ protection of telephone tapping and house search in member states. Whereas some states involve ‘judicial’ bodies initially, in the issuing phase, others rely on ‘judicial’ supervision, or on a posteriori control of the measures. On top of that, the term ‘judicial authority’ has an ambiguous and non-coherent meaning across the EU. Consequently, the core research question of this chapter gives rise to the following secondary research questions:

Should the permission to carry out telephone tapping and house search be a decision for judicial authority?

What is conceived as a judicial authority in the context of EU cooperation in criminal cases?

All these research questions are examined below.

1.1.1. **Ratione auctoritatis in domestic legislation**

1.1.1.1. **Telephone tapping**

A comparative overview of the domestic legislation shows that the majority of member states included in this research designate judicial authorities to order the measure. In France, the measure may be issued by an investigative judge or, in some cases, by a judge of liberties and detention. Telephone tapping in Ireland may be granted by a judge of the District Court upon the application of a superior officer. The measure may be carried out in the Netherlands upon the order of the public prosecutor, with the prior authorisation of an investigative authority.

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30 In cases concerning telephone tapping the ECtHR ruled that: The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, Klass v. Germany, §§ 56.
31 Such as ordering, a priori or a posteriori authorisation or review of a measure.
33 Art. 100 CCP.
34 Arts. 706–773 CPP.
judge\textsuperscript{36}. In Poland, it is exclusively in the court’s competence to issue the interception order. Pursuant to art. 237 KPK, the court, at the request of a public prosecutor, may order the surveillance and recording of the content of telephone conversations by way of telephone tapping. According to the Spanish LECrim, only the judicial authority, which is the investigating magistrate, is competent to order telephone tapping\textsuperscript{37}. Unlike in other countries covered by the research, interception of communication in England and Wales may be carried out with a warrant from the Secretary of State, at the request of authorised officials. The competent authorities to apply for the issue of an interception warrant are indicated in Section 6 RIPA, and cover, among others:

- the Director-General of the Security Service,
- the Chief of the Secret Intelligence Service,
- the Commissioner of Police of the Metropolis,
- the Chief of Defence Intelligence,
- a person who, for the purposes of any international mutual assistance agreement, is the competent authority of a country or territory outside the United Kingdom\textsuperscript{38}.

\textbf{1.1.1.2. House search}

A warrant to search premises in England and Wales may only be issued by a court\textsuperscript{39}. In France, the measure is usually granted by the examining magistrate or, in a preliminary inquiry, the detention and liberty judge\textsuperscript{40}. Most search warrants in Ireland are issued by District Court judges upon the hearing of evidence on oath given by a member of the police not below the rank of inspector\textsuperscript{41}. In the Netherlands, house search must be conducted where possible by the investigating magistrate\textsuperscript{42}. In Poland, a competent body to issue a search warrant is a prosecutor or court, depending on the stage of proceedings\textsuperscript{43}. In Spain, the measure is also granted by a judge or a court\textsuperscript{44}.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{37} Art. 588 bis b LECrim.
  \item \textsuperscript{38} Section 6 RIPA; Interception of Communications. Code of Practice, p. 7-8.
  \item \textsuperscript{40} R. VOGLER, \textit{France} [in:] \textit{Criminal Procedure in Europe}, R. VOGLER, B. HUBBER (eds.), p. 247-248.
  \item \textsuperscript{41} Section 7 Criminal Justice (Miscellaneous Provisions) Act 1997.
  \item \textsuperscript{42} Art. 110 Sv; M. J. BORGERS, L. STEVENS, \textit{The Netherlands…}, p. 192.
  \item \textsuperscript{43} Art. 220 KPK.
  \item \textsuperscript{44} Art. 546 LECrim.
\end{itemize}
\end{footnotesize}
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1.1.1.3. Conclusion

As the overview of domestic legislation shows, besides England and Wales, the member states covered by this research entrust judges, courts or investigative judges with granting authority when it comes to the issue of telephone tapping. None of the investigated member states authorise a public prosecutor to do so. In the case of house search, only Poland authorises the public prosecutor to issue a search warrant at pre-trial stage. Other member states entrust judges, investigative judges or courts with granting authority in this matter. What is noteworthy is that in the majority of states the issuance of permission for telephone tapping requires a two-step procedure, namely the submission of an application to the relevant authority, followed by the decision of that authority.

Table 1: Ratione auctoritatis in domestic legislation

<table>
<thead>
<tr>
<th></th>
<th>Court, judge or investigative judge</th>
<th>Public prosecutor, other authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Telephone tapping</strong></td>
<td>Ireland, France, Poland, The Netherlands, Spain</td>
<td>England and Wales</td>
</tr>
<tr>
<td><strong>House search</strong></td>
<td>England and Wales, Ireland, France, Poland (trial stage), The Netherlands, Spain</td>
<td>Poland (pre-trial stage)</td>
</tr>
</tbody>
</table>

1.1.2. Ratione auctoritatis in MLA and MR instruments

One of the research questions of this chapter is whether the permission to carry out telephone tapping and house search should be a decision for a judicial authority. This question follows from the fact that the majority of member states investigated in this research entrust courts, judges or investigative judges in this matter, which gives rise to the hypothesis that the auctoritatis issue could be tackled by simple reference to 'judicial' authority. However, the term 'judicial authority' has an ambiguous meaning in the context of EU cooperation in criminal matters. It refers to the criminal justice system as a whole and, consequently, relates to all authorities working in it, such as prosecutors, central authorities, police or even administrative authorities. Hence, it is necessary to verify who is conceived as a 'judicial' authority in the context of EU cooperation in criminal matters, in order to provide a common standard coherent with both national and supra-national approaches to this term.

Therefore, the following analysis presents an overview of the development of the term 'judicial' within MLA and MR instruments. Special consideration is

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See in more detail: G. VERMEULEN, W. DE BOND'T, C. RYCKMAN (ed.), Rethinking ..., p. 65
et seq.; Z. DURDEVIĆ, Judicial Control..., p. 990.
given to the provisions which explicitly refer to authorities competent to issue telephone tapping and house search for purposes of EU cooperation.

1.1.2.1. ‘Judicial’ authorities in MLA instruments

- 1959 ECMA

The ‘mother treaty’ uses the term ‘competent judicial authority’ without defining it and – according to art. 24 of the ECMA – leaves the scope of this term to the national law of member states. As a result, member states are given considerable freedom to indicate which authority they appoint as judicial, which is also highlighted in the Explanatory Report to the Convention:

As mentioned in the commentary on Article 1, paragraph 1, the term “judicial authorities” has a different connotation in different countries. In some countries “Public Prosecutors” come within the term, whereas in others they do not. Accordingly, it was agreed that any country could at the time of signature or of deposit of its instruments of ratification define how it would construe “judicial authorities” for the purposes of the Convention, so as to allow, if considered desirable, for the inclusion of “Public Prosecutors”.

Therefore, the 1959 ECMA gives member states the freedom to indicate which authority they appoint as judicial for purposes of application of the Convention. This results in a broad understanding of the term ‘judicial authority’, which – depending on the domestic provisions of member states – may differ from one state to another and, moreover, does not refer only to judges and courts. Consequently, ‘judicial authorities’ assigned by member states can be central, governmental or even police authorities.

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46 See, inter alia: art. 1.1 of the ECMA: The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party; art. 3.1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents; art. 10.1. If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear.

47 Art. 24 of the ECMA: A Contracting Party, may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary-General of the Council of Europe, define what authorities it will, for the purposes of the Convention, deem judicial authorities.


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- 2000 EU MLA Convention

The 2000 EU MLA Convention uses the term ‘competent’ authorities. As in the case of 1959 ECMA, the instrument leaves the specification of this term to the member states, according to their domestic law\textsuperscript{51}.

Given the scope of this research, the specific provisions dealing with interception of telecommunications cannot be overlooked here. According to art. 17 of the Convention:

\begin{quote}
Art. 17. For the purpose of the application of the provisions of Articles 18, 19 and 20, ‘competent authority’ shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by those provisions, an equivalent competent authority, specified pursuant to Article 24(1)(e) and acting for the purpose of a criminal investigation.
\end{quote}

Consequently, the Convention does not require the authorities competent for dealing with cross-border interceptions to be judicial, which is additionally pointed out in the Explanatory Report on art. 17 of the Convention:

\begin{quote}
This Article allows a Member State, where no judicial authority has competence for applying Articles 18, 19 and 20, to specify pursuant to Article 24(1)(e) an equivalent competent authority acting for the purpose of a criminal investigation. This provision means that under the conditions laid down in Articles 18, 19 and 20, the other Member States accept interception requests from a competent authority acting for the purpose of a criminal investigation, but which is not necessarily a judicial authority\textsuperscript{52}.
\end{quote}

In conclusion, as in the case of the 1959 ECMA, the 2000 EU MLA Convention gives member states the freedom to indicate which authorities they deem to be judicial, however – as explained in the Explanatory Report – their ‘judicial’ nature is not required. At the same time, the term ‘judicial’ is not precisely defined by the Convention.

\textsuperscript{51} Art. 24 of the 2000 EU MLA Convention: When giving the notification referred to in Article 27(2), each Member State shall make a statement naming the authorities which, in addition to those already indicated in the European Mutual Assistance Convention and the Benelux Treaty, are competent for the application of this Convention and the application between the Member States of the provisions on mutual assistance in criminal matters of the instruments referred to in Article 1(1), including in particular: (a) the competent administrative authorities within the meaning of Article 3(1), if any; (b) one or more central authorities for the purposes of applying Article 6 as well as the authorities competent to deal with the requests referred to in Article 6(8); (c) the police or customs authorities competent for the purpose of Article 6(5), if any; (d) the administrative authorities competent for the purposes of Article 6(6), if any; and (e) the authority or authorities competent for the purposes of the application of Articles 18 and 19 and Article 20(1) to (5).

\textsuperscript{52} 2000 EU MLA Convention Explanatory Report, p. 21.
Conclusion: a ‘non-coherent authorities landscape’

The member states’ freedom to define and appoint ‘competent’ and ‘judicial’ authorities results in a ‘non-coherent authorities landscape’ for cooperation in criminal matters based on MLA instruments. Hence, ‘judicial’ cooperation within the meaning of these instruments in practice also covers prosecutors, central, governmental and police bodies. To illustrate this, the following tables present which authorities are competent to deal with telephone tapping and house search upon MLA instruments:

Table 2: ‘Judicial’ authorities deemed to receive requests upon MLA instruments

<table>
<thead>
<tr>
<th>Telephone tapping</th>
<th>England and Wales</th>
<th>Ireland</th>
<th>France</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competent authority</td>
<td>Central</td>
<td>Central</td>
<td>Judicial</td>
<td>Prosecutor</td>
<td>Prosecutor</td>
<td>Judicial</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>House search</th>
<th>England and Wales</th>
<th>Ireland</th>
<th>France</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competent authority</td>
<td>Central</td>
<td>Central</td>
<td>Judicial</td>
<td>Prosecutor</td>
<td>At pre-trial stage: prosecutor At judicial stage: judicial</td>
<td>Judicial</td>
</tr>
</tbody>
</table>

All items are based on information available at European Justice Network <http://www.ejn-crimjust.europa.eu/ejn>.

1.1.2.2. ‘Judicial’ authorities in MR instruments

A new quality of cooperation based on the mutual recognition principle brings up a new approach to ‘judicial’ authorities. The MR instruments introduce the terms ‘issuing’ and ‘executing’ member states instead of ‘requested’ and ‘requesting’ member states and, step by step, seek to specify the meaning and scope of the word ‘judicial’.

The FD FO is the first instrument based on the principle of mutual recognition, which deals with a narrow spectrum of EU cooperation with respect to evidence. The instrument bases cooperation on the direct contact of ‘judicial authorities’, without, however, defining what is perceived as ‘judicial’. According to its provisions:

Art. 1. The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. (…).

As mentioned above, the FD FO uses terms such as the ‘issuing’ and ‘executing’ state, which are typical for mutual recognition, and defines them as follows:

Art. 2a): ‘issuing State’ shall mean the Member State in which a judicial authority, as defined in the national law of the issuing State, has made, validated or in any way confirmed a freezing order in the framework of criminal proceedings.

Art. 2b): ‘executing State’ shall mean the Member State in whose territory the property or evidence is located.

Given the language of the above-mentioned provisions, one might assume that the FD FO only requires the authorities of the issuing member state to be judicial. However, further articles concerning recognition and execution of a freezing order also make references to the ‘judicial’ nature of the executing authorities, as follows:

Art. 5.1. The competent judicial authorities of the executing State shall recognise a freezing order, transmitted in accordance with Article 4, 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 (…).

Art. 5.3. The competent judicial authorities of the executing State shall decide and communicate the decision on a freezing order as soon as possible and, whenever practicable, within 24 hours of receipt of the freezing order.

Art. 6.3. The judicial authorities of the issuing State shall forthwith notify the judicial authorities of the executing State that the freezing order has been lifted. In these circumstances it shall be the responsibility of the executing State to lift the measure as soon as possible.
In this light it becomes apparent that the FD FO refers to cooperation between ‘judicial authorities’, both on the issuing and executing side. At the same time, the instrument lacks any definition of the term ‘judicial’ and leaves specification of its meaning to member states. This, as in the case of MLA instruments, results in a wide variety of types of bodies appointed by member states to issue and execute the freezing order, including judges, investigative magistrates, prosecutors and central and police authorities.

- FD EEW

The EEW Proposal clarifies the scope of the term ‘judicial’ significantly. Referring to procedural guarantees and minimum safeguards, the document limits the scope of ‘judicial’ authorities to judges, investigating magistrates and prosecutors:

It is important to note that the issuing authority must be a judge, investigating magistrate or prosecutor. Other competent authorities (including police, customs and administrative authorities) are not permitted to issue a European Evidence Warrant. Such authorities must seek the decision of a judge, investigating magistrate or prosecutor in order to have a European Evidence Warrant issued.

Consequently, art. 2 of the EEW Proposal stipulates that:

Art. 2 a) “issuing authority” shall mean a judge, investigating magistrate or

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54 It is noteworthy that when discussing the instrument some member states postulated specification and definition of the term ‘judicial’ for the purposes of its application, see in more detail: R.A. MORAN MARTINEZ, Decisión marco de 22 de julio de 2003, relativa a la ejecución en la unión europea de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas, Estudios de Derecho Judicial 2007, no. 117, p. 189-190.

55 EEW Explanatory Memorandum, para. 71; see also: EEW Explanatory Memorandum, para. 47: In the issuing State, the issuing judicial authority is limited to judges, investigating magistrates or prosecutors. There is also a need to prevent equivalence with the domestic criminal procedural law of the issuing State when dealing with evidence obtained in another Member State. For this reason, the judicial authority issuing a European Evidence Warrant must be satisfied that it would be able to obtain the objects, documents or data in similar circumstances if they were on the territory of its own Member State. This prevents the European Evidence Warrant from being used to circumvent national safeguards on obtaining evidence. As an example, this would preclude using the European Evidence Warrant to obtain objects, documents or data from the executing State that would be impossible to obtain in the issuing State because it is protected by legal, medical or journalistic privileges; Recital (8) of the EEW Proposal: The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. It should therefore be issued only by judges, investigating magistrates and prosecutors, and only when certain minimum conditions have been satisfied. These should include the tests of necessity and proportionality. There is also a need to prevent the issuing State from circumventing its national law by obtaining objects, documents or data that it would not be able to obtain in similar circumstances if they were available on its own territory.
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prosecutor with competence under national law to issue a European Evidence Warrant;

b) “executing authority” shall mean an authority with competence under national law to execute a European Evidence Warrant.

Thus, within the meaning of the EEW Proposal, the term ‘judicial’ covers either judges, investigative magistrates or prosecutors. At the same time, the EEW Proposal does not require the executing authorities to have judicial nature, except for certain decisions concerning execution of the warrant.

However, the final version of the FD EEW significantly broadens the definition of issuing authorities. According to art. 2 (c) FD EEW, the ‘issuing authority’ can mean:

- a judge, a court, an investigating magistrate, a public prosecutor, or
- any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law.

Accordingly, the FD EEW provides an open definition of issuing ‘judicial’ authorities, the scope of which may differ significantly from one member state to another.

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56 Contrary to the FD FO, which refers to the ‘competent judicial executing authority’, the EEW Proposal uses the terms ‘executing authority’ (see arts. 11, 12.1(a) and 14) and ‘competent authority for execution’ (see art. 7.1).

57 Art. 15 of the EEW Proposal: 1. A judge, investigating magistrate or prosecutor in the executing State shall oppose the recognition or execution of the European Evidence Warrant if this would infringe the ne bis in idem principle according to the Framework Decision 2003/.../JHA on the application of the principle of ne bis in idem. 2. A judge, investigating magistrate or prosecutor in the executing State may also oppose the recognition or execution of the European Evidence Warrant if: (a) its execution would infringe the ne bis in idem principle with respect to proceedings in a third State; or (b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the European Evidence Warrant; see also EEW Proposal, para 102: A decision of non-recognition or non-execution is explicitly limited to a judge, investigating magistrate or prosecutor in the executing State. This avoids the situation in which a police or administrative authority would have the power to overturn a judicial decision. In cases where a police or administrative authority is responsible for the execution of the warrant, that authority must nevertheless seek the decision of a judge, investigating magistrate or prosecutor in order to refuse to recognise and execute the warrant.

58 However, see amendments of the European Parliament which advocated limitation of the definition of issuing authority, as follows: one of the most important guarantees for the public is that evidence should only be collected by the judicial authorities, or in other words judges, investigating magistrates and public prosecutors, EUROPEAN PARLIAMENT, Resolution T6-0486/2008.

59 See also Recital (8) of the FD EEW: The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. The EEW should therefore be issued only by judges, courts, investigating magistrates, public prosecutors and certain other judicial authorities as defined by Member States in accordance with this Framework Decision.
With regard to the ‘executing authority’ the FD EEW states that it shall mean ‘an authority having competence under the national law’. Hence, the instrument does not require the executing state to be ‘judicial’, except for authorities entitled to refuse recognition or execution and postponement of recognition or execution.60

It is worth highlighting that, besides clarifying the term ‘judicial authority’, the FD EEW also refers to potential problems concerning ratione auctoritatius incompatibilities in light of search and seizure. According to its art. 11.4:

Art. 11.4: If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

This provision clearly shows that in cases of such intrusive measures as search and seizure, the FD EEW regards issuances undertaken by ‘judicial’ authorities as preferable, and it also includes public prosecutors.61

EIO Directive

The EIO Directive goes further in defining the term ‘judicial’ authority than the former instruments. According to its art. 2:

Art. 2 c) ‘issuing authority’ means:

(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal

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60 See: art. 13.2 FD EEW: The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law; art. 16.3 FD EEW: The decision to postpone recognition or execution of the EEW pursuant to paragraphs 1 or 2 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law.

61 However, the introduction of this ground for refusal of ratione auctoritatius in the cooperation instruments was questioned as hampering the concept of EU cooperation, see: G. VERMEULEN, W. DE BONDT, C. RYCKMAN (eds.), Rethinking..., p. 88-89.
proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO;

d) ‘executing authority’ means an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law.

The distinction between ‘a judge, a court, an investigative judge or a public prosecutor’ and ‘any other competent authority’ is more precisely explained in the EIO Proposal Explanatory Memorandum:

(...) most Member States will probably use point (i) which provides for the designation of a judge, a court, an investigating magistrate or a public prosecutor as the authority competent to issue an EIO. However, in order to take into account the various national systems, point (ii) allows for the designation of another type of judicial authority, as long as it is, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence in the case concerned to order the gathering of evidence. A Member State may for example designate a police authority as an issuing authority for the purpose of the EIO but only if that police authority has the power to order the investigative measure concerned at national level. This solution is in line with existing mutual legal instruments as well as with the FD on the EEW. The latter, however, is less flexible as it contains a validation procedure through which the Member States which designated, for example, police authorities as issuing authorities, may be required by the executing State to have the EIO validated by a judicial authority stricto sensu (a judge, prosecutor, court or investigating magistrate). This validation procedure is among the additional complexities brought by the EEW compared to mutual legal assistance and a simplification is therefore necessary. Moreover, the solution proposed in the draft Directive is in conformity with the principle of mutual recognition.

Hence, the Directive provides a distinction between judicial authorities sensu stricto which are a judge, prosecutor, court or investigating magistrate, and

62 It is noteworthy that the EIO Proposal speaks of ‘any other judicial authority’ instead of ‘any other competent authority’, see art. 2 (a) (ii) of the EIO Proposal: (...) any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law.
63 EIO Proposal Explanatory Memorandum, p. 4.
RATIONE AUCTORITATIS

judicial authorities *sensu larna*, for example, police authorities. What follows from art. 2 (c) EIO Directive is that not only judges, courts and investigating magistrates but also prosecutors are seen as ‘judicial’ bodies *sensu stricto*. These ‘judicial’ authorities are also designated to lead a validation procedure in cases where the order is issued by ‘any other competent authority’, as set out in art. 2(c)(ii) of the EIO Directive. With regard to the authorities competent to execute the order, member states are free to designate their competent national authorities in accordance with national law. However, as a result of the EP’s intervention, ‘judicial’ authorisation is needed where the national law of the executing state requires it. It is noteworthy that this final solution is still criticised as unsatisfactory in terms of ensuring compliance with human rights.

- **FD EAW**

While looking into *uctoritatis* concerns it is also necessary to consider the FD EAW, in order to ascertain how the instrument overcomes the problem of different authorities competent under domestic law to issue the warrant. The FD EAW Proposal defines ‘judicial’ authorities as follows:

- “issuing judicial authority” means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant
- “executing judicial authority” means the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant.

As explained in the Explanatory Memorandum attached to the EAW

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65 Unsurprisingly, negotiations on the nature of the executing authority also proved difficult. The original proposal defined executing authority as “an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case”, therefore leaving the issue to national law. The fact that the national authority competent to undertake the investigative measure would often be the police did not please the European Parliament, which wished to render the executing authorities “judicial”. The compromise found reads as follows: “executing authority means an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law.”, I. ARMADA, *The European Investigation Order…*, p. 12-13.

66 Equally, what of the judicial nature of the executing authority? At present, the executing authority is only defined by its competence to execute the order. There is a good argument for judicial intervention on either side to ensure compliance with human rights and the fundamental principles of national law and for proper consideration of the grounds for refusal given the scope of the instrument (…). An element of judicial validation needs to be in place on both sides – issuing and executing, D. SAYERS, *The European…*, p. 9, 16.

67 EAW Proposal, p. 28.
Proposal, this approach corresponds to the 1957 Extradition Convention, which covers the judiciary and public prosecutors, but excludes police authorities. However, the final version of the FD EAW does not provide the above-mentioned definitions and uses the term ‘judicial authority’, without its further definition or specification, as follows:

Art. 6.1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

6.2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

This ‘strong judicial’ approach is worth exploring, especially in light of the diversity of legal systems. According to the Annex to the Report from the Commission, most member states indicated judges or courts, whether as issuing or executing authorities. However, some member states designated the police, administrative central bodies or prosecutors as ‘judicial authorities’. Hence, within the scope of ‘judicial’ authorities indicated by member states one may find:

68 The procedure of the European arrest warrant is based on the principle of mutual recognition of court judgments. State-to-State relations are therefore substantially replaced by court-to-court relations between judicial authorities. The term “judicial authority” corresponds, as in the 1957 Convention (cf. Explanatory Report, Article 1), to the judicial authorities as such and the prosecution services, but not to the authorities of the police force. The issuing judicial authority will be the judicial authority which has authority to issue the European arrest warrant in the procedural system of the Member State (Article 4).
With regard to the executing judicial authority, several procedural mechanisms are possible depending whether the simplified procedure applies or not (Article 16). It will be the prosecution service or a judge, depending on the procedure applicable in the Member State. The term “executing judicial authority” will cover one or the other, as the case requires. But it must always be the authority that takes the decision to execute the warrant. Even if Article 5 enables the Member States to confer powers on a central authority in a series of circumstances, that authority will not be covered by this definition, EAW Proposal, p. 7-8; see also: The term “competent authorities” in the English text corresponds to autorités judiciaires in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities. COUNCIL OF EUROPE, Explanatory Report to the European Convention on Extradition, Paris, 13.12.1957, European Treaty Series – No. 30, p. 4.
69 In this respect see comments of A. SUOMINEN, The principle of mutual recognition in cooperation in criminal matters, Bergen 2010, p. 21-22.
- an investigative magistrate (Austria),
- a regional court in a panel composed of one judge (Sweden),
- a District Court in a panel composed of three professional judges (Poland),
- a District Court in a panel composed of one judge (Cyprus),
- a District Court in a panel composed of one professional judge and two lay judges (Finland),
- an appeal court (Italy),
- a High Court (Ireland)72.

It is worth pointing out that, according to the Commission, the diversity of authorities designated as ‘judicial’ issuing and executing bodies should not be problematic as long as the procedural guarantees and the fairness of the proceedings are not hampered73.

- Conclusion: ‘judicial’ authorities sensu stricto and sensu largo

MR instruments, unlike MLA ones, seek to make more precise the scope of the term ‘judicial’ authorities. From the FD EEW and the EIO Directive, it clearly follows that prosecutors are seen as ‘judicial’ authorities together with courts, judges and investigative magistrates. The EIO Directive explicitly distinguishes between judicial authorities sensu stricto and sensu largo. It is noteworthy that the scope of judicial authorities sensu largo is still open and may cover various domestic authorities. All these approaches are presented in Table 3:

Table 3: ‘Judicial’ authorities in MR instruments

<table>
<thead>
<tr>
<th></th>
<th>FD FO</th>
<th>FD EEW</th>
<th>EIO Directive</th>
<th>FD EAW</th>
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<tbody>
<tr>
<td>Issuing authority</td>
<td>A judicial authority</td>
<td>A judicial authority:</td>
<td>1) a judge, a court, an investigating judge or a public prosecutor</td>
<td>A judicial authority</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1) a judge, a court, an investigating</td>
<td>2) any other competent authority</td>
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<td></td>
<td></td>
<td>magistrate, a public prosecutor,</td>
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<td></td>
<td></td>
<td>2) any other judicial authority, appointed by member state in</td>
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</table>

It is worth highlighting that the EU instruments deal only with the decision whether or not to issue the order/warrant. Consequently, the instruments do not interfere with domestic rules regarding authorities’ competences in the gathering of evidence which are provided in national law. In other words, in light of the EIO Directive, non-‘judicial’ authorities may also be competent to authorise telephone tapping and house search at the domestic level, if the national law stipulates this. In this case, ‘judicial’ intervention is required only for issuing the EIO. Both the initial, domestic decision concerning the issue of the measures and further decisions concerning their execution may be undertaken without any ‘judicial’ contribution.

1.1.3. Ratione auctoritatis in the case-law of the ECtHR

1.1.3.1. Meaning of the word ‘judicial’

The ECHR presents a different approach to ‘judicial’ authorities than the EU instruments. First of all, the Convention does not use the term ‘judicial authority’; instead, it refers to the court, the judge and the tribunal\textsuperscript{74}. Moreover, Art. 5.3 ECHR, which deals with arrest and detention, makes reference to the term ‘judicial power’, as follows:

\textsuperscript{74} The Court pointed out that: It is true that the Convention uses the word “court” (French “tribunal”) in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5 (4), Articles 2 (1), 5 (1) (a) and (b), and 6 (1) (tribunal) (art. 5-4, art. 2-1, art. 5-1-a, art. 5-1-b, art. 6-1). In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see Neumeister judgment of 27th June 1968, Series A, p. 44, paragraph 24), but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place, De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium, §§ 78.
Art. 5.3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power (…).

Both the components ‘officer’ and ‘judicial power’ have been subsequently clarified by the ECtHR in its case-law. The essential judgment on this issue is Schiesser v. Switzerland, in which the Court stated that

the term ‘officer’ is not identical with the ‘judge’ but must nevertheless have some of the latter’s attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested. The first of such conditions is independence of the executive and of the parties (…). This does not mean that the “officer” may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

Accordingly, the Court is of the position that the essential components of ‘judicial power’ are:
- independence of the executive, and
- impartiality.

Hence, although in many states as well as in the EU instruments, the position of public prosecutor is considered a ‘judicial authority’, it cannot be automatically considered to exercise judicial power in the light of the Convention. In other words, the ECtHR assumes that although the wider meaning of the word ‘judicial’ exists (e.g. in the EU instruments), this meaning is not valid for the interpretation of the Convention. For the Court, the adjective ‘judicial’ in the context of ‘judicial authority’, ‘judicial power’, ‘judicial control’ and ‘judicial review’ pertains only to judges and the courts, as bodies which are independent of the executive, impartial of any interested parties and able to conduct procedures with judicial character. Exceptionally, ‘judicial power’ can be exercised by other bodies provided these bodies possess judicial attributes, that is to say, independence of the executive and of the parties.

Given the Court’s definition of the word ‘judicial’, it is necessary to

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77 In addition, under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the “officer” under the obligation of hearing himself the individual brought before him (…); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons, Schiesser v. Switzerland, § 31.
investigate its approach to the authorities involved in granting permission for telephone tapping and house search. Accordingly, the following analysis examines the requirements for authorities empowered to grant such measures, in particular, where the Court requires them to be ‘judicial’ decisions.

1.1.3.2. Telephone tapping

In cases concerning telephone tapping, the ECtHR highlights that what is of utmost importance is sufficient protection against the risk of abuse. This requirement has a strong link with \textit{ratione auctoritatis}, as the issuing authorities are entrusted with ensuring that the measure is not ordered haphazardly\textsuperscript{79}. Thus, the Court leaves the decision of which authorities are competent to permit, carry out and supervise the measure to member states, and these authorities may be of judicial but also executive nature\textsuperscript{80}, as long as they provide adequate and effective guarantees against abuses\textsuperscript{81}. However, in cases where the issuing authority is non-judicial, the Court requires the involvement of judicial bodies in the \textit{a priori} or \textit{a posteriori} review of the measure in order to constitute a guarantee of an appropriate procedure designed to ensure that measures are not ordered unconstitutionally.

\textsuperscript{79} See, \textit{inter alia}: Malone v. United Kingdom, §§ 70: The issue to be determined is therefore whether, under domestic law, the essential elements of the power to intercept communications were laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities; Weber and Saravia v. Germany, §§ 93: The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures. §§ 94. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference; see also: Bykov v. Russia, §§ 78.

\textsuperscript{80} Dragojević v. Croatia, §§ 82: In particular, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.

\textsuperscript{81} Klass and Others v. Germany, §§ 49: As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (…). Nevertheless, the Court stresses that \textbf{this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance}. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. §§ 50: The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.
haphazardly, irregularly or without due and proper consideration. This review, according to the Court, may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated and, as a rule, should be reserved to judicial bodies.

However, this judicial control competence is not exclusive and may be extended. In Dumitru Popescu v. Romania the ECtHR expressed the view that there must be either:

- judicial control, or
- control by an independent body over the issuing body’s activity.

Similarly, in Klass and Others v. Germany the Court concluded that the exclusion of judicial control does not automatically lead to violation of the Convention and accepted a posteriori review carried out by non-judicial authorities, stating that the German procedure ensured effective control.

82 Dragoević v. Croatia, §§ 94: (…) verification by the authority empowered to authorise the use of secret surveillance, inter alia, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, committing or having committed certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration (…).

83 In Klass and Others v. Germany the Court found: §§ 55: (…) As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual’s knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual’s rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8 -­‐‑2), are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-­‐‑17, para. 34). The rule of law implies, inter alia, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

84 Klass and Others v. Germany, §§ 56: The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

85 Dumitru Popescu v. Romania, §§ 70-­‐‑73; see also: Iordachi and Others v. Moldova, §§ 40 and §§ 51. In this case the Court concluded that the fact that the decision in this case had been left to the public prosecutor’s discretion cannot satisfy the requirement of independence from the executive and does not provide sufficient guarantees against the risk of abuse. Because the Romanian legislation relied on the prosecutor to issue the measure and lacked posteriori control of the measure, which would be enforced by an independent authority, the Court held that there had been a violation of Art. 8 ECHR, see: M.A. NOWICKI, Dumitru Popescu przeciwko Rumunii (nr 2) -­‐‑ wyrok ETPC z dnia 26 kwietnia 2007 r., skarga nr 71525/01 [in:] M.A. Nowicki, Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2007, Oficyna 2008, p. 133.

86 Klass and Others v. Germany, §§ 56: (…) having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and
In conclusion, the Court first and foremost requires that authorities designated to issue the interception order ensure adequate protection against abuses and haphazard decisions. Therefore, the Court requires review of the measure to be carried out preferably by a judicial authority, or – under certain conditions – an authority independent of the issuing body’s activity\(^\text{87}\). This review, according to the Court, may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated.

1.1.3.3. *House search*

In cases concerning house search, the ECtHR neither defines the scope of nor the nature of the bodies that should be empowered to issue a search warrant. Instead, the Court’s analysis aims at examining whether the authorities carrying out criminal proceedings shall be empowered to order and effect the searches themselves, or only under a judicial warrant\(^\text{88}\). With reference to the relevant case-law, the Court is of the opinion that the issuance does not necessarily have to be a judicial decision, however, any absence of an *a priori* judicial warrant must be counterbalanced by the availability of an *ex post factum* judicial review\(^\text{89}\).

It is worth highlighting that the Court – as in the case of telephone tapping – refers also to ‘independent or judicial supervision’. In *Heino v. Finland* the Court stated:

> Turning to the present case, the Court reiterates that it has already found in the Sallinen and Others case (…), that there was no independent or judicial supervision when granting the search warrant as the decision to authorise the order was taken by the police themselves\(^\text{90}\).

\(^{87}\) See also: As regards the authority competent to authorise the surveillance, authorising of telephone tapping by a non-judicial authority may be compatible with the Convention (…), provided that that authority is sufficiently independent from the executive, Zakharova v. Russia, §§ 258.


\(^{89}\) See, *inter alia*: Misan v. Russia, §§ 57: (…) in the absence of a requirement for prior judicial authorisation at the material time, the investigation authorities had unfettered discretion to assess the expediency and scope of the search and seizure. §§ 58: The Court further finds that the absence of a prior judicial authorisation was not counterbalanced by the availability of an ex post factum judicial review. In the present case the judicial review was limited to verifying whether the search and seizure had been ordered by a competent prosecutor. (…) The Court is therefore not convinced that the search of the applicant’s home was justified by “relevant” and “sufficient” reasons.

\(^{90}\) Heino v. Finland, §§ 44.
Consequently, the Court accepts as authorities competent to issue permission to carry out the measure, inter alia, prosecutors\(^91\), border guard officers\(^92\) or even public servants\(^93\), ruling that an effective judicial or independent \textit{a posteriori} review of the interference guarantees sufficient protection against abuses\(^94\).

\textbf{1.1.3.4. Conclusion}

The overview of ECtHR case-law leads to the conclusion that the Court, instead of labelling competent authorities, focuses on analysing whether the authorities designated to issue permission for telephone tapping and house search ensure adequate protection against arbitrary interference and haphazard decisions. Hence, the Court takes the position that in the case of both measures it is essential that either an \textit{a priori} or \textit{a posteriori} review is carried out by:

- a judicial authority, or
- an authority independent of the issuing body’s activity.

Moreover, the ECtHR operates under a definition of ‘judicial authorities’ different from that presented in the EU instruments, which preferably cover judges and courts, and exceptionally other bodies provided they are independent of the executive, impartial towards interested parties and able to conduct the procedure with judicial character. It is noteworthy then, in contradiction to MR instruments, that this approach usually excludes prosecutors from the scope of ‘judicial’.

\(^91\) Smirnov v. Russia, §§ 45: In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an \textit{ex post factum} judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both the lawfulness of, and justification for, the search warrant. The efficiency of the actual review carried out by the domestic courts will be taken into account in the following analysis of the necessity of the interference.

\(^92\) Harju v. Finland. In this case, concerning a search warrant issued and effected by the Finnish Border Guard, the Court stated that the applicant’s right to respect for her home was violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review \textit{a posteriori} of either the decision to order the search or the manner in which it was conducted (§§ 44). It is noteworthy that the Court again pointed out that here the absence of a prior judicial warrant may be counterbalanced by the availability of an \textit{ex post factum} judicial review (§§ 44).

\(^93\) Camenzind v. Switzerland, §§ 46-47. In this case the Court did not find problematic the fact that under Swiss legislation a search can be issued by designated senior public servants. The Court stated that having regard to the safeguards provided by Swiss legislation, especially to the limited scope of the search and \textit{post factum} judicial control, the interference was in line with Art. 8 ECHR.

\(^94\) As an example to the contrary see: Funke v. France, §§ 57: (…) the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasized by the Government (see paragraph 54 above), appear too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued.
1.1.4. **Minimum standards with regard to ratione auctoritatis**

The goal of this chapter is to devise a minimum standard which could enhance mutual trust between member states in terms of authorities appointed to issue telephone tapping and house search in the context of EU cooperation in criminal matters. The overview of both MLA and MR instruments shows that various authorities are competent to act in the cooperation in criminal matters in the EU, and that member states are left to appoint ‘judicial’ authorities in accordance with their domestic legal systems. Moreover, the EIO Directive makes a distinction between judicial authorities *sensu stricto* and *sensu largo*, providing an exhaustive list of the former group and leaving open the latter. Given the domestic provisions, which in most cases appoint courts, judges or investigative judges to issue the measures, one may wonder whether reference to *sensu stricto* judicial authorities could be an option and constitute a minimum standard. However, on the other hand, the ECtHR in cases concerning both measures rules that the issuing authority should be a guarantee that the measure is not ordered haphazardly. Consequently, the Court does not focus on specifying competent authorities, but on determining the components that ensure adequate protection against arbitrary interference.

From the Court’s case-law the conclusion clearly follows that what is of utmost importance when it comes to the question of authorities appointed to authorise such intrusive measures as telephone tapping and house search is that these authorities ensure protection against risk of abuses of power. Accordingly, if mutual trust between member states is aimed at, then it is necessary to focus on authorities’ competences and their capability of ensuring protection against abuses instead of naming them as judicial authorities *sensu stricto* or *sensu largo*.

This approach prioritises protection against abuses over defining the authorities. That could also help to overcome the diversity of national legal systems which may entrust different authorities with authority in this matter. Moreover, it is fully in line with the mutual recognition philosophy, especially in light of the FD EAW which accepts different authorities designated to deal with the EAW, as long as the procedural guarantees and the fairness of the proceedings are not hampered. Finally, this approach does not require a definition of a judicial authority, which helps to overcome the dichotomy apparent between the EU and ECtHR approaches to the scope of the term ‘judicial’, especially in terms of public prosecutors.

Hence, given the standards produced by the Court, mutual trust between member states could be enhanced by ensuring under domestic provisions that both measures are reviewed either *a priori* or *a posteriori* by:

- judges or courts, or
- in exceptional cases by other bodies as long as they are independent of the executive, impartial towards interested parties and able to conduct the procedure with judicial character.
In conclusion, *auctoritatis* obstacles could be overcome by adopting common requirements for competences of authorities designated to issue the measures, and their capability of ensuring protection against abuses of power. In other words, operating under the same level of protection against arbitrary interferences has the potential to enhance the mutual trust and, consequently, mutual admissibility of evidence gathered from both measures. In the new scenario, member states would assume *per se* that, irrespective of how the foreign issuing authority is named, it ensures the commonly agreed minimum standards against the risk of abuses of power. This conclusion also means that the ‘judicial’ nature of the *ratione auctoritatis*, which has different connotations for the EU instruments and the ECHR, is not required.
1.2. Ratione materiae

Thus far, there is no such thing as common grounds for evidence-taking in the EU. Consequently, each member state sets these grounds itself, in accordance with national law. This may lead to significant incompatibilities when it comes to cross-border gathering of evidence. Problems may arise especially when the measure requested by the issuing member state would not be available in a similar domestic case in the executing state, due to the fact that, for example, the use of the investigative measure is restricted to specific preconditions or cases. These materiae incompatibilities may hamper smooth evidence-gathering across the EU and constitute an obstacle in the field of per se admissibility of evidence. In other words, diversity of grounds across the EU may cause mutual distrust between member states as to the preconditions for issuing such intrusive measures as telephone tapping or house search and, therefore, lead to dilemmas regarding admissibility of evidence.

Thus, this chapter investigates materiae concerns in view of coming to common EU minimum standards for ordering telephone tapping and house search. The central research question of this part of the research is the following:

Is coming to common grounds for ordering telephone tapping and house search for the purposes of EU cooperation in criminal matters feasible?

Before embarking on a detailed study, some terminology and conceptual concerns have to be clarified. Firstly, the research uses the terms ‘double/mutual admissibility’ interchangeably with the terms ‘double/mutual availability’ of measures. All these terms describe a situation where the measure is available in the specific case both in the issuing and the executing state. Secondly, materiae concerns investigated in this chapter have a strong link with the double criminality principle, because – as reported below – the majority of the EU/CoE instruments reserve the right of execution of the investigative measure indicated by another member state dependent on the double criminality of the relevant offence. It has to be stressed that this research distinguishes between double criminality and double admissibility. This is because the former deals with the right to refuse the execution of the foreign request/order if the offence being investigated does not meet the double criminality requirement in the executing state. The latter, on the other hand, deals with the availability of the measure in

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95 The requirement of double criminality was developed as a protection mechanism aimed at preventing member states from being obligated to cooperate in the enforcement of a decision contrary to their own legal system. In spite of its indisputable importance, the double criminality requirement is nowadays considered an obstacle for smooth cooperation throughout the EU and, consequently, the EU attempts to limit its use, see in more detail: G. VERMEULEN, W. DE BOND, Y. VAN DAMME, EU cross-border gathering..., p. 30.
the executing state, which may cause problems if the domestic requirements of member states differ and the issued measure does not fall within domestic preconditions or could not be effected in a comparable domestic case. In other words, even if the double criminality requirement is fulfilled and the request/order may be executed, it does not guarantee that the investigative measure concerned will be automatically executed due to the fact that domestic grounds for the measure in the executing state may involve different requirements. To sum up, whereas double criminality applies to the EU cooperation level, double admissibility refers to domestic provisions as to the availability of the investigative measures. Therefore, for the foreign request/order to succeed, it is necessary to comply with both requirements, unless the instruments governing evidence-gathering provide otherwise which, as reported below, is usually not the case.

1.2.1. **Ratione materiae in domestic legislation**

As an important preliminary it has to be pointed out that none of the investigated jurisdictions provide special grounds for issuing the measures on the basis of foreign requests. Consequently, the member states use domestic *ratione materiae* preconditions also for the purposes of EU cross-border cooperation. A brief overview of these provisions is presented below.

**1.2.1.1. Telephone tapping**

In England and Wales, pursuant to Section 5 RIPA, telephone tapping can be carried out if it is necessary:
- in the interests of national security;
- for the purpose of preventing or detecting serious crime[^96];
- for the purpose of safeguarding the economic well-being of the United Kingdom; or
- in circumstances which appear to the Secretary of State to give effect to the provisions of any international mutual assistance agreement.

Accordingly, in England and Wales the gravity of the offence is not a criterion[^97], however, the measure must fulfil the requirements of proportionality and necessity[^98]. Grounds for the measure in France are set out in art. 100 CCP. According to this article, the measure is permissible for the investigation of felonies and misdemeanours for which the penalty incurred is equal to or in

[^96]: Serious crime is defined as an offence for which a person who has reached the age of 21 and who has no prior convictions could reasonably be expected to be sentenced to three years of imprisonment or more.
excess of two years’ imprisonment\(^9\). In Ireland, grounds for telephone tapping are laid down in Sections 4 and 5 of the Criminal Justice (Surveillance) Act 2009. Under the legislation, an application is allowed only:

- where the applying Garda has reasonable grounds for believing that as part of an operation or investigation being conducted by the Garda Síochána concerning an arrestable offence, the surveillance is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence or obtaining evidence for the purposes of proceedings in relation to the offence,
- the measure is necessary for the purpose of preventing the commission of arrestable offences or of maintaining the security of the State\(^100\).

It is noteworthy that the arrestable offence is defined as any offence which is potentially punishable by at least five years imprisonment\(^101\). In the Netherlands the measure is allowed only in cases where there is:

- reasonable suspicion that a criminal offence for which detention on remand is allowed has been committed;
- suspicion of an offence that constitutes a serious breach of the legal order;
- suspicion that an organisation is plotting or committing serious crimes;
- indications of a terrorist crime.

There must also be real urgency for the measure to be approved\(^102\). Given the Dutch provisions, the degree of suspicion required for the use of the measure depends on the context in which the measure is deployed\(^103\). It should also be noted that offences which constitute a serious breach of the legal order are defined as offences which are potentially punishable by at least four years imprisonment\(^104\). The Polish KPK relies on an exhaustive list of offences. Accordingly, telephone tapping in Poland is allowed only when the proceedings in progress, or the justified concern that a new offence might be perpetrated, pertain to one of the 19 offences listed in art. 237 § 3 KPK, which include, among others: homicide, kidnapping, people trafficking and armed robbery. In Spain, pursuant to art. 588 ter a) LECrim, permission for interception of telephone telecommunications can only be granted when the inquiry focuses on some of the offences referred to in art. 579.1 LECrim, namely: intentional crimes with deprivation of freedom of at least three years, terrorism cases, crimes perpetrated by a criminal group or organisation.

\(^100\) Section 4 Criminal Justice (Surveillance) Act 2009.
\(^101\) Section 8 Criminal Justice (Mutual Assistance) Act 2006.
\(^104\) Art. 67 Sv.
1.2.1.2. House search

Search warrants for premises in England and Wales are issued under a variety of acts, therefore the preconditions may vary slightly\(^{105}\). As an example, Section 8 of the PACE requires the following grounds for the interference:

- an indictable offence has been committed\(^{106}\);
- material on the premises mentioned which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
- that the material is likely to be relevant evidence, and relevant evidence is anything that would be admissible at trial for the offence;
- it is not practicable to communicate with a person entitled to grant entry and access to the material; and
- it does not consist of or include items subject to legal privilege, excluded material or special procedure material\(^{107}\).

In France, the grounds for house search are determined by the purpose of the measure, which may be carried out in any premises in order to find objects which could be useful to the discovery of the truth. The minimum imprisonment threshold of five years is required only for searches conducted without the consent of the person in whose house they take place\(^{108}\). In Ireland, grounds for searches are distributed across various statutes. In principle, a house search is permitted if there are reasonable grounds for suspecting that a person or evidence in relation to the investigation of a relevant offence is to be found at that place. For example, Section 10 of the Criminal Justice (Miscellaneous) Act 1997 provides that a search is permitted if there are reasonable grounds for suspecting that evidence of, or relating to the commission of:

- an indictable offence involving the death of or serious bodily injury to any person,
- an offence of false imprisonment,
- an offence of rape,

is to be found in any place.

Another example is the Misuse of Drugs Act 1977, which permits a search if there are reasonable grounds to suspect that a controlled drug is on the premises\(^{109}\). Pursuant to the Child Trafficking and Pornography Act 1998, the measure is permissible when a District Court judge is satisfied that there are reasonable grounds for suspecting that evidence connected with an offence

\(^{105}\) T. HOWSE, England…, p. 158.

\(^{106}\) It is worthy of note that the phrase ‘indictable offence’ is an extension from the most serious offences (‘serious arrestable offences’) to a wider class of more serious offences: P. OZIN, H. NORTON, P. SPIVEY, PACE…., p. 24.

\(^{107}\) Section 8 PACE.

\(^{108}\) J. TRICOT, France…., p. 244.

\(^{109}\) Section 10 Misuse of Drugs Act 1977.
under this act is to be found on the premises. According to the Dutch Strafvordering, the measure is permitted only with regard to crimes with a minimum imprisonment of four years or where there is a reasonable suspicion that such a crime has been committed. It is also worthy of note that there is no requirement that the search warrant must state the address of the place to be searched, provided the information is sufficient to identify the premises. Moreover, the warrant does not have to specify the items to be seized. Grounds for searches in Poland are set out in art. 219 KPK. The measure is permitted for all offences provided the objectives of the measure are:
- detection, detention or forcible arrest of a suspected person, or
- the finding of objects which might constitute evidence in a case or which are subject to seizure in criminal proceedings.
A search of premises or other places may be conducted if there are justified grounds for the belief that either a suspected person or specified objects are there.

The Spanish LECrim does not provide detailed requirements for house searches. Therefore, the measure is determined by the object which may be collected as evidence: instruments, objects, papers, documents or relevant items or information in a wider sense. According to Spanish jurisprudence, house search is permissible:
- for the purposes of arrest or detention,
- in cases of serious crime,
- in cases of terrorism.

1.2.1.3. Conclusion

The comparative study exhibits striking differences between the investigated jurisdictions in their approaches to the preconditions required for issuing both measures. The most common approaches apparent among these six jurisdictions are as follows:
- an exhaustive list of offences;
- a minimum imprisonment threshold;
- general grounds or reference to the objective of the interference.
This mix of grounds does not automatically mean that the scope of offences is incoherent and that an offence which is listed in, for example, the Polish KPK, does not comply with the requirement for a sentence of four years imprisonment in the law of the Netherlands. What is problematic, however, is the different

110 Section 7 Child Trafficking and Pornography Act 1998.
111 I. PEÇI, The Netherlands..., p. 110. It is noteworthy that the search may also be carried out under special powers laid down in specific acts, see: ibid., p. 111.
system of classification of these offences, which may cause practical problems when it comes to EU cross-border cooperation. In order to facilitate further analysis, Tables 4 and 5 present the variety of grounds reported in the investigated member states.

Table 4: Grounds for telephone tapping in domestic legislation

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<th>England and Wales</th>
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Table 5: Grounds for house search in domestic legislation

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<th>Ireland</th>
<th>The Netherlands</th>
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1.2.2. Ratione materiae in MLA and MR instruments

The European Union may be considered a 'laboratory' in which several new and interesting ideas have developed and some 'experiments' have been carried out in the field of international cooperation in criminal matters114.

This quote may be used as an excellent introduction to an overview of how dual criminality and dual availability of investigative measures have been tackled within instruments governing criminal cooperation in the EU. It is noteworthy that these issues have always been hotly debated and the final solutions have usually been the result of compromises between member states. Therefore, the following overview examines which grounds give rise to limit by member states either double criminality or double availability for purposes of cooperation in criminal matters in the EU. In doing so, various approaches are presented, since different instruments attempt to tackle the cross-border allowance for certain investigation techniques in different ways.

1.2.2.1. Double criminality and double availability in MLA instruments

- Extraditable offences

This subsection explains double criminality and double availability concerns across extradition-related instruments115. Undoubtedly, the ‘extradition saga’ plays an important role in the central research question of this chapter, since extradition-related instruments elaborate on categories of grounds governing the use of extradition between member states. These grounds are based on the concept of extraditable offences which complement the availability of extradition with sanction thresholds116.

The basic extradition-related instrument which addresses the issue and elaborates on the concept of extraditable offences is the European Convention on

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116 It is noteworthy that the concept of extraditable offences has always been widely debated when developing extradition instruments, see in more detail: G. VERMEULEN, EU conventions..., p. 72 et seq.
Extradition (hereafter: CoE Extradition). With regard to the provisions regulating the double criminality requirement, the instrument distinguishes between:

- the situation where the person still has the status of a suspect, in which case the threshold in the issuing/requesting member state is assessed in an abstract way, looking at the sanction that might be imposed; and
- the situation where the person has already been convicted, in which case the threshold in the issuing/requesting member state is assessed in a concrete way, looking at the sanction that was imposed.

Consequently, art. 2.1. of the CoE Extradition sets a threshold of:

- one year of imprisonment in abstracto as a requirement for the requesting state;
- four months of imprisonment in concreto as a requirement for the requesting state;
- one year of imprisonment in abstracto as a requirement for the requested state.

It is noteworthy that at the same time the Benelux Extradition Treaty requires only a six-month threshold in abstracto in both states. The latter instrument was a means to lower the Convention’s threshold. This problem was triggered again when drafting the 1996 Convention relating to Extradition between Member States of the European Union (hereafter: EU Extradition), in which art. 2:

- maintained the in abstracto threshold of one year in the requesting state;
- raised the in concreto threshold in the requesting member state from four to six months.

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119 See Art. 2.1 of the Treaty between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning extradition and mutual Assistance in Criminal Matters, 27.6.1962, <www.consilium.europa.eu>.
121 In this respect see the comments of W. De Bondt: This means that (...) the in concreto threshold was raised from four (in Art. 2.1. CoE Extradition) to six months (in Art. 2.1. EU Extradition), without any form of justification, not even when compared to existing regional instruments. The Benelux Extradition Treaty for example lowered the in abstracto CoE threshold by rendering offences extraditable as soon as they are punishable with a deprivation of liberty of at least six months or punished with a detention order if a maximum period of at least four months (...) The coexistence of these instruments created the rather complex situation in which the sanction threshold and therefore the scope of the extraditable offences was dependent on the ratification process in each of the individual member states, W. DE BONDT, Overcoming... , p. 142.
- lowered the *in abstracto* threshold in the requested state to six months.

It is noteworthy that initially all delegations were uniformly willing to lower the threshold in the requesting state to the level of six months, as with the already mentioned Benelux Extradition Treaty\(^{122}\). Moreover, during the negotiations on extraditable offences, a variety of suggestions and proposals were considered, such as making the absence of double criminality only an optional ground for refusal or allowing extradition for crimes only punishable in the requesting state\(^{123}\).

- **1959 ECMA and 2001 ECMA Second Protocol**

The 1959 ECMA and its 2001 ECMA Second Protocol explicitly address the double admissibility of measures referring to double criminality, *ordre public* or the extraditable nature of the offence. The 1959 ECMA deals with the double admissibility of the measure indicated in the MLA request in the context of search and seizure and makes this measure dependent either on the double criminality of the offence being investigated, the extraditable nature of the offence or the general *ordre public* rule. Art. 5 provides:

> Art. 5.1. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions: a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party; b) that the offence motivating the letters rogatory is an extraditable offence in the requested country; c) that execution of the letters rogatory is consistent with the law of the requested Party\(^{124}\).

It has to be stressed that almost all states made a declaration under this article\(^{125}\).

\(^{122}\) Nevertheless, the maintaining of a higher threshold was acknowledged as a fortunate decision due to the fact that (...) making extradition possible for minor offences or for offences regarded as less serious even in the requesting state would definitely not have been held an improvement of the extradition relations between the EU Member States, G. VERMEULEN, T. VANDER BEKEN, *Extradition in the European Union: State of the Art and Perspectives*, European Journal of Crime, Criminal Law and Criminal Justice, 1996/3, vol. 4, p. 215-217.


\(^{124}\) As explained in the 1959 ECMA Explanatory Report, the introduction of this requirement is necessary due to the fact that mutual assistance under the ECMA is not subject to the rules of extradition or to those of culpability in both countries, see: 1959 ECMA Explanatory Report, p. 6.

\(^{125}\) Off all the EU member states twenty-four made the execution of letters rogatory for search and seizure subject to the conditions laid down in art. 5.1 ECMA: one under subparagraph (b), three under subparagraph (c), thirteen under subparagraphs (a) and (c), four under
More links between investigative measures and their double availability may be found in the 2001 ECMA Second Protocol. Accordingly, art. 8 of the 2001 ECMA Second Protocol introduces the general *ordre public* requirement, as follows:

Art. 8. (…) where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol.

Thus, the 2001 ECMA Second Protocol opens new frontiers to judicial cross-border cooperation, giving the requested member state the right to execute the foreign request even if the indicated investigative measure is not provided by its domestic law. However, as stressed in the 2001 ECMA Second Protocol Explanatory Report, ‘there must be a limit and that limit is to be found in the requirement that the action sought is not contrary to fundamental principles of the legal system of the requested party’. The document also specifies that ‘fundamental principles of law’ means ‘fundamental principles of the legal system’, which suggests that this term shall be interpreted broadly.

Reference to *ordre public* may be also found in art. 9 which deals with hearings by video conference:

Art. 9.2. The requested Party shall agree to the hearing by video conference provided that the use of the video conference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Party has no access to the technical means for video conferencing, such means may be made available to it by the requesting Party by mutual agreement.

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subparagraphs (a), (b) and (c), and three under subparagraphs (b) and (c); Reservations and Declarations for Treaty No.030 - European Convention on Mutual Assistance in Criminal Matters, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/030/declarations>, status as of 12.10.2016.

126 Presently, the need is recognised by all to open new frontiers to judicial co-operation. The first such new frontier consists in coming back to basics and executing what is requested, as opposed to executing equivalent actions. What is requested is often no more than what is legally required in the requesting Party for evidentiary purposes. Equivalent action executed instead of what is requested often is not admissible in the requesting Party for evidentiary purposes, 2001 ECMA Second Protocol Explanatory Report, para. 62, p. 7.

127 Obviously, States cannot undertake to carry out action in just any manner requested. There must be a limit. That limit is to be found in the requirement that the action sought is not contrary to fundamental principles of the legal system of the requested Party. Such a limit is broad enough to ensure that most requests will be executed; yet it fulfills its role of freeing States from any obligation to take action that would go against their "nature", 2001 ECMA Second Protocol Explanatory Report, paras. 63-64, p. 7.

RATIONE MATERIAE

It is noteworthy that this article seeks to ensure double admissibility of the measure both when the domestic conditions of the requested state are not fulfilled and when the measure is not provided under its law at all\textsuperscript{129}.

However, these widely opened frontiers according to art. 8 of the 2001 ECMA Second Protocol are limited by the Protocol itself. For some measures, such as cross-border observation (art. 17)\textsuperscript{130} and controlled delivery (art. 18), member states undertake to ensure that the measures may be permitted but only in the framework of criminal investigations into extraditable offences. It should be noted that extraditable offences within the meaning of the Protocol are offences with respect to which, \textit{in abstracto}, extradition is possible either under a treaty or under domestic legislation\textsuperscript{131}.

In conclusion, the 1959 ECMA and its 2001 ECMA Second Protocol rely on the \textit{ordre public} rule when it comes to the double admissibility of investigative measures indicated in the request. However, both documents provide some specific provisions with regard to search and seizure, cross-border observation and controlled delivery, which link double admissibility with double criminality or the extraditable nature of the offence being investigated\textsuperscript{132}.

- 2000 EU MLA Convention

The 2000 EU MLA Convention duplicates many provisions from the 1959 ECMA, including those on the double admissibility of the measures.

As in the case of the 1959 ECMA, the 2000 EU MLA Convention states that hearing by video conference would be permitted insofar as the measure is not contrary to fundamental principles of the law of the requested state\textsuperscript{133}. Controlled deliveries may be permitted in each member state in the framework of criminal investigations into extraditable offences within the meaning of the Protocol are offences with respect to which, \textit{in abstracto}, extradition is possible either under a treaty or under domestic legislation\textsuperscript{131}.

\textsuperscript{129} In the context of paragraph 2, the reference to “fundamental principles of law” implies that a request may not be refused for the sole reason that the hearing of witnesses and experts by videoconference is not provided under the law of the requested Party, or that one or more detailed conditions for a hearing by videoconference would not be met under national law, 2001 ECMA Second Protocol Explanatory Report, para. 76, p. 8.

\textsuperscript{130} In cases of cross-border observation, the 2001 ECMA Second Protocol also provides a procedure for urgent cases for investigations of offences listed in art. 17.6 which cover assassination; murder; rape; arson; counterfeiting; armed robbery and receiving of stolen goods; extortion; kidnapping and hostage taking; traffic in human beings; illicit traffic in narcotic drugs and psychotropic substances; breach of the laws on arms and explosives; use of explosives; illicit carriage of toxic and dangerous waste; smuggling of aliens; sexual abuse of children.

\textsuperscript{131} Extraditable offences are offences with respect to which, \textit{in abstracto}, extradition is possible either under a treaty or under domestic legislation. The concrete circumstances of the case, such as the nationality of the person concerned, may not be used in order to characterise an offence as extraditable or not, 2001 ECMA Second Protocol Explanatory Report, para.139, p.13.

\textsuperscript{132} With regard to telephone tapping see also provisions of Recommendation No. R (85) 10, art. 1: The execution of such letters rogatory should be refused only for the following reasons: (...) if, in view of the circumstances of the case, the interception would not be justified according to the law of the requested Party governing the interception of telecommunications in that state.

\textsuperscript{133} Art. 10 of the 2000 EU MLA Convention.
of criminal investigations into extraditable offences\textsuperscript{134}, and these offences should be interpreted in accordance with the EU Extradition\textsuperscript{135}.

It is noteworthy that the 2000 EU MLA Convention introduces specific provisions with regard to the interception of telecommunications, which also address the problem of double admissibility. Art. 18.5 (b) lays down the conditions under which a requested state must comply with a request to intercept telecommunications with immediate transmission to the requested side where the subject of the interception is present on its territory, as follows:

\begin{quote}
Art. 5.1. The requested Member State shall undertake to comply with requests (…):
\begin{itemize}
  \item b) (...) where the requested measure would be taken by it in a similar national case. The requested Member State may make its consent subject to any conditions which would have to be observed in a similar national case.
\end{itemize}
\end{quote}

Consequently, the Convention requires that telephone tapping is available in such a particular case both in the requesting and requested member state, which is also clearly pointed out in the 2000 EU MLA Convention Explanatory Report:

\begin{quote}
Should this be the case, the requested Member State must agree to the measure if such a measure would be taken by it in a similar national case. It may also make its consent subject to any conditions which would, under its national law, have to be observed in a similar national case. These could, for example, be conditions which exclude certain categories of person from the measure or which cover the use of the intercepted material (…)\textsuperscript{136}.
\end{quote}

Another example of how to deal with the double admissibility of measures may be found in the 2001 EU MLA Convention Protocol with regard to mutual assistance in respect of information held by banks. Accordingly, art. 1.3 introduces the double criminality requirement for information on bank accounts and stipulates that the measure only applies to certain forms of offences, which must be covered by at least one of three alternatives:

- penalty threshold of four years imprisonment in the requesting state and two years in the requested state;
- an offence listed in the Europol Convention;
- an offence covered by the instruments relating to the protection of the European Communities’ financial interests, to the extent they

\textsuperscript{134} Art. 12 of the 2000 EU MLA Convention.

\textsuperscript{135} The concept of what constitutes an extraditable offence at the level of the Union was addressed in the 1996 Convention on Extradition between the Member States of the European Union. Under Article 2 of the said Convention, an extraditable offence is one which is punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months, 2000 EU MLA Convention Explanatory Report, p. 12.

\textsuperscript{136} 2000 EU MLA Convention Explanatory Report, p. 23.
are not already covered by the Europol list137.

It is worth noting that the imprisonment threshold set out in this article is quite strict, especially if confronted with the threshold of extraditable offences under extradition-related instruments. However, this approach is the result of a compromise between member states which believe in the general scope of application, penalty thresholds and lists of offences138. In cases where the offence under investigation is not an offence in the requested state, the lack of dual criminality may be used as a ground for refusal139.

Paragraph 5 of the same article forms another part of the compromise. According to its provisions:

1.5. Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.

In other words, this paragraph allows the member state to require the consistency of the request with its law, irrespective of the double criminality compliance. However, as pointed out in the 2001 EU MLA Convention Protocol Explanatory Report, that provision shall be interpreted in the light of the instrument and must not hinder its practical effect by applying this condition:

The possibilities for a member state to refuse assistance on the ground that the request is not consistent with its law are therefore limited. This means for example that a Member State cannot refuse a request made under Article 1 solely because its national law does not provide for the production of information relating to the existence of bank accounts in criminal investigations, or because its national

137 Art. 1.3 of the 2001 EU MLA Convention Protocol: The obligation set out in this Article shall apply only if the investigation concerns: an offence punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State, or; an offence referred to in Article 2 of the 1995 Convention on the Establishment of a European Police Office (Europol Convention), or in the Annex to that Convention, as amended, or; to the extent that it may not be covered by the Europol Convention, an offence referred to in the 1995 Convention on the Protection of the European Communities’ Financial Interests, the 1996 Protocol thereto, or the 1997 Second Protocol thereto. It is noteworthy that the formulation of this article has been criticised as uncertain and vague with regard to the scope of the Europol mandated offences, see: G. VERMEULEN, W. DE BONDT, EULOCS. The EU level offence classification system: A bench-mark for enhanced internal coherence of the EU’s criminal policy, Maklu 2009, p. 20.

138 The provisions in this paragraph are the result of a compromise between those Member States which were in favour of a general scope of application, those which preferred (different) penalty thresholds and yet others which preferred a list of offences. The final text was agreed in the light of the amount of work that the execution of requests for information on bank accounts may involve and the fact that the measure is a new measure, not provided for in any earlier instruments relating to mutual assistance in criminal matters, and so far not available in certain Member States, 2001 EU MLA Convention Protocol Explanatory Report, p. 3.

provisions on search and seizure normally demand a higher threshold than that set in paragraph 3 (…)\textsuperscript{140}.

The same provision is set out in art. 2 of the 2001 EU MLA Convention Protocol which deals with requests for information on banking transactions\textsuperscript{141}.

- SIC

The provisions of the Schengen Implementation Convention (hereafter: SIC) related to double admissibility of cross-border searches are also worth mentioning here:

Art. 51. The Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following:

(a) the act giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(b) execution of the letters rogatory is consistent with the law of the requested Contracting Party.

Accordingly, the SIC links the double admissibility of evidence from search and seizure with either a six-month threshold or consistency with the domestic law of the requested party.

1.2.2.2. Double criminality in the MR instruments

Instruments based on the mutual recognition principle provide a different approach to mutual availability of the EU cross-border measures, linking it with the concept of double criminality.

\textsuperscript{140} On the other hand the provision allows a judicial control in the requested State. Since there are no common rules in this respect, the nature of that control may be different in the different Member States. In general terms it means that the requested State will be able to put the request before a judicial authority for an assessment of the request with regard to national conditions, including constitutional requirements, that are not covered in Article 1. Such conditions might include, for example, privileged information, 2001 EU MLA Convention Protocol Explanatory Report, p. 4.

\textsuperscript{141} Art. 2.4 of the 2001 EU MLA Convention Protocol: Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.
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- **FD EAW and surrenderable offences**

The concept of extraditable offences, developed within the MLA instruments, lost its meaning following the introduction of the FD EAW and the implications for the double criminality requirement associated therewith. Hence, the following analysis starts from this instrument which initiates the new approach.

The FD EAW does not copy the concept developed within the realm of extraditable offences and, instead, introduces a new concept of ‘surrenderable offences’ based on a two-track approach. First of all, the instrument still refers to the sanction threshold, however, it is modified to:

- 12 months **in abstracto** in the issuing member state; and
- four months **in concreto** in the issuing member state.

It is worth noting that the FD EAW resiles from imposing a threshold for the executing state. However, the key provision of the FD EAW is the breaking down of double criminality by introducing the so-called ‘32 MR offences list’:

**Art. 2.2.** The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of **at least three years** and as they are defined by the law of the issuing Member State, shall,

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142 W. DE BONDT, Overcoming …, p.143.

143 Art. 2.1 FD EAW: A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of **at least 12 months** or, where a sentence has been passed or a detention order has been made, for sentences of **at least four months**. Accordingly, one may notice that the in abstracto threshold in the issuing member state corresponds to the threshold included in the EU Extradition, whereas the in concreto provision corresponds to the 1957 CoE Extradition, W. DE BONDT, Overcoming…, p. 143.

144 These offences, hereafter abbreviated as the ‘MR offences’, are as follows: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests, laundering of the proceeds of crime, counterfeiting currency, including the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage. It is worth noting that the list was clearly inspired by the Europol list as supplemented by the Eurojust Decision, the list in the SIC and the substantive criminal law acquis at that time, see: G. VERMEULEN, W. DE BONDT, EULOCS…., p. 20. It also should be noticed that the MR offences vary slightly across instruments, see: G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering…, p. 30-31.
under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: (…).

Art. 2.4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

(…)

Art. 4. The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State (…).

Thus, the FD EAW introduces an automatic application of the mutual recognition principle and execution of the warrant if the following cumulative conditions are fulfilled:

- the offence is one of the 32 MR offences, according to the issuing member state; and
- the offence is punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state.

For other acts, which are not on the list, execution of a warrant may still be subject to the condition of double criminality145.

The abolition of the double criminality requirement in the FD EAW was hotly debated during drafting of the instrument and was described as ‘the central and the most controversial element in the application of the principle of mutual recognition to criminal law’146. Consequently, the move towards limitation of double criminality within the FD EAW was by no means welcomed with open arms everywhere. This approach has been questioned, especially in light of the limits of mutual recognition and abolition of the test of dual criminality without previous approximation of the substantial law147.

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145 It has to be stressed that lack of dual criminality constitutes grounds for an optional refusal only (art. 4.1 FD EAW).


of the MR offences list has also been criticised for being overly generic and imprecise. This scepticism follows from the fact that differences in domestic legislation with regard to the substantial law of the issuing state may only lead to a situation where a state is required to execute a warrant even though the offence is not punishable in its legislation. Therefore, many questions and fears have been raised under the FD EAW due to the fact that it allows surrender of the subject of the warrant even if the offence at issue is not punishable in the executing state. This issue was also analysed by the ECJ in the case Advocaten voor de Wereld. The association Advocaten voor de Wereld questioned whether the abolition of double criminality with regard to 32 offences is in line with the principle of legality in criminal matters. The ECJ disagreed that it infringes that principle due to the fact that the FD EAW does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract, but relies on the criminal offence as defined in the law of the issuing state. Moreover, the Court pointed out that the issuing state is the party that should make sure that the principle of nullum crimen sine lege is respected and as long as the legislation of the issuing state is sufficiently clear there is no breach in that field. Despite the fact that the ECJ was defendants in criminal proceedings throughout the European Union [in:] EU and International Crime Control: Topical Issues, M. COOLS, B. DE RUYVER, M. EASTON, L. PAUWELS, P. PONSAERS, G. VANDE WALLE, T. VANDER BEKEN, F. VANDER LAENEN, G. VERMEULEN, G. VYNCKIER (eds.), Maklu 2010; A. WEMYEMBERGH, The functions of approximation of penal legislation within the European Union, Maastricht Journal of European and Comparative Law 2005, Vol. 12, No. 2.

148 The '32 MR offences list' refers only to the nature of the listed offences and does not guarantee compatibility between member states with regard to their scope at domestic level, see: P. WILIŃSKI, Opinia prawna o dopuszczalności ograniczenia wykonania ENA ze względu na zasadę wzajemności, zasadę podwójnej karalności, zasadę terytorialności oraz ochronę praw podstawowych [in:] Nowelizacja Art. 55 Konstytucji RP przez Sejm V kadencji, Biuro Analiz Sejmowych, Kancelaria Sejmu 2006, p. 43; A. GÓRSKI, P. HOFMANSKI (eds.), A. SAKOWICZ, D. SZUMIŁO-KULCZYCKA, Europejski…, p. 168-172.


150 Ibid., §§ 50: This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. §§ 51: In accordance with Article 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, ‘if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State’. §§ 52. Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of ‘the issuing Member State’. The Framework Decision does not seek to harmonise the criminal offences in question in respect of...
straightforward in its view, it is safe to say that this judgment did not fully tackle the obstacles and problems of the limits of double criminality\(^{153}\).

- **FD FO**

The FD FO follows the concept of double criminality established in the FD EAW, and art. 3.2 of the framework decision abandons the double criminality requirement with regard to the MR offences list. Accordingly, these offences, as they are defined by the law of the issuing state, and if they are punishable in the issuing state by a custodial sentence of a maximum period of at least three years, shall not be subject to verification of the double criminality of the act\(^{154}\). For cases not covered by the list, the executing state may subject the recognition and enforcement of a freezing order to the condition that the acts for which the order was issued constitute an offence under the laws of that state, whatever the constituent elements or however they are described under the law of the issuing state\(^{155}\).

The instrument, however, does not directly address the problem of the double availability of the measure indicated in the order. Consequently, ambiguity arises over what should happen if the double criminality requirement of the offence is fulfilled, but in a similar domestic case the freezing would not be available in the executing state? The FD FO Directive remains silent on this matter\(^{156}\). Hence, some member states reacted independently and introduced additional grounds for refusal in their national legislation, where the requirement of double availability of the measure is not satisfied. Some authors


\[^{154}\] Art. 3.2 FD FO: The following offences [32 MR offences, M.K.], as they are defined by the law of the issuing State, and if they are punishable in the issuing State by a custodial sentence of a maximum period of at least three years, shall not be subject to verification of the double criminality of the act.

\[^{155}\] Art. 3.4 FD FO: For cases not covered by paragraph 2, the executing State may subject the recognition and enforcement of a freezing order made for purposes referred to in paragraph 1(a) to the condition that the acts for which the order was issued constitute an offence under the laws of that State, whatever the constituent elements or however described under the law of the issuing State.

\[^{156}\] Besides a general rule that the executing state shall forthwith take the necessary measures for immediate execution of the order in the same way as for a freezing order made by an authority of the executing state, see art. 5.1. FD FO.
call it an ‘extended’ scope of the requirement laid down in art. 3.4 FD FO. This line of reasoning, however, has not been accepted by the Commission which stated that this is clearly not in compliance with the framework decision.157

- FD EEW

The double criminality together with the double admissibility concept was widely debated when drafting the FD EEW. The EEW Proposal promotes further limitations of the double criminality requirement and stipulates that the recognition or execution of the warrant shall not be subject to verification of dual criminality if either or both of the following conditions are met:

- it is not necessary to carry out a search of private premises for the execution of the warrant; or
- the offence is one of the offences listed in art. 16.2 EEW Proposal.158

In other words, the EEW Proposal requires verification of double criminality only in cases concerning searches of private premises, unless the offence being investigated is one of the offences included in the list.159 It is worth noting that this far-reaching approach was used to test its political feasibility, due to the fact that the Commission took the view160 that the concept of dual criminality is inconsistent with the principle of mutual recognition of a judicial decision and, consequently, it should not be possible to refuse execution on such grounds161.


158 The list of offences in this Article is copied from the list of offences in Article 2 of the draft Framework Decision on the application of the principle of mutual recognition to financial penalties. This builds upon the list of offences in Article 2 of the Framework Decision on the European arrest warrant, which is also incorporated in Article 3 of the Framework Decision on freezing orders, EEW Proposal, para. 108, p. 25, see also: S. GLESS, Mutual recognition, judicial inquiries, due process and fundamental rights [in:] European evidence warrant: transnational judicial inquiries in the EU, J. VERVAELE (ed.), Intersentia 2005, p. 127.

159 In line with the approach adopted in the draft Framework Decision on the application of the principle of mutual recognition to financial penalties, the list does not contain a threshold level of imprisonment or other penalty in the issuing State, EEW Proposal, para. 109, p. 25.


161 Refusal to execute the European Evidence Warrant on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) is inconsistent with the principle of mutual recognition of a judicial decision. It should consequently not be possible to refuse execution on such grounds. However, in order to facilitate the change-over from the existing rules to the new mutual recognition regime of the European Evidence Warrant, a two-stage approach is proposed. First, this Article narrows the conditions in which execution can be made dependent on dual criminality. Secondly, Article 24 provides that dual criminality, as more narrowly defined by Article 16, can be invoked only for a transitional period (…). This Article builds on the position in existing instruments that dual criminality is abolished except where the executing State considers it necessary to carry out a seizure or a search of premises. It goes further by abolishing the ability to refuse
However, as the final version of the FD EEW shows, the political feasibility was limited and consequently the provisions concerning mutual availability of measures were only partially incorporated. The first condition which links the double criminality requirement with searches of private premises still stands in the FD EEW. However, the instrument restores the threshold of three years of imprisonment for the MR offences. Moreover, if the EEW is not related to any of the MR offences and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality.

It is noteworthy that the final version of the FD EEW specifically addresses the problem of double admissibility for evidence from house search. Art. 11.3 reads:

11.3. Each Member State shall ensure:
- that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW;
- co-operation on the ground of dual criminality where either: (a) it is not necessary to carry out a search of private premises for the execution of the warrant. This reflects the added sensitivity of searching private premises; or (b) the offence is on the list of offences specified in this Article.

With respect to ‘political utopianism’ and discussions on the EEW see: W. DE BONDT, G. VERMEULEN, Appreciating Approximation…, p. 25.

In this respect see the key features of the amended legislative proposal for reconsultation agreed upon by the Council: Double criminality: regarding the definition of offences, the proposal provides that for 32 categories of offences, double criminality may not be invoked by the executing State as a ground for refusing an EEW if the offence concerned is punishable in the issuing State with at least three years of imprisonment. If the EEW is not related to any of the offences set out in the list and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality. If the EEW is not related to any of the offences set out in the list and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality. In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State, Council of the European Union, Amended legislative proposal for reconsultation, 2003/0270(CNS), 18.7.2008, and the critical remarks of the European Parliament associated thereto: Verification of double criminality should gradually disappear from instruments founded on mutual recognition. The provision which this amendment removes is a step in the opposite direction and was not envisaged in the European Commission proposal, EUROPEAN PARLIAMENT, Report on the proposal for a Council Framework Decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (13076/2007 – C6-0293/2008 – 2003/2070(CNS)), 15.10.2008, p. 20.

Art. 14.1. FD EEW: The recognition or execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure.

Art. 14.2. FD EEW: If it is necessary to carry out a search or seizure for the execution of the EEW, the following offences, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State, shall not be subject to verification of double criminality under any circumstances.

See art. 14.3 FD EEW.
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and

(ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 14(2).

Therefore, the instrument, regardless of the availability of measures for domestic cases, requires the search and seizure to be available for the purpose of executing an EEW which relates to the offences included in the MR offences. In the literature this approach is described as an example of ‘alternative use of the 32 MR offences list’.

- **EIO Directive**

Unfortunately, the approach developed under the FD EEW for ‘alternative use of the MR offences list’ was not employed when drafting the EIO Directive. As a matter of fact, the instrument which seeks to replace the existing, over-complex framework of mutual legal assistance in the EU, and which covers almost all types of evidence, takes a step backwards when it comes to ensuring the double permissibility of investigative measures

In the first place, the EIO Directive maintains double criminality and the three-year imprisonment threshold. However, the instrument lacks any provision such as those laid down in art. 11.3 FD EEW, which would ensure the availability of the measure indicated in the EIO in the executing member state with regard to some cases. Instead, the EIO Directive lists the investigative measures which must always be available under the law of the executing state. However, the scope of the measures concerned is extremely tight and refers neither to telephone tapping nor to house search. Moreover, the EIO Directive states that the problem of double admissibility may be resolved by recourse to a different type of investigative measure other than that indicated in the EIO if

167 G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering..., p. 31.
169 See Art. 11.1 (g) EIO Directive and Annex D of the EIO Directive.
170 Art. 10.2 EIO Directive: Without prejudice to Article 11, paragraph (1) does not apply to the following investigative measures, which always have to be available under the law of the executing State: (a) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO; (b) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; (c) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State; (d) any non-coercive investigative measure as defined under the law of the executing State; (e) the identification of persons holding a subscription of a specified phone number or IP address.
that measure would not be available in a similar domestic case\textsuperscript{171}. Hence, even if not explicitly expressed in the grounds for refusal, art. 10 EIO Directive introduces a new hidden ground for refusal\textsuperscript{172}, except in the case of interception of telecommunications, where this ground is explicitly laid down in the Directive:

\textbf{Art. 30.5. In addition to the grounds for non-recognition or non-execution referred to in Article 11, the execution of an EIO referred to in paragraph 1 may also be refused where the investigative measure would not have been authorised in a similar domestic case. The executing State may make its consent subject to any conditions which would be observed in a similar domestic case.}

It is worth noting that this approach follows from the fact that the EIO is based on an investigative measure to be executed; therefore, in accordance with the principle of mutual recognition, it is the issuing authority that decides on the type of investigative measure to be executed. Consequently, provisions concerning recourse to a different type of investigative measure bring necessary flexibility to this rule and make it possible for the executing authority to choose in some situations\textsuperscript{173}.

- Proposal for the establishment of the European Public Prosecutor’s Office

When looking into instruments addressing evidence-gathering and the double permissibility of investigative measures, the provisions set out in the

\textsuperscript{171} In this respect see also Recital (10) of the EIO Directive: However, the executing authority should, wherever possible, use another type of investigative measure if the indicated measure does not exist under its national law or would not be available in a similar domestic case. Availability should refer to occasions where the indicated investigative measure exists under the law of the executing State but is only lawfully available in certain situations, for example where the investigative measure can only be carried out for offences of a certain degree of seriousness, against persons for whom there is already a certain level of suspicion or with the consent of the person concerned. The executing authority may also have recourse to another type of investigative measure where it would achieve the same result as the investigative measure indicated in the EIO by means implying less interference with the fundamental rights of the person concerned.

\textsuperscript{172} Art. 10.5 EIO Directive: Where, in accordance with paragraph 1, the investigative measure indicated in the EIO does not exist under the law of the executing State or it would not be available in a similar domestic case and where there is no other investigative measure which would have the same result as the investigative measure requested, the executing authority shall notify the issuing authority that it has not been possible to provide the assistance requested.

\textsuperscript{173} EIO Explanatory Memorandum, p. 10. See also further comments: (…) when the investigative measure provided for in the EIO exists in the law of the executing State but its use is restricted to a list or category of offences which does not include the offence covered by the EIO: this case covers for example the situation where the EIO is issued in order to intercept the telecommunications of a suspect and where, in the executing State, the interception of telecommunications is available only for a list of offences which does not include the offence mentioned in the EIO. In such case, it would be unreasonable to impose the measure to the executing State.
EPPO Proposal cannot be overlooked. Art. 26 of the EPPO Proposal lists the 21 investigative measures which should be available in all member states for the purposes of investigations and prosecutions conducted by the European Public Prosecutor’s Office. Such measures would be subject to the conditions provided for in this article and those set out in national law. Investigation measures other than those included in the list may only be ordered or requested by the European Public Prosecutor’s Office if available under the law of the member state where the measure is to be carried out. Moreover, according to the instrument, member states should ensure that some of the investigative measures are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out.

It is worth noting that both investigative measures covered by this research, namely telephone tapping and house search, are included in the above list and, moreover, are subject to judicial authorisation in cases where the domestic law requires it.

1.2.2.3. Conclusion

As the above analysis shows, the instruments governing cross-border cooperation in criminal matters in the EU provide different approaches to tackling the double availability of investigative measures. Extradition-related instruments rely on the concept of extraditable offences, which links the allowance for the measure with imprisonment thresholds in both the requesting and requested state. Other MLA instruments refer to ordre public, however, with regard to some measures, such as monitoring of bank information, home searches or interception of telecommunications, the execution may be dependent on double criminality or compliance with domestic provisions regarding the availability of the measure in the requested state in a similar domestic case.

The MR instruments originally aspired to ensure the mutual availability of evidentiary measures throughout the EU, including the availability of search and seizure, if the offence being investigated is one of the MR offences. However, this idea failed as it was politically unfeasible and the approach agreed within the EIO Directive allows the executing member state to refuse the execution if in a similar domestic case the measure indicated in the EIO would not be permissible. Therefore, the EIO Directive does not maximise the

174 Art. 26.2 EPPO Proposal: Member States shall ensure that the measures referred to in paragraph 1 may be used in the investigations and prosecutions conducted by the European Public Prosecutor’s Office. Such measures shall be subject to the conditions provided for in this Article and those set out in national law. Investigation measures other than those referred to in paragraph 1 may only be ordered or requested by the European Public Prosecutor’s Office if available under the law of the Member State where the measure is to be carried out.

175 The approach agreed within the cooperation in criminal matters should be, however, confronted with the power to enter and search private premises for the purposes of European cooperation available within other fields of EU cooperation. In this matter see, inter alia, arts. 12–13 of the European Council, Council Regulation (EC) No 139/2004 of 20 January 2004 on the
availability of investigative measures among member states, even in cases related to offences which give rise to abandoning the principle of double criminality in surrendering a person.

Table 6: References to the double availability of investigative measures across MLA and MR instruments

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<td>MR offences list in cases of search or seizure</td>
<td>MR offences list</td>
</tr>
<tr>
<td>Reference to extraditable offences</td>
<td>-</td>
<td>Search or seizure (art. 5)</td>
<td>Controlled deliveries (art. 12)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Minimum threshold</td>
<td>12 months in abstracto in the requesting state</td>
<td>6 months in abstracto in the requested state</td>
<td>6 months in concrete in the requesting state</td>
<td>-</td>
<td>Requests for information from bank accounts (art. 1 of 2001 Protocol)</td>
<td>3 years (with regard to MR offences list)</td>
<td>3 years (with regard to MR offences list)</td>
</tr>
</tbody>
</table>

control of concentrations between undertakings (the EC Merger Regulation), 29.1.2004, OJ L 24/1, which allow searches of private premises under a foreign request. In this respect see also the comments of W. JASIŃSKI in: Gwarancjność przepisów regulujących przeszukiwanie w sprawach ochrony konkurencji i konsumenta, forthcoming.
### 1.2.3. *Ratione materiae in the case-law of the ECtHR*

According to the ECtHR some investigative measures cannot be available for just any offence. However, the Court does not seek to link the particular grounds with the availability of investigative measures; instead, it focuses on setting out rules with respect to the quality of the legal basis of those coercive and intrusive measures\(^\text{176}\).

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1.2.3.1. Telephone tapping

In cases concerning telephone tapping, the ECtHR first of all points out that, in order to avoid abuses of power:
- the impugned measure must have some basis in domestic law;
- the domestic law must be compatible with the rule of law and accessible to the person concerned\textsuperscript{177}.

The Court also explains that tapping and other forms of interception of telephone conversations represent a serious interference in someone’s private life and correspondence and must accordingly be based on a law that is particularly precise\textsuperscript{178}. Moreover, it is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated\textsuperscript{179}. Thus, any law providing a legal basis for the measure has to set out clearly the conditions subject to which telephone conversations may be tapped in order to ensure the foreseeability of the measure\textsuperscript{180}.

It is worth noting that the Court accepts various approaches to setting out the preconditions, including general grounds for interception. In Kennedy v. The United Kingdom, a case concerning the English grounds referring to national security, preventing or detecting serious crime or safeguarding the economic well-being of the UK, the Court ruled that:

As to the nature of the offences, the Court emphasises that the condition of foreseeability does not require States to set out exhaustively by name the specific offences which may give rise to interception. However, sufficient detail should be provided of the nature of the offences in question (…) The applicant criticises the terms “national security” and “serious crime” as being insufficiently clear. The Court disagrees. It observes that the term “national security” is frequently employed in both national and international legislation and constitutes one of the legitimate aims to which Article 8 § 2 itself refers. The Court has previously emphasised that the requirement of “foreseeability” of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on “national security” grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance (…) The Court therefore considers that, having regard to the provisions of RIPA, the nature of the offences which may give rise to an interception order is sufficiently clear\textsuperscript{181}.

\textsuperscript{177} Dragojević v. Croatia, §§ 151.
\textsuperscript{178} Kruslin v. France, §§ 33.
\textsuperscript{179} Weber and Saravia v. Germany, §§ 93.
\textsuperscript{180} See inter alia: Weber and Saravia v. Germany §§ 96; Dragojević v. Croatia, §§ 83.
\textsuperscript{181} Kennedy v. United Kingdom, §§ 159: As an example of the contrary, see the conclusions in Iordachi and Others v. Moldova: Moreover, it is unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance,
To sum up, the minimum safeguards produced by the Court with regard to *ratione materiae* consist of a legal basis which precisely determines the nature of the offences which may give rise to an interception order. Moreover, given the fact that the measure is of an intrusive nature, the Court also requires compliance with principles of necessity and proportionality.\(^{182}\)

### 1.2.3.2. House search

As in the case of telephone tapping, in cases concerning house searches, the Court focuses on examining the quality of the legal basis for the interference and whether this legal basis ensures a minimum standard against abuses of power.\(^{183}\) Firstly, according to the Court, the measure must have a clear basis in a domestic legal system in order to afford adequate and effective safeguards against any abuse.\(^{184}\) It is noteworthy that the Court accepts the precondition referring to the objective of the measure, e.g. to uncover physical evidence that may be instrumental for the criminal investigation, preventing a crime or protecting the rights and freedoms of others.\(^{185}\) However, in any case a decision as to the house search must be based on reasonable suspicion.\(^{186}\) It is noteworthy that the facts which raise such suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge.\(^{187}\)

Secondly, the house search has to be carried out in accordance with the principle of necessity and proportionality.\(^{188}\) According to the Court’s settled case-law, the notion of necessity implies that the interference corresponds to a ‘pressing social need’ and in particular that it is proportionate to the legitimate protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define “national security”, “public order”, “protection of health”, “protection of morals”, “protection of the rights and interests of others”, “interests of ... the economic situation of the country” or “maintenance of legal order” for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds. Iordachi and Others v. Moldova, §§ 46.


\(^{183}\) W. JASIŃSKI, Dowodowe czynności..., p. 17-25.

\(^{184}\) Crémieux v. France, §§ 39.

\(^{185}\) Smirnov v. Russia, App. 71362/01, §§ 44.

\(^{186}\) Wieser and Bicos Beteiligungen GmbH v. Austria, §§ 58.

\(^{187}\) Ratushna v. Ukraine, §§ 77, see also: Vasylchuk v. Ukraine, App no. 24402/07, § 78.

\(^{188}\) The principal point in issue has been the justification for the search. Under the Court’s settled case-law, the notion of “necessity” implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the Contracting States. The Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences, Zubáč v. Slovakia, §§ 40; see also: Saint-Paul Luxembourg S.A. v. Luxembourg, §§ 43-46.
aim being pursued\textsuperscript{189}. In this respect, the Court also explores the offence that may give rise to the request for a house search\textsuperscript{190}. Moreover, the Court stated that the fact that a penalty incurred is lower than five years of imprisonment does not automatically mean that the measure is disproportional\textsuperscript{191}.

The ECtHR also refers to the content of the warrant. Accordingly, it must contain:
- information about the ongoing investigation;
- the purpose of the search or the reasons why it is believed that a search of the applicant’s property would enable evidence of any offence to be obtained\textsuperscript{192};
- the number of entries authorised, limited to a maximum if a warrant authorises multiple entries\textsuperscript{193}.

1.2.3.3. Conclusion

In summary, the position of the ECtHR is that telephone tapping and house search cannot be made available for just any offence. However, the Court does not explicitly list which offences justify these intrusive measures, but instead focuses on the quality of the legal basis for them. Consequently, the ECtHR has ruled that both measures require a clear basis in a domestic legal system, which is accessible and feasible to the person concerned in order to afford adequate and effective safeguards against any abuse. Moreover, both measures shall comply with necessity and proportionality requirements.

1.2.4. Minimum standards with regard to ratione materiae

The overview of domestic provisions shows the variety of grounds which are apt to justify telephone tapping and house search, determined by exhaustive list of offences, minimum imprisonment thresholds, general grounds or the

\textsuperscript{189} According to the Court’s settled case-law, the notion of necessity implies that the interference corresponds to a “pressing social need” and in particular that it is proportionate to the legitimate aim pursued, Keegan v. United Kingdom, §§ 30.

\textsuperscript{190} To determine whether these measures were “necessary in a democratic society”, the Court has to explore the availability of effective safeguards against abuse or arbitrariness under domestic law and check how those safeguards operated in the specific case under examination. Elements taken into consideration in this regard are the severity of the offence in connection with which the search and seizure have been effected, Stefanov v. Bulgaria, §§ 38.

\textsuperscript{191} See Steeg and Wenger v. Germany, App. no. 9676/05, App. No. 10744/05 and App. no. 41349/06 [in:] W. JASIŃSKI, Dowodowe czynności…, p. 17-25.

\textsuperscript{192} Niemietz v. Germany, §§ 37; Smirnov v. Russia, §§ 48.

\textsuperscript{193} In the case Rossem v. Belgium the ECtHR noted that: [the] search warrant had to be accompanied by certain limitations, so that the interference which it authorised was not potentially unlimited, particularly with regard to the right to respect for a person’s home. The warrant had therefore to contain a minimum number of indications, so that it was subsequently possible to verify whether the police officers who enforced it had complied with the scope of the investigation thus authorized, COUNCIL OF EUROPE, Press release 618(2004).
objectives of the measures. All these approaches are in line with the ECtHR case-law which requires that the legal basis for interference is explicitly and precisely set out in the law. At the same time, both the CoE and the EU instruments deal with *ratione materiae* issues by referring to *ordre public*, extraditable offences, minimum imprisonment thresholds or lists of offences. MR instruments that abandon double criminality for MR offences, however, do not represent progress towards common grounds for evidence-taking, and allowance of investigative measures in cases with a cross-border dimension is still governed by the domestic, and very different provisions of the member states concerned. That may have a frustrating effect both for gathering and use of evidence in a cross-border context. Therefore, it seems necessary to devise common grounds for ordering telephone tapping and house search for purposes of EU cooperation in criminal matters. Operating under common preconditions would facilitate cross-border evidence-taking, but also enhance mutual admissibility of evidence, since it would do away with dilemmas as to whether the measure would be available in a similar domestic case and, consequently, whether the gathered evidence can be *per se* admissible.

The biggest problem that arises here, however, is the question of how to devise minimum standards, given the variety of domestic provisions in this matter. The solutions apparent in MLA instruments, which refer to extraditable offences or the *ordre public* clause194, do not seem to offer a solution here. The reason is that they are context-sensitive and allow member states to refuse if domestic requirements for evidence-taking are not fulfilled. What is aimed at in this chapter, however, is a situation where no differences exist among member states as to the allowance of both measures in cross-border context. Accordingly, it is necessary to consider approaches developed under MR instruments, which aim at ensuring the mutual availability of certain measures for the purposes of EU cooperation in criminal matters, namely:

- linking mutual availability with the minimum imprisonment threshold in the issuing state; or
- linking mutual availability with the MR offences list.

1.2.4.1. In search of a common denominator

- The minimum imprisonment threshold as a solution?

The minimum imprisonment threshold is used to deal with the recognition and execution of warrants or orders. A penalty threshold of three years of imprisonment in the issuing state is stipulated, *inter alia*, in the FD EAW, FD FO, FD EEW and EIO Directive. In this light, it is necessary to examine whether this

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threshold could also accommodate the mutual availability of telephone tapping and house search.

This alternative would consist of ensuring that if the offence being investigated is punishable in the issuing state by a custodial sentence or a detention order for a maximum period of at least three years, the executing member state ensures that both telephone tapping and house search are available for the purpose of execution of the order. This three-year threshold corresponds with the threshold required for double criminality across the MR instruments. This approach, however, constitutes neither a satisfactory nor a fortunate alternative, for the following reasons.

First of all, this alternative does not seek to provide common grounds for both measures across the EU, since it merely indicates which law shall prevail. It would also be contrary to art. 30.5 EIO Directive, which highlights the requirement of mutual allowance for the interception of telecommunications. Moreover, the scope of its use would also be hampered by the fact that in different member states different offences meet the threshold of three years of imprisonment. That means that issuing the measures in an EU cross-border context would be still context-sensitive and would not enjoy the mutual availability across the EU.

- Double admissibility for MR offences

The second alternative for *ratione materiae* refers to the MR offences and consists of situations where member states ensure the availability of telephone tapping and searches of premises if the offence being investigated relates to any of the MR offences. This approach is inspired by art. 11.3 (ii) FD EEW which ensures the availability of search and seizure for the purpose of the execution of the EEW where it is related to any of the ‘32 MR offences list’. In other words, this alternative would mean the possibility to use MR offences beyond the abandonment of the double criminality requirement195.

The main added value of this approach is its compliance with the concept of MR offences which already exists and is used in the framework of EU cooperation in criminal cases, especially in cases concerning EAW. Operating under an exhaustive list of offences would free member states from context-sensitive availability and, instead, ensure coherent list of offences giving rise to mutual allowance for both measures. Given the serious nature of all MR offences, there is a high chance that the availability of both measures already falls within the scope of domestic grounds, irrespective of how member states determine availability preconditions. Moreover, if the member states are willing to introduce these grounds for investigations being carried out in a domestic context, then the transfer of already existing evidence would also be facilitated.

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195 This alternative has already been given attention in the following study: G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering…. See also: W. DE BONDT, Overcoming …, p. 57.
However, the biggest objection to this alternative may be domestic incoherence with regard to the substantive law of the member states and lack of EU definitions of the MR offences. This problem was raised in the German demarche with respect to the FD EEW, where Germany had made the lack of clear and common definitions and the possibility of having to meet obligations with regard to behaviour not criminalised under German legislation one of its key issues during negotiations. Indeed, the different approaches to the substantive law may significantly hamper the use of MR offences as mutual preconditions for both measures. However, it should be stressed that there are current initiatives to overcome these difficulties, which are briefly presented below.

- **Approximation of the MR offences and added value of EULOCs**

As indicated in the preceding paragraph, the 32 MR offences, also called ‘Euro crimes’, have never been tackled at the EU level as a united exercise, however, a series of offences on the list have been subjected to harmonisation.

First and foremost, substantive difficulties could also be overcome using the EU Level Offence Classification System (EULOCs) which brings together the current JHA substantive criminal law acquis. The EULOCs would bring simplicity and accessibility to the double criminality requirement. As a consequence, double criminality as a ground for refusal could be abandoned with respect to offences that have been subject to approximation and identified as such in the EULOCs. Thus, from the perspective of the cooperating member states, EULOCs can simplify the procedure of recognition and significantly limit the time dedicated to establishing whether or not double criminality is met in cases where cooperation is dependent on a double criminality requirement. Consequently, the double criminality verification process for those offences that have been subject to approximation would have the potential of speeding up the cooperation process. Finally, and most important for this research, the classification would also have an impact on the admissibility of evidence, due to the fact that in many cases the availability of an investigative measure depends on the crime that is the subject of the investigation. Therefore, the introduction

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197  W. DE BONDT, G. VERMEULEN, Appreciating Approximation…, p. 25.
198  See also: G. VERMEULEN, W. DE BONDT, C. RYCKMAN (eds.), Rethinking…, p. 421 et seq.
199  L. KLIMEK, European Arrest Warrant, Springer 2015, p. 103-104. See also provisions of the Stockholm Programme: Minimum rules with regard to the definition of criminal offences and sanctions may also be established when the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy which has been subject to harmonisation measures, p. 15. See also: A. SUOMINEN, Effectiveness and Functionality of Substantive EU Criminal Law, New Journal of European Criminal Law, Vol. 5, Issue 3, 2014, p. 388 et seq.; T. MARGUERY, European Union Fundamental Rights and Member States Action in EU Criminal Law, Maastricht Journal of European and Comparative Law, 2013, Vol. 2, p. 290-291.
of minimum standards with respect to the gathering of evidence in the EU could be effectuated at least for offences that have been subject to approximation and for which it may be expected that member states consider it important to strengthen the fight against those offences\textsuperscript{201}.

1.2.4.2. Conclusion

The research has revealed the need for mutual availability of telephone tapping and house search for purposes of EU cooperation in criminal matters. This goal could be achieved by ensuring the availability of both measures if the offence being investigated is related to any offence included in the MR offences list\textsuperscript{202}. That would ensure that no differences exist among member states as to the allowance for the measures. Enhancing mutual trust as to the preconditions for both measures would be rewarded with per se admissibility of evidence if gathered accordingly, since member states would not need to face the dilemma of whether the measure would be permissible in a similar domestic case and, consequently, the status of the evidence gathered.

Consequently, given the central research question of this chapter, devising common grounds for ordering telephone tapping and house search for the purposes of EU cooperation in criminal matters may prove feasible if it is based on the MR offences list. Operating under a common materiae standard would ensure the mutual admissibility of evidence gathered using both measures within the entirety of the EU in cases where the offence being investigated relates to one of the ‘Euro crimes’. The common scope of ratione materiae for telephone tapping and house search would do away with issues arising from national incompatibilities concerning the grounds for ordering the measure, facilitate cross-border gathering of evidence and, consequently, enhance their per se admissibility throughout the EU. Introducing the minimum standard with respect to evidence-gathering in a domestic context would also significantly enhance the transfer and mutual admissibility of evidence that already exists. For other offences, which are not included in the MR offences list, the general provisions would still apply. In other words, in cases not concerning the MR offences, the member states might still subject the execution of investigative measures to the double admissibility requirement.

\textsuperscript{201} G. VERMEULEN, W. DE BONDT, C. RYCKMAN (eds.), Rethinking..., p. 436-438.

\textsuperscript{202} See also 2010 Stockholm Programme, p. 15: The relationship between approximation of criminal offences or their definition and the double criminality rule in the framework of mutual recognition should be further explored. The Commission is invited to make a report to the Council on this issue. One of the issues may be the necessity and feasibility of approximation or definition of criminal offence for which double criminality does not apply.
1.3. **Ratione loci**

The next issue that deserves focus when examining minimum standards to enhance *per se* admissibility of evidence is related to *ratione loci*. Inconsistencies in this matter may arise when execution of an investigative measure indicated by another member state surpasses the *ratione loci* scope of the executing state because the locations/places where the measure can be taken are more limited in a national context. Given the fact that the measures investigated in this research have different *loci* connotations, the following study presents a separate analysis for each measure.

Thus, for telephone tapping, the research focuses on cases in which the location of the telephone is a determining factor – in other words, telephone tapping as linked to and determined by its location, e.g. in someone’s home, an office or a public place. Consequently, the central research question is the following:

*How could member states enhance mutual trust in terms of telephone tapping targeted by location in view of enhancing the *per se* admissibility of evidence?*

With regard to house search, the research aims at overcoming incompatibilities concerning the scope of ‘house’ that may be searched. Consequently, the central research question is the following:

*How could member states define a ‘house’ for the purposes of EU cross-border house searches in view of enhancing the *per se* admissibility of evidence?*

1.3.1. **Ratione loci with regard to telephone tapping**

This chapter deals with minimum standards relating to telephone tapping where the location of the telephone is a determining factor. Telephone tapping may be carried out, for instance, in the case of targeting home telephones, office telephones, publicly available telephones (telephone-boxes, restaurants, hotels etc.) or within strategic monitoring. In all these cases the key factor is the location of the telephone used by the individual.

1.3.1.1. **Ratione loci with regard to telephone tapping in domestic legislation**

The majority of member states do not explicitly state rules for telephone tapping targeted by location. The reference to location as a subject of the measure may be found under the English RIPA. The lack of explicitly

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204 W. JASIŃSKI, *Dowodowe czynności …*, p. 17-25.
205 Section 8 RIPA: An interception warrant must name or describe either (a) one person as the
expressed regulations leaves open the question of whether the measure is permitted in the member states\(^{206}\).

Table 7: \textit{Ratione loci} with regard to telephone tapping in domestic legislation

<table>
<thead>
<tr>
<th></th>
<th>England and Wales</th>
<th>France</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal reference to \textit{ratione loci}</td>
<td>YES (premises)</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
</tr>
</tbody>
</table>

1.3.1.2. \textit{Ratione loci} with regard to telephone tapping in MLA and MR instruments

The MLA and MR instruments concerning telephone tapping are not very forthcoming when it comes to the legitimacy of ‘tapping targeted by location’. However, some references relevant to the matter are listed below.

- Council of Europe, Recommendation No. R (85) 10

According to art. 2 a) of the Recommendation, a request for assistance should contain a description of the telecommunication to be intercepted. Therefore, this provision covers a broad scope and the term ‘telecommunication to be intercepted’ may be defined by reference to particular person, telephone number or targeted location.

\(^{206}\) According to the representatives from the member states consulted for this research, it is highly probable that the measure would be permitted in Spain. The measure could be considered (if necessary, proportionate and well founded) in France and the Netherlands. It is highly doubtful whether the measure could be effected in Ireland, due to the fact that the telephone number to be intercepted is always related to a specific person. This strict point of view also prevails in Polish doctrine, however, it is safe to say that the question of ‘tapping targeted by location’ in Poland has not been fully grasped and still calls for special attention. For instance, one of the opinions developed under Polish legislation is that tapping targeted by location may refer only to office telephones and, moreover, only if the telephone is not being used by third parties; otherwise, the measure is not permitted, see: K. DUDKA, \textit{Ochrona prawa do prywatności i jej ograniczenia w polskim prawie karnym}. Cz. 1, Czasopismo Prawa Karnego i Nauk Penalnych, 2000/2, p. 83. With respect to the French regulation, see also the domestic case of \textit{French Trésor Public and Société de Course v. L} [1965] Dalloz Jur, 423-424 where the court stated the admissibility of the tapping of telephone boxes \cite{RZEPLINSKI2019}.
RATIONE LOCI

- **2000 EU MLA Convention**

The Convention does not explicitly refer to *ratione loci* in terms of telephone tapping. Its art. 18.3 (f) stipulates that requests under this article shall include, among other things, the provision of sufficient technical data, in particular the relevant network connection number, to ensure that the request can be met.

Therefore, as in the case of Recommendation No. R (85) 10, the Convention basically refers to the telephone number to be intercepted. This leads to the conclusion that the instrument does not exclude the tapping of telephones targeted by the location, which could be executed as far as the domestic provisions of concerned member states allows for that.

- **Council Resolution of 17 January 1995 on the lawful interception of telecommunications**

The provisions of the Council Resolution of 17 January 1995 on the lawful interception of telecommunications\(^2\)⁰ are also interesting in the light of the permissibility of tapping targeted by location, as it provides:

> Art. 1. Law enforcement agencies require access to the entire telecommunications transmitted, or caused to be transmitted, to and from the number or the other identifier of the target service used by the interception subject.

This provision shows that the interception of telecommunications may take place either with regard to the number, or other target service used by the person whose communications are to be intercepted, which may also include telephones determined by location.

- **EIO Directive**

The Directive also refers to the ‘target identifier’. Its art. 30.3 c) stipulates that the EIO shall contain:

- information for the purpose of identifying the subject of the interception;
- the desired duration of the interception; and
- sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed.

Specification of the term ‘target identifier’ is provided by Section H7 of the EIO template\(^2\)⁰. Accordingly, this term covers, in particular, mobile telephones, landline telephones, email addresses and Internet connections. Accordingly, the


\(^2\)¹ Annex A of the EIO Directive.
‘target identifier’ in light of the EIO provisions may also be determined by its location.

- Conclusion

The wording of the instruments and documents concerning telephone tapping leads to the conclusion that the cross-border interception may also refer to a measure determined by the location of the telephone. This conclusion follows from the fact that the instruments use terms such as: ‘relevant network connection number’, ‘identifier of the target service used by the interception subject’, or ‘the target identifier’, which may be understood in a broad sense and also cover telephones determined by their location.

1.3.1.3. Tapping targeted by location in the case-law of the ECtHR

In cases concerning telephone tapping, the ECtHR does not rule out interceptions linked with particular places. A good example thereof may be the recent case of Zakharov v. Russia, where the Court stated as follows:

Lastly, as regards the content of the interception authorisation, it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered209.

A similar line of reasoning may be found in the case of Kennedy v. United Kingdom, where the Court examined the provisions of the English RIPA and ruled, as follows:

(...) in internal communications cases, the warrant itself must clearly specify, either by name or by description, one person as the interception subject or a single set of premises as the premises in respect of which the warrant is ordered (...). Names, addresses, telephone numbers and other relevant information must be specified in the schedule to the warrant. (...) The Court considers that, in the circumstances, no further clarification in the legislation or the Code of the categories of persons liable to have their communications intercepted can reasonably be required210.

Having arrived at this conclusion, it is necessary now to examine whether the ECtHR imposes any particular minimum standards with regard to telephone tapping determined by certain loci. Thus, the following study sketches the case-law concerning places most extensively examined by the Court, namely homes, offices and public telephones.

209 Zakharov v. Russia, §§ 264.
210 Kennedy v. United Kingdom, §§ 160.
In its case-law the ECHR permits the tapping of telephones linked with a home. In *Klass and Others v. Germany* the Court ruled:

The Court does not exclude that the contested legislation, and therefore the measures permitted thereunder, could also involve an interference with the exercise of a person's right to respect for his home.

Moreover, the Court highlights that telephone conversations made from the home deserve the protection provided by Art. 8 ECHR:

> It is clear from the Court’s case-law (...) that telephone conversations made from the home are covered by the notions of “private life” and “correspondence” under Article 8 of the Convention.

The legitimacy of the tapping of office telephones was examined by the ECHR in the case of *Halford v. United Kingdom*. In this case the applicant alleged that calls made both from her home and office telephones were intercepted for the purposes of obtaining information to be used against her. When examining the case, the Court ruled that the applicant could have had a reasonable expectation of privacy for such calls and, consequently, found that there was a violation of Art. 8 ECHR in relation to the interception of calls made via office telephones:

> In the Court’s view, it is clear from its case-law that telephone calls made from business premises as well as from the home may be covered by the notions of “private life” and “correspondence” within the meaning of Article 8.

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211 The Court, having considered all the evidence, does not find it established that there was an interference with Ms Halford’s rights to respect for her private life and correspondence in relation to her home telephone. In view of this conclusion, the Court does not find a violation of Article 8 of the Convention (art. 8) with regard to telephone calls made from Ms Halford’s home, *Halford v. United Kingdom*, §§ 60. See also: CH. GRABENWARTER, *European Convention on Human Rights: Commentary*, C.H. Beck 2014, p. 202.

212 *Klass and Others v. Germany*, §§ 41; see also: *Malone v. United Kingdom*, §§ 64.

213 *Halford v. United Kingdom*, §§ 52, see also: *Amann v. Switzerland*, §§ 43.

214 (...) There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to
The same line of argumentation may be found in *Copland v. United Kingdom*, a case dealing with the interception of office e-mails:

*According to the Court’s case-law, telephone calls from business premises are prima facie covered by the notions of “private life” and “correspondence” for the purposes of Article 8 § 215.*

- **Public telephones**

One of the most difficult questions when examining tapping targeted by location is whether conversations held *via* publicly available telephones could also be intercepted and, if so, whether these conversations fall within the scope of Art. 8 ECHR in the same way as home or office telephones. From the case-law concerning this issue follows the conclusion that the key factor in these cases is first and foremost a person’s reasonable expectations as to privacy.

Accordingly, where an applicant uses an open-air channel, the interception does not constitute interference since the conversation is accessible to other users and could hardly be classified as private communication216. The same conclusion was made with regard to conversations undertaken within a radio channel for civil aircraft217. On the other hand, in *A. v. France* the Court accepted the argument that where a conversation concerned the public interest, this did not deprive it of its private character218.

Another significant example is the case of *Perry v. The United Kingdom*. In this case the Court pointed out that:

*It cannot therefore be excluded that a person’s private life may be concerned in measures effected outside a person’s home or private premises. A person’s reasonable expectations as to privacy is a significant though not necessarily conclusive factor*219.

215 (…). It follows logically that e-mails sent from work should be similarly protected under Article 8, as should information derived from the monitoring of personal Internet usage, *Copland v. United Kingdom*, §§ 41.


219 *Perry v. United Kingdom*, §§ 37.
In *Uzun v. Germany* the authorities intercepted telephones in the house in which the applicant lived with his mother and in a telephone box situated nearby. In that case the key issue was surveillance via GPS, however, the conclusion drawn by the ECtHR is also relevant for the purposes of this research:

> There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.

Thus, in the Court’s view tapping of conversations held via public channels may also be permitted and, as far as they comply with the reasonable expectation of privacy, they fall within the scope of Art. 8 ECHR.

**Conclusion**

The case-law settled by the ECtHR shows that the Court allows for interceptions and surveillance linked with particular locations. According to the Court, due to the intrusive nature of these measures, some of the ‘tapped locations’ are also covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Art. 8 ECHR. These locations are, in particular, homes and business premises.

1.3.1.4. Minimum standards with regard to telephone tapping and *ratione loci*

As reported in this chapter, the inconsistencies of domestic law may negatively impact on the gathering and admissibility of evidence from telephone

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220 *Uzun v. Germany*, §§ 44; see also: There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor (...). A person walking along the street will inevitably be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character (see also Herbecq and the Association “Ligue des droits de l’homme” v. Belgium, nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, Decisions and Reports (DR) 92-B, p. 92, concerning the use of photographic equipment which does not involve the recording of the visual data obtained). Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain (...). Likewise, the covert and permanent recording of the applicants’ voices at a police station for further analysis as voice samples directly relevant for identifying these persons in the context of other personal data was regarded as the processing of personal data about them amounting to an interference with their private lives (...), *Uzun v. Germany*, §§ 44-47.
tapping targeted by location. Consequently, given the domestic differences, the flexibility of the EU and CoE in this matter (references to specific targets, which may be described by their location), as well as the ECHR’s approach, it seems necessary to establish common rules addressing the legitimate exercise of the measure and the admissibility of evidence gathered accordingly.

Thus, cross-border telephone tapping could be facilitated if member states ensured the availability of tapping targeted by location for the purposes of EU cooperation in criminal matters. The introduction of this provision would clarify the availability of the measure in a cross-border context and do away with discussions as to the legitimacy of the measure and enhance per se admissibility of evidence gathered thereby. Operating under common rules could also ensure a common level of protection for affected persons. Hence, given the fact that the measure may interfere with the privacy of a broad spectrum of third party or random users, it is also necessary to consider certain limitations.

First and foremost, following the approach of the ECHR, the measure would need to correspond with the level of protection ensured in Art. 8 ECHR, since the tapping of a telephone determined by location (e.g. home telephone, office telephone) is covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Art. 8 ECHR. This rule also applies to conversations made via publicly available telephones, if a person whose conversations are tapped has reasonable expectations as to the privacy of the conversations. It is noteworthy that nowadays the usage of publicly available telephones is not very great. However, the conclusions made in this respect may give rise to further, extended research on minimum standards regarding the interception of e-conversations targeted by location, e.g. in hot-spots, wifi zones etc.

Taking into account the wide range of persons whose conversations may be intercepted within the tapping of telephones determined by location (e.g. flat-mates, office-mates, random users), mutual trust as to the measure could be additionally enhanced if member states ensured that it is available only in exceptional cases and, obviously, if the requirements for necessity and proportionality are fulfilled, and that the stored data are screened and processed in a way that minimises the risk of abuses.

1.3.2. Ratione loci with regard to house search

This research deals solely with house search and, consequently, no concerns are raised relating to searches of public premises since public premises fall outside the scope of Art. 8 ECHR and, consequently, do not deserve special focus with regard to all the criteria undertaken in this research.

However, the term ‘house’ has very different connotations across the domestic legislation of member states and that may hinder searches carried out upon EU cooperation, as well as per se admissibility of items gathered from the

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221 With regard to the protection of third parties monitored by chance or as necessary participants, see p. 140-141.
measure. Therefore, this part of the research elaborates upon a common minimum standard with regard to the notion and scope of the word ‘house’ in the context of cross-border house searches.\(^{222}\)

1.3.2.1. Definition of a ‘house’ in domestic contexts

The member states included in this research tend not to specify the scope of premises that may be searched in their legislation. Only one jurisdiction (England and Wales) provides detailed regulation in this matter (\textit{any place, in particular, any vehicle, vessel, aircraft or hovercraft; any offshore installation; any tent or movable structure} \(^{223}\)). The provisions of other member states have been laid down vaguely. As a result, these issues are elaborated on by scholars and jurisprudence and, therefore, some of examples are outlined below.

According to French doctrine and jurisprudence, ‘domicile’ is not only a person’s central place of existence (établissement) but also a temporary residence (office, hotel room, vehicle adapted for living, theatre box). At the same time, the jurisprudence excludes from this scope an artistic atelier, a car or a burnt-out flat\(^{224}\). The French approach may be contrasted to Spanish jurisprudence, which is less protective and excludes from the scope of ‘domicile’, inter alia, garages, offices, squats, elevators, vehicles or hotel rooms rented by the hour\(^{225}\). The Irish provisions, in general, distinguish between private premises and dwellings and offer greater constitutional protection to the latter\(^{226}\). In Poland, the biggest controversies have been stirred up with regard to searches of vehicles where the Human Rights Defender submitted an application to the Constitutional Tribunal with a view to examining the compatibility of the present approach with the Polish Constitution\(^{227}\). It is noteworthy that searches of vehicles in Poland are allowed under numerous so-called ‘police acts’ which permit interference without judicial or prosecutorial control. Different provisions for car searches also apply in the Netherlands\(^{228}\).

This variety of domestic approaches, especially with regard to cars, confirms the necessity of progress towards a common understanding of what constitutes ‘house’ in the context of EU cross-border searches.

\(^{222}\) Concerns with regard to ratione loci covered by special privileges are elaborated upon in the chapter which deals with ratione personae, as well as minimum standards relating to searches of legal persons.

\(^{223}\) Section 23 PACE.

\(^{224}\) M. ROGACKA-RZEWNICKA, Recenzja pracy doktorskiej mgr Artura Kaznowskiego pt. „Institucja przeszukania w procesie karznym a prawo do prywatności”, p. 9.


\(^{226}\) A. CRAS, Y.M. DALY, Ireland..., p. 51 et seq.


\(^{228}\) I. PEÇI, The Netherlands..., p. 111.
1.3.2.2. *Ratione loci with regard to house search in the MLA and MR instruments*

The instruments governing trans-border house searches do not attempt to overcome difficulties that follow from different understandings of the word ‘house’ in the EU. Consequently, the legitimacy of house search is always context-sensitive and depends on the domestic regulations of the member states concerned. However, two instruments which address this issue are worth mentioning here and are elaborated on below.

- **SIC**

The SIC provides an interesting approach to the *ratione loci*. Art. 41.5 (c) concerns the general conditions for hot pursuit:

> **41.5 (c)** Entry into *private homes and places not accessible to the public* shall be prohibited.

Accordingly, this provision distinguishes between private homes and places which are not accessible to the public, and a link between both places which prohibits entry is the expectation of privacy associated therewith.

- **FD EEW**

The EEW Proposal in many places refers to ‘private premises’229. Reference to ‘private premises’ may be also found in the FD EEW. Its Recital (7) reads:

> The EEW may be used to obtain any objects, documents and data for use in proceedings in criminal matters for which it may be issued. This may include, for example, objects, documents or data from a third party, from a *search of premises including the private premises* of the suspect, historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques.

Unfortunately, at no point does the instrument attempt to clarify the meaning of this term.

- **Conclusion**

The majority of instruments governing EU cross-border house search remain silent when it comes to the notion and scope of the word ‘house’. The FD EEW makes reference to ‘private premises’ but without further specification of that term. On the other hand, a clear rule is provided in the SIC, which equates private homes with places not accessible to the public.

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229 See paras 36, 98 and 107 of the EEW Proposal.
1.3.2.3. Meaning of ‘home’ in the case-law of the ECHR

The ECtHR is of the opinion that the notion of ‘home’ does not solely encompass a private individual’s home. In the Court’s view, the word ‘domicile’ in the French version of Art. 8 ECHR has a broader connotation than ‘home’ and should prevail over the English version.230

According to the Court, the ‘domicile’ will usually be the place, the physically defined area, where private and family life develops. Whether or not a particular habitation constitutes a ‘home’ depends on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place. In its case-law the Court has also extended the notion of ‘home’ to cover business premises and offices located on the premises of a public authority. There has also been some consideration with regard to vehicles. All of these categories are briefly presented below.

- Home

In numerous cases the Court has specified how the scope of ‘home’ should be understood within the meaning of Art. 8 ECHR. Accordingly, the notion ‘home’ could include a place where one intended to live, not confining ‘home’ to where one actually was living particularly where there is no intention to use the residence in question as one’s home.233

However, the Court highlights that not all living places are ‘homes’, for example, holiday homes and work hostels might be exceptions (although the Court ruled that a hotel room used by a homeless person constitutes his ‘home’).234 A good example of the notion of ‘home’ is the case of Rachwalski and Ferenc v. Poland. In that case the Court found that there had been a violation of private life and home with regard to an old and decrepit house the applicants rented and where they occasionally invited their friends to spend a night or a couple of days (a squat).

It is also noteworthy that the Court is of the opinion that ownership is not necessary to establish a ‘home’ and, consequently, a rented flat also constitutes a ‘home’.

231 Rachwalski and Ferenc v. Poland, §§ 68.
235 Gillow v. United Kingdom, §§ 46.
- Business premises and the offices of persons exercising liberal professions

The important case in the area of business premises is Niemietz v. Germany. In this case the Court pointed out that it is not always possible to distinguish clearly which of an individual’s activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time\textsuperscript{236}.

Consequently, the Court found that:

[T]he words “private life” and “home” as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8\textsuperscript{237}.

Consequently, the Court ruled that the term ‘home’ or ‘domicile’ also covers business premises and the offices of persons exercising liberal professions\textsuperscript{238}. It is noteworthy that this approach also refers to the business premises of a juristic person\textsuperscript{239}.

- Office located on the premises of a public authority

In the case of Peev v. Bulgaria the Court ruled that the offices located on the premises of a public authority fall within the scope of ‘home’ in light of Art. 8 ECHR. The Court pointed out that:

[U]nder the “reasonable expectation of privacy” test in light of circumstances of the case, a search which extended to the applicant’s desk and filing cabinets must be regarded as an interference with his private life\textsuperscript{240}.

\textsuperscript{236} Niemietz v. Germany, §§ 29.
\textsuperscript{237} Niemietz v. Germany, §§ 31.
\textsuperscript{238} See: Funke v. France, §§ 48 and Crémieux v. France, §§ 31 in respect of searches of residential premises; Chappell v. United Kingdom §§ 51, and Buck v. Germany §§ 31-33 in respect of business premises; and Niemietz v. Germany, §§ 29-31 and Roemen and Schmit v. Luxembourg, §§ 64-65 in respect of offices of persons exercising a liberal profession.
\textsuperscript{239} Société Colas Est and Others v. France, §§ 41.
\textsuperscript{240} Peev v. Bulgaria, §§ 39: The Court considers that, in view of its similarity to the cases cited above, the situation obtaining in the present case should also be assessed under the “reasonable expectation of privacy” test. In the Court’s opinion, the applicant did have such an expectation, if not in respect of the entirety of his office, at least in respect of his desk and his filing cabinets. This is shown by the great number of personal belongings that he kept there (…). Moreover, such an arrangement is implicit in habitual employer-employee relations and there is nothing in the particular circumstances of the case –
This conclusion was repeated in a case which dealt with the search of a professor’s office located at a university:

As to the search of a person’s office located on the premises of a public authority, the Court has considered such a measure to interfere with the individual’s private life if the person concerned had had a “reasonable expectation of privacy” in respect of his office, whereas it left open whether such a search also amounted to an interference with the individual’s right to respect for his home241.

- Vehicles

With regard to the permissibility of car search, the Court clearly pointed out that:

the search of a person’s car interferes with the rights guaranteed by Article 8 § 1 ECHR242.

This conclusion was repeated in Petri Sallinen and Others v. Finland, where the Court examined Finnish regulations specifying search and seizure of privileged material which had been found and seized during a search of a law office as well as the flat and vehicles of an applicant.

Therefore, in light of the case-law of the ECtHR, one may assume that vehicle searches also interfere with the rights guaranteed by Art. 8 ECHR and deserve special attention when deriving minimum standards with regard to ratione loci.

- Conclusion

The overview of the case-law settled by the ECtHR shows a broad notion of the word ‘home’, since the Court links the ‘home’ with a reasonable expectation of privacy. Accordingly, the ‘home’ should mean not merely the place where one intended to live, but also business premises, offices located in the premises of a public authority and vehicles.

such as a regulation or stated policy of the applicant’s employer discouraging employees from storing personal papers and effects in their desks or filing cabinets – to suggest that the applicant’s expectation was unwarranted or unreasonable. The fact that he was employed by a public authority and that his office was located on government premises does not of itself alter this conclusion, especially considering that the applicant was not a prosecutor, but a criminology expert employed by the Prosecutor’s Office (...). Therefore, a search which extended to the applicant’s desk and filing cabinets must be regarded as an interference with his private life.

241 Steeg and Wenger v. Germany, Apps. no. 9676/05, 10744/05 and 41349/06, Commission decision of 3 June 2008.

242 Steeg and Wenger v. Germany, Apps. no. 9676/05, 10744/05 and 41349/06; see also: Ernst and Others v. Belgium, §§ 110.
1.3.2.4. Minimum standards with regard to ratione loci and house search

While looking into the domestic approaches it became clear that, in pursuit of enhancing mutual admissibility of evidence in the EU, it is necessary to provide a common understanding of the term ‘house’ in the context of cross-border searches. This common understanding could follow the approach of the ECtHR and SIC 1985, and rely on a reasonable expectation of privacy together with inaccessibility of the place to the public. Therefore, ‘house’ would be a place where one intends to live, but also an office, premises located within public authorities, a vehicle and any other place which is not accessible to the public. Operating under the same understanding of the scope of ‘house’ could facilitate cross-border searches and contribute to enhancing mutual trust of evidence gathered therein.

1.3.3. Conclusion

This chapter examined the feasibility of coming to minimum standards with regard to ratione loci separately for telephone tapping and house search. As to the former measure, the conclusion is that gathering of evidence from telephone tapping and per se admissibility thereof could be enhanced if member states clearly allowed telephone tapping targeted by location for purposes of EU cross-border cooperation. This location could be a home, an office or even a public place. Taking into account the wide range of persons whose conversations may be intercepted within the tapping of telephones determined by location (e.g. flat-mates, office-mates, random users), the measure will be available only in exceptional cases, accompanied by safeguards for persons targeted by chance and, obviously, if the requirements for necessity and proportionality are fulfilled.

As to the latter measure, introducing a common definition of what constitutes ‘house’ in the context of EU cross-border searches could do away with dilemmas that arise from variations of domestic laws and ensure that the measure is carried out under the same provisions. This definition could follow the approach of the ECtHR and SIC 1985, and provide that a ‘house’ will be a place with reasonable expectation of privacy and inaccessibility of the place to the public.

Operating under these minimum standards could remove the difficult issues that arise from the diversity of domestic laws and enhance mutual trust between member states, ensuring that both measures are permissible under common minimum provisions, associated with the same level of protection of persons affected. That could be rewarded with per se admissibility of evidence gathered from both measures.

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243 Consequently, ‘house’ is to be construed as also including the registered office of a company run by a private individual and a legal entity’s registered office, branches or other business premises, see: Buck v. Germany, §§ 31.
1.4. **Ratione temporis**

Differences between member states as to temporis concerns constitute another element that may hamper mutual admissibility of evidence gathered from telephone tapping and house search in an EU cross-border context. Thus, the goal of this chapter is to investigate both measures in terms of *ratione temporis*, in view of coming to common minimum standards. As in the previous chapter, due to the different connotations of *ratione temporis* relating to telephone tapping and house search, the measures deserve separate analysis.

Accordingly, minimum standards with regard to *ratione temporis* and telephone tapping should deal with the duration of the measure. The central research question is the following:

*How could member states enhance mutual trust with regard to the time limits of telephone tapping?*

Regarding house search, minimum standards should refer to the time of the search and its influence on the admissibility of evidence. Consequently, the central research question is the following:

*How could member states enhance mutual trust with regard to the time of house search?*

*Ratione temporis* concerns may also be linked to the procedural moment when the measures become available (e.g. the *in rem* phase, *in personam* phase etc.). However, it is neither feasible nor necessary to come to a common approach in this respect, especially in light of diversities between legal systems and different structures of criminal proceedings across the EU. Moreover, it is doubtful whether a stage of proceedings itself may have such a significant impact on the mutual *per se* admissibility of evidence, if in both cases the measures are accompanied by common minimum standards. Therefore, these issues are not elaborated upon in this research.

### 1.4.1. **Ratione temporis with regard to telephone tapping**

This chapter deals with the duration limits of the measure. The absence of common EU minimum standards in this matter may hamper cross-border telephone tapping when the issued period of time surpasses the *ratione temporis* scope of the executing state, because the time limits in the executing state are shorter, or because the measure is subject to intermediate renewal where it lasts for the duration ordered. Therefore, this chapter offers an insight into the questions of the duration, time limit and renewal of cross-border telephone tapping.
1.4.1.1. Time limits of telephone tapping in domestic legislation

All systems investigated in this research adhere to clear provisions regarding the maximum duration of the measure and the conditions of its renewal. However, as the following table outlines, there are differences in terms of the duration of a single issuance and of the total time limits of the measure, which are apparent across the jurisdictions investigated:

Table 8: Ratione temporis with regard to telephone tapping in domestic legislation

<table>
<thead>
<tr>
<th></th>
<th>England and Wales</th>
<th>France</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duration of the measure</td>
<td>3 or 6 months (depending on the nature of the offence)</td>
<td>4 months</td>
<td>3 months</td>
<td>4 weeks</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Renewal</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES – up to 3 months in total</td>
<td>YES – up to 6 months in total</td>
<td>YES – up to 18 months in total</td>
</tr>
</tbody>
</table>

1.4.1.2. Ratione temporis with regard to telephone tapping in the MLA and MR instruments

Neither the MLA nor the MR instruments provide straightforward provisions with regard to maximum duration of the measure. The instruments and policy documents solely address whether there is an indication of the duration of the measure in the request/order and what should happen in cases where the desired duration exceeds the domestic scope temporis of the requested state. The examples are listed below:

- Council of Europe, Recommendation No. R (85) 10

  Art. 2. Requests for assistance should, in addition to the indications mentioned in Article 14 of the convention, contain the following information:
  d. an indication of the period of time during which the interception is to be effected.

  Art. 3. If the period for which interception is requested exceeds the period for which an order is, or may be, issued according to the law of the requested Party, that Party should so inform the requesting Party without delay and indicate possibilities, if any, for extending this period.
RATIONE TEMPORIS

- 2000 EU MLA Convention

Art. 18.3. Requests under this Article shall include the following:
(e) the desired duration of the interception.

- EIO Directive

Art. 30.3. An EIO referred to in paragraph 1 shall also contain the following information:
(b) the desired duration of the interception.

Consequently, the concrete duration of telephone tapping carried out in an EU cross-border context depends on the member states concerned. It is noteworthy that, in light of the Recommendation No. R (85) 10, the law of the requested state prevails and the requesting party must adhere to its domestic time limits and renewal procedures.

1.4.1.3. Maximum duration of telephone tapping in the case-law of the ECtHR

In cases concerning telephone tapping, the ECtHR has ruled that the establishment of a general rule with regard to the maximum duration of the measure is left to member states. At the same time, the Court does not set a maximum limit and, moreover, presents a wide margin of appreciation in this matter.

In Kruslin v France the Court held that the setting of a limit on the duration of telephone tapping was necessary244. However, in the case of Kennedy v. United Kingdom the Court ruled as follows:

(…) the overall duration of any interception measures will depend on the complexity and duration of the investigation in question and, provided that adequate safeguards exist, it is not unreasonable to leave this matter for the discretion of the relevant domestic authorities245.

In the same judgment, the Court pointed out that ‘adequate safeguards’ relate, inter alia, to supervision and keeping the warrants under continuous review, which constitutes satisfactory protection against abuses and arbitrary interference246. A similar line of reasoning may be found in the case of Iordachi v.

244 Above all, the system does not for the time being afford adequate safeguards against various possible abuses (…) Nothing obliges a judge to set a limit on the duration of telephone tapping, Kruslin v. France, §§ 35.
245 Kennedy v. United Kingdom, §§ 161.
246 Ibid.
Moldova in which the Court referred to the setting up of clear requirements for renewal of the measure and procedure²⁴⁷.

It is also noteworthy that in the case Van Pelt v. The Netherlands the Commission found that the tapping of the applicant’s telephone for almost two years had not violated the ECHR²⁴⁸.

In summary, the ECtHR is of the opinion that the law should provide for clear limitations on the duration of telephone tapping, as well as a procedure to follow after the expiry of this time and grounds for its renewal. However, the Court accepts long durations and the absence of a maximum limit, as far as it is reasonable in the circumstances of the case and as long as it is accompanied by adequate safeguards.

1.4.1.4. Minimum standards with regard to ratione temporis and telephone tapping

Given the case-law of the ECtHR, it is clear that mutual trust between member states could be enhanced by ensuring that they provide clear rules as to the maximum duration of the measure and its renewals. That could strengthen the presumption that the foreign procedure under which the measure is effectuated ensures the same level of protection against abuses. Having regard to the results of the comparative study, the legislation included in this research already adheres to the requirements outlined above. In each member state provisions for dealing with the maximum duration of the measure and clear conditions of renewal are in place. However, regardless of this fact, time limits in cross-border telephone tapping are still very context-sensitive and may significantly vary, depending on the member states concerned. That could still hamper cross-border execution of the measure.

Consequently, it is necessary to consider whether adopting common time limits for the measure carried out in an EU cross-border context could be a solution here. Even if it would significantly facilitate evidence-gathering, the idea seems neither desirable nor doable. Firstly, it would be difficult to set out any reasonable and satisfactory common duration. Secondly, it is doubtful whether member states would be willing to resile from their domestic provisions and introduce new time limits for the purposes of EU cross-border telephone tapping. Thirdly, the ECtHR does not set any concrete minimum duration either, ruling that what is of utmost importance is the quality of the law and appreciating different domestic approaches in this matter.

Therefore, it is necessary to consider whether member states could continue

²⁴⁷ The Court further notes that the legislation in question does not provide for a clear limitation in time of a measure authorising interception of telephone communications. While the Criminal Code imposes a limitation of six months (…), there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months’ period, Iordachi and Others v. Moldova, §§ 45.
²⁴⁸ Van Pelt v. The Netherlands (dec.).
regulating this issue and simply acknowledge differences coming from domestic legislation, on condition that they provide clear rules as to the duration of the measure and its renewal. That would mean that member states could agree to execute the foreign, desirable duration, even if it differed from the domestic provisions that would apply in a similar domestic case. This approach fully relies on the domestic provisions of the issuing state, and leaves this state with the decision as to the time limit for the telephone tapping warrant to be issued and executed, according to its law. Given the fact that mutual trust would be enhanced by ensuring that member states envisage provisions relating to the maximum duration of the measure and the conditions of its renewal, the executing state could per se assume that the measure is to be issued and renewed (if necessary), according to the law that provides the same level of protection. However, what brings the necessary flexibility to this rule for the executing side is the overall maximum duration provided by the domestic law of the executing state, which constitutes the maximum limit to which the executing state may act. In other words, member states would apply foreign requirements as to the duration of the measure but only to the maximum extent provided by the law of the executing state.

To sum up, the minimum standards for telephone tapping with regard to *ratione temporis* could consist of ensuring that all member states provide clear rules as to the maximum duration of the measure and its renewal. This provision would enhance mutual trust between member states and strengthen the presumption that the procedure under which the measure is granted or renewed ensures the same level of protection against abuses and, therefore, the executing member state may execute it according to the desired duration, unless it extends past the overall maximum time limit in that state.

### 1.4.2. *Ratione temporis* with regard to house search

This chapter deals with the times of searches, especially searches conducted at night and at ‘unreasonable hours’. Incompatibilities between member states in this matter may raise dilemmas as to the admissibility of evidence gathered upon different time frameworks. Consequently, the following study investigates the feasibility of coming to minimum standards that would enhance mutual trust between member states in this matter and *per se* admissibility of evidence, even that gathered at night or daybreak.

#### 1.4.2.1. Search-times in domestic legislation

There is no coherence between the investigated legal systems as to the time of searches. Whereas two provide precise time frameworks for the measure, the other states refer to ‘reasonable hours’. None of the investigated laws explicitly prohibits night searches. However, all member states require that night searches shall be conducted solely in exceptional cases.
In England and Wales, house search under a warrant must be carried out at a reasonable hour unless it appears to the constable executing it that the purpose of the search may be frustrated upon an entry at a reasonable hour. Searches in France are only authorised to be carried out during the day-time. Apart from exceptional cases provided for by law, searches may not be undertaken before 6 am. These exceptional cases involve, among other things, drugs, organised crime or terrorism. Also, operations launched during the day may be continued into the night. Warrants in Ireland can be executed at any time, including night-time, likewise in the Netherlands. In Poland, according to art. 221 KPK, searches of places of residence are conducted at night-time only in urgent cases. The ‘night-time’ is from 10 pm to 6 am, however, a search commenced by day may be continued during the night-time. Pursuant to the LECrim, a search may be conducted during the day and, in urgent cases, during the night as well. There is no one rule for ‘day’ or ‘night’ hours in the Spanish criminal proceedings. Following the jurisprudence, in such cases, the season and ‘Spanish customs’ should also be considered.

Table 9: Ratione temporis with regard to house search in domestic legislation

<table>
<thead>
<tr>
<th>England and Wales</th>
<th>France</th>
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<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Search time</strong></td>
<td>Day and night</td>
<td>06.00–21.00</td>
<td>Day and night</td>
<td>06.00–22.00</td>
<td>Day and night</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Night searches allowed only in urgent cases</td>
<td></td>
<td>Night searches allowed only in urgent cases</td>
<td></td>
</tr>
</tbody>
</table>

1.4.2.2. Search-times in the MLA and MR instruments

The instruments governing evidence-gathering do not address much the search-time concerns. The only example may be found in the EEW Proposal, which includes special provision with regard to these issues. Accordingly, art. 12 of the EEW Proposal, which deals with additional safeguards for the execution of a warrant, reads:

249 Section 16 PACE.
250 J. TRICOT, *France…*, p. 244.
Art. 12.2 (a): a search of private premises should not start at night, unless this is exceptionally necessary due to the particular circumstances of the case.

This safeguard, however, has not been incorporated into the final version of the FD EEW. Undoubtedly, this article was striving for the maximisation of procedural safeguards and the chances of admissibility for evidence gathered within the measure by limiting night searches only to exceptional cases. However, having taken into account the comparative study, one may notice that the term ‘night’ is still imprecise due to the fact the ‘night’ may have different connotations across different domestic laws.

1.4.2.3. Ratione temporis with regard to house search in the case-law of the ECtHR

In cases concerning search times, the Court is more concerned with the principle of necessity and proportionality than on indicating a strict time framework for the measure.

In the case of Misan v. Russia the Court accepted the domestic Russian approach that allows searches during night hours. In that case the Russian police carried out a search of the applicant’s flat from 9.30 pm to 11.00 pm. The applicant argued that the night search had not been relevant and sufficient, and, consequently, it had been unlawful under domestic law. However, the Court pointed out that:

it does not consider it necessary to determine whether the mere fact that the search was carried out at night is in itself sufficient to undermine its lawfulness. It will instead concentrate on whether the interference was “necessary in a democratic society”\textsuperscript{252}.

In the case Rachwalski and Ferenc v. Poland the Court found there to be a violation in the fact that the applicants were confronted by a number of police officers carrying truncheons and accompanied by dogs at the front door of their house in the middle of the night. However, when examining the quality of the Polish law, the Court did not question the possibility of carrying out a night search under Polish legislation. Nevertheless, the Court observed that the domestic provisions that allow night-searches had not been fulfilled in this case\textsuperscript{253}.

An interesting example is the case of Kučera v. Slovakia, where the Court found a violation of Art. 8 ECHR even thought the measure started at 6.00 am (in accordance with the domestic law that specified the hours of searches). The Court concluded that, in light of all the circumstances of this case, starting the

\textsuperscript{252} Misan v. Russia, §§ 54.
\textsuperscript{253} Rachwalski and Ferenc v. Poland, §§ 71-73.
search at daybreak had been neither necessary nor proportional.

In summary, the approach of the ECtHR allows night-searches insofar as the measure is necessary and proportional. However, according to the Court, the terms of carrying out the measure during the night should have a clear legal basis in domestic law, and the key feature is always necessity and proportionality of the search time in a particular case.

1.4.2.4. Minimum standards with regard to ratione temporis and house search

There is common ground between the domestic systems of the member states included in this research as to the exceptional conditions under which a night search may be executed. This approach corresponds with the case-law of the ECtHR, which links search times with the principle of proportionality and necessity instead of ruling on a precise time framework for the measure. Therefore, the minimum standard with regard to ratione temporis and house search could comply with domestic rules, the provision set out in art. 12.2 (a) EEW Proposal together with the case-law of the ECtHR, and consist of ensuring that house searches are carried out solely at reasonable hours, unless this is exceptionally necessary due to the particular circumstances of the case. Accordingly, member states would still be allowed to perform night searches (or searches at unreasonable hours), however, the use of this way of carrying out the measure would be limited by common requirements based on principles of necessity and proportionality apparent in each particular case.

Accordingly, differences in domestic time-frames would not constitute any obstacle to per se admissibility of the evidence, since member states would believe that the search executed in an EU cross-border context would meet the same conditions and ensure the same level of protection against abuses in terms of temporis.

1.4.3. Conclusion

This chapter has provided an insight into temporis concerns in view of coming to common EU minimum standards in this respect, which would enhance mutual trust between member states and result in per se admissibility of evidence.

The outcome is that, with regard to telephone tapping, mutual trust could be enhanced by member states introducing straightforward rules regarding the time limits of the measure, namely, maximum duration and rules for its renewal. That could allow member states to execute orders containing various durations of the measures. With regard to house search, mutual trust could be taken to a higher level by member states ensuring that night searches, as well as searches at unreasonable hours, can be conducted only in exceptional cases, if necessary due to the particular circumstances of the case. In this scenario member states would

per se trust that, irrespective of temporis incompatibilities between member states, the measure is carried out according to a commonly agreed, minimum standard, and does not carry a risk of abuses of power.

Introducing these provisions for the purposes of EU cross-border telephone tapping and house search could facilitate evidence-gathering, enhance mutual trust between member states as to the time frameworks, and, consequently, enhance the per se admissibility of evidence gathered accordingly.
1.5. Ratione personae

EU cross-border gathering and use of evidence may also be hampered by incompatibilities related to *ratione personae*. These incompatibilities may arise when evidentiary measures can only be taken for a limited category of persons and when these categories vary depending on the member state concerned\(^{255}\), or when domestic provisions provide special rules relating to the gathering of evidence from specific persons or professions. This may apply, for example, to persons covered by immunities, persons obliged not to disclose information classified as privileged or confidential, or secrets related to some professions or functions, such as lawyers, journalists and doctors. Extra dilemmas may arise with regard to the targeting of third persons, as well as the status of third persons affected by chance. Moreover, consideration shall also be given to the liability of legal persons to be subject to the measures\(^{256}\).

Consequently, this chapter looks into *ratione personae* issues with a view to coming to common EU minimum standards with regard to various categories of persons that may be targeted by the measures. Thus, the central research question is the following:

*Which categories of persons could be targeted by telephone tapping and house search in the context of EU cross-border gathering of evidence?*

This central research question gives rise to the following secondary questions:

*Which immunities or privileges require a special procedure when it comes to EU cross-border telephone tapping and house search?*

*Could telephone tapping and house search be permissible with regard to third parties?*

*Could legal persons be the subject of telephone tapping and house search?*

With regard to these research questions one may wonder whether some of

\(^{255}\) As the study on EU cross-border evidence-gathering shows, *member states are very reluctant to proceed with the execution of an investigative measure if it surpasses the national scope ratione personae.* Only 70% indicated that execution would not be possible in such cases. Only 30% is prepared to go ahead with this investigative measure, G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, *EU cross-border gathering…*, p. 75-76.

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these concerns would fit better into the chapter dealing with *ratione loci*, in particular when it comes to interferences in places used by persons granted immunity or privilege (e.g. law firms, politicians’ offices, etc.). However, exploring these items within *ratione personae* is justified by the fact that the core link between the special procedure and the place is the privileged person. Consequently, the determining factor is not the *locus* itself but the fact this *locus* is occupied by a person enjoying special privilege. Therefore, the searching and tapping of ‘privileged places’ was omitted from the *ratione loci* chapter and is elaborated upon below.

1.5.1. *Ratione personae in domestic legislation*

1.5.1.1. Telephone tapping

The comparative study shows that member states allow for a wide scope of persons who may be targeted by telephone interceptions. According to all the domestic provisions, the measure may be carried out not only with regard to suspects, but also with regard to other individuals, including third parties. However, all member states provide restrictions in this matter, indicating categories of persons which cannot be affected by the measure or persons whose conversations may be tapped under certain, limited conditions:

Table 10: *Ratione personae* with regard to telephone tapping in domestic legislation

<table>
<thead>
<tr>
<th>Category of persons whose conversations may be tapped</th>
<th>England and Wales</th>
<th>France</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>all individuals, including third parties</td>
<td>all individuals, including third parties</td>
<td>all individuals, including third parties</td>
<td>all individuals, including third parties</td>
<td>all individuals including third parties</td>
<td>all individuals including third parties</td>
<td></td>
</tr>
<tr>
<td>lawyers, journalists, ministers of religion</td>
<td>lawyers</td>
<td>journalists</td>
<td>lawyers</td>
<td>professionally privileged persons, including lawyers</td>
<td>doctors, journalists, attorneys, persons covered by immunity</td>
<td></td>
</tr>
<tr>
<td>Personae restrictions (non-exhaustive list)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

T. HOWSE, *England…*, p. 152; *Interception of Communications. Code of Practice*, p. 16-23; art. 237 § 4 KPK. With regard to the remaining states, the information is based on my consultation with representatives of member states

Having regard to the third research question of this chapter, it is noteworthy that there is no consistency between member states as to the admissibility of evidence obtained from tapped conversations of the tapped conversations of representatives of legal persons257.

257 According to member states’ representatives, only in three member states could the measure be considered admissible and effected (France, Ireland and Spain). In the remaining states, there
1.5.1.2. House search

For house search, member states provide that the measure may be carried out with regard to all individuals, including persons who are not parties in criminal proceedings. In the legislation included in this research materiae concerns and the circumstances of a particular case prevail over the status of the individuals whose premises may be searched. However, as in the case of telephone tapping, the legislation refers to persons whose premises are protected due to the fact that they are occupied by persons enjoying special privileges, including lawyers, journalists and doctors.

Table 11: Ratione personae with regard to house search in domestic legislation

<table>
<thead>
<tr>
<th>Category of persons</th>
<th>England and Wales</th>
<th>France</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>all individuals</td>
<td>all individuals</td>
<td>all individuals</td>
<td>all individuals</td>
<td>all individuals</td>
<td>all individuals</td>
<td>all individuals</td>
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</tbody>
</table>

<table>
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<tr>
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<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>lawyers</td>
<td>lawyers</td>
<td>lawyers</td>
<td>lawyers</td>
<td>lawyers</td>
<td>lawyers</td>
<td>lawyers</td>
</tr>
</tbody>
</table>

Section 7.2 Police and Criminal Evidence Act 1984, Code B, Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises; arts. 219, 225 and 226 KPK. With regard to the remaining states, information is based on my consultations with representatives from the member states.

1.5.1.3. Conclusion

As the overview of domestic legislation shows, member states do not limit the legitimate exercise of these measures to parties to the proceedings. Consequently, the measures may be executed against other individuals, including third parties.

However, all the member states provide limitations on the use of the measures, specifying categories of persons who deserve special protection, due to fact that they are covered by immunities or privileges. These categories of persons vary from one member state to another, however, all those included in this research give lawyers special protection.

It is also worth noting that the member states are not coherent when it comes to telephone tapping or searching of premises of legal persons. Whereas in some

are no special rules relating to legal persons, which leaves open the question as to the admissibility of the measure.
the legislation contains straightforward provisions relating to this issue, in other
member states the legislation remains silent on the matter.

1.5.2.  **Ratione personae in the MLA and MR instruments**

This subsection examines whether the MLA and MR instruments governing
EU cooperation in criminal matters address *personae* concerns with regard to
both measures. In particular, this part of the study aims at exploring whether the
EU favours any groups of persons or professions that deserve special protection
in the context of EU cooperation in criminal matters. Consideration is also given
to the legitimacy of subjecting third parties and legal persons to the measures.

1.5.2.1.  **Ratione personae in MLA instruments**

When examining the MLA instruments one may notice that there are not
many references to *ratione personae* in them. Only the Recommendation No. R
(85) 10 provides that the execution of such letters rogatory may be refused if,
according to the law of the requested party, the status of the person whose
telecommunications are to be intercepted does not permit the use of this
measure. Consequently, member states are given the freedom to refuse
execution of the foreign request if its execution would surpass the domestic
*personae* scope.

As for legal persons, the instruments refer to the availability of mutual legal
assistance which relates to proceedings in connection with offences for which a
legal person may be liable. However, no specific concerns are raised with
regard to the legal person as a subject of evidentiary measures.

1.5.2.2.  **Ratione personae in MR instruments**

In contrast to the MLA instruments, the MR instruments directly address the
*ratione personae* and link these issues with grounds for non-execution. The MR
instruments explicitly state that the executing member state may refuse
recognition or execution where there is an immunity or privilege under the law
of this state which makes it impossible to execute the warrant/order. However,
this formulation may raise ambiguities due to the fact that there is no common
definition of what constitutes an immunity or privilege in the EU.

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258  Art. 3.2 2000 EU MLA Convention: *Mutual assistance shall also be afforded in connection with
criminal proceedings and proceedings as referred to in paragraph 1 which relate to offences or
infringements for which a legal person may be held liable in the requesting Member State;* see also: G.

273-278.
The first instrument to make reference to immunity or privilege was the FD EAW. Its art. 20 reads:

Art. 20.1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived. The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

The introduction of this ground for refusal has been called in the literature a step backwards in comparison with mutual legal assistance, where this ground for refusal was traditionally not included. Moreover, even though it has been acknowledged that the field of obtaining evidence does not necessarily require the same rules as decisions to arrest people and that it is not an appropriate method to take the grounds for refusal already contained in other mutual recognition instruments as a starting point for negotiations, this provision has consequently been copied into the EU instruments governing evidence-gathering, namely the FD FO, the FD EEW and the EIO Directive.

- FD FO

The FD FO in its art. 7 lists grounds for optional non-recognition or non-execution. Accordingly, the execution of the order may be refused or not recognised if:

Art. 7.1. (b) there is an immunity or privilege under the law of the executing

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260 It is noteworthy that this ground was inserted in the framework decision during the December 2001 negotiations for the sole reason of convincing Italy, which did not want to risk Italians under national political immunity or privilege becoming surrenderable under the EAW.


263 See also: Whilst it should already be pitied that this was the price to be paid for reaching consensus at the level of the JHA Council on the EAW, there was clearly no good reason to simply copy the ground for non-execution into the sphere of MLA by introducing it in the EEW or the Freezing Order, for the effect of execution would not come close to surrender, as in the case of the EAW, G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering…, p. 49-50.
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state which makes it impossible to execute the freezing order\textsuperscript{264}.

- FD EEW

The FD EEW consequently copies the ratione personae approach and stipulates that recognition or execution of the EEW may be refused in the executing state if:

Art. 13.1 (d) there is an immunity or privilege under the law of the executing state which makes it impossible to execute the EEW.

However, it is remarkable that the EEW Preamble provides some clarifications as to what may constitute an immunity of privilege. Thus, Recital (17) of FD EEW reads:

There is no common definition of what constitutes an immunity or privilege in the European Union and the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions\textsuperscript{265}.

It is also noteworthy that Form A of the EEW template included in the EEW Proposal required further details of whether the objects, documents or data sought by the warrant constitutes material likely to be covered by any privileges or immunities\textsuperscript{266}. However, the final template of the EEW lacks this reference.

- EIO Directive

The EIO Directive follows the approach presented in the preceding paragraphs. Accordingly, art. 11.1 (a) stipulates that recognition of execution of an EIO may be refused in the executing state where:

Art. 11.1 (a) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO.

As in the case of the preceding instruments, the EIO Directive does not provide any definition of what constitutes an immunity or privilege and,

\textsuperscript{264} It is noteworthy that the FO Proposal did not include this provision.
\textsuperscript{265} Recital (17) of the FD EEW: (…) but should not be interpreted in a way which would run counter to the obligation to abolish certain grounds for refusal in Article 7 of the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.
\textsuperscript{266} EEW Proposal, Annex, Form A (D).
consequently, leaves it to national law. However, Recital (20) of the Directive makes reference to protections which apply to the medical and legal professions as well as to the freedom of the press and freedom of expression in other media\(^{267}\).

It is noteworthy that when discussing the final wording of the EIO Directive issues of privileges and immunities were hotly debated. Special attention was drawn to legal privileges and house search. It was highlighted that a general ground for refusal would be necessary to ensure that the execution of an EIO to search the office of a lawyer may be refused to protect the relationship between the lawyer and the suspected and accused person. It was also stressed that this situation could be dealt with under the ground for refusal related to privileges and immunities, which could be further developed\(^{268}\). Moreover, it was pointed out that:

It should be possible to refuse an EIO where its recognition or execution in the executing State would involve \textit{breaching of an immunity or privilege in that State}. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the \textit{same celerity and priority as for a similar national case}\(^{269}\).

It is also noteworthy that the EIO Directive, in contrast to preceding instruments, also refers to freedom of the press and freedom of expression in other media. This issue was under discussion with regard to the measures which conflict with constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media\(^{270}\). 

\(^{267}\) See also Recital (20) of the Directive: It should be possible to refuse an EIO where its recognition or execution in the executing State would involve \textit{breaching of an immunity or privilege in that State}. There is no common definition of what constitutes an immunity or privilege in Union law, the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way to counter the obligation to abolish certain grounds for refusal as set out in the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This may also include, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media; see also: In its request, the European Parliament asked specifically about standards relating to ‘protection of attorney’s offices from search and seizure’. It is clear from the case law that a stricter standard of scrutiny is usually applied when it comes to searches of lawyers’ offices and seizures of documents or computers containing the information on the lawyers’ clients (and similarly for other groups with professional secrecy requirements). In such cases, both the CJEU and ECtHR require more safeguards to be put in place in order to protect professional secrecy (…), EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, Opinion…, p. 7-8.


\(^{269}\) EUROPEAN PARLIAMENT, Committee report tabled for plenary, 1st reading/single reading, A7-0477/2013.

\(^{270}\) COUNCIL OF THE EUROPEAN UNION, Outstanding issues, (15329/10), 21.10.2010, p. 18. The question of whether the protection of certain professional groups (in this case journalists)
With regard to legal persons, the EIO Directive presents a similar approach to the EU 2000 MLA and stipulates that:

Art. 4. An EIO may be issued: (d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

This provision, however, does not clarify whether the legal person may be subjected to evidentiary measures such as telephone tapping and house search.

1.5.2.3. Conclusion

Neither the MLA nor the MR instruments have made telephone tapping or searches of premises explicitly dependent on specific *ratione personae* requirements. However, the MLA instruments traditionally make the execution of a letter rogatory dependent on compliance with the domestic *personae* scope and, if the legal system of the executing state grants immunity to the requested person, then the requested state may refuse the assistance. In contrast, the MR instruments explicitly refer to immunity or privilege and make it a ground for non-recognition or non-execution, even if there is no common understanding in the EU of what constitutes immunity or privilege. Thus, the instruments attempt to clarify these terms and, therefore, link them with the legal, medical and journalistic professions. In this light it stands out that even if *ratione personae* has been traditionally connected with political privileges, the MR instruments clearly loosen the link with political aspects.

The instruments do not provide any particular references to the possibility of making third parties or legal persons subject to the measures. However, Annex A Section E, which refers to the identity of the person concerned by the investigative measure attached to the EIO Directive, also applies to legal persons.

1.5.3. *Ratione personae in the case-law of the ECtHR*

Following the MR instruments, which take into special consideration the legal, medical and journalism professions, it is necessary to look into the case-law settled by the ECtHR relating to these professions. Accordingly, the following study deals with the minimum standards which the Court has established with regard to telephone tapping and house search of persons should fall under the ground for refusal mentioned as immunities or privileges, was raised by Austria. It is noteworthy that a reference to the media is also included in Recital (28) of the FD EEW, which refers to freedom of the press and freedom of expression in other media.

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271 Vide: Italian position with regard to adoption of the EAW, p. 121.
272 G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, EU cross-border gathering..., p. 50.
granted these privileges. Moreover, given the research questions reported in the opening paragraph, the overview of case-law also encompasses _ratione personae_ concerns with regard to third parties and legal persons.

1.5.3.1. Protection of professional privileges

- **Legal privilege**

In cases concerning lawyers targeted by telephone tapping, the ECtHR first emphasises that, by virtue of Art. 8 ECHR, correspondence between lawyers and their clients, whatever its purpose, enjoys privileged status as far as confidentiality is concerned. This follows from the fact that lawyers are assigned a fundamental role in a democratic society and, therefore, should have in their professional contacts with clients a reasonable expectation of protection and respect for professional privacy.

However, communications falling within the ambit of the lawyer-client privilege can still be intercepted, for example, by chance or because the suspect whose conversations are being intercepted calls his lawyer. The risk of interception of privileged materials may also occur in cases where a lawyer is a suspect. Therefore, the Court has derived minimum standards with regard to telephone tapping which affects the legal profession. These standards may be summarised in the following way:

- the law must provide a clear legal basis for defining the interception of privileged conversations. In other words, the law should provide clear rules defining what should happen when a telephone call made by a client to his lawyer is intercepted;
- the law must contain procedures for supervising the interception when the intercepted material may cover an area of the confidential relations between lawyers and their clients. Due to the possibility of

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273 Michaud v. France, §§ 117-118; see also: S. v. Switzerland, §§ 48. The Court considers that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective; see also: The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system, Elci and Others v. Turkey, §§ 669.

274 Iordachi and Others v. Moldova, §§ 50.

275 Iordachi and Others v. Moldova, §§ 50.
human error or abuse, the Court considers that it is desirable to entrust the supervisory control to a judge;\footnote{276}{In order to secure respect for this reasonable expectation, it is therefore required that the interception of telecommunications be subject to an adequate system of supervision. In this area, faced with evolving and sophisticated technology and the possibility of human error or abuse, the Court considers that it is in principle desirable to entrust the supervisory control to a judge, Aalmoes and 112 Others v. The Netherlands (dec.).}

- the measure must comply with requirements of extreme necessity and proportionality in cases in which a lawyer is participating. The Court highlights that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim being pursued;\footnote{277}{Aalmoes and 112 Others v. The Netherlands (dec.); Messina v. Italy (no. 2), §§ 65.}

One of the cases in which the Court examined the quality of the law with regard to legal professional privilege is \textit{Kopp v. Switzerland}. In this case the Court pointed out that, even though Swiss case-law had established the principle that legal professional privilege only covers the relationship between lawyers and their clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer’s work under instructions from a party to proceedings and those relating to activity other than that of counsel. The Court was not convinced by the Swiss procedure of selection of privileged information which cannot become part of the case file from not privileged information which could be added to the case file and considered in court. The Court noticed that the person tasked with sorting between these types of information (the lawyer working in the post department) who is a member of the executive, worked without the supervision of an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his or her clients, which directly concern the rights of the defence. Accordingly, the Court stated that Swiss law does not indicate with sufficient clarity the scope and manner of exercise of the authorities’ discretion in the matter and, consequently, the tapped lawyer did not enjoy the minimum degree of protection required by the rule of law in a democratic society, which constitutes a breach of Art. 8 ECHR;\footnote{278}{Kopp v. Switzerland, §§ 72-75.}

On the contrary, in the case of \textit{Aalmoes v. The Netherlands}, the Court was satisfied with the quality of domestic law with regard to the tapping of a lawyer. In this case, the Court noticed that the Dutch regulation distinguishes whether the lawyer is a suspect or a third party. As for the former, if the information obtained by the interception falls within the ambit of the legal privilege of non-disclosure, it must be destroyed and may not be used in evidence. Dutch law prescribes the involvement of a member in authority of the professional group (a representative of the bar association) concerned with identifying what information may and may not be added to the case file in the light of the
privilege. It is the investigating judge who eventually authorises what information conveyed to or by the suspect may be included in the case file. In cases where the lawyer is not a suspect, his telephone cannot be intercepted. However, in the case of conversations intercepted by chance (e.g. because the client called his lawyer), the prosecutor who screens the information may order that the privileged information has to be destroyed. In summary, the Court was satisfied that the Dutch regulations governing the interception of telecommunications in the context of tapping lawyers are sufficiently precise, comprehensive and provide for adequate safeguards against abuses.

According to the case-law of the ECtHR, searches of law offices are permissible unless they involve the seizure of privileged items. Consequently, the Court has developed minimum standards in order to ensure adequate protection and effective safeguards against any abuse and arbitrariness in cases where a search of a lawyer's office is concerned. The Court's core standards in this matter are as follows:

- the measure has to be proportionate to its purposes of preventing crime;
- the measure should preferably be supervised by a judicial or independent authority;
- the warrant has to be reasonably limited; and
- the search has to be carried out in the presence of an independent observer in order to ensure that materials subject to professional secrecy are not removed.

One of the major cases in this area is Niemietz v. Germany. In this case, the authorities expected to find a document in a law firm which might have revealed the identity of a third party to be prosecuted for a criminal offence.

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279 Aalmoes and 112 Others v. The Netherlands (dec.).
280 In the present case, hard disks were searched, copied and seized. They contained information passing between the first applicant and his clients, who had no role in the investigated offence. While the seized hard disks were returned to the first applicant, however, a copy of the fourth hard disk remained with the police for some considerable time. The Court notes that the search and seizure were rather extensive and is struck by the fact that there was no independent or judicial supervision (….) In sum, the Court finds that the search and seizure measures in the present case were implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of applicable regulations specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society, Salinen and Others v. Finland, §§ 89-92.
281 In addition, the Court notes that, while the search was carried out in the presence of two certifying witnesses, they were neighbours who were not legally qualified (see paragraph 16 above). This may be considered problematic, as this lack of legal qualification made it highly unlikely that these observers were truly capable of identifying, independently of the investigation team, which materials were covered by legal professional privilege, with the result that they did not provide an effective safeguard against excessive intrusion by the police into the applicant’s professional secrecy, Stefanov v. Bulgaria, §§ 43.
When analysing the case, the Court first noted that the search of a place such as a law firm was disproportionate to the purpose of preventing crime. Secondly, the Court found that there were no special procedural safeguards attending the exercise of search powers on the premises of lawyers in German law, even though the search had been carried out in the presence of two assistants. Thirdly, according to the Court, the warrant was drawn in broad terms, in that it ordered a search for and the seizure of ‘documents’, without any limitation, hence not revealing the purpose of the search of the law firm.282

In Smirnov v. Russia the applicant claimed that his flat (which was part of the ongoing criminal investigation into his clients’ alleged criminal activity) had been searched with a view to obtaining evidence against his clients and their files stored on his computer and, therefore, the search had violated the lawyer-client privilege. When examining the case the Court stated that the search order was drafted in extremely broad terms, referring indiscriminately to ‘any objects and documents that were of interest for the investigation’, without any further limitation. The order did not contain any information about the ongoing investigation, the purpose of the search or the reasons why it was believed that the search at the law firm would enable evidence of any offence to be obtained. The Court found that the domestic authorities failed in their duty to give ‘relevant and sufficient’ reasons for issuing the search warrant. Moreover, the Court observed that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were ‘of interest’ for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to ongoing criminal proceedings. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege. With regard to the materials that were inspected and seized, the Court found that the search impinging on professional secrecy to an extent that was disproportionate to whatever legitimate aim was being pursued.284

282 The ECtHR also stressed that: (…) having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that appears disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Art. 6 ECHR, Niemietz v. Germany, §§ 37.


284 Smirnov v. Russia, §§ 48.
Another example is the case of Roemen and Schmit v. Luxembourg, in which the Court noted that, unlike in the case Niemietz v. Germany, the search of the law firm was accompanied by special procedural safeguards: the warrant was executed in the presence of an investigating judge, a representative of the public prosecutor and the President of the Bar Council285.

On the other hand, in the case of Robathin v. Austria, the Court found a violation of Art. 8 ECHR due to the fact that the supervision did not enable one to establish that the search of all the applicant’s electronic data was proportionate to the circumstances. Moreover, the Court stated that the seizure and examination of all data in the law office went beyond what was necessary to achieve the legitimate aim286.

- Press privilege

In cases concerning the surveillance of journalists, the Court highlights the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom. However, the minimum standards for the tapping of journalists are lower than in the case of the tapping of lawyers.

The first difference is apparent in the area of permissibility of the measure. Whereas the information covered by a lawyer’s privilege may never be a target of the measure, the tapping of conversations held by a journalist may be justified by an overriding requirement in the public interest287. However, in this respect, the Court highlights the importance of supervision of the measure with a view to ensuring adequate and effective safeguards against any abuse and arbitrariness.

In Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands the Court examined the interception of journalists’ communications in order to determine from whence they had obtained their information. When analysing the case, the Court found that Dutch law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources due to the lack of any, either prior or post factum, review by an independent body with the power to prevent or terminate the surveillance288.

The post factum review of an interference that had been performed by the public prosecutor was examined by the ECtHR in Sanoma Uitgevers B.V. v. The

285 Roemen and Schmit v. Luxembourg, §§ 69-72. However, in this case the Court found violation of Art. 8 ECHR due to the fact that the search warrant was drafted in relatively broad terms and, above all, the ultimate purpose of the search was to establish the journalist’s source through his lawyer.

286 Robathin v. Austria, §§ 51-52.

287 See, inter alia, Goodwin v. United Kingdom, §§ 39; Voskuil v. The Netherlands, §§ 65.

288 Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands, §§ 100-102.
Netherlands. In this case, the tapping was also carried out in order to effect the disclosure of journalistic sources. Regardless of the fact that the measure had been the subject of a judicial post factum review, the Court stated that the review could not cure these failings, since it could not prevent the disclosure of the identity of the journalistic sources from the moment when this information came into the hands of the public prosecutor and the police.

On the other hand, in Weber and Saravia v. Germany, the Court examined the problem of conversations held by journalists which were intercepted fortuitously within ‘strategic monitoring’. Firstly, the ECtHR noted that in the present case the aim of strategic monitoring was not to identify journalists’ sources due to the fact that the surveillance measures were, in particular, not directed at uncovering journalistic sources. Secondly, the ECtHR noted that there was no special provision for the protection of freedom of the press in German law. However, the Court stated that, regardless of the lack of provisions referring to the non-disclosure of sources, the general safeguards were considered adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum.

As was highlighted above, in cases concerning journalists, the Court sees the press as the ‘public watchdog’ and highlights the concomitant importance of ensuring that individuals remain free to disclose information to the press which, in a democratic society, should properly be accessible to the public. Accordingly, in numerous cases the Court has ruled on the inviolability of a newspaper’s premises and stated that the competing interests – namely the protection of journalists’ sources and the prevention and repression of crime – always need to be properly balanced. In the cases Ernst and Others v. Belgium, Tillack v. Belgium, Martin and Others v. France, and Ression and Others v. France the Court consequently pointed out that the reasons given by the authorities to justify the searches could be considered relevant, but not sufficient, and stated that the measure had been disproportionate and had violated the applicants’ right to freedom of expression under the ECHR.

By way of contrast, in Stichting Ostade Blade v. The Netherlands the ECtHR dealt with the search of a magazine’s premises which was undertaken after a press release that the magazine had received a letter from an organisation claiming responsibility for a series of bomb attacks. When examining the case, the Court stated that the search, which had been carried out in order to investigate a serious crime and prevent further attacks, complied with the requirement of being necessary in a democratic society.

290 Weber and Saravia v. Germany, §§ 151.
291 Goodwin v. United Kingdom, §§ 39; Roemen and Schmit v. Luxembourg, §§ 46; Ernst and Others v. Belgium, §§ 91; Sanoma Uitgevers B.V. v. The Netherlands, §§ 50; and Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands, §§ 127; Voskuil v. The Netherlands, §§ 64-65.
292 Stichting Ostade Blade v. The Netherlands, §§ 64-68.
- Medical privilege

In cases concerning access to medical data for purposes of criminal proceedings, the ECtHR has referred to preservation of an adequate balance between the interests of an individual and the public interest in investigating crime.

In Z. v. Finland the Court examined the search of a hospital and seizure of the medical records of the wife of a suspect who refused to give evidence against her husband. This information at the material time could have been decisive to the question of whether the suspect should be prosecuted for attempted manslaughter in respect of five offences or just three of them.

When examining the case, the Court noted that respecting the confidentiality of health data is a vital principle in the legal systems of all member states. It is crucial not only to respect the sense of privacy of patients but also to preserve their confidence in the medical profession and in the health services in general.\(^\text{293}\)

However, at the same time, the Court ruled that the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in the investigation and prosecution of crime and in the publicity of court proceedings, where such interests are shown to be of even greater importance.\(^\text{294}\) In this case, the Court noted that the measure was subject to limitations and safeguards against abuse. It is noteworthy that the Court accepted the fact that the measure had been ordered by the prosecution and not by a court.\(^\text{295}\) The Court found to be most important the fact that the obtaining of medical records is possible under Finnish law only in very limited circumstances, namely in connection with the investigation and the bringing of charges for serious criminal offences for which a sentence of at least six years of imprisonment is prescribed.\(^\text{296}\) Moreover, the seized material had been submitted in the context of proceedings held in camera and case documents were treated as confidential. In addition, it was possible to challenge the seizure before the court. Consequently, the Court stated that the seizure of the applicant’s medical records and their inclusion in the investigation file were supported by relevant and sufficient reasons and, moreover, that the measures were proportionate to the legitimate aims pursued.\(^\text{297}\)

\(^{293}\) Z. v. Finland, §§ 95.
\(^{294}\) Z. v. Finland, §§ 97.
\(^{295}\) Z. v. Finland, §§ 108.
\(^{296}\) Z. v. Finland, §§ 107 and §§ 103.
\(^{297}\) Z. v. Finland, §§ 106-110.
**RATIONE PERSONAE**

1.5.3.2. Third parties and persons affected fortuitously

- **Telephone tapping**

The Court allows the tapping of the conversations of all individuals, including third parties who are not parties to an investigation. However, the Court highlights the importance of the quality of law in this matter and states that the legislation must precisely describe the categories of person who, in practice, may have their communications intercepted.298

This issue was examined by the ECtHR in the case of *Iordachi and Others v. Moldova* in which the Court found a violation of Art. 8 ECHR due to the fact that the legislation did not indicate with sufficient clarity which categories of persons are liable to have their telephones tapped (the legislation in question referred to ‘suspects, defendants or other persons involved in a criminal offence’). The Court stated that the language was very general when referring to such persons, as it states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence, without further explanation as to who exactly falls within the category of ‘other person involved in a criminal offence’299.

In the recent case of *Zakharov v. Russia* the Court was again straightforward in allowing the measure with regard to third parties. When examining the Russian provisions the Court noted that:

> interceptions may be ordered not only in respect of a suspect or an accused, but also in respect of a person who may have information about an offence or may have other information relevant to the criminal case (...) The Court has earlier found that interception measures in respect of a person who was not suspected of any offence but could possess information about such an offence might be justified under Article 8 of the Convention (...). At the same time, the Court notes the absence of any clarifications in Russian legislation or established case-law as to how the terms “a person who may have information about a criminal offence” and “a person who may have information relevant to the criminal case” are to be applied in practice300.

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298 Kennedy v. United Kingdom, §§ 160; see also: Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order (...) are nowhere defined, Huvig v. France, §§ 34.

299 Moreover, the Court is concerned by the fact that the impugned legislation does not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It notes that Article 156 § 1 of the Criminal Code uses very general language when referring to such persons and states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation has been given as to who exactly falls within the category of “other person involved in a criminal offence”, Iordachi and Others v. Moldova, §§ 44.

300 Zakharov v. Russia, §§ 245; see also: Greuter v. The Netherlands (dec); see also: Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For
Moreover, according to the Court, special consideration must always be given to any actual or potential infringement of the privacy of individuals who are not the subjects of the investigation and whose conversations are tapped by chance (e.g. persons who were targeted by individual calls, or random users of the tapped telephone). With a view to ensuring protection of these ‘necessary participants’, the Court requires that the law envisages a procedure of screening and sorting of the gathered data.

Accordingly, the Court has indicated that in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle:

- desirable to entrust supervisory control to a judge (however, the Court also accepted the supervision of an independent authority).

example, the categories of people liable to have their telephones tapped by judicial order (…) are nowhere defined, Krustin v. France, §§ 35.

(…) the Act does not regulate in detail the case of persons monitored “fortuitously” as “necessary participants” in a telephone conversation recorded by the authorities pursuant to those provisions. In particular, the Act does not specify the precautions which should be taken with regard to those persons, Amann v. Switzerland, §§ 61.

In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed; see also: Weber and Saravia v. Germany, §§ 95; Huvig v. France, §§ 34; Amann v. Switzerland, §§ 76.


Within the system of surveillance established by the G 10, judicial control was excluded, being replaced by an initial control effected by an official qualified for judicial office and by the control provided by the Parliamentary Board and the G 10 Commission. The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge. Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control. Furthermore, the democratic character is reflected in the balanced membership of the Parliamentary Board. The opposition is represented on this body and is therefore able to participate in the control of the measures ordered by the competent Minister who is responsible to the Bundestag. The two supervisory bodies may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling. The Court notes in addition that an individual believing himself to be under surveillance has the opportunity of complaining to the G 10 Commission and of having recourse to the Constitutional Court (…). However, as the Government conceded, these are remedies which can come into play only in exceptional circumstances, Klass and Others v. Germany, §§ 56.
RATIONE PERSONAE

- necessary for the law to have straightforward rules as regards the procedure for examining, using and storing the data\(^{305}\).
- House search

In cases concerning house search, the Court is straightforward in allowing the measure with regard to a wide scope of individuals, including third parties, as long as the measure is necessary and proportionate:

The Court accepts that the task of uncovering evidence of a crime might necessitate a search of a third party’s premises (…) However, such action must be proportionate\(^{306}\).

According to the Court, the search of a third party’s house needs to correspond to a pressing social need and, in particular, needs to be proportionate to the legitimate aim being pursued. Consideration must also be given to the extent of possible repercussions on the reputation of the person affected by the search\(^{307}\).

Undertaking this task in the case of Buck v. Germany the Court noticed that the search and seizure in the case at issue was carried out against a third party (a son of the suspect). Taking into account the circumstances of the case, in

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\(^{305}\) As regards the procedure for examining, using and storing the data, the Government indicated in their submissions that, under RIPA, an intercepting agency could, in principle, listen to all intercept material collected (…). The Court recalls (…) that the authorities’ discretion to capture and listen to captured material was very wide. However, that case, unlike the present case, involved external communications, in respect of which data were captured indiscriminately. Contrary to the practice under the Interception of Communications Act 1985 concerning external communications, interception warrants for internal communications under RIPA relate to one person or one set of premises only (…), thereby limiting the scope of the authorities’ discretion to intercept and listen to private communications. Moreover, any captured data which are not necessary for any of the authorised purposes must be destroyed, Kennedy v. United Kingdom, §§ 162. It is noteworthy that in this case the Court found no breach of Art. 8 ECHR, even though the measure may affect a wide range of third parties, due to the fact that the law provides adequate safeguards for the protection of data obtained, in particular, (…) strictly limits the number of persons to whom intercept material can be disclosed, imposing a requirement for the appropriate level of security clearance as well as a requirement to communicate data only where there is a “need to know”, §§ 163. As an example of the contrary see: Liberty and Others v. United Kingdom, §§ 64-65, see also: Zakharov v. Russia, §§ 302.

\(^{306}\) Vasylchuk v. Ukraine, §§ 79.

\(^{307}\) The Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the specific circumstances of each case in order to determine whether, in the particular case, the interference in question was proportionate to the aim pursued (…). The criteria the Court has taken into consideration in determining this latter issue have been, inter alia, (…) the extent of possible repercussions on the reputation of the person affected by the search (…) Having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued, Buck v. Germany §§ 45, §§ 52.
particular the fact that the measure was ordered in connection with a minor offence and, moreover, the search was carried out in a town of some 10,000 inhabitants which meant that it was likely to have an adverse effect on the personal reputation of the person affected, the Court concluded that the interference could not be regarded as proportionate to the legitimate aims being pursued and, consequently, found a violation of Art. 8 ECHR\textsuperscript{308}.

This line of reasoning is also apparent in the case of Zubaľ v. Slovakia. In this case, the Court found a violation of Art. 8 ECHR due to the fact that the search of the applicant’s house was carried out without sufficient grounds, where the applicant was not suspected of any criminal offence but was an injured party in the criminal case\textsuperscript{309}.

1.5.3.3. Legal persons

When exploring ratione personae concerns, consideration must be also given to the liability of a legal person to be the subject of telephone tapping and house search.

Legal persons are directly protected by Art. 8 ECHR. One of the major cases in this area is the case of Société Colas Est and Others v. France, in which the Court examined a house search carried out with regard to a legal person and ruled, as follows:

\begin{quote}
The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (…). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company’s right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (…). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company’s registered office, branches or other business premises\textsuperscript{310}.
\end{quote}

Following this conclusion, in the area of the tapping of conversations held within a legal person’s activities, the Court ruled that:

\begin{quote}
\textsuperscript{308} Buck v. Germany, §§ 48-53, see also: Misan v. Russia, §§ 56-64.  
\textsuperscript{309} It is true that the scope of the search was, reasonably, limited to a visual examination of the premises, and that it was carried out in the presence of a third person who was not involved in the case. The Court nevertheless considers relevant the applicant’s argument that the presence of the police at his house at 6 a.m. had repercussions for his reputation. At the relevant time the applicant was abroad. His holiday was disturbed by the news of the search and the immediate arrangements which he considered it necessary to make with a view to protecting his rights. The Court considers that the search of the applicant’s house, carried out without sufficient grounds, when the applicant was not suspected of any criminal offence but was an injured party in the criminal case in issue, was not “necessary in a democratic society”. There has accordingly been a violation of Article 8 of the Convention, Zubaľ v. Slovakia, §§ 44-45.  
\textsuperscript{310} Société Colas Est and Others v. France, §§ 41.
\end{quote}
As regards the applicant association, the Court notes that it has already held that a legal person is entitled to respect for its “home” within the meaning of Article 8 § 1 of the Convention (...) While it may be open to doubt whether, being such a person, it can have a “private life” within the meaning of that provision, it can be said that its mail and other communications, which are in issue in the present case, are covered by the notion of “correspondence” which applies equally to communications originating from private and business premises (…). The former Commission has already held, in circumstances identical to those of the present case, that applicants who are legal persons may fear that they are subjected to secret surveillance. It has accordingly accepted that they may claim to be victims (…) The applicant association is therefore entitled to the protection afforded by Article 8 § 311.

It is noteworthy that in cases concerning legal persons the Court highlights the risk of the interferences having much more far-reaching consequences than in cases of natural persons and, therefore, it requires that such interferences must be strictly proportionate to the legitimate aims pursued312.

1.5.3.4. Conclusion

The Court has produced a rich body of case-law with regard to telephone tapping and house search respectively and ratione personae.

With regard to the taking of evidence from persons granted special protection due to their profession, the Court has defined minimum standards concerning the permissibility of the measures and the safeguards associated with them. In cases related to legal privilege, the Court points out the inviolability of information concerning the right of defence. In order not to interfere in an area covered by the lawyer-client privilege, the Court has derived minimum standards as to the supervision of the measure and the procedure relating to the screening and destruction of the privileged information. In cases affecting journalistic and medical privilege, the Court allows interference if the measure is proportionate and necessary in the circumstances of the case and, moreover, if the disclosure of privileged sources is limited to an unavoidable minimum.

311 Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, §§ 60.
312 In the instant case, the Court observes that during a large-scale administrative investigation, officials from the DGCCRF went to the applicant companies’ head offices and branches in order to seize several thousand documents. It notes that the Government did not dispute that there had been interference with the applicant companies’ right to respect for their home (see paragraph 32 above), although they argued that the companies could not claim a right to the protection of their business premises “with as much force as an individual could in relation to his professional or business address” (…) and that, consequently, the entitlement to interfere “might well be more far-reaching”. The Court must therefore determine whether the interference with the applicant companies’ right to respect for their home satisfied the requirements of paragraph 2 of Article 8, Société Colas Est and Others v. France, §§ 42; see also: Crinilleux v. France, §§ 40-41.
Regarding the scope of persons that may be targeted by the measure, the Court accepts the fact that both telephone tapping and house search may be issued and executed with regard to third parties. However, in order to protect these persons from abuses, the Court has established minimum standards which relate to, *inter alia*, gathering, screening and storing the material.

With regard to legal persons, the Court makes it clear that they are directly protected by Art. 8 ECHR and may become the subject of a house search or telephone tapping. However, having regard to the wide scope of persons who may be affected if a legal person is targeted by measures, the Court requires extra consideration as to the necessity and proportionality of the measure to the legal aim being pursued.

### 1.5.4 Minimum standards with regard to ratione personae

*Ratione personae* difficulties can still hinder smooth cooperation in the area of free gathering and use of evidence. The above analysis shows that domestic laws provide different approaches to the issue and that this variety in scope of domestic privileges or immunities may have a negative impact on EU cooperation, since inconsistencies as to immunity or privilege constitute a ground for refusal under the MR instruments.

This research cannot tackle *personae* issues in great detail due to the fact that there is no common EU-level approach to what constitutes immunity or privilege, and it is not the aim of this study to explore this approach. However, certain minimum standards in this matter can be derived already, within the current state of play. Firstly, following the concept of privileges and immunities included in the MR instruments, it is necessary to consider common minimum standards with regard to special rules relating to persons covered by certain professional privileges listed in the instruments. Secondly, it is worth investigating whether third parties and legal persons could be a subject of the measures carried out in a cross-border context, since the differences between member states reported in the research, as well as a high level of risk of abuses associated therewith, can significantly hamper the EU cross-border gathering of evidence.

#### 1.5.4.1 Special rules relating to persons granted professional privileges

When looking into the MR instruments, in particular the EIO Directive, one may notice that the link between privileges, immunities and political concerns is loosening. The EIO Directive highlights the legal, journalistic and medical professions as the professions that, in particular, deserve special focus in the context of EU cooperation in criminal matters. Consequently, the following analysis deals with these groups of professions with a view to coming to minimum standards which would enhance mutual trust and result in *per se* admissibility of evidence gathered from these persons.
- **Legal privilege**

It is indisputable that any information obtained by an interception which falls within the ambit of the legal privilege of non-disclosure must be destroyed and may not be used as evidence. Accordingly, what could in the first place enhance mutual trust between member states is the assurance as to inevitability of the privileged information and a clear procedure relating to interferences which may affect information covered by privilege.

Therefore, it would contribute to mutual trust if member states distinguish between situations where a lawyer is the subject of the interception (e.g. as a suspect) or where his or her conversations are monitored by chance. Consequently, following the minimum rules provided by the ECtHR, the minimum standards in this respect could consist of ensuring that domestic provisions envisage adequate procedures for supervising the measure in cases where client-lawyer privileged information may be interfered with. In other words, it is necessary to ensure among member states that material protected by lawyer-client privilege is screened and sorted by a competent body, which guarantees that information which concerns the right of defence will not become part of the case file. It is noteworthy that the Court is in favour of involving bodies which are entrusted with distinguishing between privileged and not privileged information, e.g. a representative of the bar association or a judge, and member states could follow this requirement.

With regard to searches of law firms, member states could focus on ensuring effective safeguards that the privileged materials are not interfered with. Therefore, following the approach of the ECtHR, searches of law firms in a cross-border context could be carried out, for example, in the presence of an observer (preferably a representative of a bar association) who ensures that materials subject to professional secrecy are not removed. However, this goal could also be achieved by ensuring a procedure of screening and sorting of the gathered items by a competent body, e.g. a judge or bar representative, together with a limiting of the possibility of disclosure of this material before its review.

Therefore, it would be left to member states to ensure this commonly agreed level of protection in their domestic legislation.

In both cases, the measure will be undertaken only if necessary and proportionate to the purposes of a particular investigation. Moreover, following

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313 See also: COUNCIL OF EUROPE, Recommendation No. R (2000) 21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, 22.10.2000: All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law, Principle I para. 6.

314 According to the loci minimum standard, the term ‘law firm’ may also refer to the lawyer’s home, car or any place where the privileged information is stored.
the ECtHR, it would require *a priori*\(^{315}\) review of the decision as to issuance,
effect by a judicial or independent body of judicial character, in order to
ensure that the decision is not undertaken without due and proper
consideration. Moreover, in the case of searches, member states could establish
certain conditions as to the content of the warrant, which in cases concerning
law firms should be extremely precise in terms of the items that are found. That
could allow member states to trust that authorities are not allowed to engage in
‘sleepwalking’ with regard to law firms.

In summary, mutual trust between member states with regard to gathering
of evidence from lawyers could be enhanced by domestic legislation ensuring:
- absolute inviolability of information covered by legal privilege;
- *a priori* review/authorisation (by a judicial or independent body of
  judicial character) of the decision to target a lawyer;
- adequate procedure for carrying out the measure, in particular,
screening, sorting and removal of the gathered items.

- **Journalistic and medical privileges**

Taking into account the Court’s approach, press and medical privileges do
not require an identical level of protection as in the case of legal privileges and
authorities, in certain circumstances, may attempt to discover information
covered by journalistic and medical privilege.

Before embarking on a detailed analysis, it is worth noting that the limits to
the rights for non-disclosure of press information are also listed and elaborated
on in Recommendation No. R (2000) 7 of the Committee of Ministers to Member
States on the right of journalists not to disclose their sources of information\(^{316}\).
According to these provisions, disclosure of the information may only occur if
there is a legitimate aim, where the disclosure is necessary in the absence of
reasonable alternative measures, where legitimate interest is outweighed
(protetion of human life, prevention of a major crime, defence of a person
accused of convicted of having committed a major crime), and this applies to all
stages of any proceedings\(^{317}\).

According to this provision and the Court’s case-law it stands out that what is
of the utmost importance here is to ensure that a decision is made with
adequate *a priori* consideration, and ensuring compliance with this particular
requirement could contribute to enhancing mutual trust between member states.

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\(^{315}\) It should be recalled that with regard to persons who are not covered by professional
privileges, the review of the measure may have *a posteriori* character and, moreover, can
intervene at three stages: when the measure is first ordered, while it is being carried out, or after
it has been terminated.

\(^{316}\) Principle 3 of the COUNCIL OF EUROPE, Recommendation No. R (2000) 7 of the Committee
of Ministers to Member States on the right of journalists not to disclose their sources of
information, 8.3.2003.

\(^{317}\) See also ibid., para. 24 et seq.
This goal could be achieved by ensuring that any decision to interfere in journalistic or medical privilege will be subjected to adequate *a priori* review, in order to ensure that the decision is not taken haphazardly and is proportionate to the aim being pursued. This *a priori* review could be effectuated by appointing a judicial (or independent) body as either issuing or authorising body.

Besides that, mutual trust could also be enhanced by ensuring that privileged information is gathered, screened, sorted and destroyed under special mechanisms of control in order to ensure that only such information which does not enjoy special protection will be registered or made available by the investigative action. This requirement could also apply if the privileged material was intercepted fortuitously. It is noteworthy that, as in the case of searches of law firms, the search warrant may limit the scope of the measure with a view to safeguarding privileged items.

In summary, with regard to journalistic and medical privileges, member states could make progress towards mutual admissibility of evidence gathered from these professions by ensuring:

- *a priori* review/authorisation (by a judicial or independent body) of the decision to target a journalist or medical professional;
- adequate procedure for carrying out the measure, in particular, screening, sorting and removing the gathered items.

### 1.5.4.2. Third parties and persons affected fortuitously

According to the case-law of the ECtHR, as well as the domestic provisions of the member states concerned, both telephone tapping and house search may also affect persons who do not necessarily have to be involved in the criminal proceedings. Firstly, both measures may be issued and executed with regard to third parties. Secondly, the measures carry a high risk of affecting third persons by chance. Therefore, if mutual admissibility of evidence gathered from both measures is the aim, then progress towards mutual trust as to persons involved as necessary participants is also required.

Accordingly, the next step involves specification of the requirements which could facilitate evidence-taking from third parties and maximise the protection against abuses with regard to persons monitored by chance. Following the Court’s case-law with regard to both measures this goal could be achieved by

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318 See also ibid., which deals with interception of communications, surveillance and judicial searches and seizure: Judicial authorities ordering such search or seizure should limit their search and seizure order with respect to the disclosure of a journalist’s source, and judicial or police authorities following such an order should respect the confidentiality of the source in their search and seizure actions in accordance with both, Article 8 and Article 10 of the European Convention on Human Rights. This should require, for example, that the search or seizure be limited to material which does not contain information identifying a source. Practical examples could be the seizure of movable objects but not of information in case of seizure on grounds of pecuniary claims against journalists or the search for illegal objects being limited to these objects without taking note of any information identifying a source, para. 58.
ensuring that:

- the law provides clear and precise rules concerning the procedure for examining, using and storing the data, including rules of removal or non-disclosure of the gathered items and persons who may have access to the gathered data. It is noteworthy that these issues are strongly linked to data protection in criminal proceedings;

- the measure is properly supervised, and that material gathered by chance is removed or not disclosed. This requirement is of the utmost importance especially in a field where abuse is potentially so easy (e.g. tapping of legal persons, searches of business premises, strategic monitoring) and could have such harmful consequences for democratic society as a whole (in such cases, following the Court’s approach, it is advisable to entrust supervision to a judge or independent authority).

1.5.4.3. Legal persons

Due to the incompatibility of domestic laws, minimum standards addressing the subjection of legal persons to telephone tapping and house search also appear necessary. According to the research, it could facilitate cooperation if member states were to provide directly for the allowance of such measures in cross-border contexts. That would be in line with the ECHR, since the Court allows such measures and highlights that legal persons are protected by Art. 8 ECHR. However, given the wide scope of persons whose rights might be

319 In this respect see, inter alia: art. 20 of the EIO Directive; THE EUROPEAN DATA PROTECTION SUPERVISOR, Opinion of the European Data Protection Supervisor on the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden for a Directive of the European Parliament and of the Council on the European Protection Order, and on the 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 regarding the European Investigation Order in criminal matters, OJ C 355/1, p. 1-9; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, Opinion…, p. 8-9; COUNCIL OF THE EUROPEAN UNION, Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, 30.12.2008, OJ L 350/60; EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. A comprehensive approach on personal data protection in the European Union, Brussels 4.11.2010, COM(2010) 609 final; EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, 25.1.2012, CO(2012) 10 final.
infringed (e.g. the tapping of legal persons would probably affect a wide scope of random conversations), special consideration has to be given to the requirement of necessity and proportionality of the measure. Accordingly, member states could provide clear rules as to the way of executing the measures (e.g. rules for the supervision, sorting or deletion of the gathered data). These rules may correspond with the standards presented with regard to third parties in the preceding paragraph.

1.5.4.4. Conclusion

The aim of this chapter was to verify the feasibility of coming to common EU minimum standards for personae categories which deserve special protection, the targeting of third parties, and the targeting of legal persons. These particular concerns were selected for the following reasons. Firstly, MR instruments provide protection of certain categories of persons which should be given special attention when executing evidentiary measures abroad. Secondly, both measures carry a high risk of affecting third persons and, therefore, mutual trust in this matter needs to be enhanced. Finally, the most differences across member states are expected in this matter, since each legal system may be in favour of different categories of privileges.

The issues surrounding ratiocine personae cannot be fully overcome without a common understanding of privileges and immunities, which constitutes a ground for refusal under the MR instrument and is one of the biggest obstacles when it comes to the EU cross-border cooperation. However, given the fact that the EIO Directive explicitly refers to legal, journalistic and medical privileges, it is necessary to consider whether coming to common EU minimum standards at least with regard to these privileges is feasible, especially in light of the domestic provisions which also give special consideration to the professions concerned.

Accordingly, with regard to lawyers, mutual trust between member states could be upgraded by introducing clear rules regarding the inviolability of client-lawyer confidentiality and, consequently, the inadmissibility of evidence gained via the tapping of lawyers and searches of law firms in pursuit of information which falls within the scope of the right of defence. However, it does not automatically mean that a lawyer cannot be a subject of the measures (if privileged material is not targeted), or that a lawyer’s conversations cannot be tapped fortuitously. Nevertheless, in any case where there is a risk that privileged, legal material may be affected, a member state should ensure that the protected material is not targeted and, if gathered by chance, is separated from the case file and not used in the proceedings.

Gathering of evidence from journalists and medical professionals could be enhanced if member states ensured that the measures are carried out only if necessary in the circumstances of the case, proportionate to the aim being pursued and, moreover, that the disclosure of protected sources is limited to an unavoidable minimum. It would be left to the member states how they
effectuate these requirements. However, following the case-law of the ECtHR, the involvement of a judicial or independent body in issuing or supervising the measure must be regarded as good practice.

Mutual trust between member states could also be enhanced with regard to the third parties who may be affected by the measures, by providing clear rules as to gathering, examining, storing and using the data concerning third parties and ‘necessary participants’. These issues have a strong link with data protection for individuals with regard to the processing of personal data for the purposes of criminal proceedings.

Finally, per se admissibility of evidence could also be facilitated if member states regulate the targeting of legal persons with the measures. As in the case of third parties, it would be necessary for the measures to be accompanied by clear rules for examining, screening and sorting data gathered by chance.

All these dimensions of ratione personae minimum standards would enhance mutual trust between member states and ensure that, even if national procedures may differ, the member states provide the same level of protection with regard to persons who may be targeted by the measures. Taking evidence from journalists, third parties or legal persons would meet the same conditions and guarantees, irrespective of the member states concerned. As a result, both the issuing and executing states involved in cooperation could per se assume that the measure is covered by the same level of protection as in a similar domestic case. That could significantly contribute to enhancing per se admissibility of evidence throughout the EU.
2. Minimum standards with regard to the procedural rights associated with telephone tapping and house search

The following two chapters deal with procedural rights associated with telephone tapping and house search. At first sight, these issues may seem disconnected from the concerns explored in the preceding chapters, due to the fact that they are not strictly related to the field of evidence-gathering. However, the procedural rights concerns cannot be omitted from this research due to their significant impact on mutual trust between member states and, consequently, mutual admissibility of evidence.

It is safe to say that mutual recognition of evidence could be significantly upgraded if member states could trust per se that the gathering of evidence abroad has not violated the fundamental rights of the persons concerned and that the cross-border context of evidence-gathering neither deprives individuals of their fundamental rights nor reduces the accessibility and effectiveness of these rights. In this context and due to the variety of evidentiary measures and their impact on various fundamental rights, it is necessary to consider which evidentiary measures protect certain rights and, subsequently, how to come to common minimum standards in view of upholding these rights.

EU fundamental rights are envisaged in particular in the ECHR and the EU Charter. These instruments address, inter alia, the right to respect for private

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321 It is worth noting that the incompatibilities in procedural rights are far more significant when pre-trial evidence-gathering is spread over multiple member states, see in more detail: W. DE BONDT, G. VERMEULEN, The Procedural Rights …, p. 165. See also: H. KUCZYŃSKA, The problem of a European Code of Criminal Procedure, p. 6-7.

322 With regard to the sources of EU fundamental rights see: T. MARGUERY, European Union…, p. 284-288.
life, the right to a fair trial, the right to a defence, the presumption of innocence, and the right against self-incrimination. Due to the fact that Art. 82.2 (b) TFEU allows the setting of minimum standards concerning the rights of individuals in criminal procedure, the EU has also adopted various instruments providing minimum standards with regard to procedural rights, in particular the rights of the accused and victims of crime.

Among fundamental rights enshrined at the EU level, both telephone tapping and house search are linked to the right to respect for private life and, therefore, this fundamental right deserves special focus if enhancing mutual

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It is worth noting that the debate on the procedural rights of the accused has been stirred up by the EUROPEAN COMMISSION, Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, 19.2.2003, COM (2003)75 final. The next step towards uniform procedural guarantees was the Proposal for a Council Framework Decision on certain Procedural Rights in Criminal Proceedings throughout the European Union, 28.4.2004, COM (2004)328 final. However, the main aim of the Proposed FD was not to create new rights or to monitor compliance with those rights that already exist under the ECHR or other international or European instruments, but rather to ensure a reasonable level of protection for suspects and defendants in criminal proceedings in order to comply with the principle of mutual recognition. Nevertheless, the proposal was not adopted due to the fact that not all member states were convinced of its merits, see: W. DE BONDT, G. VERMEULEN, _The Procedural Rights...,_ p. 164, T. SPRONKEN, M. ATTINGER, _Procedural Rights in Criminal Proceedings. Existing Level of Safeguards in the European Union_, Maastricht 2005, p. 5; see also: T. SPRONKEN G. VERMEULEN, D. DE VOCHT, L. VAN PUYENBROECK, _EU Procedural Rights in Criminal Proceedings_, Maastricht 2009; L. VAN PUYENBROECK, G. VERMEULEN, _Towards Minimum Procedural Guarantees..._; G. VERMEULEN, _How far can we go..._, p. 8-10. The next step towards common procedural rights for suspects was a resolution on the Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, 4.12.2009, OJ C295/1. In the Roadmap it is stated that in the context of implementing the principle of mutual recognition, work should also be undertaken on those aspects of procedural law in which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of member states. The Roadmap deals with six measures which are believed to strengthen the procedural rights of suspected or accused persons in criminal proceedings, as follows: Measure A: Translation and Interpretation; Measure B: Information on Rights and Information about the Charges; Measure C: Legal Advice and Legal Aid; Measure D: Communication with Relatives, Employers and Consular Authorities; Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable; Measure F: A Green Paper on Pre-Trial Detention. Accordingly, one may notice that no measures are proposed with regard to legal remedies. Following the Roadmap, several instruments on various aspects of procedural rights have already been enhanced by means of directives, _inter alia_, the right to translation, the right to information, the right of access to a lawyer and the presumption of innocence and the right to be present at the trial in criminal proceedings.


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admissibility of evidence gathered through these measures is the goal. Consequently, the next step involves the investigation of how to enhance mutual trust with regard to this right. Undoubtedly, the focus here should be on limitations, since the exercise of both measures may seriously interfere with the right to privacy. Thus, both measures can be undertaken under strict conditions, inter alia, if necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. However, everyday practice shows that authorities do not always proceed in accordance with these requirements. Hence, both the ECHR and EU Charter grant to persons whose rights guaranteed therein are violated the right to an effective remedy in order to protect and pursue these rights. In case of the right to respect for private life, these remedies aim at verifying the use of the measures which carry a risk of violations of this fundamental right. In this light it stands out that the procedural right worth investigating in this research is the right to an effective remedy against both measures. Ensuring that the cross-border context does not deprive the person whose privacy was infringed of the possibility of challenging the measures could significantly contribute to enhancing mutual trust and mutual admissibility of evidence across the EU.

Therefore, the two following chapters verify whether is it possible to come to common EU minimum standards for an effective legal remedy against the measures.

2.1. Rights to legal remedies

As explained in the opening subsection, if member states were to ensure that persons whose right to privacy was infringed by the measures carried out in an EU cross-border context enjoy the same opportunity to legal remedies against them it would contribute to enhancing mutual trust and mutual recognition of evidence in the EU. However, due to the variety of legal systems the right to legal remedies may be provided differently across the member states, which may hinder the enforcement of these rights in cases having a cross-border dimension. Therefore, the central research question in this chapter is the following:

How could member states provide common minimum criteria for the application of legal remedies against telephone tapping and house search?

2.1.1. Rights to legal remedies in domestic legislation

In daily European life an individual may be confronted with different legal remedies and also potential conflicts of legal norms under and across particular
This statement perfectly reflects the state of play when it comes to legal remedies against telephone tapping and house search across the EU member states. The rich landscape of systems and procedures hampers the formulation of a coherent and transparent comparative overview with regard to legal remedies. Accordingly, the following comparative study is limited to fundamental aspects of the issues discussed in this chapter and sketches the concerns that may have an impact on mutual admissibility of evidence.

When reviewing the various domestic laws, sharp contrasts between member states appear, especially with regard to:
- the types of proceedings upon which the measures may be challenged; and
- the scope of persons entitled to challenge the measures.

Consequently, according to the provisions of the member states investigated in this research, the right to legal remedies against the measures may be effectuated on either one or more of the following procedures:
- challenging the measures within criminal proceedings:
  a) with a view to questioning its legality, necessity or proportionality, or the procedure undertaken (available usually at pre-trial stage as an interlocutory appeal, granted to the parties or persons concerned; usually leading to exclusion of evidence or reduction of its probative value);
  b) with a view to excluding the evidence (available usually at trial-stage within exclusionary rules, granted to the parties);
- challenging the measures within civil or administrative procedure:
- with a view to an action for compensation of damages.

The procedures listed above entail further differences between the member states investigated in this research, which relate to:
- the variety of bodies entitled to review the measures (e.g. prosecutors, criminal judges, civil judges, investigative judges);
- the variety of persons entitled to challenge the measures (e.g. parties to the proceedings, persons concerned – including third persons if affected by the measure – or the investigative authorities themselves);
- the variety of objectives of the legal remedy (e.g. exclusion of evidence, nullity of evidence or compensation of damages for persons whose rights were infringed).

327 For these reviews, I acknowledge the assistance of representatives from various member states.
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The sketch of domestic regulations shows variations and differences between the systems in their approaches to the legal remedies. Whereas in some member states the availability of challenge of the measures already arises at pre-trial stage within an interlocutory appeal, other states do not provide a specific legal remedy and rely on the exclusionary rules applicable at trial stage or provide this right beyond the criminal proceedings within a civil or administrative procedure. Another sharp point of difference is the aim pursued by the remedy, which may be the exclusion of evidence, its nullity or compensation for damages. All these diversities may hinder the challenge to procedure in cross-border cases.

2.1.2. Legal remedies in the MLA and the MR instruments

As an important preliminary note, it is necessary to distinguish between legal remedies against the assistance and legal remedies against the measure undertaken upon the assistance. The former remedies are traditionally envisaged in the cooperation instruments, whereas the latter are bound by the domestic provisions of member states. Taking into account the aim of this research, the following study will in particular focus on legal remedies against investigative measures carried out in a cross-border context.

2.1.2.1. Legal remedies in the MLA instruments

The MLA instruments concerning evidence-gathering do not explicitly address legal remedies. No reference to the rules that should apply within appeal proceedings is made whatsoever in the 1959 ECMA or in the 2000 EU MLA Convention. As a result, the availability and scope of the legal remedies raised within the MLA cooperation will depend on the domestic provisions of the member states concerned.

2.1.2.2. Legal remedies in the MR instruments

In contrast to the MLA instruments, explicit references to legal remedies are apparent in the instruments based on mutual recognition. Therefore, the following overview focuses on instruments governing evidence-gathering and approaches to legal remedies which envisaged therein.

- FD FO

The FD FO deals solely with the rules concerning legal remedies against the order. Its art. 11 reads:

Art. 11.1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal
remedies without suspensive effect against a freezing order executed pursuant to Article 5, in order to preserve their legitimate interests; the action shall be brought before a court in the issuing State or in the executing State in accordance with the national law of each.

2. The substantive reasons for issuing the freezing order can be challenged only in an action brought before a court in the issuing State (…).

Accordingly, the instrument clarifies the procedure applied against a freezing order undertaken upon the FD FO. Art. 11.2 FD FO makes it clear that the initial, substantive decision as to issuance may only be challenged in the issuing state328. However, this provision does not ensure the availability of such a remedy in the issuing state.

- FD EEW

The FD EEW follows the approach adopted in the FD FO with respect to legal remedies. Consequently, its art. 18 reads:

Art. 18.1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures. The action shall be brought before a court in the executing State in accordance with the law of that State.

2. The substantive reasons for issuing the EEW, including whether the conditions established in Article 7 have been met, may be challenged only in an action brought before a court in the issuing State. The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.

328 It is worth noting that the FO Proposal reads: art. 2. The freezing order may not be appealed as to its substance in the executing State. However, this wording was questioned by the EP which stated that an appeal in the executing State can never relate to the substance since this would lead to a duplication of procedures and that it is necessary to give a clearer indication than does the proposal of the special cases in which an appeal may be lodged in the executing State. Accordingly, the EP proposed the following amendment: In the executing State an appeal may relate solely to the grounds for non-execution laid down in Article 6 and to the conditions of execution referred to in Article 5(3) and may not under any circumstances relate to the substance, see: EUROPEAN PARLIAMENT, Report on the initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence, 12.7.2001, Amendment 10. However, this line of reasoning does not address the problem that the executing state, in general, is not competent to examine the substantive grounds for issuing the warrant. Therefore, the final wording of art. 11.2 FD FO is more precise and correct than the proposal.
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(…)

5. The issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring actions mentioned in paragraphs 1 and 2, in particular by providing interested parties with relevant and adequate information.

These provisions, as in the case of the FD FO, solely address decisions as to the issuance and execution of the warrant, without further reference to decisions concerning evidence-gathering in domestic contexts. However, an important provision is included in Recital (21) FD EEW:

Each Member State has in its law legal remedies available against the substantive reasons underlying decisions for obtaining evidence, including whether the decision is necessary and proportionate, although those remedies may differ between Member States and may apply at different stages of proceedings.329

Moreover, direct reference to legal remedies against house search is envisaged in the EEW Proposal. Its Art. 12 stipulates that:

Art. 12.2. The following additional safeguards are provided with respect to search and seizure:

(b) a person whose premises have been searched should be entitled to receive written notification of the search. This should state, as a minimum, the reason for the search, the objects, documents or data seized and the legal remedies available (…)

As explained in the EEW Proposal:

In the executing State, there is a need to ensure that the fundamental right not to incriminate oneself is protected, as well as a need for additional safeguards with respect to search and seizure. When coercive measures are used to obtain the evidence, it is essential that effective legal remedies exist in both the issuing and executing States. Further safeguards are provided in the grounds of refusal to execute the European Evidence Warrant.330

Unfortunately, this trend related to remedies against search and seizure was not incorporated into the final version of the FD EEW.

- EIO Directive

The approach envisaged in the EIO Directive varies slightly from the approaches laid down in the preceding instruments. Art. 14 of the EIO Directive stipulates:

329 Recital (21) of the FD EEW.
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Art. 14.1. **Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.**

2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

3. Where it would not undermine the need to ensure confidentiality of an investigation under Article 19(1), the issuing authority and the executing authority shall take the appropriate measures to ensure that information is provided about the possibilities under national law for seeking the legal remedies when these become applicable and in due time to ensure that they can be exercised effectively.

4. Member States shall ensure that the time-limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases and are applied in a way that guarantees the possibility of the effective exercise of these legal remedies for the parties concerned.

5. The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

6. A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

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331 It is noteworthy that the initial version for this article was more general: Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State. As explained in the EIO Explanatory Memorandum: Article 13 provides that legal remedies shall be available for the interested parties in accordance with national law. As this proposal contains a general regime and does not distinguish between the types of investigative measures, it is not appropriate to provide in this proposal a single regime for legal remedies. It is however necessary, under the principle of mutual recognition, to prevent that substantive reasons for issuing the EIO are challenged in an action brought before a court of the executing State, p. 14. It is noteworthy that when discussing the final version of the EIO various approaches to legal remedies were debated and suggested, e.g.: The legal remedies available against an EIO should at least be the same as those available in domestic cases against the investigative measure in question. In accordance with their national law, Member States should ensure that these legal remedies can be used and should promptly inform interested parties about the possibilities and methods of legal remedy. In cases where objections against an EIO are made by an interested party in the executing State, the executing State will examine whether there are reasons for not recognising the EIO, for example because of the lack of proportionality, or infringement of human rights, it is advisable that such information is transmitted to the issuing authority and that the interested party is duly informed. There is a need to ensure the right to information and access to the courts for those affected by an EIO. The right of defence forms part of the right to a fair trial (Articles 47 and 48 of the Charter) during all stages of the proceedings, see Amendment 65 in: Amendments 55–199 on the adoption of a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Draft report, 10.2.2012, p. 8-9.
The wording of the article makes it clear that legal remedies shall be available not only against the EIO (namely as to decision of its issuing and executing), but principally against the measures indicated therein\(^\text{332}\). In other words, from art. 14.1 EIO Directive the conclusion follows that:

- the substantive reasons for issuing the measure may be challenged in the issuing state, according to the law of this state;
- the manner of executing the investigative measure indicated in the EIO may be challenged in the executing state, according to the law of this state\(^\text{333}\).

However, even if the EIO Directive goes further that the previous instruments and ensures legal remedies against investigative measures, this provision becomes superfluous and useless in cases where domestic law does not provide such a remedy.

### 2.1.2.3. Conclusion

The overview across the instruments governing evidence-gathering reveals that there is no provision whatsoever expressly regulating the right to legal remedies against evidentiary measures, including telephone tapping and house search.

Therefore, the availability and manner of challenging the investigative measures depend on the law of the member states concerned. The EIO Directive ensures legal remedies equivalent to those available in a similar domestic case; however, this provision becomes superfluous in cases where domestic law does not provide such a remedy or its execution is not feasible in certain stages of the procedure. Moreover, none of the instruments attempt to overcome the variety of domestic approaches to legal remedies against investigative measures. Consequently, it should be stressed that the single reference to proceeding in accordance with domestic legal remedies is in no way satisfactory. Another conclusion is that the EU does not as yet provide more extensive protection for legal remedy against telephone tapping or house search other than that provided in the ECHR and the EU Charter.

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\(^{332}\) Recital (22) of the EIO Directive: Legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned.

\(^{333}\) Compare art. 14.1 of the EIO Directive (Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO) with art. 18.1. EEW (Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the recognition and execution of an EEW) and art. 11.1 FD FO (Member States shall put in place the necessary arrangements to ensure that any interested party (…) have legal remedies (…) against a freezing order executed pursuant to Article 5).
2.1.3. Legal remedies against the measures in the case-law of the ECtHR

In numerous cases, the ECtHR has emphasised the importance of the right to legal remedies against measures such as telephone tapping and house search. In reaching this conclusion, the Court gives particular weight to the scope of persons concerned and the effectiveness of the remedies available.

2.1.3.1. Telephone tapping

In cases concerning legal remedies against telephone tapping, the Court examines very diverse fields related to these concerns, pointing out the requirement of a sufficiently effective apparatus for controlling the measure.

In the case of the Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria the Court was dissatisfied with the absence of remedies against the measure. Firstly, the Court noted that there was no proper review of the measure, which would have verified its issuance and execution, and the screening and destruction of the data had the surveillance proved fruitless\(^{334}\). Secondly, the Court was not convinced by the absence of judicial or independent control of the measure\(^{335}\). Finally, the Court was struck by the lack of any remedies against the measure:

The result of this lack of information is that those concerned are unable to seek any redress in respect of the use of secret surveillance measures against them. Moreover, the Government have not provided any information on remedies – such as an application for a declaratory judgment or an action for damages – which could become available to the persons concerned if they find out about any measures against them\(^{336}\).

In the same case, the Court delineated stages in which the legal remedies

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\(^{334}\) The texts make no provision for acquainting the judge with the results of the surveillance and do not command him or her to review whether the requirements of the law have been complied with (…) Similarly, there exists no independent review of whether the original data is in fact destroyed within the legal ten-day time-limit if the surveillance has proved fruitless (…) Another point which deserves to be mentioned in this connection is the apparent lack of regulations specifying with an appropriate degree of precision the manner of screening of the intelligence obtained through surveillance, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction, Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, §§ 85-86.

\(^{335}\) The SSMA does not provide for any review of the implementation of secret surveillance measures by a body or official that is either external to the services deploying the means of surveillance or at least required to have certain qualifications ensuring his independence and adherence to the rule of law (…) The Court further notes that the overall control over the system of secret surveillance is entrusted solely to the Minister of Internal Affairs (…) – who not only is a political appointee and a member of the executive, but is directly involved in the commissioning of special means of surveillance –, not to independent bodies (…), Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, §§ 85-87.

\(^{336}\) Ibid., §§ 101-102.
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may apply, which may occur after the termination of the surveillance, but also when the surveillance is ordered and while it is in progress\[337\].

The importance of legal remedies against the measure was also pointed out in the case of \textit{Rotaru v. Romania}. The Court stated that there must exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the grounds of defending it. Consequently, the ECtHR ruled as follows:

\[\text{[I]n order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services’ activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, inter alia, that interference by the executive authorities with an individual’s rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure\[338\].}\]

Following this approach, in the recent case of \textit{Zakharov v. Russia} the Court was not convinced by the Russian remedies against the measure, in particular, the effectiveness of such remedies and stated that:

\[\text{Lastly, with respect to the remedies to challenge the alleged insufficiency of safeguards against abuse in Russian law before the Russian courts, the Court is not convinced by the Government’s argument that such remedies are effective (…) In view of the above considerations, the Court finds that Russian law does not provide for effective remedies to a person who suspects that he or she has been subjected to secret surveillance. By depriving the subject of interception of the effective possibility of challenging interceptions retrospectively, Russian law thus eschews an important safeguard against the improper use of secret surveillance measures\[339\].}\]

On the contrary, in the case of \textit{Klass and Others v. Germany} the Court was convinced by the system of legal remedies provided by German law. The Court noted that from the moment of notification of the measure, various legal

\[337\text{ It is obvious that when surveillance is ordered and while it is under way, no notification of the persons concerned is possible, as such notification would jeopardise the surveillance’s effectiveness. They are therefore of necessity deprived of the possibility to challenge specific measures ordered or implemented against them. However, this does not mean that it is altogether impossible to provide a limited remedy — for instance, one where the proceedings are secret and where no reasons are given, and the persons concerned are not apprised whether they have in fact been monitored – even at this stage, ibid., §§ 100.}\]

\[338\text{ Rotaru v. Romania, §§ 59.}\]

\[339\text{ Zakharov v. Russia, §§ 299-300.}\]
remedies become available to the individual. These remedies were as follows:

- an action reviewed by an administrative court in terms of the lawfulness of the application and the conformity with the law of the surveillance measures ordered;
- an action for damages in a civil court if the individual has been prejudiced;
- an action for the destruction or, if appropriate, restitution of documents;
- finally, if none of these remedies is successful, application to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law.\(^{340}\)

A similar conclusion was made by the Court in the case of Weber and Saravia v. Germany\(^ {341}\).

It is remarkable that the Court is also of the opinion that an individual may, under certain conditions, claim to be the victim of a violation without having to allege that such measures were in fact applied to him or her\(^ {342}\).

2.1.3.2. House search

In cases concerning house search the Court is of the opinion that the person affected by the measure should be granted effective access to that review, in order to afford adequate safeguards against abuse\(^ {343}\).

In Harju v. Finland the Court stated that the applicant’s right to respect for her home was violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review \textit{a posteriori} of either the decision to order the search, or the manner in which it was conducted\(^ {344}\).

On the contrary, in the case of Smirnov v. Russia the Court observed that, in the absence of a requirement for prior judicial authorisation, the investigating authorities had unfettered discretion to assess the expediency and scope of the search and seizure. In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an \textit{ex post factum} judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both the lawfulness of, and justification for, the search warrant\(^ {345}\).

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\(^{340}\) Klass and Others v. Germany, §§ 71.


\(^{342}\) Otherwise, where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions, Association “21 December 1989” and Others v. Romania, §§ 167.

\(^{343}\) Miailhe v. France (No. 1), §§ 37.

\(^{344}\) Harju v. Finland, §§ 44.

\(^{345}\) Smirnov v. Russia, §§ 45.
2.1.3.3. Conclusion

In conclusion, the Court rules that there should be a requirement for legal remedies against both measures, which would ensure an effective apparatus for controlling the measures. It is noteworthy that the ECtHR is satisfied with various forms of remedies, as long as these remedies afford adequate and effective safeguards against abuse. In the case of both telephone tapping and house search, legal remedies should attempt to verify substantive reasons underlying decisions to issue the measure and the manner in which it was conducted. Moreover, with regard to telephone tapping, the Court is of the opinion that, under certain conditions, a person may claim to be a victim of a violation without having to allege that such measures were in fact applied to him or her, and even if the measure proved fruitless.

2.1.4. Minimum standards with regard to legal remedies against telephone tapping and house search

Due to the variety of legal systems and approaches to legal remedies, coming to common minimum standards and answers to research question presented in opening subsection may seem difficult at first sight. MR instruments, and in particular the EIO Directive, do not make much progress towards legal remedies against investigative measures and simply refer to domestic provisions, which are strikingly different. However, what may help to overcome these differences is the ECtHR’s case-law which turns attention from the procedure applied to the effectiveness of the remedies. Following the Court’s approach, member states could enhance mutual trust by ensuring effective apparatus for controlling the measures, in accordance with domestic measures. This effective apparatus would give any person whose right to respect for privacy was infringed a legal remedy to challenge:

- the substantive reasons underlying the decisions to obtain evidence, including whether the decision is necessary and proportionate. This scope of remedies could cover, in particular, the initial decision as to the issuance of the measure and would relate to *ratione materiae*, as well as its necessity and proportionality to the aim being pursued (e.g. in the case of searches of legal persons or the tapping of a telephone targeted by its location);
- the manner in which the measure was issued and exercised. These remedies could deal, in particular, with *ratione auctoritatis*, *ratione loci*, and *ratione temporis*, as well as the concerns related to the use, storage, screening or destruction of irrelevant data.

Accordingly, depending on the circumstances of the case and person concerned, these remedies may vary significantly between member states and apply, *inter alia*, in criminal, civil or administrative proceedings. However, it
should be noted that if the legal remedy is granted to the entitled person and it is effective in the ECtHR’s understanding, the available procedure is of secondary importance. This conclusion significantly helps to overcome the problem of variations in domestic procedures applicable to legal remedies.

Special consideration should be given to persons targeted by telephone tapping if the measure proves fruitless. In this case, breaches may relate, *inter alia*, to the storage or disclosure of the gathered data. However, it is doubtful whether these persons shall be covered by a minimum standard due to the absence of any criminal evidence in such cases. Nevertheless, these persons could be granted remedies to pursue their rights in the fields of civil or administrative law, as well as within data protection instruments, according to domestic provisions.

In summary, ensuring that each member state provide effective legal remedies against telephone tapping and house search for the persons whose right to privacy was affected by the measures would significantly enhance mutual trust between member states, even though those remedies may differ between member states, apply in different proceedings and entail different consequences. What is of utmost importance is that the person who believes his or her fundamental rights were infringed is granted an effective means to pursue those rights, and that the cross-border context of proceedings does not hamper it. The key here is the ‘effectiveness’ of the right to a remedy, which can be ensured differently within the legal systems across the EU. As a result, mutual trust in cross-border gathering of evidence would be taken to a higher level and member states could accept evidence *per se*, believing that gathering of evidence abroad does not violate fundamental rights ensured at EU level.
2.2. **Right to be notified**

Effective apparatus for controlling the measures can only work if the persons entitled to challenge the measure are fully aware of the fact they were the subject of the measures, and that the legal remedy is available. Consequently, to tackle the concerns about procedural rights fully, this chapter deals with the right to be notified of the measures. The central research question here is the following:

*How can member states come to a common EU minimum standard for effective notification of the measures?*

**2.2.1. The right to be notified in domestic legislation**

As in the case of legal remedies, the following study will merely report different approaches, relevant for purposes of the research.

**2.2.1.1. Notification of telephone tapping**

The overview across six jurisdictions reveals that member states regulate the notification of the measure differently. Accordingly, member states provide:

- individual notification of the measure given to the persons whose telephones have been tapped;
- no individual notification of the measure, but the parities may be notified by accessing the case files;
- no notification whatsoever.

**2.2.1.2. Notification of house search**

Notification of house searches in member states investigated in this research is usually exercised either as a right to be present at the search or being notified of it in writing, with both measures sometimes being exercised simultaneously. However, in member states that allow searches without invitation/consent, notification may also be effectuated by official information that the measure has

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346 This issue was pointed out by the ECtHR in light of the telephone tapping in *Weber and Saravia v. Germany*: [*The question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively*, §§ 135.]

347 For the following study, I acknowledge the reviews carried out by representatives of member states.
been conducted or the presence of a judicial authority when the measure is being carrying out.

Accordingly, the following approaches are apparent:
- obligatory/alternative presence of the occupier or/and witnesses;
- obligatory/alternative presence of supervising authorities (e.g. investigative judge);
- granting to the person concerned notification of the search.

2.2.1.3. Conclusion

Surprisingly, the right to be notified of the measures constitutes a sharp point of difference between member states. Besides the variety of approaches, it is very doubtful whether all of the notifications available under domestic legislation may be recognised as effective.

2.2.2. The right to notification in the MLA and MR instruments

2.2.2.1. Telephone tapping

A reference to notification of the measure might be found in Recommendation No. R (85) 10, which includes the provision that the requested party might make the execution of letters rogatory dependent on the condition that:

Art. 4 (c) after the requested interception has taken place, the authorities of the requested party will, in accordance with the law and practice of that party, so inform the subscriber to the telecommunication facility which has been intercepted or any other person concerned.

Besides that provision, no reference to notification whatsoever is made either in the MLA or the MR instruments.

2.2.2.2. House search

The only explicit reference to notification of the persons whose house has been searched is laid down in the EEW Proposal. Its Art. 12.2 (b), concerning additional safeguards applicable to search and seizure, reads:

(…) a person whose premises have been searched shall be entitled to receive written notification of the search. This shall state, as a minimum, the reason for the search, the objects, documents or data seized, and the legal remedies available (…)

Unfortunately, this notification provision was not included in the final version of the FD EEW or the EIO Directive.
2.2.2.3. Conclusion

An overview of the MLA and MR instruments reveals that notification of the measures has not been given a lot of attention at EU level. Neither the 2000 EU MLA Convention nor the EIO Directive attempts to address the question of notification of telephone tapping, even if these instruments refer to the measure. With regard to notification of house search, only the EEW Proposal addresses the issue, however, the proposed solution has not been incorporated into further instruments concentrated on evidence-gathering. Accordingly, the right to be notified of the measures conducted in the cross-border context depends on the domestic provisions of the member states concerned.

2.2.3. The right to notification in the case-law of the ECtHR

2.2.3.1. The right to be notified of telephone tapping

The approach of the ECtHR is not very clear in terms of notification of the measure. On the one hand, the Court points out that as soon as notification can be made without jeopardising the purpose of the surveillance after its termination, information should be provided to the persons concerned. In the case of the Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria the Court found that:

the absence of a requirement to notify the subject of interception at any point was incompatible with the ECHR, in that it deprived the interception subject of an opportunity to seek redress for unlawful interferences with his or her Article 8 rights and rendered the remedies available under the national law theoretical and illusory rather than practical and effective. The national law thus eschewed an important safeguard against the improper use of special means of surveillance.

Moreover, when examining this case, the Court highlighted that adequate and effective guarantees against abuse should exist both:

- during the initial stage when issuing the measure, and
- during the later stages when the surveillance is actually being carried out or has already ended. According to the Court, that control is crucial for verifying whether the executors in fact comply with the warrants authorising the use of such means, or whether they faithfully reproduce the original data in the written record.\(^\text{348}\)

\(^{348}\) Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, §§ 85.
In the case of Zakharov v. Russia the Court similarly ruled that:

The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions.

On the other hand, in the cases of Klass and Others and Weber and Saravia:

the Court examined German legislation which provided for notification of surveillance as soon as that could be done after its termination without jeopardising its purpose. The Court took into account that it was an independent authority which had the power to decide whether an individual being monitored was to be notified of a surveillance measure. The Court found that the provision in question ensured an effective notification mechanism which contributed to keeping the interference with the secrecy of telecommunications within the limits of what was necessary to achieve the legitimate aims pursued.

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349 Zakharov v. Russia, §§ 302.
350 In the opinion of the Court, it has to be ascertained whether it is even feasible in practice to require subsequent notification in all cases. The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, as the Federal Constitutional Court rightly observed, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court’s view, in so far as the “interference” resulting from the contested legislation is in principle justified under Article 8 para. 2 (art. 8-2) (…), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the “interference”. Moreover, it is to be recalled that, in pursuance of the Federal Constitutional Court’s judgment of 15 December 1970, the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardising the purpose of the restriction, Klass and Others, §§ 58, see also: H. KUCZYŃSKA, Interception of communications in the light of European Convention of Human Rights, (Intercepção de Comunicações sob a Luz da Convenção Européia de Direitos Humanos), Argumenta Revista do Programa de Mestrado em Ciência Jurídica da Universidade Estadual Do Norte Parana 2011, Brazil, p. 122-123.
351 The fact that persons concerned by secret surveillance measures are not subsequently notified once surveillance has ceased cannot by itself warrant the conclusion that the interference was not “necessary in a democratic society”, as it is the very absence of knowledge of surveillance which ensures the efficacy of the interference. Indeed, such notification might reveal the working methods and fields of operation of the Intelligence Service (see Klass and Others, cited above, p. 27, § 58, and, mutatis mutandis, Leander, cited above, p. 27, § 66). As soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned, Weber and Saravia v. Germany, §§ 135.
352 Zakharov v. Russia, §§ 288.
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However, in some cases, the Court accepts the lack of notification, as long as there are other safeguards:

By contrast, in the case of Kennedy the absence of a requirement to notify the subject of interception at any point in time was compatible with the Convention, because in the United Kingdom any person who suspected that his communications were being or had been intercepted could apply to the Investigatory Powers Tribunal, whose jurisdiction did not depend on notification to the interception subject that there had been an interception of his or her communications353.

A similar line of argumentation may be also found in the case of Greuter v. The Netherlands, in which the Court examined the lack of obligation for Dutch criminal investigating authorities to inform persons who are not themselves suspects in a criminal investigation of the tapping of their telephone lines and stated that:

The Court considers that in order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain supervisory safeguards established by law in order to prevent arbitrariness. Supervisory procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law. This implies inter alia that the interference by the executive authorities with an individual’s rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure (...). The fact that information about an individual is being gathered by way of secret surveillance, and that its storage and possible release is not disclosed to the person concerned, does not of itself warrant the conclusion that such an interference is not “necessary in a democratic society” (...). The Court further notes that the tapping took place with the authorisation and under the supervision of an investigating judge, as required by the relevant statutory and regulatory provisions. The Court finally notes that, when the applicant asked the public prosecutor whether her telephone had been tapped, she received an affirmative reply and (...) was subsequently granted access to the records of the intercepted telephone conversations354.

353 Ibid.; see also: Kennedy v. United Kingdom, §§ 169.

354 Greuter v. The Netherlands (dec.), see also Leander v. Sweden, §§ 66: The fact that the information released to the military authorities was not communicated to Mr. Leander cannot by itself warrant the conclusion that the interference was not “necessary in a democratic society in the interests of national security”, as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure.
2.2.3.2. The right to be notified of house search

In cases concerning house search the Court in its case-law recommends the presence of independent observers, particularly with regard to searches of law firms.\(^{355}\)

In the case of Alexov v. Bulgaria the Court concluded that the search of a home was not conducted ‘in accordance with the law’ within the meaning of Art. 8 § 2 ECHR, \textit{inter alia}, due to the fact that the right to be present had not been fulfilled. The Court noted that

\textit{the search was conducted in the presence of two witnesses, it appears that none of the other individuals required by law to be present – the occupier or a member of his family, the manager of the property or a representative of the municipality attended. Accordingly, it appears that the prerequisites for performing such a search were not present and its execution was not in compliance with the relevant provisions of domestic law.}\(^{356}\)

On the other hand, in Camenzind v. Switzerland the Court found the manner of searching proportionate to the aim being pursued due to the fact that, \textit{inter alia}, the interference took place in the applicant’s presence after he had been allowed to consult the file on his case and telephone a lawyer.\(^{357}\)

However, in none of the cases mentioned above does the Court develop a general requirement, with regard to either the presence of the occupier or independent observers or the manner of proceeding if the householder of the premises is absent at the time of the search. At the same time, the Court stressed the importance of independent witnesses when a lawyer’s office is being searched. In Aleksanyan v. Russia the Court stated that where a lawyer’s office is concerned it is necessary to examine whether it was carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed.\(^{358}\) It is noteworthy, however, that the Court does not accept random observers when it comes to law firms. In Iliya Stefanov v. Bulgaria the Court noted that:

\textit{while the search was carried out in the presence of two certifying witnesses, they were neighbours who were not legally qualified. This may be considered problematic, as this lack of legal qualification made it highly unlikely that these observers were truly capable of identifying, independently of the investigation team, which materials were covered by legal professional privilege, with the result that they did not provide...}\(^{359}\)

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\(^{355}\) See in more detail on pages 129-131.

\(^{356}\) Alexov v. Bulgaria, §§ 128.

\(^{357}\) Camenzind v. Switzerland, §§ 46.

\(^{358}\) Aleksanyan v. Russia, §§ 214.
an effective safeguard against excessive intrusion by the police into the applicant’s professional secrecy.}

2.2.3.3. Conclusion

In conclusion, with regard to telephone tapping, the Court is of the opinion that the notification of the interception should be provided to the person concerned as soon as it can be made without jeopardising the purpose of the interference. Such notification may also be fulfilled by granting access to documents relating to interceptions. However, under some circumstances, the Court accepts a lack of individual notification which at the same time does not deprive the person concerned of access to the transcripts and legal remedies against the measure. In the field of house searches, the Court provides minimum standards for safeguards which include, inter alia, notification of the person whose premises have been searched and the need for independent third parties to be present at the search.

2.2.4. Minimum standards with regard to notification of the measures

The right to notification of the measures plays an important role in enhancing mutual trust between member states, complementing the right to legal remedies by enabling its feasibility. Consequently, to enhance procedural rights in cross-border gathering of evidence fully and completely, it is also necessary to come to common minimum standards with regard to the right to be notified of telephone tapping and house search. This goal can be achieved by member states ensuring that persons entitled to legal remedies against the measure carried out in cross-border context are also effectively informed about the fact the measure was carried out and that a legal remedy against its taking is available.

In the case of both measures it would be up to member states to ensure the effective performance of such notification. In cases concerning telephone tapping, it could be effectuated as a separate decision, or through access to the case files, depending on the legal system and way of conducting proceedings. With regard to house search, the right to be notified of the measure could correspond with the EEW Proposal, which stipulates that a person whose premises have been searched shall be entitled to receive notification (preferably written) of the search, which explains the reason for the search, the objects, documents or data seized, and the legal remedies available. However, member states could provide other ways of exercising the notification, provided it ensures detailed information explaining the principles and scope of the search, sufficient for effective questioning of the measure.

Stefanov v. Bulgaria, §§ 43.
G. VERMEULEN, L. VAN PUYENBROECK, Approximation..., p. 58.
3. **Minimum standards to enhance *per se* admissibility of evidence: conclusions**

A big obstacle in the field of mutual admissibility of evidence is the lack of mutual trust, which follows from the differences between legal systems across the EU. As a consequence, it may be difficult for authorities to accept evidence gathered from such intrusive measures as telephone tapping or house search, if there is mutual distrust as to the way of evidence-gathering, preservation of fundamental rights or protection against abuses of power. Consequently, if *per se* admissibility of evidence is aimed at, it is necessary to enhance mutual trust by introducing common minimum standards in the sharpest points of contrast between domestic provisions. When it comes to telephone tapping and house search, these contrasts were reported in the following fields:

- rules governing telephone tapping and house search, in particular, the scope of both investigative measures *ratione auctoritatis*, *ratione materiae*, *ratione loci*, *ratione tempori* and *ratione personae*; and
- procedural rights associated with both measures, namely, the right to be notified of them and the right to legal remedies against their exercise.

The research has proved the feasibility of coming to common minimum standards in these fields. Consequently, irrespective of the name-tag of the issuing authority, if member states assume *per se* that bodies designated by other member states guarantee the minimum protection against arbitrariness, the evidence gathered upon their decisions would constitute *per se* admissible evidence, even if in a similar domestic case the measure would require the involvement of a different body (e.g. judicial). If member states ensure the availability of both measures with regard to cases concerning MR offences, it would do away with discussions about the mutual allowance of the measures and result in *per se* admissible evidence gathered upon common minimum *materiae* standards. Mutual trust could also be significantly enhanced by introducing the same minimum standards with regard to places and time-frameworks in which the measures may be conducted. If member states accept a mutual approach to *personae*, including the scope of persons concerned and groups granted special treatment, evidence gathered through these persons would constitute *per se* admissible evidence and ensure a common level of protection for these persons in the EU. On top of that, persons whose rights were infringed could be granted common minimum standards related to effective legal remedies, although these remedies may differ between member states and may apply at different stages of proceedings. Moreover, the feasibility of effectuating these remedies could be enhanced by adopting common standards for the notification of the measures.

It is noteworthy, however, that the exhaustive derivation of minimum standards is not always feasible. Accordingly, gathering and use of evidence
PER SE ADMISSIBILITY: CONCLUSIONS

may be still hampered by *ratione materiae* or *ratione personae* incompatibilities, due to the lack of common EU understanding of substantive law, privileges or immunities. The minimum standards derived in this research deal with these concerns only to the extent currently possible.

It is also important to stress that the introduction of minimum standards would obviously not deprive member states of the possibility to adopt more generous standards of protection. However, to constitute *per se* admissibility within the entirety of the EU, proceeding in line with the minimum standards would be sufficient.

In summary, evidence obtained through EU cross-border telephone tapping or house search, if it complies with the minimum standards investigated in this research, would constitute *per se* admissible evidence even if the domestic provisions are not always the same in every member state. That would finally provide transparent rules as to the status of evidence gathered in EU cross-border contexts, since thus far neither the domestic legislation of member states (save for the Polish KPK) nor that of the EU contains rules directly addressing admissibility of evidence gathered abroad. Therefore, operating under minimum standards could finally clarify the status of evidence gathered abroad and make progress towards a comprehensive system for the obtaining and use of evidence in criminal matters in the EU.
III. Minimum standards for admissibility of irregularly obtained evidence

The minimum standards elaborated in the former part provide transparent rules in terms of the way that evidence is gathered, in view of enhancing its *per se* admissibility in the EU. However, the question arises what to do with evidence that has been gathered irregularly, in breach of law or not in accordance with common minimum rules; to accept it or not? If so, on the basis of which jurisdiction?

It is safe to say that from the very beginning the problem of irregular evidence raises ambiguities in the EU cross-border context. The Tampere conclusions refer solely to ‘evidence lawfully gathered’ by a member state’s authorities. Neither MLA nor MR evidence-related instruments raise any concerns whatsoever about irregular evidence. At the same time current practice in the EU illustrates the member states’ confusion when it comes to the admission of evidence irregularly obtained in another EU member state, due to the lack of domestic or EU rules in this matter. The lack of transparent common rules as to irregular evidence may significantly hamper mutual trust and discourage member states from cooperation in the evidentiary field. On the other hand, it may open the doors for overstepping or bypassing domestic regulations within cross-border proceedings, which the academic literature has termed *evidential ‘process-laundering’*[^262]. Evidence-laundering may have a very harmful effect on the fundamental rights and carry a risk of breaches committed as a result of EU cooperation. On top of that, cross-border cooperation may bring irregularities both in the issuing and executing member state, which may raise ambiguities about admissibility on both sides, due to the fact that it is not clear whether a member state should use its own approaches to the admissibility of the evidence or rely on foreign admissibility rules. In this context it is noteworthy that member states are unwilling to apply their national rules concerning the admissibility of evidence and usually take a more lenient attitude to evidence obtained abroad than would be the case in a similar domestic context[^363].

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[^361]: EUROPEAN COUNCIL, Presidency Conclusions, Tampere 15 and 16 October 1999, p. 36.
[^363]: See art. 587 of the KPK: *Transcripts from inspections, examinations of persons in the capacity of the accused, witnesses or experts made on the request of a Polish court or public prosecutor, or transcripts from other evidentiary procedures carried out by the courts or public prosecutors of foreign States or authorities acting under their supervision, may be read at the trial on the principles set forth in Article 389, 391 and 393, if the manner of conducting the procedure is not contrary to the legal order of the Republic of Poland;* see also: A. GÓRSKI, *Komentarz do art. 587 KPK [in:] Kodeks postępowania Karnego. Komentarz, A. SAKOWICZ (ed.), Warszawa 2015, p. 1216-1217.
IRREGULARLY OBTAINED EVIDENCE

Hence, given all the issues reported above, a common rule relating to irregularly obtained evidence appears necessary in order to ensure a minimum level of protection and to comply with the principle of mutual recognition. Thus, the aim of this chapter is to make progress towards a common EU theory about evidence obtained irregularly gathered from telephone tapping and house search. The central research questions here are as follows:

Is it feasible to come to common EU minimum standards on the basis of which it can be decided when irregular evidence, which obviously cannot constitute per se admissible evidence, will be admissible after all (non per se admissibility)?

Is it feasible to come to common EU minimum standards on the basis of which it can be decided when irregular evidence will be inadmissible in any event (per se inadmissibility)?

The opening subsections of this part of the research show the multi-faceted understanding of irregular evidence and the manners of dealing with irregular evidence in various contexts. The second part goes straight to the research questions, bringing up the topic of the factors that should determine the non per se admissibility or per se inadmissibility of evidence gathered from telephone tapping and house search in the EU cross-border context.

1. Irregularly obtained evidence: What exactly does it mean?

Before embarking on a detailed study of the admissibility of irregularly obtained evidence it is necessary to specify in what sense the term ‘irregularly obtained evidence’ is being used for the purposes of this research.

‘Irregular’, ‘illegal’, ‘improper’, ‘unlawful’, ‘gathered in violation of law’, ‘flawed’, ‘illegally obtained’; all of these terms can be found when studying the literature regarding evidence of which the admissibility should be questioned. This variety of nomenclature also reflects the variety of national and supra-national approaches to the issue discussed in this chapter. This research, however, follows the terminology according to which:

- evidence obtained illegally – means evidence that has been obtained by way of an offence;
- evidence obtained irregularly – means evidence that has been obtained in violation of procedural law;
- evidence obtained improperly – means evidence that has been obtained as a consequence of deception or fraud\(^{364}\).

\(^{364}\) A. LACH, Europejska pomoc..., p. 318-319.
Due to the scope of the research, which deals in particular with procedural concerns, this study refers to the above mentioned ‘evidence obtained irregularly’ and, therefore, uses this term.

2. Approaches to irregularly obtained evidence in domestic legislation

2.1. Evidence gathered domestically

The aim of this part of the study is to provide a general overview of approaches to evidence obtained irregularly across the domestic legislation of the member states investigated in this research\(^{365}\). The domestic approaches to irregular evidence gathered domestically will be subsequently confronted with approaches to irregular evidence, but gathered in an EU cross-border context.

English legislation introduces three basic flaws that determine the irregularity of evidence which are, as follows: (a) any evidence obtained by torture, which leads to automatic exclusion of the evidence; (b) evidence of any intercepted communications to which the Regulation of Investigatory Powers Act 2000 applies, including communications intercepted illegally; and (c) a confession made by an accused person that was obtained by oppression, or by words or actions conducive to unreliability. Any other illegally obtained evidence may be excluded in the exercise of judicial discretion within a ‘fair-trial’, laid down in §§ 78 of the PACE\(^{366}\):

§§ 78: In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The court is obliged to take the view that the admission of evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it\(^{367}\). It is noteworthy, however, that common law systems pay more attention to the effect that the evidence will have at a trial than with how the evidence was obtained\(^{368}\). Consequently, it is not the mere fact that evidence has been illegally obtained that entitles the court to exclude it under

\(^{365}\) In this respect see also: J. R. SPENCER, The Concept of ..., p. 31.
\(^{368}\) T. HOWSE, England ..., p. 173.
Section 78 PACE, it must also be ensured that a person has a fair trial, so the court may exclude evidence even though the evidence itself is admissible. French legislation relies on the theory of evidentiary nullities, which is dominant in European countries with civil law systems. Broadly speaking, the French law provides a distinction between:

- formal nullities which are explicitly laid down in the law (rules that end with the words ‘under penalty of nullity’), concerning, in particular, the pre-trial stage, e.g. irregularities concerning search and seizures (§§ 56-57 CCP) or interception of telecommunications (§§ 100 CCP); and
- substantive irregularities which entitle a judge to state the nullity under Art. 171 CCP:

\[
\text{Art. 171: There is a nullity when the breach of an essential formality provided for by a provision of the present Code or by any other rule of criminal procedure has harmed the interests of the party it concerns.}
\]

Regarding the latter, French case law has developed two leading ‘essential formalities’, which refer to public order and rights of the defence.

In Ireland there is a dichotomy between evidence which has been:

- obtained in breach of the legal rights of an individual; or
- obtained in breach of constitutional rights.

In reference to the former, the trial judge has the discretion to admit or exclude the evidence taking into account all the circumstances of the case within the balancing test of the public interest and a fair trial of the accused. It is noteworthy that the Irish courts have adopted a rather inclusionary approach to this evidence. When it comes to evidence gathered through a breach of an individual’s constitutional rights, then the evidence must be automatically excluded by the trial judge, unless there are extraordinary extenuating circumstances which justify its admission.

The Dutch Strafordering provides so-called ‘minimum evidence rules’, which limit the free evaluation of the evidence by the judge for the purpose of facilitating the establishment of the substantive truth (e.g. the rule that proof of an accused person’s guilt may not be presumed only on the basis of a statement by one witness). Apart from these minimum rules, the Ste does not contain any

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370 A. LACH, Europejska pomoc ..., p. 325.
374 A. CRAS, Y.M. DALY, Ireland..., p. 34. It is also noteworthy that a recent Supreme Court’s decision in DPP v JC [2015] IESC 31 changed the general exclusionary rule which had been in place for the past 25 years; see in more detail in this respect: Y.M. DALY: <http://humanrights.ie/civil-liberties/dpp-v-jc-initial-observations-on-the-exclusionary-rule-case/>. 
rules on how the evidence was gathered. Consequently, illegally obtained evidence is admissible as legal evidence. However, this does not automatically mean that the evidence could be used at a trial. Firstly, its exclusion may be required due to unreliability caused by the violation. Secondly, exclusion may be based on one of the interesting sanctions, laid down in Art. 359a Sv:

Art. 359a. 1. If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that:

- the severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way;
- the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged;
- the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.

2. In applying the first subsection, the court must take account of the interest that the breached rule serves, the gravity of the breach and the harm it causes.

3. The judgment must contain the decisions referred to in the first subsection. These must be reasoned.

The Polish KPK has recently sharply modified the approach to admissibility of irregular evidence, significantly opening a possibility of use of irregular evidence in criminal proceedings. Two articles introduced in 2016 currently regulate this area, namely art. 168a and 168b of the KPK. According to the former, evidence may not be deemed inadmissible only on the basis of the fact that it has been obtained in breach of procedural rules or by way of a forbidden act referred to in art. 1§1 of the Polish Criminal Code, unless the evidence has been obtained by public officers upon murder, intentional bodily injury or deprivation of liberty. Art. 168b opens a broad possibility to use evidence gathered by intelligence services in criminal proceedings. Besides these articles, the KPK has established several procedural bans, which have direct impact on the admissibility of evidence. Accordingly, evidence covered by prohibitive bans laid down in the law (e.g. interrogation of the counsel for the defence concerning facts he has learned in the course of preparing the defence, or a priest concerning the content of a confession, or a ban on using unacceptable interrogation methods such as hypnosis) will be inadmissible.

The general approach in Spain is that the sentence can be based only on the evidence given at trial with full respect to the principle of contradiction. That

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376 P. WILIŃSKI, Criminal Procedure…, p. 212.
377 L. BACHMAIER, Spain …, p. 710.
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is why Spanish law provides a detailed approach to illegal evidence. The key statutory provision in Spain concerning the exclusion of evidence is Art. 11.1 of the LOPJ which stipulates that:

Art. 11.1. Evidence obtained, directly or indirectly, in violation of fundamental rights or liberties, shall have no effect.

The expression ‘no effect’ means either a prohibition on admitting the evidence, or a prohibition on evaluating it378. Moreover, Art. 238 of the LOPJ refers to nullity when the evidence was obtained through violation of statutory procedural rules:

Art. 238. Procedural acts will be fully void in the following cases:
- When the court lacks subject-matter jurisdiction.
- When the act has been performed under violence or compulsion.
- When the essential rules of procedure are not respected and this may have caused an actual restriction of the right of defence.
- When the act is done without the assistance of lawyer, in the cases where the law prescribes it as mandatory.
- When an oral hearing is held without the mandatory presence of the court clerk.
- In all other cases where the procedural rules so state379.

2.2. Evidence gathered in the trans-border context

This subsection examines whether member states also apply their protective rules concerning irregularly obtained evidence to evidence gathered abroad. It is necessary to highlight that, save for the Polish art. 587 KPK (which accepts foreign items provided the manner of conducting the procedure is not contrary to the legal order of the Republic of Poland), member states do not provide rules for admissibility of evidence gathered abroad, including evidence gathered irregularly. Therefore, instead of legislation this part of the study examines the relevant case-law produced at domestic levels.

One of the oft-cited and leading cases in this field (also an illustration of evidence-laundering) is *R. v. Governor of Pentonville Prison ex parte Chinoy*. Chinoy worked as a manager in Paris and was wanted in the US for money-laundering offences. US agents had unlawfully intercepted Chinoy’s telephone, which was based in France. Knowing that the information obtained through interception would be excluded in extradition proceedings in France, the US agents arranged Chinoy’s arrest by English police when he was visiting the UK. During the extradition proceedings, the English court had to make reference to the admissibility of evidence obtained from illegal interceptions carried out by the US in France. In doing so, the Court used art. 78 PACE and, as a consequence, upheld the admissibility of the evidence irrespective of the fact that in the *lex loci* the evidence would not be admissible. Thus, the English court ignored the fact that in France the evidence was irregular and treated it in the same manner as would have been the case if it had been gathered domestically.

Good examples of the ‘reverse phenomenon of process laundering’ (admissibility in the *locus* state, but inadmissibility in the *forum* state) are found in certain Belgian cases concerning telephone tapping when this measure still had no legal basis under Belgian law.

In the first case, the interception of telecommunications had been carried out in the Netherlands, between a suspect under investigation in Belgium and a drug-trafficcker operating in the Netherlands. The requesting state was Belgium, even though the interception of telecommunications still had no legal basis there. Regardless of this fact, the interception was submitted as evidence and the Belgian courts relied upon this evidence in convicting the suspect. Their rationale was that the interception had been carried out in accordance with both the *lex loci* and Art. 8 ECHR. Accordingly, the domestic court accepted this ‘legal bypass’, which allowed intentional, cross-border gathering and use of evidence which would be questionable if gathered domestically.

The essential fact in the second case was that the Belgian authorities used records tapped in France in the course of criminal proceedings, upon the initiative of French bodies and within French proceedings. Again, the Belgian *Cour de Cassation* upheld the admissibility of the evidence due to the fact that the records had been obtained in conformity with French law and the ECHR. What is noteworthy here is that the Belgian court noted its incompetence to verify

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foreign procedures, highlighting at the same time that any evidence collected in violation of the ECHR should not be admissible.\(^{384}\)

The last case deals with an application for extradition from Belgium to Sweden. The application was partially based on records obtained in Sweden, in accordance with Swedish law. However, such evidence would not have been admitted in Belgium, where it would have been recognised as unlawfully obtained. Taking into account conformity with Swedish law, as well as Art. 8 ECHR, the Belgian court again relied upon the evidence presented to it, this time on behalf of the Swedish authorities.\(^{385}\)

2.3. Conclusion

The above paragraphs reveal that even if all member states were to develop complex and protective domestic approaches to irregularly obtained evidence, these domestic rules may not be scrupulously applied when it comes to evidence gathered from abroad. Firstly, this follows from the fact that member states usually lack domestic rules regarding the admissibility of evidence collected abroad. Secondly, it is safe to say that some member states are more tolerant and flexible in their approaches to foreign items. In order to outline the possible approaches to the admissibility of evidence irregularly gathered abroad, one may distinguish between member states that:

- rely on *lex loci* legislation and use foreign requirements with regard to irregular evidence;
- rely on *lex forum* legislation and use the same model of control that applies to evidence gathered nationally;
- limit the domestic model of control to general principles, such as the legal order or fundamental rights;
- ignore both the foreign and domestic models of control and automatically recognise the evidence as regular.\(^{387}\)

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3. Approaches to irregularly obtained evidence in the case-law of the ECtHR

The ECHR does not contain any rules regarding the admissibility or exclusion of evidence obtained irregularly. Hence, the Court indicates its secondary role in that issue, consequently underlining that questions of admissibility or exclusion of evidence are primarily given to national judges, operating under national laws. Therefore, the Court points out that its role should be centred solely on the consequences of the use of irregular evidence, in particular, on the question of whether the use of irregular evidence has violated Art. 6 ECHR which guarantees the right to a fair trial. In other words, the role of the Court is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Art. 6 ECHR:

*It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found.*

Therefore, the Court’s approach to illegally obtained evidence has been described in the literature as a ‘right to fair-use of evidence’, which constitutes a protective system based on a two-tiered analytical model. In the first tier, the Court’s analysis determines whether Convention rights were violated. In the second tier, the ECtHR examines whether the admission or use of evidence obtained in violation of a first-tier norm violated Art. 6 ECHR. As an important preliminary note, however, it should be stressed that the Court is very

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389 See *inter alia*, *Schenk v. Switzerland*, §§ 46 and *Mantovanelli v. France*, §§ 34. The Court has also reiterated that it is not its task to act as a court of appeal or, as is sometimes said, as a court of fourth instance, for the decisions of domestic courts, see: *Evcimen v. Turkey*, §§ 25.


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careful in examining the alleged violations of Art. 6 ECHR in respect of the admissibility of evidence and, moreover, is oriented towards remedying unfairness so that irregularly obtained evidence can be used. Consequently, the Court has developed two approaches to illegal evidence and fair trials:

- *per se* inadmissibility: illegally obtained evidence which presents such a high risk to fairness that it may absolutely not be used (evidence obtained through violation of Art. 3 ECHR, amounting to torture);
- *non per se* admissibility: illegally obtained evidence which presents a high risk to fairness (obtained in violation of Art. 3 ECHR, not amounting to torture) or a low risk to fairness of trial (violations of Art. 8 ECHR).

All of these approaches are outlined below.

3.1. **Per se inadmissibility**

3.1.1. **Evidence obtained through violation of Art. 3 ECHR, amounting to torture**

The Court has established only one absolute exclusionary rule regarding evidence obtained in violation of Art. 3 ECHR393, that is, in circumstances amounting to torture394. This rule concerns both statements and real evidence, as follows:

[I]ncriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court’s judgment in the Rochin case (…), to “afford brutality the cloak of law”. It notes in this connection that Article 15 of the United Nations

393 It has to be stressed that, in opposition to art. 15 UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, neither the ECHR nor the Charter for Fundamental Rights of the European Union or the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment expressly addresses the problem of admissibility of evidence gathered as a result of torture, see in more detail: W. JASIŃSKI, Ł. CHOJNIAK, Admissibility of Evidence Obtained by Torture and Inhuman or Degrading Treatment in Criminal Proceedings. Overview of European and Polish Standards [in:] C. FENYVESI, C. HERKE (eds.), Pleadings. Celebration Volume of Professor Tremmel Florian’s 70th Birthday, Pecs 2011, p. 125 et seq.

394 The Court defines torture as: deliberate inhuman treatment causing very serious and cruel suffering (...) In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating; Gäfgen v. Germany, §§ 90.
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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture. Consequently, according to the Court’s stance, evidence obtained by torture (both confession and real evidence) will always render the trial unfair:
- irrespective of its probative value, and
- irrespective of whether its use was decisive in securing the defendant’s conviction.

The Court’s approach is supported by the following arguments. Firstly, the admission of statements obtained as a direct result of treatment violating the prohibition of torture would put in question the absolute character of that prohibition. Secondly, statements obtained as a direct result of treatment in breach of Art. 3 ECHR are simply unreliable.

Consequently, the use of evidence obtained through torture will always breach Art. 6 ECHR, regardless of whether or not the evidence was a decisive factor in the conviction.

3.2. Non per se admissibility

As explained above, the Court has established only one per se inadmissibility rule concerning evidence obtained through torture. Consequently, from the
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Court’s point of view, evidence gathered in violation of Art. 3 ECHR, not amounting to torture, as well as in violation of Art. 8 ECHR, presents a lower risk to fairness of trial than evidence obtained by torture and, therefore, the unfairness may be processed away through compensation mechanisms. In other words, in cases concerning violations which are not torture, the ECHR appears to restore fairness using the balancing test\(^\text{399}\).

3.2.1. Evidence obtained in violation of Art. 3 ECHR, not amounting to torture

The absolute exclusionary rule relating to torture has not been extended to other forms of violation of Art. 3 ECHR, namely inhuman or degrading treatment or punishment. From the Court’s point of view, this category of violations still presents a high risk to fairness, however, contrary to torture, this can still be recuperated within the balancing test.

In the case of Jalloh v. Germany evidence was gathered through inhumane or degrading treatment, not amounting to torture\(^\text{400}\). When examining the case, the Court stated that:

\(\text{§§ 105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture (…).}\\
\text{§§ 106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.}\\
\text{§§ 107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open (…).}\)

\(^{399}\) That approach has been described in the literature as a broad and flexible umbrella test of balancing, allowing for restrictions of sub-rights, as long as proceedings as a whole were fair. However, the Court's Art. 6 ECHR balancing is not always well-structured and is complicated by its at times unclear applications of what appears to be a well-conceived approach. This sometimes makes it difficult to ascertain how and why a particular outcome was reached in a concrete case, F. PINAR ÖLÇER, The European Court... p. 376-377.

\(^{400}\) An applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Art. 3 ECHR when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention, see: Jalloh v. Germany, §§ 104 et seq.
It is noteworthy that in this case the Court found violation of Art. 6 § 1 ECHR taking into account that the evidence was decisive in conviction of the applicant. Moreover, the Court highlighted that any possible discretion the national courts may have had to exclude the evidence could not come into play, as it considered the impugned treatment to be authorised by national law.\(^{401}\)

In conclusion, evidence obtained through inhumane or degrading treatment or punishment does not cause per se inadmissibility of evidence. However, taking into account all the circumstances of the case, including the weight of evidence, the offence at issue or the public interest in securing a conviction, this breach may also render the trial unfair.\(^{402}\)

### 3.2.2. Evidence obtained in violation of Art. 8 ECHR

Although the ECHR sets high standards for the protection of privacy and interprets Art. 8 ECHR widely, it does not rigorously enforce those standards by excluding evidence obtained in violation of this article.\(^{403}\) On the contrary, in most cases regarding the violation of the right to privacy, the Court accepts the admission of evidence. To justify this, the Court uses a balancing test of defence rights and the impact of the evidence on the conviction of the accused.

One of the leading cases concerning the admissibility of evidence obtained through violation of Art. 8 ECHR is the case of *Schenk v. Switzerland*.\(^{404}\) When examining the case, the Court used its standard balancing test concerning right

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\(^{401}\) *Jalloh v. Germany*, §§ 121-123. However, see the concurring opinion of Judge Bratza; the concurring opinion of Judge Zupančič; the dissenting opinion of Judges Wildhaber and Callisch; the joint dissenting opinion of Judges Ress, Pellonpää, Baka and Šikuta and the dissenting opinion of Judge Hajiyev.

\(^{402}\) In this respect see the concurring opinion of Judge Cabral Barreto attached to the judgment in *Bykov v. Russia*: [We] should also go a step further by stating unequivocally that the use of evidence obtained by means of an act classified as inhuman or degrading treatment automatically undermines the fairness of a trial, since the difference between torture and inhuman treatment is often difficult to establish and the nuances are sometimes tiny; furthermore, as a rule, both situations – torture and inhuman and degrading treatment – involve blunders by the authorities against an individual in a position of inferiority. The Grand Chamber should in my opinion state firmly that any evidence obtained in breach of Article 3 in the course of a trial – through torture or ill-treatment – will always infringe Article 6 of the Convention, even if such evidence did not play a decisive part in the conviction, and even if the accused was able to challenge the evidence thus obtained, without leaving open the possibility of relying on the weight of public interest and the seriousness of the offence.


\(^{404}\) In this case the applicant claimed to be the victim of an infringement of his right to respect for his private life and his right to the confidentiality of telephone telecommunications which had been tapped contrary to the domestic law, as well as his right to a fair trial by reason of the use of the disputed recording in evidence. The Commission, however, dismissed the complaint based on Art. 8 ECHR on the ground that the domestic remedies had not been exhausted. On the other hand, the Commission declared the application admissible with regard to the use of the recording and violation of Art. 6 ECHR, see: *Schenk v. Switzerland*, §§ 36-37.
of defence and with the impact of the evidence on the conviction of the accused. Regarding the former requirement, the Court arrived at the conclusion that the applicant had and indeed took the opportunity of challenging the authenticity of the recordings and opposing their use. Moreover, he was able to examine witnesses, including a witness in respect of the recording’s content. According to the Court, the fact that his attempts were unsuccessful made no difference in the circumstances of the case.

Regarding the latter requirement, the Court pointed out that the recording of the telephone conversation was not the only evidence on which the conviction was based. Consequently, it was stressed that the criminal court had taken account of a combination of evidential elements before reaching the final opinion.

Taking into account all the circumstances of the case, the Court therefore concluded that, irrespective of the illegal interception, there was no violation of Art. 6 ECHR. In other words, the applicant’s trial was fair, because:

- the accused had the opportunity to dispute the use of illegal evidence,

- the recorded material was not the only piece of evidence in the case.

Another case concerning the admissibility of evidence gathered in violation of the right to privacy was Bykov v. Russia. In this case, although the Court found there was a violation of Art. 8 § 2 ECHR, it did not automatically exclude the evidence. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 (art. 6) of the Convention guarantees 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 regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair, Schenk v. Switzerland, §§ 45.

However, three separate opinions were annexed to this judgment. In their Joint Dissenting Opinion, Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo stated that: No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention. In the instant case, it is not disputed that “the recording in issue was obtained unlawfully”. Even if the courts which determined the charge against the applicant relied, as is noted in the judgment, on “evidence other than the recording but which corroborated the reasons based on the recording for concluding that [the person concerned] was guilty”, it remains true that they “admitted the recording in evidence” and that their decisions were “partly” founded on the disputed cassette. For these reasons, we have reached the conclusion that in this case there was a violation of the right to a fair trial as secured in Article 6 (art. 6) of the Convention. See also the Joint Dissenting Opinion of Judges Pettiti and De Meyer, and the Dissenting Opinion of Judge De Meyer, all attached to the judgment.

In this case the applicant complained that the covert operation had involved an unlawful intrusion into his home and that the interception and recording of this conversation had interfered with his private life (Bykov v. Russia, §§ 69 et seq.). The Court stated that the
irregular recordings. Instead, the Court used the standard balancing test to examine the fairness of the whole proceedings, as in the previous case\(^{410}\).

Consequently, the Court examined whether the rights of the defence were disregarded and whether the evidence in question was supported by other material. Regarding the former, the Court noted that the applicant’s trial was adversarial and, in particular, that he had an opportunity to challenge the use of the evidence\(^{411}\). With regard to the latter, the Court stated that the evidence obtained through the interception of telecommunications was not the sole basis for the applicant’s conviction since the key evidence for the prosecution was a statement\(^{412}\). Consequently, with regard to the above mentioned conclusions, after examining:

- the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned,
- the nature and degree of the alleged compulsion, and

interference was not ‘in accordance with law’, as required by Art. 8 § 2 ECHR, due to the absence of specific and detailed regulations. Consequently, the Court noted that the use of this surveillance technique as part of an ‘operative experiment’ was not accompanied by adequate safeguards against various possible abuses. Accordingly, its use was open to arbitrariness and was inconsistent with the requirement of lawfulness, which constitutes a breach of Art. 8 § 2 ECHR (see in particular: Bykov v. Russia, §§ 82-82).

\(^{410}\) §§ 90. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.

\(^{411}\) In the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and dismissed in reasoned decisions. The Court notes that the applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence, Bykov v. Russia, §§ 96.

\(^{412}\) The Court further observes that the impugned recording, together with the physical evidence obtained through the covert operation, was not the only evidence relied on by the domestic court as the basis for the applicant’s conviction. In fact, the key evidence for the prosecution was the initial statement by V., who had reported to the FSB that the applicant had ordered him to kill S., and had handed in the gun (…). This statement, which gave rise to the investigation, was made by V. before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant. Furthermore, he reiterated his incriminating statements during his subsequent questioning on several occasions and during the confrontation between him and the applicant at the pre-trial stage. §§ 98. In view of the above, the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant’s conviction, corroborated as it was by other conclusive evidence. Nothing has been shown to support the conclusion that the applicant’s defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary, Bykov v. Russia, §§ 96.
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- the use to which the material obtained through the covert operation was put,

the Court found that the proceedings in the applicant’s case, considered as a whole, were not contrary to the requirements of a fair trial and there had been no violation of Art. 6 § 1 ECHR\(^{413}\), irrespective of the fact that there was a violation of Art. 8 ECHR and the applicant’s right to privacy\(^{414}\).

Another case which is worth presenting here is the case of *Khan v. The United Kingdom*\(^{415}\). Two themes clearly emerge from this judgment. Firstly, in contrast to the position examined in the *Schenk* case, the recordings in question were not unlawful in the sense of being contrary to domestic criminal law\(^{416}\). Secondly, the recordings were the only evidence against the applicant and his plea of guilty was tendered only on the basis of the judge’s ruling that the evidence should be admitted.

Consequently, following the Court’s stand presented in the case of *Schenk*, the recordings in *Khan* should be excluded due to their decisive impact on the conviction of the accused. The Court, however, stated otherwise and explained:

\[\text{§§ 37. (…)}\]

It is true that, in the case of *Schenk*, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. However, the Court notes in this regard that the recording in the *Schenk* case, although not the only evidence, was described by the Criminal Cassation Division of the Vaud Cantonal Court as having “a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal

\[^{413}\text{Bykov v. Russia, §§ 104-105.}\]

\[^{414}\text{However, annexed to the judgment was the concurring opinion of Judge Cabral Barreto, the concurring opinion of Judge Kovler, the partially dissenting opinion of Judge Costa and the partially dissenting opinion of Judge Spielmann, joined by Judges Rozakis, Tulkens, Casadevall and Mijović. The controversy of that conclusion may be seen not only in the judgment, but also in the literature, see: F. PINAR ÖLCER, The European Court…, p. 396.}\]

\[^{415}\text{In this case, the applicant alleged a violation of Art. 8 ECHR due to the fact that the listening device was placed in the suspect’s home by the police without judicial authorisation and without there ever having been a law regulating such invasions of privacy (see: *Khan v. United Kingdom*, §§ 22 et seq.). A breach of Article 6 § 1 of the Convention was found based on the ground that the use as the sole evidence in his case of the material which had been obtained in breach of Article 8 of the Convention was not compatible with the ‘fair hearing’ requirements of Article 6 (see: *Khan v. United Kingdom*, §§ 29 et seq.).}\]

\[^{416}\text{The Court notes at the outset that, in contrast to the position examined in the *Schenk* case, the fixing of the listening device and the recording of the applicant’s conversation were not unlawful in the sense of being contrary to domestic criminal law. (…)}\text{The “unlawfulness” of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant’s right to respect for private life and that, accordingly, such interference was not “in accordance with the law”, as that phrase has been interpreted in Article 8 § 2 of the Convention, *Khan v. United Kingdom*, §§ 36.}\]
proceedings” (...). Moreover, this element was not the determining factor in the Court's conclusion. Moreover, this element was not the determining factor in the Court’s conclusion.

Subsequently, the Court turned its attention to the rights of defence:

§§ 38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the Schenk case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the voir dire and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference (...).

Consequently, the ECtHR found no violation of Art. 6 ECHR:
- irrespective of the fact that the evidence challenged was the only evidence against the applicant;
- basing its judgment on the fact that the accused had been able to challenge the authenticity and use of the recording. As in the case of Schenk, the Court concluded that the fact that the applicant was at each stage unsuccessful made no difference.

It is noteworthy that, when examining the fact the recordings were the only evidence, the Court also referred to the nature of the evidence, as follows: In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker, Khan v. United Kingdom, §§ 37.

However, see the partly concurring, partly dissenting opinion of Judge Loucaides: I cannot accept that a trial can be “fair”, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. It is my opinion that the term “fairness”, when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a “fair” trial if it is conducted in breach of the law. It is true that the Convention is not part of the domestic legal system of the United Kingdom, but for the purposes of the question in issue, it should be treated as such, in view of its ratification by that country and the ensuing obligation to enforce its provisions through its State organs. In other words, in assessing whether a trial was “fair” I can see no reason to make allowances for a State which ratified the Convention but has failed to incorporate it into its system. (...) The basic argument against such an exclusionary rule is the pursuit of the truth and the public interest values in effective criminal law enforcement which entail the admission of reliable and trustworthy evidence, for otherwise these values may suffer and guilty defendants may escape the sanctions of the law. Breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition. In any event the argument has no place in the context of the issues in this case because evidence amounting to an interference with the right to privacy can be admitted in court proceedings and can lead to a conviction for a crime, if the securing of such evidence satisfies the requirements of the second paragraph of Article 8, including the one at issue in the present case, that is, that it was obtained “in accordance with the law”.

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Focusing now on search and seizure, one may assume that the Court employs the same approach as in cases concerning the interception of telecommunications. In *Miailhe v. France (No.1)* the Court found a breach of Art. 8 ECHR due to the absence of any requirement for a judicial warrant or any other restrictions and conditions provided for in law. As a result, the applicant argued that he was the victim of the consequences of the original breach of Art. 8 ECHR found by the Court, and that the prosecuting authorities had rendered his criminal conviction unfair, based as it was almost exclusively on the documents seized by customs in circumstances held to have been contrary to the Convention. When examining a violation of Art. 6 ECHR the Court again pointed out that the applicant had the opportunity to raise the objections of nullity of the evidence, which were dismissed by the national courts. The Court also noted that both parties had presented arguments at hearings on the documentation on case file and, in general, the equality of arms and respect for the right of defence were preserved. Consequently, the proceedings as a whole were fair, regardless of the fact that the Court based its statement solely on evidence gathered through a violation of Art. 8 ECHR.

### 3.3. Admissibility of irregular evidence gathered abroad

The cases reported above involved irregular evidence gathered in a merely domestic context. What is of utmost interest in this chapter, however, is the question of the admissibility of evidence gathered irregularly in the cross-border context. Thus far, the Court has neither dealt in sufficient detail with the status of irregular evidence gathered abroad nor with evidentiary process-laundering within the EU. However, it clearly follows from the current case-law of the ECtHR that evidence irregularly gathered abroad is not *per se* inadmissible.

The previously mentioned case of *Chinoy*, in which the English court admitted that the transcripts and tapes had been illegally obtained by the US authorities in France, may be cited as the first example. Taking into account the English court’s conclusion, Chinoy turned to the European Commission of Human Rights, claiming that his private life, home, family and correspondence had been interfered with contrary to Art. 8 ECHR. According to Chinoy, that interference consisted in the use made by the authorities and the English courts of material from unlawful and clandestine tapping of telephone conversations involving himself and members of his family. He also placed emphasis on the reliance on and internal use of the recordings in processing and accessing the

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419 *Miailhe v. France (No.1)*, §§ 38-40.
420 Ibid., §§ 38.
421 Ibid., §§ 44-46.
422 See on note 380 above.
423 *Chinoy v. United Kingdom* (dec.) App. no. 15199/89.
case, in particular in the extradition proceedings\textsuperscript{424}. The Commission did not deny the unlawfulness of the evidence under French law. However, it underlined that:

\textit{It is not for the Commission to determine which of the views as to French law put forward is correct. Nor is it for the Commission to determine in this case whether the recording of the conversations involved a violation of the Convention by France. It has not been established whether the French authorities were or were not aware, and if so to what extent, of the activities of the United States agents, nor have the French courts had the opportunity to consider the matter. Furthermore, the present application has been brought against the United Kingdom. Accordingly, the Commission will deal with this application not in the context of clearly established (or admitted) unlawfulness of the recording under the Convention or under French law, but on the assumption that doubt persists as to such lawfulness.}

Accordingly, when examining what use was made of the recordings, and how that use affected the applicant’s rights under Art. 8 ECHR and Art. 6 ECHR, the Commission first and foremost noted that the recordings at issue were not made by or with the consent of the UK authorities. Consequently, the use made by those authorities was limited to receipt of the materials from the US, and examination of its relevance in the extradition proceedings. In this respect the Commission recalled the case of \textit{Schenk} and concluded that irregular evidence cannot be excluded as a matter of principle and \textit{in abstracto}\textsuperscript{425}. Moreover, the Commission noted that the transcripts which were used in open court related solely to business matters, did not disclose any lack of respect for his private and family life and, therefore, did not violate Art. 8 ECHR.

A critical observer may point to the fact that the Commission did not attach any relevance to the admissibility and internal use of the material, even though there existed some doubt as to the lawfulness of the recordings in question. This element, however, was ignored as the complaint was not directed against France. In respect of violation of Art. 6 ECHR, the Commission reiterated that the ECHR contains no express or implied requirement as to the exclusion or admissibility of unlawfully obtained evidence. However, the Commission concluded that the fact that the information was obtained in breach of French law did not prevent it from being lawfully included in the evidence under English law, as long as there was a legal basis under English law to do so\textsuperscript{426}.

\textsuperscript{424} Besides violation of Art. 8 ECHR, Chinoy also complained that he had no remedy before a national authority in respect of this complaint, contrary to Art. 13 ECHR. He also alleged a violation of Art. 5.4 ECHR, contending that the scope of the proceedings was too limited.

\textsuperscript{425} The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair, \textit{Schenk v. Switzerland}, §§ 46.

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It is noteworthy that the Chinoy example is described in the literature as a ‘judicial acceptance of a concept that might be termed evidential process laundering’, since the US agents illegally obtained evidence which was inadmissible in France and sought to ‘launder’ that evidence through English admissibility rules\(^ {427}\). It is also noteworthy that this approach has been criticised, as it meant that the protection provided in the Convention was merely theoretical and illusory\(^ {428}\). However, on the other hand, the English court examined the evidence using the same rules as would have been the case with evidence gathered domestically\(^ {429}\).

A similar line of reasoning may be found in Rodriguez v. The Netherlands. In this case, the Court dealt with the problem of the subsequent use of information gathered abroad, which may raise issues under Art. 6 ECHR\(^ {430}\). The Court first of all reiterated that questions concerning the admissibility of evidence are primarily a matter for regulation by national law. Moreover, the Court considered that:

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\text{[T]he Convention does not preclude reliance, at the investigating stage, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected.}
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However, the Court did not pursue this issue due to the fact that the applicant had not substantiated in any way the argument that such reasons existed in the case in question.

In conclusion, one may assume that neither the Court nor the Commission excluded evidence gathered abroad per se, even though its use raised questions with regard to fair trial. However, it has to be stressed that both cases lack analysis of the requirements for admissibility of that evidence, which leaves the status of illegal evidence gathered abroad open to question.

3.4. Conclusion

Taking into account the Strasbourg Court’s approach to the admissibility of evidence, one may conclude that the Court distinguishes between three

\(^{427}\) C. GANE, M. MACKAREL, The Admissibility ..., p. 114.

\(^{428}\) A.A.H. VAN HOEK, M.J.J.P. LUCHTMAN, Transnational cooperation..., p. 18.


\(^{430}\) The applicant complained, inter alia, that the Dutch court refused to take oral evidence from the US Assistant Attorney as she could have clarified issues in relation to the investigation carried out in the USA.
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categories of violations which bring with them different consequences in relation to the exclusion of evidence, as follows:

- **per se inadmissibility**: evidence gathered through torture (Art. 3 ECHR) should have no effect, irrespective of its probative value, the seriousness of the crime being investigated, the public interest in securing the conviction and the other circumstances of the case;

- **non per se admissibility**:
  
  a) evidence gathered through inhumane or degrading treatment or punishment (Art. 3 ECHR) should be balanced within an exacting balancing test which examines the right to defence, the role that the evidence plays in the conviction, as well as the seriousness of the crime being investigated, the public interest in securing the conviction and the probative value of the evidence;

  b) evidence gathered through violation of the right to privacy (Art. 8 ECHR) should be balanced within the balancing test which is less exacting than in the previous categories of violation. First of all, when examining the cases concerning privacy violations, one may easily notice the Court’s general willingness to allow the evidence irrespective of the breaches. Secondly, the Court places emphasis on the high probative value of the evidence which often consists of physical evidence (items seized through a search or records obtained through interception)\(^{431}\). Thirdly, the Court treats the privacy violations as less offensive to fairness and reduces the balancing test to an examination of whether the defence has been granted the adequate opportunity to challenge the manner in which the evidence was obtained, as well as its use in the trial.

\(^{431}\) In this light it should be stressed that, in the case of evidence gathered through inhumane or degrading treatment or punishment, the Court does not attach so much attention to the probative value of the evidence, compare: Jalloh v. Germany with Khan v. United Kingdom. In the former case, concerning violation of Art. 3 ECHR (but not torture), the Court excluded material evidence irrespective of its high probative value. By contrast, in the latter case the Court referred to the strong nature of evidence such as telephone tapping, pointing out that there is no risk of it being unreliable and, consequently, the need for supporting evidence is correspondingly weaker, which resulted in its admission in evidence which played a decisive part in the conviction. In this respect see also Allan v. United Kingdom: ¶¶ 43: In that context, regard must also be had to whether the rights of the defence have been respected, in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use, as well as the opportunity of examining any relevant witnesses; whether the admissions made by the applicant during the conversations were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions (see Khan, cited above, ¶ 36); and the quality of the evidence, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy (ibid., ¶ 37). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.
Consequently, even factors examined within the balancing test in cases concerning inhumane or degrading treatment or punishment, such as the weight of public interest, the seriousness of the offence etc., are of secondary importance here.\footnote{432}

Consequently, taking into account the scope of this research, which deals with telephone tapping and house search, one may notice that the Court has not developed any exclusionary rule with respect to privacy violations, to which both measures relate. In other words, there is no violation of Art. 8 ECHR which would automatically lead to the inadmissibility of flawed evidence. Instead, the Court promotes an umbrella balancing test which is broader and more flexible than the test used in cases of evidence gathered through inhumane or degrading treatment or punishment (Art. 3 ECHR). This conclusion follows from the fact that, in the Court’s view, violations of the right to privacy pose a low risk to trial fairness and can be counterbalanced through compensation mechanisms. In other words, the Court’s priority is the question of fairness of the proceedings rather than the substantial right to privacy which definitely plays a secondary role here.\footnote{433}

The Art. 6 ECHR balancing test of privacy violations consists of two main requirements:

- the procedural right to oppose irregular evidence. In other words, the defence has to be given an opportunity to challenge the legality of the evidence and its authenticity, and to oppose its use in a trial. The fact that these attempts are unsuccessful makes no difference;
- the impact of evidence on the conviction of the accused.\footnote{434} This requirement examines whether the illegal evidence plays a dominant role in a conviction, namely, whether the evidence is decisive for the outcome of the proceedings. Consequently, if defence rights have been respected within evidentiary proceedings and the evidence in question is not decisive for the establishment of the defendant’s guilt, the use of

\footnote{432} However, see Heglas v. Czech Republic §§ 87, §§ 91, where the Court considered that the seriousness of the crime and the public interest in prosecuting it should be taken into account when determining the admissibility of evidence gathered through violation of privacy rights. See also the critical comments of A.M. Torres Chedraui: When the seriousness of the crime is taken into account in the context of fair trial rights, the protection of the right is limited for certain criminals, and there are no additional safeguards to compensate for this limitation. Finally, the right to a fair trial protects certain procedural values which would be seriously undermined if they would be subsumed to the gravity of the crime. In this respect, this right is different from art. 8, because art. 8 protects privacy, and a consideration of the gravity of the crime would not undermine the essence of this article, A.M. TORRES CHEDRAUI, An analysis ..., p. 227-229.

\footnote{433} V. RAMANENKA, Restrictions on admissibility of improperly obtained evidence in criminal trial, Central European University, November 27, 2011, p. 60.

\footnote{434} See, in particular: Allan v. United Kingdom; Bykov v. Russia, P.G. and J.H. v. United Kingdom; Heglas v. Czech Republic; Schenk v. Switzerland.
illegal evidence will not render the trial unfair. However, the case-law of the Court clearly demonstrates the secondary role of this requirement, since the Court has allowed flawed items, irrespective of the fact that they were the decisive materials in the convictions, basing its conclusion solely on defence rights. In this respect, one may assume that the requirement that renders the trial unfair is, in principle, the right to defence against illegal evidence. It is also noteworthy that the Court’s balancing test is narrower in comparison with tests provided under national legislation included in this research and, in general, does not require balancing of the seriousness of the breach with the weight of public interest or offence at issue.

Consequently, the Court has adopted the stance that evidence obtained through violation of Art. 8 ECHR may be admitted in proceedings and this does not render the trial unfair, as long as the rights of defence have been respected. The relevance of other factors is circumvented by the particular cases. This conclusion, however, may be discussed from various perspectives.

First of all, the Court’s approach may be characterised as controversial, unstable and quite dynamic. This view is supported by the fact that the Court quite frequently adds to and adapts its own model, creating new areas of protection. The controversial nature of the Court’s approach is also notable in numerous concurring and dissenting opinions attached to the judgments concerning the admissibility of illegal evidence. In this respect, it has to be stressed that the ECtHR is not consistent in terms of general conclusions with regard to non per se admissibility. The four dissenting judges in the Schenk case, whose opinion was partially followed by Judges Loucaides (attached to the Khan v. UK judgment) and Tulkens (attached to the P.G. and J.H. v. UK judgment), consider that a trial could not be described as ‘fair’ where evidence obtained in breach of a fundamental right guaranteed by the Convention had been admitted.

In this respect, it is worth recalling the interesting point of view expressed in the concurring opinion of Judge Cabral Barreto, attached to the Bykov v. Russia judgment, which distinguishes between:

- prohibited evidence, which relates to substantive law (e.g. a breach of the right to confer freely with one’s lawyer), and
- improper evidence which relates to procedural law (e.g. the lack of judicial authorisation for telephone tapping).

Consequently, according to this approach, violation of the substantive law should determine the unlawfulness of the evidence, whereas a violation of the procedural law should not automatically entail a violation of Art. 6 ECHR, but simply the presumption of a violation. When discussing this point of view, the

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435 Z. DURDEVIĆ, Judicial Control..., p. 997.
436 F. PINAR ÖLÇER, The European Court..., p. 375.
437 Concurring opinion of Judge Cabral Barreto in the case of Bykov v. Russia. It is noteworthy that in that case Judge Cabral Barreto considered that there was no violation because there was
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Problem of the admissibility of a statement taken in the absence of a lawyer cannot be overlooked, as this is a great example of evidence affecting substantive law.

In the case of Salduz v. Turkey the Court examined the admissibility of evidence obtained from an interrogation conducted in the absence of a lawyer. When examining the case, the Court first underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. In the analysis which followed, the Court stated that:

- the applicant’s rights to a fair trial were undoubtedly prejudiced by the restrictions on his access to a lawyer during the police interrogation;

- neither the assistance subsequently provided by a lawyer, nor the adversarial nature of the ensuing proceedings, in which the defence was able to challenge the prosecutor’s statements, could cure these defects.

In this light, the Court questioned the admissibility of that statement, especially with regard to the fact that it constituted the main evidence on which the conviction was based. A similar problem was scrutinised by the Court in the case of Płonka v. Poland, in which the Court found a breach of Article 6 § 1 of only a formal breach (“in accordance with the law”) in obtaining evidence that, in principle, was admissible in a democratic society and the rights of defence were, moreover, respected.

438 Salduz v. Turkey, §§ 54.

439 Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (see, mutatis mutandis, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction, Salduz v. Turkey, §§ 55.

440 Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant’s access to a lawyer during police custody would have had on the ensuing proceedings, Salduz v. Turkey, §§ 58.

441 Moreover, not only did the Izmir State Security Court not take a stance on the admissibility of the applicant’s statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy (…). In this connection, the Court observes that in convicting the applicant, the Izmir State Security Court in fact used the evidence before it to confirm the applicant’s statement to the police, Salduz v. Turkey, §§ 57. In the same line is the case of Płonka v. Poland in which the Court stated that: The Court considers that in the present case the applicant was undoubtedly directly affected by the lack of access to a lawyer during her questioning by the police. Neither the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the police custody, Płonka v. Poland, §§ 41.
the Convention in conjunction with Article 6 § 3 (c) due to the fact the confession made in the absence of a lawyer had a bearing on the conviction.

Returning to the Court’s conclusions with regard to the admissibility of evidence, it should be stressed that the Strasbourg approach is widely discussed in the literature, for the following reasons. The first argument is that the Court mistakenly confuses the admissibility and the weight of the evidence. Secondly, it is still controversial and doubtful whether the trial can be considered as ‘fair’ where evidence obtained in breach of a fundamental right guaranteed by the Convention had been admitted. Finally, it is argued that the case-law concerning Art. 3 ECHR has provided a clear model for Art. 6 ECHR. Therefore, the consequences of violation of Art. 3 ECHR are not merely a matter for regulation under national law. Accordingly, the modern understanding of the case-law of the ECtHR should also cover violations of Art. 8 ECHR; in other words, the exclusionary rule should concern the prohibition of violations of privacy such as illegal searches and interceptions of communications.

The Court’s approach can also be criticised as being too narrow and incoherent. Firstly, the ECtHR places emphasis on the opportunity of challenging the illegal evidence, referring solely to rights of defence. At the same time, the Court remains silent over the procedural opportunity to oppose the use of evidence obtained in violation of privacy rights by other parties, e.g. the victim or, in particular, persons whose right to privacy have been violated. Moreover, it should be remembered that this research deals with measures carried out at the pre-trial stage. Consequently, one may notice that an assessment of the fairness of the whole proceedings at this ‘stage of play’ may cause practical problems.

Finally, in its case-law, the Court has dealt solely with evidence gathered in the domestic context. The very general and brief conclusions as to the admissibility of irregular evidence gathered abroad do not fully explain the links between the trial process and trans-border gathering of evidence. Taking into account both of the cases presented above, one may assume that the Court

442 The applicant subsequently denied the content of her statement to the police. However, her initial confession made in the absence of a lawyer had a bearing on her conviction. While the statements made by the applicant during police custody and her confession were not the sole basis for her conviction, the Katowice Regional Court nevertheless based its final decision on them, observing that her testimony during the hearings was not credible. In view of the circumstances, the guarantee of fairness enshrined in Article 6 required that the applicant had the benefit of the assistance of a lawyer from the very first stage of police questioning. In this regard, it is not for the Court to speculate on what the applicant’s reaction or her lawyer’s advice would have been had she had access to a lawyer at the initial stage of the proceedings, Plonka v. Poland, §§ 39-40.


444 In the previous chapter it was argued that the rights to legal remedies against the authenticity and use of evidence should be granted to the persons whose rights were violated, if those breaches may have an impact on the admissibility of evidence and results in the exclusion of this material.

445 See: Chinoy v. United Kingdom; Rodriquez v. The Netherlands.
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does not per se exclude evidence irregularly gathered abroad. In this respect, one may wonder whether the Court is of favour of the per se admissibility of irregular evidence gathered abroad, or its non per se admissibility.

Consequently, these and other questions regarding the admissibility of irregular evidence still remain largely unanswered by the Court’s case law.

4. Irregularly obtained evidence in EU instruments

The EU has not fully tackled the problem of irregularly obtained evidence in any document related to cross-border cooperation in criminal matters. However, some references to the admissibility of irregularly obtained evidence were made within the Corpus Juris and EPPO Proposal. Therefore, the relevant provisions of these documents are presented below. 446

4.1. Corpus Juris

The Corpus Juris was an academic proposal on European criminal law and criminal procedural law for the purpose of combating fraud against the EC budget and the establishment of a ‘European Public Prosecutor’ as an EC authority. 447 It sought to unify and define criminal offences and some procedural rules, in order to ensure the effectiveness of the proposal, as well as the rights of defence, particularly in cases of internal frauds, where the absence of judicial control could jeopardise the protection of individual rights 448.

The Corpus Juris deals with the admissibility of evidence in arts. 32 and 33. Whereas art. 32 contains a non-exhaustive list of admissible evidence 449, art. 33 provides a straightforward rule with regard to evidence irregularly obtained:

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446 In this context it is also necessary to mention the Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, which refers to use of statements gathered through torture, in breach of the right to remain silent or in breach of the right not to incriminate oneself, see Recital (45) and art. 10 of the Directive.


449 Art. 32.1 of the Corpus Juris: In the Member States of the European Union, the following evidence is admitted: a) testimony, either direct, or presented at the trial via an audiovisual link if the witness is in
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Art. 33.1. In proceedings for one of the offences set out above (Articles 1 to 8) evidence must be excluded if it was obtained by Community or national agents either in violation of the fundamental rights enshrined in the ECHR, or in violation of the European rules set out above (Articles 31 and 32), or in violation of applicable national law without being justified by the European rules previously set out; but such evidence is only excluded where its admission would undermine the fairness of the proceedings to admit it.

2. The national law applicable to determinate whether the evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained. When evidence has been obtained legally in this sense, it should not be possible to oppose the use of this evidence because it was obtained in a way that would have been illegal in the country of use. But it should always be possible to object to the use of such evidence, even where it was obtained in accordance with the law of the country where it was obtained, if it has nevertheless violated rights enshrined in the ECHR or the European rules (Articles 31 and 32).

This rule, according to the authors of the Corpus Juris, reflects both the importance and complexity of the problem of evidence obtained in breach of the law in a cross-border context, in particular:
- the diversity of evidentiary rules in the area of exercising coercive powers;

another Member State, or recorded by the EPP in the form of a ‘European deposition’. For the latter, the witness must be examined before a judge, the defence lawyer must be present and allowed to put questions, and the operation must be recorded on the video; b) questioning of the accused, either direct or recorded by the EPP in the form of a ‘European interrogation report’. For the latter the questioning must take place before a judge, the accused must be assisted by a defence lawyer of his choice (who has received the dossier in good time, and the latest 48 hours before the questioning) and, if necessary, by an interpreter; in addition, the operation must be recorded on video; c) statements made by the accused, outside the interrogation previously mentioned, as long as they have been made before the competent authority (EEP or judge), and the accused has first been informed of his right to silence and his right to be assisted by a defence lawyer of his choice and that the statements have been recorded in some way; d) documents presented by an official accountant, appointed by the competent court from individuals or corporations appearing on a European list approved by the Member States on the proposal of the E.E.P., either during the preparatory stage, or at the beginning of the trial; e) documents that the accused has been required to produce in a preliminary administrative investigation, unless such an obligation is accompanied by criminal sanctions. 2. These provisions do not exclude the validity of other forms of evidence considered as admissible under the national law in force in the State of the court of judgment. Those rules, however, are centred on the ‘European deposition’ and ‘European interrogation report’ introduced in particular in order to ensure Anglo-Saxon practices which are extremely restrictive in this area.

It has to be stressed that some member states proposed amendments to this provision arguing that it is not in line with the jurisprudence of the ECHR which rejects the automatic exclusion of evidence obtained in violation of law. Moreover, it was said that art. 33 has an internal contradiction due to the fact that either the evidence is collected in violation of higher rules and is thus excluded or it is collected in compliance with the rules and is admitted. Finally, the Luxembourg report found that art. 33§2 might be difficult to cooperate on in practice since, regarding the evidence obtained abroad, this article would force the authorities to pay attention to the admissibility rules of the country where the evidence was obtained, see: M. DELMAS-MARTY, J.A.E. VERVAELE (eds.), The implementation... p. 361-362.
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- the diversity of attitudes towards the admissibility of illegally obtained evidence;
- the decision as to which jurisdiction should apply in cases where the evidence was obtained in accordance with the locus state, while the method by which the evidence was obtained would have been unlawful in the country where the evidence was requested;
- the problem of admissibility of evidence obtained against the law of the locus country for use in another member state, where it would have been obtained legally451.

Hence, the Corpus Juris proposal set the rule that the evidence must be rejected if it was obtained in breach of the ECHR, the European rules laid down in arts. 31 and 32 of the Corpus Juris, or national law. However, it is noteworthy that such evidence can only be excluded when its admission would contravene due process. On the other hand, it should not be possible to object to the use of evidence obtained lawfully in another member state solely because it would have been obtained illegally in the country where the evidence is to be used452. In other words, the judge must make sure that no irregularity has taken place which could damage the legally protected interest of the accused person. Consequently, if the evidence only concerns third-party interests there is no obligation to exclude it453.

This proposal can be considered as an attempt to combine the accusatorial and inquisitorial traditions with complementary application of national law, which clearly defines the legislation that should determine the violation of law. Moreover, the study group rejected any 'automatic' exclusion of evidence and limited exclusion to cases in which admission would apply only in a case where illegal evidence would undermine the fairness of the proceedings454.

However, the proposed approach to irregularly obtained evidence was criticised in the academic literature from various perspectives. Firstly, it was stressed that the Corpus Juris copies the assessment criteria of the ECtHR, regardless of the fact that national rules are very protective when it comes to the admissibility of irregularly obtained evidence. Consequently, it would mean the abolition of national rules on admissibility and disregard the protection of human rights in national legal systems, since the aim of the exclusionary rule at the national level is not only to preserve a fair trial but also to protect other fundamental rights. Secondly, it was argued that in some stages of proceedings, such as the pre-trial stage, it is not possible to estimate whether certain evidence will render the proceedings unfair as a whole455.

451 Corpus Juris..., p.140.
452 Ibid.
455 Z. ĐURDEVIĆ, Judicial Control..., p. 998.
In conclusion it should be noted that although the *Corpus Juris* project has been criticised over the past decade, it contained a harmonising structure that attempted to bring together the existing European legal frameworks, and was a catalyst for future proposals, including in the field of admissibility of irregularly obtained evidence\(^\text{456}\).

### 4.2. Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor and EPPO Proposal

The next EU initiatives which address the admissibility of irregularly obtained evidence are the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor and EPPO Proposal\(^\text{457}\). Accordingly, the Green Paper reads:

> The prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the Member State where it is found. The question of the exclusion of evidence obtained contrary to the law therefore has to be considered.

> The law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated, which integrates in all Member States the principles of Article 6 of the Union Treaty, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It would include certain Community rules such as those governing the European arrest warrant or record of questioning where they are used as evidence\(^\text{458}\).

Therefore, according to the Green Paper, the rules governing exclusion would be those of the member state in which the evidence was obtained. The Green Paper is a clear derivation from the principle of *locus regit actum* and, consequently, member states are expected to accept evidence that would be accepted in the locus state, even if under different rules with regard to their collection and admissibility. As pointed out in the academic literature, it presupposes that the trial courts have to be familiar with the rules of evidence in the other member states, which may cause significant practical problems.


\(^{458}\) Ibid., point 6.3.4.2, p. 59.
However, the Commission argued that this is a common situation in private international law and, moreover, the practical difficulties here should be cleared up by progress in facilitating networking among the member states’ judicial systems, promoted by schemes such as the European Judicial Network 459.

Irrespective of the Green Paper’s provisions, the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office (hereafter: EPPO) does not explicitly address evidence gathered unlawfully and provides a general admissibility rule, as follows:

Art. 30. Evidence presented by the European Public Prosecutor’s Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence.

What is noteworthy is that the admissibility rule proposed in the EPPO is supported by the partial harmonisation of investigation measures 460 and defence rights 461. With regard to the latter, one may notice that those safeguards are in line with the ‘roadmap’ for strengthening the procedural rights of suspected or accused persons in criminal proceedings 462. At the same time the EPPO Proposal introduces a broad rule on the mutual admissibility of evidence, based on fundamental rights enshrined in the EU Charter 463.

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459 Ibid., p. 59.
460 Art. 26.1 of the EPPO lists 21 measures that shall be available for the purposes of investigations and prosecutions conducted by the EPPO, which shall be subject to the conditions provided in this article and those set out in national law.
461 See Chapter IV of the EPPO which deals with procedural safeguards (arts. 32–35).
462 It is also important to mention here that the link between admissibility of evidence and effectiveness of the rights ensured in the Roadmap has already been commented on in the literature: If these rights are to be made effective, they must be accompanied by a rule that evidence obtained in breach of them is inadmissible, and for such a rule to be applicable throughout the Union it would have to be included in the EU instrument by which the defence rights were guaranteed, see: J.R. SPENCER, The Green Paper …, p. 604-605.
463 In the literature it was pointed out that this wide scope of the proposal, as well as the absence of harmonizing rules on the admissibility of evidence, makes it susceptible to the risk of forum shopping, see: M. LUCHTMAN, J. VERVAELE, European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor’s Office), 10 Utrecht Law Review, 2014 (132), p. 141.
4.3. Conclusion

Analysis of the few existing EU approaches to irregularly obtained evidence leads to the conclusion that none of the outlined proposals provide rules of per se inadmissibility of irregularly obtained evidence. However, certain conditions need to be met. First and foremost, such evidence cannot affect the fairness of the proceedings. Moreover, whereas the Corpus Juris and Green Paper strongly relate to locus law and require that evidence must have been obtained lawfully in the state where it is found, the EPPO Proposal does not make such a reference and provides a general rule for the admissibility of evidence which would not adversely affect the fairness of the procedure, right to an effective remedy, presumption of innocence or right to defence.

5. Minimum standards for admissibility of irregular evidence

The problem of how to tackle evidence obtained irregularly in the transnational context is far from new, and the academic literature has already presented certain alternative scenarios in this respect. However, the EU with its aspirations to mutual recognition of evidence still lacks an approach which would be in line with the mutual recognition philosophy and ensure preservation of fundamental rights ensured in the ECHR and EU Charter. Therefore, the following study examines whether it is feasible to come to common rules with regard to evidence gathered irregularly in EU cross-border contexts.


465 In this respect, see three alternatives proposed by Gane and Mackarel: the theory of the diminished protection of the accused, the theory of neutrality and the theory of double admissibility. According to the first one, the appropriate law should be the one that provides a lower standard of admissibility. The main weakness of this theory is, however, that it cannot be acceptable as it dilutes the protection of the suspect, on the one hand, and, on the other, may encourage states to seek to obtain evidence abroad by means which would not be lawful if exercised domestically. The second approach refers to ‘neutrality’ and states that the admissibility of evidence obtained abroad would be admissible under the lex fori if gathered in the same manner. However, it was argued that this approach displays a lack of respect for foreign jurisdiction. Moreover, taking the example of the Chinoy case into account, the principle of neutrality may encourage member states to indulge in ‘forum shopping’ in order to take advantage of the most relaxed national regimes. Finally, the authors proposed double admissibility, which requires a double examination of evidence, which should be admitted only if admissible in both member states. This approach has been accepted as respecting both foreign rules and the fundamental rules of the trial state’s criminal justice system. see: C. GANE, M. MACKAREL, The Admissibility..., p. 116-119; G. VERMEULEN, A European Judicial Network linked to Europol?, Maastricht Journal of European and Comparative Law, 4 (1997), p. 353.
5.1. Examining possible scenarios

When considering domestic approaches, ECtHR jurisprudence and current EU initiatives in this field, the following possible scenarios occur for dealing with evidence gathered irregularly in the EU cross-border context:

- indication of the law that should determine whether evidence was gathered irregularly and whether it may be used, even if it is irregular;
- introducing minimum standards for non *per se* admissibility and *per se* inadmissibility which would be based on fundamental rights ensured at EU level; or
- recognition of evidence as *per se* admissible or *per se* inadmissible.

Consequently, the following analysis examines these scenarios. Due to the fact that the last alternative leads neither to the overcoming of existing problems nor to the development of a satisfactory common approach, it is not examined below.

5.1.1. Determining the decisive law

The first scenario relates to the law that should determine whether the evidence has been obtained regularly or irregularly. This approach is inspired by *Corpus Juris* and the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor which rely on provisions of the *locus* state. Accordingly, this scenario entails three further options:

- application of the *locus* law. This approach would be based on the condition that the law of the place where the evidence is situated should be decisive. This approach, however, is not free of obstacles. First of all, it would probably create too many practical difficulties when determining the regularity of evidence using foreign rules. Secondly, it does not attempt to overcome the problem of evidentiary process-laundering, since the exclusion of evidence would be still very context-sensitive. Finally, it ignores *forum* law, which may provide different rules with regard to the admissibility of evidence;
- application of the *forum* legislation and use of the same model of control that applies to evidence gathered nationally. According to this approach, the admissibility of evidence would be determined by asking a simple question: would the evidence, if gathered in this manner domestically, be admissible? This approach, however, should be rejected as lacking respect with regard to the *locus* state. Moreover, application of this approach would definitely have a frustrating effect on trans-border cooperation since it does not solve the problems.
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reported in the preceding scenario and, in addition, ignores the provisions of the locus state;
- double admissibility. This scenario requires a double examination of evidence: namely, admission of evidence only if it complies with the requirements in both member states. However, this solution seems to be too restrictive. Moreover, neither the Corpus Juris, the Green Paper nor the EPPO Proposal requires double admissibility with regard to irregular evidence. Double admissibility would also be inefficient in more complex trans-border investigations which concern more than two member states and, consequently, would require triple admissibility, quadruple admissibility etc. Moreover, it should be remembered that some member states are more lenient when it comes to evidence irregularly obtained abroad and do not apply domestic rules of admissibility in such cases. Applying this rule would, paradoxically, hamper cross-border use of evidence instead of taking it to a higher level.

5.1.2. Minimum standards based on EU fundamental rights

This scenario consists of breaking with both the locus and forum standards for admissibility of irregular evidence, if gathered in the EU cross-border context, and basing the use of irregular evidence on commonly agreed standards relating to fundamental rights enshrined in the ECHR and EU Charter. In other words, the decision whether or not to recognise irregular evidence would be determined by the consequences of violation of a particular fundamental right. Compliance with this scenario would require two steps:
- firstly, linking evidence/investigative measures to particular fundamental rights;
- secondly, verifying categories of violations of these rights which bring with them different consequences in relation to the exclusion of evidence.

Undoubtedly, this alternative may appear too far-reaching and controversial, since it would require member states to use different, usually lower, standards for irregular evidence if gathered in an EU cross-border context than those applied in domestic cases. It could paradoxically increase the laundering of evidence through EU standards and the bypassing of domestic admissibility rules. However, even if at first sight it may seem provocative, this approach has the potential to provide solutions for many dilemmas caused by cross-border admissibility of irregular evidence.

Firstly, as was reported in the opening subsections, member states tend to be more flexible when it comes to foreign irregular evidence and not apply their domestic admissibility rules so restrictively if evidence was gathered abroad. From this perspective, common minimum standards for the admissibility of irregular evidence would upgrade standards instead of limiting them, and
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ensure at least the compliance with EU fundamental rights. Secondly, common minimum rules concerning the admissibility of irregular evidence cannot be disconnected from specific categories of evidence. This means that the fundamental rights to be preserved and, consequently, minimum standards determining admissibility or inadmissibility, would be measure-specific and rights-oriented.

Therefore, the following study examines the possibility of coming to common rules for per se inadmissibility and non per se admissibility of evidence gathered irregularly in the EU cross-border context through telephone tapping and house search. Due to the fact that the fundamental right to which both measures are linked is the right to respect for private life, the research necessarily takes into account the analysis of breaches of Art. 8 ECHR presented in the preceding subsection.

5.1.2.1. The lack of minimum standards for per se inadmissibility

Thus far, neither the EU nor the ECtHR has developed an exclusionary rule of absolute character other than that relating to evidence gathered through torture (Art. 3 ECHR). The case-law of the Court, presented in the preceding paragraphs, makes it clear that violations of Art. 8 ECHR, to which telephone tapping and house search belong, do not entail per se inadmissibility of gathered evidence. None of the existing EU instruments lead one to conclude otherwise. Moreover, abuses or breaches committed within telephone tapping or house search would not have such a significant impact on their probative value as in the case of, for instance, torture or interrogation in the absence of a lawyer.

Hence, the conclusion is that there are no EU standards on the basis of which it can be decided whether irregular evidence gathered through telephone tapping or house search will be inadmissible in any event. Consequently, any evidence irregularly obtained will be considered as not per se admissible and will be examined through minimum standards for non per se admissibility.

5.1.2.2. Minimum standards for non per se admissibility

Due to the lack of minimum standards for per se inadmissibility the next step involves the determination of the standards on the basis of which it can be decided when irregular evidence will be admissible after all. Following the ECtHR, this can be determined by using a balancing test to verify:

- whether the right to defence was preserved, in particular, whether the defence has been presented with adequate opportunity to invoke defence rights in challenging the manner in which the evidence was obtained, as well as its use in the proceedings; and
- whether the conviction was based solely on the irregularly obtained evidence.

This examination will aim at verifying the fairness of the procedure, and the
potentially negative impact of use of irregular evidence on other fundamental rights, in particular the right to defence. Depending on the result of this test, evidence will be deemed admissible after all, or inadmissible. Operating under these standards would ensure the preservation of EU fundamental rights in any event, and the mutual effect of the balancing test due to the fact that fundamental rights are the same elsewhere. That also means that admissibility of irregular evidence would lose its context-sensivity, since it will not be dependent on very different domestic provisions.

6. Minimum standards for admissibility of irregularly obtained evidence: conclusions

This chapter has explored a common approach to mutual admissibility of irregular evidence gathered in an EU cross-border context from telephone tapping and house search. After investigation of domestic legislation, case-law of the ECtHR and the EU’s approach, the research has revealed that mutual admissibility of irregular evidence may be achieved if member states break with locus and forum provisions in this matter and apply common EU standards regarding non 
per se admissibility and 
per se inadmissibility, based on fundamental rights ensured at EU level. It is noteworthy that various investigative measures may differently affect various fundamental rights, therefore minimum standards would also vary depending on the evidence and fundamental right that it may affect. Consequently, not all breaches of fundamental rights will give rise to the same standards for 
per se inadmissibility and non 
per se admissibility.

Telephone tapping and house search carry a risk of violations of the right to respect for private life and, therefore, it is necessary to follow up with the standards related to consequences of violation of this right in relation to the admissibility of evidence. The research has revealed that any breaches of the right to privacy entail 
per se inadmissibility of evidence and, consequently, minimum standards presented in this research only concern minimum standards for non 
per se admissibility. Accordingly, a decision whether or not to recognise evidence gathered in violation of the right to privacy would be made on the basis of two requirements: first, on the preservation of rights to defence, and second, on the impact of the evidence on conviction. Operating under this standard will verify the fairness of the procedure and, depending on the result of the test, will lead to admissibility or inadmissibility of evidence.

The biggest advantage of this approach is that it is not domestic law-oriented and neither requires the authorities to be familiar with the rules of evidence in the other member states, nor to test certain elements of the case with their conformity with foreign rules, since the fundamental rights on which the minimum standards are based are the same elsewhere. However, a critical observer could argue that this approach does not fully overcome the problem of
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the ‘black margin’ of evidence that might still be laundered. In other words, member states could take advantage of more relaxed legislation in the field of evidence-gathering and subsequently launder evidence gathered abroad under non per se admissibility standards, which are usually more lenient than domestic provisions in this matter. However, this approach at least ensures compliance with fundamental EU rights, which currently may be violated in the course of cross-border cooperation. Secondly, even if this cluster of rights is more limited than domestic provisions, this ‘limited scenario’ still prevails over the current ‘no-rules scenario’, which leaves it completely unclear how to proceed with irregular evidence gathered abroad.
IV. Final conclusions: Mutual admissibility of evidence in the EU: legal fiction or a feasible scenario?

The main objective of this study was to find out whether it is feasible to come to various types of common EU minimum standards with a view to enhancing mutual admissibility of evidence gathered from telephone tapping and house search in the EU. The study of minimum standards proves necessary due to the lack of common transparent rules addressing admissibility of evidence gathered in a cross-border context, together with inefficiency of the FRA principle which may make the whole effort towards free gathering of evidence fruitless.

The research was divided into two parts. In the first part minimum standards to enhance per se admissibility were the main focus. The second part was dedicated to minimum standards for admissibility of evidence gathered irregularly.

With regard to the first part of the study, the research has revealed the feasibility of coming to two groups of common EU minimum rules: minimum standards in terms of rules governing evidence-gathering (ratione auctoritatis, ratione materiae, ratione loci, ratione temporis, ratione personae), and minimum standards in terms of procedural rights associated with both measures (right to legal remedies against the measures and right to be notified of the measures). The reason for the selection of these particular standards is that they significantly impact on mutual trust and, moreover, the most differences across member states were reported. According to the research, this goal can be achieved by ensuring the same minimum level of protection against arbitrary interferences, of availability of the measures, and of rules concerning evidence-taking. The outcome of the study is that these standards can be met even if domestic regulations vary from one member state to another. The research also shows that complying with these standards would contribute to enhancing mutual trust between member states and, consequently, result in enhancing per se admissibility of evidence gathered in the EU cross-border context.

Thus, regarding ratione auctoritatis, the research has examined which authorities should be designated to issue the permission to carry out telephone tapping and house search in order to enhance the mutual admissibility of evidence gathered upon these measures. The study has revealed that mutual trust between member states could be enhanced not by introducing common name-tags but by ensuring that authorities appointed by member states guarantee protection against arbitrary and haphazard interferences. This goal can be achieved by ensuring that both measures are reviewed either a priori or a posteriori by a judicial authority, or an authority independent of the issuing body’s activity, as long as they are independent of the executive, impartial
towards interested parties and able to conduct procedure with a judicial character. Ensuring the same standard in this matter could enhance mutual trust between member states, facilitate cooperation, improve the protection against abuses and do away with dilemmas on admissibility of evidence gathered where there are ratione auctoritatis incompatibilities. If operating under this common standard, member states would assume per se that, irrespective of how the foreign issuing authority is named, the commonly agreed, minimum level of protection is ensured.

With regard to ratione materiae, the research investigated the feasibility of setting of common grounds for ordering telephone tapping and house search for the purposes of EU cooperation in criminal matters, in view of enhancing mutual availability of the measures. The study has revealed that a common materiae standard could be effectuated by member states ensuring the availability of telephone tapping and house searches in cases concerning the MR offences. That would mean the allowance of both measures within the entirety of the EU in cases where the offence being investigated relates to one of the MR offences. Operating under this standard could do away with dilemmas as to the allowance of the measure in a cross-border context and result in per se admissibility of evidence gathered accordingly.

With regard to ratione loci the research examined how member states could enhance mutual trust in terms of telephone tapping targeted by location, and what should constitute a 'house' in the light of EU cross-border house searches. Consequently, for telephone tapping the research has proved that it would be helpful if member states were clearly to provide the allowance of telephone tapping targeted by location for purposes of EU cross-border cooperation. That would ensure the mutual availability of telephone tapping targeted by location, enhance mutual trust with regard to the measure and mutual recognition of items gathered upon the measure. Turning to house search, the research has revealed the need to come to a common understanding of what constitute a 'house' in the EU cross-border context. According to the research, a broad understanding of 'house' is recommendable, which encompasses also offices, business premises, vehicles and other places which are not accessible to the public. That could resolve the issues coming from variations of domestic laws, ensure that both measures are carried out under the same provisions, and, as a result, enhance per se admissibility of evidence gathered through the measure.

The ratione temporis chapter has faced the problem of how member states may enhance mutual trust with regard to time limits of telephone tapping and time of house search. The study has revealed that mutual trust between member states could be upgraded by ensuring that all member states provide clear rules as to the maximum duration of the measure and its renewals, and that house searches are carried out at reasonable hours and in accordance with the principles of necessity and proportionality. These provisions could enhance mutual trust between member states as to the procedure under which the measure is
effectuated abroad and result in per se admissibility of evidence, even if gathered upon different time-frameworks.

With respect to ratione personae, the research verified the feasibility of coming to minimum standards with regard to the categories that deserve special protection, targeting third parties, and targeting legal persons. Thus, with regard to lawyers, the research has revealed that mutual trust between member states may be enhanced by introducing clear rules regarding the inviolability of client-lawyer confidentiality and, consequently, the inadmissibility of evidence gained via telephone tapping or searches in pursuit of information which falls within the scope of the right of defence. Regarding journalists and medical professionals, this goal could be achieved by ensuring that the measures are undertaken only if necessary in the circumstances of the case, proportionate to the aim being pursued and, moreover, that the disclosure of protected sources is limited to an unavoidable minimum. With regard to third parties who may be affected by the measures, the research has shown that mutual trust could be enhanced by ensuring clear rules as to the gathering, examination, storage and use of the data concerning third parties and ‘necessary participants’. Finally, if member states agree on targeting a legal person with the measures for the purposes of EU cross-border cooperation, it could overcome dilemmas as to the mutual allowance of the measure and mutual admissibility of gathered items. However, as in the case of third parties, the measures should be accompanied by clear rules for examining, screening and sorting data gathered by chance.

The second group of minimum standards to enhance per se admissibility deals with procedural rights associated with the measures. The research has revealed that the mutual recognition of evidence would be enhanced if member states could trust that the gathering of evidence abroad had not violated the fundamental rights of the persons concerned, and that the cross-border context of evidence-gathering would neither deprive individuals of their rights nor reduce the accessibility and effectiveness of these rights. According to the research, in terms of telephone tapping and house search, the rights which contribute to enhancing mutual trust between member states are the right to legal remedies against the measures, and the right to be notified of the measures.

The outcome of the study is that mutual admissibility of evidence can be enhanced by ensuring that both procedural rights are granted to any individual whose rights were infringed by the measures. It would mean that the person who believes his or her right to privacy was infringed is, firstly, informed about the fact that the measure was carried out, and secondly, granted effective tools to pursue his or her rights, even if the evidence has been collected in the EU cross-border context. It is noteworthy that, according to the research, this common standard can be met even though the manner of the exercise of these rights differs between member states, for example, it is applied at different stages of proceedings, in different form of proceedings (like criminal, civil or administrative proceedings), or it entails different consequences. The key here is
‘effectiveness’, which can be ensured in different ways within the various legal systems across the EU.

Turning attention to the second part, which deals with minimum standards for admissibility of evidence gathered irregularly, the research has shown that, even if all member states were to develop complex and protective domestic approaches to irregularly obtained evidence, these domestic rules would not be scrupulously applied when it comes to evidence gathered abroad. Firstly, this follows from the fact that member states usually lack domestic rules regarding the admissibility of evidence collected abroad. Secondly, it is safe to say that member states are usually more tolerant and flexible in their approaches to foreign items. The lack of transparent rules concerning admissibility of irregular evidence may lead to evidentiary-laundering, violations of fundamental rights envisaged in ECHR or EU Charter, undermine mutual trust and, as a consequence, discourage member states from cooperation. Therefore, the research also investigated minimum standards on the basis of which it can be decided when evidence gathered irregularly in a cross-border context from telephone tapping and house search will be per se inadmissible or non per se admissible. After examining possible scenarios the research has revealed the feasibility of basing common minimum rules on fundamental rights ensured at EU level. In other words, the admissibility of certain evidence could be determined by categories of violation of fundamental rights which bring with them different consequences in relation to the exclusion of evidence. Due to the fact that telephone tapping and house search are linked to the right to respect for private life, it was necessary to verify which violations of this fundamental right would entail per se inadmissibility or non per se admissibility. On the basis of the EU approach to evidence gathered irregularly and the substantial amount of case-law produced by the ECtHR the research has revealed the lack of violations of right to privacy that would lead to per se inadmissibility. Hence, the approach to irregularly obtained evidence drafted in this research only contains minimum standards for non per se admissibility. According to the research, the decision whether irregular evidence can be admissible after all would be made on the basis of the balancing test testing the impact of irregular evidence on other fundamental EU rights, especially the right to defence, in view of determining the fairness of the procedure. Accordingly, operating under non per se admissibility minimum standards would mean breaking with the domestic standards for admissibility of irregular evidence gathered in the EU cross-border context and basing the use of irregular evidence on the balancing test of fundamental rights ensured at the EU level.

In conclusion, this research based on a threefold methodology and focused on two specific investigation methods has proved the feasibility of coming to common EU minimum standards with regard to both measures. Compliance with these common EU minimum standards would enhance mutual trust between member states in terms of evidence-taking, the procedural rights of persons concerned and the preservation of fundamental rights ensured at the EU
level. As this research deals with minimum rules, member states would still be able to extend these standards in order to provide a higher level of protection. However, mutual recognition of evidence across the EU would be achieved by the adoption of common minimum standards, irrespective of upgraded domestic rules.

The outcome of the study on telephone tapping and house search gives rise to two further questions that are relevant for future policy. The first question consists of whether many more measures need to be investigated in order to come to common minimum standards and, if so, which ones. The second question is how to make these standards workable across the EU. Undeniably, there are more types of measures that require the diversity of domestic regimes to be overcome and the adoption of various minimum standards with a view to enhancing mutual admissibility of evidence. These types of measures should be selected on the basis of their intrusive character, questionable admissibility of evidence gathered, or expected differences between member states that could potentially obstruct admissibility of evidence. Given the widespread development of new technologies, these standards could in particular relate to electronic evidence. The investigative measures that deserve to be ruled out at EU level could be subsequently collected in one instrument and adopted by means of a directive regarding minimum standards for gathering of evidence with a view to enhancing its mutual admissibility. If successful, these minimum standards could finally shape the so far nonexistent concept of mutual recognition of evidence in criminal matters in the EU.
Annexes: Overviews of the criminal procedure systems in the member states investigated in the research

1. England and Wales

The English common law system is the mother of all common law systems and one of only three jurisdictions in the developed world without a written constitution\textsuperscript{466}. Despite the fragmentation, multiplicity of actors and general complexity of the criminal justice system in England and Wales, one can indisputably notice that the process is adversarial and based on well-established rules of evidence\textsuperscript{467}. English criminal proceedings are divided into the pre-trial phase and the trial. Collection of evidence is exercised at the pre-trial phase, both by the police and the defendant\textsuperscript{468}. It is worth noting that in England and Wales the police enjoy considerable powers and extremely wide discretion in the investigation of crime. The police have a right to act independently and, in principle, do not have to report their actions to the public prosecutor\textsuperscript{469}. The main sources of criminal procedure in England and Wales are scattered across numerous statutes and examples of case law, however, the most significant areas of criminal procedure with regard to evidence are regulated in the Criminal Justice Act 1987, Criminal Procedure Rules 2005, the Regulation of Investigatory Powers Act 2000 and the Police and Criminal Evidence Act 1984.

It is worth noting that there is no right to privacy in English and Welsh law, other than as provided by Art. 8 ECHR\textsuperscript{470}. Until \textit{Malone v. UK}, telephone tapping in England and Wales was carried out despite the fact that there was no relevant law\textsuperscript{471}. Nowadays, the use of interception of telephone communications is regulated by the Regulation of Investigatory Powers Act 2000 (hereafter: RIPA). According to the RIPA, interception may carried out with the consent of one party\textsuperscript{472} or authorised by warrant without the knowledge of either\textsuperscript{473}. It is

\textsuperscript{470} P. DARBYSHIRE, \textit{Criminal Procedure...}, p. 79.
\textsuperscript{472} Section 3 Regulation of Investigatory Powers Act 2000.
\textsuperscript{473} Section 5 Regulation of Investigatory Powers Act 2000.
noteworthy that intercept evidence is not admissible in courts and that interceptions are permissible only for investigative purposes. The power to enter and search premises is set out in the Police and Criminal Evidence Act 1984 (hereafter: PACE), however, some alternative search powers, supplementary to the PACE, are provided in the Criminal Justice and Police Act 2001, Part 2 (Code B 7) and Terrorism Act 2000, Schedule 5, Part I (Code B 6.14–6.15).

2. France

The French system of procedure can be called mixed, a ‘hybrid model of procedure that represents a successful fusion of the best elements of both inquisitorial and adversarial practice’. The French pre-trial phase comprises two procedures: the ordinary preliminary inquiry and the inquiry of flagrant felonies. The organisational structure of the pre-trial stage in France is determined by the nature of the offence. Separation of procedures is linked with the separation of functions and authorities between the police, the prosecutor and the examining magistrate. It is worth noting that French criminal procedure provides for a very strong judicial role in the pre-trial phase. The main source of criminal procedure law in France is the Code de Procédure Pénale (hereafter: CCP). Collection of evidence is exercised by the State Authority, which includes the official investigating police, the prosecutor and the examining magistrate.

There are no precise references in the French Constitution to the protection of communications. Moreover, France had no rules in this area until 1990. After the Strasbourg cases (Hudvig v. France, Kruslin v. France), provisions dealing with the interception of communications were introduced in § 100 et seq. CPP.

Although there is no express reference in the French Constitution, the inviolability of the home is protected as a constitutional value. Nevertheless, the French Constitutional Council declared as constitutional a law permitting authorised agencies to enter and search premises if the balance between the inviolable home and the fight against crime renders it necessary. It has to be

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478 P. HAUCK, Judicial Decisions..., p. 25.
479 Ibid., p. 43.
481 Ibid., p. 152.
stressed that the CCP contains various provisions on searches of premises, depending on the nature of the crime and the pre-trial procedure. The main legal basis for the measure is art. 56 et seq CCP, however, the CCP also provides a less protective procedure on the issue of organised crime (art. 706–789 CCP)\textsuperscript{482}.

3. Ireland

The adversarial model of Irish criminal procedure has developed from a common law tradition, however, many important practices and rules are founded on constitutional and statutory principles. The criminal procedure is not fully set down in any one document. The basic law of the Irish legal system is the 1937 Constitution, which includes strong provisions with reference to evidence obtained in breach of constitutional law\textsuperscript{483}. The main sources of Irish criminal procedure are the Criminal Procedure Act 2010, the Criminal Evidence Act 1992 and the Criminal Justice (Surveillance) Act 2009.

When examining the Irish regulations it is worth noting that the Irish common law system has in general more restrictive rules governing the admissibility of evidence than those in civil law systems\textsuperscript{484}. Indeed, its evidentiary rules are essentially exclusionary in nature\textsuperscript{485}. The rules are so significant that in some cases more time is spent arguing over the admissibility of evidence than establishing the guilt of the accused\textsuperscript{486}.

The competent body to conduct a criminal investigation in Ireland is the Garda Síochána. Judges have no function in the investigation of offences other than issuing warrants, including tapping and search warrants. Evidence gathered by either telephone tapping or house search, if collected in accordance with legal and constitutional rights, may be used as evidence during the trial\textsuperscript{487}.

Telephone tapping in Ireland is permissible within covert surveillance. The relevant provision that allows listening to conversations or making a recording of them is the Criminal Justice (Surveillance) Act 2009\textsuperscript{488}. According to the Act, evidence obtained as a result of surveillance may be admitted as evidence in criminal proceedings\textsuperscript{489}. This Act applies to members of the Garda Síochána, members of the defence forces and officers of the Revenue Commissioners,\textsuperscript{482} Ibid., p. 154.\textsuperscript{483} A. RYAN, Ireland [in:] Toward a Prosecutor for the European Union. Volume 1. A Comparative Analysis, K. LIGETI (ed.), Hart Publishing 2013, p. 342.\textsuperscript{484} J. HAMILTON, Mutual Assistance in Criminal Matters in Ireland and the Proposed European Evidence Warrant [in:] P.J. CULLEN (ed.), Dealing with European Evidence in Criminal Proceedings: National Practice and European Union Policy, ERA Forum, Special Issue 2005, p. 67.\textsuperscript{485} M. BUTLER, Criminal litigation, Oxford 2009, p. 33.\textsuperscript{486} P. O’MAHONY, Criminal Justice in Ireland, Dublin 2002, p. 43.\textsuperscript{487} A. RYAN, Towards a System…, p. 85.\textsuperscript{488} Besides telephone tapping, such surveillance is to include monitoring and observing a particular person or group of persons or monitoring or making a recording of places or things, by or with the assistance of surveillance devices, Section 1 Criminal Justice (Surveillance) Act.\textsuperscript{489} Section 14 Criminal Justice (Surveillance) Act 2009.
however, for the purposes of this research, further analysis deals only with the carrying out of the measure by the gardaí.

The inviolability of premises is ensured in the Irish Constitution, nonetheless this right may be interfered with in certain cases and in a manner specified in law. In Ireland, however, there are numerous acts providing individual procedures relating to specific offences. The general power to issue a search warrant in respect of evidence relating to the commission of an arrestable offence is set out in the Criminal Justice (Miscellaneous Provisions) Act 1997. A search warrant can also be based on the Misuse of Drugs Act 1977, the Terrorism Act 2000 and the Child Trafficking and Pornography Act 1998.

4. The Netherlands

The primary source of Dutch criminal proceedings is the Code of Criminal Procedure (Strafvordering 2001, hereafter: Sv). However, many norms of criminal procedure are set out in special laws. The private lives of individuals are protected by Art. 10 of the Dutch Constitution, which provides the right to respect for private life, except for limitations on this right provided by the law. More specific rights with regard to the integrity of homes and the confidentiality of communications are formulated in Arts. 11–13 of the Constitution. Measures such as telephone tapping and house search may be undertaken during the pre-trial phase, which has an inquisitorial character. The results of an investigation, including the results of telephone tapping and searches, consisting of written files, may be used as evidence in a trial. The competent body to investigate a case is the police, under the supervision of the prosecutor, however, the investigative judge also plays an important role at this stage, because he/she has the authority to authorise investigative procedures – such as searches of premises and telecommunication intercepts. The investigating judge guarantees the equality of arms between the defence lawyer and the public prosecutor.

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490 Art. 40.5 of the Irish Constitution.
The measure is set out within the rules for secret, special powers of investigation, allowed only on the suspicion of a criminal offence that has been perpetrated or on suspicion that organised criminal offences have been planned and perpetrated. The central provisions with regard to the measure are set out in Art. 126m et seq. Sv.

The ability and power to enter and search premises in the Netherlands is set out in Art. 110 Sv. It is worth noting that besides the rules laid down in the Sv, there are special provisions with regard to the measure in the Algemene Wet op het Binnentreden (The General Act of Entering Premises, hereafter: GAEP). The GAEP deals especially with the situation where investigating officers enter a premises only to look around, without searching it. However, evidence gathered under the GAEP is not per se inadmissible.

5. Poland

The main legal source of criminal procedure in Poland is the 1997 Code of Criminal Procedure (Kodeks Postępowania Karnego, hereafter: KPK), radically modified by two contradictory reforms, firstly in 2015 and secondly in 2016. The main purpose of the 2015 reform was to change the fundamental structure of the criminal process, more specifically, to replace the central role of the court with actions undertaken by the parties, especially the public prosecutor, with significant limitation of the court’s evidentiary initiative. However, the 2016 amendment shifted back most of provisions introduced in 2015 and re-established a more inquisitorial model of criminal procedure.

Polish criminal proceedings are composed of two main stages, the preparatory proceedings and the trial. The organisational structure of the pre-trial stage in Poland is determined by the nature of the offence and may take place in the form of an investigation or a less formal inquiry. The authorities that conduct the investigative proceedings are the public prosecutor and the police. There is no investigative judge in Poland, however, some specific decisions and
investigative measures taken at the pre-trial stage are reserved for the court, e.g. arrest or telephone tapping. Evidence collected during the pre-trial stage may be subsequently used in the trial.

Protection of communications in Poland is ensured by Art. 49 of the Polish Constitution. Any limitations thereon may be imposed only in certain cases and in a manner specified by statute.

There is a two-tiered regulation of telephone tapping in Poland. The core legal basis with regard to the measure is Chapter 26 of the KPK which deals with surveillance and telephone tapping. However, telephone tapping is also permissible in Poland as part of covert surveillance based on secret methods of investigation regulated by the Police Act of 6 April 1990. This ‘police surveillance’ is, however, permitted only upon judicial authorisation. This unnatural division of methods of investigation has been widely criticised in the Polish jurisprudence, especially after introduction of the rule that all information obtained as a result of police surveillance may be admissible at trial (art. 19.15 of the Police Act. This research deals solely with the provisions laid down in the KPK.

The inviolability of premises is ensured in Art. 50 of the Polish Constitution. Any search of a house, premises or vehicle may be made only in certain cases and in a manner specified by statute. Searches of houses are extensively and precisely regulated in the KPK. It is worth noting that, as in the case of telephone tapping, the Polish criminal code precisely sets out the rights of individuals affected by the measure, including interlocutory appeal.

6. Spain

The basic legal text regulating criminal procedure in Spain is the 1882 Criminal Procedure Act (Ley de Enjuiciamiento Criminal, hereafter: LECrim). It is worth noting that the provisions dating from the nineteenth century are expected to be replaced with a complex amendment. Moreover, new regulations concerning telephone tapping are provided by the Organic Law 13/2015, October 5 (in force since December 2015) which regulates technology-related investigation measures. In addition to the LECrim, there are other laws that also regulate certain aspects of the Spanish criminal procedure, among others, the 1995 Trial by Jury Organic Law and the 1985 Judicial Powers Organic Law. In Spain, case law is not of itself a source of law in its own right, however, it plays a significant role in the interpretation and meaning of certain, unclear
rules, especially in order to fill some legal lacunae and to ‘rectify’ the meaning of
some over a century old provisions, as well. It is worth nothing that both Courts
have been noticeably influenced by the case-law of the E Ct HR\textsuperscript{510}.

There is a strong separation between the investigating and prosecuting
authorities in Spain. However, the investigative stage is supervised by the
investigating magistrate (\textit{Juzgados de Instrucción}).

The right to privacy in communication is ensured in the Spanish Constitution
(Art. 18.3 CE), however, the same article provides that it can be limited upon a
judicial decision. Accordingly, relevant provisions with regard to telephone
tapping are regulated in Arts. 588 ter a) to 588 ter m) of the LECrim.

The inviolability of premises is laid down in the Spanish Constitution, except
in cases of flagrant crime (Art. 18.2 CE). The main provisions regarding searches
of premises are regulated in Art. 545 \textit{et seq.} LECrim.

\footnotesize{\textsuperscript{510} R. VOGLER, B. HUBER (ed.) \textit{Criminal Procedure in Europe}, Berlin 2008, p. 549-551.}
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Any effort to gather evidence may prove pointless without ensuring its admissibility. Nevertheless, the EU, while developing instruments for smooth gathering of evidence in criminal matters, is not taking much effort to enhance its admissibility. Due to the lack of common rules in this matter, gathering and use of evidence in the EU cross-border context is still governed by the domestic law of the member states concerned. This may lead to situations where, given the differences between legal systems across the EU, evidence collected in one member state will not be admissible in other member states. Due to the fact that the Lisbon Treaty opened the possibility to adopt minimum rules concerning, among other things, the mutual admissibility of evidence, this research investigates the concept of minimum standards designed to enhance mutual admissibility of evidence in the EU. Through a study of two investigative measures, telephone tapping and house search, the author examines whether coming to various common minimum standards is feasible and whether compliance with these standards would finally shape the as yet nonexistent concept of the free movement and mutual recognition of evidence in criminal matters in the EU.

Essential reading for both national and EU policy makers, scholars and practitioners involved in cross-border gathering of evidence in the EU.

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