



## Future Options for Free Movement of Evidence

# Common EU Standards for Telephone Tapping and House Search

Seminar 'Applying the European Investigation Order'  
ERA, Cracow, 1-2 March 2018

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Co-funded by the Justice Programme of the European Union 2014-2020



**I. CENTRAL RESEARCH QUESTION:** Is it feasible to come to various types of common EU minimum standards in view of enhancing its *per se* admissibility?

## **II. SCOPE OF THE STUDY**

- 2 investigative measures
- 3 methodological techniques:
  - comparative study of 6 legislations (England and Wales, Ireland, the Netherlands, France, Poland, Spain)
  - investigation of CoE and EU legislation and policy documents
  - analysis of the case-law of the ECTHR



### III. OUTCOME OF THE STUDY

First step: reporting domestic incompatibilities that may negatively impact upon mutual admissibility:

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



1. Minimum standards to with regard to rules governing telephone tapping and house search
  - rules governing evidence-gathering related to: *ratione auctoritatis, ratione materiae, ratione loci, ratione temporis* and *ratione personae*
  - procedural rights related to the measures: the right to be notified of the and the right to legal remedies against their application
  - approaches to admissibility of evidence gathered irregularly



## ***Ratione auctoritatis***

### Problems:

- both measures may seriously affect the right to respect for private life -> necessity, proportionality, adequate protection against abuses of power
- different member states empower different authorities to order the measures

### Proposed standard:

- common requirements for competences of authorities designated to issue the measures and their capability of ensuring protection against abuses of power
- 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



## ***Ratione materiae***

Problem: different grounds for evidence taking -> variety of provisions may hamper smooth evidence-gathering

Proposed standard:

- applying the concept of 'alternative use of the 32 MR offences list' -> introduction of this approach would ensure the mutual admissibility of both measures in cases where the offence being investigated relates to one of these offences
- in cases not concerning the MR offences, the member states might still subject the execution to the domestic admissibility requirement



## ***Ratione loci***

Problems: 1) different approaches to availability of telephone tapping where the key factor is the location of the telephone; 2) what constitutes a 'house' in the context of EU cross-border evidence-gathering

### Proposed standards:

- member states clearly permit **telephone tapping** targeted by location, if it is necessary for the purposes of EU cross-border cooperation
- common definition of what constitutes a „**house**“, based on a reasonable expectation of privacy and on the inaccessibility of the place to the public



## *Ratione temporis*

### Problem:

- different time-frameworks for both measures

### Proposed standards:

- adopting straightforward rules regarding the time limits of **telephone tapping**, namely, maximum duration and conditions for its renewal
- 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





## ***Ratione personae***

Problems: 1) the use of the measures is usually restricted to a limited category of persons; 2) domestic provisions provide special rules relating to the gathering of evidence from specific persons or professions

### Proposed standard:

- specific provisions for legal, journalistic and medical privileges
- clear rules as to gathering, examination, storage and use of the data concerning third parties and 'necessary participants'
- targeting of legal persons with the measures



## 2. Right to legal remedies + right to notification

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

Ensuring that the cross-border context of evidence-gathering neither deprives individuals of their rights nor reduces the accessibility and effectiveness of those rights



## Right to legal remedies + right to notification

Problem: availability and manner of challenging the investigative measures depend on the law of the member states (art. 14.1 EIO)

### Proposed standard:

- 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
- 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



### 3. Irregularly obtained evidence: a stalemate?

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



Problems:

- lack of domestic rules regarding admissibility of evidence collected abroad
- lack of transparent EU rules regarding the lawfulness of the way evidence was gathered

That may result in:

- risk of evidence-laundering and violations of fundamental rights
- intensification of mutual distrust when it comes to cross-border evidence-gathering and its use



Solution: basing the use of irregular evidence on commonly agreed standards for:

- **non *per se* admissibility**
- ***per se* inadmissibility**

relating to fundamental rights enshrined in the ECHR and the EU Charter.

Applying that concept would mean that the decision whether or not to recognise irregular evidence would be determined by the consequences of violation of a particular fundamental right.



The case of telephone tapping and house search:

<i>Per se</i> inadmissibility	Non <i>per se</i> admissibility
<ul style="list-style-type: none"><li>- lack of exclusionary rule of absolute character (ECHR, EU Charter)</li><li>- marginal impact of the breaches on probative value</li></ul>	<p>Balancing test to verify:</p> <ul style="list-style-type: none"><li>- whether the right to defence was preserved</li><li>- whether the conviction was not based solely on the irregularly obtained evidence</li></ul>
<b>LACK OF PER SE INADMISSIBILITY RULE</b>	<b>DEPENDING ON THE RESULT EVIDENCE WILL BE RECOGNISED AS ADMISSIBLE AFTER ALL OR INADMISSIBLE</b>



## CONCLUSIONS:

- the research has proved the feasibility of coming to common EU minimum standards with regard to both measures
- complying with these common EU minimum standards would be helpful in enhancing mutual trust between member states in terms of evidence-taking, the procedural rights of persons concerned and the preserving of fundamental rights ensured at the EU level
- for irregularly obtained evidence, operating under commonly agreed exclusionary rules would enhance the preservation of EU fundamental rights in any event