UNIVERSITY OF MISKOLC
FACULTY OF LAW
DEÁK FERENC DOCTORAL SCHOOL OF LAW

dr. Márta Ábrahám

COLLECTION AND ASSESSMENT OF EVIDENCE IN CROSS-BORDER CRIME IN THE EUROPEAN UNION

Theses of the PhD dissertation

MISKOLC
2024

TABLE OF CONTENTS

I. Purpose, subject and structure of the PhD dissertation

"It is an inherent duty of the modern state, in exercising its right to punish, to detect crimes and to punish the perpetrators of crimes through its organs established for this purpose."[1]Respect for human rights is, however, a pillar of the European Union (EU): it is a condition of accession and part of the EU's core values. According to Article 2 of the Treaty on the Functioning of the European Union (TFEU), "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".
The second part of the sentence in Article 67(1) states that in this area "fundamental rights and the different legal systems and traditions of the Member States shall be respected".

Issues of admissibility of evidence in criminal proceedings have become particularly important in the EU since the creation of the area of freedom, justice and security.

Some 13.6 million Europeans live permanently outside their home country. 10% of Europeans have lived and worked abroad at some point in their lives and 13% have gone abroad for education or training.[2] These figures show how important it is to ensure adequate and effective action for the rights of those who are prosecuted in their own country or while travelling or living abroad.

"Based on the principle of mutual recognition and the effective fight against cross-border crime, one of the means of ensuring the cross-border use of evidence is the establishment of common standards and common guarantees, which can result in the creation, maintenance and strengthening of mutual trust in the field of criminal law, which is the ultimate part of the sovereignty of the Member States."[3] Mutual recognition, which is the cornerstone of criminal cooperation, is based on the presumption of mutual trust, i.e. that Member States trust each other's legal systems, but mutual trust can be undermined by various problems, mostly of a practical or political nature, and some Member States therefore face specific difficulties in the effectiveness of their criminal justice systems.

The EU has recently introduced a number of tools to facilitate the circulation of evidence, but has neglected to look at how the admissibility of evidence can be checked.

National prosecution authorities often investigate offences where a part of the evidence is located abroad (the witness is abroad, the offence was committed by passing through foreign territory, the offender moved across borders, or the offence was committed in a digital environment, etc). In accordance with Art. 6 of the European Convention on Human Rights

[1] Farkas Ákos: A bizonyítékok gyűjtésére és értékelésére vonatkozó szabályok az EU-ban. In: Az Európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai különös tekintettel az adócsalás, a korrupció, a pénzmosás és a büntetőjogi compliance nemzeti szabályozására, valamint a kiberbűnözésre. (Szerk.: Farkas – Dannecker – Jacsó), Wolters Kluwer Hungary, Budapest, 2019. 488.
[2] Libor Klimek: Mutual Recognition of Judicial Decisions in European Criminal Law. Springer, 2017. 638.
[3] Kis László: Leplezett eszközökkel kapcsolatos bizonyítási tilalmak az európai és a hazai joggyakorlatban – a kölcsönös bizalom elve a tagállami bíróságok és az európai bíróságok párbeszédében. Miskolci Jogi Szemle XIV. évfolyam 2019. 2. különszám 1. kötet 36.

(ECHR) and Arts. 47 and 48 Charter of Fundamental Rights of the European Union (CFR), it must be ensured that evidence gathered in cross-border investigations does not lead to its unlawful or unfair use. Providing for both efficiency and fundamental rights protection in transnational cases is demanding, however, since each Member State has its own rules on investigative measures and the exclusion of evidence. At present, the rules on the collection, use, and admissibility of evidence are left to the laws of national criminal procedure of the Member States. The EncroChat case in recent years has also highlighted the problems of access to and use of criminal evidence in a cross-border criminal case. Ensuring efficiency and the protection of fundamental rights in cross-border cases is a complex task, as each Member State has its own rules on investigative measures and the exclusion of evidence. At present, the rules on the collection, use and admissibility of evidence are determined by the national criminal procedural laws of the Member States.

According to a communication from the European Police Office (Europol), the dismantling of the EncroChat encrypted telephone network has led to the prevention of violent attacks, murders and attempted murders, corruption and large-scale drug trafficking, among other things, and to the acquisition of a large amount of information by organised crime groups. The investigation was initiated by the French police criminal procedure of the Member States. In 2017, in the case of EncroChat, after discovering that criminal groups were using the company's communication channel. The information obtained during the investigation, which was initiated by the French authorities and subsequently led by the Dutch competent authorities, was shared between EU Member States and with several non-EU countries. Based on the data collected, 6,558 suspects, including 197 particularly wanted criminals, were arrested three years after the encrypted communication system was hacked.

Ensuring efficiency and the protection of fundamental rights in cross-border cases is a complex task, as each Member State has its own rules on investigative measures and the exclusion of evidence. At present, the rules on the collection, use, and admissibility of evidence are left to the laws of national criminal procedure of the Member States.

"Three questions rightly arise when trying to prove crimes involving several EU countries:
- which Member State has jurisdiction to prosecute the offence;
- how, under what rules, should the detection and proof of the offences be carried out;
- how evidence and evidence obtained in another Member State can be used in the courts of the State having jurisdiction."[4] The importance of the rules of evidence and the applicable law is therefore even more important than before.

The national laws of criminal procedure of the Member States attach differing consequence as to the unlawful gathering and/or use of evidence and that several national laws do not contain any specific rules at all as to where the evidence was obtained (i.e. no special rules for evidence obtained abroad). However, the resulting problems and the appropriate measures to address them are assessed differently. There are parallels and similarities, but no two systems are the same.

The question is: what problems does cross-border evidence gathering pose, i.e. how can evidence gathered in one Member State be used in another? What are the obstacles to the use

[4] Farkas Ákos: A bizonyítékok gyűjtésére és értékelésére vonatkozó szabályok az EU-ban. 489.

of foreign evidence? How does the principle of mutual recognition work? What principles of evidence can be developed? How is evidence collected by joint investigation teams used? How does Hungarian judicial practice relate to foreign evidence?

The Treaty on the Functioning of the European Union (TFEU), in article 82(2), provides for the possibility for the European Parliament and the Council, by means of directives, to adopt minimum rules on the mutual admissibility of evidence.

It would therefore be advisable to establish clear – and if possible, also uniform – criteria governing the admissibility or exclusion of certain cross-border evidence. Again, there is an obvious need for clearer guidelines at EU level.

With all this in mind, my aim was to examine what this current "fragmented" system means, and I considered it important to provide a comprehensive comparative legal analysis of the issue. What are the factors that hinder the effectiveness of cooperation? The focus of the research was - in part ¬ to explore the historical antecedents of fragmented legal systems, and to present a historical overview of European criminal procedural systems. The dissertation not only examines the issues, periods and characteristics of the historical antecedents, but also includes a discussion of the present-day specificities and differences between the inquisitorial and the accusatorial procedural systems. I also examine the principle of mutual recognition in the light of four principles of EU law which together affect the meaning and scope of the principle of mutual recognition, namely the principles of proportionality, subsidiarity, sincere cooperation and mutual trust. I will also outline the legal basis for the principle of mutual recognition in the TFEU. I will also examine how this principle has evolved in secondary EU legislation on judicial cooperation in criminal matters. It is also necessary to address the need to strengthen procedural rights in criminal proceedings.

I will also examine the nodes of the present for which a comparative legal analysis may lead to useful results. I will examine the rules of evidence, including the fate and use of legally and illegally obtained evidence, and analyse the principles and legal context on which cross-border gathering of evidence is based. In parallel, I will try to identify problems and obstacles to the admissibility of evidence. Given the lack of legal standards in EU law on the collection, use and exclusion of evidence, the question arises to what extent common standards can be derived from the human rights jurisprudence of the two European courts (the European Court of Human Rights and the Court of Justice of the European Union) and whether these standards can be used as a basis for future harmonisation. The Council of Europe and its judicial body, the European Court of Human Rights in Strasbourg (ECtHR), play a special role in the development of standards for the exclusion of evidence. In this respect, one segment of the analysis focuses on the ECtHR's jurisprudence on exclusionary rules, focusing on issues such as the different types of evidence obtained unlawfully and human rights violations.

"The Court of Justice of the European Union (hereinafter 'CJEU') has a decisive role in interpreting EU law, both in terms of the consistency of specific EU and national rules and their fundamental rights implications in the light of the Charter of Fundamental Rights. In the latter case, the case-law of the CJEU may also develop standards which can serve as a common basis and guidance for the interpretation of specific provisions of EU and national law."[5] I give an

[5] Kis László: Leplezett eszközökkel kapcsolatos bizonyítási tilalmak az európai és a hazai joggyakorlatban – a kölcsönös bizalom elve a tagállami bíróságok és az európai bíróságok párbeszédében. 37.

overview of what happens to evidence obtained abroad in another Member State and in domestic criminal proceedings. The analysis will also look at whether EU legal solutions exist to address the challenges that arise. My aim is also to explore whether there is a need at EU level and, if so, why there is a need for EU-level rules on evidence and in which areas any such rules might be needed. The starting point of the dissertation is that in the EU Member States, with their different legal systems and traditions, the laws on the gathering of evidence and the national laws on the admission or exclusion of evidence are only partially harmonised and vary widely. Each EU Member State, due to its sovereignty, acts according to its own rules of criminal procedure and evidence. The key question for the EU criminal justice system is how to make it work more efficiently in the absence of uniform rules or a common code.

Differences in the rules of investigation and judicial procedure can lead to the loss of relevance of evidence as a result of the results, when, in Tremmel's words, criminal cases are characterised not by an abundance of evidence but by a scarcity of evidence. Differences between Member States' rules can prevent the mutual admissibility of evidence and its use. The outcome of a trial is largely determined by the results of the preparatory phase of the gathering of evidence.[6]

Hypothesis 1.

The different national regulations in the Member States clearly show the pitfalls of legal diversity and complexity resulting from differences in the principles, rules and practices governing the gathering of evidence: they undermine the effectiveness of criminal law cooperation, hinder the effective prosecution of cross-border crime, jeopardise the success of proceedings and may infringe fundamental rights.

Hypothesis 2.

One of the means of ensuring the admissibility of evidence obtained in another EU Member State is the establishment of common basic standards and common guarantees, which can lead to the maintenance and strengthening of mutual trust in the field of criminal law, which is the ultimate basis of mutual recognition of the sovereignty of the Member States.

Overall, it can be concluded that the dissertation has a definite aim to highlight possible elements of future EU rules on cross-border evidence by examining the above issues.

In order to achieve the objectives set out above, the thesis discusses in seventeen chapters the main areas of evidence collection and assessment in cross-border crime in the European Union. The first chapter aims to present the introductory ideas, the hypotheses and the research methodology. In this context, I have pointed out that the different national regulations in the Member States highlight the fact that the legal diversity and complexity resulting from the differences in the principles, rules and practices governing the taking of evidence harbours

[6] Ábrahám Márta: Az osztrák büntetőeljárás reformjának egyes kérdései. Tanulmányok Horváth Tibor Professor Emeritus 75. születésnapjára, Bíbor Kiadó 2002., 11.

pitfalls: it impairs the effectiveness of criminal law cooperation, hinders the effective prosecution of cross-border crime, jeopardises the success of proceedings and may infringe fundamental rights.

The second chapter of the dissertation deals with the theory of evidence, and in this context I examined the definitions of the concept of evidence, the purpose, task and object of evidence, the concepts of the fact to be proved, the fact to be proved and the evidence.

I also considered it indispensable to analyse the factors that hinder the effectiveness of cooperation. The focus of the research was – in part – to explore the historical antecedents of the fragmented legal systems, and to present the historical background of European criminal procedural systems. The dissertation not only examined the historical background, periods and characteristics, but also included a discussion of the present-day characteristics and differences between the inquisitorial and accusatorial procedural systems (Chapter 3).

In chapter four, I examined the principle of mutual recognition in the light of four principles of EU law which together affect the meaning and scope of the principle of mutual recognition, namely proportionality, subsidiarity, sincere cooperation and mutual trust.

Furthermore I examined how this principle appeared in the field of cooperation in criminal matters, and then I analysed the relationship between the principle of mutual recognition and the evidence.

In the next chapter, I addressed the need to strengthen the rights in criminal proceedings, including the right to interpretation and translation, the presumption of innocence and the right to be present at trial.

Then, in chapter six, I set out the rules for gathering and evaluating evidence in the European Union, with a particular emphasis on national approaches to the admissibility and exclusion of evidence, ranging from no admissibility test to broad judicial discretion. I tried to outline, taking a few examples and comparing the rules of evidence applicable in the EU member states, including the rules on the further fate and use of legally and illegally obtained evidence, presenting the domestic regulations as well.

Furthermore, in chapter seven I also analysed the principles and legal environment on which cross-border gathering of evidence is based. In parallel, I have attempted to identify the problems and obstacles to the admissibility of evidence in Chapter 10 of this dissertation.

In the absence of common minimum rules in EU law on the collection, use and exclusion of evidence, I examined the extent to which common standards can be derived from the human rights jurisprudence of the two European courts (the European Court of Human Rights and the Court of Justice of the European Union) and whether these standards can be used as a basis for future harmonisation (Chapter 8). The Council of Europe and its judicial body, the European Court of Human Rights in Strasbourg, play a special role in developing standards for the exclusion of evidence. In this context, one of the segments of the study was the ECtHR's jurisprudence on exclusionary rules, focusing on issues such as the different types of evidence obtained unlawfully and violations of human rights.

The digitalisation of every aspect of life, the use of the web, makes it easier to commit crimes and harder to detect them, making electronic evidence an increasingly important element in criminal proceedings. The digitisation of the last five years has in itself led to a significant trans-

nationalisation of criminal cases. This has justified the eleventh chapter of this dissertation, which is devoted to the dilemmas related to electronic evidence.

The analysis also extended to the functioning of joint investigation teams (Chapter 12), which undoubtedly have an added value compared to traditional forms of police and judicial cooperation: they allow for the direct collection and exchange of information and evidence without the need to resort to traditional channels of mutual legal assistance.

In Chapter 13, I analyse the impact of differences in criminal procedures on mutual recognition and cross-border cooperation.

Chapter 14 (Conclusions) of this dissertation presents, in a critical perspective, the conclusions and proposals concerning the EU legal instruments whose adoption is essential for a smoother and more effective system of judicial cooperation within the EU, towards the development of an area of freedom, security and justice.

Finally, I have presented and critically analysed the European Law Institute's proposal for a directive on the mutual admissibility of evidence and electronic evidence in criminal proceedings, pointing to the urgent need to adopt minimum standards in key areas of admissibility of evidence. This is followed by a summary in Hungarian and English.

II. A description of the research methodology

Due to the nature of the research, the scientific method of the research is norm analysis and hermeneutic content analysis, as well as grammatical and taxonomic analysis of the law as it is constituted, linked to the norm text.

In order to support the hypotheses formulated above and to answer the research questions posed, I used established jurisprudential methods, such as historical, analytical and comparative methods.

In addition to exploring, interpreting and reflecting on the relevant literature, the comparative analysis pays particular attention to the differences between national (Member States') criminal procedural laws, especially in areas where differences between national laws affect cross-border evidence and the "free movement" of evidence. These include rules on the admissibility of evidence gathered in another Member State, rules on investigative acts, the principle of equality of arms in transnational investigations, ECtHR and CJEU case law.

After defining the objective conceptual elements and study parameters, a comparative study of the judicial systems of the so-called model countries is carried out and conclusions are drawn by interpreting the results.

It is based mainly on the exploration and evaluation of primary sources (laws, EU legal documents: EU treaties, conventions, directives, framework decisions relevant for the admissibility of evidence) and partly on the collection, processing and comparison of secondary literature.

III. Summary of the research results

The present dissertation was a thought experiment to demonstrate that comparative criminal procedural law analysis is of paramount importance for the evaluation and further development of EU criminal justice cooperation, and that international experience can provide many lessons. It has been shown that, although the rules of evidence are based on the same principles in all Member States, they differ considerably in detail.

Most legal systems do not have a consistent and comprehensive regulation on transnationalcriminal proceedings and rules on the applicable law or conflicts of law rules are largely missing. With regard to evidence obtained abroad, the practice varies greatly. In some cases it is admitted without any further control, whilst on other occasions it is subject to exhaustive domestic filters in order to check its compliance with domestic legal principles and sometimes also with the statutory provisions of theexecuting state. This patchwork of rules, principles and practice does not only increase the complexity of transnational justice, but undoubtedly has a negative impact on the protection of fundamental rights and the efficiency of international judicial cooperation, hindering also the free circulation of evidence and its admissibility at trial.[7]

However, EU law does not regulate the admissibility of evidence in criminal proceedings. Although Article 82(2)(a) TFEU has empowered the European Union to carry out a minimum harmonisation on the mutual admissibility of evidence, this has not yet been done. Under Article 82(2)(a) TFEU, the EU has the power to adopt a directive laying down minimum standards for mutual recognition, while respecting the principles of subsidiarity and proportionality. It can be seen that only the second sentence of Article 14(7) of the EIO Directive mentions the evaluation of evidence obtained through an EIO. „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."

However, the EIO Directive does not contain rules on the admissibility of evidence or the exclusion of evidence. Neither does the recent Commission proposal for a European Evidence Warrant for electronic evidence in criminal matters (draft Regulation on e-evidence), which also maintains the status quo and only addresses the admissibility of certain types of electronic evidence in the context of exemptions or privileges (Article 18 of the draft Regulation). By simply restating the principle of forum regit actum, the EU legislator has not solved the problems already mentioned. Practice shows that there are still many reservations about the application of the lex fori. The failure to apply the lex fori and the potentially wide discretion of the judge to decide whether to admit illegally obtained evidence is significant in practice and may lead to a situation which favours the accused, i.e. the evidence is not used at trial.

As we have seen, this calls for the creation of a catalogue of mutually acceptable rules of evidence. As regards evidence, it is essential to harmonise national laws to the extent necessary.

[7]Bachmaier Winter, Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR1s Case Law (2013) Utrecht Law Review, 128.

A solution could be to draw up rules allowing the results of evidence taken in another Member State to be used at trial. In the context of the future EU rules on the admissibility of evidence, it is essential to define what they should cover. The first step is therefore to define the scope of the instrument. This poses the following serious dilemma for EU legislators: Should it be limited to cross-border investigations or could it also cover cases with purely domestic elements? In my view, the common rules to be established should apply only to proceedings relating to cross-border crime. It is neither realistic nor desirable to create a European code of criminal proceedings, even if it were only dedicated to criminal evidence.[8]

As I have already indicated, it is essential to establish EU minimum rules on the collection and assessment of evidence. With the proliferation of means of obtaining evidence and the wide range of rules on the assessment of evidence, rules on the exclusion of illegally obtained evidence have become an essential element of the EU's toolbox. The EU legislators must make use of the explicit powers conferred on the EU by the Lisbon Treaty under Article 82(2)(a) TFEU.

Given the lack of legal standards in the EU on the collection, use and exclusion of evidence, the question arose to what extent common standards could be derived from the human rights jurisprudence of the two European courts (ECtHR and CJEU) and whether these standards could be used as a basis for future harmonisation. We have seen that the practice of the two European Courts can play a key role in the rethinking of the theory and practice of national evidence law, both in terms of the rules of evidence and the criteria for excluding evidence. It is necessary to establish rules on the absolute and relative inadmissibility of evidence, but also to guarantee that it cannot be used by other Member States. Their jurisprudence can provide essential guidance for the formulation of EU rules on exclusion, offering a number of clues as to when the use of evidence would violate the fairness of the procedure.

However, when setting minimum standards of proof, I believe that care must be taken not to create a major shift in the division of competences between the Union and the Member States. For example, in its judgment in Ivo Taricco and Others, the CJEU required national courts not to apply national limitation rules, arguing that in a significant number of cases they prevented the imposition of effective and dissuasive criminal sanctions for serious fraud affecting the financial interests of the European Union.[9] And in the Dzivev case, already mentioned, the Bulgarian national court asked the CJEU on this basis whether, in the light of the principle of effectiveness in criminal proceedings relating to VAT offences, it was not contrary to the application by a national court of national legislation requiring the exclusion from criminal proceedings of evidence, such as telephone interceptions, which is subject to prior judicial authorisation, where such authorisation was granted by a court which had no jurisdiction to do so. In other words, he questioned whether the rule on the exclusion of unlawful evidence should be waived.

A key issue in the development of minimum standards is the minimum harmonisation of the basic rules and principles relating to the admissibility of testimony and pre-trial statements.
First and foremost, the examination of witnesses must be free from any kind of trap, deception or coercion. It is necessary to provide for the forum court to summon the witness to the trial in cases where the testimony is relevant. I consider it indispensable to provide that the judgment

[8] Charlotte Claverie-Rousset, 'The Admissibility of Evidence in Criminal Proceeding between European Union Member States' (2013) 3(2) European Criminal Law Review 166.
[9] C-105/14.

may not be based solely or decisively on the testimony of a person to whom the accused could not directly or indirectly address questions. It may be appropriate to establish rules on the reimbursement of witnesses' expenses, which would guarantee that the witness's travel and accommodation costs are fully advanced by the court. In my view, this would significantly increase the willingness of witnesses to appear at trial, especially in cases where a foreign witness is required. However, for this provision to be effective, it is necessary to inform witnesses of this in the summons.

If it is impossible for the witness to attend the hearing, he or she should be heard by video link. The witness would be obliged to appear before the court of his or her place of residence, or the nearest court with videoconferencing facilities, for his or her examination by videoconference. The use of a video and audio recorder could also be mandatory to protect witnesses, for example if a person under the age of 16 is being questioned against whom the offence has been committed or if there are reasonable grounds to believe that the witness will not be available for questioning at the trial and that his or her questioning is necessary to clarify the facts. As a further criterion, the accused and the defence should be given the opportunity to put questions to the witness in this case (either in advance or in writing afterwards).

There is a need to develop a rule that the use of pre-trial testimony should, as a general rule, only be allowed at trial if the "presence" of the witness abroad cannot be ensured at the trial, neither his physical presence nor his hearing by videoconference. In the case of cross-border investigations, it seems appropriate to make it an obligation for the investigating authority to video-record all pre-trial hearings of witnesses, in line with the principle of immediacy.

In the light of the above, I consider it important to lay down in the Directive a rule that Member States must ensure that evidence obtained under the lex loci principle is admissible in the criminal proceedings of the State in which it is obtained, unless it infringes the fundamental constitutional principles of the forum Member State - the Member State where the evidence is used in the trial. I also consider it indispensable to provide that evidence cannot, in principle, be transferred to other Member States for use in criminal proceedings if it was obtained in contravention of the constitutional principles of the State where it was obtained.

It would be the responsibility of Member States to ensure that the evidence handed over to the forum State continues to be examined to ensure that it meets the appropriate safeguards to ensure the fairness of the proceedings as a whole.

It is necessary to establish rules on the absolute and relative inadmissibility of evidence, which may not be used in criminal proceedings in one Member State, but it is also necessary to guarantee that it cannot be used by other Member States.

In the light of ECtHR case-law, evidence obtained in violation of, for example, torture, incitement to police violence, the prohibition of self-incrimination, the right to silence or the right to legal assistance should be excluded. In my view, evidence obtained by deception or coerced during interrogation is also inadmissible.

It is important that national courts should be obliged to examine how evidence is gathered and, if there is doubt as to whether the defendant's substantial rights have been infringed, to exclude the evidence concerned. There is also a need to develop an EU rule that excludes evidence that cannot be known how it was collected and by what process. It is therefore important, as I have already indicated, that the forum courts should be obliged to examine how evidence was

collected and, if there is any doubt as to whether the substantial rights of the accused have been violated, to exclude the evidence concerned from the scope of the evidence.

In my view, the use or disclosure of evidence obtained in breach of the right to refuse to testify or the prohibition on refusing to testify is inadmissible. I believe it is essential to ensure that the suspect or accused person has an effective remedy against the use of illegally obtained evidence at various stages of the criminal proceedings, and that this guarantee is also applied during the investigation. Nevertheless, I consider it justified that the judgment may be challenged on the ground that the evidence used is inadmissible under the Directive.

I believe that the adoption of minimum standards needs to be complemented by provisions that strengthen and develop the existing framework for judicial review.

It can be seen that the nature of cross-border crime weakens the application of the principle of equality of arms, as the guarantees stemming from the principle of equality of arms are generally more difficult to enforce in cross-border situations. For example, the defence lawyer may have to travel to the country where the investigation has been conducted in order to gather additional evidence that cannot be obtained in the forum country. In such a case, travel and the costs of finding and hiring an interpreter or translator will be additional. Investigations abroad may involve financial and language problems which prevent the defence from being proactive at the investigative stage.

The current legislation allows lawyers to practise outside their own country, but a Hungarian lawyer can only effectively defend a defendant within the borders of Hungary, and abroad he is at a disadvantage compared to colleagues qualified and practising in Hungary. As soon as an investigation or prosecution is transferred to another country, the national defender's jurisdiction ceases almost immediately. This is a very sensitive issue in the relationship between the defender and the accused.[10] The situation is not straightforward when proceedings are transferred from Hungary to another EU country, in which case the defence of the accused is taken over by the defence lawyer of that country. The question therefore arises as to whether, if there is a European Public Prosecutor's Office, there is also a need for a European Public Defender. It is not possible to give a clear answer to this question at the moment, as much depends on further negotiations and their outcome. What is clear is that in the future, the position of the defender in cross-border criminal cases will need to be strengthened, especially at the investigative stage of criminal proceedings.

For example, the participation of the defence counsel is only guaranteed in a limited number of investigative acts, of which his participation in the interrogation of the defendant is the primary one. The Directive on access to a lawyer (DIRECTIVE 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty) 3. Pursuant to Article 3(3)(c), Member States shall ensure that the suspected or accused person has the right to have his lawyer present at least at the following investigative or evidentiary acts, where these are provided for by national law and where the suspected or accused person is required or permitted to be present:

- presentation for identification;
- confrontations;
- attempt to give evidence.

[10] Associate Professor Ádám Békés drew attention to the dilemma in this regard in his preopposition opinion.

At the same time, consideration should be given to expanding the catalogue of investigative acts, and it may be justified to extend the regulation to witness interviews, searches and DNA testing.

There is currently no provision regulating detention conditions in the EU. It would therefore be worth considering the adoption of minimum standards on detention conditions, which is of particular interest from the point of view of the EU's need and ambition for legal uniformity, especially since, as the Aranyosi and Căldăraru judgment has clearly highlighted, poor detention conditions are a clear obstacle to the smooth operation of the European arrest warrant, adversely affecting mutual trust, and the possible non-execution of the warrant is an important consequence. Member States must comply with when applying the arrest while the person is awaiting surrender. It is easy to see that there is a close link between the conditions of detention, the effectiveness of mutual recognition and the protection of individuals' rights.

Cross-border cooperation cannot work properly without a higher degree of harmonisation of victims' rights. In terms of cross-border cooperation instruments, the EU has significantly neglected victims' rights issues. The first striking asymmetry between defendants and victims is quantitative. As regards the right of defence ¬ the six directives adopted in a relatively short period of time ¬ contrast with the two measures adopted on the status of victims. Despite the minimalist approach of the legislators, the provisions contained in the six directives on protection represent, on the whole, a significant convergence of standards.

Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) provides for the establishment of minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having cross-border implications, in particular as regards the rights of victims of crime. Compensation systems for victims of crime widely vary across the Member States,depending on whether compensation is sought from the State, or from the offender.[11] Within the former system, there are significant differences between Member States in terms of the conditions for claiming compensation, the possibilities to claim compensation at different stages of the procedure, the procedures, time limits and amounts awarded.

Compensation from the offender exists in all Member States, but in different forms. Cross-border compensation from the State is regulated by Directive 2004/80/EC on compensation to crime victims. Under the Directive, victims of crime must be guaranteed fair and appropriate compensation for the harm they have suffered, regardless of where the crime was committed in the EU. The Directive will allow victims of crime to obtain compensation in cross-border situations. It ensures that the victim can make a claim for compensation in the Member State of residence. The amount of compensation to be paid to each victim is left to the discretion of the Member State where the crime was committed, but it must be fair and appropriate. However, in the absence of approximation of compensation schemes, cross-border cooperation is problematic in practice.

[11] Criminal Procedures Laws accross the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation. Forrás: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf Letöltés ideje: 2023.09.19. 144.

The differences between national systems raise the following issues and concerns in particular:

- the scope of the compensation directive is limited, i.e. it only covers intentional violent crimes;
- the transnational situation may lead to victim discrimination or "reverse discrimination";
- some countries do not allow their own nationals to claim compensation if the crime was committed abroad.

A solution could be to revise the compensation directive, with provisions to ensure better access to justice and compensation for victims.

A further dilemma regarding the scope is whether a future directive should be limited to defining rules on inclusion and/or exclusion. Or should it provide for the approximation of rules on the collection and use of evidence?

As a starting point, it may be noted that the determination of jurisdiction may be based on Article 1(1) of the Directive. Article 82(2) TFEU must be interpreted as being limited to providing only for a mandatory admissibility rule obliging the national authorities of a Member State to admit evidence gathered by a judicial authority of another Member State on the basis of a mutual recognition instrument. As Vervaele rightly pointed out:

"Although approximation is theoretically limited to minimum rules to facilitate mutual recognition of judicial decisions, it is clear from the application of Article 82(2)(b) to (c) TFEU by the legislator that this approximation in fact means harmonisation of national criminal procedures (i.e. not limited to mutual recognition instruments) in order to facilitate possible mutual recognition. Harmonisation is not strictly limited to the minimum harmonisation, but to the minimum rules, that is to say, to what is necessary to facilitate and enhance mutual recognition between Member States".

Given the specific nature of evidence systems, it cannot be the aim to provide a clear set of rules for all procedural acts and means of proof, nor would it be accepted by the Member States.

As indicated above, it would be worth considering supplementing the mandatory admission rule with exclusion rules derived from European human rights law. Future EU rules should include additional provisions on the cross-border nature of investigations. Likewise, a future directive on the obtaining and admission of evidence in the EU could also address other aspects of the right to evidence, e.g. by developing specific procedural safeguards to strengthen the defence of incrimination in the context of investigations with an international element, such as the right of the defence to obtain or request evidence.

The ECtHR decides on the fairness of the criminal proceedings as a whole, but at a certain stage of the proceedings it is not foreseeable that certain evidence will render the proceedings as a whole unfair, and exclusion prevents the proceedings from being "effective". The logical consequence is that any EU rules cannot stop at this level of 'protection'. It is very important that, in addition, the purpose of the exclusionary rule at national level is not merely to preserve the fairness of the proceedings.

It should be stressed that the current jurisprudence of the ECtHR focuses on domestic situations (the same legal regime applies to the taking of evidence and the trial) and does not deal with cases with a cross-border dimension. Since the case-law of the two courts is not entirely comprehensive and not entirely consistent, the mere repetition of minimum rules that can be drawn from the case-law has no added value in the codification process.

There is a need to create a rule that would oblige the forum court to control the process of gathering evidence, i.e. under the new rule the court should, in its discretion, give weight to the circumstances of the acquisition of the evidence and its process.

As we have seen, the mutual admissibility of evidence in criminal proceedings is definitely one of the areas where common rules are needed. At the current stage of development of EU law, the question of whether evidence obtained in breach of national or EU law can be used is governed by the law of the Member States, i.e. the question of admissibility of evidence is currently a matter for national law.

However, in those matters where EU law is applicable, the relevant national provisions cannot be in breach of Articles 47 and 48 of the Charter.

Significant changes are also expected in the area of remedies. The principle of effective judicial protection is a general principle of Community law, rooted in the constitutional traditions common to the Member States, reaffirmed in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union.

The law-shaping role of the CJEU is well illustrated by its understanding of the right to effective judicial protection. The elevation of the right to effective judicial protection to a "general principle of EU law" in the 2018 Associação Sindical dos Juìzes Portugueses case[12] may encourage Member States to seek preliminary rulings from the Court of Justice to clarify the scope of the application of Article 47 of the Charter in the case of cross-border evidence. In that case, the reference for a preliminary ruling concerned the interpretation of the second subparagraph of Article 19(1) TFEU and Article 47 of the Charter of Fundamental Rights of the European Union.

The request was made in proceedings between the Associação Sindical dos Juízes Portugueses (Portuguese Judges' Union, 'ASJP') and the Tribunal de Contas (Court of Auditors, Portugal) concerning the temporary reduction of the salaries of the members of that forum in the context of the guidelines of the Portuguese State's budgetary policy. According to the judgment of the Grand Chamber, the European Union is a legal union in which legal persons have the right to challenge before the courts the legality of any decision or other national act relating to the application of European Union law to them. Article 19 TFEU, which gives concrete expression to the value of the rule of law enshrined in Article 2 TFEU, confers the task of ensuring judicial review in the EU legal order not only on the Court of Justice but also on national courts. According to the judgment, as provided for in the second subparagraph of Article 19(1) TFEU, the Member States are to provide for the legal remedies necessary to ensure the right of individuals to effective judicial protection in the areas governed by EU law. Member States are

[12] C-64/16. judgment of the court, 27 February 2018

therefore obliged to put in place a system of remedies and procedures that allow for effective judicial review in these areas. [13]

So, in the spirit of the right to an effective remedy, the adoption of a new remedy against a decision on evidence gathered abroad could be a key element of future EU minimum standards.

As we have seen, there are also important differences in the rules on investigations. In particular, the procedure for requesting investigative measures needs to be clarified. It would seem reasonable for the defence to initiate the investigative measure with its national authorities, which would then forward it to the executing Member State.hich allow for effective judicial review in those areas.

As a matter of example, in both the Netherlands and Italy, the defence must file an application to the national authorities of the country of prosecution for them to send a letter of request to the foreign authorities asking for further inquiries to be carried out. However, chances that these applications are successful are sometimes thinner. In Italy for example, the defence will have to build a much more solid case file than in domestic cases, in order to demonstrate the importance of the requested investigation, with yet no guarantees that its demands will be successful.[14] Furthermore, as the defence has no "insight" into the investigative acts carried out by the executing State, the defence's request may lead to an outcome contrary to the desired one, for example, the evidence gathered ¬ although initially presented in order to exonerate the accused ¬ may turn out to be incriminating for the accused. This incriminating evidence may then be shared with the authorities of the issuing State.

The European Public Prosecutor's Office and the European Investigation Order will be responsible for implementing the right of effective protection in the area of cross-border crime in the coming years, and the experience gained in its application should therefore be continuously evaluated. In criminal proceedings, Article 6 of the European Convention on Human Rights ensures that the accused has the right to participate effectively and meaningfully in the criminal proceedings and to follow the proceedings. [15]

The concept of a fair trial also includes the fundamental right to an adversarial process, which is closely linked to the principle of equality of arms. The prosecution is therefore obliged to present all the evidence in its possession so that the defence can make a statement on it. Equality of arms gives the parties the opportunity to see all the evidence and documents and to comment on them and submit motions, i.e. a fair balance between them.[16] In particular, it is a violation of the equality of arms if one party, unlike the other party, does not have access to relevant documents.

Restrictions on access to evidence should not preclude the accused from seeing the evidence before the trial and having the opportunity to comment on it. Since access to evidence is not an

[13] See, to this effect, Inuit Tapiriit Kanatami and Others v Parliament and Council, judgment of 3 October 2013, C-583/11 P, EU:C:2013:625, paragraphs 100 and 101, and the case law cited therein.
[14] Criminal Procedures Laws accross the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation. Forrás: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf Letöltés ideje: 2023.09.19. 80.
[15] Dr. Paczolay Péter: A tisztességes tárgyaláshoz való jog az EJEB gyakorlatában. In.: A tisztességes eljáráshoz való jog (szerk.: Tóth J. Zoltán) Wolters Kluwer Hungary, Budapest, 2021. 162.
[16] Dr. Paczolay Péter: A tisztességes tárgyaláshoz való jog az EJEB gyakorlatában. 163.

absolute right, in criminal proceedings there may be a particularly strong argument in favour of limitation on the grounds of national security and witness protection, which may justify withholding evidence.[17]

The challenges outlined above call for the development of a framework for the collection and admissibility of evidence in the area of EU criminal cooperation that contributes to strengthening the rights of the defence and in particular the right to a fair trial.

At least from a strictly theoretical point of view, the adoption of these instruments is essential towards the development of a smoother and more efficient judicial cooperation system within the Union, an area based on freedom, security and the enforcement of law.

There are no rules in EU law on the admissibility of evidence gathered through an EIO issued in a way that is contrary to the requirements of the EIO Directive. The admissibility of evidence is a matter for national law, which must, however, comply with the requirements of the rights of the defence as laid down in Articles 47 and 48 of the Charter.

The cases illustrate the long-standing difficulty of striking a balance between protecting human rights on the one hand and ensuring the effective application of cross-border legal instruments on the other.

[17] Dr. Paczolay Péter: A tisztességes tárgyaláshoz való jog az EJEB gyakorlatában. 164.

IV. List of publications related to the dissertation

1. Ábrahám Márta: Az OLAF kapcsolatai más uniós intézményekkel és szervekkel. In.: Az Európai Csalás Elleni Hivatal (OLAF) az Európai Unió bűnügyi együttműködési rendszerében. (Szerk.: Farkas Ákos), KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005. 243-276.

2. Ábrahám Márta: A bizonyítékok gyűjtése és értékelése az EU-ban határokon átnyúló bűnözés esetén. Miskolci Jogi Szemle, 2019. 2. különszám 1. kötet 21.

3. Ábrahám Márta: Az OLAF kapcsolatai más európai uniós intézményekkel és szervekkel című fejezet Az Európai Csalás Elleni Hivatal (OLAF) az Európai Unió bűnügyi együttműködési rendszerében című könyvben. Szerkesztő: Farkas Ákos.
KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005. 243-276.

4. Ábrahám Márta: A bírósági eljárást előkészítő eljárás struktúrája Franciaországban, Németországban és Angliában. Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica. Tomus 19. 2001. 19-37.

5. Ábrahám Márta: A bírósági eljárást előkészítő eljárás struktúrája Hollandiában, Belgiumban, Svédországban és Spanyolországban. Collega, 6. évfolyam, 2001/1. szám 20-23.

6. Ábrahám Márta: A német tanúvédelmi törvény, különös tekintettel a videotechnika alkalmazására a büntetőeljárásban. Jogtudományi Közlöny, 2001. évi 7-8. szám, 321-324.

7. Ábrahám Márta: Az Europol működésének dilemmái. Belügyi Szemle 2001. évi 11. szám 107-122.

8. Ábrahám Márta: Az osztrák büntetőeljárás reformjának egyes kérdései. Tanulmányok Horváth Tibor Professor Emeritus 75. születésnapjára, Bíbor Kiadó 2002., 11-25.

9. Kiss Anna - Ábrahám Márta: Elmaradt reform? (Jegyzetek az előzetes eljárásról, különös tekintettel a hazai és az osztrák nyomozásra) Magyar Jog 2003. év márciusi szám, 157-165.

10. Ábrahám Márta – Karsai Krisztina: Európai büntetőjog – magyar szemmel.
Collega 2000/5. 73-74.